

**SOAH DOCKET NO. 701-22-2828.IDEA**  
**TEA DOCKET NO. 262-SE-0522**

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

v.

**CLEAR CREEK INDEPENDENT**  
**SCHOOL DISTRICT,**  
**Respondent**

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**BEFORE A SPECIAL EDUCATION**

**HEARING OFFICER FOR**

**THE STATE OF TEXAS**

**DECISION OF THE HEARING OFFICER**

\*\*\* (Student), by next friend \*\*\* (Parent, and, collectively, Petitioner) brings this action against the Clear Creek 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 issues in this case are whether the District failed to provide Student a free, appropriate public education (FAPE) during the 2021-2022 school year and whether the District appropriately implemented Student’s individualized education program (IEP). The Hearing Officer concludes that the District provided Student with a FAPE reasonably calculated to allow Student to make progress in light of Student’s unique circumstances and appropriately implemented Student’s IEP.

**I. DUE PROCESS HEARING**

The due process hearing was conducted on January 3-5, 2023 through the Zoom videoconferencing platform. Student was represented throughout this litigation by Student’s legal counsel, Mark Whitburn and Sean Pevsner of Whitburn & Pevsner, PLLC. In addition, \*\*\*,

Student's mother, attended the hearing. The District was represented throughout this litigation by its legal counsel, Janet Horton and Paige Martin of Thompson & Horton, LLP. In addition, Dr. \*\*\*, the Executive Director of Special Services for the District, and \*\*\*, the District's Coordinator of Assessment and Related Services, attended the hearing as party representatives. Petitioner requested that the hearing be open to the public and observers were present.

The parties offered joint and separately disclosed exhibits. Petitioner offered testimony of Student's case manager, three District teachers of the \*\*\*\*\*, a District \*\*\* specialist, \*\*\* (a private expert on \*\*\*\*\*), and \*\*\* (a private expert on special education and dyslexia). Respondent offered testimony of two of Student's teachers, Student's case manager, a District \*\*\*\*\*, the District's \*\*\* program coordinator, a former District special education administrator, and Ms. \*\*\* as an assessment expert. The hearing was recorded and transcribed by a certified court reporter. Both parties filed timely written closing briefs. The Decision in this case is due on March 13, 2023.

## II. ISSUES

### A. Petitioner's Issues

Petitioner alleged the following IDEA issues for decision in this case pertaining to the 2021-2022 school year:

- Whether the District failed to provide Student a FAPE by failing to develop an appropriate IEP for Student that addresses Student's \*\*\*\*\* and Student's dyslexia.
- Whether the District failed to appropriately implement Student's IEP.

### B. Petitioner's Requested Relief

Petitioner requested the following items of relief:

- Order the District to retain a consultant with expertise in \*\*\* to supervise development and implementation of an appropriate IEP for Student.
- Order the District to develop an appropriate program for Student with the assistance of a \*\*\* consultant.
- Order the District to train staff who work with Student on implementation of Student's IEP and Student's disabilities.
- Order the District to provide Student with compensatory education services.
- Order the District to determine Student to be eligible for special education based on a \*\*\*\*\* (\*\*\*).
- Order the District to reimburse Student's parent for privately obtained educational services.
- Any other relief the Hearing Officer deems appropriate.

### C. Respondent's Legal Position

Respondent generally and specifically denied Petitioner's factual allegations and legal claims. Respondent also asserted a one-year statute of limitations, which Petitioner agreed applies to actions filed before September 2022.

## III. FINDINGS OF FACT

1. Student is \*\*\* years old and in the \*\*\* grade. Student lives with Student's parents \*\*\*. Student is eligible for special education based on a specific learning disability (SLD) in the area of reading fluency and other health impairment (OHI) due to Attention Deficit Hyperactivity Disorder (ADHD), \*\*\*\*\* (\*\*\*), \*\*\* (\*\*\*), and \*\*\*.<sup>1</sup>

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<sup>1</sup> Joint Exhibit (JE) 1 at 1-2; JE 9 at 29.

2. Student was first evaluated for special education as a \*\*\* by the \*\*\* Independent School District. That October 2017 evaluation recommended eligibility under the OHI category based on Student's ADHD.<sup>2</sup>
3. Student transferred to the District at the beginning of \*\*\* grade in the 2018-2019 school year. Student's \*\*\* grade IEP noted that Student was receiving \*\*\*\*\* conditions and included an accommodation related to reminding Student to \*\*\*.<sup>3</sup>
4. Student's annual ARD Committee meeting in \*\*\* grade was held on September \*\*\*, 2019. Student's \*\*\* was not an area of concern, "Parent discussed that Student's \*\*\* therapy has been successful," and the \*\*\* accommodation was not continued. Student's eligibility based on ADHD and placement in the general education setting with accommodations and supports was continued.<sup>4</sup>

#### 2020-2021 School Year – \*\*\* grade

5. Student's annual ARD Committee meeting in \*\*\* grade was held on September \*\*\*, 2020 and continued on September \*\*\*, 2020. Student's eligibility and placement remained the same.<sup>5</sup>
6. Student was due for a triennial reevaluation in the fall of 2020. A review of existing evaluation data (REED) was conducted on September \*\*\*, 2020 to prepare for the reevaluation. Parent suspected additional disabilities to be explored, including SLD, \*\*\*, speech impairment, and \*\*\*. The District agreed to complete updated assessments in the areas of language, functional \*\*\* assessment, learning media assessment, occupational therapy (OT), psychological, cognitive, academic achievement, and assistive technology (AT).<sup>6</sup>
7. In October 2020, Dr. \*\*\*\*\* conducted a private \*\*\* learning assessment of Student. Dr. \*\*\*\*\* diagnosed Student for the first time with \*\*\*, in addition to Student's prior diagnoses of \*\*\*\*\* and \*\*\*. The addition of the \*\*\* diagnosis was based on an assessment of Student's \*\*\* pathways, history of past \*\*\* and \*\*\* issues,

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<sup>2</sup> Respondent's Exhibit (RE) 66 at 10.

<sup>3</sup> RE 63 at 2, 15; RE 64.

<sup>4</sup> RE 61 at 1, 7, 11, 13.

<sup>5</sup> RE 57 at 1, 9, 11.

<sup>6</sup> JE 10.

- and medical history that included \*\*\*. Dr. \*\*\*\*\* made numerous recommendations for classroom accommodations that would support Student's \*\*\* needs.<sup>7</sup>
8. \*\*\* is a neurological condition affecting the \*\*\* part of the brain. Characteristics of \*\*\* include \*\*\*.<sup>8</sup>
  9. Dr. \*\*\* is a leading expert on \*\*\* and creator of the \*\*\* Scale assessment tool. The \*\*\* Scale results are divided into ranges one through ten. Phase III (ranges seven to ten) represents the last phase wherein the person with \*\*\* is utilizing strategies to overcome \*\*\* symptoms and has more typical \*\*\*. When an individual reaches Phase III, they are considered to have "refined" their \*\*\*. Previous terminology was to "resolve" \*\*\*, however a more recent publication by Dr. \*\*\* moved to the term "refine."<sup>9</sup>
  10. The District's updated evaluation was completed in December 2020. The evaluation reviewed medical information regarding Student's \*\*\*. Student had received an initial \*\*\*\*\* diagnosis in 2016 and \*\*\* therapy in 2018. In October 2020, Dr. \*\*\*\*\* again diagnosed Student with \*\*\*\*\*, as well as diagnosing Student with \*\*\*. An OHI eligibility form was received from Dr. \*\*\* indicating the following medical conditions: \*\*\*, \*\*\*\*\*, \*\*\*, \*\*\*, \*\*\*, and \*\*\*.<sup>10</sup>
  11. The District received two \*\*\* Reports for Student. A July \*\*\*, 2020 report by Dr. \*\*\*\*\* noted that Student had \*\*\*, no \*\*\*, \*\*\*, and poor \*\*\*. The report recommended \*\*\*, frequent breaks, and limited screen time, and concluded that Student did not have a serious \*\*\*. An October \*\*\*, 2020 report by Dr. \*\*\*\*\* was comparable to Dr. \*\*\*\*\*'s report with regard to \*\*\* recommendation. However, Dr. \*\*\*\*\*'s report concluded with

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<sup>7</sup> Petitioner's Exhibit (PE) 7 at 2, 5-6, 8-9.

<sup>8</sup> PE 7 at 15-16.

<sup>9</sup> Transcript (Tr.) 270, 297-98.

<sup>10</sup> JE 9 at 11.

“[t]his patient appears to have a serious \*\*\* (\*\*\*).”<sup>11</sup>

12. The District’s functional \*\*\* evaluation used a variety of formal and informal measures. The \*\*\* who completed the evaluation consulted materials by Dr. \*\*\* related to the \*\*\* Scale, however a \*\*\* Scale was not conducted. The evaluator concluded that Student had “resolved all of the \*\*\* characteristics of the Phase III, Range 9-10 Scoring Guide” based on the evaluator’s review of \*\*\* Scale materials and her assessment of Student’s functioning in the characteristics of \*\*\*. Overall, the functional \*\*\* evaluation found that Student accessed the curriculum and school environment adequately. The functional \*\*\* evaluation found that Student did not demonstrate an educational need for \*\*\* services from a \*\*\*.<sup>12</sup>
13. The District’s \*\*\* evaluation found that Student was successful at navigating the indoor and outdoor school environment and did not demonstrate a need for \*\*\* services.<sup>13</sup>
14. The District’s OT evaluation determined that Student had difficulty with aspects of writing and \*\*\* motor skills. The report recommended that Student receive OT support and certain AT to support writing.<sup>14</sup>
15. The speech and language portion of the evaluation found Student to be in normal ranges and Student did not qualify for special education based on any speech impairment.<sup>15</sup>
16. As part of the emotional/behavioral portion of the evaluation, Parent provided extensive information about Student’s behavior at home. Student reportedly \*\*\* and struggled with sustaining friendships. Parent reported her concern that Student’s behaviors that appear to be related to ADHD are actually related to Student’s \*\*\* problems. Student’s teachers reported that Student can be inattentive and disorganized, but Student had appropriate social skills and interactions. During observations by the evaluator, Student was off task more than Student’s peers. The evaluation concluded that Student’s behavior was consistent with Student’s ADHD diagnosis. A functional behavior assessment (FBA) was conducted analyzing Student’s off task behavior, which was most common during writing tasks. The FBA made recommendations to address the behavior but did not

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<sup>11</sup> JE 9 at 12-13.

<sup>12</sup> JE 9 at 18, 21-24; Tr. 721-27, 729-30, 734.

<sup>13</sup> JE 9 at 16.

<sup>14</sup> JE 9 at 28, 65.

<sup>15</sup> JE 9 at 9, 60.

- recommend a behavior intervention plan, concluding it was unwarranted in these circumstances.<sup>16</sup>
17. The District's cognitive evaluation found Student to have a full-scale IQ in the high average range. Student was in the average range in processing speed and working memory, high average in fluid reasoning and verbal comprehension, and extremely high in \*\*\*.<sup>17</sup>
  18. In the area of academic performance, the evaluation noted that Student was currently reading below grade level. On standardized testing, Student's performance was average in reading and math, but below average in writing.<sup>18</sup>
  19. The District used a pattern of strengths and weaknesses analysis to determine whether Student met eligibility criteria for any SLD. The evaluation analyzed Student's weaknesses in writing and spelling in relation to Student's other cognitive abilities and determined that Student has \*\*\*. Likewise, the evaluation analyzed Student's weaknesses in reading fluency and spelling in relation to Student's cognitive abilities and determined that Student has mild dyslexia. In reading fluency, Student's rate was good, but Student's accuracy was lower than expected. The evaluation recommended that Student be found eligible for special education in the category of SLD in reading fluency. The evaluation considered Student's \*\*\* and recommended that Student did not meet the criteria to also be considered an SLD in written expression.<sup>19</sup>
  20. The evaluation recommended continued eligibility for OHI based on Student's ADHD. The District had received an updated OHI eligibility form regarding Student's ADHD from Dr. \*\*\*. Although Student did not qualify as \*\*\* impaired, the evaluation also recommended that Student be eligible under OHI for \*\*\*, \*\*\*, and \*\*\*. The evaluation recommended AT, OT, accommodations, and teaching strategies to address Student's needs.<sup>20</sup>
  21. An ARD Committee meeting was held on December \*\*\*, 2020 to review the evaluation. At that time, Student was about a \*\*\* behind grade level in reading and Student's handwriting was difficult to read. Student was on grade level in math. The ARD Committee agreed to an annual goal in reading fluency and an annual goal in writing composition. Accommodations

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<sup>16</sup> JE 9 at 31-38, 44-46.

<sup>17</sup> JE 9 at 48.

<sup>18</sup> JE 9 at 54-56.

<sup>19</sup> JE 9 at 63-65; Tr. 441-42, 446.

<sup>20</sup> JE 9 at 11, 66-69.

included: access to short breaks to use \*\*\*, feedback provided frequently, checks for understanding, copy of class notes, have student repeat back directions, sentence stems for writing assignments, reduce amount of copying required in math, graphic organizers, tracking tool for reading, writing process checklist, assignment chunking, extra time, oral instead of written response, movement breaks, positive reinforcement, preferential seating, private discussion about behavior, reminders to stay on task, slant board, and AT with text-to-speech, word prediction, and word processing. Student's program continued to be predominantly in the general education setting, however 80 minutes per week of targeted reading support in a special education setting and 60 minutes per week of in class support in \*\*\* were added. Direct (15 minutes, twice per nine weeks) and consult (30 minutes, once per nine weeks) OT services were also added to Student's schedule of services.<sup>21</sup>

22. During the ARD Committee meeting, Parent disagreed with the determination that Student did not meet criteria as a student with a \*\*\*, or an SLD in written expression. Dr. \*\*\* joined for a portion of the meeting and provided information about Student's \*\*\* conditions and her recommendations. The meeting was recessed to obtain more information and continued on January \*\*\*, 2021. In the interim, Dr. \*\*\* had provided more information to the District about Student's \*\*\* symptoms and recommended \*\*\* breaks. The ARD Committee agreed that Student would receive specially designed instruction to address reading fluency more appropriate to Student's specific needs, rather than a standard protocol dyslexia program. The ARD Committee also agreed that a \*\*\* would provide support to school staff on working with Student. Ultimately, Parent agreed with the IEP, despite disagreeing with portions of the evaluation.<sup>22</sup>
23. Between the December 2020 ARD Committee meeting and the reconvene on January \*\*\*, 2021, Student's \*\*\*, Dr. \*\*\*, provided a letter detailing information about Student's \*\*\* and recommended accommodations. \*\*\* was added as an OHI eligibility.<sup>23</sup>
24. After the conclusion of the annual ARD Committee meeting, Ms. \*\*\* trained school staff, including Student's teachers, on Student's IEP, including on the information from Dr. \*\*\* about recognizing Student's \*\*\* fatigue and appropriate accommodations for

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<sup>21</sup> JE 8 at 2-3, 5, 7, 13.

<sup>22</sup> JE 8 at 17-18, 21; Tr. 452-53, 455-56.

<sup>23</sup> JE 8 at 2; RE 33 at 2-3.



that. Ms. \*\*\* also provided the school staff with additional resources if they had questions, including access to a \*\*\*.<sup>24</sup>

25. An ARD Committee meeting was held on March \*\*\*, 2021 to correct a clerical error in the IEP, failing to check a box for a graph paper accommodation in math, and to add information regarding Student's \*\*\*.<sup>25</sup>
26. Another ARD Committee meeting was held on May \*\*\*, 2021. At that time, Student had already mastered Student's reading fluency goal and was reading on grade level. The ARD Committee added an accommodation at Parent's request that Student use a particular \*\*\* that was recommended for \*\*\*. The meeting ended in agreement.<sup>26</sup>
27. Student's report card for the 2020-2021 school year reflects that Student met all \*\*\* grade-level standards.<sup>27</sup>

#### **2021-2022 School Year – \*\*\* grade**

28. Parent sent a letter to the \*\*\* principal, dated August \*\*\*, 2021, expressing disagreement with the IEP that was developed at the May 2021 ARD Committee meeting and requesting another ARD Committee meeting to discuss her concerns. District administrators met with Parent to discuss her concerns in advance of the ARD Committee meeting.<sup>28</sup>
29. An ARD Committee meeting was held on September \*\*\*, 2021. The ARD Committee agreed to add an additional 50 minutes per week of targeted academic support in the special education setting for \*\*\* to target Student's weaknesses identified by Student's case manager's data collection. The ARD Committee also agreed to two additional annual goals in reading fluency and phonological awareness since Student had mastered Student's fluency goal at the end of the previous school year. The meeting ended in agreement.<sup>29</sup>

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<sup>24</sup> Tr. 472-73.

<sup>25</sup> JE 7 at 2.

<sup>26</sup> JE 6 at 1, 7.

<sup>27</sup> JE 12 at 3.

<sup>28</sup> RE 67; Tr. 503.

<sup>29</sup> JE 5 at 5, 8; Tr. 505-09.

30. In October 2021, Student was evaluated by Dr. \*\*\* at the \*\*\*. Dr. \*\*\* reviewed Student's medical history, but not the District's 2020 evaluation or any educational records, and conducted some \*\*\* assessments. The assessment did not substantiate the \*\*\* challenges reported by Parent, however, this was noted to not be unusual because functional \*\*\* in the real world cannot be adequately assessed in a clinical setting. The \*\*\* report therefore adopted Dr. \*\*\*'s \*\*\* diagnosis and recommended a school-based assessment by a \*\*\*.<sup>30</sup>
31. Student made steady progress on Student's writing goal from the December 2020 IEP, ultimately mastering the goal by November 2021.<sup>31</sup>
32. Student's \*\*\* grade annual ARD Committee meeting was held on December \*\*\*, 2021. At that time, Student was reading on grade level and received a passing (approaching grade level) score on the \*\*\* grade State of Texas Assessments of Academic Readiness (STAAR) reading assessment. Student's handwriting was still difficult to read, particularly when Student was writing quickly. Student was on grade level in math and passed the \*\*\* STAAR assessment. The ARD Committee continued the annual goals in phonological awareness and reading fluency adopted at the September 2021 meeting. Accommodations were added to minimize auditory and \*\*\* distractions and a checklist of materials needed for transitions. Student's schedule of services was adjusted to a total of 90 minutes of support per week in a special education setting for \*\*\* and the removal of in-class support in the general education setting. The meeting ended in disagreement; however, Parent declined an opportunity to reconvene the meeting. Parent submitted a written addendum to the IEP commenting on Student's use of the \*\*\* and some behavior incidents.<sup>32</sup>
33. Parent obtained a private functional \*\*\* evaluation in November 2021, completed by \*\*\*. Ms. \*\*\* is a \*\*\* for a public school district in \*\*\* and also has a private business offering tutoring to families of children with \*\*\*. Ms. \*\*\* conducted in-person observation and assessment of Student, as well as reviewed videos of Student provided by Parent. Parent sent Ms. \*\*\* at least ten videos and three are referenced in the report. Ms. \*\*\* did not review the District's evaluation of Student or any other District documentation related to Student or observe Student at school. The \*\*\* report noted reviewing Dr. \*\*\*'s report and inaccurately states that Dr. \*\*\* considered Student to be functionally \*\*\*.

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<sup>30</sup> PE 6 at 10.

<sup>31</sup> RE 10 at 4.

<sup>32</sup> JE 1 at 2-3, 6, 8, 15, 19, 21-22.

The evaluation made observations on Student's abilities in \*\*\* efficiency skills and \*\*\* behaviors corresponding to \*\*\* based on Ms. \*\*\*'s interactions with Student, review of Parent videos, and information from Parent interview. She observed Student exhibiting symptoms and challenges in almost all of the \*\*\* efficiency skills and \*\*\* behaviors. Ms. \*\*\* administered a \*\*\* Range and scored Student at \*\*\*, or the beginning of Phase III. The evaluation included testing Student's reading fluency on \*\*\*. The evaluation recommended that Student be eligible for special education based on \*\*\* and various accommodations and AT to support Student's needs. Ms. \*\*\* testified that services from a \*\*\* were needed to help Student's teachers understand \*\*\* and Student's needs.<sup>33</sup>

34. Another ARD Committee meeting was held on February \*\*\*, 2022 to review the \*\*\* evaluation. In preparation for the meeting, District staff also reviewed the three Parent videos that Ms. \*\*\* cited in her report. District \*\*\* compiled their impressions of the \*\*\* report. The notes of these impressions demonstrated some misunderstandings about the \*\*\* Range assessment protocol and whether the District had ever completed one for Student. One District \*\*\* thought that Ms. \*\*\* had scored her \*\*\* Range protocol incorrectly, however others did not.<sup>34</sup>
35. During the ARD Committee meeting, District staff shared their opinions that some of Ms. \*\*\*'s conclusions appeared to be unsupported, even after reviewing the videos. District staff reviewed the \*\*\* efficiency skills and \*\*\* behaviors corresponding to \*\*\*, and how District staff's observations and experiences with Student differ from what was reported by Ms. \*\*\*. District staff also demonstrated their own misunderstanding about the \*\*\* Range by inquiring about why Ms. \*\*\* had not done an extension part of the protocol that was not required.<sup>35</sup>
36. The school-based members of the ARD Committee did not accept the \*\*\* report's conclusions that Student should be eligible based on \*\*\* or that Student needed direct services from a \*\*\*. The meeting ended in disagreement.<sup>36</sup>
37. A reconvene ARD Committee meeting was held on March \*\*\*, 2022. Counsel for Petitioner discussed that Student's \*\*\* diagnosis is uncontested and concern that the District had been dismissive of how \*\*\* may be impacting Student. Counsel for the District reiterated

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<sup>33</sup> PE 3 at 12, 19-22; Tr. 266-67, 301, 351-52.

<sup>34</sup> JE 2; PE 10; Tr. 177-78, 193-95, 198, 244-45.

<sup>35</sup> JE 2-5; Tr. 537-39, 601-02.

<sup>36</sup> JE 2 at 5-6.

that District staff have not seen Student's symptoms manifest in the ways reported by Ms. \*\*\*, and that the District maintains its position that Student does not qualify for special education based on \*\*\*. The meeting ended in disagreement.<sup>37</sup>

38. Ms. \*\*\* has provided remote private tutoring services for Student since completing her evaluation. She testified that she continues to observe the \*\*\* symptoms documented in her evaluation during her ongoing work with Student.<sup>38</sup>
39. Student made steady progress on the annual goals adopted in the December 2021 IEP, ultimately mastering those goals by November 2022.<sup>39</sup>
40. Student's report card for the 2021-2022 school year reflects that Student met or exceeded almost all grade-level standards for the \*\*\* grade. The one standard where Student was approaching, instead of meeting or exceeding, was applying writing conventions authentically.<sup>40</sup>
41. On the \*\*\* grade STAAR exams, Student met grade level standards in reading and mastered grade level standards in math, making accelerated progress over Student's prior year scores on both tests. Student was one question short of mastering grade level standards in reading.<sup>41</sup>
42. Student is very independent and advocated for \*\*\*self directly to Student's \*\*\* grade teachers.<sup>42</sup>
43. Student was at times resistant to using the accommodations in Student's IEP, including declining teacher-suggested \*\*\* breaks and use of the \*\*\*. Student also sometimes needed reminders to \*\*\*.<sup>43</sup>
44. Student had one discipline referral in the 2021-2022 school year for an incident on \*\*\*, 2021 wherein Student \*\*\*

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<sup>37</sup> JE 3 at 2-4; JE 4.

<sup>38</sup> PE 16; Tr. 275, 277.

<sup>39</sup> JE 19.

<sup>40</sup> JE 12 at 2.

<sup>41</sup> RE 4 at 3; Tr. 514.

<sup>42</sup> Tr. 654-66, 682, 684-85.

<sup>43</sup> Tr. 102-03, 631, 765, 769.

- \*\*\*. Student subsequently apologized and was assigned a lunch detention.<sup>44</sup>
45. Student was very successful with Student's classroom job as \*\*\*, enjoyed playing with peers at recess, generally got along with Student's classmates with minor exceptions, and had positive relationships with Student's teachers.<sup>45</sup>
46. During the 2021-2022 school year, Parent was in regular communication with Student's teachers and school administrators, who were responsive to her requests and questions.<sup>46</sup>
47. Student has had the same case manager in \*\*\* grade (2018-2019), \*\*\* grade (2020-2021), \*\*\* grade (2021-2022), and \*\*\* grade (2022-2023). Student's case manager provided the targeted instruction in the special education setting identified in Student's IEPs using research-based curricular tools with fidelity, typically one-on-one.<sup>47</sup>
48. In September 2022, Student was assessed for the District's \*\*\* program and met the identification criteria. To qualify, students must score in the ninety- seventh percentile on two cognitive tests. Student met these criteria on the cognitive assessments with a particular strength in non-verbal spatial reasoning.<sup>48</sup>
49. Student's cognitive test results across evaluations, including special education evaluations over time and the \*\*\* testing, have consistently reflected above average or high scores in subsections that assess \*\*\* processing. Student's only consistently low average \*\*\* processing area has been on picture span subtests that assess \*\*\* working memory and attention.<sup>49</sup>

#### IV. DISCUSSION

Petitioner alleges that the District denied Student a FAPE by failing to devise and implement appropriate IEPs for Student in the 2021-2022 school year. Petitioner seeks an order that the District

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<sup>44</sup> JE 14.

<sup>45</sup> Tr. 647, 667-71, 792-94, 831-33.

<sup>46</sup> RE 12; RE 51; RE 54; RE 55; RE 56; Tr. 478-79, 672-73, 794, 808-09.

<sup>47</sup> Tr. 108, 508-09, 517, 522, 805, 811, 824, 831.

<sup>48</sup> JE 20; Tr. 841.

<sup>49</sup> RE 24.

develop an appropriate program with the assistance of a \*\*\* consultant, staff training, compensatory services, eligibility based on \*\*\*, and reimbursement for Parent's expenses on privately obtained services. Much of Petitioner's Closing Brief arguments focus on the appropriateness of the District's 2020 evaluation of Student and whether Student should be eligible for special education on the basis of \*\*\*. However, Petitioner did not raise claims in this proceeding regarding the appropriateness of the District's evaluation or Student's eligibility areas. Therefore, these are only addressed below in the context of the appropriateness of Student's IEP.

#### **A. Burden of Proof**

The burden of proof in a due process hearing is on the party challenging the IEP and/or placement. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n.4 (5th Cir. 2009). The burden of proof in this case is on Petitioner to show that the District failed to provide Student with a FAPE *and* to offer a program that is reasonably calculated to provide Student with the requisite educational benefit. *Tatro v. State of Tex.*, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part, rev'd in part sub nom. Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984), and *vacated in part*, 741 F.2d 82 (5th Cir. 1984).

#### **B. FAPE**

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. 20 U.S.C. § 1400(d). The district has a duty to provide a FAPE to all children with disabilities ages 3-21 in its jurisdiction. 34 C.F.R. §§ 300.101(a), 300.201; Tex. Educ. Code § 29.001. The district is responsible for providing Student with specially-designed, personalized instruction with sufficient

support services to meet Student's unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with Student's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89, 200-01, 203-04 (1982).

The basic inquiry is whether the IEP implemented by the school district "was reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). The Fifth Circuit has articulated a four-factor test to determine whether a Texas school district's program is reasonably calculated to enable the child to receive educational benefit. Those factors are:

- Whether the program is individualized on the basis of the student's assessment and performance;
- Whether the program is administered in the least restrictive environment (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).<sup>50</sup>

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).

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<sup>50</sup> Even after the Supreme Court's 2017 decision in *Andrew 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. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018). (citing *Andrew F.*, 137 S. Ct. at 1000-01).

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

In meeting the obligation to provide FAPE, the school district must have in effect an IEP at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, the IEP must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the duration and frequency of the services, and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.320, 300.323(a).

The District's obligation when developing Student's IEP is to consider Student's strengths, Student's parent's concerns for enhancing Student's education, results of the most recent evaluation data, and Student's academic, developmental, and functional needs. 34 C.F.R. § 300.324(a)(1)(i). 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).

Petitioner argues that Student's IEPs were not appropriately individualized on the basis of assessment and performance with regard to Student's \*\*\* and dyslexia. Student had one IEP in effect for essentially the first half of the 2021-2022 school year, which was the IEP that had been developed during the \*\*\* grade ARD Committee meetings in December 2020 and January 2021, then modified at ARD Committee meetings in March 2021, May 2021, and September 2021. For the second half of the \*\*\* grade, Student had the IEP developed at the annual ARD Committee meeting on December \*\*\*, 2021. The evidence shows that both of Student's \*\*\* grade IEPs were sufficiently individualized on the basis of assessment and performance, including in meeting Student's \*\*\* needs and dyslexia.



i. \*\*\*

When the first of 2021-2022 school year IEPs was created, Student had just been diagnosed with \*\*\* for the first time by Dr. \*\*. The team conducting Student's December 2020 evaluation collected information from Dr. \*\*, Dr. \*\* was included in the December 2020 ARD Committee meeting, the District collected additional information from Dr. \*\* between meetings, and Dr. \*\*'s recommendations were included in Student's accommodations. The 2020 evaluation included a functional \*\* evaluation and learning media assessment that provided assessment data on Student's academic and functional \*\* needs. Although the ARD Committee did not find Student eligible based on a \*\*, \*\* was included as an OHI and the IEP included consult services by a \*\* to support Student's teachers to address Student's \*\*, in addition to the accommodations recommended by Dr. \*\*. In May 2021, a Parent-requested accommodation was added to support Student's \*\* needs through the use of \*\*. This IEP carefully considered the assessment data available on Student's \*\* and was appropriately individualized based on Student's needs.

The IEP from the \*\* grade annual ARD Committee meeting in December 2021 is substantially similar to the previous IEP with regard to Student's \*\*-related needs. Accommodations were added to minimize auditory and \*\* distractions. There is no evidence that Student's \*\* needs changed significantly in the time between the drafting of these two IEPs. The \*\*-related accommodations and services remained appropriate for Student based on Student's assessment data and performance.

Notably, the District did not accept the conclusions of the \*\* evaluation. The District criticized the \*\* report as containing anecdotal and unsupported conclusions. Ms. \*\*'s testimony criticized the District's 2020 evaluation as

containing anecdotal and unsupported conclusions. However, the District's decision to not accept the \*\*\* report's conclusions was based on the District's own assessment data and experience with Student that contradicted Ms. \*\*\*'s findings. This decision was individualized based on Student's performance and data-based. Further, Ms. \*\*\* testified that a key reason Student should be considered eligible for special education based on a \*\*\* and receive services from a \*\*\* would be so the \*\*\* could educate Student's teachers on \*\*\* and supporting Student's needs. The IEPs at issue have already provided that through consult with a \*\*\* and Student-specific staff training on Student's \*\*\* fatigue needs and accommodations.

Petitioner primarily argues that the District's 2020 evaluation did not adequately assess Student's \*\*\*, including by not performing a \*\*\* Range, and therefore Student's subsequent IEPs cannot be appropriate. Petitioner also implies that the District's failure to find Student eligible for special education as a student with a \*\*\* is tantamount to ignoring Student's \*\*\*. The appropriateness of the evaluation is not an issue in this case, however there is no statutory or regulatory requirement that any particular assessment protocol be used for an IDEA-compliant evaluation of a potential \*\*\*. Likewise, there is no statutory or regularly requirement that any particular assessment protocol must be included in the data considered for an IEP to be appropriately individualized and data-based.

The evidence supports that District staff had some misunderstandings and lack of knowledge related to \*\*\* when evaluating Student and reviewing the \*\*\* report. It can be reasonably inferred from the evidence that \*\*\* is rare impairment that experienced \*\*\* may only encounter infrequently in working with students with \*\*\*\*\*. It can also be inferred that it is even more rare for students to already be at the Phase III refinement level with very strong cognitive \*\*\* processing, as Student undisputedly is, and then be diagnosed with \*\*\*. While the \*\*\* Range would likely yield useful information on Student's needs, the evidence does not support that it

was a required component for Student's 2021-2022 IEPs to be

appropriately individualized and data-based. The District's failure to have completed a \*\*\* Range for Student or consider Student eligible in the category of \*\*\* do not overcome the preponderance of evidence indicating that Student's IEPs were appropriately individualized and based on assessment and performance to meet Student's particular \*\*\*-related needs.

**ii. Dyslexia**

The evidence showed that Student's 2021-2022 IEPs at issue were individualized on the basis of assessment data and Student's performance as to Student's dyslexia needs. The 2020 evaluation had closely analyzed Student's pattern of strengths and weaknesses to detect mild dyslexia with specific weakness in accuracy. The ARD Committee agreed to tailored, specially designed instruction to target Student's specific weakness, rather than a standard dyslexia program that would require Student to be removed from general education for more time per week. During the 2020- 2021 school year, this tailored intervention supported Student's advancement to mastering Student's reading fluency goal in only half a year and making great progress to reading on grade level by the end of \*\*\* grade.

At the beginning of \*\*\* grade, the ARD Committee met to consider Student's specific weaknesses identified in data collection by Student's case manager and proposed new goals targeting fluency and phonological awareness. These goals continued in Student's IEP developed in December 2021. Student made steady progress on these new goals and ultimately mastered them within a year. Additionally, Student's overall reading made accelerated progress during the 2021-2022 school year as measured by the STAAR exams and Student's report cards, ending the year above grade-level on some reading standards. Student's 2021-2022 IEPs addressed Student's dyslexia methodically and was carefully tailored based on Student's assessment and performance.

Petitioner argues that Student's dyslexia instruction cannot be appropriate because the entire IEPs have been based on inadequate understanding of Student's \*\*\*. As discussed above, the Hearing Officer concludes that Student's IEPs were appropriately individualized based on Student's particular \*\*\* needs. Further, the IEPs address Student's dyslexia based on Student's performance, assessment data, and particular needs. All of the IEPs developed for the 2021-2022 school year were appropriately individualized on the basis of Student's performance and assessment in the area of dyslexia.

## **2. Least Restrictive Environment**

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

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's Complaint did not specifically challenge the restrictiveness of Student's educational placement, which is predominantly in the general education setting. In \*\*\* grade, Student received targeted services in a special education setting for 80 minutes, then 140 minutes, then 90 minutes per week, depending on which IEP was in effect. This limited removal from the general education setting is appropriate based on Student's particular needs, and was adjusted over the course of the year based on Student's performance. In particular, Student's dyslexia needs were met through this more targeted instruction, rather than removal for 180 minutes per week for a standard dyslexia intervention,<sup>51</sup> keeping Student in the general education setting as much as possible.

In the LRE section of Petitioner's Closing Brief, Petitioner connects an argument that removal from the general education setting is stigmatizing to Student with an argument that the District has failed to appropriately instruct Student in self-advocacy. Petitioner did not present evidence that the potential stigmatization of removal from the general education setting outweighed the benefits it provided Student. The presence or absence of instruction related to self-advocacy is not an LRE issue. To the extent that Petitioner's Closing Brief can be read to generally argue for the necessity of self-advocacy instruction, the Hearing Officer concluded above the 2021-2022 IEPs were adequately individualized based on Student's performance and assessment data. Overall, Student's program was administered in the least restrictive environment and Student was included to the maximum extent appropriate.

### **3. Services Provided in a Coordinated, Collaborative Manner by Key Stakeholders**

The IDEA contemplates a collaborative process between school districts and parents. *E.R. v. Spring Branch Indep. Sch. Dist.*, 2017 WL 3017282, \*27 (S.D. Tex. 2017), *aff'd*, 909 F.3d 754 (5th

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

The evidence showed extensive collaboration among District staff in providing Student's services, including regular collaboration between Student's teachers and case manager and consultation with the \*\*\*. Student's teachers also had regular communication with and received input from Parent about Student's needs. Parent participated in all four ARD Committee meetings held during the 2021-2022 school year and had the opportunity to share concerns and suggestions. When Parent requested an ARD Committee meeting at the beginning of the year, District administrators met with Parent first to understand her concerns, as well as held an ARD Committee meeting, which ended in agreement. District staff collaborated extensively to prepare for the February 2022 ARD Committee meeting to review the \*\*\* evaluation, although that collaboration evidenced some misunderstandings and lack of knowledge about \*\*\*. The February 2022 meeting ended in disagreement because the District did not accept the \*\*\* report's conclusions and a reconvene meeting was held in March 2022, which also ended in disagreement. A failure to agree with Parent does not, in itself, show a failure to collaborate with Parent.

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<sup>51</sup> Tr. 455-56.

Petitioner argues that the District refused to consider Parent's input, including by rejecting the \*\*\* report and information from Dr. \*\*. Dr. \*\* did not provide any information to the District during the 2021-2022 school year. As discussed above, during the 2020- 2021 school year, the District solicited input from Dr. \*\* and included her recommendations in accommodations for Student. The District had engaged in a collaborative and coordinated process, including ongoing responsiveness to Parent input, when it rejected Ms. \*\*'s conclusions. Overall, the evidence showed that services were provided in a coordinated, collaborative manner by key stakeholders. Petitioner failed to show that the District excluded Parent in bad faith or refused to listen to her.

#### **4. Academic and Non-Academic Benefits**

Whether a Student received academic and non-academic benefit is one of the most critical factors in any analysis as to whether a Student has received a FAPE. *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813-14 (5th Cir. 2012).

Here, the record is replete with evidence of Student's achievements. During the 2021-2022 school year, Student made accelerated progress in both reading and math as measured by the STAAR test. Student met or exceeded all grade-level standards in all areas, with one limited exception in writing. Student mastered all of Student's IEP goals. Student experienced non-academic success as well in Student's relationships with teachers and peers.

Petitioner's Closing Brief argues that, despite Student's achievement, Student's IEPs were not calculated to provide academic and non-academic benefit because they did not address Student's \*\*\* appropriately. Implied in Petitioner's argument is an expectation that despite overall achievement, the IEPs were not appropriate unless they further remediated Student's \*\*\*.

However, “overall educational benefit, not solely disability remediation, is the IDEA’s statutory goal.” *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 398 (5th Cir. 2012). As discussed above, Student’s IEPs adequately considered Student’s \*\*\*-related needs. Petitioner’s Closing Brief is also critical of the way that progress was measured on Student’s reading goal as not sufficiently encompassing of all of the scenarios in which Student must read. Petitioner’s argument, however, ignores Student’s record of success in reading across settings and teachers. Overall, Student demonstrated tremendous success during the 2021-2022 school year, academically and non-academically.

## 5. FAPE Conclusion

When looking at the totality of the *Michael F.* factors as applied to the IEPs at issue here, the evidence showed that the IEPs were individualized based on Student’s assessment and performance, provided in Student’s LRE, provided in a coordinated and collaborative manner by the key stakeholders, and provided Student academic and non-academic benefit. The evidence showed that Student’s program was reasonably calculated to provide meaningful educational benefit and was appropriately ambitious in light of Student’s unique circumstances for the 2021-2022 school year. *Andrew F.*, 137 S. Ct. at 992. Based on the four factors of *Michael F.*, the evidence establishes that the District provided Student a FAPE during the relevant time period.

## C. IEP Implementation

When determining whether a school district failed to adequately implement a student’s IEP, a hearing officer must determine whether a FAPE was denied by considering under the third *Michael F.* factor whether there was a significant or substantial failure to implement the IEP and whether, under the fourth *Michael F.* factor, there have been demonstrable academic and nonacademic benefits from the IEP. *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 796 (5th Cir. 2020). To prevail on Student’s claim under the IDEA, Petitioner must show



more than a *de minimis* failure to implement all elements of Student's IEP, and instead, must demonstrate that the District failed to implement substantial or significant provisions of the IEP. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000).

Petitioner's Complaint alleges that the District failed to implement Student's IEP. However, Petitioner did not present evidence that the District failed to implement Student's IEP during the relevant time period and appears to have abandoned this claim by not addressing it in Petitioner's Closing Brief. As discussed above, factors three and four was resolved in favor of the District.

Petitioner therefore did not meet Petitioner's burden on this claim.

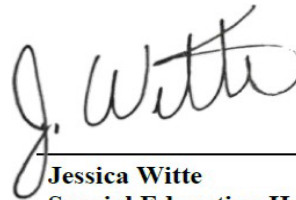
## V. CONCLUSIONS OF LAW

1. The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. *Schaffer*, 546 U.S. at 62.
2. Student was provided FAPE and Student's IEPs were reasonably calculated to address Student's needs in light of Student's unique circumstances during the 2021-2022 school year. *Rowley*, 458 U.S. 176; *Andrew F.*, 137 S. Ct. 988.
3. Petitioner did not meet Petitioner's burden of proving that the District failed to implement Student's IEP. *Schaffer*, 546 U.S. at 62; *Bobby R.*, 200 F.3d at 349.

## VI. ORDERS

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

SIGNED March 9, 2023.



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Jessica Witte  
Special Education Hearing Officer  
For the State of Texas

## VII. NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the Hearing Officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. §§ 300.514(a), 300.516(a); 19 Tex. Admin. Code § 89.1185(n).