

**DOCKET NO. 307-SE-0519**

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

**DECISION OF THE HEARING OFFICER**

**I. STATEMENT OF THE CASE**

Petitioner, STUDENT, b/n/f PARENT (“Petitioner” or “Student”), brings this action against the Round Rock Independent School District (“Respondent” or “District”) under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400-1482 (IDEA) and its implementing state and federal regulations.

The main issue in this case is whether Student’s placement in the \*\*\* (\*\*\*) is appropriate for Student and the least restrictive environment for Student for the upcoming 2019-2020 school year. Additionally, Student has alleged the District failed to conduct necessary evaluations during the 2018-2019 school year and contends the District denied Student a Free Appropriate Public Education (FAPE) during the relevant time period. Having reviewed the evidence and the arguments of counsel, the Hearing Officer concludes Petitioner did not meet Petitioner’s burden of proving any of the designated issues for hearing and denies the requested relief.

**II. PROCEDURAL HISTORY**

**A. Legal Representatives**

Student was represented by Student's Father, PARENT, as a self-represented litigant. The District was represented by its counsel, Stacy C. Ferguson, Escamilla & Poneck, L.L.P.

#### **B. Resolution Session and Mediation**

The parties conducted a timely, but unsuccessful resolution session on May 30, 2019.

### **III. DUE PROCESS HEARING**

The due process hearing was conducted on July 25, 2019. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Student's Father. Respondent continued to be represented by its legal counsel, Stacy C. Ferguson of Escamilla & Poneck, L.L.P. In addition, \*\*\*, the Executive Director of Special Education for the District, attended the hearing as the party representative.

Both parties filed written closing arguments in a timely manner. The Decision in this case is due September 12, 2019.

### **IV. ISSUES**

#### **A. Petitioner's Issues**

Petitioner confirmed the following IDEA issues for decision in this case:

1. EVALUATION: Whether the District failed to conduct appropriate evaluations of Student during the 2018-2019 school year;
2. FAPE: Whether the District failed to provide Student with FAPE during the 2018-2019 school year; specifically, whether the District:
  - a. failed to consider Student's progress in skill acquisition at home and in private therapies in making educational decisions about Student;

- b. failed to update the goals in Student's Individualized Education Plan (IEP);
  - c. failed to consider input from Student's parents and therapist in making educational decisions about Student;
  - d. failed to adequately prepare Student for \*\*\*; and,
3. PLACEMENT: Whether Student's placement in the "General Education \*\*\* classroom" is appropriate for Student and the least restrictive environment for Student for the upcoming 2019-2020 school year.

#### **B. Respondent's Legal Position and Additional Issues**

Respondent generally denied the factual allegations stated in the Complaint. The District specifically denied it failed to consider Student's progress last school year in updating Student's IEP and proposing an appropriate placement for Student. The District contends the parties differ as to the progress Student made during the 2018-2019 school year. The District alleges Student only attended the District's program \*\*\* and attended private therapies the rest of the week. The District argues Student has not been able to establish a consistent routine at school due to Student's limited participation in the District's program. The District concedes Student made some progress, particularly with regard to the acquisition of speech skills and \*\*\*. However, the District disagrees with Student's Father that Student made progress in skills the District has not observed.

### **V. REQUESTED RELIEF**

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

Petitioner confirmed the following items of requested relief:

1. The District place Student in the "General Education \*\*\*\*" classroom for the 2019-2020 school year; and,
2. The District revise and update Student's IEP based on the recommendations of Student's private therapists, the results of Student's progress in private therapies, and, input from Student's parents based on Student's progress in skill-building at home.

**B. Respondent's Requested Relief**

Respondent requests the Hearing Officer deny the relief requested by Petitioner.

**VI. FINDINGS OF FACT**

1. Student is \*\*\* and eligible for special education services from the District as a student with autism and speech impairment.<sup>1</sup> Student's autism is deemed moderate to severe.<sup>2</sup>
2. Student attended school from August 2017 to the end of March 2018 in \*\*\* Independent School District (\*\*\* ISD).<sup>3</sup> Student received a Developmental Assessment from \*\*\* on April \*\*\*, 2017. At the time of the assessment, Student was \*\*\* old and was determined to have autism, a severe speech impairment and low to average cognitive ability. The evaluator recommended Applied Behavior Analysis (ABA) therapy for 15 to 30 hours per week and placement into \*\*\* at age \*\*\*.<sup>4</sup>
3. \*\*\*.<sup>5</sup>
4. Student qualified for Special Education in \*\*\* ISD as a student with Autism and Speech Impairment. Student's Full Individual Evaluation (FIE) was conducted on September \*\*\*, 2017.<sup>6</sup> Student was observed across multiple settings during the FIE.<sup>7</sup>
5. The \*\*\* ISD FIE administered a battery of clinically valid testing instruments including: the Autism Spectrum Rating Scale (ASRS), parent reports and interview, physician records, community observations, the Children's Autism Rating Scale, 2<sup>nd</sup> Edition (CARS-2), the \*\*\*, Language Use Inventory (LUI), Speech/Language Pathologist Observations and Evaluation, and an Articulation Assessment. At the time of the FIE, Student was \*\*\* and determined to be in the \*\*\* percentile for speech/language as compared to Student's same age peers.<sup>8</sup>

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<sup>1</sup> Joint Exhibit (JE)-13 at 1.

<sup>2</sup> Transcript (Tr.) at 208.

<sup>3</sup> JE-13 at 1.

<sup>4</sup> Respondent's Exhibit (RE)-12 at 5.

<sup>5</sup> Tr. at 190.

<sup>6</sup> JE-13 at 1; JE-12.

<sup>7</sup> Tr. at 13-14.

<sup>8</sup> JE-12.

6. During the FIE, Student scored in the \*\*\* percentile, “very elevated,” in all classification areas on the Teacher Administered ASRS and was deemed “very elevated” by the ASRS Parent Ratings. Student was also scored in the \*\*\* percentile (“very elevated”) on the DSM-V clinical criteria for diagnosing autism.<sup>9</sup>
7. On August \*\*\*, 2018, Student’s parent enrolled Student in \*\*\* (\*\*\*) private therapy center which emphasizes \*\*\* interventions focusing on communication, behavior, and social skills.<sup>10</sup>
8. \*\*\* ISD also conducted a Functional Behavior Assessment (FBA). The FBA is dated February \*\*\*, 2018.<sup>11</sup>
9. The FBA concluded Student had significant behavioral challenges that impede Student’s learning or the learning of others. The most significant behavior issue was physical aggression (*e.g*\*\*\*).<sup>12</sup>
10. \*\*\* administered private FBAs on July \*\*\*, 2018, and August \*\*\*, 2018, and identified additional problem behaviors: \*\*\*.<sup>13</sup>
11. Student’s instructional setting during the 2017-2018 school year in \*\*\* ISD was \*\*\* for\*\*\* hours per week. This instructional setting was considered a mainstream placement.<sup>14</sup>
12. In April 2018, Student transferred into the District.<sup>15</sup>
13. At the Transfer ARD Committee meeting held in the District on April \*\*\*, 2018, Student was placed by Student’s ARD Committee in a \*\*\* general education classroom at \*\*\*.<sup>16</sup>
14. On April \*\*\*, 2018, Student’s ARD Committee timely met for Student’s annual ARD meeting.<sup>17</sup>
15. The April \*\*\*, 2018 ARD Committee determined the September 2017 FIE was still valid.<sup>18</sup> Student was not re-evaluated by the District during the 2018-2019 school year.

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<sup>9</sup> JE-12.

<sup>10</sup> RE-1 at 2; RE-2 at 1.

<sup>11</sup> JE-12; JE-13 at 1.

<sup>12</sup> JE-11.

<sup>13</sup> RE-13; RE-14.

<sup>14</sup> JE-10; JE-11; JE-13 at 2.

<sup>15</sup> JE-13 at 2.

<sup>16</sup> JE-10; JE-13 at 2; Tr. at 92.

<sup>17</sup> JE-13 at 2.

<sup>18</sup> JE-4 at 20; Tr. at 142.

16. On April \*\*\*, 2018, Student's ARD Committee recommended a more structured environment. Specifically, the ARD Committee recommended a \*\*\* (\*\*\*) at \*\*\*.<sup>19</sup>
17. \*\*\* has a maximum of \*\*\* students. \*\*\*. A \*\*\* general education classroom has up to \*\*\* students per class.<sup>20</sup>
18. Instruction on new material is delivered on a \*\*\* basis in the \*\*\*. Student's \*\*\* classroom is led by a certified special education teacher with six years of experience who is studying to become a Board Certified Behavior Analyst (BCBA), two paraprofessionals, and a speech therapist in the classroom twice per week.<sup>21</sup>
19. Student learns best when instruction is provided on a \*\*\* basis. The \*\*\* is the only setting within the District that provides, at least partially, \*\*\* instruction.<sup>22</sup> The \*\*\* is a \*\*\* special education classroom.<sup>23</sup>
20. The majority of students placed in \*\*\* possess little or no \*\*\*.<sup>24</sup>
21. The April \*\*\*, 2018 ARD Committee meeting reviewed and considered the 14 written recommendations submitted by Student's private therapist<sup>25</sup> concerning Student's IEP goals.<sup>26</sup>
22. The District devised Student's IEP and placed Student based upon the FIE, observations, and Student's PLAAFs. The District would not consider anecdotal parental reports or progress reports from private providers without supporting data and/or seeing Student generalize the skill in the classroom setting.<sup>27</sup>
23. The District determined placement in the \*\*\* was Student's Least Restrictive Environment (LRE) and recommended the change of placement from the \*\*\*—General Education to the \*\*\* based upon Student's present levels of academic achievement and functional performance (PLAAFP). The District noted Student required complete \*\*\* support throughout the day including \*\*\*.<sup>28</sup>

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<sup>19</sup> JE-13 at 2.

<sup>20</sup> Tr. at 82-85.

<sup>21</sup> Tr. at 82-85.

<sup>22</sup> Tr. at 116-19, 128.

<sup>23</sup> Tr. at 82.

<sup>24</sup> Tr. at 93.

<sup>25</sup> JE-5; Tr. at 101-02.

<sup>26</sup> JE-3 at 2; Tr. at 61-63.

<sup>27</sup> Tr. at 38.

<sup>28</sup> JE-1; Tr. at 210-11.

24. The April \*\*\*, 2018 ARD Committee proposed an IEP for the 2018-2019 school year (April 2018 IEP). The IEP contained four measurable goals with benchmarks: (1) Expressive Language; (2) Receptive Language; (3) Functional Routines; and (4) Behavior. The IEP provided 20 accommodations, \*\*\* minutes per month of direct Speech Therapy, \*\*\* minutes of access to assistive technology (AT) per week, and \*\*\* minutes per month of parent Speech consulting services.<sup>29</sup>
25. The April 2018 IEP did not incorporate the Texas Autism Supplement or include a Behavior Intervention Plan (BIP).<sup>30</sup>
26. The April \*\*\*, 2018 IEP found Student ineligible for Extended School Year (ESY) services.<sup>31</sup>
27. On April \*\*\*, 2018, Student's parents disagreed with Student's placement in the \*\*\* at \*\*\*.<sup>32</sup>
28. On May \*\*\*, 2018, Student's ARD Committee met again and implemented a new IEP (May 2018 IEP). At that meeting, the District and Student's parents were able to reach a compromise on Student's placement for the 2018-2019 school year. Student was placed by agreement of the parties for \*\*\* hours in \*\*\* general education and \*\*\* hours daily in \*\*\*—all at \*\*\*.<sup>33</sup>
29. The May 2018 IEP contained the same four goals and added a fifth goal for Social Skills. The IEP provided 21 accommodations (one additional), \*\*\* minutes per month of direct Speech Therapy, \*\*\* minutes of access to assistive technology (AT) per week, and \*\*\* minutes per month of parent Speech consulting services.<sup>34</sup>
30. The May 2018 IEP incorporated the Autism Supplement and included a BIP.<sup>35</sup>
31. At the beginning of the 2018-19 school year, Student's parents unilaterally decided that Student would only participate in the program at \*\*\*.<sup>36</sup> Student's limited attendance has

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<sup>29</sup> JE-9.

<sup>30</sup> JE-9.

<sup>31</sup> JE-9.

<sup>32</sup> JE-13 at 2.

<sup>33</sup> JE-13 at 2.

<sup>34</sup> JE-7; Tr. at 95.

<sup>35</sup> JE-7.

<sup>36</sup> JE-13 at 2.

- impeded data collection, determination of skills across settings, and reinforcement of those skills.<sup>37</sup>
32. \*\*\* implemented a \*\*\* for Student in October 2018.<sup>38</sup>
33. Student made progress in speech, behavior and \*\*\* from August through December 2018. Student made significant progress in expressive communication—Student began using \*\*\* and went from being completely \*\*\* to make requests or protest. Student began \*\*\*<sup>39</sup> and demonstrated an increased awareness of peers and Student’s environment.<sup>40</sup>
34. \*\*\* has a \*\*\* class. Student has been in the \*\*\* class since Student enrolled in August 2018. Student has been placed on a waiting list for the \*\*\* class which, if accepted, will permit Student to attend school 5 days per week; however, Student will not be admitted into the \*\*\* class until Student is completely \*\*\*.<sup>41</sup>
35. On April \*\*\*, 2019, an ARD Committee meeting was held by the District to discuss Student’s progress and determine Student’s placement for the upcoming 2019-2020 school year.<sup>42</sup>
36. The District and \*\*\* use different programs to measure progress. The District uses the \*\*\* program and \*\*\* uses the \*\*\* to track and measure progress. The \*\*\* program was designed by a BCBA and incorporates Applied Behavior Analysis principles. The \*\*\* program was designed for use in schools and is more structured. The \*\*\* program is used in therapeutic/clinical settings, has far less structure, and is a naturalistic \*\*\* therapy that emphasizes \*\*\*. While there are areas of overlap between the programs, the programs serve different purposes and measure skills differently.<sup>43</sup>
37. At the April \*\*\*, 2019 ARD meeting, Student’s father disagreed with the District’s proposed goals and objectives, as well as the proposed placement for Student. The District proposed \*\*\* hours in \*\*\* general education and \*\*\* hours daily in \*\*\*. Both placements were to occur at \*\*\*.<sup>44</sup>

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<sup>37</sup> JE-4 at 2-3; JE-13 at 2; Tr. at 38, 56, 116-19, 128.

<sup>38</sup> RE-22.

<sup>39</sup> Tr. at 73.

<sup>40</sup> RE-18 at 2.

<sup>41</sup> Tr. at 74-75.

<sup>42</sup> JE-13 at 2.

<sup>43</sup> Tr. at 221.

<sup>44</sup> JE-13 at 2.



38. The ARD meeting on April \*\*\*, 2019, ended in disagreement. Student's parents were requesting placement in \*\*\* general education only.<sup>45</sup>
39. On May \*\*\*, 2019, the District scheduled a collaboration meeting with the \*\*\* staff to collaborate on Student's goals. Student's parent withdrew consent for \*\*\* to share information with the District prior to the meeting.<sup>46</sup>
40. Student's \*\*\* teacher drafted Student's IEP goals. The teacher attempted to reconcile information provided by \*\*\* and Student's Father with the District's data and classroom observations. The teacher consulted with Student's Father before, during, and after ARD Committee meetings to craft mutually agreeable, objective, and meaningful goals. Several parental requests for changes to IEP goals were honored.<sup>47</sup>
41. The ARD Committee reconvened on May \*\*\*, 2019, and again on May \*\*\*, 2019. The District presented new proposed goals for Student at the meeting on May \*\*\*, 2019, but the District's proposed placement remained the \*\*\*; again the meeting ended in disagreement.<sup>48</sup>
42. In June 2019, Student's parent prohibited \*\*\* from consulting with the District because \*\*\* was going to charge the parent for the consultation time.<sup>49</sup>
43. In June 2019, Student continued to struggle \*\*\*.<sup>50</sup>

## VII. DISCUSSION

### A. FAPE

#### 1. Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique

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<sup>45</sup> JE-13 at 2.

<sup>46</sup> RE-34 at 5-6.

<sup>47</sup> Tr. at 102, 108-09.

<sup>48</sup> JE-13 at 2.

<sup>49</sup> Tr. at 65.

<sup>50</sup> RE-7 at 1; RE-25 at 10; Tr. at 76.

needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d). The District has a duty to provide a FAPE to all children with disabilities ages 3-21 who are enrolled in the school district. 34 C.F.R. § 300.101(a); Tex. Educ. Code § 12.012(a)(3). A FAPE is special education and related services and specially designed personalized instruction with sufficient support services to meet the unique needs of the child in order to receive a meaningful educational benefit. The instruction and services must be provided at public expense and comport with the child's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

## **2. Burden of Proof**

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.<sup>51</sup> *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). In this case, Petitioner bears the burden of proving the designated issues by a preponderance of the evidence.

## **3. The Four Factors Test**

The Fifth Circuit has articulated a four-factor test to determine whether a school district's program meets IDEA requirements. Those factors are:

- The program is individualized on the basis of the student's assessment and performance;
  - The program is administered in the least restrictive environment;
  - The services are provided in a coordinated, collaborative manner by the "key" stakeholders; and
  - Positive academic and non-academic benefits are demonstrated. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).
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These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F.3d 286, 294 (5th Cir. 2009).

**a. Denial of FAPE (2018-2019)**

Petitioner asserts the District failed to provide Student a FAPE during the 2018-2019 school year because:

- it failed to consider Student's progress in skill acquisition at home and in private therapies in making educational decisions about Student;
- failed to update the goals in Student's IEP;
- failed to consider input from Student's parents and therapist in making educational decisions about Student; and
- failed to adequately prepare Student \*\*\*.

Petitioner was unable to meet the burden of proof concerning the alleged denial of a FAPE.

While the IDEA guarantees only a "basic floor of opportunity," the IEP must nevertheless be specifically designed to meet Student's unique needs, supported by services that permit Student to benefit from the instruction. *Rowley*, 458 U.S. at 188-189.

While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the school district must nevertheless provide Student with a meaningful educational benefit – one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist. v. VP*, 582 F. 3d 576, 583 (5th Cir. 2009) *cert. denied*, 559 U.S. 1007(2010). The basic inquiry in this case is whether the IEP implemented by the District was reasonably calculated to provide the requisite educational benefit given the child's unique circumstances. *Rowley*, 458 U.S. at 206-20; *Andrew F. v. Douglas Cnty. Dist. RE-1*, 137 S.Ct. 988 (2017). Having reviewed the evidence and

considered the parties' arguments, the Hearing Officer concludes the District provided Student a FAPE at all times relevant to this case.

**b. Factor 1 – Individualized on the Basis of Assessment and Performance**

In meeting the obligation to provide a FAPE, the District must have in effect an IEP at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, the IEP must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, and the duration and frequency of the services and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.323(a).

**(1) Placement.**

The chief issue in this case is Student's \*\*\* placement. When Student transferred into the District in April 2018, Student was initially placed in a \*\*\* general education classroom based upon Student's existing IEP from \*\*\* ISD. The District conducted an Annual IEP meeting on April \*\*\*, 2018 and determined Student's 2017 FIE was still appropriate and recommended placement in its \*\*\* classroom. Placement in the \*\*\* was recommended based upon Student's present levels of academic achievement and functional performance (PLAAFP), Student's FIE and FBA, and after observing Student's ongoing need for significant \*\*\* support. The District concluded an \*\*\* placement was necessary for Student to make progress on Student's IEP goals. The \*\*\* is a more structured and focused setting and has fewer students which provides necessary communication, socialization, the opportunity to receive 1:1 instruction, and behavior support. The evidence convincingly demonstrated Student's placement and overall educational program were individualized based upon Student's FIE, FBA and PLAAFP.

**(2) Alleged Failure to update Student's IEP goals.**

Student's \*\*\* teacher drafted Student's IEP goals. The evidence showed the teacher attempted to reconcile information provided by \*\*\* and Student's father with the District's data and classroom observations. The teacher consulted with Student's father before, during, and after ARD Committee meetings to craft mutually agreeable, objective, and meaningful goals. Several parental requests for changes to IEP goals were honored. Student's IEP goals were timely updated in May 2018.

**c. Factor 2 – Least Restrictive Environment**

There is a two-part test for determining whether an educational placement is the Least Restrictive Environment (LRE). First, the hearing officer determines whether education in the regular classroom, with the use of supplemental aids and services can be achieved satisfactorily for the student. If it cannot and the school intends to provide special education or to remove the child from regular education, the hearing officer asks, second, whether the school has mainstreamed the child to the maximum extent appropriate. At the outset of step one, the hearing officer examines whether the school district has taken steps to accommodate the special needs child in regular education. If the school district has made no effort to take such accommodating steps, the inquiry ends, for the school district is in violation of the IDEA's express mandate to supplement and modify regular education. If the school district is providing supplementary aids and services and is modifying its regular education program, hearing officers then examine whether its efforts are sufficient. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

The accommodation mandate is not limitless. A school district is not required to establish a "class within a class" or to modify the general education curriculum beyond recognition to accommodate a handicapped student. The child's needs and the impact of those needs on other children must also be considered. If a regular education instructor must devote all of his/her time to one handicapped child, the instructor will be acting as a special education teacher in a regular education classroom. Moreover, a general education placement is pointless if teachers are forced to modify the regular education curriculum to the extent that the disabled child is not required to learn any of the skills normally taught in regular education. *Daniel R.R.*, 874 F.2d at 1048-49.

However, a child with a disability may not be removed from a general education classroom solely because of needed modifications to the general education curriculum. 34 C.F.R. § 300.116(e). If the hearing officer determines that education in the regular classroom cannot be achieved satisfactorily, the hearing officer then asks whether the child has been mainstreamed to the maximum extent appropriate and whether the school district considered the continuum of placements. *Daniel R.R.*, 874 F.2d at 1049; 34 C.F.R. § 300.115.

The preponderance of the evidence established the District has taken steps to accommodate Student in regular education and fully considered the continuum of placements when it devised Student's hybrid placement, with supplemental aids and services, implemented during the 2018-2019 school year and proposed again for the 2019-2020 school year. The hybrid placement mainstreamed Student to the maximum extent appropriate. Student was placed for \*\*\* hours in \*\*\* general education and \*\*\* hours daily in the self-contained \*\*\*. Student needs the additional structure, the opportunities to receive \*\*\* instruction, and the lower student: teacher ratio inherent in the \*\*\* to make progress on Student's developmental IEP goals. Student's hybrid \*\*\* placement is Student's LRE.

**d. Factor 3 – Services Provided in a Coordinated, Collaborative Manner by Key Stakeholders**

All members of the ARD Committee, including parents, must have the opportunity to participate in a collaborative manner in developing the IEP. 34 C.F.R. § 300.322(a). A decision of the ARD Committee concerning required elements of the IEP must be made by mutual agreement if possible. 19 Tex. Admin. Code § 89.1050(g). The evidence establishes Student's parent was fully involved in Student's educational decision making. Student's Father attended ARD meetings and voiced his concerns and disagreements. Those concerns were fully considered by the District. For a period of time, Student's Father coordinated communication with \*\*\* prior to withdrawing consent to share information. Furthermore, no evidence was presented at hearing concerning a lack of coordination or parental exclusion from the decision making process. In this case, services were provided in a coordinated and collaborative manner. Student's parent had the opportunity to meaningfully participate in Student's educational decision making.

**(1) Alleged Failure to consider input from Student's parents and therapist in making educational decisions about Student.**

This sub-issue is a restatement of the first sub-issue: "Failed to consider Student's progress in skill acquisition in non-school settings." The evidence established the District did consider written input on Student's IEP goals submitted by Student's private therapist during the ARD Committee meeting in April 2018 and the \*\*\* teacher exerted considerable effort to consider input from Student's father when crafting IEP goals. Petitioner did not meet the burden of proof on this sub-issue.

**e. Factor 4 – Academic and Non-Academic Benefits**

When considering a student's IEP, including placement, hearing officers must consider whether the child will receive an educational benefit from regular education. This inquiry necessarily will focus on the student's ability to grasp the essential elements of the regular education curriculum. Thus, hearing officers pay close attention to the nature and severity of the child's handicap as well as to the curriculum and goals of the regular education class. Recognizing there are benefits to peer modeling and integrating special education students with their non-disabled peers, hearing officers pay close attention to the nature and severity of the child's handicap as well as to the curriculum and goals of the regular education class. If the goal of a particular program is enhancing the child's development, as opposed to teaching Student academics, the inquiry must focus on the child's ability to benefit from the developmental lessons, not exclusively on Student's potential for learning academics. *Daniel R.R.*, 874 F.2d at 1049.

**(1) Failed to consider Student's progress in skill acquisition in non-school settings.**

The Complaint alleges the District failed to consider Student's progress in skill acquisition at home and in private therapies when making educational decisions about Student. A major area of disagreement between the parties involves the level of progress reported to, or observed by, Student's parents and Student's ability to demonstrate those same skills in the classroom.

It is not surprising Student's parent and \*\*\* have observed different levels of progress. First, Student is only in school \*\*\* and has far fewer opportunities to demonstrate Student has progressed on a particular skill. Second, the data collection programs used by the District and \*\*\* are different and serve different purposes. The District uses the \*\*\* program and \*\*\* uses the \*\*\* to track and measure progress. The \*\*\* program was designed by a BCBA and incorporates Applied Behavior Analysis principles. The \*\*\* program was designed for use in schools and is more structured. The \*\*\* program is used in a therapeutic/clinical setting, has far less structure, and is naturalistic \*\*\* way of therapy involving a lot of \*\*\* therapy. While there are areas of overlap between the programs, the programs serve different purposes and measure skills differently.

It is evident the District did, within the limits of using its own data, considered Student's progress outside of the school setting. Petitioner failed to meet the burden of proof on this sub-issue. The evidence established Student's needs are more developmental. Student requires more structure to make progress on Student's communication and behavior needs. Thus, Student's hybrid placement provides the necessary additional structure needed for non-academic developmental progress in \*\*\* while providing exposure and access to academics and Student's non-disabled peers in the general education \*\*\*.

Finally, the parental decision for Student to attend school \*\*\* has impeded data collection, assessing the generalization of skills across settings, and reinforcement of those skills. Regardless, the evidence established Student's IEP and placement were designed to foster both academic and non-academic progress.

## **B. Other Designated Issues**

### **1. Evaluation**

Student alleges the District failed to conduct appropriate evaluations of Student during the 2018-2019 school year. Student transferred into the District from \*\*\* ISD in April 2018 with an existing FIE and IEP. Upon Student's enrollment, the District had 30 calendar days to either implement the existing \*\*\* ISD IEP or create and implement a new IEP. 34 C.F.R. § 300.323(e); 19



Tex. Admin. Code § 89.1050(j)(1). The ARD Committee meeting held on April \*\*\*, 2018, determined the 2017 \*\*\* FIE was current and devised a new IEP. The District has not re-evaluated Student since Student enrolled.

With limitations, a school district must re-evaluate whenever a student's educational or related service needs, including improved academic achievement and functional performance warrant re-evaluation or whenever a re-evaluation is requested by a parent or teacher. 34 C.F.R. § 300.303(a). Petitioner did not present any evidence that a re-evaluation was requested or that there were areas of suspected disability and/or need warranting a re-evaluation. Petitioner failed to meet the burden of proving a re-evaluation was needed.

**2. Failed to adequately prepare Student for \*\*\*.**

Testimony from the District Executive Director of Special Education revealed, because of Student's \*\*\*; consequently, this issue is not ripe for hearing or a decision. Furthermore, Petitioner presented no evidence on this sub-issue and the Hearing Officer deems it abandoned. *Orlando C., b/n/f Eva C., v. Ysleta Independent School District*, 34 IDELR 172 (W.D. Tex. 2001) (explaining "ripeness is an element of standing, which requires an *actual controversy or injury*." See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2135, 119 L.Ed.2d 351 (1992) ('[T]he plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.')."

### VIII. CONCLUSIONS OF LAW

1. The District is a local education agency (LEA) responsible for complying with the IDEA as a condition of the State of Texas' receipt of federal funding, and the District is required to provide each disabled child with a FAPE pursuant to the IDEA, 20 U.S.C. § 1400 *et seq.*
2. Petitioner bears the burden of proof on all issues raised in the complaint. *Schaffer ex rel. v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).
3. The District properly and timely concluded Student's 2017 FIE was valid upon Student's transfer into the District. 34 C.F.R. § 300.323(e); 19 Tex. Admin. Code § 89.1050(j)(1). A re-evaluation was not requested by Student's parent or a teacher, and at all times relevant to


this proceeding, Student did not demonstrate additional areas of need or suspected disability warranting a re-evaluation. 20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303.

4. At all relevant times, Student's IEPs provided a FAPE and contained all required components of an IEP, including present levels of performance, and measurable goals. 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a); 19 Tex. Admin. Code § 89.1055; *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).
5. Student's IEP was timely and appropriately revised and updated. 34 C.F.R. § 300.324(b).
6. The District consistently considered recommendations of Student's parent and private providers. 20 U.S.C. § 1414(c); 34 C.F.R. §§ 300.305(a); 300.321(a)(1); 300.322(a).
7. Student's hybrid placement in \*\*\* general education and \*\*\* during the 2018-2019 school year, and proposed again for the 2019-2020 school year, was appropriate and was the LRE. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114; *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127 (5th Cir. 1993).

#### IX. ORDERS

Based on the foregoing findings of fact and conclusions of law, Petitioner's requests for relief are **DENIED**.

**SIGNED September 5, 2019.**

  
**David A. Berger**  
Special Education Hearing Office  
For the State of Texas

**X. NOTICE TO PARTIES**

The Decision of the Hearing Officer in this case 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. 19 Tex. Admin. Code § 89.1185(p); Tex. Gov't Code § 2001.144(a)(b).