

SOAH Docket No. 701-23-18685 Suffix: IDEA
TEA Docket No. 271-SE-0523

**Before the
State Office of Administrative
Hearings**

—
**STUDENT bnf PARENT,
Petitioner
v.
Katy Independent School District,
Respondent**

DECISION AND ORDER

*** (Student), by next friend *** (Parent, and, collectively, Petitioner)¹ brings this action against the Katy Independent School District (Respondent or the District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, and its implementing state and federal regulations. The issues in this case are whether the District failed to provide Student a free,

¹ Student is ***. Parent *** was filed and included in the record. Therefore, Parent is entitled to ***.

appropriate public education (FAPE) and whether the District failed to develop and implement an appropriate individualized education program (IEP) for Student. The Hearing Officer concludes 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 August 23-25, 2023 through the Zoom videoconferencing platform. Student was represented in this litigation by Student's attorney, Mark Whitburn of Whitburn & Pevsner PLLC. Both of Student's parents were present. The District was represented by its in-house legal counsel, ***. In addition, Dr. ***, the Assistant Superintendent of Special Education, attended the hearing as party representative for the District. Petitioner requested that the hearing be open to the public and observers were present.

The parties offered joint and separate exhibits. Petitioner offered testimony of Student's teacher, the District's *** program specialist, Student's Parent, Student's speech language pathologist (SLP), and a paraprofessional. Respondent offered testimony from the campus admission review and dismissal (ARD) committee meeting facilitator, Student's occupational therapist, the campus nurse, Student's ***, Student's ***, another SLP, and Dr. ***. 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 October 13, 2023.

II. ISSUES

A. PETITIONER'S ISSUES

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

- Whether the District denied Student a FAPE.
- Whether the District failed to develop and implement an appropriate IEP for Student, including inadequate speech therapy and ***, resulting in inadequate progress.

B. PETITIONER'S REQUESTED RELIEF

Petitioner requested the following items of relief:

- Order the District to continue to serve Student ***.
- Order the District to develop an appropriate IEP for Student that includes a full day of services, including speech therapy and *** and an appropriate *** plan.
- Order the District to provide Student compensatory services.
- Order the District to train staff working with Student on Student's IEP and how to *** Student.
- Order the District to consult with an inclusion specialist on appropriate inclusion opportunities for Student.
- 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.

III. FINDINGS OF FACT

1. Student is *** years old and attends the District's *** program at ***. Student lives with Student's parents *** and has attended the District since ***. Both *** and English are spoken at home. Parent is bilingual and Student's Parent speaks primarily ***.²
2. Student is eligible for special education based on *** (***) and other health impairments (OHIs) of *** and ***. Student has historically also been eligible based on speech impairment. Student has additional medical diagnoses of ***. Student is ***. Student requires extensive *** services for ***.³
3. Student has historically experienced ***. Student has ***. Student has an individual healthcare plan for *** at school.⁴
4. Student's *** plans documented in Student's IEP *** plans over the years have consistently been to ***.⁵
5. In *** grade (the 2017-2018 school year), Student was able to ***.⁶

² Joint Exhibit (JE) 16; JE 22 at 1; JE 30 at 28; JE 34 at 2, 4.

³ JE 3 at 56; JE 7 at 1; JE 11 at 42; JE 16 at 27; JE 30 at 2; JE 34 at 5-6.

⁴ JE 16 at 23-24, 31; JE 41.

⁵ JE 1 at 9; JE 3 at 19; JE 9 at 11; JE 11 at 9; JE 15 at 9; JE 17 at 11; JE 21 at 12; JE 30 at 34.

⁶ JE 1 at 7.

6. In *** grade (the 2018-2019 school year), Student was able to ***. Student practiced ***. There were attempts to teach Student a ***, but Student would not use it and staff continued to ***. Student could ***. However, Student required more assistance with *** than the prior school year.⁷
7. Early in the 2019-2020 school year, Student was ***. After the ***, Student began to have difficulty ***. Student also showed regression in Student's ability to ***.⁸
8. Student's doctor ordered a *** in March 2020 due to Student's ***. During the ***, Student was able to ***.⁹
9. During *** grade in the 2019-2020 school year, Student was served in a *** classroom for the majority of the day. Student attended an *** class, speech therapy (20 minutes, two times per grading period), and occupational therapy (30 minutes, two times per six weeks). Student received *** (20 minutes per six weeks) and *** (30 minutes, two times per six weeks).¹⁰
10. In March 2020, schools closed to in-person instruction due to the COVID-19 pandemic. In the 2020-2021 school year, schools reopened to in-person instruction. The District continued to also offer a virtual option. Student's

⁷ JE 3 at 16-17, 59; JE 7 at 2; JE 9 at 42.

⁸ JE 10 at 2; JE 11 at 7; JE 14 at 2; JE 16 at 24.

⁹ JE 12.

¹⁰ JE 11 at 34-35.

family opted for Student to remain a virtual student during that school year; however, it was difficult for Student to participate in virtual services.¹¹

11. As of April 2021, Student was only ***. ***. Student was ***.¹²

2021-2022 School Year

12. During the 2021-2022 school year, the District no longer offered a virtual option for all students. Student's physician provided notes on August ***, 2021 and September ***, 2021 indicating that Student could not return to in-person instruction due to Student's risks if Student were to contract COVID-19.¹³
13. At an ARD Committee meeting on September ***, 2021, the committee discussed that Student had not yet attended school that school year and that paperwork was in process to initiate homebound services. Physician information is required to place a student on homebound services.¹⁴
14. Another ARD Committee meeting was held on October ***, 2021, placing Student on homebound services after receiving adequate physician information. Student's homebound placement was later extended through the end of the 2021-2022 school year through an IEP amendment. The homebound services included four hours per week of direct instruction, as well as ***, occupational therapy, and *** in the home. Parent declined speech teletherapy.¹⁵

¹¹ JE 13; JE 14 at 3; JE 15 at 5, 33; Due Process Hearing Transcript (Tr.) 585-86.

¹² JE 16 at 5, 7, 11, 14, 21; Tr. 298.

¹³ JE 17 at 4-5.

¹⁴ JE 17 at 34; Tr. 588.

¹⁵ JE 19 at 6; JE 20.

15. Student completed the *** grade in the 2021-2022 school year while on homebound and participated in a ***.¹⁶
16. On April ***, 2022, the District completed a *** with Parent discussing Student's skills, needs, and future plans. The *** reiterated that Student's ***. It also emphasized that Student's medical needs are complex and are the top priority. Parent reported that Student was ***. The *** emphasized including Student in group activities and trying to increase Student's independence, including ***.¹⁷
17. Student's ARD Committee met on April ***, 2022 and May ***, 2022 to discuss the upcoming school year. Student's physician released Student to return to school in person. The ARD Committee agreed to a full day schedule in the *** program, as well as integrated speech therapy (15 minutes per grading period), *** (20 minutes, two times per 18 weeks), occupational therapy (20 minutes, two times per 18 weeks), and *** (30 minutes, two times per six weeks). The Committee also agreed to goals in communication (***. The goals had been developed based on the *** and input from Parent. The ARD Committee discussed that full day services may taper as Student ***.¹⁸
18. In the present levels section of this IEP, the SLP noted that "[d]ue to staffing, [Student] has not received speech therapy services since Student has been on homebound." The deliberations also stated the same. This was inaccurate. Parent did not consent to Student receiving speech teletherapy and Student's homebound schedule of services had not included speech therapy in the home. Additionally,

¹⁶ JE 21 at 16.

¹⁷ JE 22.

¹⁸ JE 21 at 7, 21-23, 30, 33-34; Tr. 47-48.

the SLP had provided integrated services to support the staff working with Student while Student was at home to encourage communication. The SLP also intended to try to see Student in person, even though not required by Student's IEP, and that had not happened.¹⁹

19. During the 2021-2022 school year, Student received *** in the home. During these sessions, the *** discussed with Student's Parent Student's need for ***. Student ***.²⁰

2022-2023 School Year

20. Student began attending the *** program in person in the fall 2022 semester. The *** program serves students with disabilities who ***. Students may attend the *** program for a full day or a partial day schedule. In addition to classroom instruction, the *** program includes ***. The length of the ***.²¹
21. At the beginning of the 2022-2023 school year, Parent responded to a survey from Student's teacher providing information about Student's *** needs. Parent reported that Student typically needed ***. Parent also reported that Student needed ***. Parent relayed that Student should ***.²²
22. From the first day of school, Student refused ***. Student's

¹⁹ JE 19 at 6; JE 21 at 9, 33; Tr. 316-21, 366, 394-96, 397-99.

²⁰ JE 44.

²¹ Tr. 57-58, 71, 182, 566-67, 570-72.

²² JE 65 at 4.

parents received daily information about what Student ***. Student also did not demonstrate the level of independence that was anticipated based on the information in the April 2022 ***.²³

23. On August ***, 2022, Student's *** emailed Parent asking about Student's ***. Parent reported that they would see the doctor to get new ones the following month.²⁴
24. On September ***, 2022, November ***, 2022, November ***, 2022, March ***, 2023, and May ***, 2023, the occupational therapist worked with Student and staff to trial different *** and strategies to address ***, none of which were consistently successful.²⁵
25. Student's Parent came to school on October ***, 2022 and showed staff how ***. The school nurse was present and recorded videos of ***. Student did not *** to the same degree as Student did with staff. Student ***. Student's ***. Family members came to school to *** to the same degree that Student did with staff.²⁶
26. On November *** and November ***, 2022, the campus nurse attempted to *** Student. She ***. The *** was also enlisted to attempt to encourage ***, which was unsuccessful. Staff generally were unsuccessful at getting Student to ***. Staff members were not comfortable ***. The school nurse and the District's *** specialist testified to *** concerns if staff were to ***

²³ Respondent Exhibit (RE) 6; Tr. 188-89, 202.

²⁴ JE 67.

²⁵ JE 47 at 5; Tr. 436-37.

***. Because Student exhibited more resistant behaviors to staff members than Student did to family members, staff members would have needed to use more force than family members did to restrain Student ***.²⁷

27. Staff discussed whether a half-day school schedule would be more appropriate for Student to ensure Student received ***. Staff did not think *** was appropriate.²⁸
28. An ARD Committee meeting was held on November ***, 2022 because Student was not making progress on Student's IEP goals and was still mostly *** during the school day. Student's parents participated with the assistance of a *** translator. The ARD Committee discussed that since returning to school in person that semester, Student's functional skills proved to be lower than expected when Student's IEP goals were developed in April 2022. Student would not ***. Student did not ***. Staff shared that they could not restrain Student to force Student ***. Parent asked if Student's Parent could come to school to ***. District staff denied this request. District staff proposed new IEP goals for total *** that were more appropriate to Student's present levels. Parent disagreed with changing the goals and stated that staff were not instructing Student correctly to result in progress on the goals. Parent stated that Student *** at home but acknowledged that Student does not *** at home. Parent discussed that Student had an outside evaluation from 2021 that provided more information about Student's functioning. Parent stated that the outside report concluded that Student had a developmental and functional level equivalent to ***, and that the District was not appropriately instructing Student at this level. The meeting was

²⁷ JE 51 at 53-54; Tr. 75, 81-83, 205, 257-58, 454-55, 459-60, 500-01, 503, 530-33.

tabled to consider the new information. Parent never provided the private evaluation Student referenced to District staff.²⁹

29. Student ***. On November ***, 2022, Parent emailed Student's teacher asking that Student's ***. After consulting with District staff, the teacher emailed Parent on November ***, 2022 that Student would not ***. Parent responded that Student disagreed with the decision. The teacher responded that they could discuss this topic further during the upcoming ARD Committee meeting or schedule a parent- teacher conference. Parent did not respond to this email or request any further conversation on this topic.³⁰
30. Student had attended *** with Student's class in the fall 2022 semester. When Student attended ***. Student was not ***. Student did not attend the remaining *** for the rest of the school year. Student typically did not attend school on these *** days. Student did continue to participate in the regular class ***.³¹
31. The ARD Committee meeting continued on December ***, 2022. Parents were accompanied by non-attorney advocate Karen Cunningham. A *** translator was present. The advocate shared information about Student ***. District staff shared that this was new information to the District and requested medical documentation to support that this is safe for Student. The advocate stated that the family wanted Student to have future *** opportunities and they do not want Student to go to a day program. The advocate also shared that the family intended to take Student for an intake appointment with the ***

²⁹ JE 23 at 4-5; JE 24 at 24:50-25:16, 26:26-26:52, 32:05-34:50; PE 2 at 102-04; Tr. 420-21.

³⁰ JE 72; JE 73; JE 74; RE 2; Tr. 119-20, 139, 175-76, 280.

*** in the coming weeks. District staff explained that this was new information to the District and the IEP had been developed to *** Student to ***. The advocate requested new evaluations be completed. The committee continued to discuss the attempts to ***. The meeting ended in disagreement on the present levels and proposed goal changes. The District agreed not to implement any of the proposed changes until after evaluations were completed and reviewed.³²

32. Student's teacher testified that the draft IEP for the December ***, 2022 meeting proposed a change to the IEP that would check a box in the *** section requiring Student to participate in ***. However, the proposed IEP was not agreed upon and the proposed IEP never went into effect. The teacher testified that if this IEP change had gone into effect, she would have recommenced bringing Student ***. This was not discussed at the ARD Committee meeting.³³

New Evaluations

33. A review of existing evaluation data (REED) meeting was conducted on December ***, 2022. The SLP discussed that the new speech evaluation would investigate whether Student remained eligible for speech. Parent signed consent for new evaluations in the following areas: speech, physical/medical, sociological/cultural, emotional/behavioral, ***, cognitive, adaptive behavior, academic/***, occupational therapy, ***, ***, and assistive technology.³⁴
34. An assistive technology evaluation was completed, report dated January ***, 2023. The evaluators observed Student, did a skills assessment, and collected information from Student's teacher. Student's parents did not respond to

³² JE 23 at 5-9; JE 25 at 23:52-24:30; Tr. 197, 422-23.

³³ PE 2 at 99; Tr. 128-30, 173-74, 243.

requests for input. Student did not engage with ***. Student could ***. However, Student did not demonstrate an understanding of the ***. Student just ***. The report recommended that Student continue to be offered flexible options for engagement and expression, and total communication methods including gestures, vocalizations, and devices.³⁵

35. A functional behavior assessment (FBA) was completed, dated February ***, 2023, to analyze Student's ***. Student was observed multiple times by a licensed specialist in school psychology (LSSP), who saw Student ***. The function of Student's behavior was determined to be ***. The evaluator could not reach a conclusion as to why Student was *** and noted that more medical information was needed.³⁶
36. A *** evaluation was completed, dated February ***, 2023. Student's parents did not respond to requests for updated information, so the report repeats information from the April 2022 ***. The report recounted teacher information about Student's need for one-on-one assistance in all areas of ***. The report also detailed Student's ***.³⁷
37. Another evaluation report dated February ***, 2023 compiled evaluation information in the areas of sociological, speech/communication, health/motor abilities, emotional/behavior, and intelligence/adaptive behavior. Student's parents did not respond to requests for information in these areas. The speech portion of the evaluation detailed that Student has been at the same level of communication development for *** years. Student uses

³⁵ JE 31.

³⁶ JE 32.

***. Student had made some limited progress within this level of communication in the years Student attended school before COVID. However, Student had reached a plateau in performance, and, with consideration of Student's overall developmental profile, further development of communication skills was not expected with ongoing speech therapy. The report therefore recommended that Student no longer be considered eligible based on a speech impairment and no longer receive speech therapy. The SLP considered Texas Speech and Hearing Association (TSHA) guidelines for dismissal from speech services in making this recommendation.³⁸

38. Student was ***. Student's adaptive behavior was rated as *** in all categories. Student's intellectual development was assessed as in the *** developmental range. The report recommended continued eligibility based on *** and OHI.³⁹
39. An occupational therapy and *** evaluation was completed, dated February ***, 2023. Student's parents did not respond to requests for information for this evaluation. The report details Student's prior use of ***. Student was observed at school, including transfers with staff assistance from Student's ***. Student does not indicate when Student's ***. Student has not been able to ***. Student requires ***. The report recounts Student's *** difficulties beginning with Student's ***. The report ultimately recommended continued *** to work on ***. The report recommended discontinuing occupational therapy

³⁸ JE 34 at 4-6, 11-12; JE 86; JE 88; JE 92; PE 3 at 42-46; Tr. 338-42, 363-64, 367, 372-73, 380-84.

because the barriers to Student's progress were motivational, or possibly medical, and not within the purview of occupational therapy.⁴⁰

40. A *** evaluation was completed by an SLP who specializes in ***, dated February ***, 2023. Student's parents did not respond to requests for information for this evaluation. The SLP observed Student during ***. Student ***. During another observation, different ***. The evaluator could not determine conclusively whether Student had a ***, and recommended follow up when additional medical information was available. She was unable to conduct more observations of Student due to Student's frequent absences. The *** specialist testified to medical concerns if Student is ***. She also testified to the impact *** may have, including limited ability to ***.⁴¹
41. A *** evaluation was completed, dated February ***, 2023. Student's parents did not respond to requests for information for this evaluation. The *** had supported Student's IEP goals by encouraging Student through ***. Student was able to ***. *** had not proven to be a successful motivator to encourage Student ***. The report recommended continued *** to encourage Student's communication.⁴²
42. On March ***, 2023, Student's teacher emailed Parent to let Student know that Student had ***, which was a new behavior. Parent responded that Student would keep Student home from school "until this issue is

⁴⁰ JE 35; JE 79; JE 82; JE 83; JE 84; JE 90; Tr. 434, 439-40.

⁴¹ JE 36; JE 80; JE 88; JE 89; Tr. 512-13, 517, 524-25, 527-28, 535-36.

investigated.” On March ***, 2023, a campus assistant principal emailed Parent that Student would investigate the concerns and encouraged Parent to send Student to school.⁴³

Evaluations Reviewed and New IEP Proposed

43. An annual ARD Committee meeting was held on March ***, 2023. Both parents and Ms. Cunningham participated. A *** translator was present. All of the new evaluations were reviewed. The advocate disagreed with the recommendation that Student no longer receive speech therapy. The ARD Committee discussed Student’s lack of progress on Student’s goal to ***. The meeting was tabled at the request of the advocate.⁴⁴
44. The ARD Committee meeting continued on March ***, 2023. Discussion continued about speech eligibility, edits to the present levels, and an error on Student’s progress reports indicating that Student’s goals had been discontinued. They were not discontinued, and progress notes continued to be reported. The ARD Committee reviewed proposed annual goals and that they would be implemented in school and community settings. New annual goals were proposed in ***. The *** supplement portion of the IEP was reviewed, including ***, which the parents and advocate did not dispute. District staff proposed changing the *** supplement to indicate that Student needed *** experiences. The meeting was tabled due to the advocate having another meeting to attend.⁴⁵
45. The ARD Committee meeting continued on April ***, 2023. This meeting focused on the proposed schedule of services. The District proposed a half-day program in the *** program for the remainder of the school year and the upcoming 2023-2024 school year. The half-day schedule was recommended

⁴³ JE 100; JE 101.

⁴⁴ JE 30 at 53-55; JE 38 at 1:34:38.

because it provided enough time to work on Student's IEP goals and get adequate ***. The proposed schedule also included *** and ***. Parents disagreed with the half-day schedule recommendation. The ARD Committee meeting concluded in disagreement.⁴⁶

46. A reconvene ARD Committee meeting was held on May ***, 2023. The ARD Committee continued to discuss speech eligibility and the half-day schedule. Student's teacher discussed that all of Student's goals can be addressed with a half day of services. District staff discussed possible schedules and Student's participation in *** even on a partial day schedule. The committee discussed Student's absences and the advocate stated that Student was not attending school due to family concerns about Student's safety and the District's inability to ***. The meeting ended in disagreement. Prior written notice was issued May ***, 2023.⁴⁷
47. Student made no progress during the 2022-2023 school year on the annual goals developed in Spring 2022 to ***.⁴⁸
48. On February ***, 2023, Parent provided a doctor's note dated December ***, 2022 stating that "it is not medically necessary to ***." A medical referral form for *** was sent to and returned by Student's doctor, dated March ***, 2023, however the doctor did not answer the question on the form about whether Student needed ***. This did not adequately address District staff concerns about whether Student needed ***. On March ***, 2023, Parent provided an updated doctor note indicating that Student didn't need ***.⁴⁹

⁴⁶ JE 30 at 50-51, 57-58; Tr. 222, 282, 569-70.

⁴⁷ JE 30 at 58-61; RE 3 at 5:20, 8:40.

⁴⁸ JE 30 at 30; RE 4; RE 7.

⁴⁹ JE 30 at 54; JE 43; JE 45; JE 95; JE 98; JE 102; Tr. 471-72, 478-83.

49. On March ***, 2023, the *** attempted *** with Student. Student was not successful in ***. The *** was attempted again on April ***, 2023. The *** was also present and attempted to motivate Student to ***. A ***. Student was then successful in ***. The *** remained concerned about ***.⁵⁰
50. During the 2022-2023 school year, Student typically arrived at school *** following private therapy appointments. In addition to these partial absences, Student was absent for *** full days in the fall 2022 semester and *** full days in the spring 2023 semester. Student only attended *** full school days in the spring 2023 semester. This volume of absences impacted the ability of school staff to gather information for the evaluations completed in the spring 2023 semester.⁵¹

IV. DISCUSSION

Petitioner alleges that the District denied Student a FAPE by failing to devise and implement an appropriate IEP for Student. Petitioner seeks an order that the District develop an appropriate IEP with full day services with speech therapy, an appropriate *** plan, and inclusion opportunities, and provide staff training on ***Student. Petitioner's closing brief limited its arguments to the 2022-2023 school year and the requested relief listed here, rather than the relief requested in the Complaint and detailed in Section II.B.

⁵⁰ JE 46 at 5-6; JE 105; RE 14; RE 15.

⁵¹ JE 64; RE 5; Tr. 207, 526.

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) (emphasis added).

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).

A hearing officer applies a four-factor test to determine whether a 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;
- 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).

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). 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*, 580 U.S. 386, 399 (2017). 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 a 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 parents' 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).

There was only one IEP implemented during the entirety of the 2022-2023 school year, which was developed during the spring 2022 semester. A new IEP was proposed through the spring 2023 ARD Committee meetings. However, this action was filed before that IEP could be implemented, resulting in a stay put placement of the program from the spring 2022 IEP. Both IEPs are discussed herein.

The spring 2022 IEP created a program for Student to begin in the ***

program after not attending school in person for more than *** years. The IEP included a full day schedule of instruction and related services, accommodations and supports, and annual goals. The IEP included all the required elements. *See* 34 C.F.R. §§ 300.22, 300.320, 300.323(a). The instructional arrangement and schedule of services were comparable to what Student received when Student attended school in person in the past. The accommodations and supports also mirrored what had typically been provided to Student when Student attended school in person.

Petitioner complains that the goals in the spring 2022 IEP were developed based on the *** and information from Parent, and that this was inadequate information. Petitioner also faults the District's reliance on the *** because Petitioner argues it was developed while Student was still on homebound services and therefore only considered Student's needs as a homebound student. The *** itself speaks more generally though to Student's skills and needs, including community experiences and exposure to group activities. The record as a whole does not support Petitioner's narrow interpretation of the utility of the ***. Further, the goals developed in reliance on the*** were also consistent with Student's present levels when Student had last attended school in person and with the information from the homebound service providers about Student's levels of performance at home. All of this information constituted the most recent data available to the District on Student's performance and needs, and Student's goals were appropriately developed accordingly.

Petitioner's closing brief also argues that the District erred by continuing to implement these goals even after they proved to be inappropriate for Student's present levels. The District held an ARD Committee meeting to propose new goals

in November 2022. Petitioner complains that this was not soon enough. However, Parent disagreed with changing the goals and indicated Parent had new information to share with the committee about Student's functional levels. The District agreed to table the conversation to consider the new information. Parent never provided that information. Instead, Parent brought an advocate to the next ARD Committee meeting who requested a new round of evaluations from the District. The District agreed to conduct new evaluations and postpone discussion of any goal changes until after the new evaluation information could be considered. The District faced a choice between two difficult options: force disagreement with Parent based on staff's belief that adequate information existed to change the goals then, or try to reach consensus by agreeing to collect additional evaluation information before making changes. Neither choice is patently right or wrong. The hearing officer declines to find the District's choice to seek consensus through collecting more information before making changes to be inadequately data based.

The District ultimately did propose a new IEP after the evaluations were completed. Student's parents mostly declined to provide information to any of the evaluators, resulting in a new draft IEP that still relied almost entirely on staff information, and a repeated refrain of need for updated medical information from Student's treating doctors. Notably, the new IEP proposed new goals, a half-day schedule, and discontinuing speech services. All of these changes were tied to the assessment information obtained from the new evaluations. The new goals reflected Student's present levels in communication, as well as Petitioner's stated desire at the December 2022 ARD Committee meeting that Student have *** options.

A half-day schedule adequately meets Student's needs from an *** *** program

while appropriately prioritizing Student's health and need for ***. Petitioner takes two opposing positions here by arguing that the District must provide a full- day program, while also refusing to send Student to school at all because Student is not able to be ***. A half-day schedule will still result in school staff attempting to ***, but Student's *** needs can be more adequately met with more time at home. Perhaps this would change in the future with more medical information or changes in Student's health. However, based on the medical and assessment information currently available to the District, the half- day schedule is appropriate for Student. Petitioner also has not shown that allowing Student's ***, was appropriate or required for Student to receive a FAPE.

Dismissal from speech eligibility and speech services was also an appropriately data-based decision. Petitioner points to limited progress that Student made within Student's *** level in the 2014-2019 time period as proof that ongoing speech therapy is necessary for Student. However, Petitioner has not rebutted the conclusions of the SLP that Student has reached a plateau and ongoing therapy is unlikely to result in further growth. The advocate seemed to take the position in ARD Committee meetings that a ***student must, by definition, be eligible for speech therapy. However, this is not an individualized approach. The recommendation to dismiss Student from speech was based on

TSHA guidelines and appropriately data based. Further, Student's communication needs would still be addressed through the communication goal in the IEP, the work of the *** classroom teacher, and the *** targeting communication. Petitioner's closing brief attempts to contort the SLP's considerations to instead reflect an ongoing need for speech therapy, but Petitioner has offered no actual evidence in support of an ongoing need.

Petitioner's Complaint asserted that the District offered inadequate *** services as well. However, Petitioner offers no argument on Student's *** services. The record supports that Student's *** services were appropriately tailored to the data on Student's needs.

Petitioner asked numerous District witnesses why they did not request an FBA when Student was *** during the fall 2022 semester. However, once an FBA was completed, the LSSP was unable to determine a reason for Student's ***, beyond the function of ***, based on observation alone. Petitioner did not meet Student's burden to show that an earlier FBA was a missing piece of evaluation data that the District needed to develop an appropriate program for Student.

Petitioner has also complained about the District's decision to ***. During the hearing, Petitioner asked multiple staff witnesses about whether they considered various alternatives to allow Student to continue to participate in *** that had not been raised previously with District staff, including ***. Petitioner also asserts that Student could be ***. However, Petitioner offered no evidence that this could be ***. The evidence all indicates that Student requires the assistance of ***.

The Hearing Officer disagrees with the interpretation by District staff that checking a particular box about *** in the *** portion of the IEP is dispositive on whether Student could be included on ***. However, the decision to exclude Student from *** was based on the medical information provided to the District by Parent. The communication and lack thereof about this decision is addressed under prong three below. Whether alternatives could have been agreed upon to

increase Student's participation in *** also points to communication breakdowns, but not an absence of individualization on the basis of data.

Overall, the evidence showed that both of Student's IEPs at issue were individualized on the basis of assessment data and Student's performance.

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).

The IDEA's regulations require a school district to ensure availability of a continuum of instructional placements to meet the needs of students with disabilities, including instruction in regular classes, special classes, special schools, homes, hospitals, and institutions. 34 C.F.R. § 300.115. State regulations require that school districts make available a continuum of instructional arrangements to meet the individualized needs of students with disabilities, including mainstream classes, homebound services, hospital classes, resource room and/or services, self-contained-regular campus, nonpublic day school, and residential treatment facility. 19 Tex. Admin. Code § 89.1005(c).

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

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

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

Student's instructional arrangement, when attending school in person, has consistently been predominantly or exclusively in a self-contained special education setting. In the 2022-2023 school year, Student returned to a self-contained setting in the *** program after being in a more restrictive homebound setting. An *** program is, by necessity, a self-contained setting as same-age non-disabled peers ***. Petitioner has not challenged the appropriateness of a self-contained setting for Student. However, Petitioner argues that the District's *** represents a failure to mainstream Student to the maximum extent appropriate. The Hearing Officer does not agree that Student's *** with Student's self-contained class once or twice a month represents a more restrictive placement. Rather, the Hearing Officer views this issue as a question of whether Student's self-contained program was appropriately individualized to Student's needs.

However, even assuming without deciding that the removal from community outings constitutes a more restrictive placement, the evidence supports that it was appropriate for Student based on the information the District had at the time about

Student's health and safety needs, as discussed under prong one above. Student's setting overall is appropriately based on Student's particular needs, including ***. 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 communication and collaboration related to Student's participation in *** was lacking. The District has relied upon an overly technical interpretation of one check-box in the *** supplement about ***. The record does not reflect that the relationship the District drew between this check-box and Student's participation in *** was ever explained to Student's parents. Student's teacher and the District members of the ARD Committee clearly contemplated that there would be ways to include Student in *** and still meet Student's medical needs. When this

finally came up at the March ***, 2023 ARD Committee meeting, District staff acknowledged that Student's goals would be implemented in the community and that the check-box would be checked in Student's *** supplement. However, the *** supplement was addressed at the end of the meeting when the advocate was attempting to table due to her schedule, and there was very little discussion about it. The District could have been much clearer in explaining to the parents that it did not believe it could take Student on *** until the box was checked and the IEP was implemented. The lack of coordination and collaboration on this issue can also be seen in the contradictory District positions of not taking Student *** because of Student's medical needs, but also maintaining that it would do so again as soon as the box was checked in the *** supplement.

However, despite the coordination and collaboration failures related to ***, the record generally reflects very robust coordination and collaboration in the implementation of Student's program. The *** classroom staff and the related service providers working with Student exhibited extensive collaboration in implementing Student's program and meeting Student's needs. Classroom staff and related service providers also relied on District resources as needed to appropriately serve Student. There was extensive collaboration among District staff, as well as Student's family, in attempts to find ways to *** Student at school.

Student's parents received daily information about Student's *** at school. Student's parents were participants in all *** ARD Committee meetings held during the relevant time period, along with their advocate for *** of those meetings. The District considered and responded to information provided by the parents and advocate. Although District staff have not always agreed with Parent's requests

in ARD Committee meetings, a failure to agree does not indicate an unwillingness to collaborate. The District also sought consensus with the parents by agreeing to delay consideration of goal changes until after further evaluations.

Conversely, the District received very limited responses and information from the parents. Parent never provided the evaluation Student brought up at the November 2022 ARD Committee meetings. After requesting a battery of new evaluations

through their advocate, the parents failed to respond to almost all of the numerous attempts to obtain their input from the professionals completing the evaluations. The parents and advocate also provided conflicting information at various points about whether Student would live at home and attend a day program in the future or seek *** opportunities. When new future aspirations and information were shared with the District, the District responded appropriately. Petitioner complains that the proposed IEP in spring 2023 contained unilateral recommendations, but the parents refused to provide information for the evaluations on which this draft IEP was based.

Overall, the evidence showed that services were provided in a coordinated, collaborative manner by key stakeholders at times, to the extent the District was able. Petitioner failed to show that the District excluded Student's parents in bad faith or refused to listen to them.

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). Student is in an 18+ program, therefore Student's program is no longer focused on academics and can be assessed in terms of appropriately addressing Student's post- secondary needs. *See* 34 C.F.R. § 300.43.

It is undisputed that Student made no progress on Student's IEP goals in the 2022- 2023 school year. The District gave up the possibility of progress on more appropriate goals by attempting to reach consensus with the parents instead of implementing the new goals proposed in the fall 2022 ARD Committee meetings. Once the ARD Committee met again in the spring 2023 semester, the District proposed appropriate goals, taking into consideration Student's needs and present levels, that are more likely to result in progress. However, this IEP has yet to be implemented due to stay put.

While Student did not progress on Student's IEP goals, Student did benefit from Student's participation in the *** program. Participating in the classroom activities, ***, when permitted, gave Student the inclusion opportunities recommended by the April 2022 ***. Student would have benefited even more if the District had facilitated better communication on the *** to find a way to include Student in more of them. Student received instruction and related services intended to increase Student's independence and communication, which were other areas of need addressed in the *** and subsequent evaluations.

On the other hand, Student undoubtedly suffered from the *** Student took in during the school day throughout the school year. The impact this had on Student's overall progress is not known from the record. However, the record reflects that great efforts were made to understand and address this. A reasonable inference from the record, including the decline in Student's ability to *** beginning in the 2018-2019 school year and subsequent ***, supports that the issue is ultimately medical. Although *** than District staff, Petitioner did not prove that this

was due to some failure by the District. It is entirely understandable, particularly in light of Student's medical history and more than two years of not attending school, that Student is more willing to ***.

Overall, the IEP implemented in the 2022-2023 school year provided Student some academic and non-academic benefits. To the extent that the IEP did not provide as much benefit as it could have, the blame lies in the District's prioritization of seeking consensus over changing the goals and Student's confounding and overriding medical needs. The IEP proposed in the Spring 2023 ARD Committee meetings was also appropriately designed to produce academic and non-academic benefits.

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 at issue were individualized based on Student's assessment and performance, provided in Student's LRE, provided in a

sufficiently 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 2022-2023 school year. *Andrew F.*, 458 U.S. at 399. Based on the four factors of *Michael F.*, the evidence establishes that the District provided Student a FAPE during the relevant time frame.

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 appears to have abandoned the implementation claim by failing to address it in Student's Closing Brief. The record supports that Student's IEP was appropriately implemented during the relevant time frame. In particular, the evidence supports that Student's IEP goals from the spring 2022 IEP were implemented during the entirety of the 2022-2023 school year, even though there

had been a clerical error on the progress reports indicating that they had been discontinued. Petitioner seems to question whether Student had an opportunity to work on Student's IEP goals on the one day Student attended school on campus while Student's ***. The record is unclear on whether Student's IEP goals were addressed that one day. However, even if they were not, this does not constitute a substantial failure to implement the IEP.

The Hearing Officer does not view Student's attendance or nonattendance *** as an implementation issue, as the Hearing Officer likewise disagrees that checking the *** box in the *** supplement is dispositive on whether Student can attend ***. Student's need for *** exists regardless of the check box, according to the ***, and can be accomplished in a variety of ways, including through the ***. There was no implementation failure related to ***. Both prongs three and four above were resolved in favor of the District. Petitioner did not meet Student's burden of proof as to this issue.

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. *Rowley*, 458 U.S. at 188- 89; *Andrew F.*, 580 U.S. at 399.
3. Petitioner did not meet Student's burden of proving that the District failed to implement Student's IEPs. *Schaffer*, 546 U.S. at 62; *Bobby R.*, 200 F.3d at 349.

VI. ORDER

Based upon the foregoing findings³⁴ of fact and conclusions of law, Petitioner's

requests for relief are **DENIED**.

Signed OCTOBER 12, 2023.

ALJ Signature:

A handwritten signature in black ink, appearing to read "J. Witte", is written over a horizontal line.

Jessica Witte

Presiding Administrative Law Judge

VII. NOTICE TO THE PARTIES

The Decision 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).