

DOCKET NO. 267-SE-0516

STUDENT,	§	BEFORE A SPECIAL EDUCATION
b/n/f PARENT & PARENT,	§	
Petitioner	§	
	§	
v.	§	HEARING OFFICER FOR
	§	
LEANDER INDEPENDENT SCHOOL	§	
DISTRICT,	§	
Respondent	§	THE STATE OF TEXAS

DECISION OF HEARING OFFICER

Student (Student), by next friends Parent (Mother) and Parent (Father) (all three collectively, Petitioner) requested an impartial due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The Leander Independent School District (the District) is the Respondent to Petitioner’s complaint. Petitioner’s allegations include that the District incorrectly rescinded Student’s eligibility for Special Education, failed to fully identify all of Student’s suspected disabilities when evaluating Student for Special Education, and failed to provide Student with a free appropriate public education (FAPE) designed to meet Student’s unique educational needs. The District responded that Student did not meet the second prong of eligibility for special education and related services, Student was fully evaluated in all areas of suspected disability as part of the Full Individual Evaluation (FIE) and its addendum, and asserted that to the extent a procedural violation may have occurred, the Student was not denied a FAPE.

As discussed further below, the hearing was held on July 18-19, 2016, in Leander, Texas. Petitioner was represented by attorneys Sonya Kerr and Fernando Salcedo, and the District was represented by attorneys Kelly Shook and Todd Clark. As also discussed below, a continuance of the briefing dates and an extension of the decision due date were granted, for good cause, and the Decision was timely issued on August 22, 2016.

I. HEARING REQUEST, CLAIMS AND COUNTERCLAIM, AND DECISIONS OF THE HEARING OFFICER

Petitioner filed a Request for a Due Process Hearing (Complaint) on May 20, 2016. In its First Amended Complaint, filed on May 23, 2016, Petitioner clarified the issues, without adding any issues not previously alleged. Petitioner's allegations and short summaries of the decisions made by the Hearing Officer follows. The District's counterclaim is included as issue No. 4.

Petitioner's Claims

1. **Whether the District incorrectly rescinded Petitioner's eligibility for Special Education;**

Decision of the Hearing Officer is for the Petitioner.

2. **Whether the District failed to fully identify all of Petitioner's suspected disabilities when evaluating Student for Special Education;**

Decision of the Hearing Officer is for the District.

3. **Whether the District failed to provide Petitioner with a FAPE by failing to implement the IEP it prepared to meet Student's unique educational needs;**

Decision of the Hearing Officer is for Petitioner.

Counter Claim

4. **Whether the District's FIE is sufficient or an Independent Educational Evaluation (IEE) should be ordered to be performed at the District's expense;**

Decision of the Hearing Officer is for the District.

Relief Sought

1. **A finding that Petitioner is eligible for Special Education services;**

Decision of the Hearing Officer is for Petitioner.

2. **An order requiring the District to hire an independent expert qualified to provide direction and guidance to Petitioner's Admission Review and Dismissal Committee (ARDC) and to all school staff so that they can prepare an Individual Education Program (IEP) for Petitioner that is designed to meet Student's unique educational needs, or in the alternative order the District to pay for Petitioner to receive a program of education from a private source or some combination thereof;**

Decision of the Hearings Officer is for the District.

3. **An order requiring the District to provide Petitioner with compensatory education in an amount equal to the deprivation of education Student has experience;**

Decision of the Hearings Officer is for Petitioner.

4. **An order requiring the District to reimburse Petitioner for all costs of private evaluations and tutoring provided prior to the time that Petitioner was deemed eligible for special education services;**

Decision of the Hearings Officer is for the District.¹

II. PROCEDURAL HISTORY

This hearing was initially set pursuant to the urgency suggested by the IDEA and at the request of Petitioner, who wanted a decision before the beginning of the fall 2016 semester. An initial scheduling order was issued on the same day the First Amended Complaint was filed, setting the hearing for July 6-7, 2016, with a decision deadline of August 6, 2016. On May 27, 2016, the District filed its plea to the jurisdiction and response to the First Amended Complaint, and prior written notice. In the response, the District asserted a counter-claim defending the FIE after Petitioner requested an IEE.

The District requested a continuance of the hearing, because its witnesses were not available during the summer. This request was strongly objected to by Petitioner, who desired a decision before the beginning of the 2016-2017 school year. The Hearing Officer denied the

¹ No further discussion of this issue will be addressed in this Decision as it was not pursued during the evidentiary hearing.

request, noting that Petitioner made it clear in the complaint that Petitioner's expectation was that this case would go to hearing within the deadlines set out under the IDEA. Petitioner agreed to mediate and discuss settlement but only if these could be accomplished within the IDEA deadlines.

The District's attorney also had a conflict for the hearing dates, so Petitioner agreed to move back the hearing by one week, starting on July 11, 2016. However, the Hearing Officer was in training that week, so the hearing was moved back two weeks, to July 18-19, 2016. At Petitioner's insistence, the decision due date remained August 6, 2016. The parties were advised in the initial scheduling order that the Hearings Officer was out of the country from July 31, 2016, to August 14, 2016. It was decided that the decision would be issued by July 30, 2016, and an expedited transcript (3-day turnaround) was ordered. The hearing took 20 hours, essentially holding a three-day hearing in two days. Unfortunately, due to the amount of hearing time and poor room acoustics, the three-day turnaround on the transcript was not possible. The transcript was not completed until July 28, 2016, a day after the parties' briefing was due. At this point, Petitioner requested a continuance for the parties' briefing to August 15, 2016. The decision due date was extended to August 22, 2016.

III. APPLICABLE LAW

As a local educational agency responsible for complying with IDEA as a condition of the State of Texas receiving federal education funding, the District is required to provide each child with a disability in its jurisdiction with a FAPE.² The FAPE provided to a student with a disability must be provided at public expense, meet state standards, include an appropriate school education, and be provided in accordance with a properly developed IEP.³

The FAPE tailored by the ARDC, as expressed in the IEP:

² 20 U.S.C. §§ 1400(c) and 1412(a)(1).

³ *Board of Edu. Of the Hendrick Hudson Cent. Sch. Dist. Westchester County v. Rowley*, 458 U.S. 176, 181; 102 S. Ct. 3034, 3038 (1982).

need not be the best possible one, nor one that will maximize the child's educational potential; rather it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit Student 'to benefit' from the instruction. In other words, the IDEA guarantees only a 'basic floor of opportunity' for every disabled child. . . . Nevertheless, the educational benefit . . . to which an IEP must be geared cannot be a mere modicum or *de minimis*; rather, an IEP must be 'likely to produce progress, not regression or trivial educational advancement.' In short, the educational benefit that an IEP is designed to achieve must be 'meaningful.'⁴

The IDEA creates a presumption that a school district's decisions made pursuant to the IDEA are appropriate and that the party challenging the decisions bears the burden of proof at all times.⁵ A party attacking the appropriateness of an IEP established by a school district bears the burden of showing why the IEP and resulting placement were inappropriate under the IDEA.⁶ To prevail, Petitioner must, therefore, establish that the District violated the IDEA regarding the issues in controversy.

The District bears the burden to prove that the FIE of Student was appropriate.⁷ To prevail, the District must, therefore, prove that the FIE meets all standards under the IDEA.⁸

IV. ISSUES IN CONTROVERSY AND HEARING OFFICER'S DECISIONS

The two components to consider when determining eligibility for Special Education related services are:

1. Whether Student is a child with a disability; and

⁴ *Michael F.*, 118 F.3d at 247-48 (citations and footnotes omitted).

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

⁶ *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-248 (5th Cir. 1997), as cited in *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000); *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1010-1011 (5th Cir. 2010).

⁷ 34 C.F.R. § 300.502(b)(2)-(3).

⁸ 34 C.F.R. §§ 300.301, 300.303 through 300.311.

2. Whether Student has a proven educational need for Special Education services.

Component No. 1 was not contested. Student's FIE was completed by the District on *** 2016, and found that Student met the eligibility criteria as a student with a Specific Learning Disability in the areas of Written Expression and Other Health Impairment (OHI) for ADHD. At the *** 2016 ARDC (***) ARDC meeting, it was confirmed that Student met eligibility for these two areas, with *** (***) added to OHI.

Thus, whether the Student is a child with a disability is not an issue that will be addressed in detail in this decision and order. Rather, the significant material question is whether the Student has an educational need for Special Education services, such that Student was not provided FAPE with the Section 504 accommodations already implemented. This is significant in two aspects: 1) whether the ***, 2016 ARDC (***) ARDC meeting incorrectly determined that Student did not have an educational need, and 2) whether the District failed to provide FAPE if they had an obligation to do so after the *** ARDC meeting, assuming an agreement to provide Special Education services was reached.

The other significant issue is procedural and concerns whether the District determined Student eligible for Special Education services, with Parents' agreement, following the *** ARDC meeting and then, without prior written notice or any additional evaluations, changed Student's eligibility at the *** ARDC meeting. Again, whether Student is in need of Special Education services such that Student was not provided FAPE, even while provided Section 504 accommodations, is a coupled issue. Otherwise, this situation would be a procedural violation, with no violation of FAPE.

As found and discussed below, the Hearing Officer finds that the District was obligated on ***, 2016, to implement the IEP as it prepared and proposed at the *** ARDC meeting; that the *** ARDC actions were procedurally a violation of the IDEA; and that failure to provide Student with Special Education services was a failure to provide Student with FAPE. It is further found that District staff at the second ARDC meeting and at hearing ignored the facts proven in the FIE and during the hearing. Student does not show Student's work because of

Student's Dysgraphia, a disability. Student has to rush Student's work because Student expends a tremendous amount of time and effort taking what is in Student's sharp mind and trying to put it down in writing. In fact, this is exhausting to Student and will only become more difficult and more challenging as the Math problems require more steps and more showing of work, and as the Reading and Writing and Sciences become more complex. Intervention with Special Education is essential, without any further delay, to assist Student in all of these areas.

Finally, the Hearing Officer finds that the FIE was conducted in accordance with the IDEA and other requirements and that an IEE at the District's expense is not warranted.

V. WITNESSES PRESENTED

The following witnesses testified at the hearing and are listed here for ease of reference when reading the Findings of Fact.

A. Petitioner's Witnesses

1. ***⁹
2. ***¹⁰
3. Jana Palcer¹¹
4. ***¹²
5. Father (***)
6. ***, Ph.D.¹³

⁹ Ms. *** is *** who attended both ARDs with Parents. Tr. at 16.

¹⁰ Ms. *** is an Educational Diagnostician for LISD. She received her Bachelor of Science from ***, her master's degree from ***, and an administrative certification from ***. While working toward her master's degree, she studied ***, ***, and her focus was on behavior disorders and autism. Tr. at 49.

¹¹ Ms. Palcer is a lay advocate for Parents. Tr. at 163.

¹² Ms. *** is an ARD Facilitator for the District. She holds degrees in both special education and general education and has licenses to teach in both.

¹³ Dr. ***, a clinical neuropsychologist in private practice, provided expert testimony on behalf of Petitioner. She received her Ph.D. in clinical psychology from *** and completed an internship at ***. She has been a licensed neuropsychologist since 1998 and was board certified in clinical neuropsychology in 2008. Tr. at 216-218.

7. ***, Ph.D.¹⁴
8. ***, M.D.¹⁵
9. Mother (***)
10. ***¹⁶

B. Respondent's Witnesses

1. ***¹⁷
2. ***¹⁸
3. ***¹⁹
4. ***²⁰
5. ***²¹

¹⁴ Dr. *** is a Licensed Specialist in School Psychology (LSSP) in private practice who was hired by Parents to conduct a forensic study of the procedures that were followed in Student's evaluation. Dr. *** received an undergraduate degree in special education, a master's degree in psychometrics, and a Ph.D. in educational psychology. Tr. at 435.

¹⁵ Dr. *** is Student's pediatrician. He graduated from residency at *** and has been in practice for 14 years. Tr. at 671.

¹⁶ Ms. *** is *** who runs a parents' advocacy group. Tr. at 562.

¹⁷ Ms. *** was Student's *** *** teacher at ***. She has a degree in special education with a minor in teaching the visually impaired. Tr. at 287.

¹⁸ Ms. *** was Student's *** grade *** teacher. Tr. at 628.

¹⁹ Mr. *** is the Principal at *** School. Tr. at 655.

²⁰ Ms. *** is the Lead LSSP for the District. She has a bachelor's degree in elementary education from ***, and a master's degree in school psychology from ***. Tr. at 720, 222.

²¹ Ms. *** is employed as an occupational therapist by the District. She holds a Bachelor of Science degree from ***, and a master of occupational therapy from ***.

VI. FINDINGS OF FACT

Based upon the evidence and argument of the parties, the Hearing Officer makes the following findings of fact:

Background

1. The District is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing the student a FAPE in accordance with the IDEA, 20 U.S.C.A. § 1400, et seq., and the rules and regulations promulgated pursuant to IDEA.
2. Student resides with Parents within the boundaries of the District.
3. Student was ***; Student's ***. After ***, Student began private occupational therapy services that continued for the next *** years.²²
4. Student was first diagnosed with mild ADHD and *** in ***²³ and with Dysgraphia (Specific Learning Disability in Written Expression) in ***.²⁴
5. Student received a Section 504 plan in *** grade; the Section 504 plan provided accommodations and modifications but no direct services.²⁵

Specific Learning Disability and Educational Need

6. Student's final grades in *** grade were A's and B's, after Section 504 accommodations, including an allowance to re-perform assignments.
7. Student's benchmark scores in *** grade were "shockingly low," (the words used by Student's teachers). Student failed the benchmarks for:²⁶
 - a. Reading - ***% score;
 - b. Writing - ***% score; and
 - c. Math - ***% score.
8. Student's benchmark scores in *** and *** were ***% and ***%, respectively.²⁷

²² P- 7 at 75; P. Ex. 17.

²³ P-15.

²⁴ First Amended Complaint.

²⁵ P-5; P-6 at 57, 61.

²⁶ R-1.

9. Student's local benchmark tests scores varied, with *** commended; *** advanced; *** not met; and the rest met, completed, and developed.²⁸
10. Due to Student's failing benchmark scores in Reading, Writing, and Mathematics, and Student's failing confidence as a student, Parents requested that Student not take the State of Texas Assessments of Academic Readiness STAAR in Reading, Mathematics and Writing.²⁹
11. Students' confidence in Student's educational abilities and Student's anxiety about school led to *** at various times during *** grade.
12. Because Student's *** grade teacher knew Student could not effectively write out Student's answers for the *** *** (***), she let Student give answers orally and she wrote the answers. This was a Section 504 accommodation.³⁰
13. With accommodation in writing, Student was at grade level for ***_***.³¹
14. Student's *** grade teachers indicated concerns about Student and noted these weaknesses:³²
 - a. difficulty producing written work;
 - b. poor attention and concentration;
 - c. excessively high/low activity level;
 - d. difficulty following directions; and
 - e. difficulty following tasks.
15. Student struggles to complete assignments with the accuracy and complexity typical of a student at Student's grade level. Student becomes tired during *** tasks. Student's *** are not as complex as expected considering Student's *** abilities. ***, ***, ***, *** are all weak.³³

²⁷ R-1.

²⁸ R-2.

²⁹ R-3.

³⁰ R-9; R-10.

³¹ The ***.

³² R-18 at 1 of 2.

³³ P-12 at 4 of 10, citing to the Learning Disability Report.

16. Even with the Section 504 interventions and accommodations to address Student's ***-*** and Dysgraphia, Student struggles to complete written assignments to a satisfactory degree. This finding is made in accordance with reporting from Parents and teachers.³⁴
17. Student has ***-***. This was diagnosed by ***, M.D.
18. The performance of a child with ***-*** *** may vary from day-to-day and even from hour-to-hour. This is possibly one of the most frustrating aspects of the disorder for both parents and child.³⁵
19. Student's medical condition manifests with the following concerns:³⁶
 - a. difficulty with coordination that affects Student's handwriting and ability to do schoolwork;
 - b. struggles with *** such as ***, ***, and ***;
 - c. difficulty with time coordinating *** and ***;
 - d. trouble writing and has to concentrate very hard with written work; and
 - e. forgets what Student is thinking before Student can write it out on paper, causing a great deal of frustration.
20. Dr. *** strongly recommended a one-on-one assistant to help Student in school. The evidence did not prove that such intervention is necessary.³⁷
21. ***, Ph.D., ABPP-CN performed a comprehensive neuropsychological evaluation of Student.³⁸
23. Student has *** with slow psychomotor speed, poor spontaneous writing, and impaired *** that affect Student's educational learning now and will do so even more in the future unless appropriate supports and Special Education services are provided.³⁹
24. Student's specific diagnoses are: ADHD, combined type, ***, Specific Learning Disorder with Impairment in Written Expression (Dysgraphia); and ***-***.
25. Dr. *** reported and the greater weight of evidence establishes that Student needs:
 - a. a combination of remedial assistance and assistive technology;

³⁴ P-12 at 4-5 of 10.

³⁵ P-6 at 21 of 43 (REED-Review of Existing Evaluation Data, ***, 2015).

³⁶ R-34 at 21.

³⁷ R-34 at 21.

³⁸ P-13.

³⁹ P-13.

- b. occupational therapy to address ***;
 - c. use of technology programs to help Student organize Student's writing;
 - d. additional time to complete exams and written assignments as timed tasks are unlikely to show Student's true grasps of conceptual information.
 - e. assistance in copying information presented orally or on a written board and in copying assignments into Student's homework notebook;
 - f. assistance and changes in educational materials as matters become more complex given Student's Dysgraphia/ADHD, which is not ***; and
 - g. more one-on-one assistance and a change in educational materials to assist Student from further loss in Student's confidence academically and to assist Student in communicating Student's thoughts into writing (cognitive processing speed when writing).⁴⁰
26. ***, Licensed Psychologist, performed an evaluation of Student on *** 2014, when Student was *** years old, and found mild ADHD and *** – Dysgraphia.⁴¹
27. Student has an extremely varied and unique academic profile, showing high strengths in intelligence but low deficits in organizing and communicating Student's thoughts into writing.
28. Student has deficits in written expression and a cognitive deficit in cognitive processing speed.
29. Student has compensated for Student's poor processing speed, written expression deficits, and *** by using Student's high intellect.⁴²
30. As Student is getting older and Student's schoolwork is becoming more complex and difficult, Student is becoming less able to compensate for Student's disabilities using Student's high intellect.⁴³
31. Student's handwriting declined in legibility over the past school year.⁴⁴
32. Student was given credit for work that was not legible.⁴⁵
33. Student's writing is difficult to read due to *** and ***, ***.⁴⁶

⁴⁰ P-13.

⁴¹ P-15.

⁴² P-15.

⁴³ P-15; R-1; and R-18.

⁴⁴ P-7 at 4 of 42 (FIE results reported by Student's teachers).

⁴⁵ P-21 at 472. See answers 1 – 3 in particular.

34. Student scored in the very low range for Student's age on the ***, which tests a student's ability to *** (***).⁴⁷
35. Student has one or more health-related conditions, which directly affect Student's ability to learn from the general educational process.⁴⁸
36. Student's confidence suffers from Student's understanding and belief that teacher's do not like Student's handwriting.⁴⁹
37. At times, the District and Student's teachers in particular have been behind on addressing Student's disabilities related to ***:
- a. as late as ***, 2015, Student was not provided special equipment and/or technology to improve functioning;⁵⁰
 - b. Student's teacher stated that at times Student's "apps" will be helpful, and at other times we will need Student to do *** tasks (thus removing a necessary accommodation);
 - c. insisting Student perform some assignments with *** results in Student's failing confidence and dislike of school;
 - d. it was written in *** 2016 on one of Student's papers (Student's grade was a ***% correct) that, "****!", apparently ignoring that writing out information in Student's answers is a manifestation of Student's disability and is very frustrating for Student;
 - e. rather than demands to write out Student's work, Student needs encouragement, a change in educational instruction and materials, and an accommodation of more time and tech supports with training on how to use the supports;⁵¹ and
 - f. due to the stress from Student's disability and Student's school experience, Student suffers from *** that resulted in absenteeism's during ***.
38. Student has an educational need for Special Education services concerning *** – written expression as shown by:
- a. the analysis and outcome of the FIE, including the District's Staff person concluding that she was very confident Student qualified as disabled with written expression;

⁴⁶ P-7 at 4 of 42.

⁴⁷ P-7 at 7 of 42.

⁴⁸ P-7 at 7 of 42.

⁴⁹ P-7 at 11 of 42.

⁵⁰ R-17 at 4 of 4.

⁵¹ P-21 at 470.

- b. student's performance decreased over Student's *** grade year in writing ability (as noted by Student's teachers in the FIE);
 - c. student's "shocking" drop in Reading, Writing, and Math benchmarks when Student failed all three during *** grade;
 - d. student's loss in confidence in Student's educational abilities (due in part to the lack of data driven goals where Student can see progress) and also due to failure to implement accommodations;
 - e. student's ADHD and dislike of school because of Student's disabilities and the resulting negative encouragement to write out Student's answers - with an exclamation point;
 - f. student's *** related to emotional demonstration of Student's stress level of school that cause Student to be absent from school; and
 - g. the agreement that Student had an educational need by all participants at the *** ARDC meeting, including Student's teachers, other District personnel, and Mother who was at the meeting and including Father who was included in a later emailed agreement on ***, 2016.
39. At the *** 2016 ARDC meeting, District personnel presented an IEP with goals for Student that the District found appropriate to address the Special Education needs for Student. However, a month later, at the *** ARDC meeting, the District withdrew this IEP and stated they could not develop appropriate goals for Student's IEP, suggesting there was no educational need.
40. In order to have the same opportunity to succeed in the classroom as other students, some of the accommodations and changes in curriculum that the ARDC might consider to address Student's Educational Needs in an IEP include:
- a. a change in educational curriculum, including the provision of resource writing instruction on a daily basis and with goals and achievements that can be met demonstrating Student's success to prevent further decline in Student's self-confidence with writing;
 - b. a removal of any grade level assignments where Student is required to write out Student's work, at least until Student demonstrates the ability to explain Student's answers in writing at acceptable competency levels as determined through measurable data;
 - c. additional time to complete written assignments the first time they are completed, rather than merely offered an opportunity to re-perform the assignment after failure; and
 - d. more one-on-one time with District personnel in the classroom or out to assist Student in notetaking and in developing data driven calculations of Student's

progress toward IEP goals, including the length of time it takes Student to write, in addition to positive encouragement.

41. To provide a FAPE for Student, the District must find Student eligible for Special Education services in the area of OHI, written expression, and provide educational goals with measureable data collection.
42. It was noted by District Staff during the *** 2016 ARD Committee meeting, in which it was determined Student was eligible for Special Education services that:
 - a. Math is hard for Student, because Student has difficulty showing Student's work on a device;
 - b. Student struggles to take Student's work from Student's head and put it on bubble sheets;
 - c. Student's has an IDEA educational need in writing because of Dysgraphia. Student's writing is often times illegible with *** issues. This also creates a struggle for Student in science because of the challenges Student has in the labs of taking notes and making drawings.
 - d. student is in limbo, sometimes Student can talk Student's teacher through Student's work and sometimes Student cannot;
 - e. the teachers need to see a breakdown of Student's work in order to understand what Student is thinking/doing;
 - f. the teachers cannot find where the breakdown is and Student needs to be able to show them on Student's own (but Student cannot);
 - g. when the curriculum requires many steps to perform, Student's mental analysis is not working for Student as Student must show Student's work;
 - h. student does not want to be timed as it freaks Student out;
 - i. student has difficulty in fluency and processing speed;
 - j. student's answers are broken, Student loses Student's train of thought, Student is not sequential, Student's answers are very bulleted and rote, and while Student has the skills, Student does not have the flow;
 - k. the rate at which Student writes Student's thoughts/ skills is what gets Student;
 - l. student's benchmark testing scores must be very frustrating for Student;
 - m. emotional behavior and ADD/ADHD affect Student's ability to learn in the classroom;
 - n. Student *** often and has reported ***;

- o. Occupational therapy (OT) was recommended; and
 - p. if Parents agreed to the IEP as proposed by the District, the ***, 2016 meeting would be canceled (inferring that Special Education eligibility was settled and accepted.).
43. Student's teachers participated in the *** ARDC meeting and were in agreement with the determination of eligibility, including an educational need for Special Education services.
 44. The statements and opinions of District Staff between the *** and *** ARDC meetings vacillated greatly when discussing Student's performance and educational need for Special Education services.
 45. During the hearing, Student's teachers testified and contradicted their assertions during the *** ARDC meeting, and they used extreme language in doing so, with "very" oftentimes repeated to discuss how wonderful Student was performing.
 46. Student's *** teacher for *** grade was certified in Special Education and her opinions provided before and during the *** ARDC meeting were made with knowledge of educational needs and Special Education.
 47. The greater weight of evidence establishes that the changes in the opinions provided by Student's teachers were made to comply with other District Staff's desired approach to Special Education.
 48. It was not proven that Student has an educational need for Special Education services concerning ADHD alone.
 49. Student's *** and ADHD are interrelated.⁵²
 50. Student has an educational need for learning how to write in a more proficient manner so as to allow Student the same opportunity to succeed in the general education curriculum as not disabled students. This includes educational needs in Math, Science, and Writing.
 51. Student has the educational need of learning how to capture Student's thinking and put it on paper in order to succeed in the general education curriculum. Addressing this need is essential for student to have success in the general education curriculum as Student becomes less able to compensate for Student's disability with Student's high intellect as the curriculum becomes more complex, as writing became in the *** grade.
 52. Student's difficulty in writing is not predominately caused by rushing Student's work, but is from Student's disability.

⁵² Tr. at 670. Dr. ***'s testimony.

Procedural Findings on Eligibility and Provision of FAPE

53. District's staff person concluded during the *** ARDC meeting that Student qualified as disabled with Written Expression and she was very confident of this and made it known to Mother. All of the District's staff at the *** ARDC meeting agreed.
54. When asked if she agreed with the written expression eligibility determination, Mother stated absolutely yes in OHI for ***.
55. Parents confirmed their acceptance of the special needs eligibility determination by written email dated ***, 2016.⁵³
56. Difficulties with establishing present goals result from a lack of data driven evaluative techniques.
57. Goals and evaluative techniques are needed that will allow Student to see Student's educational progress in the general education curriculum and with achievement calculated in a measureable, data-driven method.
58. Parents' consented to the initial provision of Special Education and related services but disagreed with particular services in Student's IEP.
59. The District was made fully aware in writing that Parents consented to the initial provision of Special Education services.⁵⁴
60. The District unilaterally withdrew Student's eligibility of Special Education services after agreed to by the District and Parents.
61. The District had the responsibility to implement the IEP it prepared and presented at the *** ARDC meeting and that it determined to be appropriate for Student, until the *** ARDC meeting.⁵⁵
62. The District was required to begin providing the Special Education services in its proposed IEP on ***, 2016, or at the latest, immediately upon the Parents' written acceptance and consent to the initial provision of Special Education services, on ***, 2016.
63. The Special Education services to be provided after the initial determination of eligibility were the services as outlined in the proposed IEP, until the Parents and District held an ARDC meeting to work on the IEP (the *** ARDC meeting).

⁵³ P-10 at 1.

⁵⁴ P-10.

⁵⁵ P-9 and P-10; *Hubbard Exempted Village* 111 LRP 59645, Ohio State Educational Agency CP 0126-2011 (July 29, 2011).

64. Parents attended the *** ARDC meeting with the reasonable understanding that the *** ARDC meeting was only to address goals and the particular services to be provided in Student's IEP.
65. Parents were not provided with any notice that District staff met previously to the *** ARDC meeting and reconsidered the Special Education eligibility that was proposed by the District at the *** ARDC meeting and accepted/consented to it in writing (email) by the Parents.
66. The *** ARDC:⁵⁶
- a. determined that based on evaluation data, including the input of Student's *** grade teachers, that Student meets eligibility criteria for Special Education services in the area of OHI for ADHD and ***, and with a Specific Learning Disability in the area of Written Expression;
 - b. discussed the goals and objectives with no objection to those proposed, but with Mother wanting to discuss the IEP issues with Father;
 - c. found that Student will receive academic and nonacademic benefits from general education and Special Education services and supports and continues to need Special Education supports and services to make educational progress; and
 - d. adjourned with the District staff and Mother being in agreement.
67. The decision that Student needed and qualified for Special Education services was based upon the evaluation of Student's current grades and testing, the FIE, information from physicians, District LSSP, District Diagnostician, Parent's input, and teachers' input.⁵⁷
68. The teachers' statements in the *** ARDC meeting indicated that after reviewing Student's performance over the last several weeks, they determined that Student was not eligible for services under the IDEA.⁵⁸
69. Between the *** ARDC meeting and the *** ARDC meeting, Student attended school for *** days, missing school because of ***.
70. Student's teachers did not have any significant and additional information between the *** ARDC meeting and the *** ARDC meeting that would lead them to change their determination on Student's eligibility for Special Education services pursuant to the IDEA.
71. No additional testing or evaluation, other than *** days of attendance at school, were performed between the *** ARDC determination that Student was eligible for Special Education and the change in opinion at the *** ARDC meeting.

⁵⁶ P-9 at 20-21 of 24.

⁵⁷ P-9 at 23 of 24.

⁵⁸ P-12 at 5 of 10.

72. The teachers' original determinations as indicated in the Consideration/Referral For A Special Education Evaluation, the FIE testing and conclusions, and statements made during the *** ARDC meeting are more credible than the change in opinions provided at the *** ARDC meeting.
73. The evidence establishes a reasonable presumption that District personnel at some level intervened with the Student's teachers and the LSSP recommendations, either directing or "training" them to a finding of no eligibility in the *** ARDC meeting.
74. ***, the District's Lead LSSP, inaccurately and improperly testified that if Student was to receive Special Education services, over 70% of the students attending the District would be eligible for Special education.
75. Student's educational profile is very unique, with Student's *** alone eliminating most of the students in Student's class from being a fair comparison and Student's *** removing the rest of the students in Student's class.
76. It was not proven that 70% of the students at the District are medically suffering from an IDEA-identified special need nor that they are a good comparison for Student's unique profile.
77. No other student in Student's class has been diagnosed with ***.
78. A comparison of Student to 70% of Student's classmates without considering Student's unique profile is a violation of the IDEA and an incorrect philosophical teaching and approach to Special Education. Grades are correctly considered by an ARDC but should not be considered outcome determinative, in the way suggested by the District.

FIE and IEE

79. The members of the multi-disciplinary team who conducted Student's FIE are well-credentialed, trained, and experienced personnel.
80. Student was evaluated using a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by Mother and teachers, which enabled the multidisciplinary team to determine Student's eligibility as a child with OHI for ADHD and ***, and Specific Learning Disability (SLD) in the area of written expression.
81. The FIE provides the necessary information to develop Student's Special Education program.
82. The multiple assessments are well-recognized tests specifically chosen by Student's evaluators to provide an accurate assessment of Student's strengths and weaknesses in all areas to develop an appropriate educational program for Student.

83. Student was assessed in all areas of suspected disability and the FIE was sufficiently comprehensive to identify all of Student's educational and related service's needs.
84. Student's FIE is appropriate in that it meets all IDEA requirements and, therefore, Petitioner is not entitled to an IEE at public expense.
85. Student's FIE accurately and correctly concluded that Student was eligible for Special Education services as a student with OHI for *** and with a SLD in Written Expression.

VII. DISCUSSION

A. Evidence Presented by Petitioner

1. ***'s *Testimony*

Ms. *** is *** who attended both the ARDs on ***, 2016, and on ***, 2016.⁵⁹ Ms. *** stated that the ARDC agreed at the first meeting that Student was eligible to receive Special Education services and an IEP was drafted to provide Student services. However, according to Ms. ***, Mother was unsure of the services being offered and waited to sign the IEP until after she could review it with her husband, who was out of town. It was Ms. ***'s belief that the second ARD was scheduled only to discuss and clarify the services outlined in Student's IEP.⁶⁰

2. *** *Testimony*

Ms. *** has been employed by Leander ISD as an Educational Diagnostician for *** years. She has worked in special education for *** years, *** of which she served as an Educational Diagnostician for other school districts, performing an average of 50-80 FIEs per year.⁶¹

⁵⁹ Ex. P-9 at 24A; Ex. P-12 at 10A; Tr. at 17-18.

⁶⁰ Tr. at 18-19.

⁶¹ Tr. at 49-50.

Ms. *** acknowledged that the ARDC determined at the *** ARDC meeting that Student qualified for Special Education services and developed two goals for Student's IEP, including *** minutes per day of direct inclusion support in the general education classroom and *** ***-minute OT consultative services per ***-week grading period. In addition, Student would be allowed up to 3 hours of assistive technology for Math trials, which would be supported by OT.⁶² Although the IEP from the *** ARDC meeting indicated that the ARDC was in agreement, Mother did not sign the IEP because she first wanted to review it with her husband, who was out of town.⁶³

Ms. *** received an email from Mother on ***, 2016, requesting the initiation of the services outlined in the IEP, but services were not initiated at that time, because the email also stated that Parents disagreed with both the FIE and that IEP. According to Ms. ***, the Parents' disagreement with the FIE and IEP made it unclear what services they were requesting to be initiated, but she did not contact the parents to clarify or inform them that services were not being initiated at that time.⁶⁴ Rather, Ms. *** and ***, the school's LSSP, began reviewing the data from the first FIE and created an FIE Addendum on ***, 2016.⁶⁵ However, both the FIE and the FIE Addendum recommend that Student qualified for services under SLD and OHI and that Student needs Special Education.⁶⁶

Ms. *** admitted that this is the first time in her *** years as a diagnostician, that a district initially determined that a child was eligible for services, then subsequently pulled that determination at a subsequent ARDC meeting.⁶⁷

⁶² P-9 at. 15.

⁶³ *Id* at 9.

⁶⁴ Tr. at 36.

⁶⁵ P-11.

⁶⁶ P-7 at 39 and P-11 at 34.

⁶⁷ Tr. at 150.

3. *Jana Palcer's Testimony*

Jana Palcer is a lay advocate for parents. She attended and assisted the parents in the *** ARDC meeting. Ms. Palcer has represented other students at ARDC meetings within the District, and stated that the District's attorney was present at every one. In fact, she stated that she has even chosen not to attend some ARDC meetings when she is representing a student because her attendance at an ARDC meeting triggers the District to have their attorney present. Ms. Palcer feels that the attorney's presence changed the whole course of the meetings.⁶⁸

Ms. Palcer testified that she and Parents believed that the *** ARDC meeting was being held to make changes to the IEP proposed at the first ARDC meeting, and the ARDC meeting proceeded in that fashion until toward the end when the teachers developed a new consensus that Student did not qualify due to lack of educational benefit.⁶⁹ When Ms. Palcer and Parents tried to question the District's staff at the *** ARDC about the implementation of the IEP developed at the *** ARDC meeting, the District's attorney, Ms. Hays, cut them off without discussion by saying "It's over. It's done."⁷⁰

4. *Testimony by ****

*** has been employed by the District for about *** years and served as the ARDC Facilitator for both ARDC meetings. She typically facilitates annual ARDC meetings rather than initial ARDC meetings but she did facilitate the *** ARDC meeting in this case. Ms. *** was aware that Parents were taping the ARDC meeting so she taped it as well, but stated that she was unaware that Student's counsel had requested a copy of the tape or that the District told Student's attorney the quality of the tape was so bad that she couldn't listen to it.⁷¹

⁶⁸ Tr. at 164.

⁶⁹ Tr. at 167

⁷⁰ Tr. at 168.

⁷¹ Tr. at 182.

Ms. *** recalled stating at the *** ARDC meeting that the FIE showed Student's long-term retrieval had a standard score of *** but Student's processing speed was ***, which she said must be very frustrating for Student. She admitted the two scores showed a disconnect, which was one fact that led the ARDC to qualify Student's eligibility for written expression.⁷²

5. *Dr. *'s Testimony***

Dr. *** is a clinical neuropsychologist. She was licensed in 1998 and board certified in neuropsychology in 2008. At Parents' request, Dr. *** performed an evaluation on Student in ***, where she found evidence of *** and SLD in Written Expression, as well as ADHD combined type. Dr. *** also reported Student's *** in the form of *** were significant. Dr. *** testified that the CTOPP test she conducted on Student, which indicates a student's building blocks of reading, showed Student in the normal range; however, the TOWL-*** test, which tests written language, was below average.⁷³ Her findings on *** were in agreement with the findings on similar tests conducted by the District in the FIE. The District found Student's rate of *** to be significant as well. Dr. *** recommended Student be considered for Special Education with support in OT and Assistive Technology programs.⁷⁴

6. *Father's Testimony*

Father asserted that it was his understanding that Student was found eligible for Special Education services at the *** ARDC Meeting, which he was unable to attend, and the *** ARDC Meeting was scheduled to allow the parties to discuss and draft an appropriate IEP for Student. Father also attended the Protocols Meeting on ***, 2016, and he testified that there was no indication at the Protocols Meeting and no suggestion given before the *** ARDC meeting that the District had decided Student did not qualify for special education services. Rather, Father asserted that it was only at the end of the *** ARDC meeting, when District's

⁷² Tr. at 193-194.

⁷³ P-14 at 14.

⁷⁴ P-13.

attorney “abruptly” shut down the meeting, that there was any indication the District had changed its mind on Student’s eligibility to receive Special Education services.⁷⁵

Father stated that Student was receiving private occupational services to help with Student’s *** since Student was *** or *** years old. Father stated that, at home, Student struggles with tasks such as *** or ***, and has trouble ***, which may result in Student *** or *** too hard.⁷⁶

Although Student took the STAAR tests in the *** grade and received commended scores, Parents elected to opt Student out of the STAAR for *** grade due to the amount of writing it would require of Student.⁷⁷ Father also testified that Student was referred to the *** program, which is a *** program, for several years, but each year Student failed the entry test because of the writing component of the test.⁷⁸ Even though Student made A’s and B’s Student’s *** grade year, Father said that it was only because Student was graded on work Student had frequently re-done.

7. Testimony by *, Ph.D.⁷⁹**

Dr. ***, a licensed specialist in school psychology, was asked by Petitioner to conduct a documentary review of the following: 1) FIE; 2) *** ARDC Report; 3) Parent’s ***, 2016 email; 4) FIE Addendum; 5) *** ARDC Report; 6) Dr. ***’s Report; and 7) Dr. ***’s Report.

⁷⁵ Tr. at 265. It was noted by the teachers that the students *** at school.

⁷⁶ Tr. at 262-263.

⁷⁷ Tr. at 274-275.

⁷⁸ Tr. at 275.

⁷⁹ The District objected to Dr. ***’s testimony citing Texas Administrative Code Section 465.38, limiting the type of services that may be provided by a school psychologist. The Hearing Officer does not rule on the application of the Rules of Practice for Psychologists, but he notes that Dr. ***’s testimony and report did not form the basis for any finding of fact or conclusion of law. Rather, the majority of Dr. ***’s testimony concerned whether an IEE was necessary. On this matter, the Hearing Officer finds for the District.

Dr. *** expressed concern in regard to the District's evaluations being conducted so soon after other testing because of possible "test-retest reliability violation." This was described as the potential of a student remembering some aspects of a standardized test, resulting in skewed or inaccurate scores.⁸⁰ To illustrate her point, Dr. *** pointed out that both Dr. *** and the District utilized the *** Instrument to measure Student's *** skills.⁸¹ According to Dr. ***'s report, Student had a standard score of ***, while the District's report indicated that Student had an overall score of ***, which is a ***-point difference in the course of approximately *** months and she opined that this could make a difference in determining whether student is average or below average in ***.⁸² Dr. *** also noted other possible errors in the District's evaluations based on whether or not the proper number of tests were administered or reported and whether the District used a test that has been replaced by a newer edition.

Dr. *** opined that the District committed procedural violations following the issuance of prior written notice after the *** ARDC meeting. She stated that once prior written notice is issued with the IEP, eligibility and services are established, which effectively closes an evaluation.⁸³ In order to change the eligibility of a student, a new evaluation would have to be conducted. Dr. *** recommended that the services outlined in the IEP from the initial ARDC meeting be put into place, at least in the interim.⁸⁴ She also recommended an IEE to determine proper placement of Student, the goals, and the potential accommodations and modifications.⁸⁵

8. *Testimony of *, M.D.***

Dr. *** has been Student's pediatrician for approximately one year. He noted that Student's issues are primarily related to *** and ***. Student has multiple diagnoses, including ***, ADHD Combined Type, and Dysgraphia.

⁸⁰ Tr. at 446.

⁸¹ Tr. at 448.

⁸² Tr. at 448-449.

⁸³ Tr. at 459.

⁸⁴ Tr. at 530.

⁸⁵ Tr. at 541.

He described *** as a *** *** disorder in which ***, which he termed as ***. This can result in *** because the ***, ***.⁸⁶ Dr. *** stated that *** never goes away, but like ***, a person can be taught to work around it *** with appropriate interventions.

Dr. *** testified that there is a significant comorbidity between *** and ADHD and that approximately ***% of children with *** also have ADHD. He stated it is hard to tell which condition is responsible for some symptoms, such as bad handwriting and he gave the following example:

If you're trying to focus on the pencil in the right, you know, way to make the letter 'A,' then you – then you forget what the question was that you were asked, and so it looks like you have attention problem because you're so far – you were working so hard, like focusing on the handwriting.⁸⁷

Dr. *** believes that Student has a moderate case of ***, and he feels Student most probably has ADHD as well. He testified that Mother came to him complaining that she couldn't get Student services from school for *** because the school was concentrating too hard on the ADHD diagnosis. He then offered to scrap the ADHD diagnosis because he felt the symptoms of such would be taken care of under the *** diagnosis, but still feels Student has ADHD.⁸⁸

Dr. *** acknowledged that Student was seen in his office multiple times for complaints of ***. Nothing was ever found, so Dr. *** concluded *** were psychogenic from stress and anxiety.⁸⁹

⁸⁶ Tr. at 672-673.

⁸⁷ Tr. at 682.

⁸⁸ Tr. at 683.

⁸⁹ Tr. at 686.

B. Evidence Presented by Respondent**1. ***'s Testimony**

Ms. *** testified by telephone on behalf of the District. Ms. ***, who is a *** *** teacher at Student's school, where she has been employed for *** years, had Student in her class for the *** school year for ***, ***, ***.⁹⁰ She described Student as one of her brightest students, fun, very sharp, and very quick to pick up new concepts, and said that she finds herself having to challenge Student rather than having to reiterate or reteach things to Student.

Her classroom is an active class, so she stated that Student's hyperactivity did not create a challenge or problems in her class. Ms. *** testified that *** grade is tough across the board for most students because of the emphasis on *** to the curriculum.⁹¹ Student's final grades for the *** school year,⁹² according to Ms. ***, do not reflect a student who had to re-do assignments frequently.

Ms. *** believes that Student's 504 accommodations are adequate in addressing Student's needs, but that Student sometimes chooses not to use them. When asked about the regression in Student's *** scores between *** *** grade to *** *** grade from a *** *** to *** ***, Ms. *** opined that it was most likely attributed to "summer slide," which is common for students as they do not tend to read during the summer.⁹³ As for Student's *** errors, she stated that she did not deduct points for *** on assignments unless it was an actual *** test, and she asserted that this is her practice with all her students.⁹⁴

⁹⁰ Tr. at 288.

⁹¹ Tr. at 300.

⁹² R-1 at 5.

⁹³ Tr. at 323-324.

⁹⁴ T. at 424-426.

Ms. *** testified that Student complained often about *** and Student was oftentimes referred to the school nurse, but not always. She said that sometimes she would give Student the option of finding other ways to *** such as taking breaks or walks.⁹⁵

2. ***'s Testimony

***, a *** grade teacher has been employed for *** years with the District. Ms. *** was Student's *** teacher during the *** school year and she testified that she did not observe Student struggling with *** problems in her classroom. When asked about Student's handwriting, Ms. *** stated that she could read 95% of Student's work without having to ask Student to clarify what Student wrote and added that she has to seek clarification for other students' handwriting from time to time as well.

Ms. *** recalled that her *** grade *** class consisted of *** students and it was part of the *** program, in which some of the *** *** ***. However, she stated that the *** grade students were not graded on ***. She stated that Student is very bright and is "right in there" with the rest of the students in regard to Student's academic performance in ***. The only accommodation Ms. *** had in place for Student in her class was the use of *** to help student show Student's work.⁹⁶

On the Benchmark Tests this past year, Student scored ***% in Math, ***% in Reading, and ***% in Writing.⁹⁷ She admitted that the scores indicated that Student failed to meet the District's expectations for *** grade in all the tested subjects, and that at the *** ARDC meeting, Ms. *** told the committee, "*** is hard for Student to *** and try to figure all this out."⁹⁸

⁹⁵ Tr. at 408-409.

⁹⁶ Tr. at 641.

⁹⁷ Tr. at 642-644.

⁹⁸ Tr. at 644.

3. ***'s *Testimony*

Mr. *** is the Principal of ***, where Student attends school within the District. Mr. *** testified that he has not observed Student around the campus to stand out in any way or be isolated from Student's peers. In fact, he stated that Student seems to be well-liked amongst Student's peers and presents the same as any other student.

When asked about the *** program, Mr. *** described it as *** program within the district. He asserted that the test issued to qualify for the program is not a writing-based test. Rather, it consists largely of *** and ***.⁹⁹

Mr. *** does not hold a degree or certification in Special Education, but testified that based on his experience as an education administrator, he did not consider the email from Parents, dated ***, 2016, to constitute consent to initiate Special Education services. He believed that Parents would need to file something more formal, such as the signed IEP itself, to constitute parental consent.¹⁰⁰ However, Mr. *** did not call or write Parents after receiving the email, and he does not know of anyone else doing so, to inform Parents that services would not be initiated until the school obtained a formal signature on the IEP from them.¹⁰¹

4. *Testimony by ***, LSSP*

Ms. *** has been employed by the District as a Lead LSSP for *** years. In her role of Lead LSSP, she reviews evaluations and IEPs with LSSPs from several District campuses when a 10-day reconvene of an ARDC is necessary because of disagreement. She was recently appointed Special Education Coordinator for the District.

⁹⁹ Tr. at 655.

¹⁰⁰ Tr. at 664-665.

¹⁰¹ Tr. at 666-669.

Ms. *** did not attend the *** ARDC meeting, but she became involved when Ms. *** contacted her after receiving the email from Parents indicating that they disagreed with the FIE and the IEP. Ms. *** testified that between the two ARDC meetings, Ms. *** and other District members, including the District's attorney, conducted a staffing to discuss Student's FIE and IEP. At that meeting, she stated, the idea that Student did not have an educational need for Special Education arose after they tried re-drafting goals for Student and found they were writing goals that were grade-appropriate and above.¹⁰²

An addendum was completed for the FIE after the staff meeting, but Ms. *** did not believe the FIE Addendum was sent to Parents prior to the *** ARDC meeting. She stated that Parents were not informed prior to the *** ARDC meeting that the District had changed its position on Student's eligibility.¹⁰³ However, she acknowledged that both FIEs recommended Student qualified for and exhibited a need for Special Education. It was Ms. ***'s opinion that Student does not meet the second prong of eligibility because Student does not require individualized instruction to access Student's education, and if Student were to be found eligible, she stated that the District would have to find 70% of the kids eligible for Special Education.¹⁰⁴

In order to implement an IEP that results from an initial placement ARDC meeting, Ms. *** stated that formal consent from the parents is required. On the other hand, if a child was already in Special Education, and no agreement is reached after two ARDC meetings, the last effective IEP would remain in effect.¹⁰⁵ The time between ARDC meetings is used to gather additional data and information in an effort to identify and create goals for the student that can be agreed upon by the District and parents. In this case, Ms. *** said that the new information mostly came in the form of teacher input on how they address Student's struggles in the classroom.¹⁰⁶

¹⁰² Tr. at 746.

¹⁰³ Tr. at 741.

¹⁰⁴ Tr. at 763.

¹⁰⁵ Tr. at 726.

¹⁰⁶ Tr. at 730.

The only document Ms. *** reviewed in preparation for the second ARDC meeting was the FIE. The additional information provided by the teachers was not data-driven in that there was no accounting for the number of times Student had to be re-directed in class, had to re-do Student's assignments, or complained of ***.¹⁰⁷

VIII. DECISION

The Hearing Officer finds that the District was obligated on ***, 2016, to implement the IEP it had prepared and proposed at the *** ARDC meeting; that the *** ARDC actions were procedurally a violation of the IDEA; and that failure to provide Student with Special Education services was a failure to provide Student with a FAPE.

The IDEA at 34 CFR § 300.300(b)(1) establishes that once a parent has agreed to the provision of Special Education services, the IEP as proposed (even if not yet agreed to) must be implemented. During the *** ARDC meeting, Ms. *** stated that the evaluation was reviewed and accepted. Mother was asked if she agreed and she answered "yes." Ms. *** then asked Mother whether she was in agreement with Special Education services and Mother again answered "yes." This matter settled, it was then stated that the ARDC could go on to preparation of the IEP, the second but distinct part of this process. Moreover, the notes from the *** ARDC meeting state, "parents/District adjourned in agreement." It was clear that the only question remaining concerned the IEP, as Ms. *** wrote a note to Mother stating, "Thank you for all your support today. Please let *** know if there are any questions or concerns with the IEP report. If you are in agreement with the IEP report, I have flagged the areas for you to check."¹⁰⁸ Finally, should any possible question remain as to Parents' agreement with the provision of Special Education services, Mother sent an email (written confirmation) to Ms. *** on ***, 2016, stating that, "[W]e do agree to the initiation of Special Education services and the eligibility of OHI and SLD . . ." ¹⁰⁹ Thus, this matter was decided and the only issue to address at the *** ARDC

¹⁰⁷ Tr. at 770-771.

¹⁰⁸ P-9 at 24A.

¹⁰⁹ P- 10. Specific Learning Disability (SLD).

meeting was the IEP. Mother's concerns were that the IEP did not go far enough. She did not disagree with the provisions of the IEP proposed but wanted additional data-driven goals and assessments.

To the surprise of Parents, the District showed up at the *** ARDC meeting and withdrew the determination and agreement that Student was a child with a disability who had an educational need for Special Education services. Given the prior agreement on this issue, the District was required to provide Parents with prior written notice before it proposed to change the identification, evaluation, or education placement or the provision of FAPE to Student.¹¹⁰ The District failed to provide any notice even though it unilaterally changed the Student's identification as a child with a need for Special Education services, unilaterally indicating the decision was made without proper (or any) notice to Parents and without the additional testing and examinations that are required before any such change is made. The actions of the District appear very close to a predetermination, but the Hearing Officer does not make such a finding.

As noted above, Parents agreed to the provision of Special Education services and the provision of those services were immediately demanded by the IDEA, regardless of the process that went on to perfect or reach an agreement on the IEP. The proposed IEP was required to be put in effect the day after the *** ARD or on ***, 2016, at the latest (when written confirmation of the agreement was received by the District). This situation is addressed by the U.S. Department of Education in its Revised June 2010 *Questions and Answers On Individualized Education Programs (IEP), Evaluation, and Reevaluations*. The relevant questions and answers are below:

Question D-5: Does the requirement that a public agency obtain parental consent for the initial provision of special education and related services mean that parents must consent to each service included in the initial IEP developed for their child?

Answer: No. Under 34 CFR § 300.300(b)(1), a public agency that is responsible for making FAPE available to a child with a disability must obtain informed consent from the parent of the child before the initial provision of special

¹¹⁰ 20 U.S.C § 1415(c); 34 C.F.R. § 300.503(a)-(c).

education and related services. However, **this consent requirement only applies to the initial provision of special education and related services generally, and not to the particular special education and related services to be included in the child's initial IEP.** In order to give informed consent to the initial provision of special education and in related services under 34 CFR § 300.300(b)(1), parents must be fully informed of what special education and related services are and the types of services their child might need, but not the exact program of services that would be included in an IEP to be developed for their child. Once the public agency has obtained parental consent and before the initial provision of special education and related services, the IEP Team (ARDC in Texas) would convene a meeting to develop an IEP for the child in accordance with 34 CFR §§ 300.320 through 300.324.¹¹¹

Question D-6: What recourse is available to parents who consent to the initial provision of special education and related services but who disagree with a particular service or services in their child's IEP?

Answer: In situations where a parent agrees with the majority of services in Student's/her child's IEP, but disagrees with the provision of a particular service or services, such as physical therapy or occupational therapy, the public agency should work with the parent informally to achieve agreement. **While the parent and public agency are attempting to resolve their differences, the agency should provide the service or services that are not in dispute.**¹¹²

The remaining question is whether the District's failures in these areas were a mere procedural violation or prevented the provision of FAPE, when it was necessary. In this regard, the briefing of the parties appears to discuss two different students, but as evaluated by the same teachers. Petitioner's portrayal is supported by the FIE, by the teachers' observations included in reports completed for the FIE, by the most recent testing, by the statements made by the teachers and other District personnel at the *** ARDC meeting, and by the determinations made by the ARDC at the *** meeting.

¹¹¹ This is what Parents reasonably expected that the *** ARDC meeting would address.

¹¹² Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations, accessed on July 25, 2016 at <https://www2.ed.gov/policy/speced/guid/idea/iep-qa-2010.pdf> ; emphasis added.

The District's portrayal is supported by the Student's grades, by the statements made by the teachers and other District Staff at the *** 2016 ARDC meeting, and by much of the testimony of the teachers and District Staff during the hearing.

The Hearing Officer is tasked with weighing these various portrayals and making a decision on the greater weight of evidence. This is not the standard decision where differing experts testimony must be weighed to determine an outcome. Rather, the decision in this case greatly results from a determination on the credibility of various statements made by District staff at various times. In this regard, this case is unique.

Having reviewed the record thoroughly, there is a shocking difference between the opinions provided by the teachers and other District Staff in preparation of the FIE, in the FIE, and made during the *** ARDC meeting as compared to the statements and conclusions made during the *** ARD and then at hearing. Moreover, the reasons given for the conflicting statements, a lack of knowledge about the process and an assignment of blame on reliance of other District Staff are not credible. One of the teachers is certified in Special Education and certainly has the expertise to understand the ARDC process. Rather, it is more likely that the change in statements came from "education" provided by District Staff during the District-only staff meeting. A difference in philosophy about the role of Special Education appears most likely to have led to the changing opinions and statements of District Staff.

In order to understand the differences and then come to a conclusion, the Hearing Officer summarized a collection of statements from District Staff. Those made at or prior to the *** ARDC meeting are in the first column and later statements are in the second column. Statements recorded in the two columns do not correspond to each other and should not be read horizontally. Rather, they should be read vertically down for the first column and then vertically down for the second column for a general comparison of the statements.

FIE¹¹³ and *** ARD Statements by District Staff¹¹⁴	*** ARD and testimony at hearing same District Staff
Student's impulsivity does affect Student's is ability to benefit from classroom instruction to the same degree as Student's peers.	Student is one of the brightest students I know. Student is very fun; Student is very sharp; and Student's very, very quick. Student grasps concepts quicker than the majority of my students. And, to be honest, I find myself having to challenge Student instead of go back and reteach something or reiterate something. ¹¹⁵
Student's significant weakness is processing speed; linked to achievements in Reading, Math, and Written Expression; affects all three areas.	...(Student) has no problem doing that (writing grade level text) Student does it very well. So...and Student answers the question thoughtfully and consistently and accurately. ¹¹⁶
When there is a processing speed weakness, we address all areas of concern.	If Student would be in special education, I would think 70% of our kids would be in special education at this point given Student's performance level. ¹¹⁷
We need to make sure we document the present levels, the weaknesses in math fluency, work reading fluency and reading rate. (These are) areas of weakness...we have to address for Student.	Teacher could not tell Student's handwriting apart from a number of other Student's papers if Student did not write Student's name on it. ¹¹⁸ (Handwriting not that bad).
Long-term retrieval at *** versus processing at ***. It must be very frustrating for Student.	Teacher could read 95% of Student's work without having to ask Student to clarify what Student wrote and added that she has to seek clarification for other students' handwriting from time to time as well.
We need to address the fluency, it is there, it is weak. We need to write a goal.	Student is very bright and is "right in there" with the rest of the students in regard to Student's academic performance in math.
Science is a challenge. I will be flat out	Student's very active; Student's very bright;

¹¹³ R-26.

¹¹⁴ P-28.

¹¹⁵ Tr. at 297.

¹¹⁶ Tr. at 334-35.

¹¹⁷ Tr. at 763.

¹¹⁸ Tr. at 313-314.

FIE¹¹³ and *** ARD Statements by District Staff¹¹⁴	*** ARD and testimony at hearing same District Staff
honest. Science is a challenge with Student because of labs, notes, technical drawings and things like that. So for that one I am open to any and all suggestions.	Student's very friendly, Student's well liked; Student's got a good sense of humor; Student's – I mean, Student's just a great kid. ¹¹⁹
I don't grade (take) off when I can't read (Student's work); I just ask Student, like what is this supposed to say? ¹²⁰	I do not believe that Student needs specialized instruction in writing, because when I teach Student, from what I'm able to view, Student doesn't—it's not a good pace. Student needs specific focused instruction in that area. ¹²¹ (there is an apparent conflict in this testimony from a teacher given during the hearing).
It would be helpful to come up with a plan so breaks aren't reactive but are proactive.	Student is not below grade level in writing content. With penmanship it depends on the day; depends on if Student's rushing it; case-by-case. ¹²²
Math is a struggle anytime the writing gets lengthy. I didn't realize what it could look like.	Student is currently performing on *** grade level; addressing Student's disabilities is therefore not the purpose of Special Education. ¹²³
I looked back at Student's ***, Student had ***. When I go online to look at Student's expectancy, it says *** ** grade is ***.	Day-to-day Student shows Student's work on a majority of assignments. ¹²⁴
Student is in limbo, sometimes Student can talk Student's teacher through Student's work and sometimes Student cannot.	Even when distracted, Student is attending to and benefitting from the lesson. ¹²⁵
Student does not want to be timed as it freaks	*** has been helpful on legibility and some

¹¹⁹ Tr. at 299.

¹²⁰ This suggests that Student is allowed to use oral responses when teachers cannot read Student's writing and no deduction for poor writing leads to Student receiving high scores, despite Student's dysgraphia.

¹²¹ Tr. at 319. This is a summary but the apparent conflict is included in the transcript.

¹²² Tr. at 339.

¹²³ R-12 at 186.

¹²⁴ R-12 at 186.

¹²⁵ R-12 at 187.

FIE¹¹³ and *** ARD Statements by District Staff¹¹⁴	*** ARD and testimony at hearing same District Staff
Student out.	productivity. ¹²⁶
The rate at which Student writes Student's thoughts/ skills is what gets Student.	Teachers believe the low benchmark scores are because Student did not show Student's work and rushed through the assessments. ¹²⁷
When the curriculum has many steps to perform, Student's mental analysis is not going to work for Student as Student must show Student's work.	
Student struggles to take Student's work from Student's head and put it on bubble sheets.	
Student's answers are broken, Student loses Student's train of thought, Student is not sequential, Student's answers are very bulleted and rote, and while Student has the skills, Student does not have the flow.	
Student had a "shocking" drop in reading, writing, and math benchmarks.	
Legibility of Student's handwriting was comparable to peers at the beginning of the school year, but they have seen a decline in legibility since that time.	

A review of a teacher's comment made during the *** ARDC meeting was challenged during the hearing. A comparison of the explanations given for Student's difficulty with writing down Student's thoughts is indicative of the change in tone and content of the opinions of District staff. The two statements below should be compared to each other, with the initial comment made at or before the *** ARDC meeting and the second comment made at the hearing:

Student's often able to prove Student's	Student doesn't like writing Student's
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¹²⁶ R-12 at 186.

¹²⁷ R-12 at 186.

<p>knowledge successfully. Sometimes Student's able to share Student's knowledge easily orally, but has written language—Student struggles with *** task and the teacher will allow Student to share orally or write it quickly ***.</p>	<p>responses with ***. Student'd rather—I mean, Student'd rather just tell you the answer, you know; Student likes ***; that's fun. Student likes using a--- like ***—I'm sorry—***; to ***. But, yeah, Student doesn't like to use the ***- response mode.¹²⁸</p>
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The change is that Student's struggling with *** task is reworded to indicate a preference that Student merely does not like to use ***. With these types of changes in statements and opinions offered by the District staff, the Hearing Officer discounts the opinions and statements made by District staff. In fact, District's staff's own words undercut the presumption that its decision-making is afforded in the IDEA.

It is a reasonable presumption then, that something occurred between the *** and *** ARDC meetings, most likely at the District staff meeting. It was noted by Ms. *** that the questioning of eligibility emerged during that meeting.¹²⁹ According to Ms. ***, the determination on educational need came down to how the teachers addressed the Student's struggles in the classroom.¹³⁰ But the recommendation included in the FIE, as prepared by a qualified group of District professionals, did not change. There was no additional testing, no additional examinations, and only *** additional days of class that Student participated in between the two ARDC meetings. The FIE included extensive input from the teachers and other District staff, and they determined that Student was a child with a disability and that this disability adversely affected Student's educational performance.¹³¹

Ms. *** testified, "If Student (Student) would be in special education, I would think 70 percent of our kids would be in Special Education at this point given Student's performance level." She repeatedly compared Student to other students in her testimony. She discussed her special Education philosophy and disagreed with the goals prepared by District staff in Student's

¹²⁸ Tr. at 333.

¹²⁹ Tr. at 745.

¹³⁰ Tr. at 742.

¹³¹ Tr. at 741.

IEP, because she believed they were written for Student to achieve Student's maximum potential, to go from decent reading to a higher level. She opined that this is not what Special Education is designed for.¹³² Moreover, the teachers then joined in during the second ARDC meeting, reporting that Student was able to complete *** grade work just like every other *** grade student. They added that because of this, there is no educational purpose for Special Education for Student. During the second ARDC meeting, there was an excuse for each of Student's deficits: Student's writing difficulty was because Student did not like writing or because Student rushed through Student's work. It was stated that Student can produce legible writing if Student only slows down. And, Student's failing scores on benchmark tests in Reading, Math and Writing were simply because Student did not slow down and didn't show Student's work.

The teachers and District ignore the facts proven in the FIE and during the hearing. Student does not show Student's work because of Student's Dysgraphia, a disability. Student has to rush Student's work because Student expends a tremendous amount of time and effort taking what is in Student's sharp mind and trying to put it down in writing. In fact, this is exhausting to Student and will only become more difficult and more challenging as the Math problems require more steps and more showing of work, and as the Reading and Writing and Sciences become more complex. Intervention with Special Education is essential, without any further delay, to assist Student in all of these areas.

To some extent, it appears that the District has already gone beyond Special Education to address Student's special needs and has determined that nothing will help so Student should be assisted with Section 504 technological and accommodations. It was noted during the hearing that Student has a *** that leads to some of Student's difficulties in writing. The District notes that it is too late to change this. The Hearing Officer agrees. But it is not too late to assist the student in overcoming Student's special needs, at least to some extent, to give Student the educational opportunity to succeed in Science and Math where the accommodations offered do not suffice. Student's educational need is learning how to better process Student's ideas and put

¹³² Tr. at 751.

them into writing. It is too early to relegate Student to use of accommodations only and that do not afford Student the same educational opportunity as Student's peers.

The Hearing Officer is convinced that Student, if provided with the additional Special Education assistance accorded Student through the IDEA, can succeed with a combination of a greater ability to process and flow information from Student's mind to Student's hands and then also through the use of accommodations. While the Hearing Officer agrees with Ms. ***'s philosophic opinion that Special Education is not appropriately used for a student to achieve Student's maximum potential, the evidence in this hearing suggest that Ms. *** and the District staff wholly fail to take into consideration the unique profile of Student, including Student's ***, and that Special Education will only provide Student with the same opportunity to succeed as the other students, not at all assistance to meet Student's maximum potential.

This difference occurs because the District makes its decision solely based on a comparison of Student's grades to those of the other students in Student's class. This is where Ms. *** and the Hearing Officer must part ways on philosophic approaches. Each child with a disability must be measured against Student's own expected performance, and not against an arbitrary standard. Student needs remedial help in the area of processing speed where Student shows a significant weakness and which is linked to achievements below that to which Student is reasonably expected in Reading, Math, and Written Expression.¹³³ Student's underachievement is measured against Student's own ability, which is above the class average given Student's **. Failing the three Benchmarks in those areas should have set off alarm bells for the District, as it did for Parents.

Student's individual profile reveals a student with Dysgraphia and with *** (***) accompanying Student's emotional stress caused by Student's disability, slow processing speed, and weaknesses in Math and reading fluency, as well as reading rate. Student has relied on Student's high intelligence to compensate for Student's disabilities. The Hearing Officer finds the comparison made to 70% of students, to those who do not have Dysgraphia, to those who do

¹³³ P - 28.

not share Student's ***, and to those who do not have Student's other weaknesses to overcome, is an incorrect application, and a violation of the IDEA. Grades may and should be considered but they should not be the sole driving factor, particularly given Student's unique profile; Student's failing Benchmarks in Writing, Reading, and Math; Student's shortcomings described by Student's teachers; the testing reported in the FIE, and the decrease in writing legibility over the year, as noted by teachers in the FIE.

IX. CONCLUSION

The greater weight of evidence establishes that Student is a child with a disability and who qualifies for Special Education for that disability because of an educational need. For this reason, the Hearing Officer finds that the District's procedural violations amounted to a failure to provide FAPE from ***, 2016, to date. Moreover, even should no procedural violation have occurred, the District failed to provide Student with a FAPE from the *** ARDC meeting to date.

Compensatory services are awarded for *** *** 2016. Student's teachers noted that Student regressed over the summer but there was insufficient evidence about this for compensatory time to be awarded for lost Special Education support in the summer. The Hearing Officer finds approximately *** days of lost Special Education support *** at 30 minutes per day. Accordingly, Student is awarded *** hours of compensatory time to make up for the 30 minutes a day of lost support in instruction, reteach of skills, and teacher consultation as noted in the IEP.¹³⁴

¹³⁴ Understanding that both Parents and the District want Student to achieve and have Student's best interests in mind, the Hearing Officer notes this following information as an aside, not related to the decision in this case but perhaps assisting the parties and the ARDC in crafting a successful IEP for Student. After this decision was made, the Hearing Officer while researching cases concerning Dysgraphia came upon *C.B. v. Pittsford Central School District*, a 2010 case heard in the Western District of New York.¹³⁴ Student received 37 minutes per day of assistance in writing deficiencies. This case should not be used as a comparison to Student any more than a comparison of Student's classmates without consideration of Student's unique profile should be considered.

X. CONCLUSIONS OF LAW

1. The District is a local educational agency responsible for complying with the IDEA as a condition of the State of Texas's receipt of federal education funding, and the District is required to provide each disabled child in its jurisdiction with a FAPE, pursuant to the IDEA, 20 U.S.C. § 1400 *et seq.*
2. Parents of students with disabilities are entitled to file a due process complaint and have a hearing on any matter relating to the identification, evaluation, or educational placement of the student, or the provision of a FAPE to the student. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.507-300.513.
3. Petitioner bears the burden of proof on all issues raised in the proceeding, except for the District's counterclaim. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).
4. The District bears the burden of proof on all issues raised in its counterclaim regarding the appropriateness of the FIE. 34 C.F.R. § 300.502(b)(1),(b) (2)(i), (b)(3).
5. In *** 2016, the District correctly determined that Student is a child with one or more of the IDEA enumerated disabilities who, by reason thereof, is eligible for Special Education and related services, which Student receives as a child with SLD and OHI. 34 C.F.R. § 300.8(a)(1); 19 Tex. Admin. Code § 89.1040(a), (c)(8)(10).
6. Student became eligible to receive Special Education services from the District on ***, 2016, or at the latest immediately upon the Parents' written acceptance and consent to the initial provision of Special Educational services, on ***, 2016.
7. The District failed to provide Student with a FAPE from ***, 2016, until the end of the District's school year. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; *Board of Edu. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 181; 102 S.Ct. 3034, 3038 (1982); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347-348 (5th Cir. 2000).
8. Student's placement in general education meets the Least Restrictive Environment (LRE) requirements of the IDEA. 20 U.S.C. § 1412(5); 34 C.F.R. §§ 300.114, 300.116; *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1039, 1046-1047 (5th Cir. 1989).
9. Student is being denied a FAPE because the District failed to implement an IEP that is adequately tailored to Student's unique educational needs following the determination of eligibility. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; *Rowley*, 458 U.S. at 181; *Bobby R.*, 200 F.3d at 347-348.
10. The District failed to provide Student's teachers with information about Student's IEP in accordance with the requirements of 19 Tex. Admin. Code § 89.1075(c).

11. Petitioner proved that the failure to implement modifications and accommodations resulted in a lack of meaningful educational progress for Student in accordance with the IDEA. *Bobby R.*, 200 F.3d at 348-349; 34 C.F.R. § 300.323.
12. The District shall call an ARDC meeting and revise the existing IEP as was planned for the *** ARDC meeting.¹³⁵
13. The Hearing Officer is without authority to order the District to hire an expert to help with development of the IEP, as requested by Petitioner.¹³⁶
14. Student's IEP fails to comply with all requirements of the IDEA and applicable Texas law. 34 C.F.R. §§ 300.320, 300.324; 19 Tex. Admin. Code §§ 89.1050(g), 89.1055(a).
15. Petitioner proved that the District caused a deprivation of educational benefits for failing to have Student's IEP in place after the determination that Student was eligible for IDEA modifications and accommodations. 20 U.S.C. §§ 1414(d)(2)(A), 1415(f)(3)(E)(ii)(III); 34 C.F.R. §§ 300.323(a), 300.513(a)(2)(iii).
16. The District evaluated Student in all areas of suspected disability. 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4).
17. The District timely held an initial ARDC meeting on ***, 2016. 20 U.S.C. 1414(d)(4); 34 C.F.R. § 300.324(b)(1)(i).
18. The District held an ARDC meeting on ***, 2016, that should have been limited to consideration of the IEP and in particular the accommodations and modifications and goals. 20 U.S.C. § 1414(d)(3)(E); 34 C.F.R. § 300.324(a)(5).
19. Parents need not agree to the IEP in order to accept and implement eligibility.
20. After eligibility was determined and Parents accepted the provision of services pursuant to the IDEA, the District and ARDC lacked authority to change the eligibility determination without an additional evaluation. Thus, the actions of the *** ARDC are a procedural violation of the IDEA.
21. The District's denial of eligibility for Special Education at the *** 2016 ARDC meeting was a violation of the IDEA.
22. A parent of a child with a disability is entitled, under certain circumstances, to obtain an IEE of the child at public expense, as set forth in 34 C.F.R. § 300.502(b).

¹³⁵ *Lake Travis Indep. Sch. Dist. v. M.L.*, 50 IDELRN 105 (W.D. Tex. 2007).

¹³⁶ *Saucon Valley Sch. Dist. v. Robert O.*, 785 A.2d 1069 (Pa. Commw. Ct. 2001).

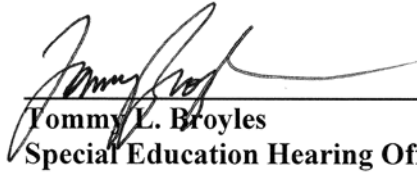
23. The evaluations that are part of the District's FIE were conducted in accordance with IDEA requirements at 34 C.F.R. §§ 300.301, 300.303 through 300.311.
24. The FIE was comprehensive. 34 C.F.R. § 300.304(c)(6).
25. Petitioner is not entitled to an IEE at public expense. 34 C.F.R. § 300.502(b)(3),(b)(5).

ORDER

Having considered the evidentiary record and the foregoing Findings of Fact and Conclusions of Law, the hearing officer hereby orders as follows:

Petitioner's requested relief is granted in part, and the District's requested relief concerning its FIE is granted.

SIGNED August 22, 2016.



Tommy L. Broyles
Special Education Hearing Officer
For the State of Texas

NOTICE TO THE PARTIES

This Decision of the Hearing Officer is a final and appealable order. Any party aggrieved by the findings and decision made by the Hearing Officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States.¹³⁷

¹³⁷ 20 U.S.C. § 1451(i)(2); 34 C.F.R. § 300.516; 19 Tex. Admin. Code § 89.1185(n).