

**DOCKET NO. 305-SE-0616**

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

**DECISION OF THE HEARING OFFICER**

STUDENT (Student), by next friends, Parents \*\*\* (Father) and \*\*\* (Mother) (collectively, Petitioner), requested an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEA).<sup>1</sup> The Conroe Independent School District (the District) is the respondent to the complaint. As addressed in more detail below, Petitioner alleges that the District failed to place Student in the least restrictive environment (LRE), as required by the IDEA, thereby denying Student a Free Appropriate Public Education (FAPE). Petitioner also alleges that the District predetermined Student’s placement and did not allow Student’s parents (Parents) to have meaningful participation in the development of an Individualized Education Program (IEP) through an Admission Review and Dismissal Committee (ARDC). The District maintains that Student’s placement meets LRE requirements, and asserts that Parents had an opportunity to—and in fact did—provide meaningful input to Student’s IEP. The Hearing Officer finds that Student’s parents were not denied an opportunity to participate in the ARDC meeting and that Student’s placement meets LRE requirements.<sup>2</sup> The IEP is appropriately designed to provide Student with benefit and with an opportunity to succeed educationally. Moreover, no procedural violation was proven. Therefore, Petitioner’s requests for relief are denied.

As discussed below, the hearing was held on November 3-4, 2016, in Conroe, Texas. Petitioner was represented by advocate Karen Mayer Cunningham, and the District was

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<sup>1</sup> 20 U.S.C. §§ 1400 *et seq.*

<sup>2</sup> 34 C.F.R. § 300.114, .116.

represented by attorney Amy C. Tucker. The parties requested an extension of the decision due date to afford them time to file briefs. The request was granted for good cause, and the Decision was timely issued on December 16, 2016

### I. DUE PROCESS HEARING REQUEST AND ISSUES

Petitioner filed a Request for a Due Process Hearing (Complaint) on June 30, 2016. In the Complaint, Petitioner alleged that the District denied Student a FAPE in the following ways:

1. The District inappropriately predetermined Student's placement in the \*\*\* classroom during the 2016-2017 school year rather than in \*\*\* classroom and denied Parents the right to participate meaningfully in the development of Student's IEP before and at the ARDC.
2. The District and ARDC did not design an IEP to meet Student's unique needs that is supported by services that permit Student to benefit from the instruction.
3. The District failed to place Student in the LRE.<sup>3</sup>
4. The District has not identified the positive academic and non-academic benefits to be demonstrated by Student.<sup>4</sup>
5. The District inappropriately determined and added to Student's educational program and profile through "Child Find" that Student was Intellectually Disabled (ID).

For relief, Petitioner seeks a finding that the District violated Student's rights as a student with disabilities under IDEA by predetermining Student's placement in a self-contained special education classroom denying Student a FAPE, which Student is entitled to receive in the LRE, and an order directing the District to return Student to \*\*\* class as set out in the December \*\*\*, 2015 ARDC. Petitioner also requests that the ID designation be removed from Student's eligibility page.

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<sup>3</sup> 34 C.F.R. § 300.114(a)(2)(i)(ii). The IDEA requires that a student with a disability be educated with non-disabled peers to the maximum extent appropriate and that special classes, separate schooling and other removal from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

<sup>4</sup> This issue was not actively pursued during the hearing and no relief was sought for this alleged violation.

The District requests all of Petitioner's allegations be denied and that the Hearing Officer make a finding that its Full and Individual Evaluation (FIE) was performed in compliance with the IDEA and thus Petitioner's request for an Independent Education Evaluation (IEE) at the District's expense be denied.

## II. RESOLUTION SESSION AND PROCEDURAL HISTORY

The Resolution Session was held on July 14, 2016, but did not result in a settlement.

The hearing was initially set on August 18-19, 2016, but during the July 29, 2016 prehearing conference, Petitioner represented that an on-going IEE would be completed by October 20, 2016, and asked that the hearing be continued. The District agreed with Petitioner's request to continue the hearing on the merits, and both parties requested an extension of the decision due date. In Order No. 2, as agreed to by the parties, the hearing was rescheduled to November 3-4, 2016, and the decision due date was extended to November 29, 2016.<sup>5</sup>

The hearing convened on November 3 and 4, 2016, before Tommy Broyles, hearing officer, at the District's Administration Building located at 3205 West Davis, Conroe, Texas. At the close of the evidentiary hearing, the District requested an extension of the decision due date to afford the parties sufficient time to submit briefs and provide the court reporter adequate time to complete the transcript. The parties requested that briefing be due December 2, 2016, and that the decision due date be extended to December 16, 2016. The ALJ granted both requests.

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<sup>5</sup> In response to Petitioner's request for an IEE, the District filed a request for hearing to establish that its FIE was appropriately performed pursuant to the IDEA and that Petitioner was not entitled to an IEE at public expense. 34 C.F.R. § 300.502(b)(2)(ii). The District's counterclaim was heard as a part of this same proceeding, initiated by Petitioner.

### III. BURDEN OF PROOF AND BACKGROUND INFORMATION

#### A. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.<sup>6</sup> However, the burden of proof is on the District in regard to its claim and requested finding that its FIE was conducted in compliance with all IDEA requirements.<sup>7</sup>

#### B. Background

At the time of the due process hearing, Student was in \*\*\* grade, and resides with Student's Parents within the District's geographical boundaries. Student attends Student's home school.

##### 1. Student's Eligibility for Special Education and \*\*\* Grade IEP

The District first determined that Student was eligible for special education services in the spring of 2013, based on an FIE completed on March \*\*\*, 2013.<sup>8</sup> Student met the criteria for autism and speech/language impairment.<sup>9</sup> At the time, Student was \*\*\* years old.

The ARDC met on December \*\*\*, 2015, to reevaluate Student's intellectual and adaptive behavior, and Student's academic achievement and functional performance because of concerns raised by Student's teachers about Student's academic progress in reading and math. The ARDC acknowledged that Student met the eligibility criteria as a student with autism and speech/language impairment, but directed that additional evaluations be completed by March \*\*\*, 2016.<sup>10</sup>

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<sup>6</sup> *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); *see also Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993).

<sup>7</sup> 34 C.F.R. § 300.502(b)(2)(i)(3).

<sup>8</sup> Respondent Ex. 4 (hereinafter R-\_) at 1.

<sup>9</sup> Petitioner Ex. 14 (hereinafter P-\_) at 1.

<sup>10</sup> R-2 at 1-2.

From December \*\*\*, 2015, to December \*\*\*, 2016, the ARDC set five measurable goals in education for Student and established a Behavioral Intervention Plan (BIP).<sup>11</sup> The ARDC determined that the LRE was for Student to attend \*\*\* minutes per week in the \*\*\* (\*\*\*) \*\*\* classroom, \*\*\* minutes per week in \*\*\* classroom, and the remainder of the day in general education.<sup>12</sup> Student was also provided \*\*\* minutes per week of speech and language therapy.<sup>13</sup> The ARDC did not recommend extending the school year. Parents attended this ARDC meeting.<sup>14</sup>

## **2. The ARDC Meeting for 2016-2017 School Year**

The 2016 FIE report found the current evaluation results to indicate that Student meets the criteria for the disability condition of ID.<sup>15</sup> The ARDC met on April \*\*\*, 2016 (2016 ARDC) to consider the 2016 FIE.<sup>16</sup> Parents and all necessary ARDC members were present.<sup>17</sup>

Based on the evaluation material reviewed, including the newly-performed intelligence and educational achievement tests performed in the 2016 FIE, the ARDC found that Student has a primary disability of autism, a secondary disability of ID, and a tertiary disability of speech impairment. The ARDC modified Student's IEP to include special education services of \*\*\* minutes per day in a \*\*\* classroom for \*\*\* and \*\*\* minutes per day in \*\*\* classroom for \*\*\*.<sup>18</sup> The remainder of Student's day is in general education.

## **3. Parents' Concerns**

Parents testified that Student is a good-hearted, happy, and \*\*\* child who is liked by other children. According to Father, the District did not notify them of the scheduled February

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<sup>11</sup> R- Ex. 2 at 5-9.

<sup>12</sup> R- 2 at 15.

<sup>13</sup> R- 2 at 16.

<sup>14</sup> R- 2 at 19.

<sup>15</sup> R- 3 at 11.

<sup>16</sup> ARDC meetings were set but cancelled for February \*\*\*, 2016, and March \*\*\*, 2016.

<sup>17</sup> R- 1 at 33.

<sup>18</sup> R- at 26.

\*\*\*, 2016 ARDC meeting until Friday, February \*\*\*, 2016, when the diagnostician told him that the school was going to place his \*\*\* in the \*\*\* classroom.<sup>19</sup> Father described his response to this as outrage, he was floored.<sup>20</sup> The ARDC meeting was canceled by Parents in order to allow them time to review the proposed IEP.<sup>21</sup>

District Staff's recommendation that ID be included in Student's eligibility and that Student be placed in the \*\*\* classroom for special education initiated the deteriorated relations between Parents and District Staff. In addition, Parents testified they are dissatisfied with their opportunity to participate in the development of the draft IEP, to have their changes made during the ARDC meetings, and with the teachers' lack of data collection and lack of communication with Parents.

The most important meetings, documents, and other matters are presented below with how they are referenced in the Decision and Order:

March ***, 2013 FIE	2013 FIE
December ***, 2015 Review of Existing Evaluation Data	2015 REED
December ***, 2015 ARDC	2015 ARDC
February ***, 2016 FIE	2016 FIE
April ***, 2016 ARDC	2016 ARDC
April ***, 2016 IEP	2016 IEP
September 2016 IEE	2016 IEE

## VI. FINDINGS OF FACT

1. Student resides with Parents within the District's boundaries and is eligible for special education services.<sup>22</sup>
2. At the time of the 2016 FIE, Student was \*\*\* years old and attending \*\*\* as \*\*\* grader.<sup>23</sup>

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<sup>19</sup> Tr. at 17. \*\*\* is a \*\*\* for Students with needs. \*\*\* are taught along with direct instruction in social skills and behavior. Tr. at 107-8.

<sup>20</sup> Tr. at 18.

<sup>21</sup> Tr. at 34.

<sup>22</sup> R-1.

<sup>23</sup> R-3.

3. Student was found eligible for Special Education services as a student with autism and speech impairment in the 2013 FIE.<sup>24</sup>
4. An 2015 ARDC Report and 2015 REED found the need for additional information due to Student's educational performance, specifically concerns in academics and information retention and whether a disability condition existed with the need for additional special education services.<sup>25</sup>
5. Additional information obtained and reviewed in the 2016 FIE include:<sup>26</sup>
  - a. review of educational records;
  - b. review of home language survey;
  - c. parent information and interview;
  - d. teacher information and interview;
  - e. Stanford Binet Intelligence Scales;
  - f. Kaufman Test of educational Achievement; and
  - g. Adaptive Behavior Assessment System.
6. The 2016 ARDC considered the 2016 FIE and found that Student meet the special education criteria for autism, ID, and speech impairment.<sup>27</sup>
7. The designation of Student meeting the criteria for autism and speech impairment is uncontested.
8. Parents paid for an IEE that was completed in September 2016.<sup>28</sup>
9. The findings made in the IEE generally agreed with the findings of the 2016 FIE, including that Student was eligible for educational services as a student with ID.<sup>29</sup>
10. For \*\*\* years, including \*\*\* years in \*\*\*, Student was taught in both the general education and \*\*\* classrooms.<sup>30</sup>
11. For these \*\*\* years, Student remained at the developmental reading assessment (DRA) level of \*\*\*, a \*\*\* level.<sup>31</sup>

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<sup>24</sup> R-4.

<sup>25</sup> R-2.

<sup>26</sup> R-3 at 2.

<sup>27</sup> R-1.

<sup>28</sup> P-3.

<sup>29</sup> P-3.

<sup>30</sup> Tr. at 319.

<sup>31</sup> Tr. at 320; R-3 at 10.

12. Over the past \*\*\* years, Student showed several concerns with academic progress:<sup>32</sup>
  - a. Needing much more time and repetition than other \*\*\* students to complete instructional activities and being unable to keep up with the pace of class;<sup>33</sup>
  - b. Requiring 1:1 instruction;
  - c. Difficulty in acquiring and remembering new information;<sup>34</sup>
  - d. Difficulty with reading; and
  - e. Experiencing a lack of attention that interferes with Student's learning.<sup>35</sup>
13. The 2015 ARDC ended in consensus and with an agreement to increase Student's time in \*\*\* room while additional information was gathered.<sup>36</sup>
14. Student has a Full Scale IQ of \*\*\*, indicating that Student's intellectual functioning is mildly impaired or within the delayed range of intelligence.<sup>37</sup>
15. In addition to the uncontested disabilities of autism and speech impairment, Student meets the criteria for ID.<sup>38</sup>
16. Based on the 2015 REED and 2016 FIE, a multidisciplinary team met from the District to prepare the proposed IEP for the 2016 ARDC meeting; Parents were not included at this District Staff meeting.<sup>39</sup>
17. Parents were called a day before the initially scheduled ARDC meeting by the educational diagnostician and were advised that the school-based members of the ARDC would recommend that Student participate in the \*\*\* program instead of \*\*\* program for special education.<sup>40</sup>
18. ARDC meetings were canceled once by Parents and once by the District.<sup>41</sup>

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<sup>32</sup> R-3 at 2; R-2 at 25-26.

<sup>33</sup> Tr. at 317.

<sup>34</sup> Tr. at 317.

<sup>35</sup> Tr. at 320.

<sup>36</sup> Tr. at 22-24; R-3 at 19.

<sup>37</sup> R-3 at 5.

<sup>38</sup> R-3 at 11.

<sup>39</sup> Tr. 338-345.

<sup>40</sup> Tr. at 19-20.

<sup>41</sup> Tr. at 20 and 39.



19. When the ARDC meeting was canceled by the District, the school Principal met with Parents in an informal meeting.<sup>42</sup>
20. After meeting with Parents, the Principal met with the school-based ARDC members, shared Parent's concerns, and asked them to reconsider the draft IEP.<sup>43</sup>
21. The draft IEP was changed pursuant to Parents' input through the Principal, in that Student's special education setting was changed from all \*\*\* to \*\*\* minutes in \*\*\* and \*\*\* minutes in \*\*\* Room.<sup>44</sup>
22. Parents disagreed, wanting Student to remain in \*\*\* room with \*\*\* curriculum for all special education instruction.<sup>45</sup>
23. Parents disagreed with adding ID to Student's eligibility.<sup>46</sup>
24. Parents provided input into the ARDC's preparation of Student's Present Levels of Academic Achievement and Functional Performance (PLAAFP) and several changes to the PLAAFP were made pursuant to Parents' input.<sup>47</sup>
25. The 2016 ARDC ended with Parents in disagreement.<sup>48</sup>
26. Parents were offered an opportunity to provide a written statement of disagreement that would be attached to the ARD document but Parents declined.<sup>49</sup>
27. Parents were offered a 10-day recess and to reconvene the ARDC meeting, but Parents declined.<sup>50</sup>
28. \*\*\* classroom curriculum is not reasonably calculated to provide Student an educational benefit given Student's special education needs:
  - a. Student demonstrated inconsistent and minimal academic progress with increasing frustration when performing \*\*\* curriculum;<sup>51</sup>

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<sup>42</sup> Tr. at 40.

<sup>43</sup> Tr. at 425.

<sup>44</sup> R-1 at 26.

<sup>45</sup> R-1 at 31.

<sup>46</sup> R-1 at 29.

<sup>47</sup> R-1 at 29-30.

<sup>48</sup> R-1.

<sup>49</sup> R-1 at 31 and 35.

<sup>50</sup> R-31 at 1.

- b. Educational gaps between Student and Student's peers are widening as Student ages because Student is unable to keep up with the rigors and pace of \*\*\* room curriculum;<sup>52</sup>
  - c. Student needs a learning environment with a smaller student to adult ratio, providing Student with more individual attention and direction;<sup>53</sup>
  - d. Student needs formal social skills and adaptive behavior training;
  - e. Student needs daily living skills to maximize independence;<sup>54</sup>
  - f. The FIE and IEE both suggest Student needs \*\*\* curriculum for Student to progress educationally;<sup>55</sup>
  - g. At this time, \*\*\* teacher is seeing minimal or no progress for Student;<sup>56</sup> and
  - h. Student is not receiving a benefit from the modified general education curriculum.<sup>57</sup>
29. Predetermination did not occur during Staff's pre-2016 ARDC meeting, only a draft IEP was prepared.<sup>58</sup>
30. Student's IEP was not predetermined and was not determined until the 2016 ARDC meeting.<sup>59</sup>
31. Parents participated in the development of Student's IEP.<sup>60</sup>
32. Parents were provided notice and opportunities to attend the 2015 and 2016 ARDC meetings.<sup>61</sup>
33. Student's program was individualized and based on Student's performance and assessment as detailed above in the data collected and instruments used for the 2016 FIE.<sup>62</sup>

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<sup>51</sup> R-2 at 26.

<sup>52</sup> P-3 at 12; Tr. at 185-186.

<sup>53</sup> P-3 at 14; Tr. at 186.

<sup>54</sup> P-3 at 14.

<sup>55</sup> Tr. at 191.

<sup>56</sup> Tr. at 322.

<sup>57</sup> Tr. at 322; 324.

<sup>58</sup> R-1; Tr. at 338-345.

<sup>59</sup> R-1; Tr. at 338-345.

<sup>60</sup> Tr. at 40; 243; 445.

<sup>61</sup> R-1 at 43-45; R-2;

<sup>62</sup> R-1; R-3.

34. Student's special education services are best taught in the \*\*\* classroom with the \*\*\* curriculum.<sup>63</sup>
35. Student's special education teachers worked well with general education teachers and other District personnel to coordinate and implement Student's services.<sup>64</sup>
36. Regular progress reports were provided to Parents and Student's progress, or lack thereof, was tracked by District personnel.<sup>65</sup>
37. While attending the \*\*\* classroom, Student is showing a significant improvement in academic success and Student's frustration is decreased.<sup>66</sup>
38. Both the FIE and the IEE performed at Parents' expense conclude that ID is an appropriate designation for Student, and its inclusion in the IEP is necessary for providing a complete picture of Student's needs and allowing the ARDC to address those needs.
39. The FIE was appropriately conducted.<sup>67</sup>
40. In the 2016 IEP, the District identified and provided positive academic and non-academic benefits as well as goals and benchmarks in order to later determine Student's progress and achievements.<sup>68</sup>

#### IV. DISCUSSION AND ANALYSIS

Petitioner offered 14 exhibits which were all admitted. The District offered 17 exhibits which were all admitted. Both parties called fact and expert witnesses to testify.

##### A. Procedural Allegations<sup>69</sup>

In order to prevail on this issue, the IDEA requires Petitioner to prove that there is a procedural violation and that this violation:

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<sup>63</sup> Tr. at 185-191, 263-265, 276, 317-318;

<sup>64</sup> Tr. at 143-149, 358, 374.

<sup>65</sup> Tr. at 269.

<sup>66</sup> Tr. at 264-265.

<sup>67</sup> R-3.

<sup>68</sup> R-1; R-9.

<sup>69</sup> These are the issues set out in Order No. 3.

- a. Impeded the student's right to a FAPE; or
- b. Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the student; or
- c. Caused the deprivation of educational benefit.<sup>70</sup>

The Hearing Officer finds that Parents failed to meet their burden of proof. No violation of Student's right to a FAPE was proven, as discussed in the following "FAPE" section. It was not proven that Student's placement was predetermined or that Parents were denied meaningful participation in the development of the IEP, in the 2016 ARDC meeting, or in any portion of the process. The Hearing Officer finds no deprivation of educational benefit due to procedural violations.

Petitioner objected to the District's staff meeting prior to the 2016 ARDC meeting in order to collaborate and prepare a draft IEP. The meeting took place without Parents but with Student's teachers and District evaluators. Student's progress and needs were discussed. Following this meeting, a proposed IEP was drafted, presented to Parents, and eventually discussed at the 2016 ARDC meeting.

Mother testified that for her to have input into the ARD document, she must be allowed to participate in the District's staff meeting.<sup>71</sup> However, the IDEA allows the District to hold preparatory meetings prior to the ARDC meeting in order to develop a proposed IEP.<sup>72</sup> This did not violate the Parents' participation rights, and it is the District's responsibility to prepare the initial draft of Student's IEP.<sup>73</sup> However, the draft IEP is only the starting point for discussions at the ARDC meeting. Parents have a right to participate in the ARDC and to have their opinions heard and considered, with appropriate adjustments to the IEP then made. Parents fully participated in the ARDC meeting and adjustments were made. No procedural violations were

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<sup>70</sup> 20 U.S.C. § 1415(f)(3)(E)(ii); *see also Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 811 (5th Cir. 2003). 34 C.F.R. § 300.513(a)(2)(i)-(iii).

<sup>71</sup> Tr. at 75.

<sup>72</sup> 34 C.F.R. § 300.501(b)-(c).

<sup>73</sup> Tr. at 292-3.

committed by the District when the staff-only, pre-ARDC meeting was held and a draft IEP developed.

Also addressing the parental right of participation, the District must provide notice and make efforts to have one or both Parents at the ARDC meetings. This requirement provides Parents with an opportunity to participate in the development of Student's IEP. If neither parent can attend a scheduled ARDC meeting, the District must use other methods to ensure parental participation, including telephone calls and telephone conference.

Here, the District contacted Parents prior to the meetings to provide information in preparation of the ARDC gathering, albeit only a day or two prior to the initially scheduled 2016 meeting. When Parents requested additional time, it was given. Moreover, when a meeting was canceled at the last minute by the District, the Principal met with Parents, listened to their input and then provided this input to the Staff developing the proposed IEP. The Principal requested that Parents' input be carefully considered, and the record establishes that Staff did just that. The Draft IEP was revised significantly even before the ARDC meeting, based on Parents' input.

Student's special education program and instructional setting, as originally proposed by Staff, were changed from \*\*\* minutes per day in the \*\*\* classroom to \*\*\* minutes per day in the \*\*\* classroom and \*\*\* minutes per day in \*\*\* classroom.<sup>74</sup> The proposed IEP recommended Student remain in general education, as Parents desired, for most of each school day. Parents continued to object, desiring Student not be taught in the \*\*\* classroom and with the \*\*\* curriculum at all. While the IDEA provides parents with a right to have meaningful input, it does not provide parents with the right to dictate an outcome.<sup>75</sup> There was no procedural error in this regard.

Parents also objected to the lack of communication with them while the Draft IEP was prepared and of not being informed of the contents of the Draft IEP until shortly before the proposed ARDC meeting. The call from the District's diagnostician shocked Parents when she advised that the District was recommending that special education services be provided in the

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<sup>74</sup> R-1 at 26.

<sup>75</sup> *White v. Ascension Parish School Board*, 343 F.3<sup>rd</sup> 373 (5<sup>th</sup> Cir. 2003).

\*\*\* classroom, rather than in \*\*\* classroom. This change in educational setting for special education services, the change in curriculum that accompanies this change in rooms, and the designation that Student also be classified as a student with ID underlies most of Parents' concerns and objections to the 2016 IEP.<sup>76</sup>

But the question concerning procedural violations does not rest on whether Parents' concerns were addressed to Parents' satisfaction in the 2016 IEP. Rather, the question is one of whether Parents were provided the opportunity for meaningful input into the 2016 IEP. Both attended the 2016 ARDC meeting. During this ARDC meeting, the PLAAFP's were reviewed line-by-line and several changes were made pursuant to the additional information provided by Parents. During this same meeting, the goals and objectives in the proposed IEP were also reviewed line-by-line, as were the proposed accommodations. Changes were again made pursuant to Parents' input. Moreover, it is important to note that these changes came after the Draft IEP was changed before the 2016 ARDC meeting and pursuant to Parents' input through the Principal, as discussed above.

Ultimately, Parents continued to disagree with any placement in \*\*\*, with the information in the Autism supplement, and with the added secondary classification of ID. They declined the District's invitation to attach individual statements to the ARD document and declined the opportunity to reconvene. While Parents did not get the ARDC to make many of the changes they desired, Parents were effectively and sufficiently included in the process and in preparation of Student's IEP.

The Hearing Officer concludes that Petitioner failed to prove any procedural violations significantly impeded Parents' opportunity to participate in the decision-making progress. The record is without evidence that any procedural violations impeded Student's right to FAPE or caused a deprivation of educational benefit.

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<sup>76</sup> These issues are addressed below.

**B. FAPE**

To provide a FAPE, the IEP must be specifically designed to meet Student's unique needs, and supported by services that permit Student to benefit from the instruction.<sup>77</sup> The Fifth Circuit established four factors to review when determining whether the IEP at issue and as implemented was reasonably calculated to provide Student with the requisite meaningful educational benefit under the IDEA.<sup>78</sup> These factors are:

- The program is individualized on the basis of the student's assessment and performance;
- The program is administered in the LRE;
- The services are provided in a coordinated and collaborative manner by key stakeholders; and
- There are positive academic and non-academic benefits demonstrated.

**1. Was the program individualized on the basis of Student's assessment and performance?<sup>79</sup>**

The evidence showed that Student's IEP was developed and individualized on the basis of the 2013 FIE, the 2015 REED, a functional behavioral assessment (FBA) completed on March \*\*\*, 2014, and on additional testing performed for the 2016 reevaluation (2016 FIE), including testing for IQ, educational achievement, and adaptive skills.<sup>80</sup> Proposed goals and objectives were developed and proposed at the 2016 ARDC meeting fully considering the assessments of Staff, Parents, and the expert opinions contained in evaluation reports.

Parents' concerns about Student's ID designation were not proven to be well founded. Parents' paid for the 2016 IEE but its findings support the conclusion of the ARDC. Both the 2016 FIE and 2016 IEE found Student eligible for services as a student with ID.

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<sup>77</sup> 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).

<sup>78</sup> *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5th Cir. 1997). There is no requirement the four factors be considered or weighed in any particular way. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d, 286, 293 (5th Cir. 2009).

<sup>79</sup> 34 C.F.R § 300.346(a), 300.531-532.

<sup>80</sup> R-3 at 2.

Parents voiced concerns that the \*\*\* curriculum is not on grade level with the general education curriculum. However, the evidence establishes that Student's disabilities are best addressed with the \*\*\* curriculum. Parents object and fear that the \*\*\* curriculum is effectively giving up on their child. The evidence does not support this interpretation of the ARDC's decision regarding appropriate curriculum for Student. Rather, Student's performance, testing, and other evaluative tools confirm that Student is receiving the appropriate curriculum to allow Student an opportunity to succeed. Moreover, the evidence shows that Student is not making progress in the general education curriculum for reading, even when it is modified.

Maintaining Student in the general education curriculum, even if modified in \*\*\* room, will only lead to a decline in Student's progress made with the \*\*\* curriculum. Moreover, as Student sees progress, Student's discouragement is lessened, perhaps even going away in the \*\*\* classroom. Student is relaxed, able to focus, and attends to the tasks assigned with the \*\*\* curriculum.<sup>81</sup> The evidence establishes that Student will progress more, learn faster, and be provided an opportunity to reach Student's unique potential at this time by continuing to successfully master the \*\*\* curriculum.<sup>82</sup>

## **2. Was the program administered in the LRE?**

The IDEA requires that a student with a disability be educated with non-disabled peers to the maximum extent appropriate and that special education classes, separate schooling and other removals from the regular education environment occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>83</sup> There was no disagreement about the amount of time Student should spend in special education (\*\*\* minutes per day) with the remainder of the day in the general education setting.

It became apparent during the hearing that Petitioner misunderstood \*\*\* room to be a less restrictive setting than the \*\*\* classroom for purposes of LRE. This is inaccurate as both

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<sup>81</sup> Tr. at 265.

<sup>82</sup> Tr. at 268.

<sup>83</sup> 34 C.F.R. § 300.114 (a)(2)(i)(ii).



settings are equally restrictive from an instructional setting perspective. Both are special education classrooms as opposed to general education. LRE requires that children with disabilities be educated with children who are non-disabled to the maximum extent appropriate.<sup>84</sup> There are no non-disabled classmates in either of these special education settings. However, Student does receive inclusion, to the maximum extent appropriate, with non-disabled peers as Student attends general education classrooms for most of each school day. It should be noted that even while in general education classrooms, Student continues to work on Student's IEP goals.

The distinguishing factors between \*\*\* and \*\*\* are the curriculum and student-to-teacher ratios. \*\*\* room \*\*\*.<sup>85</sup> In \*\*\*, \*\*\*,<sup>86</sup> The \*\*\* classroom also has \*\*\*, giving \*\*\* students \*\*\*. This is precisely what the evidence showed would best meet Student's unique needs.

Petitioner urged that Student be given time to meet the IEP goals in the manner prescribed during the 2015 ARDC meeting—100% in \*\*\* classroom. After the 2016 FIE, the school-based members of the ARDC proposed Student receive special education services 100% in the \*\*\* classroom. After reviewing parental concerns, the school-based members of the ARDC agreed to reduce the time for Student in \*\*\* from \*\*\* minutes to \*\*\* minutes. And as agreed to by Parents, Student remains in \*\*\* classroom for the additional special education program—\*\*\* minutes per day.

This is less an LRE issue and more a curriculum and instructional setting issue.<sup>87</sup> The issue does not concern the amount of time Student will spend in the general education classroom. The evidence, including Student's performance while in the \*\*\* classroom, demonstrates that the ARDC's decision to include student in \*\*\* was and is appropriate. In \*\*\* years of instruction in \*\*\* classroom, Student's reading remained at a DRA level of \*\*\* and was not showing any improvement.<sup>88</sup> Student was not able to keep up with the modified general education

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<sup>84</sup> 34 C.F.R. § 300.114(b).

<sup>85</sup> Tr. at 108.

<sup>86</sup> Tr. at 108.

<sup>87</sup> 34 C.F.R. § 300.116.

<sup>88</sup> Tr. at 320.

curriculum. However, when gaps in Student's prerequisite reading skills were properly addressed in the \*\*\* classroom, Student showed huge improvements, and Student is able to keep up with the \*\*\* curriculum.<sup>89</sup>

Student receives Student's unique program of special education services in an appropriate placement, with a combination of special education and general education classes. The time in \*\*\* is necessary for Student to have an opportunity for meaningful education.

**3. Were the services provided in a coordinated and collaborated manner by key stakeholders, including Parents?<sup>90</sup>**

The evidence also supports the conclusion that the services provided to Student are provided in a coordinated and collaborative manner by key stakeholders.<sup>91</sup> The special education teachers worked closely together and with the general education teachers, occupational therapist, and speech therapist to provide Student's services. Student's progress was monitored by District Staff and Student's IEP was implemented as required by the Fifth Circuit.<sup>92</sup> It was through teacher monitoring that the ARDC determined additional evaluations were needed and that led to the identification of Student's ID. Mother's testimony establishes that she is involved and knowledgeable about Student's educational matters.

Petitioner offered evidence establishing that certain teachers are better at collaboration with Parents than others. However, Petitioner failed to prove that District Staff failed to coordinate and collaborate with all stakeholders, including Parents. Petitioner elicited testimony from teachers demonstrating that they have a variety of ways to collect data, have not routinely kept written tracking data, but oftentimes share information orally. The Hearing Officer notes that the data collection could be more robust. Student's teacher admitted that should a teacher leave the District, a new teacher will have no data points. Nevertheless, the IDEA does not demand written data collection and it was not shown that the method used by the District harmed the coordination and collaboration between the stakeholders in this instance. Data was collected and then transferred to

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<sup>89</sup> Tr. at 321.

<sup>90</sup> 34 C.F.R. §§ 300.343-.345.

<sup>91</sup> *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d at 253.

<sup>92</sup> *Bobby R.*, 200 F.3d at 349.

the IEP progress reports and given to Parents with report cards (periodic reports), as required by the IDEA.<sup>93</sup> Thus, Petitioner failed to prove services were not provided in a coordinated and collaborative manner.

It should be noted that \*\*\* classroom with the \*\*\*.<sup>94</sup> Tests were given before and after teaching each unit, allowing the teachers to track whether Student made progress. The \*\*\* \*\*\* demonstrated significant progress by Student in mastering skills taught with this curriculum.

#### **4. Are there positive academic and non-academic benefits demonstrated?**

Student made minimal progress—only “de minimis” progress in reading—in the general education and \*\*\* curriculums. When Student began receiving services in the \*\*\* classroom, Student began making meaningful progress, both academically and behaviorally. The IDEA requires that the student’s benefit from the educational program be meaningful and more than simply “de minimis.”<sup>95</sup> The educational program must be likely to produce progress and not merely trivial advancement.<sup>96</sup> For this reason, after Student failed to show sufficient progress after \*\*\* years of teaching, the District reasonably sought additional evaluations to determine if additional or different special educational services were needed. The evidence substantiates that the District accurately determined what additional services are necessary.

To continue with the modified general education curriculum in \*\*\* classroom, after this length of minimal success, would put the District at risk of a finding that it failed to provide Student with FAPE in regard to at least reading. However, with the addition of the \*\*\* curriculum, the better teacher-to-student ratio, and the additional cognitive assessments, there are demonstrated positive academic and non-academic benefits. The most significant non-academic benefit is Student’s lessened frustration. Accordingly, Petitioner failed to meet its burden of proof on this issue.<sup>97</sup>

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<sup>93</sup> 34 C.F.R. §§ 300.320(a)(3)(ii); Tr. at 194.

<sup>94</sup> R-11; Tr. at 228. 260-261.

<sup>95</sup> *Polk v. Cent. Susquehanna Int. Unit 16*, 853 F.2d 171, 180, 182 (3d Cir. 1988).

<sup>96</sup> *Houston Ind. Sch. Dist. v. VP*, 582 F.3d at 583.

<sup>97</sup> *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005)

Having reviewed the four factors for a FAPE above, the Hearing Officer concludes that the District provided Student with a FAPE.

### **C. Eligibility Designation**

#### **1. Was ID inappropriately determined and added to Student's educational program and profile?**

There is no dispute that Student's primary disability is autism with a secondary disability of speech impairment.<sup>98</sup> However, Parents object to the inclusion of ID as a disability. They urge that the ARDC was not required by the IDEA to list all of Student's eligibilities. Parents are unaware of any purpose for the inclusion, other than perhaps additional funding for the school or to justify the ARDC's desire to change Student's location for special education from \*\*\* to the \*\*\* classroom.<sup>99</sup>

It should be noted that District Staff offered to meet with Parents to discuss why inclusion of ID in Student's eligibility was needed.<sup>100</sup> The record does not indicate whether a meeting was held. However, there is no evidence to suggest the motivations assumed by Parents are accurate. Rather, the evidence establishes that the District performed the 2016 FIE to address concerns over Student's academics and ability to retain information.<sup>101</sup> More specifically, the 2016 FIE was performed to ascertain whether an additional disability was present that might lead to the need for additional special education services.

Sources of data for the 2016 FIE included Parents' input through a home language survey, a parent information interview, and an Adaptive Behavior Assessment System performed with Mother and Student's classroom teacher. An LSSP reviewed Student's educational records and administered the academic and intelligence tests. Student scored in the low or very low range of scores when compared with same age peers in reading composite, written language, and

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<sup>98</sup> P-21.

<sup>99</sup> Tr. at 44.

<sup>100</sup> Tr. at 43.

<sup>101</sup> R-3 at 2.

math. Student's Full Scale IQ score indicated global intellectual functioning within the mildly impaired or delayed range of intelligence. In all areas of IQ tested, Student demonstrated sub-average cognitive ability. It should again be noted that Parents had an outside IEE performed and the results were similar.

The District's FIE provided valuable information and allowed the ARDC to craft an IEP providing the necessary special education services that offered Student a FAPE and a reasonable opportunity to succeed.

Student's IEP is an individualized program based upon Student's unique needs and regardless of the eligibilities listed, each of Student's needs must be addressed. The evidence established that the special education needs and services for Student's autism are not the same as for Student's ID. Petitioner presented no evidence that the FIE was inadequate or that Student's eligibility of ID is inappropriate. Moreover, Parents' disagreement with the eligibility designation of ID does not render the designation inappropriate. The ARDC's inclusion of ID was appropriately made and for Student's benefit and potential success.

## **2. Was the District's FIE conducted according to appropriate procedures?**

Petitioner presented no evidence that the FIE was not appropriately performed under the IDEA. Rather, the testimony and exhibits offered into evidence prove that the FIE was conducted in compliance with all IDEA requirements.<sup>102</sup>

### **D. Summary of Conclusions**

Through application of the IDEA and Fifth Circuit precedent to the facts of this case, clear and convincing evidence establishes that the District acted in a collaborative manner, that the IEP is appropriate in setting the LRE, Student's special education placement, and Student's need for \*\*\* curriculum. Finally, the unrebutted evidence establishes that the District's FIE is appropriate and that Parents are not entitled to an IEE at public expense.<sup>103</sup>

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<sup>102</sup> 34 C.F.R. § 300.304.

<sup>103</sup> 34 C.F.R. § 300.502(b)(3).

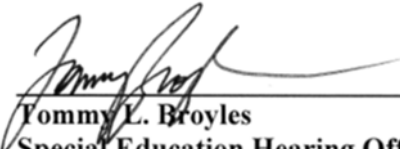
## VII. CONCLUSIONS OF LAW

1. The District is an LEA responsible for complying with the IDEA as a condition of the State of Texas' receipt of federal funding, and the District is required to provide each disabled child with a FAPE pursuant to the IDEA, 20 U.S.C. § 1400 *et seq.*
  2. Student, by next friends, Parents, bears the burden of proof on all issues raised in Petitioner's Complaint. *Schaffer ex rel. v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).
  3. The Texas one-year statute of limitation (SOL) began running one year before the Complaint was originally filed— June 30, 2016. The accrual date for the Complaint was June 30, 2015. 19 Texas Administrative Code § 89.1151(c).
  4. The District appropriately determined that Student is in need of services as a student with autism, ID, and speech impairment and all three are appropriately identified as a part of Student's educational profile. 34 C.F.R. § 300.8(c)(1)(ii); 19 Tex. Admin. Code §§ 89.1040(c)(1)(5)(10).
  5. The 2016 ARDC's placement and schedule of services places Student in the LRE. 20 U.S.C. § 1412(a)(5)(A). *See Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1039 (5th Cir. 1989).
  6. Student's IEP as written was appropriately individualized to ensure Student makes meaningful educational progress. 20 U.S.C. 1414(c)(1)(B)(iii)-(iv); 34 C.F.R. § 300.324(a)(2)(v), (a)(3)(ii).
  7. Parents were provided with a meaningful opportunity to participate in the decision-making process regarding the provision of a FAPE. 34 C.F.R. § 300.519(a)(2)(ii).
  8. Parents were members of the ARDC making decisions about Student's educational placement. No portion of the 2016 IEP was predetermined by the District. 20 U.S.C. §§ 1414(e), 1415(b)(1); 34 C.F.R. §§ 300.327, 501(b)-(c).
  9. The District's FIE was conducted pursuant to the requirements of the IDEA and Petitioner is not entitled to an IEE at the District's expense. 34 C.F.R. 300.502(b)(3).
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### VIII. ORDER

After considering the evidentiary record and the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer hereby orders as follows:

Petitioner's requests for relief are **DENIED**.



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

### 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. 19 Tex. Admin. Code §89.1185 (p); Tex. Gov't Code, §2001.144(a) (b).