

III. DUE PROCESS HEARING

The due process hearing was conducted via the Zoom videoconferencing platform on May 25 and 26, 2022. The hearing was recorded and transcribed by a certified court reporter. Petitioner was represented at the due process hearing by their legal counsel, Dominique Augustus and Henry G. Bostwick. In addition, ***, Student's mother, attended the due process hearing.

Respondent was represented by its legal counsel, Janet Horton and Paige Martin. In addition, ***, the Director of Special Services for the District, attended the hearing as the party representative. Both parties filed written closing briefs in a timely manner. The Decision in this case is due August 17, 2022.¹

IV. ISSUES

A.

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- concluded Student met eligibility criteria for a speech impairment. The evaluators recommended Student receive speech therapy services.³
3. The District evaluators noted Student's significant issues with behavior at school and concluded Student's behavior impaired Student's school performance. The District evaluators concluded Student did not have the characteristics of autism, but did have characteristics consistent with attention deficit hyperactivity disorder (ADHD) and *** (***) . Student was also assessed to be in the severe clinical range for *** . The District evaluators concluded Student met the criteria for an emotional disturbance based on a general pervasive mood of *** .⁴
 4. As part of the reevaluation, the District conducted a functional behavior assessment (FBA) and determined Student engaged in the behaviors of noncompliance and disrespectful behavior to escape non-

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goal for Student timely turning in Student's school work, and a goal for Student requesting help when Student encounters a concept Student does not understand.¹⁸

18. The ARD committee developed a *** plan for Student with an overall goal for Student to ***. The ARD committee determined Student would ***. Prior to the ARD meeting, Student met with District staff to discuss Student's *** plans and the District's *** proposals. The *** plan was based upon Student's interests, goals, and needs which were identified by *** and District staff. Student's Parent chose to have Student not attend the ARD meeting to discuss Student's *** plan.¹⁹

19. The ARD committee determined Student needed the in-class accommodations of frequent checks for understanding, gaining Student's attention before delivering instruction, providing hard copies of notes before instruction, providing a binder to organize daily work, and extra time for completing assignments and tests. Student had the behavioral accommodations of leaving class early, daily check in and out with behavioral support staff, reminders to stay on task, positive reinforcement, preferential seating, and a token chart. The ARD committee determined Student also needed a

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reviewed the recommendations and determined one-on-one instruction was not necessary for Student, but that the request for smaller clae

While evidence related to the 2018-19 and 2019-20 school years was admitted and reviewed in this case, no legal issues from that time frame are under consideration in this decision. In addition, while Petitioner indicated the relevant time frame included the 2021-22 school year, Petitioner failed to present any evidence related to the 2021-22 school year. Thus, the analysis and decision in this case will only concern the 2020-21 school year.

A. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.³⁶ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The burden of proof in this case is on Petitioner to show the District failed to provide Student with a FAPE and to offer a program that is reasonably calculated to provide Student with the requisite educational benefit. *Id.*

B. Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related serv (lic)es sedsraes reo()-1m1 (s)2 (d(s)5tJ0

v. Rowley 458 U.S. 176, 188-89, 200-01, 203-04 (1982). Petitioner alleges the District failed to provide Student a FAPE during the 2020-21 school year.

A hearing officer applies a four-factor test to determine whether a Texas school district's program provided a FAPE to a student with a disability. 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).

the recommendations for one-on-one instruction, and the lack of social work and in-home services.

A. Development of Student's IEP

The District's obligation when developing Student's IEP and BIP was to consider Student's strengths, Student's parent's concerns for enhancing Student's education, results of the most recent evaluation data, and Student's academic, developmental, and functional needs. 34 C.F.R. § 300.324(a)(1)(i). In preparing to develop Student's IEP upon Student's return from ***, the District met with *** staff and reviewed the IEP recommendations made by ***. District staff also reviewed the 2018 District reevaluation and met in a staffing meeting to prepare an IEP. Parent participated in three ARD committee meetTw 2.828-0.002(e)3 (e)3 (ti)14 (ng)6 (13.3)(D)6 (1h-

First, the District must receive informed parental consent before proceeding with an evaluation. 20 U.S.C. §1414(c)(3); 34 C.F.R. §300.300(c)(1)(i). As such, Parent's tentative verbal assent to the evaluation was not sufficient consent for the District to proceed with the evaluation. Petitioner alternatively argues the District, pursuant to 34 C.F.R. § 300.300(c)(2), should have proceeded with the evaluation based upon Parent's refusal to consent. To be clear, this regulation permits a school district to conduct an evaluation when a parent refuses a school district's multiple efforts to obtain consent, but does not require a school district to do so. In this case, where Parent was actively being represented by a special education advocate from a law firm, the District was justified in not trampling over Parent's rights and conducting an evaluation of Student without consent.

Additionally, a parent may not assert a student is entitled to special education services while simultaneously refusing to allow a school district to evaluate the student to determine what those services may be. *Andress S. v. Cleveland Indep. Sch. Dist.*, 3d 176, 178 (5th Cir. 1995), cert. denied, 519 U.S. 812 (1996). A parent who desires for her child to receive special education services must allow a school district to reevaluate her child using school district personnel. *Id.* at 179. Thus, here, Parent cannot insist on Student being identified as a child with autism without first allowing the District to perform its own evaluation.

While the District did not unconditionally accept Dr. ***'s autism identification, it nonetheless did develop a program consistent with her evaluation. In her September 2019 evaluation, Dr. *** indicated Student was able to manage Student's behavior and cognitive functioning on par with Student's same-aged peers in a structured setting with few distractions, adult support, and academic accommodations. Dr. *** also recommended Student attend general education ***. The District's IEP and program for Student placed Student in general education classes with the structured support of the *** program and accommodations of frequent checks for understanding, gaining Student's attention before delivering instruction,

providing hard copies of notes before instruction, providing a binder to organize daily work, extra time for completing assignments and tests, daily check in and out with behavioral support staff, reminders to stay on task, positive reinforcement, and preferential seating. As recommended, the District also placed Student in the ***. Moreover, *** assessed Student to be at or near grade level in all academic areas, and, therefore, the District appropriately placed Student in general education academic classes.

C. IEP For The 2020-21 School Year

Petitioner argues the District had no actual IEP in place for Student at the beginning of the 2020-21 school year, because Parent never agreed to an IEP. However, the evidence showed the District met its obligation to have an IEP in place for Student at the outset of the 2020-21 school year. 34 C.F.R. § 300.323(a). The District held ARD committee meetings in February and March of 2020, which proposed an IEP and program for Student. Following Ilo2 -1.8(300.)5 istis cre inmeecem

The determination of whether a student with a disability can be educated in general education settings requires an examination of the nature and severity of the student's disability, the student's needs and abilities, and the school district's response to the student's needs. *Id.*

Here, when Student was transitioning back to the District, *** reported Student had made significant progress in exhibiting pro-social behavior, that Student completes

34 C.F.R. § 300.511(d). Respondent has the right to know the issues presented and prepare its case accordingly. As such, Petitioner’s predetermination argument is not properly before this hearing officer.

However, even if Petitioner had properly raised this issue, the evidence in the record does not support this claim. “Predetermination occurs when the school district makes educational decisions too early in the planning process, in a way that deprives parents of a meaningful opportunity to fully participate as equal members of the IEP team.” *E. R. by E. R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 769 (5th Cir. 2018) (quoting *R.L. ex rel. O.L. v. Miami Dade Cty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014)). “To avoid a finding of predetermination, there must be evidence the state has an open mind and might possibly be swayed by the parents’ opinions and support for the IEP provisions they believe are necessary for their child.” *Id.* Here, in response to Parent’s request for smaller classes, the District convened the ARD committee and moved Student to several smaller classes. The District also offered on multiple occasions to convene the ARD committee to discuss ***, once Parent unilaterally placed Student. The evidence demonstrates the District considered Parent’s request for *** and smaller classes and did not predetermine to deny placement at ***.

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.*, 303 F.3d 801, 813-14 (5th Cir. 2012).

The evidence showed that Student benefitted from the District’s program. While in-person, Student performed well academically, participated in class, and rarely experienced behavioral difficulties. Even after Parent chose to move Student to virtual instruction, Student learned the academic material and passed Student’s classes because District staff made efforts

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