

**DOCKET NO. 293-SE-0720**

<b>STUDENT, B/N/F PARENT and PARENT,</b>	§	<b>BEFORE A SPECIAL EDUCATION</b>
<b>Petitioner</b>	§	
	§	
v.	§	<b>HEARING OFFICER FOR</b>
	§	
<b>KATY 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**

Petitioner, Student b/n/f Parent and Parent (Petitioner or Student), brings this action against the Katy Independent School District (Respondent or the School District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400-1482, and its implementing state and federal regulations. The issues presented in this case are whether the School District denied Student a Free, Appropriate Public Education (FAPE), failed its Child Find duty, and impeded Petitioner’s right to meaningful participation.

The Hearing Officer concludes the School District provided Student a FAPE and did not impede Petitioner’s right to meaningful participation.

**II. PROCEDURAL HISTORY**

**A. Legal Representation**

Student was represented throughout this litigation by Student’s legal counsel John A. Robinson, Jr., with J.A. Robinson II & Associates. The School District was represented throughout this litigation by its general counsel Alaina Smith and Kevin Christiansen.

### III. DUE PROCESS HEARING

The due process hearing was conducted via the Zoom videoconference platform on November 3-5, 2020. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Petitioner's counsel, John A. Robinson, Jr. In addition, \*\*\* and \*\*\*, parents (Parents), attended the hearing.

Respondent continued to be represented by its general counsel Alaina Smith and Kevin Christiansen. In addition, \*\*\*, the Executive Director of Special Education for the School District, attended the hearing as the party representative. Both parties timely filed written closing briefs. The Hearing Officer's Decision is due on December 31, 2020.

### IV. ISSUES

#### A. Petitioner's Issues

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

1. FAPE: Whether the School District failed to provide Student with a Free Appropriate Public Education (FAPE) during the 2019-2020 school year, including:
  - a. IEP: Whether Student's IEP (i) was not appropriate; (ii) was not individualized to address Student's specific needs; (iii) did not include Assistive Technology (AT) devices and services and other accommodations; (iv) did not provide a meaningful benefit; and (v) was not properly implemented.
  - b. COLLABORATIVE: Whether Student's services were provided in a coordinated, collaborative manner by key stakeholders.
2. IDENTIFICATION: Whether the School District failed to timely identify Student as a student with a disability in need of special education instruction and related services.
3. PROCEDURAL: Whether the School District impeded Student's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student; or caused a deprivation of educational benefit.

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

The School District generally denies the allegations in Petitioner's Complaint with respect to Petitioner's IDEA claims, asserts that it provided Student with FAPE during the relevant time period, and contends Petitioner is not entitled to any of its requested relief.

The School District raises the remaining additional legal issue:

1. STATUTE OF LIMITATIONS: Whether any of Student's IDEA claims that accrued prior to July 6, 2019, should be dismissed as outside the one-year statute of limitations rule as applied in Texas.

**V. REQUESTED RELIEF****A. Petitioner's Requested Relief**

Petitioner requests the following items of relief:

1. The School District fund private placement for Student.
2. The School District reimburse parents for private tutoring for Student.
3. The School District provide Student with compensatory education for the time Student was denied a FAPE. Compensatory education hours to be delivered by a certified special education teacher mutually agreed upon by the School District and Petitioner parents, including, supplemental support in dyslexia, reading fluency, and spelling.
4. The School District reimburse parents for the cost of any third party evaluations and assessments for Student; cost of visits to and from third party evaluations and assessments; cost of any out-of-pocket expenses for Student's testing, tutoring, and therapy; and mileage for those items listed.
5. The School District reimburse parents for attorney's fees and costs.
6. All remedies available to Petitioner as a matter of law or deemed necessary by the Hearing Officer.

**B. Respondent's Requested Relief**

1. An order denying Petitioner any of Petitioner's requested relief.

**VI. FINDINGS OF FACT****\*\*\* through \*\*\* Grade school years**

1. Student enrolled in the School District in \*\*\*. Student received Response to Intervention (RTI) services during \*\*\* and \*\*\* grade for targeted reading intervention. Parent requested a Special Education evaluation on December \*\*\*, 2016, during Student's \*\*\* grade year. Parent signed consent for the evaluation on January \*\*\*, 2017.<sup>1</sup>
2. The School District completed a Full and Individual Evaluation (FIE) of Student on March \*\*\*, 2017. Student's cognitive functioning was within the average to high average range for Student's age. Student's overall reading comprehension fell within normal limits for Student's age. Student exhibited a weakness in reading fluency; however, Student was reading on grade level expectation at the time. Student scored within the normal range on the oral reading, reading fluency subtest.<sup>2</sup>
3. The FIE determined Student did not meet the educational criteria as a student with a Specific Learning Disability (SLD) because Student did not demonstrate deficits in cognitive processing or in reading words in isolation.<sup>3</sup>
4. The Admission, Review, and Dismissal (ARD) Committee met on March \*\*\*, 2017. The School District determined Student did not qualify for special education services at that time because Student scored in the normal range on one reading fluency test and below normal on another reading fluency test. Additionally, Student was currently on reading level and had \*\*\* in reading. The discrepancy between Student's cognitive and achievement levels was not great enough. Parent disagreed with the evaluation. Prior Written Notice was mailed on March \*\*\*, 2017. Parent received and signed acknowledging receipt of Procedural Safeguards on March \*\*\*, 2017.<sup>4</sup>
5. On September \*\*\*, 2017, a private clinical psychologist and Licensed Specialist in School Psychology (LSSP) performed an Independent Educational Evaluation (IEE) on Student. The private evaluator found Student's intellectual ability was within the above average

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<sup>1</sup> Joint Exhibit (JE) 8 at 1; JE 1; JE 2; JE 3; JE 4 at 1.

<sup>2</sup> JE 8 at 7, 9-10, 13, 15.

<sup>3</sup> JE 8 at 14-15.

<sup>4</sup> JE 16 at 2; JE 11; JE 9.

range and determined Student met the criteria for special education services under the disability category of SLD in the areas of basic reading, reading comprehension, and reading fluency.<sup>5</sup>

6. On October \*\*\*, 2017, the ARD Committee met to discuss the IEE. The School District rejected the IEE due to discrepancies between it and the School District FIE provided to Student. The School District proposed further evaluation for cognitive and achievement areas related to reading. Parent disagreed with the ARD Committee and wanted the IEE accepted by the Committee. The School District agreed to complete the further evaluations quicker than the normal 30 day timeline.<sup>6</sup>
7. The School District completed another FIE on November \*\*\*, 2017. The FIE determined Student had a specific weakness in naming facility (ability to rapidly call objects by their names) and an academic deficit in reading fluency and met the criteria for SLD in the area of reading fluency. Based on Student's difficulties in naming facility and reading words in isolation it was determined Student met the criteria for a student with dyslexia. The FIE recommended Student needed accommodations in the classroom; have Student practice \*\*\*; use a structured step-by-step phonics instruction program that focuses on enhancing automatic; and rapid whole word recognition skills.<sup>7</sup>
8. Dyslexia is a term used to describe an SLD in basic reading skills and/or reading fluency. Characteristics of dyslexia include difficulties with: identifying and recalling the names of alphabet letters, numbers, and familiar objects; mapping sounds to letters; blending, segmenting, and manipulating sounds in words; reading words in isolation or reading unknown words; reading fluency; and spelling.<sup>8</sup>
9. The ARD Committee met on November \*\*\*, 2017 and developed an IEP for Student. Student was reading at a Fountas and Pinnell (F&P) level \*\*\*, which was \*\*\* levels below \*\*\* grade at the time. F&P is an individualized reading inventory assessment. To determine a student's F&P level, a student reads an F&P leveled reader book out loud with a teacher. The teacher monitors rate, accuracy, expression, errors, and self-correction. Additionally, a student answers comprehension questions. The test provides a level, either instructional, independent, or frustration level.<sup>9</sup>
10. The November 2017 IEP included two reading goals for Student, Student was educated in the general education classroom with supplementary aids and services. The IEP included the following accommodations: extended time in reading; Q&A read; accommodated word

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<sup>5</sup> JE 13 at 1-5.

<sup>6</sup> JE 16.

<sup>7</sup> JE 19 at 7, 8.

<sup>8</sup> Respondent's Exhibit (RE) 27 at 3.

<sup>9</sup> JE 21; Transcript (TR) at 150-51.

study assessment; accommodated reading rubric; and no spelling grade on writing rubrics.<sup>10</sup>

11. The School District adopted an IEP amendment on May \*\*\*, 2018, which updated Student's Present Levels of Academic Achievement and Functional Performance (PLAAFP). Parent was in agreement with the amendment. At the end of \*\*\* grade, Student read instructionally on grade level at \*\*\* correct words per minute (wpm). Student showed improvement on blend patterns, vocabulary, spelling, and text fluency with a slight decrease in comprehension.<sup>11</sup>

### **\*\*\* and \*\*\* Grade school years**

12. The ARD Committee met on October \*\*\*, 2018 for Student's annual review. Student read at an F&P Level \*\*\*, which was \*\*\* grade levels above the current grade level expectation. Student's fluency was below grade level at \*\*\* wpm. Student received dyslexia intervention services through the School District's general education dyslexia interventionist. Student's comprehension was on an end of \*\*\* grade level. Student's IEP included two goals for reading. It included classroom accommodations and STAAR testing accommodations. Student was educated in the general education setting.<sup>12</sup>
13. In October 2018, Student's reading fluency was at \*\*\* words per minute per Student's annual IEP. Student's \*\*\* grade reading IEP goal for the 2018-2019 school year was to read \*\*\* words per minute by the end of the year. In January 2019, Student's dyslexia monitoring noted Student read at \*\*\* words per minute and in March Student read at \*\*\* words per minute. This discrepancy indicates Student is capable of reading at Student's IEP goal of \*\*\* words per minute; however, when Student stops to use Student's decoding strategies it impacts Student's rate. At the end of \*\*\* grade, Student was reading at \*\*\* correct words per minute.<sup>13</sup>
14. In October 2018, \*\*\* grade, Student read at level \*\*\* with \*\*\*% accuracy and by the end of the year Student read at level \*\*\* with \*\*\* % accuracy. This exceeded Student's \*\*\* grade case manager's expectations for moving up reading levels. Student made progress as a whole in reading. Even though wpm may have decreased, Student increased Student's reading level, Student comprehended what Student read, and Student read in more than one-word phrases and with expression.<sup>14</sup>
15. Student received all As on Student's \*\*\* grade report card. Student passed all of Student's District Learning Assessments (DLA) and Campus Based Assessments (CBA) in the 2018-

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<sup>10</sup> JE 21.

<sup>11</sup> JE 22; JE 61C at 4.

<sup>12</sup> RE 32 at 1, 3.

<sup>13</sup> RE 32 at 3, 5; Petitioner's Exhibit (PE) 54 at 1; JE 62D at 5.

<sup>14</sup> JE 53C at 2; TR 2 at 471-72.

- 19 school year. The rigor for DLAs and CBAs is high and these assessments are on par with the State of Texas Assessment of Academic Readiness (STAAR) testing. Student was on grade level for the F&P end of year assessment.<sup>15</sup>
16. Student mastered grade level on STAAR testing in \*\*\* grade for \*\*\*. Student scored above the state, district, and campus average on the test. Student's STAAR test was accommodated. For \*\*\*, however, the \*\*\*. Student's STAAR accommodations included \*\*\*. \*\*\* accommodations were allowed in the \*\*\* portion.<sup>16</sup>
17. On a Beginning of the Year Jerry Johns assessment Student's \*\*\* grade year, Student read on an independent level \*\*\* grade on \*\*\* at \*\*\* grade level. This remained the same as the assessment at the end of Student's \*\*\* grade year. The Jerry Johns Basic Reading Inventory measures fluency and comprehension. Student showed weakness in \*\*\*; however, it increased from the previous year. Student's beginning of year F&P assessment was on grade level.<sup>17</sup>
18. The ARD Committee met on October \*\*\*, 2019 for Student's annual review. Student was reading at an F&P level \*\*\*, which was on target for \*\*\* grade. When Student read a "cold" read Student's wpm were \*\*\* and on a practice read Student read \*\*\* wpm. Student averaged \*\*\* wpm on cold reads and \*\*\* wpm on practice reads of \*\*\* grade text. A School District instructional coach assessed Student's fluency and Student scored \*\*\* wpm on a cold read of level \*\*\* text and \*\*\* wpm on practice, level \*\*\* text.<sup>18</sup>
19. Student's October 2019 IEP included two goals in reading and one in \*\*\*. The IEP included classroom accommodations as well as STAAR accommodations. Parents attended the ARD meeting; they were happy with Student's progress in all areas except fluency. The ARD meeting was tabled because parent requested the School District's instructional officer attend and for the School District to gather additional data.<sup>19</sup>
20. The ARD Committee used the 2017 School District FIE, information from School District personnel, Student communication needs, Student's achievement from the previous year's IEP goals, DLAs, and parent input to develop the IEP. Student's goals were implemented by Student's general education teachers, special education staff, and the dyslexia teacher. Evaluation of progress was monitored by data collection, observations, and teacher reports/feedback.<sup>20</sup>

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<sup>15</sup> JE 55D at 6; JE 28 at 4; RE 30 at 1; TR at 600-01; RE 30 at 2.

<sup>16</sup> RE 30 at 2; JE 28 at 11.

<sup>17</sup> JE 63B at 3; TR at 793; RE 30 at 2.

<sup>18</sup> JE 53B at 5.

<sup>19</sup> JE 28.

<sup>20</sup> JE 28 at 1, 4, 6, 18-22.

21. The ARD Committee reconvened on November \*\*\*, 2019. Parent expressed her concerns regarding the \*\*\* goal, the oral administration accommodation, and the measurability of Student's goals. The instructional officer indicated the goals were measurable and trackable. The plan for \*\*\* was to evaluate data in January. Parent indicated verbal agreement, but did not sign until she had the opportunity to review the document. The signature page was returned on November \*\*\*, 2019, with "agree" marked; however, she indicated the document does not meet Student's educational needs.<sup>21</sup>
22. The ARD Committee reconvened again on December \*\*\*, 2019, to discuss Parent's concerns regarding Student's IEP. Parent indicated Student did not receive enough services to provide Student support. Additionally, Parent notified the ARD Committee of Student's emotional distress at home and stated school was difficult for Student. The School District offered counseling services for Student. Parent declined until she received recommendations from a private therapist. The School District proposed more in-class support during \*\*\* and parent declined. The ARD Committee asked Parent for suggestions. Parent agreed to the IEP with reservations.<sup>22</sup>
23. In the fall of 2019, Student met expectations in \*\*\*. Student exceeded expectations in \*\*\*. Student did not meet expectations in \*\*\*. On a Jerry Johns assessment, Student scored \*\*\* in \*\*\* and when reading and comprehending \*\*\* grade text with a fluency score of \*\*\* wpm. On Student's most recent Jerry Johns assessment Student read \*\*\* wpm with \*\*\*\*% accuracy on a \*\*\* grade level passage and \*\*\* wpm with \*\*\*\*% accuracy on a \*\*\* grade level passage.<sup>23</sup>
24. A private evaluator (Licensed Psychologist and LSSP) performed a psychoeducational evaluation and psychological evaluation of Student with a finalized report dated January \*\*\*, 2020, the School District received the evaluation in April 2020. The evaluator found Student met the criteria for an SLD in the areas of basic reading and reading fluency. Student had a weakness in auditory processing and long-term storage and retrieval. The evaluator found Student did not qualify for special education services as a student with an emotional disturbance.<sup>24</sup>
25. The evaluator recommended Student receive explicit, systematic, research-based and intense reading instruction individually or in a small group to address basic reading skills and reading fluency. She recommended a balanced literacy approach to reading intervention focused on improving text orthography skills, reading fluency, and \*\*\* and weekly data should be gathered. The School District's dyslexia program, Reading by

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<sup>21</sup> JE 28 at 20, 28.

<sup>22</sup> JE 28 at 22, 28.

<sup>23</sup> JE 28 at 2.

<sup>24</sup> JE 39; JE 44 at 3; JE 39 at 6-7.



Design, is systemic and researched based. The in-class supports targeted fluency and \*\*\* and weekly data was collected on IEP goals.<sup>25</sup>

26. The evaluator recommended oral administration of tests and assignments provided consistently and automatically and if needed, testing should occur individually. Student's October 2019 IEP included oral administration at Student's request and small group administration on all assessments. After the April 2020 ARD Committee meeting, the School District changed oral administration accommodation to regular provision rather than at Student's request.<sup>26</sup>
27. The evaluator recommended the following accommodations: \*\*\*.<sup>27</sup>
28. Student's October 2019 IEP and in-class supports already provided many of the private evaluator's recommendations, including: \*\*\*. The School District noted Student did not need an additional study guide based on Student's current performance and Student did not demonstrate a need for \*\*\*.<sup>28</sup>
29. Student's IEP accommodations were provided as follows: \*\*\*.<sup>29</sup>
30. Additionally, the evaluator recommended an AT evaluation; \*\*\*; and compensatory services. The School District agreed to an AT evaluation at the REED on April \*\*\*, 2020. The current IEP included \*\*\*. The School District determined the data did not support the use of \*\*\* software in all areas because Student performed well with Student's \*\*\* and \*\*\* would be over-accommodating and reduce Student's \*\*\* practice. Additionally, the School District determined Student's data did not support a paraprofessional because Student met or exceeded the performance of Student's peers without this support.<sup>30</sup>
31. A Review of Existing Evaluation Data (REED) was completed and discussed at the revision ARD Committee meeting on April \*\*\*, 2020. The evaluation reviewed School District FIEs, the independent IEE from 2017, teacher and parent information, and school records. The School District was unable to use the 2020 private psychoeducational evaluation because it was provided to the School District the night before the ARD meeting. The ARD Committee agreed further testing was needed, and would occur when in-person instruction resumed in October 2020. The REED determined Student's three year re-evaluation was due and recommended an evaluation in the form of formal cognitive (including \*\*\*) with informal adaptive behavior. The ARD Committee agreed to an AT evaluation in the area of written communication including literacy supports at Parent's

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<sup>25</sup> JE 39 at 7; JE 49 at 3.

<sup>26</sup> JE 39 at 7; JE 49 at 3.

<sup>27</sup> JE 39 at 7.

<sup>28</sup> JE 49 at 3.

<sup>29</sup> TR at 303, 530, 592, 777, 539-40, 533-34, 538, 549.

<sup>30</sup> JE 39 at 7-8; JE 49 at 3.

- request. Additionally, updated norm-referenced achievement testing was included at Parent's request. The ARD Committee agreed to a psychological evaluation due to Parents' concerns over Student's well-being.<sup>31</sup>
32. During the April \*\*\*, 2020 ARD Committee meeting Parent indicated Student was over-accommodated. Parent indicated concern that Student's IEP goals were not individualized and Student did not make progress. The Committee asked Parents what they wanted to see in the IEP. Parents offered no suggestions and mentioned the meeting was to express their concerns. The School District offered to complete the proposed evaluations and adjust Student's goals based on the data gathered. The Committee tabled the ARD meeting.<sup>32</sup>
33. The ARD Committee reconvened on April \*\*\*, 2020 and again on April \*\*\*, 2020. Parents complained Student's \*\*\* goal was not measureable; the School District proposed to change the IEP goal and send an amendment home when the goal is created. The goal was reworded to match the instructional officer's suggestion. Parents shared concerns Student's curriculum was modified. The School District explained all assessment and classroom work provided to Student is on grade level with accommodations as outlined in Student's IEP. Parents shared concerns about Student's fluency fluctuating. The School District discussed the data and Student's growth.<sup>33</sup>
34. The ARD Committee discussed the outside evaluation and revisions to the current IEP were made using the recommendations except for \*\*\*. Parent expressed concerns Student's IEP does not address Student's needs and asked for increased support time. The School District explained the data does not support increased support time. The ARD Committee meeting ended in nonconsensus.<sup>34</sup>
35. On March 19, 2020, the School District ceased in-person instruction due to the Covid-19 pandemic. Students were provided virtual, at-home instruction. Student's March 2020 benchmark for a practice read was to read \*\*\*. Student demonstrated capability at this target level, but did not show consistently at \*\*\*%. Student met the objective \*\*\* times. Student's lowest practice read was \*\*\* wpm and Student's highest was \*\*\* wpm. Student met Student's March 2020 benchmark on Student's \*\*\* goal.<sup>35</sup>
36. Student's March 2020 benchmark for cold reads was \*\*\*. Student demonstrated capability on a cold read to read \*\*\* wpm in a level \*\*\*, but had not shown consistency. Student met the benchmark \*\*\* times. Student's lowest cold read was \*\*\* wpm and Student's highest was \*\*\* wpm. Student consistently lowered Student's errors and Student's self-corrections, which allowed Student to consistently improve Student's overall accuracy

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<sup>31</sup> JE 43.

<sup>32</sup> JE 44 at 4.

<sup>33</sup> JE 44 at 4.

<sup>34</sup> JE 44 at 4-6.

<sup>35</sup> RE 26; TR at 546; JE 53B at 6-8. JE 44 at 1.

- when reading. Most times when Student was close to the goal, but did not achieve it, it was due to self-correction. Student would \*\*\*.<sup>36</sup>
37. The end of year F&P inventory for \*\*\* grade was not completed due to school closure for Covid-19. Additionally, the 2020 STAAR test was cancelled due to Covid-19.<sup>37</sup>
38. Parent or Parents attended each ARD Committee meeting. Additionally, they emailed Student's teachers or school personnel to discuss concerns, request ARD meetings, or to inform them of Student's well-being.<sup>38</sup>
39. The School District conducted an AT evaluation in September 2020. The evaluation made recommendations based on what Student enjoyed using during the evaluation, what Student found helpful, and what will help Student make progress in \*\*\* in the future. It recommended the ARD Committee consider a \*\*\* for Student; \*\*\*; alternatives to Student's current accommodations of \*\*\* as it can be time consuming and lead to frustration; \*\*\* tool in all subject areas when reading for comprehension is required. Student could incorporate this technology using Student's iPad or the \*\*\*.<sup>39</sup>
40. Student's fluency rate fluctuates as expected over different genres and text complicity. Student's silent reading is exceptional and Student is able to comprehend at high levels as compared to Student's non-disabled peers. During assessments, oral reading fluency is typically slower because students know they are being timed and often go back to self-correct.<sup>40</sup>
41. Student's weakness in \*\*\* are typical of a student with dyslexia. Dyslexia intervention helps with \*\*\* by teaching \*\*\*.<sup>41</sup>
42. The goal of fluency is to be a comprehensive reader. Fluency is not limited to reading speed, but encompasses a student reading with expression; in phrases and not just one word at a time. As text becomes more complex, reading rate slows because a student is decoding more and learning more. As a student grows more comfortable in that reading level, reading rate will increase. The ultimate goal of reading is comprehension. Student's fluency did not affect Student's comprehension.<sup>42</sup>
43. Fluency rate can differ between assessments for several reasons. One is the student may be assessed by two different assessors, Student's general education instructor and Student's

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<sup>36</sup> JE 44 at 1.

<sup>37</sup> JE 63A at 2; TR 1 at 48.

<sup>38</sup> PE 19-20, 43-50, 51-52, 57, 60-66. RE 1-22.

<sup>39</sup> JE 51.

<sup>40</sup> JE 44 at 4.

<sup>41</sup> TR at 696, 701.

<sup>42</sup> TR at 471, 480, 527.

dyslexia interventionist. It could be because a student is reading two different passages, the testing environment, or the time of day. Fluency depends on the complexity of the text and a student's interest in the text.<sup>43</sup>

44. The School District collected data from various sources to determine Student's progress. They used classroom observations, discussions between Student's case manager and Student's teachers and discussions with Student's dyslexia interventionist. Data collection occurred twice a week and was compiled into Student's progress reports.<sup>44</sup>
45. The School District used data from Student's F&P assessments, State assessment results, and DLAs to determine if Student was reading at or above grade level. Student's reading comprehension is strong. Student has compensating skills and works hard to achieve reading comprehension at grade level.<sup>45</sup>
46. Student had several friends at school and an outgoing personality. Student is bright, wants to do well, and follows directions. Student participates in \*\*\* and it's an area that boosts Student's self-esteem. Student also participated in \*\*. Student's \*\*\* grade teacher never noticed Student upset or scared at school. Parent notified teacher one day of Student being upset and by the time Student was in teacher's class Student saw no signs of Student being upset.<sup>46</sup>
47. In February 2020, Parents informed the School District of their intent to place Student in private school starting in fall 2020. Student attends \*\*\* grade at \*\*. \*\* is an independent school that serves students with average or above average intelligence and diagnosed with learning disabilities. Core academic classes meet \*\*\* hours per week and classes are \*\*\* students or less.<sup>47</sup>

## VII. DISCUSSION

### A. Statute of Limitations

A parent may file a due process complaint on any matter relating to the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE to the child within two years from the date the parent knew or should have known about the alleged action that

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<sup>43</sup> TR 804-05, 851.

<sup>44</sup> TR 461-64.

<sup>45</sup> TR at 795, 296, 405, 696.

<sup>46</sup> TR at 679, 379, 393, 551, 535 550, 596, 597.

<sup>47</sup> RE 2; TR at 663; PE 100.

forms the basis of the complaint. 20 U.S.C. § 1415 (b)(6)(f)(3)(C); 34 C.F.R. §§ 300.503 (a)(1)(2); 300.507 (a)(1)(2).

The two-year limitations period may be more or less if the state has an explicit time limitation for requesting a due process hearing under IDEA. 20 U.S.C. §1415 (f)(3)(C); 34 C.F.R. § 300.507 (a)(2). Texas has an explicit statute of limitations rule. In Texas, a parent must file a request for a due process hearing within one year of the date he or she knew or should have known about the alleged action that serves as the basis for the hearing request. 19 Tex. Admin. Code § 89.1151 (c).

In this case Parent was aware Student received RTI during \*\*\* and \*\*\* grade. Parent requested a special education evaluation in December 2016 at the end of the fall semester of Student's \*\*\* grade year. The School District deemed Student ineligible for Special Education Services during an ARD Committee meeting in March 2017. Parent disagreed with the decision. Parent sought a private IEE and supplied it to the School District. A second ARD Committee meeting occurred in October 2017. The School District continued to determine Student ineligible for Special Education services. Parent disagreed. The School District conducted additional testing and held a third ARD Committee meeting on November \*\*\*, 2017. The School District found Student eligible for Special Education services as a student with a SLD in reading.

The basis of Parents' complaint is the School District's alleged failure to comply with its Child Find obligation. At minimum Parent knew or should have known about the alleged action of failure to comply with its Child Find obligation when Parent disagreed with the ARD Committee decision on March \*\*\*, 2017, that Student did not qualify for Special Education. Parent again disagreed with the alleged action of failure to comply with its Child Find obligation on October \*\*\*, 2017, when the School District again denied special education services and requested more testing. Parent had a year to file Parent's Complaint from the knew or should have known date; therefore, the due process hearing should have been filed by October \*\*\*, 2018. Furthermore, Parents received the procedural safeguards on March \*\*\*, 2017. When a local educational agency delivers a copy of IDEA procedural safeguards to parents, the statutes of limitations for IDEA violations commence without disturbance. Regardless of whether parents later examine the text of these safeguards to acquire actual knowledge, that simple act suffices to impute upon them constructive knowledge of their

various rights under the IDEA. *El Paso Independent School Dist. v Richard R.*, 567 F. Supp. 2d 918 (W.D. Tex. Jul. 14, 2008)

The Hearing Officer does not address the Child Find/Identification issue or the issues of FAPE and implementation of the IEP prior to the 2019-2020 school year raised by Petitioner because it is barred by the Statute of Limitations period as applied in Texas.

## **B. Duty to Provide FAPE**

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free, appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A). The school district has a duty to provide a FAPE to all children with disabilities ages 3-21 residing in its jurisdiction. 34 C.F.R. § 300.201(a); Tex. Educ. Code § 29.001.

The school district is responsible for providing students with disabilities with specially designed personalized instruction with sufficient support services to meet the student's unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with the student's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

## **C. Burden of Proof**

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.<sup>48</sup> *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). The burden of proof is on Petitioner to show the School District failed to

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<sup>48</sup> There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n. 4 (5th Cir. 2009).

provide Student with a FAPE and to offer a program that is reasonably calculated to provide Student with the requisite educational benefit. *Id.*

#### **D. FAPE**

##### **The Four Factors Test**

The Fifth Circuit has articulated a four factor test to determine whether a Texas school district's program meets IDEA requirements. Those factors are:

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, collaborative manner by the key stakeholders; and
4. 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).

Even after the Supreme Court's 2017 decision in *Endrew F.*, the test to determine whether a school district has provided a FAPE remains the four-factor test outlined by the Fifth Circuit. *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018).

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

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

In meeting the obligation to provide FAPE, the school district must have in effect an IEP at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, the IEP must include a description

of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the duration and frequency of the services, and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.323(a). While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the school district must nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009). The basic inquiry in this case is whether the IEP implemented by the school district “was reasonably calculated to enable Student to make progress appropriate in light of the child’s circumstances.” *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 at 999 (2017). The District’s obligation when developing Student’s IEP is to consider Student’s strengths, Student’s parent’s concerns for enhancing Student’s education, results of the most recent evaluation data, and Student’s academic, developmental, and functional needs. 34 C.F.R. 300.320(a)(1)(i).

The evidence showed Student’s October 2019 IEP contained PLAAFPs based on evaluations. The ARD Committee reviewed the 2017 FIE, teacher observations and reports, Parent concerns, and District Level Assessments to develop Student’s IEP goals. Student struggled with reading fluency and \*\*\*. Student’s IEP included two reading goals for fluency and one \*\*\* goal. Student’s IEP included accommodations to meet Student’s individual needs including: \*\*\*. In April 2020, the ARD Committee met again. During the meeting, Parent provided the private psychoeducational and psychological evaluation. Once the School District had time to review the private evaluation, the ARD Committee reconvened. The School District was already providing most of the accommodations recommended by the evaluation. The ARD committee changed the oral administration accommodation from “at Student’s request” to “regular provision”. At the time, the data did not support the use of \*\*\* software in all classes or the provision of a paraprofessional because Student was progressing without those accommodations. After an AT evaluation in September 2020, the plan was to add the \*\*\* software in all classes.

The School District collected data twice a week to determine if Student was meeting Student’s progress goals and if the goals needed to change. Data was collected by classroom observations, discussions between Student’s case manager and Student’s teachers and discussions



with Student's dyslexia interventionist. Student's IEP was individualized based on Student's assessments and Student's performance.

## **2. Least Restrictive Environment**

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

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

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

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

The evidence showed Student was educated in the general education setting with the supplemental services and accommodations necessary for Student to be successful in this setting. Based on the continuum of educational placements, general education is the least restrictive. Additionally, Parents did not complain about the LRE in the Complaint or in the hearing. Student was educated in the LRE.

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

The IDEA contemplates a collaborative process between the school district and the parents. *E.R. v. Spring Branch Indep. Sch. Dist.*, 2017 WL 3017282, \*27 (S.D. Tex. 2017), *aff'd* 909 F.3d 754 (5th Cir. 2018). The IDEA does not require a school district, in collaborating with a student's parents, to accede to a parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999). The right to meaningful input does not mean a student's parents have the right to dictate an outcome, because parents do not possess "veto power" over a school district's decisions. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003). Absent bad faith exclusion of a student's parents or refusal to listen to them, a school district must be deemed to have met the IDEA's requirements regarding collaborating with a student's parents. *Id.*

The evidence showed Student's services were provided in a coordinated, collaborative manner by key stakeholders. Parents attended ARD meetings and their concerns were addressed by the School District. Parent wanted the School District instructional officer to attend the ARD meetings and the School District allowed this. When Parents had concerns with IEP goals and Student's progress, the School District discussed those. For example, Parent felt Student's \*\*\* goal was not measurable. To address this concern, the District adjusted the goal using language suggested by the instructional officer invited to the meeting by the Parent. Teachers and Student's case managers were in frequent communication to ensure they monitored Student's progress. Data collected was then put in Student's progress reports and provided to the Parents to review. Parent complained Student was over-accommodated and then requested more in-class support. The School District offered counseling services and more in-class support to address Parents' concerns and Parent declined. Student's case manager, teachers, and dyslexia intervention teacher communicated regularly to assess Student's progress and areas of need.

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

Whether a Student received academic and non-academic benefit is one of the most critical factors in any analysis as to whether a Student has received a FAPE. *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 812-13 (5th Cir. 2012).

The evidence showed Student received academic and non-academic benefit. Student was able to complete grade-level work with Student's accommodations. Student mastered the STAAR test for \*\*\* in Student's \*\*\* grade year. Student received straight As in Student's \*\*\* and \*\*\* grade years. Student was reading at or above grade level at the end of \*\*\* grade. Student was able to meet Student's IEP goals on fluency for practice and cold reads, but struggled with consistency. Student's practice read benchmark for March 2020 was to read \*\*\* wpm on level \*\*\*. Student read on level \*\*\* at \*\*\* wpm. Student's cold read benchmark for March 2020 was to read \*\*\* wpm on level \*\*\*. Student read on level \*\*\* at \*\*\* wpm. Difficulty with reading fluency is a characteristic of dyslexia. Reading fluency or rate is based on many factors including complexity of text, provider of the assessment, and testing environment. The main goal in reading is comprehension and Student had strong comprehension skills. Even though Student was below Student's wpm some of the time, Student could exceed Student's goals and was making progress. At times, Student did not meet Student's wpm goal because of self-correction. Student met Student's \*\*\* goal benchmark.

Additionally, Student received non-academic benefit. Student is a bright, \*\*\* with friends. Student participates in \*\*\* which improves Student's self-esteem. Parent complained of anxiety; however, no teachers witnessed any display of anxiety from Student.

The School District provided Student a FAPE. Student's IEP was individualized based on School District evaluations and assessments, private evaluations and assessments, and Student's performance. Student's services were provided in the general education setting which is the least restrictive environment. Services were provided in a coordinated, collaborative manner with key stakeholders and Student received academic and non-academic benefit.

#### **E. Implementation of the IEP**

When a parent brings a claim based on a school district's failure to *implement* an IEP, the first factor (whether the program is individualized) and second factor (whether the program is administered in the least restrictive environment) are generally "not at issue." *Spring Branch Indep. Sch. Dist. v. O.W. by next friend Hanna W.*, 961 F. 3d 781, 795-96 (5th Cir. 2020) (citing

*Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 348 (5th Cir. 2000)). Rather, a court must decide whether a FAPE was denied by considering, under the third factor, whether there was a “substantial or significant” failure to implement an IEP; and under the fourth factor, whether “there have been demonstrable academic and non-academic benefits from the IEP.” *Id.* at 796 (citing *Bobby R.* at 349).

Student’s October 2019-2020 IEP included accommodations to meet Student’s individual needs including: \*\*\*. Student received \*\*\* of the STAAR test, CBAs, and DLAs. On the STAAR test Student received \*\*\*. Student’s teachers provided \*\*\*. Student was not penalized for \*\*\*. Student had access to \*\*\* and used them frequently. Student had a \*\*\*.

Student’s IEP was implemented with fidelity and Student was provided Student’s IEP accommodations. Petitioner presented no evidence of any lack of implementation. Additionally, under the fourth prong, Student made academic and non-academic progress as addressed above.

Petitioner did not meet Petitioner’s burden on this issue and failed to show the School District did not properly implement Student’s IEP.

## **F. Procedural Issues**

Under the IDEA, a denial of FAPE can only be found if the procedural violation: impeded the child’s right to a FAPE; significantly impeded the parent’s opportunity to participate in the decision making process regarding the provision of FAPE to the parent’s child; or caused a deprivation of educational benefit. 34 C.F.R. §300.513(a)(2)(i-iii).

The evidence showed Parents were provided meaningful participation in the decision making process. The School District held six ARD Committee meetings during the 2019-2020 school year. The School District allowed multiple reconvene ARD meetings when agreement was not reached, instead of the one required by state regulations. Tex. Admin. Code. §89.1050(g)(1). The School District allowed one of its instructional officers to attend ARD meetings at Parent’s request. Outside evaluations were discussed at ARD meetings. Parent was asked for Parent’s suggestions

for Student's educational program and IEP goals were modified based on the independent evaluations.

Petitioner did not meet Petitioner's burden on this issue. The School District did not violate Parents' procedural rights and did allow Parents meaningful participation in the decision making process.

## **G. Private Placement at School District Expense**

### **1. Two-part Test**

Student must meet a two-part test in order to secure continued placement at \*\*\* at school district expense. First, Student must prove the school district's proposed program was not appropriate under the IDEA. Second, Student must prove continued placement at \*\*\* is appropriate. A private placement may be appropriate even if it does not meet state standards that apply to the public school. *Burlington Sch. Committee v. Dept. of Educ.*, 471 U.S. 359, 370(1985); *Florence Cnty. v. Carter*, 510 U.S. 7 (1993).

### **2. Test Applied to the Facts**

The School District's program was appropriate and Student received a FAPE; therefore, the Hearing Officer need not address whether or not continued placement at \*\*\* is appropriate.

Petitioner did not meet Petitioner's burden in proving the School District's program was not appropriate under IDEA. Therefore, the Hearing Officer will not address private placement at School District expense.

## **VIII. CONCLUSIONS OF LAW**

1. Respondent provided Petitioner with a free appropriate public education and developed and implemented an appropriate IEP for the 2019-20 school year that provided an

educational benefit. Petitioner did not meet Petitioner's burden of proof on this issue. *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Schaffer*, 546 U.S. at 62; *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997); 34 C.F.R. §§ 300.22, 300.323 (a); 19 Tex. Admin. Code § 89.1055 (e).

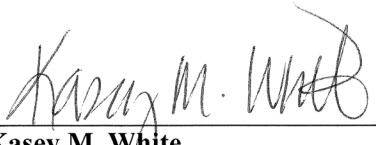
2. The School District did not violate Parent's procedural rights. 34 C.F.R. §300.513.
3. Petitioner is not entitled to private placement at School District expense. *Burlington Sch. Committee v. Dept. of Educ.*, 471 U.S. 359, 370(1985); *Florence Cnty. v. Carter*, 510 U.S. 7 (1993).

### IX. ORDERS

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

All other relief not specifically stated herein is **DENIED**.

**SIGNED December 29, 2020.**

  
\_\_\_\_\_  
**Kasey M. White**  
**Special Education Hearing Officer**  
**For the State of Texas**

### X. NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 19 Tex. Admin. Code §89.1185(p); Tex. Gov't Code, Sec. 2001.144(a) (b).