

**DOCKET NO. 119-SE-1218**

<b>STUDENT B/N/F PARENT,</b>	§	<b>BEFORE A SPECIAL EDUCATION</b>
<b>Petitioner</b>	§	
	§	
<b>V.</b>	§	<b>HEARING OFFICER FOR</b>
	§	
<b>KLEIN INDEPENDENT SCHOOL</b>	§	
<b>DISTRICT,</b>	§	
<b>Respondent</b>	§	<b>THE STATE OF TEXAS</b>

**DECISION OF THE HEARING OFFICER**

**I. STATEMENT OF THE CASE**

Student, \*\*\*, by Student’s next friend Parent (Student or, collectively, Petitioner), filed a request for an impartial due process hearing (Complaint) under the Individuals with Disabilities Education Act (IDEA) and its implementing state and federal regulations on December 21, 2018, with Notice of the Complaint issued by the Texas Education Agency (TEA) on the same day. The Respondent to the Complaint is the Klein Independent School District (Respondent or District). The main issue in this case is whether the District provided Student a Free Appropriate Public Education (FAPE). The Hearing Officer finds the District did provide Student a FAPE in Student’s Least Restricted Environment (LRE) and appropriately implemented the educational plan it prepared for Student.

**II. PROCEDURAL HISTORY**

**A. Legal Representatives**

Petitioner was represented throughout this litigation by Student’s parent, \*\*\*, as a self-represented litigant. Student’s parent is a certified educational diagnostician employed by a different school district. Respondent was represented throughout this litigation by its legal counsel, Holly Sherman and Erik Nichols of Karczewski, Bradshaw, Spalding, Nichols, Lam & Langlois, Attorneys & Counselors.

**B. Resolution Efforts**

The parties notified the hearing officer by electronic mail on January 7, 2019, that they would proceed to mediation in lieu of a resolution session and that a mediator had already been assigned. The parties participated in mediation on January 14, 2019, but were unable to reach an agreement. The parties continued informal settlement negotiations in good faith after that, but did not reach a resolution of the case.

**III. DUE PROCESS HEARING**

The due process hearing was held in the District on August 29, 2019. Petitioner continued to be represented by Student's parent as a self-represented litigant. Respondent continued to be represented by its legal counsel, Holly Sherman and Erik Nichols. Dr. \*\*\*, Executive Director of Special Programs for Respondent, also attended the hearing as the party representative. The hearing was recorded and transcribed by a certified court reporter.

At the conclusion of the hearing, the parties requested the record remain open to allow for submission of written closing arguments. The parties also requested access to the hearing transcript prior to submitting their arguments. Both parties submitted timely closing arguments on October 15, 2019. The Hearing Officer's decision is due on October 31, 2019.

**IV. ISSUES****A. Petitioner's Issues**

Petitioner submitted the following issues, as stated in Order No. 2:

1. Whether Respondent's 2018 Full Individual Evaluation (FIE) complied with the requirements of the IDEA.
2. Whether Respondent failed to provide Student a FAPE once Student became eligible for special education and related services.

3. Whether Respondent failed to provide a sufficiently challenging academic curriculum with access to advanced classes for Student.
4. Whether Student's Individualized Education Plan (IEP) contained accommodations necessary for Student to receive a FAPE.
5. Whether Respondent failed to provide accurate progress reports.
6. Whether Respondent failed to provide sufficient related services to provide Student a FAPE.
7. Whether Respondent failed to implement Student's IEP.
8. Whether Respondent failed to use qualified personnel to work with Student.
9. Whether Respondent denied Student's mother the opportunity to participate in planning Student's educational program.

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

Respondent generally and specifically denied each and every allegation raised by Petitioner and denied responsibility for providing any of Petitioner's requested relief. In addition, Respondent requested dismissal of all claims and requests for relief arising under statutes other than the IDEA. The Hearing Officer granted that request in Order No. 2.

**V. REQUESTED RELIEF**

Petitioner requested the Hearing Officer order the following requested relief:

1. Order Respondent to use a certified special education teacher as a support for Student during the first five minutes of class and during the last five minutes of class for all of Student's core academic classes.
2. Order Respondent to provide Student all classes to complete Student's \*\*\* in a timely manner, if necessary, providing those classes on a different campus in the District.
3. Order Respondent to provide the chunking of large assignments as an accommodation.
4. Order Respondent to provide in-class support from a certified special education teacher

who can prompt Student to remain on task.

5. Order Respondent to provide compensatory education.
6. Order Respondent to provide summer school to Student.

## VI. FINDINGS OF FACT

### Background

1. Student is \*\*\* and attends \*\*\* in the District. Student is eligible for special education as a Student with a primary disability of \*\*\*, a secondary disability of Other Health Impairment (OHI) for a \*\*\* disorder, and a tertiary disability of Emotional Disturbance (ED).<sup>1</sup>
2. Student was a student in the District from the 2010-11 school year until the 2015-16 school year. Student then spent the 2016-17 school year, Student's \*\*\* grade year, in a different school district. Student returned to the District at the beginning of the 2017-18 school year. Student has been a student in the District continuously since August 2017.<sup>2</sup>
3. \*\*\*. That incident led to Student developing both a \*\*\* disorder and \*\*\*.<sup>3</sup>
4. \*\*\*.<sup>4</sup> Student \*\*\* as a result of that incident.<sup>5</sup> \*\*\*.<sup>6</sup>
5. Student first began receiving Section 504 services in the 2011-12 school year, when Student was in \*\*\* grade in the District. At that time, Student required Section 504 services due to difficulty concentrating, \*\*\* and other conditions affecting Student's ability to function socially and academically. Student continued to attend mainstream, general education classes with accommodations for Student's disability, which was defined at the time as \*\*\*.<sup>7</sup>

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<sup>1</sup> Respondent's Exhibit 1, page 1 (RE-\_\_ at \_\_).

<sup>2</sup> *Id.*

<sup>3</sup> RE-7 at 5, 15; Hearing Transcript, page 92 (Tr. at \_\_).

<sup>4</sup> Tr. at 114.

<sup>5</sup> RE-7 at 37.

<sup>6</sup> *Id.* at 20.

<sup>7</sup> *Id.* at 19.

6. In April 2012, after Student had been receiving Section 504 services for several months, the District referred Student for an FIE. The FIE determined Student did not qualify for special education and related services.<sup>8</sup>

### The 2018 FIE

7. After Student was found ineligible in 2012, Student was not evaluated for special education and related services again until 2018. At that time, the District and Student's parent agreed to evaluate Student again due to issues Student was experiencing with memory and organization.
8. Student's parent signed consent to evaluate on February \*\*\*, 2018.<sup>9</sup> The agreed-upon consent indicated Student would receive "cognitive and achievement testing, executive functioning evaluation, psychological evaluation, and a Functional Behavioral Assessment."<sup>10</sup>
9. The District completed the FIE on May \*\*\*, 2018.<sup>11</sup> An addendum was added to the FIE on May \*\*\*, 2018, after a medical doctor confirmed Student met criteria as a student with \*\*\*.<sup>12</sup> The Admission, Review and Dismissal (ARD) Committee, including Student's parent, unanimously adopted the FIE in an ARD Committee meeting on May \*\*\*, 2018.<sup>13</sup>
10. The FIE tested Student in the areas agreed upon in the consent signed by Student's parent.<sup>14</sup> It included an administration of the Woodcock-Johnson IV in order to test Student's cognitive abilities. The Woodcock-Johnson IV, administered over the course of two sessions, measured seven areas of cognitive ability: Comprehension Knowledge, Fluid Reasoning, Short-Term Working Memory, Cognitive Processing Speed, Auditory Processing, Long-Term Retrieval, and Visual Processing. In each area, Student scored at least in the "average" range. Student scored in the "high average" range in Cognitive Processing Speed and Long-Term Retrieval. Student scored in the "superior" range in Visual Processing.<sup>15</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> RE-11.

<sup>10</sup> *Id.*

<sup>11</sup> RE-7.

<sup>12</sup> RE-8.

<sup>13</sup> RE-2 at 29.

<sup>14</sup> RE-7 at 1-2.

<sup>15</sup> *Id.* at 5-9.

11. The FIE also utilized the NEPSY II to test Student's neuropsychological development. It found Student had a number of strengths, but demonstrated a deficit in "impulsive response style with poorly controlled output."<sup>16</sup>
12. The FIE used the Comprehensive Executive Function Inventory (CEFI) to test Student's executive functioning. As part of the CEFI, three of Student's teachers, Student's parent, and Student filled out the CEFI inventory. The CEFI found Student had deficits in attention, working memory, and initiation.<sup>17</sup>
13. Two formal, peer-reviewed testing instruments were used to test Student's behavioral and psychological characteristics: the Conners Comprehensive Behavior Rating Scale and the Multidimensional Anxiety Scale for Children, 2nd Edition.
14. The District staff who prepared the FIE conducted five in-person observations of Student over four separate days. The District staff also interviewed Student, Student's teachers, and Student's parent. The District staff relied on questionnaires completed by Student's parent, Student, and Student's teachers. They also conducted a comprehensive review of Student's educational records, including the 2012 FIE that had found Student ineligible for special education and related services.<sup>18</sup>
15. The FIE found Student experiences anxiety in social situations or when singled out; difficulty with self-image; distractibility; physical manifestations of Student's anxiety such as headaches, stomach aches, and fatigue; and difficulty sharing Student's feelings. The FIE concluded Student met criteria as a Student with ED.<sup>19</sup> It also recommended Student obtain outside counseling to help with some of Student's anxiety issues. It did not recommend Student utilize counseling as a related service.<sup>20</sup>
16. In addition to finding Student eligible for special education as a student with ED, the FIE recommended Student should be eligible for special education as a student with \*\*\* and OHI for \*\*\* disorder.<sup>21</sup>
17. The District also conducted a Functional Behavioral Assessment (FBA) as part of its FIE. The FBA recommended a number of strategies for encouraging positive behavior from Student, including nonverbal cues, non-startling verbal reminders, checking for understanding, partnering with a peer, opportunities to take breaks between assignments,

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<sup>16</sup> *Id.* at 11.

<sup>17</sup> *Id.* at 12-3.

<sup>18</sup> *Id.* at 2.

<sup>19</sup> *Id.* at 21-26.

<sup>20</sup> RE-4 at 3.

<sup>21</sup> RE-7 at 32; RE-8.

earned privileges, removal of distractions, and a number of other strategies aimed at helping Student with focus, work completion, and organization.<sup>22</sup>

18. The FIE concluded with recommendations about accommodations and strategies for Student's IEP.<sup>23</sup> Among other things, it recommended extended time for tests and in-class assignments with the option to complete those somewhere away from other students, teaching focusing strategies like "checking for critical features" and "careful listening," encouraging the use of notebooks and planners for organization, and removing time limits where possible since Student's responses become more impulsive under time constraints.<sup>24</sup>
19. Without conceding that its evaluation failed to comply with the IDEA, the District granted Student's parent's request for an Independent Education Evaluation (IEE) with an evaluator of Student's parent's choice after the Complaint was filed.<sup>25</sup> Student's parent selected the IEE evaluator, because her chosen evaluator was "highly recommended" to her and had not worked with the District previously.<sup>26</sup>
20. The IEE was particularly focused, by agreement of the parties, on the areas of cognitive and academic achievement testing.<sup>27</sup> The IEE used different formal testing measures than the FIE. The IEE relied on the WISC-5, the CTOPP-2, the KTEA-3, the WIAT-III, the Nelson-Denny Reading Test-Form I, and a behavior rating inventory filled out by Student, Student's parent, and Student's teachers. The IEE provider also conducted four in-person observations and interviewed Student, Student's teachers, and Student's parent.<sup>28</sup>
21. The IEE evaluator reviewed the District's 2018 FIE as part of preparing her IEE. She found the District's FIE "appropriate" and "thorough."<sup>29</sup>
22. The IEE concluded the District had correctly identified Student's eligibility for special education in the categories of \*\*\*, ED, and OHI. The IEE also found Student's anxiety and the health problems associated with it might be caused by the "academic rigor" of Student's classes and Student's busy schedule.<sup>30</sup> Student's presence in \*\*\* classes was leading to many of Student's anxiety issues.<sup>31</sup> That anxiety can exacerbate Student's \*\*\* disorder and lead to negative impacts on Student's physical well-being. The IEE

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<sup>22</sup> RE-7 at 27-31.

<sup>23</sup> *Id.* at 31-6.

<sup>24</sup> *Id.* at 34-5.

<sup>25</sup> Tr. at 261; RE-14 at 1.

<sup>26</sup> Tr. at 281-82.

<sup>27</sup> Tr. at 267.

<sup>28</sup> RE-14 at 1-2; Tr. at 264.

<sup>29</sup> Tr. at 267.

<sup>30</sup> RE-14 at 24.

<sup>31</sup> Tr. at 280-81.

recommended Student be removed from the \*\*\* classes and placed in regular, mainstream sections instead.<sup>32</sup>

23. The IEE did not recommend any related services for Student, including counseling.<sup>33</sup> The IEE provider found the accommodations provided in the District's IEP to be appropriate and sufficient.<sup>34</sup> The IEE provider also found that the District was implementing the IEP it designed.<sup>35</sup>

### Student's IEP

24. On May \*\*\*, 2018, the ARD Committee met to approve the FIE and adopt an IEP. Student's parent attended the meeting.<sup>36</sup>
25. The ARD Committee came up with three annual goals:
- 1) By the next annual ARD Committee meeting, Student will maintain a minimum of \*\*\* in all academic classes;
  - 2) By the next annual ARD Committee meeting, Student will maintain attention to the task at hand for ten-minute intervals with no more than three verbal or nonverbal reminders in three out of five observations for at least two consecutive grading periods;
  - 3) By the next annual ARD Committee meeting, Student will initiate work on assignments within 60 seconds of being given a directive. This will result in completed work assignments in Student's classes. Student will accomplish this goal with no more than three reminders per class period in two out of five observations for at least two consecutive grading periods.<sup>37</sup>
26. The ARD Committee also put the accommodations recommended in the FIE into Student's IEP, including extra time, a private place to take tests, using memory mnemonic strategies, and providing a method to organize assignments.<sup>38</sup>

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<sup>32</sup> RE-14 at 24.

<sup>33</sup> *Id.*

<sup>34</sup> Tr. at 277.

<sup>35</sup> *Id.*

<sup>36</sup> RE-2 at 29.

<sup>37</sup> *Id.* at 3-5.

<sup>38</sup> *Id.* at 3.



27. Student's parent requested that someone come into the special education classroom to provide Student reminders to complete Student's work. Not having that support person has been the biggest reason Student's Section 504 accommodations were no longer adequate and Student needed special education and related services.<sup>39</sup> In response to Student's parent's suggestion, the District agreed to provide a Support Facilitator to check in with Student in the first five minutes of each class and in the last five minutes of each class.<sup>40</sup>
28. The ARD Committee also created a Behavior Intervention Plan (BIP) based on the data and strategy suggestions collected in the FBA. The two behaviors the BIP targeted were off-task behavior and the Student's organization and completion of work.<sup>41</sup> The BIP listed several behavior management techniques to avoid, such as singling out Student, giving directives with more than two-three steps, or seating Student near distractions or disruptive students.
29. The BIP listed a number of prosocial strategies for teachers to implement, such as teaching Student to use Student's planner, teaching Student discreet methods of asking for help when Student needs it, and teaching Student to use verbal self-commands such as teaching Student to tell \*\*\*self "okay, calm down and think about the question."<sup>42</sup> The BIP also provided suggestions for adapting the classroom environment to meet Student's needs. It concluded with suggestions for rewards and consequences that could encourage positive, focused behavior from Student.<sup>43</sup>
30. The May \*\*\*, 2018 ARD Committee meeting ended with all parties, including Student's parent, in agreement with the District's FIE and proposed IEP.<sup>44</sup>

### The 2018-19 School Year

31. Student was in \*\*\* grade at \*\*\* during the 2018-19 school year. Student started the school year \*\*\* classes, including \*\*\* classes in \*\*\*.<sup>45</sup> Student struggled in the \*\*\* classes in Student's first semester, so in the second semester of the school year Student changed to regular, mainstream \*\*\* classes.<sup>46</sup>

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<sup>39</sup> *Id.* at 7.

<sup>40</sup> *Id.* at 11.

<sup>41</sup> *Id.* at 22-3.

<sup>42</sup> *Id.* at 23.

<sup>43</sup> *Id.*

<sup>44</sup> RE-2 at 29.

<sup>45</sup> RE-20 at 1; Tr. at 80.

<sup>46</sup> Tr. at 82.

32. Student finished the year with \*\*\* grades ranging from 92-100 in Student's other \*\*\* classes.<sup>47</sup> Student's grades were similar in the 2018-19 school year to what they were in past years.<sup>48</sup> Student also passed all of Student's STAAR exams.<sup>49</sup>
33. The District provided Student's parent with reports about Student's progress toward Student's IEP goals every nine weeks.<sup>50</sup> Student's special education monitoring teacher was responsible for collecting that data. She was also responsible for making sure teachers implemented Student's IEP. To that end, she met regularly with both Student and Student's teachers to ensure all accommodations were provided to Student.<sup>51</sup> Student made progress toward Student's three IEP goals throughout the school year. Student was on pace to meet Student's annual IEP goals by May 2019 at the time the Complaint was filed.<sup>52</sup>
34. Student's biggest educational deficits are in organization and memory.<sup>53</sup> Student began the school year with a number of accommodations focused on helping Student with deficits in those areas. These included reminders to turn in assignments and remain on task, using memory strategies, individual testing in a counselor's suite to avoid distractions, removing time limits wherever possible, and a number of other strategies.<sup>54</sup> The District also provided a Support Facilitator to check in with Student at the beginning of each class and five minutes before the end of each class.<sup>55</sup>
35. The accommodations recommended in the FIE and listed in the IEP were implemented in the fall of 2018.<sup>56</sup> For instance, Student completed all of Student's testing in the counselor's suite, a private place as recommended in the FIE and provided in the IEP.<sup>57</sup> The District also provided Student a planner so Student could write down Student's activities and deadlines.<sup>58</sup> Student's tests were untimed to the extent that was possible.<sup>59</sup>
36. A special education monitoring teacher, the same teacher responsible for preparing Student's progress reports, checked frequently with Student's teachers to ensure all

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<sup>47</sup> RE-20 at 2.

<sup>48</sup> Tr. at 83.

<sup>49</sup> RE-16.

<sup>50</sup> RE-32; Tr. at 200.

<sup>51</sup> Tr. at 199-201.

<sup>52</sup> RE-18; RE-20; Tr. at 148.

<sup>53</sup> Tr. at 125.

<sup>54</sup> RE-2 at 3.

<sup>55</sup> *Id.* at 11.

<sup>56</sup> Tr. at 69.

<sup>57</sup> Tr. at 237.

<sup>58</sup> Tr. at 226.

<sup>59</sup> Tr. at 251.

accommodations were appropriately provided.<sup>60</sup> However, Student continued to struggle with remembering to do Student's homework and turn in assignments, particularly in Student's \*\*\* classes.

37. All teachers and staff who worked with Student during the school year were appropriately certified and credentialed.<sup>61</sup> District staff tried several different strategies to address the issues with remembering to do assignments in addition to those listed in Student's accommodations in the IEP. For example, the initial IEP called for Student to use a planner to record Student's upcoming assignments. However, early in the 2018-19 school year, it became clear that was not working.<sup>62</sup>
38. Once District staff realized the planner listed as an accommodation in Student's IEP was not working, staff members began placing sticky notes in Student's planner to remind Student to do the work. Student frequently lost the sticky notes, so the method proved ineffective.<sup>63</sup> Eventually, staff members started sending \*\*\* an email at the end of each day \*\*\* what Student needed to do to prepare for the next school day.<sup>64</sup> That was the method \*\*\* Student's mother requested and preferred.<sup>65</sup> The District also sent Student's mother daily emails about any assignments Student was missing.<sup>66</sup>
39. Student participated in several extracurricular activities through the District during the 2018-19 school year. Student was \*\*\*.<sup>67</sup>
40. In \*\*\*, Student has received "top scores" for Student's ability \*\*\*. Student not only excels \*\*\*, but Student also uses \*\*\* as an opportunity to make friends \*\*\*.<sup>68</sup>
41. Student's \*\*\* participation required Student to \*\*\*.<sup>69</sup>

### **The Three Fall 2018 ARD Committee meetings**

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<sup>60</sup> Tr. at 198-99

<sup>61</sup> RE-33.

<sup>62</sup> Tr. at 226.

<sup>63</sup> Tr. at 181.

<sup>64</sup> Tr. at 126.

<sup>65</sup> Tr. at 182.

<sup>66</sup> Tr. at 186.

<sup>67</sup> Tr. at 45, 176.

<sup>68</sup> Tr. at 170-71.

<sup>69</sup> Tr. at 178-79.

42. On October \*\*\*, 2018, the District convened an ARD Committee meeting to address Student's ongoing issues with remembering to turn in assignments. Student was present and Student's mother participated by telephone.
43. The District explained a Support Facilitator checked in with Student during the first five minutes of class and five minutes before a class ends to ensure smooth transitions from class-to-class. This was consistent with the accommodation the District agreed to provide at the May \*\*\*, 2018 ARD Committee meeting which ended in consensus.<sup>70</sup>
44. The Support Facilitator is certified as an Instructional Aide II by the Texas State Board for Educator Certification.<sup>71</sup> Student's parent requested that, instead of a Support Facilitator, a certified special education teacher provide those check-ins. The meeting ended in disagreement over that issue.<sup>72</sup>
45. The ARD Committee reconvened on October \*\*\*, 2018. The District agreed to provide a certified general education teacher instead of the Support Facilitator to do the check-ins with Student. The ARD Committee also updated Student's accommodations to reflect, as requested by Student and Student's parent, that the District would provide a daily email to Student reminding Student to complete and turn in Student's work.
46. Additionally, the District assigned a certified special education co-teacher to meet with Student one-on-one for 30 minutes per day during \*\*\* to review Student's assignments. \*\*\* is the District's time for direct intervention with students who require it. It falls in the middle of the school day.<sup>73</sup> Student did not like being singled out in that way. In November, Student asked \*\*\* not to have \*\*\* anymore. The District eventually stopped offering \*\*\* to Student after Student requested not to have it.<sup>74</sup>
47. The October \*\*\*, 2018 meeting did not end in consensus. Student's parent did not feel the Support Facilitator was correctly logging the time spent with Student at the beginning and end of class, claiming instead that the Support Facilitator "doctored" the daily logs. She also did not feel the progress reports were accurate, since they showed Student was making progress toward Student's IEP goals even though Student was struggling in Student's \*\*\* classes.<sup>75</sup>
48. The District conducted an internal investigation after the ARD Committee meeting and determined that the Support Facilitator was logging the time with fidelity.<sup>76</sup> As for the

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<sup>70</sup> RE-3 at 19; RE-2 at 11.

<sup>71</sup> RE-33 at 1.

<sup>72</sup> RE-3 at 19.

<sup>73</sup> Tr. at 78.

<sup>74</sup> Tr. at 111-12.

<sup>75</sup> RE-3 at 20; Tr. at 78.

<sup>76</sup> Tr. at 69-75.

progress reports, the progress Student showed in Student's progress reports was based on progress toward Student's IEP goals and was not necessarily connected to Student's grades in Student's \*\*\* classes.<sup>77</sup>

49. Student's parent also asserted that a certified special education teacher should be the one providing the check-ins at the beginning and end of class with Student instead of a general education teacher.<sup>78</sup> The District stated a general education teacher could provide the check-ins with more effectiveness, because the general education teachers had knowledge of the subject content that special education teachers do not possess.<sup>79</sup>
50. The ARD Committee reconvened again on December \*\*\*, 2018, in order to review Student's progress during the first semester. Student was having significant difficulty in Student's \*\*\* classes. Those \*\*\* classes were also causing Student's anxiety. Because of the intensity of those classes, once Student forgot to do some assignments and fell behind the others, the work "snowballed" and increased Student's anxiety as Student tried to catch up with the rest of the class.<sup>80</sup>
51. Student's parent had concerns that Student needed increased counseling due to Student's growing anxiety. Student's parent reported that Student's private counselor recommended Student receive counseling as a related service. The District agreed to do an assessment for counseling as a related service.<sup>81</sup>
52. Student's teachers recommended Student be taken out of Student's \*\*\* classes and placed in regular, mainstream classes instead to decrease Student's anxiety and allow Student to be successful. Student's parent disagreed, stating that Student could remain in Student's \*\*\* classes if the District assigned a certified special education teacher instead of a general education teacher to provide Student's check-ins during class.
53. The December \*\*\*, 2018 ARD Committee meeting ended in non-consensus.<sup>82</sup> A week after the meeting, Petitioner filed the Complaint.

## VII. DISCUSSION

### A. Burden of Proof

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<sup>77</sup> Tr. at 221.

<sup>78</sup> Tr. at 76.

<sup>79</sup> Tr. at 80, 201-02.

<sup>80</sup> Tr. at 246.

<sup>81</sup> RE-4 at 2.

<sup>82</sup> RE-4 at 3.

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.3d 127, 131 (5th Cir. 1993). 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). Therefore, the burden of proof in this case is on Petitioner. *Schaffer*, 546 U.S. at 62.

**B. Whether the District's 2018 FIE complied with the IDEA**

The District conducted an initial FIE of Student in the spring of 2018. Petitioner does not dispute that the District complied with its “child find” requirement and the timelines associated with beginning and completing its FIE. Petitioner instead states that the FIE itself did not comply with the IDEA.

In an initial FIE, school districts must test students in all areas of suspected disability. 20 U.S.C. § 1414(b)(3)(B). A disability is “suspected” when a school district is on notice that a student has displayed symptoms of that disability. *Timothy O. v. Pasa Robles Unified Sch. Dist.*, 822 F.3d 1105, 1119 (9th Cir. 2016).

An FIE must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, to determine whether the child qualifies for special education and the content of the child's IEP. 34 C.F.R. § 300.304(b)(1). It should use technically sound instruments of evaluation to assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 34 C.F.R. § 300.304(b)(3). It must also be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C.F.R. § 300.304(c)(6).

The FIE in this case used a wide variety of assessment tools: five in-person observations of Student across four different days; interviews with Student, Student’s parent, and Student’s teachers; surveys completed by Student, Student’s parent, and Student’s teachers; several formal,

peer-reviewed assessment tools to test for intelligence, executive functioning, psychological functioning, and other areas in which the District suspected Student might have deficits; and an FBA. It found Student eligible for special education and related services under three categories of disability. It also prescribed recommendations for the IEP.

Perhaps most significantly, the IEE evaluator chosen by Petitioner, using different formal assessment instruments than the District had used, confirmed the FIE's key findings and characterized the FIE as "appropriate" and "thorough." The IEE evaluator also found the IEP developed by the District from the FIE to be "appropriate." The FIE complied with the IDEA.

Petitioner argues that the District's FIE differed from the FIE for which she signed consent. Petitioner therefore argues that the consent was invalid and the FIE did not comply with federal law.<sup>83</sup> That argument is not supported by evidence in the record. The consent form signed by the parent stated the FIE would involve cognitive and achievement testing, executive functioning evaluation, psychological evaluation, and a Functional Behavioral Assessment. The FIE provided all of the agreed-upon tests and complied with the IDEA. Petitioner did not provide evidence of any agreements made separately from the consent form which the District might have violated.

### **C. Duty to Provide a FAPE**

Petitioner has asserted that the 2018-19 IEP developed and implemented by Respondent failed to provide a FAPE to Petitioner. The IDEA requires states like Texas which receive federal funding to make a FAPE available to all students with disabilities residing in the state. 20 U.S.C. § 1412(a)(1)(A); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 232 (2009).

In order for a student to receive a FAPE, a school district must provide the student an educational program reasonably calculated to enable the student to make progress appropriate in light of the student's circumstances. *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 988, 1001 (2017). The program need not be the best possible program, but rather one specifically designed to meet the child's unique needs, supported by services that will permit the child to benefit from

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<sup>83</sup> Petitioner's Closing Argument, at 5.

the instruction. *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 810 (5th Cir. 2003). The student's progress must be something more than mere *de minimis* progress. *Endrew F.*, 137 S.Ct. at 1000. Every child should have the opportunity to meet appropriately challenging objectives. *Id.* at 992.

The Fifth Circuit has articulated a four-factor test to determine whether a school district's program meets IDEA requirements. Even after the Supreme Court's decision in *Endrew F.*, the test to determine whether a school district has provided a FAPE remains the four-factor test outlined by the Fifth Circuit. *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018). Those factors are:

- Whether the program is individualized on the basis of the student's assessments and performance;
- Whether the program is administered in the LRE;
- Whether the services are provided in a coordinated, collaborative manner by the "key" stakeholders; and,
- Whether positive academic and non-academic benefits are demonstrated.

*Cypress-Fairbanks Ind. 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. *Michael Z.*, 580 F. 3d at 294. Application of the four factors to the evidence in this case supports the conclusion that the District's program was appropriate.

### **1. Whether the Program Is Individualized on the basis of assessment and performance**

A program is sufficiently individualized when multiple assessments are conducted of the student, the ARD committee considers these assessments along with parent and teacher input in developing the student's IEP, accommodations and modifications are made based on the student's



test performance and parent input, and the IEP goals are revised based on new assessment data. *Candi M. v. Riesel Indep. Sch. Dist.*, 379 F.Supp.3d 570, 597 (W.D. Tex. 2019).

In this case, Student's initial FIE was completed and adopted by a unanimous ARD Committee in May 2018. The FIE was "thorough" and included in it an FBA and multiple recommendations for Student's IEP. The IEP incorporated the suggestions of the FIE, providing the recommended accommodations and services as well as a BIP to help with Student's organizational abilities and tendency to engage in off-task behaviors.

During the fall of 2018, after Student began struggling with increased anxiety and was struggling in Student's \*\*\* classes, the District convened three ARD Committee meetings to address the issues. The District removed Student from the classes that were causing Student the most stress and anxiety while still offering Student a "challenging" academic program in which Student could make progress. *See Andrew F.*, 137 S.Ct. at 993. The District also tried to provide Student 30 minutes per day of one-on-one instruction during \*\*\* in response to Student's difficulty turning in assignments in the fall of 2018. The District's program was individualized to meet Student's unique needs.

Further, the District fully implemented Student's IEP. To prevail on a claim under the IDEA, the party challenging implementation of the IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school district failed to implement substantial or significant provisions of the IEP. This approach affords school districts some flexibility in implementing IEPs while also holding them accountable for material failures and for providing each student with a disability a FAPE. *Houston Ind. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000). Failure to implement a material portion of an IEP violates the IDEA, but failure to perfectly execute an IEP does not amount to denial of FAPE. *See Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. T.H.*, 642 F.3d 478, 484 (4th Cir. 2011).

In this case, the District implemented the IEP appropriately. Petitioner argues Student was responsible for "implement[ing] Student's own accommodations," because Student had to

remember to check Student's email on a daily basis for reminders to complete Student's work.<sup>84</sup> However, the email accommodation was Student and Student's parent's suggestion after a planner had proven ineffective in reminding Student to complete Student's work. The District then tried placing sticky notes inside the planner, but that did not work either. So Student and Student's parent requested the emails during an October ARD Committee meeting and the District agreed to implement the suggestion. It was an accommodation listed in the IEP at Student's suggestion and it was implemented by general education staff, as the IEP stated it would be.

Petitioner also suggested the log books showing the accommodations were implemented had been "doctored" and the progress reports were fabricated. The District conducted an internal investigation of the allegation after it was first raised in October 2018 and found the allegation unsubstantiated. A District staff member was specifically assigned to ensure all of the IEP accommodations and services were implemented with fidelity. That staff member also collected the data and formulated the progress reports. That staff member frequently communicated with staff and checked on Student to ensure the IEP was implemented. Petitioner did not present sufficient evidence to show the District was not implementing the IEP.

## **2. Least Restrictive Environment**

Second, the District's program was delivered in the LRE. The IDEA requires that students with disabilities be educated in general education settings with students without disabilities to the maximum extent appropriate. The IDEA has a strong preference in favor of educating students with disabilities in general education settings with their peers who do not have disabilities. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. at 176, 188-89 (1982). However, if a school district cannot satisfactorily educate a student with a disability in the general education setting, then the school district may remove the student from the general education setting and place them in special education classes. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a)(1)(2)(i-ii). This requirement of the IDEA is referred to as a school district's

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<sup>84</sup> Petitioner's Closing Argument, at 9.

obligation to educate a student in the LRE. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

To determine whether a school district is educating a student with a disability in the LRE, a hearing officer must consider:

- 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.*

Student spent all Student's time in a mainstream, general education environment. Student benefited from that environment and neither Petitioner nor Respondent felt Student needed a more restrictive placement.

Petitioner argues that removing Student from Student's \*\*\* classes violated the requirement to educate Student in Student's LRE.<sup>85</sup> The District removed Student from those classes as a way to help Student's anxiety. The District placed Student in mainstream, general education sections of those classes. The LRE requirement does not mandate more than that. *See Id.* The IEE confirmed Student needed to be removed from those sections due to the anxiety those classes caused. The District educated Student in Student's LRE.

### **3. Whether Services Were Provided in a Collaborative Manner**

Third, the services were provided in a collaborative manner. The IDEA contemplates a collaborative process between the school district and the 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

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<sup>85</sup> Petitioner's Closing Argument, at 7.

(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.*

In this case, Student's parent, herself a diagnostician, agreed with the May \*\*\*, 2018 ARD Committee meeting where the FIE was accepted and Student was found eligible for special education and related services. The District held three ARD Committee meetings in the fall of 2018 in order to take Student's parent's suggestions regarding the IEP. Student's parent participated in each meeting. No educational decisions were made without Student's parent's input.

The District adopted several suggestions from Student and Student's parent. For instance, at Student's parent's suggestion, the District stopped using the Support Facilitator to provide the check-ins for Student at the beginning and end of each of Student's classes. At Student's suggestion, the District stopped assigning Student to \*\*\* for support from a certified special education teacher. At Student and Student's parent's suggestion, the District started emailing daily reminders to Student instead of using sticky notes. The District also emailed Student's parent daily to let Student know about assignments Student was missing.

While Student's parent disagreed with several of the decisions made during the fall of 2018, her input was always considered and often adopted. She and the District maintained a collaborative relationship.

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

Fourth, Student received both academic and non-academic benefit from Student's program. 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, 812-13 (5th Cir. 2012). Benefit should not be measured in relation

to one's peers, but rather should be reviewed with respect to the individual student. *Bobby R.*, 200 F.3d at 349.

Academically, Student demonstrated educational progress by maintaining excellent grades in all Student's classes once Student was removed from the \*\*\* sections of three core courses and passing all standardized tests. Student's grades have been similar throughout Student's academic career and have demonstrated steady progress. Non-academically, Student has taken advantage of several extracurricular activities, including \*\*\*. Student has been successful and thrived in those activities. \*\*\* has given Student not only the opportunity to excel \*\*\*, but also to make friends with Student's fellow \*\*\*. *See Marc V. v. North East Indep. Sch. Dist.*, 455 F.Supp.2d 577, 596 (W.D. Tex. 2006) (noting making friends is a key non-academic benefit). Student has also learned the responsibility of \*\*\* through Student's involvement in \*\*\*.

## 5. Conclusion

Student received an education based on assessment and input from key stakeholders in Student's LRE and derived both academic and non-academic benefit from it. Therefore, the District provided Student a FAPE. *See Michael F.*, 118 F.3d at 253.

### D. Whether Respondent failed to provide accurate progress reports

Petitioner contends the District did not provide accurate progress reports, claiming that the District "doctored" the daily logs and that the progress reports did not accurately reflect Student's progress toward Student's IEP goals.<sup>86</sup> The District provided progress reports every nine weeks, examining Student's progress toward each of the IEP goals. Petitioner claims that, even though Student was struggling in Student's \*\*\* classes, the progress reports showed Student was making progress toward Student's IEP goals and were therefore inaccurate.<sup>87</sup> However, only one of the IEP goals dealt directly with Student's grades. Student passed all of Student's classes for the

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<sup>86</sup> Petitioner's Closing Argument, at 8.

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school year and thus met that goal. The other goals dealt with Student's organizational abilities and were independent of Student's grades. The District assigned a staff member whose job was to collect the data in those reports and ensure their accuracy. The progress reports accurately showed progress toward those goals and indicated Student was on pace to meet them during the 2018-19 school year.

Petitioner did not present sufficient evidence the progress reports or daily logs were inaccurate. The District conducted its own investigation after Student's parent raised the concern that they had been "doctored" and concluded they had not been. Petitioner did not present sufficient evidence to rebut that conclusion.

**E. Whether Respondent failed to provide sufficient related services to provide Student a FAPE.**

Petitioner contends the District did not provide sufficient related services to allow Student to receive a FAPE. Specifically, Petitioner asserts the District should have provided counseling as a related service for Student.<sup>88</sup>

The term "related services" refers to such developmental, corrective, and other supportive service, including counseling, as may be required to assist a child with a disability to benefit from special education. 20 U.S.C. § 1401(a)(17). Only those related services necessary to allow a child with a disability to benefit from special education need to be provided. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 894 (1984).

Petitioner argues that the related service Student required, but was not provided, was counseling as a related service. Neither the FIE nor the IEE recommended counseling as a related service. The ARD Committee, including Student's parent, did not see the need for counseling as a related service at the May \*\*\*, 2018 ARD Committee meeting.

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<sup>88</sup> Petitioner's Closing Argument, at 6-7.

In the fall of 2018, Student's parent and the District agreed the District should evaluate Student's need for counseling as a related service. The District agreed at the December 2018 ARD Committee meeting to provide a counseling evaluation. Petitioner filed the Complaint one week after the meeting. There is not enough evidence that counseling was needed for Student to receive a FAPE at the time the initial IEP was crafted in May 2018. Student received a FAPE from the District without counseling as a related service.

**F. Whether Respondent failed to use qualified personnel to work with Student.**

Petitioner alleges that a certified special education teacher should have been providing Student's check-ins at the beginning of each class and five minutes before each class ended. Instead, the District provided first a Support Facilitator and later a certified general education teacher to provide the check-ins.

The IDEA requires that all personnel who provide special education and related services are qualified to do so. 34 C.F.R. § 300.156; 19 Tex. Admin. Code § 89.1131. Petitioner did not present evidence that any staff members who worked with Student were not qualified to do so. Rather, she presented evidence that she preferred a certified special education teacher provide the check-ins.

The District is not required under the IDEA to defer to a demand to address a child's needs in the parent's preferred way. *Wood v. Katy Indep. Sch. Dist.*, 163 F.Supp.3d 396, 418 (S.D. Tex. 2015). In this case, the Support Facilitator and general education teacher were capable of providing Student's check-ins. They did so with fidelity as stated in the IEP. Petitioner did not meet the burden of establishing that unqualified personnel worked with Student.

### **VIII. CONCLUSIONS OF LAW**

1. The District's 2018 FIE complied with the IDEA. 20 U.S.C. § 1414(b)(3)(B).
2. The District provided Student a sufficiently challenging curriculum to provide Student a FAPE. Student's education was provided in Student's LRE while appropriately


collaborating with Student's parent and other key stakeholders. 20 U.S.C. § 1412(a)(1)(A); *T.A.*, 557 U.S. at 232 (2009); *Michael F.*, 118 F.3d at 253.

3. The District provided accurate and timely progress reports to Student's parent.
4. The District provided sufficient related services to allow Student to receive a FAPE. 20 U.S.C. § 1401(a)(17); *Tatro*, 468 U.S. at 494.
5. The District implemented Student's IEP with fidelity. *Bobby R.*, 200 F.3d at 349.
6. The District relied only on qualified personnel to work with Student. 34 C.F.R. § 300.156; 19 Tex. Admin. Code § 89.1131.

### IX. ORDERS

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

**SIGNED October 31, 2019.**

  
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**Ian Spechler**  
**Special Education Hearing Officer**  
**For the State of Texas**

### X. NOTICE TO PARTIES

The Decision of the Hearing Officer 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(n).