

**DOCKET NO. 056-SE-1018**

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

**DECISION OF THE HEARING OFFICER**

**I. PROCEDURAL HISTORY**

Student by Student's next friends Parent and Parent (collectively, Petitioner or Student) brought this action against the Sweetwater Independent School District (Respondent or District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and its implementing state and federal regulations. Petitioner requested a due process hearing on October 31, 2018 with notice issued by the Texas Education Agency the same day.

The main issue in this case is whether the District denied Student a free, appropriate public education (FAPE) by failing to develop an appropriate Individualized Education Program (IEP) reasonably calculated to enable Student to make progress in light of Student's unique circumstances.

The hearing officer concludes Student's IEPs for the 2017-2018 and 2018-2019 school years were reasonably calculated to enable Student to make progress in light of Student's unique circumstances and Student was not denied a free, appropriate public education.

**A. Continuances**

One continuance was granted and the decision due date was extended twice. The hearing

was continued to January 23-25, 2019 and the decision due date extended to February 27, 2019 (Order No. 2). A second extension of the decision due date was granted to give the parties an opportunity to submit written closing arguments (Order No. 7).

**B. Legal Representatives**

Student was represented throughout this litigation by Elizabeth Angelone of the Cuddy Law Firm. Jennifer Swanson, of the same firm, served as co-counsel until December 18, 2018. Petitioner filed a Notice of Withdrawal and Substitution of Lead Counsel on January 3, 2019 with notice of Ms. Swanson's withdrawal and substituting Devin Fletcher of the Cuddy Law Firm for Elizabeth Angelone as lead counsel.

The District was represented by Holly Wardell of Eichelbaum, Wardell, Hansen, Powell and Mehl throughout the litigation. Amy Foster, of the same firm, was co-counsel at the hearing.

**C. Resolution Efforts**

A resolution session was held on November 14, 2018 but agreement was not reached. The parties participated in mediation on December 12, 2018. The mediation was unsuccessful.

**D. Preliminary Motions**

The hearing officer considered several preliminary motions, including Respondent's November 9, 2018 Motion for Expedited Production of Documents that was resolved when the hearing was continued, and Petitioner's Motion for Clarification of Issues Presented and Relief Requested filed on December 10, 2018 and granted in Order No. 3. Respondent's Motion to Exclude Petitioner's Expert was granted on February 1, 2019 (Order No. 6).

## II. DUE PROCESS HEARING

The due process hearing was conducted in person on January 23-25, 2019 and reconvened by telephone on January 31, 2019 to hear testimony from a previously unavailable witness. The hearing was recorded and transcribed by a certified court reporter.

Petitioner was represented by Petitioner's legal counsel, Devin Fletcher. Student's parents, \*\*\* and \*\*\*, attended the hearing. Respondent was represented by its legal counsel, Holly Wardell, with the assistance of co-counsel, Amy Foster. \*\*\*, Director of Special Education for the District, was the party representative.

## III. ISSUES

### A. Petitioner's Issues

Petitioner challenges Student's educational program for the 2017-2018 and 2018-2019 school years. The issues for decision are as follows:

FAPE: Whether the District denied Student a FAPE by failing to develop an appropriate IEP reasonably calculated to enable Student to make progress in light of Student's unique circumstances.

FAPE: Whether Student's IEP failed to include:

- a. Accurate present levels of academic achievement and functional performance;
- b. Individualized, clear, unambiguous, measurable, specific, sufficiently challenging, and appropriate goals and objectives based on assessments and evaluations;
- c. Adequate and congruent short-term benchmarks and objectives;
- d. Appropriate accommodations to support meaningful progress for Student; and
- e. Recommendations for supplementary aids and services and/or program modifications to allow Student to be educated in Student's least restrictive environment.

FAPE: Whether the District failed to consider and implement its own recommendations from Student's October 2016 Full and Individual Evaluation (FIE), including one on one instruction.

FAPE: Whether the District failed to recommend and provide appropriate related services for Student to meet Student's specific learning needs.

FAPE: Whether the District failed to appropriately address Student's academic needs by not recommending or providing appropriate research-based teaching methodologies.

FAPE: Whether the District failed to convene an Admission, Review, and Dismissal (ARD) Committee meeting to address bullying of Student.

PLACEMENT: Whether the District failed to educate Student in the least restrictive environment.

PROCEDURAL: Whether the District failed to allow meaningful parental participation in the decision-making process regarding the provision of FAPE to Student by failing to:

- a. Provide Student's parents with compliant Prior Written Notice (PWN);
- b. Provide timely and adequate progress reports to Student's parents;
- c. Conduct appropriate, comprehensive, and timely evaluations of Student; and
- d. Provide an Independent Educational Evaluation (IEE) for occupational therapy (OT) and a Functional Behavioral Assessment (FBA) and impermissibly capping the parents' IEE request and failing to provide a truly independent evaluation.

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

The District generally denies the allegations in Petitioner's Complaint and maintains it provided Student FAPE in the least restrictive environment at all relevant times. The District also raised the following legal issue for decision:

STATUTE OF LIMITATIONS: Whether any of Student's IDEA claims that accrued outside the one year statute of limitations rule as applied in Texas should be dismissed.

## **IV. REQUESTED RELIEF**

### **A. Petitioner's Requested Relief**

Petitioner seeks the following items of relief:

1. A finding Student was denied a free, appropriate public education.
2. An order for an IEE at District expense in all areas of suspected disability and need by an independent, qualified provider.
3. An order directing Student's ARD Committee to convene and develop a new IEP for Student that is ambitious in light of Student's unique circumstances and:
  - a. Accurately reflects Student's present levels of academic achievement and functional performance;
  - b. Includes appropriate goals and short-term objectives that address Student's academic and behavioral needs;
  - c. Includes appropriate related services, including speech therapy, social skills, occupational therapy, counseling, and a one on one aide;
  - d. Identifies appropriate teaching methodologies that will be used to address Student's academic needs;
  - e. Identifies appropriate behavior methodologies and includes a plan to implement positive behavioral methodologies;
  - f. Includes parent training to support implementation of the IEP; and
  - g. Provides services in Student's least restrictive environment; or
  - h. In the alternative, if the District is unable to provide the above, placement in a private or non-public day school at District expense.
4. Compensatory services, including services Student was entitled to but did not receive, including any academic, social skills, or other services determined necessary by the IEE.
5. Reimbursement and/or funding for costs incurred by Student's parents for evaluations, tutoring, and mileage.
6. Any additional relief deemed appropriate by the hearing officer.

## V. FINDINGS OF FACT

1. Student is \*\*\* years old and in \*\*\* grade. Student is eligible for special education as a student with \*\*\* and \*\*\*.<sup>1</sup> Student lives with Student's parents in Sweetwater, Texas and enjoys \*\*\*.<sup>2</sup>
2. Student was initially referred for a special education evaluation due to a possible speech/language delay.<sup>3</sup> An FIE dated May \*\*\*, 2014 found Student eligible for special education as a student with a Speech/Language Impairment \*\*\* with \*\*\* deficits.<sup>4</sup> Student has received speech services in the District since August 2014.<sup>5</sup>
3. \*\*\*. Student succeeded socially and adapted well to the school environment, but could not \*\*\*.<sup>6</sup> The District began targeted interventions and progress monitoring in January 2016 and recommended Student \*\*\* in May 2016.<sup>7</sup>
4. Student's ARD Committee met on May \*\*\*, 2016 at Student's parents' request to discuss Student's lack of progress during the \*\*\*. The District recommended, and Student's parents agreed to, academic and cognitive testing.<sup>8</sup>
5. The evaluation was completed on October \*\*\*, 2016 and the ARD Committee met on October \*\*\*, 2016 to consider it. The District educational diagnostician administered the \*\*\* to assess Student's \*\*\*. Student scored a \*\*\* in \*\*\* (\*\*% percentile, age equivalent of \*\*\*) and \*\*\* in \*\*\* (\*\*% percentile, age equivalent of \*\*\*). These scores indicated Student may have difficulty following teacher directives, understanding others, and using age-appropriate vocabulary, grammar, and sentence structure.
6. The Goldman-Fristoe Test of Articulation-3, \*\*\*, yielded a below average score, finding Student's speech approximately \*\*\*% \*\*\* to an unfamiliar listener.<sup>9</sup> Student's teacher reported average gross motor coordination and below average fine motor coordination in

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<sup>1</sup> Respondent's Exhibit 14 at 2 (hereinafter R. Ex. \_\_\_ at \_\_\_).

<sup>2</sup> Petitioner's Exhibit 1 at 7 (hereinafter P. Ex. \_\_\_ at \_\_\_); R. Ex. 2 at 7; Hearing Transcript at 312 (hereinafter Tr. at \_\_\_).

<sup>3</sup> R. Ex. 1 at 1.

<sup>4</sup> R. Ex. 1 at 8.

<sup>5</sup> R. Ex. 22.

<sup>6</sup> Tr. at 560, 565-566.

<sup>7</sup> R. Ex. 8 at 4; Tr. at 559, 588.

<sup>8</sup> R. Ex. 8 at 4.

<sup>9</sup> P. Ex. 1 at 5; R. Ex. 2 at 5; Tr. at 346-347.

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7. The Wechsler Individual Achievement Test, Third Edition (WIAT-3) measures academic abilities with average scores between 85 and 115. Student achieved the following results: \*\*\* (\*\*\*); \*\*\* (\*\*\*); \*\*\* (\*\*\*); \*\*\* (\*\*\*); \*\*\* (\*\*\*); \*\*\* (\*\*\*); and \*\*\* (\*\*\*).<sup>11</sup> These scores revealed deficits in all areas tested.
8. The evaluation found Student eligible for special education as a student with \*\*\*. IEP recommendations included: re-teaching skills, or re-addressing skills previously taught when there continues to be a weakness; one on one instruction; reading assignments aloud; books on CD; partner reading; \*\*\*, \*\*\*, \*\*\*.<sup>12</sup> The updated FIE found Student continued to be eligible for special education as a student with a speech impairment.<sup>13</sup>
9. The ARD Committee reviewed Student's Present Levels of Academic Achievement and Functional Performance (PLAAFPs), a narrative portion of an IEP based on objective data that describes how a student is performing at the time.<sup>14</sup> The Special Education teacher considered teacher information and testing data to develop Student's PLAAFPs.
10. In Reading and Math, Student was working on a \*\*\* level. In Speech, deficits adversely impacted the ability to access information in the general education classroom. In Written Expression, Student was on grade level and could \*\*\* and \*\*\*. No writing goal was recommended. In the area of Behavior, Student was easily distracted by Student's surroundings, but responded to redirection and teacher directives. No behavioral goal was recommended. Student's functional performance was considered. Student could function in most areas of Student's educational environment with direction and had some difficulty with \*\*\* directions. Student was on level in Science and Social Studies, meaning Student could access the grade level curriculum.<sup>15</sup>
11. Student's parent wanted Student to be able to read, write, and do math commensurate with Student's peers and requested weekly discussions with the Special Education teacher about Student's progress. School personnel confirmed Student would be promoted to \*\*\* for the 2017-2018 school year.<sup>16</sup>
12. Student's Schedule of Services was modified to reflect participation in the general education \*\*\* classroom 315 minutes per day, with 80 minutes per day in the resource classroom for Reading and Math. Student would also receive \*\*\* minutes of speech

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<sup>10</sup> P. Ex. 1 at 6; R. Ex. 2 at 6.

<sup>11</sup> P. Ex. 1 at 12; R. Ex. 2 at 12; Tr. at 252-253.

<sup>12</sup> P. Ex. 1 at 14; R. Ex. 2 at 14; Tr. at 268.

<sup>13</sup> P. Ex. 1 at 19; R. Ex. 2 at 17.

<sup>14</sup> Tr. at 66.

<sup>15</sup> P. Ex. 8 at 2; R. Ex. 10 at 3; Tr. at 49.

<sup>16</sup> R. Ex. 9 at 4; R. Ex. 12 at 20.

- instruction two times per week. Instruction would be in small groups or one on one.<sup>17</sup>
13. Student has good attendance and attends school regularly. Student has an even disposition generally and is a happy kid.<sup>18</sup> Student's social skills are a strength and Student enjoys being around Student's peers, is personable, and has many friends.<sup>19</sup>
14. Student has good behavior at school, understands classroom rules, and follows school rules. Student works hard and wants to learn. Student understands oral directions and follows teacher directives.<sup>20</sup> Student has never had a disciplinary referral or suspension.<sup>21</sup> Student requires slightly more redirection, but Student's behavior is consistent with \*\*\*.<sup>22</sup> Student achieved a year end score of \*\*\* during the 2017-2018 school year. \*\*\*.<sup>23</sup> Student's behavior does not impede Student's learning or that of others and Student did not require a Behavior Intervention Plan.<sup>24</sup>
15. The District uses \*\*\* to assess academic strengths and weaknesses and measure reading abilities for all students. The program generates graphs and a scaled score for each reading domain, allowing for evaluation of progress over time. \*\*\* results are one data point used to form Student's PLAAFPs and track overall reading progress.<sup>25</sup>
16. October 2015 and May 2016 \*\*\* testing in Overall Reading showed a grade equivalent of \*\*\*.<sup>26</sup> In May 2017, the fall semester of Student's \*\*\*, Student was moderately below grade level, performing at a grade equivalent of the \*\*\*\*\*.<sup>27</sup> Results from January 2018 and May 2018 testing reveal a grade equivalent of the \*\*\*\*\*.<sup>28</sup> The ups and downs in Student's \*\*\* scores are to be expected and stem from Student's short-term memory and long-term retrieval deficits.<sup>29</sup>
17. Student's Special Education teacher, who provided core academic instruction in Reading, Language Arts and Math during \*\*\*, has worked in the education field for \*\*\* years and

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<sup>17</sup> R. Ex. 9 at 8; Tr. at 269-270.

<sup>18</sup> P. Ex. 1 at 7; R. Ex. 2 at 7; Tr. at 316, 394, 395, 490.

<sup>19</sup> Tr. at 227-228, 394, 615.

<sup>20</sup> Tr. at 92, 234, 394, 424, 429, 430, 472, 554, 638-639, 673, 680.

<sup>21</sup> Tr. at 321, 490, 554.

<sup>22</sup> Tr. at 207-208, 263-264, 355, 673.

<sup>23</sup> P. Ex. 15; R. Ex. 12 at 20; R. Ex. 20 at 3, 7.

<sup>24</sup> R. Ex. 10 at 4; R. Ex. 11 at 3.

<sup>25</sup> Tr. at 103-104, 156, 229, 399.

<sup>26</sup> P. Ex. 3 at 1; R. Ex. 12 at 13.

<sup>27</sup> P. Ex. 3 at 3; R. Ex. 12 at 15.

<sup>28</sup> P. Ex. 3 at 4, 6; R. Ex. 12 at 16, 18.

<sup>29</sup> Tr. at 229, 436.



- has specialized training in working with students with disabilities.<sup>30</sup> Student developed goals in English Language Arts, Reading and Math to present to the ARD Committee and worked with Student daily to master them.<sup>31</sup>
18. Student was provided one on one instruction with the Special Education teacher or an educational aide during Student's \*\*\*. Student worked with the Special Education teacher one on one for 15-20 minutes daily during the 2017-2018 school year, Student's \*\*\*. Other resource instruction was provided in small groups of other students with disabilities.<sup>32</sup>
  19. Student has good handwriting skills \*\*\*. Student's penmanship is legible and Student demonstrates good spatial approximation, or proper spacing between words.<sup>33</sup> Student can \*\*\*. \*\*\*.<sup>34</sup>
  20. The ARD Committee convened for Student's annual review on January \*\*\*, 2017. Student's parent expressed a desire for Student to be academically successful.<sup>35</sup> Student's PLAAPs were not updated because Student had not had enough time to master the goals developed in October 2016. PLAAPs would generally not be revised if there were no changes.<sup>36</sup>
  21. The ARD Committee developed and accepted Student's annual goals and objectives. Testing, teacher information, and developmental norms for appropriate language for students of a certain age were considered in developing Student's speech goals.<sup>37</sup> In Speech Therapy\*\*\*, one goal targeted speech \*\*\* with four short-term objectives on correct use of \*\*\*. A Speech Therapy-\*\*\* goal targeted grammatically correct sentences in conversation with two objectives in correct use of nominative and possessive pronouns.
  22. A functional goal targeted following \*\*\* directions. An English Language Arts and Reading goal targeted \*\*\*. A Mathematics goal targeted the ability to read, write, and \*\*\*.<sup>38</sup> Student required accommodations, which are fluid and may change over time, in all academic areas, to include instructional aids; small group instruction; visual aids; study aids/\*\*\*; exemption from reading before peers; extra time to complete assignments; grading based on participation/social skills acquisition; and multiple choice questions.<sup>39</sup>

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<sup>30</sup> Tr. at 388-389.

<sup>31</sup> Tr. at 399, 401-402.

<sup>32</sup> Tr. at 419-420.

<sup>33</sup> Tr. at 181, 231, 450, 611, 682-683.

<sup>34</sup> Tr. at 221-222, 241.

<sup>35</sup> P. Ex. 8 at 1; R. Ex. 10 at 2.

<sup>36</sup> Tr. at 409, 456.

<sup>37</sup> Tr. at 352.

<sup>38</sup> P. Ex. 8 at 5-7; R. Ex. 10 at 6-8.

<sup>39</sup> P. Ex. 8 at 8; R. Ex. 10 at 9; Tr. at 110-111.

23. Student required speech therapy in a small group setting and would otherwise receive instruction in a combination of the general education and resource classrooms. Student's presence in the general education classroom did not interfere with the learning of others. Student's Schedule of Services called for 303 minutes per day in the general education classroom and 80 minutes of instruction in Reading and Math in the general education classroom, or 40 minutes daily in each subject. Student would also receive speech therapy for 30 minutes twice a week.<sup>40</sup>
24. The District uses \*\*\* Diagnostic software to establish academic benchmarks for all students.<sup>41</sup> Student's Math \*\*\* testing in September 2017, early in Student's \*\*\*, yielded a scaled score of \*\*\*, in the \*\*\* percentile as compared to same age peers nationally.<sup>42</sup> In an October 2017 \*\*\* Reading test, Student's Oral Reading Fluency score of \*\*\* revealed Student would likely be unable to read any grade level text. \*\*\*.<sup>43</sup> These scores indicate Student had only an emerging understanding \*\*\*.
25. Student's IEPs call for Student's parents to receive progress reports when report cards are issued, \*\*\*.<sup>44</sup> The District uses software to generate progress reports, so a given report may reflect both the most recent \*\*\* period and previous \*\*\* grading intervals. Some data on a progress report will therefore reflect a prior goal.<sup>45</sup>
26. Progress is reported in a percentage and reflects Student's accuracy for the goal at the time it is reported. Progress on a goal is tracked in a session where the goal is worked on.<sup>46</sup> The reports included a Progress Code (percentage of progress towards achieving goal), yes/no check boxes indicating whether sufficient progress was being made, whether further action was needed, and a space for general comments.<sup>47</sup> Individual speech goals were targeted every other session. Session documentation and participation determined Student's percentage of goal achievement.<sup>48</sup>
27. Student's first progress report after beginning \*\*\* is dated October \*\*\*, 2017 and reflects progress on the goals established in January 2017. The Special Education Teacher reported \*\*\*% progress in achieving Student's functional goal of following \*\*\* directions; \*\*\*% progress in achieving Student's English Language Arts and Reading goal of being able to

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<sup>40</sup> P. Ex. 8 at 10-13; R. Ex. 10 at 11-14.

<sup>41</sup> Tr. at 102.

<sup>42</sup> P. Ex. 2 at 9.

<sup>43</sup> P. Ex. 2 at 8.

<sup>44</sup> R. Ex. 11 at 5-8; Tr. at 60-61, 351, 418, 655, 663, 693.

<sup>45</sup> Tr. at 155.

<sup>46</sup> Tr. at 378-379, 655, 664, 691, 695.

<sup>47</sup> R. Ex. 12 at 36-34.

<sup>48</sup> Tr. at 380.

- \*\*\*. In Math, Student demonstrated \*\*\*% mastery in achieving the goal of reading, writing, and \*\*\*.<sup>49</sup>
28. Student's November \*\*\*, 2017 progress report reflects \*\*\*% progress in achieving Student's functional goal, \*\*\*% progress in Student's English Language Arts and Reading goal, and \*\*\*% mastery of Student's Math goal.<sup>50</sup> The December \*\*\*, 2017 progress report reflected mastery of Student's Functional and English Language Arts and Reading goals. Student demonstrated \*\*\*% mastery of Student's goal in Math.<sup>51</sup>
29. The District provided software generated progress reports on Student's Speech\*\*\* and \*\*\* goals. Speech specific progress reports were prepared on the following dates: October \*\*\*, 2017; November \*\*\*, 2019; December \*\*\*, 2017; February \*\*\*, 2018; April \*\*\*, 2018; May \*\*\*, 2018; September \*\*\*, 2018; November \*\*\*, 2018; November \*\*\*, 2018.<sup>52</sup>
30. Student was in the fall semester of \*\*\* grade when the ARD Committee convened for Student's annual review on December \*\*\*, 2017.<sup>53</sup> Student's parent expressed concern about Student's reading abilities.<sup>54</sup> The ARD Committee reviewed Student's PLAAFPs, which were based on General Education teacher input, \*\*\* reports, \*\*\* testing, Special Education teacher observations, and work samples.<sup>55</sup>
31. In Reading, Student's \*\*\* Reading test score of \*\*\* reflected a grade equivalent of \*\*\*. Student could \*\*\*. Student had difficulty \*\*\*.<sup>56</sup> Student's English/Language Arts goal was modified to build on Student's prerequisite skills and begin incorporating \*\*\*.<sup>57</sup>
32. Student's speech had improved at the word, sentence, and conversational levels. Student struggled with \*\*\*. In the area of Written Expression, Student could \*\*\*, which entails developmentally \*\*\*. Student had difficulty with sentence structure. Student could \*\*\*.
33. Student's \*\*\* Math test yielded a score of \*\*\*, well below same age peers. Student could \*\*\*. Student could \*\*\*. Student could \*\*\*. Student had difficulty with \*\*\*.<sup>58</sup>
34. In the area of Behavior, Student was easily distracted by Student's surroundings, but could

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<sup>49</sup> R. Ex. 12 at 40-41.

<sup>50</sup> R. Ex. 12 at 42-43.

<sup>51</sup> R. Ex. 12 at 44-45.

<sup>52</sup> R. Ex. 23 at 6-11.

<sup>53</sup> R. Ex. 11 at 1.

<sup>54</sup> R. Ex. 11 at 18.

<sup>55</sup> Tr. at 410.

<sup>56</sup> R. Ex. 11 at 2; Tr. at 404.

<sup>57</sup> Tr. at 412-413.

<sup>58</sup> R. Ex. 11 at 2.

be redirected, responded well to teacher directives, and could follow the Student Code of Conduct. No behavioral goal was recommended. Student's level of functional performance was considered and Student could function in all areas of Student's educational environment. Student was 'on level' in Science and Social Studies with accommodations, meaning Student was performing the same as Student's peers.<sup>59</sup>

35. The ARD Committee developed and accepted Student's annual goals and objectives. In Speech \*\*\*, one goal targeted developmentally appropriate \*\*\* and correct use \*\*\*. A Speech \*\*\* goal targeted correct use of irregular verbs, irregular plurals, and subject-verb agreement with three objectives targeting these skills.
36. An English Language Arts and Reading goal targeted \*\*\* in isolation \*\*\* with two short-term objectives on \*\*\* and basic vocabulary knowledge. A Language Arts goal targeted \*\*\* short-term objectives on spatial approximation and writing \*\*\*. A Math goal targeted the ability to read, write, and \*\*\*. Methods of evaluation included data collection and observations in Speech and observations and work samples in Math, English Language Arts, and Reading.<sup>60</sup>
37. The December 2017 IEP established accommodations in all academic areas, including instructional aids; small group instruction; visual aids; opportunities to leave class for specialized assistance; study aids/\*\*\*; exemption from reading before peers; extra time to complete assignments; grading based on participation/social skills acquisition; and multiple choice questions. Exams of reduced length and reading tests according to state standards were also recommended.<sup>61</sup>
38. The ARD Committee found Student needed weekly speech therapy in a small group setting and would receive other instruction in a combination of the general education and resource classrooms. Student's presence in the general education classroom did not interfere with the learning of others. Instruction entirely in the general education classroom with supplementary aids and services was rejected because it would prohibit mastery of the IEP goals and objectives, grade level on the Texas Essential Knowledge Skills (TEKS) exceeded Student's present level of educational performance, and Student required significantly below grade level instruction. Speech therapy also required small group and individual instruction with specialized staff in a less distracting environment.<sup>62</sup>
39. Student's Schedule of Services for the remainder of \*\*\* grade (December \*\*\*, 2017 to May \*\*\*, 2018) called for 298 minutes per day in the general education classroom and 80 minutes per day of instruction in Reading and Math in the general education classroom, or 40 minutes daily in each subject. Student would also receive Speech Therapy for 30

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<sup>59</sup> R. Ex. 11 at 3; Tr. at 448.

<sup>60</sup> P. Ex. 9 at 4-7; R. Ex. 11 at 5-8.

<sup>61</sup> R. Ex. 11 at 9.

<sup>62</sup> R. Ex. 11 at 12-14.

minutes twice a week. During the 2018-2019 school year (August \*\*\*, 2018 – December \*\*\*, 2018) Student would receive instruction in the general education classroom for 263 minutes per day, with 40 minutes of instruction each in Math, Language Arts, and Reading in the resource setting. Student would continue to receive Speech Therapy for 30 minutes per day twice a week.<sup>63</sup>

40. The District provided Student's parents PWN dated December \*\*\*, 2017 that reflected Student's annual ARD Committee meeting was held to review Student's annual progress and the option of dismissing Student from special education was rejected. The District considered Student's FIE, parent and teacher information, observations, and health information in making any proposals or refusals.<sup>64</sup>
41. \*\*\* data from January 2018 and May 2018 found Student was at significant risk of not meeting grade level expectations in Overall Reading with a grade equivalent of \*\*\*. Student achieved Ability Index scores of \*\*\* and \*\*\*, respectively (\*\*% percentile).<sup>65</sup>
42. In \*\*\* Math tests in January 2018 and May 2018, Student received scaled scores of \*\*\* and \*\*\*, respectively, placing Student in the \*\*\* and then \*\*\* percentile as compared to same age peers nationally. Both scores reflected a grade equivalent of \*\*\*, or performance comparable to an average \*\*\* grader after the start of the school year. The percentages of mastery of skills were: \*\*\* (\*\*%, \*\*%); \*\*\* (\*\*%, \*\*%); and \*\*\* (\*\*%, \*\*%).<sup>66</sup>
43. In a \*\*\* Reading test in January 2018 Student's skill set scores indicated Student was \*\*\* with a scaled score between \*\*\* and \*\*\*. Student's estimated Oral Reading Fluency (words correct per minute) was \*\*\*. In a \*\*\* Reading test in May 2018, Student's skill set scores indicated Student was a \*\*\* Reader with a scaled score between \*\*\* and \*\*\*. Student's estimated Oral Reading Fluency (words correct per minute) was \*\*\*.
44. Student achieved the following sub-domain scores in the January 2018 and May 2018 \*\*\* tests, respectively: \*\*\*\*.<sup>67</sup> These scores reflect improvement across all domains. By the end of Student's \*\*\* grade year, Student was a \*\*\*.<sup>68</sup>
45. A \*\*\* Diagnostic Reading Report of testing in October 2017, January 2018, and May 2018 reflects progress in each domain.<sup>69</sup>

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<sup>63</sup> R. Ex. 11 at 15.

<sup>64</sup> R. Ex. 11 at 20.

<sup>65</sup> P. Ex. 3 at 4-5, 6-7; R. Ex. 12 at 16-17, 18-19.

<sup>66</sup> P. Ex. 2 at 3, 4; R. Ex. 12 at 23, 24.

<sup>67</sup> P. Ex. 2 at 1, 2; R. Ex. 12 at 21, 22.

<sup>68</sup> Tr. at 416.

<sup>69</sup> R. Ex. 14 at 30; Tr. at 438-439.

46. The goals adopted in December 2017 were addressed in a February \*\*\*, 2018 progress report showing \*\*\*% mastery of Student's English Language Arts and Reading \*\*\* goal; \*\*\*% mastery of the Language Arts \*\*\* goal; and \*\*\*% progress in achieving Student's Math goal of reading, writing, and representing \*\*\*.<sup>70</sup> An April \*\*\*, 2018 progress report indicated \*\*\*% mastery of Student's \*\*\* goal; \*\*\*% mastery of Student's \*\*\* goal. Student demonstrated \*\*\*% mastery of Student's Math goal.<sup>71</sup> Student increased Student's percentage of mastery in each academic goal between January and May 2018.
47. Student receives instruction in Science and Social Studies in the general education classroom. Student's General Education teacher has been teaching for almost \*\*\* years. Student engages in collaborative learning in the general education setting, a research-based instructional model, where small groups of students work together on an activity. Science and Social Studies provide less pencil and paper based academic learning, including cooperative learning, projects, art activities, and group work.<sup>72</sup> Student participates in all classroom activities and accesses the general education curriculum with accommodations and modifications. Instructional aids in Social Studies include \*\*\*, weekly use of a peer tutor, oral administration of worksheets, and writing down Student's response.<sup>73</sup>
48. Student's 2017-2018 year end score in Science was \*\*\*, with a year end score in Social Studies of \*\*\*.<sup>74</sup> In Science, Student achieved a \*\*\*, \*\*\*, and \*\*\* in the first, second, and third \*\*\* week score respectively, with a semester average score of \*\*\*. In Social Studies, Student achieved an \*\*\*, \*\*\*, and \*\*\* in the first, second, and third \*\*\* week score respectively, with a semester average score of \*\*\*.<sup>75</sup> Information on Student's progress and behavior in Science and Social Studies is conveyed to the parents in Student's progress reports, three week reports, and through graded assignments sent home every week.<sup>76</sup>
49. Student attends \*\*\* and \*\*\* in the general education setting and is able to access the lessons without accommodations.<sup>77</sup>
50. The ARD Committee convened at Student's parents' request on August \*\*\*, 2018.<sup>78</sup> Bullying was listed among parental concerns, but does not appear to have been addressed

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<sup>70</sup> R. Ex. 12 at 46-47.

<sup>71</sup> R. Ex. 12 at 48-49.

<sup>72</sup> Tr. at 110, 223, 226.

<sup>73</sup> Tr. at 186, 210, 211-212, 228.

<sup>74</sup> R. Ex. 20 at 3.

<sup>75</sup> R. Ex. 20 at 7.

<sup>76</sup> Tr. at 214-215.

<sup>77</sup> Tr. at 472, 480.

<sup>78</sup> P. Ex. 10 at 1; R. Ex. 12 at 3.

at the meeting.<sup>79</sup> The family's advocate and the District's attorney attended.<sup>80</sup> Student's goals in Math, English Language Arts, and Reading were modified and work samples were added as a method of evaluating progress at parental request.<sup>81</sup> Student's father reported Student wants to \*\*\* and the family is encouraging Student to achieve that goal.<sup>82</sup>

51. Student was evaluated \*\*\* at parental expense. The evaluation found Student was \*\*\* years behind Student's peers in reading. Student's parents shared this information with the ARD Committee, but did not provide the evaluation.<sup>83</sup> Educators familiar with \*\*\* do not recommend the \*\*\* program for Student because staff are not certified Special Education teachers. \*\*\* is also not an instructional program, but a tutoring program focused on closing the gaps for students with learning disabilities, not students with \*\*\*.<sup>84</sup>
52. Student's parents requested an IEE in the areas of cognitive and achievement testing, an OT evaluation, and an FBA. Student's parents also asked for Student to receive Science and Social Studies instruction in a self-contained classroom, the most restrictive educational setting available in a public school.<sup>85</sup> Student's parents agree Student has made progress in speech, but not other areas, and want a more restrictive placement to get Student on grade level academically.<sup>86</sup>
53. District ARD Committee members raised concerns about removing Student entirely from the general education classroom, including the social detriment of being excluded from time with Student's peers, lost opportunities for collaborative learning, and the benefits of exposure to nondisabled peers for language development.<sup>87</sup>
54. Student's parents declined the District's offer to conduct an updated FIE while considering the parental request for an OT evaluation and an FBA.<sup>88</sup> The ARD Committee meeting ended in disagreement.<sup>89</sup>
55. The District provided PWN dated August \*\*\*, 2018. The District declined parental requests to hold ARD Committee meetings by video conference to facilitate the family advocate's participation and project meeting documents due to lack of capability to do so.

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<sup>79</sup> R. Ex. 12 at 51, 55.

<sup>80</sup> P. Ex. 10 at 1, 8; R. Ex. 12 at 3, 11.

<sup>81</sup> R. Ex. 12 at 10; Tr. at 121-122.

<sup>82</sup> P. Ex. 10 at 2; R. Ex. 12 at 4.

<sup>83</sup> R. Ex. 13 at 3; Tr. at 299, 440.

<sup>84</sup> Tr. at 566, 615.

<sup>85</sup> P. Ex. 10 at 2; R. Ex. 12 at 4; Tr. at 131-132.

<sup>86</sup> Tr. at 327, 328.

<sup>87</sup> P. Ex. 10 at 2; R. Ex. 12 at 4; Tr. at 109, 170, 353, 422.

<sup>88</sup> Tr. at 320-321, 499.

<sup>89</sup> P. Ex. 10 at 3, 4; R. Ex. 12 at 5, 6.

The District further declined to treat the August 2018 ARD Committee meeting as Student's annual review because it was not due for four months. The District agreed to consider the request for an IEE, but noted it had not yet conducted an OT evaluation because data did not suggest Student required OT. Student also did not exhibit behavioral concerns \*\*\* that would suggest an FBA was needed.

56. The PWN declined to move Student to a self-contained classroom for Science and Social Studies given the steady progress on Student's reading goals and ability to access the curriculum with supports and accommodations. Specific concerns included decreased access to the full range of curriculum, reduced educational opportunities with nondisabled peers, and limiting exposure to typically developing peers for language development. The District again offered to conduct an updated FIE.<sup>90</sup>
57. The District again provided PWN dated August \*\*\*, 2018. The District confirmed it was declining to hold Student's annual ARD Committee meeting at that time and project ARD Committee meeting documents. Because the requests were not supported by data, the District declined parental requests to send homework home every day, for daily communication from Student's teachers regarding Student's progress and behavior, and to ensure any testing sent home included a date and academic levels.<sup>91</sup>
58. Student began \*\*\* grade at a different \*\*\* school in the District in August 2018.<sup>92</sup> Student's \*\*\* grade Special Education teacher has daily contact with Student for two hours in the morning and one hour and 45 minutes in the afternoon. The teacher participates in ARD Committee meetings and helped develop Student's PLAAFPs and create Student's goals for the 2018-2019 school year.<sup>93</sup>
59. The ARD Committee reconvened on September \*\*\*, 2018 to continue the discussions from the August 2018 ARD meeting. Student's parents again requested an IEE and the District agreed to provide IEE criteria and information. The parents requested no changes to Student's schedule until the independent evaluation was complete and declined to sign the ARD meeting signature page.<sup>94</sup>
60. The District provided PWN dated September \*\*\*, 2018 acknowledging the IEE request in the areas of cognitive, achievement, OT, and an FBA. The District confirmed its agreement to do further cognitive and academic testing, but declined to conduct an OT evaluation and FBA because data supported neither request and the District had not had an opportunity to conduct its own evaluations in these areas.<sup>95</sup>

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<sup>90</sup> P. Ex. 10 at 5-6; R. Ex. 12 at 7-8.

<sup>91</sup> P. Ex. 18 at 2; R. Ex. 16 at 2.

<sup>92</sup> Tr. at 301-301.

<sup>93</sup> Tr. at 634-635.

<sup>94</sup> P. Ex. 11 at 2, 3; R. Ex. 13 at 2, 3.

<sup>95</sup> P. Ex. 11 at 5; R. Ex. 13 at 6; 13; R. Ex. 17 at 5.



61. Independent examiner qualifications were provided to the parents, which included a 100 mile geographical limitation unless there are no available providers.<sup>96</sup> Numerous individuals within the 100 mile geographic limitation were qualified to evaluate Student.<sup>97</sup> The District did not file a due process complaint against Student's parents after refusing to evaluate Student for OT and conduct an FBA.<sup>98</sup>
62. On September \*\*\*, 2018 the parents provided the District the names of two proposed independent evaluators. One proposed evaluator was from \*\*\*, Texas and the other from \*\*\*, Texas – both outside the District's 100 mile geographical limitation. The second proposed evaluator also did not have the professional credentials required by the District's IEE criteria.<sup>99</sup>
63. The District provided Student's parents the names of two additional evaluators who met District qualifications, both educational diagnosticians.<sup>100</sup> In a September \*\*\*, 2018 correspondence, the parents expressed dissatisfaction with the small number of potential evaluators provided and the District's geographical criteria and renewed their request for comprehensive testing of Student.<sup>101</sup> The District affirmed its previous position regarding the geographical limitation and scope of testing in correspondence on September \*\*\*, 2018.<sup>102</sup>
64. In Prior Written Notice dated September \*\*\*, 2018 the District declined a parental request for private tutoring at District expense because of Student's progress in reading and slow but steady mastery of Student's IEP goals. The District also cited Student's need for specialized instruction by a certified Special Education teacher, not a tutor. The District also refused to reimburse Student's parents for advocate fees and time off work to attend ARD Committee meetings based on District policies.<sup>103</sup>
65. The parents provided the District the names of two additional proposed evaluators on September \*\*\*, 2018.<sup>104</sup> In correspondence dated October \*\*\*, 2018 the District declined to grant an IEE with one proposed provider, a licensed psychologist from \*\*\*, Texas whose licensure did not appear current and who was not a Licensed Specialist in School Psychology (LSSP). The District also declined to contract with the second proposed

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<sup>96</sup> R. Ex. 27 at 1.

<sup>97</sup> Tr. at 116-117.

<sup>98</sup> Tr. at 76.

<sup>99</sup> R. Ex. 26 at 1; R. Ex. 27 at 1-2.

<sup>100</sup> R. Ex. 27 at 2; Tr. at 77-78.

<sup>101</sup> R. Ex. 28 at 1; Tr. at 80-81.

<sup>102</sup> P. Ex. 19 at 1; R. Ex. 29 at 1.

<sup>103</sup> R. Ex. 18 at 2.

<sup>104</sup> R. Ex. 30 at 1; R. Ex. 31 at 1.

- evaluator located in \*\*\*, Texas, well outside the District's 100 mile limit. The District provided the names of four additional individuals who met its IEE criteria.<sup>105</sup>
66. In a communication on October \*\*\*, 2018 the District provided the names of two educational diagnosticians who met its qualifications and advised the parents of the right to have one evaluator, rather than two, in response to a parental concern about the potential number of evaluators.<sup>106</sup> The parents initially selected one of the individuals provided on September \*\*\*, 2018 – an educational diagnostician from \*\*\*, Texas.<sup>107</sup>
67. In a correspondence dated October \*\*\*, 2018 the parents notified the District they preferred to have an LSSP, rather than an educational diagnostician, conduct the testing and requested a list of individuals with that credential. The District advised the parents it had already contracted with the previously selected provider and declined to change the evaluator.<sup>108</sup> The parents ultimately selected another educational diagnostician who met District qualifications to conduct the IEE.
68. The IEE in the areas of cognitive and academic achievement was conducted in October and November 2018 by an experienced educational diagnostician.<sup>109</sup> She administered the Kaufman Assessment Battery for Children, Second Edition (KABC-2), which measures cognitive ability. Student achieved Fluid-Crystallized Index score, or Full Scale IQ score, of \*\*\*, confirming the October 2016 finding Student is a student with \*\*\*.<sup>110</sup>
69. The KABC-2 revealed Student has significant weaknesses in short-term and long-term memory. In the area of Short Term Memory, or the ability to hang onto information for immediate recollection, Student scored \*\*\* (Lower Extreme range). This deficit impacts Student's ability to learn and is consistent with fluctuations in Student's performance. Results indicate Student will struggle to learn reading and math skills. In the area of Long-Term Storage and Retrieval, or the ability to learn new information, Student scored \*\*\* (Lower Extreme range).<sup>111</sup> The results indicate Student will require significant repetition to get the information to stay in Student's long-term memory.<sup>112</sup>
70. In Fluid Reasoning, or use of focused attention to solve novel problems, Student scored \*\*\* (Average range). In Crystallized Ability, or knowledge and skills of one's culture, Student scored \*\*\* (Below Average range). In Visual-Spatial Processing, or the ability to

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<sup>105</sup> R. Ex. 32 at 1-2.

<sup>106</sup> P. Ex. 21 at 1.

<sup>107</sup> R. Ex. 33 at 1.

<sup>108</sup> R. Ex. 34 at 1.

<sup>109</sup> P. Ex. 5; R. Ex. 3; Tr. at 95, 599.

<sup>110</sup> P. Ex. 5 at 3; R. Ex. 3 at 3; Tr. at 601-602.

<sup>111</sup> P. Ex. 5 at 2; R. Ex. 3 at 2; Tr. at 603.

<sup>112</sup> Tr. at 603-604.

use simulated mental imagery to solve problems, Student scored a \*\*\* (Lower Extreme range). Each score, with the exception of Fluid Reasoning, reflects normative weaknesses.<sup>113</sup>

71. Student was administered the Kaufman Test of Educational Achievement, Third Edition (KTEA-3), an assessment of academic ability. In Math Concepts and Application, which entails applying math principles to real life situations, Student scored \*\*\* (Low range). In \*\*\*, or basic reading skills, Student scored \*\*\* (Low range). In Written Expression, Student scored \*\*\* (Very Low range). In Math Computation, or working out the problem, Student scored \*\*\* (Low range). In \*\*\*, Student scored \*\*\* (Very Low range). In Reading Comprehension, Student scored \*\*\* (Below Average range).<sup>114</sup>
72. In \*\*\*, where the evaluator reads a story and then asks questions about it, Student achieved a score of \*\*\* (Average range). This score, an indication Student can listen to a teacher and understand the information, is a relative strength. In \*\*\*, Student scored \*\*\* (Below Average range).<sup>115</sup> The instructional implications of the KTEA-3 are that Student will struggle in a general education classroom in basic academic areas such as reading, English, and math.<sup>116</sup>
73. Student was given the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-5), an intelligence test that measures cognitive abilities. Student achieved the following scores: Verbal Comprehension (\*\*\*); Visual Spatial (\*\*\*); Fluid Reasoning (\*\*\*); Working Memory (\*\*\*); and Processing Speed (\*\*\*), yielding a Full Scale Intelligence Quotient of \*\*\*. These results are consistent with Student's performance on the KBAC-2.<sup>117</sup>
74. The WISC-5 working memory composite score is comprised of the Digit Span and Picture Span composites. Student scored \*\*\* (Extremely Low range). The instructional implications of the WISC-5 are that Student will have difficulty obtaining and retaining academic concepts – not only to learn them, but commit them to memory. Student may also demonstrate a skill one day and be unable to demonstrate the same skill the next day.<sup>118</sup>
75. The independent evaluator recommended a functional classroom environment focused on acquiring basic academic and life skills. She did not recommend instruction in only a special education classroom given Student's strong \*\*\* skills and the social benefits of exposure to certain grade level curriculum along with Student's peers. A more restrictive placement may be necessary if Student cannot retain the information presented in the

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<sup>113</sup> P. Ex. 5 at 1-3; R. Ex. 3 at 1-3.

<sup>114</sup> P. Ex. 5 at 21-22; R. Ex. 3 at 21-22; Tr. at 604-605.

<sup>115</sup> P. Ex. 5 at 22; R. Ex. 3 at 22; Tr. at 606, 617-618.

<sup>116</sup> Tr. at 606.

<sup>117</sup> P. Ex. 5 at 4; R. Ex. 3 at 44; Tr. at 606-607.

<sup>118</sup> P. Ex. 5 at 43-44; R. Ex. 3 at 43-44; Tr. at 608-609.

- general education classroom with accommodations.<sup>119</sup>
76. Student's teachers reported Student has average fine and gross motor skills.<sup>120</sup> Student enjoys \*\*\* and can do so independently. Student can \*\*\*. Student can \*\*\* as would be expected at Student's age. Student is independent in Student's \*\*\* at school. Student can \*\*\*.<sup>121</sup>
77. Occupational therapists work with students with disabilities in educational settings in the areas of fine motor skills, visual motor skills, and sensory processing skills. To qualify for OT in an educational setting, deficits in one or more of those areas must impact academics. The District's expert reviewed Student's records to form her opinion about Student's OT needs, including Student's FIE, October 2018 IEE, ARD Committee documents, and work samples.<sup>122</sup>
78. Student's work samples show \*\*\*. Work samples show Student can \*\*\*, which may be difficult for a child with a motor delay. A work sample \*\*\* showed good motor accuracy.<sup>123</sup> Student's \*\*\* answers show difficulty with closure, but otherwise show good pencil pressure, \*\*\*.<sup>124</sup> Student is able to access the curriculum with Student's current \*\*\* skills.<sup>125</sup>
79. Student's annual review was held on November \*\*\*, 2018. Parental concerns included Student's inability to read \*\*\* or write \*\*\* and Student's continued reliance on \*\*\* to compute \*\*\* math problems.<sup>126</sup>
80. The ARD Committee reviewed Student's PLAAFPS. In Reading, Student demonstrated academic weaknesses in \*\*\*. Student could \*\*\*. \*\*\* Survey on August \*\*\*, 2018 showed Student can \*\*\*. Student could recognize \*\*\*. The survey was re-administered on November \*\*\*, 2018 and Student could \*\*\*. Student had continued difficulties with \*\*\*. Student could use \*\*\*. \*\*\* testing showed Student's Text Fluency ability is \*\*\* and Student's Overall Reading ability is the \*\*\*. A Reading goal was recommended.<sup>127</sup>
81. Student's speech \*\*\* continued to improve. In Written Expression, Student had difficulty with \*\*\*, \*\*\*, and had difficulty with \*\*\*. Student could \*\*\*. Student was working to

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<sup>119</sup> P. Ex. 5 at 5; R. Ex. 3 at 5; Tr. at 611-612, 619.

<sup>120</sup> P. Ex. 5 at 5; P. Ex. 3 at 5.

<sup>121</sup> Tr. at 91, 313-315, 672.

<sup>122</sup> Tr. at 520, 527, 546-547.

<sup>123</sup> R. Ex. 24 at 21; Tr. at 530, 528-529.

<sup>124</sup> R. Ex. 24 at 10-12, 22-23; Tr. at 531, 536-537, 542.

<sup>125</sup> Tr. at 544.

<sup>126</sup> R. Ex. 14 at 2.

<sup>127</sup> R. Ex. 14 at 3.

\*\*\*.

82. In Math, Student could \*\*\*. \*\*\*.
83. Student responded to teacher directives, required some cues to stay on task, and completed Student's work. Student did not require behavioral or functional goals. Student was able to access the grade level TEKS in Science and Social Studies in the general education classroom with accommodations. Goals in each subject were developed. Student's Math goal was revised to \*\*\*.<sup>128</sup> The meeting was adjourned pending the results of the IEE.<sup>129</sup>
84. Student can \*\*\*, \*\*\*. Student knows \*\*\*. Student works on \*\*\*, a research-based reading program every day.<sup>130</sup> Student can \*\*\*.<sup>131</sup> Since the beginning of the 2018-2019 school year, Student has learned to \*\*\*. Student has progressed from \*\*\*.<sup>132</sup>
85. Student has made slow progress academically and is progressing at a slower rate than Student's peers due to Student's disabilities.<sup>133</sup> Even with several different teaching methods, \*\*\*.<sup>134</sup> Fluctuations in progress and skills are common for a student with disabilities like Student. It is expected Student will score lower on academic testing than Student's non-disabled peers and Student's level of academic performance is commensurate with Student's Full Scale IQ. Even intensive instruction would not close the gaps between Student and Student's non-disabled peers. No type of instruction can remedy Student's \*\*\*.<sup>135</sup>
86. Student has made slow, yet tangible progress in speech, particularly with \*\*\*. Student's speech is now \*\*\*. Student's speech is impacted by Student's \*\*\* and repetition is needed to master goals.<sup>136</sup> Student continues to struggle with certain \*\*\*. Student has almost mastered \*\*\*. At the January 2019 annual ARD Committee meeting, Student's speech goal was updated to require \*\*\*% \*\*\* and the ARD Committee hopes Student will reach or surpass this by the end of the annual period as this skill becomes more solidified in Student's speech. Strategies used with Student by District speech related service personnel are based on peer-reviewed research.<sup>137</sup>

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<sup>128</sup> R. Ex. 14 at 4, 8; Tr. at 664-665.

<sup>129</sup> R. Ex. 14 at 22; Tr. at 153.

<sup>130</sup> Tr. at 296, 648-649, 650, 676.

<sup>131</sup> Tr. at 658.

<sup>132</sup> Tr. at 465, 686.

<sup>133</sup> Tr. at 98, 419.

<sup>134</sup> Tr. at 411.

<sup>135</sup> Tr. at 99-100, 127, 613-614.

<sup>136</sup> Tr. at 351-352, 357, 366-367, 370, 381.

<sup>137</sup> Tr. at 356, 375-376.

87. The District inquired about parental concerns. Student's parent or parents attended and participated in ARD Committee meetings and were given opportunities to ask questions and did so. The District provided the parents drafts of documents at meetings.<sup>138</sup>
88. Student's parent recalls her \*\*\* reporting incidents of bullying at school to Student as early as 2014.<sup>139</sup> The principal of the school Student attended for \*\*\* received no reports from Student's parents. Others did not report bullying to her.<sup>140</sup> Student never reported bullying to Student's Special Education teachers.<sup>141</sup> Student \*\*\*, \*\*\*,<sup>142</sup>
89. Student's father contacted the school counselor to report another Student \*\*\* in January 2019. Prior to this report, Student's parents made no complaints of bullying during the 2018-2019 school year.<sup>143</sup>
90. The District has a bullying policy that includes a complaint process.<sup>144</sup> The policy defines 'bullying' as a single significant act or pattern of acts by one or more students directed at another student that exploits an imbalance of power and involves written or verbal expression, expression through electronic means, or physical conduct that has or will physically harm a student, damage student property, or place a student in reasonable fear of harm to his or her person or property; is sufficiently severe, persistent, or pervasive enough the action or threat creates an intimidating, threatening, or abusive educational environment; materially and substantially disrupts the educational process or the orderly operation of a classroom or school; or infringes on the rights of the victim at school. The policy establishes a procedure for notifying parents of alleged victims and establishes procedures for reporting an incident of bullying and the investigation of allegations.<sup>145</sup>
91. Student's parents did not raise questions about Student's progress reports to either Student's Special Education teacher \*\*\*,<sup>146</sup>
92. The District continues to believe the data does not support an OT evaluation. The District has, however, since agreed to conduct an OT evaluation and also obtained consent for an FIE.<sup>147</sup>

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<sup>138</sup> Tr. at 113, 136-137, 232-233, 263, 309, 329, 372, 670.

<sup>139</sup> Tr. at 285.

<sup>140</sup> Tr. at 571, 594.

<sup>141</sup> Tr. at 441, 677.

<sup>142</sup> Tr. at 288, 572-573.

<sup>143</sup> Tr. at 507-508.

<sup>144</sup> Tr. at 83, 494, 568.

<sup>145</sup> R. Ex. 43 at 2; R. Ex. 44 at 1-3.

<sup>146</sup> Tr. at 418, 671, 697-698.

<sup>147</sup> Tr.at 89-90.

## VI. STATUTE OF LIMITATIONS

Under the IDEA, a parent may file a due process complaint on any matter relating to the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE within two years of the date the parent knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. § 1415(b)(6)(f)(3)(C); 34 C.F.R. §§ 300.503(a)(1)(2); 300.507(a)(1)(2). The two year limitations period may be more or less if the state has an explicit time limitation for requesting a due process hearing under IDEA, in which case the state timelines apply. 20 U.S.C. §1415(f)(3)(C); 34 C.F.R. § 300.507(a)(2). In Texas, state regulations require a parent to file a due process hearing within one year of the date he or she knew or should have known about the alleged action forming the basis for the hearing request. 19 Tex. Admin. Code § 89.1151(c).

Petitioner alleges a deprivation of FAPE for the 2017-2018 and 2018-2019 school years and raised neither exception to the statute of limitations in Petitioner's due process complaint. The District raised the one year statute of limitations as an affirmative defense. Specifically, the District contends the limitation period is calculated going back one year from the date the complaint was filed and only claims accruing after November 1, 2017 fall within the statute of limitations.

The District's argument to count back one year from the date the complaint, however, misapplies the discovery rule. Petitioner's cause of action under the IDEA accrued when Student's parent knew or had reason to know of the injury that forms the basis of the due process complaint. *See, Doe v. Westerville City Sch. Dist.*, 50 IDELR, 132, p. 5-6 (D.C. Ohio 2008). Student's parents have consistently raised concerns about Student's academic progress, but first disagreed with Student's IEP and placement in August 2018. Petitioner's complaint was filed on October 31, 2018 - within one year of when the parents knew or should have known of the claims dating back to August 2018. The affirmative defense of the statute of limitations is overruled and Petitioner may proceed with all claims.

## VII. DISCUSSION

**A. Duty to Provide a Free, Appropriate Public Education**

Students with disabilities are entitled to a FAPE that provides special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d). The District must provide a FAPE to all children with disabilities residing within its jurisdiction between the ages of three and twenty-one. 34 C.F.R. § 300.101(a); Tex. Educ. Code § 12.012(a)(3). The District must provide these students specially designed, personalized instruction with sufficient support services to meet their unique needs in order to receive an educational benefit. Instruction and services must be at public expense and comport with the IEP developed by the Student's ARD Committee. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

**B. Individualized Education Program**

A school district must ensure an IEP is in effect at the beginning of each school year to meet its obligation to provide a student with a disability a FAPE. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured, and must instead include a description of related services, supplementary supports and services, instructional arrangement, program modifications, supports from school personnel, designated staff to provide the supports and services, and the duration, frequency and location of the services that will be provided. 34 C.F.R. §§ 300.22; 300.323(a).

**C. Burden of Proof**

There is no distinction between the burden of proof in an administrative hearing and judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n. 4 (5th Cir. 2009). The burden of proof in a due process hearing is on the party challenging the IEP and placement. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993); *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1291 (5th Cir. 1991). The burden of proof is on Petitioner to show the District did not provide Student a FAPE.



**D. Individualized Education Program Requirements**

In developing an IEP for a student with a disability, the ARD Committee must consider his or her strengths, parental concerns for enhancing the student's education, results of the most recent evaluation data, and academic, developmental, and functional needs. A student's IEP must include a statement of PLAAFPs, including how a student's disability affects his or her involvement and progress in the general education curriculum. 34 C.F.R. 300.320(a)(1)(i). For students whose behavior impedes his or her learning or that of others, the IEP must also consider positive behavioral interventions and supports and other behavioral strategies. 34 C.F.R. § 300.324(a)(2)(i).

The ARD Committee is required to review, at least annually, a student's IEP, and make any needed revisions to address lack of expected progress on the basis of any re-evaluations, information provided by parents, or the student's anticipated needs. Consideration of the student's behavioral needs must also be addressed. 34 C.F.R. § 300.324(b).

While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the school district must nevertheless provide Student with a meaningful educational benefit and one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist. v. V.P.*, 582 F.3d 576, 583 (5th Cir. 2009). The basic inquiry in this case is whether the IEP developed and implemented by the District 'was reasonably calculated to enable Student to make progress appropriate in light of Student's unique circumstances.'" *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 at 999 (2017).

**E. Free Appropriate Public Education**

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

- The program is individualized on the basis of assessment and performance;
- The program is delivered in the least restrictive environment;
- Services are provided in a coordinated, collaborative manner by the key stakeholders; and
- Positive academic and non-academic benefits are demonstrated.

*Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5th Cir. 1997).

These factors are indicators of an appropriate program and guide the fact-intensive inquiry required in evaluating a school district's educational program and need not be accorded any particular weight or applied in any particular way. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009). *See also, Klein Indep. Sch. Dist. v. Per Hovem*, 690 F. 3d 390, 397 (5th Cir. 2012).

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

First, the evidence showed Student's program was individualized on the basis of assessment and performance.

Student's October 2016 FIE revealed, and the October 2018 IEE confirmed, Student is eligible for special education as a student with \*\*\*. Both evaluations, along with other District assessments, identify significant academic weaknesses. Student's IEP goals and objectives addressed foundational academic skills, such as \*\*\* and speech goals targeted identified weaknesses \*\*\*. As skills are mastered or insufficient progress on a goal is not made, goals are updated or modified.

Student was identified as eligible as a student with \*\*\* in October 2016. The evaluation identified specific academic needs. The ARD Committee modified Student's Schedule of Services so Student would receive specialized instruction in Reading and Math in \*\*\* classroom with a certified Special Education teacher to reflect Student's need for individualized instruction. Based on the strengths and deficits identified in the FIE, the ARD Committee adopted extensive

classroom and instructional accommodations, some of which were recommended in the FIE, to support Student in the general education and \*\*\* classrooms.

The October 2016 FIE recommended one on one instruction. Student was provided one on one instruction with a Special Education teacher or educational aide during Student's \*\*\* and 15-20 minutes daily of direct instruction with the teacher during \*\*\* grade. Student's \*\*\* grade Special Education teacher works with Student for two hours in the morning and one hour and 45 minutes in the afternoon each day and some of this time was one on one instruction. This FIE recommendation was implemented by the District.

Related services may be required to assist a student with a disability with benefitting from special education. 34 C.F.R. § 300.34(a). Student's October 2016 FIE and October 2018 IEE do not recommend related services apart from speech. Student was first identified as a student with a \*\*\* in 2014 with continued eligibility established by the October 2016 evaluation. Student's speech needs were considered at every annual ARD Committee meeting, with goals and objectives developed by an LSSP. Student received speech therapy 30 minutes two times per week during the 2017-2018 and 2018-2019 school years, delivered one on one or in small groups, to target identified needs in the areas of language and articulation. Student's goals were modified to reflect Student's progress. This aspect of Student's IEP was individualized on the basis of assessment and performance.

Student's ARD Committee reviewed and revised Student's PLAAFPs at the October 2016 meeting when eligibility as a student with \*\*\* was added. Student's PLAAFPs were reviewed and revised by every annual ARD Committee in January 2017, December 2017, and November 2018. Student's Special Education teachers gathered information from a variety of sources in developing Student's PLAAFPs. This information was used to inform the content of Student's academic, behavioral, functional, and speech IEP goals. Student's PLAAFPs were sufficiently detailed to help inform ARD Committee decisions about how Student's disability impacts Student's involvement and progress in the general education curriculum and the educational placement Student required to meet Student's academic and non-academic needs. 34 C.F.R. 300.320(a)(1)(i).

The District evaluates academic proficiency for all students with \*\*\* and \*\*\* software throughout the school year. \*\*\* Reading tests were given in October 2017, January 2018, and May 2018 and \*\*\* Math tests given in September 2017, January 2018, and May 2018. The District collected \*\*\* data tracking Student's reading skill development numerous times between October 2015, Student's \*\*\*, and January 2019. This information helped inform Student's PLAAFPs and gave District educators objective indicators of Student's academic levels and need. These needs were targeted in Student's IEP goals and objectives in Reading and Math.

Student's PLAAFPs included a review of Student's behavior. Student's behavioral performance, as reported by Student's teachers, showed no concerns. Student may require slightly more redirection than Student's peers, but Student's behavior is otherwise consistent with that of a \*\*\* grader. Student gets along with peers, has friends, and has never been disciplined at school. The ARD Committee considered Student's behavior and consistently found it did not impede Student's learning or that of others and otherwise addressed Student's behavioral needs, as required. 34 C.F.R. § 300.324(b). The evidence supports the District's conclusion Student did not exhibit a need for a BIP.

## **2. Least Restrictive Environment**

The evidence showed Student was educated in the least restrictive environment.

### **a. Inclusion of Students with Disabilities**

The IDEA expresses a strong preference for inclusion of students with disabilities and requires those students be educated with students without disabilities to the maximum extent appropriate. The IDEA thus requires education of a student with a disability in the least restrictive environment appropriate to meet his or her needs. Special classes, separate schooling, or other removal from the regular educational environment may occur only when the nature or severity of the student's disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. §

300.114(a)(1)(2)(i)(ii); *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 (5th Cir. 2009).

**b. Least Restrictive Educational Environment**

Students with disabilities must be educated with students without disabilities to the fullest extent possible and consideration of a student's least restrictive environment must include an examination of the degree of benefit the student will obtain from an inclusive education. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1049 (5th Cir. 1989). There is a presumption in favor of the educational placement established by the IEP. The party challenging the IEP bears the burden of showing why the educational setting is not appropriate. *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d at 1291.

The IDEA's implementing regulations require a school district to ensure the availability of a continuum of instructional placements to meet the needs of students with disabilities, including instruction in regular classes, special classes, special schools, homes, hospitals, and institutions. 34 C.F.R. § 300.115. State regulations require a school district make available a continuum of instructional arrangements to meet the individualized needs of students with disabilities, to include mainstream classes, homebound services, hospital classes, resource room and/or services, self-contained-regular campus (mild, moderate, severe), nonpublic day school, and residential treatment facility. 19 Tex. Admin. Code § 89.63(c).

In this jurisdiction, there is a presumption in favor of inclusion of students with disabilities under a two-part test to determine whether removal from the general education setting is appropriate. First, whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily for the student. If not, second, whether the school district included the student to the maximum extent appropriate. *Daniel R.R.*, 874 F.2d at 1045. Consideration of several factors is required to resolve these inquiries, including:

- The nature and severity of the student's disabilities;
- Student's academic achievement;

- The non-academic benefits of regular classroom placement;
- The overall experience in the mainstreamed environment balancing the benefits of regular education and special education to the student; and
- The effect of the student's presence on the regular class, specifically whether the student's behavior so disruptive in the regular classroom that the education of the other students is significantly impaired and whether the student requires so much attention the needs of other students will be ignored. *Id.* at 1048-49.

No single factor in this non-exhaustive list is dispositive. *Id.* at 1048. The analysis must be an individualized, fact-specific inquiry and requires careful examination of the nature and severity of the student's disabilities, his or her needs and abilities, and the school district's response to those needs. *Id.* The issue of whether the IEP was provided in the least restrictive environment is a relevant factor in making the overall determination whether the school district's program provided the student FAPE. *Daniel R.R.*, 874 F.2d at 1049; *Michael F.*, 118 F.3d at 253; *R.H. v. Plano Ind. Sch. Dist.*, 607 F. 3d 1003, 1012-1013 (5th Cir. 2010).

### **c. Student's Educational Placement**

The nature and severity of Student's disabilities impact Student's ability to be educated entirely in the general education classroom. Student requires speech therapy in a small group setting and intensive and specialized instruction from a Special Education certified teacher in \*\*\* concepts of Reading, Language Arts, and Math in a \*\*\* classroom. Student is otherwise included general classroom with Student's peers, including \*\*\*, \*\*\*, \*\*\*, and \*\*\*.

The evidence showed Student participates in all lessons without accommodations in \*\*\* and \*\*\*. Student participates in all classroom activities in \*\*\* and \*\*\* in the general education classroom. While both subjects require Student to be able to read at a higher \*\*\*, these classes lend themselves well to an inclusion opportunity for Student. The subjects require less pencil and paper based academic learning and Student benefits from the collaborative learning model, a research-based instructional approach, and projects, art activities, and group work that facilitate Student's participation in classroom activities. Student achieved passing grades in \*\*\* and \*\*\* based on participation.

In August 2018, Student's parents requested a change in Student's educational placement to a self-contained classroom for all academic subjects in hopes doing so would improve Student's academic skills to a level more comparable with same age peers. A self-contained classroom is the most restrictive educational setting available on a public school campus and is more restrictive than Student's current \*\*\* classroom placement.

The District's opposition to the parents' placement proposal appears rooted not only in its legal objection to ensure Student is educated with Student's peers to the maximum extent appropriate, but is also based on data it gathered about Student's expected level of performance in the general education classroom with accommodations and supports. Receiving academic instruction in \*\*\* and \*\*\* capitalizes on Student's identified strength in social skills. Not only does the parents' proposal for a significantly more restrictive setting run counter to Student's identified social strengths, Student would be deprived of opportunities to practice and learn language from typically developing peers. A less included education would also eliminate the social aspect of learning available to Student in the general education classroom.

Because Student's current accommodations and modifications allow Student to access the general education curriculum in \*\*\* and \*\*\*, adjustment of those accommodations or additional supports would likely be appropriate before placing Student in a self-contained setting for those subjects.

Balancing the competing factors, Student was included to the maximum extent appropriate. The evidence shows Student was educated in the least restrictive setting and Petitioner did not meet Petitioner's burden of showing the educational setting in Student's IEP was inappropriate and Student requires a more restrictive educational setting. *Daniel R.R.*, 874 F.2d at 1049; 34 CFR § 300.114.

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

Third, the evidence showed Student's services were provided in a coordinated and collaborative manner by key stakeholders.

The District met its obligation to convene annual ARD Committee meetings in January 2017, December 2017, and November 2018. These meetings were attended by the requisite members, including Student's Special Education teacher, a General Education teacher, and Student's parent or parents. *See* 34 C.F.R. § 300.321(a); 89 Tex. Admin. Code § 89.1150(c).

Student's parent or parents attended all ARD Committee meetings, either in person or by telephone. They were routinely invited to share parental concerns, participated in the discussions, and asked questions of District personnel. Parental requests were included in Student's IEP.

Student's parents raised significant concerns with Student's educational program and placement beginning in August 2018, straining the relationship between the parties. Parental requests for technology to facilitate advocate participation in meetings and project ARD Committee meeting documents were declined. Despite emerging disagreements, the District continued to meet its obligations to provide progress reports and keep and the parents apprised of its position regarding Student's education through Prior Written Notice. The weight of the credible evidence supports the conclusion Student's parents were able to access and participate in the IEP development process.

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

Fourth, the evidence supports the conclusion Student's program was reasonably calculated to provide meaningful educational benefit. *Rowley*, 458 U.S. at 206-207. The evidence also shows Student's program was appropriately ambitious in light of Student's unique circumstances. *Endrew F.*, 137 S. Ct. at 992.

The IDEA does not require a student's IEP guarantee a certain level of accomplishment. An IEP must instead be reasonably calculated to meet a student's educational needs given student's unique circumstances. *Id.* A school district is not required to provide a student the best possible



education and improvement in every academic and non-academic area is not required to receive an educational benefit. The issue is not whether the school district could have done more, but whether the student received an educational benefit. *Houston Ind. Sch. Dist. v. V.P.*, 582 F. 2d 576, 590 (5th Cir. 2009). Whether a student demonstrates positive academic and non-academic benefits is ‘one of the most critical factors in this analysis’. *Renee J. v. Houston Indep. Sch. Dist.*, 913 F.3d 523, 529 (5th Cir. 2019).

**a. Academic Benefits**

Student’s academic progress has been slow, but Student is making progress in retaining and applying basic academic skills. In a Reading \*\*\* test on January \*\*\*, 2018 Student’s skill set scores indicated Student was a \*\*\* with a scaled score between \*\*\* and \*\*\*. \*\*\* Reading testing in October 2017, January 2018, and May 2018 reflect progress in each domain. Student progressed from a \*\*\* in January 2018 to a \*\*\* in May 2018 meaning Student has the skills to work on becoming a fluent reader.

Student needs repetition to master Student’s speech goals and has made slow but steady progress in speech, \*\*\*. Student’s speech is now \*\*\*. Student’s parents agree Student has made progress in this area.

Student’s academic abilities have continued to develop in Student’s \*\*\* grade year. Student can now \*\*\*. \*\*\*. \*\*\*. Since the beginning of the 2018-2019 school year, Student can \*\*\*. While Student is progressing at a slower rate than Student’s peers due to Student’s disabilities, Student’s progress is consistent with Student’s level of disability. See *Houston Indep. Sch. Dist. v. Bobby R.*, 328 F.3d 804 (5th Cir. 2003). Student received academic benefits from Student’s educational program.

**b. Non-Academic Benefits**

Student received non-academic benefits as well. By December 2017, Student mastered Student’s Functional goal and improved in Student’s ability \*\*\* such that a goal in this area was

no longer necessary. Student's social skills are an identified strength and the District seeks to capitalize on this strength by ensuring Student is included with Student's peers as much as possible.

## 5. Conclusion

The basic floor of opportunity standard set forth in *Rowley* does not require a district to remediate a student's disability. When the four requirements set forth in *Cypress-Fairbanks v. Michael F.*, are met, a District satisfies its FAPE obligation. The hearing officer concludes Student's program was individualized on the basis of assessment and performance, delivered in the least restrictive environment, services were provided in a coordinated, collaborative manner by the key stakeholders, and Student made academic and non-academic progress. When Student's program is considered as a whole, Student was provided a FAPE by the District. *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012).

## F. Bullying as a Denial of FAPE

Bullying is the unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance. The behavior must be repeated, or have the potential to be repeated, over time. Bullying includes actions such as making threats, spreading rumors, attacking someone physically or verbally and excluding someone from a group on purpose. *Government Accountability Office*, Report on Bullying (June 2012) (<http://www.gao.gov/assets/600/591202.pdf>). District policy also defines bullying and details procedures for reporting incidents of bullying by and to parents and the investigation of these incidents.

A school district's failure to stop bullying may constitute a denial of a FAPE. *Shore Regional High Sch. Bd. of Educ. v. P.S.*, 381 F. 3d 194 (3d Cir. 2004); *Letter to Dear Colleague*, 113 LRP 33753 (OSERS Aug. 20, 2013) (bullying that results in the student not receiving meaningful educational benefit constitutes a denial of a FAPE under the IDEA and must be remedied). Bullying may lead to a denial of a FAPE if school personnel were deliberately indifferent to, or failed to take reasonable steps, to prevent bullying that adversely affects or results in the regression of educational

benefit or substantially restricts the student with a disability from accessing educational opportunities. *T.K. and S.K. ex rel K.K. v. New York City Dept. of Educ.*, 779 F. Supp. 2d 289, 316 (S.D. N.Y. 2011). The bullying need not be outrageous, but sufficiently severe, persistent, or pervasive to create a hostile environment for the student with a disability. Petitioner does not need to show the bullying prevented all opportunity for an appropriate education, only that it is likely to impact a student's opportunity for an appropriate education. *Id.* at 779 F. Supp. 2d at 317.

The principal of the school Student attended \*\*\* received no reports of bullying from Student's parents or others. The record shows that when Student moved \*\*\*, there were no reports of bullying until January 2019. The incidents the District had knowledge of related to Student's \*\*\* and the incident where \*\*\* do not constitute bullying as defined by federally issued guidance or District policy.

Bullying involves exploitation of the balance of power between students and a negative peer interaction may or may not rise to the level of bullying. While Student may have reported negative peer interactions to Student's parents they may perceive as bullying, the incidents were not reported to District personnel, with the exceptions noted above.

While parent report is but one method educators learn of an allegation of bullying, the District must otherwise take reasonable steps to prevent bullying of a student with a disability. In this case, the District was not on notice of this particular parental concern before August 2018. The alleged actions against Student were also not sufficiently severe, persistent, or pervasive to create a hostile environment or affect Student's opportunity for an appropriate education. The record does not support Petitioner's allegation Student was bullied or bullying resulted in any regression or substantially restricted Student's access to Student's educational program. *T.K.*, 779 F. Supp. 2d at 317.

#### **G. Procedural Issues**

Petitioner's procedural allegations are as follows: Whether the District failed to allow meaningful parental participation in the decision-making process regarding the provision of FAPE to Student by failing to:

- a. Provide Student's parents with compliant PWN;
- b. Provide timely and adequate progress reports to Student's parents;
- c. Conduct appropriate, comprehensive, and timely evaluations of Student; and
- d. Provide an IEE in OT and an FBA and impermissibly cap the parents' IEE request and failed to provide a truly independent evaluation.

To prevail, Petitioner must show these procedural violations significantly impeded parental opportunity to participate in the decision-making process regarding the provision of a free, appropriate public education to Student. 34 C.F.R. § 300.513(a)(2)(ii).

### **1. Prior Written Notice**

Petitioner did not meet Petitioner's burden of proving the District violated parental procedural rights under the IDEA. A school district must provide the parent of a child with a disability PWN when it proposes to initiate or change the identification, evaluation, or educational placement of the student, or the provision of FAPE or refuses to change the educational placement of the student or the provision of FAPE. 34 C.F.R § 300.503(a). An IEP itself may be a component of PWN if the information regarding the school district's proposal or refusal to change a student's identification, evaluation, educational placement or provision of FAPE is stated in the IEP. *Letter to Lieberman*, 52 IDELR 18 (OSEP 2008); *Assistance to States for Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46,691 (Aug. 14, 2006).

In this case, the record reflects the District provided the parents PWN on December \*\*\*, 2017 after Student's annual ARD Committee meeting to confirm its intent to continue providing Student special education and related services. The District refused several parental requests,

including a more restrictive placement, but agreed to consider the request for an IEE in PWN provided on August \*\*\*, 2018. PWN provided on August \*\*\*, 2018 and September \*\*\*, 2018 confirmed refusal of several parental requests and agreement to an IEE in the areas of cognitive and achievement testing.

The notices served as written communication to Student's parents of the District's proposals and refusals regarding their \*\*\*'s special education program. The notices were provided contemporaneously with annual ARD Committee meetings and at other junctures where parental requests were accepted or refused as the regulations require. The District met its obligation as to PWN.

## **2. Progress Reports**

Petitioner did not meet Petitioner's burden of proving the District violated parental procedural rights under the IDEA by failing to provide timely and adequate progress reports. Periodic reports to parents of students with disabilities on the progress he or she is making on his or her goals are required under IDEA, such as through the use of quarterly reports, other periodic reports, or concurrently with report cards. 34 C.F.R. § 300.320(a)(3)(ii).

The District provided Student's parents software generated progress reports in each subject or other area, including speech, where Student had a goal every \*\*\* weeks concurrent with reports cards as required by Student's IEP. The reports reflected the percentage of mastery toward a particular goal on the date the report is prepared. There is no evidence Student's parents did not receive these reports. Student's parents made no inquiries with Student's Special Education teachers or other District personnel with questions regarding Student's progress reports. The District met its obligation as to progress reports

## **3. Evaluations**

Petitioner did not meet Petitioner's burden of proving the District violated parental procedural rights under the IDEA by failing to conduct appropriate, comprehensive, and timely evaluations of Student.

Student's eligibility for special education as a student with \*\*\* was identified in the October 2016 updated FIE and any claims related to that FIE fall outside the applicable statute of limitations. Student's parents requested an IEE in the areas of cognitive and achievement on August \*\*\*, 2018 which the District agreed to on August \*\*\*, 2018. While maintaining the data did not support an educational need for an OT evaluation or FBA, the District attempted to work with the parent to identify an IEE evaluator to conduct cognitive and achievement testing.

Student's parents chose an IEE provider in October 2018 and the IEE was completed October and November 2018. The IEE consisted of the agreed to academic and cognitive testing and adaptive behavior testing and was sufficiently comprehensive to give the ARD Committee a full picture of Student's strengths, needs, and deficits and confirm earlier findings. The District met its obligation as to the timing and scope of evaluations.

#### **4. Independent Educational Evaluation**

Petitioner did not meet Petitioner's burden of proving the District violated parental procedural rights under the IDEA by failing to provide an IEE in OT and an FBA or impermissibly capping the parents' IEE request.

The parent of a child with a disability is entitled to an IEE at public expense if the parent disagrees with the school district's own evaluation so long as the IEE meets reasonable school district criteria. 34 C.F.R. § 300.502(a)(1)-(3), (b)(1). A school district may challenge a parental request for an IEE by requesting a due process hearing and showing its evaluation was appropriate under IDEA. If the school district's evaluation is appropriate, the parent still has the right to the IEE, but not at public expense. 34 C.F.R. § 300.502(b)(2).

The District imposes a 100 mile geographical limit on independent evaluators to facilitate student observation and ARD Committee participation. The District will exceed the limitation if there are no available providers within the geographical limitation. While Student's parents may have preferred an evaluator from outside the 100 mile limit or one with other qualifications, numerous qualified providers were available in the area, rendering the geographical limitation reasonable. *Letter to Bluhm*, 211 LRP 7086 (OSEP 1980). Student's parents also did not prove Student has unusual behavior or other disability that would necessitate an exception to the District's IEE criteria. *Letter to Parker*, 104 LRP 30069 (OSERS 2004).

The District never conducted an OT evaluation of Student because Student did not demonstrate an academic need for OT. At school, Student is able to \*\*\*. Student is independent in Student's personal care needs. Student demonstrates \*\*\* has good spatial awareness. Student is able to access the curriculum with Student's current fine motor skills and does not otherwise demonstrate deficits in sensory processing, fine motor, or visual motor skills impeded Student's academics.

The District has also never conducted an FBA of Student because Student's behavior did not warrant one. Student has good behavior in school and has never been disciplined or suspended. Student consistently achieves high marks in the area of Conduct. There was no evidence Student's behavior interferes with Student's learning.

Not only did Student not show a need for either an OT evaluation or FBA, the District has not first conducted evaluations in those areas with which the parent can disagree. The parental request for IEEs in OT and behavior are therefore not ripe. 34 C.F.R. § 300.502(b)(1). Because the District granted the parental request for an IEE for cognitive and achievement testing, the District did not need to sue Student's parents to defend its evaluation. 34 C.F.R. § 300.502(b)(2)(ii).


### VIII. CONCLUSIONS OF LAW

1. Petitioner did not meet Petitioner's burden of proof as the party challenging a student's IEP and educational placement. *Schaffer v. Weast*, 546 U.S. 49 (2005).
2. Student was provided a FAPE during the relevant time period. IEPs for the 2017-2018 and 2018-2019 school years were appropriately ambitious and reasonably calculated to meet Student's needs in light of Student's unique circumstances. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017).
3. The District did not violate parental procedural rights under the IDEA as to PWN, progress reports, or an IEE in areas previously unassessed by the District. 34 C.F.R. § 300.513(a)(2)(ii).
4. The District conducted timely and comprehensive evaluations of Student as required under the IDEA. 34 C.F.R. § 300.304.

### IX. ORDERS

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

**SIGNED April 1, 2019.**

  
\_\_\_\_\_  
**Kathryn Lewis**  
**Special Education Hearing Officer**  
**For the State of Texas**

### X. NOTICE TO PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 20. U.S.C. § 1415(i)(2); 19 Tex. Admin. Code Sec. 89.1185(n).