

DOCKET NO. 332-SE-0816

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

DECISION OF HEARING OFFICER

Petitioner, STUDENT (Student) by next friends PARENT and PARENT (Parents) (collectively, Petitioner) requested an impartial due process hearing (complaint) pursuant to the Individuals with Disabilities Act (IDEA), 20 U.S.C. § 1400 *et seq.* Tomball Independent School District (District) is the Respondent to the complaint. Petitioner alleges that the District deprived Student of a Free Appropriate Public Education (FAPE) by: (1) failing to place Student in the least restrict environment (LRE); (2) failing to provide Student with the appropriate supplemental aids and services recommended; and (3) predetermining Student’s educational placement for the 2016-2017 school year without meaningful parental input.

I. PROCEDURAL HISTORY

Petitioner filed its complaint with the Texas Education Agency (Agency) on August 19, 2016, and the case was assigned to the Hearing Officer on that same day.¹ The Hearing Officer issued an order establishing the procedural schedule for this case on August 23, 2016, and set the hearing for September 22-23, 2016. A prehearing conference was convened on September 9, 2016 at which time it was determined that 4 days would be required for the

¹ Initially, the Hearing Officer was under the belief that the case was required to be assigned to Hearing Officer Sharon Cloninger who held a due process hearing on September 9-11, 2015, regarding Student (TEA Docket No. 335-SE-0715). Agency rules state that if a request for hearing relates to the same student who was involved in another hearing that was filed within the past 12 months, the Agency will assign the recently filed hearing request to the same hearing officer who presided over the previous hearing. 19 Tex. Admin. Code § 89.1170(a). The complaint in the previous case was filed on July 7, 2015, and the current complaint was filed on August 19, 2016. More than one year has elapsed since the request for hearing was filed in the previous case.

hearing. In addition, Petitioner requested an open hearing and that a stay put be enforced to ensure Student remained in Student's current educational placement, and Petitioner's requests were granted. The hearing was continued and rescheduled for October 17, and 19-21, 2016.

The hearing convened on October 17, 2016, at the District's Staff Development Center located at 1302 Keefer Street, Room 705, Tomball, Texas. Petitioner was represented by Shiloh Carter of Disability Rights Texas and John Keville of Winston & Strawn, LLP. The District was represented by Amy Tucker of Rogers, Morris & Grover.

II. ISSUES, PROPOSED RELIEF, AND BURDEN OF PROOF

A. Issues

In the complaint, Petitioner alleges that the District denied Student a FAPE and raised the issues below, which were noted in Order No. 2:

1. The District has failed to provide a FAPE during the 2016-2017 school year in that:
 - a. The District failed to ensure, to the maximum extent possible, that Student received educational instruction and services in the LRE.
 - b. The District failed to provide Student with appropriate supplemental aids and services recommended in the Independent Educational Evaluation (IEE) performed on May ***, 2016.
 - c. The District predetermined Student's educational placement for the 2016-2017 school year without meaningful parental input.

B. Proposed Remedies

Petitioner requested that the hearing officer order the following relief:

1. The District to provide an appropriate educational placement for Student for the 2016-2017 school year in the LRE for all core academic subjects, including *** and ***. The District to provide the following services identified as areas of need during the May ***, 2016 IEE for speech and language:
 - a. Speech services that address ***, ***, ***;
 - b. A communication device that is ***;
 - c. Speech services that include the opportunity for in-class observation and therapeutic intervention, as well as additional staff training on cues and prompts utilized by Student to enhance verbal output; and
 - d. An IEP that includes components of speech and communication.

C. Burden of Proof

The IDEA creates a presumption that a school district's decisions made pursuant to the IDEA are appropriate and that the party challenging the decisions bears the burden of proof at all times.² Petitioner must, therefore, establish that the alleged violations resulted in a denial of FAPE or other substantive violation of the IDEA.

III. STIPULATED FINDINGS OF FACT

On October 10, 2016, Petitioner included the following stipulated facts with its disclosure documents:

1. Tomball ISD is the resident school district for Student.
2. Student is a ***-year-old enrolled in the *** at *** in Tomball Independent School District for the 2016-2017 school year. Student is eligible to receive special education and related services under the eligibility categories of Intellectual Disability and Speech Impediment. Student ***.³

² *Schaffer ex rel. v. West*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005), *see also 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).

³ JE-2 at 2.

3. Student’s Annual ARD and Reevaluation Review was conducted by the District on December ***, 2015.
4. On August ***, 2013, Student was *** in the District’s *** (***) *** ***.
5. During the 2015-2016 school year, Student attended *** at *** in Tomball ISD. The following table reflects Student’s schedule of services during the 2015-2016 school year:

*** 2015-2016 Schedule of Services		
General Ed. Classroom		Special Ed. Classroom
***	*** min. per week (***) min. per day)	*** min. per week (***) min. per day)
***	*** min. per week (***) min. per day)	
***	*** min. per week (***) min. per day)	
***	*** min. per week (***) min. per day)	
***	*** min. per week (***) min. per day)	
***	*** min. per week (***) min. per day)	
TOTAL:	*** min. per week (***) min. per day)	*** min. per week (***) min. per day)
*** min. total per week (***) min. total per day) of instruction		

6. On November ***, 2015, during Student’s *** year, an ARD meeting was convened to conduct a Review of Existing Evaluation Data (REED).⁴ Additional evaluation in the areas of speech/language, updated vision and hearing screening, occupational therapy, updated parent/teacher information, formal cognitive testing, adaptive behavior measures, formal/informal achievement data and assistive technology was requested.⁵
7. The District’s Reevaluation Review was completed on December ***, 2015.⁶
8. On December ***, 2015, an Annual ARDC meeting was convened for Student.⁷ The District’s FIE was reviewed.⁸ Student’s progress on Student’s goals and objectives were reviewed.⁹ The school-based members of the ARDC proposed a recess of the ARD meeting to allow Parents an opportunity to review the evaluation and proposed goals and objectives prior to proceeding. Parents agreed to the recess.¹⁰

⁴ JE-3.

⁵ JE-4 at 4-3 (noting additional evaluation to be completed by December ***, 2015).

⁶ JE-4.

⁷ JE-2.

⁸ JE- 2-29.

⁹ JE-2 at 30.

¹⁰ *Id.*

9. On December ***, 2015, the ARDC reconvened. Parents disagreed with the FIE and verbally requested an IEE.¹¹ The new proposed goals/objectives were reviewed and revised.¹²
10. The schedule of services for the remainder of the 2015-2016 school year and the beginning of the 2016-2017 school year were also discussed during the December ***, 2015 ARDC.¹³ The following table depicts Student’s proposed schedule of services for the 2016-2017 school year:

*** 2016-2017 Schedule of Services		
General Ed. Classroom		Special Ed. Classroom
***	*** min. per week (***) min. per day)	*** min. per week (***) min. per day)
***	*** min. per week (***) min. per day)	
***	*** min. per week (***) min. per day)	
***	*** min. per week (***) min. per day)	
***		*** min. per week (***) min. per day)
***		*** min. per week (***) min. per day)
TOTAL:	*** min. per week (***) min. per day)	*** min. per week (***) min. per day)
*** min. total per week (***) min. total per day) of instruction		

11. The proposed schedule of services for the 2016-2017 school year recommended decreasing Student’s time in the general education setting by an additional *** so that Student would start receiving *** minutes a day each of *** instruction and *** instruction in the special education classroom instead of the general education classroom. Parents disagreed with the proposed 2016-2017 schedule. The ARD meeting ended in disagreement and Student’s parents were offered a 10-day recess.
12. On January ***, 2016, Student’s parents sent a letter to the District’s Director of Special Education, ***, requesting an IEE.
13. On January ***, 2016, the ARD committee reconvened. The areas of non-consensus were reviewed. Parents continued to be in disagreement with the 2016-2017 proposed schedule of services.¹⁴
14. For the Speech/Language IEE, Parents selected ***, who completed the IEE on May ***, 2016. Ms. ***’s evaluation was reviewed by the ARDC on May ***, 2016. At the May ***, 2016 ARDC, Parents again disagreed with the District’s proposed schedule of services for the 2016-2017 school year. They also noted their disagreement with the particular communication device being utilized by Student (*i.e.*, ***).

¹¹ *Id.*

¹² JE-2 at 30-31.

¹³ JE-2 at 32.

¹⁴ JE-2 at 33.

15. When their first choice evaluator was not able to complete the assessment, Parents selected Dr. *** for the Psychoeducational IEE. Dr. ***'s IEE is dated August ***, 2016.

IV. DISPUTED FINDINGS OF FACT

Proposed placement for the 2016-2017 school year and whether the placement is in the LRE?

1. The central issue in this case is whether the District violated the IDEA's LRE mandate by proposing to reduce Student's general education time by *** by moving Student's *** and *** courses (*** minutes each) from the general education classroom to the special education classroom.
2. At the beginning of Student's *** year, Parents requested a due process hearing to challenge the District's recommendation that Student receive *** hours/day of Student's *** and *** instruction in the special education classroom.¹⁵ They also alleged they were denied the right to meaningfully participate in the development of Student's IEP. Parents sought, among other relief, placement in the regular education *** classroom for the entirety of Student's school day.¹⁶
3. The 2015-2016 Decision was not appealed and is final.
4. The hearing officer in the 2015-2016 Decision held that Student's cognitive levels prevent Student from following along with the instruction in the general education classroom. The hearing officer also concluded that the proposed placement with a combination of general education and special education instruction is the placement that is most beneficial for Student's progress.¹⁷
5. The hearing officer in the 2015-2016 Decision held that the schedule of services outlined in Stipulated Finding of Fact No. 5 was the appropriate LRE placement.
6. After the 2015 due process hearing, the District conducted Student's 3-year Reevaluation. On the assessment of intelligence and cognitive abilities, Student received a Full Scale IQ

¹⁵ See Hearing Officer's Decision, TEA Dkt. No. 335-SE-7015 (SEA Tex. Oct. 29, 2015) (hereinafter "Decision") at 1-2.

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 43-44.

- Standard Score of ***.¹⁸ The corresponding percentile rank of *** means that *** of people demonstrate a higher cognitive ability than Student.¹⁹
7. With respect to adaptive behavior, the 2015 Reevaluation Committee determined that Student demonstrated deficits in the areas of fine motor skills, communication, *** (including *** and ***), functional academic skills and home and community orientation.²⁰
 8. Considering Student's level of intellectual functioning and concurrent deficits in adaptive behavior, the Reevaluation Committee concluded Student qualified as a student with an Intellectual Disability.²¹ The evaluation of Student's language confirmed eligibility as a student with a Speech Impairment with deficits in expressive and receptive language skills and articulation.²² Student's academic achievement in ***, reading and writing was commensurate with Student's intellectual functioning.²³
 9. The ARDC convened on December ***, 2015, to consider the Reevaluation and to develop Student's IEP for the remainder of the 2015-2016 school year and the first half of the 2016-2017 school year. The different portions of the Reevaluation were reviewed by the multi-disciplinary team. Based on the results, it was recommended to change Student's eligibility to Intellectual Disability (ID) and Speech Impairment (SI).²⁴
 10. The ARDC then reviewed Student's progress on Student's former goals/objectives, as well as the new proposed goals/objectives. Extensive discussion occurred around the new proposed goals/objectives and several were changed based on parental input. Upon Parents' request for goals related to *** and ***, the special education teacher, ***, agreed to draft goals for consideration at a reconvened ARDC. The Committee also agreed with Parents' request to develop a goal related to "****." Lastly, ***, speech therapist, agreed with Parents' request to draft a new speech goal related to developing Student's use of ***.²⁵
 11. The ARDC agreed to take a recess to provide Parents with additional time to review the Reevaluation and the new proposed goals/objectives.²⁶

¹⁸ JE-4 at 9.

¹⁹ Tr. at 181.

²⁰ JE-4 at 20.

²¹ JE-4 at 21.

²² JE-4 at 4.

²³ JE-4 at 13-14.

²⁴ JE-2 at 29. It was recommended that Student no longer qualified as a student with an Other Health Impairment (OHI). See 34 C.F.R § 300.8(c)(9) (defining OHI).

²⁵ JE-2 at 30; Tr. at 593-94.

²⁶ JE-2 at 30.

12. The ARDC reconvened on December ***, 2015. Parents disagreed with the Reevaluation and indicated their intent to seek an IEE. Additional review and revision of the goals/objectives occurred before all were accepted by the team.²⁷ The District agreed to Parents' request to collect data once every 2 weeks instead of two times weekly as required by District's procedures.²⁸
13. The ARDC considered and discussed Student's placement and the LRE.²⁹ Parents shared their belief that the District was not complying with the IDEA's statutory mandate to maximize, to the greatest extent appropriate, Student's time in the general education classroom and that Student would accomplish more if Student's placement included more time in the general education classroom with Student's nondisabled peers.³⁰ While all ARDC District members agreed that both Student and Student's peers benefit greatly from Student's inclusion in the general education setting, school staff emphasized that based on Student's Present Levels of Academic Achievement and Functional Performance (PLAAFPs), Student needs a small setting to learn new skills. School staff explained that Student cannot achieve Student's goals/objectives without special education instruction.³¹
14. The District members of the ARDC determined that the *** curriculum outlined in the Texas Essential Knowledge and Skills (TEKS) exceeds Student's present level of educational performance to the extent that Student requires instruction significantly below current grade placement. Student's present level of performance is such that the modifications required for Student to achieve Student's goals/objectives cannot be implemented in the general education classroom without eliminating essential components of the general education curriculum. After considering and discussing the potential harmful effects of removing Student from the general education classroom, the District members of the ARDC recommended a combination of general education and special education instruction.³²
15. For the remainder of the 2015-2016 school year, the ARDC did not recommend a change from the schedule already in place and already determined to be appropriate by the previous hearing officer. However, considering the increased difficulty level and the change in the nature of the *** and *** curriculum from *** to ***, school staff recommended Student receive *** and *** instruction in the special education classroom for ***. The remainder of the proposed *** schedule was the same as ***, which called

²⁷ JE-2 at 2-19, 31.

²⁸ Tr. at 265, 595-98.

²⁹ JE-2 at 22, 24, and 32.

³⁰ JE-2 at 22.

³¹ *Id.*

³² JE-2 at 23, 25.

for most of *** (***), and *** instruction in the special education classroom.³³ However, *** minutes/day of *** and *** minutes/day of *** would continue to be implemented in the regular education classroom along with all remaining instructional time including instruction in *** and ***. Student would have in-class support (support provided by a special education paraprofessional) during all regular education instructional time.³⁴ Lastly, school staff continued to recommend that Student be included with Student's nondisabled peers in all nonacademic and extracurricular activities such as lunch, *** and field trips.³⁵

16. In response to school staff's proposed placement, Parents recommended an additional *** minutes of general education time for the remainder of the 2015-2016 school year and an additional *** hours of general education time for the 2016-2017 school year.³⁶ The District disagreed with Parents proposed schedule based on Student's present level of performance.³⁷ Parents noted their disagreement with the District's Reevaluation and the schedule of services. Based on the disagreement, Parents were offered and accepted a reconvene ARDC meeting to further consider the areas of disagreement.³⁸
17. On January ***, 2016, the ARDC reconvened. Additional discussion occurred regarding Student's PLAAFPs, the LRE and data collection.³⁹ Parents' disagreement with the Reevaluation, the schedule of services and the PLAAFPs was documented in the non-consensus ARD paperwork.⁴⁰
18. The current complaint was filed on August 19, 2016. Shortly before the hearing was filed, the family's second IEE was completed by Dr. *** on August ***, 2016.⁴¹ Dr. *** noted the family's belief that placing Student in a special education classroom with other children who display similar academic, cognitive, language and social delays is detrimental to Student's progress.⁴² Consistent with the District's evaluation, Dr. *** concluded Student's Full Scale IQ was a *** and fell in the *** percentile.⁴³ Student's academic achievement scores were in the "very low" range, all falling below a ***

³³ JE-2 at 25-26; Tr. at p. 583.

³⁴ JE-2 at 26.

³⁵ JE-2 at 24.

³⁶ JE-2 at 47.

³⁷ *Id.*

³⁸ JE-2 at 33.

³⁹ *Id.*

⁴⁰ JE-2 at 43.

⁴¹ JE-7 at 1.

⁴² *Id.*

⁴³ JE-7 at 3.

equivalent. Dr. *** explained that Student's "overall academic skills appear to be rather rudimentary and more in keeping with those of a *** rather than a ***."⁴⁴

19. The District members of the ARDC included very experienced teachers and a speech pathologist that know Student very well and have worked with Student's during both Student's *** and *** school years. ***, Student's *** teacher for the current school year, has 11 years of experience in education with 6 of those as a *** teacher.⁴⁵ Ms. ***, Student's special education teacher for ***, has 17 years of experience as a special education teacher.⁴⁶ ***, a certified special education teacher and speech language pathologist, is the Program Specialist for Low Incidence Population and has 17 years of experience in education.⁴⁷ Ms. *** has attended ARD meetings for Student since the 2014-2015 school year.⁴⁸ She has spent approximately 30-40 hours observing Student specifically, but also spent numerous additional hours in Ms. ***'s special education classroom for a variety of other reasons.⁴⁹
20. The District has made sufficient effort to accommodate Student in regular education. In fact, despite the significant impact of Student's disability on Student's ability to obtain an educational benefit from regular education, the ARDC did not propose to remove Student from all general education academics. Instead, the ARDC recommended a modified curriculum with paraprofessional support and accommodations to be implemented in the regular education environment for some of the *** and *** instruction.⁵⁰
21. Student's *** curriculum, like Student's *** and *** guidelines from the last 2 years, must be modified 100% in order for Student to access the general education curriculum. Student is not held responsible for any of the regular education curriculum being studied by the regular education students.⁵¹ And, significantly, because of Student's educational needs, Student will not master Student's goals in the general education setting, much less any of the rest of the curriculum with only occasional opportunities in the regular education classroom to work on Student's goals. All of the experienced, educational professionals who have worked with Student agree that Student requires specialized

⁴⁴ JE-7 at 6-7.

⁴⁵ Tr. at 516.

⁴⁶ Tr. at 252.

⁴⁷ RE-13; Tr. at 576-79.

⁴⁸ Tr. at 579.

⁴⁹ Tr. at 579-80.

⁵⁰ JE-2 at 26 (documenting portion of *** and *** in general education with modified curriculum, as well as, the in-class support (ICS) with a paraprofessional for all regular education time); JE-2 at 20 (documenting modification/accommodations for all classes).

⁵¹ See JE-2 at 25 (documenting that the ARD Committee agreed that Student's grades are determined by special education in core subjects).

instruction at Student's level and at Student's pace with increased repetition and small group instruction in order to make progress.⁵²

22. At present levels of performance, Student does not receive an educational benefit from core academic subjects being taught in the general education classroom. Student's ID prevents Student's from being able to grasp the essential elements of the regular education curriculum. Student's IEP goals represent "the prerequisite skills" of the *** curriculum – not the *** curriculum itself.⁵³ Prerequisite skills represent the below grade-level foundational skills a child needs before he or she can extend that knowledge to grade level curriculum.⁵⁴
23. The incremental change in the proposed schedule, to remove Student from the regular education *** and *** instruction, was a result of the increased difficulty level of the curriculum from *** to ***. As Student's *** teacher, ***, explained, Student's classes were taught in a more "****" manner that permitted Student to receive educational benefits.⁵⁵ However, in the ***, the curriculum ***,⁵⁶ In order for the curriculum to be meaningful to Student, Student needs the information introduced at a lower level, at a slower pace, and with significantly increased repetition.⁵⁷
24. Student is unable to grasp any of the actual *** curriculum and instead requires 100% of it to be modified. The modified activities are not recognizable as *** curriculum.⁵⁸ The nature and severity of Student's disability simply does not permit Student's to make meaningful educational progress without the combination of special education and regular education instruction recommended by the ARDC. Without access to the modified curriculum in the special education classroom, Student will be denied meaningful access to the *** curriculum as mandated by the IDEA.
25. Student appears lost during the general education academic instruction and is more concerned about ***self than Student is with what Student's teachers or Student's nondisabled peers are doing.⁵⁹

⁵² Tr. at 297-98 (Ms. *** can provide Student with meaningful access to the entire *** curriculum as required by the IDEA, albeit at a prerequisite level and at a slower pace with increased repetition, in the special education classroom.), 482, 583.

⁵³ See e.g., Tr. at 524.

⁵⁴ Tr. at 584.

⁵⁵ Tr. at 477.

⁵⁶ Tr. at 583.

⁵⁷ *Id.*

⁵⁸ Tr. at 565.

⁵⁹ Tr. at 542 (Ms. *** explaining Student becomes disengaged during academic activities and ***, or something similar), 481-82 (Ms. *** explaining during academic activities Student will ***), 615 (Ms. *** explaining Student becomes "very disinterested" when academics begin in the regular education classroom).

26. Student's low communication skills interfere with Student's success in the regular education environment.⁶⁰
27. Contrary to the general education setting, Student is much more engaged and outgoing – Student is “excited,” “eager,” “comes alive,” “lights up” and “confident”—in the special education setting.⁶¹ Student communicates much more in the special education environment. The opportunity for Student to vocalize and communicate in the special education setting is significantly increased due to the small student/teacher ratio.⁶² In fact, not only are increased opportunities present in the special education classroom, but Student takes advantage of the opportunities and actually responds often and spontaneously in that environment.⁶³
28. Student has significant and substantial needs in the acquisition of both academic and life skills, including communication that cannot be met in the regular education classroom. Moreover, to make meaningful academic progress Student needs extensive repetition, a smaller student/teacher ratio, and a slower pace with a modified curriculum if Student is to have meaningful access to the curriculum.⁶⁴ Increased special education time for Student will result in increased communication skills that will improve Student's life all around.⁶⁵ Additionally, an increase in special education time will assist Student with making progress in Student's communication skills and academic skills, which will make Student's time with Student's nondisabled peers more meaningful.⁶⁶ The educational benefits of the special education setting outweigh any benefit Student might receive (*e.g.* increased exposure to nondisabled peer behavior and communication modeling) from additional inclusion time.
29. Utilizing inclusion strategies to provide Student with the opportunity to generalize or reinforce certain skills in the regular education classroom is not equivalent to providing Student with the significant repetition, the slower pace, and the small setting *essential* to Student's ability to master any academic skills; that is, it does not provide Student with meaningful access to the curriculum. As Ms. ***, the *** teacher explained, the instruction she provides in her classroom that relates to Student's *** goal is a total of

⁶⁰ See *e.g.*, Tr. at 478.

⁶¹ Tr. at 522 (Ms. *** explaining Student shows excitement in the special education classroom, but not in regular education), 617 (Ms. *** explaining high level of engagement in special education classroom that is not seen in regular education classroom).

⁶² Tr. at 617 (Ms. *** explaining difference in occasional opportunities for communication in large group versus repeated opportunities for communication in small group).

⁶³ Tr. at 616-17.

⁶⁴ See *e.g.*, Tr. at 482, 520, and 583.

⁶⁵ Tr. at 233.

⁶⁶ Tr. at 549, 590.

less than 1 minute on a single day during the *school year*. In fact, the “instruction” on the goal consists of a simple review during a pre-teaching activity.⁶⁷

30. The inclusion of Student in the *** general education curriculum and classes for *** and *** would require Student to engage in a separate, unrecognizable activity at Student’s level with paraprofessional support.⁶⁸ Whether the paraprofessional is sitting with Student working on a highly modified activity in the middle of the classroom, the side of the classroom or the back of the classroom, it is still a “class” just for Student. Such an arrangement is a distraction for the teacher and students who are engaged in a different activity at a much higher level.⁶⁹
31. Student has made good progress on mastering Student’s IEP goals and has earned good grades in *** and ***; however, as all of Student’s teachers explained, the progress and good grades, like the *** and ***, are based on Student’s progress on Student’s IEP goals and the modified curriculum taught by Ms. *** in the special education classroom.⁷⁰
32. The entire *** curriculum is provided by Ms. *** in the special education classroom, but at a prerequisite level and a pace that permits Student to learn the essential components of the curriculum.⁷¹ While regular education teachers can utilize inclusion strategies/techniques to reinforce Student’s goals, the evidence establishes that Student needs specialized instruction with a smaller student/teacher ratio, with instruction in a modified curriculum at a slower pace, and with more repetition to make progress. In other words, the only way to meet Student’s educational needs in the regular education setting would be for Ms. *** to provide the necessary specialized instruction in a corner of the regular education classroom; *i.e.*, to provide a “classroom within a classroom.”⁷²
33. Student’s presence has a collateral detrimental effect on the regular classroom environment due to additional staff member and effort required to educate Student in that environment. While Student is not a behavior problem, Student requires full-time

⁶⁷ Tr. at 525 (explaining it consists of a review of what students are already expected to know).

⁶⁸ To the extent Dr. ***’s (Petitioner’s inclusion expert) recommendations required Student to work independently on academic tasks, the evidence establishes Student does not engage in any academic tasks independently. Tr. at 480, 518-19.

⁶⁹ See Tr. at 525 (teaching Student the *** goal in regular education classroom would require “Student’s own little classroom” within the educational classroom), 531 (in order to teach Student at Student’s level would require Student to be separated from the rest of the class).

⁷⁰ Tr. at 226 (Ms. *** explaining the grades are reflective of work she does with Student on Student’s goals/objectives and with the integrated curriculum), 292, 483 (Ms. *** explaining she does a lot of reinforcing, but “it was definitely Ms. *** in the special education classroom who has taught Student the things that Student knows”), 521 (Ms. ***’s testimony that Student’s grades were not assigned by her and are not reflective of progress in the *** curriculum).

⁷¹ Tr. at 374-75.

⁷² See *e.g.*, Tr. at 531.

assistance during academic activities, whether that is the attention of the teacher or a paraprofessional. Despite Student's intensive needs in the regular education environment, the District has provided the supplementary aids and services necessary to meet Student's needs in that environment for a significant portion of the school day. However, special education instructional time is critical to Student's progress and to Student's ability to have meaningful access to the core academic curriculum.

34. The District's proposed IEP mainstreams the student to the maximum extent appropriate. The District has not proposed that Student be segregated from the regular education setting for the entirety of Student's school day. The regular education environments where Student can successfully participate with modified curriculum and accommodations, which include a portion of ***, ***, ***, and ***, remain part of Student's educational program. Additionally, Student participates with Student's regular education peers in ancillary activities, including lunch, ***, special assemblies and other school activities. Although Parents would prefer that Student interact with Student's nondisabled peers more extensively by being placed in the general education classroom full-time, the District's proposed IEP places Student in the general education setting to the maximum extent appropriate.⁷³
35. The District has only proposed to remove Student during core academic instruction time, including portions of ***, ***, as well as ***, and ***, when Student is unable to receive a meaningful educational benefit from the grade-level instruction being provided in the classroom.⁷⁴ Understanding the importance the language and behavioral role models of nondisabled peers provide to Student, the ARDC continued to recommend that Student be included with Student's nondisabled peers for a portion of ***, and ***, all instruction in ***, ***, and ***, and all ancillary activities like ***, and lunch.⁷⁵

Did the District fail to provide Student with appropriate supplemental aids and services recommended in the IEE performed on May *, 2016?**

36. After recessing, the ARDC reconvened on December ***, 2015. The ARDC reviewed Student's accommodations and agreed to add ***, and a *** (***) consistent with the recommendations of the assistive technology (AT) evaluation. There was no recommendation at this time for any particular *** (***) device, e.g., ***, or a ***.⁷⁶

⁷³ See Tr. at 607 (Ms. *** explaining each portion of the academic school day is considered separately during LRE discussions).

⁷⁴ Tr. at 583 (Ms. *** explaining the importance of providing Student with instruction at Student's level to ensure Student can make meaningful progress in the curriculum).

⁷⁵ Tr. at 588-89 (Ms. *** explaining the benefits of Student's inclusion with regular education students).

⁷⁶ JE-2 at 20, 32.

37. Dr. ***, Petitioner's inclusion expert, recommended the use of technology such as *** that could benefit Student in Student's reading, writing, ***, and communication goals.⁷⁷ Instead of using *** devices, Student could utilize ***, ***, to support Student's communication in addition to Student's other goals.⁷⁸ Ms. ***, the speech pathologist who conducted the Speech/Language IEE, similarly recommended a "****" device (*i.e.* ***) "would increase Student's communicative strengths and reduce unwanted attention from peers and from unfamiliar people."⁷⁹
38. On December ***, 2015, the Reevaluation Review recommended that for written expression, Student should utilize an *** and *** due to Student's *** deficits.⁸⁰ Further, the *** ***.⁸¹ The District did not provide the *** until March ***, 2016.⁸² The District has never provided Student with *** or a **** device.⁸³ The December ***, 2015 Reevaluation Review also recommended the use of ***.⁸⁴
39. As part of Student's 3 year Reevaluation, the District conducted an AT evaluation.⁸⁵ Dr. ***, an expert in assistive technology and occupational therapy, along with Ms. ***, an expert in Speech Language Pathology, considered Student's needs for assistive technology in numerous domains including, but not limited to, communication. Based on Parents' input regarding Student's use of *** ***, the evaluators ensured *** was one of the multiple devices "considered" during the evaluation.⁸⁶ Based on Student's demonstrated needs, two recommendations were made: First, it was recommended that Student be provided with a way to communicate Student's ability to perform a task independently. It was suggested this could be accomplished either by use of *****; and the second recommendation emphasized the use of *** across educational settings.⁸⁷
40. With respect to the AT, the District implemented the recommendations for a *** and ***.⁸⁸ A ***** was immediately introduced that permitted Student to communicate whether Student wanted to work independently or needed help.⁸⁹ Ms. *** also began

⁷⁷ PE-5 at 4.

⁷⁸ PE-5.

⁷⁹ Tr. at 354.

⁸⁰ *Id.*

⁸¹ JE-4; Stipulated Fact 7.

⁸² JEs-4, 9; PE-32.

⁸³ *Id.*

⁸⁴ JE-4.

⁸⁵ JE-4 at 15-18.

⁸⁶ JE-4 at 16; Tr. at 441.

⁸⁷ JE-4 at 16-17.

⁸⁸ *See* JE-2 at 20; Tr. at 413.

⁸⁹ Tr. at 394, 409 (Dr. *** explaining process after ARDC started with implementation of *** and ***).

working with ***. Based on Student's success with the ***, by March ***, 2016, Ms. *** was looking for a communication device to extend the progress Student was making with ***.⁹⁰

41. The ARDC reviewed the AT evaluation and recommended: (1) a *** to permit Student to let others know when Student needed help; and (2) ***. The introduction of *** in March 2016 was an extension of the progress Student was making with the recommendations made by the ARDC.⁹¹

Did the District predetermine Student's educational placement for the 2016-2017 school year without meaningful parental input?

42. The District held several ARD meetings over numerous hours in an attempt to reach consensus on all issues.⁹² Parents' input and recommendations are documented in numerous parts of the ARD document.⁹³ Another ARD meeting, another 5 hours of collaboration, occurred on May ***, 2016.⁹⁴
43. There was no bad faith exclusion, or any exclusion for that matter, of Parents or refusal to listen to or consider their input.
44. Since the 2015 due process hearing, the Principal directed that all communication with Parents must have prior approval of the Principal.⁹⁵
45. On March ***, 2015, Mother requested to observe Student in *** class and volunteered to help in the classroom after Student's *** teacher was allegedly unable to share any details about Student's participation or progress in class. Eleven months later, on April ***, 2016, Mother was allowed to observe Student's *** class.⁹⁶

V. APPLICABLE LAW

A. Statutory Overview and FAPE

⁹⁰ RE-2 at 59 (Ms. *** describing Student's progress with ***).

⁹¹ Tr. at 413.

⁹² Tr. at 591-92 (explaining none of the meetings during the 2015-2016 school year lasted less than 5 hours; minimum of 15 hours of face-to-face collaboration).

⁹³ *See e.g.*, JE-2 at 2, 32-33, 36.

⁹⁴ JE-1.

⁹⁵ PEs-20-25; RE-2 at 72; Tr. at 84, 279, 315, 499, 526, and 562.

⁹⁶ PE-23; Tr. at 9, 57.

The placement recommended by the District is presumed to be appropriate and Petitioner bears the burden of proof at all times.⁹⁷

The primary purpose of the IDEA is to ensure that children with disabilities receive a FAPE.⁹⁸ The Fifth Circuit has explained that a FAPE “need not be the best possible one, nor one that will maximize the child’s educational potential.”⁹⁹ Instead, the IDEA only guarantees a child with a disability “a basic floor of opportunity.”¹⁰⁰ Schools are merely required to develop an individualized program capable of providing “an educational benefit” to the child.¹⁰¹ The District is not required to implement the “best” program designed by an expert to remediate or maximize a child’s educational potential.¹⁰²

The IDEA’s FAPE mandate requires schools to provide eligible students with special education and related services that, in part, “include an appropriate preschool, elementary school, or secondary school education.”¹⁰³ “Special education” is defined to mean *specially designed instruction*, provided at no cost to the parents, that is intended to meet the unique needs of a child with a disability.¹⁰⁴ “Specially designed instruction” means adapting, as appropriate, to the needs of the child, the content, methodology, or delivery of the instruction:

- To address the unique needs of the child that result from the child’s disability; and

⁹⁷ See *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); see also *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003).

⁹⁸ See *White*, 343 F.3d at 378.

⁹⁹ *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998) (hereinafter *Michael F.*); see also *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 810 (5th Cir. 2003).

¹⁰⁰ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982) (hereinafter *Rowley*) (FAPE consists of “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.”).

¹⁰¹ *Rowley*, 458 U.S. at 201 (interpreting the IDEA’s definition of FAPE).

¹⁰² See *Kings Local Sch. Dist Bd. v. Zelazny*, 325 F.3d 724, 731 (6th Cir. 2003) (stating expert’s program showed district how to maximize student’s potential but IDEA does not require it be implemented).

¹⁰³ 34 C.F.R. § 300.17(c).

¹⁰⁴ 34 C.F.R. § 300.39(a)(1).

- To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.¹⁰⁵

In evaluating the provision of FAPE, the Hearing Officer must determine whether the educational plan developed through the IDEA's procedures was *reasonably* calculated to enable the child to receive *meaningful* educational benefits.¹⁰⁶ In determining whether the District has provided the requisite "basic floor of opportunity," the Fifth Circuit utilizes a four part test: (1) is the program individualized on the basis of the student's assessment and performance; (2) is the program administered in the LRE; (3) are the services provided in a coordinated and collaborative manner by the key "stakeholders;" and (4) are positive academic and non-academic benefits demonstrated.¹⁰⁷

B. LRE

One of the primary mandates of the IDEA is "mainstreaming," which is the requirement that an IEP place a disabled child in the LRE for his/Student's education:

In general, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.¹⁰⁸

"By creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the IDEA," the requirement that a school district provide a FAPE on the one hand, and the requirement that, on the other hand, it does so within the least restrictive

¹⁰⁵ 34 C.F.R. § 300.39(b)(3).

¹⁰⁶ *Rowley*, 458 U.S. at 206-07.

¹⁰⁷ *See Michael F.*, 118 F.3d at 247; *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 346 (5th Cir.), *cert. denied*, 531 U.S. 817 (2000).

¹⁰⁸ 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).

environment.¹⁰⁹ “Even when school officials can mainstream [a] child,” however, “they need not provide for an exclusively mainstreamed environment.”¹¹⁰ Rather, “the IDEA requires school officials to mainstream each child only to the maximum extent appropriate. In short, the IDEA’s mandate for FAPE qualifies and limits its mandate for education in the regular classroom.”¹¹¹

In *Daniel R.R.*, the Fifth Circuit established a flexible, two-part test for determining whether an IEP’s placement was in the LRE. “First, can education in the regular classroom, with the use of supplemental aids and services, be achieved satisfactorily for a given child?”¹¹² Second, “If it cannot and the school intends to provide special education or to remove the child from regular education, has the school mainstreamed the child to the maximum extent appropriate?”¹¹³ The Fifth Circuit further explained, “[A]t the outset of step one, we must examine whether the state has taken steps to accommodate the handicapped child in regular education.... If the state has made no effort to take such accommodating steps, our inquiry ends, for the state is in violation of the Act’s express mandate to supplement and modify regular education.”¹¹⁴

C. Predetermined Placement

The IDEA requires the District to ensure that Parents are members of any group that makes decisions about their child’s educational placement.¹¹⁵

Predetermination occurs when District members of the IEP team unilaterally decide a student’s placement in advance of an IEP meeting. For example, in *Deal v. Hamilton County*

¹⁰⁹ *Daniel R.R.*, 874 F.2d at 1044.

¹¹⁰ *Daniel R.R.*, 874 F.2d at 1045.

¹¹¹ *Id.*

¹¹² *Daniel R.R.*, 874 F.2d at 1048.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ 20 U.S.C. §§ 1414(e), 1415(b)(1); 34 C.F.R. §§ 300.327; .501(c)(1).

Board of Education,⁴² IDELR 109 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005), when parents requested that the district fund an Applied Behavior Analysis (ABA) program, the IEP team refused and indicated its policy prevented it from considering a program other than the one in which it had invested. During IEP meetings, the district allowed the parents to voice their opinion and present evidence regarding an appropriate program for their son, but it already had decided on his placement and educational methodology.

If a school district predetermines a disabled student's placement and excludes the parents from participating in the decision making process, it has committed a procedural error. When the evidence presented at hearing shows that parents were actively engaged in the IEP formation process, such evidence will go far to defeat a claim of predetermination and may render a procedural violation harmless. However, the mere presence and opportunity of a parent to speak at ARDC IEP meetings does not, standing alone, equate to an adequate opportunity to participate. Participation must be more than a mere form; it must be *meaningful*.¹¹⁶ Procedural violations of this type are actionable only if they impede the parent's participation in the IEP process or result in educational harm.¹¹⁷

District personnel are permitted to preplan, create a draft IEP, and discuss the "way ahead" prior to an ARDC meeting. The difference between "preparation" and "predetermination" is such conduct is only considered harmless as long as school officials are "willing to listen to parents" and "come to the meeting with suggestions and an open mind, not a requisite course of action."¹¹⁸

¹¹⁶ *W.G.*, 960 F.2d at 1485; *see also N.L. v. Knox County Schools*, 315 F.3d 688 (6th Cir.2003) (stating that school officials must be willing to listen to the parents and must have open minds).

¹¹⁷ *Cooper v. District of Columbia*, 64 IDELR 271 (D.D.C. 2014).

¹¹⁸ *Knox County Schools*, 315 F.3d 688, 693-95 (6th Cir.2003); *R.P. v. Alamo Heights Independent School Dist.*, 703 F.3d 801, 811 (5th Cir. 2012) ("Under Federal regulations, not every conversation about a child is a statutorily-defined meeting in which parents must participate."); *See* 34 C.F.R. § 300.501(b)(3) ("A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.").

If shown that there was no way that anything Parents said, or any data Parents produced, could have changed the District's determination of appropriate placement, then Parents' participation was no more than after the fact involvement.

If Petitioner meets their burden of showing Parents were precluded from meaningfully participating in the ARDC meetings and IEP development because the District had predetermined placement and/or services, then the District will have committed a procedural violation of the IDEA. Again, a procedural violation can only cause substantive harm when it seriously infringes upon Parents' opportunity to participate in the IEP process¹¹⁹ or results in the loss of an educational opportunity.

"The mere fact that the IEP may not have incorporated every request from the parents does not render the parents 'passive observers' or evidence any predetermination."¹²⁰

VI. DISCUSSION

A. **Did the District fail to ensure, to the maximum extent possible, that Student received educational instruction and services in the LRE?**

The record is abundantly clear that Student is engaging, outgoing, friendly, and an endearing child who is fortunate to have loving and engaged parents dedicated to assisting Student maximize Student's opportunities in life. The record also reveals that District personnel involved with Student are experienced, dedicated, and empathetic and are pursuing Student's best educational interests. Unfortunately, the Parties reached an impasse as to what is the most appropriate placement for Student that will maximize Student's educational opportunities.

In addition to repeating the reference for mainstreaming, the regulations require that each school district maintain a continuum of alternative placements.¹²¹ The regulations further

¹¹⁹ *Knable v. Bexley City School Dist.*, 238 F.3d 755 (6th Cir. 2001); *see also Rowley*, 458 U.S. 176, 208, (1982) ("Congress sought to protect individual children by providing for parental involvement ... in the formulation of the child's individual educational program.").

¹²⁰ *J.E. and C.E. v. Chappaqua Cent. Sch. Dist.*, 68 IDELR 48 (S.D.N.Y. 2016).

provide that in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs, and that a child is not to be removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum.¹²²

Based upon Student's cognitive deficits, the increasing complexity of the *** curriculum that requires synthesis and analysis of material, the degree to which the curriculum must be modified to permit Student to access the material, and the amount of time required by the teacher and/or aide to accommodate Student, the District proposed to modify Student's 2016-2017 placement by reducing Student's time in the general education classroom by ***. Specifically, the District proposed to reduce Student's time in the general education classroom by having *** minutes of *** and *** minutes of *** taught in the special education classroom instead of the general education classroom. Under the proposed placement, Student still has portions of *** and *** taught in the general education classroom, has lunch, ***, and attends assemblies and field trips with Student's nondisabled peers.

Parents challenge the proposed change in placement believing that with the appropriate supports and accommodations, Student will surpass District expectations and achieve social and academic success. Parents seek 100% mainstreaming of core academic subjects in the general education classroom which they believe is necessary for Student to benefit from peer communication and behavior modeling.

Having reviewed the law, the evidence presented, and the arguments of the Parties, the Hearing Officer finds that the District has maximized Student's inclusion in the general education classroom. The District cannot educate Student satisfactorily in the general education classroom, even with modifications to the curriculum and the use of supplemental aids and services, all of which constitute sufficient support. Implementing Student's IEP in the general education classroom only with the needed modifications would eliminate essential components

¹²¹ 34 C.F.R. § 300.115.

¹²² 34 C.F.R § 300.116(e).

of the general education curriculum and/or activity. For Student to access the *** curriculum, 100% of the curriculum must be modified to the point the curriculum is unrecognizable. Delivery of the modified curriculum to Student will require a “classroom within a classroom.” Such an effort is not required under the law.

In *Daniel R.R.*, the Fifth Circuit employed a flexible approach in deciding whether a school has complied with the mainstreaming requirement.¹²³ The statutory language, by its terms also contemplates the flexible approach, requiring mainstreaming to the maximum extent “appropriate” when education can be achieved satisfactorily. As the court in *Daniel R.R.* stated, “schools must retain sufficient flexibility in the educational planning if they truly are to address each child’s needs.”¹²⁴ The ARDC utilized this flexibility to create a combination of regular education and special education instruction that complies with the IDEA’s mandate that Student be included with Student’s nondisabled peers to the maximum extent appropriate and also receive meaningful access to the curriculum.¹²⁵

In this jurisdiction a number of factors must be considered to inform each stage of the LRE inquiry.¹²⁶

Accommodations in regular education: The first factor examines whether the District has taken steps to accommodate the child in regular education. The requirement to modify is not limitless, but it requires more than mere token gestures. In examining the extent to which this requirement is met, the Court in *Daniel R. R.* identified the following as relevant:

- a. a school district need not provide every conceivable supplementary aid or service to assist the child;

¹²³ See *Brillon v. Klein Indep. Sch. Dist.*, 100 Fed. Appx. 309, 312 (5th Cir. 2004).

¹²⁴ See *Klein*, 100 Fed. Appx. 309, 312 (5th Cir. 2004).

¹²⁵ *Id.* at 1050 (explaining IDEA’s mandate for a continuum of placements may require a combination of regular education and special education instruction).

¹²⁶ *Id.* at 1048-49.

- b. the IDEA does not require regular education instructors to devote all or most of their time to one child;
- c. mainstreaming is pointless if instructors are forced to modify the regular education curriculum to the extent the handicapped child is not required to learn any of the skills. Educators are not required to change the curriculum beyond recognition or operate a “classroom within a class.”¹²⁷ When 90-100 percent of the curriculum must be altered such that it no longer resembles the curriculum in the classroom the presumption in favor of mainstreaming is overcome.¹²⁸

Educational benefit: The next factor examines the extent to which the child will receive an educational benefit from regular education, focusing on the student’s ability to grasp the essential elements of the regular education curriculum.¹²⁹ Notably, this inquiry is substantially different than the educational benefit prong of the *Michael F.* test, which merely requires academic and non-academic benefits that are more than trivial.¹³⁰ Instead, *Daniel R.R.* requires “close attention” to the nature and severity of the child’s disability and the curriculum and goals of the regular education class.¹³¹

Overall educational experience: A third factor to consider is the child’s overall educational experience in the mainstream environment, balancing the benefits of regular and special education for each individual child. A “child may be able to observe only a minimal amount of the regular education program, but may benefit *enormously* from the language models that his non-handicapped peers provide for him.”¹³² In such a case, the benefits of mainstreaming “may” tip the balance in favor of regular education even if the child cannot flourish academically. On the other hand, mainstreaming a child who will suffer from the experience would violate the IDEA’s mandate for a FAPE.

¹²⁷ *Brillon*, 100 Fed. Appx. at 313; *Daniel R.R.*, 874 F.2d at 1049.

¹²⁸ *Daniel R.R.*, 874 F.2d at 1050 (explaining such efforts are not required under the IDEA).

¹²⁹ *Id.* at 1049.

¹³⁰ *Cypress-Fairbanks Independent School Dist.*, 118 F.3d 245, 253 (5th Cir. 1997).

¹³¹ *Id.*

¹³² *Daniel R.R.*, 874 F.2d at 1049 (emphasis added).

Effect on the regular classroom environment: A fourth factor to consider is the effect the disabled child's presence has on the regular classroom environment, and thus, on the education the other students are receiving. In this regard, placement in regular education may prove troublesome for two reasons. First, the child may engage in disruptive behavior (not applicable in this case). Second, the child may require so much of the instructor's attention that the instructor will have to ignore the other students' needs. A teaching assistant or an aide may minimize the burden on the teacher, but if the disabled child requires so much of the teacher or the aide's time that the rest of the class suffers, then the balance will tip in favor of special education.¹³³

The evidence showed that Student's teachers and service providers engaged in a careful and thoughtful discussion regarding the least restrictive environment appropriate to meet Student's needs, and the decision complies with the IDEA. The District did make changes to the IEP at Parents' request, *e.g.*, to the IEP goals, its ultimate decision not to agree to more inclusion time does not indicate a lack of collaboration, just a disagreement over the appropriate educational placement for Student.

Analyzing the facts of this case in light of the analysis in *Daniel R.R.* compels the conclusion that the mix of special education and regular education proposed by the ARDC is the LRE. The facts in *Daniel R.R.* are directly on point with the facts of this case. In fact, unlike Daniel, who was removed from regular education for everything except lunch and ***, Student is still included in regular education for a portion of ***, ***, all *** and all non-academic times. Consequently, this case presents a compelling example of a student for whom the ARDC has ensured it erred on the side of maximizing the student's time in the regular education environment.

Factor 1 – Accommodations in Regular Education Classroom: The District has adequately accommodated Student in the LRE and has made more than mere token gestures to accommodate Student in regular education. In fact, despite the significant impact of Student's

¹³³ *Daniel R.R.*, 874 F.2d at 1049-1050.

disability on Student's ability to obtain an educational benefit from regular education, the ARDC did not propose to remove Student from all academics. Instead, the ARDC recommended a modified curriculum with paraprofessional support and accommodations to be implemented in the regular education environment for some of the *** and *** instruction.¹³⁴ The regular education and special education teachers collaborate often.¹³⁵ Ms. ***, the special education teacher, has trained the paraprofessionals on how to modify activities in the general education class for Student and how to implement Student's accommodations.¹³⁶

The weight of the evidence proved that the *** curriculum must be modified 100% in order for Student to access the curriculum. Student is not held responsible for any of the regular education curriculum being studied by the regular education students.¹³⁷ Additionally, because of Student's educational needs, Student will not master Student's goals, much less any of the rest of the curriculum, with only occasional opportunities in the regular education classroom to work on Student's goals. All of the experienced, educational professionals who have worked with Student agree that Student requires specialized instruction at Student's level and at Student's pace with increased repetition and small group instruction in order to make progress.¹³⁸ Ms. *** can provide Student with meaningful access to the entire *** curriculum as required by the IDEA, albeit at a prerequisite level and at a slower pace with increased repetition, in the special education classroom.¹³⁹

Factor 2 – Educational Benefit: Under *Daniel R.R.*, the examination of whether the student receives an educational benefit from regular education focuses on the student's ability to grasp the essential elements of the regular education curriculum. Student's IEP goals represent

¹³⁴ JE-2 at 26 (documenting portion of *** and *** in general education with modified curriculum, as well as, the ICS with a paraprofessional for all regular education time); JE-2 at 20 (documenting modification/accommodations for all classes).

¹³⁵ See e.g., Tr. at 317 (explaining access to regular education lesson plans and discussions before and after school); at 489 (Ms. *** said that she and Ms. *** "worked so closely together").

¹³⁶ Tr. at 736 (Ms. ***'s testimony that Ms. *** trained the paraprofessionals and has observed them modifying and accommodating appropriately).

¹³⁷ See JE-2 at 25 (ARD Committee agreeing grades are determined by special education in core subjects).

¹³⁸ Tr. at 482, 520, and 583.

¹³⁹ Tr. at 297-98.

“the prerequisite skills” of the *** curriculum – not the *** curriculum itself.¹⁴⁰ Prerequisite skills represent the below grade-level foundational skills a child needs before they can extend that knowledge to grade level curriculum.¹⁴¹ The incremental change in the proposed schedule, to remove Student from the regular education *** and *** instruction, was a result of the increased difficulty level of the curriculum from *** to ***. Student’s *** classes were taught in a more “***” manner that permitted Student to receive educational benefits.¹⁴² However, in ***, the curriculum ***.¹⁴³ In order for the curriculum to be meaningful to Student, Student needs it introduced at a lower level, at a slower pace, and with significantly increased repetition.¹⁴⁴

Because of Student’s cognitive limitations, Student is unable to grasp any of the actual *** curriculum and instead requires 100% of it to be modified. The modified activities are not recognizable as *** curriculum.¹⁴⁵ The nature and severity of Student’s disability simply do not permit Student to make meaningful educational progress without the combination of special education and regular education instruction recommended by the ARD Committee. Without access to the modified curriculum in the special education classroom, Student will be denied meaningful access to the *** curriculum as mandated by the IDEA.

Factor 3 – Overall Education Experience: Examining Student’s overall educational experience in the mainstream environment, there is no evidence that indicates Student is receiving educational benefits that would tip the balance in favor of additional mainstreaming time. In fact, Student appears lost during the general education academic instruction and is more concerned about ***self than Student is with what Student’s teachers or Student’s nondisabled

¹⁴⁰ See e.g., Tr. at 524-25.

¹⁴¹ Tr. at 584.

¹⁴² Tr. at 477.

¹⁴³ Tr. at 295, 583.

¹⁴⁴ Tr. at 482, 520, and 583.

¹⁴⁵ Tr. at 565.

peers are doing.¹⁴⁶ Student's low communication skills interfere with Student's success in the regular education environment.

Contrary to the general education setting, Student is much more engaged and outgoing – Student is “excited,” “eager,” “comes alive,” “lights up” and “confident”—in the special education setting.¹⁴⁷ Student communicates much more in the special education environment.¹⁴⁸ As Ms. *** explained, the opportunity for Student to vocalize and communicate in the special education setting is significantly increased due to the small student/teacher ratio.¹⁴⁹ In fact, not only are increased opportunities present in the special education classroom, but Student takes advantage of the opportunities and actually responds often and spontaneously in that environment.¹⁵⁰ Petitioners did not meet their burden to prove a sufficient benefit from language models or any other non-academic benefit as required by *Daniel R.R.*¹⁵¹

The evidence establishes Student has significant and substantial needs in the acquisition of both academic and life skills, including communication skills, that cannot be met in the regular education classroom. Moreover, Student needs extensive repetition, a smaller student/teacher ratio, and a slower pace with a modified curriculum if Student is to have meaningful access to the curriculum.¹⁵² Ms. *** explained, based on her 17 years of experience, that increased special education time for Student will result in increased communication skills that will improve Student's life all around.¹⁵³ Ms. *** concurred explaining that an increase in

¹⁴⁶ Tr. at 542 (Ms. *** explaining Student becomes disengaged during academic activities and ***, or something similar), 481-82 (Ms. *** explaining that during academic activities Student will ***), 615 (Ms. *** explaining Student becomes “very disinterested” when academics begin in the regular education classroom).

¹⁴⁷ Tr. at 522 (Ms. *** explaining Student shows excitement in the special education classroom, but not in regular education), 617 (Ms. *** describing high level of engagement in special education classroom that is not seen in regular education classroom).

¹⁴⁸ Tr. 472-73.

¹⁴⁹ Tr. at 617 (explaining difference in occasional opportunities for communication in large group versus repeated opportunities for communication in small group).

¹⁵⁰ Tr. at 616-17.

¹⁵¹ *Schaffer ex rel. v. West*, 546 U.S. 49 (2005).

¹⁵² See e.g., Tr. at 482, 520, 583.

¹⁵³ Tr. at 233.

special education time will assist Student with making progress in Student's communication skills and academic skills, which will make Student's time with Student's nondisabled peers more meaningful.¹⁵⁴ Balancing the benefits of general and special education reveals that the ability of the special education setting to meet Student's needs far outweighs any limited unidentified benefit Student might or might not receive from additional inclusion time, including any increased opportunity to observe behavior and communication modeling by nondisabled peers.

Petitioners argued that Student should have increased time in the regular education because it is feasible for Student's IEP goals to be implemented in that environment. In this regard, it is significant that in developing the LRE test, the Fifth Circuit in *Daniel R.R.* specifically rejected the test being employed by the Sixth Circuit and enunciated in *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983).¹⁵⁵ The test employed in the Sixth Circuit was whether the services that make a segregated placement superior *could be feasibly provided in a non-segregated setting*. If they can, the placement in the special education setting would be inappropriate according to the Sixth Circuit.

Petitioners' case relies heavily on the *feasibility* of providing services to Student in the general education setting. There is no doubt that it is feasible to do virtually anything in the regular education environment with enough services, but as the Fifth Circuit noted in *Daniel R.R.*, that is not the appropriate test. It is feasible that any child could be taught in a general education setting if enough staff persons and modifications were put in place there. The fact that it is possible does not mean that it is required, or appropriate, under the IDEA. As another Texas hearing officer recognized:

Obviously, it is possible to simply place all disabled students, regardless of educational skills or needs in one large classroom where they are each taught completely different curriculums with no meaningful interaction or integration. This approach would not only be chaotic but is intellectually dishonest. Simply being placed in the same classroom is not inclusion or mainstreaming for a

¹⁵⁴ Tr. at 549, 590.

¹⁵⁵ *Daniel R.R.*, 874 F.2d at 1046.

disabled student. The student should be able to derive some actual educational benefit from his placement.¹⁵⁶

Although it may be feasible with sufficient resources to implement Student's IEP goals in the general education classroom, utilizing inclusion strategies to provide Student with the opportunity to generalize or reinforce certain skills in the regular education classroom is not equivalent to providing Student with the significant repetition, the slower pace, and the small setting *essential* to Student's ability to master any academic skills; that is, it does not provide Student with meaningful access to the curriculum. As Ms. *** explained, the instruction she provides in her classroom that relates to Student's *** goal is a total of less than 1 minute on a single day during the school year.¹⁵⁷

Although Dr. *** (Petitioner's inclusion expert) testified the recommendations she made do not require a "class within a class," they do. The recommendations were for Student to engage in a separate, unrecognizable activity at Student's level with paraprofessional support.¹⁵⁸ Whether the paraprofessional is sitting with Student working on a highly modified activity in the middle of the classroom, the side of the classroom or the back of the classroom, it is a "class" just for Student. This set up would be a distraction for the teacher and students who are engaged in a different activity at a much higher level.¹⁵⁹

Petitioners also challenged the extent to which the proposed special education time is appropriate in light of the fact that Student is making good progress. Petitioners point to the facts that Student is mastering Student's IEP goals and that Student's *** report card documents *** in *** and *** in ***, to support their argument. However, the evidence showed Student's

¹⁵⁶ *Northside Indep. Sch. Dist.*, TEA Dkt. No. 050-SE-1001, at *8 (SEA Tex. Jan. 4, 2002).

¹⁵⁷ Tr. at 525.

¹⁵⁸ To the extent Dr. ***'s recommendations required Student to work independently on academic tasks the evidence establishes Student does not engage in any academic tasks independently. Tr. at 480 (Ms. *** regarding off-task behavior without 1:1 support), 518-19 (Ms. *** explaining Student's off-task behavior if 1:1 support is not provided during academic time).

¹⁵⁹ See Tr. at 525 (teaching Student the *** goal in regular education classroom would require "Student's own little classroom" within the educational classroom), 531 (asserting that in order to teach Student at Student's level would require Student to be separated from the rest of the class).

progress and good grades, like the *** and *** grades, are based on Student's progress on Student's IEP goals and the modified curriculum taught by Ms. *** in the special education class.¹⁶⁰ The Fifth Circuit rejected the same argument in *Brillon*:

“... the fact that Ethan met his own IEP goals, and received at one point high grades under a standard for special education students or his individualized IEP, does not undermine the hearing officer's fact finding, amply supported by Ethan's teachers, that (1) the ‘IEP goals represented a small part of the curriculum the other students were expected to master,’ (2) Ethan was struggling by the end of the ***, (3) Ethan met his *** IEP goals only because ‘the instruction he received in the general education class was repeated in the special education class,’ and (4) Ethan's teachers found that his disabilities profoundly impacted his involvement and progress in the general curriculum.”¹⁶¹

Petitioners' argument also overlooks the fact that the IEP goals are not the only thing the District is required to teach Student. The District is required by the IDEA to provide Student with the specialized instruction necessary for Student to access the entire curriculum. For Student that requires instruction in prerequisite skills, at a slower pace, and with more repetition than is available in a general education classroom. Consequently, the relative simplicity of a student's IEP goals are not the only consideration when determining LRE. As Ms. *** explained, she, like the general education teacher, teaches the entire *** curriculum, but at a prerequisite level and a pace that permits Student to learn the essential components of the curriculum.¹⁶² While regular education teachers can utilize inclusion strategies/techniques to reinforce Student's goals, the evidence establishes that Student needs specialized instruction with a smaller student/teacher ratio, with instruction in a modified curriculum at a slower pace, and with more repetition to make progress. In other words, the only way to meet Student's needs in the regular education setting would be for Ms. *** to provide the necessary specialized

¹⁶⁰ Tr. at 226 (Ms. *** explaining the grades are reflective of work she does with Student on Student's goals/objectives and with the integrated curriculum), 292, 483 (Ms. *** explaining she does a lot of reinforcing, but “it was definitely Ms. *** who has taught Student the things that Student knows”), 521 (Ms. ***'s testimony that Student's grades were not assigned by Ms. *** and are not reflective of progress in the *** curriculum).

¹⁶¹ 100 Fed. Appx. at 313.

¹⁶² Tr. at 374-75.

instruction in a corner of the regular education classroom; *i.e.*, to provide a “classroom within a classroom.”¹⁶³ That is not required by the IDEA.

Factor 4 – Effect on Regular Classroom: Student’s presence has a detrimental effect on the regular classroom environment due the presence of an additional staff member and the efforts required to educate Student in that environment. While Student is not a behavior problem, Student requires full-time assistance during academic activities, whether that is the attention of the teacher or a paraprofessional.¹⁶⁴ Despite Student’s intensive needs in the regular education environment, the District has provided the requisite supplementary aids and services necessary to meet Student’s needs in that environment for a significant portion of the school day. However, special education instructional time is critical to Student’s progress and to Student’s ability to have meaningful access to the core academic curriculum.

Factor 5 – Mainstreamed to the Maximum Extent Possible: The next phase of the inquiry under *Daniel R.R.* is whether the school district’s proposed IEP mainstreams the student to the maximum extent appropriate. The District has not suggested that Student be removed from the regular education setting for the entirety of Student’s school day. The regular education environment, where Student can successfully participate with modified curriculum and accommodations, including portions of ***, ***, ***, ***, and ***, remains a part of Student’s program. Additionally, Student participates with Student’s regular education peers in ancillary activities, including lunch, ***, special assemblies and other school activities.

Although Parents would prefer that Student interact with Student’s nondisabled peers more extensively by being placed in the general education classroom full-time, the District’s proposed IEP places Student in the general education setting to the maximum extent appropriate.¹⁶⁵ The District has only proposed to remove Student during core academic instruction time, including portions of ***, ***, as well as ***, and ***, when Student is

¹⁶³ See *e.g.*, Tr. at 531.

¹⁶⁴ See *Daniel R.R.*, 814 F.2d at 1049-50.

¹⁶⁵ See Tr. at 607 (Ms. *** explaining each portion of the academic school day is considered separately during LRE discussions).

unable to receive a meaningful educational benefit from the grade-level instruction being provided in the classroom.¹⁶⁶ Understanding the importance of the language and behavioral role models that nondisabled peers provide to Student, the ARDC has continued to recommend Student be included with Student's nondisabled peers for a portion of *** and ***, all instruction in ***, ***, and ***, and all ancillary activities like *** and lunch.¹⁶⁷

Based on a preponderance of the evidence and application of the Fifth Circuit's *Daniel R. R.* LRE test, Petitioners failed to meet their burden of showing that the proposed placement was not in the LRE. The evidence showed that Student has been mainstreamed to the maximum extent appropriate. The IEP proposed for the 2016-2017 school year is the LRE.

Collaboration with Key Stakeholders:

Despite testimony introduced at hearing that since the 2015 due process hearing the Principal directed that all communication with Parents must have prior approval of the Principal, the evidence does not support a finding that the rigid communication protocol impeded Parents' meaningful participation in ARDC meetings. Such rigid control of communication with Parents is counter to the IDEA's statutory collaboration mandate and can be indicative of an adversarial position taken by the District during the IEP process, a process which allegedly precluded Parents from having free access to District personnel during the development and implementation of Student's IEP. Having carefully reviewed this issue, the Hearing Officer finds that the weight of the evidence strongly supports that Parents fully participated in the IEP process, they were listened to, and many of their suggestions/requests were eventually incorporated into the IEP that has been substantially complied with.¹⁶⁸

B. Did the District fail to provide Student with appropriate supplemental aids and services recommended in the IEE performed on May *, 2016?**

¹⁶⁶ Tr. at 583 (Ms. *** explaining the importance of providing Student with instruction at Student's level to ensure Student can make meaningful progress in the curriculum).

¹⁶⁷ Tr. at 588-89 (Ms. *** explaining the benefits of Student's inclusion with regular education students).

¹⁶⁸ *Michael F.*, 118 F.3d at 253.

Petitioners allege Student's IEP was not properly individualized because it did not incorporate all of the recommendations in the Speech IEE conducted by Ms. ***. This is a prong of the FAPE test that asks whether the individualized program proposed for the student is based on the student's assessment and performance.¹⁶⁹ The District "is not obligated to provide every possible service or the very best education that might be desired."¹⁷⁰ More specifically, schools are not required by the IDEA to implement the recommendations of experts that are designed to maximize a student's performance.¹⁷¹ In short, while "more," "different," or "better" services/goals/accommodations might be possible, the relevant question is whether the IEP as written is appropriate.¹⁷² The record establishes that the proposed IEP with its numerous goals and objectives, accommodations, speech therapy and occupational therapy provided for in Student's IEP is highly individualized to meet Student's unique needs.

The recommendations made by Petitioner's independent evaluator were to "enhance" and "improve" the "gains" and "success" Student is already experiencing. The IDEA does not require the District to implement them. Student is making meaningful educational progress and mastering the IEP goals and objectives, including the speech goals, that the Parties agreed were appropriate for Student.¹⁷³ If the strategies implemented are reasonably calculated to enable the student to make meaningful progress, the IEP is appropriate.¹⁷⁴ Nothing more is required by the IDEA.

The credible evidence showed *** is the device that is most appropriate for Student at this time. The device is appropriate for the following reasons:

¹⁶⁹ *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 346 (5th Cir.), *cert. denied*, 531 U.S. 817 (2000) (citing *Michael F.*, 118 F.3d at 253).

¹⁷⁰ *Clear Creek Indep. Sch. Dist. v. J.K.*, 400 F.Supp. 991, 997 (S.D. Tex. 2005).

¹⁷¹ *See Kings Local Sch. Dist Bd. v. Zelazny*, 325 F.3d 724, 731 (6th Cir. 2003) (stating expert's program showed district how to maximize student's potential but IDEA does not require it be implemented).

¹⁷² *Adam J. v. Keller Indep. Sch. Dist.*, Civ. No. 4:01-CV-0797-A, U.S. Dist. LEXIS 15193, at *5 (N.D. Tex. Aug. 15, 2002) (finding that another plan "might work as well or even better does not mean that defendant has failed to provide plaintiff a FAPE"), *aff'd*, 328 F.3d 804 (5th Cir. 2003).

¹⁷³ *See e.g.* Tr. at 452 (regarding progress on speech goals), 453-54 (describing progress and generalization in multiple areas of speech/communication).

¹⁷⁴ *Rowley*, 458 U.S. at 201 (interpreting the IDEA to require an IEP capable of providing "an educational benefit" to the child).

- The device permits Student to build on the skills Student is acquiring through the use of *** and to continue to make progress and experience success.¹⁷⁵ The selection of the specific device considered Student's current system of communication (***), intellectual functioning, attention, response to ***, context of use in the classroom, and Student's IEP goals and objectives.¹⁷⁶ While *** might be appropriate in the future, it is not appropriate at this time.¹⁷⁷
- The device is *** for Student and ***.¹⁷⁸ Moreover, the possibility of *** specifically considered and ruled out as an issue.¹⁷⁹ There is no expert testimony to the contrary from an occupational therapist in the record. Regardless, per Parents' request, Student is not required *** Student's device; the *** Student.¹⁸⁰
- The device is not stigmatizing. To the contrary, the evidence suggests that Student's ***.¹⁸¹ In fact, as Dr. *** explained, the fact that *** device, like they would *** ***, is a benefit because it is instead perceived by others as "****" for Student.¹⁸²
- Parents' desire that Student utilize *** as a communication device was specifically considered, but rejected because it did not have the features Student needed to expand on Student's current success. The conclusion not to utilize *** was unrelated to cost or availability. In fact, not only would *** have been a less expensive device, but they are *** to the District.¹⁸³

Although there may be more or different things that could have been included in the IEP, there is no evidence that Student's IEP as written was not appropriately individualized to ensure Student makes meaningful educational progress. School districts are not required to implement

¹⁷⁵ Tr. at 389, 413 (*** provides the "best opportunity to interact in the classroom without an extra learning curve"), 453-54 (Ms. *** explaining Student's independent use of ***, ***, and generalization of those new skills utilizing the device).

¹⁷⁶ Tr. at 766-67.

¹⁷⁷ Tr. at 400.

¹⁷⁸ Tr. at 771 (explaining the device *** for personal use).

¹⁷⁹ Tr. at 771 (explaining consideration of ***, was specifically considered).

¹⁸⁰ Tr. at 768-69.

¹⁸¹ Tr. at 442, 454 (Ms. *** testimony that Student's *** Student in communication utilizing the device).

¹⁸² Tr. at 774.

¹⁸³ Tr. at 767 (***) less expensive), 773 (explaining not only were ***, but they had *** to all equipment at Region IV's Educational Service Center AT lab).

recommendations of experts that might result in better or more progress.¹⁸⁴ The IEP as written provides Student with appropriate supplemental aids and services even if it is not the exact aids and services recommended by outside experts.

C. Did the District predetermine Student’s educational placement for the 2016-2017 school year without meaningful parental input?

Petitioners allege that the District refused to collaborate with them on the LRE determination. Under the IDEA, parents have a procedural right to participate in IEP meetings.¹⁸⁵ The District held several ARDC meetings over numerous hours in an attempt to reach consensus on all issues.¹⁸⁶ Parents’ input and recommendations are documented in numerous parts of the ARD document.¹⁸⁷ Another ARD meeting, so another 5 hours of collaboration, occurred on May ***, 2016.¹⁸⁸ While the District did make extensive changes to the IEP at Parents’ request, *e.g.*, to the IEP goals, its ultimate decision not to agree to more inclusion time does not indicate a lack of collaboration, just a disagreement over the appropriate educational placement for Student.¹⁸⁹ “Absent any evidence of bad faith exclusion of the parents or refusal to listen to or consider the [parents’] input, [the district] met IDEA requirements with respect to parental input.”¹⁹⁰ The preponderance of the evidence does not support a finding that the District predetermined Student’s placement for the 2016-2017 school year or that the District excluded Parents from the IEP development process.

¹⁸⁴ *Rowley*, 458 U.S. at 201 (interpreting the IDEA to require an IEP capable of providing “an educational benefit” to the child); *Zelazny*, 325 F.3d at 731 (stating expert’s program showed district how to maximize student’s potential but IDEA does not require it be implemented).

¹⁸⁵ 34 C.F.R. § 300.501(b)-(c).

¹⁸⁶ Tr. at p. 591-92 (explaining none of the meetings during the 2015-2016 school year lasted less than 5 hours; minimum of 15 hours of face-to-face collaboration).

¹⁸⁷ See *e.g.*, JE-2 at 2, 32-33, and 36.

¹⁸⁸ JE-1.

¹⁸⁹ See *White*, 343 F.3d at 380 (concluding the right to participate does not equate to “the right to dictate an outcome and obviously cannot be measured by such.”).

¹⁹⁰ *Id.*

VII. CONCLUSIONS OF LAW

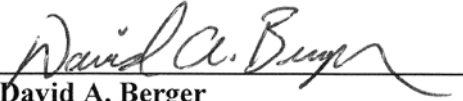
1. The District is an LEA responsible for complying with the IDEA as a condition of the State of Texas' receipt of federal funding, and the District is required to provide each disabled child with a FAPE pursuant to the IDEA, 20 U.S.C. § 1400 *et seq.*
2. Student, by next friends, Parents, (collectively, Petitioner) 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 date the Complaint was originally filed— August 19, 2016. The accrual date for the complaint was August 19, 2015. 19 Texas Administrative Code § 89.1151(c).
4. The District's proposed placement and schedule of services for the 2016-2017 school year 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).
5. 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).
6. The District did not refuse to collaborate with Parents on the LRE or any other placement decision. No portion of the proposed 2016-2017 IEP was predetermined by the District. 20 U.S.C. §§ 1414(e), 1415(b)(1); 34 C.F.R. §§ 300.327, 501(b)-(c).

VIII. ORDER

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

The Hearing Officer **DENIES** Petitioner's requested relief.

SIGNED December 6, 2016.


David A. Berger
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.¹⁹¹

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