No. 20-

IN THE

Supreme Court of the United States

WILLIAM V. AND JENNY V.,

Petitioners,

v.

COPPERAS COVE INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. The first question presented is: Is not specifically naming non-dispositive factors, when actually arguing the factors, a waiver of claims?

II. A "child with a disability" under the Individuals with Disabilities Education Act ("IDEA") must (i) have a qualifying disability; and (ii) "by reason thereof, need[ ] special education and related services." 20 U.S.C. § 1401(3)(A).

The second question presented is: When an IDEA-eligible child with a disability is inappropriately disqualified from special education, has a legally cognizable injury occurred?

III. The third question presented is: When a child with a disability has not received the appropriate special education services in an identified area of need, is a parent required to show regression or *de minimis* progress to be entitled to substantive relief?

IV. The fourth question presented is: What is the appropriate standard of review concerning questions of whether a student made appropriate progress under the IDEA?

PARTIES TO THE PROCEEDING

The caption of this case includes the names of all parties.

RELATED CASES

The following are the cases related to this petition:

- *William V. et al. v. Copperas Cove Indep. Sch. Dist.*, No. 19-51046, U.S. Court of Appeals for the Fifth Circuit, judgment entered September 14, 2020.
- *William V. et al. v. Copperas Cove Indep. Sch. Dist.*, No. 6:17-cv-00201, U.S. District Court for the Western District of Texas—Waco Division, judgment entered October 22, 2019.
- *William V. et al. v. Copperas Cove Indep. Sch. Dist.*, No. 19-50051, U.S. Court of Appeals for the Fifth Circuit, judgment entered August 8, 2019.
- *William V. et al. v. Copperas Cove Indep. Sch. Dist.*, No. 6:17-cv-00201, U.S. District Court for the Western District of Texas—Waco Division, judgment entered December 18, 2018.

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JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 14, 2020. Pet. App. A1. Petitioner's request for rehearing en banc was denied on October 30, 2020, with a mandate entered November 9, 2020. Pet. App. F1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On March 19, 2020, this Court ordered that the deadline for filing any petition for writ of

certiorari be extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. Order List 589 U.S.

STATUTES INVOLVED

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., requires public educational agencies receiving federal funds for special education services provide each child with a disability a "free appropriate public education" that must be "provided in conformity with the individualized education program required under" the IDEA. 20 U.S.C. § 1401(9). "The term 'child with a disability' means a child—(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3)(A).

STATEMENT OF THE CASE

In enacting the predecessor statute to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., "one of the evils Congress sought to remedy…was the unilateral exclusion of disabled children by schools." *Honig v. Doe*, 484 U.S. 305, 327 (1988). Recently, the Court reiterated to all federal courts that an Individualized Education Program ("IEP"), the mechanism by which schools must provide a "free appropriate public education" ("FAPE") to children with

disabilities under the IDEA, must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S.Ct. 988, 998-999 (2017); *see Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-207 (1982).

Since the Court first described the requirement for an appropriate IEP nearly forty years ago, federal courts of appeals have become intractably divided over not only the level of educational benefit the IDEA demands (which *Endrew F.* addresses), but also the corollary to the demanded level of educational benefit—that is, the nature and level of *loss of educational benefit* to create a legally cognizable injury under the IDEA. Some courts, including the Fifth Circuit below, rely on their pre-*Endrew F.* caselaw to find school districts in harmless violation of the IDEA so long as a district provides generalized educational intervention that may or may not address all areas of need. In contrast, other courts carve out an exception that such interventions cannot be harmless if the IEP team failed to assess or otherwise consider all of a child's areas of special education and related service need. Resolving the conflict among the circuits will ensure millions of children with disabilities a consistent state-to-state level of education, while providing parents and educators much-needed guidance regarding their rights and obligations.

A. Legal Background

Congress, aware that children with disabilities were regularly denied access to public schools, conducted a 1972 investigation, finding that most children with disabilities "were either totally excluded from schools or [were] sitting idly in

regular classrooms awaiting the time when they were old enough to 'drop out.'" *Rowley*, 458 U.S. at 179 (alteration in original) (quoting H.R. Rep. No. 94-332 at 2 [1975]); *see also* Edwin W. Martin et al., *The Legislative and Litigation History of Special Education*, The Future of Children (Spring 1996) at 25-28. Consequently, in 1975, Congress passed the Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975), which it later amended and renamed as the IDEA, Pub. L. No. 101-476, 104 Stat. 1103 (1990). Congress has since amended and reauthorized the IDEA twice – in 1997 and 2004. Pub. L. No. 105-17, 111 Stat. 37 (1997); Pub. L. No. 108-446, 118 Stat. 2647 (2004).

The IDEA utilizes Congress's spending power to encourage states, in exchange for federal special education funding, to provide children with disabilities a FAPE,[1] which requires parents and educators to collaborate in creating annual IEPs "tailored to the unique needs" of each child with a disability. *Rowley*, 458 U.S. at 179, 181; *see* 20 U.S.C. § 1414(b)(4), (d)(1)(B); 34 C.F.R. § 300.327. However, Congress decided "this cooperative approach would not always produce a consensus", and created "an elaborate set of what it labeled 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements", which involve administrative and judicial review. *Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359, 368 (1985); 20 U.S.C. § 1415(f), (i)(2)(A). Schools and parents alike may request a due process hearing, to present a hearing

[1] Under the IDEA, a FAPE is "special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title." 20 U.S.C. § 1401(9).

officer at a local or state education agency with the dispute. 20 U.S.C. § 1415(f)(1)(A); *see Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 51 (2005). Then, the hearing officer decides whether the district has met the IDEA's requirements, including whether it provided FAPE to the child. 20 U.S.C. § 1415(b)(6), (f)(1)(A). If aggrieved, a party may seek review of the agency decision in a state or federal court, which "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii).

This Court first examined the IDEA's predecessor statute in *Rowley*, where it was held that the IDEA does not require schools to maximize the potential of children with disabilities in order to provide a FAPE, because Congress had not intended to achieve "strict equality of opportunity or services" between children with and without disabilities. 458 U.S. at 189-190, 198. At the same time, however, the Court recognized that a child's IEP must be reasonably calculated to enable the child to receive educational benefit (*Id.* at 206-207); and more than thirty years later, in *Endrew F.*, the Court added that it "should come as no surprise" that "the progress contemplated by the IEP must be appropriate in light of the child's circumstances". *Endrew F.*, 137 S.Ct. at 999.

Between *Rowley* and *Endrew F.*, Congress amended and reauthorized the IDEA twice – in 1997 and 2004. Pub. L. No. 105-17, 111 Stat. 37 (1997); Pub. L. No. 108-446, 118 Stat. 2647 (2004).

The 1997 amendments elevated the IDEA's goals from a guarantee of access, toward "ensuring equality of opportunity, full participation, independent living, and

economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1). Congress explained that, while the previous version of the act was "successful in ensuring children with disabilities…access to a free appropriate public education", implementation had been "impeded by low expectations and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." 20 U.S.C. § 1400(c)(3), (c)(4). Hence, the 1997 amendments sought "to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (quoting S. Rep. No. 105-17 at 3 [1997]).

The 2004 amendments further increased goals for educating children with disabilities, by requiring, for example, that IEPs describe services for children over age fifteen that assist them in transitioning to post-secondary education, employment, and, as appropriate, independent living. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII).

In *Endrew F.*, except for a brief mention that Congress did not materially change the definition of FAPE since *Rowley* was decided, the Court declined to address the impact of Congress' decisive shift in intent for the IDEA. However, as at least one Circuit has discussed, *Rowley* and *Endrew F.* referred to the content of an IEP, making those decisions less helpful concerning the *implementation* of an IEP, including a "stay-put" or "pendency" IEP. *See L.J. by N.N.J. v. Sch. Bd. of Broward Cnty.*, 927 F.3d 1203 (11th Cir. 2019). On their face, Congress intended the

intervening amendments between *Rowley* and *Endrew F.* to involve the provision—and thus implementation—of a FAPE, making the amendments applicable to cases involving implementation issues.

B. Factual Background

During the underlying hearing, W.V. was a second-grader with severe dyslexia and related disorders. Pet. App. B12. W.V. also has the capacity to make significant progress at school. *See* Pet. App. A2. However, CCISD failed to provide W.V. with a free and appropriate public education ("FAPE") by failing to provide an appropriate IEP or placement. Pet. App. A3. Consequently, W.V. made no meaningful progress and continued to function well below his abilities even requiring teachers to read his assignments aloud to him because he could not read. *See* Pet. App. A6.

W.V. entered CCISD as a first grader with an IEP from his prior school district and attended CCISD during the underlying hearing. Pet. App. G8. The IEP was accepted and implemented by CCISD in September of 2015. Pet. App. G8.

On April 18, 2016, the Parents requested a full individual evaluation ("FIE") due to increasing concerns with W.V.'s reading, writing, and articulation deficits. Pet. App. B2. On April 28, 2016, CCISD issued a Notice of Action, that it would not be testing W.V. for a Specific Learning Disability but would only assess for general education dyslexia. Pet. App. B2. On May 11, 2016, the Parents received a letter from CCISD, informing them that CCISD intended to delay their evaluation request

until CCISD received the results of the dyslexia assessment and the Admission, Review, and Dismissal Committee ("ARDC") discussed the results. Pet. App. G14.

CCISD did not provide consent forms granting the FIE until September 12, 2016. *See* Pet. App. D3, G19. On November 16, 2016, CCISD administered an FIE. Pet. App. G21. CCISD's FIE claimed W.V. did not meet disability criteria for a Specific Learning Disability, was no longer eligible for Speech Impairment, and CCISD recommended that W.V. no longer receive Speech Therapy. Pet. App. G21.

CCISD's documentary evidence noted W.V. had not met his speech goals and also acknowledged W.V.'s well-below-average performance in reading. Pet. App. B13. W.V.'s teacher agreed W.V. required IEP reading goals, but no reading goals were provided in any IEP. *See* Pet. App. G8-G17. Despite having an average ability to learn, the record indicates that W.V. consistently failed to meet grade-level standards in written expression, basic reading and fluency skills, and mathematics. Pet. App. A6, B4.

In December of 2016, Parents requested an IEE, having disagreed with CCISD's assessment of W.V. Pet. App. G25. As a result of CCISD's failure to respond to their IEE requests, the Parents hired Dr. Lesli Doan, a nationally certified school psychologist, to conduct an IEE, and Parents also obtained an IEE for speech from Sydney Perricone, M.S., CCC-SLP. Pet. App. *See* E14, G7, G29.

After conducting a comprehensive evaluation, Ms. Perricone found W.V. met the eligibility criteria as a student with a speech articulation developmental disorder, and he continued to demonstrate an educational need to receive speech

therapy. Pet. App. G29. In January 2017, Dr. Doan evaluated W.V. and concluded W.V. met eligibility requirements for Specific Learning Disability in basic reading, reading fluency, reading comprehension, math reasoning, and written expression. *See* Pet. App. B10-B11, B14, G6. Dr. Doan administered various assessments to measure patterns of cognitive strengths and weaknesses. *See* Pet. App. E14, G6, G27. Via the Short-Term Working Memory subtest, Dr. Doan identified several of W.V.'s weaknesses; namely, W.V.'s difficulties following directions, understanding long reading passages, spelling, sounding out words, and doing math problems. *See* Pet. App. G27.

Dr. Doan noted that, contrary to CSSID's findings of W.V.'s mastery (and CCISD's intervention efforts), W.V. was not making adequate progress; and testified CCISD's own findings actually showed that W.V. was below-average based on the publisher guidelines of the tests CCISD used, noting that the tests administered did not necessarily measure W.V.'s dyslexia. *See* Pet. App. B18, E14. Dr. Doan testified that W.V.'s phonological awareness score was below-average, explaining that: (i) a student's phonological awareness is important because it is the first step in learning to read; and (ii) W.V.'s deficit in phonological awareness hindered his ability to identify letters and sounds within letters.

Dr. Doan testified to conducting what was called a "recall of digits" or "recall of sequential order subtests" with W.V. receiving low scores in each subtest, indicating that W.V. had difficulty doing math, following directions whether they are written or oral, and understanding long passages. *See* Pet. App. A6. Dr. Doan

recommended that CCISD provide specific goals to address the needs of a student with a Specific Learning Disability with significant weaknesses in the areas of reading, written expression (i.e., spelling), and math word problems.

C. Proceedings Below

W.V.'s parents filed a request for a special education due process hearing on January 12, 2017, seeking various items of relief that included a finding of continued special education eligibility, as well as orders for public funding of independent educational evaluations ("IEE"), appropriate placement and services memorialized in an IEP, and compensatory services in an amount equal to the deprivation suffered by W.V., including but not limited to dyslexia services to which W.V. is entitled. Pet. App. G6. On June 30, 2017, the SEHO determined CCISD provided a FAPE to W.V. and no procedural violations were committed. Pet. App. B4, D4, E4, G46-G48.

On appeal by the Parents, the Magistrate recommended granting summary judgment in CCISD's favor and denying the Parents' motion for judgment on the administrative record. Pet. App. E27-E28. Over the Parents' objections, the District Judge adopted the Magistrate's recommendation. Pet. App. D9-D10. On appeal, the United States Court of Appeals for the Fifth Circuit vacated and remanded the decision for reconsideration in light of the appropriate standard. Pet. App. C4.

On remand, the district court again granted summary judgment to CCISD finding that CCISD procedurally violated the IDEA as W.V. has a specific learning disability and by reason thereof needs special education services, and the school

district failed to find that W.V. qualified for specially designed instruction. Yet, the Court concluded that W.V. was not injured by CCISD's failure to provide the specialized instruction W.V. required in order to make meaningful progress. Pet. App. B24.

On the second appeal, the Fifth Circuit affirmed the district court's decision. Pet. App. A10.

Petitioner sought rehearing en banc. The Fifth Circuit denied this request. Pet. App. F.

REASONS FOR GRANTING WRIT OF CERTIORARI

The courts of appeals are in disarray over what constitutes a legally cognizable injury under the IDEA and, when such injury exists, how much regression or lack of progress parents are required to show. This confusion has led some courts to utilize improperly stringent standards of review and exalt form over substance in the application of non-dispositive factors, presumably in order to rid dockets of—instead of answering—these questions. This Court should use the instant case—which cleanly presents the legal issues plaguing millions of children—to resolve the conflict.

A. As to each question presented, the decision below contravenes the spirit of the IDEA and this Court's precedent and perpetuates a conflict among the courts of appeals.

Both the Court and Congress have emphasized the purposes of the IDEA. This Court recognizes that "one of the evils Congress sought to remedy [by enacting the IDEA's predecessor statute] was the unilateral exclusion of disabled children by

schools." *Honig v. Doe*, 484 U.S. 305, 327 (1988). Almost a decade later, Congress doubled-down on its intent, by using the 1997 IDEA amendments to elevate the IDEA's goals toward those of "ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities", and going on to explain that the IDEA's prior version's implementation had been "impeded by low expectations and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." 20 U.S.C. § 1400(c)(1), (c)(4).

In *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S.Ct. 988, 993-994 (2017), this Court began to address the "more difficult problem" that the *Rowley* Court dared not reach, concerning "when handicapped children are receiving sufficient educational benefits to satisfy the requirements" of the IDEA. This Court, mindful of the IDEA's inherent resistance to a bright-line rule "on what 'appropriate' progress will look like from case to case", stopped short of addressing IEP implementation issues, trusting that:

> "By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances."

Endrew F., 137 S.Ct. at 1001-1002. In the absence of guidance on, for instance, school districts that merely continue "stay put" interventions that are found during litigation to have violated the IDEA all along, lower courts have effectively reverted

to their pre-*Endrew F.* caselaw, with the Fifth Circuit's seminal case, *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. b/n/f/ Mr. and Mrs. Barry F.*, 118 F.3d 245, fn. 1 118 F.3d 245 (5th Cir. 1997), *cert. den'd*, 118 S.Ct. 690 (1998), having expressly declined to address the impact of the IDEA's 1997 amendments. More egregiously, some lower courts have taken an avoidant stance toward addressing these issues at all.

1. Non-dispositive factors.

The Circuits and this Court have long-denounced the exaltation of form over substance. *C.f., United States v. DiFrancesco*, 449 U.S. 117, 142 (1980); *Metallurgical Industries, Inc. v. Fourtek, Inc.*, 771 F.2d 915, 916 (5th Cir. 1985); *Devine & Devine Food Brokers, Inc. v. Wampler Foods, Inc.*, 313 F.3d 616 (1st Cir. 2002) (finding no de facto merger despite test of four non-dispositive factors because all other circumstances supported a contrary conclusion that to ignore would be to hold "form over substance"); *Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814 (2d Cir. 1970) ("To rule that an unintended flaw in procedure bars a deserving litigant from any relief is an unwarranted triumph of form over substance, the kind of triumph which, commonplace enough prior to our more enlightened days, we strive now to avoid whenever possible"); *Heineke v. Santa Clara University*, 812 Fed.Appx. 644, 645 (Mem) (9th Cir. Jul. 20, 2020) (finding abuse of discretion in requiring separate cause of action); *Dawkins v. Dist. of Columbia*, 872 F.2d 496 (Table), 1989 WL 40280 *3 (D.C. Cir. 1989); *Cowger v. Arnold*, 460 F.2d 219, 222 (3d Cir. 1972); *Hartford Fire Ins. Co. v. Harleysville Mut.*

Ins. Co., 736 F.3d 255, 262 (4th Cir. 2013); *Elliot v. Lator*, 497 F.3d 644, 650 (6th Cir. 2007); *Geinosky v. City of Chicago*, 675 F.3d 743, 748 (7th Cir. 2012); *United States v. Gilbert C. Swanson Foundation, Inc.*, 772 F.2d 440, 441 (8th Cir. 1985); *Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977, 983 (10th Cir. 2010); *Menzie v. Ann Taylor Retail Inc.*, 549 Fed.Appx. 891, 895-896 (11th Cir. 2013).

The Fifth Circuit utilizes four non-dispositive factors, i.e., the "*Michael F.* factors", as indicators of whether an IEP is appropriate under the IDEA. *See E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018). In a significant departure from longstanding, widely-recognized precedents, the Fifth Circuit opinion below expanded the principle that "failure to raise an argument before the district court waives that argument," to now require that each particular *Michael F.* factor be directly delineated in an "independent argument". *Compare* Pet. App. A8, with *Rittinger v. Healthy All. Life Ins. Co.*, 914 F.3d 952, 955 (5th Cir. 2019).

The Fifth Circuit has repeatedly stated that *Michael F.* factors "can serve as indicators" in certain IDEA contexts. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. et al.*, 118 F.3d 245, 253 (5th Cir. 1997) (emphasis added); *Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 215 (5th Cir. 2019) (distinguishing *Michael F.* from eligibility analysis). When a party does not address the *Michael F.* factors by name in briefing, courts look to whether anything in that party's briefing "could be construed as challenging the district court's finding" as to the *Michael F.* factors. *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1013 (5th Cir. 2010).

Since *Michael F.*, the Fifth Circuit's decisions emphasized that the factors are non-dispositive and may be assigned discretionary weight or no consideration at all. *Spring Branch Indep. Sch. Dist. v. O.W.*, 961 F.3d 781, 795-796 (5th Cir. Jun. 12, 2020) (first and second factors "not at issue"); *A.A. v. Northside Indep. Sch. Dist.*, 951 F.3d 678, 690-691 (5th Cir. Mar. 6, 2020) ("In our de novo application of the *Michael F.* factors, we only analyze the first and fourth factors since they are the basis of Parent's substantive IDEA challenge"); *R.S. v. Highland Park Indep. Sch. Dist.*, 951 F.3d 319, 330 (5th Cir. Feb. 26, 2020) ("We have not held 'that district courts must apply the four factors in any particular way'") (quoting *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 294 (5th Cir. 2009)).

Here, Petitioners had organized the arguments and evidence before the district court, acknowledging that some argument had not "directly address[ed]"—for example, labeling—the first *Michael F.* factor. Similarly, the Petitioners repeatedly argued that CCISD's failures pertaining to the first three *Michael F.* factors were directly related to—and in many instances, demonstrated by—the absence of facts favoring CCISD on the fourth *Michael F.* factor. It would have been a waste to both the parties and the courts, to regurgitate that substance as an "independent argument" under a separate heading. Neither act was intended to concede half of the legal analysis; and this Court should require the Fifth Circuit to complete a full analysis of Petitioner's appeal.

2. Legally cognizable injury.

As discussed by one court, with its (Third) Circuit's endorsement:

> "Although there are no reported judicial decisions considering whether a public school's unilateral disenrollment of special education students is a change in placement, there is a substantial body of case law analyzing whether the modification or termination of an educational program constitutes a 'fundamental change' or 'elimination.' Those cases distinguish between inconsequential modifications in a student's program and those which 'significantly affect the child's learning experience.' Unlike program modifications, which change an aspect of a child's special education program, eliminations result in the complete cessation of the delivery of special education services. Courts have found indefinite expulsions, graduation, and transfers from a school outside the district to those within the district all implicate the stay-put rule.
>
> …
>
> … In both graduation and disciplinary exclusion cases, any change in a special education child's placement must comply with the procedural safeguards—regardless of what outcome state or local laws might dictate for a special education student's non-disabled peers.
>
> For instance, the disciplinary removal of a student with a disability is construed as a change in placement, and may require a school to evaluate the student, conduct a team meeting, propose an alternate special education plan, and provide special education services pending an agreed upon placement. Similarly, courts have held that graduation is a 'change in placement' which triggers the protections of the stay-put provision. In *Cronin v. Board of Education*, the court analogized graduation to long-term suspensions and expulsions because both 'result[ed] in total exclusion of a child from his or her educational placement.' Noting that '[n]o change in placement seems quite so serious nor as worthy of parental involvement and procedural protections as the termination of placement in special education,' the Court found that a student's removal from his high school program by graduation during the pendency of proceedings violated the stay-put provision. Like a graduation, indefinite suspension, or expulsion, the unilateral disenrollment of a special education student, which results in the absolute termination of a child's special education program, and purportedly the termination of a LEA's responsibility to deliver FAPE, is a change in placement."

R.B. v. Mastery Charter Sch., 762 F.Supp.2d 745, 757-760 (E.D.Pa. Dec. 29, 2010), *aff'd sub nom.*, 532 Fed.Appx. 136 (3d Cir. 2013). By way of analogical example to this matter:

> "The district court found that any possible classification error would have been harmless because the District otherwise provided S.P. with a FAPE. While it is true that '[t]he IDEA concerns itself not with labels, but with whether a student is receiving a [FAPE],' the classification error was not harmless. '[I]n the case of a child who is deaf or hard of hearing,' the IEP team must 'consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs.' Having improperly determined that S.P. does not have a hearing impairment disability, the District considered only goals and programs that would address S.P.'s speech and language delay. '[W]ithout evaluative information' regarding S.P.'s hearing impairment, 'it was not possible for the IEP team to develop a plan reasonably calculated to provide [her] with a meaningful educational benefit.'"

S.P. v. East Whittier City Sch. Dist., 735 Fed.Appx. 320, 322 (9th Cir. 2018) (internal citations omitted). As a matter of law on evaluations under circumstances similar to those W.V. faces, the Ninth Circuit, in reversing the district court's finding of FAPE in *S.P.*, stated:

> "The IDEA also requires the District to ensure that its students are 'assessed in all areas of suspected disability.' 'Anything less would not provide a complete picture of the child's needs.' While members of the IEP team were familiar with S.P.'s degree of hearing loss, the assessments were heavily focused on her speech and language disability. While the District was entitled to consider 'evaluations and information provided by [S.P.'s] parents,' including the audiogram conducted by Palacios, an independent obligation remained to conduct a full initial evaluation of S.P. in all areas of suspect disability. The District's 'auditory skills assessment' of S.P. consisted of only 'observation and review of records.' Such limited review was insufficient to satisfy the District's evaluative obligation."

735 Fed.Appx. at 322-323 (internal citations omitted); *see Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S.Ct. 988, 999 (2017) ("the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable

by children at the other end, with infinite variations in between")(quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 202 [1982]).

This Court should reject any rule that sees neither procedural nor substantive harm to a child who is legally eligible and in need of special education services, yet deemed disqualified. Here, W.V. presents with double-deficit dyslexia, a unique circumstance that affected what progress should look like for him. W.V.'s parents presented overwhelming evidence in the courts below, demonstrating that neither W.V.'s level of progress nor CCISD's limited screening were legally sufficient in light of W.V.'s double-deficit dyslexia for findings in CCISD's favor; and both decisions below, along with the Fifth Circuit's opinion, ignored this evidence. *See* Tex. Educ. Code § 38.003 (Texas Dyslexia Act).

Further, on multiple occasions throughout its decision, the district court misattributed over two pages worth of events to a wrong time period. Even if these issues implicated clear error review, it was sufficient for W.V.'s parents to alert the Fifth Circuit to the issues, without terms of art or other magic words. While CCISD may have cherry-picked evidence to illustrate manufactured progress, it was impossible to show such evidence was legally sufficient to demonstrate the level and type of progress necessary for W.V. under the IDEA; it was equally impossible for the decisions below or the Fifth Circuit to make such a finding.

The Fifth Circuit's opinion focuses on what was stated in the decisions below, along with what magic words were not stated by W.V.'s parents. However, the opinion's lack of legal analysis resulted in a simple endorsement of a rule that

allows school districts to unilaterally exclude otherwise IDEA-eligible children from receiving a FAPE by claiming, without evaluative support, that such children are disqualified. The practical consequences are enormous for the many parents who watch their children suffering when schools that promise cookie-cutter interventions, that a district will subsequently disclaim at the sight of any parent seeking to exercise due process rights. The absence of evaluative support in such a rule is the sharpest twist of the knife, which would effectively gut the IDEA, in a significant departure from the Supreme Court's precedent in *Rowley*, 458 U.S. at 202, and *Endrew F.*, 137 S.Ct. at 999, that progress obtainable by children have infinite, dramatically differing variations.

This Court should accept this case to clarify the nuanced legal sufficiency of a school district's evaluative information and a child's need for special education services, and define when there is procedural or substantive harm in disqualification of eligibility for special education services, such as for children who are determined eligible but claimed disqualified.

3. Regression and lack of progress.

The second question presented (i.e., how much regression or lack of progress need be shown by parents) in this Petition highlights the importance of the first question (i.e., legally cognizable injury), and the underlying case is a prime example for the necessary answers to these questions.

There is a significance to the burden of proof in IDEA cases; and particularly, the case underlying this Petition. In 2005, the Court acknowledged that "Congress

has never explicitly stated…which party should bear the burden of proof at IDEA hearings", and then, in the absence of a State (there, Maryland) law or regulation conferring the burden of proof upon a particular party, held "no more than we must to resolve the case at hand: The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 54, 62 (2005). In dissent, Justice Ginsburg stated: "For reasons well stated by Circuit Judge Luttig, dissenting in the Court of Appeals, 377 F.3d, at 456-459, I am persuaded that 'policy considerations, convenience, and fairness' call for assigning the burden of proof to the school district in this case." *Schaffer*, 546 U.S. at 63 (Ginsburg, J., dissenting). Since the Court's decision in *Schaffer*, some courts have acknowledged how fairness is trampled when school districts do not carry the burden of proof:

> "According to TMS's testing and progress reports, L.H. made steady progress. HCDE disputed this, however, accusing TMS of misrepresenting the results and arguing that L.H. did not actually progress at TMS. L.H.'s parents and experts contend that much of this is rooted in prejudice on the part of public school employees against the Montessori Method, and it is hard to ignore the partisan motive of HCDE's teachers and staff, who are effectively parties to this case; TMS's teachers and staff have no such motive. But the district court found HCDE's witnesses more credible and sided with HCDE's assessment that, although the TMS teachers and the parents' experts assessed him as having achieved a much higher level, as of L.H.'s third or fourth grade year at TMS, his math skills were at a first-grade level, his ability to decode words was at a third-grade level, and his reading comprehension an early-second-grade level."

L.H. v. Hamilton Cnty. Dept. of Educ., 900 F.3d 779, 788 (6th Cir. 2018). The *L.H.* family had TMS, a private school that would collect tuition for L.H.'s enrollment,

regardless of whether the family could subsequently collect public reimbursement. *See L.H.*, 900 F.3d at 787. However, here, W.V., like millions of other similarly situated children with disabilities, had to rely on the school district's records and witnesses, three outside experts, and the director at a private tutoring center. Pet. App. G7. Absent all-school-day access to a child (or, alternatively, the unlikely scenario of public school staff willing to openly admit they failed to perform their jobs), there is currently no way of knowing how a family could overcome the burden to show that a school district denied their child a FAPE and what relief is owed.

What additionally makes W.V.'s situation the prime case for this Court's consideration is that the district court well illustrated the near impossibility of relief that families face, in the absence of guidance on how much regression was suffered or the lack of progress made. Petitioner pointed to objective standards where W.V. failed to make progress, and an expert familiar with W.V. and his disabilities testified to the inadequacy of the educational methods for W.V. to be able to make progress. *See* Pet. App. A6, E14. Petitioner further pointed to evidence that W.V.'s teacher had *modified his grades*. Pet. App. B19, E24-E25. Simply put, it is incredulous to expect that W.V. actually made meaningful progress in light of his circumstances. Nevertheless, Judge Albright stated that letter grade improvement "was not the goal of his IEP", and made the surprising finding that the school district's evidence in the record showed progress being made, despite ample record evidence to the contrary and despite the unsurprising notion that a school district's records are likely to show whatever the school district wants. Pet. App. B19-B20.

This is curable, by a decision by this Court as to how much W.V. regressed or how lacking in progress he was.

4. Modified *de novo* or clear error review.

In 2008, the Tenth Circuit acknowledged and otherwise declined to address its status as a minority in applying a modified *de novo* review in the IDEA context, instead of the clear error review applied by the Third, Fifth, Eighth, and Ninth Circuits. *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1150 fn. 6 (10th Cir. 2008) (Gorsuch, C.J.).

Even then, some courts below have missed a fine, yet important, distinction epitomized in both *Rowley* and *Endrew F.*, concerning what standard of review should apply to varying aspects of analyzing educational progress under the IDEA—namely, what *appropriate* progress looks like, as opposed to the factual finding that *any or some* progress was made. For instance, here, the Fifth Circuit reviewed only "the district court's ultimate conclusion that the District complied with the IDEA" *de novo*, and considered all other conclusions to be "factual" and subject to only clear error review. Pet. App. A6-A10. Further, the Fifth Circuit omitted its own prior caselaw stating that mixed issues of law and fact are reviewed *de novo*. *See Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 676 (5th Cir. 2018). At first glance, this would appear to be a split from the First Circuit, which has stated:

> "The majority of Johnson's challenges raise only questions of law. Her final claim of error, however, includes both a pure question of law, i.e. whether the district court applied the proper standard in evaluating N.S.'s educational progress, and a mixed question of law

> and fact, i.e. whether, measured against the correct standard, N.S.'s progress under the challenged IEPs was sufficient."

Johnson v. Boston Public Schools, 906 F.3d 182, 191 (1st Cir. 2018) (emphasis in original). However, in *Johnson*, the First Circuit then went on to apply clear error review to those issues, and neither party appealed to this Court. 906 F.3d 182, 191-196.

Here, application of the more stringent clear error standard has sanctioned grievous errors by the district court in not fully or appropriately reviewing the record evidence. Petitioner had explained the circumstances to which the law should have been applied, with arguments focused on: (i) legal conclusions; and (ii) mixed questions of law and fact. The Fifth Circuit did not appear to recognize that the Petitioner's referenced facts were those that the Magistrate and district court erred in not addressing—and thus, not weighing—and those that were unsupported by the record as being misstated by the Magistrate and/or district court. These were mixed questions of law and fact that triggered *de novo* review. *C.f., Krawietz*, 900 F.3d at 676. In using clear error review to clear the appellate docket, the Fifth Circuit effectively announced a new rule that an eligible child with a disability can be disqualified on a whim without recourse or remedy. Such a rule, if permitted to stand, would blaze a trail for school districts to deny millions of children access to and the benefits of special education.

B. The questions presented are exceptionally important and warrant this Court's review.

If permitted, the Fifth Circuit's decision and analysis will have sweeping legal and practical consequences. As a matter of fact, it would eviscerate any chance of families of children with disabilities from succeeding in the IDEA's administrative due process hearing, at least so long as school districts remember to have their staff testify that some progress was made, reverting to the (pre-*Endrew F.*) standards that were rejected by this Court.

Parents of children with disabilities face enormous emotional and practical challenges, among such challenges being the intensive process of developing an IEP and determining whether a child's school is actually implementing it. While this challenge may be limited in some States, such as New York, where the IEP team is expected to meet once annually and finalize an IEP to last for an entire school year, a parent's challenges are greatly amplified in other States, such as Texas, where the IEP is considered more of a living document and its development and implementation are considered part of an ongoing process throughout a child's educational career. In either event, parents—who are statutorily-mandated members of the IEP team—need clarity of their (and the school district's) rights and obligations, together with the certainty that each child is receiving an appropriate program in light of the child's unique circumstances. Parents should not have to—and in many cases, cannot—bear the added financial and emotional burdens of unilaterally placing their children in different schools, just to verify that a school district's program was not appropriate or, even if appropriate, not provided. This

Court's answer to the questions presented in this matter would significantly reduce the difficulties that parents face in this process.

Consistent, objective standards are also required for school administrators who are obligated to efficiently provide free appropriate public education to children with disabilities, if for no other reason, to effectively collaborate with parents and appropriately evaluate children to prevent—or, at least, amicably resolve—disputes.

This matter is the next step in reaching the objective standard necessary for parents and school administrators to provide a FAPE to children with disabilities. In *Endrew F.*, this Court held that, "to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S.Ct. at 999. While the Court, in *Endrew F.*, primarily focused on whether a student was *offered* a program that would enable appropriate progress, the Court also reiterated its prior statement from *Rowley*: "For children with disabilities, receiving instruction that aims so low would be tantamount to 'sitting idly … awaiting the time when they were old enough to 'drop out.'" 137 S.Ct. at 999, *quoting* 458 U.S. at 179, 102 S.Ct. 3034. Hence, while *Endrew F.* did not decide standards surrounding the implementation of a child's IEP, the Court foresaw that deciding what is appropriate for a school to offer was simply one side of the coin; monitoring what the school provides is the other, whether at the IEP team, administrative, or court level.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 14, 2020
Lyle W. Cayce
Clerk

No. 19-51046

WILLIAM V., *as parent / guardian / next friend of* W.V., *a minor individual with a disability*; JENNY V., *as parent / guardian / next friend of* W.V., *a minor individual with a disability*,

Plaintiffs—Appellants,

versus

COPPERAS COVE INDEPENDENT SCHOOL DISTRICT,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:17-CV-201

Before SMITH, WILLETT, and DUNCAN, *Circuit Judges*.

PER CURIAM:*

Appellants contend that Appellee Copperas Cove Independent School District (the "District") violated the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1401 *et seq.*, with respect to the

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

educational services it provided their child, W.V. The district court granted the District's summary judgment motion. We affirm.

I.

W.V. was a student in the District with dyslexia and speech difficulties. When he entered the District in first grade, the District continued to implement a program W.V.'s previous school had developed to treat his speech impairment. W.V. was not considered to have a "Specific Learning Disability" ("SLD"), which would have required the District to provide additional services. *See* 20 U.S.C. § 1401(3)(A)(i) (providing a child is eligible for certain IDEA services if he has, *inter alia*, "specific learning disabilities"). During first grade, W.V.'s mother asked the District to evaluate him for an SLD. The District declined to do so, but it did test, and eventually treat, W.V. for dyslexia. The following school year, the District began providing W.V. assistance under the "Wilson Reading System." But later that fall, after reviewing W.V.'s performance in speech, reading, and cognitive capability, the District found that W.V. was no longer eligible for speech therapy and that his reading scores showed improvement consistent with his dyslexia counseling.

After exhausting appropriate state administrative remedies, *see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 204–05 (1982), W.V.'s parents sued the District, alleging it violated the IDEA by delaying W.V.'s SLD assessment; concluding W.V. did not have an SLD or a speech and language impairment; failing to evaluate whether W.V. required "assistive technology"; and employing the Wilson Reading Program, which, they alleged, "did not demonstrate positive results" and "was not research-based." The parties cross-moved for summary judgment.

The district court granted summary judgment to the District, adopting in part the magistrate judge's report and recommendation. The

court held that the District "violated the IDEA by finding W.V. did not qualify as a student with an SLD." But the court concluded the violation was only "procedural" and did not deprive W.V. of a Free Appropriate Public Education ("FAPE") because his SLD status "did not result in the loss of [his] educational opportunities." The parents appealed, and we reversed and remanded, asking the district court to assess under the proper standard whether W.V. qualified as a "child with a disability." *William V. v. Copperas Cove Indep. Sch. Dist.*, 774 F. App'x 253, 254 (5th Cir. 2019). In particular, we asked the court to consider whether W.V. "need[ed] special education and related services," a necessary condition for IDEA coverage. *Id.* at 253 (quoting 34 C.F.R. § 300.8(a)(1)).

On remand, the district court followed our instructions and held W.V. needed special education services, thus qualifying as a "child with a disability." As it did previously, the court then found the District had procedurally violated the IDEA by finding W.V. had no SLD, but that this did not cause W.V. "a legally cognizable injury."[1] According to the court, the District's erroneous SLD determination did not harm W.V. because "the District continued providing W.V. with the same . . . services" and "kept W.V.'s [individualized educational program or 'IEP'] in place months after" it had determined he no longer had a SLD. Additionally, the court applied our four *Michael F.* factors, *see Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997),[2] to determine whether the District had

[1] The court also reiterated it had "accept[ed] and adopt[ed] the [magistrate's] Report and Recommendation in its entirety except as to" the SLD analysis.

[2] The factors ask whether "(1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and (4) positive academic and non-academic benefits are demonstrated." *Michael F.*, 118 F.3d at 253.

provided W.V. with a FAPE, concluding that the District's treatment of W.V. (1) was individualized, (2) was administered in "the least restrictive environment," (3) was "effectuated in a coordinated and collaborative manner by key stakeholders," and (4) "demonstrated positive academic and non-academic results." The court therefore again granted summary judgment to the District. A timely appeal followed.

II.

We review the district court's fact findings for clear error and defer to those findings unless we have "a definite and firm conviction that a mistake has been committed." *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 395 (5th Cir. 2012) (quoting *Hous. Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009)). We review legal conclusions, including the ultimate liability conclusion, *de novo*. *Id.* (citing *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993)). But factual conclusions, such as "[w]hether the student obtained educational benefits from the school's special education services," are reviewed for clear error. *Id.* (citing *Teague*, 999 F.2d at 131); *accord A.A. v. Northside Indep. Sch. Dist.*, 951 F.3d 678, 684 (5th Cir. 2020) (citation omitted)). The party attacking a school district's decisionmaking "bears the burden of demonstrating its non-compliance with IDEA." *Hovem*, 690 F.3d at 395 (citing *Teague*, 999 F.2d at 131).

III.

Federally funded school districts must follow the IDEA's "substantive and procedural requirements," including the basic obligation of providing a FAPE for all disabled children. *William V.*, 774 F. App'x at 253 (citing *Honig v. Doe*, 484 U.S. 305, 310 (1988)); *see generally Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 993–94 (2017). The IDEA's core substantive requirement is that schools design and adhere to an IEP for each disabled student. *Honig*, 484 U.S. at 311. "The IEP is the means by which

special education and related services are 'tailored to the unique needs' of a particular child." *Endrew F.*, 137 S. Ct. at 994 (quoting *Rowley*, 458 U.S. at 181). In addition, the IDEA "establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." *Honig*, 484 U.S. at 311–12. But procedural violations of the IDEA "alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity." *Hovem*, 690 F.3d at 396 (citation omitted).

To satisfy the IDEA, a school need not provide the best possible education or even "one that will maximize the child's educational potential." *Michael F.*, 118 F.3d at 247 (citation omitted). It must provide only "an education that is specifically designed to meet the child's unique needs, supported by services that will permit him 'to benefit' from the instruction." *Id.* at 247–48 (quoting *Rowley*, 458 U.S. at 188–89). "In other words, the IDEA guarantees only a 'basic floor of opportunity' for every disabled child, consisting of 'specialized instruction and related services which are individually designed to provide educational benefit.'" *Id.* at 248 (quoting *Rowley*, 458 U.S. at 201). But an IEP must be designed to achieve "meaningful," not "*de minimis*," progress. *Id.* (citations omitted); *see also Endrew F.*, 137 S. Ct. at 1001 (the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances").

A.

Appellants argue the district court erred when it found the District's failure to classify W.V. as having an SLD did not deny him educational opportunities. Specifically, they contend the district court (1) failed to give adequate weight to W.V.'s lack of progress under his IEP, (2) failed to find

the District did not use research-based methods, and (3) misapplied the four *Michael F.* factors. We address each argument in turn.

1.

Appellants contend the district court failed to "conduct[] its own analysis to consider W.V.[']s regression and lack of progress." They claim the court relied too heavily on W.V.'s grades and reading level assessments. They also argue W.V.'s scores on standardized tests were "stagnant and far below grade level."

Appellants fail to show reversible error. The district court and the magistrate judge, whose report and recommendation the court adopted in relevant part, addressed W.V.'s grades and standardized tests at great length, rejecting the same arguments Appellants now raise on appeal. For example, the magistrate rejected the argument concerning W.V.'s failure to meet grade-level standards on standardized tests, finding that these measures "compare[d] W.V. to his peers and [did] not address standards particular to W.V.'s personal improvements or regression." The magistrate instead identified meaningful development in W.V.'s progress reports, relying on these to conclude he had made more than *de minimis* progress under his IEP. The district court adopted these findings and, based on extensive evidence of progress in speech and reading skills, found the District had complied with the IDEA. Appellants' briefing in our court largely repeats their arguments in the district court and scarcely acknowledges the district court's (and the magistrate's) reasoning. For example, the magistrate and district court both relied heavily on *Houston Independent School District v. Bobby R.*, in which we emphasized that under the IDEA, a student's development must be measured with respect to him, not other students. 200 F.3d 341 (5th Cir. 2000). On appeal, Appellants do not address *Bobby R.* or provide any argument that the district court erred in its application of our precedent. Nor

do they show clear error in the district court's findings that "W.V. was continuously progressing in the general education setting" in areas such as reading, writing, and math.

Moreover, while the district court's ultimate conclusion that the District complied with the IDEA is reviewed *de novo*, we review underlying factual conclusions only for clear error. *Hovem*, 690 F.3d at 395 (citation omitted). The magistrate and the district court thoroughly addressed each of the arguments Appellants now raise and weighed evidence of W.V.'s progress accordingly. We cannot upend the district court's conclusions merely because Appellants believe it should have weighed the evidence differently. Based on Appellants' arguments and our own review of the record, we lack "a definite and firm conviction that a mistake has been committed." *Id.* (citation omitted).

2.

The same is true of Appellants' second argument, that the district court ignored their contention that the District failed to employ "research-based" programs. Appellants contended that the Wilson Reading System was not research-based and that, in any case, "research does not support its use for children, such as W.V., with severe dyslexia." The district court rejected both arguments. For instance, the court found that the Wilson program, to which W.V.'s parents had consented, was "a structured, research-based program that comports with the Texas Dyslexia Handbook." The court also cited ample evidence of W.V.'s improvement under the Wilson program in terms of, for example, conversational speech accuracy and reading comprehension. Appellants fail to address this analysis. Moreover, the district court expressly rejected expert testimony that the Wilson program was inadequate for W.V.'s needs because the testimony contradicted the evidence of W.V.'s improvement. Appellants rely on that

same testimony on appeal without explaining why the district court clearly erred in rejecting it. Accordingly, Appellants have again failed to show clear error.

3.

Finally, Appellants contend the district court misapplied three of the four *Michael F.* factors. *See supra* n.1. They admit they failed to "directly address" the first factor before the district court—namely, whether W.V.'s program was individualized. Their argument as to that factor is forfeited. *Rittinger v. Healthy All. Life Ins. Co.*, 914 F.3d 952, 955 (5th Cir. 2019) (citation omitted). They also fail to develop an independent argument as to the fourth factor—whether W.V. benefited from his IEP—referring only to their previous argument regarding W.V.'s academic progress, which the District, the Special Education Hearing Officer ("SEHO"), the magistrate, the district court, and now this panel have all rejected. As to the third factor—whether the IEP was effectuated in a "collaborative manner"—Appellants show no clear error in the district court's conclusion that they were involved extensively in forming and executing W.V.'s IEP. The record reflects, for example, that Appellants were invited to and participated in several meetings to discuss W.V.'s IEP and that the District regularly kept them apprised of his progress. We therefore find no reversible error in the district court's application of the *Michael F.* factors.

B.

We next address Appellants' contention that the district court erred by failing to treat three other District actions as procedural IDEA violations. Namely, they argue that the court failed to address (1) whether the District unduly delayed W.V.'s Full and Individual Evaluation (or "FIE"), *see* 20 U.S.C. § 1414(a)(1)(A); (2) whether W.V. had a speech impairment, and (3)

whether the District improperly failed to evaluate whether W.V. needed assistive technology.

Yet again, Appellants' briefing merely reiterates the same arguments made before the district court and attacks the court's fact findings without demonstrating clear error. For example, they claim the district court "without discussion" rejected their argument that the District unduly delayed W.V.'s FIE. This is incorrect. The magistrate devoted several pages to the issue, concluding that "the record demonstrates a logical chain of progression from W.V.'s first day in the District to his FIE testing a year later." The magistrate concluded that the District adopted a previous school's IEP and that the District had ample evidence that "W.V. appeared to be progressing." And the magistrate similarly rejected Appellants' argument that the District should have suspected a need for special education "in September 2015, the month W.V. entered the District." Appellants fail to identify clear error in these fact-bound conclusions.

Appellants' second argument, that the district court failed to address whether W.V. had a speech and language impairment, similarly ignores detailed fact findings. For example, Appellants repeat the argument that the District revoked W.V.'s impairment status based solely on a five-minute assessment. The magistrate addressed this contention at length, finding the District's speech pathologist worked with W.V. five times per week, for thirty minutes per meeting, per six-week grading period. Furthermore, the magistrate made extensive findings regarding the speech pathologist's qualifications and interactions with W.V., none of which Appellants address on appeal.

The same is true for Appellants' final argument, that the district court "fail[ed] to address the argument that" the District should have evaluated W.V. for assistive technology. That is incorrect. The magistrate's report and

recommendation analyzed this argument extensively, concluding that Appellants "fail[ed]" the first prong of the relevant analysis "by disregarding . . . entirely" their burden to prove that W.V. needed assistive technology for his FAPE. *See* 34 C.F.R. § 300.105. Appellants fail to show reversible error as to this conclusion.[3]

AFFIRMED.

[3] Because we conclude the district court did not reversibly err in holding that the District evaluated W.V. properly, we need not address Appellants' argument that the District should have reimbursed them for private evaluations.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

WILLIAM V. AND JENNY V., AS PARENTS / GUARDIANS / NEXT FRIENDS OF W.V., A MINOR INDIVIDUAL WITH A DISABILITY,	§	
Plaintiffs,	§	**CASE NO. 6:17-CV-00201-ADA-JCM**
v.	§	
COPPERAS COVE INDEPENDENT SCHOOL DISTRICT,	§	
Defendant.	§	

MEMORANDUM AND ORDER

Before the Court are the Motion for Judgment on the Administrative Record or Alternative Motion for Summary Judgment filed by Copperas Cove Independent School District (the "District"), Def.'s Mot. Summ. J. [ECF No. 69], Motion for Judgment on the Administrative Record or Alternatively Motion for Summary Judgment filed by William V. and Jenny V., Pls.' Mot. Summ. J. [ECF No. 70], Response to Summary Judgment filed by Plaintiffs, Pls.' Summ. J. Resp. [ECF No. 71], Response to Summary Judgment filed by Defendant, Def.'s Summ. J. Resp. [ECF No. 72], Objections to Summary Judgment Motion filed by Defendant, Def.'s Objs. [ECF No. 73], Response to Objections filed by Plaintiffs, Pls.' Objs. Resp. [ECF No. 74], Reply in Support of Objections filed by Defendant, Def.'s Objs. Reply [ECF No. 76], Reply in Support of Summary Judgment filed by Plaintiffs, Pls.' Summ. J. Reply [ECF No. 78], Reply in Support of Summary Judgment filed by Defendants, Def.'s Summ. J. Reply [ECF No. 79], Motion to Strike

Amended Complaint filed by Defendant, Def.'s Mot. Strike [ECF No. 84], Response to Motion to Strike filed by Plaintiffs, Pls.' Strike Resp. [ECF No. 86], Reply in Support of Motion to Strike filed by Defendant, Def.'s Strike Reply [ECF No. 90], Motion for Leave to File Supplemental Motion for Summary Judgment filed by Defendant, Def.'s Mot. Supp. [ECF No. 87], Response to Motion to Supplement filed by Plaintiffs, Pls.' Supp. Resp. [ECF No. 89], and Reply in Support of Motion to Supplement filed by Defendant, Def.'s Supp. Reply [ECF No. 90]. For the reasons that follow, the Court **ORDERS** Defendant's Motion for Judgment be **GRANTED**, Plaintiffs' Motion be **DENIED**, and Defendant's Objections, Motion to Supplement, and Motion to Strike be **DENIED** as moot.

I. BACKGROUND

Minor W.V. is a fourth-grader with dyslexia and documented-difficulty in reading and articulation. Pls.' First Am. Compl. at 6 [ECF No. 2]. Before entering the District as a first grader, W.V.'s prior school developed a Speech Impairment ("SI") program for W.V. due to articulation errors inconsistent with W.V.'s age and development. Administrative Record ("A.R.") at 8 [ECF No. 9-3].[1] The District accepted the prior school's program when W.V. entered in September 2015 and began providing him Speech Therapy. *Id.*

On April 18, 2016, Plaintiff Jenny V. requested the District evaluate W.V. for a Specific Learning Disability ("SLD"). *Id.* at 12. A District representative responded W.V. would continue to receive the benefits set by the District and its Admission, Review, and Dismissal Committee's ("ARDC") program. *Id.* The District formally responded on April 28, 2016 with a Notice of Action that W.V. would not be tested for an SLD but would be tested for dyslexia. A.R. at 12.

[1] The administrative record will herein be cited as "A.R. at __", with "__" denoting the page number.

Plaintiff Jenny V. met with the District's Special Education Director on April 29, 2016 to request SLD testing in addition to dyslexia testing. A.R. at 13. The Director concluded the data only supported dyslexia screening. *Id.* at 13–14. On May 31, 2016, the ARDC stated W.V. would receive dyslexia services daily for the next year, would be given extra time to complete assignments, receive additional instruction as needed, receive on-task reminders, and have materials read to him, among other assistance. *Id.* at 15–16.

On September 6, 2016, a TPRI[2] test administered to W.V. resulted in a "still developing" score in all areas. A.R. at 17–18. W.V. also began receiving assistance under the Wilson Reading System to improve reading accuracy and spelling. *Id.* at 19. On September 12, 2016 the ARDC reconvened to conduct a review of W.V.'s performance. *Id*. The ARDC determined W.V. should undergo a Full Individual Evaluation ("FIE") to reassess his needs and potential for Special Education services, though it did find based on an October 2015 screening that available assistive technology was sufficient to accommodate W.V.'s needs. A.R. at 18–19. The FIE was completed November 16, 2016, with the following relevant results:

- W.V. no longer met eligibility for a SI;
- The GFTA-2 Test, as used by a Speech Language Pathologist ("SLP") employed by the District, scored W.V. in the average standard range with at least 80% accuracy in verbal exchanges;
- The District's SLP recommended W.V. no longer receive Speech Therapy services;
- W.V. no longer met eligibility for a SLD;

[2] In education and, particularly, special education, acronyms are ubiquitous to the point that they create, rather than alleviate, most confusion. *See* Special Education Acronyms and Terms, ParentCompanion.Org (accessible at: http://www.parentcompanion.org/article/special-education-acronyms-and-terms) (last accessed September 18, 2018 at 10:41 a.m.). The Court will strive to define those acronyms relevant in its analysis, but will refrain from defining those that are not.

- A Cross-Battery Assessment System ("X-BASS" or "Cross-Battery") applied by a District-employed Educational Diagnostician showed none of W.V.'s global cognitive abilities (i.e. verbal comprehension, working memory) was below average range (the identifier of a student with a SLD);

- The Cross Battery applied by the District, using tests WJ-IV ACH, WJ-IV OL, and KTEA-3, found average or above-average scores for W.V. in all but reading; and,

- W.V.'s reading scores were consistent with his dyslexia and showed improvement concurrent with the District's provided dyslexia services.

A.R. at 21–24.

In January 2017, Plaintiffs requested a due process hearing through the Texas Education Agency. *Id.* at 4. Plaintiffs complained the District: (1) denied W.V. a free appropriate public education ("FAPE") by violating its child find duty; (2) failed to comply with procedural requirements; (3) conducted an inappropriate FIE; and (4) developed an Individualized Education Program ("IEP") that did not meet W.V.'s unique needs. *Id.* at 3. A hearing was held on May 30-31, 2017 before a Special Education Hearing Officer ("SEHO"). *Id.* at 4. The SEHO rendered a decision on June 30, 2017 finding in favor of the District on all counts. *Id.* at 49.

On July 28, 2017, Plaintiff Jenny V., joined by William V., sued the District on behalf of W.V., appealing the decision of the SEHO. Pls.' Compl. at 1. Plaintiffs challenge the following findings by the SEHO: (1) Plaintiffs did not prove the District violated the Individuals with Disabilities Act ("IDEA"); (2) the District's FIE was appropriate; (3) the District properly identified, evaluated, and placed W.V.; (4) the District did not commit any procedural violations; and (5) Plaintiffs were not entitled to an individualized evaluation at District expense. A.R. at 3–4. The parties filed cross-motions for summary judgment on May 31, 2018, each seeking a ruling on the administrative record. Def.'s Mot. Summ. J. at 1; Pls.' Mot. Summ. J. at 1. Defendant also filed, on June 14, 2018, an objection to portions of Plaintiffs' Motion regarding a Department of

Education report, allegations of impropriety by a district employee, transportation costs as damages, conflicts between W.V. and other students, and private school costs. Def.'s Objs. ¶¶ 1–5. Over the following months, the parties fully briefed these disputes.

A Report and Recommendation was filed by the Magistrate Judge on October 15, 2018, recommending that the Court grant in full Defendant Copperas Cove Independent School District's Motion for Judgment on the Administrative Record or, in the Alternative, Motion for Summary Judgment and deny Plaintiffs' opposing Motion for Judgment on the Administrative Record or, in the Alternative, Motion for Summary Judgment. On December 10, 2018, this Court entered an **ORDER** accepting and adopting the Report and Recommendation in its entirety except as to the Magistrate Judge's findings that the District did not procedurally violate the IDEA because W.V. did not qualify as a student with an SLD. On appeal to the United States Court of Appeals for the Fifth Circuit, the Fifth Circuit **VACATED** and **REMANDED** the case for reconsideration, in light of the appropriate standard.

II. LEGAL STANDARD

The Individuals with Disabilities Education Act (IDEA) can be found in Title 20, Chapter 33 of the United States Code. The purpose of the IDEA is:

> to ensure that all children with disabilities have available to them a free appropriate public education . . . designed to meet their unique needs and to ensure that the rights of children with disabilities and parents of such children are protected.

20 U.S.C. § 1400(d)(1)(A)-(B). The IDEA compels those states receiving federal funding to educate children with disabilities to the maximum extent appropriate with children who are not disabled, 20 U.S.C.S. § 1412(a)(5), and to do so in the least restrictive environment consistent with their needs. *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 922 (W.D. Tex.

2008). In exchange for such funds, States pledge to ensure a free appropriate public education (FAPE) is available to all children with disabilities residing in the State between the ages of 3 and 21. 20 U.S.C.S. § 1412(a)(1)(A). Because the State of Texas receives federal education funding, all school districts within its borders must comply with the IDEA. *Richard R.*, 567 F. Supp. 2d at 922.

A "child with a disability" means a child who has a disability, and because of the disability needs special education and related services. 20 U.S.C.S. § 1401(3)(A). Thus, to qualify for special education, a student (1) must have one or more of the disabilities recognized by the IDEA and (2) need special education services. *Id*. Once a school accepts that one of its students is eligible under the IDEA, the school must develop an individualized educational program (IEP) for that student. *Dall. Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 306 (5th Cir. 2017). The IEP is a written statement, prepared at a meeting of qualified representatives of the local educational agency, the child's teacher, parent(s), and where appropriate, the child. 20 U.S.C. § 1414(d). To ensure that each student receives a FAPE, school districts must collaborate with parents to develop and implement an IEP that is "reasonably calculated to enable the child to receive educational benefits." 20 U.S.C. § 1400(d)(l)(A); *R.H v. Plano Indep. School Dist*., 607 F.3d 1003, 1008 (5th Cir. 2010).

In the event an IEP is necessary, courts take a two-step approach in reviewing its adequacy: (1) courts first evaluate whether the school district complied with the procedural requirements of the IDEA; and (2) then evaluate whether the IEP is reasonably calculated to enable the student to receive educational benefits. *Klein Indep. School Dist. v Hovem,* 690 F.3d 390, 396 (5th Cir. 2012) (citing *Bd. Of Educ. v. Rowley,* 458 U.S. 176, 206-07 (1982)). Although the FAPE that the IDEA demands of the states need not be the best possible one, nor one that

will maximize the child's educational potential, it must be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him "to benefit" from the instruction. *Richard R.*, 567 F. Supp. 2d at 922. To determine whether the IEP is "reasonably calculated to enable the child to receive educational benefits," courts must evaluate four factors: (1) whether the program is individualized on the basis of the student's assessment and performance; (2) whether the program is administered in the least restrictive environment; (3) whether the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and (4) whether there was positive academic and non-academic benefits demonstrated. *Cypress-Fairbanks Indep. School Dist. v. Michael F.*, 118 F.3d 245, 248, 253 (5th Cir. 1997).

The judiciary's role under the IDEA is purposefully limited. *Richard R.*, 567 F. Supp. 2d at 922. Therefore, while a federal district court's review of a state hearing officer's decision is virtually de novo, this by no means represents an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. *Id.* Instead, the district court should accord due weight to the state hearing officer's findings. *Id.* Operationally, the "due weight" standard calls upon the district court to receive the record of the administrative proceedings, to take additional evidence at the request of any party, and ultimately, to reach an independent decision based on a preponderance of the evidence. *Id.* Accordingly, the Court uses the two-part inquiry, taking care not to substitute its own notion of sound educational policy. *Richard R.*, 567 F. Supp. 2d at 926-27. First, the Court will consider whether the state complied with the procedures as set forth in the IDEA. Secondly, the Court will determine if the District's actions were "reasonably calculated" to enable the child to receive educational benefits. *Id.* Under this two-part test, summary judgment effectively asks the Court

to decide the case based on the administrative record. *E.G. v. Northside Indep. Sch. Dist.*, No. SA:12-CA-949-FB, 2014 WL 12537177, at *5 (W.D. Tex. March 31, 2014) (Biery, J.).

Plaintiffs argue they should be granted summary judgment for six independent reasons. Pls.' Mot. Summ. J. at 1–20. First, they argue the District violated the IDEA by unduly delaying W.V.'s assessment for a SLD. *Id.* at 3. Second, they argue the District violated the IDEA by finding W.V. did not qualify as a student with a SLD. *Id.* at 5. Third, they argue the District violated the IDEA by finding W.V. did not qualify as a student with a Speech and Language Impairment. *Id.* at 9. Fourth, they argue the District violated the IDEA by failing to evaluate whether assistive technology was needed for W.V.'s FAPE. *Id.* at 13. Fifth, they argue the District violated the IDEA by implementing the Wilson Reading Program because the program did not demonstrate positive results. *Id.* at 14. Lastly, Plaintiff's argue the District violated the IDEA by implementing the Wilson Reading Program because the program was not research-based. Pls.' Mot. Summ. J. at 15.

Alternatively, the District argues it is entitled to summary judgment for five reasons. Def.'s Mot. Summ. J. at 7. First, it argues it had no reason to suspect W.V. suffered from a SLD. *Id.* at 7–8. Second, it argues the methods it used to assess SLD eligibility were appropriate. *Id.* at 10–11. Third, it argues any alleged procedural violation of the IDEA did not lead to the denial of W.V.'s FAPE or Plaintiffs' opportunity to participate. *Id.* at 14–15. Fourth, it argues the Court may not consider Plaintiffs' purported evidentiary challenges. *Id.* at 19–20. Finally, it argues Plaintiffs are not entitled to reimbursement for W.V.'s private education in North Carolina. *Id.* at 20–21.

III. DISCUSSION

The IDEA can be violated in two ways. *Richard R.*, 567 F. Supp. 2d at 926-27; *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003). First, a school district can fail to implement procedural safeguards set forth by the IDEA. *Id.* Second, a school district can fail to make reasonably-calculated efforts to ensure a student received educational benefits. *Id.* A plaintiff must therefore identify a procedural requirement imposed by the IDEA and show how the corresponding district violated it. *See Leticia H. v. Ysleta Indep. Sch. Dist.*, 502 F. Supp. 2d 512, 518 (W.D. Tex. 2006). However, even after such showing, the plaintiff must then prove an injury resulted from the procedural violation. *See, e.g., id.* ("Defendant is correct that a procedural violation standing alone will not entitle a plaintiff to relief. Accordingly, most courts require a showing of substantive harm precipitating from a procedural violation before granting relief.") (citing *Adam J v. Keller Indep. Sch. Dist*., 328 F.3d 804 (5th Cir. 2003)). A plaintiff may be injured by either (1) a denial of the child's FAPE if that denial resulted in the loss of educational opportunity; or (2) denial of the parent's ability to participate in the IEP process. *Adam J v. Keller Indep. Sch. Dist*., 328 F.3d 804, 812 (5th Cir. 2003).

A. The District Procedurally Violated the IDEA because W.V. is a Child with a Disability Under the Act.

The IDEA does not compel the School District to provide a student with an IEP unless the student qualifies as a "child with a disability" under the Act. 20 U.S.C. § 1414(d)(2)(A); *see also* 34 C.F.R § 300.306(c)(2). There is a two-part test for making such a determination. A child qualifies as a "child with a disability" under the IDEA if the child (1) has an intellectual disability, specific learning disability (SLD), or other health impairment and (2) "by reason thereof, needs special education and related services." 34 C.F.R. § 300.8(a)(1).

i. W.V. has a specific learning disability

The IDEA defines a SLD as:

> (A) In general. The term "specific learning disability" means a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.
>
> (B) Disorders included. Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, *dyslexia*, and developmental aphasia

20 U.S.C. § 1401 (emphasis added). The IDEA's statutory language explicitly includes dyslexia as a disorder included as a SLD. *Id*. W.V. was diagnosed with dyslexia; therefore, the SEHO erred in concluding that W.V. did not have a SLD.

The District claims that "it is undisputed that, at the time of the due process hearing, the law did not require a finding of an SLD when dyslexia was diagnosed." However, the District cites no authority for this claim and does not address the fact that the IDEA itself explicitly defines dyslexia as an SLD. The provisions from *The Dyslexia Handbook* that the District cites for support gives background on how dyslexia is diagnosed; however, it does not provide any support for the District's argument that dyslexia is not an SLD.

The District correctly notes that the IDEA does not require school districts to classify students by a disability or create an appropriate label to identify a student with a disability. 20 U.S.C. § 1412(a)(3)(B); *G.I. v. Lewisville Indep. Sch. Dist*., No. 4:12-cv-385, 2013 WL 4523581, at *10 (E.D. Tex. Aug. 23, 2013). Defendant then quotes the Fifth Circuit, which stated that:

> [T]he Child Find provision itself suggests that diagnostic labels alone should not be determinative when considering whether a remedy furthers IDEA's purposes. The position that the diagnostic label affixed to a child should determine whether she has prevailed under the IDEA "reflects a preoccupation with labels that [IDEA] do[es] not share."

Lauren C. by and through Tracey K v. Lewisville Indep. Sch. Dist., 904 F.3d 363, 376 (5th Cir. 2018) (emphasis in original) (quoting *Angela L. v. Pasadena Indep. Sch. Dist*., 918 F.2d 1188, 1195 (5th Cir. 1990)). In these cases, the Fifth Circuit determined that a child displaying the symptoms of an SLD as listed in the statute, who has not been labeled with such a condition, should not be denied services for *lack* of a label. The context of these cases indicates that the Fifth Circuit's statements do not support the idea that a school district can wiggle out of providing services once a condition like dyslexia has been diagnosed, as the District suggests. In the present case, W.V. has already been diagnosed with an eligible condition. Such a diagnosis negates the need for additional testing to determine SLD status and the District's discretion in making such a determination.

Therefore, the Court finds that the District and SEHO erred in finding that W.V. did not have a SLD. However, this inquiry only satisfies the first prong of the two-part test in determining whether W.V. is a "child with a disability" and therefore entitled to an IEP.

ii. W.V. "needed" special education services because of his SLD

What it means to *need* special education and related services is not clear. *Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 215 (5th Cir. 2019). The IDEA defines "special education" as "specially designed instruction . . . to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(29). Regulations elaborate that "[s]pecially designed instruction means adapting . . . the content, methodology, or delivery of instruction [to] address the unique needs of the child that result from the child's disability [and to] ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children." 34 C.F.R. § 300.39(b)(3). The IDEA defines "related services" to mean "transportation, and such developmental, corrective, and other

supportive services . . . as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26)(A). Importantly, if a child "needs a related service and not special education, the child is not [eligible]." 34 C.F.R. § 300.8(a)(2)(i).

As the Fifth Circuit highlighted, the line between "special education" and "related services" is murky; however, case law suggests that where a child is being educated in the regular classrooms of a public school with only minor accommodations and is making educational progress, the child does not "need" special education within the meaning of the IDEA. *William V. v. Copperas Cove Indep. Sch. Dist.*, 774 F. App'x 253, 253 (5th Cir. 2019).[3]

In the present case, W.V.'s accommodations cannot be said to be minor nor merely a "related service." Even though W.V. was making educational progress, he was still in need of specifically designed instruction to address his unique needs.

On June 6, 2016, W.V. finished first grade but failed to meet State standards in reading and writing. A.R. at 16. The complaint was filed in January 2017 during the middle of W.V.'s second-grade year, and at the time of the February 2017 ARDC meeting, W.V. was still receiving specially designed instruction to address his unique needs. A.R. at 26. Specifically, when W.V. started second grade in August 2016, his teachers were provided with hard copies of

[3] Citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 207 n.28 (1982) ("When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit."); *Lisa M.*, 924 F.3d at 215-18 (finding a child's struggles in the general education environment indicative of a need for special education); *Alvin Indep. Sch. Dist. v. A.D. ex rel. Patricia F.*, 503 F.3d 378, 384 (5th Cir. 2007) ("First, A.D.'s passing grades and success on the TAKS test demonstrate academic progress."); *C.M. ex rel. Jodi M. v. Dep't of Educ.*, *State of Hawaii,* 476 F. App'x 674, 677 (9th Cir. 2012) ("[T]he district court applied the proper standard in determining that, based on C.M.'s performance in her regular education classes, with accommodations and modifications, C.M. was able to benefit from her general education classes without special education services."); *A.L. v. Alamo Heights Indep. Sch. Dist*., 2018 WL 4955220, at *6 (W.D. Tex. Oct. 12, 2018) ("[S]uccess in general education classes cuts against placement in special education.").

his accommodations and modifications including: daily dyslexia services in the general education setting; extra time to complete assignments; having an opportunity to repeat and explain instructions; sit near the teacher; receive reminders to stay on task; and have all material, except reading class passages, read to him. A.R. at 15–16. The following month W.V.'s reading teacher admitted that to be successful in the educational setting, W.V needed oral administration of assignments, tests, and phonics instruction. A.R. at 17. Furthermore, W.V. began participating in a Wilson Reading System group for students with dyslexia for 45 minutes during the Response to Intervention ("RtI") period. A.R. at 19. W.V. also attended 45-minute long, one-on-one tutoring sessions with the interventionist after school on Thursdays, specifically using the Wilson Reading Program. *Id*. Given the definition of "special education" as set forth in the IDEA and the manner in which the District adapted the content, methodology, and delivery of instruction to specifically address the unique needs of W.V., it cannot be said that these accommodations and modifications were minor, nor merely a "related service."

Moreover, it cannot be said that the special education services were no longer needed as determined by the District in November 2016 and later confirmed by the ARDC in February 2017. *See* A.R. at 27. In November, when the District completed W.V.'s FIE, it was determined that W.V. had weaknesses in reading achievement that was attributable to his previously identified dyslexia. A.R. at 23. His basic reading achievement was well below average range, consistent with dyslexia, which affected his reading comprehension and reading fluency. *Id*. In February, when reviewing the District's FIE, the ARDC determined that W.V. would continue to receive dyslexia intervention. A.R. at 26. The Districts Educational Diagnostician summarized the evaluation, noting that W.V.'s below average scores in reading skills matched the deficit described in his dyslexia evaluation.

Accordingly, W.V. was still in need of specifically designed instruction to address unique needs associated with his dyslexia. Therefore, by reason of his SLD, W.V. needs special education and related services. Thus, W.V. is a "child with a disability" as defined by the IDEA.

B. Plaintiffs Were Not Injured by the District's Procedural Violation of the IDEA

After proving a procedural violation, a plaintiff must prove that an injury resulted from such violation. *Leticia H.*, 502 F. Supp.2d at 518. A Plaintiff can demonstrate they were injured from a procedural violation if that procedural error: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the IEP process; or (3) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii); *see also Adam J.*, 328 F.3d at 811–12. Plaintiffs allege that W.V. was denied a FAPE and, consequentially, that W.V. was denied educational benefits. However, Plaintiffs do not allege that the District denied their ability to participate in the IEP process. The Court finds that Plaintiffs demonstrated a procedural violation but failed to demonstrate that W.V. was injured as a result of that violation.

The U.S. Supreme Court first addressed the question of when an IEP provides a FAPE in *Board of Education of Hendrick Hudson Central School District v. Rowley, Westchester County*, 458 U.S. 176 (1982). The Fifth Circuit summarized the *Rowley* standard:

> [An IEP] need not be the best possible one, nor one that will maximize the child's Educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him 'to benefit' from the instruction. In other words, the IDEA guarantees only a 'basic floor of opportunity' for every disabled child, consisting of 'specialized instruction and related services which are individually designed to provide educational benefit.' Nevertheless, the educational benefit to which the Act refers and to which an IEP must be geared cannot be a mere modicum or *de minimis*; rather, an IEP must be 'likely to produce progress, not regression or trivial educational advancement.' In short, the educational benefit that an IEP is designed to achieve must be 'meaningful.' (internal citations omitted). *Bobby R.*, 200 F.3d at 347, citing to *Cypress-Fairbanks*, 118 F.3d at 247–48.

In 2017, in *Endrew F. v. Douglas Cnty. Sch. Dist.*, the Supreme Court revisited the question of what constitutes a FAPE and concluded a FAPE "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. 988, 1001 (2017); *see also Rowley*, 458 U.S. 176, 181 (1982); *accord C.M. v. Warren Indep. Sch. Dist.* 117 LRP 17212 (E.D. Tex. 2017) (unpublished).

Since at least 1997, the Fifth Circuit has tied the provisions of a FAPE to an inquiry into a child's unique circumstances, a standard that is in alignment with the Supreme Court precedent. *C.G. v. Waller Indep. Sch. Dist.*, No. 16-20439 (5th Cir. 2017). The Fifth Circuit identifies four factors to analyze and determine whether a school district substantively denied a student a FAPE: (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and (4) positive academic and non-academic benefits are demonstrated. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).[4] The Fifth Circuit never specified how the *Michael F.* factors must be weighed by a district court. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 293 (5th Cir. 2009). Instead, the factors are general indicators of the IEP's appropriateness intended to guide a district court in the fact-intensive inquiry of whether an IEP provided an educational benefit. *Id.* at 294.

[4]Plaintiffs do not address these factors directly in their motion and instead claim the District must offer an IEP reasonably calculated to enable W.V. to make appropriate progress in light of his circumstances. Pls.' Mot. Summ. J. at 13 (citing *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017)). The recent holding in *Endrew F.*, however, does not create a new standard for determining whether a school district substantively denied a student a FAPE. *Renee J. v. Houston Indep. Sch. Dist.*, No. 4:16-CV-02828, 2017 WL 6761876, at *3 (S.D. Tex. Nov. 1, 2017). Instead, *Endrew F.* is consistent with the Fifth Circuit's four-factor analysis in *Michael F.* and therefore did not invalidate the Fifth Circuit's factors to assess whether a student received a FAPE. *Id*.

i. The IEP at bar was individualized to fit W.V.'s assessments and performance.

Multiple assessments, performance information, and evaluations conducted on a disabled child are sufficient to demonstrate the IEP is individualized.[5] The Court, upon reviewing Plaintiffs' pleadings, cannot find any claim the District's IEP was not individualized to W.V. Pls.' Mot. Summ. J. at 13–17. The SEHO lists multiple ARDC meetings, with participation from W.V.'s parents, where W.V.'s IEP was discussed, set, and reevaluated. A.R. at 17–18. Accordingly, without argument to the contrary, the first factor weighs in favor of the District.

ii. The IEP at bar was administered in the least restrictive environment.

The 'least restrictive environment' requires a child with a disability to be placed among children who are not disabled, when possible. *Z.C.*, 2015 WL 11123347 at *6. The Fifth Circuit uses a flexible, two-part test to determine whether a disabled child is in the least restrictive environment: (1) whether education in a regular classroom can be satisfactorily achieved for a given child, and (2) whether the school 'mainstreamed' the child to the extent appropriate. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989). In the case at bar, the District placed W.V. in the Wilson Reading System group, a program to promote reading skills for students with difficulty for 45 minutes during RtI period and tutoring sessions after school. A.R. at 19. All remaining instruction was administered to W.V. in the general education setting. A.R. at 44.

[5] *E.g., Z.C. v. Killeen Indep. Sch. Dist.*, No. W:14-CV-086-WSS, 2015 WL 11123347, at *6 (W.D. Tex. Feb. 17, 2015) (Smith, J.), aff'd sub nom.; *Phoung C. v. Killeen Indep. Sch. Dist*., 619 F. App'x 398 (5th Cir. 2015); *C.G. v. Waller Indep. Sch. Dist*., No. 4:15-CV-00123, 2016 WL 3144161, at *7 (S.D. Tex. June 6, 2016), aff'd sub nom.; *C.G. v. Waller Indep. Sch. Dist.*, 697 F. App'x 816 (5th Cir. 2017) (as revised June 29, 2017); *C.M. v. Warren Indep. Sch. Dist.*, No. 9:16-CV-165, 2017 WL 4479613, at *12 (E.D. Tex. Apr. 18, 2017); *Shafi v. Lewisville Indep. Sch. Dist.*, No. 4:15-CV-599, 2016 WL 7242768, at *6 (E.D. Tex. Dec. 15, 2016) (each upholding individualized IEPs when assessments and evaluations focused on the disabled child).

Nothing in this Court's analysis of the record shows the IEP isolated W.V. from other students in a general education setting or that W.V. needed isolation for any reason other than his dyslexia. Accordingly, the second factor weighs in favor of the District.

iii. The IEP at bar was effectuated in a coordinated and collaborative manner by key stakeholders.

An IEP is coordinated and collaborative when it results from discussions and input by the child's parents, teachers, administrators, or other stakeholders.[6] Here, W.V.'s mother met with administrators to discuss W.V.'s evaluation on numerous occasions. A.R. at 12. W.V.'s parents were invited to ARDC meetings and W.V.'s mother participated in multiple meetings to discuss W.V.'s IEP. A.R. at 17-18. Although they later disagreed, W.V.'s parents consented to the ARDC's initial determinations. *Id.* Parental disagreement with a determination alone does not reflect a lack of coordination and collaboration. *R.C. v. Keller Indep. Sch. Dist.*, 958 F. Supp. 2d 718, 736 (N.D. Tex. 2013). Because the Court finds the District's effort was clearly collaborative and coordinated with regards to W.V.'s IEP, the third factor weighs in favor of the District.

iv. The IEP at bar demonstrated positive academic and non-academic results.

Despite Plaintiffs' failure to address *Michael F.*, Plaintiffs present a genuine argument regarding W.V.'s positive academic and nonacademic benefits (factor four). Pls.' Mot. Summ. J. at 13–15. The Fifth Circuit does not require a district court to consider the four factors or weigh them in a particular way. *Michael Z.*, 580 F.3d at 293. Therefore, district courts may afford

[6] *See, e.g., Michael F.*, 118 F.3d at 253 (finding program development and design based on teacher, administrator, and counselor discussions was a coordinated and collaborative effort); *Z.C.*, 2015 WL 11123347 at *7 (concluding stakeholders, including parents, grandparents, advocates, legal counsel, and therapists, participated to some extent in the child's educational services was enough to meet the third factor); *C.M.*, 2017 WL 4479613 at *13 (holding email exchanges between mother, teachers, and administrators addressing child, although disagreeable and confrontational, met the collaboration element).

dispositive weight to any one factor. *See id.* at 294 (upholding a district court's decision based solely on the fourth factor). Plaintiffs ask the Court to do so here. Pls.' Mot. Summ. J. at 13-14.

In determining whether demonstrable academic and non-academic benefits arose from an IEP, a disabled child's development should be measured with respect to the individual student, not the rest of the class. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000). Only a child's inability to maintain the same level of academic progress achieved by his non-disabled peers represents a lack of educational benefit. *Id.* In *Bobby R.*, the Court held the disabled child received an educational benefit from his IEP because his test scores and grade levels improved year to year. *Id.* at 350. Other courts consider the fourth factor met when the child makes progress with behavior and social skills alone. *A.B. v. Clear Creek Indep. Sch. Dist.*, No. 4:17-CV-2382, 2018 WL 4680564, at *5 (S.D. Tex. Sept. 28, 2018). In *Michael Z.*, the Fifth Circuit upheld a district court's decision to place dispositive weight on the fourth factor and found the child's IEP showed a "consistent pattern of regress." *Michael Z.*, 580 F.3d at 294. The district court further found the IEP measures used by the district were insufficient to resolve the disabled child's difficulties because the measures repeatedly failed in the past under the continuingly-deficient IEP. *Id.*

Here, Plaintiffs argue W.V. did not show progress because he failed to meet standards on the state TPRI early reading assessment, could not meet grade-level standards based on assessments, and was one-to-two years behind his peers. Pls.' Mot. Summ. J. at 14. Plaintiffs' expert found it difficult to believe W.V. progressed under the Wilson program standards and testified W.V. was not making adequate progress in reading. *Id.* Plaintiff's argument is misplaced. The correct evaluation measures a student's individual development—it does not compare him to his peers. *Bobby R.*, 200 F.3d at 349. As noted by the Fifth Circuit:

> a disabled child's development should be measured not by his relation to the rest of the class, but rather with respect to the individual student, as declining percentile scores do not necessarily represent a lack of education benefit, but the child's inability to maintain the same level of academic progress achieved by his non-disabled peers[.]

Id.

Courts hold more than *de minimus* progress is sufficient to show positive academic and non-academic benefit. *See C.M.*, 2017 WL 4479613, at *13 (holding a disabled child's progress in English and other areas was more than *de minimus* and outweighed low grades). Here, the record shows W.V. made progress under the Wilson program. A.R. at 1189–91. Prior to attending the Wilson program and at the end of his first-grade year, W.V. read at Faountas and Pinnell ("F&P") level D (end of kindergarten). A.R. at 2658:2–16. On September 12, 2016, and in accordance with his IEP, W.V. participated in the Wilson Reading System group for students with dyslexia, as well as one-on-one tutoring sessions. *Id.* at 3214:9-3215:14. Under the IEP, progress reports were sent home every six weeks and demonstrated W.V. was progressing towards his goal of exhibiting 85% conversational speech accuracy. *Id.* at 2961:25-2962:14. By the end of second grade, W.V. read at F&P level J (end of first grade), with corresponding accuracy at 90% and comprehension at seven out of seven. *Id.* at 2767:4-17. Additionally, W.V. received a "B" in reading during the 2016-17 school year. *Id.*

Plaintiffs challenge these measurements on both their validity and appropriateness. Pls.' Mot. Summ. J. at 14. Plaintiffs first contest the validity of the District's measurements, arguing the progress reporting was "vague and incomplete at best" and W.V.'s teacher "modified" W.V.'s grades. *Id.* at 15. Improving W.V.'s letter grades, however, was not the goal of his IEP. A.R. at 2785:2-24. Instead, the ARDC's IEP was targeted at improving W.V.'s articulation up to a set percentage of accuracy. A.R. at 905. This goal was effectuated by the Wilson Reading System

participation and one-on-one tutoring sessions outside the regular curriculum. *Id.* W.V.'s second-grade marks were not the means to measure W.V.'s progress. *Id.*

Furthermore, the SEHO concluded W.V.'s IEP was reasonably calculated to provide him with academic and non-academic benefits. *Id.* at 45. The SEHO concluded W.V. "maintain[ed] a level of mastery" with all target sounds as well as structured sentence and conversational levels because of the services provided by the Speech Therapy under W.V.'s IEP. *Id.* at 45-46. The Court's task is not to second-guess the decisions of school officials or to impose its own plans for the education of disabled students, but rather to determine only whether those school officials complied with the IDEA. *A. B.*, 2018 WL 4680564 at *2. Based on the aforementioned evidence of W.V.'s progress under the IEP and the SEHO's determination, the Court finds that the officials complied with the IDEA.

Second, Plaintiffs claim the IEP measurements must be "based on peer-reviewed research to the extent practicable." Pls.' Mot. Summ. J. at 15 (citing 20 U.S.C. § 1414(d)(1)(A)(i)(IV)). Defendant concedes the record is "silent as to whether the Wilson Reading System is based on peer-reviewed research." Def.'s Mot' Summ. J. at 18. Nevertheless, peer-reviewed research is not a requirement under the fourth *Michael F.* factor. *Renee J.*, 2017 WL 6761876, at *5. In *Renee J.*, the plaintiff argued an autistic student was denied FAPE because the district did not use Applied Behavioral Analysis in fashioning and implementing the IEP. *Id.* The committee considered a number of IEP approaches, ranging from following guidelines in the Texas Autism Supplement to rewarding good behavior with a visit to a police station or restaurant. *Id.* On review, the district court found the school district did not deny FAPE by failing to use the Applied Behavioral Analysis because the parents did not specifically ask the school district to use Applied Behavioral Analysis

in devising the IEP nor did they point to anything other than the failure of the school district to use that type of analysis. *Id.*

As in *Renee J.*, W.V.'s parents did not specifically ask the District to implement any Applied Behavioral Analysis. A.R. at 19, 3096:2-10. Further, Plaintiffs consented to the FIE determination by the ARDC and W.V.'s participation in the Wilson Reading System group, a structured, researched-based program that comports with the Texas Dyslexia Handbook. *Id.* at 3099:23-3100:12. While "Applied Behavior Analysis is one example of peer-reviewed practices, [it is] not the only option." *Renee J.*, 2017 WL 6761876, at *5.

The record shows W.V. made progress and improvements under his IEP and the SEHO correctly found the progress more than *de minimus* regarding the positive academic and non-academic benefits of the IEP. A.R. at 3237:4-25. As pointed out by the Fifth Circuit, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit for purposes of the Individuals with Disabilities Education Act. *Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 379 (5th Cir. 2007). At the beginning of first grade, W.V. read at a beginning kindergarten level. *Id.* By the meeting date, he was reading at an end of kindergarten level. *Id*. Additionally, W.V. was progressing toward expectation in Writing and was at mid-year first grade level in Math. *Id*. He was passing all classes. *Id.* The record clearly demonstrates that W.V. was continuously progressing in the general education setting.

In May 2016, toward the end of W.V.'s first grade year, he was reading at F&P level D (end of kindergarten, beginning of first grade level), up 97% from F&P level A when he began first grade. *Id* at 16. On June 6, 2016, W.V. completed first grade, meeting State standards in all subjects except for reading and writing, in which he was making progress towards first grade standards. *Id.* W.V. began first grade at F&P level A and by May 2, 2016, W.V. could read at F&P

level D with 95% accuracy and 100% comprehension and at F&P level E with 80% accuracy and 100% comprehension.

By second grade, in relation to other students his age, W.V. was in the average range for receptive and expressive language skills, motor coordination, and was in the average or above average range for academic characteristics. *Id.* at 17. He was reading orally at F&P level D, and his reading comprehension skills were above average. *Id.* The accommodations required at this point for W.V to be successful in the general education setting were oral administration of assignments and tests, phonics instruction, along with additional time to complete assignments and assessments. *Id.*

Additionally, the SLP sent IEP progress reports home with W.V.'s report cards every six weeks during the 2016-2017 school year. *Id* at 20. W.V.'s September 2016 IEP Progress Report showed W.V.'s progress was sufficient for him to attain his Speech goal by the next annual ARDC meeting date. *Id.* W.V.'s November 2016 IEP Progress Report showed W.V. had reached a level of mastery with all target sounds. *Id.* In order for a child to have mastered a sound, it is generally necessary to exhibit 85% to 90% mastery over therapy sessions, across activities, and across listeners. *Id.* W.V.'s December 2016 IEP Progress Report recommended no further action to enable goal achievement. *Id.* W.V.'s February 2017 IEP Progress Report stated he had reached a level of mastery with all target sounds; was demonstrating good productions and clarity; was using all sounds appropriately and accurately in running conversational speech; and his accuracy of sound production was being maintained. *Id* at 21. W.V.'s April 2017 IEP Progress Report showed he had mastered his Speech goal and objectives. *Id.*

Finally, W.V.'s May 2017 IEP Progress Report showed he had maintained a level of mastery with all target speech sounds and his production-maintained intelligibility at the structured

sentence and conversational levels. *Id.* All factual findings which clearly demonstrate that W.V. was greatly benefiting from the education services provided by the District. When the ARDC met on February 27, 2017, to review W.V.'s November 16, 2016 FIE, W.V. had passing grades for the first semester, ranging from 82 to 94, and the first six weeks of the second semester, ranging from 80 to 95. *Id.* at 26. Therefore, the Court agrees with the SEHO's decision and finds the fourth factor weighs in favor of the District.

Even though the District determined that W.V. was no longer a child with an SLD and was no longer eligible for Special Education services, the District continued providing W.V. with the same dyslexia and Special Education services. A.R. at 9, 26. Furthermore, the District kept W.V.'s IEP in place months after the decision was made by the ARDC that W.V. did not need one, and W.V.'s IEP was still routinely reevaluated and modified to meet his needs. A.R. at 12. The record is permeated with evidence that W.V.'s education was specifically designed to meet his needs and provided services that permitted him to benefit from the instruction. In fact, W.V. made substantial educational progress as a result of the IEP implemented by the District. The ARDC complied with the IDEA's regulatory requirements, Texas law, and relevant case law in developing an IEP reasonably calculated to provide a meaningful educational benefit to W.V. and was appropriate in light of his circumstances. Therefore, in light of the foregoing analysis, the Court grants the District's Motion for Summary Judgment.

A. Other Motions

Remaining are Defendant's Objections to Plaintiff's Summary Judgment Motion, Motion to Strike Plaintiff's Amended Complaint, and Motion to Supplement its Motion for Summary Judgment. Def.'s Objs.; Def.'s Mot. Strike; Def.'s Mot. Supp. Because the Court finds the District's motion meritorious, Defendant's Objections and Motion to Supplement are moot.

Likewise, Defendant's Motion to Strike is moot. First, the motions at issue did not include any reference to the Texas Education Agency's Performance-Based Monitoring System and, to the extent they did, the Court concludes it of no consequence in resolving this dispute in favor of the District. Second, because the Court is granting Defendant's Motion for Judgment, the Plaintiff's claims for relief—even if improper—are irrelevant. The Court admonishes the parties to, in the future, limit their disputes following the filing of case-dispositive motions to those necessary to resolving the pending motions. In reviewing the numerous additional pleadings, the Court is of the opinion the parties did not do so here.

IV. CONCLUSION

Based on the foregoing reasons, the Court finds the District committed a procedural violation of the IDEA; however, that violation did not result in a legally cognizable injury. Plaintiffs must prove that they were injured by a procedural violation to recover and failed to do so. It is therefore **ORDERED** that Defendant's Motion for Judgment on the Administrative Record or, in the Alternative, Motion for Summary Judgment is **GRANTED**. Because Plaintiffs failed to meet their burden to establish reversible error in the SEHO's findings below, Plaintiff's Motion for Judgment on the Administrative Record or, in the Alternative, Motion for Summary Judgment is **DENIED**. Defendant's remaining motions are **DENIED** as moot.

SIGNED this 22nd day of October 2019.

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
August 8, 2019

Lyle W. Cayce
Clerk

No. 19-50051
Summary Calendar

WILLIAM V., As Parent/Guardian/ Next Friend of W.V., A minor individual with a disability; JENNY V., As Parent/Guardian/ Next Friend of W.V., A minor individual with a disability,

Plaintiffs - Appellants

v.

COPPERAS COVE INDEPENDENT SCHOOL DISTRICT,

Defendant - Appellee

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:17-CV-201

Before DENNIS, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:*

This case arises under the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. § 1401 *et seq*. The law requires states accepting federal educational funding to comply with the substantive and

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

procedural requirements of the Act. *See Honig v. Doe*, 484 U.S. 305, 310 (1988). The plaintiffs are the parents of a dyslexic child. They claim that the Copperas Cove Independent School District violated the IDEA by failing to provide their son with an Individualized Education Program.

The IDEA does not compel the School District to provide a student with an Individualized Education Program unless the student qualifies as a "child with a disability" under the Act. 20 U.S.C. § 1414(d)(2)(A); *see also* 34 C.F.R. § 300.306(c)(2). There is a two-part test for making that determination: A child qualifies as a "child with a disability" under the IDEA if the child (1) has an intellectual disability, specific learning disability, or other health impairment and, (2) "by reason thereof, needs special education and related services." 34 C.F.R. § 300.8(a)(1). The district court concluded that the plaintiffs' son meets the definition simply because dyslexia qualifies as a specific learning disability. It failed to engage with the second part of the test—namely, whether the plaintiffs' son *needs* special education.

We recently observed that "[w]hat it means to *need* special education and related services is not clear." *Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 215 (5th Cir. 2019). The IDEA defines "special education" as "specially designed instruction . . . to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(29). It defines "related services" to mean "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26)(A). Notably, if a child "needs a related service and not special education, the child is not [eligible]." 34 C.F.R. § 300.8(a)(2)(i).

While the line between "special education" and "related services" may be murky, case law suggests that where a child is being educated in the regular classrooms of a public school with only minor accommodations and is making

educational progress, the child does not "need" special education within the meaning of the IDEA. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 207 n.28 (1982) ("When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit."); *Lisa M.*, 924 F.3d at 215–18 (finding a child's struggles in the general education environment indicative of a need for special education); *Alvin Indep. Sch. Dist. v. A.D. ex rel. Patricia F.*, 503 F.3d 378, 384 (5th Cir. 2007) ("First, A.D.'s passing grades and success on the TAKS test demonstrate academic progress."); *C.M. ex rel. Jodi M. v. Dep't of Educ., State of Hawai'i*, 476 F. App'x 674, 677 (9th Cir. 2012) ("[T]he district court applied the proper standard in determining that, based on C.M.'s performance in her regular education classes, with accommodations and modifications, C.M. was able to benefit from her general education classes without special education services."); *A.L. v. Alamo Heights Indep. Sch. Dist.*, 2018 WL 4955220, at *6 (W.D. Tex. Oct. 12, 2018) ("[S]uccess in general education classes cuts against placement in special education.").

Because the district court did not apply the second part of the test, it did not consider whether the accommodations being provided to the plaintiffs' son constitute "special education" or instead only "related services." The court also made no findings as to whether the plaintiffs' son was making progress under the accommodations he was receiving. Consideration of those questions might lead the district court to reach a different conclusion on the child's eligibility for an Individualized Education Program, or on the issue of whether the School District's current accommodations were adequate to meet the child's educational needs.

In IDEA cases, a district court must "receive the records of the administrative proceedings" and, "basing its decision on the preponderance of the evidence, . . . grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C). On appeal, we review the district court's decision as a mixed question of law and fact. *Lisa M.*, 924 F.3d at 213. While the district court's legal conclusions are reviewed de novo, its factual findings are entitled to clear error deference. *Id.*

The record before us does not permit meaningful appellate review; because the district court did not apply the complete standard, it did not make underlying factual findings the review of which is necessary for us to conclude that its legal conclusions were correct. *See Int'l Marine, L.L.C. v. Integrity Fisheries, Inc.*, 860 F.3d 754, 762 (5th Cir. 2017). Accordingly, we VACATE and REMAND for reconsideration in light of the appropriate standard.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

WILLIAM V. AND JENNY V., AS PARENTS / GUARDIANS / NEXT FRIENDS OF W.V., A MINOR INDIVIDUAL WITH A DISABILITY,	§	
Plaintiffs,	§	
	§	Case No. 6:17-CV-00201-ADA-JCM
v.	§	
COPPERAS COVE INDEPENDENT SCHOOL DISTRICT,	§	
Defendant.	§	

ORDER ADOPTING IN PART MAGISTRATE REPORT AND RECOMMENDATION

Before the Court is the Report and Recommendation of Magistrate Judge Jeffrey C. Manske (the "Report and Recommendation"), filed October 15, 2018, recommending that the Court grant in full Defendant Copperas Cove Independent School District's Motion for Judgment on the Administrative Record or, in the Alternative, Motion for Summary Judgment and deny Plaintiffs' William V. and Jenny V., as parents / guardians / next friends of W.V., a minor individual with a disability opposing Motion for Judgment on the Administrative Record or, in the Alternative, Motion for Summary Judgment.

A party may file specific, written objections to the proposed findings and recommendations of the magistrate judge within fourteen days after being served with a copy of the Report and Recommendation, thereby securing de novo review by the district court. 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b). A party's failure to timely file written objections to the proposed findings, conclusions, and recommendation in a Report and Recommendation bars that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed

factual findings and legal conclusions accepted by the district court. *See Douglas v. United Service Auto Ass'n*, 79 F.3d 1415. 1428–29 (5th Cir. 1996) (*en banc*).

In this case, Plaintiffs timely filed an objection to the Report and Recommendation on October 29, 2018. In light of Plaintiffs' objections, the Court has undertaken a *de novo* review of the case file in this action. For the following reasons, the Court **ADOPTS IN PART** the Magistrate Judge's Report and Recommendation and **GRANTS** Defendant's Motion for Judgment on the Administrative Record or, in the Alternative, Motion for Summary Judgment.

BACKGROUND

Minor W.V. is a fourth-grader with dyslexia who also has difficulty in articulation. A.R. at 8. He entered Copperas Cove Independent School District ("the District") in September 2015 as a first-grader, bringing with him a Speech Impairment ("SI") program developed by his previous school district to improve errors in articulation inconsistent with W.V.'s age and development. A.R. at 8. The District accepted the SI and began providing him with speech therapy. *Id.* W.V. was not initially considered a student with a Specific Learning Disability ("SLD"), a higher-level of disability requiring additional services. *Id.*

Plaintiff Jenny V. requested W.V. be evaluated for an SLD on April 18, 2016. *Id.* The District formally responded on April 28, 2016 with a Notice of Action that the District would not conduct SLD testing for W.V. but would test him specifically for dyslexia. A.R. at 12. Plaintiff Jenny V. met with the District's Special Education Director on April 29, 2016 to request SLD testing in addition to dyslexia testing. *Id.* However, the Director concluded the data only supported dyslexia screening. *Id.* at 12–13. In May 2016, the District's screening confirmed that W.V. had dyslexia. *Id.* at 35.[1] On May 31, 2016, the ARDC determined W.V. would receive

[1] The Report & Recommendation incorrectly stated that W.V. was found only to exhibit tendencies of dyslexia. The record indicates that the "tendencies of dyslexia" referenced in the record were part of the evidence that led the

dyslexia services daily for the next year, would be given extra time to complete assignments, receive additional instruction as needed, receive on-task reminders, and have materials read to him, among other assistance. *Id.* at 15–16.

W.V. began receiving assistance under the Wilson Reading System to improve reading and spelling skills impaired by his dyslexia. *Id.* at 19. On September 12, 2016, the ARDC reconvened to conduct a review of W.V.'s performance. *Id.* at 18. The ARDC determined W.V. should undergo a Full Individual Evaluation ("FIE") to reassess his needs and potential for Special Education services, though it did find based on an October 2015 screening that available assistive technology was sufficient to accommodate W.V.'s needs. *Id.* at 18–19. The FIE was completed on November 16, 2016, and the District reported the following results:

1. W.V. no longer met eligibility requirements for an SI;
2. The GFTA-2 Test, implemented by a Speech Language Pathologist ("SLP") employed by the District, scored W.V. in the average standard range with at least 80% accuracy in verbal exchanges;
3. The District's SLP recommended W.V. no longer receive Speech Therapy services;
4. W.V. no longer met eligibility requirements for an SLD;
5. A Cross-Battery Assessment System ("X-BASS" or "Cross-Battery") applied by a District-employed Educational Diagnostician showed none of W.V.'s global cognitive abilities (i.e. verbal comprehension, working memory) were below average range (the identifier of a student with an SLD);

District to formally diagnose W.V. with dyslexia, not an indication that he only had some symptoms of the condition but not the condition itself. A.R. at 35.

6. The Cross-Battery applied by the District, using tests WJ-IV ACH, WJ-IV OL, and KTEA-3, found average or above-average scores for W.V. in all but reading; and

7. W.V.'s reading scores were consistent with his dyslexia and showed improvement concurrent with the District's provided dyslexia services.

A.R. at 21–24.

After receiving the FIE results, Plaintiffs requested a due process hearing through the Texas Education Agency in January 2017. A.R. at 4. Plaintiffs asserted that the District: (1) denied W.V. a free appropriate education ("FAPE") by violating its child-find duty; (2) failed to comply with procedural requirements; (3) conducted an inappropriate FIE; and (4) developed an Individualized Education Program ("IEP") that did not meet W.V.'s unique needs. *Id.* at 3. A hearing was held before a Special Education Hearing Officer ("SEHO") on May 30–31, 2017. *Id.* at 4. The SEHO rendered a decision on June 30, 2017 finding in favor of the District on all counts. *Id.* at 49.

Plaintiffs filed suit against the District on W.V.'s behalf on July 28, 2017, appealing the decision of the SEHO. Pls.' Compl. at 1. Plaintiffs challenged the following decisions of the SEHO: (1) Plaintiffs did not prove the District violated the Individuals with Disabilities Education Act ("IDEA"); (2) the District's FIE was appropriate; (3) the District properly identified, evaluated, and placed W.V.; (4) the District did not commit any procedural violations; and (5) Plaintiffs were not entitled to an individualized evaluation at the District's expense. A.R. at 3–48. The parties filed cross-motions for summary judgment on May 31, 2018, each seeking a ruling on the administrative record. On June 14, 2018, Defendant also filed an objection to portions of Plaintiffs' Motion regarding a Department of Education report, allegations of

impropriety by a district employee, transportation costs as damages, conflicts between W.V. and other students, and private school costs. Over the following months, the parties fully briefed these disputes.

The Magistrate Judge's Report and Recommendation was filed on October 15, 2018, and Plaintiffs timely filed their Objections to the Report and Recommendations of the United States Magistrate Judge on October 29, 2018. Defendant filed a Response to Plaintiffs' Objections on November 11, 2018. Plaintiffs then filed a Reply to Defendant's Response on November 15, 2018.

APPLICABLE LAW

Under the IDEA, school districts receiving federal funds must implement policies and procedures ensuring that each disabled student receives a FAPE. *See* 20 U.S.C. §§ 1400(d)(1)(A), 1412(a), 1415(a); *Daniel R.R. v. State Bd. Of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989). To ensure that each student receives a FAPE, school districts must collaborate with parents to develop and implement an IEP that is "reasonably calculated to enable the child to receive educational benefits." 20 U.S.C. § 1400(d)(1)(A); *R.H. v. Plano Indep. School Dist.*, 607 F.3d 1003, 1008 (5th Cir. 2010).

In reviewing the adequacy of an IEP, courts take a two-step approach: (1) courts first evaluate whether the school district complied with the procedural requirements of the IDEA; and (2) then evaluate whether the IEP is reasonably calculated to enable the student to receive educational benefits. *Klein Indep. School Dist. v. Hovem*, 690 F.3d 390, 396 (5th Cir. 2012) (citing *Bd. Of Educ. v. Rowley*, 458 U.S. 176, 206–07 (1982)). To determine whether the IEP is "reasonably calculated" under the second step, courts can evaluate four factors: (1) whether the program is individualized on the basis of the student's assessment and performance; (2) whether

the program is administered in the least restrictive environment; (3) whether the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and (4) whether there was positive academic and non-academic benefits demonstrated. *Cypress-Fairbanks Indep. School Dist. v. Michael F.*, 118 F.3d 245, 248, 253 (5th Cir. 1997). Under this two-part test, summary judgment effectively asks the Court to decide the case based on the administrative record. *E.G. v. Northside Indep. School Dist.*, No. SA:12-CA-949-FB, 2014 WL 12537177 at * 5 (W.D. Tex. March 31, 2014).

ANALYSIS

Plaintiffs argue they should be granted summary judgment for six independent reasons. They argue the District violated the IDEA by: (1) unduly delaying W.V.'s assessment for an SLD; (2) finding W.V. did not qualify as a student with an SLD; (3) finding W.V. did not qualify as a student with a Speech and Language Impairment; (4) failing to evaluate whether assistive technology was needed for W.V.'s FAPE; (5) implementing the Wilson Reading Program because the program did not demonstrate positive results; and (6) implementing the Wilson Reading Program because the program was not research-based. The Court agrees that the District violated the IDEA by finding W.V. did not qualify as a student with an SLD. However, the Court finds against Plaintiffs on their remaining arguments.

A. The District Procedurally Violated the IDEA.

A school district can violate the IDEA by failing to comply with procedures implemented by the Act. *See Leticia H. v. Ysleta Indep. Sch. Dist.*, 502 F. Supp.2d 512, 518 (W.D. Tex. 2006). A plaintiff must therefore identify a procedural requirement imposed by the IDEA and show how the corresponding district violated it. *Id.* at 518. However, even after such a showing, the plaintiff must then prove an injury resulted from the procedural violation. *See, e.g., id.*

("Defendant is correct that a procedural violation standing alone will not entitle a plaintiff to relief. Accordingly, most courts require a showing of substantive harm precipitating from a procedural violation before granting relief.") (citing *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003)). A plaintiff may be injured either by a denial of the child's FAPE—if that denial resulted in the loss of educational opportunity—or denial of the parent's ability to participate in the IEP process. *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 812 (5th Cir. 2003). The Court finds that Plaintiffs demonstrated a procedural violation but failed to demonstrate that W.V. was injured as a result of that violation.

Plaintiffs correctly allege that the District violated the IDEA by finding that W.V. did not qualify as a student with an SLD. The IDEA defines an SLD as:

> (A) In general. The term "specific learning disability" means a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.
>
> (B) Disorders included. Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, *dyslexia*, and developmental aphasia

20 U.S.C. § 1401 (emphasis added). The IDEA's statutory language explicitly includes dyslexia as a disorder included as an SLD. *Id.* The District diagnosed W.V. with dyslexia; therefore, the District violated the IDEA by determining in its assessment that W.V. no longer met the eligibility requirements for an SLD and thus was no longer entitled to Special Education or an IEP A.R. at 21–24.

The District claims that "it is undisputed that, at the time of the due process hearing, the law did not require a finding of an SLD when dyslexia was diagnosed." However, the District cites no authority for this claim and does not address the fact that the IDEA itself explicitly defines dyslexia as an SLD. The provisions from *The Dyslexia Handbook* that the District cites

for support gives background on how dyslexia is diagnosed; however, it does not provide any support for the District's argument that dyslexia is not an SLD.

The District correctly notes that the IDEA does not require school districts to classify students by a disability or create an appropriate label to identify a student with a disability. 20 U.S.C. § 1412(a)(3)(B); *G.I. v. Lewisville Indep. Sch. Dist.*, No. 4:12-cv-385, 2013 WL 4523581 at *10 (E.D. Tex. Aug. 23, 2013). Defendant then quotes the Fifth Circuit, which stated that:

> [T]he Child Find provision itself suggests that diagnostic labels alone should not be determinative when considering whether a remedy furthers IDEA's purposes. . . .The position that the diagnostic label affixed to a child should determine whether she has prevailed under the IDEA "reflects a preoccupation with *labels* that [IDEA] do[es] not share."

Lauren C. by and through Tracey K. v. Lewisville Indep. Sch. Dist., 904 F.3d 363, 376 (5th Cir. 2018) (emphasis in original) (quoting *Angela L. v. Pasadena Indep. Sch. Dist.*, 918 F.2d 1188, 1195 (5th Cir. 1990)). In these cases, the Fifth Circuit determined that a child displaying the symptoms of an SLD as listed in the statute, who has not been labeled with such a condition, should not be denied services for *lack* of a label. The context of these cases indicate that the Fifth Circuit's statements do not support the idea that a school district can wiggle out of providing services once a condition like dyslexia has been diagnosed, as the District suggests. In the present case, W.V. has already been diagnosed with an eligible condition, thus bypassing both the need for additional testing to determine SLD status and the District's discretion in making such a determination. Therefore, the Court finds that the District did procedurally violate the IDEA by incorrectly applying the statutory definition of SLD and revoking both W.V.'s status as a child with an SLD and his eligibility for Special Education services and an IEP as a result.

D. Plaintiffs Were Not Injured by the District's Procedural Violation of the IDEA.

After proving a procedural violation, a plaintiff must prove that an injury resulted from such violation. *Leticia H.*, 502 F. Supp.2d at 518. Plaintiffs can demonstrate they were injured

either by denial of the child's FAPE—if that denial resulted in the loss of educational opportunity—or denial of the parent's ability to participate in the IEP process. *Adam J.*, 328 F.3d at 812. Plaintiffs allege that W.V. was denied a FAPE and do not allege that the District denied their ability to participate in the IEP process.

Although the District determined that W.V. was no longer a child with an SLD and was no longer eligible for Special Education services or an IEP, the District continued providing W.V. with the same dyslexia and Special Education services after this determination as before. A.R. at 9, 26. Furthermore, the District kept W.V.'s IEP in place months after the decision was made by the ARDC that W.V. did not need one, and W.V's IEP was routinely reevaluated and modified to meet his needs. A.R. at 12. Therefore, because W.V. received the same services he had previously been receiving under his earlier status as a child with an SLD, the reclassification did not result in the loss of W.V.'s educational opportunities. Thus, the Court finds that the procedural violation in question served as little more than a classification error that, while technically incorrect under the IDEA, did not cause an injury that is legally cognizable because he was not denied educational opportunities as a result of the violation. *Adam J.*, 328 F.3d at 812.

CONCLUSION

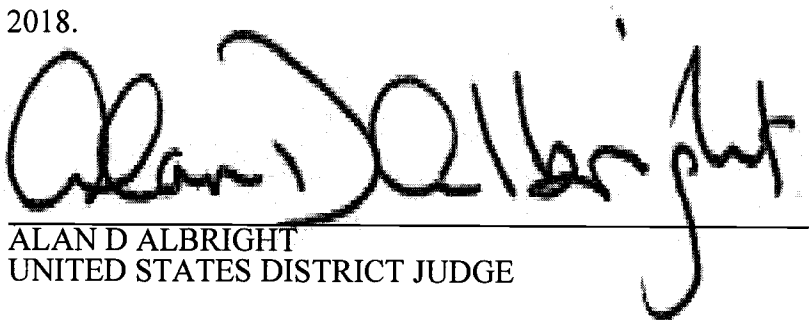
Based on the foregoing reasons, the Court finds the District committed a procedural violation of the IDEA; however, that violation did not result in a legally cognizable injury. Because Plaintiffs must prove that they were injured by a procedural violation to recover and failed to do so, the District is entitled to summary judgment.

It is therefore **ORDERED** that Plaintiffs' objections to the Report and Recommendation of the United States Magistrate Judge are **OVERRULED** except as to their objection that the

Magistrate Judge erred in finding that W.V. did not qualify as a student with an SLD and therefore did not violate the IDEA.

It is **FURTHER ORDERED** that the Report and Recommendation of the United States Magistrate Judge filed in this cause of action is **ACCEPTED AND ADOPTED** by the Court. The Report and Recommendation is accepted and adopted in its entirety except as to the Magistrate Judge's findings that the District did not procedurally violate the IDEA because W.V. did not qualify as a student with an SLD.

SIGNED this 10th day of December 2018.



ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

WILLIAM V. AND JENNY V., AS PARENTS / GUARDIANS / NEXT FRIENDS OF W.V., A MINOR INDIVIDUAL WITH A DISABILITY,	§	
Plaintiffs,	§	
v.	§	CASE NO. 6:17-CV-00201-ADA-JCM
COPPERAS COVE INDEPENDENT SCHOOL DISTRICT,	§	
Defendant.	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

This Report and Recommendation is submitted to the Court pursuant to 28 U.S.C. § 636(b)(1)(C), FED. R. CIV. P. 72(b), and Rules 1(f) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges.

Before the United States Magistrate Judge are the Motion for Judgment on the Administrative Record or Alternative Motion for Summary Judgment filed by Copperas Cove Independent School District (the "District"), Def.'s Mot. Summ. J. [ECF #69], Motion for Judgment on the Administrative Record or Alternatively Motion for Summary Judgment filed by William V. and Jenny V., Pls.' Mot. Summ. J. [ECF #70], Response to Summary Judgment filed by Plaintiffs, Pls.' Summ. J. Resp. [ECF #71], Response to Summary Judgment filed by

Defendant, Def.'s Summ. J. Resp. [ECF #72], Objections to Summary Judgment Motion filed by Defendant, Def.'s Objs. [ECF #73], Response to Objections filed by Plaintiffs, Pls.' Objs. Resp. [ECF #74], Reply in Support of Objections filed by Defendant, Def.'s Objs. Reply [ECF #76], Reply in Support of Summary Judgment filed by Plaintiffs, Pls.' Summ. J. Reply [ECF #78], Reply in Support of Summary Judgment filed by Defendants, Def.'s Summ. J. Reply [ECF #79], Motion to Strike Amended Complaint filed by Defendant, Def.'s Mot. Strike [ECF #84], Response to Motion to Strike filed by Plaintiffs, Pls.' Strike Resp. [ECF #86], Reply in Support of Motion to Strike filed by Defendant, Def.'s Strike Reply [ECF #90], Motion for Leave to File Supplemental Motion for Summary Judgment filed by Defendant, Def.'s Mot. Supp. [ECF #87], Response to Motion to Supplement filed by Plaintiffs, Pls.' Supp. Resp. [ECF #89], and Reply in Support of Motion to Supplement filed by Defendant, Def.'s Supp. Reply [ECF #90]. For the reasons that follow, the undersigned **RECOMMENDS** Defendant's Motion for Judgment be **GRANTED**, Plaintiffs' Motion be denied, and Defendant's Objections, Motion to Supplement, and Motion to Strike be **DENIED** as moot.

I. BACKGROUND

Minor W.V. is a fourth-grader with dyslexia and documented-difficulty in reading and articulation. Pls.' First Am. Compl. at 6 [ECF #2]. Before entering the District as a first grader, W.V.'s prior school developed a Speech Impairment ("SI") program for W.V. due to articulation errors inconsistent with W.V.'s age and development. Administrative Record ("A.R.") at 8 [ECF #9-3].[1] The District accepted the prior school's program when W.V. entered in September 2015 and began providing him Speech Therapy. *Id.* At the time, W.V. was not considered a student

[1] The administrative record will herein be cited as "A.R. at __", with "__" denoting the page number.

with a Specific Learning Disability ("SLD"), a higher-level of disability requiring additional services. *Id.*

On April 18, 2016, Plaintiff Jenny V. requested the District evaluate W.V. for a SLD. *Id.* at 12. A District representative responded W.V. would continue to receive the benefits set by the District and its Admission, Review, and Dismissal Committee's ("ARDC") program. *Id.* The District formally responded on April 28, 2016 with a Notice of Action that W.V. would not be tested for an SLD but would be tested for dyslexia. A.R. at 12. Plaintiff Jenny V. met with the District's Special Education Director on April 29, 2016 to request SLD testing in addition to dyslexia testing. A.R. at 12. Unfortunately the Director concluded the data only supported dyslexia screening. *Id.* at 12-13. On May 31, 2016, the ARDC stated W.V. would receive dyslexia services daily for the next year, would be given extra time to complete assignments, receive additional instruction as needed, receive on-task reminders, and have materials read to him, among other assistance. *Id.* at 15-16. However, the ARDC only found W.V. exhibited tendencies of dyslexia, rather than a SLD. *Id.*

On September 6, 2016, a TPRI[2] test administered to W.V. resulted in a "still developing" score in all areas. A.R. at 2817-18. W.V. also began receiving assistance under the Wilson Reading System to improve reading accuracy and spelling. *Id.* at 19. On September 12, 2016 the ARDC reconvened to conduct a review of W.V.'s performance. *Id.* at 18. The ARDC determined W.V. should undergo a Full Individual Evaluation ("FIE") to reassess his needs and potential for Special Education services, though it did find based on an October 2015 screening

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[2] In education and, particularly, special education, acronyms are ubiquitous to the point that they create, rather than alleviate, most confusion. *See* Special Education Acronyms and Terms, ParentCompanion.Org (accessible at: http://www.parentcompanion.org/article/special-education-acronyms-and-terms) (last accessed September 18, 2018 at 10:41 a.m.). The Court will strive to define those acronyms relevant in its analysis, but will refrain from defining those that are not.

that available assistive technology was sufficient to accommodate W.V.'s needs. A.R. at 18-19. The FIE was completed November 16, 2016, with the following relevant results:

- W.V. no longer met eligibility for a SI;
- The GFTA-2 Test, as used by a Speech Language Pathologist ("SLP") employed by the District, scored W.V. in the average standard range with at least 80% accuracy in verbal exchanges;
- The District's SLP recommended W.V. no longer receive Speech Therapy services;
- W.V. no longer met eligibility for a SLD;
- A Cross-Battery Assessment System ("X-BASS" or "Cross-Battery") applied by a District-employed Educational Diagnostician showed none of W.V.'s global cognitive abilities (i.e. verbal comprehension, working memory) was below average range (the identifier of a student with a SLD);
- The Cross Battery applied by the District, using tests WJ-IV ACH, WJ-IV OL, and KTEA-3, found average or above-average scores for W.V. in all but reading; and,
- W.V.'s reading scores were consistent with his dyslexia and showed improvement concurrent with the District's provided dyslexia services.

A.R. at 21-24.

In January 2017, Plaintiffs requested a due process hearing through the Texas Education Agency. *Id.* at 4. Plaintiffs complained the District: (1) denied W.V. a free appropriate public education ("FAPE") by violating its child find duty; (2) failed to comply with procedural requirements; (3) conducted an inappropriate FIE; and, (4) developed an Individualized Education Program ("IEP") that did not meet W.V.'s unique needs. *Id.* at 3. A hearing was held on May 30-31, 2017 before a Special Education Hearing Officer ("SEHO"). *Id.* at 4. The SEHO rendered a decision on June 30, 2017 finding in favor of the District on all counts. *Id.* at 49.

On July 28, 2017, Plaintiff Jenny V., joined by William V., sued the District on behalf of W.V., appealing the decision of the SEHO. Pls.' Compl. at 1. Plaintiffs challenge the following

findings by the SEHO: (1) Plaintiffs did not prove the District violated the Individuals with Disabilities Act ("IDEA"); (2) the District's FIE was appropriate; (3) the District properly identified, evaluated, and placed W.V.; (4) the District did not commit any procedural violations; and (5) Plaintiffs were not entitled to an individualized evaluation at District expense. A.R. at 3-48. The parties filed cross-motions for summary judgment on May 31, 2018, each seeking a ruling on the administrative record. Def.'s Mot. Summ. J. at 1; Pls.' Mot. Summ. J. at 1. Defendant also filed, on June 14, 2018, an objection to portions of Plaintiffs' Motion regarding a Department of Education report, allegations of impropriety by a district employee, transportation costs as damages, conflicts between W.V. and other students, and private school costs. Def.'s Objs. ¶¶ 1-5. Over the following months, the parties fully briefed these disputes.

II. LEGAL STANDARD

The Individuals with Disabilities Education Act can be found in Title 20, Chapter 33 of the United States Code. The purpose of the IDEA is:

> to ensure that all children with disabilities have available to them a free appropriate public education . . . designed to meet their unique needs and to ensure that the rights of children with disabilities and parents of such children are protected.

20 U.S.C. § 1400(d)(1)(A)-(B). Pursuant to the IDEA, school districts must provide each disabled child with a detailed, individualized education program, or IEP. The IEP is a written statement, prepared at a meeting of qualified representatives of the local educational agency, the child's teacher, parent(s), and where appropriate, the child. 20 U.S.C. § 1414(d). The IEP is reviewed, and if appropriate, revised, at least once each year. *Id.* A parent who disagrees with the contents of an IEP may challenge it by filing a request for a due process hearing. 20 U.S.C. §§ 1415(b)(6), 1415(f).

Under the IDEA, the parents of a disabled child are guaranteed an opportunity to complain of any matter relating to the "identification, evaluation, or educational placement" of their child or the provision of a FAPE to that child. 20 U.S.C. § 1415(b)(6). This hearing may be conducted before a local educational agency or the State educational agency. 20 U.S.C. § 1415(f)(1)(A). In the event the initial hearing is conducted before a local educational agency, an aggrieved party may then appeal to the state educational agency. 20 U.S.C. § 1415(g). After those administrative remedies are exhausted, an aggrieved party accrues the right to bring civil suit in a district court of the United States. 20 U.S.C. § 1415(f)(2)(A); *see also El Paso Indep. Sch. Dist. v. Richard R.*, No. EP:7-cv-00125-KC, 567 F. Supp. 2d 918, 925-26 (W.D. Tex. 2006) (Cardone, J.) (explaining procedure).

The judiciary's role under the IDEA is "purposefully limited[:]"

> Congress left the choice of educational policies and methods where it properly belongs—in the hands of state and local school officials. Our task is not to second guess state and local policy decisions; rather it is the narrow one of determining whether state and local school officials have complied with the Act.

White v. Ascension Parish Sch. Bd., 343 F.3d 373, 377 (5th Cir. 2003) (quoting *Flour Bruff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 693 (5th Cir. 1996)). Thus, the Court uses a two-part inquiry, taking care not to substitute its own notion of sound educational policy. *Richard R.*, 567 F. Supp. 2d at 926-27. First, the Court considers whether the state complied with the procedures as set forth in the IDEA. *Id.* Second, the Court determines if the District's actions were "reasonably calculated" to enable the child to receive educational benefits. *Id.* The burden rests with the party seeking relief. *Id.*; *White*, 343 F.3d at 377. Under this two-part test, summary judgment effectively asks the Court to decide the case based on the administrative record. *E.G. v. Northside Indep. Sch. Dist.*, No. SA:12-CA-949-FB, 2014 WL 12537177, at *5 (W.D. Tex. March 31, 2014) (Biery, J.).

Plaintiffs argue they should be granted summary judgment for six independent reasons. Pls.' Mot. Summ. J. at 1-20. First, they argue the District violated the IDEA by unduly delaying W.V.'s assessment for a SLD. *Id.* at 3. Second, they argue the District violated the IDEA by finding W.V. did not qualify as a student with a SLD. *Id.* at 5. Third, they argue the District violated the IDEA by finding W.V. did not qualify as a student with a Speech and Language Impairment. *Id.* at 9. Fourth, they argue the District violated the IDEA by failing to evaluate whether assistive technology was needed for W.V.'s FAPE. *Id.* at 13. Fifth, they argue the District violated the IDEA by implementing the Wilson Reading Program because the program did not demonstrate positive results. *Id.* at 14. Finally, Plaintiffs argue the District violated the IDEA by implementing the Wilson Reading Program, this time because the program was not research-based. Pls.' Mot. Summ. J. at 15.

Alternatively, the District argues it is entitled to summary judgment for five reasons. Def.'s Mot. Summ. J. at 7. First, it argues it had no reason to suspect W.V. suffered from a SLD. *Id.* at 7-8. Second, it argues the methods it used to assess SLD eligibility were appropriate. *Id.* at 10-11. Third, it argues any alleged procedural violation of the IDEA did not lead to the denial of W.V.'s FAPE or Plaintiffs' opportunity to participate. *Id.* at 14-15. Fourth, it argues the Court may not consider Plaintiffs' purported evidentiary challenges. *Id.* at 19-20. Finally, it argues Plaintiffs are not entitled to reimbursement for W.V.'s private education in North Carolina. *Id.* at 20-21.

III. DISCUSSION

The IDEA can be violated in two ways. *Richard R.*, 567 F. Supp. 2d at 926-27; *White*, 343 F.3d at 377. First, a school district can fail to implement procedural safeguards set forth by

the IDEA. *Id.* Second, a school district can fail to make reasonably-calculated efforts to ensure a student received educational benefits. *Id.* The Court begins its analysis with the former.

A. Procedural Violations

A school district can violate the IDEA by failing to comply with procedures implemented by the Act. *See Leticia H. v. Ysleta Indep. Sch. Dist.*, No. EP:4-CA-421-PRM, 502 F. Supp. 2d 512, 518 (W.D. Tex. 2006) (Martinez, J.) (considering an alleged violation of the IDEA's requirement that annual goals be stated in measurable terms).[3] A plaintiff must therefore identify a procedural requirement imposed by the IDEA and show how the corresponding district violated it. *Leticia H.*, 502 F. Supp. 2d at 518. However, even after such showing, the plaintiff must then prove an injury resulted from the procedural violation. *Id.* A plaintiff may be injured either by denial of the child's FAPE or denial of the parent's ability to participate in the IEP process. *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 812 (5th Cir. 2003). Plaintiffs allege the IDEA was procedurally violated by: (1) the delay in evaluating W.V.; (2) the conclusion that W.V. did not qualify as a student with an SLD; and, (3) the conclusion that W.V. did not qualify as a student with a Speech and Language Impairment.

i. Delaying evaluation of W.V. did not violate the IDEA.

Plaintiffs first challenge the SEHO's finding that the District's delay in evaluating W.V. did not violate the IDEA. Pls.' Mot. Summ. J. at 3. Specifically, Plaintiffs believe the District erred by "us[ing] the RTI process to delay conducting a full individual evaluation[]" and by not initiating a FIE in or around September 2015. *Id.* at 8. The District responds that no delay

[3] A substantive violation, alternatively, occurs when District-implemented programs are not reasonably calculated to provide a child the needed educational returns. *Lewisville Indep. Sch. Dist. v. Charles W.*, 81 F. App'x 843, 846-47 (5th Cir. 2003). That form of violation will be discussed further in Section B, infra.

occurred because it could not suspect W.V. had a SLD meriting special education services, and therefore no obligation to evaluate W.V. Def.'s Summ. J. Resp. at 5.

The "Child Find" obligation of the IDEA imposes an affirmative duty on districts to locate and timely evaluate children in their systems with suspected disabilities. 34 C.F.R. §§ 300.111(a), 300.111(c)(1). This obligation is triggered when the district "has reason to suspect a disability coupled with reason to suspect that special education services may be needed to address that disability." *Richard R.*, 567 F. Supp. 2d at 950. Therefore, Plaintiffs must prove three elements: (1) the District had reason to suspect W.V. likely had a disability; (2) the District had reason to suspect W.V. likely needed special education services to address the disability; and, (3) the District failed to evaluate W.V. within a reasonable time after suspecting a need. *Id.* The second element is the only contested element at bar. Def.'s Mot. Summ. J. at 8; Def.'s Summ. J. Resp. at 5-6.

Simply because a district suspects a child has a disability does not trigger the district's duty to evaluate that child. *Richard R.*, 567 F. Supp. 2d at 950. Instead, a district must also suspect the child likely cannot be assisted by means other than special education services. *Id.* In *Richard R.*, the Court found a district had reason to suspect special education services were needed when a student showed no improvement over the course of three years, while the district only used modifications already used ineffectively by the child (additional tutoring). *Id.* Alternatively, in *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 F. App'x 887, 892-93 (5th Cir. 2012), the Court found behavioral and personal explanations for low grades combined with testimony the student was performing well academically in alternative classroom accommodations relieved a suspicion of special education need.

It is undisputed, when W.V. first joined the District in September 2015, the District immediately provided him Speech Therapy and additional modifications pursuant to an IEP prepared by W.V.'s prior district. A.R. at 8. The District then set objectives for W.V. to complete over the next year so his potential progress / regression could be evaluated. *Id.* at 9-10. It is also undisputed that, when in April 2016 the ARDC checked W.V.'s progress, W.V. made significant advances per his general education teacher, SLP, and interventionist. *Id.* at 10-11. Further, W.V. was on track to meet the October 2016 objectives, used age-appropriate language, passed his classes, and read at an early first grade level (compared to an early kindergarten level six months prior). *Id.* When W.V. completed first grade, he read at a F&P level D (up 97% from level A six months prior). A.R. at 16. W.V. was recommended, and attended, the District's Summer Reading Academy in summer 2016. *Id.* at 17.

Given these undisputed facts, the Court cannot conclude the District disregarded a reason to suspect W.V. likely needed special education services, as opposed to the other remedial measures already demonstrating success. First, the Court does not accept Plaintiffs' claim the District should have suspected a likely need for special education in September 2015, the month W.V. entered the District. Pls.' Mot. Summ. J. at 8; Pls.' Summ. J. Reply at 5. A district must take some time to request and gather information to accurately classify its students' needs and the appropriate remedies. *Dallas Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 320 (5th Cir. 2017) (applying a reasonable time analysis). Absent the most obvious of disabilities, a district cannot rationally be expected to suspect a need for additional services without even a moment to evaluate the effectiveness of the services already available. *Id.*

Second, while six months may be enough to evaluate the effectiveness of services provided, the evidence gathered by the District in April 2016 indicated W.V. was progressing

under the current plan. A.R. at 11-17. Testimony by teachers, counselors, and W.V.'s SLP, combined with available metrics like grades and F&P levels, demonstrated W.V. was performing at or above the expectations set six months previously. *Id.*; *see also D.G.*, 481 F. App'x at 892 (considering teacher and counselor testimony as sufficient evidence of progress). The District had ample evidence the program set in place six months prior was functioning well and W.V. was on-pace to meet reasonable goals by October 2016. A.R. at 11-17. Thus, no reasonable suspicion existed to require the District dump the current plan in favor of higher-level special education services. *D.G.*, 481 F. App'x at 892.

Plaintiffs argue the District had evidence "to at least raise a suspicion that W.V. *may* have been failing to make 'sufficient progress[.]'" Pls.' Summ. J. Reply at 2. However, the Fifth Circuit requires more than '*may* indicate a failure:' instead, the evidence must '*likely* indicate a failure.' *Woody*, 865 F.3d at 320. The need for services must be probable, not merely possible. *Id.* Plaintiffs further argue the use of accommodations invalidates the District's reliance on grades as a measure of progress. Pls.' Summ. J. Reply at 2.[4] Plaintiffs' argument is unsupported on an essential issue, however, as the evidence does not show any accommodations were added to the later grades not present initially.[5] *Id.*

Further, the District relied on the testimony of W.V.'s teachers and SLP. A.R. at 11-17. Plaintiffs brush this testimony aside as "subjective opinion[.]" Pls.' Summ. J. Resp. at 2. The Court cannot, however, substitute Plaintiffs' or its own opinion for that of professional

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[4] Specifically, Plaintiffs claim W.V.'s grades were based on modified instruction and partially on participation. Pls.' Summ. J. Reply at 2.

[5] Stated alternatively, if W.V.'s grades were adjusted upward by one letter (an A grade resulted from a B performance), it does not invalidate the progress shown by a letter grade improvement over time. If W.V. scored a B grade (C performance) in 2015 then an A grade (B performance) in 2016, W.V. improved by one letter grade.

educators; it affords due deference to the opinions of the specialists. *White*, 343 F.3d at 377. As to the F&P levels, Plaintiffs point out several unknowns about the F&P level testing: how long W.V. needed to complete it, whether he had seen the exam before, and what accommodations he used in completing it. Pls.' Summ. J. Reply at 5. Critically lacking is any evidence that W.V. took inordinately long to complete the exam, saw the exam beforehand, or used heavy assistance to complete it. *Id.* The Court cannot assume the negative—that some unknown defect in the F&P level testing invalidates its accuracy—particularly when the educators and SEHO found the test to be reliable and credible evidence. *White*, 343 F.3d at 377.

Ultimately, the record demonstrates a logical chain of progression from W.V.'s first day in the District to his FIE testing a year later. A.R. at 11-17. W.V. worked under an IEP prepared by a prior district and received accommodations as needed to effectuate his growth. *Id.* When the District reviewed his progress six months later, using a combination of commonly-acceptable measurements with no evidenced failings, W.V. appeared to be progressing. *Id.* When the District reviewed his progress a year later, it ordered the FIE Plaintiffs sought. *Id.* The Court cannot in this chain of events find cause to believe the District disregarded evidence that its plan of action was likely failing to address W.V.'s needs.

ii. Finding W.V. did not qualify as a student with a SLD did not violate the IDEA.

Second, Plaintiffs challenge the SEHO's affirmation of the District's FIE conclusion that W.V. did not have a SLD. Pls.' Mot. Summ. J. at 8. Plaintiffs identify 34 C.F.R. §§ 300.304(b) and 300.309(a) as the violated provisions, which require a district, upon a failure by the child to achieve adequately, evaluate the child for a SLD by reviewing his or her response to scientific, research-based intervention or by determining whether the child exhibits a pattern of strengths and weaknesses relevant to identifying a SLD. *Id.* They claim District employees violated this

provision by employing unreliable metrics and "cook[ing] the books[.]" Pls.' Mot. Summ. J. at 13. The District protests Plaintiffs' claim of animus is "improper" and unsupported by the record and, while differences of opinion regarding the methods used may exist, the methods chosen by it do not violate the IDEA. Def.'s Summ. J. Resp. at 11.

As an initial matter, the Court concurs with the District regarding potential animus. Plaintiffs contend the District knowingly and affirmatively engaged in deceit and dereliction for the singular goal of denying their child—the District's ward—an education safeguarded by federal law. Pls.' Mot. Summ. J. at 13. That is a serious charge, and one the Court takes seriously. The record is utterly devoid of evidence or rationale for the claim District employees actively selected inaccurate and defective tests in an effort to deny W.V. access to public education resources those employees knew he needed. The Court finds no basis for Plaintiffs' characterization and summarily rejects it.

Turning to Plaintiffs' analysis, the District can violate 34 C.F.R. § 300.304 by (among others): (1) using any single measure or assessment as the sole criterion for finding an SLD; (2) using technically-unreliable instruments to assess W.V.; (3) administering any tests in an unreliable or invalid manner; (4) employing untrained or unknowledgeable personnel to conduct the testing; or, (5) administering tests inconsistently with the applicable instructions. 34 C.F.R. §§ 300.304(b)(2)-(3), 300.304(c)(1)(iii)-(v). Plaintiffs complain the District violated the above safeguards by using the Cross Battery assessment for considering W.V.'s potential SLD. Pls.' Mot. Summ. J. at 8. This fits into safeguards one, two, and five, above.[6]

[6] Plaintiffs claim the Cross Battery is a single measure, technically-unreliable, and inconsistent with the recommendations of the creators of the Cross Battery's subtests.

In education, diagnosticians use a variety of tests to determine whether a student has a SLD. A.R. at 3112:16-24. These tests ordinarily feature multiple subtests, which are usually selected by the test based on reliability and potential disabilities at issue. *Id.* at 3077:8-3018:25. Each test publisher recommends its subtests be applied in their entirety so the test provides an accurate picture of potential SLDs; the user of the test can not pick and choose portions of the test to use instead of using the entire test. A.R. at 3091:2-11. The Cross-Battery system is distinct from most others in that its publisher selected a variety of subtests from other tests to include in the assessment and does not rigidly require all of the subtests be used for the result to be accurate. *Id.* Instead, the evaluator selects subtests for the Cross-Battery based on the specific cognitive ability and deficit at issue. *Id.* at 3090:18-3091:11. The Cross-Battery includes its own recommendations for subtests to use. *Id.* at 3091:7-11.

The SEHO concluded the Cross-Battery, including the subtests it recommends, are well-researched. *Id.* at 22. This appeared based primarily on the testimony of the District's Educational Diagnostician that "I use Cross-Battery because its well researched." A.R. at 3093:21-24. Alternatively, Plaintiffs' retained Diagnostician testified the Cross-Battery was "controversial" and, if the Court understands the testimony correctly,[7] rejected by some in the field for picking portions of tests for assessment rather than an entire test for assessment. *Id.* at

[7] The testimony of Plaintiffs' expert Lesli Doan, Ph.D., is at times short of coherent. A.R. at 3125-29. Her testimony appears literally as: the creator of the Cross-Battery assessment, along with the National Association of School Psychologists, would not have agreed five years ago with the use of the Cross-Battery system, despite the fact the Cross-Battery system dates to at least 2001 and its creator (Dawn Flanagan) continues to actively promote the system. Flanagan, Dawn, et al; *Essentials of Cross-Battery Assessment* (1st Ed. 2001); *see also* A.R. at 3127:13-20 ("If you went to the National Association of School Psychologists about five years ago, all of the people, including Dawn Flanagan, . . . they actually do not agree with the fact that she is taking different subtests from these different tests.").

3127:13-3128:8. This Diagnostician further stated the Cross-Battery results could vary based on the subtests selected and the absence of subtests not selected. *Id.* at 3128:20-3129:2.

Plaintiffs' Diagnostician never states, much less shows, the Cross-Battery assessment is unreliable for evaluating SLDs under strengths and weaknesses. *C.f.* 34 C.F.R. § 300.304(b)(3) (requiring the district use reliable methodologies). Instead, she merely states the test is based on known information, and can be inaccurate to the extent information is not known. A.R. at 3128:20-23 ("so that can be very subjective, though, because they're not knowing that maybe there's other information out there. They only know the tests that you've put in there"). Such a statement applies to every form of testing possible, however, as all testing metrics are only as accurate as the data they are based on. Bad data in; bad data out.

Even then, Plaintiffs' Diagnostician recognized the X-BASS "is one method of getting a pattern of strengths and weaknesses[.]" *Id.* at 3129. While she does claim the Cross-Battery is "controversial[,]"[8] "[t]he courts are not free to choose between competing educational theories and impose that selection upon the school system." *Rettig v. Kent City Sch. Dist.*, 720 F.2d 463, 466 (6th Cir. 1983). The District used a researched and peer-recognized model for assessing SLDs. *Id.* at 3093:21-24. The IDEA does not burden the District with using every possible testing mechanism and gathering every potential relevant fact.[9] It merely requires the District gather reliable data about W.V. from multiple sources and use such data to prepare an evaluation. 34 C.F.R. § 300.304(b)(3). The District did so here. *Id.* at 3076:7-3080:16. The Court cannot

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[8] *Id.* at 3127:13.

[9] *See T.M. v. Quakertown Community Sch. Dist.*, 251 F. Supp. 3d 782, 802 (E.D. Penn. 2017) ("The IDEA does not obligate a school district to use a particular methodology to evaluate a student's intellectual potential"); *Damarcus S. v. District of Columbia*, 190 F. Supp. 3d 35, 50 (D.D.C. 2016) ("Plaintiffs have not identified any requirement that the evaluation offer a particular analysis of the information or explain data points that seem inconsistent with each other").

find the SEHO erred in concluding the District's evaluation methodology complied with the IDEA. *Id.* at 38.

iii. Concluding W.V. did not qualify as a student with a Speech and Language Impairment did not violate the IDEA.

Third, Plaintiffs challenge the SEHO's decision to uphold the District's finding that W.V. no longer had a Speech and Language Impairment. Pls.' Mot. Summ. J. at 11. They argue the District revoked W.V.'s status as impaired based on "one brief assessment, which lasted a mere five minutes," and which was conducted by "a first-year speech-language pathologist[.]" *Id.* They further point out their own retained pathologist conducted a three-hour evaluation which resulted in a finding W.V. needed speech therapy. *Id.* at 11-12. The District responds that its pathologist was W.V.'s case manager and worked with him weekly over the 2015-16 school year in preparing his IEP and managing concerns from other school personnel. Def.'s Summ. J. Resp. at 13. It claims this experience with W.V., in addition to the assessment challenged by Plaintiffs, gave it an adequate picture of W.V.'s lack of speech impairment. *Id.*

The standards applicable to the District's Speech and Language Impairment evaluation are the same as those applicable to its SLD evaluation, discussed in section ii, supra. The District's pathologist, who ultimately determined W.V. no longer had a Speech and Language Impairment, worked with the District for five years at the time of the finding. A.R. at 2963:18-24. A former specialist for the United States Army from 2001-04, she obtained a bachelor's degree in Communications Sciences and Disorders and a master's degree in Clinical Speech-Language Pathology. *Id.* at 2521-22, 2966:7-22. She also, before joining the District, worked at the Children's Center in Utah and at Killeen ISD, both in the fields of child speech language pathology. *Id.* at 2521-22, 2963:25-2964:3, 2966:23-2967:22. After transferring to the District, she obtained clinical certifications from the American Speech and Hearing Association,

completed a year of clinical fellowship in a skilled nursing facility, and worked as a speech pathology assistant. *Id.* at 2521-22, 2964:17-25. She received her certification as a licensed speech language pathologist while employed by the District. *Id.* at 2979:5-7.

Before reevaluating W.V.'s speech impairment, the pathologist met with W.V. for thirty minutes, five times a week per six-week grading period. A.R. at 3235:21-3236:2. These meetings occurred every six-week grading period over the course of the 2016-17 academic year. *Id.* The pathologist observed W.V. and his speech in various settings over this period and often without W.V.'s knowledge, to get an idea of his performance in a natural environment. *Id.* at 2969:20-2970:6, 3236:17-25. She also acted as W.V.'s case manager over this same period, gathering information on W.V.'s progress and missteps from his teachers, paperwork, nurse, counselor, and anyone else in consistent contact with W.V. *Id.* at 3237:4-25. These individuals were specifically directed to contact the pathologist with "any concerns regarding [W.V.'s] speech intelligibility [or] communication[.]" *Id.*

The District's pathologist notified Plaintiffs directly of her decision to "graduate" W.V. from speech therapy before the official finding W.V. no longer had a speech impairment. A.R. at 2300. She explained to Plaintiffs in this notice that the decision was based on the 'five-minute' GFTA-2 assessment, but also based on her observations in individual small groups and classroom settings. *Id.* The Court therefore agrees that Plaintiffs' representation the pathologist's findings were based solely on a five-minute assessment "is misleading at best." Def.'s Summ. J. Resp. at 12. While Plaintiffs may disagree with the results, a procedural challenge requires a defective methodology, and nothing about the District's November 2016 assessment—based on the GFTA-2, pathologist observation in small groups, incognito pathologist observation in class, and school staff reporting—suggests the District's pathologist

lacked the information necessary to make her decision. *Leticia H.*, 502 F. Supp. 2d. at 518. The SEHO did not err in finding the same. A.R. at 47.

iv. The District complied with the IDEA by evaluating W.V.'s need for Assistive Technology ("AT").

Fourth, Plaintiffs argue the District violated 34 C.F.R. § 300.105(a) by not ensuring assistive technology services were available to W.V. despite being needed for W.V.'s FAPE. Pls.' Mot. Summ. J. at 13. While they acknowledge "W.V. was 'screened' for assistive technology on October 12, 2015[,]" they claim no "actual AT evaluation[]" occurred. *Id.* The District's cardinal sin, Plaintiffs continue, occurred when the school principal was not aware in deposition whether W.V. was assessed for AT or what the program Learning Ally[10] is. *Id.* The District counters that W.V. was evaluated for AT "on several occasions." Def.'s Summ. J. Resp. at 14. It further asserts W.V. did not demonstrate a need for AT services. *Id.*

The IDEA requires a district evaluate whether a child with a demonstrated disability needs AT to ensure receipt of FAPE. 34 C.F.R. § 300.105. This creates a two-part analysis: (1) W.V. needed AT and (2) the District failed to evaluate W.V. for AT (procedural) or failed to provide AT sufficient to satisfy W.V.'s needs (substantive). *Id; Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 200-01 (1982). Failure to prove both prongs dooms a claim against the district. *Id.*

Plaintiffs fail on the first prong by disregarding it entirely.[11] Instead, they argue only the second prong of the two-part analysis needs to be satisfied. Pls.' Summ. J. Reply at 10-11 (citing

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[10] Plaintiffs claim Learning Ally is a "common" AT service for children who cannot read or write. Pls.' Mot. Summ. J. at 13. To support the notion, they provide a link to Learning Ally's website. *Id.*

[11] Specifically, Plaintiffs never once claim in their Motion, much less show, W.V. needed AT for his FAPE. Pls.' Mot. Summ. J. at 13. After Defendant responded bringing this defect to the Court's, and Plaintiffs', attention, Plaintiffs still failed to state or prove W.V. needed AT. Pls.' Summ. J. Reply at 10-11.

North Hills Sch. Dist. v. M.B., 684 C.D. 2014, 2015 WL 5436734 (Pa. Commw. Ct. Apr. 7, 2015)) ("[t]he failure to evaluate a student's need for AT devices or services can amount to a denial of FAPE[]"). In support, Plaintiffs cite a Pennsylvania intermediate court, which found a district denied a child's FAPE by providing AT services which did not result in a measurable benefit to the child while, at the same time, being aware AT services used at home were highly-successful. *M.B.*, 2015 5436734, at *6. Both parties in that case acknowledged the child's AT successes at home were not matched at school, but the district failed to investigate this discrepancy anyway. *Id.*

The Court does not read *M.B.* to suggest the failure to evaluate AT de facto denies a child's FAPE, even if AT was not needed by that child. *C.f.* Pls.' Summ. J. Reply at 10 ("[t]he failure to evaluate a student's need for AT devices or services can amount to a denial of FAPE[]"). Rather, the Court understands *M.B.* to reflect the limited proposition that a district cannot ignore known successes of AT simply because its own AT does not result in said success. *M.B.*, 2015 WL 5436734 at *11. To the extent *M.B.* stands for the notion that the mere failure to evaluate AT alone denies FAPE, without a showing of need for such services, the Court declines to follow it. *Leticia H.*, 502 F. Supp. 2d at 518 ("procedural irregularities which do not infringe on parental involvement or result in the loss of educational opportunity will not invalidate an IEP or entitle a plaintiff to relief").

Otherwise, Plaintiffs never discuss what AT W.V. needed and why the denial of that AT denied W.V. a FAPE. Pls.' Summ. J. Reply at 10. They present no expert testimony on the issue either. *Id.* Without evidence W.V. needed AT to receive a FAPE, the SEHO did not err in finding the District did not violate the IDEA.

Plaintiffs fail to identify any procedural violations of the IDEA in the case at bar. The logical chain of investigation from W.V.'s entrance into the District to the District's FIE refutes any claim of procedural delay under the IDEA. A.R. at 11-17. The use of the Cross-Battery, a researched and reliable, even if controversial, method for evaluating W.V. for an SLD, also satisfies the IDEA. *Rettig*, 720 F.2d at 466. The District's pathologist considered ample factors in her determination that W.V. no longer possessed a speech impairment and the IDEA procedural safeguards do not apply to second-guess her conclusion. *Leticia H.*, 502 F. Supp. 2d. at 518. Finally, Plaintiffs cannot show the District violated the IDEA by not providing AT without showing W.V. needed the AT to ensure his FAPE. *Id.* Accordingly, the SEHO did not err in finding no procedural violation of the IDEA.

B. Substantive Violations

The Fifth Circuit identifies four factors to analyze and determine whether a school district substantively denied a student a FAPE:

> (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and (4) positive academic and non-academic benefits are demonstrated.
>
> *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).[12]

The Fifth Circuit never specified how the *Michael F.* factors must be weighed by a district court. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 293 (5th Cir. 2009). Instead, the

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[12] Plaintiffs do not address these factors directly in their motion and instead claim the District must offer an IEP reasonably calculated to enable W.V. to make appropriate progress in light of his circumstances. Pls.' Mot. Summ. J. at 13 (citing *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017)). The recent holding in *Endrew F.*, however, does not create a new standard for determining whether a school district substantively denied a student a FAPE. *Renee J. v. Houston Indep. Sch. Dist.*, No. 4:16-CV-02828, 2017 WL 6761876, at *3 (S.D. Tex. Nov. 1, 2017). Instead, *Endrew F.* is consistent with the Fifth Circuit's four-factor analysis in *Michael F.* and therefore did not invalidate the Fifth Circuit's factors to assess whether a student received a FAPE. *Id.*

factors are general indicators of the IEP's appropriateness intended to guide a district court in the fact-intensive inquiry of whether an IEP provided an educational benefit. *Id.* at 294.

i. The IEP at bar was individualized to fit W.V.'s assessments and performance.

Multiple assessments, performance information, and evaluations conducted on a disabled child are sufficient to demonstrate the IEP is individualized.[13] The Court, upon reviewing Plaintiffs' pleadings, cannot find any claim the District's IEP was not individualized to W.V. Pls.' Mot. Summ. J. at 13-17. The SEHO lists multiple ARDC meetings, with participation from W.V.'s parents, where W.V.'s IEP was discussed, set, and reevaluated. A.R. at 17-18. Accordingly, without argument to the contrary, the first factor weighs in favor of the District.

ii. The IEP at bar was administered in the least restrictive environment.

The 'least restrictive environment' requires a child with a disability be placed among children who are not disabled, when possible. *Z.C.*, 2015 WL 11123347 at *6. The Fifth Circuit uses a flexible, two-part test to determine whether a disabled child is in the least restrictive environment: (1) whether education in a regular classroom can be satisfactorily achieved for a given child, and (2) whether the school 'mainstreamed' the child to the extent appropriate. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989). In the case at bar, the District placed W.V. in the Wilson Reading System group, a program to promote reading skills

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[13] *E.g. Z.C. v. Killeen Indep. Sch. Dist.*, No. W:14-CV-086-WSS, 2015 WL 11123347, at *6 (W.D. Tex. Feb. 17, 2015) (Smith, J.), aff'd sub nom.; *Phoung C. v. Killeen Indep. Sch. Dist.*, 619 F. A'ppx 398 (5th Cir. 2015); *C.G. v. Waller Indep. Sch. Dist.*, No. 4:15-CV-00123, 2016 WL 3144161, at *7 (S.D. Tex. June 6, 2016), aff'd sub nom.; *C.G. v. Waller Indep. Sch. Dist.*, 697 F. App'x 816 (5th Cir. 2017) (as revised June 29, 2017); *C.M. v. Warren Indep. Sch. Dist.*, No. 9:16-CV-165, 2017 WL 4479613, at *12 (E.D. Tex. Apr. 18, 2017); *Shafi v. Lewisville Indep. Sch. Dist.*, No. 4:15-CV-599, 2016 WL 7242768, at *6 (E.D. Tex. Dec. 15, 2016) (each upholding individualized IEPs when assessments and evaluations focused on the disabled child).

for students with difficulty for 45 minutes during RtI period and tutoring sessions after school. A.R. at 19. W.V. received all instruction in the general education setting. A.R. at 44.

Nothing in this Court's analysis of the record shows the IEP isolated W.V. from other students in a general education setting or that W.V. needed isolation for any reason other than his dyslexia. Plaintiffs failed to address this issue and upon review the Court sees no facial defect requiring further analysis. *See Michael Z.*, 580 F.3d at 294 (passing on evaluating the second factor because the plaintiff did not plead or prove it). Accordingly, the second factor weighs in favor of the District.

iii. The IEP at bar was effectuated in a coordinated and collaborative manner by key stakeholders.

An IEP is coordinated and collaborative when it results from discussions and input by the child's parents, teachers, administrators, or other stakeholders.[14] Here, W.V.'s mother met with administrators to discuss W.V.'s evaluation on numerous occasions. A.R. at 12. W.V.'s parents were invited to ARDC meetings and W.V.'s mother participated in multiple meetings to discuss W.V.'s IEP. A.R. at 17-18. Although they later disagreed, W.V.'s parents consented to the ARDC's initial determinations. *Id.* Parental disagreement with a determination alone does not reflect a lack of coordination and collaboration. *R.C. v. Keller Indep. Sch. Dist.*, 958 F. Supp. 2d 718, 736 (N.D. Tex. 2013). The District's effort was clearly collaborative and coordinated with regards to W.V.'s IEP and this third factor weighs in favor of the District.

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[14] *See, e.g., Michael F.*, 118 F.3d at 253 (finding program development and design based on teacher, administrator, and counselor discussions was a coordinated and collaborative effort); *Z.C.*, 2015 WL 11123347 at *7 (concluding stakeholders, including parents, grandparents, advocates, legal counsel, and therapists, participated to some extent in the child's educational services was enough to meet the third factor); *C.M.*, 2017 WL 4479613 at *13 (holding email exchanges between mother, teachers, and administrators addressing child, although disagreeable and confrontational, met the collaboration element).

iv. The IEP at bar demonstrated positive academic and non-academic results.

Despite Plaintiffs' failure to address *Michael F.*, Plaintiffs present a genuine argument regarding W.V.'s positive academic and nonacademic benefits (factor four). Pls.' Mot. Summ. J. at 13-15. The Fifth Circuit does not require a district court to consider the four factors or weigh them in a particular way. *Michael Z.*, 580 F.3d at 293. Therefore, district courts may afford dispositive weight to any one factor. *See id.* at 294 (upholding a district court's decision based solely on the fourth factor). Plaintiffs ask the Court to do so here. Pls.' Mot. Summ. J. at 13-14.

In determining whether demonstrable academic and non-academic benefits arose from an IEP, a disabled child's development should be measured with respect to the individual student, not the rest of the class. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000). Only a child's inability to maintain the same level of academic progress achieved by his non-disabled peers represents a lack of educational benefit. *Id.* In *Bobby R.*, the Court held the disabled child received an educational benefit from his IEP because his test scores and grade levels improved year to year. *Id.* at 350. Other courts consider the fourth factor met when the child makes progress with behavior and social skills alone. *A.B. v. Clear Creek Indep. Sch. Dist.*, No. 4:17-CV-2382, 2018 WL 4680564, at *5 (S.D. Tex. Sept. 28, 2018). In *Michael Z.*, the Fifth Circuit upheld the district court's decision to place dispositive weight on the fourth factor and found the child's IEP showed a "consistent pattern of regress." *Michael Z.*, 580 F.3d at 294. The district court further found the IEP measures used by the district were insufficient to resolve the disabled child's difficulties because the measures repeatedly failed in the past under the continuingly-deficient IEP. *Id.*

Here, Plaintiffs argue W.V. did not show progress because he failed to meet standards on the state TPRI early reading assessment, could not meet grade-level standards based on assessments, and was one-to-two years behind his peers. Pls.' Mot. Summ. J. at 14. Plaintiffs'

expert found it difficult to believe W.V. progressed under the Wilson program standards and testified W.V. was not making adequate progress in reading. *Id.* All this evidence, however, compares W.V. to his peers and does not address standards particular to W.V.'s personal improvements or regression. *Bobby R.*, 200 F.3d at 349. As noted by the Fifth Circuit:

> a disabled child's development should be measured not by his relation to the rest of the class, but rather with respect to the individual student, as declining percentile scores do not necessarily represent a lack of education benefit, but the child's inability to maintain the same level of academic progress achieved by his non-disabled peers[.]

Id.

Courts hold more than de minimus progress is sufficient to show positive academic and non-academic benefit. *See C.M.*, 2017 WL 4479613, at *13 (holding a disabled child's progress in English and other areas was more than de minimus and outweighed low grades). Here, the record shows W.V. made some progress under the Wilson program. A.R. at 1189-91. Prior to attending the Wilson program and at the end of his first grade year, W.V. read at a F&P level D (end of kindergarten). A.R. at 2658:2-16. On September 12, 2016, and in accordance with his IEP, W.V. participated in the Wilson Reading System group for students with dyslexia as well as one-on-one tutoring sessions. *Id.* at 3214:9-3215:14. Under the IEP, progress reports were sent home every 6 weeks and demonstrated W.V. was progressing towards his goal of exhibiting 85% conversational speech accuracy. *Id.* at 2961:25-2962:14. By the end of second grade, W.V. read at F&P level J (end of first grade), with corresponding accuracy at 90% and comprehension at seven out of seven. *Id.* at 2767:4-17. Additionally, W.V. received a "B" in reading during the 2016-17 school year. *Id.*

Plaintiffs challenge these measurements on both their validity and appropriateness. Pls.' Mot. Summ. J. at 14. Plaintiffs first contest the validity of the District's measurements, arguing

the progress reporting was "vague and incomplete at best" and W.V.'s teacher "modified" W.V.'s grades. *Id.* at 15. Improving W.V.'s letter grades, however, was not the goal of his IEP. A.R. at 2785:2-24. Instead, the ARDC's IEP was targeted at improving W.V.'s articulation up to a set percentage of accuracy. A.R. at 905. This goal was effectuated by the Wilson Reading System participation and one-on-one tutoring sessions outside the regular curriculum. *Id.* W.V.'s second grade marks were not the means to measure W.V.'s progress. *Id.*

Furthermore, the SEHO concluded W.V.'s IEP was reasonably calculated to provide him with academic and non-academic benefits. *Id.* at 45. The SEHO concluded W.V. "maintain[ed] a level of mastery" with all target sounds as well as structured sentence and conversational levels because of the services provided by the Speech Therapy under W.V.'s IEP. *Id.* at 45-46. The Court's task is not to second-guess the decisions of school officials or to impose its own plans for the education of disabled students, but rather to determine only whether those school officials complied with the IDEA. *A. B.*, 2018 WL 4680564 at *2. Based on the aforementioned evidence of W.V.'s progress under the IEP and the SEHO's determination, the Court finds that the officials complied with the IDEA.

Second, Plaintiffs claim the IEP measurements must be "based on peer-reviewed research to the extent practicable." Pls.' Mot. Summ. J. at 15 (citing 20 U.S.C. § 1414(d)(1)(A)(i)(IV)). Defendant concedes the record is "silent as to whether the Wilson Reading System is based on peer-reviewed research." Def.'s Mot' Summ. J. at 18. Nevertheless, peer-reviewed research is not a requirement under the fourth *Michael F.* factor analysis. *Renee J.*, 2017 WL 6761876, at *5. In *Renee J.*, the plaintiff argued an autistic student was denied FAPE because the district did not use Applied Behavioral Analysis in fashioning and implementing the IEP. *Id.* The committee considered a number of IEP approaches, ranging from following guidelines in the

Texas Autism Supplement to rewarding good behavior with a visit to a police station or restaurant. *Id.* On review, the district court found the school district did not deny FAPE by failing to use the Applied Behavioral Analysis because the parents did not specifically ask the school district to use Applied Behavioral Analysis in devising the IEP nor did they point to anything other than the failure of the school district to use that type of analysis. *Id.*

As in *Renee J.*, W.V.'s parents did not specifically ask the District to implement any Applied Behavioral Analysis. A.R. at 19, 3096:2-10. Further, Plaintiffs consented to the FIE determination by the ARDC and W.V.'s participation in the Wilson Reading System group, a structured, researched-based program that comports with the Texas Dyslexia Handbook. *Id.* at 3099:23-3100:12. While "Applied Behavior Analysis is one example of peer-reviewed practices, [it is] not the only option." *Renee J.*, 2017 WL 6761876, at *5.

The record shows W.V. made progress and improvements under his IEP and the SEHO correctly found the progress more than de minimus regarding the positive academic and non-academic benefits of the IEP. A.R. at 3237:4-25. This Court therefore upholds the fourth factor determination by the SEHO in favor of the District.

C. Other Motions

Remaining are Defendant's Objections to Plaintiff's Summary Judgment Motion, Motion to Strike Plaintiff's Amended Complaint, and Motion to Supplement its Motion for Summary Judgment. Def.'s Objs.; Def.'s Mot. Strike; Def.'s Mot. Supp. Given the Court finds Defendant's live Motion for Judgment be granted, it finds Defendant's Objections and Motion to Supplement are moot.

Likewise, Defendant's Motion to Strike is moot. First, the motions at issue did not include any reference to the Texas Education Agency's Performance-Based Monitoring System,

and, to the extent they did, the Court concludes it of no consequence in resolving this dispute in favor of the District. Second, the Court is granting Defendant's Motion for Judgment, and therefore Plaintiff's claims for relief—even if improper—are irrelevant as they are denied. The Court admonishes the parties to, in the future, limit their disputes following the filing of case-dispositive motions to those necessary to resolving the pending motions. In reviewing the numerous additional pleadings, the Court is of the opinion the parties did not do so here.

IV. CONCLUSION

For the reasons set forth above, the Court concludes Defendant's Motion for Judgment on the Administrative Record or, in the Alternative, Motion for Summary Judgment should be **GRANTED**. The District did not violate any procedural requirements imposed by the IDEA. The District also created an IEP reasonably calculated to enable W.V. to receive educational benefits. Therefore, Plaintiffs failed to meet their burden to establish reversible error in the SEHO's findings below. Plaintiff's Motion for Judgment on the Administrative Record or, in the Alternative, Motion for Summary Judgment should be **DENIED**. Defendant's remaining motions should be **DENIED** as moot.

V. RECOMMENDATION

Accordingly, it is **RECOMMENDED** Defendant's Motion for Judgment on the Administrative Record or, in the Alternative, Motion for Summary Judgment be **GRANTED**, Plaintiff's opposing Motion for Judgment on the Administrative Record or, in the Alternative, Motion for Summary Judgment be **DENIED**, and Defendant's remaining motions be **DENIED AS MOOT.**

The parties may wish to file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which

objections are made. The District Court need not consider frivolous, conclusive, or general objections. *Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

SIGNED this 15th day of October, 2018.

JEFFREY C. MANSKE,
UNITED STATES MAGISTRATE JUDGE

APPENDIX F

United States Court of Appeals for the Fifth Circuit

No. 19-51046

WILLIAM V., *as parent / guardian / next friend of* W.V., *a minor individual with a disability*; JENNY V., *as parent / guardian / next friend of* W.V., *a minor individual with a disability*,

Plaintiffs—Appellants,

versus

COPPERAS COVE INDEPENDENT SCHOOL DISTRICT,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:17-CV-201

ON PETITION FOR REHEARING EN BANC

(Opinion 09/14/2020, 5 Cir., _____, _____ F.3d _____)

Before SMITH, WILLETT, and DUNCAN, *Circuit Judges*.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled

on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

STUART KYLE DUNCAN
United States Circuit Judge

APPENDIX G

EXHIBIT A

DOCKET NO. 101-SE-0117

W[redacted] V. B/N/F W[redacted] AND J[redacted] V., Petitioner	§	BEFORE A SPECIAL EDUCATION
v.	§	HEARING OFFICER FOR
COPPERAS COVE INDEPENDENT SCHOOL DISTRICT, Respondent	§	THE STATE OF TEXAS

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EXHIBIT A

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v.	§	HEARING OFFICER FOR
COPPERAS COVE INDEPENDENT SCHOOL DISTRICT, Respondent	§	THE STATE OF TEXAS

DECISION OF HEARING OFFICER

W[redacted] V. (Student) by next friends W[redacted] and J[redacted] V. (Parents) (collectively, Petitioner) requested an impartial due process hearing (Complaint) pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 *et seq.* The Copperas Cove Independent School District (Respondent or the District) is the respondent to the Complaint. Petitioner alleges the District denied Student a free appropriate public education (FAPE) by violating its Child Find duty; failing to comply with the IDEA's procedural requirements; conducting an inappropriate Full Individual Evaluation (FIE) of Student; and developing an Individualized Education Program (IEP) for Student that does not meet his unique educational needs. The District denies Petitioner's claims.

In a counterclaim, the District seeks to establish that the FIE is appropriate and, that while Petitioner may obtain an Independent Educational Evaluation (IEE) at personal expense, the District need not provide Petitioner's requested IEEs at public expense.

The hearing officer finds Petitioner did not prove the District violated the IDEA as alleged. The hearing officer further finds the District's FIE is appropriate. Therefore, Petitioner's requested relief is denied.

I. PROCEDURAL HISTORY AND STATUTE OF LIMITATIONS

A. Procedural History

Petitioner filed the Complaint with the Texas Education Agency (TEA) on January 13, 2017. TEA issued its Notice of Filing of Request for Special Education Due Process Hearing on January 17, 2017. The parties did not reach an agreement at the January 31, 2017 resolution session. On February 14, 2017, the District filed a counterclaim to defend its November 2016 FIE. Respondent's Motion for Continuance and extension of the decision due date was granted, for good cause, on February 16, 2017.

Upon the parties' request, TEA assigned a mediator to the case on April 11, 2017. On April 18, 2017, the due process hearing was continued and the decision due date was extended for good cause to give the parties time to complete mediation. However, the mediation was not held because the parties could not arrive at a mutally agreeable date.[1]

The hearing was held May 30-31, 2017, before Sharon Cloninger, hearing officer, in the District's administration building at 705 West Avenue D, Copperas Cove, Texas. Petitioner was represented by lead attorney Elizabeth Angelone and co-counsel Devin Fletcher. The District was represented by Eric G. Rodriguez, attorney. The District's party representative was Angela Kirkpatrick, Director of Special Education. The hearing was open to the public.

The record closed June 23, 2017, after the parties submitted written closing briefs. This decision was timely issued by the July 1, 2017 due date.

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[1] Tr. at 631.

B. Statute of Limitations

The District asserted the affirmative defense of the one-year statute of limitations. Petitioner raised no exemption.[2] The accrual date for this proceeding is January 17, 2016.

II. PARTIES' ISSUES, REQUESTED RELIEF, AND BURDEN OF PROOF

A. Petitioner's Issues

1. Did the District fail to provide Student with an appropriate IEP that permitted him to receive meaningful benefit, rather than *de minimus* or trivial educational advancement?

2. Did the District fail to provide a comprehensive and proper evaluation of Student when requested by Parents?

3. Did the District fail to evaluate Student in all areas of suspected disability, including in the areas of basic reading, reading fluency, math calculation, math reasoning, and written expression?

4. Did the District fail to provide services to Student for dyslexia and/or a reading disability?

5. Did the District fail to track Student's progress toward his goals during the 2015-2016 school year and/or did the District fail to provide Parents with progress reports?

6. Did the District fail, and is it continuing to fail, to comply with all procedural requirements of the IDEA and Texas law, including providing Prior Written Notice, and by doing so has the District impeded Student's right to a FAPE; significantly impeded Parents' opportunity to meaningfully participate in the decision-making process regarding the provision of a FAPE; and/or impeded or caused a deprivation of educational benefit to Student?

7. Did the District fail to provide Extended School Year (ESY) services?

8. Did the District fail to provide Student with instruction and strategies based on peer-reviewed, research-based educational programming practices designed to meet his individual needs?

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[2] 19 Tex. Admin. Code § 89.1151.

B. Petitioner's Requested Relief

By way of relief, Petitioner requests the hearing officer to:

1. Find that Student remains eligible for special education services as a student with a Specific Learning Disability (SLD);

2. Order the District to provide reimbursement to Parents for the privately-funded January 11, 2017 IEE;

3. Order the District to pay for IEEs in Speech-Language and Assistive Technology (AT);

4. Order the District to provide an IEP to include appropriate placement and services;

5. Order the District to provide compensatory services in an amount equal to the deprivation suffered by Student, including but not limited to dyslexia services by a Certified Academic Language Therapist (CALT) and any Speech-Language services Student is entitled to; and

6. Order all other relief that may be appropriate.

C. Respondent's Counterclaim and Requested Relief

Respondent seeks to prove the District's November 2016 FIE of Student is appropriate. Respondent requests a finding that the FIE is appropriate and that Petitioner is not entitled to the requested IEEs at District expense.

D. Burden of Proof

The IDEA creates a presumption that a school district's decisions made pursuant to the IDEA are appropriate and that the party challenging the decisions bears the burden of proof at all times.[3] A party attacking the appropriateness of an IEP established by a school district bears the

[3] *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005); *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d. 373, 377 (5th Cir. 2003); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993).

burden of proof, by a preponderance of the evidence, to show why the IEP and resulting placement were inappropriate under the IDEA.[4] To prevail, Petitioner must, therefore, establish that the District violated the IDEA regarding Petitioner's delineated issues.

Regarding the counterclaim, the District bears the burden to prove that Student's FIE was appropriate.[5] To prevail, the District must prove the FIE meets all standards under the IDEA.[6]

III. WITNESSES

A. Petitioner's Experts

1. Licensed Psychological Associate, Ph.D., Nationally Certified School Psychologist (NCSP)[7]
2. Speech-Language Pathologist (SLP)[8]
3. Licensed Dyslexia Therapist (LDT), CALT[9]

B. Respondent's Experts

1. M.S., SLP, American Speech Hearing Association Certificate of Clinical Competence (ASHA-CCC)[10]
2. Educational Diagnostician (EDDIAG)[11]

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[4] *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-248 (5th Cir. 1997), as cited in *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000); *R.H. v. Plano Ind. Sch. Dist.*, 607 F.3d 1003, 1010-1011 (5th Cir. 2010).

[5] 34 C.F.R. § 300.502(b)(2)(i).

[6] 34 C.F.R. §§ 300.301, 300.303 - 300.311.

[7] Tr. at 487-490 (credentials); Tr. at 492 (designation as expert); Pet. Ex. 37 *(curriculum vitae)*.

[8] Tr. at 376-378 (credentials); Pet. Ex. 49 *(curriculum vitae)*; Tr. at 379 (designation as expert).

[9] Tr. at 262-266, 268 (credentials); Pet. Ex. 123 (*curriculum vitae*). A CALT reviews data and develops individual treatment plans for children with dyslexia. Tr. at 310 (Petitioner's expert LDT).

[10] Tr. at 322, 335-340 (credentials); Pet. Ex. 9a at 13; Resp. Ex. 84 (*curriculum vitae*); Tr. at 353 (designation as expert).

[11] Tr. at 409-411, 432-436 (credentials); Tr. at 474 (designated as expert); Pet. Ex. 9a at 13, 15; Resp. Ex. 83 (*curriculum vitae*).

C. Lay Witnesses

1. Director of Education, Sylvan Learning Center of Killeen[12]
2. District's Director of Special Education[13]
3. Principal, Ed.D., Student's elementary school[14]
4. Student's Interventionist[15]
5. Student's second-grade Reading teacher[16]

IV. FINDINGS OF FACT

A. Background

1. Student resides with Parents within the boundaries of the District, where he entered school as a first grader in August 2015.[17] Student, age 9, will attend third grade in 2017-2018.[18]

2. In November 2014, when Student attended kindergarten out of state, he received special education services for a Speech Impairment (SI) due to articulation errors that were not developmentally appropriate and caused him frustration with academic tasks.[19] Student's IEP goal was to produce /sh, ch, and j/ in words, sentences, and conversational speech with 75% accuracy.[20]

3. In September 2015, the District accepted Student's transfer IEP and began providing Speech Therapy to him.[21]

4. On February 27, 2017, the Admission, Review, and Dismissal committee (ARDC) determined that Student is no longer eligible for special education services as a student

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[12] Tr. at 595, 604-605 (credentials).

[13] Tr. at 50 (credentials).

[14] Tr. at 113 (credentials).

[15] Tr. at 157-159, 161-162 (credentials).

[16] Tr. at 199-200, 256-257 (credentials).

[17] Pet. Ex. 3 at 1, 12-13, 15; Pet. Ex. 14 at 4; Pet. Ex. 36 at 1; Resp. Ex. 30 at 30-31; Resp. Ex. 85 at 1-21, 24-27.

[18] Pet. Ex. 3 at 1.

[19] Pet. Ex. 1 at 1, 11; Pet. Ex. 2 at 1, 7; Pet. Ex. 20; Pet. Ex. 21; Pet. Ex. 22; Pet. Ex. 48 at 1-2; Pet. Ex. 104;Pet. Ex. 105; Resp. Ex. 1; Resp. Ex. 29 at 1.

[20] Pet. Ex. 1 at 3, 6; Pet. Ex. 2 at 3, 6; Pet. Ex. 48 at 1-2; Resp. Ex. 29 at 3, 6.

[21] Resp. Ex. 73 at 1.

with an SI. But because the Complaint was filed in January 2017, Student has continued to receive special education services due to the IDEA's "stay put" provision.[22]

5. Student began receiving intensive individualized Response to Intervention (RtI) services for dyslexia in May 2016.[23]

6. Dyslexia is a neurologically based disorder that interferes with the acquisition and processing of language. Symptoms can include difficulty in phonological processing, reading, writing, spelling, handwriting, and sometimes arithmetic. Student has phonological awareness issues, resulting in problems with fluency and accuracy. He reads below grade level.[24]

7. On September 23, 2015, the District sent Parents notice of an ARDC meeting to consider Student's transfer IEP and conduct an annual review. The ARDC meeting was rescheduled twice by the District and once at Parents' request, finally being held on October 26, 2015.[25]

8. Mother attended the October 26, 2015 ARDC meeting, participated, and was given an Explanation of Procedural Safeguards and Prior Written Notice.[26]

   a. The ARDC accepted the prior school's November 18, 2014 FIE and determined Student met criteria for an SI and needed special education and related services.[27]

   b. The ARDC determined Student qualified for Speech Therapy in the area of articulation.[28]

   c. The ARDC developed an IEP for Student with a Speech Therapy goal and two objectives to be completed by October 25, 2016. The goal required Student, while in a small group, and given a verbal/visual stimulus, to maintain his articulation skills in running conversational speech with 90% accuracy. The objectives required him to produce all of his sounds in running conversational speech with 80% accuracy within 12-18 weeks and with 90% accuracy within 18-36 weeks.[29]

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[22] 34 C.F.R. § 300.518; Pet. Ex. 11 at 6; Resp. Ex. 36 at 14.

[23] Tr. at 130-131 (Principal); Pet. Ex. 36 at 1-2; Resp. Ex. 77.

[24] Tr. at 163, 166 (Interventionist); Tr. at 206 (Reading teacher); Tr. at 275-277 (Petitioner's expert LDT); Pet. Ex. 123 at 4-5; Pet. Ex. 75 at 2; Resp. Ex. 3 at 2; Resp. Ex. 5; Resp. Ex. 6; Resp. Ex. 7; Resp. Ex. 8; Resp. Ex. 9; Resp. Ex. 10; *see also* Pet. Ex. 78.

[25] Pet. Ex. 14 at 4; Pet. Ex. 106; Pet. Ex. 107; Pet. Ex. 108; Pet. Ex. 109; Resp. Ex. 30 at 4-5, 7-18.

[26] Pet. Ex. 3 at 12, 14-16; Pet. Ex. 109; Resp. Ex. 26 at 4, 19-36; Resp. Ex. 30 at 5, 30, 32-34.

[27] Pet. Ex. 3 at 1, 12; Resp. Ex. 30 at 19, 21, 30.

[28] Pet. Ex. 3 at 3; Resp. Ex. 30 at 21; *see also* Resp. Ex. 37, Resp. Ex. 38.

[29] Pet. Ex. 3 at 4; Resp. Ex. 30 at 22, 30.

d. Student was to receive Speech Therapy in 30-minute sessions once a week in a small group or individual setting with trained, licensed, or certified staff in a less distracting environment than the general education classroom. Once Student demonstrated mastery of his goal, the SLP was to observe him in a more natural and functional setting, with follow-up in the Speech Therapy room for skills that Student might not be generalizing.

e. In all classes, Student's modification or accommodation was "chunking assignments."[30]

f. Student was to receive all instruction with Tier 1 core RtI in the general education classroom at his home campus.[31]

g. ESY services were not recommended either by Parents or the District because Student exhibited no documented regression.[32]

h. Student's AT screening indicated Student did not need AT devices or services to make adequate progress because the technology and devices provided in the classroom were sufficient to meet Student's needs.[33]

9. On November 6, 2015, Student was moved to Tier 2 RtI for Reading.[34]

B. First Grade (Spring 2016)

10. On March 30, 2016, Student was trying to sound out each individual sound when reading. His teacher moved him from using individual sounds such as "i-n-g" to using chunks, such as "ing."[35]

11. On April 12, 2016, the District sent Parents notice of the ARDC meeting to be held on April 14, 2016.[36]

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[30] Pet. Ex. 3 at 5; Resp. Ex. 30 at 23.

[31] Pet. Ex. 3 at 7, 11; Resp. Ex. 30 at 25, 29.

[32] Pet. Ex. 3 at 10, 12-13, 15; Resp. Ex. 30 at 28, 30.

[33] Pet. Ex. 3 at 13, 15; Pet. Ex. 24; Resp. Ex. 4 at 20; Resp. Ex. 30 at 30, 35-36.

[34] The NCSP's report incorrectly states Student began receiving Tier 2 Reading support on November 6, 2016. Pet. Ex. 36 at 2. The correct date is November 6, 2015. Tr. at 547, 549-550 (Petitioner's expert NCSP); Pet. Ex. 9a at 9; Resp. Ex. 4 at 17.

[35] Pet. Ex. 83.

[36] Pet. Ex. 110; Resp. Ex. 33 at 4-7.

12. The ARDC met on April 14, 2016, for Student's annual review and, pursuant to Parent's request, to meet with an associate of the Sylvan Learning Center of Killeen (Sylvan), where Student had been receiving instruction.[37]

a. Mother participated in the deliberations and was provided with Prior Written Notice and a Notice of Procedural Safeguards, including information about the right to request an evaluation of Student.[38]

b. The ARDC reviewed information from school personnel, Student's communication needs, Parents' concerns for enhancing Student's education, and Student's progress on his IEP goal.[39]

i. Student's progress was sufficient for him to master the IEP goal by the next annual ARDC meeting date, October 25, 2016. He had mastered all of his sounds except for the /sh/and /ch/ sounds, which he demonstrated with 77% accuracy.[40]

ii. The /ch/ articulation had improved since February 16, 2016, when he articulated the target sound with 56% accuracy. The goal required Student, while in a small group, to maintain his articulation skills in running conversation with 90% accuracy.[41]

c. Student's Present Levels of Academic Achievement and Functional Performance (PLAAFP) statements were presented by his general education teacher, interventionist, and SLP.

i. The PLAAFP statement for Speech and Related Services indicated Student was able to say his sounds in running conversational speech with 85% accuracy but that he needed to continue to work on /ch and sh/ in words, phrases, and running conversational speech.[42]

ii. The PLAAFP statements showed Student used age-appropriate language, was working at a beginning of first grade level in Reading, and was receiving Tier 2 RtI in Reading. Student was passing his classes.[43]

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[37] Pet. Ex. 4 (generally); Pet. Ex. 4 at 17; *see also* Pet. Ex. 36 at 1; Resp. Ex. 33.

[38] Pet. Ex. 4 at 1, 14-15, 17-18; Resp. Ex. 33 at 8, 21, 23-25, 29.

[39] Pet. Ex. 4 at 1-2; Resp. Ex. 33 at 8.

[40] Tr. at 327-328, 355-358 (District's expert SLP); Resp. Ex. 73 at 2-3, 6.

[41] Tr. at 327-328, 355-358 (District's expert SLP); Resp. Ex. 73 at 2-3, 6.

[42] Pet. Ex. 4 at 2; Resp. Ex. 33 at 9.

[43] Pet. Ex. 4 at 2-3, 14; Resp. Ex. 33 at 9-10, 21.

iii. The PLAAFP statements contained enough detail for the ARDC to develop an appropriate IEP for Student.[44]

d. The ARDC revised Student's IEP goal. The new Speech goal required him, while in a small group, and given verbal/visual stimulus, to improve his articulation in running conversational speech with 85% accuracy. The objectives focused on Student's ability to articulate /ch, th, and sh/. The goal was to be completed by April 13, 2017.[45]

e. Speech Therapy was to be provided in 30-minute sessions five times per six weeks' grading period.[46]

f. The ARDC decided Student did not need a behavior intervention plan or AT.[47]

g. ESY services were discussed and not recommended either by Parent or the District.[48] Student had been receiving instruction at Sylvan and would continue going to Sylvan over the summer.[49]

h. An Intensive Program of Instruction (IPI) and Accelerated Instruction Plan (AIP) were to be provided as needed. An IPI is developed when a student is not making progress toward IEP goals.[50]

13. On April 22, 2016, Student's case manager provided his general education teacher and the interventionist with copies of his accommodations and modifications, IEP goal and objectives, schedule of services, and State/District testing instructional supports as determined at the April 14, 2016 ARDC meeting.[51]

14. On April 18, 2016, Mother requested via email that the District evaluate Student for an SLD. The elementary school Principal responded via email that same day, informing her Student would continue to receive Reading RtI in a one-hour block period daily, and the following accommodations would continue to be provided by his general education classroom teacher: extra time, peer reading, preferential seating, reminders to stay on

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[44] Pet. Ex. 4 at 2-3, 14; Resp. Ex. 33 at 9-10, 21.

[45] Pet. Ex. 4 at 5, 9; Resp. Ex. 33 at 12.

[46] Tr. at 608, 622 (District's expert SLP); Pet. Ex. 4 at 11; Resp. Ex. 31 at 3; Resp. Ex. 32; Resp. Ex. 33 at 2, 18; Resp. Ex. 73.

[47] Pet. Ex. 4 at 6, 13-14; Resp. Ex. 33 at 10-11, 13, 15, 20.

[48] Pet. Ex. 4 at 11, 13; Resp. Ex. 31 at 3; Resp. Ex. 32; Resp. Ex. 33 at 2, 18, 20.

[49] Pet. Ex. 4 at 14; Resp. Ex. 33 at 21.

[50] Tr. at 151 (Principal); Pet. Ex. 4 at 11; Pet. Ex. 41 at 27-28; Resp. Ex. 31 at 3; Resp. Ex. 32; Resp. Ex. 33 at 2, 18. A May 3, 2016 IEP amendment added IPI and AIP to the schedule page of the April 14, 2016 ARDC document, correcting a clerical error. Pet. Ex. 5; Resp. Ex. 31; Resp. Ex. 32; *see* Pet. Ex. 6 at 4 for version with clerical error; *see also* Pet. Ex. 6, Pet. Ex. 15.

[51] Resp. Ex. 28 at 3.

task, repeating instructions back to the teacher, and all material read to him except for the Reading test.[52]

15. The District had 15 school days, or until May 9, 2016, to respond to Mother's request for an evaluation and was required to provide her with Prior Written Notice and Notice of Procedural Safeguards if the evaluation request was refused.[53]

16. On April 22, 2016, school staff met to consider Mother's request for an SLD evaluation. In attendance were the counselor, Student's first grade teacher, the elementary school principal, Student's interventionist, a second interventionist, and Student's SLP. The members agreed that Student did not need to be tested because he had made progress all year. At the beginning of first grade, Student read at a beginning kindergarten level. By the meeting date, he was reading at an end of kindergarten level. He was progressing toward expectation in Writing. He was at mid-year first grade level in Math. He was passing all classes.[54]

17. On April 28, 2016, the District timely sent Parents a Notice of Action that Student would not be tested for an SLD. On May 5, 2016, the District provided Mother with a Notice of Procedural Safeguards. Mother signed the Notice of Action on May 16, 2016.[55]

18. On April 28, 2016, the District sent Mother a Notice of Action informing her that Student would be tested for dyslexia. The Notice of Action states the District would continue to provide Student with his current IEP and Tier 2A Reading RtI. The District declined to honor Mother's request to move Student up to Tier 2B Reading RtI because Student was making progress under Tier 2A. On May 16, 2016, Mother consented to the dyslexia screening.[56]

19. On April 29, 2016, Parent met with the Director of Special Education to request SLD testing in addition to dyslexia testing. But data only supported dyslexia screening, which is not an evaluation specific to special education. On May 16, 2016, Mother signed the District's second Notice of Action declining to test Student for an SLD. She had been provided with a Notice of Procedural Safeguards on May 5, 2016.[57]

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[52] Tr. at 85-86 (District's Special Ed. Director); Tr. at 209-210 (Reading teacher); Tr. at 628 (District's expert SLP); Pet. Ex. 84; Pet. Ex. 85; Resp. Ex. 39.

[53] Tr. at 51-52, 85-86 (District's Special Ed. Director); Resp. Ex. 39; 19 Tex. Admin. Code § 89.1011(b). The Notice of Action comports with the IDEA's Prior Written Notice Requirements. 34 C.F.R. § 300.503.

[54] Pet. Ex. 111.

[55] Tr. at 86-88, 94 (District's Special Ed. Director); Pet. Ex. 113; Resp. Ex. 23; Resp. Ex. 39.

[56] Tr. at 88-90 (District's Special Ed. Director); Pet. Ex. 29; Resp. Ex. 24.

[57] Tr. at 97-99 (District's Special Ed. Director); Resp. Ex. 24.

20. On April 28, 2016, the District sent Parents notice of an ARDC meeting to be held on May 2, 2016, to discuss Parents' request that Student be tested for an SLD.[58] The ARDC did not meet until May 31, 2016.[59]

21. On May 5, 2016, the District sent Parents a Notice of Proposal to Evaluate Including Determination of Needed Evaluation Data. The ARDC's special request was in response to Parents' request that Student be evaluated for dyslexia and Irlen Syndrome. The District provided Mother with a Notice of Procedural Safeguards on that date.[60]

22. On May 5, 2016, Mother signed permission for the District to screen Student for Irlen Syndrome, a perceptual problem with how the brain interprets visual information. Children with Irlen Syndrome may suffer from a slow reading rate, inefficient reading, poor reading comprehension, and the inability to do continuous reading, among other things. Irlen Syndrome can coexist with learning difficulties, but some individuals may have been mislabeled as having dyslexia and/or reading disabilities.[61]

23. On May 10, 2016, Student's physician determined it was not likely that Student has Attention Deficit-Hyperactivity Disorder (ADHD). The doctor recommended that Student be assessed for an SLD, specifically dyslexia.[62]

24. On May 11, 2016, the District's Deputy Superintendent for Curriculum and Instruction suggested to Mother that her requested special education evaluations should not be considered until after Student's dyslexia testing results were obtained.[63]

25. The District's May 16, 2016 dyslexia assessment of Student showed he exhibits the tendencies of a student with dyslexia.[64]

    a. He scored below average in all areas excluding listening comprehension. He had a difficult time reciting, writing, identifying, and recalling sounds of some of the alphabet. Coexisting complications included attention, while mathematics (reasoning), handwriting, behavior, and emotions were rated as average, and oral language was rated as an asset.[65]

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[58] Pet. Ex. 112.

[59] Pet. Ex. 8; Resp. Ex. 34.

[60] Tr. at 111 (District's Special Ed. Director); Pet. Ex. 28; Resp. Ex. 2 at 3-6; Resp. Ex. 24 at 1; Resp. Ex. 26 at 3.

[61] Pet. Ex. 27; Pet. Ex. 28; Resp. Ex. 2 at 8.

[62] Tr. at 53-54 (District's Special Ed. Director); Pet Ex. 72; Pet. Ex. 88; Resp. Ex. 36 at 12.

[63] Tr. at 55 (District's Special Ed. Director); Pet. Ex. 88.

[64] Pet. Ex. 75 at 2; Resp. Ex. 3 at 2; Resp. Ex. 5; Resp. Ex. 6; Resp. Ex. 7; Resp. Ex. 8; Resp. Ex. 9; Resp. Ex. 10; *see* Pet. Ex. 78.

[65] Pet. Ex. 74; Resp. Ex. 2 at 1-3; Resp. Ex. 4 at 16.

b. Student's listening comprehension and oral vocabulary were above grade level, and his writing was not up to grade level.[66]

c. Student has deficits in phonological awareness and phonological memory, and difficulty with rapid automatic naming. Phonological awareness—the ability to identify, to hear discrete sounds—affects decoding, encoding, and fluency. Phonological memory is the ability to quickly recall letters in a timed aspect and can affect the ability to encode words (hear a word and write it). Rapid automatic naming is the ability to recall letters or letter blends in a timed aspect.[67]

26. On May 16, 2016, in response to the District's Notice of Proposal to Evaluate, Mother signed consent for an FIE and received a Notice of Procedural Safeguards.[68]

27. The Irlen Reading Perceptual Scale (IRPS) was administered to Student on May 17, 2016. The test was discontinued due to Student's inattention, lack of focus, and inability to follow directions.[69]

28. On May 18, 2016, the District sent Parents notice of a May 31, 2016 ARDC meeting. One of the purposes of the meeting was to discuss the results of Student's dyslexia assessment.[70]

29. The ARDC met on May 31, 2016, to conduct a Revision to Annual ARD dated April 14, 2016, and to review Student's completed dyslexia assessment.[71]

a. Mother participated in the deliberations and was provided with adequate Prior Written Notice and a Notice of Procedural Safeguards.[72]

b. All ARDC members agreed that Student would receive dyslexia services daily in the general education setting from May 31, 2016, through May 31, 2017. No amount of time was specified for the dyslexia services.[73]

c. The ARDC agreed that, in core subjects, Student would be given extra time to complete assignments; have an opportunity to repeat and explain instructions; sit

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[66] Tr. at 207-208 (Reading teacher).

[67] Tr. at 268-269 (Petitioner's expert LDT); Tr. at 182 (Interventionist); Tr. at 505-506 (Petitioner's expert NCSP); Pet. Ex. 74.

[68] Tr. at 111 (District's Special Ed. Director); Pet. Ex. 30; Resp. Ex. 2 at 7; Resp. Ex. 26 at 2.

[69] Resp. Ex. 11.

[70] Pet. Ex. 114.

[71] Tr. at 127-128, 145 (Principal); Pet. Ex. 8 at 1; Pet. Ex. 89; Resp. Ex. 34 at 1.

[72] Tr. at 145-146, 149 (Principal); Pet. Ex. 8 at 2, 5, 7-8; Resp. Ex. 34 at 1-2, 5, 7-8.

[73] Tr. at 146-147, 151 (Principal; partly correcting date in Pet. Ex. 8 at 5); Tr. at 627 (District's expert SLP); Pet. Ex. 8 at 2, 5; Resp. Ex. 34 at 1-2, 5.

near the teacher; receive reminders to stay on task; have all material except Reading class passages read to him; and a peer would read materials to him.[74]

d. Student was reading at Faountas and Pinnell (F & P) level D (end of kindergarten, beginning of first grade level), up 97% from F & P level A when Student began first grade.[75]

e. ESY services were discussed and not recommended either by Parent or the District.[76]

f. Mother opted to take 5 days to review the ARDC documentation. Although she agreed with the dyslexia evaluation and ARDC's proposed services, she stated she disagreed with the FIE and requested an IEE, without specifying in what area.[77]

30. On June 6, 2016, Student finished first grade, meeting State standards in all subjects except for Reading and Writing, in which he was making progress towards first grade standards.[78]

a. The District's reading level expectations for first graders was F&P level C-D at the beginning of the year; F&P level E-F in the middle of the year; and F&P level I-J at the end of the year.[79]

b. Student began first grade at F&P level A and moved to F&P level B in September 2016 and to F&P level C on January 19, 2016, reading with 99% accuracy at 57 words per minute. He continued to read at F&P level C into April. By May 2, 2016, he could read at F&P level D with 95% accuracy and 100% comprehension and at F&P level E with 80% accuracy and 100% comprehension.[80]

c. He scored "1" out of a possible "3" on fluency at both F&P level D and F&P level E, reading primarily in two-word phrases with some three- and four-word groups and some word-by-word reading; almost no smooth, expressive interpretation or pausing guided by author's meaning and punctuation; and almost no stress or inappropriate stress, with slow rate most of the time.[81]

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[74] Pet. Ex. 8 at 3-4; Resp. Ex. 34 at 2-4.

[75] Tr. at 130 (Principal); Tr. at 260 (Reading teacher); Pet. Ex. 8 at 4; Resp. Ex. 34 at 4.

[76] Pet. Ex. 8 at 5; Pet. Ex. 15a; Resp. Ex. 34 at 5.

[77] Pet. Ex. 8 at 2, 9; Resp. Ex. 34 at 2, 8.

[78] Resp. Ex. 85 at 22-23.

[79] Resp. Ex. 72 at 2.

[80] Resp. Ex. 72 at 2; Pet. Ex. 9a at 9; Pet. Ex. 41 at 5-14, 17-19, 23-24; Resp. Ex. 59; Resp. Ex. 60 at 2; Resp. Ex. 62; Resp. Ex. 64 at 1, 21, 29; Resp. Ex. 70 at 13-30; Resp. Ex. 72 at 2.

[81] Pet. Ex. 9a at 9; Pet. Ex. 41 at 5-14, 17-19, 23-24, 29-34; Resp. Ex. 59; Resp. Ex. 60 at 2; Resp. Ex. 62; Resp. Ex. 64 at 1, 21, 29; Resp. Ex. 70 at 13-30.

31. On June 6, 2016, the Director of Special Education recommended to the elementary school principal and other District staff that Student attend the District's Summer Reading Academy.[82] Student attended the Summer Reading Academy.[83]

C. Second Grade (2016-2017)

32. In August 2016, Student's case manager provided Student's general education teachers with hard copies of his accommodations and modifications, IEP goal and objectives, schedule of services, and State/District testing instructional supports as determined at the May 31, 2016 ARDC meeting.[84] Student's general education teachers received dyslexia pre-service training from the District's lead interventionist.[85]

33. On August 30, 2016, the District sent Parents an invitation to an ARDC meeting to obtain consent for additional testing of Student in all areas of suspected disabilities and to reevaluate him for an SI. The ARDC met on September 6, 2016. Mother attended, participated in the deliberations, and received Prior Written Notice and a Notice of Procedural Safeguards.[86]

34. On September 9, 2016, Student's teacher provided Parents with information regarding Student's progress. He had poor progress in acquiring basic reading skills and producing written work. In relation to other students his age, he was in the average range for receptive and expressive language skills, motor coordination, and was in the average or above average range for academic characteristics. He was reading orally at F&P level D, and his reading comprehension was above average. He was in the average range for behavioral performance. To be successful in the educational setting, he needed oral administration of assignments and tests, which he was receiving, and phonics instruction.[87] He also needed extra time to complete assignments and assessments.[88]

35. The ARDC reconvened on September 12, 2016, to conduct a Review of Existing Evaluation Data (REED).[89] Mother attended and participated.[90] The ARDC determined

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[82] Pet. Ex. 90; *see also* Tr. at 61-62 (District's Special Ed. Director); Pet. Ex. 17; Pet. Ex. 18; Resp. Ex. 34 at 2; Resp. Ex. 42; Resp. Ex. 65; Resp. Ex. 66.

[83] Tr. at 100 (District's Special Ed. Director).

[84] Resp. Ex. 28 at 1-2.

[85] Tr. at 129 (Principal); Resp. Ex. 34 at 2.

[86] Tr. at 613 (District's expert SLP); Pet. Ex. 9 at 1-5; Pet. Ex. 115; Resp. Ex. 26 at 1; Resp. Ex. 35 at 1-5, 7-8.

[87] Tr. at 252-253 (Reading teacher); Pet. Ex. 100; Resp. Ex. 4 at 58-60.

[88] Tr. at 243, 248-249 (Reading teacher).

[89] Tr. at 613-614 (District's expert SLP); Pet. Ex. 9a; Resp. Ex. 3; Resp. Ex. 4 at 9-22, 41-49.

[90] Pet. Ex. 9 at 2, 4-5; Pet. Ex. 31 at 1, 8; Resp. Ex. 3 at 1; Resp. Ex. 4 at 9, 41, 48-49.

that a reevaluation in the area of articulation was necessary.[91] Further, Student's achievement skills and abilities were to be evaluated by using formal measures.[92] The ARDC also decided Student's intellectual functioning would be evaluated using formal measures that indicate cognitive processing abilities while informal measures such as Parent information would be used to evaluate adaptive behavior.[93] The evaluations were to be completed by November 16, 2016.[94]

a. The ARDC reviewed information from teachers and Parents, progress monitoring data and benchmark testing results; the dyslexia assessment and related services' assessments; formal evaluations completed in previous years; school health screening; and school records, including grades, discipline reports, attendance, and State assessment tests.

b. Student demonstrated average receptive and expressive language skills and adequate vocabulary for his age and grade level.

c. Student's vision and hearing screening conducted on September 6, 2016, showed his vision is within normal limits without correction and his hearing is within normal limits unaided.[95] Student has had repeated ear infections since he was 2 months old and four sets of bilateral tubes in his ears.[96] Student's speech could have been impacted if the sounds he was hearing were distorted.[97]

d. Mother provided the ARDC with written sociological and general background information, development/physical history, and behavioral/emotional issues information.[98]

e. The ARDC determined, based on Student's October 12, 2015 AT screening, that AT devices available to the general education population were sufficient to meet Student's needs.[99]

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[91] Pet. Ex. 9a at 2-3, 5; Pet. Ex. 31 at 2; Resp. Ex. 3 at 2; Resp. Ex. 4 at 10-11, 42, 48.

[92] Pet. Ex. 9a at 8-10; Pet. Ex. 31 at 5-7; Resp. Ex. 3 at 5-7; Resp. Ex. 4 at 16, 45-48.

[93] Tr. at 472-473 (District's expert EDDIAG); Pet. Ex. 9a at 5-6, 16; Pet. Ex. 31 at 5; Resp. Ex. 3 at 5, 8-9; Resp. Ex. 4 at 14, 45, 48.

[94] Tr. at 472-473 (District's expert EDDIAG); Pet. Ex. 9a at 6; Resp. Ex. 3 at 5, 8-9; Resp. Ex. 4 at 14, 45-48.

[95] Pet. Ex. 9a at 3-4, 16-17; Pet. Ex. 23; Pet. Ex. 31 at 3; Pet. Ex. 36 at 1; Pet. Ex. 48 at 1, 9; Resp. Ex. 3 at 3; Resp. Ex. 4 at 12, 43, 62-63.

[96] Pet. Ex. 36 at 1; Pet. Ex. 48 at 1; Resp. Ex. 4 at 12.

[97] Tr. at 390 (Petitioner's expert SLP).

[98] Pet. Ex. 9a at 4-5; Pet. Ex. 31 at 4; Resp. Ex. 3 at 4; Resp. Ex. 4 at 12-13, 44, 50-53.

[99] Tr. at 132 (Principal); Pet. Ex. 9a at 12; Pet. Ex. 31 at 7; Resp. Ex. 3 at 7; Resp. Ex. 4 at 47.

36. On September 12, 2016, Parents consented to Student's FIE in the areas of communicative status, emotional/behavioral status, sociological status, intellectual/adaptive behavior, and academic performance.[100]

37. Beginning September 12, 2016, Student participated in a Wilson Reading System group for students with dyslexia for 45 minutes during the RtI period.[101] Student also attended 45-minute long, 1:1 tutoring sessions with the interventionist after school on Thursdays, specifically using the Wilson Reading System.[102]

a. The Wilson Reading System is a structured, multi-sensory, phonetic, research-based program that comports with the Texas Dyslexia Handbook.[103]

b. The Wilson Reading System is a supplemental reading and writing curriculum designed to promote reading accuracy (decoding) and spelling (encoding) skills for students with word-level deficits. It teaches sight word recognizion and vocabulary as well as some comprehension.[104]

c. The Wilson Reading System is effective with a number of children with dyslexia.[105]

38. On October 21, 2016, the SLP observed Student's speech in an indirect manner in the classroom, cafeteria, library, or the office to evaluate his speech in generalized settings. All of Student's actual Speech Therapy sessions were direct services in accordance with his IEP.[106]

39. In November 2016, Student scored 73% in Reading and 53% in Math on the Texas Essential Knowledge and Skills (TEKS) test, meeting the standard in Reading but not in Math.[107]

40. From October 26, 2015, when Student was a first grader, through November 5, 2016, when Student was a second grader, Student attended 80 sessions at Sylvan.[108] Sylvan's director and Student's first grade teacher—with Parents' permission—corresponded via email about Student's progress. They agreed as to which skills Student had mastered and

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[100] Pet. Ex. 32 at 1-3, 5; Resp. Ex. 4 at 36-40; Resp. Ex. 25 at 1-5; *see* Resp. Ex. 42; Resp. Ex. 44; Resp. Ex. 45.

[101] Tr. at 159-160, 161, 172, 182 (Interventionist); Pet. Ex. 9a at 9; Pet. Ex. 78a; Resp. Ex. 69.

[102] Tr. at 174-175 (Interventionist); Tr. at 201-203 (Reading teacher); Pet. Ex. 76.

[103] Tr. at 265, 299-300, 308 (Petitioner's expert LDT); Pet. Ex. 78.

[104] Tr. at 159-160, 161, 172, 182 (Interventionist); Pet. Ex. 9a at 9; Pet. Ex. 78a; Resp. Ex. 69.

[105] Tr. at 273 (Petitioner's expert LDT).

[106] Tr. at 332-333, 341-342, 366, 623 (District's expert SLP); Resp. Ex. 47.

[107] Pet. Ex. 16 at 1; Resp. Ex. 75; Resp. Ex. 76; Resp. Ex. 77; *see* Resp. Ex. 75 at 8; Resp. Ex. 78.

[108] Tr. at 596-598 (Sylvan director); Pet. Ex. 79 at 1-2; Resp. Ex. 30 at 30.

which he had not.[109] Sylvan does not do dyslexia testing or specialize in dyslexia, although students with dyslexia attend Sylvan.[110]

a. In comprehension and vocabulary, Student began the school year at the first semester of kindergarten level and finished the school year at the end of first grade level.

b. In fluency, Student began at the beginning of first grade level and ended at the end of first grade level.

c. In phonics, Student began at the pre-kindergarten level and ended at the first semester of first grade level.[111]

41. The SLP sent IEP progress reports home with Student's report card every 6 weeks during the 2016-2017 school year.[112] The Speech goal required him, while in a small group, and given verbal/visual stimulus, to improve his articulation in running conversational speech with 85% accuracy. The objectives focused on Student's ability to articulate /ch, th, and sh/. The goal was to be completed by April 13, 2017.[113]

a. Student's September 30, 2016 IEP Progress Report showed Student's progress was sufficient for him to attain the Speech goal by the next annual ARDC meeting date. He was maintaining mastery of the sh/ sound; exhibited 85% accuracy in the th sound; and showed 65% accuracy with the /ch sound.[114]

b. Student's November 4, 2016 IEP Progress Report showed he had reached a level of mastery with all target sounds.[115] Typically, in order for a child to have mastered a sound, he would exhibit 85% to 90% mastery over consecutive therapy sessions, across activities, and across listeners.[116]

c. Student's December 15, 2016 IEP Progress Report recommended no further action to enable goal achievement.[117]

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[109] Tr. at 598-600, 602-603 (Sylvan director).

[110] Tr. at 599 (Sylvan director).

[111] Tr. at 596-598 (Sylvan director); Pet. Ex. 79 at 1-2; Resp. Ex. 30 at 30.

[112] Tr. at 359-360 (District's expert SLP); Pet. Ex. 43; Pet. Ex. 45; Resp. Ex. 93.

[113] Pet. Ex. 4 at 5, 9; Resp. Ex. 33 at 12.

[114] Pet. Ex. 43.

[115] Pet. Ex. 45.

[116] Tr. at 387, 401-402 (Petitioner's expert SLP).

[117] Pet. Ex. 46.

d. Student's February 17, 2017 IEP Progress Report stated he had reached a level of mastery with all target sounds; was demonstrating good productions and clarity; was using all sounds appropriately and accurately in running conversational speech; and his accuracy of sound production was being maintained.[118]

e. Student's April 7, 2017 IEP Progress Report showed he had mastered his Speech goal and objectives. The goal was to have been met by April 13, 2017.[119]

f. The May 25, 2017 IEP Progress Report showed Student had maintained a level of mastery with all target speech sounds and his sound production maintained intelligibility at the structured sentence and conversational levels.[120]

42. The District completed Student's FIE on November 16, 2016.[121] The multi-disciplinary team found Student no longer met eligibility for SI and did not meet eligibility criteria for an SLD.[122]

a. Speech Impairment

i. The GFTA-2 is a reliable test accepted by members of the SLP profession. The District's SLP understood how to score the test and interpret the results.[123] To measure Student's growth since the out-of-state school identified him as a child with an SI, the District's SLP assessed Student with the same test as was used in 2014.[124]

ii. On the GFTA-2, Student scored a 104, in the average standard range, with no initial or final errors, and medial error of f/th. Articulatory skills in connected speech were consistent with those in isolated words. Data collected in the Speech Therapy room showed he had corrected his sound errors and was using accurate productions during verbal exchanges with at least 80% accuracy. In the classroom, he demonstrated the ability to effectively and clearly communicate with teachers and peers.[125]

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[118] Pet. Ex. 47.

[119] Pet. Ex. 103a at 11.

[120] Tr. at 363-365, 367-369 (District's expert SLP); Resp. Ex. 93.

[121] Pet. Ex. 9a at 6-8; Pet. Ex. 35; *see also* Resp. Ex. 50, Resp. Ex. 51.

[122] Pet. Ex. 35 at 4; Pet. Ex. 38 at 3-4, 6.

[123] Tr. at 347 (District's expert SLP); Resp. Ex. 4 at 10.

[124] Tr. at 371-372 (District's expert SLP).

[125] Tr. at 324-326, 354-355 (District's expert SLP); Pet. Ex. 9a at 3; Pet. Ex. 44 at 1; Resp. Ex. 15; *see* Resp. Ex. 4 at 2-3.

iii. The SLP recommended that Student no longer receive Speech Therapy services.[126]

b. Specific Learning Disability

i. A local education agency is permitted to determine what model it will use to test for an SLD.[127] The District uses the pattern of strengths and weaknesses model as determined through cross-battery testing and information provided by the campus with regard to RtI components.[128]

ii. To be identified as a student with an SLD, a student must exhibit a pattern of strengths and weaknesses in performance, achievement, or both, relevant to age, grade-level standards, or intellectual development, as indicated by significant variance among specific areas of cognitive function, such as working memory and verbal comprehension, or between specific areas of cognitive function and academic achievement.[129] To have an SLD, one of the global cognitive abilities must be in the below average range.[130]

iii. The Educational Diagnostician contacted Sylvan on October 19, 2016, and October 21, 2016, to find out what kind of testing they used.[131] Prior to assessing Student, she reviewed his educational records including RtI information, classroom grades, and the May 2016 dyslexia evaluation.[132]

iv. In evaluating Student, the Educational Diagnostician used her discretion, did not violate professional standards in her selection of subtests, and used current versions. She did not select tests outside of what is recommended by the Cross-Battery Assessment System (X-BASS).[133] The X-BASS and its recommended subtests are well researched.[134]

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[126] Tr. at 324-326, 354-355 (District's expert SLP); Pet. Ex. 9a at 3; Pet. Ex. 44 at 1; Resp. Ex. 15; *see* Resp. Ex. 4 at 2-3.

[127] 34 C.F.R. § 300.307; 19 Tex. Admin. Code § 89.1040(c)(9)(B)(ii)(II).

[128] Tr. at 109-110 (District's Special Ed. Director); Tr. at 426, 430 (District's expert EDDIAG).

[129] Tr. at 107-108 (District's Special Ed. Director); Tr. at 426-427 (District's expert EDDIAG); Pet. Ex. 35 at 2; Pet. Ex. 38 at 4.

[130] Tr. at 454 (District's expert EDDIAG); Pet. Ex. 33 at 1.

[131] Pet. Ex. 14 at 1; Pet. Ex. 25.

[132] Tr. at 476-477 (District's expert EDDIAG).

[133] Tr. at 445-448, 463, 481 (District's expert EDDIAG).

[134] Tr. at 465 (District's expert EDDIAG).

v. Student's SLD evaluation was completed on November 16, 2016.[135] Student did not exhibit a pattern of strengths and weaknesses.[136] All of Student's cognitive processing abilities, including short-term memory, are in the average range with no weaknesses in the cognitive processing areas.[137] His composite of cognitive strengths is 101.[138]

c. Achievement Ability

i. For the achievement portion of the X-BASS, select tests from the Woodcock-Johnson Tests of Achievement, Fourth Edition (WJ-IV ACH), Woodcock-Johnson Tests of Oral Language, Fourth Edition (WJ-IV OL), and Kaufman Tests of Achievement, Third Edition (KTEA-3) were administered. These test batteries are all individually administered clinical instruments designed to measure achievement ability in children and adults aged 2 through 80+ on the WJ-IV and ages 4-25 school children on the KTEA-3 with regard to reading, writing, mathematics, and oral expression and listening comprehension. Results of performance are expressed as Standard Scores (Mean of 100; Standard Deviation of 15). Standard Scores ranging from 90-110 on the WJ-IV ACH and 85-115 on the KTEA are considered to fall within the average range. The X-BASS considers the average range to be 90-110 with the normal range as 85-115.[139]

ii. All of Student's achievement scores were between the end of kindergarten and first grade levels, with the exception of math concepts and applications, which was at the second grade level.[140]

iii. Student has weaknesses in Reading achievement that are attributable to his previously identified dyslexia. His basic Reading achievement score of 79 is in the well below average range, consistent with dyslexia, which affects his Reading comprehension and Reading fluency. The phonological

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[135] Tr. at 456-457 (District's expert EDDIAG); Pet. Ex. 9a at 14-17; Pet. Ex. 35 at 2; Resp. Ex. 4 at 4-5, 18-20; Resp. Ex. 14 at 5-6, 7 (initial Score Report); Resp. Ex. 14 at 1-2, 3 (revised Score Report); Resp. Exs. 12, 13, 16, 17, 18, 19, 20, 21, 22 (protocols).

[136] Pet. Ex. 9a at 15, 17; Pet. Ex. 33 at 1; Pet. Ex. 34 at 9; Pet. Ex. 35 at 2; Pet. Ex. 38 at 4; Resp. Ex. 16 at 2; *see* Resp. Ex. 4 at 5.

[137] Pet. Ex. 9a at 6-8; Pet. Ex. 35 at 2; Pet. Ex. 38 at 4; Resp. Ex. 4 at 14-17.

[138] Resp. Ex. 4 at 14.

[139] Tr. at 413-414 (District's expert EDDIAG); Resp. Ex. 14 at 6-7 (initial Score Report); Resp. Ex. 14 at 2-4 (revised Score Report); Resp. Exs. 16-19 (KTEA-3); Resp. Ex. 20 (Tests of Oral Language); Resp. Exs. 21-22 (W-J IV ACH).

[140] Tr. at 430-431 (District's expert EDDIAG); Resp. Ex. 16 at 2.

processing score indicates there has been some improvement since dyslexia services began.[141]

d. The multi-disciplinary team reported no concerns related to Student's behavior or attention, based on team members' observations and information provided by Student's teachers and Mother.[142] Student's adaptive behavior is commensurate with his general intellectual ability.[143] Student's classroom behavior does not negatively impact his learning.[144]

e. The multi-disciplinary team was composed of qualified professionals, including Student's SLP, an educational diagnostician, and Student's general education Reading teacher.[145]

f. Student was evaluated using a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by Parent and teachers.[146]

g. The multiple assessments are well-recognized tests specifically chosen by Student's evaluators to provide an accurate assessment of Student's strengths and weaknesses in all areas.[147]

h. The tests and other evaluation materials were administered by trained personnel in conformance with the instructions provided by their producers.[148]

i. Student was assessed in all areas of suspected disability and the FIE was sufficiently comprehensive to identify all of Student's educational and related services' needs, whether or not those services are commonly linked to the disability category in which Student has been classified.[149]

j. The FIE report did not contain recommendations for the ARDC to use in developing Student's IEP, because the multi-disciplinary team found Student

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[141] Tr. at 455-456 (District's expert EDDIAG); Pet. Ex. 9a at 15; Pet. Ex. 33 at 1; Pet. Ex. 34 at 8-9; Pet. Ex. 35 at 2; Pet. Ex. 38 at 4; Resp. Ex. 4 at 5; Resp. Ex. 12.

[142] Tr. at 451-453, 466-469, 483-484 (District's expert EDDIAG); Resp. Ex. 4 at 5-6, 11-14, 16.

[143] Tr. at 348-349, 354 (District's expert SLP); Pet. Ex. 9a at 8; Resp. Ex. 4 at 11, 16, 54-57.

[144] Pet. Ex. 35 at 2-3; *see* Pet. Ex. 36 at 2; *see also* Pet. Ex. 38 at 5.

[145] 34 C.F.R. § 300.304(c)(1)(iv); 19 Tex. Admin. Code § 89.1040(b); Pet. Ex. 35 at 1, 4; Resp. Ex. 4 at 2-3, 8-9, 22.

[146] 34 C.F.R. § 300.304(b); Pet. Ex. 35 at 5-12; Resp. Ex. 4 at 10, 12-14; Resp. Exs. 12-22.

[147] 34 C.F.R. § 300.304(b), (c)(1)(iii); Tr. at 347 (District's expert SLP); Tr. at 465 (District's expert EDDIAG).

[148] 34 C.F.R. § 300.304(c)(1)(iv); Tr. at 347 (District's expert SLP); Tr. at 445-448, 463, 481 (District's expert EDDIAG).

[149] 34 C.F.R. § 300.304(c)(4), (c)(6); Resp. Ex. 4 at 36-40; Resp. Ex. 36 at 9-14.

should no longer receive services for SI and was not eligible to receive services as a student with an SLD.[150]

43. On December 1, 2016, Mother sent an email to the elementary school principal requesting IEEs in all areas of Student's suspected disability, including but not limited to "Achievement, Cognitive, SLC [sic], auditory processing, Full Speech, and hearing loss as soon as possible."[151]

44. On December 1, 2016, Mother informed the elementary school principal that she was not available for the ARDC meeting set for December 8, 2016, to consider Student's FIE.[152]

45. On December 8, 2016, the Director of Special Education emailed Mother, asking if the ARDC meeting could be rescheduled either to December 13, 2016, or December 15, 2016. She explained that the District's FIE was not final because it had not been considered by the ARDC. She stated that once the FIE was final, Parents could disagree with the results and request an IEE, after which the District would make its determination as to whether to grant or refuse the IEE request.[153]

46. The District attempted to reschedule the ARDC meeting for five separate dates in December 2016 and January 2017 but Parents were unavailable on the proposed dates. On January 7, 2017, Parents proposed January 16, 2017 (a school holiday) and January 18, 2017 (staff conflict). The District was notified of Parents' Complaint on January 17, 2017. On February 15, 2017, the District sent Parents an ARDC meeting invitation for a meeting to be held on March 1, 2017, or March 2, 2017. Parents declined the ARDC meeting invitation on February 16, 2017.[154]

47. On January 24, 2017, the District provided Parents with an invitation to a resolution meeting, a legal presentation resource letter, and a Notice of Procedural Safeguards.[155] The parties participated in a resolution session on January 31, 2017, but did not resolve their issues.[156]

48. Respondent's February 14, 2017 counterclaim served as a denial of Mother's December 1, 2016 IEE request.[157]

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[150] 34 C.F.R. § 300.304(b)(1); Pet. Ex. 35 at 4; Pet. Ex. 38 at 3-4, 6.

[151] Tr. at 64 (District's Special Ed. Director); Pet. Ex. 92; Resp. Ex. 51.

[152] Pet. Ex. 92; *see also* Resp. Ex. 50, Resp. Ex. 51, Resp. Ex. 53.

[153] Tr. at 65-68, 79-80 (District's Special Ed. Director); Pet. Ex. 93; Resp. Ex. 52.

[154] Pet. Ex. 117; Pet. Ex. 118 at 4; Resp. Ex. 36 at 1-4; Resp. Ex. 51; Resp. Ex. 52; Resp. Ex. 53; Resp. Ex. 54; Resp. Ex. 57.

[155] Resp. Ex. 55; Resp. Ex. 56.

[156] *See* SOAH Order No. 3, issued February 16, 2017.

[157] Tr. at 75-76, 82 (District's Special Ed. Director).

49. On February 23, 2017, the District invited Parents to an ARDC meeting to be held on either February 27, 2017, or February 28, 2017.[158]

50. The ARDC met on February 27, 2017, to review Student's November 16, 2016 FIE. They determined he no longer met criteria as a child with an SI and did not meet eligibility as a child with an SLD.[159]

a. Mother attended, participated, and was given Prior Written Notice and an Explanation of Procedural Safeguards.[160]

b. Student had passing grades for the first semester, ranging from 82 to 94, and the first six weeks of the second semester, ranging from 80 to 95. In Math, Student was showing work, which was an improvement from the first semester.[161] Student's Language Arts grades for the first four grading periods—from August 22, 2016, through February 17, 2017—ranged from 81 to 83.[162]

c. Student received appropriate accommodations throughout the school year.[163]

d. Student progressed from Lesson 1.1 to Lesson 2.3 in the Wilson Reading System. He scored "excellent" in accuracy and needed to improve in fluency.[164] The ARDC determined Student would continue to receive dyslexia intervention.[165] Student does not need IEP goals and objectives to target specific Reading skills.[166]

e. The ARDC reviewed Student's GFTA-2 score, the same test given in 2014, for comparison purposes. The medial position f/th error reported in the FIE had corrected itself.[167] As of December 7, 2016, Student demonstrated mastery of all sounds in the Speech Therapy setting without visual or verbal cuing.[168] Because Student had mastered all articulation goals, including the sound that remained

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[158] Pet. Ex. 118; Resp. Ex. 36 at 5-8.

[159] Tr. at 614 (District's expert SLP); Pet. Ex. 11 at 1; Pet. Ex. 38 at 1-2, 3-4, 6; Resp. Ex. 4 at 2, 5-8; Resp. Ex. 36 at 9, 11-12.

[160] Pet. Ex. 11 at 2, 4-6; Resp. Ex. 4 at 9, 21; Resp. Ex. 36 at 10-15.

[161] Pet. Ex. 11 at 2; Pet. Ex. 19; Resp. Ex. 36 at 10.

[162] Pet. Ex. 125. The check marks are for comments and accommodations which are not included with the exhibit. Tr. at 232-233 (Reading teacher).

[163] Pet. Ex. 11 at 2; Resp. Ex. 36 at 10.

[164] Tr. at 254 (Reading teacher); Pet. Ex. 11 at 2-3; Resp. Ex. 36 at 10-11.

[165] Pet. Ex. 11 at 6; Resp. Ex. 36 at 11, 14.

[166] Tr. at 245, 254-255 (Reading teacher).

[167] Tr. at 324-326, 354-355 (District's expert SLP); Pet. Ex. 9a at 2-3; Pet. Ex. 11 at 3; Pet. Ex. 21 at 3; Resp. Ex. 3 at 2; Resp. Ex. 4 at 42; Resp. Ex. 15; Resp. Ex. 36 at 11.

[168] Tr. at 329-331 (District's expert SLP); Pet. Ex. 42; Resp. Ex. 74.

when the FIE was conducted, the ARDC determined he no longer needed Speech Therapy.[169]

f. The District's Educational Diagnostician summarized the SLD evaluation. Student has no cognitive deficits. Student's Comprehensive Test of Phonological Processing-Second Edition (CTOPP-2) dyslexia assessment score improved from 80 in May 2016 to 92 when the FIE was conducted. In everything except Reading skills, Student scored in the normal range. The Reading comprehension and fluency scores match the deficit described in Student's dyslexia evaluation. The FIE shows Student does not meet criteria as a student with an SLD.[170]

g. The ARDC considered the January 11, 2017 IEE conducted by Petitioner's expert NCSP.[171] The NCSP evaluated Student in all areas of suspected disability.[172] Overall, the NCSP's test results are consistent with the FIE results except for the short-term memory cognitive score.[173]

i. The NCSP incorrectly concluded Student demonstrates a pattern of strengths and weaknesses, thus qualifying as a student with an SLD, due to a low short-term memory cognitive score obtained under the Cattell-Horn-Carroll (CHC) model (as opposed to the X-BASS), and an academic weakness in auditory processing.[174] Auditory processing scores may be reported either in the cognitive domain (as in the FIE) or the academic domain (as in the IEE). Regardless, auditory processing is not an area of SLD eligibility.[175]

ii. The Differential Ability Scales-II (DAS-II) test is 10 years old, which could affect the scores, and does not cover all of the cognitive areas covered by the X-BASS, including the cognitive area of auditory processing.[176]

iii. The Wechsler Individual Assessment Test-Third Edition (WIAT III) results were similar to the FIE results. Student's composite academic assessment score of 70 is two standard deviations below average,

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[169] Pet. Ex. 11 at 6; Resp. Ex. 36 at 11-12, 14.

[170] Tr. at 429, 444 (District's expert EDDIAG); Pet. Ex. 11 at 3; Pet. Ex. 33; Resp. Ex. 4 at 23-35; Resp. Ex. 36 at 9, 11-12, 14.

[171] Tr. at 434, 458-460 (District's expert EDDIAG); Tr. at 108 (District's Special Ed. Director).

[172] Tr. at 557 (Petitioner's expert NCSP).

[173] Tr. at 526-529, 560 (Petitioner's expert NCSP); Pet. Ex. 36 at 9.

[174] Tr. at 535, 561-562, 566-567 (Petitioner's expert NCSP); Pet. Ex. 36 at 11, 13-14.

[175] 34 C.F.R. §§ 300.8(c)(10), .307-.311; 19 Tex. Admin. Code § 89.1040(c)(9); Tr. at 563-565 (Petitioner's expert NCSP).

[176] Tr. at 460-461, 479 (District's expert EDDIAG); Pet. Ex. 36 at 8-11.

according to the publisher's statistics. Overall, Student's Reading abilities are at the kindergarten level and his Math and Written Language abilities are at the first grade level.[177]

iv. The Conners 3rd Edition (Conners 3) is a multi-informant social/emotional assessment. The scales indicated no concern about attention, comporting with the results of the May 2016 ADHD evaluation by Student's physician.[178]

v. The NCSP used incomplete RtI data in determining Student was not making adequate progress. The NCSP recommended that an SLD eligibility be considered due to Student's lack of progress, but the District uses a pattern of strengths and weaknesses model to evaluate for an SLD.[179]

51. On March 6, 2017, Mother notified the District via email that she disagreed with Student's IEP. She again requested IEEs in all areas of suspected disability, including Speech.[180]

52. In a March 7, 2017 letter to Parents, the Director of Special Education offered to reconvene the ARDC on March 21, 2017, to address Parents' disagreement with the IEP. Enclosed was information about requesting an IEE at public expense and notification that the REED was completed before Student's reevaluation due date of November 17, 2017. The Director of Special Education asked Parents to contact her regarding the offer from the District's attorney to Petitioner's attorney for an IEE in the area of Speech. Other IEE requests were denied. Parents did not contact the Director of Special Education regarding the Speech IEE.[181]

53. On March 9, 2017, the Director of Special Education provided Mother with the District's IEE guidelines and procedures, including an independent contractor list.[182]

54. On March 8, 2017, Student scored 55% in Math on the TEKS test, failing to meet the 70% required for passing.[183]

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[177] Tr. at 523-524, 573 (Petitioner's expert NCSP); Pet. Ex. 36 at 11-12.

[178] Tr. at 534 (Petitioner's expert NCSP); Pet. Ex. 36 at 12-14.

[179] Tr. at 511-512, 567 (Petitioner's expert NCSP); Pet. Ex. 36 at 2-3, 15-16; *see* Tr. at 109-110 (District's Special Ed. Director); Tr. at 426, 430 (District's expert EDDIAG).

[180] Tr. at 68-69 (District's Special Ed. Director); Pet. Ex. 95; Pet. Ex. 96.

[181] Tr. at 76, 84-85, 104 (District's Special Ed. Director); Pet. Ex. 96 at 1-2; Resp. Ex. 58.

[182] Tr. at 68-72, 74, 81-82 (District's Special Ed. Director); Pet. Ex. 96.; Resp. Ex. 58.

[183] Resp. Ex. 76 at 2.

55. The March 25, 2017 Speech IEE conducted by Petitioner's expert SLP showed that Student continued to meet IDEA eligibility criteria as a student with an SI in the area of articulation and continued to demonstrate an educational need for Speech Therapy. According to the IEE, Student exhibited a moderate articulation disorder, diagnosed as speech articulation developmental disorder. The moderate articulation disorder has potential educational impact academically and socially. It could impact his reading and writing. His errors were noticeable in conversation, which could draw negative attention from peers.[184]

a. Parents requested the IEE to determine if Student was ready to be dismissed from Speech Therapy services. Mother continued to hear articulation errors when Student spoke.[185]

b. The Clinical Evaluation of Language Fundamentals—Fifth Edition (CELF-5) is used for the identification, diagnosis, and follow-up evaluation of language skill deficits in children. Student exhibited average skills in the areas of receptive and expressive language. His paragraph comprehension skills and ability to comprehend spoken sentences were above-average when compared to same-age peers, and are a strength for Student.[186] In the context of listening to a paragraph read aloud, Student's short-term memory was average or above average.[187] The CELF-5 results were comparable to the 2014 CELF-4 results obtained by Student's out-of-state school.[188]

c. The GFTA-3 is a standardized test that assesses consonant sounds in the initial, medial, and final position of words and sentences. Overall, the evaluator observed Student to demonstrate difficulties producing the phonemes "ch," "sh," and "j." Results of the GFTA-3 indicated that Student is stimulable for correct production of fricative (/f/) and affricate (/tf, d3/) phonemes, but has not yet mastered production at the word, sentence, and conversational levels. Student had seven errors at the single word level, resulting in a standard score of 78, and seven errors at the sentence level, with a standard score of 82. Student's errors were noticeable within everyday conversation and could be distracting to the listener.[189] Mother is a familiar listener who told the evaluator the articulation errors were still present.[190]

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[184] Tr. at 385 (Petitioner's expert SLP); Pet. Ex. 48 at 1, 10, 12.

[185] Pet. Ex. 48 at 3.

[186] Tr. at 382, 384, 392, 394-398, 405 (Petitioner's expert SLP); Pet. Ex. 48 at 3, 6.

[187] Tr. at 398 (Petitioner's expert SLP).

[188] Tr. at 405-406 (Petitioner's expert SLP).

[189] Tr. at 382, 384, 392, 398-400 (Petitioner's expert SLP); Pet. Ex. 48 at 3, 7-8, 9.

[190] Tr. at 388 (Petitioner's expert SLP).

d. The Stuttering Severity Instrument-4 (SSI-4) evaluates the presence of stuttering-like dysfluencies within spontaneous speech and reading. The overall severity of Student's stuttering falls in the very mild range The evaluator did not recommend that the District provide Speech Therapy for stuttering.[191]

e. Student exhibits age-appropriate receptive and expressive language skills.[192]

f. The evaluator recommended continued Speech Therapy in the school setting through a "10-minute therapy model," which could be provided 10 minutes per session, three times per week; an articulation program to be used at home; and monitoring of Student's speech fluency skills in regard to stuttering.[193]

g. The evaluator recommended Speech Therapy goals centered around the "sh," "ch," and "j" sounds.[194] The recommendation is based on Student's standard score of 78, which is two standard deviations below the mean and indicates a need for Speech Therapy.[195]

56. The District's expert SLP has never heard Student make the sound substitution errors identified by Petitioner's expert SLP. Student is highly intelligible in the school setting and understandable by his peers. He can reasonably function in a school setting due to the services he received through Speech Therapy.[196]

57. The District's expert SLP was Student's case manager and worked with him just about weekly over the course of the school year and observed him in various settings. During that time, she observed no new errors or sound errors that had not been previously addressed in his IEP. During the course of the school year, none of Student's teachers expressed concern to the SLP that Student exhibited any specific sound errors or stuttered.[197]

58. On April 4, 2017, the elementary school principal denied Parents' March 30, 2017 request for an ARDC meeting to address name calling between Student and another child. Instead, Student was assigned to social skills training through the school counselor and a computer program called "ZooU." Bullying and harassment investigations are conducted by campus administrators. An ARDC meeting was not necessary because the social skills training and ZooU are weekly general education group lessons, and not part of Student's IEP. ZooU is a computer-based program that focuses on social-enrichment

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[191] Tr. at 383, 390-391 (Petitioner's expert SLP); Pet. Ex. 48 at 3, 8-9.

[192] Pet. Ex. 48 at 9.

[193] Tr. at 385-386, 400, 403 (Petitioner's expert SLP); Pet. Ex. 48 at 10.

[194] Pet. Ex. 48 at 11-12.

[195] Tr. at 403 (Petitioner's expert SLP).

[196] Tr. at 615-617 (District's expert SLP).

[197] Tr. at 608-610, 612, 618 (District's expert SLP).

skills. Social skills training was the appropriate course of action for Student because Student is not a behavior problem and does not engage in behavior that would result in disciplinary consequences.[198]

59. On May 17, 2017, the elementary school Principal informed Parents via email that Student had successfully completed 16 lessons in ZooU. The number of completed lessons does not necessarily correlate to the number of weeks Student received ZooU training. The ZooU sessions took about 15 minutes each and were provided during Student's dyslexia intervention time after he completed his Wilson Reading System material.[199]

60. From August 22, 2016, through April 7, 2017, Student received Reading RtI in the general education classroom.[200] The RtI was provided to Student either 1:1 or in a small group.[201]

a. On September 1, 2016, he was reading 32 words per minute at F&P level D with 94% accuracy, a fluency of "1," and excellent comprehension.

b. By November 31 [sic], 2016, Student was reading 28 words per minute at level F with 90% accuracy, 100% comprehension, and reading fluency of "1."[202] His reading comprehension was in the "excellent" range.[203] F&P level F correlates to about a mid-year first grade reading level.[204]

c. By March 2017, he was reading at F&P level H with 95% accuracy.[205]

d. Between November 2016 and March 24, 2017, Student's accuracy in correctly reading words increased.[206]

61. Student's April 13, 2017 Intervention Progress Report shows he was making expected progress but still requires intervention support.[207]

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[198] Tr. at 122-124, 134-140, 142-144, 152-153 (Principal); Tr. at 165 (Interventionist); Tr. at 614-615, 627 (District's expert SLP); Pet. Ex. 57; Pet. Ex. 62; Pet. Ex. 64; Pet. Ex. 70; Pet. Ex. 98.

[199] Tr. at 123-126, 154-155 (Principal); Tr. at 165 (Interventionist); Pet. Ex. 98a; Resp. Ex. 87.

[200] Tr. at 203-205, 210-216, 235-237 (Reading teacher); Resp. Ex. 67; Resp. Ex. 68; Resp. Ex. 70 at 1-12.

[201] Tr. at 210 (Reading teacher).

[202] Tr. at 203-205, 210-216, 235-237 (Reading teacher); Resp. Ex. 67; Resp. Ex. 68; Resp. Ex. 70 at 1-12.

[203] Pet. Ex. 41 at 37-42.

[204] Tr. at 260 (Reading teacher).

[205] Tr. at 203-205, 210-216, 235-237 (Reading teacher); Resp. Ex. 67; Resp. Ex. 68; Resp. Ex. 70 at 1-12.

[206] Tr. at 237 (Reading teacher).

[207] Pet. Ex. 103a at 10.

62. The April 25, 2017 dyslexia screening report by Petitioner's expert LDT notes that although Student had made a little progress in sound-symbol decoding in his current dyslexia program, he continued to demonstrate a significant reading deficit given his cognitive abilities. She recommended that Student receive Dyslexia Therapy 1:1 from a CALT in 45-minute to one hour sessions, four to five days per week, for two years. Oral Reading Fluency and Writing were not assessed due to time constraints; however sufficient information was obtained to make the recommendation.[208]

63. Student took the Texas Primary Reading Inventory (TPRI) assessment on September 6, 2016, January 26, 2017, and April 28, 2017.[209] The primary purpose of the screening section is to predict for teachers which of their students may need additional or intensive reading instruction to meet their grade level goals. The inventory section gives teachers an opportunity to acquire more data to help match reading instruction with specific student needs.[210]

a. On the September 6, 2016 TPRI, Student was "still developing" in areas of graphophonemic knowledge and word reading.[211] Graphophonemic knowledge is the understanding that written words are composed of patterns of letters that represent the sounds of spoken words.[212]

b. On the April TPRI, Student's fluency and accuracy scores were below grade level.[213]

64. Student's Dyslexia Student Profile & Progress Monitoring showed he had progressed from Wilson Reading System Lesson 1.1 on September 19, 2016, to Lesson 2.5 on May 19, 2017. He received dyslexia services for up to 45 minutes per session and up to five days per week throughout the school year. The services were provided to Student in a group of four or five children.[214] Student is ready to proceed to level 3.1 of the Wilson Reading Program.[215]

a. Student made big gains in phonological awareness through the Wilson Reading System. He started out struggling to decode basic consonant-vowel-consonant (CVC) words. He progressed through the program, learning to use blends within

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[208] Tr. at 280-281, 290-292, 294-298 (Petitioner's expert LDT); Pet. Ex. 123 at 4-6.

[209] Resp. Ex. 81; Resp. Ex. 82; Resp. Ex. 90. On the "Oral Reading" section, "NA" stands for "not applicable," indicating Student became frustrated and stopped reading and "SD" stands for "still developing." Tr. at 238 (Reading teacher).

[210] Pet. Ex. 51 at 1-2; Resp. Ex. 82.

[211] Pet. Ex. 41 at 35; Pet. Ex. 50; Pet. Ex. 51; Resp. Ex. 81; Resp. Ex. 82.

[212] Pet. Ex. 51 at 2; Resp. Ex. 82.

[213] Tr. at 216-222, 239 (Reading teacher); Resp. Ex. 90.

[214] Tr. at 164, 173, 184-185, 188, 195 (Interventionist); Resp. Ex. 88 at 1-4.

[215] Tr. at 191-192 (Interventionist).

words, suffixes, and double letters at the end of words. His fluency improved. He was reading one-syllable words with four-to-six sounds in Reading RtI. In the general education Reading class, he was reading multisyllabic words. His Reading comprehension is very strong, as high as fifth-grade level.[216]

b. The Wilson Assessment of Decoding and Encoding (WADE) covers all 12 steps of the Wilson Reading System. Student's percentages were low but are good given that he had only completed two steps of the reading program.[217] His Total Reading Mastery Score, which monitors progress for the two steps Student completed, was 88 percent for reading (decoding) and 85 percent for writing (encoding). A WADE was not conducted in September, as a pre-asssement.[218]

65. At the end of second grade, Student was reading at F&P level J, with corresponding accuracy at 90% and comprehension at seven out of seven. He was able to decode multisyllabic words. Since September 2016, he had progressed from F&P level D (end of kindergarten, beginning of first grade) to F&P level J (beginning of second grade reading level).[219]

66. Student's final grade in Reading was a B.[220]

V. APPLICABLE LAW, ANALYSES, AND CONCLUSIONS

A. The IDEA and Its Implementing Regulations

Under the IDEA, and its implementing regulations, school districts in Texas must afford children with disabilities a FAPE. The IDEA defines a FAPE as special education and related services that (a) are provided at public expense, under public supervision and direction, and without charge; (b) meet State standards (including IDEA requirements); (c) include an appropriate preschool, elementary school, or secondary school education; and (d) are provided in accordance with a properly developed IEP.[221] States receiving federal assistance under the IDEA

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[216] Tr. at 167-169, 171, 173-174 (Interventionist).

[217] Tr. at 188-190 (Interventionist); Resp. Ex. 88 at 1.

[218] Tr. at 189-190, 194, 196 (Interventionist); Resp. Ex. 88 at 1.

[219] Tr. at 171 (Interventionist); Tr. at 206-207, 222, 245-247, 256, 260 (Reading teacher).

[220] Tr. at 241 (Reading teacher).

[221] 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

must: (1) provide a FAPE to each disabled child within its boundaries and (2) ensure that such education is in the LRE possible.[222]

B. Child Find

Petitioner alleges the District incorrectly determined Student should be dismissed from special education as a student with an SI and improperly evaluated Student in determining he does not meet eligibility for an SLD. Further, Petitioner alleges the District failed to provide a comprehensive and proper evaluation of Student when requested by Parents.

1. Mother's April 2016 Evaluation Request

In a duty known as "Child Find," a school district has an affirmative, ongoing obligation to evaluate any child who is a resident in the district's jurisdiction who either has or is suspected of having an IDEA-eligible disability and a need for special education as a result of that disability.[223] The Child Find duty applies to all children, including children who are advancing from grade to grade.[224] A request for an initial FIE may be made by school personnel, the student's parents or legal guardian, or another person involved in the education or care of the student.[225] When a parent requests a special education evaluation, a school district need only evaluate the student when the district suspects that the student has a disability.[226] A district must notify parents in writing any time it refuses to evaluate a child.[227]

On April 18, 2016, Mother requested via email that Student be evaluated for an SLD. On April 28, 2016, the District sent Mother a Notice of Action, declining to perform the evaluation. On April 29, 2016, Mother again requested an SLD evaluation. A second Notice of Action,

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[222] *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997); 20 U.S.C. § 1412(a)(1).

[223] 34 C.F.R. §§ 300.8, 300.111.

[224] 34 C.F.R. § 300.111(c).

[225] 34 C.F.R. 300.301(b); 19 Tex. Admin. Code § 89.1011(a).

[226] 34 C.F.R. § 300.301(b); *Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 383 (5th Cir. 2007); *Richard R.*, 567 F.Supp.2d at 950; *Flour Bluff*, 481 Fed. App'x at 893; *Letter to Williams*, 20 IDELR 1210 (OSEP 1993).

[227] 34 C.F.R. § 300.503(a)(2).

again refusing to conduct the requested evaluation, along with a Notice of Procedural Safeguards, was sent to Mother on May 16, 2016. Each Notice of Action comported with IDEA requirements.[228] The District responded to Mother's request within 15 school days, as required.[229]

Further, the District correctly denied Mother's request because the District had no reason to suspect Student had an SLD which might result in a need for special education services. Under Texas law, prior to referral for an FIE, students experiencing difficulty in the general education classroom should be considered for support services available to all students, such as tutorial, remedial, compensatory, RtIs, and other academic or behavior support services. If a student continues to experience difficulty after the provision of interventions, district personnel must refer the student for an FIE.[230] In the instant case, although Student was behind in Reading, he had made nearly a year's progress in F&P levels since the beginning of the year as a result of RtIs and other academic support services. The District had no reason to suspect Student had a cognitive weakness that needed to be addressed with special education services for his Reading skills to continue to improve.

2. Dyslexia RtIs Were Effective

In May 2016, a District assessment confirmed Student has dyslexia. He began receiving general education dyslexia services in August 2016. Before school started, his general education teachers received dyslexia pre-service training from the District's lead interventionist. The dyslexia interventionist was trained to screen for dyslexia as well as to provide services to students with dyslexia.[231]

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[228] 34 C.F.R. § 300.503(b).

[229] 19 Tex. Admin. Code § 89.1011(b).

[230] 19 Tex. Admin. Code § 89.1011.

[231] Tr. at 59 (District's Special Ed. Director).

In addition to other RtIs, Student's dyslexia was addressed through the Wilson Reading System, a research-based education program designed to meet Student's needs.[232] The record is silent as to whether the Wilson Reading System is based on peer-reviewed research, which is not defined in the IDEA and has not been defined by the U.S. Department of Education. But there is nothing in the IDEA to suggest that a school district's failure to provide services based on peer-reviewed research automatically results in a denial of FAPE.[233] The evidence shows Student made progress under the Wilson Reading System. He progressed from Lesson 1.1 in September 2016 to Lesson 2.5 in May 2017. He will begin third grade at Lesson 3.1. By the end of second grade, he was reading at F&P level J (beginning of second grade), having progressed from F&P level D (end of kindergarten, beginning of first grade) in September 2016. His Reading grade for the year was a B.

Although dyslexia is a condition that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, it is not one of the 13 eligible disability categories listed in the IDEA.[234] However, dyslexia may be an eligibility under an SLD.[235] The FIE correctly established that Student does not have an SLD.

Petitioner's expert LDT presented no testimony and her evaluation of Student did not establish any needs related to Student's dyslexia services.[236] Because Student made academic progress due to the general education dyslexia services, the District had no reason to suspect he needed special education services to benefit academically.

3. Mother's December 1, 2016 Evaluation Request

On December 1, 2016—after Student's November 2016 FIE was completed, but before the FIE was considered by the ARDC—Mother made a written request for IEEs in all areas of

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[232] 34 C.F.R. § 300.39(b)(3).

[233] 71 Fed. Reg. 46,665 (2006).

[234] 34 C.F.R. § 300.8(c).

[235] 34 C.F.R. § 300.8(c)(10)(i).

[236] Tr. at 290-292, 296, 302-304 (Petitioner's expert LDT).

Student's suspected disability, including but not limited to "Achievement, Cognitive, SLD [sic], auditory processing, Full Speech, and hearing loss as soon as possible." The hearing officer notes that Student's hearing screening conducted on September 6, 2016, showed his hearing is within normal limits unaided.

Also on December 1, 2016, Mother informed the elementary school principal that she was not available to attend the December 8, 2016 ARDC meeting to consider Student's FIE. The Special Education Director notified Mother on December 8, 2016, that once the FIE was final, Parents could disagree with the results and request an IEE. The District attempted to reschedule the ARDC meeting for five separate dates in December 2016 and January 2017, but Parents were not available on any of the suggested dates. Parents proposed meeting on January 16, 2017 (a school holiday) or January 18, 2017 (District staff was unavailable). The District received Parents' Complaint on January 17, 2017, and filed a counterclaim on February 14, 2017. The counterclaim served as a denial of Mother's December 1, 2016 IEE request.[237]

The IDEA requires that a counterclaim to defend an FIE be filed "without unnecessary delay."[238] Just one week after Mother requested the IEEs, the Special Education Director explained to her that the ARDC must first consider the FIE. The District made a good faith effort to reschedule the ARDC before the winter break and immediately following the winter break. Parents filed the Complaint before the ARDC could meet to review the FIE. Given the scheduling conflicts on the parts of both Parents and District staff, it was reasonable for the District to go ahead and file its counterclaim before the ARDC meeting was held. Although the counterclaim was not filed until February 14, 2017—well after Mother's December 1, 2016 request—the delay was not unnecessary; in the interim, the District was attempting to reschedule an ARDC meeting to review the FIE.

Petitioner did not meet his burden of proof to show the District violated its Child Find duty by failing to timely identify or evaluate Student as a child with an eligible disability in need of special education and related services.

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[237] 34 C.F.R. § 300.502(b)(2)(i).

[238] 34 C.F.R. § 300.502(b)(2)(i).

4. The District's FIE Was Appropriate

The District's November 2016 FIE was appropriate, timely, and correctly concluded Student is no longer eligible for special education services as a child with an SI and does not have an SLD. Petitioner did not prove the FIE was incomplete or insufficient, or that it failed to comply with IDEA requirements. The hearing officer finds that the FIE does, in fact, comply with all IDEA requirements and is appropriate.[239]

Specifically, Student was evaluated using a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information from Parents, which enabled the multi-disciplinary team to determine Student does not have an IDEA-enumerated eligibility that requires him to receive special education services. The FIE multi-disciplinary team assessed Student in all areas of suspected disability, including in the areas of basic reading, reading fluency, math calculation, math reasoning, and written expression. The FIE report was sufficiently comprehensive to identify all of Student's educational and related services' needs, and provided the ARDC with information necessary to determine whether he had an IDEA-eligible disability that required special education services.

The FIE multi-disciplinary team correctly used the pattern of strengths and weaknesses model to determine Student does not have an SLD. The model is consistent with the IDEA and Texas law.[240] The FIE established that Student's cognitive scores are all within the average or above average range, but he has an academic weakness in Reading which is due to his dyslexia, not due to a cognitive deficit. The hearing officer finds the District utilized criteria consistent with the IDEA and Texas law in denying Student eligibility as a student with an SLD.

In addition, the FIE multi-disciplinary team correctly determined that Student's SI no longer adversely affected his educational performance and did not rise to the level of a need for special education services.[241] Petitioner's expert SLP could not, and did not, establish that any

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[239] 34 C.F.R. §§ 300.301, .304-.311.

[240] 34 C.F.R. §§ 300.8(c)(10), .307, .309(a)(1); 19 Tex. Admin. Code § 89.1040(c)(9)(B)(ii)(11).

[241] 34 C.F.R. §§ 300.8(c)(11).

speech errors she found had an adverse impact on Student's educational performance. She acknowledged that any articulation errors had only a "potential" educational impact and "could" draw negative attention.[242] Student no longer needs Speech Therapy to function in the educational environment. By the time of the February 2017 ARDC meeting at which the FIE was considered, Student had met his IEP Speech goal ahead of the April 2017 annual review date and was maintaining his ability to be understood by peers and communicate intelligibly.

The hearing officer concludes that the District met its Child Find obligation and did not deny Student a FAPE by failing to correctly identify and evaluate him.

C. The District Followed Procedural Requirements

Petitioner alleges the District did not comply with all the procedural requirements of the IDEA and Texas law. Petitioner offered no evidence of specific procedural violations committed by the District.

A procedural violation may amount to a denial of FAPE only if the violation: (1) impeded the student's right to a FAPE; (2) significantly impeded a parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or (3) caused a deprivation of educational benefit.[243] As discussed below, Petitioner did not prove its assertion that the District failed to comply with a procedural requirement of the IDEA or Texas law.

Prior Written Notice must be given when a school district proposes or refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student.[244] The evidence shows Parent was provided with Prior Written Notice at

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[242] Tr. at 385 (Petitioner's expert SLP).

[243] 34 C.F.R. § 300.513(a)(2).

[244] 34 C.F.R. § 300.503; *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1600, 113 LRP 10911 (2013).

the April 2016, May 2016, and February 2017 ARDC meetings, as required by law. Petitioner presented no evidence that the Prior Written Notice was inadequate.

As relevant to this proceeding, a copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents only one time a school year, except that a copy also must be given to the parents upon receipt of a due process hearing request under the IDEA.[245] Petitioner presented no evidence that the District failed to provide Parents with a Notice of Procedural Safeguards upon receipt of the Complaint on January 17, 2017. Instead, the evidence shows the District provided Parent with a Notice of Procedural Safeguards at the ARDC meetings held in October 2015 (before the accrual date for this proceeding), April 2016, May 2016, September 2016, and February 2017. In addition, the District provided Parent with a Notice of Procedural Safeguards in May 2016 and in September 2016 when Parent signed consent for Student to be evaluated.

Assuming, *arguendo*, that the District committed a procedural error, the error would not have amounted to a denial of FAPE. Parent actively participated in every ARDC meeting and was involved in the decision-making process regarding Student's IEP. Parent also regularly communicated with District staff. Parents were not denied the opportunity for meaningful participation in Student's educational process and Student did not suffer any loss of educational opportunity as a result of any procedural error by the District.[246]

D. Provision of FAPE

Upon a finding that a child has a disability, an ARDC must develop an IEP for the child.[247] The IEP must meet specific requirements of the IDEA and Texas law.[248]

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[245] 34 C.F.R. § 300.504(a)(2).

[246] 34 C.F.R. § 300.513(a)(2)(ii), (iii).

[247] *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d at 1007; *Cypress-Fairbanks Indep. Sch. Dist.*, 118 F.3d at 247; 20 U.S.C. § 1415(b)(1).

[248] 34 C.F.R. §§ 300.320 - 300.324; 19 Tex. Admin. Code§ 89.1055.

The U.S. Supreme Court first addressed the question of when an IEP provides a FAPE in *Board of Education of Hendrick Hudson Central School District v. Rowley, Westchester County*, 458 U.S. 176 (1982). The Fifth Circuit summarized the *Rowley* standard:

> [An IEP] need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him 'to benefit' from the instruction. In other words, the IDEA guarantees only a 'basic floor of opportunity' for every disabled child, consisting of 'specialized instruction and related services which are individually designed to provide educational benefit.' Nevertheless, the educational benefit to which the Act refers and to which an IEP must be geared cannot be a mere modicum or *de minimis*; rather, an IEP must be 'likely to produce progress, not regression or trivial educational advancement.' In short, the educational benefit that an IEP is designed to achieve must be 'meaningful.' (internal citations omitted).[249]

In 2017, in *Endrew F. v. Douglas Cnty. Sch. Dist.*, the Supreme Court revisited the question of what constitutes a FAPE and concluded a FAPE "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[250]

Since at least 1997, the Fifth Circuit has tied the provision of a FAPE to an inquiry into a child's unique circumstances, a standard that is in alignment with the *Endrew F.* holding.[251] The Fifth Circuit has set forth four factors that serve as an indication of whether an IEP is reasonably calculated to provide a 'meaningful' educational benefit under the IDEA. These factors are whether (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the LRE; (3) the services are provided in a coordinated and collaborative manner by the key "stakeholders;" and (4) positive academic and

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[249] *Bobby R.*, 200 F.3d at 347, citing to *Cypress-Fairbanks*, 118 F.3d at 247-48.

[250] *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 1001 (2017); *Rowley*, 458 U.S. 176, 181 (1982); *see C.M. v. Warren Indep. Sch. Dist.* 117 LRP 17212 (E.D. Tex. 2017)(unpublished).

[251] *C.G. v. Waller Indep. Sch. Dist.*, No. 16-20439 (5th Cir. 2017).

nonacademic benefits are demonstrated.[252] The factors need not be accorded any particular weight or be applied in any particular way. Instead, they are indicators of an appropriate IEP.[253]

The ARDC complied with the IDEA's regulatory requirements, Texas law, and relevant case law in developing an IEP reasonably calculated to provide a meaningful educational benefit to Student and was appropriate in light of his circumstances.[254]

1. Student's IEP was individualized, based on his assessments and performance

The evidence shows that, when developing Student's IEP, the ARDC considered Student's strengths, Parents' concerns, the results of Student's most recent evaluations, and Student's academic, developmental, and functional needs.[255] The ARDC also considered Student's need for related services.[256] When Student initially was enrolled in the District as a first grader in August 2015, the District accepted his transfer IEP and provided him with the designated related service of Speech Therapy. In October 2016, the ARDC timely conducted Student's annual review and developed a Speech Therapy goal based on his November 2014 FIE. Student's IEP Speech goal and objectives were revised at an April 14, 2016 ARDC meeting, based on updated information provided by Mother, District staff, and Sylvan's director. The hearing officer concludes Student's IEP was individualized, based on his assessments and performance.

Petitioner complains that the District failed to provide Student with ESY services. ESY services are special education and related services that are provided to a child with a disability beyond the normal school year of the public agency in accordance with the child's IEP at no cost

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[252] *Cypress-Fairbanks Indep. Sch. Dist.*, 118 F.3d at 253.

[253] *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009); *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d at 397.

[254] *Endrew F.*, at 1001; *Bobby R.*, at 347-349, citing to *Cypress-Fairbanks,* 118 F.3d at 247-248, 253; 34 C.F.R. §§ 300.320, .324.

[255] 34 C.F.R. § 300.324(a)(1).

[256] 34 C.F.R. § 300.320(a)(4).

to child's parents.[257] ESY services must be provided only if the ARDC determines, on an individual basis, that the services are necessary for provision of a FAPE to the child.[258] If the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided a summer educational program, then ESY services are required.[259]

Because the accrual date for this proceeding is January 17, 2016, and the due process hearing was held May 30-31, 2017, the period at issue for ESY services is the summer of 2016. The evidence shows Student received instruction from Sylvan and attended the District's Summer Reading Academy during the summer of 2016, but did not receive ESY services. The evidence also shows that at the October 2015, April 2016, and May 2016 ARDC meetings, ESY services were discussed and not recommended either by Parents or the District because Student exhibited no documented regression in academic progress.

The hearing officer finds the ARDC correctly determined Student was not eligible for ESY services in the summer of 2016.

2. The IEP was administered in the LRE

The IDEA's LRE provision requires that students with disabilities receive their education in the regular classroom environment to the maximum extent appropriate or, to the extent such placement is not appropriate, in an environment with the least possible amount of segregation from the student's nondisabled peers and community.[260] In making a placement decision, "first consideration" should be given to placement in a regular classroom before considering more restrictive placement options on the continuum of alternative placements, which includes special classes, special schools, home instruction, and instruction in hospitals and institutions.[261]

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[257] 34 C.F.R. § 300.106(b).

[258] 34 C.F.R. § 300.106(a)(2).

[259] *Alamo Heights School District v. State Board of Education*, 790 F.2d. 1153 (5th Cir. 1986).

[260] 34 C.F.R. § 300.114(a).

[261] *Letter to Cohen*, 25 IDELR 516 (OSEP 1996); 34 C.F.R. § 300.115(a), (b); 19 Tex. Admin. Code § 89.63.

The ARDC met all legal requirements in determining the LRE for Student.[262] Except for 30-minute Speech Therapy sessions to be provided five times per six weeks' grading period in the Speech Therapy room, Student received all instruction in the general education setting. The hearing officer finds Student's placement was based on his unique educational needs and circumstances, and on his IEP. Petitioner did not prove the District denied Student a FAPE by failing to place him in the LRE.

3. Key stakeholders provided the services in a coordinated and collaborative manner

Parents are an integral part of the IEP development process and, as such, are key stakeholders in the provision of services to their child, as are a student's teachers and a school district's administrators.[263] All members of the ARDC must have the opportunity to participate in a collaborative manner in developing the IEP. A decision of the ARDC concerning required elements of the IEP must be made by mutual agreement, if possible.[264]

Petitioner offered no evidence of any lack of coordination or collaboration in the development of Student's IEP. Instead, the evidence shows Parent fully participated in the ARDC meetings. Although Parents have the right to provide meaningful input, the right "is simply not the right to dictate the outcome and obviously cannot be measured as such."[265] The ARDC was not required to rely solely on outside assessments or to act as Parents requested.[266]

After the IEP was developed, Student's SLP, teachers, and interventionist were timely provided copies of his IEP goal and objectives, schedule of services, accommodations and modifications, and State/District testing instructional supports in April 2016 and August 2016. Student's first grade general education teacher and the Sylvan director routinely communicated

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[262] 34 C.F.R. §§ 300.114 - .120; .327; .501(c)(1).

[263] 34 C.F.R. § 300.321(a).

[264] 19 Tex. Admin. Code § 89.1050(g).

[265] *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d. 373, 380 (5th Cir. 2003).

[266] *Warren Indep. Sch. Dist.*, 117 LRP 17212 (E.D. Tex. 2017).

about Student's reading progress. Mother and District staff regularly discussed Student's academic and nonacademic progress.

Petitioner complains that the District did not track Student's IEP progress or provide regular IEP Progress Reports to Parents during the 2015-2016 school year. The record is silent as to whether formal IEP Progress Reports were issued. Petitioner, who has the burden of proof, offered no evidence that the IEP Progress Reports were not provided. However, the evidence shows that Parent attended and participated in ARDC meetings in October 2015 (before the accrual date for this proceeding) and in April 2016 and May 2016, during which Student's progress was discussed.

The evidence further shows that during the 2016-2017 school year, IEP Progress Reports were provided to Parents every six weeks, with Student's report card, in accordance with his IEP. Parents were not prevented from participating in Student's educational decisions due to a lack of information about his progress toward meeting his IEP goal.

The hearing officer finds that Petitioner did not prove the District failed to provide IEP Progress Reports to Parents during the 2015-2016 school year. The hearing officer further finds that Student's educational services were provided in a collaborative and coordinated manner by key stakeholders.

4. Positive academic and non-academic benefits

The evidence shows the IEP was reasonably calculated to provide Student with academic and non-academic benefits given his unique circumstances.[267] The IEP Progress Reports updated every six weeks show Student mastered his Speech goal before the April 2017 ARDC annual review date. As of May 2017, Student was maintaining a level of mastery with all target speech sounds and his sound production maintained intelligibility at the structured sentence and conversational levels. Outside the Speech Therapy room, Student is highly intelligible in the

[267] *Cypress-Fairbanks*, 118 F.3d at 247-248, quoting *Rowley*, 458 U.S. at 188-189.

school setting and understandable by his peers. He can reasonably function in a school setting due to the services he received through Speech Therapy. The hearing officer finds Student's IEP was reasonably calculated to provide him with academic and non-academic benefits.

E. Conclusion

After considering the evidence and parties' closing arguments, the hearing officer finds Petitioner did not meet his burden of proof to prevail on any of the identified issues for this proceeding. Instead, the evidence shows the District's FIE was appropriate. The District properly identified, evaluated, and placed Student; provided Student a FAPE in accordance with the IDEA and relevant case law; and committed no procedural violations. Accordingly, Petitioner is not entitled to any of the requested relief.

VI. CONCLUSIONS OF LAW

1. The District is a local educational agency responsible for complying with the IDEA as a condition of the State of Texas's receipt of federal education funding, and the District is required to provide each disabled child in its jurisdiction with a FAPE, pursuant to the IDEA, 20 U.S.C. § 1400 *et seq*.

2. Parents of students with disabilities are entitled to file a due process complaint and have a hearing on any matter relating to the identification, evaluation, or educational placement of the student, or the provision of a FAPE to the student. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.507-.513.

3. Petitioner bears the burden of proof on all issues raised in its due process hearing request. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).

4. Respondent bears the burden of proof on its counterclaim. 34 C.F.R. § 300.502(b)(2)(i).

5. A party attacking the appropriateness of an IEP established by a school district bears the burden of showing why the IEP and resulting placement were inappropriate under the IDEA. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-248 (5th Cir. 1997), as cited in *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000); *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1010-1011 (5th Cir. 2010).

6. The one-year statute of limitations applies to this proceeding, resulting in an accrual date of January 17, 2016. 19 Tex. Admin. Code § 89.1151(c).

7. Student is not eligible for special education and related services as a child with a Specific Learning Disability or a Speech Impairment. 34 C.F.R. §§ 300.8(a)(1), (c)(10), .307-.311; 19 Tex. Admin. Code § 89.1040(a), (c)(9)(B)(i), (c)(9)(B)(ii)(II), (c)(10).

8. The District fulfilled its Child Find obligation as to Student. 34 C.F.R. § 300.111; 19 Tex. Admin. Code § 89.1011.

9. The District's Full Individual Evaluation of Student, including the evaluation for a Specific Learning Disability, was conducted in accordance with IDEA requirements and is appropriate. 34 C.F.R. §§ 300.8(c)(10), .301, .303 - .311; 19 Tex. Admin. Code § 89.1040(b)(9).

10. The District provided Student with a FAPE during the time period relevant to this proceeding. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 1001 (2017); *Board of Edu. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 181 (1982); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347-348 (5th Cir. 2000).

11. The District developed an appropriate IEP for Student. 34 C.F.R. §§ 300.320 - .324, .502(c)(1); *Endrew F.*, 137 S. Ct. at 1001; *Cypress-Fairbanks*, 118 F.3d at 253 (5th Cir. 1997).

12. Student's placement meets the LRE requirements of the IDEA. 20 U.S.C. § 1412(a)(5); 34 C.F.R. §§ 300.114, .116; *Daniel R. R. v. State Board of Education*, 874 F.2d 1036, 1039, 1046-1047 (5th Cir. 1989).

13. The District did not deny Student a FAPE by failing to comply with any of the procedural requirements of the IDEA and Texas law. 34 C.F.R. §§ 300.8, .503, .513(a)(2); 19 Tex. Admin. Code §§ 89.1040(c)(8), .1050.

ORDER

Having considered the evidentiary record and the foregoing Findings of Fact and Conclusions of Law, the hearing officer hereby orders as follows:

Petitioner's requested relief is denied.

SIGNED June 30, 2017.

Sharon Cloninger

Sharon Cloninger
Special Education Hearing Officer
For the State of Texas

NOTICE TO THE PARTIES

This Decision of the hearing officer is a final and appealable order. Any party aggrieved by the findings and decision 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.[268]

[268] 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516; 19 Tex. Admin. Code § 89.1185(n).