

**DOCKET NO. 179-SE-0317**

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

**DECISION OF THE HEARING OFFICER**

\*\*\* (Student) b/n/f \*\*\* and \*\*\* (collectively, Petitioner) requested an impartial due process hearing (the Complaint) on March 31, 2017, alleging claims under the Individuals with Disabilities Education Act (IDEA). The respondent to the Complaint is the Clear Creek Independent School District (Respondent/the District). The District filed its response to the Complaint on April 4, 2017.

Petitioner alleges that during the 2015-2016 and 2016-2017 school years, the District failed to provide Student with a free, appropriate public education (FAPE) and failed to propose Student's placement in the least restrictive environment (LRE). Petitioner further alleges that the District failed to conduct an Assistive Technology (AT) evaluation during the 2016-2017 school year. The District denies Petitioner's allegations.

The hearing officer finds Petitioner did not meet its burden to prove that the District failed to provide Student with FAPE and that the District should have conducted an AT evaluation. However, Petitioner met its burden to prove the District's proposal to place Student in the Structured Learning Lab (SLL)/\*\*\* (\*\*\*) class is not reasonably calculated to provide Student with the requisite educational benefit in the LRE.

## I. PROCEDURAL HISTORY, RESOLUTION SESSION, AND STATUTE OF LIMITATIONS

### A. Procedural History

The initial prehearing telephone conference was conducted on April 28, 2017. Petitioner was represented by Sean Pevsner and Mark Whitburn, attorneys with Pevsner & Whitburn. Respondent was represented by Amy Tucker, attorney with Rogers, Morris & Grover. The parties filed a joint request to continue the hearing to May 22-23, 2017, with the decision due date extended to June 30, 2017, which was granted for good cause on May 1, 2017.<sup>1</sup>

On May 18, 2017, the hearing officer convened the final prehearing telephone conference to discuss scheduling the witnesses, admitting joint exhibits, and any other matters raised by the parties. Both parties were in attendance through their respective counsel.

The due process hearing was conducted on May 22-23, 2017. It was recorded and transcribed by a certified court reporter. Mr. Whitburn represented Petitioner. Ms. Tucker represented the District. At the conclusion of the hearing, the parties asked that the record remain open for the submission of written closing arguments and requested an extension of the decision due date to July 10, 2017, to allow the hearing officer time to complete a review of the extensive record on file in this case, conduct the requisite legal research, and to consider the parties' written closing arguments in preparing the decision. The request was granted for good cause.<sup>2</sup>

### B. Resolution Session

The deadline for the Resolution Session was April 15, 2017. The parties did not waive or convene a Resolution Session by this deadline, but instead agreed to complete a set of independent educational evaluations (IEEs) and to convene an Admission, Review & Dismissal Committee

---

<sup>1</sup> Order No. 3.

<sup>2</sup> Order No. 7.

(ADRC) meeting on April 26, 2017, prior to the end of the 30-day resolution period on April 30, 2017. During the April 28, 2017 prehearing conference, the parties confirmed the ARDC meeting originally scheduled for April 26, 2017 was rescheduled to May 1, 2017, because one of the agreed upon IEE reports was not yet available to the parties. The parties proceeded with the ARDC meeting on May 1, 2017, but the parties were unable to reach consensus and requested that the due process hearing proceed as scheduled.

### **C. Statute of Limitations**

Petitioner raised no exemptions to the one-year statute of limitations applicable to this case. Therefore the accrual date is March 31, 2016.

## **II. ISSUES, RELIEF, AND BURDEN OF PROOF**

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

Petitioner confirmed that the following issues remain in dispute:

1. Whether the District failed to provide Student with FAPE within the meaning of the IDEA during the 2015-2016 school year;
2. Whether the District failed to provide Student with FAPE within the meaning of the IDEA, (including, for example, whether the school district failed to collaborate with Student's parents and Student's private provider, during the 2016-2017 school year);
3. Whether the District's proposed placement into an SLL from Student's current placement in a general education class with in-class and Resource Room support is reasonably calculated to provide Student with the requisite educational benefit in the LRE under the IDEA; and
4. Whether the District should have, and failed to, conduct an AT evaluation during the 2016-2017 school year.

Petitioner requests the following relief:

1. Compensatory educational services, in the form of 180 hours of tutoring in all academic subjects embraced by Petitioner's current IEP goals by a private individual with experience and training in teaching students with autism spectrum disorder and \*\*\*,<sup>3</sup>
2. Revise Student's Behavior Intervention Plan (BIP) to include the recommendations of the independent Functional Behavior Assessment (FBA);
3. Maintain Student's placement in the general education classroom with in-class and Resource Room support;
4. Conduct an AT evaluation; and
5. Any other relief that equity and justice requires.

#### **B. The District's Position**

The District denies Petitioner's allegations and contends it conducted an appropriate Full Individual Evaluation (FIE). The District further contends it developed an appropriate IEP for Student and provided Student with special education services in the LRE.

#### **C. Burden of Proof**

The IDEA creates a presumption that a school district's decisions made pursuant to the IDEA are appropriate and that the party challenging the decisions bears the burden of proof at all times.<sup>4</sup> A party attacking the appropriateness of an IEP established by a school district bears the burden of proof, by a preponderance of the evidence, to show why the IEP and resulting placement were inappropriate

---

<sup>3</sup> The relief requested above was refined from that originally cited in Order No. 3 because Petitioner clarified what Petitioner was requesting in the form of compensatory services at the beginning of the hearing and in Petitioner's Closing Argument Brief.

<sup>4</sup> *Shaffer ex rel. Shaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 537, 163 L. Ed.2d 387(2005); *White et 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).

under the IDEA.<sup>5</sup> To prevail, Petitioner must, therefore, establish that the District violated the IDEA regarding Petitioner's delineated issues.

### III. FINDINGS OF FACT

#### Background

1. Student, a \*\*\*-year-old, attends a District \*\*\*. Since \*\*\*, Student has been eligible for special education services as a student with autism and \*\*\* (\*\*\*), which has since evolved into \*\*\*. Student has also been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). In October 2016, the District determined Student was eligible for special education services as a student with an Intellectual Disability (ID).
2. Autism impacts the way a student responds to questions and processes information which standardized tests do not take into consideration. Consequently, it is important to consider other data before deciding to add a disability condition such as ID. Other data includes how the student is doing in class.<sup>6</sup>
3. Student is a \*\*\*, who usually has \*\*\*. Student's perseverance and determination to learn is remarkable. Although Student's parents understood that Student \*\*\*, Student now has \*\*\* and continues to improve daily. Student embraces new challenges and has learned \*\*\*.<sup>7</sup>
4. Student has been attending a District school for the past \*\*\*. Student spent \*\*\* in the District's \*\*\*. During the 2014-2015 school year (\*\*\*), Student was in the District's SLL/\*\*\* classroom.<sup>8</sup> In \*\*\*, Student's teacher attended to Student's behavior issues and focused on \*\*\* before proceeding forward with new skills. Student made progress in the \*\*\* class.<sup>9</sup>
5. The January \*\*\*, 2010 FIE (2010 FIE) showed that Student made a composite of \*\*\* on the cognitive section of the \*\*\*, second edition, indicating that Student functioned at the \*\*\*.<sup>10</sup>

---

<sup>5</sup> *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-248 (5th Cir. 1997) as cited in *Houston Indep. Sch. Dis 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>6</sup> Tr. at 111-112, 114.

<sup>7</sup> Tr. at 36.

<sup>8</sup> Tr. at 37.

<sup>9</sup> Tr. at 38.

<sup>10</sup> Pet. Ex. 15-10; Res. Ex. 9-3.

Regarding Student's \*\*\* score, Student was in the borderline range, although Student's \*\*\* was below average.<sup>11</sup> \*\*\* refers to the degree a student is \*\*\*.<sup>12</sup> The 2010 FIE did not show that Student had an ID.<sup>13</sup>

6. Student did not respond to standardization procedures during the May \*\*\*, 2011 FIE (2011 FIE) due to Student's autism so modifications to the *Leiter International Performance Scale-Revised (Leiter-R)* were made. Consequently standard scores could not be reported, but it was noted that Student's \*\*\*.<sup>14</sup>
7. In the March \*\*\*, 2014 FIE (2014 FIE), Student's standard score on the \*\*\*, was a \*\*\*—the extremely low range of intellectual functioning. But, Student's need for \*\*\* and \*\*\* from the examiner coupled with Student's difficulty attending to the tasks on subtests attenuated the subtest scores and affected the overall scores on this test.<sup>15</sup> Consequently, this score was viewed with caution.<sup>16</sup> Student's \*\*\* score was rated by Student's parents and Student's teacher as being in the extremely low range during the 2014 FIE.<sup>17</sup>
8. In order to meet the classification as a student with ID, the student must have an overall cognitive test score that is at least two standard deviations below the mean when taking into consideration the standard of error of the test and must exhibit at least two \*\*\* skill deficits.<sup>18</sup>
9. At age \*\*\*, Student was still in the process of \*\*\*.<sup>19</sup> Because Student's overall sum of scaled scores in the 2014 FIE may have been attenuated due to Student's difficulty with standardized testing, caution was used in translating that into an ID.<sup>20</sup>

---

<sup>11</sup> Pet. Ex. 15 at 16; Res. Ex. 10 at 26.

<sup>12</sup> Pet. Ex. 17 at 16.

<sup>13</sup> Pet. Ex. 15 at 12.

<sup>14</sup> Res. Ex. 10 at 27.

<sup>15</sup> Pet. 17 at 28.

<sup>16</sup> Pet. Ex. 17 at 14-15; Res. Ex. 9-3.

<sup>17</sup> Pet. Ex. 17 at 16.

<sup>18</sup> Pet. Ex. 17 at 17.

<sup>19</sup> Tr. at 122; Pet. Ex. 17 at 17.

<sup>20</sup> Tr. at 122-123; Pet. Ex. 17 at 17.

**\*\*\* Grade: 2014-2015 School Year**

10. The SLL, the District's special education plan, consists of three programs: \*\*\*, \*\*\* (\*\*\*), and \*\*\*. The two programs at issue are the \*\*\* and \*\*\* programs.<sup>21</sup> The SLL programs are not age based; each class may have children of varying ages. Special education teachers must teach students the entire curriculum, not just those related to the student's IEP goals.<sup>22</sup>
11. The \*\*\* program is designed for students requiring functional language communication, social communication, and behavior components skills. Each student's academic needs are addressed in this class.<sup>23</sup> The \*\*\* class is an inclusive behavior-based classroom where the student participates in general education and is monitored for \*\*\* and \*\*\* needs. The student is removed from the general education class for approximately \*\*\*.<sup>24</sup>
12. The \*\*\* class is for students with fewer behavior issues so the emphasis is on academics. The \*\*\* class is for students with more severe behaviors that impede learning so the focus is on functional communication, being able to express wants and needs.<sup>25</sup> The \*\*\* class has fewer opportunities for the student to access the general education classes because the focus is to build "\*\*\*\*" skills.<sup>26</sup>
13. Student did well in the \*\*\* class during the 2014-2015 school year. Student progressed on Student's IEP goals and objectives, Student's \*\*\*, Student's behavioral issues decreased, including Student's \*\*\*, and Student spent part of Student's day in the general education classroom for inclusion.<sup>27</sup>
14. Because Student's annual review falls in March, the IEP goals are established in March and continue into the next school year. The ADRC met on March \*\*\*, 2015, with both parents in attendance.<sup>28</sup> Student's parents agreed with the IEP goals set out for completion in the March 2015 IEP and with moving Student into the \*\*\* class for the 2015-2016 school year with more time in the general education setting.<sup>29</sup>

---

<sup>21</sup> Tr. at 489.

<sup>22</sup> Tr. at 489-490.

<sup>23</sup> Tr. at 489-490.

<sup>24</sup> Tr. at 490.

<sup>25</sup> Tr. at 254.

<sup>26</sup> Tr. at 148.

<sup>27</sup> Tr. at 253-254.

<sup>28</sup> Pet. Ex. 13 at 33.

<sup>29</sup> Pet. Ex. 13 at 33-36.

15. Student made good progress in \*\*\* and mastered \*\*\* out of \*\*\* goals and \*\*\* out of \*\*\* objectives. Student's most growth was in Student's behavior, \*\*\*. Student \*\*\* and followed directions the first time asked or prompted. Student did well in Student's \*\*\* and \*\*\* and Student's behaviors decreased, particularly Student's \*\*\*.<sup>30</sup>
16. For \*\*\* months after the end of Student's \*\*\* year, Student \*\*\*.<sup>31</sup>
17. In accordance with the ARDC's decision, the District placed Student in the \*\*\* class for the 2015-2016 school year because Student no longer required \*\*\*\*\* class.<sup>32</sup>

**\*\*\* Grade: 2015-2016 School Year**

18. The \*\*\* class was a self-contained class. Student received a great deal of one-on-one instruction in the \*\*\* class and left the class for inclusion in the general education classes Student attended.<sup>33</sup> Student had \*\*\* minutes in general education classes: \*\*\* minutes in \*\*\*, \*\*\* minutes in \*\*\*, and \*\*\* minutes in \*\*\*, all three modified to Student's level with support.<sup>34</sup> Student also participated in general education with Student's peers for \*\*\*.<sup>35</sup> Student's grades were based on a 100 percent modified curriculum.<sup>36</sup> In addition, Student received \*\*\* and \*\*\*.<sup>37</sup>
19. During a review ARDC meeting on September \*\*\*, 2015, Student's mother expressed a need for \*\*\* to address Student's limited \*\*\*. The District provided her with a 45-minute training session with the District's \*\*\*.<sup>38</sup>
20. Student's mother requested that the District's \*\*\* and Student's Private \*\*\* coordinate the setting of goals for Student. The District's \*\*\* attempted unsuccessfully to contact Student's Private \*\*\*.<sup>39</sup>

---

<sup>30</sup> Tr. at 253-254; Pet. Ex. 13 at 34.

<sup>31</sup> Tr. at 97-98, 258.

<sup>32</sup> Tr. at 41.

<sup>33</sup> Tr. at 281-282.

<sup>34</sup> Tr. at 451; Res. Ex. 6 at 37.

<sup>35</sup> Tr. at 42, 438.

<sup>36</sup> Tr. at 438, 443.

<sup>37</sup> Pet. Ex. 13 at 24.

<sup>38</sup> Tr. at 86; Res. Ex. 7 at 1-2.

<sup>39</sup> Tr. at 76-77.



21. Student's parents received Student's \*\*\* from Student's \*\*\* Teacher to keep them informed about what Student did that day.<sup>40</sup> Every \*\*\* weeks, when Student's report card was sent home, the \*\*\* Teacher included the IEP update.<sup>41</sup> Student's parents did not express concerns about the progress the \*\*\* Teacher reported on Student's IEP updates.<sup>42</sup>
22. Although Student's parents requested that the \*\*\* Teacher send home additional work for Student, the last homework assignment that Student's parents received was from October of 2015.<sup>43</sup> Student's parents did not ask the \*\*\* Teacher again to send additional assignments home for Student to complete or complain to the school.<sup>44</sup>
23. In October 2015, Petitioner hired Student's \*\*\* Teacher to tutor Student on \*\*\* and \*\*\* for \*\*\*.<sup>45</sup> Student was tutored \*\*\*, and other goals on Student's IEP.<sup>46</sup> As the tutor, Student's \*\*\* Teacher also taught Student skills that she did not know to teach Student in \*\*\*, to fill in the gaps in Student's education.<sup>47</sup>
24. On March \*\*\*, 2016, the ARDC convened an annual review with Student's parents in attendance to consider Student's progress and Student's programming for the 2016-2017 school year.<sup>48</sup> Student's reading improved in \*\*\* and Student mastered the IEP goals. Student was \*\*\*.<sup>49</sup>
25. The ARDC agreed that Student would receive academic and non-academic benefits in the general education setting with in-class and resource support.<sup>50</sup> Resource class was for \*\*\* minutes for \*\*\*. In-class support was to remain the same as in \*\*\* with \*\*\* minutes for \*\*\*, \*\*\* minutes for \*\*\*, and \*\*\* minutes for \*\*\*. Special education support was provided to

---

<sup>40</sup> Tr. at 44-45, 440-441.

<sup>41</sup> Tr. at 440-441.

<sup>42</sup> Tr. at 94, 440.

<sup>43</sup> Tr. at 45-46; Pet. Ex. 19.

<sup>44</sup> Tr. at 45.

<sup>45</sup> Tr. at 48, 50.

<sup>46</sup> Tr. at 50-52, 84.

<sup>47</sup> Tr. at 85, 97.

<sup>48</sup> Res. Ex. 6 at 54.

<sup>49</sup> Res. Ex. 6 at 2.

<sup>50</sup> Res. Ex. 6 at 27.

Student for \*\*\* in the general education class.<sup>51</sup> Student's behaviors, particularly those that became problematic in January 2016, decreased by March 2016 due to behavior strategies employed by Student's teachers.<sup>52</sup> Student's parents and the parents' advocate agreed with the BIP and 2016 IEP.<sup>53</sup> For the 2016-2017 school year, the \*\*\* was \*\*\*.<sup>54</sup>

26. Student's parents requested that the 3-year re-evaluation due in March 2017 be completed earlier and that a new FBA be completed.<sup>55</sup>
27. The \*\*\* on Student's report card related what Student was \*\*\* and to Student's IEP goals.<sup>56</sup>
28. In April and May 2016, the District's Behavior Analyst performed an FBA to evaluate Student's \*\*\*.<sup>57</sup> The FBA report was completed on May \*\*\*, 2016.<sup>58</sup> The District Behavior Analyst observed Student in the \*\*\* classroom, general education class, and in physical education and reported that in the general education classroom, Student \*\*\* and to Student's general education class, and followed group instructions provided by the large-group instructor. Occasionally Student required a reminder or prompt from the support staff.<sup>59</sup> When the General Education teacher asked the class to \*\*\*, Student did so.<sup>60</sup>
29. Student mastered most of Student's IEP goals, progressed in \*\*\*, and made great strides in \*\*\* during \*\*\*.<sup>61</sup> By the end of the school year, Student did not exhibit task avoidance behaviors, so it was no longer a focus for intervention.<sup>62</sup> By April and May 2016, the incidents of Student's \*\*\* had decreased significantly and there were many days that Student did not

---

<sup>51</sup> Res. Ex. 6 at 31, 37.

<sup>52</sup> Res. Ex. 6 at 38.

<sup>53</sup> Tr. at 441-442.

<sup>54</sup> Res. Ex. 6 at 39.

<sup>55</sup> Res. Ex. 6 at 36, 38.

<sup>56</sup> Res. Ex. 13 at 1.

<sup>57</sup> Tr. at 146.

<sup>58</sup> Res. Ex. 11 at 1.

<sup>59</sup> Tr. at 153; Pet. Ex. 18 at 3.

<sup>60</sup> Tr. at 153; Pet. Ex. 18 at 3.

<sup>61</sup> Tr. at 445.

<sup>62</sup> Tr. at 155.

- \*\*\* at all.<sup>63</sup> Student had mastered a good deal of the work that Student was provided in class.<sup>64</sup>
30. At the end of \*\*\*, Student's behaviors were at a low frequency and low intensity and the BIP focused primarily on Student's efforts to \*\*\*.<sup>65</sup> The FBA/BIP adapted by the ARDC noted that Student was hard-working and followed instructions when first given the majority of the time. Student also \*\*\*, participated in class activities without protest and with minimal prompting. However, Student engaged in \*\*\*.<sup>66</sup>
31. On May \*\*\*, 2016, the ARDC met for a Review of Existing Evaluation Data (REED)<sup>67</sup> and to modify the ARDC report based on the new FBA.<sup>68</sup> At that time, Student had a \*\*\*.<sup>69</sup> Student could \*\*\*, but Student's \*\*\* was not at \*\*\*.<sup>70</sup> The \*\*\* levels were reported on the Present Levels of Academic Achievement and Functional Performance (PLAAFP) statement. \*\*\*.<sup>71</sup> The ARDC recommended new testing, including an AT evaluation, to be completed by October \*\*\*, 2016.<sup>72</sup>
32. With respect to AT, Student tried \*\*\* but it was too distracting for Student. Student's \*\*\* needs were met with \*\*\*.<sup>73</sup>
33. On Student's progress report, the percentage indication of Student's progress on the \*\*\* objective requiring Student to \*\*\* missing for October \*\*\*, 2015. However, the \*\*\* \*\*\* Teacher noted in the comment section that Student could \*\*\*.<sup>74</sup>

---

<sup>63</sup> Tr. at 158.

<sup>64</sup> Tr. at 159.

<sup>65</sup> Tr. at 187-188.

<sup>66</sup> Res. Ex. 4 at 8.

<sup>67</sup> Res. Ex. 5.

<sup>68</sup> Res. Ex. 4.

<sup>69</sup> Tr. at 452; Res. Ex. 4 at 1.

<sup>70</sup> Tr. at 454.

<sup>71</sup> Tr. at 438-439.

<sup>72</sup> Res. Ex. 4 at 4.

<sup>73</sup> Res. Ex. 6 at 5, 25, 38.

<sup>74</sup> Tr. at 457-458; Res. Ex. 13 at 6.

34. As a result of the ARDC decisions, Student remained in the \*\*\* program for \*\*\* but at a different District \*\*\* and was placed in the general education classroom with in-class and \*\*\* support together with an additional \*\*\* minutes per week in the \*\*\* setting for \*\*\* work.<sup>75</sup>

**\*\*\* Grade: 2016-2017 School Year**

35. Between the beginning of the new school year and October 2016, the frequency of Student's behavior increased and Student developed new behaviors. These behaviors included \*\*\*. Much of Student's behaviors were \*\*\* or \*\*\*.<sup>76</sup> Anytime Student's behavior was disruptive to the other students in the class, Student was removed from the general education class and completed the academic activity in the special education class until Student's behavior improved.<sup>77</sup>

36. The FBA prepared during the end of \*\*\* was adequate when prepared, but inadequate to address Student's behaviors at the beginning of the new school year. Although the District's Behavior Analyst did not make written adjustments to the BIP, she collaborated with Student's teachers, and used in-class supports and recommended strategies in addition to the BIP to improve Student's behavior. These strategies included such things as \*\*\*, and \*\*\* so Student would know what was expected of Student and when Student had \*\*\*.<sup>78</sup> Student's behavior improved during the school year.<sup>79</sup>

37. Although Student was in the \*\*\* classroom, Student's academic work was modified to the \*\*\* or \*\*\* level. Student was not expected to master any of the \*\*\* core curriculum (\*\*\*).<sup>80</sup> In class, Student focused on Student's \*\*\* and rarely paid attention to the general education teachers.<sup>81</sup> Student's grades were based on Student's modified work.<sup>82</sup>

38. Student required prompts from Student's \*\*\* while in class. Fading efforts were being made at the end of \*\*\*. Prompts refer to utilizing a support for Student to allow Student to respond appropriately, such as \*\*\*." Fading that prompt refers to moving to less intrusive prompts as Student is able to successfully complete the task with the more intrusive prompt. Similarly,

---

<sup>75</sup> Res. Ex. 6 at 30-32.

<sup>76</sup> Tr. at 164-166.

<sup>77</sup> Tr. at 420-421.

<sup>78</sup> Tr. at 422-423.

<sup>79</sup> Tr. at 162-163, 180-182.

<sup>80</sup> Tr. at 292, 302, 304-305, 307, 417-418.

<sup>81</sup> Tr. at 304-305, 307, 417-418.

<sup>82</sup> Tr. at 312.

proximity prompts begin with the support staff near Student, and as the student becomes more confident, the support staff moves further and further away from the student.<sup>83</sup>

***October 2016 FIE and ARDC meeting***

39. Student's FIE was completed in October \*\*\*, 2016 (the 2016 FIE). According to the 2016 FIE, Student continued to meet the educational disability criteria as a student with autism and \*\*\*; ID was added.<sup>84</sup> The District's educational diagnostician (the ED) evaluated Student's eligibility in the areas of ID and learning disability. The District's Licensed Specialist in School Psychology (the LSSP) evaluated Student for autism.<sup>85</sup>
40. While the ED was administering the *Stanford-Binet Intelligence Scales, fifth edition*, for the October 2016 FIE, she noted that Student frequently \*\*\*.<sup>86</sup> The *Stanford-Binet Intelligence Scales* is a standardized measure that assesses the intellectual and cognitive abilities in children and adults. The nonverbal subtests (knowledge, fluid reasoning, quantitative reasoning, visual-spatial reasoning, and working memory) were administered to measure Student's cognitive abilities. Student's \*\*\* standard score was \*\*\*.<sup>87</sup>
41. In order for a student to meet the criteria for an ID the student must first have an IQ that falls two standard deviations below the mean and also have an \*\*\* rating in at least two areas consistent with the student's intellectual functioning.<sup>88</sup>
42. The District's ED found that Student had \*\*\* deficits in Student's \*\*\* which were consistent with Student's deficits in intellectual functioning.<sup>89</sup> Students with autism and \*\*\* tend to perform lower regarding Adaptive Behavior Assessment (ABAS) questions such as: \*\*\*?
43. As a result of Student's scores on the standardized *Stanford-Binet Intelligence Scales* and Student's deficits in \*\*\*, the ARDC determined that Student qualified as a student with an ID secondary to Student's autism diagnosis.<sup>90</sup>

---

<sup>83</sup> Tr. at 176-177.

<sup>84</sup> Res. Ex. 10-40.

<sup>85</sup> Tr. at 105-106.

<sup>86</sup> Tr. at 109; Res. Ex. 10 at 28.

<sup>87</sup> Res. Exs. 9 at 3; 10 at 28.

<sup>88</sup> Tr. at 116.

<sup>89</sup> Tr. at 117-118; Res. Ex. 10 at 31-32.

<sup>90</sup> Res. Ex. 10 at 39-40, 58.

44. The performance of a student with autism and \*\*\* on the ABAS with respect to these types of questions does not necessarily indicate the student has an ID because there is overlap between autism and intellectual disability.<sup>91</sup> Autism can affect the way a student takes in information or gives information because these two disabilities, autism and ID, overlap.<sup>92</sup> The District could service Student under autism alone.<sup>93</sup>
45. The \*\*\* evaluation included the \*\*\*. The results of the \*\*\* suggest that Student's \*\*\* are significantly delayed or deficient. Student's \*\*\* fell below the expected range. Similarly, Student's \*\*\* showed deficits.<sup>94</sup> With deficits in Student's \*\*\*, it was not expected that Student would be able to \*\*\* used in the general education setting without support.<sup>95</sup> The District's \*\*\* did an informal AT evaluation of Student's needs during the 2016 FIE.<sup>96</sup>
46. The 2016 FIE show that Student's AT needs had been assessed throughout the evaluation and it was determined that Student's \*\*\* needs were being met even though a formal AT evaluation had not been performed.<sup>97</sup>
47. On October \*\*\*, 2016, the ARDC met to consider the October \*\*\*, 2016 FIE.<sup>98</sup> Based on Student's behavior, the October 2016 FIE, information from school personnel and from Student's parents, the ARDC determined that Student met eligibility for special education support and services in the areas of Autism, ID, and \*\*\*. Student would receive Student's core-academic instruction in the special education setting, but would remain in the general education classroom with in-class support for \*\*\*.<sup>99</sup> Student would also be with Student's general education peers for all nonacademic and extracurricular activities. \*\*\* and \*\*\* and \*\*\* services would continue.<sup>100</sup>

---

<sup>91</sup> Tr. at 121.

<sup>92</sup> Tr. at 137.

<sup>93</sup> Tr. at 135-137.

<sup>94</sup> Tr. at 479.

<sup>95</sup> Tr. at 479; Res. Ex. 10 at 8.

<sup>96</sup> Tr. at 130; Res. Ex. 10 at 38.

<sup>97</sup> Res. Ex. 10 at 38.

<sup>98</sup> Res. Ex. 3.

<sup>99</sup> Res. Exs. 2 at 6, 9-10; 3 at 33-34.

<sup>100</sup> Res. Ex. 3 at 33-34.

48. The ARDC also added two new behavior goals targeting \*\*\* and appropriate classroom behavior. The goals required the Special Education teachers and support staff to use positive behavior strategies that included \*\*\*.<sup>101</sup>
49. The ARDC acknowledged that removing Student from the general education classroom might cause Student to experience the following harmful effects: (1) lack of opportunity for appropriate role models; (2) lack of opportunity for social interaction; and (3) decreased self-esteem.<sup>102</sup> Student's parents disagreed with the proposed placement—noting that Student had only been in the new \*\*\* program \*\*\*—and requested an IEE. The District requested that Student's mother \*\*\* with \*\*\* classes. The meeting ended in disagreement and was rescheduled to convene 10 days later.<sup>103</sup>
50. The ARDC reconvened the meeting on November \*\*\*, 2016, and decided that Student be returned to the \*\*\* class at \*\*\* to begin immediately.<sup>104</sup> Student's mother reported that she had \*\*\* and objected to this placement for her \*\*\* because Student would \*\*\*, the academic curriculum was too limiting, and the behavioral issues of the other students were behaviors Student had overcome due to modeling the general education students in Student's class.<sup>105</sup> Student's parents expressed concern that putting Student back in the \*\*\* class would expose Student to other behavioral issues and deprive Student of peers to model.<sup>106</sup> The ARDC meeting ended in disagreement.<sup>107</sup>
51. On November \*\*\*, 2016, Petitioner filed a due process complaint and requested that Student remain in Student's current educational placement under the “stay put” provision of the IDEA.<sup>108</sup> The parties agreed the due process complaint could be dismissed without prejudice while Independent Education Evaluations (IEEs) were conducted.<sup>109</sup> The Complaint was refiled on March 31, 2017. Student remained in Student's current placement throughout the 2016-2017 school year.

---

<sup>101</sup> Res. Ex. 3 at 11-12.

<sup>102</sup> Res. Ex. 3 at 28.

<sup>103</sup> Res. Ex. 3 at 35.

<sup>104</sup> Res. Ex. 3 at 33-34.

<sup>105</sup> Tr. at 60-61; Res. Ex. 2 at 6.

<sup>106</sup> Tr. at 60.

<sup>107</sup> Res. Ex. 2 at 6.

<sup>108</sup> 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a).

<sup>109</sup> Respondent's Closing Argument at 7.

*Spring 2017*

52. The BIP coupled with the strategies and intervention added in October 2016 greatly reduced Student's problem behaviors. These additional interventions included \*\*\*.<sup>110</sup> By January and February of 2017, the severity and frequency of Student's behavior had improved and Student was making A's and B's in class on Student's modified lessons.<sup>111</sup> In the spring of 2017, most of the new behaviors Student had acquired in the beginning of the school year disappeared, but Student still occasionally had \*\*\*.<sup>112</sup> \*\*\*.<sup>113</sup>
53. Student's behavior improved in the spring, and Student enjoyed the class surroundings. Student's improvement in behavior did not yield a corresponding increase in Student's academic ability, but Student continued to meet Student's IEP goals and objectives.<sup>114</sup> Student's report card reflected that Student had passing grades in all Student's classes and Student exhibited "excellent learner characteristics." Student's lowest grade in the \*\*\* of the school year was a "76" in \*\*\*, and Student's highest grade, a "99," was in \*\*\* on Student's modified curriculum.<sup>115</sup> Student's \*\*\* improved from a \*\*\* and Student's performance in \*\*\* improved in the spring of 2017. But Student's \*\*\* had plateaued.<sup>116</sup>
54. In March 2017, Student was given a psychoeducational evaluation by an Independent LSSP. \*\*\* was developed to minimize the \*\*\* requirements in measuring general ability in four subtests: \*\*\*. Student's score fell within the range of 61 to 71. The \*\*\* was administered but the \*\*\* \*\*\* could not be obtained. On the \*\*\* subtest (\*\*\*) to measure \*\*\*; Student received a standard score of \*\*\*.<sup>117</sup>
55. The \*\*\* subtest was administered \*\*\*. The \*\*\* Student made a standard score of \*\*\*. During the \*\*\* performed \*\*\*, the Independent LSSP provided Student with \*\*\*. Student then correctly answered \*\*\* additional items.<sup>118</sup> Similarly on the \*\*\* task, Student's

---

<sup>110</sup> Tr. at 203-204; Res. Ex. 8 at 4.

<sup>111</sup> Tr. at 71-72, 170; Pet. Ex. 1 at 166-177.

<sup>112</sup> Tr. at 171.

<sup>113</sup> Res. Ex. 1 at 5.

<sup>114</sup> Tr. at 314.

<sup>115</sup> Res. Ex. 12 at 1.

<sup>116</sup> Tr. at 391; Res. Ex. 1 at 2.

<sup>117</sup> Res. Ex. 9 at 4-5.

<sup>118</sup> Res. Ex. 9 at 5.



- performance improved when Student received \*\*\*. Originally, Student only correctly answered \*\*\* items, but with \*\*\* and \*\*\* Student correctly answered \*\*\* items.<sup>119</sup>
56. Although Student displays subaverage intellectual functioning on standardized tests, and has concurrent deficits in \*\*\*, the results are impacted in part by Student's autism. When necessary supports are added, Student's functioning levels improve.<sup>120</sup>
57. \*\*\* and \*\*\* are critical areas of need for Student. Various types of AT should be evaluated in the future to determine if they can help Student effectively \*\*\*.<sup>121</sup>
58. Student requires \*\*\* and some one-on-one instruction to build a good foundation and progress in Student's learning.<sup>122</sup> Student still needs almost 100 percent attention from Student's in-class support. If the in-class support leaves the classroom, Student has difficulty staying focused and will \*\*\*.<sup>123</sup> However, towards the end of \*\*\*, efforts were being made to fade the supports.
59. Student was not a typical Resource student in \*\*\* and \*\*\* and \*\*\* because Student required \*\*\* instruction from the Resource Teacher.<sup>124</sup> Student was working on \*\*\* skills, at a \*\*\* and \*\*\* level, not closely related to the \*\*\* general education curriculum.<sup>125</sup>

***May \*\*\*, 2017 ARDC Meeting***

60. The ARDC meeting convened on May \*\*\*, 2017, with both parents in attendance, to review the IEEs, information from Student's teachers and school personnel, Student's current academic and behavioral performance, Student's \*\*\* needs, the 2016 FIE, and the concerns of Student's parents.<sup>126</sup> Student was \*\*\* with an 83-85% accuracy.<sup>127</sup> Student's \*\*\* and

---

<sup>119</sup> Res. Ex. 9 at 5.

<sup>120</sup> Res. Ex. 9 at 18-19.

<sup>121</sup> Res. Ex. 9 at 19.

<sup>122</sup> Tr. at 350.

<sup>123</sup> Tr. at 341.

<sup>124</sup> Tr. at 361, 390-391.

<sup>125</sup> Tr. at 362-363.

<sup>126</sup> Res. Ex. 1.

<sup>127</sup> Res. Ex. 1 at 2.

- Student could \*\*\*.<sup>128</sup> Student was able to participate in simple class \*\*\* and \*\*\* activities with \*\*\* and \*\*\*. Student continued to need support with \*\*\* and to use it appropriately.<sup>129</sup>
61. The ARDC again decided that Student be placed in a \*\*\* class \*\*\*\*\*. In this class, Student would spend \*\*\* minutes per day in a special education class; \*\*\* minutes per day in the general education class for \*\*\*; and have \*\*\* and \*\*\* in the general education setting.<sup>130</sup>
62. Student does better with fewer distractions and with the instructions directed towards Student.<sup>131</sup> Student is now \*\*\* and to \*\*\*, but Student needs assistance in completing Student's other academic work.<sup>132</sup> Towards the end of the year, Student's \*\*\* teacher \*\*\* classroom so Student could shift Student's attention to the \*\*\* teacher.<sup>133</sup>
63. In \*\*\*, Student's teachers worked in a coordinated and collaborated manner to ensure Student progressed academically and non-academically. Student made significant progress in Student's behavior at home and at school and was able to progress to meet Student's IEP goals.<sup>134</sup> If Student is moved to a class with \*\*\*\* Student, who exhibit severe behavior issues, and without peers in a classroom setting, Student's behavior will likely deteriorate. Moreover, because the \*\*\* teacher is not curriculum trained, Student may not be challenged academically.<sup>135</sup>
64. Currently, students in the District's \*\*\* class engage in the following behaviors: \*\*\*.<sup>136</sup> The District does not require \*\*\* teachers to \*\*\*, but instead they \*\*\*.<sup>137</sup> \*\*\* teaches the \*\*\*.<sup>138</sup>
65. At the time of the October 2016 ARDC and May 2017 ARDC meetings, the majority of the committee members had never observed \*\*\* class.<sup>139</sup>

---

<sup>128</sup> Res. Ex. 1 at 2.

<sup>129</sup> Res. Ex. 1 at 3.

<sup>130</sup> Tr. at 58; Res. Ex. 1 at 36-38.

<sup>131</sup> Tr. at 172-173.

<sup>132</sup> Tr. at 426.

<sup>133</sup> Tr. at 427.

<sup>134</sup> Res. Ex. 9 at 1.

<sup>135</sup> Res. Ex. 1 at 42, 69-71; Tr. at 73-75.

<sup>136</sup> Tr. at 251.

<sup>137</sup> Tr. at 258-259.

<sup>138</sup> Tr. at 258.

<sup>139</sup> Tr. at 328.

66. The District has modified Student's May 2017 BIP to include most of the recommendations made by Petitioner's Behavior Analyst.<sup>140</sup>
67. Student requires \*\*\* instruction to progress academically, but with in-class and resource support was able to master most of Student's IEP goals and received good grades on Student's modified curriculum.<sup>141</sup> Student progressed behaviorally by modeling Student's peers in the general education class setting.<sup>142</sup> It is important for Student to build relationships with peers and Student was establishing some relationships in \*\*\*.<sup>143</sup>

#### IV. APPLICABLE LAW, ANALYSES, AND CONCLUSIONS

##### A. The IDEA and Its Implementing Regulations

Under the IDEA, and its implementing regulations, school districts in Texas must afford children with disabilities a FAPE. The IDEA defines a FAPE as special education and related services that (a) are provided at public expense, under public supervision and direction, and without charge; (b) meet State standards (including IDEA requirements); (c) include an appropriate preschool, \*\*\*, or secondary school education; and (d) are provided in accordance with a properly developed IEP.<sup>144</sup> States receiving federal assistance under the IDEA must: (1) provide a FAPE to each disabled child within its boundaries and (2) ensure that such education is in the LRE possible.<sup>145</sup>

---

<sup>140</sup> Tr. at 193.

<sup>141</sup> Tr. at 341-342, 367-368.

<sup>142</sup> Tr. at 60.

<sup>143</sup> Tr. at 209, 238.

<sup>144</sup> 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

<sup>145</sup> *Cypress-Fairbanks*, 118 F.3d at 247; 20 U.S.C. § 1412(a)(1).

## 1. FAPE

Upon a finding that a child has a disability, an ARDC must develop an IEP for the child.<sup>146</sup> The IEP must meet specific requirements of the IDEA and Texas law.<sup>147</sup>

The U.S. Supreme Court first addressed the question of when an IEP provides a FAPE in *Board of Education of Hendrick Hudson Central School District v. Rowley, Westchester County*, 458 U.S. 176 (1982). The Fifth Circuit 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 Student '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>148</sup>

In 2017, in *Andrew F. v. Douglas Cnty. Sch. Dist.*, the Supreme Court revisited the question of what constitutes a FAPE and concluded a FAPE "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."<sup>149</sup>

Since at least 1997, the Fifth Circuit has tied the provision of a FAPE to an inquiry into a child's unique circumstances, a standard that is in alignment with the *Andrew F.* holding.<sup>150</sup> The Fifth Circuit has set forth four factors that serve as an indication of whether an IEP is reasonably

---

<sup>146</sup> *R.H.*, 607 F.3d at 1007; *Cypress-Fairbanks*, 118 F.3d at 247; 20 U.S.C. § 1415(b)(1).

<sup>147</sup> 34 C.F.R. §§ 300.320 - 300.324; 19 Tex. Admin. Code § 89.1055.

<sup>148</sup> *Bobby R.*, 200 F.3d at 347, citing to *Cypress-Fairbanks*, 118 F.3d at 247-48.

<sup>149</sup> *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 1001 (2017); *Rowley*, 458 U.S. 176, 181 (1982); see *C.M. v. Warren Indep. Sch. Dist.* 117 LRP 17212 (E.D. Tex. 2017)(unpublished).

<sup>150</sup> *C.G. v. Waller Indep. Sch. Dist.*, No. 16-20439 (5th Cir. 2017).

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 coordinated and collaborative manner by the key “stakeholders;” and (4) positive academic and nonacademic benefits are demonstrated.<sup>151</sup> The factors need not be accorded any particular weight or be applied in any particular way. Instead, they are indicators of an appropriate IEP.<sup>152</sup>

## 2. LRE

The IDEA requires that a child be provided FAPE in the LRE. Therefore, the District is required to ensure that:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, special schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of the child is such that education in regular classes with supplementary aids and services cannot be achievement satisfactorily.<sup>153</sup>

In deciding the educational placement of a student with a disability, the District must ensure that the decision is made by a group of persons including the parents and other people knowledgeable about the student, the evaluation data, and the placement options, and is in conformity with the LRE provisions.<sup>154</sup> The placement decision must be made annually, based on the student’s IEP, and be situated as close as possible to the student’s home.<sup>155</sup> It must also take into consideration any potential harmful effect on the student or on the quality of services the

---

<sup>151</sup> *Cypress-Fairbanks Indep. Sch. Dist.*, 118 F.3d at 253.

<sup>152</sup> *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009); *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1600, 113 LRP 10911 (2013).

<sup>153</sup> 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a)(1), (2)(i-ii).

<sup>154</sup> 34 C.F.R. § 300.116(a)(1),(2).

<sup>155</sup> 34 C.F.R. § 300.116(b)(1)-(3).

student needs.<sup>156</sup> A student with a disability may not be “removed from education in age-appropriate regular classrooms solely because of needed modification in the general education curriculum.”<sup>157</sup>

The Fifth Circuit has established a two-prong test for determining whether a school has complied with the LRE requirements.<sup>158</sup> The two-prong test asks “whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child,” and if not, “whether the school has mainstreamed the child to the maximum extent appropriate.”<sup>159</sup> The Court recognized that the language and behavior models available to a student with a disability from the non-disabled peers in class may be essential and helpful in the student’s development even if the student is unable to absorb all of the regular education curriculum.<sup>160</sup> As to the first prong of the test, the court identified four factors to consider: accommodation in the regular education; educational benefit; overall educational experience; and effect on the regular classroom environment.<sup>161</sup>

## **B. Background**

During the 2015-2016 school year, Student was in the \*\*\* class with inclusive time in the general education setting. At the end of Student’s \*\*\* school year, the ARDC recommended that Student remain in the \*\*\* program, but with significantly more time in the general education class. Shortly after Student began \*\*\*, Student’s concerning behavior escalated in the general education classroom. Student \*\*\*. \*\*\*.

A new FIE report regarding Student was issued in October 2016, in which Student was identified as a student with ID. The ARDC met on October \*\*\*, 2016 for an annual review in which

---

<sup>156</sup> 34 C.F.R. § 300.116(d).

<sup>157</sup> 34 C.F.R. § 300.006(e).

<sup>158</sup> *Daniel R. R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989).

<sup>159</sup> *Daniel R. R.*, 874 F.2d at 1048.

<sup>160</sup> *Daniel R. R.*, 874 F.2d at 1048.

<sup>161</sup> *Daniel R. R.*, 874 F.2d at 1048-1049.

Student's parent participated. After reviewing the 2015 FIE, Student's performance since being in \*\*\*, and considering Student's needs and information from Student's teacher, District personnel, and the parents, the ARDC recommended that Student be moved to the SLL-\*\*\* class based on Student's \*\*\* and academics. Student was being taught in the \*\*\* class a modified curriculum for all academic areas at the \*\*\* and \*\*\* level. Student's parents objected, pointing out that Student had only been in \*\*\* \*\*\*, and the potential for Student to regress both behaviorally and academically if returned to the \*\*\* class.

The meeting ended in disagreement, but was set to reconvene on November \*\*\*, 2016, after \*\*\*. The parents also requested an IEE. On November \*\*\*, 2016, Petitioner filed a request for a due process hearing requesting that Student remain in Student's current educational placement (commonly referred to as "stay put").<sup>162</sup> The case was dismissed without prejudice to afford the parties time to obtain the requested IEEs in an effort to informally resolve the matter. The parties were unable to resolve most of the issues so the Complaint was filed.

### **C. Whether the District Provided Student FAPE**

#### **1. \*\*\*: 2015-2016 School Year**

##### **a. 2015 IEP Was Individualized**

The 2015 IEP for the 2015-2016 school year was developed near the end of Student's \*\*\*. The ARDC met on March \*\*\*, 2015, and created the 2015 IEP after considering Student's performance in \*\*\*, information from school personnel, Student's \*\*\* needs, the 2014 FIE, and the parents' information and concerns. The parents agreed with the 2015 IEP. Therefore, the 2015 IEP was individualized on the basis of Student's assessment and performance in conformance with the IDEA.

---

<sup>162</sup> While a due process hearing is pending, the student remains in his or her "current educational placement" unless the parties agree otherwise or the hearing is expedited. 34 C.F.R. § 300.518(a).

**b. LRE**

In determining whether Student's placement comports with the LRE requirements, two issues must be addressed:

- (1) Can education in the general education classroom, with the use of supplemental aids and services, be achieved satisfactorily for Student?
- (2) Has the District included Student in the general education classroom to the maximum extent appropriate?

After considering Student's performance, the 2014 FIE, and the recommendations of Student's parents and school personnel, the ARDC determined Student would benefit from increased time with Student's peers in the general education setting while still being provided the structure of a \*\*\* class. Petitioner did not present any credible evidence to suggest the District failed to include Student in the general education classroom to the maximum extent appropriate. In addition, the parents agreed with this progression into to the general education setting for Student. Therefore, the District administered the \*\*\* program in the LRE during the 2015-2016 school year.

**c. Coordination and Collaboration with Parents**

It is undisputed that Student's parents participated in the March \*\*\*, 2015 ARDC meeting and that the 2015 IEP was created in a coordinated and collaborative manner. Student's parents were asked questions about Student's transition to \*\*\* and the District agreed to begin working to support the transition for the remainder of the school year. Therefore, the services provided in the 2015 IEP were provided in a coordinated and collaborative manner by the key stakeholders.

**d. Positive Academic and Non-academic Benefits**

Based on the evidence presented, the District properly implemented the 2015 IEP. Although Petitioner questioned the experience of the \*\*\* teacher, the evidence presented showed that the \*\*\* teacher sent daily summaries regarding Student's performance at school to Student's parents,



provided IEP progress reports with Student's report card, and helped Student advance on Student's IEP goals. Petitioner's parents did not ask for additional information regarding Student's academic performance. Petitioner also asserted that the \*\*\* teacher exaggerated Student's \*\*\* level. However, the evidence shows that the \*\*\* program Student was using in class did not correspond directly to the District's \*\*\* level and even Student's mother agreed Student's \*\*\* had improved.<sup>163</sup>

The information provided at the March \*\*\*, 2017 ARDC meeting by Student's \*\*\* teacher indicated that Student was \*\*\*, but Student's \*\*\* with \*\*\* were at an instruction \*\*\*. However, she noted that while Student could \*\*\*, Student's \*\*\* was not at that level. Student mastered \*\*\* out of \*\*\* objectives set out in Student's 2015 IEP. Student's behavior improved during \*\*\* by implementing the BIP developed during the spring semester. Consequently, Student enjoyed positive academic and non-academic benefits during \*\*\*. Therefore, the District provided a FAPE to Student during the 2015-2016 school year.

## **2. \*\*\*: 2016-2017 School Year**

### **a. The 2016 IEP Was Individualized**

The 2016 IEP was individualized on the basis of Student's assessments and performance during \*\*\*. The March \*\*\*, 2016 ARDC created Student's IEP for the 2016-2017 school year after consideration of Student's assessments and performance in \*\*\*, the 2014 FIE, information from Student's teachers and school personnel, and parents' concerns and information. Student's \*\*\* had improved and Student mastered many of Student's IEP goals. Student's parents and their advocate provided significant input during this meeting and the ARDC reached consensus on all issues including keeping Student in the \*\*\* program, but increasing the time in the \*\*\* general education setting with in-class and resource support.

On May \*\*\*, 2016, the District's Behavior Analyst finalized the FBA which was considered by the ARDC on May \*\*\*, 2016. The ARDC also reviewed Student's current performance. At that

---

<sup>163</sup> Tr. at 93.

time, Student had a \*\*\* and a \*\*\*. Student could \*\*\*, but Student's \*\*\* was not \*\*\*. Again, Student lost \*\*\* when Student focused on \*\*\*. During this meeting, Student's parents requested that Student's 2017 FIE be moved forward to October \*\*\*, 2016, and the District agreed. The same day, the ARDC committee held a REED, again with parents' input.

Petitioner argues that the 2016 IEP was not an appropriately individualized program because after the \*\*\* weeks in \*\*\*, the ARDC determined that it would remove Student from \*\*\* program and return Student to \*\*\* class, incorrectly determined Student had an ID, and failed to implement an appropriate BIP. However, the 2016 IEP could not predict that Student would have such a difficult transition. Student's behaviors increased and new behaviors developed when Student transitioned to \*\*\*. The District's Behavior Analyst in collaboration with Student's other teachers and support staff worked to determine which strategies worked best for Student. While this took some time, it ultimately worked and by spring Student's concerning behaviors had decreased substantially.

Although Petitioner argued that removing Student from the general education class when Student \*\*\* was the wrong strategy, it was necessary to allow the \*\*\*. The District's behavior strategies implemented in October 2016 resulted in the improvement of Student's behavior. Student's current placement was successful regarding Student's behavior.

In completing the 2016 FIE, the District's ED determined that Student's performance on standardized intellectual function tests supported by Student's \*\*\* score supported a finding that Student was eligible for special education as a student with an ID. Although the Independent LSSP opined that adding ID to Student's eligibility for special education does not change Student's identified needs and is unnecessary to maintain Student's eligibility for special education services,<sup>164</sup> she did not testify that the ED's determination that Student has an ID is wrong.

---

<sup>164</sup> Res. Ex. 9 at 19.

**b. LRE**

Petitioner does not dispute that Student's placement in \*\*\* was in the LRE. Instead, Petitioner objects to the ARDC's decision to remove Student from the general education setting and place Student in the more restrictive \*\*\* class. The issue of the ARDC's proposed placement is addressed below.

**c. Coordination and Collaboration with Parents**

The District worked in coordination and collaboration with Student's parents in creating the 2016 IEP as indicated by the parents' agreement with the IEP and the desire to keep Student in Student's "stay put" placement.

**d. Academic and Non-Academic Benefits**

Although Student is working at the \*\*\* and \*\*\* level, Student does participate with modification in the general education class. Student progressed academically and received passing grades on Student's modified curriculum. Student's behavior dramatically improved in the spring and Student made significant non-academic gains. Because Student remained in the \*\*\* program while attending general education and improved in both Student's academic and non-academic performance, this is not a disputed issue. What is in dispute is whether the ARDC's proposal to move Student to the \*\*\* class is reasonably calculated to provide Student with the requisite educational benefits in the LRE under IDEA as discussed below.

**C. Proposed Placement for 2017-2018 School Year**

When the 2016-2017 school year began, Student's concerning behavior in the \*\*\* general education setting escalated, frequently \*\*\*. On those occasions, Student was removed from class and Student's lessons continued in the \*\*\* class, if necessary, until Student's behavior improved. On October \*\*\*, 2016, a new FIE report recommended that Student be identified as a Student with an ID. An ARDC convened on October \*\*\*, 2016, to review Student's performance in the \*\*\* \*\*\* program and to consider the 2016 FIE. Aside from Student's parents and advocate, the ARDC

recommended that Student be returned to the \*\*\* class even though most of the District personnel on the ARDC had never observed \*\*\* class. It is this recommended revision to the March 2016 IEP that is at the heart of this dispute.

### **1. The 2017 IEP Is Individualized**

Petitioner disagrees with the ARDC's determination that Student is eligible for special education services with the added ID or that Student needs to be in the \*\*\* program. Disagreeing with the outcome of an ARDC meeting and the resulting IEP does not invalidate the IEP or indicate a denial of FAPE. As discussed above, there was insufficient evidence to establish that the ED's and ARDC's determination that Student has an ID was in error. Moreover, it is unclear what effect, if any, the addition of an ID had in the ARDC's determination to return Student to the \*\*\* program.

The ARDC considered the parents' concerns and the recommendations made by the Independent LSSP and Behavior Analyst. Several of the Behavior Analyst's recommendations were adopted by the ARDC. The evidence is insufficient to establish that the 2017 IEP is not individualized and based on Student's assessments and performance.

### **2. LRE**

The District maintains that the \*\*\* program will still afford Student time with Student's non-disabled peers during \*\*\*. It will not afford Student any time in a general education setting for core classes. Student's \*\*\*-grade teachers testified that Student did not receive any academic or non-academic benefit from participating in the general education class during \*\*\*. All of Student's core curriculum was modified to a \*\*\* or \*\*\* level. Although none of these teachers had observed \*\*\* program in October 2016, and most not until just before the hearing, each recommended that Student needs the \*\*\* program because it would afford Student access to the entire curriculum at Student's level, at Student's pace, and with the \*\*\* Student requires.

However, the special education teacher currently teaching the \*\*\* class confirmed that the special education students in this class have \*\*\* which Student has made significant progress.

Student's behavior has dramatically improved and exposing Student to \*\*\* would not result in a non-academic benefit. Removing Student from all core academic classes deprives Student of modeling Student's peers and will likely cause Student to regress. Although Student does not \*\*\*, Additionally, it does not appear that \*\*\*. Further, Student's placement in the \*\*\* class would require Student to \*\*\*.

Student not only progressed academically and non-academically while Student was in \*\*\*, Student also did so in \*\*\*. At that time, Student was in a \*\*\* class and went to general education classes for many of the core academic classes. Just as in \*\*\*, Student's \*\*\* core curriculum was modified as well as Student's grades. Because Student progressed academically and non-academically, the District elected to continue Student in the \*\*\* class with in-class and Resource support. Neither the Independent LSSP nor the Behavior Analyst recommended that Student be removed from Student's current placement.

The District's proposed placement for the 2017-2018 school year in the \*\*\* class is not reasonably calculated to provide Student with the requisite educational benefit in the LRE under the IDEA.

### **3. Coordination and Collaboration with Parents**

Petitioner argues that the District failed to engage in meaningful coordination and collaboration with Student's parents. The ARDC determined to remove Student from Student's current placement in the general education core academic class in October 2016, just \*\*\* after school started. The ARDC gave Student's parents time to observe another \*\*\* class. However, when the ARDC reconvened, the placement determination appeared to Student's parents to have been made already.

On May \*\*\*, 2017, the ARDC again reviewed Student's PLAAFP statement; information from Student's teachers, supports, and other school personnel; and information from the Independent LSSP and Behavior Analyst. When the parents asked to have their addendum attached to the ARDC meeting documentation, the ARDC did so. Although Student's parents felt as though the ARDC had

already determined Student's placement before considering their concerns, the evidence is insufficient to support such a finding. Therefore, Student's 2017 IEP was developed in a coordinated and collaborative manner by all stakeholders, including Student's parents.

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

According to the District, Student will benefit academically and non-academically by placement in the \*\*\* class because Student will receive the necessary support to progress. As previously discussed, the proposed placement in the \*\*\* class will not benefit Student non-academically. If Student were to be placed in the \*\*\* class and Student's behavior were to escalate, it is uncertain that Student would receive an academic benefit.

#### **D. AT Assessment**

Both the District's \*\*\* and \*\*\* testified that Student did not require a formal AT evaluation at the time of the October \*\*\*, 2016 FIE. Student's AT needs were informally evaluated and it was determined that Student's \*\*\* needs were met with devices available in the classroom. Prior efforts to provide Student with AT for Student's \*\*\* needs have been unsuccessful. Student may require a formal AT evaluation in the future, but the evidence is insufficient to establish that the District should have conducted an AT evaluation during the 2016-2017 school year.

#### **E. Conclusions**

After considering the evidence and the parties' closing arguments, the hearing officer finds Petitioner did not meet Petitioner's burden of proof to show that the District failed to provide Student with a FAPE within the meaning of the IDEA during the 2015-2016 and 2016-2017 school years or that the District should have conducted an AT evaluation during the 2016-2017 school year. Petitioner did meet Petitioner's burden to show that the District's proposed placement of Student in the \*\*\* class and removing Student from the general education class with in-class and Resource Room support in all core academic classes is not reasonably calculated to provide Student with the requisite educational benefit in the LRE under the IDEA. Accordingly, the District is required to

maintain Student's placement in the general education classroom with in-class and Resource Room supports.

## V. CONCLUSIONS OF LAW

1. The District is a local education agency responsible for complying with the IDEA as a condition of the State of Texas's receipt of federal education funding, and the District is required to provide each disabled child in its jurisdiction with a FAPE, pursuant to the IDEA, 20 U.S.C. § 1400 *et seq.*
2. Parents of students with disabilities are entitled to file a due process complaint and have a hearing on any matter relating to the identification, evaluation, or educational placement of the student, or the provision of a FAPE to the student. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.507-.513.
3. Petitioner bears the burden of proof on all issues raised in its due process hearing request. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).
4. A party attacking the appropriateness of an IEP established by a school district bears the burden of showing why the IEP and resulting placement were inappropriate under the IDEA. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-248 (5th Cir. 1997), as cited in *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000); *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1010-1011 (5th Cir. 2010).
5. The one-year statute of limitations applies to this proceeding, resulting in an accrual date of March 31, 2016. 19 Tex. Admin. Code § 89.1151(c).
6. Student's 2015 and 2016 IEPs developed by the District were appropriate for Student, based on Student's assessments and performance. 34 C.F.R. §§ 300.320 - .324, .502(c)(1); *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 1001 (2017); *Cypress-Fairbanks*, 118 F.3d at 253 (5th Cir. 1997).
7. The District's 2016 FIE of Student including the ID evaluation was conducted in accordance with IDEA requirements and is appropriate. 34 C.F.R. §§ 300.8(c)(10), .301, .303 - .311; 19 Tex. Admin. Code § 89.1040(b)(5).
8. The District provided Student with a FAPE during the 2015-2016 and 2016-2017 school years. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; *Andrew F.*, 137 S. Ct. at 1001; *Board of Edu. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 181 (1982); *Bobby R.*, 200 F.3d at 347-348.

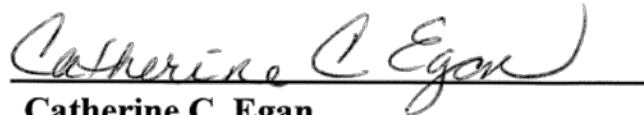
9. The District's proposed placement to return Student to the SLL/\*\* \*\* does not meet the LRE requirements of the IDEA. 20 U.S.C. § 1412(a)(5); 34 C.F.R. §§ 300.114, .116; *Daniel R. R. v. State Board of Education*, 874 F.2d 1036, 1039, 1046-1047 (5th Cir. 1989).

### ORDER

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

Petitioner's requested relief is granted in part, such that the District must maintain Student's placement in the general education classroom with in-class and Resource Room support. All other requested relief is denied.

**SIGNED July 7, 2017.**



**Catherine C. Egan**  
**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>165</sup>

---

<sup>165</sup> 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516; 19 Tex. Admin. Code § 89.1185(n).