

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

**STUDENT B/N/F PARENT,  
Petitioner**

**V.**

**KLEIN INDEPENDENT SCHOOL  
DISTRICT,  
Respondent**

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**BEFORE A SPECIAL EDUCATION**

**HEARING OFFICER FOR**

**Student's next friend Parent (Student)**

**request for an impartial due process hearing (Complaint) under the Texas Education Act (IDEA) and its implementing state and federal regulations with Notice of the Complaint issued by the Texas Education Agency. Respondent to the Complaint is the Klein Independent School District. The main issue in this case is whether the District provided a Free and Appropriate Education (FAPE). The Hearing Officer finds the District provided a Least Restricted Environment (LRE) and appropriately prepared for Student**

**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 sn and Erik s

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 Addi 9.**

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>

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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

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 regularl

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.



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.



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.

the instruction. *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, (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.

*CypressFairbanks Ind. Sch. Dist. v. Michael F.*, 18 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







obligation to educate a student in the LRE. *Daniel R.R. v. State Bd. of Educ.*, 674 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.



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**

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 re.087()22()- ntene.0878o /TT3 ofun1o /T13he h

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.

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.

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