

STUDENT	§	BEFORE A SPECIAL EDUCATION
b/n/f PARENT	§	
	§	
v.	§	HEARING OFFICER FOR THE
	§	
COMAL INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

DECISION OF HEARING OFFICER

Petitioner, *** (“Student”), by next friend, *** (“Parent”), filed a complaint requesting an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”). The complaint was received by the Texas Education Agency August 31, 2020 and assigned to this hearing officer September 1. The Respondent in the complaint is Comal Independent School District, (“District” or “Comal ISD”).

After two continuances of the due process hearing, the parties convened for a prehearing conference. The parties reported that a resolution session was waived and they participated in an unsuccessful mediation session October 9, 2020.

The parties convened January 18, 2021 to offer exhibits. Testimony in the due process hearing began January 19 and continued through January 21. Petitioner requested an open hearing. Due to the COVID-19 Pandemic (“Pandemic”), the hearing was held virtually.

Issues for Hearing

Petitioner alleged that Respondent failed to provide Student a free, appropriate public education (“FAPE”) and brought forth the following issues:

1. Whether District’s proposed placement for the 2020-2021 school year in a more restrictive environment is appropriate;
2. Whether District failed to evaluate Student appropriately, particularly whether Student’s most recent Full Individual Evaluation (“FIE”) is adequate;
3. Whether Student’s education program is appropriate;
4. Whether District failed to appropriately implement direct teaching strategies;
5. Whether District adequately trained its staff in differentiated instruction as relates to children with characteristics similar to Petitioner; and
6. Whether District failed to assess Student for assistive technology (“AT”) needs.

Requested Relief

As relief, Petitioner requests an order that directs Respondent to do the following:

1. Provide Petitioner with an appropriate individualized education program (“IEP”) that properly reflects conclusion and recommendations of the independent educational evaluation (“IEE”);
2. Provide compensatory educational services to Petitioner including but not limited to the area of reading;
3. Instruct Petitioner in the general education classroom with appropriate support;
4. Appropriately train staff members working with Petitioner in differentiated instruction to support Student’s placement in the general education classroom; and
5. Any and all relief that the hearing officer deems appropriate, or that Student’s experts and evaluators recommend.

Findings of Fact

Based on the documentary evidence and testimony of witnesses before this hearing officer, the following are findings of fact in the instant action. Citations to Petitioner’s Exhibits, Joint Exhibits, and Respondent’s Exhibits are designated with a notation of “P,” “J,” or “R” respectively, followed by the exhibit and page numbers as appropriate. Citations to the transcript are designated with a notation of “T” followed by the volume number and page numbers.

1. Student resides within the geographical boundaries of Comal Independent School District. District is responsible for the provision of special education and related services to those within its boundaries who are eligible for such services. Student is eligible for special education as a child with other health impairment (“OHI”) with Attention Deficit Hyperactivity Disorder (“ADHD”) and ***, and Speech Impairment. At the time of this hearing, Student was in *** grade. Historically, Student was educated primarily in the general education setting at ***. T: Vol. I, pgs. 34-35
2. At *** years of age, Student’s developmental age in naming or identifying objects, actions and events was *** ; Student’s listener responding skills were within the ***; visual perceptual skills were at a ***; independent play was a ***; social behavior and social play ranked at a ***, echoic (repeat specific words) was a ***; reading was within ***; writing skill level was ***; Math skills level was ***. J-11, pg. 00434-435

***** Year 2017-2018**

3. Prior to Student’s *** year, District conducted an initial FIE in the spring 2017. Parent requested that no cognition assessment be conducted. District complied. J-1; R-14, 34
4. The FIE evaluators used formal and informal measures such as the ***, parent information, observation in play, Articulation Screener from ***, occupational therapy and physical

- observations and evaluations, parent interview, Play Assessment, observations developmental Profile III, and Learning Accomplishment Profile-Diagnostic. An *** evaluation was conducted in October 2017. It was determined that Student did not require an AT evaluation at that time. J-1
5. Student's receptive and expressive language skills were below the average range. Student struggled receptively to engage in ***. Student showed good joint and reciprocal attention to preferred hands-on activities during play. Student followed single step directions with cue, but did not follow multiple step directions. Student followed few single step directions without cue. Student struggled expressively to ***, among other struggles. Student spoke primarily ***. J-1, pgs. 000061-00063
 6. Sociologically, Student learned well with modeling, inclusion and co-teaching. Emotionally, Student's teachers considered the following behaviors as average when compared to Student's same-aged peers: even/happy disposition, pleased with good work, and responds appropriately to praise and correction. Student was below average in the ability to comply or cooperate with teacher requests. Student struggled adapting to new situations without getting upset, and with acceptance of responsibility for Student's own actions. Student responded well to classmate-initiated play and interactions for small increments of time. J-1, pgs. 000067-000068
 7. Numerous classroom accommodations were recommended, such as the following: a) give Student opportunities for practice, b) review learned concepts frequently to encourage retention, c) when presenting multi-step directions, d) pause between instructions and check for comprehension, e) foster social skills by direction instruction and teach Student how to interact through social stories, modeling and role-playing, f) consistent routine and structure, g) model and cue expected behaviors, h) provide frequent and immediate feedback, i) provide positive reinforcement and frequent praise, j) provide peer modeling, peer tutoring and mentoring, and k) utilize a behavior chart as needed. J-1, pgs. 000072-000073
 8. Physical Therapy ("PT") and Occupational Therapy ("OT") were recommended. An *** evaluation was completed in October 2017 and amended the initial FIE. The *** evaluator recommended that Student receive an assistant in general education. She recommended inclusion with peers in general education physical education ("PE"), with assistance as needed for modeling, prompting, and initiation of activity. J-1, pgs. 000075-000080
 9. Student's initial admission, review, and dismissal committee ("ARDC") met in May 2017. The committee determined that Student qualified for special education as a child with OHI and Speech Impairment. Student's Present Levels of Academic Achievement and Functional Performance ("PLAAFP") incorporated the findings in the initial FIE pertaining to Student's communication skills. At the time of the ARDC meeting, Student could ***. Parent indicated

Student could ***. The committee determined that Student's behavior did not impede Student's own learning or that of others. J-2, pgs. 000019-000028

10. The ARDC developed goals for Speech Therapy, Adaptive Behavior, Mathematics, Reading, and Language Arts. Student's program was administered in the general education setting with inclusion support. A portion of Speech Language Therapy was to occur in the special education setting. All parties agreed to the ARDC decision. J-2; pgs. 000029-000045

*** Year 2018-2019

11. Near the end of Student's *** year, the ARDC met for Student's annual review. Student had mastered ***. In Speech Therapy, Student could follow a one step direction with familiar places and people with minimal cues. Student knew ***. Student *** with moderate cues. In written expression, Student had learned to ***, and needed to continue working toward ***. Since the last admission, review, and dismissal ("ARD") meeting, Student learned to *** with continual prompting from staff. Student had achieved greater accuracy of transitioning within the building and remaining in Student's assigned area. Student needed to work on increasing independence and decreasing target behaviors. For Student's *** year, the ARDC developed 14 goals and provided accommodations to assist in Student's progress. Student was placed in the general education setting with facilitated support and modifications. A portion of Speech Therapy took place in the Speech Therapy room. All members agreed to the decisions. J-3
12. The ARDC reviewed Student's Functional Behavior Assessment ("FBA") and adopted a Behavior Intervention Plan ("BIP") that targeted physical aggression such as ***, and noncompliant behaviors as defined as ***, refusing, or failure to comply with directive within 10 second period after directive is presented. The BIP also targeted unexpected verbal responses such as ***. J-3, pgs. 000134-000155; T-III, pgs. 366-369
13. Student's IEP was amended in November 2018. The amendment added *** minutes of inclusion support by a special education teacher in English Language Arts ("ELA") and Math, resource instruction for *** minutes in Math and Reading/ELA outside of direct instruction time, 5-10 minute movement breaks with additional breaks on days for ***, and *** minutes *** one time per week. J-4
14. A resource room is a special education setting. Children receive direct instruction similar in format, presentation, modalities and level to a general education classroom. Children are pulled out from their regular classroom. A special education teacher teaches them and the composition is students with disabilities only. Students in a resource room are at a different ability level than the general education level. There is a pacing and high level of independence of a child in a resource

class so that he/she can either remediate or accelerate skills in order to better access the general education curriculum. T-II, pgs. 82, 120; T-IV, pg. 648

15. In January 2019, an independent Board Certified Behavior Analyst (“BCBA”) conducted an independent FBA. The evaluator determined that many of the strategies in Student’s BIP were appropriate and correlated to the targeted behaviors. The independent evaluator made numerous recommendations including social narratives and digital picture of Student, increase in visual supports, visual schedule for every transition, sensory center in both the general education and resource classrooms, prepare Student for changes in Student’s routine or class location through visual schedule, and incorporate a yes/no visual for use in choice-making. J-5
16. In February 2019, the ARDC committee met for a revision ARD meeting. The committee included the independent FBA evaluator’s recommendations. District proposed facilitated support in the classroom with an alternative curriculum, and *** minutes resource for Math and Reading with an alternative curriculum. District proposed obtaining consent for a FIE in all areas. The committee changed Student’s reading goal to reflect only measuring ***. Mastery percentages and amount of cues were changed in two speech goals. Parent disagreed with the proposed alternative curriculum. All parties agreed to the decisions. J-6
17. Student’s three-year re-evaluation was due in May 2020. The committee reconvened on March ***, 2019 and agreed to wait until the following school year to discuss options for re-evaluation. J-6
18. District curriculum is based on the Texas Essential Knowledge & Skills (“TEKS”). Based on meeting the state grade level requirements, Student was below grade level in all academic subjects and in need of urgent intervention throughout the ***. J-15
19. District tracked Student’s performance on daily data tracking sheets throughout ***. R-1
*** Year 2019-2020
20. Immediately following the revision ARD, the parties convened for Student’s Annual ARD meeting March ***, 2019. Student was nearing the end of Student’s *** year. Student could ***. Student demonstrated an increase in practiced ***. Student continued to need an effective way to ***. Student could ***. Student recognized ***. Student needed full ***. Behaviorally, Student decreased incidents of ***. Student decreased physical aggression to obtain attention from staff although Student continued to ***. Functionally, Student navigated in the school environment but required adult supervision in order to implement Student’s BIP during transitions. Student could *** without assistance. With adult assistance, Student was able to ***. J-7
21. For Student’s *** year, the ARDC developed 17 goals for Student with numerous accommodations. It continued Student’s placement in the general education setting with

- facilitated support for *** minutes per day, plus *** minutes of Speech Therapy *** in that setting. Supplemental support for Math and ELA occurred in the resource setting. OT as a related service and *** aids and services were to be provided. The committee agreed that Student was eligible for Extended School Year (“ESY”). Parent agreed with the ARDC decisions. J-7
22. The ARDC met for a Revision ARD at the beginning of Student’s *** year. The committee agreed to increase facilitated inclusion support by special education staff from the previous *** minutes per day to *** minutes. The committee agreed to *** minutes per day in resource for both Math and ELA, and added *** minutes for movement breaks in the special education setting. J-8
23. Student’s teachers received training on Student’s IEP and BIP in August 2019. Additional training was conducted in September and October 2019. Staff met monthly to discuss modification of Student’s assignments from grade-level TEKS to ***-level TEKS. Training for new staff members occurred in January 2020. R-11, 9; T-II, pgs. 214-218, 229-230
24. District contacted Parent on November ***, 2019 regarding a need to conduct cognitive ability testing for Student. R-14
25. The ARDC met November ***, 2019 to review Student’s progress and review the need for a new evaluation. The committee discussed *** that Student was experiencing. It was reported that in ***, Math, Writing, and Reading, Student was making progress but not at the expected rate. Functionally, Student was making progress, but had not met the expected criteria for Student’s goal. Socially, Student’s interaction skills had shown improvement. Student had regular friends that ***. Parent reported similar improvement at home ***. The committee increased resource time to *** minutes for Math and Reading. The additional time was used to pre-teach skills that were taught in the general education classroom. J-10, pgs. 000397-000403; T-II, pgs. 224-225
26. The committee agreed to change the mastery criteria for the Math and Reading goals. For example, the Math goal had stated, “By the next annual ARD, ***.” The committee changed the mastery criteria to “...***...” Student’s previous Reading goal stated, “By the next annual ARD, ***.” The committee changed the mastery criteria to “...***...” J-7, 10
27. In conjunction with the ARDC meeting, the committee conducted a Review of Existing Evaluation Data (“REED”). As reasons for the REED, Student’s three-year reevaluation was due some months later, and District saw that Student was not making adequate progress. District members wanted additional evaluation information to try to identify additional areas of support for Student. R-14; T-II, pg. 62-63
28. District members proposed evaluations in the areas of Speech/Language, VBMAPP and an updated FBA, cognitive and adaptive, achievement, updated OHI, AT, and OT. Parent felt there

- would be no benefit in conducting a formal evaluation. District members of the ARDC believed that critical information was missing due to lack of evaluation information. The ARDC indicated its intention to have further conversation with Parent regarding evaluation. J-10, pg. 000398
29. During the 2019-2020 school year (***) year), Student **. Student continued to exhibit inappropriate **. R-5, 6, 7
 30. Following some ** in the first half of October, on November **, 2019, District staff and Parent met and discussed the ** that Student experienced. Recommendations to address the issues were agreed upon. Parent did not give consent for an FBA. R-4, 16
 31. ** was taken beginning November **-December **, 2019. Student's ** continued with varying degrees of frequency. District's behavior specialist developed a ** for review with Student. R-16, pgs. 006544-0006547; R-23, pgs. 006457-006459; T-II, pgs. 231-232
 32. Following Parent's refusal to give consent for evaluation, District sent Parent Prior Written Notice dated December **, 2019. The notice indicated Parent's refusal of consent to cognitive testing. District indicated such testing was critical information to develop appropriate programming for Student. District had never performed a cognitive evaluation and had no outside cognitive testing of Student. District stated that the unexplained regression in Student's progress and behavior suggested a need for more information. Due to Parent's refusal to consent, District determined it would not perform an FIE at that time. Student was due to have a 3-year reevaluation in the Spring 2020. P-11; R-17; T-II, pg. 276
 33. In an informal meeting with Parent, due to the ** Student was having, District offered to perform the FBA separately from the FIE. Parent gave consent for an updated FBA December **, 2019. District discussed the proposed FIE in the areas of Communication, Health, Motor, Emotional/Behavioral, Intellectual (Cognitive), Adaptive Behavior, Academic, and AT. Parent agreed to consider the scope of the evaluation with legal counsel and return for a follow up meeting. District did not receive consent for an FIE, and again requested consent January **, 2020. It informed Parent that District "may ask TEA to authorize the evaluation without...consent." J-11, pg. 000475; R-20, pg. 009633; R-24, pgs. 04600-04601; R-34
 34. Parent did not give consent for an FIE. District did not request a due process hearing to override Parent's lack of consent. T-IV, pgs. 672, 688
 35. Student's ** ceased in January 2020 with one exception. T-II, pgs. 260-261; T-III, pgs. 339-340
 36. Student's **. Student didn't collaborate with Student's peers. Student **. When the class did group work, Student was not successful due to Student's behaviors **. Student's teacher direct-taught **. The general education peers worked with **. The teacher worked with Student with **. T-IV, pgs. 601-615

37. At the beginning of 2020, Student's case manager reported that Student did not meet criteria on goals # 2, 3, 4, 5, and 16. Student made progress and met criteria on academic goals 1, 6, 15, and 1. The case manager, whose report was based on December ***, 2019 progress reports, erroneously reported that Student had not made criteria on goal # 2. The progress report indicated that at the time, Student had met the criteria. R-19; T-II, pgs. 183-184
38. Throughout ***, District tracked Student' academic goals daily. R-7
39. Student's annual review ARD meeting was held March ***, 2020 near the end of Student's ***year. The committee reviewed Student's PLAAFP. Teachers summarized grade level expectations for *** students in the areas of Reading, Speech/Related Services, Written Expression, Math, and Behavior. J-11
40. The ARDC reviewed the following challenging behaviors listed in the FBA: ***. Functions of the behaviors were to obtain attention, sensory stimulation, escape non-preferred settings, peers, or non-preferred task demands. J-11
41. The ARDC developed a BIP that targeted ***. J-11, pgs. 00497-00516
42. The committee determined that Student would not be able to participate in the educational program or make reasonable progress toward mastery of IEP goal and objectives without AT, devices and /or services. District did not request a formal AT evaluation at that time, but determined that supports for communication would be considered as part of Student's evaluation. J-11, pg. 000441; T-II, pgs. 68-70
43. The Coronavirus Pandemic began to spread across the United States. In an effort to mitigate the spread of the virus, District suspended direct in-person instruction March 16, 2020. R-25
44. The annual review ARDC reconvened virtually May ***. District recommended what is calls a "blended" placement. Student would be in a special education classroom called *** also referred to as a *** class, with an alternate curriculum for *** minutes a day, plus *** minutes per week of Speech Therapy. Student would receive facilitated support in the general education classroom for *** minutes per day, plus *** minutes *** period for Speech Therapy. District's reason for the change in placement was due to Student's lack of adequate progress toward Student's goals in the general education classroom. Parent disagreed with District's recommended placement and cited effects of family and peer separation and segregation. Parent disagreed with District's proposed goals. The meeting ended and a 10-day recess was offered. The parties reconvened again May ***, and ended in disagreement. District sent Prior Written Notice to Parent with a reconvene date of May ***. J-11; R-25; R-32, pg. 011252
45. District's reasons for recommending the *** placement were that TEKS objectives for Student's assigned grade level exceeded Student's present levels of educational performance, thus Student

required instruction based on present competencies that were significantly below current grade placement. District believed that modifications required for Student to achieve goals and objectives in Student's IEP could not be implemented in the general education classroom without eliminating essential components of the general curriculum. Further Student's behavior/needs were such that Student required a structured/specialized environment for implementation of Student's IEP and BIP. Finally, District determined that Student's Speech Therapy goals and objectives required a small group/individual setting in a less distracting environment than a general education classroom. District acknowledged that potentially harmful effects of removal from the general education setting included diminished access to full range of curriculum, and lack of opportunity for appropriate role models and for social interaction. Additionally, Parent again cited potential harmful effects from family and peer separation and segregation. J-11, pg. 000463-464, 468

46. A modified curriculum follows more closely to the grade level TEKS. It may be *** grade levels below, but is very much *** type of tasks or activities. Instruction is provided similarly to what is provided in general education. T-II, pg. 85
47. Instruction of an alternative curriculum is presented with more hands-on activities, more real life examples, with much repetition. T-II, pg. 85
48. The staff-to-student ratio is high in an *** setting. The setting provides flexible options for station teaching, modeling, grouping, and multisensory instruction. It offers an opportunity for less distraction, less opportunity for frustration, different ways to redirect children with regulation issues. There are no typically developing peers that receive primary instruction in an *** classroom. *** classrooms are accessed for prerequisite skills and alternative curriculum. Behavior problems may be one reason for a child to be placed in an *** setting. T-I, pgs. 36-37; T-IV, pgs. 649, 674-676, 690
49. *** does not have an *** classroom. If placed in an *** classroom, Student would attend ***. District gave the opportunity for Student's ***, as well. T-IV, pg. 650
50. District takes regular data of Student's progress on Student's IEP goals. The data is placed on a chart that lists the trial date, the number of Student's correct answers without prompts on that date, and the number of trials conducted on the given date. A percentage of success is calculated for each date. As an example, two correct responses out of six trials on a given date would be 33%. If the goal was to reach 20% accuracy or two out of 10 trials, the result is better than the goal on that particular date. To calculate Student's progress during a *** period, the percentages during that period are averaged. The daily percentages are converted to a graph for a visual representation of the charts. R-27, pgs. 010053-010062; T-II, pgs. 255-258

51. Progress reports for March ***, 2020 (** reporting period in ** year) reflected that Student made progress, as follows:

Goal Focus	Progress
***	***
***	***
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***	***
	J-10, pg. 000419; J-11, pg. 000437; J-14; T-II, pg. 72

52. Student met a third adaptive behavior goal that required Student to **. J-10, pg. 000419; J-11, pg. 000437

53. In academics, at the end of the first semester of **, Student’s report card grades ranged from **. At the end of **, Student’s final academic grades ranged from **. Due to the Pandemic, District gave all students grades of 100 for the last grading period of 2019-2020. J-16

54. Due to the Pandemic, District did not offer in-person instruction after Spring Break through the remainder of the school year. On-campus instruction was offered beginning August 25, 2020 for

those who chose to return to the classroom. Student continued with remote learning. R-8; T-IV, pg. 657

55. A remote learning contingency plan amended Student's IEP for implementation September ***, 2020, Student's *** year. Certain goals were continued while 5 goals were paused. Parent agreed with the plan. J-12; R-25
56. Prior Written Notice was sent to Parent April ***, 2020. The notice informed Parent that a re-evaluation needed to be completed by the Student's 3-year re-evaluation due date. Due to school closures for the remainder of the 2019-2020 school year and because an FIE requires in-person contact and observations in the educational setting, District proposed suspending the timeline until school resumed normal operations. R-26
57. In May 2020, Parent requested an IEE. District approved the request for IEEs in all areas, including Speech and AT. At the time of hearing, the independent AT evaluation was not completed. R-29; T-II, pgs. 299-300; T-IV, pg. 672
58. Parent obtained the services of Dr. *** to independently evaluate Student's current behavioral, intellectual, and academic functioning and conduct a FBA. She issued her report January ***, 2021. The evaluation was conducted during the Pandemic while Student was educated solely in a virtual environment. All observations were gathered virtually. Testing was not completed face-to-face. To assess Student's intellectual and academic skills, Parent and teachers completed checklists to identify Student's strengths and needs. P-4
59. Dr. *** reviewed Student's progress toward IEP goals from May ***, 2019 to October ***, 2020. Dr. *** indicated that Student met or exceeded mastery criteria by March 2020 on 8 IEP goals. By October 2020, Student met or exceeded mastery criteria on 10 IEP goals. The remaining two goals indicated "great progress" and "excellent growth." P-4, pgs. 3-4
60. Dr. *** determined the following behaviors that most frequently impact Student's current functioning in the classroom: ***. She did not observe *** during virtual instruction. P-4, pgs. 9-12
61. Dr. *** did not evaluate Student for specific learning disability or intellectual disability via standardized, face-to-face assessment. Thus, evaluation of Student's intellectual abilities as well as academic and adaptive behavior skills could not be assessed directly. She focused on parent and teacher rated measures along with parent and teacher interviews. The teacher-rated measure could not be interpreted with confidence since Student's current teachers had not interacted with Student in a traditional, in-person school environment. P-4, pg. 12
62. Dr. *** recommended an AT evaluation, extended year services, and specific amounts of time for daily resource instruction in Math and English/Language Arts. She recommended that the

remainder of Student's school day occur in a general education classroom with co-teacher or paraprofessional support. She delineated the times that *** training should occur to address basic ***. P-4, pgs. 12-14

63. ***, a Speech-Language Pathologist, conducted an independent speech and language evaluation of Student. She issued the report January ***, 2021. The assessment results indicated that Student exhibits significant weaknesses in Student's receptive, expressive, and pragmatic language skills and speech intelligibility/articulation. The standardized assessment scores were well below the average range and informal observations indicated significant areas of concern. In addition to Student's current IEP, Ms. *** added a recommendation of *** weeks with a small group of peers. She indicated that Student should receive no less than *** sessions per week of mixed model presentation: one-on-one, small group, and large group integrated. P-2
64. Student is more likely to engage in appropriate behaviors with staff with whom Student is more familiar. T-III, pg. 325
65. District staff received training at the beginning of Student's *** year. New staff received training in January 2020. Daily data sheets were sent to Parent. Student's teachers in *** held monthly meetings to discuss Student's education program. R-7, pg. 73; R-18; R-27, pgs. 134-45; T-II, pgs. 100-101, 229-230; T-III, pgs. 498, 503; T-IV, pg. 645
66. At the time of hearing and at Parent election, Student continued to receive remote learning. T-III, pgs. 525-526; T-IV, pgs. 657-658

Discussion

A petitioner who challenges the school district's eligibility determination or offer of services under the IDEA bears the burden to prove that the child has been denied a FAPE. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005).

Petitioner's Issue No. 1: Whether District's proposed placement for the 2020-2021 school year in a more restrictive environment is appropriate

The IDEA requires that to the maximum extent appropriate, children with disabilities are educated with children who are non-disabled and that removal of children with disabilities from the regular educational 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. 20 U.S. C. § 1412 (a)(5). If education in a regular classroom with supplementary aids and services cannot be achieved satisfactorily, the school must mainstream the child to the maximum extent appropriate. *Daniel R. R. v. State Board of Education*, 874 F. 2d 1036 (5th Cir. 1989). A presumption in favor of the educational placement established by an IEP exists and the party challenging it bears the

burden of showing why the educational setting is not appropriate. *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1291 (5th Cir. 1991) at 1291; *R. H. v. Plano Indep. Sch. Dist.*, 607 F. 3d 1010-11(5th Cir. 2010). “Educational placement, as used in the IDEA, means educational program-not the particular institution where that program is implemented.” *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir.2003)

In determining whether District’s proposed placement is the LRE for Student, two questions must be asked. The first question is whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily. If it cannot, then the second question to ask is whether District has mainstreamed Student to the maximum extent appropriate.

In considering whether education of Student in the regular classroom can be achieved satisfactorily, certain inquiries should be made. Whether a student with a disability can be educated in a general education setting requires an examination of the nature and severity of the student’s disability, the student’s academic achievement, needs and abilities, and the school district’s response to the student’s needs. *Daniel R. R.* at 1048. To make this determination, the following items should be reviewed:

- 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.

The first step is to consider whether District attempted to accommodate Student in the general education setting. Student received Student’s education in a combination of both the general and special education settings from *** through ***. District modified the general education curriculum in order to present materials to Student at Student’s level. District provided one-to-one support in the general education classroom. It is clear that District made continuous efforts to accommodate Student in the general education setting.

When considering whether District’s proposal would mainstream Student to the maximum extent appropriate, it is notable that District proposed what it calls a “blended” placement. The placement includes less time in the general education setting than Student previously received, and more time in a self-contained, special education setting.

In support of its position that Student’s placement should not change, Petitioner relies heavily on Student’s progress on Student’s March 2019-March 2020 goals. Overall, Student mastered several goals, and progressed on others. District staff testified that Student’s performance on Student’s goals was not as they expected and was inconsistent at best. As an example, at the time of hearing, Student had been

working ***, but did not demonstrate consistent mastery of either. The determination of placement is not based solely on progress on IEP goals. *Daniel R. R.* requires consideration of more than that.

Student's disability is such that Student's curriculum was modified from a *** level to a *** level. While in the general education setting, Student was accompanied by a special education teacher or paraprofessional. This individual sat beside Student, worked one-on-one with Student on Student's modified curriculum, and was available for redirection at all times. Student required attention, prompts and reinforcers as encouragement to do Student's tasks. Student's special education teacher testified that Student was taught separately from what the general education teacher was teaching in essentially, a "class of one." The instructional specialist described Student's setting as being "taught in isolation."

In the regular education classroom, Student exhibited disruptive behaviors and required much attention. The setting was overly stimulating for Student resulting in frustration, then behaviors. Student did not engage with the general education teacher during instruction; neither did Student participate with Student's general education peers. When ***. Student ***. When small group activities took place, Student's behaviors were such that the teacher began to believe no learning was taking place. Student's teacher testified that the *** content was overwhelming for Student even when modified. At *** to the general education peers. Student often ***.

Overall, Student's benefit from the regular classroom setting was minimal at best. As the Speech Therapist testified, Student's behaviors occurred more often in the general education setting than in the speech therapy room where Student was less aggressive. Student's abilities, along with Student's needs for attention, consistent prompts, redirection, and reinforcement, and Student's limited engagement with Student's peers in the regular classroom activities emphasize Student's need for specialized instruction.

The IDEA does not contemplate an all-or-nothing educational system in which children with disabilities attend either regular or special education. District's proposal consists of a program that includes both general and special education time. The proposal includes a general education setting with facilitated support for ELA, Math/Science, Reading/***. Student would also receive a portion of Speech Therapy in the general education environment.

It is agreed that Student needs opportunities to model behaviors. This hearing officer could not determine whether Student received any social benefit from Student's general education setting. Despite that, District's proposal includes both opportunities to model behaviors and to develop socially in the general education setting on a daily basis.

During the special education portion of Student's day, Student would have the opportunity for individualized instruction, paced at Student's pre-requisite level, with students doing the same level tasks, in a high teacher to student ratio. The specialized setting provides strong supports. When balancing the considerations required under *Daniel R. R.*, this hearing officer determines that District's proposed

blended program is Student's least restrictive environment. Petitioner failed to carry its burden of showing why the proposed educational setting is not appropriate.

Petitioner's Issue No. 2: Whether District failed to evaluate Student appropriately, particularly whether Student's most recent Full Individual Evaluation ("FIE") is adequate

Student's most recent FIE is the initial (and only) FIE. It was conducted in the spring 2017 prior to Student's entry into ***. The FIE was reviewed at the May ***, 2017 ARDC meeting. Parent was present at the meeting. Procedural safeguards were given to Parent at that time. In Texas, a party must request a due process hearing within one year of the date the complainant knew or should have known about the alleged action that serves as the basis for the hearing request. 19 Tex. Admin. Code §89.1151(c). Petitioner's issue No. 2 is barred by the one-year statute of limitations.

Petitioner's Issue No. 3: Whether Student's education program is appropriate

Public school districts must comply with the IDEA procedures for identifying children with disabilities who need special education, and delivering appropriate services as necessary to provide a free and appropriate public education (FAPE). The educational program must be meaningful, and reasonably calculated to produce progress as opposed to *de minimis* advancement. To meet its substantive obligations under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. 20 U. S. C. § 1412(a)(1); *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 189 (1982); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989). An IEP must be "specially designed" to meet a child's "unique needs" and be constructed after careful consideration of the child's present levels of achievement, disability, and potential for growth. *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000-01 (2017).

When a parent challenges the appropriateness of an IEP, the Court in *Rowley* requires that two questions are asked: whether the state has complied with the procedural requirements of the IDEA, and then, whether the IEP developed through such procedures was "reasonably calculated to enable the child to receive educational benefits." An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

The Fifth Circuit has further defined a FAPE by delineating four factors to consider as indicators of whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational program individualized on the basis of the child's assessment and performance; 2) Is the program administered in the least restrictive environment; 3) Are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) Are positive academic and non-academic benefits demonstrated? *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d at 253.

Student's 2018-2019 IEP and 2019-2020 proposed IEP were both individualized on the basis of Student's assessments and performance. In 2017, District conducted an initial FIE that included formal and informal measures and included Parent input. In 2019, in anticipation of the three-year reevaluation that was due later in the school year, the ARDC conducted a REED. The committee determined that it needed a new FIE for additional data for Speech/Language, FBA with VBMAPP, Cognitive/Adaptive, Achievement, OT, OHI eligibility, and AT. Parent consented to an FBA. Despite numerous efforts on the part of District, Parent did not give consent for the full FIE.

In developing Student's 2019-2020 IEP, District reviewed the 2017 FIE, information from school personnel, Student's communication needs, and Parent's concerns. District reviewed daily data sheets, the IEE FBA and VB-MAPP data. Both years' IEPs were developed based on Student's assessments and performance.

Petitioner does not argue that District failed to educate Student in the LRE in 2019-2020 school year. It is District's proposed placement for the 2020-2021 school year that Petitioner contends is not Student's LRE. This issue is discussed earlier in the decision.

Petitioner does not argue that District failed to provide Student's services in a coordinated and collaborative manner by the key stakeholders. The record is replete with evidence of regular meetings, emails, and discussions among District staff members regarding Student's program. Regular training was provided to those individuals who were responsible for implementing Student's IEP. Student's daily tracking sheets were provided to Parent who actively participated in ARDC meetings. District held additional meetings with Parent throughout 2018-2019 and 2019-2020. Because it wanted to create an opportunity to establish trust and not damage the relationship with the family, District respected Parent's avoidance of formal cognitive evaluation. The evidence supports a finding that Student's services were consistently provided in a coordinated and collaborative manner by key stakeholders.

During both school years, District complied with the procedural requirements when developing Student's IEP. 34 C. F. R. §300.324 (a) and (b). District considered Student's strengths, Parent concerns, the most recent evaluation of Student, and Student's academic, developmental, and functional needs. In addition, District determined that Student's behavior impedes Student's learning or that of others, considered the use of positive behavioral interventions and supports to address that behavior. The evidence reflects that Student's BIP addressed Student's behaviors. Although District considered whether Student needed AT technology, it was thwarted in its efforts to evaluate for those needs until after it developed the 2020-2021.

Student progressed on Student's goals during the 2019-2020 school year including the Speech/Language goals. Student was provided an opportunity to be with Student's age-level peers to observe and model their behaviors, and made some attempts to interact with the general education

students. Although Student's 2020-2021 IEP includes time with general education peers, Student is currently virtually learning at home and thus, has no interaction with classmates at this time. Student's independent evaluator confirmed that Student made progress on the current year's goals.

Student's 2020-2021 IEP includes Speech Therapy, both in general education and in the Speech Therapy room. It proposes placement in a self-contained special education class that is designed to provide options for station teaching, modeling, grouping, and multisensory instruction. The expectation is that there will be less distraction and less frustration for Student. The *** classroom is accessed for prerequisite skills, which is Student's current level. In light of Student's circumstances, the 2020-2021 IEP is appropriate and is reasonably calculated to produce progress rather than regression or trivial educational advancement.

Petitioner's Issue No. 4: Whether District failed to appropriately implement direct teaching strategies

Petitioner failed to provide sufficient evidence to carry its burden of proving this issue.

Petitioner's Issue No. 5: Whether District adequately trained its staff in differentiated instruction as relates to children with characteristics similar to Petitioner

Petitioner failed to provide sufficient evidence to carry its burden of proving this issue.

Petitioner's Issue No. 6: Whether District failed to assess Student for AT needs

A school district has a duty to assess a child in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. The IDEA delineates procedures that school district must follow when conducting evaluations. Such information may assist in the development of a child's IEP. 34 C. F. R. §300.304; *N.B. v. Hellgate Elem. Sch. Dist.* 50 IDELR 241 (9th Cir. 2008). This hearing officer finds nothing in the IDEA that allows a school district to accept a parent-selected independent evaluation in lieu of conducting an evaluation itself, in effect, abdicating its duty to evaluate.

Following District's numerous requests, Parent gave consent for an AT evaluation in March 2020. District closed for Spring Break from March 9 through March 13, 2020. Due to the Pandemic, District did not offer in-person school for the remainder of the school year and no in-person assessments were conducted. In May, Parent requested and was granted an IEE that would include an AT assessment. District planned to accept the AT IEE in lieu of conducting the evaluation.

There is a possibility that an independent evaluation may not be conducted in compliance with a school district's requirements. That possibility played out in the instant action. Despite the required scope of the independent evaluation that Dr. *** was to conduct, she failed to evaluate for specific learning disability or intellectual disability via standardized, face-to-face assessment. Consequently, the independent evaluation did not provide needed information. When a school district accepts an

independent evaluation in lieu of conducting the evaluation itself, it risks receiving an inadequate evaluation.

In the instant action, Parent selected the independent AT evaluator. For reasons not made clear, the independent evaluation was not completed by the time of this hearing. Delay in obtaining additional AT information resulted. After careful consideration, it is determined that District is required by the IDEA to evaluate its students. Respondent District failed to evaluate Student for AT needs; thus, the failure is a procedural violation. 34 C. F. R. §300.304 (c)(4).

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefit. A hearing officer is not precluded from ordering a school district to comply with procedural requirements under §§ 300.500 through 300.536. 34 C. F. R. §300.513(a)(2).

In considering whether District's procedural violation denied Student a FAPE, this hearing officer recognizes that District developed the 2020-2021 IEP at Student's annual ARDC meeting March ***, 2020. For several months prior to the meeting, District made many efforts to obtain consent from Parent; however, Parent refused and thus, must bear some responsibility for the lack of an AT evaluation at the time of the annual ARDC meeting. In that same vein, District chose to refrain from pursuing the evaluation by using the consent override procedures available through the IDEA. 34 C. F. R. §300.300(a)(3).

In development of Student's IEP, the ARDC reviewed the REED from November 2019, a new FBA and updated BIP, classroom data, parent information, teacher reports and the FIE. Parent was present at the annual ARD meeting and provided input in the discussions regarding Student's program. Student has received Student's program virtually since the Spring of Student's *** year. Having considered the evidence, it is determined that the procedural error did not impede Student's right to FAPE, nor did it deprive Student of educational benefit. The evidence does not support a finding of a denial of FAPE due to District's failure to conduct an AT evaluation.

Conclusions of Law

1. Student is eligible for special education services as a student with a disability under IDEA, 20 U.S.C. §1400 et. seq. and its implementing regulations. Comal Independent School District is responsible for providing the student with a FAPE.
2. District's proposed placement for the 2020-2021 school year is the least restrictive environment for Student. *Daniel R. R. v. State Board of Education*, 874 F. 2d 1036 (5th Cir. 1989).

3. The district's educational program is entitled to a legal presumption of appropriateness. *Tatro v. Texas*, 703 F.2d 823 (5 th Cir. 1983). Petitioner bears the burden of proving that the education program is not appropriate. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). District's education program is appropriate in light of Student's circumstances. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000-01 (2017); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d .
4. District failed to comply with the procedural requirement to assess Student for assistive technology needs following receipt of parental consent. 34 C. F. R. §300.304(c)(4); *N.B. v. Hellgate Elem. Sch. Dist.* 50 IDELR 241 (9th Cir. 2008).
5. District did not deny a FAPE to Student. *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d at 253; *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

Order

Based upon a preponderance of the evidence and the foregoing findings of fact and conclusions of law, due to the procedural error of Respondent, Comal Independent School District, it is hereby ORDERED that no later than 30 school days from the date of this decision, Comal ISD shall conduct and complete an Assistive Technology Evaluation of Student using all COVID-19 Pandemic health and safety precautions required by the District. It is further ORDERED that within 10 school days of the completion of the AT evaluation, Comal ISD shall convene an ARDC meeting to review the AT evaluation report and consider any need to amend Student's IEP. 34§300.513(a)(2).

All other relief requested by Petitioner is DENIED.

SIGNED on March 19, 2021.

BRENDA RUDD
Special Education Hearing Officer

NOTICE TO THE PARTIES

The decision issued by the hearing officer is final, except that any party aggrieved by the findings and decision made by the hearing officer, or the performance thereof by any other party, 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. A civil action brought in state or federal court must be initiated not more than 90 days after the date the hearing officer issued his or her written decision in the due process hearing. 20 U.S.C. §1415.