

**SOAH DOCKET NO. 701-21-2786.IDEA**  
**TEA DOCKET NO. 218-SE-0721**

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

v.

**PEARLAND INDEPENDENT SCHOOL**  
**DISTRICT,**  
**Respondent**

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**BEFORE A SPECIAL EDUCATION**  
  
**HEARING OFFICER FOR**  
  
**THE STATE OF TEXAS**

**DECISION OF THE HEARING OFFICER**

**I. STATEMENT OF THE CASE**

\*\*\* (Student), by next friend \*\*\* (Parent or, collectively, Petitioner), brings this action against the Pearland Independent School District (Respondent or the District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, and its implementing state and federal regulations. The main issues in this case are whether the District violated its Child Find obligation and whether the District denied Student a free appropriate public education (FAPE) during the relevant time period. The Hearing Officer concludes that the District did not violate Child Find and provided Student with a FAPE at all relevant times.

**II. LEGAL REPRESENTATION**

Petitioner was represented throughout this litigation by non-attorney advocate Karen Mayer Cunningham. Respondent was represented in this litigation by Christina Garcia Henshaw, Paula Maddox Roalson, and Sydney Keller with Walsh, Gallegos, Treviño, Kyle & Robinson, P.C.

### III. DUE PROCESS HEARING

The due process hearing was conducted via the Zoom videoconferencing platform on November 16-17, 2021. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by advocate Karen Mayer Cunningham. In addition, \*\*\* and \*\*\*, Student's parents (Parents), attended the due process hearing.

Respondent was represented by its legal counsel, Christina Garcia Henshaw, Paula Maddox Roalson, and Sydney Keller. In addition, Dr. \*\*\*, Assistant Superintendent of Special Programs, and \*\*\*, Special Education Director, participated as party representatives for the District. Both parties filed written closing briefs in a timely manner. The Decision in this case is due on February 4, 2022.

### IV. ISSUES

#### A. Petitioner's Issues

Petitioner raises the following IDEA issues from June 30, 2020, to the present for decision in this case:

Child Find:

1. Whether the District failed to timely conduct an appropriate full and individual initial evaluation (FIIE) and identify Student as a student with a disability eligible for special education services under the IDEA.

Substantive FAPE:

2. Whether the District denied Student a FAPE by failing to develop and implement an appropriate individualized education program (IEP) that included appropriate goals and accommodations;
3. Whether the District denied Student a FAPE by failing to develop and implement an appropriate behavior intervention plan (BIP); and
4. Whether the District denied Student a FAPE by failing to provide Parents with a meaningful opportunity to participate in the educational decision-making process.

Procedural FAPE:

5. Whether the District failed to adhere to timelines required under the IDEA;
6. Whether the District failed to permit Parent to inspect and review education records relating to Student in accordance with the IDEA; and
7. Whether the District failed to comply with Parents' procedural rights.

**B. Respondent's Legal Position and Additional Issues**

Respondent generally denies the factual allegations stated in Petitioner's Complaint and denies that Petitioner is entitled to any of the relief requested. Respondent also asserts the statute of limitations as an affirmative defense.

**V. REQUESTED RELIEF**

Petitioner requests the following items of relief:

- Relief deemed appropriate by the Hearing Officer, including private placement in a summer program, private occupational and speech therapy, private counseling, ABA social skills and behavior therapy, and tutoring and/or 1:1 services for special education and academics outside the school day. Petitioner clarified that Petitioner is seeking reimbursement for future services; and

- Training on IEP implementation, Child Find, FAPE, IDEA, and the grade-level standards developed by TEA otherwise known as Texas Essential Knowledge and Skills (TEKS).

## VI. FINDINGS OF FACT

1. Student is \*\*\*-year-old who attended \*\*\* school in the District during the 2018-19, 2019-20, and 2020-21 school years. Student lives with both Parents and is eligible for special education services as a student with autism and a speech impairment in the areas of language and articulation.<sup>1</sup>
2. The family moved to Texas from \*\*\* in the summer of \*\*\*. Both parents \*\*\*. While in \*\*\*, Student had an Individualized Family Services Plan (IFSP) and received occupational and speech therapy services and special instruction to address cognitive, communication, and social/emotional delays. An exit evaluation was performed on June \*\*\*, 2015.<sup>2</sup>
3. In October 2016, when Student was \*\*\*, Parent contacted the District, expressed concerns related to Student's behavior and speech, requested a special education evaluation, and provided the District with a copy of Student's previous IFSP.<sup>3</sup>
4. The District conducted a Full Individual and Initial Evaluation (FIIE) in December 2016. The District's team of evaluators used a variety of assessment tools to gather relevant information in the following areas: language, physical performance, emotional functioning and behavior, cognitive functioning, adaptive behavior, educational and developmental performance, and assistive technology. Based on the results of the assessments performed and data collected, the evaluators determined that Student did not meet eligibility criteria for special education and related services.<sup>4</sup>
5. Student's Admission, Review, and Dismissal (ARD) committee convened on December \*\*\*, 2016, to review the results of the FIIE. The committee determined that Student was not eligible for special education services at that time, but also agreed to collect additional information related to Student's social and emotional needs through further evaluation after Parents reported concerns with newly developing negative behaviors related to social awkwardness and Student's attempts to "try to fit in." The meeting ended

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<sup>1</sup> Joint Exhibit (JE) 28 at 1; JE 41; JE 42; JE 43; Respondent's Exhibit (RE) 18 at 3.

<sup>2</sup> Petitioner's Exhibit (PE) 37 at 3, 12; PE 38 at 1, 5; JE 2 at 1; Tr. at 31-35.

<sup>3</sup> JE 1 at 3-4; JE 4 at 1; Tr. at 37-38.

<sup>4</sup> JE 2 at 1, 8, 12; Tr. at 40-41.

in agreement. The District provided Parent with Prior Written Notice and Parent provided written consent for further evaluation.<sup>5</sup>

6. District evaluators conducted further assessments of Student's social and emotional development. The results of these assessments indicated that Student had functional adaptive skills, that Student's levels of independence were appropriate for Student's age, and that Student demonstrated significantly more behavior problems at home than at \*\*\*. The problematic behaviors were not being generalized into the \*\*\* classroom.<sup>6</sup>
7. Student's ARD committee met on February \*\*\*, 2017, to review these results. The ARD committee once again determined that, based on the results of the assessments, Student did not meet eligibility criteria for special education.<sup>7</sup>

### **2018-19 School Year (\*\*\*)**

8. Parents enrolled Student in \*\*\* in the fall of 2018. Student participated in the school's \*\*\* program, a \*\*\* program for \*\*\* students that is also offered to \*\*\* students as an enrichment program. Student's \*\*\*. As a prerequisite to Student's participation in the program, Parent signed a Parent Commitment form in which Parent acknowledged that Student would be removed from the \*\*\* program if Student engaged in behaviors that interfered with Student's learning or with classroom instruction. Although Student struggled with the \*\*\* portion of Student's program and became frustrated at times, campus teachers and staff never considered removing Student from the program.<sup>8</sup>
9. On November \*\*\*, 2018, Parent requested a screening or evaluation for occupational therapy (OT) and/or a behavior consultation due to concerns with sensory issues and whether Student was following classroom routines. In response to Parent's request, the licensed specialist in school psychology (LSSP) for the campus observed Student on December \*\*\*, 2018, and January \*\*\*, 2019. During the first observation, Student followed instructions and appeared to enjoy the small group activity in which Student was involved. The classroom teacher did not have any behavior concerns and Student followed instructions and interacted with peers appropriately. Student's learning was commensurate with that of Student's peers. During the second observation, Student complied with redirection from the teacher, engaged in classroom activities, and displayed typical activity levels. Although Student spoke out of turn once on Student's own initiative and again in

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<sup>5</sup> JE 3; JE 24 at 1, 6.

<sup>6</sup> JE 4 at 2-5, 12, 14.

<sup>7</sup> JE 4 at 16; JE 25 at 1, 5; Tr. at 44-45.

<sup>8</sup> RE 3; Tr. at 48, 50, 168-69, 176, 181-82, 275-76, 481, 492-93.

response to a peer, Student complied with redirection, did not engage in any significant disruptive behavior, and did not engage in any unusual sensory-seeking behaviors.<sup>9</sup>

10. At the end of the year, Student received \*\*\* which included the ability to observe rules, follow directions, work well independently, work without disturbing others, listen attentively, complete a task consistently, use time wisely, and participate in group activities. Student also received \*\*\* in almost all academic areas.<sup>10</sup>

**2019-20 School Year (\*\*\*)**

11. Parent contacted the school's diagnostician on September \*\*\*, 2019, and expressed concerns about Student \*\*\* and shutting down in class and Student's ability to interact socially. She also indicated previous concerns related to autism.<sup>11</sup>
12. On October \*\*\*, 2019, Parent contacted the District again, inquiring about a meeting among campus staff and Student's teachers to address work avoidance and whether there were any concerns as to whether it was impacting Student's academic progress.<sup>12</sup>
13. On October \*\*\*, 2019, Student's teacher referred Student for Tier 1 behavior interventions through the District's Response to Intervention (RtI) program at Parent's request. According to the referral, Student \*\*\*. Student \*\*\*." Student also shut down when challenged academically. Although Parent reported tantrums at home and a sensitivity to loud noises or environments, Student never complained to Student's teachers about the volume in Student's classroom and did not slam doors or scream at others while at school.<sup>13</sup>
14. During a conversation with Student's teacher on October \*\*\*, 2019, Parent again shared her concern that Student might have autism.<sup>14</sup>
15. With respect to work avoidance, Student would sometimes get frustrated during the instruction provided in \*\*\* and put Student's head down on Student's desk. This type of behavior, however, is typical of \*\*\* Student's age who participate in the \*\*\* program. Student did not demonstrate behaviors that would require interventions beyond those provided to other students in the general education environment. Student was easily

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<sup>9</sup> PE 6; PE 9; RE 5; Tr. at 55.

<sup>10</sup> JE 41.

<sup>11</sup> PE 12.

<sup>12</sup> PE 19; RE 6.

<sup>13</sup> JE 47; PE 16; PE 20; PE 21; Tr. at 164-65, 187-88.

<sup>14</sup> PE 18 at 2.

redirected, and Student’s behavior did not result in any discipline referrals. Student did not engage in these behaviors in classes other than those taught in \*\*\*.<sup>15</sup>

16. The RtI committee, however, agreed to have Student meet with the school counselor in small group sessions to help with self-esteem and self-advocacy, additional areas of concern expressed by Parents. Student participated in these sessions and demonstrated progress.<sup>16</sup>
17. Sometime during the spring semester of the 2019-20 school year, Parent verbally requested a “full evaluation” of Student from the campus diagnostician.<sup>17</sup>
18. Student received \*\*\* on Student’s report card for conduct during the first grading period of \*\*\*, but improved Student’s mark to \*\*\* by the end of the second grading period and received \*\*\* by the end of the third. Student was either \*\*\* grade-level concepts in the \*\*\* program, and Student progressed from an English reading Level \*\*\* to a Level \*\*\* by the end of the school year.<sup>18</sup>

**2020-21 School Year (\*\*\*)**

19. During the first nine weeks of the 2020-21 school year (from August 31 through October 30, 2020), Student attended school remotely due to the ongoing effects of the COVID pandemic. Student had progressed to a reading Level \*\*\* over the summer and was reading above grade level.<sup>19</sup>
20. Upon Student’s return to campus in November, the District sought Parent’s consent for Student to continue to receive counseling intervention through RtI. Student was given a “break” card that Student could use to go see the counselor when Student felt frustrated. Student used the card twice throughout the 2020-21 school year. Neither Student’s teachers, the school counselor, nor campus administration believed that a special education referral was necessary to address Student’s needs.<sup>20</sup>

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<sup>15</sup> JE 50 at 2; PE 21; Tr. at 184-85, 194, 202, 207-08.

<sup>16</sup> RE 8; PE 13 at 1; PE 21 at 2; PE 22; PE 26; Tr. at 163-64, 191, 199, 471, 474-75.

<sup>17</sup> Tr. at 68.

<sup>18</sup> JE 42.

<sup>19</sup> JE 31; JE 44; Tr. at 477.

<sup>20</sup> JE 7; Tr. at 109, 164, 206, 470-71, 475, 492, 500.

21. On November \*\*\*, 2020, Parents made a written request for a Full Individual Evaluation (FIE) of Student, and on November \*\*\*, 2020, Parents requested an evaluation of Student under Section 504 of the Rehabilitation Act (Section 504).<sup>21</sup>
22. The District initially refused Parents' request for an FIE and sent Prior Written Notice of its decision on November \*\*\*, 2020. Later that same day, Parents provided the District with an outside psychological evaluation (the \*\*\*). Two days later, the District's Coordinator of Evaluations informed Parents that the District intended to proceed with the FIE based on Parents' concerns and the outside evaluation. The District met with Parent and her advocate on November \*\*\*, 2020, provided Parent with Prior Written Notice of its decision to evaluate, obtained her consent for the evaluation, and provided her with a copy of the Notice of Procedural Safeguards.<sup>22</sup>
23. The \*\*\* was completed on October \*\*\*, 2020, by Dr. \*\*\*, a Licensed Psychologist. The evaluation included interviews with Parent, Student, and one of Student's \*\*\* providers as well as numerous formal assessments. Student's intellectual functioning fell within the average range as did Student's index scores in selective and sustained attention. Student's Adaptive Behavior Composite standard score was considered moderately low and reflected a strength in daily living skills but weaknesses in socialization and motor skills.<sup>23</sup>
24. The \*\*\* also included assessments to determine whether Student showed characteristics of Autism Spectrum Disorder. Results of these assessments showed that Student's recognition of emotions in facial expression was within the average range. However, Student appeared to have some difficulty understanding the perspective of other people and understanding abstract meanings of phrases. Parent responses to different rating scales included in the assessments indicated that Student has many characteristics similar to those of an individual who has been diagnosed with autism and that deficiencies in Student's reciprocal social behavior are clinically significant, which can lead to severe interference in everyday social interactions. Such scores are strongly associated with a clinical diagnosis of Autism Spectrum Disorder.<sup>24</sup>
25. Finally, the \*\*\* assessed Student's emotional functioning. Measures of Student's anxiety (as reported by Student) fell within normal limits. Although neither Parent nor Student's \*\*\* provider reported any significant difficulties with hyperactivity, aggression, or conduct, they both reported significant depressive behaviors and mild problems with social skills. Conversely, although the \*\*\* provider reported that Student demonstrated no more

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<sup>21</sup> RE 14; RE 18; Tr. at 477-78.

<sup>22</sup> JE 6; JE 11; JE 12; JE 13; JE 14; RE 15 at 1; RE 16; RE 18 at 1; RE 20; RE 22; Tr. at 80-82.

<sup>23</sup> RE 18 at 9-10.

<sup>24</sup> RE 18 at 11-13.



anxiety-based behaviors or somatic problems than other children Student's age, Parent reported clinically significant problems in both areas. In a similar vein, the \*\*\* provider's responses did not indicate any other difficulty with adaptive skills. According to the \*\*\* provider, Student adapts as well as others Student's age to a variety of situations; demonstrates a typical ability to work with others; has adequate organizational and social skills; and generally exhibits age-appropriate expressive and receptive communication skills. Parent's responses, on the other hand, indicate that Student has difficulty adapting to changing situations and takes longer to recover from difficult situations than most others Student's age; has difficulty making decisions, lacks creativity, and/or has trouble getting others to work together effectively; and demonstrates poor expressive and receptive communication skills. Parent's responses produced an *F* Index score that fell within the Extreme Caution range. An *F* Index score indicates a negative overall view of a child's behavior and can sometimes be viewed as a plea for help from the individual responding or a desire for immediate assistance.<sup>25</sup>

26. The \*\*\* concluded that Student met the DSM-5 criteria for Autism Spectrum Disorder, Level 1 Severity: Requiring support without accompanying intellectual impairment as well as Other Specified Depressive Disorder.<sup>26</sup>
27. On November \*\*\*, 2020, the District provided Parent with Notice and Consent for Initial Section 504 Evaluation, Notice of Rights and Procedural Safeguards for Disabled Students and their Parents, and Notice of Section 504 Meeting. On November \*\*\*, 2020, Parent signed consent for the evaluation. On November \*\*\*, 2020, the District held a Section 504 committee meeting to review its Section 504 evaluation of Student. Parents and their advocate were present and participated in the meeting. The committee considered Parent input, the \*\*\*, and teacher input and recommendations in determining that Student was eligible for services under Section 504 as a student with autism and \*\*\*. Student's Section 504 Plan included the following accommodations: frequent breaks, preferential seating to minimize distractions, check for understanding, daily communication log, positive reinforcement, and a procedural checklist. The committee determined that Student did not need a behavior plan, but that Student would benefit from specific feedback each day in a "glow and grow" format recommended by Parent's advocate. The committee also agreed that Student should receive school counseling to support development of appropriate social skills. Student participated in a small group led by the school counselor to focus on the development of Student's social skills.<sup>27</sup>

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<sup>25</sup> RE 18 at 14-15.

<sup>26</sup> RE 18 at 18.

<sup>27</sup> JE 5; JE 7; JE 8; JE 10; JE 26; JE 27; Tr. at 477-86.

28. In January 2021, the campus principal met with Parents to address their concerns regarding Student's ability to fit in socially, to advocate for \*\*\*self, and to keep up academically. Neither Student's \*\*\* teachers nor Student's previous teachers had expressed a concern about Student's abilities in these areas. Instead, Student's behaviors and classroom abilities appeared to be consistent with those demonstrated by Student's peers. Parents were also concerned that they had not been informed each time Student visited the nurse complaining of a stomach or headache. In response to Parents' concern, the principal instructed the school nurse to contact Parents any time Student came to see her.<sup>28</sup>
29. Student was absent for \*\*\* days during the period of time in which the District was conducting the 2021 FIE. Based on the District's 2020-21 academic calendar, the 57th school day after Parent provided written consent for the evaluation fell on March \*\*\*, 2021.<sup>29</sup>
30. The multi-disciplinary team that conducted the FIE included an LSSP, an occupational therapist, the lead speech language pathologist (SLP), Student's general education teachers, and Parents. The evaluation included formal and informal assessments; information gathered from Parents, Student's teachers, and \*\*\* provider; and a review of previous evaluations, including Student's IFSP, the 2016 FIIE, the 2017 FIE, and the \*\*\*. The evaluation team also reviewed Student's developmental and educational history.<sup>30</sup>
31. Multiple sources of data were used to determine the presence or absence of a communication disorder. These sources included Parent and teacher information; formal assessments; and teacher and Parent articulation observations. With regard to language, Student did not demonstrate a weakness in semantics and performed in the average range with respect to narration. Although results indicated a slight concern in syntax with Student's use of past tense regular and irregular verb forms and negation, they did not support Parents' concern for underlying difficulties with supralinguistics (language knowledge and use beyond literal meaning). Student performed in the average range in this area as well. Finally, in the area of pragmatics, teachers indicated a hesitancy by Student to interact or a limited willingness to communicate, but identified no other pragmatic weaknesses. Parents, on the other hand, reported significant pragmatic weaknesses related to play, peer interaction, conversational skills, problem-solving, conversational repair, and tone/volume. While the SLP's observations supported reports of limited peer interactions, consideration given to the circumstances surrounding COVID indicated that Student's peer interactions were no more limited than those of Student's peers. The SLP's observations did not indicate weaknesses with conversational skills, conversational repair, or

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<sup>28</sup> Tr. at 116-21, 273-80, 303-04, 485.

<sup>29</sup> JE 44; JE 62; RE 35; RE 36; RE 38.

<sup>30</sup> See generally JE 19.

- tone/volume, and formal measures did not indicate weaknesses with social language. Student performed in the average range in that area. As for articulation, Student's production of \*\*\* should have been more consistent (indicating a delay), and Student's production of \*\*\* should have been emerging. As a result, Student's errors supported a concern for the presence of a communication disorder in articulation.<sup>31</sup>
32. The District conducted an OT evaluation using formal assessments, as well as observations, teacher and parent interviews, and a review of handwriting samples. Overall, Student demonstrated good legibility in writing samples, average visual-motor integration skills, and typical sensory processing skills at school. However, Student demonstrated significantly different sensory processing skills at home. During observations in \*\*\* class, Student showed no auditory sensitivity and teachers reported that they had not observed Student display sensitivity to noise.<sup>32</sup>
33. The District also evaluated Student's emotional and behavioral needs using teacher and Parent information; classroom observations; a Student interview; and formal assessments. The results of this portion of the evaluation indicated that Student's emotions and behaviors differed in some areas depending on the setting. Student's behavior outside of school, as reported by Parents, was more problematic than Student's behavior in the classroom. Across both settings, however, Student had a tendency to be withdrawn and to have difficulty with peer socialization and social/emotional reciprocity as well as challenges with emotional control. The District evaluators relied on classroom observations and teacher information to determine that Student did not present with any significant or interfering problematic behaviors within the school setting and that a functional behavior assessment (FBA) was therefore not appropriate. Student was able to follow the Student Code of Conduct and adhere to classroom rules and expectations with the use of Student's accommodations.<sup>33</sup>
34. The behavioral portion of the District's evaluation included the Behavior Assessment System for Children, Third Edition (BASC-3)—a rating scale that measures numerous aspects of behavior including positive (adaptive) and negative (clinical) characteristics observed in the home and school settings. Neither Student's teachers, Student's Parent, nor Student's \*\*\* provider reported any concerns on the Externalizing Behaviors Composite, which includes hyperactivity and aggression scales that measure acting-out, disruptive behaviors, and self-control. This indicates that at home, at school, and at \*\*\*, Student exhibits a typical level of self-control, does not act aggressively any more than Student's peers, and follows the rules as well as most other students. The Internalizing Problems

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<sup>31</sup> JE 19 at 17-18.

<sup>32</sup> JE 19 at 19-27; Tr. at 188.

<sup>33</sup> JE 19 at 28-41.

Composite is comprised of the anxiety, depression, and somatization scales and corresponds with behaviors indicating internal distress. Student's classroom teachers did not report a concern in this area. However, both Student's \*\*\* provider and Parent reported significant depressive behaviors. And while Student's \*\*\* provider reported no concerns in the area of anxiety or somatization, Parent reported clinically significant concerns in both areas. This indicates that, at home, Student frequently displays behaviors stemming from worry, nervousness, and/or fear and displays a high number of (unspecified) health-related concerns. The School Problem Index reflects academic difficulties and measures the extent to which attention and learning impact a student in the school setting. Neither Student's teachers nor Student's \*\*\* provider indicated any concerns with attention or learning, signifying that Student is able to maintain an attention level similar to that of others Student's age. Student can comprehend and complete school work. The Behavior Symptoms Index reflects an overall level of problem behavior. Student's teachers reported moderate concerns in the area of withdrawal. Student does not avoid making friends at school, but making friends is not easy for Student. Student's teachers and \*\*\* provider report that Student generally displays clear, logical thought patterns and is generally aware of Student's surroundings. Parents, however, report that Student seems disconnected from Student's surroundings and has mild problems maintaining necessary levels of attention.<sup>34</sup>

35. The Content Scales of the BASC-3 measure both maladaptive and adaptive behaviors. The results of this portion of the assessment indicate that Student has difficulty with social skills and communicating with others at home and \*\*\* and in some settings at school. Student's classroom teachers also reported that Student does not become angry or irritated quickly, is able to control Student's reactions to environmental changes as well as others, and reacts to changes in everyday activities or routines in a manner that is typical for Student's age. Student is also able to control and maintain Student's behavior and mood as capably as other children Student's age. However, moderate concerns were reported with problem-solving (an area of executive functioning) and resiliency. For example, Student has difficulty overcoming stress and adversity and has poor coping skills.<sup>35</sup>
36. The Autism Spectrum Rating Scale (ASRS) was also included among the formal assessments used in the evaluation. The ASRS is designed to measure behaviors of children as reported by their parents and/or teachers that are associated with Autism Spectrum Disorders. The areas measured include Social/Communication, Unusual Behaviors, Self-Regulation, DSM-5 diagnostic characteristics, Peer Socialization, Adult Socialization, Social/Emotional Reciprocity, Atypical Language, Stereotypy, Behavioral Rigidity, Sensory Rigidity, and Attention/Self-Regulation. Scale scores range from the mean of 50 to Slightly Elevated (60-64), Elevated (65-69), and Very Elevated (70+). Overall, there

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<sup>34</sup> JE 19 at 31-34.

<sup>35</sup> JE 19 at 34-35.

was variability in scores among Parents and teachers, with Parents' scores often falling in the Very Elevated range (i.e., Social/Communication, DSM-5, Peer Socialization, Social/Emotion Reciprocity, Behavioral Rigidity, Sensory Rigidity, and Total Score). Parents' Total Score was \*\*\* and fell in the \*\*\* range. The teachers' Total Scores, on the other hand, were either within one standard deviation of the mean (\*\*\*) or \*\*\*.<sup>36</sup>

37. The Social Responsiveness Scale – Second Edition (SRS-2) indicates the extent of a social communication deficit that may be present in an individual. The results of this assessment were based on responses from Parents and Student's two \*\*\* teachers. Overall, the Total Score based on Parents' ratings fell in the Severe range, whereas teacher ratings fell in the Normal range. This indicates that outside of school, Student has deficiencies in reciprocal social behavior that interfere with Student's social interactions, but while at school, Student is able to interact socially with others.<sup>37</sup>
38. District evaluators also performed the Behavior Rating Inventory of Executive Function – Second Edition (BRIEF-2) and the Autism Diagnostic Observation Schedule – Second Edition (ADOS-2). The BRIEF-2 is a rating scale that assesses everyday behaviors associated with executive functioning in the home and school environments. Overall ratings by Parents were clinically elevated, indicating that outside of school, Student has self-regulatory problems in multiple domains. Overall teacher ratings, however, fell within normal limits, indicating that Student presents with very few difficulties in executive function at school. The ADOS-2 assesses communication and reciprocal social interaction skills. Results of the ADOS-2 demonstrated that Student displays impairment in Social Affect which is consistent with an Autism Spectrum Disorder.<sup>38</sup>
39. The District formally assessed Student's cognitive abilities using the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) and selected subtests of the Kaufman Test of Educational Achievement – Third Edition (KTEA-3). Student's Full Scale Intelligence Quotient was \*\*\*, indicating global intellectual functioning in the High Average Range. Student did not demonstrate any cognitive deficits.<sup>39</sup>
40. The FIE was completed on March \*\*\*, 2021 (2021 FIE) and provided to Parents by email. The District evaluators offered to review the evaluation report with Parents and their advocate prior to the ARD committee meeting, but Parents declined their offer. The District also provided Parents with drafts of Student's Present Levels of Academic Achievement

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<sup>36</sup> JE 19 at 35-37.

<sup>37</sup> JE 19 at 37-38.

<sup>38</sup> JE 19 at 38-41.

<sup>39</sup> JE 19 at 41-45.

and Functional Performance (PLAAFP) and proposed goals prior to the ARD committee meeting scheduled for April \*\*\*, 2021.<sup>40</sup>

41. The ARD committee met through the Zoom videoconferencing platform on April \*\*\*, 2021, in order to review the 2021 FIE. Parents and their advocate attended and participated in the meeting. The ARD committee reviewed the evaluation report and determined Student eligible for special education and related services as a student with autism and a speech impairment in articulation and syntax.<sup>41</sup>
42. The ARD committee also discussed Student's access to sensory items. Student's teacher reported that these items were kept in the back of the classroom and that Student did not access them very often. These items were initially kept in the back of the room at Student's request. Based on input from Parents, the classroom teacher, and the occupational therapist, however, the ARD committee agreed to keep the sensory items in a backpack by Student's desk.<sup>42</sup>
43. The ARD committee met again on April \*\*\*, 2021, and discussed Student's PLAAFP. Parents requested changes to the PLAAFP statements, including adding sections of the Texas Administrative Code and excerpts from the TEKS. Although the District members of the ARD committee expressed concern that such information was not individualized and did not address Student's specific strengths and weaknesses (and therefore did not belong in Student's PLAAFP statement), they agreed to include the information as requested in the interest of collaboration.<sup>43</sup>
44. Meanwhile, Parents and their advocate disagreed with the speech evaluation because it did not include a specific goal for pragmatic language. They also expressed a concern as to whether all forms provided to Student's teachers in the course of the OT evaluation were also given to Student's \*\*\* provider. Although the District offered to add an addendum to the FIE to include information from Student's \*\*\* provider, Parents and their advocate requested an Independent Educational Evaluation (IEE) in the areas of Psychoeducational, Psychological, Speech and Language, and OT. Respondent granted Parent's request for an IEE on April \*\*\*, 2021, and provided them with the District's IEE criteria and a list of qualified independent evaluators.<sup>44</sup>

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<sup>40</sup> JE 19; RE 47; RE 48; RE 52; RE 53; Tr. at 126-27, 248, 520.

<sup>41</sup> JE 28 at 1, 19-20; Tr. at 127-28.

<sup>42</sup> JE 28 at 19, 23; Tr. at 291, 490-91.

<sup>43</sup> JE 28 at 2-8, 22; Tr. at 128-30.

<sup>44</sup> JE 21; JE 23; JE 28 at 21.

45. The ARD committee also considered Parents' request for a BIP. Student followed the Student Code of Conduct, regularly attended to instruction, came to class prepared, used appropriate language, worked well independently, performed consistently, worked quietly, took notes, sought help appropriately, and raised Student's hand before speaking. Parent and teacher information, observations, and formal and informal emotional and behavioral assessment results indicated that Student was able to follow rules, exhibit typical levels of self-control, and control Student's impulses. On the other hand, Student also demonstrated difficulty with peer interactions, social/emotional reciprocity, coping skills, and problem-solving. Student had difficulty regulating Student's emotions when Student was upset and could be withdrawn. These behaviors, though, did not impede Student's learning or that of the other students in the classroom and were addressed through Student's accommodations and IEP goals.<sup>45</sup>
46. The ARD committee, with the input and participation of Parents and their advocate, developed four goals to address Student's needs. The first goal focused on Student's behavior, and required Student to communicate Student's frustration in a socially acceptable manner using coping strategies such as asking for a break, asking to see the counselor, or using visuals. The second goal focused on in-home training and sought to help Student generalize Student's ability to identify feelings of anxiety or frustration across the academic and home settings. The third goal focused on social skills and targeted Student's use of coping strategies to handle social interactions by demonstrating expected behaviors such as perspective-taking, friendship development, and conversation. Finally, the fourth goal focused on Student's articulation and expressive language skills.<sup>46</sup>
47. The District recommended both direct and indirect psychological services every two weeks. On the week that did not include direct services, indirect services would be provided in the form of collaboration with teachers and the SLP. The District also recommended speech services two times per week for fifteen minutes per session to target articulation and one time per week for thirty minutes to address Student's needs in the area of language.<sup>47</sup>
48. The ARD committee met for a third time on April \*\*\*, 2021. The committee agreed upon the psychological and speech services discussed at the previous ARD committee meeting and agreed upon four one-hour in-home training sessions per year. This time was flexible and could be used up front or spread out through the year based on the needs of Parents and Student. The ARD committee also considered Parents' request for in-class support. The District proposed fifteen minutes of in-class support for Student in \*\*\*—a non-

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<sup>45</sup> JE 28 at 3, 23, 27-28; Tr. at 316-17.

<sup>46</sup> JE 28 at 27-29.

<sup>47</sup> JE 28 at 9, 24.

- preferred subject. Parent reported that Student was unable to \*\*\* and requested in-class support in \*\*\* as well. The District recommended an \*\*\* evaluation to assess Student's specific needs. The committee agreed to the evaluation and further agreed that it would be due by the last day of school—May \*\*\*, 2021. Although the results of the OT evaluation did not indicate a need for OT services, the District agreed to provide integrated OT support for fifteen minutes per nine-week grading period in response to Parents' request.<sup>48</sup>
49. The ARD committee included the following accommodations in Student's IEP: access to sensory items; check for understanding; breaking up or chunking of assignments; daily communication log between Parents and teachers; decrease language/communication demands during periods of increased frustration; flexible seating; frequent breaks; note-taking assistance; positive reinforcement; preferential seating/minimize distractions; and procedural checklist for common daily procedures or multiple-step assignments.<sup>49</sup>
50. The ARD committee also discussed compensatory services. After considering the time between Parents' request for an evaluation and initiation of the evaluation process of one week, as well as Parents' concern with the need for multiple ARD committee meetings to finalize Student's IEP that spanned two weeks, the District offered three additional thirty-minute speech sessions and two additional psychological services sessions. These services were to be completed by the end of the school year. Parents agreed to these services, and the services were completed on May \*\*\*, 2021.<sup>50</sup>
51. The April \*\*\*, 2021 ARD committee meeting ended in disagreement as to the evaluation, and Parents rejected the District's offer to reconvene the meeting. Parents provided consent for the initial provision of services on April \*\*\*, 2021, and the District agreed to implement Student's IEP beginning April \*\*\*, 2021. On April \*\*\*, 2021, the District provided Prior Written Notice of the decisions made during the three April ARD committee meetings.<sup>51</sup>
52. The District completed Student's \*\*\* evaluation on May \*\*\*, 2021. The multi-disciplinary team that evaluated Student included three \*\*\* instructors, a general education \*\*\* teacher, and Student's father (\*\*\*). Using a variety of formal and informal measures, the evaluators concluded that Student performed overall within the average range compared to Student's same-age peers and did not require \*\*\*. The ARD committee met on May \*\*\*, 2021, to review the evaluation and determined that Student was not eligible for \*\*\* services. The ARD committee further agreed to add clearly defined expectations as an accommodation in all subject areas, including \*\*\*, to address a Parent concern that Student had been

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<sup>48</sup> JE 28 at 9-10, 24-25.

<sup>49</sup> JE 28 at 9.

<sup>50</sup> JE 28 at 26; JE 29 at 16.

<sup>51</sup> JE 28 at 26, 33-34; Tr. at 145-46.



- improperly placed in “\*\*\*.” The meeting ended in agreement, and the District provided Parents with Prior Written Notice of all decisions made during the meeting.<sup>52</sup>
53. Student earned the following grades at the end of the 2020-21 school year: \*\*\*. Student received \*\*\* in conduct and work habits. Student received \*\*\* \*\*\*. Student was promoted to \*\*\*, but Parents withdrew Student from the District before school started in the fall of 2021.<sup>53</sup>
54. The District implemented Student’s IEP from the first day services were to begin, April \*\*\*, 2021, to the last day of the 2020-21 school year, May \*\*\*, 2021.<sup>54</sup>
55. Progress reports indicate that Student made progress during the six-week period in which services were implemented. Student mastered one of Student’s Speech Goals and was making progress towards the others. Student was also making progress towards Student’s Coping Strategies - Social Interactions Goal. During small group activities, Student had \*\*\*. Student was also able to \*\*\*.<sup>55</sup>
56. After receiving the District’s IEE criteria on April \*\*\*, 2021, Parents selected \*\*\* to conduct Student’s speech IEE and Dr. \*\*\*, Ph.D., to complete Student’s psychoeducational and psychological IEE.<sup>56</sup>
57. \*\*\* conducted its evaluation on September \*\*\*, 2021, and completed the IEE on October \*\*\*, 2021. Evaluation results were based on observation, clinical judgment, and standardized test instruments and indicated that Student exhibited pragmatic language abilities commensurate with Student’s similar-aged peers and were not impaired. The IEE also acknowledged Parents’ concerns regarding Student’s social skills development and recommended that Student participate in a social skills group, noting that such groups are often led or facilitated by a school counselor.<sup>57</sup>
58. Dr. \*\*\* conducted an independent psychoeducational and psychological evaluation on September \*\*\*, 2021, and the report was completed on November \*\*\*, 2021. The results of this IEE were based on interviews with Student’s mother and Student’s \*\*\* teachers from Student’s new district of enrollment; information (including rating scales) from

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<sup>52</sup> JE 29 at 15, 17.

<sup>53</sup> JE 43.

<sup>54</sup> JE 52; JE 53; JE 54; JE 55; JE 56; JE 59; JE 62; Tr. 295-99, 301.

<sup>55</sup> JE 45; Tr. at 497-98.

<sup>56</sup> RE 13; PE 39.

<sup>57</sup> RE 13 at 9.

Student's \*\*\* teachers; a school observation; Student report; testing observations; and a number of formal assessments to measure Student's cognitive ability and academic achievement, orthographic competence, visual-motor integration, language, functional and adaptive behavior; and social/emotional function.<sup>58</sup>

59. Consistent with the results of the \*\*\* and the District's 2021 FIE, this IEE indicated that Student met eligibility criteria under the IDEA for autism. Dr. \*\*\* further recommended that Student be identified with an other health impairment (OHI) due to attention deficit hyperactivity disorder (ADHD) but recognized that school districts often choose not to affix OHI eligibility because the behaviors associated with it are subsumed within an autism identification.<sup>59</sup>
60. In concluding that Student met the eligibility criteria for autism, Dr. \*\*\* identified deficits in social communication and interactions across multiple contexts as well as repetitive movements, use of objects, and speech. These behaviors, however, do not interfere with Student's daily functioning. Student is easily redirected. Significant sensory needs were not indicated, and Student's visual-motor integration falls within the average range. Student does not require a modified curriculum. Dr. \*\*\* opined, however, that Student would likely perform well in the general education classroom with in-class support. Her recommendations for accommodations included the following: check for understanding, graphic organizers to help Student with Student's writing; clearly-stated expectations; preferential seating; frequent breaks; extended time to complete assignments; and chunking or breaking up assignments. She also recommended counseling as a related service in order to provide Student with strategies to manage disturbing thoughts regarding Student's differences from non-disabled peers. These recommendations were consistent with the services, supports, and accommodations included and provided to Student under Student's IEP.<sup>60</sup>
61. Parent made a records request for Student's education and related records on April \*\*\*, 2021. The District confirmed receipt of Parent's request on April \*\*\*, 2021, and provided her with a link to those records on May \*\*\*, 2021. On May \*\*\*, 2021, Parent confirmed she was able to access the records but expressed concern as to whether the District had provided all documents responsive to the request. On May \*\*\*, 2021, the District confirmed that it had produced all documents it believed to be responsive.<sup>61</sup>

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<sup>58</sup> PE 39.

<sup>59</sup> PE 39 at 45-49; Tr. at 376.

<sup>60</sup> PE 39 at 25, 45-54; Tr. at 377.

<sup>61</sup> JE 36.

## VII. DISCUSSION

Petitioner contends that the District violated the IDEA by failing to (1) timely conduct an appropriate FIE and identify Student as a student with a disability eligible for special education services; (2) implement an appropriate IEP, including a BIP; (3) provide Parents a meaningful opportunity to participate in the educational decision-making process; (4) comply with Parents' procedural rights, and (5) adhere to required timelines.

### A. Burden of Proof

There is no distinction between the burden of proof in an administrative hearing and a judicial proceeding. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n.4 (5th Cir. 2009). The burden of proof in a due process hearing is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1291 (5th Cir. 1991). Accordingly, Petitioner bears the burden of showing that the District violated its Child Find duty and/or failed to provide Student a FAPE.

### B. The Statute of Limitations in Texas

Under the IDEA, a parent may file a due process complaint on any matter relating to the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE to the child within two years from the date the parent knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.507(a)(1)-(2).

The two-year limitations period may be more or less than two years if the state has an explicit time limitation for requesting a due process hearing under the IDEA. 20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2). Texas has adopted an alternative time limitation, and state regulations

require a parent to request a hearing within one year of the date he or she knew or should have known of the alleged action(s) forming the basis of the complaint. 19 Tex. Admin. Code § 89.1151(c). The limitations period begins to run when a party knows, or has reason to know, of an injury. *Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995).

There are two exceptions to this rule. The timeline does not apply if the parent was prevented from filing a due process complaint due to:

- (1) specific misrepresentations by the public education agency that it had resolved the problem forming the basis of the due process complaint; or
- (2) the public education agency's withholding of information from the parent that was required by 34 C.F.R. § 300.1, *et seq.* to be provided to the parent.

19 Tex. Admin. Code § 89.1151(d).

Petitioner filed the Complaint in this case on June 30, 2021, and the District contends that any claims arising prior to June 30, 2020, are time-barred. Petitioner did not allege either of the two exceptions to the statute of limitations and confirmed during the initial prehearing conference that the relevant timeframe was the one-year time period leading up to the filing of the Complaint. Nonetheless, facts outside the limitations period may be considered when determining whether the District had reason to suspect that Student had a disability under the IDEA and a corresponding need for special education services upon commencement of the relevant timeframe on June 30, 2020. *Spring Branch Indep. Sch. Dist. v. O.W.*, 961 F.3d 781, 793 n.11 (5th Cir. 2020).

### **C. Child Find Under the IDEA**

The IDEA's Child Find provisions guarantee access to special education for students with disabilities. 20 U.S.C. § 1400(d)(1)(A). A school district has an affirmative duty to have policies and procedures in place to locate, and timely evaluate, children with suspected disabilities in its

jurisdiction. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a), (c)(1); *El Paso Indep. Sch. Dist. v. Richard R.R.*, 567 F. Supp. 2d 918, 950 (W.D. Tex. 2008). The Child Find obligation is triggered when a school district has reason to suspect a student has a disability, coupled with reason to suspect that special education services may be needed to address the disability. *Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 382 (5th Cir. 2007); *Richard R.R.*, 567 F. Supp. 2d at 950.

### **1. Reason to Suspect a Disability**

The evidence in this case establishes that Student experienced developmental delays and had an IFSP in place from the time Student was \*\*\* until Student was approximately \*\*\* when Student's family moved to Texas. Parents' worries with respect to Student's speech and behavior led them to request an FIIE in October 2016 when Student was \*\*\* years old. Although Student did not meet eligibility criteria at that time for special education, Parents' concerns resurfaced in November 2018 when they requested a behavior consultation to address sensory issues and to assess Student's ability to follow classroom routines. However, the record reflects that these concerns were not shared by Student's teachers. Nor were Parents' concerns substantiated through the behavior consultation performed by the LSSP. During these observations, Student followed instructions and Student's learning was commensurate with that of Student's peers. Student did not engage in disruptive behavior or any unusual sensory-seeking behaviors, and the classroom teachers did not have any behavior concerns.

Thus, the Hearing Officer concludes that the District had no reason to suspect a disability until November 11, 2020, when Parents provided it with the \*\*\* indicating that Student met the diagnostic criteria for Autism Spectrum Disorder.

## 2. Reason to Suspect the Need For Special Education Services

The question then becomes whether the District had reason to suspect a corresponding need for special education services as a result of Student’s suspected disability. *Alvin Indep. Sch. Dist.*, 503 F.3d at 382. While “neither the IDEA nor federal regulations’ define what it means to ‘need’ special education and related services,” the Fifth Circuit has held that we must consider the unique facts and circumstances of each case, including parent input and teacher recommendations, as well as information about the student’s physical condition, social background, and adaptive behavior. *Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 216 (5th Cir. 2019) (citations omitted).

The weight of credible evidence in this case demonstrates that while the \*\*\* may have given rise to a reason for the District to suspect that Student had a disability, it did not give the District reason to suspect a corresponding need for special education services. As noted above, the record reflects that Student was performing well academically and that Student demonstrated behaviors consistent with other students Student’s age while Student was at school. Although Parents expressed concerns regarding outbursts, tantrums, and sensitivity to light and sound at home, there is no evidence that Student engaged in these behaviors at school. Student participated in the \*\*\* program (which was preconditioned on appropriate, nondisruptive classroom behavior), never received any discipline referrals, and all but one grading period over the course of \*\*\* school years indicated that Student was meeting grade-level behavior expectations. Neither Student’s educational performance nor Student’s behavior ever created a concern among Student’s teachers, the school counselor, or campus administration that Student might need special education services.

In short, Petitioner failed to meet Petitioner’s burden of showing that the District had reason to suspect the need for special education and related services and, as such, failed to show that the District violated its Child Find duty.

**D. Duty to Provide FAPE**

Nonetheless, in response to Parents' written request and in light of the \*\*\*, the District evaluated Student, and the ARD committee determined Student to be eligible for special education services in April 2021. Once a student is determined to be eligible for special education, an IEP must be developed. The District's mandate to design and deliver an IEP falls under its broader statutory obligation to furnish a FAPE that emphasizes special education and related services designed to meet Student's unique needs and prepare Student for further education, employment, and independent living. 20 U.S.C. § 1400(d); *Lisa M.*, 924 F.3d at 209. The District is responsible for providing, at public expense, the specially designed instruction and support services necessary to meet Student's unique needs and confer an educational benefit. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89, 200-01, 203-04 (1982).

**E. FAPE**

**1. 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. These factors are:

- Whether the program is individualized on the basis of the student's assessment and performance;
- Whether the program is administered in the least restrictive environment (LRE);
- 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 County Sch. Dist. RE-1*, 137 S. Ct. 988, 1000-01 (2017)). 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).

**a. Individualized on the Basis of Assessment and Performance**

In meeting the obligation to provide FAPE, the school district must have in effect an IEP at the beginning of each school year that includes 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 developed and implemented by the District was reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances. *Endrew F.*, 137 S. Ct. at 999.

The evidence showed that the IEP developed in April 2021 was based on Student’s present levels of functional performance and was individualized to address the needs identified in the 2021



FIE. The ARD committee, with the input and participation of Parents and their advocate, developed four goals to address Student's identified needs. The first goal focused on Student's behavior, and required Student to communicate Student's frustration in a socially acceptable manner using coping strategies such as asking for a break, asking to see the counselor, or using visuals. The second goal focused on in-home training and sought to help Student generalize Student's ability to identify feelings of anxiety or frustration across the academic and home settings. The third goal focused on social skills and targeted Student's use of coping strategies to handle social interactions by demonstrating expected behaviors such as perspective-taking, friendship development, and conversation. Finally, the fourth goal focused on Student's articulation and expressive language skills.

In addition, Student received psychological and speech services and in-class support in \*\*\*. To address the discrepancy in Student's behaviors across settings, Student and Parents also received four one-hour in-home training sessions per year. This time was flexible and based on the needs of Parents and Student. Student's needs were further supported through accommodations, many of which had been included in Student's Section 504 Plan and were successful. Additional accommodations were added, however, to address parent concerns and areas of need. The November 2021 IEE corroborated the programming and accommodations included in Student's IEP.

Petitioner argues that Student's program was deficient because the District failed to provide Student with a BIP.<sup>62</sup> Petitioner's position is not supported by the record or relevant authority.

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<sup>62</sup> Petitioner alleged in the Complaint that the District denied Student a FAPE by failing to include IEP goals in the areas of pragmatic language and occupational therapy. Complaint ¶11. Petitioner, however, did not introduce evidence on these issues at the hearing nor address them in Petitioner's closing brief. Notably, the speech IEE obtained by Parents indicated that Student's pragmatic speech was not impaired while the psychoeducational IEE found that Student's motor skills fell within the average range and that no significant sensory needs were reported. Because the IEEs are consistent with the program developed by the ARD committee for Student in April 2021 and due to Petitioner's failure to address these two areas of alleged need either at the hearing or in Petitioner's closing brief, the Hearing Officer concludes that Petitioner failed to meet Petitioner's burden of showing that IEP goals in these areas were necessary in order for Student to receive a FAPE.

Case law establishes that a student's behavior needs can be met in a number of ways aside from a BIP, including through IEP goals, interventions, supports, and accommodations. *J.B. b/n/f Lauren B. v. Frisco Indep. Sch. Dist.*, 528 F. Supp. 3d 614, 626 (E.D. Tex. 2021). Student's IEP in this case addressed Student's behavior needs through Student's goals which focused on behavior, social skills and interactions, and in-home training. Student's needs were further supported through Student's accommodations. Moreover, the weight of credible evidence demonstrates that Student's behavior did not impede Student's learning or that of others. Petitioner thus failed to show that Student needed a BIP in order to receive a FAPE.

In sum, the IEP developed by the ARD committee in April 2021 was individualized to Student's needs, based on assessment data and performance, and reasonably calculated to allow Student to make progress appropriate in light of Student's unique circumstances. *Andrew F.*, 137 S. Ct. at 999.

**b. LRE**

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

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

- Whether the student with a disability can be satisfactorily educated in general education settings with the use of supplemental aids and services; and

- If not, whether the school district mainstreamed the student to the maximum extent appropriate.

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

Petitioner has not challenged whether Student’s program was Student’s LRE, and the record supports the conclusion that Student’s program was offered in the LRE. With the use of in-class accommodations and supports, Student received instruction in all subjects in the general education classroom. Student received speech and psychological services in either a one-on-one or small group setting. The evidence establishes that these pull-out services were necessary to meet Student’s unique needs and that the District mainstreamed Student to the maximum extent appropriate.

**c. 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. by E.R. v. Spring Branch Indep. Sch. Dist.*, 2017 WL 3017282, \*27 (S.D. Tex. 2017), *aff’d*, 909 F.3d 754 (5th Cir. 2018). As key stakeholders, parents, school administrators, and teachers familiar with the student’s needs should all be involved in the “highly coordinated and collaborat[ive] effort” of developing a student’s IEP. *Michael F.*, 118 F.3d at 253. The IDEA, however, does not require a school district, in collaborating with a parent, to accede to all of the parent’s demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 657 (8th Cir. 1999). Absent a 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. *White ex rel. White v. Ascension Par. Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003).

The weight of credible evidence establishes in this case that there was collaboration among key stakeholders during the relevant timeframe and throughout the development of Student’s IEP.

Student's teachers and campus administration frequently collaborated with Parents by email and through virtual meetings, and Parents and their advocate actively participated in the ARD committee process. The District responded to Parents' request for more frequent communication related to their child's school day and provided them with draft IEPs in advance of ARD committee meetings. The District members of the ARD committee considered Parents' and their advocate's suggestions, and the ARD committee frequently adopted them.<sup>63</sup>

In short, a preponderance of the evidence demonstrates that services were provided in a coordinated, collaborative manner by key stakeholders during the relevant timeframe. Petitioner failed to show that the District excluded Parents in bad faith or refused to listen to them.

**d. Academic and Non-Academic Benefits**

Whether a student received academic and non-academic benefit from a special education program is one of the most critical factors in any analysis regarding the provision of FAPE. *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 812-13 (5th Cir. 2012). The evidence in this case establishes that Student received both academic and nonacademic benefits from Student's program.

With respect to academic benefit, the record establishes that Student made average to above average grades during the relevant timeframe and was reading above grade level. The evidence similarly shows that Student was receiving a non-academic benefit in the short time Student's IEP was implemented prior to the last instructional day of the 2020-21 school year. Student mastered one of Student's Speech Goals and was making progress towards the other two. Student was also

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<sup>63</sup> Although Petitioner alleges in the Complaint that decisions related to Student's program were predetermined by the District, Petitioner offered no evidence to support this allegation either at the hearing or in Petitioner's closing argument.

making progress towards Student's Social Interactions Goal. Student demonstrated the ability to \*\*\*. Student was able to \*\*\*. In addition, Student demonstrated the ability to \*\*\*.

In light of the foregoing, the Hearing Officer concludes that Student received academic and non-academic benefits from Student's 2021 IEP. As such, all four *Michael F.* factors indicate that Student's program offered Student a FAPE.

## 2. Procedural Requirements

Petitioner alleges three procedural violations, claiming that Respondent failed to permit Parents to inspect and review Student's education records; failed to adhere to required timelines; and failed to comply with Parents' procedural rights. Liability for a procedural violation only arises if the procedural deficiency impeded Student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 812 (5th Cir. 2003).

Petitioner alleges that Respondent denied Parents access to Student's educational records. The IDEA requires school districts to permit parents to inspect and review their child's education records without unnecessary delay and before an ARD committee meeting, a due process hearing, a resolution session, and in no case more than 45 days after the request was made. 34 C.F.R. § 300.613. The evidence shows that the District responded to Parents' April \*\*\*, 2022 records request by May \*\*\*, 2022. The District thus complied with its obligations under § 300.613, and Petitioner's claim on this issue is without merit.

Petitioner's allegation that Respondent failed to complete the FIE within the required timeline is also without merit. Parent signed consent for the FIE on November \*\*\*, 2020. Student was absent \*\*\* of the days in which the evaluation was pending. When a student is absent for three or more days

during the pendency of an evaluation, the timeline is extended by the number of days the student was absent. 19 Tex. Admin. Code § 89.1011(c)(1). Under these circumstances, the FIE written report was due on March \*\*\*, 2021. Respondent completed the written report and provided it to Parents on March \*\*\*, 2021.<sup>64</sup>

Finally, Petitioner argues that Parent made repeated requests for an evaluation, and that Respondent failed to provide Prior Written Notice of its refusal to evaluate Student. School districts are required to provide Prior Written Notice to the parents of a child whenever the district proposes to initiate or change, or refuses to initiate or change, “the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child.” 34 C.F.R. § 300.503. As a threshold matter, the record substantiates only two requests for some type of an evaluation (after the 2017 FIE was performed). Parent made a request for a behavior consultation and/or an OT evaluation in November 2018. This, however, was not a request for a special education evaluation and did not trigger Respondent’s duty to provide Prior Written Notice.

Parent also testified that she verbally requested a “full evaluation” in the spring of 2020 from the campus diagnostician. Under these circumstances, Respondent was required to provide Prior Written Notice of its refusal to evaluate Student in the spring of 2020, and there is no evidence in the record that it did so.<sup>65</sup> Nonetheless, Petitioner failed to allege an exception to the statute of limitations and confirmed that the relevant time period for this case was within the one-year limitations period. Because this alleged procedural violation falls outside the relevant time period, it is time-barred.

In sum, Petitioner failed to establish a procedural violation of the IDEA.

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<sup>64</sup> Even if the District had provided the FIE written report to Parents one day beyond the regulatory deadline, Petitioner failed to show that this resulted in a substantive denial of FAPE.

<sup>65</sup> State administrative rules state that a school district must provide Prior Written Notice in response to a written request for a special education evaluation within fifteen school days of the date the district receives the request. 19 Tex. Admin. Code § 89.1011(b)(1). A school district is still obligated to provide Prior Written Notice in response to a verbal request; however, the fifteen school-day deadline no longer applies. The District must provide notice within a reasonable timeframe. *Richard R.R.*, 567 F. Supp. 2d at 946-48.


### VIII. CONCLUSIONS OF LAW

1. Petitioner did not meet Petitioner's burden of proving that Respondent violated its Child Find obligation. *Schaffer*, 546 U.S. at 62; 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a), (c)(1).
2. Student was provided a FAPE in the least restrictive environment 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. at 188, 203-04; *Andrew F.*, 137 S. Ct. at 999.
3. Petitioner did not meet Petitioner's burden of proving that Respondent failed to provide Parents with a meaningful opportunity to participate in the educational decision-making process. *Schaffer*, 546 U.S. at 62; 34 C.F.R. §§ 300.321(a), .322.
4. Petitioner did not meet Petitioner's burden of proving that Respondent failed to permit Parents to inspect and review Student's education records within the timeframe allowed under the IDEA. *Schaffer*, 546 U.S. at 62; 34 C.F.R. § 300.613.
5. Petitioner did not meet Petitioner's burden of proving that Respondent failed to comply with Parents' procedural rights under the IDEA during the relevant timeframe. *Schaffer*, 546 U.S. at 62; 34 C.F.R. §§ 300.503(a), .504(a).

### IX. ORDER

Based upon the foregoing findings of fact and conclusions of law, Petitioner's requests for relief are **DENIED**.

**SIGNED February 4, 2022.**

  
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**Stacy May**  
**Special Education Hearing Officer**  
**For the State of Texas**