

**DOCKET NO. 369-SE-0815**

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

**DECISION OF HEARING OFFICER**

\*\*\* (Student), by next friends \*\*\* (Mother) and \*\*\* (Father) (collectively, Petitioner) requested an impartial due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The Bastrop Independent School District (Respondent or the District) is the respondent to Petitioner’s complaint. Petitioner alleges that the District did not (1) provide Student with a free appropriate public education (FAPE) for the majority of the 2014-15 school year; (2) failed to timely conduct an annual Admission, Review, and Dismissal (ARD) meeting, failed to consider all relevant information during ARD committee meetings, and failed to have all required members present at ARD committee meetings; and (3) failed to devise and implement an appropriate Individualized Education Program (IEP). In addition Petitioner alleges that the Full and Individual Evaluation (FIE) completed in September 2015 is not appropriate and, therefore, Petitioner should be provided with an Independent Educational Evaluation (IEE) at public expense.

The District denies that it failed to provide Student a FAPE.<sup>1</sup> In a counterclaim, the District seeks to establish that the FIE is appropriate, and that while Petitioner may obtain an IEE at personal expense, the IEE may not be obtained at public expense.<sup>2</sup>

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<sup>1</sup> Respondent’s First Original Answer at 4.

<sup>2</sup> Respondent Ex. 4 at 8, 10.

The hearing officer finds that Student was not denied a FAPE as alleged; the ARD committee meetings met all requirements at issue;<sup>3</sup> the 2014-15 IEP was correctly devised and adequately implemented;<sup>4</sup> the 2015-16 IEP was primarily correctly devised except that Student's \*\*\* should have been based on a \*\*\* assessment and Student's assistive technology goals should have been based on an updated assistive technology assessment;<sup>5</sup> and that the District met its burden to prove that the 2015 FIE is appropriate except for conducting \*\*\* and assistive technology assessments.<sup>6</sup> The District must have an opportunity to conduct the assessments before Parents may request \*\*\* or assistive technology IEEs at public expense.<sup>7</sup> Therefore, Petitioner's requested relief is denied in part and granted in part, and the District's requested relief is denied in part and granted in part.

In September 2015, Parents requested \*\*\* and assistive technology evaluations. In October 2015, the District provided Parents with Notice and Consent forms for the requested evaluations. Parents did not provide consent, pending the outcome of this proceeding. Based on the outcome of this proceeding, Parents should provide consent for the evaluations and the District should conduct the evaluations. Once the evaluations are complete, the ARD committee should consider the results and revise Student's 2015-16 \*\*\* and assistive technology IEP goals accordingly.

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<sup>3</sup> 34 C.F.R. §§ 300.34(a), 300.321(a)(3), (a)(6); 19 Tex. Admin. Code § 89.1050(c)(1). Petitioner did not specify what relevant information was not considered by the ARD committee; as such, the hearing officer cannot determine what law applies to the allegation.

<sup>4</sup> 34 C.F.R. §§ 300.320 through 300.324.

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<sup>6</sup> 34 C.F.R. §§ 300.502(b)(2)-(3), 300.301, 300.303 through 300.311.

<sup>7</sup> 34 C.F.R. § 300.502(b)(3); 34 C.F.R. § 300.502(b)(5).

## I. DUE PROCESS HEARING REQUEST, ISSUES, AND BURDEN OF PROOF

### A. Due Process Hearing Request

Petitioner filed a due process hearing request (Complaint) on August 24, 2015, and an Amended Request for a Due Process Hearing (First Amended Complaint), with leave of the hearing officer, on September 25, 2015.<sup>8</sup>

### B. Petitioner's Issues and Proposed Remedies

At a prehearing telephone conference held on November 11, 2015, the issues for this proceeding were narrowed and simplified, as set out below.<sup>9</sup>

#### 1. Issues

##### a. Did the District deny Student a FAPE during any part of the applicable period?

At all relevant time periods, did the District fail to devise and implement an appropriate IEP for Student in the least restrictive environment (LRE), resulting in denial of a FAPE and harm to Student, significantly impeding Student's and Parents' opportunity to participate in the decision-making process and/or causing a deprivation of educational benefits, based on specific facts of this case, going forward?

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<sup>8</sup> As set out in Order No. 9 issued on November 10, 2015, ruling on the District's 1-year statute of limitations request, evidence dating back to before August \*\*\*, 2014, was presented for background purposes only, and not to establish that the District violated the IDEA.

<sup>9</sup> See Order No. 10, issued on November 12, 2015.

**b. Petitioner's Sub-issues**

- (i) Did the District fail to implement Student's IEP as written?
- (ii) Did the District fail to devise an appropriate IEP for Student?
- (iii) Did the District fail to adequately evaluate all areas of suspected disability in accordance with the IDEA?
- (iv) Did the District fail to conduct the annual ARD meeting in compliance with the timeline?
- (v) Did the District fail to conduct the tri-annual FIE within the appropriate timeline?
- (vi) Did the District fail to provide appropriate assessments, including cognitive assessments, and related services in the areas of academic instruction, occupational therapy, physical therapy, and assistive technology?
- (vii) Did the District fail to consider all relevant information during the ARD committee meetings?
- (viii) Did the District fail to comply with Student's and Parents' procedural rights by failing to have all required and/or necessary members present during ARD committee meetings?

**2. Petitioner's Proposed Remedies**

At the prehearing telephone conference held on November 11, 2015, Petitioner's proposed remedies were discussed and updated.<sup>10</sup> The proposed remedies, set out below, incorporate remedies proposed in the Complaint, the First Amended Complaint, and in Petitioner's Issues for Due Process and Proposed Remedies, submitted on November 11, 2015. Petitioner requests that the District shall:

- a. provide sensitivity training for all teachers and administrators in the \*\*\* school;
- b. provide training from Education Services Center Region 13 regarding: writing Present Levels of Academic Achievement and Functional Performance (PLAAPF)

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<sup>10</sup> Petitioner's request for reimbursement of attorney's fees and costs by the District was denied as outside the hearing officer's jurisdiction. *See* Order No. 10, issued November 12, 2015.

- statements; implementing IEPs; developing \*\*\* and \*\*\*,<sup>11</sup> meeting physical education requirements; and providing accommodations with fidelity;
- c. provide in-service training in assistive technology devices and services to ensure all teachers who work with Student are trained;
  - d. assure Petitioner that accommodations will consistently be provided to Student;
  - e. provide compensatory services including, but not limited to, tutoring during the 2015-16 school year to address the lack of an appropriate education program for Student during the 2014-15 school year;
  - f. provide a \*\*\* evaluation;
  - g. provide an IEE for all areas of suspected disability;
  - h. pay for a neuropsychological IEE in areas of suspected disability;
  - i. pay for IEEs for occupational therapy, speech, and assistive technology;
  - j. provide a recreational/leisure assessment, counseling assessment, and an adaptive/functional behavioral assessment;
  - k. complete a \*\*\*/\*\*\* assessment and invite representatives from local and state agencies (under the State's Memorandum of Understanding) to the ARD committee meeting for the purpose of evaluating and designing a \*\*\*/\*\*\* IEP that includes a \*\*\* arrangement for Student to include compensatory services;
  - l. contract with mutually agreeable specialist(s), or in the absence of agreement, an educational agency or university, to develop a comprehensive educational program for Student using IEEs and other assessment methods the specialists deem appropriate including curriculum, counseling, occupational therapy, assistive technology assessment and planning, recreational/leisure services, parent training and counseling services, and direct 1:1 or small group instruction or other teacher support. The program is to include: appropriate goals and objectives; a description of the services to be delivered and identification of who will deliver such services; the amount of time and nature of training to be delivered to any District staff; specific provisions for daily data collection and for weekly analysis and modification of goals and objectives based on data collected; and program standards for oversight and implementation of Student's program;
  - m. designate a mutually agreeable District staff member to serve as a communication liaison between Student's family and the school. The liaison shall be selected through discussion with the family during the ARD committee meeting; the liaison

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<sup>11</sup> \*\*\*, Respondent Ex. 4 at 28.

and the family will design a mutually agreeable communication system that may include, for example, a weekly journal, email, or periodic conferences, or any other method and on whatever schedule the parties agree on;

- n. provide and/or pay for compensatory services to include consideration of \*\*\*, remediation, and direct, contiguous instruction in the areas of disability/deficiency; including any appropriate rehabilitative, developmental, or enriching services and activities for enrichment of Student's education and training for no less than 1,260 hours to be extended beyond the 2015-16 school year if necessary;
- o. \*\*\* related to support for Student's academic and \*\*\* activities including but not limited to support with Student's \*\*\* academic goals; and
- p. provide any other relief the hearing officer deems prudent to provide Student with a FAPE.

### C. The District's Counterclaim

After the District completed Student's FIE in September 2015, Petitioner requested an IEE at public expense.<sup>12</sup> The District declines to provide an IEE for Student or reimburse Petitioner for an IEE. The District asserts that its September \*\*\*, 2015 FIE is appropriate, that the District evaluated Student in all suspected areas of disability, and that the District formulated reasonable and appropriate recommendations for educational and related services for Student based on the FIE.<sup>13</sup> The District requests that the hearing officer affirm the appropriateness of the FIE.

### D. Burden of Proof

The IDEA creates a presumption that a school district's decisions made pursuant to the IDEA are appropriate and that the party challenging the decisions bears the burden of proof at all times.<sup>14</sup> A party attacking the appropriateness of an IEP established by a school district bears the

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<sup>12</sup> Petitioner Ex. 13; Respondent Ex. 4 at 8.

<sup>13</sup> Respondent's Second Amended Answer in Response to Petitioner's First Amended Due Process Complaint at 2; see October \*\*\*, 2015 Prehearing Conference Tr.at 11; see also Order No. 10, issued November 12, 2015.

<sup>14</sup> *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005); *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d. 373, 377 (5th Cir. 2003); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993).

burden of showing why the IEP and resulting placements were inappropriate under the IDEA.<sup>15</sup> To prevail, Petitioner must, therefore, establish that the District violated the IDEA regarding Petitioner's delineated issues.

On its counterclaim, the District bears the burden to prove that the FIE of Student was appropriate.<sup>16</sup> To prevail, the District must, therefore, prove that the FIE meets all standards under the IDEA.<sup>17</sup>

## II. HEARING

The hearing was held November 17-20, 2015, before Sharon Cloninger, hearing officer, at the District's Boardroom, 906 Farm Street, Bastrop, Texas 78602. Petitioner was represented by lead counsel Elizabeth Angelone; co-counsel Andrew K. Cuddy, a member of the New York bar who appeared *pro hac vice*; and co-counsel Michael Heagerty. Attorney Charlotte Salter and co-counsel Kelly Shook represented the District.

During the due process hearing, the parties requested that the deadline for written closing briefs be extended to December 30, 2015, and that the decision due date be extended to January 16, 2016, for good cause.<sup>18</sup> This decision was timely issued.

## III. RULING ON MOTIONS IN PETITIONER'S CLOSING BRIEF

### A. Denying Motion to Exclude District's Designated Expert Witnesses

At the hearing, after "invoking the Rule," Petitioner requested exclusion of the District's designated expert witnesses from the hearing room pursuant to Texas Rule of Evidence 614. The

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<sup>15</sup> *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-248 (5th Cir. 1997), as cited in *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000); *R.H. v. Plano Ind. Sch. Dist.*, 607 F.3d 1003, 1010-1011 (5th Cir. 2010).

<sup>16</sup> 34 C.F.R. § 300.502(b)(2)-(3).

<sup>17</sup> 34 C.F.R. §§ 300.301, 300.303 through 300.311.

<sup>18</sup> See Order No. 11, issued November 23, 2015.

hearing officer denied Petitioner's motion and permitted occupational therapist \*\*\*, physical therapist \*\*\*, and \*\*\*, Ph.D., Licensed Specialist in School Psychology (LSSP), to remain in the hearing room. Petitioner reasserts the motion in Petitioner's Closing Argument.<sup>19</sup>

Petitioner argues that the hearing officer's alleged improper exemption from exclusion from the hearing room prejudices Parents, as the District's experts could tailor their testimony based upon testimony they had heard. In addition, Petitioner reasons, because the District's experts are also fact witnesses, they should have been excluded. Petitioner requests that the hearing officer decline to issue a decision on the present record and remand this case for a new hearing with the witnesses properly excluded. In the alternative, Petitioner requests that the hearing officer strike all testimony given by the District's experts on direct examination as part of the District's case in chief.

Petitioner does not dispute that Dr. \*\*\*, Ms. \*\*\*, and Ms. \*\*\* are experts in their respective fields due to their "knowledge, skill, experience, training, or education" and, as such, "permitted to testify thereto in the form of an opinion or otherwise."<sup>20</sup> Instead, Petitioner relies on case law holding that, under Federal Rule of Evidence 615,<sup>21</sup> an expert witness who is also a key fact witness, such as the District's designated experts, should be excluded when the Rule is invoked unless one of the exemptions from exclusion is shown. Petitioner correctly notes that the District did not show why any of its designated experts' presence was "essential to presentation of [the District's] cause[,]" which would have rendered them exempt from exclusion.<sup>22</sup>

The hearing officer notes that the Texas Rules of Evidence govern evidentiary issues in IDEA hearings held in Texas, except as otherwise provided by Texas Education Agency rule.<sup>23</sup>

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<sup>19</sup> Petitioner's Closing Argument at 10-13; Tr. at 63-64 (Ms. Salter designates Dr. \*\*\*, Ms. \*\*\* and Ms. \*\*\* as the District's expert witnesses and Petitioner's request to exclude them is denied); Tr. at 996 (Ms. Salter withdraws the designation of District's witness \*\*\* as an expert); *see also* Tr. at 912, 1086, 1275, 1279.

<sup>20</sup> Texas Rule of Evidence 702; *see Marin v. IESI TX Corp.*, 317 SW3d 314, 320 (Tex.App.—Houston [1st Dist.] 2010, pet. denied) (a witness may qualify as both an expert witness and a fact witness).

<sup>21</sup> Texas Rule of Evidence 614 contains provisions similar to those in Federal Rule of Evidence 615.

<sup>22</sup> Tex. Rule of Evidence 614(3).

<sup>23</sup> 19 Tex. Admin. Code § 89.1185(d).



Under 19 Texas Administrative Code § 89.1185(h), “[g]ranting a motion to exclude witnesses from the hearing room shall be at the hearing officer’s discretion.” Accordingly, Texas Rule of Evidence 614 does not strictly apply to this proceeding and it was not necessary for the District to demonstrate that its designated experts met any of that rule’s exemptions in order for them to remain in the hearing room.

Given that the bases of expert opinion can include facts or data made known to the expert at the hearing,<sup>24</sup> and the District’s counterclaim relates directly to testimony provided by Petitioner’s expert witnesses, it was within the hearing officer’s discretion to permit the District’s designated experts to hear the testimony, in particular, of Petitioner’s expert witnesses. Resulting opinions formed by the District’s experts could “assist the trier of fact to understand the evidence or to determine a fact in issue[.]”<sup>25</sup> Accordingly, Petitioner’s motion is denied.

## **B. Denying Motion to Lift Statute of Limitations**

Petitioner asserts that the 1-year statute of limitations should not have been imposed for this proceeding because the District “misled the parents for years as to [Student’s] actual academic performance.”<sup>26</sup> Petitioner requests that hearing dates should be added for presentation of evidence pre-dating the accrual date.

The accrual date pursuant to the 1-year statute of limitations is August 24, 2014.<sup>27</sup> Educational records for Student dating back to 2011, when Student enrolled in the District, are in evidence.<sup>28</sup> However, in its Closing Brief, Petitioner cites to records from the 2014-15 school year to demonstrate the District “misled the parents[.]” Petitioner did not offer any evidence that, prior to August 24, 2014, the District specifically misrepresented “that it had resolved the problem

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<sup>24</sup> Texas Rule of Evidence 703.

<sup>25</sup> Texas Rule of Evidence 702.

<sup>26</sup> Petitioner’s Closing Brief at 35-37, citing 20 U.S.C. § 1415(f)(3)(D) (exceptions to the timeline); *see also* 19 Tex. Admin. Code § 89.1151(c)(d).

<sup>27</sup> *See* Order No. 9, issued November 10, 2015.

<sup>28</sup> Petitioner Exs. 46-124, 129, 144, 149-150.

forming the basis of the [Complaint]” or that the District withheld information from Parents that was required to be provided to them.<sup>29</sup> As such, Petitioner did not prove that either of the legal exceptions to the 1-year statute of limitations apply to this case. Petitioner’s motion is denied.

#### IV. FINDINGS OF FACT

Based upon the evidence and argument of the parties, the hearing officer makes the following findings of fact:

##### *Background*

1. Student resides with Parents within the boundaries of the District.<sup>30</sup>
2. The District is a recipient of federal funds and must comply with the IDEA, including developing and implementing an appropriate IEP for Student, designed to ensure services and placement in the LRE, and reasonably calculated to confer meaningful educational benefit.
3. Student is \*\*\* years old and in the \*\*\* grade.
4. Student first enrolled in the District in \*\*\* in the \*\*\* grade.<sup>31</sup>
5. Based on an FIE completed in 2008 by the \*\*\* (Student’s previous school district), Student met disability criteria as a child with a Specific Learning Disability (SLD) in Reading Comprehension, Math Calculation, and Written Expression.<sup>32</sup>
6. An FIE completed by the District in November 2011 showed Student no longer met disability criteria for SLD, but Student was determined to be eligible for special education services due to Other Health Impairment (OHI) because of a \*\*\* disorder that began in \*\*\* 2011.<sup>33</sup>
7. Following \*\*\* \*\*\*, the District conducted another FIE.<sup>34</sup> As a result of the 2012 FIE, Student was identified as a child eligible to receive special education services as a child

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<sup>29</sup> 19 Tex. Admin. Code § 89.1151(d).

<sup>30</sup> Respondent Ex. 1 at 447; Respondent Ex. 2 at 583.

<sup>31</sup> Respondent Ex. 1 at 447; Respondent Ex. 2 at 583.

<sup>32</sup> Petitioner Ex. 125.

<sup>33</sup> Petitioner Ex. 29 at 340; Respondent Ex. 2 at 567, 575-576, 588; Respondent Ex. 23 at 12.

<sup>34</sup> Petitioner Ex. 107.

with a Speech Impairment (SI) and OHI, and was provided with the instructional service of speech therapy and the related services of physical therapy, occupational therapy, and assistive technology.<sup>35</sup>

8. Student's \*\*\*. The \*\*\* \*\*\* \*\*\* activity; however, following \*\*\*, Student experienced \*\*\* which affected the use of Student's \*\*\*. Student also experienced temporary loss of speech/language skills and impairment of cognitive skills.<sup>36</sup>
9. Student has not \*\*\*.<sup>37</sup>
10. Student presents with a lack of functional use of Student's \*\*\* \*\*\*. \*\*\*, \*\*\*; Student has learned to \*\*\*. Student's \*\*\* also resulted in executive function deficits that affect Student in the home, school, and community. Student's ability to perform age-appropriate tasks for fine motor, visual motor, and gross motor skills such as self-care activities, has been impacted by Student's disability.<sup>38</sup>
11. Since \*\*\* 2012, Student has regained many of the skills Student lost following \*\*\*. Student's learning capacity at school has significantly improved since Student's 2012 \*\*\*.<sup>39</sup>
12. However, information dated September \*\*\*, 2015, from Student's physical medicine doctor, indicates Student continues to experience "decreased balance and steadiness" due to \*\*\*.<sup>40</sup>
13. Following \*\*\*, Student was restricted by Student's physician to \*\*\* until \*\*\* 2013. In \*\*\* 2013, Student's physicians allowed Student to attend \*\*\* but restricted Student from participation in \*\*\*. Student was \*\*\* years old and in the \*\*\* grade.<sup>41</sup>
14. An annual ARD committee meeting was held on September \*\*\* 2013.<sup>42</sup> Student continued to receive services in the general education classroom with inclusion support, with the

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<sup>35</sup> Petitioner Ex. 22 at 269, 283-284; Respondent Ex. 1 at 368.

<sup>36</sup> Petitioner Ex. 29 at 340; Respondent Ex. 2 at 567, 575-576, 588, 599; Respondent Ex. 4 at 21-22; Respondent Ex. 23 at 12.

<sup>37</sup> Petitioner Ex. 29 at 340; Petitioner Ex. 87; Petitioner Ex. 89; Respondent Ex. 2 at 567, 575-576, 588; Respondent Ex. 23 at 12.

<sup>38</sup> Petitioner Ex. 6; Respondent Ex. 4 at 21-22.

<sup>39</sup> Petitioner Ex. 6; Petitioner Ex. 8.

<sup>40</sup> Petitioner Ex. 29 at 340; Petitioner Ex. 87; Petitioner Ex. 89; Respondent Ex. 2 at 567, 575-576, 588; Respondent Ex. 23 at 12.

<sup>41</sup> Petitioner Ex. 22 at 283; Respondent Ex. 1 at 37, 204.

<sup>42</sup> Respondent Ex. 1 at 220-274.

- related services of speech therapy, occupational therapy, physical therapy, and assistive technology being provided.<sup>43</sup>
15. During 2014-15, Student received all academic instruction in the general education setting and passed the \*\*\* grade.<sup>44</sup>
  16. Student has friends and socializes with Student's peers in the general education environment.<sup>45</sup>
  17. Student's behavior is not a concern.<sup>46</sup>
  18. As proposed in the 2015-16 IEP yet to be adopted, Student will receive all but Student's \*\*\* instruction in the general education setting. In 2015-16, Student receives support from special education co-teachers in Student's academic classes. Student's teachers have been informed of the various accommodations and modifications to be provided so Student may participate successfully in Student's current academic program as outlined in the 2014-15 IEP, which remains in effect pending Parents' acceptance of the 2015-16 IEP or the implementation of the 2015-16 IEP pursuant to legal order.<sup>47</sup>

***Sub-issue 1:***

***Did the District fail to implement Student's IEP as written?***

19. Student's IEP for 2014-15, developed at the September \*\*\*, 2014 annual ARD committee meeting, was to be implemented with modifications and accommodations for adaptations to the environment, materials, and instructional delivery, as well as \*\*\* accommodations to support \*\*\* after school.<sup>48</sup>

***Teachers' implementation of Student's IEP***

20. On August \*\*\*, 2014, \*\*\*, who is the District's Special Education Department Chair, and was Student's case manager in 2014-15 and is again in 2015-16, provided all of Student's teachers with information about Student's IEP goals, accommodations, modifications, and related services.<sup>49</sup>

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<sup>43</sup> Respondent Ex. 1 at 251.

<sup>44</sup> Petitioner Ex. 4 at 19; Respondent Ex. 2 at 579, 598; Respondent Ex. 33 at 1-5, 7, 10-11; Respondent Ex. 35. Student received speech therapy in the speech therapy room rather than in the general education setting. Petitioner Ex. 37 at 420.

<sup>45</sup> Tr. at 876-877 (Ms. \*\*\*).

<sup>46</sup> Respondent Ex. 2 at 584; Respondent Ex. 4 at 54.

<sup>47</sup> Tr. at 297 (Ms. \*\*\*); Tr. at 1103, 1201-1202, 1240-1241 (Ms. \*\*\*); Petitioner Ex. 4 at 19; Petitioner Ex. 158 at 1734; Respondent Ex. 2 at 579, 598; Respondent Ex. 4 at 46, 48-49, 58-59; Respondent Ex. 33 at 1-5, 7, 10-11; Respondent Ex. 35.

<sup>48</sup> Petitioner Ex. 148 at 1302, 1318; Respondent Ex. 1 at 426-427; Respondent Ex. 2 at 588-589.

<sup>49</sup> Tr. at 764-766 (Ms. \*\*\*); Petitioner Ex. 148 at 1339-1343.

21. In 2014-15, Parents and teachers communicated with each other to ensure Student's testing accommodations were followed.<sup>50</sup>
22. In 2014-15, Student's math teacher did not follow Student's IEP accommodations at the beginning of the school year but the situation improved after the math teacher left. The \*\*\* teacher did not initially give Student tests one-on-one but the situation improved.<sup>51</sup>
23. At an October \*\*\*, 2014 continuation of a brief ARD committee meeting, Father expressed concern that a particular teacher was not providing Student with a copy of class notes as required by the accommodations in Student's IEP. \*\*\*, Assistant Principal, stated she would address the issue with the teacher after the meeting. The ARD committee revised the accommodation so that Student would receive class notes at the beginning rather than at the end of class. Ms. \*\*\* notified Student's teachers of the change.<sup>52</sup>
24. On October \*\*\*, 2014, Ms. \*\*\* reminded Student's math and resource math teachers to request oral administration of Student's tests to give Student plenty of time to process and work the problems.<sup>53</sup>
25. On December \*\*\*, 2014, Student was not provided oral administration of a test as required.<sup>54</sup>
26. On January \*\*\*, 2015, Ms. \*\*\* again sent all of Student's teachers a copy of Student's special education paperwork.<sup>55</sup>
27. On January \*\*\*, 2015, Special Education Coordinator \*\*\* was consulted by Ms. \*\*\* about Student's "extra day" accommodation for tests.<sup>56</sup>
28. On January \*\*\*, 2015, when a teacher offered to allow Student to take Student's \*\*\* test in a small group and/or have it read to Student, in accordance with Student's accommodations, Student declined.<sup>57</sup>
29. On February \*\*\*, 2015, Ms. \*\*\* sent Student's math teacher a spreadsheet of Student's accommodations.<sup>58</sup>

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<sup>50</sup> Tr. at 1166 (Ms. \*\*\*); Respondent Ex. 23 at 20; *see also, for example*, Petitioner Ex. 148 at 1255-1256.

<sup>51</sup> Respondent Ex. 23 at 18.

<sup>52</sup> Respondent Ex. 1 at 413, 424; Petitioner Ex. 148 at 1283.

<sup>53</sup> Petitioner Ex. 158 at 2041, 2046, 2048.

<sup>54</sup> Petitioner Ex. 158 at 2116.

<sup>55</sup> Petitioner Ex. 158 at 2263-2280.

<sup>56</sup> Petitioner Ex. 158 at 2306. Ms. \*\*\* last name is now "\*\*\*\*."

<sup>57</sup> Petitioner Ex. 158 at 2347, 2361.

<sup>58</sup> Petitioner Ex. 158 at 2259, 2381-2382.

30. On February \*\*\*, 2015, Student was not given a modified math test, as required by Student's accommodations.<sup>59</sup>
31. On March \*\*\*, 2015, Student's \*\*\* test was orally administered.<sup>60</sup>
32. In March 2015, Student's \*\*\* and Student's \*\*\* teacher worked together via email to arrive at accommodations for a \*\*\* project. The \*\*\* was a difficult assignment for Student, who cannot \*\*\* and who struggles cognitively. Student turned in a modified assignment, as suggested by Student's \*\*\*, and received a grade of \*\*\* on the project.<sup>61</sup>
33. Student received academic benefit from the \*\*\* project.<sup>62</sup>
34. On March \*\*\*, 2015, the District decided Student would be given an extra day to complete the \*\*\* section of the State of Texas Assessment on Academic Readiness (STAAR) test, but Student was exempt from \*\*\* because the ARD committee had already accepted Student's STAAR \*\*\* score.<sup>63</sup>
35. On March \*\*\*, 2015, Student's English teacher went over Student's accommodations with Student, which was greatly appreciated by Student and Mother.<sup>64</sup>
36. On March \*\*\*, 2015, Student's science teacher responded to Mother's concern about Student's grades by sending her a copy of a pre-test quiz for Student to work on at home.<sup>65</sup>
37. On April \*\*\*, 2015, Student's \*\*\* teacher notified Mother via email that Student could have a couple of extra days to complete a project, as requested by Mother.<sup>66</sup>
38. On April \*\*\*, 2015, Student's \*\*\* teacher notified Ms. \*\*\* that he would give Student extra days to do test corrections, rather than impose the District's standard 3-day time limit.<sup>67</sup>

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<sup>59</sup> Petitioner Ex. 159 at 2387.

<sup>60</sup> Petitioner Ex. 159 at 2425.

<sup>61</sup> Tr. at 146 (Ms. \*\*\*); Tr. at 539 (Father); Tr. at 691-693, 702-704, 705 (Ms. \*\*\*); Petitioner Ex. 148 at 1190-1197, 1206-1212; Petitioner Ex. 159 at 2429-2445, 2652, 2657, 2668, 2674, 2680, 2686, 2699-2702.

<sup>62</sup> Tr. at 693 (Ms. \*\*\*).

<sup>63</sup> Petitioner Ex. 159 at 2451-2468.

<sup>64</sup> Petitioner Ex. 159 at 2540-2541, 2544.

<sup>65</sup> Petitioner Ex. 159 at 2545, 2547-2548.

<sup>66</sup> Petitioner Ex. 159 at 2590-2591.

<sup>67</sup> Petitioner Ex. 159 at 2605.

39. On April \*\*\*, 2015, Student's science test was not orally administered because Student opted to remain in the classroom for the test.<sup>68</sup>
40. On at least one occasion in the spring of 2015, Student's math teacher sent an electronic copy of class notes to Parents after Parents told him Student's notes did not make it home. The math teacher also agreed with Parents that Student could to turn in \*\*\* Student's homework.<sup>69</sup>
41. On May \*\*\*, 2015, Student's \*\*\* teacher emailed a copy of the final review to Mother after Student left the final review in the classroom.<sup>70</sup>
42. Ms. \*\*\* reminded Student's math teacher on June \*\*\*, 2015, that Student's final examination should be individually orally administered.<sup>71</sup>
43. On June \*\*\*, 2015, Ms. \*\*\* arranged for individual oral administration of Student's final exam in \*\*\*.<sup>72</sup>
44. On June \*\*\*, 2015, Ms. \*\*\* arranged for Student's English final exam to be orally administered and for Student to be escorted to and from the final exam by an adult in accordance with Student's accommodations.<sup>73</sup>
45. In 2015-16, Student continues to be educated under Student's 2014-15 IEP pending Parents' acceptance of the IEP developed at an ARD committee meeting that began in September 2015 and concluded on October \*\*\*, 2015.<sup>74</sup>
46. In 2015-16, accommodations have been inconsistently implemented. Student sometimes refuses accommodations but, Mother said, refusal should not be a choice.<sup>75</sup>
47. On September \*\*\*, 2015, Student requested a copy of class notes from Student's math teacher, pursuant to one of the accommodations in Student's IEP. After the teacher did not provide the notes, Student texted Student's case manager, who then spoke with the teacher. The teacher questioned the validity of Student's request; the case manager confirmed that providing Student with notes at the beginning of class was an accommodation. Assistant Principal Ms. \*\*\* then spoke with Student and said that the teacher was not available to give Student the notes at the beginning of class because the teacher had a meeting before

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<sup>68</sup> Petitioner Ex. 159 at 2695.

<sup>69</sup> Petitioner Ex. 158 at 2376-2380, 2383-2386; Petitioner Ex. 159 at 2633.

<sup>70</sup> Petitioner Ex. 159 at 2758.

<sup>71</sup> Petitioner Ex. 159 at 2778.

<sup>72</sup> Petitioner Ex. 159 at 2781.

<sup>73</sup> Petitioner Ex. 159 at 2784.

<sup>74</sup> Tr. at 1200-1201 (Ms. \*\*\*).

<sup>75</sup> Tr. at 552, 1391 (Father); Petitioner Ex. 4 at 19-22; Respondent Ex. 23 at 18.

that class period. When Student left the meeting with Ms. \*\*\*, Student was very angry because Student's accommodations were not being followed and Student felt like Student is a bother when Student advocates for \*\*\*self. On September \*\*\*, 2015, the math teacher \*\*\*. That same day, the teacher did not provide Student with another of Student's accommodations—a modified test.<sup>76</sup>

48. In October 2015, Student refused to be pulled out of class for occupational therapy because Student felt the occupational therapist had called Student a \*\*\* at a recent ARD committee meeting.<sup>77</sup>
49. Mother cited the math teacher's \*\*\* and the occupational therapist telling Student Student had been \*\*\* as examples of retaliation. Mother would like for District teachers and administrators to have training to learn how to be sensitive to Student and not retaliate against Student when Student advocates for \*\*\*self.<sup>78</sup>

### *Student's progress*

50. Progress reports issued every 6 weeks during 2014-15 indicate Student had either mastered, was progressing toward, or was continuing to work on objectives related to Student's IEP goals. The progress reports also indicated whether the progress at the time was sufficient for Student to achieve a particular IEP goal by the next annual ARD date in September 2015.<sup>79</sup>
51. Student mastered all of the 2014-15 IEP goals, obtaining more than trivial progress under the IEP and thus receiving an educational benefit.<sup>80</sup>
52. Petitioner's assertion that Student failed \*\*\* 2014-15 and an ARD committee meeting was not convened to discuss Student's lack of progress is not supported by the evidence, which shows Student earned \*\*\*.<sup>81</sup> There is no evidence that Parents submitted a written request for an ARD committee meeting to discuss Student's progress in \*\*\* class.<sup>82</sup>

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<sup>76</sup> Tr. at 1162-1163 (Ms. \*\*\*); Petitioner Ex. 4 at 26-28, 34-35; Petitioner Ex. 12 (Student's affidavit); Petitioner Ex. 158 at 1772; Respondent Ex. 23 at 12 (Mother's deposition).

<sup>77</sup> Tr. at 555-560 (Father's testimony); Petitioner Ex. 148 at 1180-1181; Respondent Ex. 34 at 1-2, 6-7.

<sup>78</sup> Respondent Ex. 23 at 22.

<sup>79</sup> Petitioner Ex. 18; Petitioner Ex. 26; Petitioner Ex. 34; Respondent Ex. 1 at 475-499.

<sup>80</sup> Respondent Ex. 1 at 475-499; *Bobby R.*, 200 F.3d. at 347-348.

<sup>81</sup> Respondent Ex. 1 at 500 (final report card for 2014-15 showing a \*\*\* grade of \*\*\*); but compare with Petitioner Ex. 28 (progress report showing a grade of \*\*\* for the \*\*\*); see Petitioner's Complaint at 6-7, Petitioner's Closing Brief at 30.

<sup>82</sup> 19 Tex. Admin. Code § 89.1011(e).



53. Student's final grades for Student's \*\*\*.<sup>83</sup>
54. Student's \*\*\* teacher believes Student received academic and nonacademic benefits from Student's class.<sup>84</sup> Student and teacher worked long and hard via re-teaching one-on-one to reach the \*\*\* goal of 70 % mastery.<sup>85</sup>
55. Student's \*\*\* inclusion teacher believes Student enjoyed the class, and made progress in terms of acquiring \*\*\* vocabulary and \*\*\* concepts. Further, Student's grades in the class accurately reflect what Student learned.<sup>86</sup>
56. Student participated daily and worked hard in \*\*\*. Student's inclusion teacher individualized Student's access to \*\*\* and Student received both academic and nonacademic benefit in the class. Student's teacher and Parents worked well together.<sup>87</sup>
57. Mother believes Student received some benefit from Student's academic classes in 2014-15.<sup>88</sup>
58. Progress is measured by looking at various indicia of a Student's progress with respect to Student's own level of performance, rather than with respect to Student's peers.<sup>89</sup>
59. Student made meaningful academic progress in the \*\*\* grade.
- \*\*\*
60. One of Student's accommodations is to \*\*\*, usually by Ms. \*\*\* in the 2014-15 school year and by \*\*\* in the 2015-16 school year.<sup>90</sup>
61. On August \*\*\*, 2014, Student refused \*\*\* by a teacher.<sup>91</sup>
62. In texts or emails dated October \*\*\*, December \*\*\*, and December \*\*\*, 2014, and February \*\*\*, February \*\*\*, March \*\*\*, March \*\*\*, April \*\*\*, May \*\*\*, and May \*\*\*,

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<sup>83</sup> Respondent Ex. 1 at 500. Student's \*\*\* teacher changed Student's \*\*\* final exam grade from a \*\*\* to a \*\*\*; Student already had an overall passing grade for \*\*\*. Tr. at 638-639 (Ms. \*\*\*).

<sup>84</sup> Tr. at 650, 652, 662, 665-668, 712, 714 (Ms. \*\*\*).

<sup>85</sup> Tr. at 714 (Ms. \*\*\*).

<sup>86</sup> Tr. at 717-718, 742-743, 758-760 (Ms. \*\*\*).

<sup>87</sup> Tr. at 860, 866, 875-877, (Ms. \*\*\*).

<sup>88</sup> Respondent Ex. 23 at 14, 17. As of November 2015, Student was failing two classes due to missing assignments. Tr. at 771-773 (Ms. \*\*\*).

<sup>89</sup> *Bobby R*, 200 F.3d at 349.

<sup>90</sup> Tr. at 776-777 (Ms. \*\*\*); Tr. at 1193-1194 (Ms. \*\*\*); Petitioner Ex. 158 at 1753; *see, for example*, Petitioner Ex. 130; Petitioner Ex. 148 at 1264; Petitioner Ex. 158 at 2091, 2098-2099; Petitioner Ex. 159 at 2609, 2628, 2734, 2743.

<sup>91</sup> Petitioner Ex. 148 at 1338.

- 2015, Ms. \*\*\* notified Student or Student's teacher that someone else would need to be available to \*\*\* Student and asked Student or Student's teacher to arrange for someone else to \*\*\* Student.<sup>92</sup>
63. Ms. \*\*\* notified Student via text messages on January \*\*\*, February \*\*\*, February \*\*\*, February \*\*\*, March \*\*\*, March \*\*\*, March \*\*\*, and March \*\*\*, 2015, that she would be unavailable to \*\*\* Student due to various reasons, including illness, testing other students, and being in a meeting that was running long.<sup>93</sup>
64. \*\*\* was provided either by Ms. \*\*\*, another adult, or one of Student's peers except for one occasion each on May \*\*\*, August \*\*\*, September \*\*\* and October \*\*\*, 2015, although according to emails someone might have been available to \*\*\* Student on May \*\*\*, 2015.<sup>94</sup>
65. On May \*\*\*, 2015, Ms. \*\*\* was concerned about Student \*\*\* \*\*\* class because when Student \*\*\* the week before, the paraprofessional assumed Student \*\*\* when, in fact, Student was with Ms. \*\*\*.<sup>95</sup>
66. The District considered a September \*\*\*, 2015 letter from Student's physician \*\*\*, M.D., that stated in order to maximize Student's safety and stability while \*\*\*, Student needs to \*\*\* which will allow Student to \*\*\*.<sup>96</sup>
67. An \*\*\* is in place for the 2015-16 school year for Student's \*\*\*, \*\*\*.<sup>97</sup>
68. On August \*\*\*, 2015, the first day of the 2015-16 school year, there was confusion about where Student and Ms. \*\*\* \*\*\*.<sup>98</sup>
69. On August \*\*\*, 2015, \*\*\*.<sup>99</sup>

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<sup>92</sup> Petitioner Ex. 130; Petitioner Ex. 148 at 1264; Petitioner Ex. 158 at 2091, 2098-2099; Petitioner Ex. 159 at 2609, 2628, 2734, 2743.

<sup>93</sup> Petitioner Ex. 130; Petitioner Ex. 148 at 1264; Petitioner Ex. 158 at 2091, 2098-2099; Petitioner Ex. 159 at 2609, 2628, 2734, 2743.

<sup>94</sup> Petitioner Ex. 158 at 1753-1754, 1757, 1772, 1817, 1819, 1829, 1831-1833, 1837, 1841, 1847, 1854, 2003, 2340-2341; Petitioner Ex. 159 at 2721, 2723-2724, 2726-2727; Respondent Ex. 21 at 8, 14, 129, 142, 144, 253, 440-441, 834, 836-837, 847, 856, 959, 965, 985, 993, 1035, 1046-1048, 1050, 1054, 1058-1059, 1066, 1074-1075, 1084, 1090, 1403, 1405-1406; Respondent Ex. 31.

<sup>95</sup> Tr. at 149-150, 159 (Ms. \*\*\*). The evidence shows Student's \*\*\*. Petitioner Ex. 29 at 340; Petitioner Ex. 87; Petitioner Ex. 89; Respondent Ex. 2 at 567, 575-576, 588; Respondent Ex. 23 at 12.

<sup>96</sup> Petitioner Ex. 15; Petitioner Ex. 140 at 1157; Petitioner Ex. 146; Petitioner Ex. 148 at 1186; Respondent Ex. 23 at 21.

<sup>97</sup> Respondent Ex. 16.

<sup>98</sup> Petitioner Ex. 158 at 1750.

<sup>99</sup> Petitioner Ex. 4 at 14, 19; Respondent Ex. 19 at 1, 6; Respondent Ex. 23 at 21.

70. As reported at the continuation of the September \*\*\*, 2015 annual ARD committee meeting, Student has been resistant to \*\*\*. Father told the ARD committee that Student will follow the rules.<sup>100</sup>
71. At the October \*\*\*, 2015 reconvened ARD committee meeting, the ARD committee recommended \*\*\* because Student's physical therapy evaluation completed as part of the 2015 FIE shows Student is able to effectively \*\*\* without assistance.<sup>101</sup>
- Assistive technology*
72. Student currently has a \*\*\* \*\*\* given to Student by the District during 2013-14, when Student was in the \*\*\* grade, to assist Student with classroom assignments. \*\*\*.<sup>102</sup>
73. Student had \*\*\* for a year before \*\*\*.<sup>103</sup>
74. Student used \*\*\* in \*\*\* grade but rarely used it during 2014-15, when Student was in \*\*\* grade.<sup>104</sup>
75. Student has complained to Father many times that \*\*\*, along with \*\*\*, is \*\*\* and the \*\*\* \*\*\* is not valuable for Student in the way it should be.<sup>105</sup>
76. Parents have asked the District to \*\*\* Student's \*\*\* \*\*\* but the District has not done so. As a result, Student's \*\*\*, putting Student at a risk of \*\*\*.<sup>106</sup>
77. Father believes Student has benefited very little from having \*\*\* provided by the District.<sup>107</sup>
78. Student did not \*\*\* in \*\*\* class but was able to complete \*\*\* assignments with the assistance of the inclusion teacher or, in group projects, when another student \*\*\*.<sup>108</sup>

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<sup>100</sup> Respondent Ex. 4 at 59.

<sup>101</sup> Tr. at 1193-1194 (Ms. \*\*\*); Respondent Ex. 4 at 57.

<sup>102</sup> Tr. at 562, 564 (Father); Petitioner Ex. 4 at 15, 39-41; Petitioner Ex. 22 at 284; Petitioner Ex. 148 at 1228-1232, 1234-1236, 1242-1243; Petitioner Ex. 158 at 1761-1762; Respondent Ex. 23 at 14, 23; *see* 34 C.F.R. §§ 300.5, 300.6, 300.105(a).

<sup>103</sup> Tr. at 564 (Father).

<sup>104</sup> Tr. at 564-565 (Father); Petitioner Ex. 4 at 15, 39-41; Petitioner Ex. 22 at 284; Petitioner Ex. 148 at 1228-1232, 1234-1236, 1242-1243; Petitioner Ex. 158 at 1761-1762; Respondent Ex. 23 at 14, 23.

<sup>105</sup> Tr. at 564-565, 567 (Father).

<sup>106</sup> Tr. at 568, 1387 (Father).

<sup>107</sup> Tr. at 568, 582 (Father); *see also* Tr. at 512-513 (Dr. \*\*\*).

<sup>108</sup> Tr. at 668 (Ms. \*\*\*).

79. Student did not \*\*\* in \*\*\* class. Student provided \*\*\* answers.<sup>109</sup>
80. Student did not \*\*\* in \*\*\* where Student provided \*\*\* responses without difficulty.<sup>110</sup>
81. \*\*\*, MA, CCC-SLP, Lead Speech-Language Pathologist, and Assistive Technology Coordinator for the District, emailed Mother in January 2015 to help Mother access an \*\*\* with \*\*\* at the \*\*\* grade level so Mother could assist Student at home in Student's reading and comprehension of \*\*\*, which Student was studying in English class.<sup>111</sup>
82. In January 2015, Ms. \*\*\* suggested coordinating \*\*\* for Student with Student's English teacher and co-teacher.<sup>112</sup>
83. In January 2015, Ms. \*\*\* met with Student's English teacher to show her the \*\*\* containing \*\*\*.<sup>113</sup>
84. In January 2015, Ms. \*\*\* observed Student in \*\*\*, \*\*\* and English to address Student's assistive technology use and needs.<sup>114</sup>
85. In January 2015, Ms. \*\*\* met with \*\*\*, speech pathologist, to discuss Student's assistive technology needs.<sup>115</sup>
86. In 2014-15, Ms. \*\*\* met with Student to train Student to \*\*\*. When Student took \*\*\* to class, a co-teacher helped Student \*\*\* for writing assignments.<sup>116</sup>
87. According to a statement in the May 2015 ARD committee meeting report, in which the committee conducted a Review of Existing Evaluation Data (REED), the \*\*\* assisted Student in \*\*\* Student's \*\*\* work and the \*\*\*.<sup>117</sup>
88. Student mastered Student's assistive technology goals and objectives for 2014-15.<sup>118</sup>

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<sup>109</sup> Tr. at 746-747 (Ms. \*\*\*).

<sup>110</sup> Tr. at 879-880 (Ms. \*\*\*).

<sup>111</sup> Respondent Ex. 20 at 1-16.

<sup>112</sup> Tr. at 905-906 (Ms. \*\*\*); Petitioner Ex. 158 at 2308, 2316, 2357-2358; Respondent Ex. 18 at 22.

<sup>113</sup> Respondent Ex. 20 at 12-13.

<sup>114</sup> Petitioner Ex. 158 at 2179; Respondent Ex. 18 at 42.

<sup>115</sup> Petitioner Ex. 158 at 2325-2326.

<sup>116</sup> Respondent Ex. 4 at 53-54.

<sup>117</sup> Tr. at 509 (Dr. \*\*\*).

<sup>118</sup> Petitioner Ex. 154 at 1681.

89. Student was permitted by the District to keep and \*\*\* during the summer of 2015. On June \*\*\*, 2015, Ms. \*\*\* sent to Mother tutorials for \*\*\* and \*\*\* that are \*\*\* \*\*\*.<sup>119</sup>
90. The \*\*\* was provided to Student in May 2015 but as of that date, it had not been included in Student's IEP.<sup>120</sup>
91. On August \*\*\*, 2015, Student reviewed \*\*\* and \*\*\* with Ms. \*\*\* and was able to access both \*\*\* independently and effectively.<sup>121</sup>
92. In August 2015, Ms. \*\*\* informed Student's teachers about Student's assistive technology accommodations.<sup>122</sup>
93. Dr. \*\*\* understands that Student's \*\*\* is primarily for \*\*\* assistance. Dr. \*\*\* was surprised at how much \*\*\* Student was able to produce during the September 2015 psychological evaluation, especially given Student has had to \*\*\*\*\*. The fact that Student has access to \*\*\* when Student needs it, but does not use it all the time, seems appropriate to Dr. \*\*\*.<sup>123</sup>
94. As of October 2015, Student did not have \*\*\* at home and only occasionally took \*\*\* home to use it.<sup>124</sup>
95. In October 2015, Student kept \*\*\* \*\*\* and took it home at Mother's request. Student would like to \*\*\* but needs more training and needs to be able to use it \*\*\*.<sup>125</sup>
96. On October \*\*\*, 2015, the day after Student told \*\*\*, a certified occupational therapy assistant supervised by Ms. \*\*\*, that Student did not need \*\*\* for every class, Ms. \*\*\* consulted with the District's Information Technology (IT) services about \*\*\* access for the \*\*\* and for the \*\*\*, \*\*\*, and \*\*\*. Once IT completed the work, Ms. \*\*\* would return \*\*\* to Student.<sup>126</sup>
97. Student \*\*\* proficiently and uses Student's \*\*\* in class for tasks such as \*\*\* Student's assignments for organization.<sup>127</sup>

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<sup>119</sup> Petitioner Ex. 159 at 2792-2793.

<sup>120</sup> Petitioner Ex. 135.

<sup>121</sup> Petitioner Ex. 158 at 1744.

<sup>122</sup> Petitioner Ex. 158 at 1748, 1759.

<sup>123</sup> Tr. at 227-228 (Dr. \*\*\*).

<sup>124</sup> Respondent Ex. 23 at 16.

<sup>125</sup> Tr. at 507, 510 (Dr. \*\*\*); Petitioner Ex. 4 at 15, 39-41; Petitioner Ex. 22 at 284; Petitioner Ex. 148 at 1228-1232, 1234-1236, 1242-1243; Petitioner Ex. 158 at 1761-1762; Respondent Ex. 23 at 14, 23.

<sup>126</sup> Petitioner Ex. 135; Petitioner Ex. 136; Respondent Ex. 34 at 2. The record is silent as to whether \*\*\* has been returned to Student.

<sup>127</sup> Tr. at 387 (Ms. \*\*\*); Tr. at 504 (Ms. \*\*\*); Tr. at 675, 677 (Ms. \*\*\*).

*Occupational therapy*

98. Occupational therapy logs kept by Ms. \*\*\* indicate Student attended 32 sessions of occupational therapy between September \*\*\*, 2014, and June \*\*\*, 2015.<sup>128</sup>
99. During 2014-15, Student received regular occupational therapy with the focus on assisting Student to complete tasks \*\*\*. Student was able to independently complete most physical tasks needed at school, with only an occasional need for modification or assistance. Student received numerous occupational therapy treatments throughout the year to help \*\*\*.<sup>129</sup>
100. At the beginning of 2014-15, Ms. \*\*\* assisted Student with \*\*\* class.<sup>130</sup>
101. Student has earned the \*\*\*.<sup>131</sup>
102. In the \*\*\* class, Student \*\*\* of a paraprofessional in a program designed by Ms. \*\*\* and Ms. \*\*\* that included a written checklist. Once a week, Ms. \*\*\* met with Student in \*\*\* class to work on skills such as \*\*\*. Ms. \*\*\* never saw Student \*\*\* in the class.<sup>132</sup>
103. The therapeutic intervention from Ms. \*\*\* and Ms. \*\*\* in Student's \*\*\* class \*\*\* days per week helped to maintain Student's \*\*\* and the \*\*\*.<sup>133</sup>
104. On May 6, 2015, Ms. \*\*\* provided Student with \*\*\* to wear at school as well as \*\*\*.<sup>134</sup>
105. According to the June \*\*\*, 2015 occupational therapy progress report, Ms. \*\*\* and Student were continuing to work on \*\*\*, which Student could do with \*\*\*. \*\*\*.<sup>135</sup> Father disagrees with Ms. \*\*\*'s report that Student can \*\*\*.<sup>136</sup> As of November 2015, it is Ms. \*\*\*'s opinion that Student should adapt for the deficit in that Student has been working on the skill for 3 years and, based on Student's responses to Ms. \*\*\*, \*\*\* is not a highly valued skill for Student.<sup>137</sup>

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<sup>128</sup> Petitioner Ex. 9; Petitioner Ex. 19 at 208-219; Respondent Ex. 1 at 501-512; Respondent Ex. 7.

<sup>129</sup> Petitioner Ex. 22 at 283.

<sup>130</sup> Tr. at 937 (Ms. \*\*\*).

<sup>131</sup> Tr. at 352-354 (Ms. \*\*\*); Tr. at 1229 (Ms. \*\*\*); Petitioner Ex. 22 at 283; Respondent Ex. 2 at 600.

<sup>132</sup> Tr. at 352-354 (Ms. \*\*\*); Tr. at 1229 (Ms. \*\*\*); Petitioner Ex. 22 at 283; Respondent Ex. 2 at 600.

<sup>133</sup> Tr. at 937 (Ms. \*\*\*).

<sup>134</sup> Petitioner Ex. 159 at 2715.

<sup>135</sup> Petitioner Ex. 18 at 194.

<sup>136</sup> Tr. at 579 (Father).

<sup>137</sup> Tr. at 954 (Ms. \*\*\*); Tr. at 1393 (Father).

106. Beginning in 2015-16, the District provided occupational therapy services for Student on October \*\*\*, November \*\*\*, and November \*\*\*, 2015, through a licensed/certified occupational therapy assistant supervised by Ms. \*\*\*. Student had refused occupational therapy services from Ms. \*\*\* on October \*\*\*, 2015, due to a conflict between them, and occupational therapy was not provided on October \*\*\*, 2015, due to Parents' request that occupational therapy be placed on hold.<sup>138</sup>
107. To assist Student with projects that require \*\*\*, the District has made available to Student \*\*\* so Student can \*\*\*.<sup>139</sup>
108. At the beginning of the 2015-16 school year, Mother confirmed that Student had received benefit from the occupational therapy provided by the District over the previous year but noted the benefit could have been partly due to occupational therapy Student concurrently received at \*\*\* and at home.<sup>140</sup>
109. In Ms. \*\*\*'s opinion, Student benefitted from the occupational therapy services.<sup>141</sup>

### *Physical therapy*

110. Student has received direct physical therapy services from the District since \*\*\*. Student initially was only able to \*\*\* following Student's \*\*\*\*\* for \*\*\* and received physical therapy services \*\*\* Student's academic day. Since then, Student has progressed, tolerating \*\*\* of instruction. \*\*\*.<sup>142</sup>
111. Physical therapy logs kept by District physical therapist Ms. \*\*\* indicate that Student was provided with 37 physical therapy sessions from August \*\*\*, 2014, through June \*\*\*, 2015.<sup>143</sup>
112. For 2014-15, Student received physical therapy services weekly and during \*\*\* to integrate safe and appropriate activities into Student's program. Emphasis was on improving Student's \*\*\* during Student's \*\*\* program to allow Student to \*\*\* into Student's routine for lifelong management of Student's \*\*\* issues.<sup>144</sup>

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<sup>138</sup> Tr. at 555-560 (Father); Tr. at 943 (Ms. \*\*\*); Tr. at 1188-1191 (Ms. \*\*\*); Petitioner Ex. 148 at 1180-1181; Respondent Ex. 34 at 1-2, 6-7.

<sup>139</sup> Tr. at 943 (Ms. \*\*\*).

<sup>140</sup> Petitioner Ex. 4 at 36; Petitioner Ex. 158 at 1980-1983; Respondent Ex. 23 at 8, 9, 23.

<sup>141</sup> Tr. at 937 (Ms. \*\*\*).

<sup>142</sup> Petitioner Ex. 22 at 283.

<sup>143</sup> Petitioner Ex. 9; Petitioner Ex. 19 at 220-255; Respondent Ex. 1 at 513-548. It is unclear if the March \*\*\*, 2015 physical therapy session involved Student or only a conversation with Mother. The session is counted in the total. Respondent Ex. 1 at 535; *see also* Respondent Ex. 7.

<sup>144</sup> Petitioner Ex. 22 at 283.

113. Ms. \*\*\* provided Parents with physical therapy exercises for Student to do at home.<sup>145</sup>
114. Student mastered Student's physical therapy IEP goals for 2014-15, which also assisted Student in obtaining the one \*\*\* \*\*\*,<sup>146</sup>
115. In October 2015, Mother confirmed that Student had received benefit from the physical therapy provided to Student by the District during the previous school year.<sup>147</sup>
116. For the 2015-16 school year, the District provided Student with physical therapy sessions on October \*\*\*, and \*\*\*, 2015, as of the November \*\*\*, 2015 report date.<sup>148</sup>
117. In 2015-16, Student \*\*\* and is able to \*\*\* as well as \*\*\* without assistance.<sup>149</sup>
118. \*\*\*. Student has demonstrated that Student is very responsible in \*\*\*,<sup>150</sup>
119. Due to Student's progress in the area of \*\*\*, the September 2015 ARD committee recommended that the provision of \*\*\* be discontinued but that Student continue to be allowed to \*\*\*.<sup>151</sup>

### *Speech and language therapy*

120. Speech and Language Therapy logs kept by District Speech and Language Therapist \*\*\* show that Student was provided with 22 sessions of speech therapy from September \*\*\*, 2014, to May \*\*\*, 2015.<sup>152</sup>
121. At the beginning of 2014-15, Student was owed and received compensatory sessions of speech therapy for sessions that were not provided in the 2013-14 school year.<sup>153</sup>
122. By May \*\*\*, 2015, Student had received all required speech therapy for the 2014-15 school year.<sup>154</sup>

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<sup>145</sup> Petitioner Ex. 148 at 1213-1214; Petitioner Ex. 159 at 2710.

<sup>146</sup> Tr. at 1073 (Ms. \*\*\*); Petitioner Ex. 159 at 2741; Respondent Ex. 4 at 55.

<sup>147</sup> Respondent Ex. 23 at 10.

<sup>148</sup> Respondent Ex. 34 at 3-5. The hearing officer notes that the due process hearing began November 17, 2015, so any subsequent physical therapy sessions are not in the report.

<sup>149</sup> Tr. at 1023-1024; 1032 (Ms. \*\*\*).

<sup>150</sup> Tr. at 1021, 10-25-1026, 1030-1033 (Ms. \*\*\*).

<sup>151</sup> Respondent Ex. 4 at 57.

<sup>152</sup> Respondent Ex. 1 at 550-559; Respondent Ex. 7.

<sup>153</sup> Tr. at 1069, 1071-1072 (Ms. \*\*\*); Petitioner Ex. 9; Petitioner Ex. 25; Petitioner Ex. 45; Petitioner Ex. 50; Petitioner Ex. 148 at 1320; Respondent Ex. 23 at 21.

<sup>154</sup> Petitioner Ex. 159 at 2748.



123. At the beginning of the 2015-16 school year, Mother confirmed that Student had received benefit from the speech therapy provided to Student by the District the previous school year.<sup>155</sup>

*Student's 2014-15 IEP considered at May 2015 ARD committee meeting*

124. At an ARD committee meeting held on May \*\*\*, 2015, the occupational therapy, physical therapy, and speech therapy providers reported to Father that they were on track to complete Student's services for the 2014-15 school year.<sup>156</sup>

125. At the May \*\*\*, 2015 ARD committee meeting, Mother asked if someone could help Student and Student's teachers learn how to navigate Student's assistive technology.<sup>157</sup>

126. The May \*\*\*, 2015 ARD committee meeting report states \*\*\* Student's \*\*\* did not meet Student's needs at that time. The report suggests that \*\*\* should be investigated for Student. It was noted that as math expectations increase, additional assistive technology options in the area of math should be investigated.<sup>158</sup>

127. In 2015-16, an assistive technology team will help with the implementation of assistive technology for Student.<sup>159</sup>

128. At the May \*\*\*, 2015 ARD committee meeting, Mother expressed concern that teachers were not always giving Student Student's class notes, one of Student's required accommodations.<sup>160</sup>

129. At the May \*\*\*, 2015 ARD committee meeting, \*\*\*, Special Education Administrator, reviewed the process of first contacting the teacher, then the case manager, then the campus administrator when accommodations are not provided.<sup>161</sup>

130. At the May \*\*\*, 2015 ARD committee meeting, Mother asked \*\*\* Student as part of Student's \*\*\* support when Ms. \*\*\* is not available. When Ms. \*\*\* is not available, she lets Student and Student's teacher know. The ARD committee agreed to develop a formal plan for Student's \*\*\* when Student's "buddy" is unavailable.<sup>162</sup>

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<sup>155</sup> Respondent Ex. 23 at 11.

<sup>156</sup> Petitioner Ex. 20 at 257; Respondent Ex. 1 at 454.

<sup>157</sup> Petitioner Ex. 20 at 257; Respondent Ex. 1 at 454.

<sup>158</sup> Petitioner Ex. 154 at 1680.

<sup>159</sup> Petitioner Ex. 20 at 257; Respondent Ex. 1 at 454.

<sup>160</sup> Respondent Ex. 1 at 454.

<sup>161</sup> Respondent Ex. 1 at 454.

<sup>162</sup> Petitioner Ex. 20 at 257; Respondent Ex. 1 at 454.

131. Student's modifications and accommodations and schedule of services remained in place from May \*\*\*, 2015, through September \*\*\*, 2015,<sup>163</sup> pending the next annual ARD committee meeting.
132. In August 2015, Student's teachers met to review Student's accommodations and to become familiar with Student's IEP.<sup>164</sup>
133. The ARD committee agreed that beginning August \*\*\*, 2015, teachers would request consultation with the occupational therapist before assigning major projects.<sup>165</sup>
134. A preponderance of the evidence establishes that Student's IEP was substantially implemented during 2014-15 and any lack of implementation of the accommodations and modifications were due, in part, to the District's failure to follow through and, in part, to Student's refusal to accept the offered accommodations. The teachers' failures to fully implement accommodations and modifications on a regular basis were *de minimis*.<sup>166</sup>

***Sub-issue 2:***

***Did the District fail to devise appropriate IEPs for Student in 2014-15 and 2015-16?***

***2014-15 IEP***

135. An annual ARD committee meeting was convened for Student on September \*\*\*, 2014.<sup>167</sup>
136. In developing the 2014-15 IEP, the ARD committee considered Student's PLAAFPs in reading (\*\*\*) ; speech therapy and related services including occupational therapy; math (\*\*\*) ; \*\*\*, \*\*\*, \*\*\*, and \*\*\*.<sup>168</sup>
137. The \*\*\* PLAAFP did not contain a statement of Student's academic strengths or needs, performance data, or grades.<sup>169</sup>

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<sup>163</sup> Petitioner Ex. 22 at 267, 269; Respondent Ex. 1 at 464-466.

<sup>164</sup> Petitioner Ex. 158 at 1735-1736, 1740.

<sup>165</sup> Petitioner Ex. 22 at 267.

<sup>166</sup> *Bobby R.*, 200 F.3d at 349.

<sup>167</sup> Petitioner Ex. 37; Respondent Ex. 1 at 367-410.

<sup>168</sup> Tr. at 1085, 1087, 1110 (Ms. \*\*\*) ; Petitioner Ex. 37 at 398-399; Respondent Ex. 1 at 368-369; Petitioner Ex. 148 at 1305; Respondent Ex. 1 at 368-369.

<sup>169</sup> Tr. at 722-725 (Ms. \*\*\*) .

138. In developing the 2014-15 IEP, the ARD committee considered Teacher Input Forms submitted on September \*\*\*, 2014, by Student's \*\*\*, English, \*\*\*, and \*\*\* teachers, and input from Student's \*\*\* and \*\*\* teachers, the occupational therapist, the physical therapist, and the speech therapist.<sup>170</sup>
139. Student's 2014-15 IEP includes curriculum modifications and accommodations for Student to meet grade-level expectations based on the Texas Essential Knowledge and Skills (TEKS) requirements.<sup>171</sup>
140. The District is required to hold students to the TEKS grade level expectations with modifications and accommodations, if necessary.<sup>172</sup>
141. Student was provided with reading assistance, a calculator, and supplemental aids, as well as an inclusion teacher in the classroom, to help Student master Student's IEP goals based on the TEKS.<sup>173</sup>
142. In writing Student's 2014-15 IEP goals, Ms. \*\*\* used the TEKS as a guide and considered Student's assessments, information from teachers, and Student's test results to ascertain what Student is struggling with.<sup>174</sup>
143. Student's \*\*\* inclusion teacher believes Student is capable of mastering Student's IEP goals, based on the TEKS, with accommodations and a teacher who tries different ways to make the curriculum accessible.<sup>175</sup>
144. The ARD committee did not use the term "research-based methodology" regarding instruction for Student, but that does not mean the methods discussed were not based on research. The District uses a website that is a clearinghouse of research-based methods that the ARD committee uses to make its IEP recommendations. The ARD committee also uses generally accepted practices for students with disabilities.<sup>176</sup>
145. In developing the 2014-15 IEP, the ARD committee considered Student's goal, \*\*\*. The ARD committee determined that Student's IEP would be used as \*\*\*.<sup>177</sup>

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<sup>170</sup> Tr. at 1085 (Ms. \*\*\*); Petitioner Ex. 40; Petitioner Ex. 148 at 1321-1322; Respondent Ex. 1 at 368-369.

<sup>171</sup> Petitioner Ex. 14 at 163-165; Respondent Ex. 2 at 593. TEKS are state curriculum goals that all students must meet by 70 %. Petitioner Ex. 132; Petitioner Ex. 133; Tex. Edu. Code §§ 28.002, 28.025, 29.005, 39.025.

<sup>172</sup> Tr. at 251-252, 263 (Dr. \*\*\*); Tr. at 1114 (Ms. \*\*\*).

<sup>173</sup> Tr. at 251-252 (Dr. \*\*\*).

<sup>174</sup> Tr. at 804, 813, 820-823 (Ms. \*\*\*).

<sup>175</sup> Tr. at 883-884, 892-893 (Ms. \*\*\*).

<sup>176</sup> Tr. at 267, 1352 (Dr. \*\*\*); Tr. at 1228 (Ms. \*\*\*).

<sup>177</sup> Tr. at 213 (Dr. \*\*\*); Petitioner Ex. 37 at 400; Petitioner Ex. 148 at 1259. The box next to the statement "[\*\*\* [.]" was checked in error. Tr. at 1118 (Ms. \*\*\*); Respondent Ex. 1 at 370.

146. \*\*\*.<sup>178</sup>
147. Because Student \*\*\*, Student may \*\*\*.<sup>179</sup>
148. \*\*\*.<sup>180</sup>
149. A \*\*\* ARD committee meeting is held any time from when a student \*\*\*.<sup>181</sup>
150. The ARD committee developed seven measurable annual IEP goals for Student, with corresponding objectives, some to be completed by June 2015 and others by September 2015.<sup>182</sup>
151. Student's academic IEP goals for mathematics, science, language arts, and social studies were to be implemented by general education teachers and special education teachers in a general education classroom and the methods of evaluation were to include teacher made tests, work samples, observations, and teacher reports/feedback, with progress reports every 6 weeks.<sup>183</sup>
152. Student's 2014-15 IEP included speech therapy and the related services of occupational therapy, physical therapy, and assistive technology.<sup>184</sup>
153. The functional IEP goal and objectives for the related service of occupational therapy were implemented by the occupational therapist, general education teacher, and special education teacher, in the general education setting. The methods of evaluation included data collection, work samples, teacher reports and feedback, and observations. Progress coincided with the issuance of report cards. The completion date was September \*\*\*, 2015.<sup>185</sup>
154. The combined academic and functional IEP goal and objectives for the instructional service of speech and language therapy were completed by September \*\*\*, 2015, outside the general education classroom, with implementation by the speech language pathologist and speech language pathologist assistant. The methods of evaluation included data collection,

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<sup>178</sup> Petitioner Ex. 37 at 402-403.

<sup>179</sup> Petitioner Ex. 37 at 372-373; *see* \*\*\*). The \*\*\*. Tr. at 220 (Dr. \*\*\*).

<sup>180</sup> Tr. at 832 (Ms. \*\*\*).

<sup>181</sup> Tr. at 1260-1261 (Ms. \*\*\*).

<sup>182</sup> Tr. at 730 (Ms. \*\*\*); Petitioner Ex. 37 at 405-412; Respondent Ex. 1 at 375-382. The science goal is to be completed by June \*\*\*, 2015, not June \*\*\*, 2014. Petitioner Ex. 37 at 407.

<sup>183</sup> Petitioner Ex. 37 at 405-407, 409-410, 417, 420; Respondent Ex. 1 at 375-377, 379-380, 387, 390.

<sup>184</sup> Petitioner Ex. 37 at 401, 423; Respondent Ex. 1 at 371, 393.

<sup>185</sup> Petitioner Ex. 37 at 408, 418, 420; Respondent Ex. 1 at 378, 388, 390, 426-427.

- observations, consultation with teachers, and student conferences. Progress reports coincided with the issuance of report cards.<sup>186</sup>
155. The functional IEP goal and objectives for the related service of physical therapy were completed by September \*\*\*, 2015; implemented in the general education setting by the physical therapist. Student was evaluated based on observations and data collection. Progress reports were provided every 6 weeks.<sup>187</sup>
156. A counseling evaluation completed by \*\*\*, LSSP, for the District in November 2013 indicated that Student demonstrated mild symptoms of anxiety and attention problems. The evaluator recommended that Student receive counseling as a related service to address coping skills, self-confidence, and future planning. The District began providing Student with counseling services by an LSSP.<sup>188</sup>
157. In September 2014, the ARD committee reviewed the continued need for the related service of counseling. Parents stated they would consult with Student to find out if Student was still interested in counseling services.<sup>189</sup>
158. At an October \*\*\*, 2014 continuation of a brief ARD committee meeting, Father stated the family had decided against counseling services for Student. Parents revoked their consent for psychological services telling the District it was because the District proposed that Student would have one counselor in the fall and a different counselor in the spring, and Student needs the consistency of seeing one counselor.<sup>190</sup>
159. The District remains ready, willing, and able to provide counseling services if requested by Parents and Student in the future.<sup>191</sup>
160. At the October \*\*\*, 2014 continuation of a brief ARD committee meeting, Parents revoked their consent for the District to speak with Student's outside medical providers. After that date, medical information about Student was relayed directly to the District by Parents.<sup>192</sup>

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<sup>186</sup> Petitioner Ex. 37 at 411, 418; Respondent Ex. 1 at 381, 388.

<sup>187</sup> Petitioner Ex. 37 at 412, 418, 420; Respondent Ex. 1 at 382, 388, 390, 426-427.

<sup>188</sup> Respondent Ex. 1 at 448; Respondent Ex. 2 at 584.

<sup>189</sup> Petitioner Ex. 37 at 424; Respondent Ex. 1 at 394.

<sup>190</sup> Tr. at 580-581, 1397 (Father); Tr. at 1235, 1237 (Ms. \*\*\*); Petitioner Ex. 14 at 166; Petitioner Ex. 22 at 282; Petitioner Ex. 33 at 363; Petitioner Ex. 148 at 1326; Respondent Ex. 1 at 413, 435-437, 449; Respondent Ex. 2 at 584, 593; Respondent Ex. 4 at 21-22; Respondent Ex. 23 at 12-13.

<sup>191</sup> Petitioner Ex. 14 at 166; Petitioner Ex. 22 at 282; Petitioner Ex. 33 at 363; Petitioner Ex. 148 at 1326; Respondent Ex. 1 at 413, 435-437, 449; Respondent Ex. 2 at 584; Respondent Ex. 23 at 12-13.

<sup>192</sup> Tr. at 1316 (Dr. \*\*\*); Tr. at 926 (Ms. \*\*\*).

161. In a doctor's order dated August \*\*\*, 2014, Student's physician Dr. \*\*\* asked the District to allow Student to substitute physical therapy and occupational therapy for \*\*\*.<sup>193</sup>
162. At the annual ARD committee meeting on September \*\*\*, 2014, Parents requested that Student's physical therapy and occupational therapy services be substituted for Student's \*\*\* requirement.<sup>194</sup> The ARD committee determined that Student would be enrolled in \*\*\* class, with modifications, which would allow Student to \*\*\* under Texas Education Agency guidelines.<sup>195</sup> At the continuation of a brief ARD committee meeting on October \*\*\*, 2014, an academic goal related to \*\*\* was added to Student's IEP. Implementers were a physical therapist, Student's \*\*\* teacher, and a paraprofessional, with evaluation by data collection and observations, and progress reports to be provided every 6 weeks.<sup>196</sup>
163. Modifications and accommodations necessary to enable Student to be involved in and to progress in the general education curriculum included a number of adaptations for the environment, adaptations to materials, adaptations to instructional delivery, and \*\*\* accommodations to support \*\*\*.<sup>197</sup>
164. The IEP developed at the annual ARD committee meeting on September \*\*\*, 2014, was appropriate.<sup>198</sup>
165. Student was educated in the LRE in 2014-15.<sup>199</sup>

### ***2015-16 IEP***

166. Student's draft IEP as presented at the September \*\*\*, 2015 annual ARD committee meeting had not been adopted as of the November 2015 due process hearing.<sup>200</sup> If Parents do not consent to the new IEP, the previous IEP will remain in effect due to the IDEA's "stay put" requirements.<sup>201</sup>
167. In developing Student's new IEP goals, Ms. \*\*\* and Ms. \*\*\* relied in part on the 2015 FIE that shows Student will benefit from a high level of structure and support in organizing

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<sup>193</sup> Petitioner Ex. 42; Respondent Ex. 1 at 447.

<sup>194</sup> Respondent Ex. 1 at 394.

<sup>195</sup> Tr. at 1079 (Ms. \*\*\*); Respondent Ex. 1 at 413.

<sup>196</sup> Respondent Ex. 1 at 423; Petitioner Ex. 148 at 12811284-1298, 1312.

<sup>197</sup> Petitioner Ex. 37 at 413-414; Respondent Ex. 1 at 383-384.

<sup>198</sup> Petitioner Ex. 37; 34 C.F.R. §§ 300.320 through 300.324.

<sup>199</sup> Tr. at 1319-1320 (Dr. \*\*\*).

<sup>200</sup> Tr. at 1201 (Ms. \*\*\*); Respondent Ex. 4 at 32-38; 34 C.F.R. § 300.518(a). The draft IEP is at Respondent Ex. 3.

<sup>201</sup> Tr. at 1201, 1206-1207 (Ms. \*\*\*); 34 C.F.R. § 300.518(a); Petitioner Ex. 22 at 277; Respondent Ex. 4 at 55, 60, 64.

- Student's thoughts in writing assignments, and in developing Student's mechanics and proofreading skills.<sup>202</sup>
168. Some of the adaptations for instructional delivery contained in the 2015-16 IEP, such as giving Student extra time for oral and written responses in class and on \*\*\* assignments, are to accommodate Student's slow processing speed.<sup>203</sup>
169. In developing Student's 2015-16 IEP, the ARD committee considered PLAAFPs for speech therapy, occupational therapy, physical therapy, reading, math, and social studies.<sup>204</sup>
170. In drafting Student's September 2015 IEP, the ARD committee considered Teacher Input Forms submitted in August 2015.<sup>205</sup>
171. Because Student appeared to be making progress on Student's IEP goals and objectives in Student's 2015-16 \*\*\* co-teach setting, the ARD committee recommended that Student continue to receive \*\*\* instruction in the general education setting.<sup>206</sup>
172. Because Student requires a slower pace of instruction that cannot necessarily be duplicated in the language arts general education setting, the ARD committee recommended that Student receive language arts instruction in the resource setting in 2015-16 due to the class size being smaller than the general education class size.<sup>207</sup>
173. A specific program called \*\*\* is used with language arts students in the resource room. \*\*\* is specific to comprehension and there is also a written component.<sup>208</sup>
174. Father disagreed with the ARD committee's recommendation that Student be placed in the resource classroom for language arts.<sup>209</sup>
175. At a continuation of the September \*\*\*, 2015 annual ARD committee meeting, the committee determined that Student will receive all academic education and related services/other services in the general education setting except for \*\*\* minutes per day of \*\*\* in the special education resource room and \*\*\* minutes \*\*\* a week, for \*\*\* weeks of

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<sup>202</sup> Tr. at 1348 (Dr. \*\*\*); Petitioner Ex. 14 at 164.

<sup>203</sup> Tr. at 1308-1309 (Dr. \*\*\*); Respondent Ex. 4 at 58.

<sup>204</sup> Respondent Ex. 4 at 24-27, 54.

<sup>205</sup> Petitioner Ex. 158 at 1942-1945.

<sup>206</sup> Respondent Ex. 4 at 58.

<sup>207</sup> Tr. at 1372 (Dr. \*\*\*); Respondent Ex. 4 at 58.

<sup>208</sup> Respondent Ex. 4 at 59.

<sup>209</sup> Respondent Ex. 4 at 58, 59.

- assistive technology services in the special education setting, and speech and language therapy in the speech therapy room.<sup>210</sup>
176. Students who are instructed in the resource room have access to the general education curriculum.<sup>211</sup>
177. In considering the LRE, the ARD committee determined that the benefits of Student's placement outweigh anticipated harmful effects.<sup>212</sup>
178. In considering the LRE, the ARD committee determined that Student will have the opportunity to participate with students without disabilities in nonacademic, extracurricular, and other activities.<sup>213</sup>
179. Student's draft IEP as presented at the September \*\*\*, 2015 annual ARD committee meeting contains the goal that by September \*\*\*, 2016, Student will demonstrate improvement in Student's emotional functioning and coping skills as evidenced by demonstrating completion of three short-term objectives in individual counseling sessions in a special education setting.<sup>214</sup>
180. At the October \*\*\*, 2015 conclusion of the September \*\*\*, 2015 annual ARD committee meeting, Ms. \*\*\* recommended that, instead of continuing to receive direct occupational therapy services, Student receive \*\*\* minutes per \*\*\* weeks of consultation services from an occupational therapy provider. Consultation includes working with teachers regarding the requirements of an activity as well as working with Student regarding how to adapt or modify the activity or task so Student can perform the activity or task independently.<sup>215</sup>
181. At the October \*\*\*, 2015 conclusion of the reconvened annual ARD committee meeting, Ms. \*\*\* recommended that speech therapy continue to be provided to Student.<sup>216</sup>
182. At the October \*\*\*, 2015 continuation of the September \*\*\*, 2015 annual ARD committee meeting, the ARD committee determined that Student meets the following Health Classification for Special Education: \*\*\* (\*\*\*). A member of the healing arts licensed to practice in Texas has provided the school with written documentation concerning the nature of the impairment and the expectations of physical activity for Student.<sup>217</sup>

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<sup>210</sup> Tr. at 1240-1241 (Ms. \*\*\*); Petitioner Ex. 158 at 1734; Respondent Ex. 4 at 46, 48-49, 58-59.

<sup>211</sup> Tr. at 1243 (Ms. \*\*\*).

<sup>212</sup> Respondent Ex. 4 at 46.

<sup>213</sup> Respondent Ex. 4 at 47.

<sup>214</sup> Respondent Ex. 4 at 37, 58.

<sup>215</sup> Respondent Ex. 4 at 59.

<sup>216</sup> Respondent Ex. 4 at 59.

<sup>217</sup> Respondent Ex. 4 at 44. The provider of the information is not identified.



183. At the October \*\*\*, 2015 conclusion of the September \*\*\*, 2015 annual ARD committee meeting, Ms. \*\*\* recommended that Student be dismissed from physical therapy services based on the results of the physical therapy evaluation conducted for the 2015 FIE.<sup>218</sup>
184. The District considered a September \*\*\*, 2015 letter from Student's physician Dr. \*\*\* that stated in order to maximize Student's safety and stability while \*\*\*, \*\*\*.<sup>219</sup>
185. One of Student's accommodations is to \*\*\*.<sup>220</sup>
186. As part of the 2015-16 IEP yet to be accepted by Parents, the ARD committee recommended removing \*\*\* school, as Student is able to effectively \*\*\* without assistance.<sup>221</sup>
187. At the October \*\*\*, 2015 reconvened ARD committee meeting, the ARD committee recommended assistive technology sources to provide Student with training on uses of Student's \*\*\* for academic tasks. For the first 6 weeks, it is recommended that Student receive instruction twice weekly for 3 weeks; for the subsequent 6 weeks, it is recommended that Student receive services once a week in class to assist Student with completing tasks \*\*\*. For the remainder of the year, it was proposed that assistive technology services focus on monitoring Student's use of \*\*\* in the classroom, with additional services as needed.<sup>222</sup>
188. Student's \*\*\* as contained in the 2015-16 IEP is based on an informal assessment that includes a teacher questionnaire, Student's questionnaire, and a Behavior Assessment Scale for Children.<sup>223</sup>
189. The District's practice is to design specific \*\*\* services for students in special education \*\*\*.<sup>224</sup>
190. A \*\*\* assessment was not requested or discussed during the May 2015 REED ARD committee meeting. A \*\*\* assessment may be provided separately from the FIE.<sup>225</sup>

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<sup>218</sup> Respondent Ex. 4 at 51-52, 59.

<sup>219</sup> Petitioner Ex. 15; Petitioner Ex. 140 at 1157; Petitioner Ex. 146; Petitioner Ex. 148 at 1186.

<sup>220</sup> Petitioner Ex. 158 at 1753. Under the proposed 2015-16 IEP, Student will continue to \*\*\*, but will no longer \*\*\*. Respondent Ex. 4 at 57.

<sup>221</sup> Respondent Ex. 4 at 57.

<sup>222</sup> Respondent Ex. 4 at 48.

<sup>223</sup> Tr. at 1244-1245 (Ms. \*\*\*).

<sup>224</sup> Tr. at 1250-1251 (Ms. \*\*\*).

<sup>225</sup> Tr. at 1266 (Ms. \*\*\*).

191. A \*\*\* assessment \*\*\* in order to provide the ARD committee with more information \*\*\*.<sup>226</sup>
192. Many types of \*\*\* assessments are available for the District to choose from depending on Student's specific needs.<sup>227</sup>
193. In October 2015, the District provided Parents with a Notice and Consent form for a \*\*\* assessment of Student. As of November 2015, Parents had not consented to the evaluation.<sup>228</sup>
194. Once Student's \*\*\* evaluation is completed, Student's \*\*\* goal might be revised based on information from that evaluation.<sup>229</sup>
195. The IEP \*\*\* goals will be implemented in \*\*\*, with the \*\*\*, which is in the general education setting.<sup>230</sup>
196. According to a report from the October \*\*\*, 2015 continuation of the September \*\*\*, 2015 annual ARD committee meeting, \*\*\*. \*\*\*.<sup>231</sup>
197. In 2015-16, Student is taking \*\*\* and \*\*\*, which \*\*\* relate to Student's goal \*\*\* and would help to prepare Student \*\*\*.<sup>232</sup>
198. It would be physically and cognitively challenging if not extremely unlikely for Student to \*\*\*.<sup>233</sup>
199. While Student's goal \*\*\* might need to be revised based on the outcome of Student's \*\*\* evaluation, the District does not determine \*\*\* for students with disabilities.<sup>234</sup>
200. The District typically does not begin individualizing special education instruction for \*\*\* until a student's \*\*\* so the student can focus \*\*\* through the general education curriculum, with inclusion support.<sup>235</sup>

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<sup>226</sup> Tr. at 214 (Dr. \*\*\*).

<sup>227</sup> Tr. at 1250 (Ms. \*\*\*).

<sup>228</sup> Tr. at 218-219 (Dr. \*\*\*).

<sup>229</sup> Respondent Ex. 4 at 55. The hearing officer notes that at the previous annual ARD committee meeting held on September \*\*\*, 2014, the ARD committee determined that a \*\*\* evaluation was not needed at that time. Petitioner Ex. 37 at 401.

<sup>230</sup> Respondent Ex. 4 at 58.

<sup>231</sup> Respondent Ex. 4 at 28-29, 55.

<sup>232</sup> Tr. at 221 (Dr. \*\*\*); Tr. at 297 (Ms. \*\*\*); Petitioner Ex. 145; Respondent Ex. 23 at 16.

<sup>233</sup> Tr. at 213-216 (Dr. \*\*\*); Tr. at 292-295 (Ms. \*\*\*); Tr. at 417-418 (Dr. \*\*\*).

<sup>234</sup> Tr. at 1130, 1136 (Ms. \*\*\*).

<sup>235</sup> Tr. at 1124, 1138 (Ms. \*\*\*).

201. A preponderance of the evidence establishes that the District devised an appropriate IEP for Student for 2015-16 except that, because Student is \*\*\*, a \*\*\* evaluation should have been completed before the ARD committee developed Student's \*\*\*<sup>236</sup> and Student's assistive technology needs should have been updated.
202. A preponderance of the evidence establishes that the District failed to develop an appropriate 2015-16 IEP because Student's \*\*\* as contained in the IEP is not based on information obtained from a \*\*\* assessment.
203. A preponderance of the evidence establishes that the District failed to develop an appropriate 2015-16 IEP because Student's assistive technology goals and objectives contained in the IEP are not based on a formal assistive technology evaluation.<sup>237</sup>

***Sub-issue 3:***

***Did the District fail to adequately evaluate all areas of suspected disability in accordance with the IDEA?***

204. An initial evaluation of Student in September 2006, prior to \*\*\*, showed average abilities and mild features of a mathematics disorder.<sup>238</sup>
205. Based on an FIE completed in 2008 by Student's previous school district, Student met disability criteria as a child with an SLD in Reading Comprehension, Math Calculation, and Written Expression.<sup>239</sup>
206. A reevaluation completed by the District in November 2011 showed Student no longer met disability criteria for SLD, but Student was eligible for special education services due to OHI because of a \*\*\*.<sup>240</sup>
207. After Student's \*\*\*, an October 2011 \*\*\* evaluation of Student by \*\*\*, Ph.D., Pediatric Neuropsychologist, revealed a significant decline in neurocognitive functioning.<sup>241</sup>
208. Following Student's May 2012 \*\*\*, the District completed an FIE in September 2012 to determine current levels of functioning and eligibility for additional special education services. The 2012 FIE consisted of speech/language, assistive technology, occupational therapy, and physical therapy evaluations, which covered Student's areas of suspected disability.<sup>242</sup>

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<sup>236</sup> 34 C.F.R. § 300.320(a)(7)(b), Tex. Educ. Code §§ 29.011, 29.0111; 19 Tex. Admin. Code § 89.1055(h)(i).

<sup>237</sup> Respondent Ex. 4 at 38.

<sup>238</sup> Petitioner Ex. 30 at 344-345; Petitioner Ex. 85; Respondent Ex. 24 at 1880.

<sup>239</sup> Petitioner Ex. 29 at 340; Respondent Ex. 2 at 567, 575-576, 588; Respondent Ex. 23 at 12.

<sup>240</sup> Petitioner Ex. 29 at 340; Respondent Ex. 2 at 567, 575-576, 588; Respondent Ex. 23 at 12.

<sup>241</sup> Petitioner Ex. 30 at 344-345; Petitioner Ex. 85; Respondent Ex. 24 at 1880.

<sup>242</sup> Petitioner Ex. 107 at 817.

209. \*\*\* in 2013 found general improvements in cognitive functioning since Student's \*\*\* neuropsychological assessment in October 2011. While improvements were noted compared to Student's functioning in 2011, there was continued evidence of a generalized decline in Student's overall cognitive performance compared to Student's overall cognitive performance in 2006.<sup>243</sup>
210. In October 2014, Parents privately obtained a neuropsychological assessment from \*\*\*, Ph.D., ABPP, Licensed Psychologist, at \*\*\*, \*\*\*. The assessment was not provided to the District until November 2015, in accordance with the disclosure deadline for the due process hearing.<sup>244</sup>
211. Dr. \*\*\*'s assessment showed that Student has relative strengths in a number of areas including narrative memory, list-learning ability, social competence, and receptive vocabulary and that Student's areas of weakness include substantial challenges in motor functioning \*\*\* that affect both gross and fine motor skills. Dr. \*\*\* noted that Student has significant challenges in processing speed in verbal, visual, and motor domains and cognitive flexibility. In terms of memory, Student does better when information is presented verbally rather than visually.<sup>245</sup>
212. Dr. \*\*\*'s October 2014 report stated that on language functioning, Student's receptive vocabulary was at the \*\*\* level; Student's expressive vocabulary was at the borderline to impaired range; and Student had mild decreases in phonemic fluency and mental flexibility relative to 2013 testing. NEPSY-II test results showed receptive language performance in the very impaired range. Regarding memory functioning, Student's performance on tasks of visual memory remained in the borderline to impaired range which was fairly consistent with the 2013 results.<sup>246</sup>
213. According to Dr. \*\*\*'s October 2014 report, Student's overall cognitive abilities are in the mild range of intellectual disability with a Full Scale Intelligence Quotient (FSIQ) of \*\*\* consistent with a FSIQ of \*\*\* in March 2013. Student's overall academic skills are in the moderately impaired range with performance significantly below grade level in all areas measured and substantial variability in functioning by subject.<sup>247</sup>
214. In her October 2014 report, Dr. \*\*\* recommended that Student continue with special education placement with ancillary services for occupational therapy, physical therapy, and

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<sup>243</sup> Petitioner Ex. 30 at 344-345; Petitioner Ex. 85; Respondent Ex. 24 at 1880.

<sup>244</sup> Tr. at 1314-1315 (Dr. \*\*\*).

<sup>245</sup> Petitioner Ex. 29 at 341.

<sup>246</sup> Petitioner Ex. 30 at 346; Respondent Ex. 24 at 1882.

<sup>247</sup> Petitioner Ex. 30 at 347; Respondent Ex. 24 at 1883.

- speech/language therapy. She also recommended instruction in adaptive tools.<sup>248</sup> She said Student should continue to work on functional academic skills \*\*\*.<sup>249</sup>
215. An ARD committee meeting was held on May \*\*\*, 2015, to consider the REED.<sup>250</sup>
216. There is no evidence that between completing the 2012 FIE and the May 2015 ARD committee REED meeting, either Parents or anyone else raised the possibility with the District that Student had areas of suspected disability that had not been evaluated, or that the District suspected Student had areas of disability that had not been evaluated.
217. At the May 2015 REED meeting, the ARD committee determined that updated testing was needed in the areas of occupational therapy, physical therapy, speech and language skills, cognitive abilities and achievement abilities in reading, writing, and math in order to better inform the ARD committee for Student's educational programming.<sup>251</sup>
218. At the May 2015 REED meeting, the ARD committee, including Parents, determined that no formal assessment in the area of assistive technology was needed.<sup>252</sup>
219. At the May 2015 REED ARD committee meeting, Parents agreed that no additional physical/medical, sociological/cultural, or emotional/behavioral assessments were needed.<sup>253</sup>
220. A \*\*\* assessment was not requested or discussed during the May 2015 REED ARD committee meeting. A \*\*\* assessment may be provided separately from the FIE.<sup>254</sup>
221. A preponderance of the evidence establishes that all areas of suspected disability were addressed at the May 2015 REED ARD committee meeting and Student was evaluated in those areas of suspected disability for the September 2015 FIE.
222. A preponderance of the evidence establishes that since Student's enrollment in the District in 2011, the District has evaluated Student in all areas of suspected disability. Further, based on the psychological evaluation results of the 2015 FIE, the District offered in October 2015 to conduct an adaptive skills evaluation to determine if Student has an Intellectual Disability (ID).

***Sub-issue 4:***

***Did the District fail to conduct the annual ARD meeting in compliance with the timeline?***

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<sup>248</sup> Petitioner Ex. 29 at 342.

<sup>249</sup> Petitioner Ex. 30 at 349-350; Respondent Ex. 24 at 1885-1886.

<sup>250</sup> Petitioner Ex. 21; Petitioner Ex. 22 at 278-288; Respondent Ex. 1 at 445-452.

<sup>251</sup> Petitioner Ex. 22 at 285; Respondent Ex. 1 at 446-452.

<sup>252</sup> Tr. at 1266 (Ms. \*\*\*); Petitioner Ex. 22 at 284; Petitioner Ex. 148 at 1183-1185, 1187.

<sup>253</sup> Tr. at 185, 187 (Dr. \*\*\*); Petitioner Ex. 22 at 279-281.

<sup>254</sup> Tr. at 1266 (Ms. \*\*\*).

223. The District timely held an annual ARD committee meeting on September \*\*\*, 2014, less than one year after the September \*\*\* 2013 annual ARD committee meeting.<sup>255</sup>
224. The District held an annual ARD committee meeting on September \*\*\*, 2015,<sup>256</sup> \*\*\* school days after the 1-year deadline.
225. A preponderance of the evidence establishes that the District timely conducted the September \*\*\*, 2014 annual ARD committee meeting.
226. A preponderance of the evidence establishes that although the September \*\*\*, 2015 annual ARD committee meeting was held 8 school days after the annual deadline, it was held in conjunction with the ARD committee's consideration of the FIE that was due on September \*\*\*, 2015. Holding the annual ARD committee meeting \*\*\* school days late constitutes a *de minimis* procedural error with no educational impact on Student.

***Sub-issue 5:***

***Did the District fail to conduct the tri-annual FIE within the appropriate timeline?***

227. On August \*\*\*, 2012, Parents provided consent for an FIE.<sup>257</sup>
228. The FIE was completed on September \*\*\*, 2012.<sup>258</sup>
229. The FIE was considered by the ARD committee on September \*\*\*, 2012.<sup>259</sup>
230. An evaluation for the related service of counseling was completed on November \*\*\*, 2013, and considered by the ARD committee on November \*\*\*, 2013.<sup>260</sup>
231. The next FIE was due on September \*\*\*, 2015.<sup>261</sup>
232. On May \*\*\*, 2015, Parents provided consent for the FIE due in September 2015.<sup>262</sup>
233. Mother did not check the box on the form to indicate in the affirmative that she understood consent for the FIE was voluntary and could be revoked at any time.<sup>263</sup>

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<sup>255</sup> Petitioner Exs. 36, 37, 64; Respondent Ex. 1 at 220-274.

<sup>256</sup> Tr. at 1204 (Ms. \*\*\*); Respondent Ex. 4 at 1-2, 28. Providing a \*\*\* assessment, if appropriate, is part of \*\*\* services. 34 C.F.R. § 300.43(a)(2).

<sup>257</sup> Respondent Ex. 1 at 39.

<sup>258</sup> Respondent Ex. 1 at 59-79.

<sup>259</sup> Respondent Ex. 1 at 80-113.

<sup>260</sup> Respondent Ex. 1 at 280-289, 290-314.

<sup>261</sup> Respondent Ex. 1 at 80, 367, 452; 34 C.F.R. § 300.303(b)(2).

<sup>262</sup> Petitioner Ex. 23; Petitioner Ex. 24.

<sup>263</sup> Petitioner Ex. 23.

234. On May \*\*\*, 2015, Mother provided consent for the District to conduct a full psychological evaluation as part of the FIE and checked the box acknowledging that she could revoke her consent at any time.<sup>264</sup>
235. An FIE was timely completed on September \*\*\*, 2015.<sup>265</sup>
236. A preponderance of the evidence establishes that the District timely conducted Student's 2015 FIE, within 3 years of the 2012 FIE.

***Sub-issue 6:***

***Did the District fail to provide appropriate assessments, including cognitive assessments, and related services assessments in the areas of academic instruction, occupational therapy, physical therapy, and assistive technology?***<sup>266</sup>

237. At the May 2015 REED meeting, the ARD committee determined that updated testing was needed in the areas of occupational therapy, physical therapy, speech and language skills, cognitive abilities, and achievement abilities in reading, writing, and math in order to better inform the ARD committee for Student's educational programming.<sup>267</sup>
238. At the May \*\*\*, 2015 REED ARD committee meeting, Parents agreed that no additional physical/medical, sociological/cultural, or emotional/behavioral assessments were needed.<sup>268</sup>
239. The May 2015 ARD committee, including Parents, determined that no formal assessment in the area of assistive technology was needed.<sup>269</sup>
240. The May 2015 ARD committee, including Parents, did not request that a \*\*\* assessment be part of the 2015 FIE.<sup>270</sup>
241. On September \*\*\*, 2015, Mother requested that a \*\*\* assessment and an assistive technology assessment be conducted as part of the FIE.<sup>271</sup>

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<sup>264</sup> Petitioner Ex. 24 at 292.

<sup>265</sup> Petitioner Ex. 22 at 278; Respondent Ex. 2; Respondent Ex. 4 at 17.

<sup>266</sup> Sub-issue 6 also relates to the District's counterclaim regarding the appropriateness of the 2015 FIE; see additional findings of fact in the section addressing the District's counterclaim, *infra*.

<sup>267</sup> Petitioner Ex. 22 at 285; Respondent Ex. 1 at 446-452.

<sup>268</sup> Petitioner Ex. 22 at 279-281.

<sup>269</sup> Petitioner Ex. 22 at 284; Petitioner Ex. 148 at 1183-1185, 1187.

<sup>270</sup> Tr. at 204, 216-217 (Dr. \*\*\*); Tr. at 1152-1153 (Ms. \*\*\*); Petitioner Ex. 20; Petitioner Ex. 21; \*\*\*.

<sup>271</sup> Tr. at 1152-1153 (Ms. \*\*\*); Petitioner Ex. 158 at 1887, 1897-1905.

242. On September \*\*\*, 2015, Dr. \*\*\* responded that, with the September \*\*\*, 2015 FIE deadline fast approaching, meaningful assessments could not be completed before the FIE deadline and, in addition, the \*\*\* and assistive technology assessments were outside what was agreed upon at the May \*\*\*, 2015 REED. Dr. \*\*\* suggested that additional evaluations could be considered at the upcoming September 2015 ARD committee meeting so the entire committee could discuss Student's needs.<sup>272</sup>
243. Conducting a \*\*\* assessment can take weeks.<sup>273</sup>
244. Requests for any assessment for a student in special education must be considered and approved by the ARD committee before the assessment is conducted.<sup>274</sup>
245. An annual ARD committee meeting was held on September \*\*\*, 2015, to review Student's September 2015 FIE, draft an IEP, discuss \*\*\* services, and consider Parents' request for assessments in the areas of assistive technology and \*\*\*.<sup>275</sup>
246. The ARD committee meeting was continued on October \*\*\*, 2015.<sup>276</sup>
247. The ARD committee meeting concluded on October \*\*\*, 2015.<sup>277</sup>
248. At the October \*\*\*, 2015 continuation of the September \*\*\*, 2015 annual ARD committee meeting, the District agreed to Parents' request for assistive technology and \*\*\* evaluations. The evaluations must be conducted within 45 school days from the date consent is obtained from Parents.<sup>278</sup>
249. As of the November 2015 due process hearing, Parents had not consented to the assistive technology or \*\*\* evaluations and the District cannot conduct those evaluations without Parents' consent.<sup>279</sup>
250. At the September \*\*\*, 2015 annual ARD committee meeting, Dr. \*\*\* discussed that she would like to investigate Student's adaptive skills as Student's cognitive profile could indicate the presence of an ID.<sup>280</sup>

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<sup>272</sup> Tr. at 216-217 (Dr. \*\*\*); *see also* Tr. at 1157-1159 (Ms. \*\*\*); Petitioner Ex. 158 at 1887, 1897-1905.

<sup>273</sup> Tr. at 218 (Dr. \*\*\*).

<sup>274</sup> Tr. at 219 (Dr. \*\*\*).

<sup>275</sup> Tr. at 1159, 1167 (Ms. \*\*\*); Petitioner Ex. 17; Respondent Ex. 4 at 1-2, 28.

<sup>276</sup> Respondent Ex. 4 at 53-56.

<sup>277</sup> Tr. at 1052 (Ms. \*\*\*); Respondent Ex. 4 at 23-136; *see* Respondent Ex. 4 at 73 (signature page of participants).

<sup>278</sup> Tr. at 1265 (Ms. \*\*\*); Petitioner Ex. 148 at 1183-1185; Respondent Ex. 4 at 23; Respondent Ex. 23 at 20.

<sup>279</sup> Tr. at 1161 (Ms. \*\*\*); Tr. at 218-219 (Dr. \*\*\*).

<sup>280</sup> Respondent Ex. 4 at 7.



251. At the October \*\*\*, 2015 continuation of the September \*\*\*, 2015 annual ARD committee meeting, the District requested an adaptive behavior assessment.<sup>281</sup>
252. Dr. \*\*\* explained that the adaptive behavior assessment was requested because Student's cognitive skills indicate more testing is needed in the area of adaptive behavior to determine if Student has an ID. She described the additional services Student could be eligible for \*\*\* if Student were diagnosed with an ID \*\*\*.<sup>282</sup>
253. An adaptive skills evaluation includes assessing activities of daily living such as communication, dressing, showering, cooking, and also functional academic skills such as counting change; self-regulation and self-direction skills, such as being able to work toward long-term vs. short-term goals; and emotional regulation.<sup>283</sup>
254. Parents, who have never requested an adaptive functioning assessment, declined to consent to the adaptive behavior evaluation because results could discourage Student if Student were to realize the implications of the ID eligibility.<sup>284</sup>
255. A preponderance of the evidence establishes that the District provided appropriate assessments, including cognitive assessments, and related services assessments in the areas of academic instruction, occupational therapy, and physical therapy.
256. A preponderance of the evidence establishes that, because Student was \*\*\* September \*\*\*, 2016, a \*\*\* assessment should have been conducted before the ARD committee devised \*\*\* for the 2015-16 IEP.
257. A preponderance of the evidence establishes that, because Student does not always use Student's \*\*\* and Student's need for additional training, other options for assistive technology should have been explored via an assistive technology evaluation.

***Sub-issue 7:***

***Did the District fail to consider all relevant information during the ARD committee meetings?***

258. In the Complaint, First Amended Complaint, and Petitioners' Closing Brief, Petitioner did not specify what relevant information the ARD committee failed to consider.<sup>285</sup>

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<sup>281</sup> Respondent Ex. 4 at 23.

<sup>282</sup> Petitioner Ex. 14 at 166-167.

<sup>283</sup> Tr. at 191-192 (Dr. \*\*\*).

<sup>284</sup> Tr. at 187-190, 271 (Dr. \*\*\*); Respondent Ex. 4 at 54.

<sup>285</sup> Petitioner alleges that some of Student's PLAAFPs were missing or incomplete in the September \*\*\*, 2014 ARD committee report. First Amended Complaint at 3, Fact 13. But it is not clear from the allegation that the missing PLAAFPs are the "relevant information" the ARD committee failed to consider.

259. Petitioner presented insufficient evidence to prove that the District failed to consider all relevant information during the ARD committee meetings held between August \*\*\*, 2014, and October \*\*\*, 2015.

***Sub-issue 8:***

***Did the District fail to comply with Student's and Parents' procedural rights by failing to have all required and/or necessary members present during ARD committee meetings?***

260. At the September \*\*\*, 2014 ARD committee meeting, Father expressed concern that the counselor had not been present at any previous ARD committee meetings and stated Parents' decision regarding Student's \*\*\* class might have been different had the counselor been present. The counselor, \*\*\*, was present at the September \*\*\*, 2014 ARD committee meeting.<sup>286</sup>

261. At the September \*\*\*, 2014 annual ARD committee meeting, all required members were present.<sup>287</sup>

262. A brief ARD committee meeting was held on September \*\*\*, 2014, to address related services counseling, \*\*\*, and revisions to the September \*\*\*, 2014 ARD committee deliberations at Parents' request. No contention was made that any required or necessary member of the committee was absent.<sup>288</sup>

263. The brief ARD committee meeting was continued on October \*\*\*, 2014, to review Student's participation in \*\*\*. The committee accepted IEP goals and objectives for \*\*\*. There was no contention that any required or necessary member of the ARD committee failed to attend the meeting.<sup>289</sup>

264. The ARD committee met on May \*\*\*, 2015, for a REED. There is no assertion that any of the required or necessary committee members failed to attend the meeting.<sup>290</sup>

265. An annual ARD committee meeting was held on September \*\*\*, 2015, to consider, among other things, the September 2015 FIE and Parents' request for additional evaluations in the areas of assistive technology and \*\*\*.<sup>291</sup>

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<sup>286</sup> Respondent Ex. 1 at 394, 406.

<sup>287</sup> Petitioner Ex. 37 at 426, 435.

<sup>288</sup> Petitioner Ex. 36; Petitioner Ex. 148 at 1325; Respondent Ex. 1 at 411-412.

<sup>289</sup> Petitioner Ex. 31 at 356-358; Respondent Ex. 1 at 412-413, 438-440.

<sup>290</sup> Petitioner Ex. 21; Petitioner Ex. 22 at 275, 286; Respondent Ex. 1 at 445-474, 472 (signatures of committee members).

<sup>291</sup> Respondent Ex. 1 at 563-566.

266. All persons who were invited to attend the September \*\*\*, 2015 ARD committee meeting were present except for the District representative and the \*\*\*. But \*\*\*, \*\*\*, was in attendance.<sup>292</sup>
267. All required members of the ARD committee were present at the October \*\*\*, 2015 continuation of the September \*\*\*, 2015 annual ARD committee meeting.<sup>293</sup>
268. All required members of the ARD committee were present at the October \*\*\*, 2015 continuation of the September \*\*\*, 2015 annual ARD committee meeting.<sup>294</sup>
269. A preponderance of the evidence establishes that the District complied with Student's and Parents' procedural rights by having all required and/or necessary members present during ARD committee meetings held from August \*\*\*, 2014, through October \*\*\*, 2015.

### *The District's Counterclaim*

270. An ARD committee meeting was held on May \*\*\*, 2015, to consider the REED.<sup>295</sup>
271. The May 2015 ARD committee determined that updated testing was needed in the areas of occupational therapy, physical therapy, speech and language skills, cognitive abilities, and achievement abilities in reading, writing, and math in order to better inform the ARD committee for Student's educational programming.<sup>296</sup>
272. On May \*\*\*, 2015, Parent consented to the FIE including an evaluation for psychological services.<sup>297</sup>
273. The evaluation for psychological services typically includes an individually administered intelligence and/or achievement test.<sup>298</sup>
274. The multi-disciplinary team that conducted the FIE assessments consisted of Ms. \*\*\*, occupational therapist; Ms. \*\*\*, physical therapist; \*\*\*, MA, CCC-SLP; and Dr. \*\*\*, LSSP. The team reviewed September 2015 reports by Dr. \*\*\* and \*\*\*, M.D., as well as FIEs from 2008, 2011, and 2012, a 2013 report by Dr. \*\*\*, and a 2013 counseling evaluation.<sup>299</sup>

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<sup>292</sup> Respondent Ex. 4 at 2, 12.

<sup>293</sup> Respondent Ex. 1 at 53.

<sup>294</sup> Respondent Ex. 4 at 73.

<sup>295</sup> Petitioner Ex. 21; Petitioner Ex. 22 at 278-288; Respondent Ex. 1 at 445-452.

<sup>296</sup> Petitioner Ex. 22 at 285; Respondent Ex. 1 at 446-452.

<sup>297</sup> Respondent Ex. 1 at 441-444.

<sup>298</sup> Respondent Ex. 1 at 442.

<sup>299</sup> Petitioner Ex. 15; Petitioner Ex. 140 at 1158; Petitioner Ex. 146; Petitioner Ex. 148 at 1186; Respondent Ex. 2 at 567-568, 584; Respondent Exs. 9, 10, 11, 18.

275. Multi-disciplinary team members used assessment tools and strategies that provided relevant information that directly assisted the ARD committee in determining Student's educational needs. The multi-disciplinary team also made recommendations for the ARD committee to consider when meeting on September \*\*\*, 2015 to review the FIE.<sup>300</sup>

### *Psychological Evaluation*

276. Dr. \*\*\*, who has been an LSSP since 2009 and a licensed psychologist since 2012, became the District's Evaluation Supervisor in August 2015. She has evaluated between 30 and 60 students per year to determine eligibility and programming for special education services under the IDEA.<sup>301</sup>

277. Dr. \*\*\* completed Student's psychological evaluation for the FIE.<sup>302</sup>

278. As part of the evaluation, Dr. \*\*\* obtained teacher information, observed Student in Student's \*\*\* class, and interviewed Student.<sup>303</sup>

279. Dr. \*\*\* observed Student use a computer and \*\*\* class; she did not see Student use assistive technology.<sup>304</sup>

280. As part of the psychological evaluation, Dr. \*\*\* reviewed Student's FIEs from 2008, 2011, and 2012, and reviewed a disability report prepared by Student's physician, Dr. \*\*\*.<sup>305</sup>

281. Dr. \*\*\* noted that Student's cognitive skills were assessed in a 2008 FIE, in October 2011, and again in March 2013, when Student's abilities yielded a FSIQ score of \*\*\*.<sup>306</sup>

282. Dr. \*\*\* conducted the psychological evaluation over three sessions on September \*\*\*, and \*\*\*, 2015.<sup>307</sup>

283. Dr. \*\*\* gave Student the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) to measure Student's cognitive skills. The test assessed Student's verbal comprehension, visual spatial abilities, fluid reasoning, working memory, and processing

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<sup>300</sup> Tr. at 1311 (Dr. \*\*\*); Respondent Ex. 4 at 594-597.

<sup>301</sup> Tr. at 164-166, 170-171 (Dr. \*\*\*); Respondent Ex. 17.

<sup>302</sup> Respondent Ex. 2 at 583-593, 596.

<sup>303</sup> Petitioner Ex. 14 at 157-158, 161; Respondent Ex. 2 at 584-585, 588.

<sup>304</sup> Tr. at 222, 226 (Dr. \*\*\*).

<sup>305</sup> Petitioner Ex. 14 at 140-141; Petitioner Ex. 148 at 1186.

<sup>306</sup> Respondent Ex. 2 at 586.

<sup>307</sup> Respondent Ex. 4 at 567-568.

- speed. Student's FSIQ was calculated to be \*\*\*, with a percentile rank of \*\*\*, which is within the lowest 1 % for students Student's age.<sup>308</sup>
284. Student's FSIQ score of \*\*\* was consistent with testing results from 2011 (standard score of \*\*\*) and 2013 (standard score of \*\*\*).<sup>309</sup>
285. Dr. \*\*\* attempted to give Student the NEPSY-II, a widely-used measure of neurocognitive processes including memory, learning, attention, and theory of mind. Clinicians use one or more batteries of the NEPSY-II to investigate areas of interest or concern.<sup>310</sup>
286. Memory subtests of the NEPSY-II were attempted with Student to better investigate Student's short-term and long-term memory abilities. Student demonstrated significant frustration and limited engagement and motivation toward testing tasks. Student became increasingly frustrated and testing was discontinued. Due to discontinuation of the subtests, scores from the NEPSY-II could not be considered a valid estimate of Student's abilities.<sup>311</sup>
287. Following discontinuation of the NEPSY-II test, Student \*\*\* and Student wondered if Student had to do the testing. Student was concerned that testing was affecting Student's classroom time and Student's ability to get Student's work done.<sup>312</sup>
288. Dr. \*\*\* administered the Kaufman Test of Educational Achievement, Third Edition (KTEA-III) to measure Student's academic skills. The widely-used standardized test was given in order to provide standard comparisons between Student's achievement development and that of other children Student's same age.<sup>313</sup>
289. Dr. \*\*\* administered the KTEA-III to Student in accordance with the instruction manual.<sup>314</sup>
290. The KTEA-III results indicated that Student's academic skills are consistent with Student's cognitive abilities. Student demonstrated the strongest skills in basic reading ability, achieving a score in the borderline range of ability. Student's math computation skills were slightly lower and also fell within the borderline range of ability. Student's skills in reading comprehension, math reasoning, and written expression all fell in the extremely low range of ability. Student's academic skills appear to best advantage on tasks Student can learn

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<sup>308</sup> Tr. at 464-465 (Dr. \*\*\*); Tr. at 1306 (Dr. \*\*\*); Petitioner Ex. 14 at 160; Respondent Ex. 2 at 586-587; Respondent Ex. 18 at 417-466. Note that the test in evidence is the WISC-V, not the WISC-IV, as referenced in Respondent Ex. 2 at 586.

<sup>309</sup> Petitioner Ex. 14 at 160-161; Respondent Ex. 2 at 587-588, 593.

<sup>310</sup> Respondent Ex. 2 at 587-588; Respondent Ex. 18 at 371-410.

<sup>311</sup> Tr. at 168, 231-232, 1305 (Dr. \*\*\*); Petitioner Ex. 148 at 1182; Respondent Ex. 2 at 587.

<sup>312</sup> Petitioner Ex. 4 at 23-25; Petitioner Ex. 14 at 140, 158; Petitioner Ex. 158 at 1919-1921.

<sup>313</sup> Respondent Ex. 2 at 590-592; Respondent Ex. 18 at 270-370.

<sup>314</sup> Tr. at 1334, 1351, 1365 (Dr. \*\*\*).

by rote or routine, such as applying decoding strategies, memorizing spelling, and using steps on paper-and-pencil math problems. Student struggles to apply knowledge in more fluid, novel situations.<sup>315</sup>

291. The psychological evaluation showed that Student's cognitive skills are significantly below average, compared with those of other children Student's age. Student is likely to need significant accommodations and support in all areas, in order to develop skills and retain information.<sup>316</sup>
292. Student's adaptive behavior, as informally assessed by Dr. \*\*\*, appears generally equivalent or somewhat better developed than Student's cognitive abilities. Dr. \*\*\* suggested that the ARD committee may consider requesting formal adaptive testing to better understand Student's skills, deficits, and intervention needs.<sup>317</sup>
293. Based upon the test results, Dr. \*\*\* made 12 general instructional recommendations adequate for the ARD committee to use in designing Student's IEP.<sup>318</sup>
294. The psychological evaluation was discussed at the September \*\*\*, 2015 annual ARD committee meeting.<sup>319</sup>
295. The outcome of Dr. \*\*\*'s evaluation is very similar to the outcome obtained by Dr. \*\*\* in the October 2014 \*\*\* neuropsychological evaluation that was not provided to the District until November 2015.<sup>320</sup>
296. An October \*\*\*, 2015 letter from \*\*\*, occupational therapist with \*\*\*, was considered by the ARD committee at the October \*\*\*, 2015 continuation of the annual ARD committee meeting. Ms. \*\*\* stated that Student has had challenges with executive function tasks, such as short term memory and problem solving, since \*\*\*.<sup>321</sup>

### *Speech/Language/Communication Evaluation*

297. Ms. \*\*\* conducted Student's speech/language/communication evaluation on September \*\*\*, 2015.<sup>322</sup>

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<sup>315</sup> Petitioner Ex. 14 at 163-165; Respondent Ex. 2 at 593.

<sup>316</sup> Respondent Ex. 2 at 588.

<sup>317</sup> Respondent Ex. 2 at 588, 593.

<sup>318</sup> Tr. at 1302 (Dr. \*\*\*); Petitioner Ex. 14 at 168.

<sup>319</sup> Respondent Ex. 4 at 7-8, 26-27.

<sup>320</sup> Tr. at 1316-1318, 1363 (Dr. \*\*\*); Petitioner Ex. 30.

<sup>321</sup> Petitioner Ex. 3; Respondent Ex. 4 at 21-22, 57; Respondent Ex. 26.

<sup>322</sup> Respondent Ex. 2 at 568-575, 594, 597.

298. In conducting her evaluation, Ms. \*\*\* considered information from 2012 \*\*\* speech and language reports for Student.<sup>323</sup>
299. Ms. \*\*\* administered the Expressive Vocabulary Test, Second Edition Form B, which is a norm-related test that measures a person's expressive language. Student achieved a score of \*\*\*, based on a mean of 100, with a percentile of 3 and an age equivalent of \*\*\*.<sup>324</sup>
300. Ms. \*\*\* administered the Oral and Written Language Scales, Second Edition (OWLS-II), an assessment of receptive and expressive language for children and young adults. The OWLS-II consists of four scales, but only the Oral Expression scale was assessed, due to time constraints and Student fatigue. Student's percentile rank was 2 and test-age equivalent was \*\*\*.<sup>325</sup>
301. Ms. \*\*\* administered the Comprehensive Assessment of Spoken Language (CASL; Carrow-Woolfolk, 1999) test to Student. The test is an individually-administered, in-depth oral language assessment for children and young adults ages 3 through 21. Fifteen subtests measure different aspects of oral language and provide a wide variety of quantitative information. Age-based normative scores can be reported for each test and/or scores can be reported as a standard score with a mean of 100 and a standard deviation of 15. Category Index Scores and a Core Composite Score are available for reporting.<sup>326</sup>
302. Ms. \*\*\* informally assessed Student's receptive/expressive and social-pragmatic language skills throughout the evaluative session as well as via therapeutic observation.<sup>327</sup>
303. Based on formal and informal assessments, Ms. \*\*\* determined Student exhibits severe expressive/receptive language deficits and moderate-to-severe deficits in the area of social-pragmatic language. Articulation skills were observed to be age appropriate. Voice and fluency of speech were also found to be within normal limits. Student's language/communication difficulties interfere with Student's ability to adequately understand and engage in the world around Student and to clearly convey thoughts/feelings, all of which impact Student's overall academic success.<sup>328</sup>
304. Ms. \*\*\* found that Student continues to meet eligibility criteria as a child with SI in the areas of receptive/expressive and pragmatic language.<sup>329</sup>

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<sup>323</sup> Respondent Ex. 2 at 568-570.

<sup>324</sup> Respondent Ex. 2 at 572.

<sup>325</sup> Respondent Ex. 2 at 572.

<sup>326</sup> Respondent Ex. 2 at 572-574; Respondent Ex. 18 at 238-269.

<sup>327</sup> Respondent Ex. 2 at 574.

<sup>328</sup> Respondent Ex. 2 at 575.

<sup>329</sup> Respondent Ex. 2 at 605.

305. Ms. \*\*\* recommended that Student continue to receive speech therapy services to remediate speech and language difficulties and further support academic success.<sup>330</sup>
306. A preponderance of the evidence shows that the evaluation prepared by Ms. \*\*\* appropriately addresses Student's need for the instructional service of speech therapy.
307. Ms. \*\*\* presented the evaluation at the annual ARD committee meeting held on September \*\*\*, 2015.<sup>331</sup>

### *Occupational Therapy Evaluation*

308. Ms. \*\*\* earned her master's degree in occupational therapy in 1981 and is a licensed occupational therapist. She has worked in school settings for about 15 of the 34 years she has been in practice.<sup>332</sup>
309. Ms. \*\*\* conducted the occupational therapy evaluation of Student for the FIE.<sup>333</sup>
310. As part of her evaluation, Ms. \*\*\* reviewed records on August \*\*\*, 2015, and interviewed teachers and observed Student on August \*\*\*, 2015, and September \*\*\* 2015.<sup>334</sup> Ms. \*\*\* reviewed all of Student's occupational therapy records, occupational evaluations, progress reports, and IEP goals and objectives for occupational therapy. No outside occupational therapy evaluations were available for her to review.<sup>335</sup>
311. Dr. \*\*\* stated that based on VMI test results, Student has the visual motor skills of \*\*\*-year-old. In Ms. \*\*\*'s opinion, Student's skill level is delayed in relation to Student's peers but is adequate for reading and writing, because \*\*\*-year-olds can read and write. As such, no occupational therapy has been provided related to improving Student's visual motor skills.<sup>336</sup>
312. Ms. \*\*\* noted Student has made significant progress since the 2012 FIE. Student has successfully \*\*\* and is able to independently complete the majority of functional fine motor tasks needed at school, including the completion of \*\*\* work.<sup>337</sup>
313. Ms. \*\*\* found Student to have \*\*\*.<sup>338</sup>

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<sup>330</sup> Petitioner Ex. 14 at 178; Respondent Ex. 2 at 595-596, 605.

<sup>331</sup> Respondent Ex. 4 at 6, 25.

<sup>332</sup> Tr. at 281-282 (Ms. \*\*\*); Ms. \*\*\*'s *curriculum vitae* is at Respondent Ex. 29.

<sup>333</sup> Respondent Ex. 2 at 579-583, 602.

<sup>334</sup> Respondent Ex. 2 at 598.

<sup>335</sup> Tr. at 299-300 (Ms. \*\*\*); Petitioner Ex. 14 at 141.

<sup>336</sup> Tr. at 963-965 (Ms. \*\*\*).

<sup>337</sup> Respondent Ex. 2 at 598.

<sup>338</sup> Respondent Ex. 2 at 580.



314. Ms. \*\*\* concluded Student will continue to need occupational therapy due to \*\*\*, which will not change without \*\*\*.<sup>339</sup>
315. Ms. \*\*\* conducted a neuromuscular assessment on September \*\*\*, 2015. According to the neuromuscular assessment results, Student continues to experience increased \*\*\*.<sup>340</sup>
316. Ms. \*\*\* conducted a School Function Assessment (SFA) of Student on September \*\*\* and September \*\*\*, 2015.<sup>341</sup>
317. The SFA is a criterion-referenced assessment of the functional motor skills required in an educational setting. It is composed of multiple subsections that evaluate through observation, interview, and testing, different types of tasks that may be performed by a student during a typical day at school.<sup>342</sup>
318. The SFA does not use standard scores. Rather, the SFA assesses whether a student has the ability to perform certain tasks that would typically be mastered by a certain age. For instance, by the time a child is 6 years old, he should be able to tie his shoes. On the SFA, a 6-year-old is either at 100 % or not on \*\*\*. The SFA is designed to assess skills for children at the \*\*\* through \*\*\* levels; there is no SFA designed for \*\*\* students.<sup>343</sup>
319. The SFA subsections related to functional \*\*\* were completed as part of Student's evaluation. The areas evaluated included using materials; set up and clean up; eating and drinking; hygiene; clothing management; \*\*\* work; and computer and equipment use.<sup>344</sup>
320. On the SFA, Student did not meet the criterion score for writing because Student's writing speed of \*\*\* letters per minute, or \*\*\* words per minute, is not a speed comparable to that of most students Student's age.<sup>345</sup>
321. Student's IEP accommodations and modifications address Student's slower production of writing in the classroom.<sup>346</sup>
322. On the SFA, Student demonstrated that, \*\*\* provided by the District, Student is able to independently \*\*\*. Student received a criterion score of \*\*\* related to using the computer.

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<sup>339</sup> Tr. at 953 (Ms. \*\*\*); Respondent Ex. 2 at 582-583, 598.

<sup>340</sup> Respondent Ex. 2 at 599-600.

<sup>341</sup> Petitioner Ex. 14 at 154-155; Respondent Ex. 2 at 581-582, 598, 600-601; Respondent Ex. 18 at 411-416; Respondent Ex. 22.

<sup>342</sup> Tr. at 302 (Ms. \*\*\*); Petitioner Ex. 14 at 154; Respondent Ex. 2 at 581-582, 600; Respondent Ex. 22.

<sup>343</sup> Tr. at 302, 307 (Ms. \*\*\*).

<sup>344</sup> Tr. at 304 (Ms. \*\*\*); Petitioner Ex. 14 at 153-155; Respondent Ex. 2 at 600-601.

<sup>345</sup> Tr. at 308 (Ms. \*\*\*).

<sup>346</sup> Tr. at 308-309 (Ms. \*\*\*).

- Although Student could perform most of the tasks, such as turning the computer on, Student's typing speed brought Student's overall score down. Student's typing speed ranged from \*\*\* letters per minute, or about \*\*\* words per minute. If Student chose to, Student could use Student's \*\*\* to independently complete academic projects that require word processing.<sup>347</sup>
323. Ms. \*\*\* conducted the Beery Developmental Test of Visual Integration, Sixth Edition (Beery VMI) on September \*\*\*, 2015.<sup>348</sup>
324. The Beery VMI is a standardized test designed to assess a student's ability to coordinate visual and motor abilities. This skill is foundational for drawing, coloring, cutting, and writing tasks needed in the educational curriculum. The test involves copying a series of increasingly difficult geometric figures.<sup>349</sup>
325. Student's score of \*\*\* on the Beery VMI was not statistically significant from Student's previous Beery VMI score of \*\*\* in 2013, so the visual perception and motor coordination tests were not repeated.<sup>350</sup>
326. Based on the evaluation results, Ms. \*\*\* recommended that Student be provided with accommodations, modifications, and adapted equipment/materials as needed \*\*\* completion of required academic tasks, which could include needing modification of specific tasks or adaptation of materials in Student's classes by the occupational therapist.<sup>351</sup>
327. In Ms. \*\*\*'s professional opinion, going forward in 2015-16, Student needs consultative rather than direct occupational therapy supports and services to benefit from Student's special education program.<sup>352</sup>
328. Ms. \*\*\* presented the evaluation at the September \*\*\*, 2015 annual ARD committee meeting.<sup>353</sup>
329. Student has been receiving outpatient occupational therapy services intermittently at \*\*\* since May 2012.<sup>354</sup>

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<sup>347</sup> Tr. at 309-310, 313, 944-945 (Ms. \*\*\*); Respondent Ex. 2 at 582.

<sup>348</sup> Petitioner Ex. 14 at 155; Respondent Ex. 2 at 582, 598, 601; Respondent Ex. 18 at 223-237.

<sup>349</sup> Petitioner Ex. 14 at 155; Respondent Ex. 2 at 582, 601.

<sup>350</sup> Petitioner Ex. 14 at 155; Respondent Ex. 2 at 582, 601.

<sup>351</sup> Petitioner Ex. 14 at 155, 171; Respondent Ex. 2 at 596.

<sup>352</sup> Petitioner Ex. 14 at 155, 175; Respondent Ex. 2 at 582.

<sup>353</sup> Respondent Ex. 4 at 7, 25.

<sup>354</sup> Petitioner Ex. 6; Petitioner Ex. 8.

330. The priorities of educationally-based and clinically-based occupational and physical therapy are different. The therapists are equally trained and licensed, but the approach and goals for each setting are different. Some students have a medical need for therapy but not an educational need. A school district provides related services only as needed to support the student in meeting his or her educational goals. A doctor's order or prescription is considered by the ARD committee but does not determine therapy services.<sup>355</sup>
331. Therapy services are discontinued when the ARD committee determines there are no longer any goals, accommodations, or staff/student training that require the intervention of a therapist, and the expertise of the therapist is no longer a necessary component of the student's educational program in order for the student to continue achieving identified academic, developmental and functional outcomes of the IEP.<sup>356</sup>
332. In a September \*\*\*, 2015 letter considered by the District, Student's treating physician Dr. \*\*\* stated that Student would continue to benefit from receiving occupational therapy in the school setting.<sup>357</sup>
333. Ms. \*\*\*, occupational therapist with \*\*\*, evaluated Student on October \*\*\*, 2015, to address increased difficulty with activities of daily living and school tasks. She reported that Student continues to \*\*\*. She reports it takes Student extra time to complete school work \*\*\*.<sup>358</sup>
334. Ms. \*\*\* stated in October \*\*\*, 2015 and October \*\*\*, 2015 letters considered by the District that Student would highly benefit from ongoing occupational therapy services at school to address continuing deficits in Student's school environment.<sup>359</sup> In the letters, Ms. \*\*\* noted that Student reports the inability to \*\*\*.<sup>360</sup>
335. In her letters, Ms. \*\*\* recommended accommodations for Student to include the continuation of \*\*\* required to complete the task; and continued school occupational therapy services to increase Student's participation in school-related tasks and success as a student.<sup>361</sup>
336. Based on Student's progress and ongoing needs, Ms. \*\*\* requested, in an October \*\*\*, 2015 letter considered by the District, that Student be provided occupational therapy to

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<sup>355</sup> Respondent Ex. 13 (generally), and at 1411, 1412.

<sup>356</sup> Respondent Ex. 13 at 1412.

<sup>357</sup> Petitioner Ex. 15.

<sup>358</sup> Petitioner Ex. 6; Petitioner Ex. 8.

<sup>359</sup> Petitioner Ex. 3; Petitioner Ex. 6; Respondent Ex. 4 at 21-22.

<sup>360</sup> Petitioner Ex. 3; Respondent Ex. 4 at 21.

<sup>361</sup> Respondent Ex. 4 at 21.

continue addressing fine motor skill and executive function deficits and ensure that Student continues to progress through schooling without barriers that hinder Student's learning.<sup>362</sup>

337. The occupational therapist at \*\*\* has provided Student with \*\*\*, \*\*\*, \*\*\*,<sup>363</sup>

***Physical Therapy Evaluation***

338. Ms. \*\*\* is a physical therapist with more than 20 years of experience. Since 2001, she has been a staff physical therapist with the District, where she has provided direct and consultative therapy services to students ages 3 to 22, with an emphasis on maximizing functional abilities to minimize the effects of various disabilities on each student's ability to participate in the educational process and to allow for optimal \*\*\*,<sup>364</sup>

339. Ms. \*\*\* met with Student on August \*\*\*, September \*\*\*, and September \*\*\*, 2015, to assess Student's need for the related service of physical therapy.<sup>365</sup>

340. As part of the evaluation, Ms. \*\*\* reviewed Student's previous physical therapy records on September \*\*\*, 2015.<sup>366</sup>

341. Ms. \*\*\*'s evaluation included portions of the SFA, Timed Up and Go, Berg Balance Test, Six-Minute Walk Test, Informal Balance Observations, and an Orthopedic and Gait Assessment, which measured Student's balance, functional mobility, gait, endurance, and speed.<sup>367</sup>

342. Student was able to perform the Berg Balance Test activities at the 100 % level with no difficulties noted, but with performance differences \*\*\*. Student was able to independently and safely \*\*\*; and \*\*\*. Portions of the SFA were completed with difficulties only noted with \*\*\*. No concerns were noted in Student's ability to access Student's academic environment or to be able to adequately move at a functional pace to \*\*\*.<sup>368</sup>

343. When using Student's \*\*\*,<sup>369</sup>

344. Ms. \*\*\* recommended that Student \*\*\* at least 2-3 times per week and during \*\*\*,<sup>370</sup>

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<sup>362</sup> Petitioner Ex. 6.

<sup>363</sup> Respondent Ex. 23 at 5.

<sup>364</sup> Respondent Ex. 30.

<sup>365</sup> Respondent Ex. 2 at 576-579, 603.

<sup>366</sup> Respondent Ex. 2 at 603.

<sup>367</sup> Respondent Ex. 2 at 603.

<sup>368</sup> Respondent Ex. 2 at 603.

<sup>369</sup> Respondent Ex. 2 at 576, 579, 603.

<sup>370</sup> Respondent Ex. 2 at 576, 579, 604; Respondent Ex. 23 at 6.

345. Ms. \*\*\* found that Student demonstrated improvements in \*\*\*.<sup>371</sup>
346. The evaluation results support Ms. \*\*\*'s recommendation that Student does not qualify for academic-based physical therapy services.<sup>372</sup>
347. Ms. \*\*\* presented the evaluation at the September \*\*\*, 2015 annual ARD committee meeting.<sup>373</sup>
348. In a September \*\*\*, 2015 letter considered by the District, Student's treating physician Dr. \*\*\* stated that Student would continue to benefit from receiving physical therapy in the school setting.<sup>374</sup>

*Assistive technology evaluation is pending*

349. Formal assessment of Student's assistive technology needs was not requested during the May 2015 REED to be part of the September 2015 FIE.<sup>375</sup> Instead, the committee agreed that as academic expectations increase, additional assistive technology supports might be warranted, and will be implemented as needed.<sup>376</sup>
350. As of May 2015, Student's assistive technology needs were being monitored on a regular basis by Student's special education teachers, occupational therapist, physical therapist, and speech-language pathologist.<sup>377</sup>
351. Student's assistive technology needs were assessed for the September 2012 FIE. Student's current accommodations, based on the September 2012 FIE results, include access to a word processor, \*\*\*, and a recording device as needed. Student has access to a calculator. Student also is able to use Student's \*\*\*. According to the 2015 FIE, the ARD committee should consider and address Student's assistive technology needs as they arise.<sup>378</sup>
352. Student is adept at using the calculator.<sup>379</sup>
353. The annual ARD committee considered Student's assistive technology needs and found assistive technology to be a needed related service. The ARD committee decided that

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<sup>371</sup> Respondent Ex. 2 at 603.

<sup>372</sup> Petitioner Ex. 14 at 176-177; Respondent Ex. 2 at 579, 603.

<sup>373</sup> Respondent Ex. 4 at 6, 26, 55.

<sup>374</sup> Petitioner Ex. 15; Petitioner Ex. 148 at 1186.

<sup>375</sup> Petitioner Ex. 21; Petitioner Ex. 22 at 284; Respondent Ex. 4 at 53.

<sup>376</sup> Petitioner Ex. 21 at 264-265; Petitioner Ex. 22 at 284.

<sup>377</sup> Petitioner Ex. 22 at 284.

<sup>378</sup> Respondent Ex. 2 at 592.

<sup>379</sup> Tr. at 830 (Ms. \*\*\*).

Student, staff, and parents should be provided training on current software, and the use of additional software programs for written expression and math should be considered.<sup>380</sup>

354. Parents' request for an assistive technology evaluation was considered at the October \*\*\*, 2015 continuation of the annual ARD committee meeting.<sup>381</sup>
355. The District agreed to conduct an assistive technology evaluation.<sup>382</sup> The evaluation will include information about adaptations to the device that will work best for Student's independent utilization of the device.<sup>383</sup>
356. As of November 2015, Parents had not given consent for the District to conduct the assistive technology evaluation because of the pending due processing hearing.<sup>384</sup>
357. An assistive technology evaluation could assess whether Student, who receives oral administration of tests as an accommodation, could benefit from replacing \*\*\* work with auditory dictation or auditory presentation.<sup>385</sup>
358. A preponderance of the evidence establishes that, in light of the changes Student has experienced since \*\*\* 2012 assistive technology evaluation, an updated assistive technology evaluation could provide critical information to the ARD committee for selecting assistive technology that would assist Student in reading, writing, and math.

**\*\*\* *evaluation is pending***

359. Student's \*\*\* services were discussed at the October \*\*\*, 2015 continuation of the September \*\*\*, 2015 annual ARD committee meeting, including Student's \*\*\*.<sup>386</sup>
360. The District agreed with Parents' request to conduct a \*\*\* evaluation.<sup>387</sup>
361. As of the November 2015 due process hearing, Parents had not given consent for the District to conduct the \*\*\* evaluation.<sup>388</sup>

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<sup>380</sup> Petitioner Ex. 14 at 166, 174.

<sup>381</sup> Respondent Ex. 4 at 53-54.

<sup>382</sup> Respondent Ex. 4 at 54.

<sup>383</sup> Respondent Ex. 4 at 56.

<sup>384</sup> Tr. at 535 (Father).

<sup>385</sup> Tr. at 415 (Dr. \*\*\*).

<sup>386</sup> Respondent Ex. 4 at 28-29, 54.

<sup>387</sup> Respondent Ex. 4 at 54; Petitioner Ex. 148 at 1183-1185.

<sup>388</sup> Tr. at 218-219 (Dr. \*\*\*).

362. A preponderance of the evidence establishes that a \*\*\* evaluation should have been conducted before the September 2015 annual ARD committee meeting so results could be considered by the ARD committee in developing Student's \*\*\*.<sup>389</sup>
- \*\*\*
363. On September \*\*\*, 2014, the ARD committee accepted Student's STAAR \*\*\* assessments in \*\*\* exam scores \*\*\*.<sup>390</sup>
364. In the fall of 2014, Student was \*\*\*, although Student was \*\*\* grade, because Student lacked a \*\*\*. Student's designation was changed from \*\*\* to \*\*\*.<sup>391</sup>
365. Student began the 2014-15 school year with \*\*\* students and was enrolled in all of Student's classes for the \*\*\* year. There was no impact to Student's \*\*\* as Student was with \*\*\* grade students, receiving \*\*\* instruction. The \*\*\* showed that Student would \*\*\*.<sup>392</sup>
366. Student \*\*\* in 2014-15. As of June 2015, Student had \*\*\*, which \*\*\*.<sup>393</sup>
367. The \*\*\*.<sup>394</sup>
368. The ARD committee determined at the October \*\*\*, 2015 continuation of the September \*\*\*, 2015 annual ARD committee meeting that Student's IEP will be used as Student's \*\*\*.<sup>395</sup>

### ***FIE Conclusion/Statement of Disability***

369. Based on a review of Student's testing history, Student's cognitive and physical abilities have been impacted significantly as a result of Student's \*\*\*. Although Student has recovered many of Student's skills, Student continues to demonstrate significant cognitive and academic deficits. The evaluators recommended that the ARD committee should consider Student's continued eligibility as a student with OHI due to \*\*\*.<sup>396</sup>

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<sup>389</sup> 34 C.F.R. § 300.320(a)(7)(b), Tex. Educ. Code §§ 29.011, 29.0111, 19 Tex. Admin. Code § 89.1055(h)(i).

<sup>390</sup> Respondent Ex. 4 at 41. Student did not perform at a satisfactory level on the STAAR for \*\*\* taken in the Spring of 2015. Petitioner Ex. 143.

<sup>391</sup> Petitioner Ex. 159 at 2556-2557, 2560, 2562, 2564.

<sup>392</sup> Respondent Ex. 1 at 412, 454.

<sup>393</sup> Petitioner Ex. 128; Petitioner Ex. 142 at 1162; Respondent Ex. 4 at 54.

<sup>394</sup> Tr. at 1080 (Ms. \*\*\*); Petitioner Ex. 134; Petitioner Ex. 158 at 1730, 1733, 2033; Respondent Ex. 1 at 372; Tex. Educ. Code § 28.025(c)(2).

<sup>395</sup> Respondent Ex. 4 at 29; Petitioner Ex. 148 at 1314.

<sup>396</sup> Petitioner Ex. 14 at 166; Respondent Ex. 2 at 593.

370. Based on results of formal and informal assessment in the speech-language evaluation, Student exhibits severe expressive/receptive language deficits and moderate-to-severe deficits in the area of social-pragmatic language. Articulation skills were observed to be age appropriate. Voice and fluency of speech were also found to be within normal limits. Student's language/communication difficulties interfere with Student's ability to adequately understand and engage in the world around Student and to clearly convey thoughts/feelings all of which impact Student's overall academic success. The evaluators recommended that Student continued to receive specialized instruction provided through speech therapy services to further remediate expressive/receptive/pragmatic language deficits. Student continues to meet eligibility as a student with SI in the areas of receptive/expressive and pragmatic language.<sup>397</sup>
371. The evaluators noted that repeated cognitive testing over the past few years has indicated that Student's skills, while slightly improved in some respects, appear to have stabilized. Student's cognitive skills yielded scores which fell more than two standard deviations below the mean (average). The evaluators recommended that the ARD committee should consider requesting additional testing to formally assess Student's adaptive skills deficits in order to determine whether Student meets Texas Education Agency disability criteria as a student with an ID. Although the OHI category is sufficient to meet Student's needs while Student attends public school, fewer supports are available for this type of disability \*\*\*. Should Student wish to pursue services available to individuals with ID in the future, Student's skills should be assessed while Student is still in the developmental period (*i.e.*, \*\*\*) in order to meet disability criteria. In addition, testing of Student's adaptive skills would allow for any necessary appropriate planning and intervention while Student is \*\*\*.<sup>398</sup>
372. Based on the results of the physical therapy evaluation, the evaluators recommend that Student does not qualify for academic-based physical therapy services.<sup>399</sup>
373. The evaluators determined that Student will continue to need support from occupational therapy due to \*\*\*. Support will consist of accommodations, modifications, and adapted equipment/materials as needed \*\*\* completion of required academic tasks.<sup>400</sup>
374. The multi-disciplinary team determined that Student meets criteria for OHI and SI and that Student's disabilities adversely affect Student's educational performance. Student's cognitive deficits as a result of Student's health conditions and concurrent academic deficits affect Student's ability to be successful in Student's classes. Student's speech/language impairment impacts all areas of academics as well as social

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<sup>397</sup> Petitioner Ex. 14 at 148; Respondent Ex. 2 at 594. Note that Dr. \*\*\*'s description of Student's adaptive skills appears to contradict the speech-language evaluation finding. Petitioner Ex. 14 at 161. Dr. \*\*\* testified that her statement in the report that Student is "often able to process abstract information and uses good pragmatic language abilities" is an error. Tr. at 260-261.

<sup>398</sup> Tr. at 190-191 (Dr. \*\*\*); Respondent Ex. 2 at 593-594.

<sup>399</sup> Respondent Ex. 2 at 594.

<sup>400</sup> Respondent Ex. 2 at 594, 596.



communication with peers, teachers, and family. By reason of Student's disabilities, Student needs special education services, which may include speech therapy.<sup>401</sup>

375. Student's cognitive and communication deficits \*\*\* require specially-designed instruction in order to achieve academic success. The evaluators suggested that the ARD committee consider continuation of special education support within the general education classroom, addition of speech/language therapy, and specific classroom accommodations and modifications relating to physical and cognitive limitations.<sup>402</sup>
376. The evaluators made general instructional recommendations for Student's IEP. Since an FIE needs to supply information to develop IEPs for 3 years, providing specific recommendations would limit the applicability of the FIE.<sup>403</sup>

*Appropriateness of FIE*

377. The District has established by a preponderance of the evidence that the members of the multi-disciplinary team who conducted Student's FIE are well-credentialed, trained, and experienced.
378. The District has established by a preponderance of the evidence that Student was evaluated using a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by Parents, Student's physicians and other medical personnel, and teachers, which enabled the multidisciplinary team to determine Student's continued eligibility as a child with IHO and SI.<sup>404</sup>
379. The District has established by a preponderance of the evidence that, except for \*\*\* and assistive technology evaluations, the FIE provides the necessary information to develop Student's IEP.
380. The District has established by a preponderance of the evidence that the multiple assessments are well-recognized tests specifically chosen by Student's evaluators to provide an accurate assessment of Student's strengths and weaknesses in all areas to develop an appropriate IEP for Student.
381. The District has proved by a preponderance of the evidence that Student was assessed in all areas of suspected disability. However, because assistive technology and \*\*\* evaluations were not conducted, the FIE was not sufficiently comprehensive to identify all of Student's educational needs and needs for related services.

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<sup>401</sup> Respondent Ex. 2 at 594.

<sup>402</sup> Respondent Ex. 2 at 595.

<sup>403</sup> Tr. at 1311 (Dr. \*\*\*); Respondent Ex. 2 at 595.

<sup>404</sup> Respondent Ex. 2 at 593-594.

382. The District has established by a preponderance of the evidence that the individual evaluations that were conducted as part of the 2015 FIE meet all IDEA requirements and are appropriate.
383. The District did not establish by a preponderance of the evidence that the FIE meets all IDEA requirements and is appropriate, because assistive technology and \*\*\* evaluations should have been conducted and were not.
384. The District must be afforded the opportunity to conduct \*\*\* and assistive technology evaluations before Parents may request \*\*\* and adaptive technology IEEs at public expense.<sup>405</sup>

## V. DISCUSSION

### A. Witnesses

The following witnesses testified:

- Mother
- Father
- \*\*\*, Special Education Case Manager
- \*\*\*, General Education Teacher
- \*\*\*, Teacher
- \*\*\*, Ph.D. (Petitioner's designated expert)
- \*\*\*, Ph.D., Evaluation Supervisor (District's expert witness)
- \*\*\*, Occupational Therapist (District's expert witness)
- \*\*\*, OTR (Petitioner's designated expert)
- \*\*\*, \*\*\* Teacher
- \*\*\*, Assistant Principal secretary
- \*\*\*, AT/SLP (Petitioner's designated expert)
- \*\*\*, Physical Therapist (District's expert witness)
- \*\*\*, Special Education Coordinator

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<sup>405</sup> 34 C.F.R. § 300.502(b)(5).

**B. Parents' Testimony**

Father testified that he does not trust the District because of its failure to consistently implement Student's IEP accommodations. As an example, he said that only after multiple communications from Parents did the District provide Student with class notes in 2014-15 and in September 2015.<sup>406</sup> He does not trust the District because Student is supposed to \*\*\* and the accommodation has been inconsistent.<sup>407</sup> Regarding \*\*\*, Father said Student was provided a \*\*\* program by the occupational therapist and the physical therapist, but never engaged in \*\*\*.<sup>408</sup> Also, Father does not trust the District because he was not informed that Student was not mastering Student's goals. Had he been, he possibly would have changed direction in terms of Student's programming.<sup>409</sup> He could redevelop trust with the District if he was assured on a monthly basis that Student's accommodations are being implemented.<sup>410</sup>

Father testified that he thought Student was being graded like other students. He was surprised to learn, during preparation for the due process hearing, that Student was not.<sup>411</sup> At this point, Father does not believe Student's 2014-15 IEP was appropriate; that Student's 2015 FIE was appropriate; or that Student's assistive technology, occupational therapy, or anything else provided by the District, was appropriate.<sup>412</sup>

Father testified that sometimes Student was given reduced homework assignments. Student required maximum assistance from Father on Student's homework, which could take a couple of hours. He would work the problems with Student from start to finish, then give Student the opportunity to re-work them \*\*\*self, giving Student continuous help.<sup>413</sup>

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<sup>406</sup> Tr. at 514-518, 581-583 (Father).

<sup>407</sup> Tr. at 519-520 (Father).

<sup>408</sup> Tr. at 520-522 (Father).

<sup>409</sup> Tr. at 523-525, 548-549 (Father).

<sup>410</sup> Tr. at 583 (Father)

<sup>411</sup> Tr. at 551-552 (Father).

<sup>412</sup> Tr. at 584 (Father).

<sup>413</sup> Tr. at 538 (Father).

Father acknowledged that Student does not have the skills to \*\*\*. He said the District has done nothing to help Student with skills of independent living.<sup>414</sup> Student is not capable of \*\*\*. Father has been working with Student daily on \*\*\*.<sup>415</sup> Father does not think Student's classes in \*\*\*, \*\*\*, and \*\*\* will help Student in Student's \*\*\*.<sup>416</sup>

One of Student's IEP goals is to \*\*\* at home, which Father does with Student. But nobody from the District has contacted him to verify that he and Student are doing the home exercise program.<sup>417</sup> Father has worked with Student on \*\*\*, which takes Student 15 or 20 minutes to accomplish, by which time Student's back aches and Student is frustrated. Father does not understand how the District can claim Student has mastered \*\*\*.<sup>418</sup>

Mother agrees with Father's testimony.<sup>419</sup> She stated that Parents have reached out to the District many times, but Student has not been getting the help Student needs.<sup>420</sup> Parents want Student obtain the best education possible, given where Student is now, without having to fight people for it.<sup>421</sup>

Mother testified that \*\*\* Student was involved in a lot of physical activities. Student \*\*\*.<sup>422</sup> Mother acknowledged that Student is struggling and is behind Student's peers. She said it is disheartening to watch Student and Father \*\*\*, and to see Student get frustrated because Student is trying to figure it out.<sup>423</sup>

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<sup>414</sup> Tr. at 572 (Father).

<sup>415</sup> Tr. at 571-572 (Father).

<sup>416</sup> Tr. at 574 (Father).

<sup>417</sup> Tr. at 577 (Father).

<sup>418</sup> Tr. at 579 (Father).

<sup>419</sup> Tr. at 591 (Mother).

<sup>420</sup> Tr. at 590, 596 (Mother).

<sup>421</sup> Tr. at 590 (Mother).

<sup>422</sup> Tr. at 588 (Mother).

<sup>423</sup> Tr. at 590 (Mother).

Mother explained that Student is a good person with a big heart who wants to do well.<sup>424</sup> Mother described Student as a people pleaser who only wants encouragement. She said Student easily shuts down when Student is frustrated.<sup>425</sup> Mother said all that Parents want is for Student to be normal, to feel like Student is normal, to feel like Student can be successful like Student's peers and not be given pushback from people when Student asks for what Student wants.<sup>426</sup>

### **C. Testimony of Petitioner's Experts**

#### **1. Testimony of \*\*\*, Ph.D., LSSP**

\*\*\*, who holds a Ph.D. in Educational Psychology, has worked as an LSSP and has a private practice in neuropsychology in \*\*\* Texas. In her private practice, she evaluates children, adolescents, and adults with neurological impairment and participates in multidisciplinary school-based evaluations (FIEs and IEEs) for children with autism and low incidence disabilities.<sup>427</sup>

At Parents' request, Dr. \*\*\* reviewed Student's educational records to address Student's current educational services and suggested possible modifications to enhance Student's acquisition of new knowledge, skills, and abilities. In a November \*\*\*, 2015 report, Dr. \*\*\* recommended utilization of a broad range of assessment procedures to address specific issues regarding attention and concentration, memory, speed of information processing, and executive function. She said the assessments would be beneficial to guide the design of instructional strategies that are most consistent with Student's strengths and weaknesses.<sup>428</sup>

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<sup>424</sup> Tr. at 589 (Mother).

<sup>425</sup> Tr. at 593 (Mother).

<sup>426</sup> Tr. at 589-590 (Mother).

<sup>427</sup> Tr. at 387-394 (Dr. \*\*\*); Petitioner Ex. 153.

<sup>428</sup> Petitioner Ex. 156 at 1687, 1690.

Dr. \*\*\* found the District's 2015 FIE to be incomplete with regard to guiding the development of Student's IEP.<sup>429</sup> Memory and learning are areas that should have been addressed, and Dr. \*\*\* should have followed through on that testing after first receiving incomplete results.<sup>430</sup> However, the two measures used by Dr. \*\*\* are fairly consistently used for educational evaluations.<sup>431</sup> Dr. \*\*\* saw less emphasis in the FIE on what kind of program would be most appropriate for Student and more emphasis on test scores and whether they established a new eligibility category.<sup>432</sup> Dr. \*\*\* said a broader range of classroom observations would have been helpful because, \*\*\*, there is the potential for Student to \*\*. Dr. \*\*\* also noted that Dr. \*\*\*'s observation of Student in the \*\*\* classroom did not include much in way of reading, writing, or math.<sup>433</sup>

Dr. \*\*\* feels the FIE could have provided more specific guidance to the ARD committee in the way of instructional strategies for Student, given Student's functional level. The FIE focused on accommodations but not on modifying the instructional process or the information presented to Student.<sup>434</sup> For instance, Student's processing speed was determined to be an issue but was not addressed in accommodations that would assist Student if Student is among students with faster processing speeds.<sup>435</sup> Auditory skills seemed to be a relative strength but Dr. \*\*\* did not see any accommodations or recommendations to alter the presentation of information to take advantage of Student's auditory skills, such as using books on tape, as opposed to requiring reading.<sup>436</sup> Dr. \*\*\* suggested that behavioral intervention should have been recommended, including a careful selection of tasks and meaningful positive reinforcement, along with some guidance and support

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<sup>429</sup> Tr. at 400 (Dr. \*\*\*).

<sup>430</sup> Tr. at 401-402, 485 (Dr. \*\*\*).

<sup>431</sup> Tr. at 401 (Dr. \*\*\*).

<sup>432</sup> Tr. at 405 (Dr. \*\*\*).

<sup>433</sup> Tr. at 406-407 (Dr. \*\*\*).

<sup>434</sup> Tr. at 409, 411 (Dr. \*\*\*).

<sup>435</sup> Tr. at 413 (Dr. \*\*\*).

<sup>436</sup> Tr. at 414-415 (Dr. \*\*\*).

in developing alternatives and a more realistic but still very positive perception of \*\*\*self, in terms of Student's abilities, both personally and in comparison to peers Student's age.<sup>437</sup>

Dr. \*\*\* believes the 2014-15 IEP goals and objectives are not individualized to Student based on Student's strengths and weaknesses. She said there is no indication of how the District is going to educate Student to the TEKS level. She suggested that Student needs interim goals including a time frame for mastery with clear documentation of progress.<sup>438</sup> For instance, Student's reading goal should have been broken down into how well Student could accomplish the physical and mental process of reading versus how well Student was able to use the information Student had read.<sup>439</sup>

Dr. \*\*\*'s main point is that Student has potential that is not being met and the process that is being considered for Student primarily relates to accommodations in the instructional environment instead of specific instructional strategies that the teachers need to know in their interaction with Student for Student to be able to learn.<sup>440</sup> She explained there a difference between allowing Student an extra hour to read versus developing a strategy for reading instruction that is tailored to Student's cognitive strengths and weaknesses.<sup>441</sup>

Dr. \*\*\* agrees with Student's OHI and SI eligibility, but thinks that based on Student's scores, a case could be made that Student has an ID.<sup>442</sup> Dr. \*\*\* said that usually, with an ID, there is more of a global developmental effect, particularly in children with a more pervasive developmental disorder that occurred at an earlier age; but Student has more variability in Student's cognitive scores.<sup>443</sup>

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<sup>437</sup> Tr. at 417 (Dr. \*\*\*).

<sup>438</sup> Tr. at 420-421 (Dr. \*\*\*).

<sup>439</sup> Tr. at 422, 490-491 (Dr. \*\*\*).

<sup>440</sup> Tr. at 424 (Dr. \*\*\*).

<sup>441</sup> Tr. at 425 (Dr. \*\*\*).

<sup>442</sup> Tr. at 443-444 (Dr. \*\*\*).

<sup>443</sup> Tr. at 445 (Dr. \*\*\*).

Regarding the 2014-15 IEP, Dr. \*\*\* said it appears Student was expected to learn the same information, in about the same way, as nondisabled \*\*\* grade students. Dr. \*\*\* agreed that undocumented modifications and accommodations occur in the classroom all the time, giving a disabled child more access to the curriculum. But, she said, random occurrences in the classroom typically do not count in the same way as accommodations and modifications that are structured, deliberate, organized and appropriate. And, she noted, typically, in the education setting, what is documented is what happened.<sup>444</sup>

Dr. \*\*\* agreed that Student's informal language assessment represented quite a bit of progress since Student's \*\*\* and that Student would benefit from being in a mainstream classroom with children of varying abilities. But being in an environment in which Student cannot perform at the same level as Student's peers might require Student to have support in interacting with Student's peers.<sup>445</sup>

Dr. \*\*\* recommends adaptive skills and \*\*\* evaluations for Student. An adaptive skills evaluation would be helpful for addressing Student's limited adaptive skills in the academic setting.<sup>446</sup>

In Dr. \*\*\*'s experience, evaluators and teachers collaborate to develop recommendations for instructional interventions.<sup>447</sup> Dr. \*\*\* said that an FIE should do more than identify areas of difficulty; the evaluators should synthesize all of the information in order to make specific recommendations for the instructional process.<sup>448</sup>

Dr. \*\*\* agreed that teachers could use information from Dr. \*\*\*'s report that Student is likely to have trouble understanding complex ideas and understanding nuances of relationship between words. Another bit of useful information for teachers is that Student might be expected

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<sup>444</sup> Tr. at 448-451 (Dr. \*\*\*).

<sup>445</sup> Tr. at 458 (Dr. \*\*\*); Respondent Ex. 2 at 574.

<sup>446</sup> Tr. at 463-464, 492 (Dr. \*\*\*).

<sup>447</sup> Tr. at 493 (Dr. \*\*\*).

<sup>448</sup> Tr. at 477-478 (Dr. \*\*\*).



to struggle when asked to interpret or use visual spatial information, such as maps or diagrams.<sup>449</sup> But Dr. \*\*\* said evaluation information most beneficial to teachers tends to be prescriptive rather than spread out.<sup>450</sup> Almost everything that is written in the FIE relates to accommodations or external factors, not to instructional strategies on how to interact with Student given Student's level of ability to process and retain information.<sup>451</sup>

## **2. Testimony and Report of \*\*\*, Licensed Speech-Pathologist**

Ms. \*\*\* is a Licensed Speech-Pathologist with a professional credential as an Assistive Technology Professional.<sup>452</sup> She has been a speech pathologist for 43 years and an assistive technology professional for 18 years. She conducts between 20 and 30 evaluations a year.<sup>453</sup> She testified on Petitioner's behalf as an expert witness.<sup>454</sup>

### **a. Speech Language Impressions and Recommendations**

According to Ms. \*\*\*'s November \*\*\*, 2015 report, overall, results from speech language evaluations have been reflected in the development of Student's speech language goals and objectives throughout the years, with Student's progress noted in the records reviewed by Ms. \*\*\*. She noted that new goals and objectives were developed each year that built upon the previously achieved goals and/or additional goals were added that met Student's language needs.<sup>455</sup>

An area of concern for Ms. \*\*\* is Student's standard score of \*\*\*, well below average, on the Pragmatic Judgment subtest. She said records indicated a speech IEP goal was written for Student to express Student's feelings during 2013-14, but there is no record that the goal was

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<sup>449</sup> Tr. at 465-467 (Dr. \*\*\*).

<sup>450</sup> Tr. at 469 (Dr. \*\*\*).

<sup>451</sup> Tr. at 473-474 (Dr. \*\*\*).

<sup>452</sup> Petitioner Ex. 152.

<sup>453</sup> Tr. at 497-498 (Ms. \*\*\*).

<sup>454</sup> Tr. at 499 (Ms. \*\*\*).

<sup>455</sup> Petitioner Ex. 154 at 1673.

mastered, and it was not included in the IEP for the 2014-15 school year. The September \*\*\*, 2015 informal assessment indicated Student demonstrated adequate ability to acknowledge and interpret nonverbal social cues. Ms. \*\*\* recommended that the District develop appropriate pragmatic language goals to meet Student's needs. She suggested considering an additional formal assessment measure in the area of pragmatics and/or error analysis of the Pragmatic Judgment subtest. This test would identify specific strengths and needs concerning interrupting feelings and explain potential and/or likely outcomes for social/linguistic events.<sup>456</sup>

**b. Assistive Technology Impressions and Recommendations**

Ms. \*\*\* noted that Student's most recent assistive technology evaluation, completed in 2012, was incomplete because it did not contain a trial plan.<sup>457</sup>

According to Ms. \*\*\*'s November 2015 report, an ARD committee report dated September \*\*\*, 2014, specified that Student \*\*\*. However, the ARD report indicates that during observations at school, Student was able to \*\*\* when Student did not \*\*\*.<sup>458</sup>

Regarding the use of \*\*\*, Ms. \*\*\* said the only reference in the records to Student's progress with \*\*\* was in the May \*\*\*, 2015 REED report, which stated that a \*\*\* assisted Student with \*\*\* of Student's \*\*\* work and the \*\*\*.<sup>459</sup>

Ms. \*\*\* stated in her report that the records reviewed did not give a clear account of developed assistive technology trial/investigation plans or results. She recommended that the District consider documenting all elements of an assistive technology trial/investigation plan to include start and end trial dates and specific classroom activities for a weekly trial. She said assigned staff should be responsible for determining if the assistive technology improves Student's

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<sup>456</sup> Petitioner Ex. 154 at 1673.

<sup>457</sup> Tr. at 500-501 (Ms. \*\*\*). The hearing officer notes that the appropriateness of the 2012 assistive technology evaluation is not at issue in this proceeding due to the imposition of the 1-year statute of limitations.

<sup>458</sup> Petitioner Ex. 154 at 1679.

<sup>459</sup> Petitioner Ex. 154 at 1679-1680.

quality or quantity of work. The District also should designate who will provide technical support and training to classroom staff and a timeline for support. Finally, the District should select a staff member to gather trial data information and write a summary by the trial end date to submit for review by the ARD committee.<sup>460</sup>

In her report, Ms. \*\*\* recommended that the District consider developing an AT Consideration Guide listing access to areas to include: writing, spelling, reading, math, study/organizational skills, listening, oral communication, seating/positing/mobility, daily living activities, recreation and leisure, and \*\*\* and \*\*\*. The document should be reviewed annually to ensure Student's access needs are met as Student's academic requirements evolve. Ms. \*\*\* suggested that because Student may learn better when given information verbally rather than in written form, the District should consider a trial/investigation for a text reader. Because Student enjoys \*\*\*, Ms. \*\*\* also recommended that the District consider an assistive technology trial/investigation to compare Student's access to word processing on a small screen versus a large screen for various activities.<sup>461</sup>

In her report, Ms. \*\*\* criticized the lack of specific documentation at various times in District records that led to Parents' concern as well as hindering Student's access to the curriculum. She opined that Student's lack of access to the curriculum might have resulted in Student's reduced ability to function and learn the curriculum at an optimum level according to Student's potential.<sup>462</sup>

### **3. Testimony of \*\*\*, OTR**

Ms. \*\*\* is a Registered Occupational Therapist with 12 years' experience and has been a school-based staff therapist with the \*\*\* Independent School District since 2002.<sup>463</sup> She has

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<sup>460</sup> Petitioner Ex. 154 at 1681.

<sup>461</sup> Petitioner Ex. 154 at 1682.

<sup>462</sup> Petitioner Ex. 154 at 1682.

<sup>463</sup> Tr. at 366-367 (Ms. \*\*\*); Petitioner Ex. 151.

conducted between 20 and 30 evaluations per year.<sup>464</sup> Ms. \*\*\* did not observe or meet Student.<sup>465</sup> Ms. \*\*\* testified as one of Petitioner's designated expert witnesses.<sup>466</sup>

Ms. \*\*\* said that of the two tests administered by Ms. \*\*\*, the Beery VMI, which is a visual motor test, was appropriate for Student.<sup>467</sup> But Ms. \*\*\* did not understand how Ms. \*\*\* obtained the results she did on the SFA, since the test is for children ages \*\*\* and Student was \*\*\* years old at the time of the evaluation.<sup>468</sup>

Regarding the 2014-15 IEP occupational therapy goals, Ms. \*\*\* was concerned with the lack of documented progress. For instance, regarding \*\*\*, progress notes for single occasions in November and December 2014, and again in February 2015, do not indicate progress toward mastery.<sup>469</sup> Overall the first progress report, dated September \*\*\*, 2014, showed "W," or working toward goals. Ms. \*\*\* conceded it was too early after implementation of the IEP for Student to have made much progress. The second progress report, dated April \*\*\*, 2015, states the goals and objectives but contains no notes from the occupational therapist, she said.<sup>470</sup> In addition, there is no documentation in the second progress report about how supplemental aids were used or if teachers were trained to use them.<sup>471</sup>

Regarding the 2015 FIE, Ms. \*\*\* did not think the occupational therapy evaluation was adequate to design a program for Student going forward. For instance, information contained in the SFA cannot be scored and information from the SFA related to Student's ability to use classroom materials, self-care, and fine motor skills, is not included in the evaluation report.<sup>472</sup>

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<sup>464</sup> Tr. at 368 (Ms. \*\*\*).

<sup>465</sup> Tr. at 381-382 (Ms. \*\*\*).

<sup>466</sup> Tr. at 369 (Ms. \*\*\*).

<sup>467</sup> Tr. at 369-370 (Ms. \*\*\*).

<sup>468</sup> Tr. at 370 (Ms. \*\*\*).

<sup>469</sup> Tr. at 370-373 (Ms. \*\*\*); Petitioner Ex. 155 at 1683; *see also* Tr. at 561, 1393 (Father).

<sup>470</sup> Tr. at 376 (Ms. \*\*\*).

<sup>471</sup> Tr. at 375 (Ms. \*\*\*).

<sup>472</sup> Tr. at 377 (Ms. \*\*\*).

She questioned the accuracy of at least one notation in the SFA. A handwritten note says “\*\*\* with moderate assistance.” Ms. \*\*\* explained that “moderate assistance” is at least 50 % physical assistance but what was reported was “occasional verbal cues.” By comparison, “partial performance” means Student is able to do part of the tasks independently; “inconsistent performance” means Student can sometimes, but not consistently, complete a task.<sup>473</sup>

In addition, Ms. \*\*\* reviewed Dr. \*\*\*’s October \*\*\*, 2014 letter to the District, which states that Student’s fine motor coordination and speed is in the “severely impaired range \*\*\*” [sic]. He also reports that visual motor integration is in the severely impaired range, at approximately the \*\*\*-year-old level and is significantly lower than Student’s borderline performance the previous year. Ms. \*\*\* noted that, although Dr. \*\*\*’s letter was reviewed as part of the FIE process, the District’ evaluation did not state Student is functioning at the \*\*\*-year-old level, leading Ms. \*\*\* to believe the District’s evaluation leaves out pertinent information.<sup>474</sup>

In her November \*\*\*, 2015 report based on a review of the District’s occupational therapy records for Student, Ms. \*\*\* described the difference between educational occupational therapy, in which goals and objectives are established to help the student successfully participate in Student’s education, and medical occupational therapy, which is based on physical impairment or medical need.<sup>475</sup> Ms. \*\*\* formulated recommendations after reviewing data and information reported from the District’s occupational therapist, Parents, an out-patient therapist, a neuropsychologist, and educational records including but not limited to ARD committee reports, treatment notices, progress notes, IEP goals/objectives, evaluation data/results, and reported functional abilities as they relate to activities of daily living.<sup>476</sup>

Ms. \*\*\* recommended that the District provide occupational therapy services to Student to address \*\*\*, fine motor skills, \*\*\*, and executive function deficits.<sup>477</sup> Ms. \*\*\*’s report stated

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<sup>473</sup> Tr. at 386-388 (Ms. \*\*\*).

<sup>474</sup> Tr. at 377-378 (Ms. \*\*\*).

<sup>475</sup> Petitioner Ex. 155 at 1684.

<sup>476</sup> Petitioner Ex. 155 at 1685.

<sup>477</sup> Petitioner Ex. 155 at 1685.

that the District's occupational therapist reported Student has achieved independence with the recommended functional tasks. However, Student's physician Dr. \*\*\* (in October 2014), the \*\*\* occupational therapist (in October 2015), and Parents, indicated Student has not achieved independence with the functional tasks and activities of daily living. Dr. \*\*\* reports "significant difficulty" with executive function skills including initiation, working memory, planning/organizational skills. Ms. \*\*\* notes that each of the aforementioned skills is necessary for Student to be successful in the educational environment.<sup>478</sup>

Ms. \*\*\* also recommended that the District provide \*\*\* assistance to Student to help Student establish \*\*\*.<sup>479</sup>

## **D. Testimony of the District's Witnesses**

### **1. Testimony of \*\*\***

Ms. \*\*\*, the District's Director of Special Education Services,<sup>480</sup> has provided support for the ARD committee process for Student since 2012.<sup>481</sup> Ms. \*\*\* testified that including specific instructional strategies in the 2015 FIE, as recommended by Dr. \*\*\*, is not necessary. She explained that the ARD committee considers the basic recommendations in the FIE to construct specific accommodations in the IEP that relate to the content area. Evaluators are not required to be extremely specific in recommending how teachers should provide modifications or

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<sup>478</sup> Tr. at 382-383 (Ms. \*\*\*); Petitioner Ex. 155 at 1685-1686.

<sup>479</sup> Petitioner Ex. 155 at 1686.

<sup>480</sup> Tr. at 1041 (Ms. \*\*\*); Ms. \*\*\*'s *curriculum vitae* is at Respondent Ex. 25.

<sup>481</sup> Tr. at 1043 (Ms. \*\*\*).

accommodations because the FIE covers a 3-year period<sup>482</sup> during which time a child's educational needs could change.

Ms. \*\*\* testified about Student's 2014-15 IEP. She said Student's \*\*\* IEP goals and objectives are based on the TEKS \*\*\* curriculum, which all Texas students are required to master at the 70 % level. For special education students, the District is required to produce IEP goals and objectives that are directly related to the TEKS curriculum, with additional supports. She explained that Student's condensed goals are specific to Student's disability.<sup>483</sup> Student's modified content focuses on four objectives for \*\*\* was accomplished through a modified curriculum. Student's progress on the IEP goals was measured through unit tests, teacher-made tests, work samples, and teacher reports and feedback.<sup>484</sup>

According to the September 2014 PLAAFP for \*\*\*, Student is able to participate in the curriculum, understands when to ask questions, and is able to answer questions regarding the curriculum when Student is given wait time and prompting. Student has difficulty retaining information. Ms. \*\*\* said Student's IEP English goals tie into the PLAAFP because if Student is struggling with retaining information, a supplemental aid is the appropriate support to provide for Student as it is a memory support.<sup>485</sup>

Ms. \*\*\* testified that Student's IEP goals for \*\*\* also are based on a modified curriculum, including modified tests and quizzes.<sup>486</sup>

## **2. Testimony of Dr. \*\*\***

Dr. \*\*\* was designated as an expert witness for the District based on her expertise in the evaluation of students with eligibility or potential eligibility for special education; the various

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<sup>482</sup> Tr. at 1170-1171 (Ms. \*\*\*).

<sup>483</sup> Tr. at 112-113 (Ms. \*\*\*).

<sup>484</sup> Tr. at 114 (Ms. \*\*\*).

<sup>485</sup> Tr. at 108-111 (Ms. \*\*\*).

<sup>486</sup> Tr. at 124 (Ms. \*\*\*).

instruments administered to Student by psychologists and neuropsychologists since 2008; and issues related to the cognitive, psychological, intellectual, functional and academic performance and abilities of Student. She evaluates anywhere from 30 to 60 students per year, including students with \*\*\* and she has received training in evaluating children with \*\*\*. Her testimony and expertise in IDEA requirements and the administration of FIEs and reevaluations was necessary for the District to defend the September 2015 FIE.<sup>487</sup>

The purpose of Dr. \*\*\*'s evaluation was to establish overall cognitive and achievement levels as requested by the ARD committee. All of Student's cognitive skills, as documented over the past few years, were reported to be well below average. Student, who has a global cognitive deficit, would be expected to have deficits in memory and executive functioning. Therefore, Dr. \*\*\* chose general measures in order to establish general levels of functioning.<sup>488</sup>

Dr. \*\*\* began her evaluation by reviewing Student's records,<sup>489</sup> including a report from Dr. \*\*\*, neuropsychologist, who said Student has an executive functioning impairment. Dr. \*\*\* explained that executive functioning is the part of the brain involved in managing other cognitive processes, such as memory and attention and self-regulation. She further stated that an executive functioning impairment could impact Student's participation in Student's academic programming by causing difficulty with planning, organizing ideas and materials, maintaining attention, and working toward long-term goals. Dr. \*\*\* also found Student to have language impairment. Dr. \*\*\* said Student's language appeared to be one of Student's stronger abilities, but that overall, Student's skills are below average.<sup>490</sup>

Dr. \*\*\* gave Student the KTEA-III, a norm-referenced test of academic skills and achievement, comparing students to other students their age.<sup>491</sup> Test results showed Student's academic achievement levels to be below average. Student's strongest skill is in basic reading,

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<sup>487</sup> Tr. at 164-166, 170-171 (Dr. \*\*\*). Dr. \*\*\*'s *curriculum vitae* is at Respondent Ex. 17.

<sup>488</sup> Tr. at 168, 180-184 (Dr. \*\*\*).

<sup>489</sup> Tr. at 171 (Dr. \*\*\*).

<sup>490</sup> Tr. at 176-178 (Dr. \*\*\*).

<sup>491</sup> Tr. at 234 (Dr. \*\*\*); Petitioner Ex. 14 at 163.



which is decoding words; but the score of \*\*\* is in the borderline range and the \*\*\* percentile is significantly below average (\*\*\*% of students Student's age perform better). Student's next highest score was math computation. Dr. \*\*\* observed Student was very good at using strategies and techniques, had obviously been taught rules to follow, and was very methodical in how Student tried to answer the questions, which helped Student out.<sup>492</sup> In writing, Student had a difficult time organizing Student's thoughts and ideas.<sup>493</sup>

Dr. \*\*\* acknowledged that the KTEA publisher would report a grade equivalency of Student's scores as being at the \*\*\* level. But Dr. \*\*\* would not use grade equivalency for planning Student's curriculum; she believes a better estimate of Student's grade level performance would come from classroom-based assessments. She testified that Student is not performing at the \*\*\* grade level, cannot be taught at that level without modifications, and without assistance, cannot move at the same pace as non-disabled students.<sup>494</sup>

Dr. \*\*\* also evaluated Student using the WISC-V, the new assessment for cognitive skills.<sup>495</sup> Dr. \*\*\* used subtests in five major areas of general intelligence to obtain a FSIQ score. The result was a FSIQ score of \*\*\* and a percentile rank of \*\*\*, which means Student is functioning cognitively, overall, within the lowest \*\*\*% of other children Student's age.<sup>496</sup> Because Dr. \*\*\* suspected Student is performing well below average, she did not use the starting point for children Student's age but used a starting point for younger children. She testified that doing so is best practice and is within the scope of the test. However, she could not allow Student to respond orally, because oral responses are outside the scope of the test.<sup>497</sup> That is, because the WISC-V is a standardized assessment, scores have validity based on the test being presented to everyone in the same way. Although Student could not respond orally, Student simply had to

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<sup>492</sup> Tr. at 235, 239 (Dr. \*\*\*).

<sup>493</sup> Tr. at 236 (Dr. \*\*\*).

<sup>494</sup> Tr. at 239-240 (Dr. \*\*\*).

<sup>495</sup> The WISC-V is a Wechsler measure, very similar to the Wechsler abbreviated scale of intelligence that was given to Student in neuropsychological evaluations conducted outside the District. Tr. at 169-170 (Dr. \*\*\*).

<sup>496</sup> Tr. at 253-255 (Dr. \*\*\*); Petitioner Ex. 14 at 160.

<sup>497</sup> Tr. at 272 (Dr. \*\*\*).

make slash marks for Student's answers; Dr. \*\*\* turned the test pages for Student so Student would not be slowed down. Similarly, because the test cannot be modified, Dr. \*\*\* could not allow Student to use a calculator for the math portion. Because other students do not use a calculator to take the test, allowing Student to use one would not result in an accurate assessment of Student's ability compared to other children Student's age.<sup>498</sup> Cognitive testing results and Dr. \*\*\*'s observations show that Student often has trouble understanding or conveying more complex information.<sup>499</sup> The WISC-V included assessment of Student's short-term memory. Dr. \*\*\* ascertained that Student needs re-teaching due to Student's memory issues.<sup>500</sup>

Although a memory test was not specifically requested by the May 2015 REED ARD committee, Dr. \*\*\* was interested in evaluating Student's visual memory impairment by using the NEPSY-II, a neuropsychological assessment tool.<sup>501</sup> After Student became frustrated, Dr. \*\*\* stopped the subtest and could not report accurate results. Dr. \*\*\* could not re-administer the subtests on another day without experiencing practice effects which would invalidate the tests. Had the May 2015 REED ARD committee specifically requested memory testing, Dr. \*\*\* would have made more of an effort to test Student's memory, she said.<sup>502</sup>

Dr. \*\*\* made a "general instructional recommendation" that Student "will learn information at a much slower rate compared to Student's general education peers." She recommended providing "new material and skills in a setting with a low teacher-to-student ratio where the pace of instruction can be modified to fit [Student's] needs."<sup>503</sup> She pointed out that in the general education setting, with the inclusion teacher, the teacher-to-student ratio is lowered in

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<sup>498</sup> Tr. at 273-274 (Dr. \*\*\*).

<sup>499</sup> Tr. at 260-261 (Dr. \*\*\*); Petitioner Ex. 14 at 161.

<sup>500</sup> Tr. at 184, 256 (Dr. \*\*\*).

<sup>501</sup> The District's Notice of Evaluation informed Parents of the areas to be assessed but not which assessment instruments would be used. Since memory is a cognitive skill, and Parents had consented to an assessment of Student's cognitive skills, Dr. \*\*\* did not obtain specific consent from Parents to conduct the NEPSY-II subtests. Tr. at 199-200, 203-204 (Dr. \*\*\*).

<sup>502</sup> Tr. at 180-184, 231-232 (Dr. \*\*\*)

<sup>503</sup> Tr. at 243 (Dr. \*\*\*); Petitioner Ex. 14 at 168.

the classroom.<sup>504</sup> Dr. \*\*\* has seen students with abilities similar to Student's be successful in placements ranging from inclusion settings, resource settings, and with life skills instruction. The best placement depends on where the student is able to succeed, she said.<sup>505</sup>

Dr. \*\*\* testified that a \*\*\* for Student was considered by the September 2015 ARD committee.<sup>506</sup> She said many of Student's strengths as recorded in the 2014 and 2015 \*\*\* are the same. The 2015 report states Student works well with others, participates in class, is able to memorize Student's \*\*\* and independently locate the classrooms. Both the 2014 and 2015 documents note that Student struggles with comprehension of information, has a difficult time learning new vocabulary, and needs more processing time. The 2015 report states that Student becomes frustrated when faced with difficult tasks and recommends that Student needs to become more proficient in \*\*\*, as Student wants \*\*\*. For instance, Student cannot \*\*\* or consistently \*\*\*, although Student understands the process. The report states that Student needs to learn appropriate coping strategies in dealing with frustrating situations and tasks. Student also needs to advocate for \*\*\*self in Student's classes in an appropriate manner to ensure Student receives Student's accommodations to prepare Student for working with Student's \*\*\*. These needs are addressed in the recommended math and counseling IEP goals, designed to prepare Student for \*\*\* in managing frustrations associated with school.<sup>507</sup>

Dr. \*\*\* recommends continuing to offer counseling goals to Student, who does not appear to have the problem-solving abilities to be able to work through frustrations and setbacks, even on a fairly simple level.<sup>508</sup> Teachers reported that, most of the time, Student is very hard working and attentive and pleasant but at times becomes frustrated, often because Student feels Student's accommodations are not being provided. They reported that Student had difficulty accepting their offered solutions.<sup>509</sup>

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<sup>504</sup> Tr. at 244 (Dr. \*\*\*).

<sup>505</sup> Tr. at 245 (Dr. \*\*\*).

<sup>506</sup> Tr. at 205 (Dr. \*\*\*).

<sup>507</sup> Tr. at 211-212, 221, 242-243 (Dr. \*\*\*); Respondent Ex. 4 at 1, 28-29.

<sup>508</sup> Tr. at 233 (Dr. \*\*\*).

<sup>509</sup> Tr. at 233-234 (Dr. \*\*\*).

Dr. \*\*\* was involved in developing Student's counseling goals and objectives for the 2015-16 IEP. She did not formally assess Student's social and emotional needs because a formal assessment was not requested by the May 2015 ARD committee. Instead, she used a combination of her own observations and information obtained during other formal assessments as well as Student's counseling evaluation from 2013. Dr. \*\*\* observed Student to work very hard during three of the four times Dr. \*\*\* met with Student for formal assessments. Dr. \*\*\* was impressed with Student's attention and effort. Dr. \*\*\* is concerned about helping Student improve Student's emotional functioning and coping skills.<sup>510</sup>

Dr. \*\*\* believes Student is improving although it is difficult to make a direct comparison between early assessments and current assessments, given the intervening onset of the \*\*\*. But based on the fact that Student's achievement, relative to other children Student's age, is actually higher than Student's related cognitive skills, Dr. \*\*\* believes Student is exhibiting some growth.<sup>511</sup>

### **3. Testimony of Ms. \*\*\*, Physical Therapist**

Ms. \*\*\* is a physical therapist and District employee who has worked with Student since 2012-13.<sup>512</sup>

An adaptive \*\*\* evaluation was not necessary because Student could participate in General TEKS. Therefore, to \*\*\*, Student \*\*\* in 2014-15.<sup>513</sup> Ms. \*\*\* did not recommend that Student participate in \*\*\* due to safety issues with \*\*\*.<sup>514</sup> But, Ms. \*\*\* testified, Student was able to meet TEKS for fitness. Although there are no TEKS for \*\*\*, Student's 2014-15 IEP goals for \*\*\* were based on the TEKS for fitness.<sup>515</sup>

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<sup>510</sup> Tr. at 228, 230-231 (Dr. \*\*\*); Respondent Ex. 4 at 37.

<sup>511</sup> Tr. at 246-247 (Dr. \*\*\*).

<sup>512</sup> Tr. at 356 (Ms. \*\*\*); Ms. \*\*\*'s *curriculum vitae* is at Respondent Ex. 30.

<sup>513</sup> Tr. at 360, 364 (Ms. \*\*\*).

<sup>514</sup> Tr. at 360 (Ms. \*\*\*); Petitioner Ex. 4 at 148.

<sup>515</sup> Tr. at 358-360 (Ms. \*\*\*).

Ms. \*\*\* initially provided physical therapy to Student in \*\*\* class on a daily basis, then three times per week, and finally once a week.<sup>516</sup> A paraprofessional attended the \*\*\* class with Student daily. The paraprofessional's role was to assist Student in \*\*\*, if Student needed assistance; and ensuring Student was able to continually follow the directions of the written \*\*\* program designed by Ms. \*\*\* and the occupational therapist. Other students in the \*\*\*. Student did not \*\*\*.<sup>517</sup>

#### 4. Testimony of \*\*\*, Occupational Therapist

Ms. \*\*\* holds a master's degree in occupational therapy. She has worked in school settings for about 15 of the 34 years she has been in practice.<sup>518</sup> Ms. \*\*\* worked directly with Student in 2014-15, and the beginning of 2015-16. Ms. \*\*\* now supervises Student's occupational therapy but does not provide it directly, due to an October 2015 conflict between the two of them.<sup>519</sup>

Following Student's 2012 \*\*\*, another District occupational therapist worked with Student to help Student transition from \*\*\* and to prepare Student to return to school full time. Ms. \*\*\* explained that in the medical setting, an occupational therapist's focus is on remediating a disability. But in the school setting, as mandated by the Texas Education Agency, the focus is on ensuring that a student has access to his or her academic curriculum.<sup>520</sup>

One role of the occupational therapist is to work with Student in the classroom, teaching the necessary skills or adapting materials for a specific project, then pulling back from disrupting

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<sup>516</sup> Tr. at 357 (Ms. \*\*\*).

<sup>517</sup> Tr. at 358 (Ms. \*\*\*).

<sup>518</sup> Tr. at 281-282 (Ms. \*\*\*); Ms. \*\*\*'s *curriculum vitae* is at Respondent Ex. 29.

<sup>519</sup> Tr. at 313-315, 317-318 (Ms. \*\*\*); Tr. at 555-560 (Father); Petitioner Ex. 158 at 1980.

<sup>520</sup> Tr. at 282-285 (Ms. \*\*\*).

Student's educational program. Ms. \*\*\* said she was not contacted by Parents or the \*\*\* teacher to assist Student with the 2014-15 \*\*\* project. Currently, Student uses \*\*\*. The \*\*\* to assist Student in \*\*\*, for instance, which is very difficult to do \*\*\*. Student has had a home exercise program the entire time that the District has served Student.<sup>521</sup>

Ms. \*\*\* testified that the District is exploring the possibility of providing Student with an adaptive tool to \*\*\*, which Student otherwise does using Student's \*\*\*. However, because the adaptive tool \*\*\*, it might not be allowed on the \*\*\* school campus.<sup>522</sup> Without adaptive tools, Student can \*\*\*, in addition to other school-related tasks.<sup>523</sup>

## VI. APPLICABLE LAW, ANALYSES, AND CONCLUSIONS

### A. The IDEA and Its Implementing Regulations

The IDEA, the Texas Education Code, and the rules promulgated by the Texas Commissioner of Education and the State Board of Education require the District to guarantee certain procedural and educational rights to parents of children with disabilities. Under the IDEA, and its implementing regulations, school districts in Texas must afford children with disabilities a [FAPE], which is defined as “special education and related services that: [a]re provided at public expense, under public supervision and direction, and without charge; [m]eet the standards of the [State educational agency] . . . ; [i]nclude an appropriate preschool, elementary school, or secondary school education in the State involved; and [a]re provided in conformity with the [IEP] that meets the requirements of [34 C.F.R.] §§ 300.320 through 300.324.”<sup>524</sup>

### B. Did the District deny Student a FAPE during any part of the applicable period?

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<sup>521</sup> Tr. at 347-349, 351, 966 (Ms. \*\*\*).

<sup>522</sup> Tr. at 292 (Ms. \*\*\*).

<sup>523</sup> Tr. at 967 (Ms. \*\*\*).

<sup>524</sup> 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

## 1. Applicable Law

The central issue raised by Petitioner is whether Student received a FAPE consistent with the IDEA. Specifically, Petitioner alleges that “at all relevant time periods, the District failed to devise and implement an appropriate IEP for Student in the LRE, resulting in denial of a FAPE and harm to Student, significantly impeding Student’s and Parents’ opportunity to participate in the decision-making process and/or causing a deprivation of educational benefits, based on specific facts of this case, going forward.”

The U.S. Supreme Court has ruled that a FAPE requires tailoring an education to the unique needs of the child with a disability by means of an IEP that meets a specific standard.<sup>525</sup> The Fifth Circuit has summarized the *Rowley* standard:

[An IEP] need not be the best possible one, nor one that will maximize the child’s educational potential; rather, it need only be an education that is specifically designed to meet the child’s unique needs, supported by services that will permit him ‘to benefit’ from the instruction. In other words, the IDEA guarantees only a ‘basic floor of opportunity’ for every disabled child, consisting of ‘specialized instruction and related services which are individually designed to provide educational benefit.’ Nevertheless, the educational benefit to which the Act refers and to which an IEP must be geared cannot be a mere modicum or *de minimis*; rather, an IEP must be ‘likely to produce progress, not regression or trivial educational advancement.’ In short, the educational benefit that an IEP is designed to achieve must be ‘meaningful.’ (internal citations omitted).<sup>526</sup>

The Fifth Circuit has set forth four factors that serve as an indication of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA. These factors are whether (1) the program is individualized on the basis of the student’s assessment and performance; (2) the program is administered in the LRE; (3) the services are provided in a

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<sup>525</sup> *Board of Edu. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 181; 102 S.Ct. 3034, 3038 (1982).

<sup>526</sup> *Bobby R.*, 200 F.3d at 347, citing to *Cypress-Fairbanks*, 118 F.3d at 247-48.

coordinated and collaborative manner by the key “stakeholders;” and (4) positive academic and nonacademic benefits are demonstrated.<sup>527</sup>

In determining whether there were demonstrable academic and nonacademic benefits from the IEP at issue, the Fifth Circuit determined that a disabled child’s development should be measured not by his relation to the rest of the class, but rather with respect to the individual student. Further, declining percentile scores do not necessarily represent a lack of educational benefit, but only a child’s inability to maintain the same level of academic progress achieved by his nondisabled peers. As with the argument in *Rowley* that an IEP must maximize a child’s potential, the argument that a child should not experience declining percentile scores may be an unrealistic goal and it is a goal not mandated by the IDEA.<sup>528</sup>

## **2. Petitioner’s Argument**

Petitioner alleges the District denied Student a FAPE by failing to address Student’s unique needs and failing to develop a realistic, much less appropriate, \*\*\* to prepare Student for \*\*\*.<sup>529</sup> Petitioner suggests that Student’s IEP must be evaluated prospectively as of the time it was created, based on holdings by the Second Circuit, Fourth Circuit, Sixth Circuit, Ninth Circuit, and Tenth Circuit; Petitioner acknowledges, however, that the Fifth Circuit has not ruled on this issue.<sup>530</sup>

## **3. District’s Argument**

The District contends that Student was provided a FAPE in accordance with existing Fifth Circuit requirements.<sup>531</sup> First, the District argues, Student’s IEP was individualized. The ARD committee developed Student’s 2014-15 IEP based upon the 2012 FIE, the 2013 counseling

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<sup>527</sup> *Bobby R.*, 200 F.3d at 347-348, citing to *Cypress-Fairbanks*, 118 F.3d at 253.

<sup>528</sup> *Bobby R.*, 200 F.3d. at 349 citing to *Cypress-Fairbanks*, 118 F.3d at 253.

<sup>529</sup> Petitioner’s Closing Brief at 1.

<sup>530</sup> Petitioner’s Closing Brief at 9-10.

<sup>531</sup> District’s Closing Argument at 12-19.



evaluation, as well as information from Student's treating physicians, teacher observations,<sup>532</sup> input from Parents, grades, and informal assessments by providers of related services.<sup>533</sup> The information was used to develop Student's PLAAFPs.<sup>534</sup> With that information, the ARD committee developed IEP goals and objectives to address Student's needs, and a number of accommodations were provided to ensure Student could make educational progress. IEP progress reports generated about every 6 weeks indicate Student made progress on and, by the end of the year, mastered Student's IEP goals. Student passed all of Student's \*\*\* classes.<sup>535</sup> In addition, Student's IEP proposed for 2015-16 is based upon the 2015 FIE results.<sup>536</sup> At the September 2015 and October 2015 ARD meetings, the committee discussed Student's individual needs at length, and also discussed at length whether any changes to accommodations, supports, goals, or services were required.<sup>537</sup>

Second, the District asserts that Student is being educated in the LRE, as mandated by the IDEA,<sup>538</sup> which creates a strong preference for educating children with disabilities in the general education setting.<sup>539</sup> The District points out that the IDEA does not require that a child with disabilities who is in a general education setting be able to learn at the same rate as classmates who do not have disabilities.<sup>540</sup> With appropriate accommodations and supports as set forth in Student's IEP, Student was able to receive all of Student's academic instruction in the general education setting in \*\*\* grade and, if the 2015-16 IEP is accepted by Parents, will receive all academic instruction except for \*\*\* in the general education setting.<sup>541</sup> As stated in the proposed

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<sup>532</sup> Tr. at 1084 (Ms. \*\*\*'s testimony).

<sup>533</sup> Tr. at 1063 (Ms. \*\*\*).

<sup>534</sup> Respondent Ex. 1 at 368-369.

<sup>535</sup> Respondent Ex. 1 at 475-500; Respondent Ex. 6 at 1247.

<sup>536</sup> Respondent Ex. 4.

<sup>537</sup> Respondent Ex. 4 at 51-60.

<sup>538</sup> *Rowley*, 458 U.S. at 202-203; 20 U.S.C. § 1412(5); 34 C.F.R. § 300.114(a)(2), 300.115(d) and (e).

<sup>539</sup> 20 U.S.C. § 1412(a)(5)(A); *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1039 (5th Cir. 1989).

<sup>540</sup> District's Closing Argument at 14-15; *Daniel R.R.*, 874 F.2d 1046-1047.

<sup>541</sup> Tr. at 661 (Ms. \*\*\*).

2015-16 IEP, Student's slow processing speed combined with writing challenges make education in a smaller setting with more individualized instruction in \*\*\* appropriate for the \*\*\*.<sup>542</sup>

Third, the District notes that Petitioner did not present evidence that the District failed to provide Student's services in a coordinated and collaborative manner by key stakeholders. Instead, the evidence shows the District has worked closely with Parents and has considered information from Student's outside medical providers in developing Student's IEP. In addition to holding a number of ARD committee meetings in which Parents fully participated, District staff has maintained constant communication with Parents outside the ARD meetings to work collaboratively and cooperatively on Student's progress.<sup>543</sup>

Last, the District contends that Student's grades, IEP progress reports, and testimony from teachers and Parents all demonstrate that Student received at least some academic and nonacademic benefits from specialized instruction in the District.<sup>544</sup>

#### **4. Analysis and Conclusion**

Petitioner did not prove that beginning on August \*\*\*, 2014, the District failed to devise and implement an appropriate IEP for Student.<sup>545</sup> The 2014-15 IEP was individualized on the basis of Student's assessments and performance.<sup>546</sup> Further, Student's 2014-15 academic instruction was in general education classrooms with inclusion teachers and accommodations and modifications that constituted the LRE for Student.<sup>547</sup> Teachers and staff provided Student's services in a coordinated and collaborative manner. In 2014-15, Parents fully participated in ARD

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<sup>542</sup> Respondent Ex. 4 at 58-59.

<sup>543</sup> Tr. at 874-875 (Ms. \*\*\*); Respondent Ex. 21.

<sup>544</sup> District's Closing Argument at 17-19; Respondent Ex. 21 at 103, 310; Respondent Ex. 23 at 8-11, 14-15, 17, 65; Tr. at 29, 34, 38-39, 42, 55, 59, 650, 666-667, 742, 772-774, 785, 866-876,

<sup>545</sup> See Sub-issue 1 and Sub-issue 2, *infra*.

<sup>546</sup> See Sub-issue 2, *infra*.

<sup>547</sup> Educating children with disabilities in an environment with non-disabled children is one of the express objectives of the IDEA. 20 U.S.C. § 1412(a)(5)(A). The LRE factor should be viewed in light of this express objective. *Rowley*, 458 U.S. at 181 n. 4.

committee meetings and were in frequent contact with District staff and Student's teachers, who were responsive to Parents' inquiries and requests. Student's 2014-15 IEP, as designed, afforded Student positive academic and nonacademic benefits. Student was not deprived of a meaningful educational benefit, as alleged. Student was not denied a FAPE.

However, Petitioner proved that the \*\*\* and assistive technology goals in the 2015-16 IEP are not sufficiently individualized based on Student's assessments and performance. The District has not formally evaluated Student's \*\*\*. And, as demonstrated by Ms. \*\*\*\*'s testimony and report, without an assistive technology evaluation, the District cannot adequately design assistive technology goals for Student. Therefore, the 2015-16 IEP is not designed to achieve a meaningful educational benefit for Student and, as such, Student is being denied a FAPE.

### **C. Petitioner's Sub-issues**

#### **1. Did the District fail to implement Student's IEP as written?**

##### **a. Applicable Law**

A party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. Failure to implement a material portion of the IEP amounts to denial of a FAPE.<sup>548</sup>

After an IEP is written and an appropriate placement determined, the local education agency is obligated to provide the student with special education and related services as listed in the IEP.<sup>549</sup> The local education agency must implement a student's IEP with all required components.<sup>550</sup>

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<sup>548</sup> *Bobby R.*, 200 F.3d. 348-349.

<sup>549</sup> 34 C.F.R. § 300.323(c).

<sup>550</sup> 34 C.F.R. § 300.323(c).

Each school district must ensure that each teacher who provides instruction to the student with disabilities has access to relevant sections of the student's current IEP; is informed of the teacher's specific responsibilities related to implementation of the IEP, such as goals and objectives, and of needed accommodations, modifications, and supports for the student; and has an opportunity to request assistance regarding implementation of the IEP.<sup>551</sup>

**b. Petitioner's Argument**

Petitioner argues that the District failed to implement Student's assistive technology services on a consistent basis. Student was supposed to \*\*\*\*\* assistance, but Student rarely used it because, \*\*\*, it was \*\*\* at school. Also, Student, Student's teachers, and Parents were not trained on how to \*\*\*. Petitioner concludes the District denied Student a FAPE by failing to implement the device in a way that Student could obtain meaningful educational benefit from using it.<sup>552</sup>

**c. District's Argument**

Regarding assistive technology, the District notes that Student, in accordance with Student's IEP, is allowed, but not required, to use Student's assistive technology device. Student voluntarily decided not to use Student's \*\*\*.<sup>553</sup> Three of Student's 2014-15 teachers all testified that Student did not use assistive technology in their classes, and it did not impede Student's access to or ability to complete assignments.<sup>554</sup> After Parents expressed concern at the May 2015 REED meeting about the implementation of Student's assistive technology accommodation, the ARD committee asked the occupational therapist to complete a plan for Student to use the device in

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<sup>551</sup> 19 Tex. Admin. Code § 89.1075(c).

<sup>552</sup> Petitioner's Closing Brief at 30-31, citing to Petitioner Ex. 21 at 263; Petitioner Ex. 36 at 390, 392; Petitioner Ex. 37 at 404, 413, 420; Tr. at 226-227, 564-565, 568, 582, 668, 746.

<sup>553</sup> Respondent Ex. 1 at 383-384; Respondent Ex. 23 at 14.

<sup>554</sup> Tr. at 668 (Ms. \*\*\*); Tr. at 746 (Ms. \*\*\*); Tr. at 880 (Ms. \*\*\*).

Student's classes. The occupational therapist presented the recommendations at the October \*\*\*, 2015 reconvened ARD committee meeting.<sup>555</sup>

The District argues that any failure to provide \*\*\* is *de minimis* and not a denial of a FAPE.<sup>556</sup> The District points out there were times in 2014-15 when Student declined \*\*\* and that Student has been able to successfully \*\*\*. In 2015-16, Student \*\*\* and is able to \*\*\* on campus as well as \*\*\* without assistance.<sup>557</sup> In fact, due to Student's progress in the area of \*\*\*, the September 2015 ARD committee recommended that provision of \*\*\* be discontinued.<sup>558</sup>

#### **d. Analysis and Conclusion**

To prevail on a claim that the District failed to implement Student's IEP, Petitioner must show that the lack of implementation amounted to a substantial or significant failure to provide services under the IEP.<sup>559</sup> Evidence of Student's amount of progress during \*\*\* grade and the beginning of \*\*\* grade is probative of whether failure to implement certain accommodations in Student's IEP constitutes denial of a FAPE.

It is undisputed that some of the accommodations in Student's 2014-15 IEP, which remained in effect at the beginning of 2015-16 due to the IDEA's "stay put" provision, were not always implemented. At least once, a teacher did not provide Student \*\*\*. Several times, \*\*\* Student to Student's \*\*\*. On a few occasions, teachers did not provide Student with oral administration of tests. Sometimes accommodations were offered but declined by Student; for instance, occasionally Student refused to \*\*\* and at least twice declined oral administration of tests. In addition, Student did not always \*\*\* provided to Student by the District because the device \*\*\*, and Student had not been fully trained on how to use it. The evidence shows the District provided Student, Parents, and Student's teachers with at least some training on \*\*\*. The

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<sup>555</sup> Respondent Ex. 1 at 454; Respondent Ex. 4 at 58-59.

<sup>556</sup> District's Closing Argument at 19-23.

<sup>557</sup> Tr. at 1023-1024, 1032 (Ms. \*\*\*).

<sup>558</sup> Respondent Ex. 4 at 57, 59.

<sup>559</sup> *Bobby R.*, at 348-349.

record is silent as to whether Student, Parents, or Student's teachers requested additional training. The record is also silent as to whether Student or Parents informed the District that Student was not using \*\*\*. Not using the assistive technology did not prevent Student from making educational progress; there is no evidence that Student would have made more progress if Student had consistently used \*\*\*.<sup>560</sup>

A preponderance of the evidence establishes that Student's IEP was substantially implemented during 2014-15 and at the beginning of 2015-16. Any lack of implementation of the IEP was due, in part, to the District's failure to fully follow through with Student's accommodations and modifications and, in part, to Student's refusal to accept the offered accommodations. Student achieved Student's 2014-15 IEP goals and passed all of Student's \*\*\* grade classes, \*\*\*, and advancing to the \*\*\* grade for 2015-16. As of November 2015, Student was passing all but two of Student's \*\*\* grade classes, due to missing assignments.<sup>561</sup> The conclusive evidence of Student's academic progress during \*\*\* grade establishes that an educational benefit was conferred under Student's IEP.

Petitioner did not prove that the District failed to implement substantial or significant provisions of the IEP. The way in which the District implemented Student's IEP did not deny Student a FAPE.<sup>562</sup>

## **2. Did the District fail to devise an appropriate IEP for Student?**

### **a. Applicable Law**

The U.S. Supreme Court has ruled that a FAPE requires tailoring an education to the unique needs of the child with a disability by means of an IEP that meets a specific standard.<sup>563</sup> As set

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<sup>560</sup> Tr. at 668 (Ms. \*\*\*); Tr. at 746 (Ms. \*\*\*); Tr. at 880 (Ms. \*\*\*).

<sup>561</sup> Tr. at 770-773 (Ms. \*\*\*).

<sup>562</sup> *Bobby R.*, at 348-349.

<sup>563</sup> *Rowley*, 458 U.S. at 181.

forth *supra*, the Fifth Circuit has summarized the *Rowley* standard and has established four factors to determine whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA.<sup>564</sup>

At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP.<sup>565</sup> The failure to have an IEP in effect at the beginning of the school year may result in a denial of a FAPE. However, this procedural error does not amount to a denial of a FAPE unless it impedes the child's right to a FAPE, impedes the parents' participation in the IEP process, or results in deprivation of educational benefits.<sup>566</sup> Educational harm does not necessarily result from a procedural error where a school district substantially implemented a student's IEP, the student's academic progress was more than trivial, and the student received a meaningful benefit in other academic areas.<sup>567</sup> In determining whether a student was deprived of educational benefits, the student's development should be measured with respect to the individual student and not the rest of his or her class.<sup>568</sup>

### *Definition of IEP*

The IEP must comply with the requirements of 34 C.F.R. §§ 300.320 and 300.324.<sup>569</sup> Generally, an IEP is a written statement for each child that is developed, reviewed, and revised in an ARD committee meeting that must include:<sup>570</sup>

- PLAAFPs stating how the child's disability affects the child's involvement and progress in the general education curriculum (*i.e.*, the same curriculum as for nondisabled children);<sup>571</sup>

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<sup>564</sup> *Bobby R.*, at 347-349, citing to *Cypress-Fairbanks*, 118 F.3d at 247-248, 253.

<sup>565</sup> 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a).

<sup>566</sup> 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. 300.513(a)(2); *Adam J. v. Keller I.S.D.*, 328 F.3d 804 (5th Cir. 2003).

<sup>567</sup> *Bobby R.*, 200 F.3 349-350.

<sup>568</sup> *Bobby R.*, 200 F.3d at 349.

<sup>569</sup> 19 Tex. Admin. Code § 89.1055(a).

<sup>570</sup> 34 C.F.R. § 300.320(a); 20 U.S.C. § 1414(d).

<sup>571</sup> 34 C.F.R. § 300.320(a)(1)(i).

- A statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other educational needs that result from the child's disability;<sup>572</sup>
- A description of how the child's progress toward meeting the annual goals will be measured; and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;<sup>573</sup>
- A statement of the special education and related services<sup>574</sup> and supplementary aids and services, based on peer-reviewed research<sup>575</sup> to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals; to be involved in and make progress in the general education curriculum and to participate in extracurricular and other nonacademic activities; and to be educated and participate with other children with disabilities and nondisabled children;<sup>576</sup>
- An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and extracurricular and other nonacademic activities;<sup>577</sup>
- A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments; and if the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why the child cannot participate in the regular assessment; and why the particular alternate assessment selected is appropriate for the child;<sup>578</sup>
- The projected date for the beginning of the services and modifications, and the anticipated frequency, location, and duration of those services and modifications;<sup>579</sup>

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<sup>572</sup> 34 C.F.R. § 300.320(a)(2)(i)(A)(B).

<sup>573</sup> 34 C.F.R. § 300.320(a)(3)(i)(ii).

<sup>574</sup> Related services are defined at 34 C.F.R. § 300.34(a).

<sup>575</sup> Peer-reviewed research is "research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published." 71 Fed. Reg. 46,664 (2006).

<sup>576</sup> 34 C.F.R. § 300.320(a)(4)(i)(ii)(iii).

<sup>577</sup> 34 C.F.R. § 300.320(a)(5).

<sup>578</sup> 34 C.F.R. § 300.320(a)(6).

<sup>579</sup> 34 C.F.R. § 300.320(a)(7).



- \*\*\*; and<sup>580</sup>
- No additional requirements. Nothing in this section shall be construed to require that additional information be included in a child's IEP beyond what is explicitly required in 20 U.S.C. § 1414 or for the IEP Team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.<sup>581</sup>

All members of the ARD committee must have the opportunity to participate in a collaborative manner in developing the IEP. A decision of the ARD committee concerning required elements of the IEP must be made by mutual agreement if possible.<sup>582</sup>

### *Development, Review, and Revision of IEP*

- Generally, in developing each child's IEP, the IEP Team must consider the strengths of the child; the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and functional needs of the child.<sup>583</sup>
- The IEP Team must consider whether the child needs assistive technology devices and services.<sup>584</sup>
- A regular education teacher of a child with a disability, as a member of the IEP Team, must, to the extent appropriate, participate in the development of the IEP of the child, including the determination of supplementary aids and services, program modifications, and support for school personnel.<sup>585</sup>
- Review and revision of IEPs. Generally, each public agency must ensure that the IEP Team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals and in the general education curriculum, if appropriate; the results of any reevaluation;

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<sup>580</sup> \*\*\*.

<sup>581</sup> 34 C.F.R. § 300.320(d); 20 U.S.C. § 1414(d)(1)(A)(VIII)(cc)(ii).

<sup>582</sup> 19 Tex. Admin. Code § 89.1050(g).

<sup>583</sup> 34 C.F.R. § 300.324(a)(1)(i-iv); 20 U.S.C. § 1414(d)(4)(B).

<sup>584</sup> 34 C.F.R. § 300.324(a)(2) (v).

<sup>585</sup> 34 C.F.R. § 300.324(a)(3)(ii).

information about the child provided to, or by, the parents; the child's anticipated needs; or other matters.<sup>586</sup>

**b. Petitioner's Argument**

Petitioner contends the District failed to develop an appropriate IEP, including a failure to appropriately evaluate Student, develop appropriate PLAAFPs, develop meaningful and measurable goals and objectives, report meaningfully on short-term goals and objectives, and \*\*\*. In addition, Petitioner contends the District violated numerous key procedural requirements that impeded Student's right to a FAPE and significantly impeded Parent's meaningful participation.<sup>587</sup>

Petitioner argues that the District did not comport with IDEA requirements when writing goals for Student, who cannot be taught at the \*\*\* grade level without modifications.<sup>588</sup> In particular, when writing IEP goals aligned with State standards, the ARD committee must consider how a child's disability impacts his or her ability to advance toward attaining the annual IEP goals. If a child is performing below grade level, the IEP goals should be ambitious but achievable, even if their attainment does not result in the child reaching grade level that year.<sup>589</sup> Also, Petitioner states that a goal such as "70 % mastery of grade-level TEKS" does not meet IDEA requirements for a measurable goal.<sup>590</sup> For instance, in Dr. \*\*\*'s opinion, Student's IEP should have broken out goals to separate the higher-level reasoning component from the lower-level reading component that still causes Student great difficulty.<sup>591</sup>

Petitioner states that the \*\*\* goal of Student \*\*\* was not individualized to Student's special needs, in that the goal is likely not attainable by Student. The goal was not based upon an

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<sup>586</sup> 34 C.F.R. § 300.324(a)(6)(b)(1); 19 Tex. Admin. Code § 89.1050(g).

<sup>587</sup> Petitioner's Closing Brief at 1-2.

<sup>588</sup> Petitioner's Closing Brief at 20, citing to Tr. at 182, 240; Petitioner Ex. 30 at 347; *see also* Petitioner's Closing Brief at 24-25, citing to Petitioner Ex. 30 at 347-348, and Tr. at 238, 421, 423, 639-641, 720-721, 760, 882-883.

<sup>589</sup> Petitioner's Closing Brief at 20, citing *Dear Colleague Letter*, 66 IDELR 227, 115 LRP 53903 (OSEP 2015).

<sup>590</sup> Petitioner's Closing Brief at 20, citing *Grading and Progress Monitoring for Students with Disabilities*, Texas Education Agency/Education Service Center, Region 20 (2015), at 25; Tr. at 251-252 (Dr. \*\*\*); Petitioner Ex. 37 at 405.

<sup>591</sup> Petitioner's Closing Brief at 25, citing to Tr. at 422.

appropriate \*\*\* assessment “related to \*\*\*,” as mandated by the IDEA.<sup>592</sup> As such, the \*\*\* in Student’s IEP denies Student a FAPE, Petitioner states.

Petitioner argues that the District’s failure to provide Student with appropriately intensive instruction in reading, writing, and math denied Student a FAPE.<sup>593</sup> With specialized instruction and support services, Student’s IEP could be designed to enable Student to make progress in the general education curriculum based on the State’s \*\*\* grade content standards, while still addressing needs based on Student’s PLAAFPs, Petitioner contends.<sup>594</sup>

Petitioner states that the 2014-15 IEP occupational therapy goal is incomplete because it states that Student will receive “45 minutes, 17 sessions” without indicating the frequency of the services, stating only that the services will be provided in the general education setting between September \*\*\*, 2014, and September \*\*\*, 2015. The incomplete goal denies Student a FAPE, Petitioner contends.<sup>595</sup>

Petitioner asserts that Student’s PLAAFPs are inappropriate in that they are conclusory and no information is provided under “State/District Required Assessment Results/Considerations.” The PLAAFPs contain no standardized test scores, no scores from criterion-referenced instruments, and no descriptions of Student’s actual academic skills. Rather, they contain brief subjective descriptions of Student’s class participation from Student’s \*\*\* grade teachers, who had only known Student for a few weeks by September 2014. Student’s FSIQ and its impact on Student’s educational performance are not included. The PLAAFPs fail to report on Student’s social, emotional, and behavioral skills. The PLAAFPs are completely inappropriate and deny Student a FAPE, according to Petitioner.<sup>596</sup>

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<sup>592</sup> Petitioner’s Closing Brief at 27, \*\*\*.

<sup>593</sup> Petitioner’s Closing Brief at 27-29.

<sup>594</sup> Petitioner’s Closing Brief at 28, citing to *Dear Colleague Letter*, 66 IDELR 227, 115 LRP 53903 (OSEP 2015).

<sup>595</sup> Petitioner’s Closing Brief at 30, citing to 34 C.F.R. § 300.320(a)(7). The notation “17 sessions” means 17 of 18 weeks per semester, so the service was to be provided weekly. Tr. at 920 (Ms. \*\*\*).

<sup>596</sup> Petitioner’s Closing Brief at 31-32, citing to Petitioner Ex. 37 at 398-400.

Petitioner argues that the District did not provide meaningful progress reports to Parents in 2014-15.<sup>597</sup> In particular, the final progress report, which states Student achieved all of Student's IEP goals and objectives, is completely misleading and thus significantly deprives Parents of meaningful participation in the IEP development process, by deceiving Parents as to Student's actual achievement.<sup>598</sup>

Petitioner concludes that Student's IEP establishes unrealistic requirements while failing to individualize Student's IEP goals by addressing Student's significant skill deficits in reading, writing, and math. Petitioner argues that the District did not provide documentation establishing that Student met Student's 2014-15 IEP goals or that Student achieved a meaningful benefit from the challenge of being held to the exact same academic standards as Student's nondisabled peers while receiving no specialized instruction to address Student's core deficits.<sup>599</sup>

### **c. District's Argument**

The District disagrees with Petitioner's contention that Student's IEP academic goals are inappropriate because they are aligned with the TEKS.<sup>600</sup> Under the IDEA, IEP academic goals must relate to a state's curriculum standards; the curriculum standards in Texas are the TEKS.<sup>601</sup> The Department of Education recently emphasized that it is essential that students with disabilities be exposed to the same standards of achievement as their nondisabled peers, but with modifications, accommodations, and supports as set forth in the students' IEPs.<sup>602</sup> The District argues that Student's IEP goals are directly aligned with the DOE's recommendations, and provide the LRE in the general education setting.

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<sup>597</sup> Petitioner's Closing Brief at 33-34.

<sup>598</sup> Petitioner Ex. 18 at 183-207; Petitioner Ex. 26 at 308, Petitioner Ex. 36 at 383; Petitioner Ex. 37 at 407; Tr. at 815, 819, 822-823, 888.

<sup>599</sup> Petitioner's Closing Brief at 25, citing to Tr. at 370-371 (Ms. \*\*\*).

<sup>600</sup> District's Closing Argument at 23-25; Tr. at 248 (Dr. \*\*\*).

<sup>601</sup> Tr. at 1112 (Ms. \*\*\*); "Individualized Education Plan (IEP) Goal Development, Question & Answer Document," by the Texas Education Agency and Statewide Progress in the General Curriculum Network, 11/17/2015; Question 2.2; Question 2.4.

<sup>602</sup> Fed. Reg. Vol. 80, No. 162, 50773-50784.

The District contends that it correctly addressed Student's \*\*\* services in the 2014-15 and 2015-16 IEPs.<sup>603</sup> Student's \*\*\* meets all required legal requirements, and appropriately takes into account Student's own interests and preferences.<sup>604</sup> Petitioner has failed to provide any evidence that Student's \*\*\* is inappropriate, or that any procedural deficiencies have risen to the level of a denial of a FAPE.

Regarding related services, the District disagrees with Petitioner's allegation that the District inappropriately proposed to reduce Student's occupational therapy support from direct services to consult services, and inappropriately recommended discontinuation of physical therapy services based upon results of the 2015 FIE.<sup>605</sup> The District states that under the IDEA, the District has a duty to provide related services which a student eligible for special education *needs* to access the educational curriculum (emphasis added in original).<sup>606</sup> Petitioner did not identify any *educational need* for Student to continue to receive direct occupational therapy or physical therapy services in order to receive a FAPE (emphasis added in original). Student's 2015 occupational therapy evaluation results, and 2014-15 IEP progress reports and therapy logs, indicate Student no longer has an educational need for direct occupational therapy services but instead will receive integrated occupational therapy services on a consultation basis.<sup>607</sup> Similarly, Student's demonstrated skills in the 2015 physical therapy evaluation and observations of Student at school show that physical therapy services are no longer needed in the educational setting.<sup>608</sup>

#### **d. Analysis and Conclusion**

The hearing officer finds the District failed to provide a FAPE in the \*\*\* and assistive technology areas in the 2015-16 IEP but all other alleged violations were de *minimis*. Petitioner did not prove that the District caused a deprivation of educational benefits by the procedural

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<sup>603</sup> District's Closing Argument at 25-27.

<sup>604</sup> Respondent Ex. 4 at 28-30.

<sup>605</sup> District's Closing Argument at 27-31; Respondent Ex. 2 at 582-583.

<sup>606</sup> *Student v. Houston ISD*, TEA Docket No. 183-SE-0406 (December 6, 2006); Respondent Ex. 13 at 1409.

<sup>607</sup> Respondent Ex. 2 at 580-582; Respondent Ex. 34.

<sup>608</sup> Respondent Ex. 1 at 38; Respondent Ex. 2 at 577-579, 603; Respondent Ex. 4 at 6; Respondent Ex. 23 at 2, 6, 11.

violation of a failure to have Student's IEP in place at the beginning of the school year in 2014-15 and 2015-16.<sup>609</sup> Petitioner did not provide sufficient evidence to controvert the District's contention that Student mastered Student's 2014-15 IEP goals, except for Father's assertion that Student has not mastered \*\*\*. Similarly, although Petitioner raised questions about Student's academic grades, the evidence presented was insufficient to overcome the District's evidence that Student passed all Student's classes in \*\*\* grade and is now an \*\*\* grader. Although the annual ARD committee did not consider development of Student's 2015-16 IEP until September \*\*\*, 2015, it was reasonable for the ARD committee to wait for the September \*\*\*, 2015 completion of the tri-annual FIE before developing a new IEP.

Moreover, Parents were active participants in each and every ARD committee meeting and their recommendations and requests were considered and often accepted by the committee. The 2014-15 and 2015-16 IEPs at issue were the result of collaborative efforts between Parents and the District. The hearing officer finds, therefore, that the District complied with the procedural requirements of the IDEA.

The 2014-15 IEP and, overall, the 2015-16 IEP, were reasonably calculated to provide Student a meaningful educational benefit, in accordance with the IDEA. However, the \*\*\* in the 2015-16 IEP is not based on a \*\*\* assessment, as required by \*\*\*. Given the testimony of Petitioner's expert witnesses and the District's expert witnesses that Student's \*\*\* is more than likely unrealistic, it is particularly critical that Student's \*\*\* be assessed and Student be provided with a \*\*\* that will help Student meet \*\*\* that comport with Student's abilities. The hearing officer finds that the District's failure to include a \*\*\* assessment in the 2015 FIE for use in developing the 2015-16 IEP is more than a *de minimis* procedural violation, and deprives Student of a FAPE.

Similarly, the 2015-16 IEP assistive technology goal does not adequately address Student's individual assistive technology needs. Ms. \*\*\* suggested that because Student may learn better when given information verbally rather than in written form, the District should consider a

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<sup>609</sup> 20 U.S.C. §§ 1414(d)(2)(A), 1415(f)(3)(E)(ii)(III); 34 C.F.R. §§ 300.323(a), 300.513(a)(2)(iii).

trial/investigation for a text reader. Ms. \*\*\* also recommended that because Student enjoys \*\*\*, the District consider an assistive technology trial/investigation to compare Student's \*\*\* for various activities. The hearing officer finds that a formal assistive technology evaluation would assist the District in determining exactly what assistive technology might aid Student's ability to function and learn the curriculum at an optimum level according to Student's potential. Without the evaluation, Student's 2015-16 assistive technology IEP goal was not adequately individualized and Student has been denied a FAPE as a result.

**3. Did the District fail to adequately evaluate all areas of suspected disability in accordance with the IDEA?**

**a. Applicable Law**

In conducting the FIE, the District was required to assess Student in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;<sup>610</sup>

**b. Petitioner's Argument**

Petitioner asserts the District should have conducted assistive technology, \*\*\*, and adaptive \*\*\* evaluations, and additional tests to assess Student's memory, as part of the 2015 FIE. As such, the hearing officer should award an IEE, Petitioner argues.<sup>611</sup>

**c. District's Argument**

The District states that Petitioner presented no evidence to support a failure to evaluate in all areas of suspected disability. Student's areas of suspected disability were discussed at the May \*\*\*, 2015 REED meeting, in which the ARD committee determined that additional assessment

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<sup>610</sup> 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4).

<sup>611</sup> Petitioner's Closing Brief at 13-19.

data was needed in the areas of cognitive and achievement testing, occupational therapy, physical therapy, and speech, but that further intellectual and/or related services testing was not warranted.

On September \*\*\*, 2015, Parents requested that assistive technology and \*\*\* evaluations be added to the FIE. At the ARD committee meeting that began on September \*\*\*, 2015, the District agreed to provide those evaluations. As of the November due process hearing, Parents had not provided consent. In addition, based on 2015 FIE results, the District requested an adaptive skills evaluation to determine whether the additional eligibility of ID should be added but Parents declined to provide consent.<sup>612</sup>

#### **d. Analysis and Conclusion**

In the First Amended Complaint, Petitioner states that Student was not evaluated in “all areas of suspected disability, including learning disabilities in math and reading.” But the FSIQ and achievement testing performed for the 2015 FIE relate specifically to math and reading achievement.<sup>613</sup> An assistive technology assessment does not evaluate an area of suspected disability; rather, the evaluation determines how assistive technology can benefit a child in his or her areas of disability. Therefore, although the hearing officer holds that an assistive technology evaluation should be conducted, such an evaluation does not relate to any failure by the District to assess Student in all areas of suspected disability. Similarly, a \*\*\* assessment assesses \*\*\*. Petitioner did not prove by a preponderance of the evidence that the District failed to adequately evaluate all areas of suspected disability in accordance with the IDEA.

#### **4. Did the District fail to conduct the annual ARD meeting in compliance with the timeline?**

##### **a. Applicable Law**

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<sup>612</sup> District’s Closing Argument at 31-32.

<sup>613</sup> See KTEA-III results, which measured Student’s letter and word recognition, decoding, reading comprehension, reading vocabulary, reading understanding, math computation, math fluency, math concepts and applications, and written expression. Respondent Ex. 2 at 591-592.



The IEP Team must review a child's IEP periodically, but not less frequently than annually to determine whether the child's annual goals are being achieved and to revise the IEP as appropriate.<sup>614</sup> To the extent possible, the district shall encourage consolidation of reevaluation meetings with other IEP Team meetings.<sup>615</sup>

School districts must conduct annual reviews in a timely manner regardless of whether an IEP is being challenged in a due process hearing. Although the IDEA's "stay put" provision precludes a district from changing a student's placement or services during the pendency of a FAPE dispute, it does not relieve the district of its duty to convene an ARD committee meeting not less than annually and to revise a child's IEP as needed.<sup>616</sup>

**b. Petitioner's Argument**

Petitioner's Closing Brief does not address this sub-issue.

**c. District's Argument**

The District argues that the September \*\*\*, 2015 ARD committee meeting was held after the annual deadline so that the 2015 FIE could be considered in developing Student's 2015-16 IEP. The District points out Parents agreed to attend the meeting on that date, and were full and active participants in the meeting, which was recessed and reconvened on October \*\*\*, 2015, and October \*\*\*, 2015. Moreover, since Petitioner filed a due process hearing request in August 2015, the IDEA's "stay put" provision was in effect, and no changes to the 2014-15 IEP could be

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<sup>614</sup> 20 U.S.C. 1414(d)(4); 34 C.F.R. § 324(b)(1)(i).

<sup>615</sup> 20 U.S.C. 1414(d)(3)(E); 34 C.F.R. § 324(a)(5).

<sup>616</sup> 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a).

implemented without agreement of the District and Petitioner.<sup>617</sup> Thus, the District concludes, the procedural impact of the slight delay was *de minimis* and did not amount to a denial of a FAPE.<sup>618</sup>

**d. Analysis and Conclusion**

Petitioner did not prove that the short delay in holding the annual ARD committee meeting deprived Student of a meaningful educational benefit and denied Student a FAPE. Petitioner proved that annual ARD meetings were conducted on September \*\*\*, 2013; September \*\*\*, 2014; and September \*\*\*, 2015. While the September 2014 annual ARD meeting was timely held, the September 2015 annual ARD meeting was held 8 school days past the annual deadline. However, it was reasonable for the District to await completion of the 2015 FIE, which was due on September \*\*\*, 2015, so that the FIE results could be considered in devising the 2015-16 IEP.

**5. Did the District fail to conduct the tri-annual FIE within the appropriate timeline?**

**a. Applicable Law**

After an initial FIE is conducted, reevaluations must occur at least once every 3 years.<sup>619</sup>

**b. Petitioner's Argument**

This sub-issue is not addressed in Petitioner's Closing Brief.

**c. District's Argument**

The District argues that the 2015 FIE was timely completed within 3 years of the 2012 FIE. To the extent that the allegation relates to the pending \*\*\* and assistive technology evaluations,

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<sup>617</sup> Tr. at 1201 (Ms. \*\*\*); 34 C.F.R. § 300.518(a).

<sup>618</sup> 20 U.S.C. § 1415(f)(3)(E)(ii); *see also Adam J.*, 328 F.3d 804.

<sup>619</sup> 34 C.F.R. § 300.303(b)(2).

the District argues that those tests were not originally included in the scope of the FIE so failure to complete them within the FIE timeframe does not render the FIE untimely.<sup>620</sup>

**d. Analysis and Conclusion**

The uncontroverted evidence is that the District conducted an FIE in 2011, when Student first enrolled in the District; completed an FIE on September \*\*\*, 2012, following Student's \*\*\*; and timely completed an FIE on September \*\*\*, 2015. The District conducted the tri-annual FIE within the appropriate timeline.<sup>621</sup> Petitioner did not prevail on this sub-issue.

**6. Did the District fail to provide appropriate assessments, including cognitive assessments, and related services in the areas of academic instruction, occupational therapy, physical therapy, and assistive technology?**

**a. Applicable Law**

To the extent that this sub-issue relates to Parents' September \*\*\*, 2015 request that assistive technology and \*\*\* evaluations be conducted for the 2015 FIE, the District had 15 days to respond to the request. Specifically, when a parent submits a written request for an FIE to the appropriate district personnel, the district must, within 15 days of the request, notify the parent of its proposal or refusal to conduct the requested evaluation.<sup>622</sup> To the extent that this sub-issue relates to the appropriateness of the 2015 FIE, additional law related to providing appropriate assessments is set out in the section regarding the law applicable to the District's counterclaim, *infra*.

**b. Petitioner's Argument**

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<sup>620</sup> District's Closing Argument at 33-34.

<sup>621</sup> 34 C.F.R. § 300.303.

<sup>622</sup> 19 Tex. Admin. Code § 89.1011(b).

Petitioner contends that Student should be evaluated for adapted \*\*\*.<sup>623</sup> Petitioner argues that because Student cannot participate in regular \*\*\* due to Student's disability, the District must perform an adapted \*\*\* evaluation. The District's refusal to do so denies Student a FAPE.

**c. District's Argument**

The District disagrees with the contention of Petitioner's expert, Dr. \*\*\*, that the FIE is incomplete because additional memory assessments were not conducted after Student expressed frustration with the NEPSY-II memory subtests. Dr. \*\*\* explained that memory testing was not specifically requested by the May 2015 ARD committee that considered REED; information regarding Student's memory skills was obtained through the WISC-V; existing evaluations showed Student's memory skills had not changed significantly over the past few years; and Student's 2014-15 IEP already contained modifications and supports related to slow processing speeds and memory.<sup>624</sup> At the September \*\*\*, 2015 annual ARD meeting, Dr. \*\*\* recommended additional testing in the area of adaptive functioning. Parents had not, as of November 2015, provided consent for the testing to occur.<sup>625</sup>

The District also disagrees with Dr. \*\*\*'s assertion that the FIE should have contained specific programmatic recommendations tailored to each subject area. Ms. \*\*\* testified that the typical process is for the ARD committee to review the evaluation recommendations then rely on each teacher's expertise to determine what accommodations would be appropriate for each class, based on the recommendations. Broad recommendations allow the ARD committee to consider them each year within the 3-year FIE term to update and revise accommodations based on a student's access to different content or a new curriculum at a different level.<sup>626</sup>

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<sup>623</sup> Petitioner's Closing Brief at 34-35, citing to 34 C.F.R. § 300.39(a)(1)(ii), (b)(2) and Tr. at 1082 (Ms. \*\*\*).

<sup>624</sup> Tr. at 184, 203 (Dr. \*\*\*).

<sup>625</sup> Tr. at 188 (Dr. \*\*\*); Respondent Ex. 4 at 54.

<sup>626</sup> Tr. at 1169, 1171 (Ms. \*\*\*).

The District argues that Petitioner's expert Ms. \*\*\*'s criticism of the SFA is unfounded. Ms. \*\*\* testified that the SFA is normed for students from \*\*\* through \*\*\*. However, Ms. \*\*\* explained that the purpose of the SFA was to provide additional information about Student's school functioning, and there is no similar test for \*\*\* students. Ms. \*\*\* did not testify that similar testing is available, that the SFA was improperly administered, or that the SFA did not provide accurate data related to Student's functioning at school.<sup>627</sup>

#### **d. Analysis and Conclusion**

The evidence shows the District conducted all assessments requested by the ARD committee at the May \*\*\*, 2015 REED meeting. However, because Student is \*\*\*, a \*\*\* assessment should have been conducted before Student's 2015-16 IEP was devised.<sup>628</sup>

Petitioner proved that the District should conduct an assistive technology evaluation. The evidence shows Student does not \*\*\* provided by the District because \*\*\*, and Student does not feel that Student, Parents, or Student's teachers are properly trained on the device. Given that the last assistive technology assessment was completed in 2012, and the evidence shows that Student's abilities have changed since then, it would be appropriate to conduct a new evaluation to discover how best to use assistive technology to accommodate Student's memory issues, and reading and writing challenges. The evidence indicates Student proficiently uses Student's \*\*\* in class, which demonstrates Student could benefit from being provided an assistive technology device or devices that Student would be comfortable using.

Petitioner did not prove that the District should have conducted an adapted \*\*\* assessment. There is no evidence that Parents or anyone else requested an adapted \*\*\* evaluation, or that such a request was refused by the District. In addition, the evidence shows an adapted \*\*\* evaluation is not appropriate for Student. First, Student has already \*\*\*. Second, Student participated in \*\*\* with a modified curriculum that met TEKS fitness standards and Student mastered Student's goals

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<sup>627</sup> Tr. at 302, 307 (Ms. \*\*\*), Respondent Ex. 22 at 4.

<sup>628</sup> The appropriateness of the 2015 FIE is addressed below, in the section regarding the District's counterclaim.

for the class. Third, adapted \*\*\* is provided to children who cannot participate in any physical activities, who might, for instance, be confined to a hospital bed.<sup>629</sup> Student's physical activity was restricted by Student's physician but Student was able to participate in \*\*\* through IEP goals and objectives overseen by Ms. \*\*\* and Ms. \*\*\*.<sup>630</sup>

Accordingly, the hearing officer finds Student was appropriately and adequately evaluated pursuant to the IDEA except that \*\*\* and assistive technology evaluations also should have been conducted. Petitioner prevails on this sub-issue.

**7. Did the District fail to consider all relevant information during the ARD committee meetings?**

**a. Applicable Law**

Petitioner did not identify what relevant information is at issue or what law applies to this sub-issue.

**b. Petitioner's Closing Brief**

This sub-issue is not addressed in Petitioner's Closing Brief.

**c. District's Closing Argument**

The District argues that Petitioner did not introduce any evidence that the District failed to consider all relevant information at ARD committee meetings. Parents were full and active participants at all ARD committee meetings and have been in agreement with all ARD committee decisions during the time relevant to this proceeding, with the exception of the ARD meetings held beginning on September \*\*\*, 2015, after Petitioner filed the Complaint.<sup>631</sup>

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<sup>629</sup> Tr. at 1083 (Ms. \*\*\*).

<sup>630</sup> Tr. at 1082 (Ms. \*\*\*).

<sup>631</sup> District's Closing Argument at 37.

**d. Analysis and Conclusion**

Petitioner did not identify in the Complaint, the First Amended Complaint, at hearing, or in Petitioner's Closing Brief what relevant information the ARD committee failed to consider. Without that information, the hearing officer cannot find that Petitioner prevailed on this sub-issue.

**8. Did the District fail to comply with Student's and Parents' procedural rights by failing to have all required and/or necessary members present during ARD committee meetings?**

**a. Applicable Law**

In Texas, the ARD committee is the IEP team defined in federal law and regulations.<sup>632</sup> As relevant to this proceeding, the ARD committee must include the parents of the student; not less than one regular education teacher of the student; not less than one special education teacher of the student; a school district representative who is qualified to provide, or supervise the provision of, special designed instruction to meet the unique needs of students with disabilities, is knowledgeable about the general education curriculum, and is knowledgeable about the availability of district resources; an individual who can interpret the instructional implications of evaluation results; at the discretion of the parent or district, other individuals who have knowledge or special expertise regarding the student, including related services personnel, as appropriate; [and] whenever appropriate, the student.<sup>633</sup>

The IDEA does not expressly require that related service providers be members of a child's IEP team. However, some mandatory members of the IEP team may include providers of related services.<sup>634</sup> As relevant to this proceeding, counseling is a related service.<sup>635</sup>

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<sup>632</sup> 19 Tex. Admin. Code § 89.1050(a); 34 C.F.R. § 300.321.

<sup>633</sup> 19 Tex. Admin. Code § 89.1050(c)(1); *see also* 34 C.F.R. § 300.321(a)(6).

<sup>634</sup> 34 C.F.R. § 300.321(a)(3).

<sup>635</sup> 34 C.F.R. § 300.34(a).

**b. Petitioner's Argument**

Petitioner's Closing Brief does not address this sub-issue.

**c. District's Argument**

Petitioner failed to present any evidence to support this allegation.<sup>636</sup> Petitioner's sole argument during the hearing was that \*\*\* were not present for the September 2014 annual ARD committee meeting, \*\*\*. But Petitioner presented no evidence that Parents requested the presence of \*\*\*.<sup>637</sup> Petitioner provided no evidence as to how failure to invite outside agency representative(s) to any of the ARD committee meetings at issue caused a deprivation of educational benefits.

**d. Analysis and Conclusion**

In reviewing the ARD committee reports related to the accrual period in this proceeding, the hearing officer found only one reference to the possibility that a required ARD committee member was not in attendance. At the September \*\*\*, 2014 annual ARD committee meeting, Father stated that had the counselor been present at a previous meeting, which was held before the accrual period, Parents might have made a different decision regarding Student's \*\*\* class. But a counselor is a provider of a related service and is not ordinarily a mandatory member of the ARD committee. Thus, even if the counselor had not attended a meeting during the accrual period, her absence would not necessarily have constituted a violation of Parents' and Student's procedural rights. Otherwise, the evidence supports a finding that all required members of the ARD committee were present at meetings held during the accrual period, in accordance with 34 C.F.R. § 300.321(a)(3). Petitioner did not prevail on this sub-issue.

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<sup>636</sup> District's Closing Argument at 37-38.

<sup>637</sup> \*\*\*.



**C. Was the 2015 FIE appropriate?****1. Applicable Law**

Each public agency must conduct an FIE, in accordance with 34 C.F.R. §§ 300.304 through 300.306, before the initial provision of special education and related services to a child with a disability under the IDEA provisions.<sup>638</sup> A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with 34 C.F.R. §§ 300.304 through 300.311 if the public agency determines that the educational needs or needs for related services, including improved academic achievement and functional performance, of the child warrant a reevaluation.<sup>639</sup> Reevaluations must occur at least once every 3 years.<sup>640</sup>

Parents of Student have the right to obtain, at public expense, an IEE conducted by a qualified examiner who is not employed by the District if Parents disagree with the District's FIE.<sup>641</sup> "Public expense" means that the District either pays for the full cost of the IEE or otherwise ensures that the IEE is provided at no cost to Parents.<sup>642</sup> If the District, as in this case, files a counterclaim to show that the FIE is appropriate, and the hearing officer decides in the District's favor, Parents still have the right to an IEE, but not at public expense.<sup>643</sup> However, a parent is entitled to only one IEE at public expense each time a public agency conducts an evaluation with which the parent disagrees.<sup>644</sup> Therefore, the District must have the opportunity to conduct Parents' requested \*\*\* and assistive technology evaluations before \*\*\* and assistive technology IEEs can be provided at public expense.

As applicable to Student's FIE, the District was required to:

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<sup>638</sup> 20 U.S.C. § 1414(a); 34 C.F.R. § 300.301.

<sup>639</sup> 20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303.

<sup>640</sup> 34 C.F.R. § 300.303(b)(2).

<sup>641</sup> 34 C.F.R. § 300.502(a)-(b).

<sup>642</sup> 34 C.F.R. § 300.502(a)(3)(ii).

<sup>643</sup> 34 C.F.R. § 300.502(b)(2)-(3).

<sup>644</sup> 34 C.F.R. § 300.502(b)(5).

- Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about Student, including information provided by Parents, in determining the content of Student's IEP;<sup>645</sup>
- Not use any single measure or assessment as the sole criterion for determining an appropriate educational program for Student;<sup>646</sup>
- Provide or administer assessments and other evaluation materials in a mode of communication and in the form most likely to yield accurate information on what Student knows and can do academically, developmentally, and functionally;<sup>647</sup>
- Provide or administer assessments and other evaluation materials by trained and knowledgeable personnel;<sup>648</sup>
- Provide or administer assessments and other evaluation materials in accordance with any instructions provided by the producer of the assessments;<sup>649</sup>
- Select and administer assessments so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure);<sup>650</sup>
- Assess Student in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;<sup>651</sup>
- Coordinate Student's assessments with Student's prior school;<sup>652</sup>

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<sup>645</sup> 20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).

<sup>646</sup> 20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2).

<sup>647</sup> 20 U.S.C. § 1414(b)(3)(A)(ii); 34 C.F.R. § 300.304(c)(1)(ii).

<sup>648</sup> 20 U.S.C. § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.304(c)(1)(iv).

<sup>649</sup> 20 U.S.C. § 1414(b)(3)(A)(v); 34 C.F.R. § 300.304(c)(1)(v).

<sup>650</sup> 20 U.S.C. § 1414(b)(3)(A)(ii); 34 C.F.R. § 300.304(c)(3).

<sup>651</sup> 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4).

<sup>652</sup> 20 U.S.C. § 1414(b)(3)(D); 34 C.F.R. § 300.304(c)(5).

- Conduct an evaluation that is sufficiently comprehensive to identify all of Student's special education and related service needs, whether or not commonly linked to the disability category in which Student has been classified;<sup>653</sup>
- Use assessment tools and strategies that provide relevant information that directly assists persons in determining that the educational needs of Student are provided;<sup>654</sup>
- Review existing evaluation data, including evaluations and information provided by Parents; current classroom-based, local, or State assessments, and classroom observations; and observations by teachers and providers of related services;<sup>655</sup> and
- Ensure that Student is observed in Student's learning environment (including the regular classroom setting) to document Student's academic performance and behavior in the areas of difficulty by at least one qualified professional.<sup>656</sup>

## **2. District's Position**

The District contends that the FIE complies with all IDEA requirements. Specifically, Student was evaluated by a qualified multidisciplinary team that used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. The District further argues that the FIE provided the information necessary to develop Student's educational program, assessed Student in all areas of suspected disability, and was sufficiently comprehensive to identify all of Student's educational needs and needs for related services. The District points out that Petitioner's expert witnesses Dr. \*\*\* and Ms. \*\*\* were not able to identify any assessments that were not conducted in accordance with IDEA standards.<sup>657</sup>

## **3. Petitioner's Position**

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<sup>653</sup> 34 C.F.R. § 300.304(c)(6).

<sup>654</sup> 20 U.S.C. § 1414(b)(3)(C); 34 C.F.R. § 300.304(c)(7).

<sup>655</sup> 20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. § 300.305(a)(1).

<sup>656</sup> 34 C.F.R. § 300.310.

<sup>657</sup> District's Closing Argument at 39-43.

Petitioner contends that the FIE did not meet standards and failed to identify all of Student's special education needs and needs for related services. Petitioner argues that the District failed to evaluate Student in numerous areas, including \*\*\* needs, adaptive behavior, sensory needs, assistive technology, sign language, parent training, in-home training, and applied behavioral analysis.<sup>658</sup>

Petitioner specifically disagrees with the following aspects of the FIE:

- **FIE should have included assistive technology and \*\*\* evaluations.** Petitioner contends that, given Student's changes since Student's \*\*\*, an updated assistive technology evaluation is critical for determining what assistive technology will be of most benefit to Student. Also, a \*\*\* evaluation should have been conducted to determine \*\*\*; failure to conduct the assessment \*\*\* is a procedural violation \*\*\*. Petitioner argues that the District could have honored Parents' September \*\*\*, 2015 request that assistive technology and \*\*\* evaluations be included in the 2015 FIE because the September \*\*\*, 2015 FIE deadline could have been extended pursuant to Tex. Educ. Code § 29.0041.<sup>659</sup>
  - **FIE incomplete and lacking detail and specificity for Student's educational program.** Petitioner argues that, after a first failed attempt, Dr. \*\*\* should have pursued evaluating Student's memory deficits to assess their impact on Student's learning, which is critical to developing the IEP.<sup>660</sup>
  - **FIE lacks specific information for instructional strategies.** The FIE seemed more focused on determining Student's eligibility for services than on determining the appropriate curriculum and modifications for Student.<sup>661</sup>
- 4. Analysis and Conclusion**

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<sup>658</sup> Petitioner's Closing Brief at 13-19. The hearing officer declines to consider Petitioner's argument about inadequacies in the 2012 assistive technology evaluation because the evaluation occurred before August \*\*\*, 2014, outside the 1-year statute of limitations.

<sup>659</sup> Petitioner's Closing Brief at 16, 18-19. The hearing officer notes that Tex. Educ. Code § 29.0041 applies only to certain psychological examinations or tests and does not apply to Petitioner's argument. Instead, the timeline for responding to a parent's request for an FIE is set out in Tex. Educ. Code § 29.004, giving a school district 15 school days to respond to a request, which the District did on September \*\*\*, 2015, and again at the annual ARD committee meeting that began on September \*\*\*, 2015.

<sup>660</sup> Petitioner's Closing Brief at 16-17.

<sup>661</sup> Petitioner's Closing Brief at 17.

The District did not prove that the FIE is comprehensive enough to be appropriate. The individual evaluations that were conducted as part of the 2015 FIE meet all IDEA requirements and are appropriate. But assistive technology and \*\*\* evaluations should have been conducted and were not.

Each multidisciplinary team member except for Ms. \*\*\*, who conducted the speech/language assessment, testified at the due process hearing, establishing that the IDEA requirements for conducting the individual evaluations were met. That is, the evaluations were conducted in compliance with 34 C.F.R. §§ 300.502(b)(2)-(3), 300.301, and 300.303 through 300.311.

Specifically, as set out in the Findings of Fact, the multidisciplinary team members are trained and knowledgeable. The evaluations were based on a variety of assessment tools, including information provided by Student's teachers and medical providers; observations of Student in Student's learning environment; and a review of Student's educational records and all previous evaluations by Student's prior schools and private evaluators that were provided to the District. Further, tests were administered to Student in accordance with their respective instruction manuals and in a mode most likely to yield accurate information about Student.

Dr. \*\*\*'s contention that Dr. \*\*\* should have made a second attempt to test Student's memory was rebutted by Dr. \*\*\*'s explanation that a memory test was not specifically requested by the ARD committee to be part of the FIE; that other tests in the psychological evaluation measured Student's memory; and that she could not re-administer the NEPSY-II subtests on another day without experiencing practice effects which would invalidate the tests. Also, Dr. \*\*\*'s explanation of why specific instructional strategies are not included in the FIE, as recommended by Dr. \*\*\*, persuades the hearing officer that the FIE is not lacking in that respect.

Similarly, the hearing officer is persuaded that Ms. \*\*\*'s use of the SFA was reasonably calculated to measure Student's ability to function at school and was, therefore, an appropriate test to administer in spite of Ms. \*\*\*'s concerns about the age appropriateness of the assessment.

However, a \*\*\* evaluation should have been conducted before the September 2015 annual ARD committee meeting so results could be considered by the ARD committee in developing Student's \*\*\*. And, in light of \*\*\* 2012 assistive technology evaluation, an updated assistive technology evaluation could provide critical information to the ARD committee for selecting assistive technology that would assist Student in reading, writing, and math.

The hearing officer finds that the District must conduct the \*\*\* and assistive technology evaluations. However, Petitioner's request for an IEE as to any of the evaluations that were conducted as part of the FIE is denied; that is, the evaluations that were conducted are appropriate. The District has not yet conducted the assistive technology and \*\*\* evaluations and must be afforded an opportunity to do so before Parents can request an IEE at public expense for either of those evaluations.<sup>662</sup>

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

Petitioner proved its main issue that the District deprived Student of a FAPE by failing to base Student's \*\*\* in the 2015-16 IEP on a \*\*\* assessment and Student's assistive technology services on an updated assistive technology evaluation. Petitioner also prevailed on sub-issues 2 and 6.

Regarding the evaluations that were conducted as part of the 2015 FIE, the District complied with procedures set forth at 34 C.F.R. §§ 300.301, 300.303 through 300.311. However, \*\*\* and assistive technology evaluations should have been part of the 2015 FIE. The District must conduct those evaluations before Parents may request assistive technology or \*\*\* IEEs at public expense.

### **VII. CONCLUSIONS OF LAW**

1. The District is a local educational agency responsible for complying with the IDEA as a condition of the State of Texas's receipt of federal education funding, and the District is

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<sup>662</sup> 34 C.F.R. § 300.502(b)(5).

required to provide each disabled child in its jurisdiction with a FAPE, pursuant to the IDEA, 20 U.S.C. § 1400 *et seq.*

2. Parents of students with disabilities are entitled to file a due process complaint and have a hearing on any matter relating to the identification, evaluation, or educational placement of the student, or the provision of a FAPE to the student. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.507-300.513.
3. Petitioner bears the burden of proof on all issues raised in the proceeding, except for the District's counterclaim. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).
4. The District bears the burden of proof on all issues raised in its counterclaim regarding the appropriateness of the 2015 FIE. 34 C.F.R. § 300.502(b)(1),(b) (2)(i), (b)(3).
5. The District proved that the 1-year statute of limitations should apply to this proceeding. 19 Tex. Admin. Code § 89.1151(c).
6. In September 2012, the District correctly determined that Student is a child with one or more of the IDEA enumerated disabilities who, by reason thereof, is eligible for special education and related services, which Student receives as a child with OHI and SI. 34 C.F.R. § 300.8(a)(1); 19 Tex. Admin. Code § 89.1040(a), (c)(8)(10).
7. Student is eligible to receive special education services from the District until Student's 22nd birthday. 19 Tex. Admin. Code § 89.1035.

***Petitioner's Main Issue: Student is being denied a FAPE***

8. The District provided Student with a FAPE in 2014-2015. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; *Board of Edu. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 181; 102 S.Ct. 3034, 3038 (1982); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347-348 (5th Cir. 2000).
9. Student's placement meets the LRE requirements of the IDEA. 20 U.S.C. § 1412(5); 34 C.F.R. §§ 300.114, 300.116; *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1039, 1046-1047 (5th Cir. 1989).
10. Student is being denied a FAPE in 2015-16 because the 2015-16 IEP is not adequately tailored to Student's unique educational needs. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; *Rowley*, 458 U.S. at 181; *Bobby R.*, 200 F.3d at 347-348.

***Sub-issue 1: Implementation of Student's 2014-15 IEP***

11. The District provided Student's teachers with information about Student's 2014-15 IEP in accordance with the requirements of 19 Tex. Admin. Code § 89.1075(c).

12. Petitioner did not prove that the inconsistent implementation of some of Student's 2014-15 IEP modifications and accommodations resulted in a lack of meaningful educational progress for Student pursuant to the IEP and services Student received in accordance with the IDEA. *Bobby R.*, 200 F.3d at 348-349; 34 C.F.R. § 300.323.

***Sub-issue 2: Appropriateness of Student's 2014-15 and 2015-16 IEPs***

13. Student's 2014-15 IEP complies with all requirements of the IDEA and applicable Texas law. 34 C.F.R. §§ 300.320, 300.324; 19 Tex. Admin. Code §§ 89.1050(g), 89.1055(a).
14. Petitioner did not prove that the District caused a deprivation of educational benefits by the procedural violation of a failure to have Student's IEP in place at the beginning of the school year in 2014-15 and 2015-16. 20 U.S.C. §§ 1414(d)(2)(A), 1415(f)(3)(E)(ii)(III); 34 C.F.R. §§ 300.323(a), 300.513(a)(2)(iii).
15. The 2014-15 IEP contains a \*\*\* that meets legal requirements. \*\*\*.
16. The \*\*\* in the 2015-16 IEP \*\*\* assessments related \*\*\*, as required. \*\*\*.

***Sub-issue 3: Student was evaluated in all areas of suspected disability***

17. The District evaluated Student in all areas of suspected disability. 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4).

***Sub-issue 4: Annual ARD committee meetings***

18. The District timely held an annual ARD committee meeting on September \*\*\*, 2014. 20 U.S.C. 1414(d)(4); 34 C.F.R. § 300.324(b)(1)(i).
19. The District held an annual ARD committee meeting on September \*\*\*, 2015, 8 school days past the deadline, but, as is encouraged by the law, the meeting was held in consolidation with the meeting to consider Student's 2015 FIE, due on September \*\*\*, 2015. 20 U.S.C. 1414(d)(3)(E); 34 C.F.R. § 300.324(a)(5).
20. Although Student's services continue under the 2014-15 IEP during the pendency of this proceeding due to the IDEA's "stay put" provision, the District held the September \*\*\*, 2015 annual ARD committee meeting as required by 20 U.S.C. § 1415(j) and 34 C.F.R. § 300.518(a).
21. Holding the 2015 annual ARD committee meeting 8 school days past the deadline and 2 days after completion of the 2015 FIE was a *de minimis* procedural violation that does not amount to a denial of a FAPE. 20 U.S.C. § 1415(f)(3)(E)(ii); *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003); *Bobby R.*, 200 F.3d. at 348-349.

***Sub-issue 5: 2015 FIE was timely completed***



22. The September \*\*\*, 2015 FIE was timely completed within 3 years of the September \*\*\*, 2012 FIE. 34 C.F.R. § 300.303(b)(2).

***Sub-issue 6: Did the District provide appropriate assessments?<sup>663</sup>***

23. The District conducted all of the assessments that were agreed upon by the ARD committee, including Parents, at the May 2015 REED meeting. 34 C.F.R. §§ 300.303, 300.305.
24. Because Student is \*\*\*, the District should have conducted a \*\*\* evaluation before devising Student's 2015-16 IEP. \*\*\*.
25. Because Student's last assistive technology evaluation was in 2012, and Student has not regularly used \*\*\* provided to Student by the District for more than a year because \*\*\*, and Student needs more training on it, the District should have conducted an assistive technology evaluation for the ARD committee to consider in developing Student's 2015-16 IEP. 34 C.F.R. § 300.304(c)(6).
26. The District timely responded on September \*\*\*, 2015, to Parents' September \*\*\*, 2015 request that assistive technology and \*\*\* evaluations be added to the 2015 FIE. 19 Tex. Admin. Code § 89.1011(b).
27. A parent is entitled to only one IEE at public expense each time a public agency conducts an evaluation with which the parent disagrees. Therefore, the District must have the opportunity to conduct Parents' requested \*\*\* and assistive technology evaluations before \*\*\* and assistive technology IEEs can be provided at public expense. 34 C.F.R. § 300.502(b)(5).

***Sub-issue 7: Consideration of relevant information at ARD committee meetings***

28. Petitioner presented no evidence on this sub-issue and did not meet the burden of proof. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).

***Sub-issue 8: Required members were present at ARD committee meetings***

29. In Texas, the ARD committee is the IEP team defined in federal law and regulations. 19 Tex. Admin. Code § 89.1050(a); 34 C.F.R. § 300.321.
30. All required ARD committee members attended ARD committee meetings held between August \*\*\*, 2014, and October \*\*\*, 2015. 19 Tex. Admin. Code § 89.1050(c)(1).

***Appropriateness of 2015 FIE***

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<sup>663</sup> See also Conclusions of Law related to the District's counterclaim.

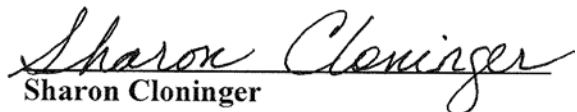
31. A parent of a child with a disability is entitled, under certain circumstances, to obtain an IEE of the child at public expense, as set forth in 34 C.F.R. § 300.502(b).
32. The evaluations that are part of the District's FIE were conducted in accordance with IDEA requirements at 34 C.F.R. §§ 300.301, 300.303 through 300.311.
33. The FIE was not comprehensive enough because it did not include \*\*\* and assistive technology evaluations. 34 C.F.R. § 300.304(c)(6).
34. Until the District conducts the \*\*\* and assistive technology evaluations, Petitioner is not entitled to IEEs for those evaluations at public expense. 34 C.F.R. § 300.502(b)(3),(b)(5).

### ORDER

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

Petitioner's requested relief is denied in part and granted in part, and the District's requested relief is denied in part and granted in part. Parents should provide consent for the \*\*\* and assistive technology evaluations and the District should conduct the evaluations. Once the evaluations are complete, the ARD committee should consider the results and revise Student's 2015-16 \*\*\* and assistive technology IEP goals accordingly.

**SIGNED January 15, 2016.**

  
Sharon Cloninger  
Special Education Hearing Officer  
For the State of Texas

### NOTICE TO THE PARTIES

This Decision of the hearing officer is a final and appealable order. Any party aggrieved by the findings and decision made by the hearing officer may bring a civil action with respect to

the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States.<sup>664</sup>

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<sup>664</sup> 20 U.S.C. § 1451(i)(2); 34 C.F.R. § 300.516; 19 Tex. Admin. Code § 89.1185(n).

DOCKET NO. 369-SE-0815

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

**SYNOPSIS**

**Issue:** Whether the District denied Student a free appropriate public education (FAPE) by failing to devise and implement an appropriate individualized education plan (IEP) in the least restrictive environment (LRE), significantly impeding Student’s and Parents’ opportunity to participate in the decision-making process and/or causing a deprivation of educational benefits.

**HELD:** For Petitioner. Petitioner established that Student was denied a FAPE because the 2015-16 IEP was not wholly based on information unique to Student, thus depriving Student of an educational benefit.

**Citation:** 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; *Board of Edu. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 181; 102 S.Ct. 3034, 3038 (1982); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347-348 (5th Cir. 2000).

**Sub-issue 1:** Whether the District failed to implement Student’s 2014-15 IEP as written.

**HELD:** For the District. Petitioner did not establish that the District failed to implement Student’s 2014-15 IEP as written. The District provided Student’s teachers with information about the IEP as required. The inconsistent implementation of some of Student’s IEP modifications and accommodations did not result in a lack of meaningful educational progress.

**Citation:** *Bobby R.*, 200 F.3d at 348-349; 34 C.F.R. § 300.323; 19 Tex. Admin. Code § 89.1075(c).

**Sub-issue 2:** Whether Student’s 2014-15 and 2015-16 IEPs are appropriate.

**HELD:** For Petitioner in part, and the District in part. Student’s 2014-15 IEP complies with all requirements of the IDEA and applicable Texas law. Petitioner did not prove that the District caused a deprivation of educational benefits by the procedural violation of a failure to have Student’s IEPs in place at the beginning of the 2014-15 and 2015-16 school years. But the District failed to devise an appropriate 2015-16 IEP for Student because the District did not formally assess Student’s \*\*\* and assistive technology needs. Specifically, the \*\*\* in the 2015-16 IEP \*\*\*.

**Citation:** \*\*\*.

**Sub-issue 3:** Whether the District failed to adequately evaluate all areas of suspected disability.

**HELD:** For the District. Petitioner did not establish that the District failed to adequately evaluate all areas of suspected disability.

**Citation:** 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4).

**Sub-issue 4:** Whether the District failed to conduct the annual Admission, Review, and Dismissal (ARD) meeting in compliance with the timeline.

**HELD:** For the District. The District timely held an annual ARD committee meeting on September \*\*\*, 2014, less than one year after the September \*\*\* 2013 annual ARD committee meeting. The next annual ARD committee meeting was held on September \*\*\*, 2015, 8 school days past the deadline, but, as is encouraged by the law, the meeting was held in consolidation with the meeting to consider Student's 2015 Full and Independent Evaluation (FIE), due on September \*\*\*, 2015. 20 U.S.C. 1414(d)(3)(E); 34 C.F.R. § 324(a)(5). Holding the 2015 annual ARD committee meeting 8 school days past the deadline and 2 days after completion of the 2015 FIE was a *de minimis* procedural violation that does not amount to a denial of a FAPE.

**Citation:** 20 U.S.C. §§ 1414(d)(3)(E),(4), 1415(f)(3)(E)(ii); 34 C.F.R. § 300.324(a)(5), (b)(1)(i); *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003); *Bobby R.*, 200 F.3d. at 348-349.

**Sub-issue 5:** Whether the District failed to timely conduct the tri-annual FIE.

**HELD:** For the District. The September \*\*\*, 2015 FIE was timely completed within 3 years of the September \*\*\*, 2012 FIE.

**Citation:** 34 C.F.R. § 300.303(b)(2).

**Sub-issue 6:** Whether the District failed to provide appropriate assessments, including cognitive assessments and assessments for related services in the areas of academic instruction, occupational therapy, physical therapy, and assistive technology.

**HELD:** For Petitioner. The District failed to provide assistive technology and \*\*\* assessments necessary to provide adequate information to design the 2015-16 IEP.

**Citation:** \*\*\*.

**Sub-issue 7:** Whether the District failed to consider all relevant information during ARD committee meetings.

**HELD:** For the District. Petitioner presented no evidence on this sub-issue and did not meet the burden of proof.

**Citation:** *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).

**Sub-issue 8:** Whether the District failed to comply with Student's and Parents' procedural rights by failing to have all required and/or necessary members present during ARD committee meetings.

**HELD:** For the District. All required ARD committee members attended ARD committee meetings held between August \*\*\*, 2014, and October \*\*\*, 2015.

**Citation:** 34 C.F.R. § 300.321; 19 Tex. Admin. Code § 89.1050(a), (c)(1).

**Issue:** Whether the District's Full and Individual Evaluation (FIE) of Student was appropriate.

**HELD:** For Petitioner. The District did not establish that the FIE was comprehensive enough to be appropriate under the IDEA. The FIE was not comprehensive enough because it did not include \*\*\* and assistive technology evaluations.

**Citation:** 34 C.F.R. § 300.304(c)(6).