

DOCKET NO. 353-SE-0823

STUDENT, B/N/F GUARDIAN, Petitioner	§	BEFORE A SPECIAL EDUCATION
	§	
	§	
v.	§	
	§	HEARING OFFICER FOR
	§	
FORT BEND INDEPENDENT SCHOOL DISTRICT, Respondent	§	
	§	
	§	THE STATE OF TEXAS

**FINAL DECISION OF THE HEARING OFFICER**

**Introduction**

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, and its implementing federal and state regulations. Petitioner Student brings this case against the Respondent, Fort Bend Independent School District (Respondent, District, or Fort Bend ISD), and generally alleges that the District failed to provide Student a free, appropriate public education (FAPE). The focus of this case is whether the District provided Student with a FAPE in the least restrictive environment.

**Procedural History**

Student filed Student's Complaint or Request for Due Process Hearing on August 14, 2023. The parties sought and received two continuances, first to allow them to attempt to mediate their dispute and later to obtain more time to review and manage several thousand pages of documents gathered and produced in discovery.

A hearing on the merits took place on January 24-26, 2024. Throughout the proceedings in this case, Mark Whitburn with Whitburn & Pevsner, PLLC, represented

Student. Paula Roalson and Christina Henshaw with Walsh, Gallegos et al. represented the District.

### **Issues from the Pleadings**

In Student's Complaint, Student raises the following legal issues in this case:

1. Whether the Respondent District failed to provide a FAPE to Petitioner Student;
2. Whether the District failed to develop and implement an Individual Educational Program (IEP) for Student's unique characteristics and needs;
3. Whether the District failed to provide instruction and services to Student in the least restrictive environment appropriate for Student's needs; and
4. Whether the District failed to collaborate with Student's guardian.

Student seeks the following relief in Student's Complaint:

1. An order compelling the District to develop and implement an appropriate IEP with appropriate supports;
2. An order compelling the District to continue to provide \*\*\* instruction in the General Education classroom;
3. An order compelling the District to provide appropriate training to all teachers and staff members working with Petitioner on appropriate implementation of Student's IEP, appropriate responsiveness to requests for assistance, and appropriate collaboration with Petitioner's guardian; and
4. Any and all further relief that the Hearing Officer deems appropriate or which is recommended by Student's experts and/or private evaluators.

The Respondent District has generally denied Student's allegations in Student's Complaint. In addition, the District raised the affirmative defense of limitations for any actions occurring before August 11, 2021. The District also filed a plea to the

jurisdiction, arguing that the Hearing Officer had no jurisdiction to consider or enter findings on issues outside his limited subject matter jurisdiction under the IDEA. The Hearing Officer granted the District's plea to the jurisdiction.

## Findings of Fact<sup>1</sup>

### *Student's background and special education history*

1. Student \*\*\* is currently \*\*\* years old and attends \*\*\* in the Fort Bend school district in the \*\*\* grade. (*JX 28*). Student lives with Student's Guardian, who is Student's legal guardian. (*JX 1 at 2*).
2. Since the \*\*\* grade, Student has lived in and attended schools in the Fort Bend school district and has received special education services the entire time. (*Id.*; *Tr. at 365, 387-388*). Student is eligible for special education services based on specific learning disabilities in basic \*\*\* skills, \*\*\*, and written expression, identified as having dyslexia. (*JX 27 at 5*). Student has never had any significant behavioral issues, and Student's teachers uniformly describe Student as a good kid and a pleasure to work with. (*Id. at 6; Tr. at 85, 110, 668*).

### *Early evaluations of Student*

3. In February 2019 while in the \*\*\* grade, Student underwent an evaluation through the \*\*\*. (*JX 1*). Finding Student suffered many learning deficiencies, the evaluator specifically recommended that Student receive instruction for

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<sup>1</sup> In this decision, references to the Transcript of the Hearing from January 24-26, 2024 will be "Tr. at \_." References to Joint Exhibits will be "JX \_ at \_"; Petitioner's Exhibits will be "PX \_ at \_"; and Respondent's Exhibits will be "RX \_ at \_."

- \*\*\*, written expression, and math *in a resource setting* by a special education teacher.<sup>2</sup> (*JX 1 at 9-10*).
4. Later, Student received a multidisciplinary Full and Individual Evaluation (FIE) in December 2019 in the \*\*\* grade. Student met eligibility for special education services as a student with specific learning disability in basic \*\*\* skills with dyslexia, written expression with \*\*\*, and \*\*\*. (*JX 3 at 1, 53*). The evaluators recommended several accommodations and assistive technologies for Student which were implemented in subsequent IEPs for Student. (*Id. at 53-55*). Student continued to receive all instruction in a general education setting with in-class support from special education teachers. Student also received basic \*\*\* services related to Student's dyslexia in a Resource class. (*Tr. at 321*).
  5. In the \*\*\* grade, according to Student's Present Level of Academic Achievement and Functional Performance (PLAAFP), Student received only one grade under 90 – \*\*\*. (*JX 12 at 4*). But according to Student's "\*\*\*\*" test, Student scored in the \*\*\* percentile nationally for \*\*\*, compared to Student's \*\*\* grade peers.<sup>3</sup> (*JX 12 at 5*). Later in the mid-school year, Student took the \*\*\* test again and scored higher at the \*\*\* percentile nationally. (*Id.*) Similarly, Student scored in the \*\*\* percentile in \*\*\* on the \*\*\* and in the \*\*\* percentile nationally when Student retested mid-school year. (*Id. at 6*).

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<sup>2</sup> Resource setting is another term for self-contained special education classroom rather than in-class support by special education teachers in a general education classroom setting. Resource classrooms look identical to general education classrooms. Only the class size is different. (*Tr. at 708*).

<sup>3</sup> \*\*\* refers to a universal assessment the District uses to track progress on students in \*\*\*. The assessment takes place two or three times during the school year. (*Tr. at 549-550*).

6. On the Texas STAAR report card for the \*\*\* grade, Student did not meet grade level in either \*\*\*. Student did, however, show noteworthy progress from the previous year. (*JX 30*).

\*\*\* *grade – 2021-2022 school year*

7. The District held an annual Admission, Review and Dismissal (ARD) meeting on April \*\*\*, 2021 to review Student’s IEP for the upcoming 2021-2022 school year. Student continued to meet eligibility for special education services based on specific learning disabilities in basic \*\*\* skills, written expression, and \*\*\*s. (*JX 12*). The ARD committee proposed several accommodations for Student for the 2021-2022 school year across Student’s core subjects, focusing on \*\*\*, that included: assistive technologies, simplified instructions, oral administration of assignments and tests, oral responses on tests, copies of teacher notes, \*\*\* assistance, small group test administration, repeated reviews, and other accommodations. (*JX 12 at 7-8*). Student also would continue receiving dyslexia services for basic \*\*\*. (*Id. at 9, 15*).
8. The ARD committee established several individualized goals for Student for the next school year, again focusing primarily on performance in \*\*\*. (*JX 12 at 25-27*). Significantly, the committee considered Resource Room setting for instruction but declined to make this placement for Student. (*Id. at 15*). Student’s Guardian agreed with implementation of this IEP. (*Id. at 19-22*).
9. The District held another ARD meeting on May \*\*\*, 2021 to discuss compensatory services for Student. The ARD committee had recommended compensatory services for Student in \*\*\*. Student’s Guardian declined the services. (*JX 13 at 11*).

10. Student underwent another FIE in September 2021. Student's Guardian had asked the District to reevaluate Student's strengths/weaknesses and educational performance levels; to determine Student's disability conditions; to identify Student's needs; and to provide additional data for the ARD committee. Guardian also wanted Student evaluated for possible autism. (*JX 8 at 1*).
11. The multidisciplinary team conducting the FIE determined in part that Student's \*\*\* performance from August 2018 through April 2021 shows a pattern in which Student begins the year low, improves, and then often regresses to a lower, more urgent need for intervention. (*JX 8 at 35-36*). The same pattern also appears for Student's \*\*\* performance during the same period. (*Id.*)
12. Overall, Student made mixed progress in Student's IEP goals across the 2021-22 school year. (*JX 39, JX 40*).

**\*\*\* grade – 2022-2023 school year**

13. In March 2022, the ARD committee met to determine Student's IEP for the upcoming 2022-2023 school year. (*JX 17*). Student continued to be eligible for special education services based on specific learning disabilities in basic \*\*\* skills, \*\*\*, and written expression. Student also continues to have dyslexia and \*\*\*. (*Id. at 3, 24*). Reviewing Student's PLAAFPs, the ARD committee concluded that Student is performing in \*\*\* at approximately the \*\*\* grade level and \*\*\* at a \*\*\* grade level. (*Id. at 5-6*).
14. The ARD committee determined that Student would receive in-class support in a general education setting for all Student's core subjects, with especially heavy accommodations in \*\*\*. (*Id. at 9-10*). In \*\*\*, the teachers and

support staff were required to instruct Student via a “\*\*\*” process or “\*\*\*” that included:

- i. Support staff or teacher will read the directions to the class.
- ii. Student will articulate Student’s understanding using the success criteria.
- iii. Support staff will explain the directions using simplified vocabulary. Pre-taught content vocabulary will be reviewed.
- iv. Student will repeat simplified directions.
- v. If multiple steps, support staff will bullet out the steps in order.
- vi. Student will execute steps need to complete the task.
- vii. Support staff will check for understanding prior to student beginning the task, and at different points during the assignment.

*(Id. at 10, 13).*

15. Student’s general education \*\*\* teacher reported that complying with these accommodations was often difficult and, even with the in-class support from the special education teacher, required spending most of their time assisting only Student. *(Tr. at 111-115).*

16. When addressing the least restrictive environment for Student’s instruction, the ARD committee considered a Resource placement but did not propose that setting during this ARD. *(Id. at 19).*

17. The ARD committee met again on May \*\*\*, 2022. In that meeting, the District explained that Student may benefit from a smaller setting instruction. *(Id. at 30).* Later, the committee reviewed the year’s proposed \*\*\* goals for Student’s IEP, as well as the accommodations the District intended to provide Student. *(Id. at 32-34).*

18. The ARD committee reconvened again on May \*\*\*, 2022. *(Id. at 32).* The District recommended extended school year services for Student which Student’s Guardian declined. *(Id. at 33).* The ARD committee then reviewed the PLAAFP data and goals for Student’s subjects for the rest of Student’s

- school year and the next one and agreed on goals for the Student's progress. (*Id. at 33-34*). In addition, Guardian requested and the committee agreed to remove the \*\*\* teacher's discretion with implementing the \*\*\* plan for instruction for Student. The ARD committee agreed to this IEP. (*Id. at 23*).
19. Shortly after the 2022-2023 school year began, at Guardian's request Student underwent an Independent Educational Evaluation (IEE) with Dr. \*\*\*, a specialist licensed in school psychology. (*JX 9*). According to Dr. \*\*\*'s evaluation, she concluded that Student meets the additional eligibility for special education services based on speech impairment and autism. (*Id. at 43-47*). Dr. \*\*\* recommended essentially many of the same instruction and accommodations the District already had in place or proposed for Student. (*JX 21 at 20; Tr. at 507*).
  20. The ARD committee met again on September \*\*\*, 2022 to review the IEE results. The District did not agree with the IEE's conclusion about Student's educational disabilities based on speech impairment or autism and found the IEE's conclusions at odds with many previous evaluations and ARD documents. (*JX 21 at 20*). The District also recommended a Resource setting Student in \*\*\*, which Guardian declined. (*Id.*)
  21. The ARD committee reconvened on September \*\*\*, and the District proposed creating more \*\*\* goals for Student in a resumed ARD meeting on October \*\*\*, 2022. Guardian did not agree with the committee on how Student would be given \*\*\* tests and also challenged the accommodation logs Student received from Student's \*\*\* class. The ARD committee ended in disagreement. (*JX 23 at 5*).
  22. The ARD committee met again in February 2023. The purpose of this meeting primarily to discuss tutoring available to Student under a new Texas law, HB4545. The committee could not agree with Student's Guardian on hours or

subjects for tutoring. (*JX 24 at 6-7*). Guardian later supplemented the February 2022 ARD notes with Guardian's version of events relating to tutoring for Student. (*JX 25*).

23. Student's \*\*\* assessments throughout Student's \*\*\* grade indicated Student need "urgent intervention" in both \*\*\*. (*RX 22*).

**\*\*\* grade – 2023-2024 school year – First year at \*\*\***

24. In March 2023, the ARD committee convened its annual meeting to develop an IEP for Student for Student's next school year, 2023-2024, in which Student will be \*\*\*. (*JX 27*). Student continues to be eligible for special education services based on a specific learning disability in the areas of basic \*\*\*/dyslexia, written expression/\*\*\*, and \*\*\*. (*JX 27 at 6*).

25. A review of then current PLAAFPs suggest that, academically, Student is regressing according to Student's \*\*\* scores. Particularly in \*\*\*, "this is an area of academic struggle" for Student. (*JX 27 at 7*). Student's \*\*\* teacher reports that Student needs to be taught concepts using the "\*\*\*\*" and requires direct support to complete independent tasks in \*\*\*." (*Id. at 8*). Student's \*\*\* score also shows Student did not grasp the concepts Student should understand in \*\*\* grade. (*Tr. at 134-135*). The ARD committee agreed with the PLAAFPs. (*JX 27 at 23*).

26. The ARD committee continued its meeting to April \*\*\*, 2023. During this meeting, the District proposed a Resource setting for \*\*\* for Student, along with in-class support in general education for \*\*\*. (*JX 27 at 24*). Guardian agreed with continuing in-class support for \*\*\*. Guardian did not agree with the proposed Resource instruction for Student in \*\*\*, stating that Student's grades have been great all year, which suggests Student's supports in regular education are working. The District responded that Student "does achieve

those grades because of the high level of support Student receives daily from Student's teachers. If Student was to work independently without the support of staff, Student would not be able to complete the tasks and make the same grades." (*Id.*) The ARD meeting was continued to a later date.

27. The next ARD meeting took place on May \*\*\*, 2023. Guardian began the meeting by stating Guardian felt blindsided by the District's previous recommendation for Resource education for Student. (*JX 27 at 25*). Guardian argues that the accommodation logs don't reflect the amount of support the District claims it needs to provide Student. In response, the District explained that,

the assistance provided by the adults working with Student results in the grades Student's received. It has also been discussed that when that adult support is not provided, Student does not complete the work independently. The IEP goals are written on a modified level, and while Student is mastering them, Student is still performing at a level that requires significant support from an adult to complete the academic task. (*Id.*)

28. Guardian contended that Guardian and Student were being targeted and retaliated against. The District responded that they were not being retaliated or discriminated against, but rather the data they have support the need for a more restrictive setting for Student. (*Id.*)

29. The ARD committee concluded its May 2023 meeting without mutual agreement on a Resource placement for Student and subsequently completed Student's IEP goals for the following year. (*JX 27 at 26, 43-52*).

30. Student's next ARD meeting took place at the beginning of the \*\*\* grade, on August \*\*\*, 2023. (*JX 28*). The District continued to propose Resource placement for Student in \*\*\*. (*Id.*) Concerning this placement and the least restrictive environment for Student, the District noted that Student

requires intensive direct instruction and support to access the general curriculum with modifications and accommodations. [Student] requires pacing and extended time to understand concepts and processes, apply, and complete assignments. [Student] lacks basic foundational skills required to keep up with the rigor and pacing in the general education setting. (*JX 28 at 11*).

31. The District also continued to propose several accommodations for Student but reduced the number of accommodations needed in \*\*\* since Student would be receiving Resource instruction and accommodations in a more intensive and continuous setting.<sup>4</sup>
32. Student's Guardian filed the current request for due process hearing on Student's behalf on August 11, 2023, which resulted in a "stay put" placement and subsequently paused the proposed placement of Student in Resource instruction for \*\*\*.<sup>5</sup>
33. On October \*\*\*, 2023, the ARD committee held a brief meeting reinstating the prior IEP for Student as a result Student's stay put requirement in light of Student's earlier request for the instant IDEA due process hearing. That meeting removed the previous recommendations for Resource placement for \*\*\*, replacing them with continued placement in general education with in-class supports, and implementing some additional goals and accommodations. (*JX 29*).
34. Student's \*\*\* score in early \*\*\* grade also suggested Student needed "urgent intervention" in both \*\*\*. (*RX 37*).
35. Significantly, for the most recent school years, Student's teacher kept and maintained "accommodation logs" reflecting the in-class accommodations

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<sup>4</sup> Compare "Accommodations" in Student's proposed 2023-2024 IEP (*JX 28 at 7-8*) with Student's 2022-2023 IEP (*JX 27 at 9-11*).

<sup>5</sup> The Hearing Officer takes judicial notice of Petitioner's Request for a Due Process Hearing filed on behalf of Student on August 11, 2023.

- they provided Student pursuant to Student's IEPs. *(RX 12, 18, 30, 35 and 40)*. Those logs collectively suggest that Student received nearly half the number of accommodations for \*\*\* as Student received for \*\*\*. *(Id.)*
36. \*\*\* is Student's current \*\*\* teacher. Despite Student's receiving a grade of \*\*\* in \*\*\* for the first semester in the 2023-2024 school year, \*\*\* explained that the grade does not necessarily reflect progress. \*\*\* in fact stated that Student had not made much progress in \*\*\* this term. *(Tr. at 47-50)*. In particular, \*\*\* stated that while Student's IEP \*\*\* goals appear appropriate, the accommodations provided Student made it difficult for \*\*\* to accurately assess Student's understanding of \*\*\* concepts. *(Tr. at 55)*. In fact, they tend to "pave over" Student's thought process of using Student's brain to recall information; consequently, the level of accommodations may in fact harm Student to where "Student will probably not fully understand the material and be successful in future \*\*\* courses." *(Tr. at 104-105)*. Significantly, \*\*\* explained how he provided Student a highly modified curriculum in the general education classroom. *(Tr. at 75-80)*.
37. \*\*\* also testified that he has \*\*\* other special education students in his \*\*\* class along with Student. \*\*\* stated that both he and the inclusion support teacher with \*\*\*, \*\*\*, provide in-class support to Student. *(Tr. at 57, 111-112)*. Student receives at least 75% of the time spent for all the special education students in the class. *(Tr. at 112)*. \*\*\* also said he was concerned about not giving enough attention to the other \*\*\* students in his class – in special education and general education – because Student receives so much attention. *(Tr. at 113-114)*. Ultimately, \*\*\* concluded that in his opinion Student cannot succeed in a general education \*\*\* class because Student "needs much more one-on-one time, a slower pace of the lesson and more of a smaller class..." *(Tr. at 114-115, 136)*.

38. While Student is in \*\*\*'s \*\*\* class, Student doesn't speak much or interacts with other classmates around Student. (*Tr. at 110,115*). Student also keeps to \*\*\*self and doesn't advocate very much for \*\*\*self. (*Tr. 138-139*).
39. \*\*\* currently provides in-class support for Student, along with \*\*\* other special education students in \*\*\*. (*Tr. at 755*). He spends the majority of his class time with Student. (*Id.*) Expectations in that class are different for Student than with other students. (*Tr. at 772*). Even though Student gets good grades, Student is nowhere near doing the \*\*\* independently. (*Tr. at 780-781*). Student had not progressed since school began this term and needs more and more help. Student's \*\*\* score places Student at \*\*\*-grade level for \*\*\*. (*Tr. at 782*).
40. Addressing Student's \*\*\* progress, \*\*\* testified that he did not believe Student can make progress in the general education setting even with all the accommodations provided to Student. (*Id.*) \*\*\* concluded that Student definitely thinks a Resource setting would be more effective for Student because it's a smaller setting and would give Student more direct help. (*Tr. at 783*).
41. \*\*\* is Student's case manager for various special education issues in school. (*Tr. at 142-143*). He stated that Student is meeting goals for \*\*\* in fall of 2023, according to Student's progress reports. (*Tr. at 148-156*). He also reported that Student's \*\*\* teacher reported that Student's current goals and plan of service, including accommodations for \*\*\*, "*continued to be appropriate.*" (*Tr. at 184*). Nevertheless, \*\*\* believes Student would do better in Resource setting and might avoid stigma or feeling ashamed in a general education class. Student doesn't participate with others in class. \*\*\* stated that Student might flourish and make more gains in Resource setting. (*Tr. at 165-177*).

42. \*\*\* has been Student's in-class special education support teacher for \*\*\* for the last three school years. (*Tr. at 191-192*). He testified that Student made some progress toward \*\*\* goals in \*\*\* grade. (*Tr. at 199-200*). \*\*\* stated that he spent 80-85 % of his class time with Student in \*\*\* in \*\*\* grade even though there were \*\*\* other special education students in the class, which was not enough time for providing those other students their special education services. (*Tr. at 287-289*).
43. \*\*\*, the Assistant Director for Special Education, testified that a Resource setting would be better for Student because Student's \*\*\* and Resource setting would be more appropriate to be able to hone in on foundational skills Student requires. It's more difficult to do this in a general education setting. The pace is quicker \*\*\* and is harder to keep up with the basics, so it ends up being hard to accomplish all these tasks at an independent level. (*Tr. at 714-715*).
44. \*\*\* concluded that there is little doubt that Student receives a highly modified curriculum – at least as far as \*\*\* instruction is concerned. No other student in the District receives as much one-on-one special education support in a general education classroom as Student. (*Tr. at 718*).
45. \*\*\*, the District's Executive Director for Student Support Services, also testified that the level of general education modification of Student's \*\*\* curriculum had never been done before. (*Tr. at 851*). Student basically was attending a "class within class" for \*\*\*, essentially having Student's own teacher in general education guiding Student from beginning to end throughout Student's instruction. (*Tr. at 455-459, 588-589*). \*\*\* did not make the same conclusion regarding Student's \*\*\* instruction.
46. Although the relationship between Guardian and the District has been strained throughout the years Student has received special education services,

there was no evidence that the District retaliated or discriminated against them. To the contrary, the evidence overall shows the District has gone above and beyond in collaborating with Guardian and providing numerous accommodations and supports to help Student achieve Student's educational goals through special education services.

## Discussion

### A. Burden of proof

There is no distinction between the burden of proof in an administrative hearing such as this case or a district court proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n.4 (5th Cir. 2009). In a due process hearing under the IDEA, the burden of proof rests upon the party challenging a proposed IEP and placement or seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). Further, "a presumption exists in favor of the local public school district's plan for educating the child, provided it comports with IDEA." *Teague, supra*, at 132.

### B. FAPE

The Supreme Court has held that to determine whether a school has provided FAPE to a student, the school must both comply with IDEA's procedural requirements and develop an individualized program reasonably calculated to enable the student to receive an educational benefit. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-207, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982). The Court also explained that an "educational benefit" under IDEA means one which is meaningful and provides a basic floor of opportunity or access to specialized instruction and related services individually designed to provide educational benefit. *Id.* at 201. Shedding additional light on IDEA and its FAPE requirements, the Court later made clear that the Act does not guarantee any particular educational outcome but rather only requires an

educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 137 S. Ct. 988, 993, 197 L.Ed.2d 335 (2017).

The Fifth Circuit has created a four-part test for determining whether a school district has provided FAPE to a student, using the following factors:

1. Whether the program is individualized on the basis of the student's assessment and performance;
2. Whether the program is administered in the least restrictive environment;
3. Whether the services are provided in a coordinated and collaborative manner by the key stakeholders; and
4. Whether both positive academic and nonacademic benefits are demonstrated.

*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997). When reviewing these factors, courts have found there is no particular manner to consider or weigh them. Rather, the caselaw holds these factors are "indicators" of an IEP's appropriateness and intended to guide the fact-intensive inquiry for evaluating whether an IEP provided an educational benefit. *Michael Z.*, *supra*, 580 F.3d at 293-294.

In this case, and essentially tracking the factors set forth in *Michael F.*, Petitioner Student challenges the Respondent District's provision of FAPE in the following respects:

- *Whether the Respondent District failed to provide a FAPE to Petitioner Student;*
- *Whether the District failed to develop and implement an IEP for Student's unique characteristics and needs;*
- *Whether the District failed to provide instruction and services to Student in the least restrictive environment appropriate for Student's needs; and*

- *Whether the District failed to collaborate with Student's guardian.*

Over the course of this proceeding, it is apparent that the parties' focus is whether Student's proposed Resource placement for \*\*\* is the least restrictive environment for Student's education. That issue will be discussed below. However, because Student also challenges the District's provision of FAPE in all its component factors, those too will be analyzed for compliance with the IDEA.

### ***1. Individualized IEP based on assessment and performance***

As part of its obligations under IDEA, a school district must have an IEP in place at the beginning of each school year that is individualized for the student, based on assessment and performance. 34 C.F.R. §§ 300.22, 300.320, 300.323(a). The record shows that the District developed highly individualized IEPs for Student for each of the relevant school years – 2021-2022 to present. Indeed, many times the parties met in additional ARD meetings to revisit and revise Student's IEPs based on new assessments or changes in Student's performance, as well as to implement the expressed desires of Student's Guardian. In short, Student's IEPs were "reasonably calculated to enable [Student] to make progress appropriate in light of [Student's] circumstances." *Andrew, supra*, 137 S. Ct. at 999.

### ***2. Least restrictive environment***

The core issue in this case is whether Student's proposed IEP for the 2023-2024 school year provides Student's education in the least restrictive environment. Specifically, the District proposes that Student receive \*\*\* in a Resource setting rather than in general education with in-class support from a special education teacher.

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 a regular or general education environment can

occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids or services cannot be achieved satisfactorily. This mainstreaming provision is known as the “least restrictive environment requirement” (LRE). 34 C.F.R. § 300.114(a)(2)(i)-(ii). Further, TEA regulations require a school district to provide a continuum of instructional arrangements based on a student’s individual needs and IEPs, which include educational settings such as: mainstream, homebound, hospital class, resource room/services, self-contained (mild, moderate, or severe) regular campus, off-home campus, nonpublic day school, residential care and treatment facility (not school district resident). 19 Tex. Admin. Code § 89.63(c).

The Fifth Circuit in *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir.), created a two-part test for determining whether a school district is educating a student with a disability in the LRE:

- 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.

*Id.* at 1048. To help flesh out these issues, the court in *Daniel R.R.* laid out a framework for examining the nature and severity of the student’s disability, Student’s needs and abilities, and the school district’s response to the student’s needs, by looking at:

- a. a school district’s efforts to provide the student with supplemental aids and services in the general education setting and modify the general education curriculum to meet the student’s needs;
- b. the educational benefit a student is receiving while placed in the general education setting;

- c. the child's overall experience in general education, balancing the benefits of general and special education; and
- d. the impact the presence of the student with a disability has on the general education setting and the education of the other students in the setting.

*Id.* at 1048-1049.

In this case it is beyond dispute that the District has tried to accommodate Student in a general education setting. Thus, under *Daniel R.R.* the issues come down to whether Student can be satisfactorily educated in a general education setting for \*\*\* and, if not, whether the District's proposed placement of Student in a Resource setting for those subjects mainstreams Student to the maximum extent appropriate. To determine those issues, we apply the four criteria above from *Daniel R.R.* to the District's proposed placement of Student for Student's \*\*\* classes in a special education Resource setting.

*a. District's efforts to educate Student in a general education setting*

The District has taken strong efforts to educate Student in a general education setting. Its IEPs for Student over recent years have shown genuine attempts to create, implement, and modify various accommodations to maximize Student's mainstreaming in all Student's core subjects. These efforts were not mere token steps by the District. *Daniel R.R.* at 1048.

For \*\*\*, however, the level and amount of accommodations have essentially modified Student's curriculum to where Student's \*\*\* course has become a "classroom within a class." The IDEA does not require schools to implement IEPs to this extent of modifying the general education curriculum. *Daniel R.R.* at 1048; *Brillon v. Klein Indep. Sch. Dist.*, 100 Fed.App'x 309, 313 (5th Cir. 2004). By contrast, the record evidence here did not show anywhere near the same level of modification of Student's curriculum for

Student's \*\*\* instruction. The level and frequency of accommodations for Student's \*\*\* instruction were markedly less than what Student received for \*\*\*. No District witness ever characterized Student's in-class support for \*\*\* as a "classroom within a class."

*b. Student's educational benefit in general education*

This factor focuses on the Student's ability to grasp the essential benefits of the regular education curriculum. *Brillon* at 313; *Daniel R.R.* at 1049.

Student's \*\*\* teacher testified that even though Student gets good grades, Student is nowhere near doing the \*\*\* functions independently, has not progressed since school began this term, and Student needs more and more help. Student's \*\*\* score also places Student at \*\*\*-grade level for \*\*\*.

Courts have found that academic achievement is not the only benefit of mainstreaming and that a student may benefit enormously from modeling of Student's nondisabled peers. *Brillon* at 314; *Daniel R.R.* at 1049. But here the evidence showed that at least with respect to Student's \*\*\* class, Student did not appear to associate with or benefit to any material degree from Student's nondisabled peers. Further, Student's case manager \*\*\* observed that Student appears to feel ashamed in having to perform work in class at a lower level than the other students.

Regarding Student's educational benefit in general education \*\*\*, Student appeared to show a greater level progress in that subject than in \*\*\*. Noteworthy, Student's \*\*\* teacher reported that Student's current goals and plan of service, including accommodations for \*\*\*, "continued to be appropriate."

*c. Student's overall experience in general education, balancing the benefits of general and special education*

While a student may not grasp all the concepts and absorb only a minimal amount of the regular education program, Student may benefit enormously from the

language models that Student's nonhandicapped peers provide for Student. In that case, the benefit Student receives from mainstreaming may tip the balance in favor of mainstreaming, even if the student does not flourish academically. *Daniel R.R.* at 1049.

In this case, the evidence showed that Student did not interact much, if at all, with Student's nondisabled peers. Consequently, "the social benefit from general education...is not clear." *Brillon* at 314. Student's overall experience shows mixed success in general education, with \*\*\* creating the most difficult obstacles for Student in mastering Student's goals and making progress. The record shows, on balance, that Student may well benefit more in \*\*\* in a Resource setting with a smaller class size, slower pace, and more one-on-one attention.

With respect to \*\*\*, the evidence did not show that Student required as radical a modification to Student's curriculum as Student needed for \*\*\*. And as noted above, Student's current \*\*\* teacher and Student's case manager support the conclusion that Student does not necessarily require \*\*\* instruction in a Resource setting. Again, Student's current \*\*\* teacher stated that Student's \*\*\* placement in a general education setting was "appropriate."

*d. Student's impact on general education setting and other students*

Sometimes a student may require so much of an instructor's attention that the instructor has to ignore the other students' needs to tend to the disabled child's needs. *Daniel R.R.* at 1049-1050; *Brillon* at 314. "Although regular education instructors must devote extra attention to their handicapped students, we will not require them to do so at the expense of their entire class." *Daniel R.R.* at 1051.

In this case, the evidence was manifest that Student's needs required Student's teachers in \*\*\* to devote the large majority of their time instructing Student and providing accommodations that exceeded any level provided elsewhere within the District. And while Student's teacher in \*\*\* also devoted a significant amount of time to

Student, the possible detriment to others in Student's \*\*\* class was not as pronounced as it appeared in Student's \*\*\* class. Or at least the evidence on this point did not suggest so. Most significantly, and as noted above, the evidence did not establish that the District had to modify Student's curriculum in \*\*\* as much as it did with Student's \*\*\* instruction to create, in effect, a classroom within a class.

The evidence warrants Student's placement in a Resource setting for \*\*\*, with continued placement in general education for \*\*\*. This mix of special education with general education is consistent with the IDEA's approach of providing eligible students with a continuum of services. The requirement of a least restrictive environment is not

an all-or-nothing educational system in which handicapped children attend either regular or special education. Rather, the Act and its regulations require schools to offer a continuum of services. Thus, the school must take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others... The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops.

*Daniel R.R.* at 1050 (citations omitted).

The Hearing Officer concludes that the proposed IEP for Student for the 2023-2024 school year, requiring Student to receive *both* \*\*\* in a Resource setting, *is not* the least restrictive environment for Student's instruction. This placement does not mainstream Student to the maximum extent appropriate. At this point in Student's education, particularly with Student's \*\*\*, a balancing of all the factors suggests that a more gradual approach to a Resource setting beginning with \*\*\* only is more appropriate and would be more beneficial for Student.

### ***3. Provision of services in a coordinated and collaborative manner***

Returning now to the *Michael F.* factors for reviewing FAPE, the next factor requires assessing whether special education services have been provided in a coordinated and collaborative manner. *Michael F.*, 118 F.3d at 253. The process of

developing an IEP is holistic, requiring the input and collaboration of various persons, including the student's parents, special and regular education teachers, therapists, and often the child \*\*\*self. 34 C.F.R. §§ 300.321, .322, .324; 19 Tex. Admin. Code 89 § 1050(c). To the extent possible, the decision of the ARD committee should be by mutual agreement. 19 Tex. Admin. Code 89 § 1050(g).

Throughout the relevant period, the District provided special education services to Student based on a highly coordinated and collaborative manner based on input from key stakeholders. The record evidence shows properly composed ARD committee meetings that included Student's Guardian, special and regular education teachers, District staff, special education advocates for Student, and other necessary participants. Several ARD meetings took place spanning numerous sessions. The ARD committees created detailed goals and objections for Student's IEPs, as well as numerous and evolving accommodations for Student to help Student achieve Student's goals.

Student's Guardian disagreed with many of the District's IEP decisions, significantly the most recently proposed IEP for Student that would have placed Student in a Resource setting for both \*\*\*. But the right of a parent or guardian to meaningful input in this process does not amount to "veto power" over the school district's decisions. *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003). And absent bad faith exclusion of a parent or guardian or refusal to listen to them in the IEP process—which is not the case here—a school district must be deemed to have met the IDEA's requirements of a coordinated and collaborative process. *Id.*

#### ***4. Academic and nonacademic benefit***

The last *Michael F.* factor for reviewing the sufficiency of FAPE – i.e., whether the student received academic and nonacademic benefit – is one of the most critical in the overall analysis. *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813-814 (5th Cir. 2012). It is not necessary for a student to improve in every area of Student's IEP

to obtain an academic benefit that satisfies the IDEA. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 350 (5th Cir. 2000).

Throughout this case, Student has not challenged so much whether Student did or would receive academic or nonacademic benefit during the relevant period. Rather, the central focus has been whether the proposed placement of Student in a special education Resource setting is Student's LRE. It is indeed possible that during the relevant period, Student did receive academic and nonacademic benefits from Student's educational placements pursuant to previous IEPs. The Hearing Officer concludes that Student did receive such benefits, although the record showed some regression by Student in \*\*\* despite mastering most of Student's IEP goals and achieving high grades in both subjects.

### **Conclusion**

Student's IEPs during the relevant period were reasonably calculated to provide a meaningful educational benefit and were appropriately ambitious in light of Student's unique circumstances. Before the 2023-2024 school year, the District provided Student with an IDEA-compliant FAPE. The issue remains whether the proposed IEP for the 2023-2024 school year provides an FAPE in the LRE. As noted above, the Hearing Officer finds that proposed IEP did not comply with the LRE to the extent it required Student's placement in a Resource setting for *both* \*\*\*. Based on the record evidence and applicable law, at this time Student would most benefit from a Resource setting for \*\*\* only and a general education setting with appropriate accommodations in \*\*\*.

### **Conclusions of Law**

Based on the preponderance of the evidence, and applicable law, the Hearing Officer makes the following conclusions of law:

1. Petitioner Student is eligible for a FAPE under the IDEA and its implementing regulations, 20 U.S.C. § 1400 *et seq.*; 34 C.F.R. § 300.301; Tex. Admin. Code § 89.1011.
2. During the 2021-2022 and 2022-2023 school years, the Respondent District provided Student a FAPE pursuant to IEPs that complied with the IDEA and were reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. at 203-204, 207; *Endrew F.*, 580 U.S. at 399.
3. The District's proposed IEP for Student for the 2023-2024 school year in part did not provide a FAPE to Student because it did not provide for Student's \*\*\* instruction in Student's LRE. 34 C.F.R. § 300.114(a)(2)(i), (ii); *Daniel R.R.*, 874 F.2d at 1048.

### **Relief and Orders**

As shown above, the District denied a FAPE to Student in part by failing to provide Student's \*\*\* instruction in the LRE. Student's proposed instruction for \*\*\* in a Resource setting in the 2023-2024 school year pursuant to the August 2023 IEP was not an appropriate placement. By contrast, Student's proposed instruction in \*\*\* in a Resource setting for the same school year was an appropriate placement in Student's LRE.

Under the IDEA, hearing officers have broad discretion to fashion appropriate relief that furthers the purpose of the IDEA and provides a FAPE to the student. *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 374, 105 S. Ct. 1996, 85 L.Ed.2d 385 (1985); *P.P. v. Northwest Indep. Sch. Dist.*, 839 Fed.App'x 848, 857 (5th Cir. 2020). Accordingly, the Hearing Officer makes the following orders:

1. Within 21 calendar days of the date of this decision, a duly-composed ARD committee shall meet to revise Student's IEP to change Student's placement in \*\*\* instruction to a Resource setting and to continue Student's placement in \*\*\* in a general education setting with appropriate in-class supports.
2. Based on the time it has taken to complete this due process hearing, Student's IEP would likely not be revised and implemented until the current school year is nearing its end. Consequently, starting Student's placement for \*\*\* in a Resource setting near the end of Student's school year could be disruptive for Student. The District and Student may wish to consider starting this Resource placement at the beginning of the next school year. The ARD committee therefore needs to discuss and agree to the start date for this placement change. Absent agreement, Student will begin Student's Resource placement for \*\*\* no later than April 29, 2024.
3. In addition, the ARD committee shall offer ESY services to Student for the summer of 2024, with emphasis in \*\*\*, to further address Student's deficiencies in these specific subjects.
4. All other relief not specifically provided for in these Orders is denied.

Dated: March 19, 2024

By: \_\_\_\_\_  
Christian A. Bourgeacq  
Special Education Hearing Officer  
for the State of Texas

### Notice to the Parties

The Decision of the Hearing Officer in this case 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); 19 Tex. Admin. Code §89.1185(p); Tex. Gov't Code, § 2001.144(a)-(b).