

**DOCKET NO. 286-SE-0616**

<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>KILLEEN INDEPENDENT SCHOOL DISTRICT, Respondent</b>	§	<b>THE STATE OF TEXAS</b>
	§	
	§	

**DECISION OF HEARING OFFICER**

\*\*\* (Student) by next friends \*\*\* and \*\*\* (Parents) (collectively, Petitioner) requested an impartial due process hearing (Complaint) pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 *et seq.* The Killeen Independent School District (Respondent or the District) is the respondent to the Complaint. The Complaint was subsequently amended (Amended Complaint). Petitioner alleges the District denied Student a free appropriate public education (FAPE) when it violated its Child Find duty; failed to comply with the IDEA’s procedural requirements; conducted an inappropriate Full Individual Evaluation (FIE) of Student; and developed an Individualized Education Program (IEP) for Student that does not meet Student’s unique educational needs. The District denies Petitioner’s allegations. The hearing officer finds Petitioner did not prove the District violated the IDEA as alleged. Therefore, Petitioner’s requested relief is denied.

**I. PROCEDURAL HISTORY AND STATUTE OF LIMITATIONS**

**A. Procedural History**

Petitioner filed the Complaint on May 31, 2016.<sup>1</sup> The parties did not reach an agreement at the June 13, 2016 resolution session. On the first day of the due process hearing that began on August 17, 2016, the parties reached a proposed settlement agreement. The case was continued to

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<sup>1</sup> Petitioner’s (Pet.) Ex. 1.

give the District's Board of Trustees (Board) time to consider the proposed settlement agreement. The Board met on August 23, 2016, and did not approve the proposed settlement agreement.<sup>2</sup> The due process hearing was reset to November 15-19, 2016.

On November 2, 2016, the due process hearing was continued to February 6-9, 2017, to give the Admission, Review, and Dismissal committee (ARDC) time to review an FIE completed in October 2016 and for Petitioner to decide whether to file an amended due process hearing request after the ARDC meeting.

On December 7, 2016, Petitioner filed the Amended Complaint and—per agreement of the parties—the due process hearing remained scheduled for February 6-9, 2017. The parties agreed to participate in mediation in lieu of the resolution session. Their February 2, 2017 mediation was unsuccessful.<sup>3</sup>

The hearing was held February 6-9, 2017, before Sharon Cloninger, hearing officer, in the District's administration building at 902 North 10th Street, Killeen, Texas. Petitioner was represented by Sonja D. Kerr, attorney. The District was represented by Janet Horton, attorney. The District's party representatives were \*\*\*, Ed.D., Executive Director of Special Education, and \*\*\*, Principal of Student's \*\*\* school.

At the close of the due process hearing, the parties requested a March 27, 2017 deadline for filing written closing arguments and an extension of the decision due date from March 6, 2017, to April 10, 2017, for good cause.<sup>4</sup> Subsequently, due to illness of Petitioner's counsel and at the request of the parties, the closing brief deadline was extended to April 24, 2017, and the decision due date was extended to May 8, 2017, for good cause shown. The closing brief deadline was then extended to April 26, 2017, pursuant to Respondent's request, without a commensurate extension of the decision due date. Another request for extension was filed and granted: closing briefs were

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<sup>2</sup> Pet. Ex. 23.

<sup>3</sup> Tr. at 1701-1702.

<sup>4</sup> Tr. at 1703.

due May 5, 2017, and the decision due date was extended to May 19, 2017, for good cause shown. Finally, due to technical difficulties that prevented the parties from timely filing objections and responses to closing briefs, the decision due date was extended yet again, for good cause, to May 23, 2017. This decision was timely issued.

## **B. Statute of Limitations**

The District asserted the affirmative defense of the 1-year statute of limitations. Petitioner raised no exemption.<sup>5</sup> The accrual date for this proceeding is May 31, 2015.

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

### **A. Issues**

1. Prior to November \*\*\*, 2016, did the District deny Student a FAPE by failing to identify Student as a student eligible for special education and related services based upon Student's disability of Attention Deficit Hyperactivity Disorder (ADHD), and/or Other Health Impairment (OHI), and/or Emotional Disturbance (ED)?
2. Prior to November \*\*\*, 2016, did the District fail to provide Parents with any written criteria identifying how a student would qualify for a Specific Learning Disability (SLD)? After November \*\*\*, 2016, did the District utilize criteria for an SLD that is inconsistent with the IDEA to deny Student eligibility as a student with an SLD?
3. Has the District failed and is it continuing to fail to comply with all procedural requirements of the IDEA and Texas law including provisions of Prior Written Notice, and by doing so has the District impeded Student's right to a FAPE, significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, or impeded or caused a deprivation of educational benefit to Student?
4. Did the October \*\*\*, 2016 FIE fail to meet IDEA requirements for a full comprehensive evaluation identifying all of Student's disabilities and eligibility pursuant to the IDEA and State law?

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<sup>5</sup> 19 Tex. Admin. Code § 89.1151.

5. Does the November 2016 IEP deprive Student of a FAPE designed to meet Student's unique educational needs in that it: (1) fails to recognize Student's SLD in \*\*\*; (2) fails to include measurable objectives in the \*\*\* goal; (3) fails to ensure sufficient \*\*\* instruction; (4) fails to provide Student with Extended School Year (ESY) services for summer 2017 or create any procedure in which Student's need for ESY will be determined; and/or (5) fails to provide a Behavioral Intervention Plan (BIP) for Student?

**B. Petitioner's Requested Relief**

1. Find that Student is eligible as a student with an SLD pursuant to the IDEA.
2. Order the District to hire an independent expert qualified to provide direction and guidance to Student's ARDC and all school staff to provide an IEP for Student that is designed to meet Student's unique educational needs or, in the alternative, to pay for Student to receive a program of education from a private source, or some combination thereof.
3. Order the District to place on its website any criteria it uses to determine a student will qualify as a student with an SLD.
4. Order the District to provide Student with compensatory education in an amount equal to the deprivation of education Student has experienced.
5. Order the District to reimburse Parents for the costs of any private evaluations, tutoring, and counseling (and transportation costs for same) they have provided given the District's refusal to recognize Student as a child entitled to eligibility pursuant to the IDEA prior to November \*\*\*, 2016.
6. Order all other relief that may be appropriate.

**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>6</sup> A party challenging the appropriateness of an IEP established by a school district bears

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<sup>6</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).

the burden of showing why the IEP and resulting placement are inappropriate under the IDEA.<sup>7</sup> The standard of proof in IDEA proceedings is a preponderance of the evidence.<sup>8</sup>

### III. WITNESSES

#### Parent

1. Mother<sup>9</sup>

#### Expert witnesses

2. Clinical Psychologist, Petitioner's expert<sup>10</sup>
3. Licensed Specialist in School Psychology (LSSP), District's expert<sup>11</sup>

#### District-wide personnel

4. Section 504 Coordinator<sup>12</sup>
5. Executive Director of Special Education<sup>13</sup>
6. Special Education Coordinator for Campus Operations<sup>14</sup>
7. Educational Diagnostician (ED DIAG)<sup>15</sup>
8. Social Worker<sup>16</sup>

#### \*\*\* Grade, \*\*\* school (August-October 2015)

9. Assistant Principal, \*\*\* school<sup>17</sup>

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<sup>7</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 Indep. Sch. Dist.*, 607 F.3d 1003, 1010-1011 (5th Cir. 2010).

<sup>8</sup> 20 U.S.C. § 1415(i)(1)(c)(iii).

<sup>9</sup> Tr. at 608-609, 703, 718 (\*\*\*); Pet. Ex. 3 (\*\*\*).

<sup>10</sup> Tr. at 132-133, 136, 138-139 (credentials); Tr. at 140-141 (designation as expert); Pet. Ex. 14 at 11-13 (*curriculum vitae*).

<sup>11</sup> Tr. at 1486-1493 (credentials); Resp. Ex. 154 (*curriculum vitae*).

<sup>12</sup> Tr. at 540, 550 (credentials); Resp. Ex. 161 (*curriculum vitae*).

<sup>13</sup> Tr. at 39-41 (credentials).

<sup>14</sup> Tr. at 351-353 (credentials).

<sup>15</sup> Tr. at 247-250, 1154-1155 (credentials); Resp. Ex. 156 (*curriculum vitae*).

<sup>16</sup> Tr. at 1285-1286 (credentials).

<sup>17</sup> Tr. at 755 (credentials).

**\*\*\* Grade/\*\*\* Grade, \*\*\* school (October 2015-present)**

10. Principal<sup>18</sup>
11. Assistant Principal, \*\*\* school<sup>19</sup>
12. \*\*\* teacher, \*\*\* grade<sup>20</sup>
13. \*\*\* teacher, \*\*\* grade<sup>21</sup>
14. General Education Counselor, \*\*\* grade<sup>22</sup>
15. General Education \*\*\* teacher, \*\*\* grade<sup>23</sup>
16. Inclusion \*\*\* teacher, \*\*\* grade<sup>24</sup>
17. Intervention \*\*\* teacher, \*\*\* grade<sup>25</sup>
18. \*\*\* teacher, \*\*\* grade<sup>26</sup>
19. \*\*\* teacher, \*\*\* grade, spring 2017<sup>27</sup>

**IV. FINDINGS OF FACT****A. Background**

1. Student resides with Parents within the boundaries of the District, where Student has attended school since \*\*\*.<sup>28</sup>
2. Student, age \*\*\*, attends \*\*\* grade at a District \*\*\* school.<sup>29</sup>
3. At age \*\*\*, Student was diagnosed with ADHD, for which Student continues to take medication.<sup>30</sup>

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<sup>18</sup> Tr. at 1326 (credentials).

<sup>19</sup> Tr. at 588-589 (credentials).

<sup>20</sup> Tr. at 876-877 (credentials).

<sup>21</sup> Tr. at 831, 842 (credentials).

<sup>22</sup> Tr. at 1449, 1485 (credentials).

<sup>23</sup> Tr. at 1236-1237 (credentials).

<sup>24</sup> Tr. at 466-467 (credentials).

<sup>25</sup> Tr. at 1006-1007, 1082 (credentials).

<sup>26</sup> Tr. at 1108-1110, 1152 (credentials).

<sup>27</sup> Tr. at 937, 992 (credentials).

<sup>28</sup> Pet. Ex. 14 at 1; Pet. Ex. 24 at 1-2; Resp. Ex. 116 at 1924-1925.

<sup>29</sup> Pet. Ex. 14 at 1; Pet. Ex. 24 at 1; Resp. Ex. 116 at 1924.

<sup>30</sup> Pet. Ex. 14 at 1; Pet. Ex. 24 at 14; Resp. Ex. 116 at 1937.

4. Typically, Students with ADHD do not pay close attention to detail, have difficulty sustaining attention, appear to not be listening, struggle to follow through on instructions, have difficulty with organization, avoid or dislike tasks that require a lot of thinking, lose things, are easily distracted and forgetful, and have difficulty remaining seated.<sup>31</sup>
5. Due to the ADHD diagnosis, the District provided Student with accommodations under Section 504 of the Rehabilitation Act of 1973 (Section 504) from May \*\*\*, 2013 (\*\*\* grade) through mid-November 2016 (\*\*\* grade).<sup>32</sup>
6. Since November \*\*\*, 2016, the District has provided Student with special education services as a child with OHI (due to the ADHD diagnosis) and ED.<sup>33</sup>
7. Some children with ADHD receive Section 504 services and some are in special education, depending on the severity of the ADHD and how it affects the child educationally.<sup>34</sup>

**1. \*\*\* Grade (2012-2013)**

8. In April 2013, Student did not meet the minimum on the State of Texas Assessments of Academic Readiness (STAAR) test in \*\*\*, correctly answering \*\*\* of \*\*\* questions needed to pass.<sup>35</sup>
9. Student passed all of Student's classes in \*\*\* grade.<sup>36</sup>

**2. \*\*\* Grade (2013-2014)**

10. The District's November 2013 dyslexia screening showed Student does not have dyslexia.<sup>37</sup>
11. In 2013-2014, Parents sent Student to Occupational Therapy (OT) for \*\*\* and general fine motor delay.<sup>38</sup> \*\*\* is a neurologically based difficulty with producing written words and letters.<sup>39</sup>

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<sup>31</sup> Pet. Ex. 12; Pet. Ex. 24 at 7.

<sup>32</sup> Pet. Ex. 24 at 2; Resp. Ex. 1 at 56; Resp. Ex. 64 at 29; Resp. Exs. 80, 81, 82; Resp. Ex. 116 at 1925.

<sup>33</sup> Pet. Ex. 24 at 35; Respondent (Resp.) Ex. 116 at 1955.

<sup>34</sup> Tr. at 266 (ED DIAG).

<sup>35</sup> Tr. at 1388 (Principal); Resp. Ex. 129 at 2462-2464.

<sup>36</sup> Tr. at 419 (Special Ed. Coord. for Campus Ops.); Resp. Ex. 39.

<sup>37</sup> Tr. at 447 (Special Ed. Coord. for Campus Ops.); Tr. at 559 (Section 504 Coord.); Resp. Ex. 15.

<sup>38</sup> Pet. Ex. 14 at 1.

<sup>39</sup> Pet. Ex. 12; Pet. Ex. 24 at 7.

12. In April 2014, Student did not meet the minimum on the STAAR in \*\*\* and \*\*\*.<sup>40</sup>
13. The District provided Student with \*\*\* (\*\*\*) and tutoring, both strategies for assisting students at risk of failing the STAAR.<sup>41</sup>
14. In September, January, and May of 2013-2014, Student received a “proficient” score in \*\*\* on the \*\*\* (\*\*\*). The \*\*\* report noted that Student may need to work on quick retrieval of \*\*\* facts.<sup>42</sup>
15. Student’s April 2014 Section 504 accommodations included checking for understanding; \*\*\*; using an assignment notebook and organizational strategies; and extended time for written assignments.<sup>43</sup> Student was not provided small group instruction as recommended by Student’s pediatrician.<sup>44</sup>
16. On May \*\*\*, 2014, the Section 504 committee determined Student continued to qualify for services due to ADHD, but that diagnoses of developmental delay and \*\*\* did not substantially limit any of Student’s major life activities.<sup>45</sup>
17. Student’s attendance was average until the second semester, when Student missed \*\*\* days.<sup>46</sup>
18. Student passed all of Student’s \*\*\* grade classes.<sup>47</sup>

### 3. \*\*\* *Grade (2014-2015)*

19. Parents sent Student to a Pediatric Neuropsychologist for a private neuropsychological evaluation. The September \*\*\*, 2014 evaluation showed.<sup>48</sup>

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<sup>40</sup> Tr. at 1388 (Principal); Pet. Ex. 14 at 2; Resp. Ex. 129 at 2462, 2464-2465.

<sup>41</sup> Tr. at 414 (Special Ed. Coord. for Campus Ops.); Resp. Ex. 48. It is unclear if the \*\*\* and tutoring were provided before or after Student failed to pass the \*\*\* and \*\*\* sections of the 2014 STAAR.

<sup>42</sup> Tr. at 411-412 (Special Ed. Coord. for Campus Ops.); Resp. Ex. 49.

<sup>43</sup> Resp. Ex. 1 at 56.

<sup>44</sup> Tr. at 399-400 (Special Ed. Coord. for Campus Ops.); Resp. Ex. 8; Resp. Ex. 64 at 29, 31.

<sup>45</sup> Tr. at 401-402 (Special Ed. Coord. for Campus Ops.); Resp. Ex. 9; Resp. Ex. 64 at 29, 32-36.

<sup>46</sup> Tr. at 1597-1598 (LSSP); Resp. Ex. 1 at 2.

<sup>47</sup> Tr. at 419 (Special Ed. Coord. for Campus Ops.); Resp. Ex. 39; Resp. Ex. 50; Resp. Ex. 53.

<sup>48</sup> Resp. Ex. 3 at 89, 93-94; Resp. Ex. 16; Resp. Ex. 64 at 29, 37-49; *see* Pet. Ex. 24 at 14; *see also* Resp. Ex. 116 at 1937. Petitioner’s expert Clinical Psychologist incorrectly reported that the Pediatric Neuropsychologist’s diagnostic impression was that Student manifested an SLD in both \*\*\* and \*\*\*. Tr. at 178 (Clinical Psychologist); *see* Pet. Ex. 14 at 1; *see also* Resp. Ex. 3 at 94.



- a. Student demonstrated average or better performance on measures of fine motor skills, visual motor integration, graphomotor coordination, sustained attention (with ADHD medication), auditory processing, and aspects of executive functioning.
  - b. Student had healthy social and emotional functioning.
  - c. Student had less well-developed \*\*\* abilities, specifically in \*\*\* \*\*\* and \*\*\*. Using the patterns of strengths and weaknesses model,<sup>49</sup> the Pediatric Neuropsychologist determined Student's \*\*\* abilities reach or approach criterion for designation of an SLD given Student's overall cognitive abilities. A formal diagnosis of SLD could not be made unless Student continued to struggle in \*\*\* and/or \*\*\* even with the addition of formal intervention.
20. Student's initial FIE, completed on October \*\*\*, 2014, shows Student had no IDEA eligible disabilities, including an SLD or OHI.<sup>50</sup>
21. Parents requested an Independent Educational Evaluation (IEE) to determine if Student has an SLD.<sup>51</sup> According to the April \*\*\*, 2015 IEE report, Student's cognitive abilities are in the average range, Student's lowest score being \*\*\* in \*\*\* \*\*\*. A score below 85 was necessary to demonstrate a need for special education. Also, Student did not demonstrate an SLD in one or more of the basic psychological processes involved in understanding or using language, spoken or written, that may manifest itself in the imperfect ability to do \*\*\* \*\*\*.<sup>52</sup>
22. Student did not meet the minimum on the spring 2015 STAAR in \*\*\* or \*\*\*.<sup>53</sup> The State of Texas did not establish a standard score for passing the spring 2015 STAAR.<sup>54</sup>
23. From September 2014 to April 2015, Student's \*\*\* score improved.<sup>55</sup> \*\*\* relates to how \*\*\*.<sup>56</sup>

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<sup>49</sup> Tr. at 326-327 (ED DIAG).

<sup>50</sup> Pet. Ex. 24 at 2; Resp. Ex. 1 at 56, 65-66; Resp. Ex. 64 at 12-26; Resp. Ex. 116 at 1925. The appropriateness of the October 2014 FIE, conducted before the accrual date for this proceeding, is not at issue.

<sup>51</sup> Tr. at 661 (Mother); Resp. Ex. 2 at 103-104; Resp. Ex. 4 at 3; Resp. Ex. 16. An IEE is an evaluation conducted by a professional of the parents' choice who is not employed by the school district when the parents disagree with the school district's evaluation. 34 C.F.R. § 300.502(a)(2)(3), (b)(1).

<sup>52</sup> Resp. Ex. 2 at 113; *see* Tr. at 172 (Clinical Psychologist); *see also* Pet. Ex. 14 at 1.

<sup>53</sup> Tr. at 1388 (Principal); Resp. Ex. 129 at 1, 5-6.

<sup>54</sup> Tr. at 392 (Special Ed. Coord. for Campus Ops.); Tr. at 633 (Mother); Tr. at 1345-1346 (Principal).

<sup>55</sup> Tr. at 176 (Clinical Psychologist).

<sup>56</sup> Tr. at 125 (Exec. Dir. of Special Ed.).

24. The ARDC, including Parents, met on April \*\*\*, 2015, to consider the OHI form and letter from Student's pediatrician. The ARDC decided Student did not need specialized instruction.<sup>57</sup>
25. The Section 504 committee met on May \*\*\*, 2015, for a periodic re-evaluation of Student's eligibility and service plan. Accommodations were added to Student's plan in the areas of oral responses, note-taking assistance, extended time for projects, and shortened assignments. The Section 504 committee, including Mother and Father, agreed Student did not meet eligibility for special education services.<sup>58</sup>
26. The ARDC met on May \*\*\*, 2015, to consider the April \*\*\*, 2015 IEE report. The District provided Parents with a Notice of Procedural Safeguards. Student was passing all classes, displayed age-appropriate social behaviors, had no discipline referrals for the school year, and was making progress in the general academic setting. Student also had a Section 504 plan for accommodations. The entire ARDC, including Mother and Father, agreed Student did not meet eligibility for special education services.<sup>59</sup>
27. Student passed all of Student's \*\*\* grade classes.<sup>60</sup>

**B. \*\*\* Grade (2015-2016)**

28. Student attended Student's \*\*\*\*\* school from August \*\*\*, 2015, through October \*\*\*, 2015, and Student's \*\*\*\*\* school beginning October \*\*\*, 2015.<sup>61</sup>

**I. \*\*\* School**

29. At the beginning of the school year, Student's Section 504 plan from \*\*\* school was provided to the \*\*\* school staff.<sup>62</sup>
30. At the \*\*\* school, Student was vivacious and talkative, and had a group of friends.<sup>63</sup>

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<sup>57</sup> Tr. at 408 (Special Ed. Coord. for Campus Ops.); Resp. Ex. 5 at 22, 24, 26-27, 29-30; Resp. Ex. 10; Resp. Ex. 64 at 27, 30.

<sup>58</sup> Resp. Ex. 69 at 4, 15, 17.

<sup>59</sup> Tr. at 681-682, 685 (Mother); Resp. Ex. 6 at 43, 45, 47-48, 50-52.

<sup>60</sup> Tr. at 419 (Special Ed. Coord. for Campus Ops.); Resp. Ex. 39 at 2.

<sup>61</sup> Tr. at 802, 825, 827 (Asst. Principal, \*\*\* school); Tr. at 1330-1331 (Principal); Resp. Ex. 28.

<sup>62</sup> Tr. at 761, 765, 806-807 (Asst. Principal, \*\*\* school); Resp. Ex. 69.

<sup>63</sup> Tr. at 789-790 (Asst. Principal, \*\*\* school).

31. On September \*\*\*, 2015, the Section 504 committee, including Parents, agreed that Student remained eligible for Section 504 services as a student with ADHD; agreed on STAAR testing accommodations; and agreed on Student's updated services plan. Accommodations included small group instruction; note-taking assistance; extended time for written assignments; and \*\*\*. The updated plan was distributed to Student's teachers on September \*\*\*, 2015.<sup>64</sup>
32. At the \*\*\* school, Mother, the Assistant Principal, and teachers regularly communicated via email about Student's assignments and progress.<sup>65</sup>
33. Father expressed concern to the Assistant Principal that Student was failing \*\*\* and \*\*\* and was weak in \*\*\*.<sup>66</sup> Parents resisted staff's attempts to provide tutoring so Student could complete unfinished assignments with teacher assistance.<sup>67</sup>
34. Out of \*\*\* days at the \*\*\* school, Student missed \*\*\* full days and \*\*\* partial days, including missing \*\*\* \*\*\* times. The absences contributed to Student's failing grades because a child needs to be present to receive instruction and complete assignments.<sup>68</sup>

## 2. \*\*\* School

35. When Student transferred to the \*\*\* school, Student had failing grades in \*\*\*, \*\*\*, and \*\*\*.<sup>69</sup>
36. As of December 2015, Student's past medical history included ADHD, sensory processing difficulty; developmental delay; \*\*\*; and \*\*\*.<sup>70</sup>

### a. \*\*\*

37. Mother began assisting Student with homework when Student was in \*\*\* school.<sup>71</sup> Doing \*\*\*-grade homework took 3 hours per night as Student was non-compliant and

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<sup>64</sup> Tr. at 191 (Clinical Psychologist); Tr. at 774 (Asst. Principal, \*\*\* school); Pet. Ex. 14 at 2; Resp. Ex. 62 at 21, 31-32; Resp. Ex. 66 at 6-9.

<sup>65</sup> Resp. Ex. 62 at 1-14, 16-25.

<sup>66</sup> Tr. at 797 (Asst. Principal, \*\*\* school); Resp. Ex. 63 at 18-19.

<sup>67</sup> Tr. at 819-820, 823 (Asst. Principal, \*\*\* school); Resp. Ex. 63.

<sup>68</sup> Tr. at 803-804, 814-815, 823-824 (Asst. Principal, \*\*\* school); Resp. Ex. 27.

<sup>69</sup> Tr. at 757-758, 785, 798-799, 813, 825-826 (Asst. Principal, \*\*\* school); Resp. Ex. 38 at 559-560; Resp. Ex. 57 at 1-4; Resp. Ex. 60 at 22.

<sup>70</sup> Pet. Ex. 13 at 36.

<sup>71</sup> Tr. at 226 (Clinical Psychologist); Tr. at 613 (Mother)

distractible.<sup>72</sup> Mother did about 80 percent of Student's \*\*\* homework because she did not want Student to fail. District staff asked Mother to stop helping Student with homework so they could determine what Student could do on Student's own.<sup>73</sup>

38. Mother tutored Student in \*\*\* for 15-to-20 hours per week.<sup>74</sup>
39. Student usually scored in the 20s or 30s on \*\*\* tests. The tests were sent home so Student could correct the missed problems and bolster Student's grade. Mother made the corrections for Student, who did not understand how to do the problems correctly.<sup>75</sup>
40. Parents and Student's \*\*\* teacher regularly communicated via email about Student's assignments, progress, and health.<sup>76</sup>
41. In an April \*\*\*, 2016 email, Student's \*\*\* teacher told Parent that Student "still has many gaps," but "Student was able to rework those problems."<sup>77</sup>
42. A push to get Student's \*\*\* average up to a 70 resulted in a 73 average for the year.<sup>78</sup>

**b.** \*\*\*

43. Student's \*\*\* teacher received a list of Student's Section 504 accommodations. He provided Student with \*\*\*; reminded Student to stay on task; checked with Student periodically to ensure Student understood the material; and gave Student extended time to complete assignments, yet Student frequently turned work in late.<sup>79</sup> Student responded well to redirection from the teacher.<sup>80</sup>
44. Mother and Student's \*\*\* teacher regularly communicated via email about missing assignments, work in general, absences, and Student's interactions with other students.<sup>81</sup>

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<sup>72</sup> Tr. at 226 (Clinical psychologist); Pet. Ex. 14 at 2.

<sup>73</sup> Tr. at 620-622, 627-628, 1687-1688 (Mother); Tr. at 1345 (Principal,); Pet. Ex. 7; *see* Tr. at 226 (Clinical Psychologist); *see also* Pet. Ex. 14 at 2.

<sup>74</sup> Tr. at 647 (Mother).

<sup>75</sup> Tr. at 623 (Mother).

<sup>76</sup> Resp. Ex. 60 at 1-63.

<sup>77</sup> Resp. Ex. 60 at 60.

<sup>78</sup> Tr. at 623 (Mother).

<sup>79</sup> Tr. at 832-833, 835-837, 850-852 (\*\*\*) teacher); Tr. at 1327-1328 (Principal); Resp. Ex. 63 at 343.

<sup>80</sup> Tr. at 845 (\*\*\*) teacher).

<sup>81</sup> Resp. Ex. 58 at 1-24, 26-45.

45. In \*\*\* class, Student was respectful to the teacher and had several friends.<sup>82</sup>
46. Student's time spent on social media and \*\*\* absences from \*\*\* class affected Student's ability to timely turn in work.<sup>83</sup> When Student performed the tasks, Student did as well as other students in the \*\*\* class and grasped the concepts.<sup>84</sup>
47. Student's \*\*\* grade for the year was \*\*\*. The grade reflects \*\*\*-grade \*\*\* curriculum in general education, with regular assignments. Student's missing and late work contributed to Student's low average for the year.<sup>85</sup>

**c. \*\*\***

48. Student's \*\*\* teacher received a copy of Student's Section 504 accommodations.<sup>86</sup> She provided Student with extra time to complete assignments, \*\*\*, and allowed Student to \*\*\*.<sup>87</sup>
49. The \*\*\* teacher modified the curriculum for Student, not for academic reasons, but because Student's work "piled up" due to Student's absences, affecting Student's grades. Student periodically made up work during after-school tutoring sessions. Student needed very little to no re-teaching.<sup>88</sup> Student had no difficulty grasping concepts. As far as staying on task, Student had as much trouble as any other student with ADHD.<sup>89</sup>
50. On \*\*\* (\*\*\*) tests, Student ranked as "proficient" in December 2015 and "basic" in May 2016, a difference that Student's \*\*\* teacher attributed to Student's ADHD, because students with ADHD can become distracted during the test.<sup>90</sup>
51. Student was easy-going in \*\*\* class.<sup>91</sup>
52. Student's first semester \*\*\* average was 72 and second semester average was 85.<sup>92</sup>

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<sup>82</sup> Tr. at 847 (\*\*\*) teacher).

<sup>83</sup> Tr. at 843-844, 866, 873 (\*\*\*) teacher).

<sup>84</sup> Tr. at 841 (\*\*\*) teacher).

<sup>85</sup> Tr. at 853-855, 869 (\*\*\*) teacher); Resp. Ex. 19.

<sup>86</sup> Tr. at 880-882, 920 (\*\*\*) teacher); Tr. at 1327-1328 (Principal); Resp. Ex. 66.

<sup>87</sup> Tr. at 882, 902-903 (\*\*\*) teacher); Resp. Ex. 64.

<sup>88</sup> Tr. at 888, 895 (\*\*\*) teacher); Resp. Ex. 19.

<sup>89</sup> Tr. at 905 (\*\*\*) teacher).

<sup>90</sup> Tr. at 889-892, 921-922 (\*\*\*) teacher); Resp. Ex. 26.

<sup>91</sup> Tr. at 909 (\*\*\*) teacher).

<sup>92</sup> Tr. at 882, 885, 888, 895-897, 915 (\*\*\*) teacher); Resp. Ex. 19.

*d. Spring 2016 STAAR*

53. Student did not pass the \*\*\* or \*\*\* sections of the spring 2016 STAAR, even with Section 504 accommodations. Student met the STAAR progress measure in \*\*\* but not in \*\*\*.<sup>93</sup>
- a. Student missed passing the \*\*\* STAAR by one answer, demonstrating progress from the previous year's \*\*\* STAAR results. When students show progress, the STAAR is compared with the previous year's STAAR to ascertain if students are meeting expected growth, even if the STAAR is failed. Student met expected growth from the previous STAAR.<sup>94</sup>
  - b. To prepare Student for the STAAR, Student's \*\*\* teacher included Student in a tutoring group \*\*\* weekly for about \*\*\* weeks.<sup>95</sup>
  - c. Student's performance on the STAAR'S \*\*\* test was affected by Student's absences and \*\*\*, which prevented Student from getting classroom instruction. Periodic tutoring in \*\*\* could not make up for missed classroom instruction.<sup>96</sup>
  - d. There are many reasons why a student may not do well on the STAAR. STAAR test results are not the only measure of how successful a student will be in the school year.<sup>97</sup>
54. Effective March \*\*\*, 2016, Student went directly to the Response to Intervention (RtI) room \*\*\* a week for \*\*\*. Student was selected for RtI due to a history of failing the STAAR \*\*\* or \*\*\* tests for the past \*\*\*; below grade level performance on the \*\*\* and \*\*\*; and/or failing for \*\*\*. The purpose of RtI was to minimize Student's learning gaps in \*\*\* and/or \*\*\*.<sup>98</sup>

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<sup>93</sup> Tr. at 393 (Special Ed. Coord. for Campus Ops.); Tr. at 912-913, 933 (\*\*\* teacher); Tr. at 1388-1389 (Principal); Pet. Ex. 7A; Pet. Ex. 24 at 21; Resp. Ex. 32 at 535; Resp. Ex. 116 at 1944; Resp. Ex. 128.

<sup>94</sup> Tr. at 1219-1220 (ED DIAG); Tr. at 1253-1255 (Gen. Ed. \*\*\* teacher); Tr. at 1352-1353 (Principal); Resp. Ex. 32; Resp. Ex. 128 at 2187; Resp. Ex. 129 at 2468.

<sup>95</sup> Tr. at 911-915, 933 (\*\*\* teacher).

<sup>96</sup> Tr. at 933-934 (\*\*\* teacher).

<sup>97</sup> Tr. at 1435-1436 (Principal).

<sup>98</sup> Resp. Ex. 62 at 9-11. Response to Intervention (RtI) provides a student with tiered support, the first tier using the least support and the third tier using the most support, with at least monthly monitoring of progress. Tr. at 64-65 (Exec. Dir. of Special Ed.).

### 3. *Dyslexia Screening*

55. On April \*\*\*, 2016, the Section 504 committee met to review Student's dyslexia screening, conducted at Parents' request on February \*\*\*, 2016.<sup>99</sup> The committee determined Student does not exhibit characteristics of dyslexia and, therefore, did not qualify for dyslexia services.<sup>100</sup> The Section 504 committee considered Student's other diagnoses by Student's pediatrician, including \*\*\*.<sup>101</sup>
- a. Mother and Father were in attendance and agreed with the Section 504 committee's determinations, including revisions to Student's Section 504 plan.<sup>102</sup>
  - b. The Section 504 committee developed an updated plan effective April \*\*\*, 2016. Accommodations in all classes included note-taking assistance; extended time for test taking, with minimized distractions; \*\*\*; reminders to stay on task; and permission to \*\*\*. In \*\*\*, Student was to receive shortened assignments and additional tutoring during \*\*\*. STAAR test accommodations included small group administration; extra time; the use of \*\*\*; and frequent breaks.<sup>103</sup>
56. Beginning April \*\*\*, 2016, Student's teachers followed the updated Section 504 plan. An addition was made to the plan on April \*\*\*, 2016, to re-teach difficult \*\*\* concepts.<sup>104</sup>
57. During \*\*\* grade, Student was absent \*\*\* times, equivalent to \*\*\* weeks of missed instruction.<sup>105</sup> The absences affected Student's ability to turn in work and build on skills.<sup>106</sup>
58. Student passed all of Student's classes for the school year.<sup>107</sup>

### 4. *Child Find (\*\*\* Grade)*

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<sup>99</sup> Resp. Ex. 62 at 2-7; Resp. Ex. 152 at 2526.

<sup>100</sup> Tr. at 447 (Special Ed. Coord. for Campus Ops.); Tr. at 540-541, 543, 560-563, 573, 575-578, 584-587 (Section 504 Coord.); Tr. at 1350-1351 (Principal); Resp. Ex. 14 at 186; Resp. Ex. 62 at 12-20; Resp. Ex. 64 at 10-11, 28-30; Resp. Ex. 106; *see* Tr. at 898 (\*\*\* teacher).

<sup>101</sup> Tr. at 547-548 (Section 504 Coord.); Tr. at 673 (Mother); Tr. at 1350-1351 (Principal).

<sup>102</sup> Resp. Ex. 64 at 11.

<sup>103</sup> Tr. at 191-192 (Clinical Psychologist); Tr. at 849 (\*\*\* teacher); Resp. Ex. 64 at 6, 9, 11; *see* Resp. Ex. 110.

<sup>104</sup> Tr. at 1348, 1352 (Principal); Resp. Ex. 59 at 73; Resp. Ex. 62 at 21-22, 25; Resp. Ex. 65 at 1-3; Resp. Ex. 110.

<sup>105</sup> Tr. at 1189 (ED DIAG); Resp. Ex. 27; Resp. Ex. 112 at 1912; *see* Resp. Ex. 29 at 1-21; *see also* Resp. Ex. 64 at 10.

<sup>106</sup> Tr. at 1334 (Principal).

<sup>107</sup> Tr. at 433-436 (Special Ed. Coord. for Campus Ops.); Pet. Ex. 24 at 20; Resp. Ex. 19; Resp. Ex. 116 at 1943; *see* Resp. Ex. 30.

59. During the 2015-2016 school year, the District had no reason to suspect Student has a disability for which Student had not been evaluated.<sup>108</sup>
- a. At the \*\*\* school, neither Parents nor any teachers expressed to the Assistant Principal that Student should be evaluated for special education.<sup>109</sup> Parents did not talk to the Assistant Principal about any mental health issues, including \*\*\*, or Student's refusal to attend school.<sup>110</sup>
  - b. At the \*\*\* school, Parents did not ask for a special education evaluation for Student.<sup>111</sup> They did not inform the Principal that Student had any mental health issues or \*\*\*. They did not provide any outside reports from health care providers indicating Student had mental health issues.<sup>112</sup>
  - c. \*\*\* school staff did not report any suspicion that Student had behavioral or mental health issues. The \*\*\* school Principal did not observe anything that caused her to suspect Student might have emotional or mental health issues.<sup>113</sup>
  - d. Student's failing grades at the \*\*\* school did not cause the Principal at the \*\*\* school to suspect Student should have a special education evaluation. Student's Section 504 accommodations were in place and Student was passing Student's classes after transferring to the \*\*\* school. There was no indication Student had emotional problems.<sup>114</sup>
  - e. There was no reason to suspect Student should be evaluated for \*\*\*. Student has legible handwriting and an adequate vocabulary. Student's handwriting does not include reversals or spelling errors, and is not illegible.<sup>115</sup>
  - f. In an October \*\*\*, 2015 email, Mother notified one of Student's teachers that Student was going to be evaluated for "\*\*\*\*" in a few weeks. As of February 2017, Student's neurologist had not decided whether to diagnose Student with a \*\*\* disorder.<sup>116</sup>
  - g. The District had no reason to suspect Student has an ED.

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<sup>108</sup> Resp. Exs. 1, 3, 62, 64.

<sup>109</sup> Tr. at 779, 787-788 (Asst. Principal, \*\*\* school).

<sup>110</sup> Tr. at 788-789 (Asst. Principal, \*\*\* school).

<sup>111</sup> Tr. at 687, 693 (Mother).

<sup>112</sup> Tr. at 1355-1357 (Principal).

<sup>113</sup> Tr. at 1358 (Principal); *see* Tr. at 390-391 (Special Ed. Coord. for Campus Ops.).

<sup>114</sup> Tr. at 1422-1423, 1425-1426 (Principal); *see* Tr. at 1450-1452 (Gen. Ed. Counselor).

<sup>115</sup> Tr. at 904, 906-907 (\*\*\* teacher); Resp. Ex. 64 at 191.

<sup>116</sup> Tr. at 721, 724 (Mother); Resp. Ex. 60 at 928.



- i. During the 2015-2016 school year, Mother sent numerous emails to school staff stating Student would not be at school due to illness. The emails did not divulge that Student was \*\*\*.<sup>117</sup>
- ii. On June \*\*\*, 2016, Mother emailed the Principal and General Education Counselor, thanking them for “nurturing the minds and spirits of my girls this year. \*\*\* spirits soar and \*\*\* look forward to coming to school each day. . . .[S]eeing how happy \*\*\* truly makes my job as a mother so much easier.”<sup>118</sup> Not until the due process hearing in February 2017 did Mother admit she sent the June \*\*\*, 2016 email to ensure Student’s transfer from the \*\*\* school to the \*\*\* school would be approved for \*\*\* grade.<sup>119</sup>
- iii. None of Mother’s emails gave the District a reason to suspect Student’s absences were due to an ED or another disability.

### C. Summer (2016)

60. At the June 8, 2016 resolution session held after the Complaint was filed, Parents declined the District’s offer to provide an FIE to include cognitive, achievement, and psychological evaluations.<sup>120</sup>
61. By letters dated June \*\*\*, 2016, and August \*\*\*, 2016, Student’s pediatrician recommended Section 504 accommodations for Student.<sup>121</sup> Except for reduced paper/pencil tasks, the District had already implemented all of the recommended accommodations.<sup>122</sup>
62. In the summer of 2016, Mother suspected Student might have an ED. She did not convey her suspicion to the District because “the District did not ask.”<sup>123</sup>
63. Upon referral by Petitioner’s attorney, Petitioner’s expert Clinical Psychologist completed a private psychological evaluation of Student on August \*\*\*, 2016.<sup>124</sup> The Clinical

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<sup>117</sup> Tr. at 713-714 (Mother).

<sup>118</sup> Resp. Ex. 57 at 12; *see* Tr. at 694-695 (Mother).

<sup>119</sup> Tr. at 694-695, 736-737 (Mother); Resp. Ex. 57 at 12.

<sup>120</sup> Tr. at 76, 93 (Exec. Dir. of Special Ed.); Resp. Ex. 34.

<sup>121</sup> Tr. at 410-411 (Special Ed. Coord. for Campus Ops.); Pet. Ex. 12 at 3-4; Resp. Ex. 151.

<sup>122</sup> Resp. Ex. 64 at 6, 9, 11. The Clinical Psychologist recommended similar accommodations. Tr. at 191-192, 197, 200 (Clinical Psychologist); Pet. Ex. 14 at 10.

<sup>123</sup> Tr. at 619 (Mother).

<sup>124</sup> Pet. Ex. 14 at 1-10.

- Psychologist did not identify any emotional difficulties for Student, finding Student has better than average ability to control Student's emotions.<sup>125</sup>
64. The Clinical Psychologist found Student has a learning disability in \*\*\* because Student's achievement standard score in \*\*\* is 15 points or more below Student's Full Scale IQ of \*\*\*.<sup>126</sup>
- a. \*\*\* is not one of the eight areas of qualification for an SLD under the IDEA.<sup>127</sup>
- b. Students with ADHD frequently have problems with \*\*\* because children with executive functioning difficulties cannot hold information (such as \*\*\*) in short-term memory long enough for it to become part of long-term memory.<sup>128</sup>
65. Student does not have behavioral difficulties at school but does at home, when Student is not on Student's medication. Student and Student's family have received ongoing psychotherapy to address the behavioral issues. Although Student has no behavioral problems at school, the Clinical Psychologist recommended a BIP for increasing Student's frustration tolerance.<sup>129</sup>
66. Petitioner's expert Clinical Psychologist diagnosed Student with Oppositional Defiant Disorder (ODD), based on what was happening at home, not at school.<sup>130</sup>
67. No evaluations available to the District prior to the Clinical Psychologist's August 2016 diagnosis of ODD indicated Student might have an ED.<sup>131</sup>
68. Upon receipt of the Clinical Psychologist's report that Student has ODD, the District requested consent to perform an FIE. On August \*\*\*, 2016, Parents provided signed consent for cognitive, psychological, speech/language, and OHI evaluations; for a Functional Behavior Assessment (FBA); OT, Physical Therapy (PT), and counseling assessments; and formal observation by an autism or behavior specialist.<sup>132</sup> The District

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<sup>125</sup> Tr. at 208-211, 236 (Clinical Psychologist); Pet. Ex. 14 at 8.

<sup>126</sup> Tr. at 142-143, 146-149, 151, 155-157, 160-162, 168, 179-181, 188-189 (Clinical Psychologist); Pet. Ex. 14 at 3-4, 7, 9-10.

<sup>127</sup> Tr. at 110, 125-126 (Exec. Dir. of Special Ed.); Tr. at 1209 (ED DIAG); Tr. at 1562, 1567, 1588 (LSSP); *see* Tr. at 191 (Clinical Psychologist); *see also* 20 U.S.C. § 1401(30)(A), 34 C.F.R. § 300.309(a)(1).

<sup>128</sup> Tr. at 144-146, 152-154 (Clinical Psychologist).

<sup>129</sup> Tr. at 165-167, 244 (Clinical Psychologist); Pet. Ex. 14 at 2.

<sup>130</sup> Tr. at 179-181 (Clinical Psychologist); Pet. Ex. 14 at 9-10.

<sup>131</sup> Tr. at 1567-1571 (LSSP).

<sup>132</sup> Tr. at 79-80, 103 (Exec. Dir. of Special Ed.); Pet. Ex. 14; Pet. Ex. 23 at 1; Resp. Ex. 114.

had 45 school days—excluding days Student was absent—to complete the FIE.<sup>133</sup> The FIE was timely completed in October 2016.<sup>134</sup>

69. The District provided Parents with a Notice of Procedural Safeguards on August \*\*\*, 2016.<sup>135</sup>

**D. \*\*\* Grade (2016-2017)**

**1. Beginning of \*\*\* grade**

70. At the beginning of \*\*\* grade, Mother—\*\*\*—\*\*\*. \*\*\*.<sup>136</sup>
71. From the first day of school until implementation of Student’s IEP on November \*\*\*, 2016, Student received accommodations in all classes through a Section 504 plan.<sup>137</sup>
72. As of August \*\*\*, 2016, Mother no longer did Student’s homework and Student could not complete it \*\*\*self. Student \*\*\*.<sup>138</sup>
73. Although Student was not in special education at the beginning of the year, Student was enrolled in an inclusion \*\*\* class, a general education class in which a special education teacher gives support to students. Student received inclusion support for \*\*\* minutes daily. Student also received \*\*\* intervention for \*\*\* minutes \*\*\* a week.<sup>139</sup> In addition, Student was pulled out for test administration in small groups.<sup>140</sup>
74. On September \*\*\*, 2016, the Section 504 committee met to address Student’s attendance issues. Student had missed at least one class period on \*\*\* out of \*\*\* school days, causing Student to fall behind in classwork. Student was failing \*\*\* and \*\*\*.<sup>141</sup>

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<sup>133</sup> Resp. Ex. 23; Tr. at 107 (Exec. Dir. of Special Ed.); Resp. Ex. 23; Tex. Educ. Code § 29.004.

<sup>134</sup> Tr. at 103, 107 (Exec. Dir. of Special Ed.); Tr. at 1159 (ED DIAG); Pet. Ex. 23; Resp. Ex. 114.

<sup>135</sup> Tr. at 109 (Exec. Dir. of Special Ed.); Resp. Ex. 115.

<sup>136</sup> Tr. at 718-720 (Mother); Tr. at 1376, 1380-1381 (Principal); *see* Tr. at 1001-1002, 1004 (\*\*\*) teacher).

<sup>137</sup> Pet. Ex. 24 at 2, 21; Pet. Ex. 25 at 7; Resp. Ex. 116 at 1925, 1944.

<sup>138</sup> Resp. Ex. 150 at 1588, 2107.

<sup>139</sup> Tr. at 120-121 (Exec. Dir. of Special Ed.); Tr. at 554 (Section 504 Coord.); Tr. at 1406, 1434 (Principal); Pet. Ex. 23 at 1; Pet. Ex. 25 at 7; Resp. Ex. 111; Resp. Ex. 152 at 2548.

<sup>140</sup> Tr. at 470-471 (Inclusion \*\*\* teacher).

<sup>141</sup> Tr. at 1455-1456 (Gen. Ed. Counselor).

- a. Parents did not attend the meeting because they believed the District would never find Student eligible for special education.<sup>142</sup>
  - b. All Section 504 classroom and STAAR test accommodations from the April 2016 plan were to remain in place, with the following additions: checks for understanding; extended time for assignments in all subject areas; and \*\*\* assignments reduced by 50%, with the teacher ensuring all concept areas are covered.
  - c. Beginning September \*\*\*, 2016, Student was to receive \*\*\* minutes of one-to-one sessions of \*\*\* intervention \*\*\* weekly during Student's \*\*\* class.
  - d. To help Student improve Student's self-esteem, weekly counseling with the General Education Counselor was added to the Section 504 plan.<sup>143</sup>
  - e. The Section 504 committee agreed, pending Parents' consent, to consider evaluating Student to determine if Student is substantially limited by \*\*\*. The Section 504 committee decided Student's diagnosis of ODD does not limit Student in the academic setting.<sup>144</sup>
75. By letter dated October \*\*\*, 2016, Petitioner's attorney notified the District that Student had \*\*\*, stating Parents wanted the District to be aware of Student's academic struggles and feelings of being overwhelmed and \*\*\*. The letter was provided to the District Social Worker and the FIE multi-disciplinary team.<sup>145</sup>
76. On October \*\*\*, 2016, Student's Section 504 committee, including Parents, met to revise Student's Section 504 services plan due to the changes in Student's emotional health and Student's struggles with attending school. \*\*\* and \*\*\* were added as areas of Section 504 eligibility for Student.<sup>146</sup>
- a. Student's \*\*\* total or partial absences during the first \*\*\* school days were the biggest hindrance to Student's academic success.<sup>147</sup>
  - b. Student was to begin having \*\*\* with the General Education Counselor, who would help Student overcome pending challenges for the day.<sup>148</sup>

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<sup>142</sup> Resp. Ex. 150 at 1617.

<sup>143</sup> Tr. at 1364-1365 (Principal); Tr. at 1457 (Gen. Ed. Counselor); Resp. Ex. 112.

<sup>144</sup> Tr. at 552-554 (Section 504 Coord.); Tr. at 1362 (Principal); Pet. Ex. 23 at 1; Pet. Ex. 24 at 2; Resp. Ex. 112 at 1910-1912; Resp. Ex. 116 at 1925.

<sup>145</sup> Tr. at 424-426, 457 (Special Ed. Coord. for Campus Ops.); Pet. Ex. 23 at 5; Pet. Ex. 24 at 17-18; Resp. Ex. 116 at 17-18.

<sup>146</sup> Tr. at 1360, 1366-1368 (Principal); Resp. Ex. 113; *see* Resp. Ex. 150 at 2124.

<sup>147</sup> Resp. Ex. 148.

<sup>148</sup> Tr. at 1438 (Principal); Tr. at 1457 (Gen. Ed. Counselor).

- c. A \*\*\* was to be put in place, pending a telephone conversation between District staff and Student's doctor, with Parents present on the telephone.<sup>149</sup>

**2. *October 2016 FIE***

77. The District conducted an FIE to determine if Student has a disability that affects Student's school performance such that Student needs special education and related services.<sup>150</sup>
  - a. The multi-disciplinary team was composed of qualified professionals, including two LSSPs, an educational diagnostician, a licensed speech therapist, and an occupational therapist.<sup>151</sup>
  - b. The multi-disciplinary team reviewed Student's prior evaluations; District assessments; school records, including STAAR scores, attendance records, and grades; the August \*\*\*, 2016 letter from Student's pediatrician; and 3 years' worth of RtI records.<sup>152</sup>
  - c. 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, and teachers.<sup>153</sup>
  - d. 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.<sup>154</sup>
  - e. The tests and other evaluation materials were administered by trained personnel in conformance with the instructions provided by their producers.<sup>155</sup>

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<sup>149</sup> As of February 2017, the telephone conversation with Student's doctor had not been arranged despite attempts made by the District and Parents in October and November 2016, and as late as January \*\*\*, 2017. Tr. at 1367-1368 (Principal); Tr. at 1682-1683, 1695-1697 (Mother); Pet. Ex. 25 at 33; Resp. Ex. 149 at 2148-2149, 2151, 2153, 2165-2166, 2518; Resp. Ex. 152 at 2543.

<sup>150</sup> Pet. Ex. 24 at 1; Resp. Ex. 116 at 1924. The FIE includes Resp. Exs. 116, 117, 118, 119.

<sup>151</sup> Pet. Ex. 24 at 1, 40; Resp. Ex. 116 at 1924, 1963; 19 Tex. Admin. Code § 89.1040(b).

<sup>152</sup> Tr. at 1156-1157, 1196 (ED DIAG).

<sup>153</sup> Pet. Ex. 24 at 1, 3, 7-8, 25, 36, 38; Resp. Ex. 116 at 1924, 1926, 1930-1931, 1948, 1959, 1961.

<sup>154</sup> Tr. at 1168-1169 (ED DIAG); Pet. Ex. 24 at 38-39; Resp. Ex. 116 at 1961-1962.

<sup>155</sup> Tr. at 1169-1170, 1178 (ED DIAG); Pet. Ex. 24 at 38; Resp. Ex. 116 at 1961.

- f. The FIE report contained recommendations for the ARDC to use in developing Student's IEP, including recommendations related to inattention/executive functioning, \*\*\*, academics, and ADHD.<sup>156</sup>
78. At the time of the FIE, Student had been absent \*\*\* full days and \*\*\* partial days out of \*\*\* days of school, including \*\*\* absences in General Education \*\*\* and \*\*\* absences in Inclusion \*\*\*. Student returned with doctor's notes for many of Student's absences.<sup>157</sup>
79. When the FIE was conducted, Student was failing \*\*\* with a 48 average and \*\*\* with a 51 average; had "incompletes" in \*\*\* and \*\*\*; and was passing \*\*\* and \*\*\* with a 100 average in each class.<sup>158</sup>
80. Student was assessed in all areas of suspected disability and the FIE was sufficiently comprehensive to identify all of Student's educational and related services' needs, whether or not those services are commonly linked to the disability category in which Student has been classified.<sup>159</sup>
- a. Student met criteria for eligibility as a student with ED. For a period of 2 months or more, Student had exhibited \*\*\*.<sup>160</sup> The LSSPs who evaluated Student recommended that the ARDC consider Student's need for counseling focusing on managing \*\*\* and physical symptoms of \*\*\*.<sup>161</sup>
- b. Student met criteria for eligibility as a student with OHI due to Student's diagnosis of ADHD and changes in Student's ability to progress academically.<sup>162</sup> The District did not need to obtain another medical diagnosis of ADHD because Student's pediatrician had provided a physician's report which could be relied upon by the multi-disciplinary team.<sup>163</sup>
- c. Student does not meet Texas Education Agency (TEA) guidelines for eligibility as a student with an SLD.<sup>164</sup>

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<sup>156</sup> Tr. at 1185-1186 (ED DIAG); Pet. Ex. 24 at 37-38, 40; Resp. Ex. 116 at 1956, 1960-1962.

<sup>157</sup> Tr. at 1189 (ED DIAG); Tr. at 1595-1596 (LSSP); Tr. at 1237 (Gen. Ed. \*\*\* teacher); Pet. Ex. 24 at 1; Resp. Ex. 116 at 1924; Resp. Ex. 148.

<sup>158</sup> Pet. Ex. 24 at 16, 20; Resp. Ex. 116 at 1939, 1943. \*\*\* is for students who did not pass the \*\*\* section of the STAAR the previous year. Pet. Ex. 24 at 18; Resp. Ex. 116 at 1941.

<sup>159</sup> Pet. Ex. 24 at 39-40; Resp. Ex. 116 at 1963.

<sup>160</sup> Tr. at 1592-1593 (LSSP); Pet. Ex. 24 at 33-36; Resp. Ex. 116 at 1956-1959.

<sup>161</sup> Tr. at 1493-1532, 1599 (LSSP); Resp. Ex. 117 at 1997-1999.

<sup>162</sup> Tr. at 1191-1193 (ED DIAG); Tr. at 1577-1580, 1592-1593, 1607, 1611-1612 (LSSP); Pet. Ex. 24 at 7, 34-35; Resp. Ex. 116 at 1930, 1957-1958.

<sup>163</sup> Tr. at 1601, 1603, 1605, 1669 (LSSP); 20 U.S.C. § 1414(d)(3)(C).

<sup>164</sup> Tr. at 298-300, 306-307, 315-316, 320-322, 1185-1186 (ED DIAG); Tr. at 1581, 1584, 1587-1588 (LSSP); Pet. Ex. 24 at 24, 34-35; Resp. Ex. 116 at 1947, 1957-1958; 19 Tex. Admin. Code § 89.1040(b)(9).

- i. The Woodcock Johnson IV Tests of Achievement covered all eight areas for learning disability under the IDEA.<sup>165</sup>
  - ii. Student did not demonstrate academic or cognitive weakness in any area on the Woodcock Johnson IV Tests of Achievement.<sup>166</sup> Student's overall academic achievement is in the average range of others Student's age.<sup>167</sup> Student's general intellectual ability score of \*\*\* is within the average range.<sup>168</sup>
  - iii. Student does not have an SLD in \*\*\*, Student's weakest area, or any other area. Student has the cognitive ability to do \*\*\* but absences as well as other factors affect Student's performance.<sup>169</sup> On the \*\*\* test, Student scored within the normal range and had 100 percent accuracy.<sup>170</sup>
  - iv. The IDEA (2004 version) and TEA rules permit school districts to choose which model to use to determine if a student has an SLD.<sup>171</sup> The District uses the pattern of strengths and weaknesses model rather than the discrepancy model to determine a student's eligibility for special education as a student with an SLD.<sup>172</sup>
  - v. The multi-disciplinary team correctly used the pattern of strengths and weaknesses model to determine Student does not have an SLD.<sup>173</sup>
  - vi. The District's legal framework for SLD criteria is available to the public on its website.<sup>174</sup>
- d. Student does not have \*\*\*. During the tests administered by the Educational Diagnostician, Student was able to hold a pencil and write legibly within the time

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<sup>165</sup> Tr. at 1165-1166, 1169, 1172, 1174, 1177 (ED DIAG); Resp. Ex. 116 at 1946.

<sup>166</sup> Tr. at 1176, 1178-1179, 1181, 1185, 1197-1198 (ED DIAG); Tr. at 1670 (LSSP); Pet. Ex. 24 at 24-25, 35; Resp. Ex. 116 at 1947-1948, 1958.

<sup>167</sup> Pet. Ex. 24 at 24; Resp. Ex. 116 at 1947.

<sup>168</sup> Tr. at 1180-1183, 1196, 1203 (ED DIAG); Pet. Ex. 24 at 25; Resp. Ex. 116 at 1948.

<sup>169</sup> Tr. at 1200, 1205-1206, 1208-1209, 1215-1217 (ED DIAG); Resp. Ex. 148.

<sup>170</sup> Tr. at 1209-1210, 1213 (ED DIAG); Resp. Ex. 116 at 1956.

<sup>171</sup> Tr. at 332, 334, 337 (ED DIAG); Tr. at 1590 (LSSP); Pet. Ex. 11 at 4; 19 Tex. Admin. Code § 89.1040(b)(9).

<sup>172</sup> Tr. at 86-88, 110 (Exec. Dir. of Special Ed.); Tr. at 306, 322-323 (ED DIAG); Tr. at 1590 (LSSP); Pet. Ex. 11; Resp. Ex. 35 at 21-23.

<sup>173</sup> Tr. at 1559, 1567, 1614, 1627, 1634-1635, 1637, 1639, 1642-1644, 1647-1648, 1651-1654, 1657, 1663, 1670-1676 (LSSP).

<sup>174</sup> Tr. at 83-85, 98-99 (Exec. Dir. of Special Ed.); Resp. Ex. 35 at 16, 19-26.

frame. Student's \*\*\*, \*\*\*, samples, and \*\*\* are within the average range.<sup>175</sup> In addition, Student's \*\*\* grade \*\*\* teacher for the spring semester has not seen Student have any difficulty with the motor activity of writing. Student's handwriting is legible.<sup>176</sup>

- e. Student does not have dyslexia.<sup>177</sup>
- f. The OT Assessment shows Student does not need school-based OT to access instruction or to benefit from Student's education. Student uses an inefficient pencil grip but is able to produce lengthy written assignments.<sup>178</sup>
- g. The PT Assessment shows Student does not need PT intervention as a support service to benefit from Student's education.<sup>179</sup>
- h. After reviewing Student's competencies, progress, and evaluation data, the multi-disciplinary team did not recommend Assistive Technology (AT).<sup>180</sup> Parents' August 2016 consent did not include permission to evaluate Student for AT.<sup>181</sup>

### **3. November \*\*\*, 2016 ARDC meeting**

- 81. The ARDC met on November \*\*\*, 2016, to review Student's FIE.<sup>182</sup> The ARDC also considered the August 2016 Clinical Psychologist's evaluation; STAAR results; District-wide assessments; Parents' information; and \*\*\*, \*\*\*, and \*\*\* evaluations.<sup>183</sup>
- 82. Mother and Father attended and fully participated in the ARDC meeting.<sup>184</sup> The District provided Mother with a Notice of Procedural Safeguards and Prior Written Notice.<sup>185</sup>

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<sup>175</sup> Tr. at 1195 (ED DIAG); Tr. at 1563-1565 (LSSP); Resp. Ex. 12 at third page; Resp. Ex. 118 at 2003.

<sup>176</sup> Tr. at 941, 946, 971-973 (\*\*\*, teacher).

<sup>177</sup> Tr. at 1565-1567 (LSSP).

<sup>178</sup> Resp. Ex. 118 at 2003, 2006.

<sup>179</sup> Resp. Ex. 119 at 2009.

<sup>180</sup> An assistive technology (AT) device is any item or piece of equipment that is used to increase, maintain, or improve the functional capabilities of a child with a disability. 34 C.F.R. § 300.5. Tr. at 362, 430 (Special Ed. Coord. for Campus Ops.); Pet. Ex. 24 at 35; Resp. Ex. 116 at 1958.

<sup>181</sup> Pet. Ex. 14; Pet. Ex. 23 at 1; Resp. Ex. 114.

<sup>182</sup> Tr. at 1369-1375 (Principal); Pet. Ex. 25 at 1, 31; Resp. Ex. 120 at 2010, 2044.

<sup>183</sup> Tr. at 1370 (Principal); Pet. Ex. 25 at 2-3, 27-28; Resp. Ex. 120 at 2011-2012, 2038-2039; *see* Tr. at 1547-1548, 1551, 1555-1556 (LSSP); *see also* Resp. Ex. 165.

<sup>184</sup> Pet. Ex. 25 at 23, 31-32; Resp. Ex. 120 at 2032, 2044-2045.

<sup>185</sup> Pet. Ex. 25 at 26-30; Resp. Ex. 120 at 2035-2043.



83. Student meets IDEA eligibility as a child with ED and OHI.<sup>186</sup>
84. Student does not meet criteria for an SLD because Student does not exhibit a normative deficit in academic achievement.<sup>187</sup>
85. At the meeting, Father signed Consent for Disclosure of Confidential Information, permitting Student's information to be exchanged between the private psychologist and the school LSSP, General Education Counselor, Social Worker, and Parents. If the exchange was done via telephone call, Parents were to be conferenced in.<sup>188</sup>
86. The ARDC will address ESY services in the spring of 2017. ESY services may be addressed at any time.<sup>189</sup>
87. The ARDC, including Parents, reached consensus and agreed to meet again in January 2017 to discuss Student's academic and nonacademic progress.<sup>190</sup>

*a. Development of IEP*

88. In developing Student's IEP, the ARDC considered Student's FIE, Present Levels of Academic Achievement and Functional Performance (PLAAFPs), STAAR results, functional skills, attendance records, and discipline records. From the beginning of the school year until the ARDC meeting date, Student had one disciplinary infraction, related to \*\*\*.<sup>191</sup>
89. The ARDC drafted three measurable IEP goals to be in effect as of November \*\*\*, 2016. Parents agreed with the goals. Progress reports are to be sent to Parents every 9 weeks.<sup>192</sup>
- a. The \*\*\* goal requires Student, with inclusion support in the general education classroom, to identify the steps necessary to \*\*\* at the \*\*\*-grade level and implement problem-solving strategies to achieve \*\*\*% mastery. Student's baseline score was \*\*\*% accuracy on November \*\*\*, 2016. The goal is to be implemented

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<sup>186</sup> Tr. at 1559-1660 (LSSP); Pet. Ex. 25 at 4, 23; Resp. Ex. 120 at 2013, 2032.

<sup>187</sup> Tr. at 1541-1542 (LSSP); Pet. Ex. 24 at 34; Pet. Ex. 25 at 23; Resp. Ex. 120 at 2032.

<sup>188</sup> Pet. Ex. 25 at 33; Resp. Ex. 120 at 2046.

<sup>189</sup> Tr. at 51 (Exec. Dir. of Special Ed.); Tr. at 363-365 (Special Ed. Coord. for Campus Ops.); Tr. at 169-170 (Clinical Psychologist); Tr. at 498-503, 531 (Inclusion \*\*\* teacher); Pet. Ex. 25 at 23; Resp. Ex. 120 at 2032.

<sup>190</sup> Pet. Ex. 25 at 23-25; Resp. Ex. 120 at 2032-2034.

<sup>191</sup> Pet. Ex. 25 at 5-7; Resp. Ex. 120 at 2014-2016. In developing Student's \*\*\* PLAAFP, the Inclusion \*\*\* teacher used Brigance testing, which showed Student scored at the \*\*\* grade placement level and has the ability to \*\*\*. Tr. at 482-484, 487-488, 508 (Inclusion \*\*\* teacher). But Student can perform \*\*\* grade \*\*\* concepts. Student scored in the "average" range on \*\*\* \*\*\* tests given in the spring and fall of 2016 and winter of 2017. Tr. at 1251-1252 (Gen. Ed. \*\*\* teacher); Resp. Ex. 127.

<sup>192</sup> Tr. at 715-716 (Mother); Pet. Ex. 25 at 4, 8-10, 23; Resp. Ex. 120 at 2013, 2032.

by the special education and general education teachers.<sup>193</sup> Although the \*\*\* goal does not address \*\*\*, it is appropriate because Student did not exhibit any deficits on FIE achievement testing related to \*\*\*.<sup>194</sup> The Inclusion \*\*\* teacher can periodically measure Student's progress by calculating a percentage of how successfully Student completes \*\*\*.<sup>195</sup>

- b. The Behavioral goal requires Student, within 36 instructional weeks, and with support from the \*\*\* with the General Education Counselor, to complete \*\*\*% or more of assigned core academic work at school. Student's baseline score on November \*\*\*, 2016, was \*\*\*%. The goal is to be implemented by the special education and general education teachers, and the General Education Counselor.
  - i. The amount of time spent in the \*\*\* varies according to Student's daily needs.<sup>196</sup>
  - ii. A specific amount of time for the \*\*\* was not established because it is not a special education related service.<sup>197</sup>
  - iii. The goal is measurable as evidenced by the data and percentages reflected in the second 9 weeks progress report, the first progress report after the IEP was in place.<sup>198</sup>
- c. The Counseling goal requires Student, within 36 instructional weeks, and when provided with explicit counseling instruction regarding coping skills, to improve Student's personal adjustment as evidenced by a self-rating of \*\*\* points or higher on Student's individualized Mood Questionnaire. Student's baseline score was a count of \*\*\* times on November \*\*\*, 2016. Student is to achieve a count of \*\*\* times by November \*\*\*, 2017. Implementers are the special education and general education teachers, the counselor, and the Social Worker.<sup>199</sup>

90. The related service of direct Counseling is to be provided for \*\*\* minutes \*\*\* times per 9 weeks in the general education setting.<sup>200</sup> The related service is in addition to the \*\*\* Student has with the General Education Counselor.<sup>201</sup>

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<sup>193</sup> Pet. Ex. 25 at 8; Resp. Ex. 120 at 2017.

<sup>194</sup> Tr. at 169 (Clinical Psychologist); Tr. at 1540 (LSSP, District's expert).

<sup>195</sup> Tr. at 1258-1259 (Inclusion \*\*\* teacher).

<sup>196</sup> Tr. at 1458, 1481-1484 (Gen. Ed. Counselor); Tr. at 1532-1533, 1539-1540 (LSSP); *see* Resp. Ex. 124.

<sup>197</sup> Tr. at 1438-1439, 1443, 1445 (Principal); Resp. Ex. 152 at 2531.

<sup>198</sup> Tr. at 1532-1533 (LSSP); Resp. Ex. 120 at 2017-2018; Resp. Ex. 153.

<sup>199</sup> Tr. at 1287-1291, 1310-1312 (Social Worker); Tr. at 1533-1534, 1593-1594 (LSSP); Resp. Ex. 120 at 2018-2019; Resp. Ex. 137; *see* Resp. Ex. 123.

<sup>200</sup> Tr. at 47-48, 112-113 (Exec. Dir. of Special Ed.); Pet. Ex. 25 at 9-10, 16; Resp. Ex. 120 at 2018-2019, 2025.

<sup>201</sup> Tr. at 1419-1421 (Principal).

91. Student's \*\*\*, \*\*\*, \*\*\*, and \*\*\*/\*\*\* teachers are to spend \*\*\* minutes per week consulting with each other about Student's educational needs.<sup>202</sup>
92. Curriculum accommodations for all classes include minimizing distractions to Student; extra time; individualized structured reminders; checking often for understanding; emphasizing critical information; having Student paraphrase or repeat directions to ensure understanding; providing note-taking assistance; and visual, verbal, or tactile reminders to stay on task. In addition, Student is to receive \*\*\* intervention \*\*\* a week for \*\*\* minutes per time.<sup>203</sup>
93. Because Student was not successful on the \*\*\* and \*\*\* sections of the 2016 STAAR, the IEP provides for \*\*\* \*\*\* and \*\*\* to be provided from November \*\*\*, 2016, through April \*\*\*, 2017. The \*\*\* instruction is to be provided \*\*\* minutes per time, \*\*\* times per week, in special education. The \*\*\* instruction is to be provided in the general education setting.<sup>204</sup>
94. The IEP provided for accommodations for spring 2017 STAAR testing. Student will take the test in a small group; be given extra time, reminders to stay on task, and frequent breaks; and distractions will be minimized.<sup>205</sup>
95. The educational services and supports of Counseling; intensive, individual interventions other than special education; tutorial, remedial, and compensatory services; and the \*\*\* were anticipated to provide Student with academic and nonacademic benefits.<sup>206</sup>

**b. Least Restrictive Environment (LRE)**

96. Student's placement for instructional and related services is primarily in the general education setting and partly in the special education setting.<sup>207</sup>
  - a. Student's school day is commensurate to that of students without disabilities and Student is not excluded from nonacademic and extracurricular activities.<sup>208</sup>

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<sup>202</sup> Pet. Ex. 25 at 17; Resp. Ex. 120 at 2026. The Schedule of Services page was corrected at the January \*\*\*, 2017 ARDC meeting to reflect Student's placement in the general education \*\*\* class with inclusion support since the beginning of the school year. Resp. Ex. 152 at 2548; *see* Resp. Ex. 120 at 2026.

<sup>203</sup> Resp. Ex. 120 at 2016.

<sup>204</sup> Tr. at 45-46, 115-116, 126-127 (Exec. Dir. of Special Ed.); Pet. Ex. 25 at 18; Resp. Ex. 120 at 2027. The IEP does not state how often or how long the \*\*\*\* will be provided.

<sup>205</sup> Pet. Ex. 25 at 19; Resp. Ex. 120 at 2028.

<sup>206</sup> Pet. Ex. 25 at 20; Resp. Ex. 120 at 2029.

<sup>207</sup> Pet. Ex. 25 at 21-22; Resp. Ex. 120 at 2030-2031.

<sup>208</sup> Pet. Ex. 25 at 20; Resp. Ex. 120 at 2029.

- b. Student's placement is not anticipated to harmfully affect Student or other students.<sup>209</sup>
  - c. Student does not need to be placed in a \*\*\* \*\* classroom. Student's \*\*\* skills are adequate for placement in the general education inclusion class.<sup>210</sup> In addition, Student's school does not have a \*\*\* \*\* classroom for students of average or higher intelligence.<sup>211</sup>
  - d. Student is not excluded from non-academic and extracurricular activities.<sup>212</sup>
97. Student's IEP was provided to all of Student's teachers on November \*\*\*, 2016.<sup>213</sup>

#### 4. \*\*\* *under the IEP*

98. \*\*\* is for \*\*\*, or \*\*\* minutes. The Inclusion \*\*\* teacher is in the classroom for the \*\*\*-minute block, working with about \*\*\* special education students, including Student.<sup>214</sup> Student works on the same \*\*\* grade \*\*\* assignments as the rest of the class, with the Inclusion \*\*\* teacher's assistance.<sup>215</sup> Student is working at grade level and not struggling at all.<sup>216</sup> Student is able to \*\*\* without using any AT devices.<sup>217</sup> Student has not \*\*\*.<sup>218</sup>
99. From the time the IEP was implemented until the February due process hearing date, Student received \*\*\* assistance in an inclusion general education setting from the General Education \*\*\* teacher and the Inclusion \*\*\* teacher, as well as \*\*\* intervention due to failing the \*\*\* portion of the STAAR.<sup>219</sup>

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<sup>209</sup> Pet. Ex. 25 at 20; Resp. Ex. 120 at 2029.

<sup>210</sup> Tr. at 360-361 (Special Ed. Coord. for Campus Ops.); Tr. at 528 (Inclusion \*\*\* teacher); Tr. at 1261 (Gen. Ed. \*\*\* teacher).

<sup>211</sup> Tr. at 1409-1410, 1413-1414 (Principal).

<sup>212</sup> Pet. Ex. 25 at 20; Resp. Ex. 120 at 2029.

<sup>213</sup> Tr. at 938-939, 993, 1001 (\*\*\*) teacher); Tr. at 1239, 1268 (Gen. Ed. \*\*\* teacher); Resp. Ex. 120 at 2016; Resp. Ex. 122.

<sup>214</sup> Tr. at 122-125, 128 (Exec. Dir. of Special Ed.); Tr. at 472-475, 524 (Inclusion \*\*\* teacher); Tr. at 1401-1404, 1407 (Principal).

<sup>215</sup> Tr. at 477 (Inclusion \*\*\* teacher).

<sup>216</sup> Tr. at 478, 490 (Inclusion \*\*\* teacher).

<sup>217</sup> Tr. at 481-482 (Inclusion \*\*\* teacher).

<sup>218</sup> Tr. at 629-630 (Mother).

<sup>219</sup> Tr. at 468-469 (Inclusion \*\*\* teacher). The intervention is not RtI, as Student is in special education. The intervention is to help Student make up for the "incomplete" in \*\*\* at the end of the fall semester. Tr. at 489 (Inclusion \*\*\* teacher).

- a. The amount of special education \*\*\* did not change between November 2016 and January 2017. Student receives \*\*\* minutes per week of inclusion \*\*\*, which includes \*\*\*-minute sessions on \*\*\* with the Inclusion \*\*\* teacher.<sup>220</sup>
  - b. In addition to special education services, Student receives \*\*\* \*\*\* intervention \*\*\* times per week, \*\*\* minutes per time. One of the weekly \*\*\*-minute interventions is spent helping Student with organizational skills.<sup>221</sup>
  - c. The Inclusion \*\*\* teacher consults with the General Education \*\*\* teacher and Intervention \*\*\* teacher weekly, at least \*\*\* per time.<sup>222</sup>
100. The Principal, General Education \*\*\* teacher, Inclusion \*\*\* teacher, and Intervention \*\*\* teacher collaborate to work on gaps in Student's \*\*\* skills.<sup>223</sup>
101. After Student \*\*\*, Student worked with the Intervention \*\*\* teacher during the \*\*\* to catch up on missing assignments.<sup>224</sup>

**5. \*\*\* *Grade Fall Semester Absences and Grades***

102. For the fall semester, Student had \*\*\* excused absences each in \*\*\*, \*\*\*, \*\*\*, and \*\*\*; \*\*\* excused absences in \*\*\*; and \*\*\* excused absences in \*\*\*.<sup>225</sup>
- a. Sometimes Student refused to go to school. Mother did not report the behavior to the District due to potential truancy consequences.<sup>226</sup>
  - b. Student's absences in \*\*\* affected Student's ability to do \*\*\* and caused gaps in Student's learning. Student could potentially catch up in \*\*\* by working with a teacher individually a couple of times per week, if the teacher teaches to Student's strengths and weaknesses.<sup>227</sup>

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<sup>220</sup> Tr. at 1398-1404, 1432-1433 (Principal).

<sup>221</sup> Tr. at 490-491, 516-517, 519 (Inclusion \*\*\* teacher).

<sup>222</sup> Tr. at 516, 530 (Inclusion \*\*\* teacher).

<sup>223</sup> Tr. at 1430-1432 (Principal).

<sup>224</sup> Tr. at 1366 (Principal).

<sup>225</sup> Resp. Ex. 132; Resp. Ex. 134; Resp. Ex. 148.

<sup>226</sup> Tr. at 642-643 (Mother).

<sup>227</sup> Tr. at 200-201 (Clinical Psychologist); Tr. at 367-368, 397-398 (Special Ed. Coord. for Campus Ops.).

103. At the end of the fall session, Student was failing \*\*\*, with a \*\*\* average for the semester. Student had “incompletes” in \*\*\* and \*\*\*.<sup>228</sup> As of February 2017, the \*\*\* teacher was working with Student to finish the \*\*\* assignment and obtain a fall semester grade.<sup>229</sup> As of February 2017, Student was working on the last missing \*\*\* assignment.<sup>230</sup>

## 6. *Revised IEP*

104. The ARDC met on January \*\*\*, 2017, and reconvened on January \*\*\*, 2017, to revise Student’s IEP.<sup>231</sup> Parents attended the ARDC meetings.<sup>232</sup>

105. At the time of the first meeting, Student had missed \*\*\* days of school for the year.<sup>233</sup>

106. In revising Student’s IEP, the ARDC considered Student’s most recent FIE, \*\*\* tests, PLAAFPs, developmental skills, physical factors, adaptive behavior, emotional factors, STAAR results, District-wide assessments, curriculum accommodations, grades, counseling documentation, and information from Parents, teachers, and the General Education Counselor.<sup>234</sup>

107. The winter 2016-2017 \*\*\* tests measured Student’s progress in \*\*\* and \*\*\* as compared to the spring and fall of 2016.<sup>235</sup>

a. Student’s fall 2016 \*\*\* score showed Student performed better than \*\*\* percent of the children who took the test nationwide. Student took \*\*\* minutes to take the fall 2016 \*\*\* test and \*\*\* minutes to take the winter 2017 \*\*\* test. Student scored in the \*\*\* percentile on the winter 2017 test, higher than other students across the District.<sup>236</sup>

b. The \*\*\* test identified Student’s gaps in \*\*\*. Student’s Intervention \*\*\* teacher is addressing those gaps and Student’s General Education \*\*\* teacher and Inclusion \*\*\* teacher are aware of the gaps.<sup>237</sup>

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<sup>228</sup> Resp. Ex. 132; Resp. Ex. 153.

<sup>229</sup> Tr. at 955-956, 983-985 (\*\*\*) teacher); Resp. Ex. 131; Resp. Ex. 150 at 59-60; *see* Resp. Exs. 125, 126.

<sup>230</sup> Tr. at 1249, 1280-1282 (Gen. Ed. \*\*\* teacher).

<sup>231</sup> Resp. Ex. 152.

<sup>232</sup> Resp. Ex. 152 at 2556-2557.

<sup>233</sup> Resp. Ex. 152 at 2529.

<sup>234</sup> Tr. at 1378, 1380, 1393-1394 (Principal); Resp. Exs. 138, 139, 141, 142, 143, 144; Resp. Ex. 152 at 2523-2425, 2527-2530, 2548; Resp. Ex. 153.

<sup>235</sup> Resp. Ex. 127.

<sup>236</sup> Tr. at 1129-1135 (\*\*\*) teacher); Resp. Ex. 127; Resp. Ex. 152 at 2523-2524.

<sup>237</sup> Tr. at 1275, 1284 (Gen. Ed. \*\*\* teacher).

- c. The \*\*\* score was in the average range. The progress trend was upward with scores of \*\*\* in spring 2016; \*\*\* in fall 2016; and \*\*\* in winter 2017.<sup>238</sup>
108. The ARDC reviewed Student's progress on the three measurable annual IEP goals that had been effect since November \*\*\*, 2016.<sup>239</sup> During the \*\*\*-week period since the IEP had been implemented, Student was performing at the same level on the \*\*\* goal and Student's work completion in the four core subjects had improved.<sup>240</sup>
- a. On the \*\*\* goal, Student had applied strategies to come up with the correct answer \*\*\*% of the time. Student was to achieve \*\*\*% accuracy by November \*\*\*, 2017. By January 2017, Student's progress remained at \*\*\*%. Student's lack of progress was due in part to Student's absences.<sup>241</sup> Student had missed \*\*\* class \*\*\* times since the IEP was implemented.<sup>242</sup>
- b. On the Behavioral goal, Student was completing \*\*\*% of assigned work in core courses at school. The original baseline on November \*\*\*, 2016 was \*\*\*%. Between November \*\*\*, 2016, and December \*\*\*, 2016, Student showed growth to \*\*\*%. Between January \*\*\*, 2017, and January \*\*\*, 2017, Student showed growth to \*\*\*%. The goal was to achieve completing \*\*\*% or more of assigned work at school by November \*\*\*, 2017.<sup>243</sup>
- c. The Counseling goal requires Student, within \*\*\* instructional weeks, and when provided with explicit counseling instruction regarding coping skills, to improve Student's personal adjustment as evidenced by a self-rating of \*\*\* points or higher on Student's individualized Mood Questionnaire. Student's baseline score was a count of \*\*\* times on January \*\*\*, 2017, unchanged since the goal was implemented in November 2016. Student is to achieve a count of \*\*\* times by November \*\*\*, 2017.<sup>244</sup>
- i. Counseling services with \*\*\* began on November \*\*\*, 2016. Student filled out Stress/Anxiety Ladder Worksheets as a way to assess what situations

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<sup>238</sup> Tr. at 1251-1253 (Gen. Ed. \*\*\* teacher); Resp. Ex. 127.

<sup>239</sup> Tr. at 1258-1260 (Gen. Ed. \*\*\* teacher); Resp. Ex. 139; Resp. Ex. 152 at 2531-2533; Resp. Ex. 153; *see* Pet. Ex. 25 at 8-10; Resp. Ex. 120 at 2017-2019.

<sup>240</sup> Resp. Ex. 152 at 2531-2532.

<sup>241</sup> Tr. at 509, 532-533 (Inclusion \*\*\* teacher); Resp. Ex. 148.

<sup>242</sup> Resp. Ex. 152 at 2543.

<sup>243</sup> Resp. Ex. 152 at 2531-2532; Resp. Ex. 153; *see* Resp. Ex. 124.

<sup>244</sup> Resp. Ex. 123; Resp. Ex. 152 at 2532-2533; Resp. Ex. 153. The baseline and measurement tools for the Counseling goal were provided by the LSSPs who were on the FIE multi-disciplinary team. Tr. at 1295-1298, 1300-1302, 1315-1317, 1322 (Social Worker); Resp. Ex. 137 at 2421-2425; *see also* Resp. Ex. 120 at 2018-2019.

caused Student's stress and Mood Questionnaires to describe Student's feelings for the previous month.<sup>245</sup>

- ii. \*\*\* meets with Student at varying times in an attempt not to have Student miss the same class over and over.<sup>246</sup>
- iii. As of February 2017, Student had made some progress. Student was able to recognize what triggers some of Student's physical responses and is using coping skills more.<sup>247</sup>
- iv. \*\*\* checks in with Mother weekly to find out if there are any concerns or if any follow-up is needed with Student.<sup>248</sup>

109. Because Student did not perform satisfactorily on \*\*\* and \*\*\* portions of the spring 2016 STAAR, Student is to participate in an \*\*\* \*\*\* from January \*\*\*, 2017, to May \*\*\*, 2017. Student will receive \*\*\* remediation \*\*\* minutes per time, \*\*\* times per week, in a special education setting, and maintain grade level \*\*\* skills through instruction \*\*\* minutes per time, \*\*\* times per week, in a general education setting.<sup>249</sup>
110. The ARDC determined a BIP was not needed because Student's work completion and anxiety are addressed in the Behavior and Counseling goals.<sup>250</sup>
111. The only revisions to the November 2016 IEP were updated progress information regarding Student's goals and objectives; an agreement to conduct an AT evaluation; a pending request by the District to conduct an In-Home Training evaluation; a change to the Instructional Service page to reflect Student had received Inclusion \*\*\* since the beginning of the school year; an agreement that Student will carry an agenda and track Student's own progress; and an agreement to consider ESY services at an April 2017 ARDC meeting.<sup>251</sup> Provision of ESY services may be considered by an ARDC at any time.<sup>252</sup>

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<sup>245</sup> Tr. at 1293 (Social Worker); Resp. Ex. 137 at 2417, 2422-2425. The correct date for the last visit before the due process hearing is January \*\*\*, 2017, not November \*\*\*, 2016. Tr. at 1297-1298 (Social Worker); Resp. Ex. 137 at 2423.

<sup>246</sup> Tr. at 1323 (Social Worker).

<sup>247</sup> Tr. at 1311, 1313-1314 (Social Worker).

<sup>248</sup> Tr. at 731-732 (Mother); Tr. at 1305, 1320 (Social Worker).

<sup>249</sup> Resp. Ex. 152 at 2539; *see* Pet. Ex. 25 at 18; *see also* Resp. Ex. 120 at 2027. The November 2016 IEP did not state how long the \*\*\* sessions were to be. The revised IEP extends the services beyond the April \*\*\*, 2017 end date in the November 2016 IEP.

<sup>250</sup> Resp. Ex. 152 at 2543.

<sup>251</sup> Tr. at 117, 119-120 (Exec. Dir. of Special Ed.); Tr. at 430 (Special Ed. Coord. for Campus Ops.); Tr. at 533-535, 537 (Inclusion \*\*\* teacher); Resp. Ex. 152 at 2530, 2543, 2547-2548.

<sup>252</sup> Tr. at 531 (Inclusion \*\*\* teacher).



112. Efforts to support Student in the educational setting as set out in the revised IEP include Counseling services; intensive, individual interventions other than special education (Tier III); tutorial/remedial/compensatory services; and an accelerated program of instruction, all calculated to provide Student with academic and nonacademic benefit.<sup>253</sup>
113. The draft document contained Prior Written Notice regarding the District's proposed or refused actions.<sup>254</sup>
114. Parents were offered and took a 10-day recess to review the draft IEP.<sup>255</sup> By letter dated January \*\*\*, 2017, Parents notified the ARDC they did not accept the revised IEP as written. They requested special education assistance rather than RtI for \*\*\*; a BIP to assist Student with getting to school and getting work done; ESY services; and consent forms to sign for independent AT and In-Home Training evaluations.<sup>256</sup> Mother believes the \*\*\* goal, as adopted in November 2016, could be improved: Student should have one goal for \*\*\* \*\*\* and one goal for \*\*\*.<sup>257</sup>
115. The ARD document was later finalized with no changes except for noting Parents' disagreement.<sup>258</sup>
116. Pursuant to Parents' request, the ARDC agreed to provide an AT evaluation.<sup>259</sup> The District requested an In-Home Training assessment. Parents signed consent for the AT assessment and In-Home Training assessment on February \*\*\*, 2017.<sup>260</sup>
117. Student is to receive all instruction and services in the general education setting with supplementary aids and services, based on a review of assessment data, new IEP, instructional modifications/supports necessary to implement the IEP, and previous efforts and considerations.<sup>261</sup>

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<sup>253</sup> Resp. Ex. 152 at 2540.

<sup>254</sup> Resp. Ex. 152 at 2547-2549.

<sup>255</sup> Resp. Ex. 152 at 2543.

<sup>256</sup> Tr. at 597-602 (Asst. Principal, \*\*\* school); Pet. Ex. 33.

<sup>257</sup> Tr. at 716, 735 (Mother).

<sup>258</sup> The final version of the January 2017 ARD document without "draft" on it was not available by the disclosure deadline for the due process hearing. But Resp. Ex. 152, with the exception of noting Parents' disagreement, is the final version. Tr. at 597-598 (Asst. Principal, \*\*\* school).

<sup>259</sup> At the January 2017 ARDC meeting, two of Student's teachers stated Student does not need AT beyond what is already available in the classroom, such as \*\*\*\* class. Parents requested an AT evaluation and the ARDC agreed. Resp. Ex. 152 at 2543, 2548.

<sup>260</sup> Tr. at 1383-1384 (Principal); Tr. at 1697-1698 (Mother); Resp. Ex. 152 at 2543, 2548.

<sup>261</sup> Tr. at 55, 60 (Exec. Dir. of Special Ed.); Resp. Ex. 152 at 2541.

## V. 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, elementary school, or secondary school education; and (d) are provided in accordance with a properly developed IEP.<sup>262</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>263</sup>

### B. Child Find

Student's eligibility for special education services as a child with OHI and ED is not in dispute. Instead, Petitioner alleges the District failed to timely identify Student under its Child Find obligation and improperly evaluated Student in determining Student does not meet eligibility for an SLD.<sup>264</sup>

#### 1. The District timely identified Student

In a duty known as "Child Find," a school district has an affirmative, ongoing obligation to evaluate any child who is a resident in the district's jurisdiction who either has or is suspected of having an IDEA-eligible disability and a need for special education as a result of that disability.<sup>265</sup> The Child Find duty applies to all children, including children who are advancing

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<sup>262</sup> 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

<sup>263</sup> *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997); 20 U.S.C. § 1412(a)(1).

<sup>264</sup> Petitioner's Post-hearing Brief at 14, 19-23.

<sup>265</sup> 34 C.F.R. §§ 300.8, 300.111.

from grade to grade.<sup>266</sup> A request for an initial FIE may be made by school personnel, the student's parents or legal guardian, or another person involved in the education or care of the student.<sup>267</sup> But, because the Child Find obligation is an affirmative one, a parent is not required to request that the school district identify and evaluate a child.<sup>268</sup>

Under Texas law, referral of students for an FIE must be a part of the district's overall, general education referral or screening system. Prior to referral, students experiencing difficulty in the general education classroom should be considered for support services available to all students, such as tutorial, remedial, compensatory, RtIs, and other academic or behavior support services. If a student continues to experience difficulty after the provision of interventions, district personnel must refer the student for an FIE.<sup>269</sup> A district can violate its Child Find duty by repeatedly referring a student for interventions rather than evaluating the student's need for special education and related services.<sup>270</sup>

Petitioner argues the District has known since Student was in \*\*\* grade that Student has ADHD and inappropriately provided Student with Section 504 accommodations instead of placing Student in special education.<sup>271</sup> But the existence of a disability such as ADHD does not automatically trigger a duty to conduct an FIE, even if the student has some academic difficulties. The Child Find duty is triggered when the school district has reason to suspect the disability may need to be addressed with special education services. Then, the school district must evaluate the student within a reasonable amount of time.<sup>272</sup>

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<sup>266</sup> 34 C.F.R. § 300.111(c).

<sup>267</sup> 34 C.F.R. 300.301(b); 19 Tex. Admin. Code § 89.1011(a).

<sup>268</sup> *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 Fed. App'x 887 (5th Cir. 2012, unpublished).

<sup>269</sup> 19 Tex. Admin. Code § 89.1011.

<sup>270</sup> *El Paso Indep. Sch. Dist. v. R.R.*, 567 F. Supp. 2d 918, 947 (W.D. Tex. 2008), rev'd on o.g., 591 F.3d 417 (5th Cir. 2009).

<sup>271</sup> The appropriateness of the Section 504 plan is outside the hearing officer's jurisdiction and is not at issue.

<sup>272</sup> *Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 383 (5th Cir. 2007); *Richard R.*, 567 F.Supp.2d at 950; *Flour Bluff*, 481 Fed. App'x at 893.

The evidence shows that until August 2016, the District had no reason to suspect Student needed special education and related services to address Student's ADHD or any other disability. Prior to the May \*\*\*, 2015 accrual date for this proceeding, Student was screened for dyslexia (2013), with negative results. In May 2014, the Section 504 committee determined Student's diagnoses of developmental delay and \*\*\* did not substantially limit any of Student's major life activities and that continuing to provide accommodations for ADHD would be appropriate. A private neuropsychological evaluation conducted in September 2014, when Student was in \*\*\* grade, showed Student does not have an SLD in \*\*\* or \*\*\*, and that Student had healthy social and emotional functioning. An October 2014 FIE showed Student had no IDEA-eligible disabilities, including OHI and SLD. An April 2015 IEE showed Student did not meet IDEA eligibility for an SLD in \*\*\* or any other area. In ARDC meetings held in April 2015 and May 2015, and in a May 2015 Section 504 committee meeting, committee members (including Parents) decided Student did not meet eligibility for special education services.

After the May \*\*\*, 2015 accrual date for this proceeding, Student began \*\*\* grade. The evidence shows that during the 2015-2016 school year, the District had no reason to suspect Student had a disability for which Student had not been evaluated, including an ED.<sup>273</sup> In addition, Student's February 2016 dyslexia screening, conducted at Parents' request, was negative. Petitioner did not carry Petitioner's burden of proof to show that during the 2015-2016 school year Student needed specially designed instruction, as defined by the IDEA, to meet Student's unique needs and to ensure Student had access to the general curriculum so that Student could meet the educational standards the District applies to all students.<sup>274</sup> Accommodations in the general education classroom were sufficient for Student to pass Student's classes and be promoted to \*\*\* grade.

Petitioner contends that Student's failure to ever pass the \*\*\* STAAR indicates Student is a student with an SLD in \*\*\*. The evidence shows that Student missed passing the \*\*\* grade \*\*\* STAAR by only one answer, and that Student met the progress measure on the exam, which means

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<sup>273</sup> See Finding of Fact No. 59.

<sup>274</sup> 34 C.F.R. § 300.39(b)(3).

Student made the year's progress from the previous year.<sup>275</sup> The \*\*\* grade STAAR was not administered prior to the conclusion of the February 2017 due process hearing. The hearing officer is persuaded by the District's argument that the STAAR—a test taken on one day of a school year—is not necessarily an indicator that a student is disabled and needs special education. While it is one factor to consider, it is not dispositive. Far more dispositive to the identification issue is Student's academic performance throughout the entire school year, Student's grades, and Student's behavior.

The District conducted timely and appropriate evaluations as circumstances warranted. The District's June 2016 offer to conduct an FIE, made about \*\*\* days after the Complaint was filed, was declined by Parents. Prior to August 2016, the District had no reason to suspect Student might have an ED. Student exhibited no signs of ED at school, where Student had friends and no behavior issues. The ED manifested as absences from school due to \*\*\*. But the District was not aware that Student's absences were due to \*\*\*. Mother informed school personnel that Student was absent due to illness, and often provided doctor's notes for excused absences. Until receiving the Clinical Psychologist's evaluation in August 2016, the District had no reason to suspect Student had an ED. In fact, the Clinical Psychologist stated the ODD diagnosis was based on Student's behavior at home, not at school. Upon receiving the evaluation, the District immediately obtained Parents' consent to conduct an FIE and timely completed the FIE in October 2016.

The FIE multi-disciplinary team properly considered Student's October 2016 \*\*\*, psycho-evaluations, and other information to determine Student has an ED that renders Student eligible for special education services. The ARDC met in a timely manner in November 2016,<sup>276</sup> found Student eligible for special education services due to OHI and ED, and on November \*\*\*, 2016, Student began receiving special education services under an appropriate IEP.

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<sup>275</sup> Respondent Killeen Independent School District's Proposed Findings of Fact and Conclusions of Law (Respondent's Closing Brief) at 64-65.

<sup>276</sup> 19 Tex. Admin. Code § 89.1011(c).

Petitioner did not meet Petitioner's burden of proof to show the District violated its Child Find duty by failing to timely identify Student as a child with an eligible disability in need of special education and related services.

## **2. The District properly evaluated Student**

The District's October 2016 FIE was appropriate, timely, and correctly identified Student as a child with OHI and ED, but not an SLD. Petitioner presented no evidence to challenge the appropriateness of the 2016 FIE except for the way in which Student was assessed for an SLD. Petitioner did not prove the FIE was incomplete or insufficient, or that it failed to comply with IDEA requirements. The hearing officer finds that the FIE does, in fact, comply with all IDEA requirements.<sup>277</sup>

Specifically, Student was evaluated using a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information from Parents, which enabled the multi-disciplinary team to determine Student's eligibility as a child with OHI and ED. The FIE multi-disciplinary team assessed Student in all areas of suspected disability. The FIE report was sufficiently comprehensive to identify all of Student's educational and related services' needs, and provided the ARDC with information necessary to develop Student's IEP.

The FIE multi-disciplinary team correctly used the patterns of strengths and weaknesses model to determine Student does not have an SLD. The model is consistent with the IDEA and Texas law.<sup>278</sup> Petitioner referenced no legal requirement that the District provide Parents with the criteria used to assess Student for an SLD. As such, the hearing officer finds the District committed no procedural violation in that regard. Even if Petitioner prevailed on this issue, Petitioner's requested remedy that the District must post the SLD criteria it uses on its website is moot. The evidence shows the District's SLD criteria are already posted on its website.

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<sup>277</sup> 34 C.F.R. §§ 300.301, 300.304 - 300.311.

<sup>278</sup> 34 C.F.R. §§ 300.8(c)(10), 300.307, 300.309(a)(1); 19 Tex. Admin. Code § 89.1040(c)(9)(B)(ii)(11).

The hearing officer concludes that prior to November \*\*\*, 2016, the District did not deny Student a FAPE by failing to correctly identify and evaluate Student. The hearing officer also finds the District was not legally required to provide Parents with written criteria identifying how Student would qualify for an SLD. Finally, the hearing officer finds the District utilized criteria consistent with the IDEA and Texas law in denying Student eligibility as a student with an SLD.

### **C. The District Followed Procedural Requirements**

Petitioner alleges the District did not comply with all the procedural requirements of the IDEA and Texas law. The only named procedural violation alleged by Petitioner is with regard to providing Prior Written Notice; the allegation is not supported by underlying facts. Petitioner offered no evidence of specific procedural violations committed by the District.

Prior Written Notice must be given when a school district proposes or refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student.<sup>279</sup> A procedural violation may amount to a denial of FAPE only if the violation: (1) impeded the student's right to a FAPE; (2) significantly impeded a parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or (3) caused a deprivation of educational benefit.<sup>280</sup> As discussed below, Petitioner did not prove its assertion that the District failed to comply with a procedural requirement of the IDEA or Texas law.

First, during the 2015-2016 school year, when Student was in \*\*\* grade, the District had no reason to suspect Student was a child with a disability who needed special education. The District did not propose or refuse to initiate or change Student's identification, evaluation, placement, or its provision of FAPE to Student. Student was not a special education student.

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<sup>279</sup> 34 C.F.R. § 300.503; *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1600, 113 LRP 10911 (2013).

<sup>280</sup> 34 C.F.R. § 300.513(a)(2).

However, at an ARDC meeting held May \*\*\*, 2015, just \*\*\* days before the accrual date for this proceeding, the District gave Parents a Notice of Procedural Safeguards.

As relevant to this proceeding, a copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents only one time a school year, except that a copy also must be given to the parents upon receipt of a due process hearing request under the IDEA.<sup>281</sup> Petitioner presented no evidence that the District failed to provide Parents with a Notice of Procedural Safeguards upon receipt of the Complaint on May 31, 2016.

No circumstances arose until August \*\*\*, 2016, to trigger the District's duty to provide Parents with Prior Written Notice. On August \*\*\*, 2016, the District received the Clinical Psychologist's report that Student has ODD. On that same date, the District proposed and Parents signed consent for an FIE. The Notice of Evaluation related to the consent identified every area that was to be assessed. The District also gave Parents a Notice of Procedural Safeguards. Together, providing Parents with the Notice of Evaluation and Notice of Procedural Safeguards met the requirements for Prior Written Notice.<sup>282</sup> Appropriate Prior Written Notice also was provided to Parents before and after the ARDC meetings held on November \*\*\*, 2016; January \*\*\*, 2017; and January \*\*\*, 2017.<sup>283</sup> At the January \*\*\*, 2017 ARDC meeting, the District offered Parents a single opportunity to recess and reconvene, in compliance with Texas law.<sup>284</sup>

Assuming, *arguendo*, that the District committed a procedural error, the error would not have amounted to a denial of FAPE. After the May 2015 ARDC meeting, Parents actively participated in the Section 504 meetings held in September 2015, April 2016, and October 2016. Parents chose not to attend the September 2016 Section 504 committee meeting because they believed the District would never find Student eligible for special education. They were also active participants in each ARDC meeting since May \*\*\*, 2015, and have had every opportunity to be

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<sup>281</sup> 34 C.F.R. § 300.504(a)(2).

<sup>282</sup> 34 C.F.R. § 300.503(a), (b), (c)(1).

<sup>283</sup> Resp. Ex. 120 at 2038-2043, 2047-2050, 2182-2185; Resp. Ex. 152 at 2547-2555.

<sup>284</sup> 19 Tex. Admin. Code § 89.1050(g)(1).



involved in the decision-making process regarding Student's IEP. Parents were not denied the opportunity for meaningful participation in Student's educational process and Student did not suffer any loss of educational opportunity as a result of any procedural error by the District.<sup>285</sup>

#### **D. Provision of FAPE**

Upon a finding that a child has a disability, an ARDC must develop an IEP for the child.<sup>286</sup> The IEP must meet specific requirements of the IDEA and Texas law.<sup>287</sup>

The U.S. Supreme Court first addressed the question of when an IEP provides a FAPE 35 years ago 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 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>288</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>289</sup>

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<sup>285</sup> 34 C.F.R. § 300.513(a)(2)(ii), (iii).

<sup>286</sup> *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d at 1007; *Cypress-Fairbanks Indep. Sch. Dist.*, 118 F.3d at 247; 20 U.S.C. § 1415(b)(1).

<sup>287</sup> 34 C.F.R. §§ 300.320 - 300.324; 19 Tex. Admin. Code § 89.1055.

<sup>288</sup> *Bobby R.*, 200 F.3d at 347, citing to *Cypress-Fairbanks*, 118 F.3d at 247-48.

<sup>289</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).

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>290</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 coordinated and collaborative manner by the key "stakeholders;" and (4) positive academic and nonacademic benefits are demonstrated.<sup>291</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>292</sup>

The evidence shows that the ARDC complied with the IDEA's regulatory requirements, Texas law, and relevant case law in developing an IEP reasonably calculated to provide a meaningful educational benefit to Student.<sup>293</sup>

**1. Student's IEP was individualized, based on Student's assessments and performance**

The evidence shows that, when developing Student's IEP, the ARDC considered Student's strengths, Parents' concerns, the results of Student's most recent evaluations, and Student's academic, developmental, and functional needs.<sup>294</sup> The ARDC also considered Student's need for related services.<sup>295</sup> The hearing officer concludes Student's IEP was individualized, based on Student's assessments and performance.

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<sup>290</sup> For an excellent analysis of how each of the four factors in the Fifth Circuit's standard has a parallel in *Andrew F.*, see Respondent's Closing Brief at 80-82.

<sup>291</sup> *Cypress-Fairbanks Indep. Sch. Dist.*, 118 F.3d at 253.

<sup>292</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 at 397.

<sup>293</sup> *Bobby R.*, at 347-349, citing to *Cypress-Fairbanks*, 118 F.3d at 247-248, 253; 34 C.F.R. §§ 300.320, 300.324.

<sup>294</sup> 34 C.F.R. § 300.324(a)(1).

<sup>295</sup> 34 C.F.R. § 300.320(a)(4).

Petitioner complains that the IEP does not recognize Student's SLD in \*\*\*.<sup>296</sup> But, as addressed *supra*, Student has no SLD in \*\*\*. Petitioner further contends the IEP does not include measurable \*\*\* goal objectives and fails to ensure sufficient \*\*\* instruction. The evidence contradicts Petitioner's assertions. Student's Inclusion \*\*\* teacher testified as to how the \*\*\* goal objectives are measured. In addition, under the IEP, Student is provided with General Education \*\*\* for \*\*\* minutes per day; \*\*\* in an inclusion setting for \*\*\* minutes per day; and one-on-one \*\*\* intervention \*\*\* times per week for \*\*\* minutes per time. The hearing officer finds the amount of \*\*\* instruction included in the IEP is reasonably calculated to afford Student an educational benefit.

Petitioner also alleges the IEP is insufficient because ESY services for the summer of 2017 are not included.<sup>297</sup> The evidence established that the ARDC would consider ESY services at its April 2017 meeting, after the IEP had been in place long enough to determine if ESY services are needed. And, as the Inclusion \*\*\* teacher testified, ESY services may be considered by an ARDC at any time. The hearing officer finds the ARDC's decision to consider ESY services at its April 2017 meeting was appropriate.

Finally, Petitioner avows the IEP is lacking because it does not include a BIP, as recommended by Petitioner's expert Clinical Psychologist, to help Student increase Student's frustration tolerance particularly in \*\*\* and to engage in school in general.<sup>298</sup> Certainly, school avoidance behaviors may warrant a BIP.<sup>299</sup> But after considering the Clinical Psychologist's evaluation of Student, the ARDC addressed Student's frustration and school avoidance by including Behavior and Counseling goals in the IEP. The hearing officer finds the ARDC developed appropriate goals to address concerns raised by the Clinical Psychologist.

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<sup>296</sup> Petitioner's Post-hearing Brief at 19-23.

<sup>297</sup> Petitioner's Post-hearing Brief at 24-25.

<sup>298</sup> Petitioner's Post-hearing Brief at 23-24; Respondent's Closing Brief at 83.

<sup>299</sup> See, e.g., *L.O. v. N.Y. City Dep't of Educ.*, 822 F.3d 95, 114 (2d Cir. 2016).

## **2. The IEP was administered in the LRE**

The IDEA's LRE provision requires that students with disabilities receive their education in the regular classroom environment to the maximum extent appropriate or, to the extent such placement is not appropriate, in an environment with the least possible amount of segregation from the student's nondisabled peers and community.<sup>300</sup> To remove a child from a regular education environment, the ARDC must consider whether the nature and severity of the child's disability is such that education in a regular classroom setting cannot be satisfactorily achieved, regardless of the use of supplemental aids or services; whether placement in the regular classroom will potentially be harmful to the child; and whether the IEP must include positive behavioral interventions and supports in the case of a child whose behavior impedes the child's learning or that of others.<sup>301</sup> In making a placement decision, "first consideration" should be given to placement in a regular classroom before considering more restrictive placement options on the continuum of alternative placements, which includes special classes, special schools, home instruction, and instruction in hospitals and institutions.<sup>302</sup>

The ARDC met all legal requirements in determining the LRE for Student.<sup>303</sup> The hearing officer finds Student's placement is based on Student's unique educational needs and circumstances, and on Student's IEP. Petitioner did not prove the District denied Student a FAPE by failing to place Student in the LRE.

## **3. Key stakeholders provided the services in a coordinated and collaborative manner**

Parents are an integral part of the IEP development process and, as such, are key stakeholders in the provision of services to their child, as are a student's teachers and a school

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<sup>300</sup> 34 C.F.R. § 300.114(a).

<sup>301</sup> 34 C.F.R. §§ 300.116, 300.324(a)(2)(i); *see also* *Oberti v. Board of Education*, 995 F.2d 1204 (3d Cir. 1993); and *Daniel R .R. v. State Board of Education*, 874 F.2d 1036, 1048 (5th Cir. 1989).

<sup>302</sup> *Letter to Cohen*, 25 IDELR 516 (OSEP 1996); 34 C.F.R. § 300.115(a), (b); 19 Tex. Admin. Code § 89.63.

<sup>303</sup> 34 C.F.R. §§ 300.114 - 300.120; 300.327; 300.501(c)(1).

district's administrators.<sup>304</sup> All members of the ARDC must have the opportunity to participate in a collaborative manner in developing the IEP. A decision of the ARDC concerning required elements of the IEP must be made by mutual agreement, if possible.<sup>305</sup>

Petitioner offered no evidence of any lack of coordination or collaboration in the development of Student's IEP. Instead, the evidence shows Parents fully participated in the ARDC meetings. Although Parents have the right to provide meaningful input, the right "is simply not the right to dictate the outcome and obviously cannot be measured as such."<sup>306</sup> The ARDC was not required to rely solely on outside assessments or to act as Parents requested.<sup>307</sup>

Since implementation of the IEP, Student's \*\*\* teachers and the \*\*\* school Principal confer at least weekly about Student's progress; the Social Worker converses weekly with Mother; and there is regular communication between Parents and District personnel regarding Student's education.

The hearing officer finds that, on these facts, Student's educational services are being provided in a collaborative and coordinated manner by key stakeholders.

#### **4. Positive academic and non-academic benefits**

The evidence shows the IEP was reasonably calculated to provide Student with academic and non-academic benefits given Student's unique circumstances. Nothing in the IDEA requires a school district to guarantee progress.<sup>308</sup> At the time of the due process hearing, the IEP had been in effect for a little more than \*\*\* months, during which time Thanksgiving holidays and the winter break occurred. Even though Student missed \*\*\* \*\*\* times after the IEP was implemented, Student had maintained Student's baseline score on the IEP \*\*\* goal as of the January \*\*\*, 2017

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<sup>304</sup> 34 C.F.R. § 300.321(a).

<sup>305</sup> 19 Tex. Admin. Code § 89.1050(g).

<sup>306</sup> *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003).

<sup>307</sup> *Warren Indep. Sch. Dist.*, 117 LRP 17212 (E.D. Tex. 2017).

<sup>308</sup> *Cypress-Fairbanks*, 118 F.3d at 247-248, quoting *Rowley*, 458 U.S. at 188-189.

ARDC meeting. By that time, Student also had begun completing \*\*\*% of assigned work in core courses, up from Student's November \*\*\*, 2016 baseline score of \*\*\*% on the Behavior goal. In addition, Student had made some progress on Student's IEP Counseling goal. Student was able to recognize what triggers some of Student's physical responses and practice coping skills more than Student did in November 2016, exhibiting positive non-academic benefit. The progress is appropriate given both that Student's absences impede Student's access to academic progress through the IEP and how short a time the IEP has been in place.

### **E. Conclusion**

After considering the evidence and parties' closing arguments, the hearing officer finds Petitioner did not meet Petitioner's burden of proof to prevail on any of the identified issues for this proceeding. Instead, the evidence shows the District properly identified, evaluated, and placed Student; provided Student a FAPE in accordance with the IDEA and relevant case law; and committed no procedural violations. Accordingly, Petitioner is not entitled to any of the requested relief.

## **VI. CONCLUSIONS OF LAW**

1. The District is a local educational agency responsible for complying with the IDEA as a condition of the State of Texas's receipt of federal education funding, and the District is required to provide each disabled child in its jurisdiction with a FAPE, pursuant to the IDEA, 20 U.S.C. § 1400 *et seq.*
2. Parents of students with disabilities are entitled to file a due process complaint and have a hearing on any matter relating to the identification, evaluation, or educational placement of the student, or the provision of a FAPE to the student. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.507-300.513.
3. Petitioner bears the burden of proof on all issues raised in the proceeding. *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.

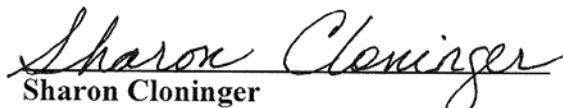
- 1997), as cited in *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000); *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1010-1011 (5th Cir. 2010).
5. The 1-year statute of limitations applies to this proceeding, resulting in an accrual date of May 31, 2015. 19 Tex. Admin. Code § 89.1151(c).
  6. Student is eligible for special education and related services as a child with an Emotional Disturbance and Other Health Impairment. 34 C.F.R. § 300.8(a)(1); 19 Tex. Admin. Code § 89.1040(a), (c)(4), (c)(8).
  7. The District fulfilled its Child Find obligation as to Student. 34 C.F.R. § 300.111; 19 Tex. Admin. Code § 89.1011.
  8. The District's Full Individual Evaluation of Student, including the evaluation for a Specific Learning Disability, was conducted in accordance with IDEA requirements and is appropriate. 34 C.F.R. §§ 300.8(c)(10), 300.301, 300.303 - 300.311; 19 Tex. Admin. Code § 89.1040(b)(9).
  9. The District provided Student with a FAPE during the time period relevant to this proceeding. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 1001 (2017); *Board of Edu. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 181 (1982); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347-348 (5th Cir. 2000).
  10. The District developed an appropriate IEP for Student. 34 C.F.R. §§ 300.320 - 300.324, 300.502(c)(1); *Andrew F.*, 137 S. Ct. at 1001; *Cypress-Fairbanks*, 118 F.3d at 253 (5th Cir. 1997).
  11. Student's placement meets the LRE requirements of the IDEA. 20 U.S.C. § 1412(a)(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).
  12. The District did not deny Student a FAPE by failing to comply with any of the procedural requirements of the IDEA and Texas law. 34 C.F.R. §§ 300.8, 300.503, 300.513(a)(2); 19 Tex. Admin. Code §§ 89.1040(c)(8), 89.1050.

**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.

**SIGNED May 23, 2017.**

  
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>309</sup>

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<sup>309</sup> 20 U.S.C. § 1451(i)(2); 34 C.F.R. § 300.516; 19 Tex. Admin. Code § 89.1185(n).