

**BEFORE A SPECIAL EDUCATION**  
**HEARING OFFICER FOR THE STATE OF TEXAS**

**DECISION OF THE HEARING OFFICER**

<b>STUDENT, b/n/f/ PARENT,</b>	§	
<b>Petitioner and Counter-Respondent</b>	§	
§		
<b>v.</b>	§	<b>DOCKET NO. 009-SE-0911</b>
§		
<b>NORTHWEST INDEPENDENT</b>	§	
<b>SCHOOL DISTRICT,</b>	§	
<b>Respondent and Counter-Petitioner</b>	§	

**PETITIONER: Pro Se**

**Parent  
(Address Redacted), Texas**

**REPRESENTING RESPONDENT:**

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**DOCKET NO. 009-SE-0911**

**STUDENT, b/n/f PARENT,  
Petitioner and Counter-Respondent**

**BEFORE A SPECIAL EDUCATION**

**v.**

**NORTHWEST INDEPENDENT  
SCHOOL DISTRICT,  
Respondent and Counter-Petitioner**

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**FOR THE STATE OF TEXAS**

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**Statement of the Case**

Petitioner and Counter-Respondent Student (“the Student”), by next friend, Parent (“the Parent”), requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (“IDEA”), 20 U.S.C. §1400, *et seq.*, against Respondent and Counter-Petitioner Northwest Independent School District (“the District”).

Petitioner was represented by petitioner’s parent pro se throughout this litigation. Respondent was represented by attorney Cynthia Buechler. The Texas Education Agency (“TEA”) received this due process request (“\*\*\*-I”) and issued the notice of filing on September 7, 2011.<sup>1</sup>

Respondent filed two notices of insufficiency and Petitioner filed two amended complaints, granted prior to the first telephonic pre-hearing conference (“PHC”) on October 20, 2011. The due process hearing was reset to a two-day setting on January 11-12, 2012. Petitioner filed a second due process complaint, Docket No. 083-SE-1111 (“\*\*\*-II”), on November 28, 2011.<sup>2</sup> Petitioner did not retain counsel for \*\*\*-II and Respondent re-urged the motion for consolidation, granted for good cause shown. The consolidated case proceeded under Docket No. 009-SE-0911. The revised procedural schedule reset the hearing for a three-day setting on February 29 – March 2, 2012, with the Decision Due Date set for April 7, 2012.

The Parent chose to have a due process hearing open to the public. As planned, the first day of hearing convened on February 29, 2012, but the hearing recessed before the first witness testified.<sup>3</sup> By agreement, the hearing reconvened on May 8 - 10, 2012, with additional rebuttal testimony taken by telephone on June 14, 2012.<sup>4</sup> The parties sought leave to file written closing statements granted for good cause shown. Both parties timely filed

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<sup>1</sup> Docket No. 009-SE-0911 is the first of two dockets before this Hearing Officer concerning the parties.

<sup>2</sup> Respondent urged consolidation of the two dockets and filed its counterclaim in \*\*\*-II on December 5, 2011, and on December 21, 2011, two separate PHCs took place in \*\*\*-I and \*\*\*-II. Because Petitioner sought legal counsel for \*\*\*-II but did not intend to have representation for \*\*\*-I, the Hearing Officer denied the consolidation request, joined the counterclaim to \*\*\*-II, and set new pleading deadlines for filing and review of the parents’ custody documents *in camera* regarding the non-custodial parent’s educational rights.

<sup>3</sup> Due to the serious sudden illness of Petitioner and a serious illness/subsequent death in the Hearing Officer’s immediate family, the hearing did not proceed on this date. The parties rescheduled the hearing for the first available setting workable for all parties to May 2012.

<sup>4</sup> Due to a serious health emergency of Petitioner at the end of the third hearing day, the rebuttal testimony could not proceed. The rebuttal testimony concluded by telephone conference on June 14, 2012, a date selected to ensure participation of all parties.

their written closing statements by the deadline on June 11, 2012, and the record closed on June 12, 2012.<sup>5</sup> The Hearing Officer timely entered the Decision of the Hearing Officer on July 25, 2012.

Petitioner complains of the following actions or inactions of Respondent regarding the student's evaluation, placement, and the provision of a free appropriate public education ("FAPE") by the following:

1. Whether the District ignored parental requests between August \*\*\*, 2010, resulting in a \*\*\*-day delay of the Student's entrance into school;
2. Whether the District implemented the individualized education program ("IEP") from the Student's previous school, including placement of the Student within the general education classroom and two hours daily of pull-out individualized instruction, beginning August \*\*\*, 2010;
3. Whether the District provided the Parent<sup>6</sup> with Prior Written Notice ("PWN") detailing the District's proposed changes to the Student's IEP for the meetings of the Admission, Review, and Dismissal Committee ("ARDC") held on: a) October 12, 2010, and continued on October 21, 2010; and, b) October 27, 2011;
4. Whether the ARDC meetings held on October 12 and 21, 2010, included: a) written statements regarding the reason/rationale for rewriting each IEP goal; and, b) an explanation, for rewriting the goals/objectives;
5. Whether the District provided a competently trained diagnostician to help develop the Student's IEP between August 24, 2010, through January 7, 2011;
6. Whether the District failed to provide the Parent with true and correct IEP progress reports for each six-week period of the 2010-2011 school year, thus limiting the Parent's ability to address the Student's lack of progress and resulting in the Student's regression;
7. Whether the District timely provided a copy of its independent educational evaluation ("IEE") guidelines for six weeks after approval of the IEE for an FBA on February 28, 2011;
8. Whether the Student's ARDC meetings properly considered seven years of behavioral data from the Student's previous Board Certified Behavior Analysts ("BCBA") to develop the Student's IEP and Behavioral Intervention Plan ("BIP"), and to determine the Student's need for In-home training ("IHT") and Extended School Year ("ESY") services;
9. Whether, prior to June 21, 2011, the District pre-determined the Student's ARDC meeting, including – but not limited to – directing ARDC members to refuse parental requests;
10. Whether the District properly provided all Student records to the Parent without over-redaction;
11. Whether the District ensured that the Parent was a full participant in the ARDC process, including: a) proper consideration of parental input; b) including the Parent in meetings; c) including parental input into the evaluation process; d) discussing parentally-requested topics during ARDC meetings; and, e) including the Parent in development of a collaborative IEP on October 27, 2011, by means of appropriate ARDC discussion directed to the Parent, and with full consideration of the Parent's request to "table" the ARDC meeting;
12. Whether the District held an ARDC meeting in October 2011 at a time convenient to the Parent;
13. Whether the District implemented the Student's IEP addendum changes, including use of the Student's backpack throughout the school day, beginning October 2011;
14. Whether the District improperly maintained, and allowed unauthorized access to, the Student's confidential special education records; and,

<sup>5</sup> Order No. 11 set the written closing argument deadline, referencing a 12-page limit and the hearing transcript. The Hearing Officer set no line spacing requirements or specific font size for the written closings. Respondent timely filed its written closing argument in a double-spaced 19-page format, with request for leave to exceed the page limitation, while Petitioner used a 12-page single-spaced format. Over the objection of Petitioner, the Hearing Officer set a deadline on July 12, 2012, permitting Respondent the option to: a) re-format its double-spaced closing into a single-spaced format comparable to Petitioner's selected format; or, as the motion to extend the page limit was untimely, b) the Hearing Officer would consider only the first 12 pages of Respondent's previously-filed 19-page written closing. Respondent timely re-formatted the previous filing and submitted a single-spaced 12-page version in comparable type font and margins to Petitioner's written closing, at which time the record closed. All three filed versions of the parties' written closings are a part of this record.

<sup>6</sup> The Student's mother and custodial parent filed this proceeding on behalf of the Student. All references to "Parent," unless otherwise specified, are to the custodial parent.

15. Whether the District timely completed the Student's occupational therapy ("OT") evaluation and assistive technology ("AT") evaluation within evaluation timelines.

As relief, Petitioner seeks an order of the Hearing Officer regarding the following:

1. An Order directing the District to provide 40 hours per week of Applied Behavior Analysis ("ABA") therapy at school district expense as compensatory services for an inadequate educational program that resulted in the Student's regression;
2. An Order for the District to take specific actions required by IDEA;
3. An Order providing for compensatory special education or related services;
4. Maintenance of the Student's placement as "Stay Put" during the pendency of this dispute; and,
5. An Order for use of an independent facilitator at District expense for the Student's ARDC meetings to address inappropriate ARDC meeting proceedings;

Respondent presented one counterclaim issue in this dispute, and bears the burden to prove, whether the District's Occupational Therapy Evaluation ("OT-Eval") and Augmentative Communication Evaluation ("AC-Eval") of the Student were appropriate, so that Petitioner's request for IEEs for both evaluations, at public expense, should be denied. As relief for the counterclaim, Respondent requests the Hearing Officer: a) make findings that both the OT-Eval and the AC-Eval are appropriate; and, b) deny Petitioner's request for both IEEs at public expense.

### **Jurisdiction of the Hearing Officer**

The authority of a hearing officer under IDEA is limited to determinations relating to the identification, evaluation, or educational placement of a student with a disability, or the provision of FAPE to the student. Petitioner brought allegations in this consolidated complaint concerning the TEA complaint process and the conduct of Respondent's legal counsel that are all outside the jurisdiction of the Hearing Officer and are dismissed.<sup>7</sup> In addition, Petitioner filed additional allegations outside the jurisdiction of the Hearing Officer including retaliation, harassment, improper release of records, and prospective relief in the nature of injunctive relief, all outside the jurisdiction of the Hearing Officer. The complaint was not amended to include these requests.<sup>8</sup>

### **Stipulations of Fact**

The Parties stipulated the following facts at the due process hearing:

1. As of May 2012, the Student received student's special education instruction during three class periods each day without other students present with one-on-one adult support.<sup>9</sup>
2. As of May 2012, the Student received one-on-one adult support throughout the school day.<sup>10</sup>
3. The Parent agreed to all ARDC meetings for the Student prior to Fall 2011 with the exception of meetings held on: a) July 11, 2011; and, b) July 25, 2011.<sup>11</sup>
4. The District scheduled the Student's initial ARDC meeting for the first school day of the 2010-2011 school year, but rescheduled the meeting at parental request because of the Parent's \*\*\* activities.<sup>12</sup>

<sup>7</sup> Pleading file, Dkt. No. 009-SE-0911 (Order No. 4) (Petitioner's second amended complaint issue 12); Pleading file, Dkt. No. 083-SE-1111 (Order No. 4) (Petitioner's original complaint issues 1, 4, and 5).

<sup>8</sup> Pleading file, Dkt. 083-SE-1111 (Order No. 4) (E-mail dated January 23, 2012; Transcript ("Tr.") of PHC, (January 25, 2012) at 30-36)).

<sup>9</sup> Transcript ("Tr.") at 609-610.

<sup>10</sup> *Id.*

<sup>11</sup> Tr. at 689-690.

<sup>12</sup> Tr. at 322-324.

Based upon the evidence and argument admitted into the record of this proceeding, the Hearing Officer makes the following findings of fact and conclusions of law:

## **Findings of Fact**

### **Background**

1. The Student resides within the jurisdictional boundaries of the District with student's Parent, the custodial parent. The Student's father resides \*\*\* and retains rights as a non-custodial parent. At the time of the hearing, the Student was \*\*\* years old and attended the \*\*\* School as a \*\*\*-grade student. [Pleading file; Transcript ("Tr.") at 51, 165, 181, 597-599, 789, 791-792, and 918-919].

2. The Student currently qualifies for special education and related services under the disability classifications of autism ("AU"), speech impairment ("SI"), and as student with an intellectual disability.<sup>13</sup> [Respondent's Exhibit ("R.Ex.") 17 at 1].

### **Previous \*\*\* Placement**

3. The Student began school in \*\*\* at age \*\*\* in a developmental classroom rather than an autism classroom. The Parent acknowledged fighting with the Student's previous \*\*\* school district to keep the Student out of the autism classroom, culminating in six mediation sessions over disputes regarding the Student's educational program. In one of the mediation sessions in 2008, the \*\*\* district and the Student's parents entered into a written settlement agreement. [Petitioner's Exhibit ("P.Ex.") 1A; Tr. at 639-640].

4. In \*\*\*, the Student received 25 hours a week of one-on-one intensive ABA therapy in the home setting. The state, rather than the \*\*\* school district, provided the ABA therapy. School, in the Parent's view, was not necessary for the Student's acquisition of skills at that time because of the intensive one-on-one ABA therapy, so the Parent agreed to release the \*\*\* school district from their responsibility for the Student's academics. Instead, the Parent focused on extinguishing undesired behaviors and preventing new undesired behaviors for the Student and used the Student's school program for appropriate peer modeling and generalization between home and school. [P.Ex. 1A; Tr. at 499 and 698].

5. In the 2008 agreement with the Student's parents and former \*\*\* school district, the parties agreed to: a) perform an educational and psychological evaluation of the Student with an intelligence quotient ("IQ") and non-binding recommendations; b) no use of visual cues or schedules with the Student; c) use best efforts to obtain a special education teacher for two hours of resource placement of the Student in identified settings; d) if a special education teacher was not located, agreement to a general education classroom placement for the Student for the school days, accompanied by an ancillary attendant assigned to the Student; e) specific agreement that a general education class placement was for social and not academic goals; f) waiver of academic goals under the IEP; and, g) other provisions specifying no daily telephone calls, telephone calls as needed, and polite and respectful communication between the parties. [P.Ex. 1A; Tr. at 311-312, 651, and 675-678].

6. The Parent did not allow the \*\*\* school district to do any cognitive testing of the Student and obtained such testing privately. The Parent also entered into an agreement requiring the \*\*\* school district to "black out" all references to the Student's cognitive functioning in the Student's documents and records. According to the Parent, the \*\*\* school district did not have the ability to include intellectual disability as an additional eligibility area and carried the Student's eligibility solely under the AU designation. [Tr. at 678-681].

<sup>13</sup> The Texas Education Code at §7.063 requires, prospectively, that the State Board of Education Rules use the terms and phrases listed as preferred under the person first respective language initiative in Chapter 392 of the Texas Government Code for proposing, adopting, or amending rules and reference materials, publications, and electronic media. TEX. GOV'T CODE §92.002; TEX. EDUC. CODE §7.063. Currently, IDEA's implementing regulations retain the category of mental retardation for students with an intellectual disability. 34 C.F.R. §300.8(c)(6); See also 19 TEX. ADMIN. CODE §89.1040(C)(5). In the instant docket where appropriate, "intellectual disability" will be used in place of "mental retardation" in deference to the person first respective language initiative preference.

7. The Student completed the 2009-2010 school year in \*\*\*. In April 2010, the Parent began plans to \*\*\* by visiting or calling various school districts in the surrounding geographical region of the District to select a school district that followed most closely the Parent's philosophy for the Student concerning placement and programming. [Tr. at 46-48].

8. The Parent spoke with the District's Assistant Special Education Director, \*\*\*, regarding the transfer process, the initial 30-day period of implementation of the Student's most recent IEP, and the Parent's specific desire that the Student's IEP to remain as close as possible to the last \*\*\* IEP once the initial 30-day period ended. \*\*\* told the Parent that the District was committed to ABA methods and the District employed two full-time BCBAs. \*\*\* told the Parent that decisions to revise the Student's goals could not be made in advance but would require ARDC review after the 30-day period. If all ARDC participants agreed that the goals were appropriate and working at that time, the ARDC would try to match these goals as closely as possible. [R.Ex. 14 (2:41:37—2:41:45); Tr. at 51-54 and 646-647].

### **2010-2011- \*\*\* Grade Year**

#### **August 2010 - Enrollment**

9. \*\*\*, a certified educational diagnostician with 10 years of experience, worked in the District in the 2010 - 2011 school year. \*\*\*reviewed a copy of the Student's previous Full and Individual Evaluation ("FIE") from \*\*\*. The FIE, provided by the Parent with all cognitive scores blacked out, was over three years old. \*\*\* wanted to conduct a complete a new individualized evaluation of the Student, sought consent from the Parent for the testing, but the Parent did not want cognitive scores reflected in the Student's FIE. \*\*\* persisted in her position that the new FIE should include cognitive testing and score reporting. [Tr. at 143-145].

10. The District did not receive the Student's FIE from the previous school by the transfer ARDC meeting. Based on the documents available, the ARDC specified the Student's eligibility as AU and SI. The ARDC began implementation of the Student's previous IEP from \*\*\*. Under that IEP, the Student received special education instruction but the IEP did not specify the location for the special education instruction. [R.Ex. 1 at 19; Tr. at 323-324].

11. During the 30-day transfer period, the Student's IEP specified special education instruction for two class periods: a) Applied Math in the Resource classroom; and, b) Social Skills in the \*\*\* classroom. The \*\*\* classroom combines functional academics with opportunities for students to work on independent living skills, vocational skills, communication, and socialization in an interactive environment. The remainder of the Student's instruction took place in the general educational setting with special education support, accommodations, and IEPs reflecting reduced Texas Essential Knowledge and Skills ("TEKS") curriculum. The Parent attended and participated in the transfer ARDC meeting and signed in agreement to the transfer IEP. [R.Ex. 1 at 19-20; Tr. at 326, 611, and 817-818].

12. As the 2010-2011 school year began, the Parent met with the Student's paraprofessional, \*\*\*, and special education teacher, \*\*\*, and informed them she was \*\*\*. Both the paraprofessional and special education teacher tried to assure the Parent that they would work as a team for the best interests of the Student. [Tr. at 837-838].

13. The Parent again \*\*\* when she met the Student's campus assistant principal, \*\*\*. The assistant principal encouraged the Parent to come to the ARDC with an open mind and tried to reassure the Parent. Over time, the Parent extended more trust to the assistant principal. [Tr. at 304-305].

14. At the beginning of the 2010-2011 school year, the Student showed mastery of fewer than 60 sight words, knew the alphabet, but could write fewer than six letters. Student wrote student's first name using an entire page with no attention to size or spacing. The Student communicated with one-word utterances, including hug,

mommy, and bathroom. Although student could rote count, student could not match number to object. Socially, the Student did not socialize much around other children or peers, but primarily fostered \*\*\*self and surrounded \*\*\*self with adults. [R.Exs. 19, 20, and 22; Tr. at 838-845].

15. When the Student's records from \*\*\* arrived, they did not include a formal speech and language evaluation or a formal OT report. [R.Exs. 2 at 29 and 26 at 1].

16. On October 5, 2010, the District sent a one-page written notice to the Parent of plans to convene the transfer ARDC meeting on October 12, 2010. [R.Ex. 2 at 76].

### **30-Day ARDC Meeting – October 2010**

17. The District implemented the agreed-upon transfer IEP during the 30-day transfer period. On October 12, 2010, the Student's 30-day ARDC convened to review the Student's progress and recommended an FIE to get a complete overview of the Student's cognitive, academic, and behavioral functioning. At the Parent's request, the meeting recessed and reconvened with all the Student's teachers present on October 21, 2010. [R.Ex. 2 at 29-31 and 64-65; Tr. at 147-150].

18. On October 12, 2010, the Parent received a three-page ARDC notice in person after the recessed meeting that detailed the purpose for the meeting, the actions proposed, and additional information with boxes checked for: a) propose or change evaluation; b) review existing data; c) propose to initiate or change educational placement; d) propose to initiate or change other elements of the provision of FAPE; and, e) 30-day Admission, Review, and Dismissal ("ARD"). The notice detailed the reasons for the actions proposed as follows: determine needed eligibility data; consider/revise IEP as appropriate; consider/make change of placement; and, annual ARD required. The district again sent this notice by US Mail, and the parent signed and returned the notice on October 18, 2010. [R.Ex. 2 at 73-75].

19. The Parent complained about the District's diagnostician, \*\*\*, soon after the beginning of the school year. After the transfer ARDC meeting, the District's supervisor over diagnosticians, \*\*\*, began attending the Student's ARDC meetings to assist with paperwork and some of the meeting expectations. \*\*\* first attended the second day of the two-day meeting on October 21, 2010, to give added support to the Parent. [Tr. at 62-63, 143-148 and 488].

20. The ARDC reviewed existing evaluation of the Student to prepare for additional assessment during the two-day October 2010 ARDC meeting. The Parent expressed concern about the Student \*\*\* and requested that this behavior be addressed through an FBA. The ARDC identified the areas of needed evaluation: a) a formal speech/language evaluation; b) OT evaluation with teacher and parent input; c) a psychological evaluation-Autism to include an IHT needs assessment; d) sociological input of parental and teacher information; e) cognitive assessment and adaptive behavioral assessment; and, f) academic assessment. The Parent consented to the requested evaluation. [P.Ex. 2C at 30-36; R.Ex. 2 at 32-38 and 65].

21. The two-day October 2010 ARDC meeting included detailed discussion about the Student's goals and objectives. Because the Student's \*\*\* goals did not have academic expectations commensurate with the TEKS, the curriculum in Texas, District ARDC members suggested increasing expectations in the Student's academic area by proposing and rewriting the Student's goals into standards-based IEP goals commensurate with the TEKS. The meeting included an explanation that "standards-based" goals meant the IEP goals were related to the curriculum and raised to the standard of all students, so that the Student would have the opportunity to progress as everyone else. [R.Ex. 2; Tr. at 147-148].

22. The October 2010 ARDC meeting documentation details the discussion, review, and acceptance of the changes to the goals. The Parent attended both days of the meeting, gave input into the discussion, fully participated in both meeting days, and signed in agreement to the goals and objectives. [R.Ex. 2 at 29-31; Tr. at 147-148].

23. On December 11, 2010, the District's BCBA behavior specialist, \*\*\*, conducted an FBA of the Student. \*\*\* spent approximately 10 hours conducting the FBA, collected data from the Student's teachers, and personally observed the Student. The Parent gave the BCBA copies of the Student's previous \*\*\* academic goals and progress reports, but did not provide any behavior data such as a behavior treatment plan or behavioral goals. \*\*\* contacted the BCBA from \*\*\* to obtain the Student's behavioral data, but never received the information. [R.Ex. 3 at 11-14; Tr. at 391-394].

### **January 2011 ARDC Meeting**

24. On January 11, 2011, the ARDC convened for an annual review meeting, discussion of placement, and to go over new assessment. Committee members reviewed the December 2010 FBA, the completed FIE, the IHT assessment report, and the adaptive physical education ("APE") report. The January 2011 ARDC proposed and accepted goal changes, added eligibility of intellectual disability, and proposed and completed the Student's IEP changes for the upcoming year. The Parent attended the meeting, fully participated, and signed in agreement with the FBA and all decisions made at the meeting. [R.Exs. 3 at 34 and 43-44].

25. The January 2011 ARDC agreed to the Student's removal from general education for one period each for the following classes: a) Reading/Language Arts; b) Math; c) Science; d) Daily Living; and e) Social Studies inclusion support. The ARDC specified consult services for behavior intervention and OT of 90 minutes each six-week period. Each six-week period, the Student would receive 150 minutes of APE services, 30 minutes of direct speech services, and 30 minutes of consult services. The ARDC agreed to IHT services of 19 one-hour sessions and parent training for two one-hour sessions. [R.Ex. 3 at 43-44].

### **February 2011 ARDC Meeting**

26. The ARDC met on February 28, 2011. At this meeting, the Parent requested a music therapy evaluation of the Student. [R.Ex. 4].

27. On March 8, 2011, the District granted the Parent's request for an IEE for an FBA and mailed notification to the Parent with a list of possible evaluators. The letter explained that another evaluator who did not appear on the list could be selected. On March 11, 2011, the Parent requested a list of evaluators, and the District replied by electronic communication ("E-mail") that the list had been mailed to the Parent. [R.Ex. 36 at 4; Tr. at 683].

28. On March 23, 2011, the ARDC convened for an annual review of the Student's program. Committee members reviewed the completed music therapy evaluation. The ARDC acknowledged the recent approval of the Parent's request for an IEE for an FBA, reviewed a new FBA of the Student dated March 23, 2011, and made plans to reconvene upon completion of the IEE for an FBA. The Parent attended the meeting and signed in agreement with the decisions. [R.Exs. 5 and 36 at 4; Tr. at 397-398].

29. On April 13, 2011, the Parent filed a special education complaint with TEA alleging that the District did not provide a copy of the IEE criteria for an independent FBA until six weeks after the ARDC granted the IEE request. [R.Ex. 36].

30. On April 18, 2011, the district mailed the IEE criteria to the Parent and also sent the information by E-mail on April 21, 2011. [R.Ex. 36; Tr. at 897-898].

31. On May 25, 2011, TEA issued a special education complaint report after investigation of the allegations, concluding that the Parent was not, and is not, entitled to an IEE for an FBA or an ABA evaluation. Even so, the District granted the Parent's IEE for an FBA, provided information regarding where the IEE could be obtained, and informed the Parent that a non-listed evaluator could be chosen. [R.Ex. 36].

32. As of May 25, 2011, because the Parent had not selected an evaluator that met District criteria due to the costs of the evaluation, the TEA complaint report concluded the District was not obligated to use the Parent's chosen evaluators. The report found the District's IEE criteria clearly outline acceptable costs for conducting an IEE and allow parents to show that unique circumstances justify an IEE that exceeds the maximum allowable costs. [R.Ex. 36].

33. The May 2011 TEA complaint investigation report found a procedural error had occurred as the District did not provide the criteria for obtaining the IEE until weeks after the IEE request had been made and may have delayed the IEE. Because the District provided the required information prior to issuance of the investigative report, no violation was substantiated. [R.Ex. 36].

34. All students attending \*\*\* School, receive a \*\*\* for use at school. At the end of the 2010-2011 school year, the \*\*\* school campus collects all \*\*\* in preparation for the next school year. [Tr. at 269-271].

### **Summer 2011 ESY and ARDC Meetings**

35. The Parent wanted to ensure that the Student had access to a \*\*\* during Summer 2011 ESY services. On May 22, 2011, the Parent sent an E-mail to diagnostician \*\*\* requesting the Student be allowed to keep the \*\*\* for continued work on \*\*\* goals in the summer period. The E-mail referenced previous communications with \*\*\* and \*\*\* concerning this issue during ARDC meetings with replies from the educators agreeing to "look into" the request. [P.Ex. 4B; Tr. at 270-271 and 668-699].

36. District diagnostician \*\*\* asked the campus principal, \*\*\*, if a \*\*\* would be available to the Student during 2011 ESY in June 2011. The principal replied affirmatively but was unaware at the time that all \*\*\* would be collected for \*\*\* and did not know when \*\*\* would commence. [Tr. at 259-264].

37. On June 2, 2011, the ARDC convened to discuss the Student's regression and recoupment data following school breaks, development of the 2011 ESY program for the Student, and IHT services. The Parent attended the meeting and participated. The non-custodial parent participated by telephone. The Parent wanted all objectives showing regression with lack of recoupment included in the ESY goals. The Student's special education teacher, Sunni McAsey, explained that even though mastery percentages had decreased and not increased after a period of time, decreased levels were still above the Student's goal mastery level with the exception of two goals. Committee members prepared the IEP for 2011 ESY with four goals and objectives, including the addition of a goal for sight words. All committee members signed in agreement with the decisions at this ARDC meeting. [R.Ex. 6 at 20-35].

38. At the ARDC meeting on June 2, 2011, the ARDC did not discuss the provision of a \*\*\* for the Student. [R.Ex. 6; Tr. at 170-171 and 669-670].

39. On June 8, 2011, the District's Director of Special Education sent an E-mail to the Parent noting that the IEE for the FBA could be provided locally and within District guidelines, concluding that no extenuating circumstances prevented the completion of the requested IEE within District guidelines. [R.Ex. 11 at 6; Tr. at 898-899].

40. The 2011 ESY session began on June 14, 2011. The Student did not have access to a \*\*\* between June 14 and June 21, 2011. During this time, the Student had access to an alternative device \*\*\*. [P.Ex. 4A; R.Ex. 11 at 8-9].

41. On June 14, 2011, \*\*\* sent an E-mail to the principal to schedule an ARDC to discuss a \*\*\* during the Student's 2011 ESY services. Because the principal previously granted the \*\*\* request, the principal's E-mail response questioned by the District was saying "no" to the request. [P.Ex. 4A; Tr. at 260-262].

42. The Parent believes that it is important for an IEE evaluator performing an FBA of the Student to have some input about the Student's seven-year history of formal behavioral intervention with document review. As a result, the Parent believes that this history review would result in the IEE exceeding the District's \$1,250 cost guideline for an IEE. [Tr. at 992].

43. On June 17, 2011, the Parent filed another special education complaint with TEA with two allegations: a) challenging the District's IEE guidelines; and, b) challenging the District's provision of a \*\*\* to the Student. [R.Ex. 11; Tr. at 673-674].

44. The first allegation in the Parent's June 2011 TEA complaint concerned the District's IEE guidelines. District IEE guidelines allowed a special circumstance for a higher fee to an IEE provider, yet the District's Director of Special Education did not determine a special circumstance existed for review of seven years of behavioral data. The District's behavior interventionist required current rather than historical data be utilized for an FBA to reflect the current status of the Student. The complaint investigative report did not substantiate the complaint. [R.Ex. 11 at 3-6; Tr. at 899].

45. The second allegation in the Parent's June 2011 TEA complaint concerned the implementation of the Student's March 2011 IEP regarding the Student's \*\*\* usage during bus transportation to and from 2011 ESY services. The complaint investigative report did not substantiate the allegation and found that the Student's IEP in place for 2011 ESY services did not require use of a \*\*\*. [R.Ex. 11 at 7-9; Tr. at 898-899].

46. The Parent believes the June 2011 TEA complaint investigation reached the wrong conclusion regarding the Student's access to replacement devices on the first bus ride to school on June 14, 2011. At hearing, the Parent acknowledged the Student received the devices on June 14, 2011. [R.Ex. 11; Tr. at 697-698].

47. The Parent did not present any evidence that the Student suffered any harm as a result of the Student's bus ride from home to school on June 14, 2011.

48. On June 21, 2011, the ARDC convened at request of the Parent to review and discuss 2011 ESY services and the Student's need for a \*\*\*. The ARDC agreed to grant the Parent's request for an AT evaluation of the Student, to be completed by August 5, 2011. As all other students had access to \*\*\* during ESY, the Student also had access to a \*\*\* while the AT evaluation took place. All ARDC participants agreed at the conclusion of the meeting. [R.Ex. 7; Tr. at 169-171, 225, and 270-272].

49. No "staffing" meeting occurred prior to the ARDC on June 21, 2011. The campus principal did not receive directives or instructions from District administrators that the Student should not receive a \*\*\* for 2011 ESY. [R.Ex. 11 at 8-9; Tr. at 264 and 266-267].

50. The District provided a list of six independent behavior specialists in the geographical area of the District credentialed with BCBA status or with doctorate degrees willing to conduct the IEE for an FBA within the District's guidelines. At the time of the due process hearing, the Parent had not selected an outside evaluator that meets the District's IEE guidelines to conduct an IEE for an FBA. [R.Ex. 11 at 7].

51. On July 11, 2011, the ARDC met for an annual review of the Student's IEP and educational placement and review of the completed IHT assessment. The Parent attended the meeting and the non-custodial parent participated by telephone. The Parent disagreed with the IHT recommendation to discontinue IHT, questioned the data collected for the report, gave new data to participants regarding the Student's ability to generalize goals to the home environment, and expressed concern about communication between school and home. The Parent requested a daily phone call from ESY staff to give feedback to the activities and lessons, and to provide necessary information for the next day's activities and lessons. The ARDC ended in disagreement due to the IHT evaluation. [R.Ex. 8 at 36]

52. On July 25, 2011, the ARDC reconvened to discuss items of disagreement. The ARDC discussed mastery data on IEP goals and recommended IHT and services time for two one-hour IHT sessions per six-week period, one one-hour community-based training per six-week period, and one hour of parent training per semester. Although all participants agreed with items carried forward from the meeting on July 11, 2011, the Parent disagreed with the proposed IHT goals, the frequency, and the amount of IHT. The Parent requested an independent IHT assessment. The Parent signed and received PWN of the IHT assessment, goals, and services at this meeting. [R.Ex. 9 at 17-22].

53. The ARDC met with the Parent and non-custodial parent attending via conference call on August 18, 2011. Participants reviewed the AT assessment by the District's speech pathologist, \*\*\*. \*\*\* attended the meeting and reviewed her AT evaluation results and recommended further evaluation in augmentative communication, to be completed by October 31, 2011. The Parent requested an additional OT evaluation at this meeting. [R.Exs. 10 at 12-20 and 34 at 16-34].

54. On August 18, 2011, committee members discussed the schedule of services and recommended for four periods of inclusion and three periods of resource setting outside of a special education self-contained classroom. The ARDC continued services for speech therapy, OT, IHT, parent training, APE, behavioral intervention, music therapy and transportation services. Sensory tools will be accessible to the Student that will not encourage self-stimulatory or stimming behaviors. The Parent and non-custodial parent gave written consent after this meeting for further testing for an OT assessment. [R.Ex. 10 at 12-20; Tr. at 757-758].

55. In the course of preparing the AT evaluation during the 2011 ESY session, \*\*\* observed the Student on several occasions in the school environment and spoke to the Student's bus driver about the Student's \*\*\* usage on bus rides to and from school. During this period, the \*\*\* came on the bus in the Student's backpack in the mornings and the Student did not use it on the way to ESY and did not use any other tool on the bus during this time period. [Tr. at 717-718].

56. During the ARDC meeting on August 18, 2011, the Parent asked \*\*\* to be involved in the AC-Eval. [R.Ex. 10; Tr. at 718].

57. \*\*\*, an educational diagnostician employed by the District, began serving as the Student's case manager for the ARDC meeting on August 18, 2011. At the time she became involved with the Student, \*\*\* reviewed all the Student's records. [Tr. at 757].

### **2011-2012 School Year – \*\*\* Grade Year**

58. On August 29, 2011, the Parent signed an agreement to amend the ARDC meeting, adding additional supports for the Student including access to student's backpack throughout the day, foods of minimum nutritional value throughout the day, special education support during general education time, and a specialized lock for student's locker. [R.Ex. 12; Tr. at 632-634].

### **October 2011 ARDC Meeting**

59. The District made multiple attempts to schedule an October 2011 ARDC meeting with multiple E-mails between District staff and the Parent to find a workable date and time. The initial notice set the meeting for October 14, 2011. When the Parent could not attend on that date, \*\*\* rescheduled the meeting to October 17, 2011. The meeting was rescheduled again, to a date workable for the Parent, to allow participation of the District's Director of Special Education. [R.Exs. 13 at 17-39 and 33 at 1-10].

60. The District provided notice to the Parent of proposed changes to the Student's IEP on October 18, 2011, signed by the Parent on October 19, 2011. This notice specified that a parent had requested the meeting. As the requesting parent had not stated specific reasons for the ARDC meeting, the District would consider all checked items on the notice including: a) review of existing data; b) propose to develop/review/revise an IEP and consider/revise an IEP as appropriate; c) propose to initiate or change evaluation; d) propose to initiate or

change/consider/make the educational placement; e) propose to initiate or change other elements of FAPE; f) propose/consider/make disciplinary change of placement (FBA, BIP, manifestation determination); g) determine needed evaluation data; and, h) consider results of new evaluation/re-evaluation. [R.Ex. 13 at 17-19].

61. On October 27, 2011, the ARDC convened with the Parent in attendance and the non-custodial parent participating by telephone. This meeting was recorded. The meeting began with introductions. Within the first four minutes of the meeting, the Parent challenged the participation of the District's attorney, clarified that she had called the meeting to go over her concerns on technology, announced she would not go over her concerns unless the District's speech language pathologist, \*\*\*, was at the meeting, and challenged the participation of the campus principal, \*\*\*, as a relevant member of the ARDC. District participants upheld the participation of the campus principal and he remained in the ARDC meeting. [R.Exs. 13 at 13, and 14 (0:02 – 0:46)].<sup>14</sup>

62. District speech language pathologist \*\*\* was not able to attend the October 2011 ARDC. Another speech pathologist employed by the District, \*\*\*, attended and participated in the meeting in place of \*\*\*. [R.Exs. 13 at 13, and 14 (0:01 – 0:02)].

63. The non-custodial parent gave input in the October 2011 ARDC meeting, asking to include a goal in the Student's IEP to communicate with a familiar adult over the Internet using a computer with Skype software. When the Parent questioned whether the Student possessed prerequisite skills for a goal with Skype or telephone usage and how this goal would be generalized to the home, District ARDC participants explained that once the student generalized this goal, the home environment would be considered. The Student's special education teacher, Jenna Gackenbach, gave input on the Student's progress toward the underlying skills of dialing, ability to distinguish voice, voice recognition, and expressed belief that this technology use was appropriate for the Student at this time. District ARDC members and the non-custodial parent agreed to revise the Student's communication goal to include technology such as Skype; the Parent abstained from agreement on this issue. [R.Exs. 13 at 13, and 14 (0:17 – 0:46)].

64. The Parent expressed concern regarding the non-custodial parent's right to communicate with the Student at school at the October 2011 ARDC meeting. In response, the District members agreed to review the parents' divorce decree. The non-custodial parent gave verbal assurance in the meeting that he is permitted to communicate with the Student during the day. [R.Exs. 13 at 13, and 14 (0:43 – 0:44)].

65. The Parent wanted to recess the October 2011 ARDC discussion before the Parent's concerns had been discussed. Although District participants wanted to express their opinions at this meeting before recessing the meeting, District participants reassured the Parent that she would be given a 10-day recess after the meeting. [R.Exs. 13 at 13, and 14 (0:44 – 0:48)].

66. The Parent again announced she was recessing the October 2011 ARDC meeting, the recess was not to be considered a 10-day recess, and the Parent would sign the meeting paperwork for the day's meeting with "we have recessed." When District members of the ARDC wanted to discuss additional issues prior to recessing, the Parent stated, "We will definitely have a recess at this point if the school will have anything else coming [...] You're saying you're going to ambush with some other things because you checked the box even though you said you checked the box because you didn't know what the parent was wanting to decide, wanting to discuss [...] Well, I'm going to recess the ARDC at this point because this is not about ex-husband or about me, this is about you. So you need to tell me what you're going to discuss [...] You have your attorney here, I do not have one. But it's not going to be agree or disagree and we are not going to do a 10-day time period, it will be a chance for me [to] go get more information." Respondent's attorney encouraged the Parent to get more information, but because the ARDC notice for this meeting had checked all items, next asked District ARDC members if they had concerns to bring

<sup>14</sup> Respondent's exhibits include three compact disc ("CD") recordings of the ARDC meetings between October – December 2011 in R.Exs. 14, 16, and 18. For convenience, the CD markers are referenced by hour and minute. For example, the first hour at the second minute marker corresponds to 0:02.

forward. The non-custodial parent also asked if the school members had any other items to discuss. [R.Exs. 13 at 13, and 14 (0:48 – 1:02)].

67. Although the October 2011 ARDC acknowledged the need to reconvene after completion of the pending OT and augmentative communication evaluations, committee members discussed the Student's current needs for technology. The Parent did not want to agree or disagree during this discussion; District participants agreed that current technology was appropriate. The non-custodial parent also found current AT appropriate for the Student, noting the Student's needs change daily and the Student had a \*\*\* as did all students on the campus. [R.Exs. 13 at 13, and 14 (0:54 – 0:57)].

68. The District October 2011 ARDC members discussed proposed revisions to the Student's goals and objectives, including reducing some goal mastery levels of some of the Student's goals to allow the goals to be reasonably obtained. The Parent challenged the opinion of the special education teacher, \*\*\*, regarding reducing any goal mastery below 100% if the Student received adult support. The special education teacher and the speech pathologist stated their beliefs that the proposed mastery level changes were appropriate for the Student. District ARDC members and the non-custodial parent agreed to the goal and objective revisions, including adding Skype to the communication goal as requested by the non-custodial parent. At the end of the meeting, the Parent disagreed with the goal and objective revisions, including the communication goal with Skype. [R.Exs. 13 at 13, and 14 (1:02 – 2:51); Tr. at 548].

69. The Parent became increasingly loud and agitated as the October 2011 ARDC meeting progressed. The Parent challenged the honesty of District ARDC members, stating her belief that the special education teacher and other District employees received instruction prior to the meeting on what opinion they should have during this ARDC meeting and, as a result, did not express their true opinions. In response, District ARDC participants discussed the contentious nature of this ARDC meeting in an apparent attempt to refocus the Parent back to the meeting purpose. The Parent again challenged all District ARDC participants' veracity, warning them to be ready to testify under oath in future proceedings brought by the Parent such as ethics complaints, licensing complaints, and the due process hearing of this proceeding. Respondent's counsel reminded the Parent that the ARDC meeting/process was for the Student, each ARDC member possessed the right to state their own opinions even if that opinion was not well-received, and each individual member of the ARDC had the right to make a decision that is in the best interest of the Student. [R.Exs. 13 and 14 (1:30 – 1:55)].

70. District ARDC meeting participants used appropriate tone and volume throughout the October 2011 ARDC meeting. [R.Ex. 14 (0:01—3:19)].

71. The Student's then-current special education placement resulted in the Student remaining one-on-one for most of the day. District ARDC members wanted to discuss changing the Student's placement for special education instruction into the \*\*\* classroom with other students as a lesser restrictive environment. The \*\*\* classroom setting has functional academics and vocational-skill focus in a very structured setting with abundant communication and socialization throughout the school day that includes cooking and life skills with age-appropriate peers. [R.Exs. 13 and 14 (1:56 – 2:49); Tr. at 184-186].

72. The \*\*\* room had two adults and six students at the time of the October 2011 ARDC. With the addition of the Student and student's one-on-one aide, the ratio would have increased to three adults and seven students. [R.Ex. 14 (2:13 – 2:18)].

73. The Parent referenced past data on the Student's \*\*\* program during the October 2011 ARDC. The District had not received the seven years of data from the Student's previous program and again District participants encouraged the Parent to submit any additional information for ARDC review and consideration. [R.Ex. 14 (2:37 – 2:39)].

74. At the October 2011 ARDC, the Parent expressed concern that the \*\*\* room would expose the Student to inappropriate behaviors that would be mimicked by the Student, and once acquired, would take time and direct ABA therapy to extinguish. The Parent described a previous summer in \*\*\* when the Student attended a three-week summer clinic for one-on-one ABA therapy. After exposure on three occasions to a student in an adjacent classroom who inappropriately screamed, the Student mimicked the behavior and began screaming. It required two years of weekly ABA therapy of 18 to 25 hours to extinguish the Student's screaming behavior. [R.Ex. 14 (2:42 – 2:45)].

75. The Parent likens the \*\*\* classroom to the \*\*\* school district's autism class placement refused by the Parent. Should the Student be placed in the \*\*\* classroom, the Parent anticipates such a placement would result in the Student "coming out more autistic than student went in." [Tr. at 639].

76. The Parent actively ensures that the Student interacts with general education students outside of school. At school, the Student eats lunch with these students. [Tr. at 975-976].

77. Under the proposed placement changes by the ARDC, the Student would not have a reduction in general education time and would continue to have lunch with non-disabled peers. [R.Ex. 17; Tr. at 944].

78. The Student did not engage in conversation with other students in the lunchroom even when eating at a table with student's friends. [Tr. at 732-734].

79. The October 2011 ARDC recessed before making a placement decision to allow the Parent to observe the classroom and to allow the non-custodial parent time to obtain information regarding the proposed \*\*\* classroom. The ARDC planned to reconvene on a second day to continue the meeting. [R.Exs. 13 at 14, and 14 (2:50:39 – 2:51:10)].

#### **Re-convene of October 2011 ARDC Meeting in November 2011**

80. On November 11, 2011, the District sent out notice to the Parent to reconvene the ARDC meeting of October 27, 2011, for another meeting day. The notice included the District's proposed changes to the Student's IEP and reasons for the meeting, including the following: a) propose to initiate or change evaluation; b) review of existing data; c) propose to develop/review/revise an IEP; d) propose to initiate or change/consider/make the educational placement; e) propose to initiate or change other elements of FAPE; f) propose/consider/make disciplinary change of placement (FBA, BIP, manifestation determination); g) consider ESY services; h) consider results of new evaluation/re-evaluation; i) annual ARDC meeting as required; and, j) continuation of the ARDC meeting of October 27, 2011. On November 14, 2011, the Parent signed the notice and indicated she would attend the meeting scheduled for November 29, 2011. [R.Ex. 15 at 101-104].

81. On November 18, 2011, the Parent requested copies of the Student's 2010-2011 IEP progress reports be available for each ARDC member when the ARDC resumed on November 29, 2011. The Parent asked to have the checklists projected onto the screen in the meeting to allow the Parent to see what was being marked or unmarked, asking that the ARDC be prepared for a long meeting. [R.Ex. 33 at 17].

82. The Parent attended and fully participated in all facets during the November 2011 ARDC meeting day. Although the non-custodial parent could not be reached by telephone during the meeting, the non-custodial parent left a message on another District telephone line. As requested by the Parent, attending ARDC members received copies of the Student's 2010-2011 goals and objectives, progress reports of the goals in place since August 2011, and current proposed revisions to the goals and objectives. [R.Exs. 15, 16 (0:01 – 0:02 and 2:11), and 18 (0:07 – 0:08).].

83. The November 2011 ARDC reviewed the District's OT-Eval. The evaluation included standardized assessment data from the Sensory Profile School Companion and the short version of the Child Occupational Therapy Profile. The District's OT evaluator, \*\*\*, reviewed teacher reports and performed an observation of the

Student. To assess the Student's handwriting, the evaluator used a Handwriting and Typing Screener. The evaluator made recommendations to address the following areas: a) independence with teeth brushing and face washing; b) mild weakness in hands and decreased higher level motor planning; c) making choices with neutral/non-preferred activities; d) difficulty making a plan or problem-solving; and, e) low awareness of all types of sensation. The evaluator recommended continued OT support on a consult basis for 90 minutes per six-week period. The Parent had no questions after this review. [P.Ex. 2B; R.Exs. 15, 16 (0:01 – 0:26), and 34 at 11-15].

84. At the November 2011 ARDC meeting, the ARDC reviewed the District's AC-Eval. The District's speech pathologist, \*\*\*, performed the evaluation. \*\*\* is the lead of the District's AT team, served as the first AT coordinator in \*\*\* district, and has on-going professional focus on alternative forms of communication for students with disabilities. During her 20 years as a speech-language pathologist, \*\*\* performed countless speech, augmentative communication, and AT evaluations of students with communication disorders and significant cognitive impairments, both in private practice and as an educational consultant prior to coming to the District. [P.Ex. 2C; R.Exs. 15 at 16, 16 (0:26 – 1:08), and 34 at 3-8; Tr. at 714-715].

85. \*\*\* completed the AC-Eval of the Student over several visits, using interview information from a Parent interview on July 19, 2011, and information from numerous observations of the Student. Based on direct assessment and teacher report on September 16, 2011, the AC-Eval used a Functional Communication Profile to review in a systemic manner and to summarize the Student communicates in the following areas: a) sensory/motor; b) attentiveness; c) receptive language; d) expressive language; e) pragmatics/social language; f) speech; g) voice; and, h) non-oral communication. The Student showed poor attention span, needed to be redirected, and was distractible across all environments. [P.Ex. 2C; R.Ex. 34; Tr. at 731].

86. \*\*\* also reviewed the Student's ability to understand and use symbols on the Test of Aided-Communication Symbol Performance ("TASP"). The Student actively cooperated and participated on TASP tasks presented with score ranges on the following: a) identification of noun pictures (97%); b) understanding picture symbols (0% - 66%); c) comprehension to task (sort items) (100%); and, d) spoken word target (point to items) (0% -100%). The Student was not able to complete the sentence closure task. [P.Ex. 2C at 4; R.Ex. 34 at 6].

87. As part of the AC-Eval, \*\*\* evaluated the Student's ability to combine separate symbols into one message. With picture representation, modeling, and visual cueing, the Student could combine two symbols only in direct imitation. The Student showed spontaneous responses on the last word heard for the majority of responses. When presented with a communication board, the Student vocalized words as student pointed to the words/symbols on the board as modeled to student. The Student also worked with a voice output communication device during the AC-Eval. After modeling a sequence of buttons to produce a phrase, the Student selected the buttons as modeled, but did not verbally produce the phrase. On some sequences, the Student selected the last button multiple times to hear the word, exhibiting self-stimming behavior. Over time after the novelty of voice output wore off, these behaviors could be addressed. [P.Ex. 2C at 4; R.Ex.34 at 6].

88. The voice output communication device is similar to an iPod device. \*\*\* also worked with the Student using the voice output communication device and with an iPod using a communication application. The Student effectively put words together but with the device speaking back, the Student did not verbalize. [Tr. at 727-728]

89. The iPod device was not effective for the Student because it required student to push buttons to go to a different page rather than using a paper board where the words are on one page. [Tr. at 726-727].

90. \*\*\* used "best practices" of her profession to conduct the AC-Eval. All information within the report is specifically individualized about the Student and does not contain any information about another student. At the due process hearing, \*\*\* acknowledged that the AC-Eval report contained one typographical error of another student's name. [P.Ex. 2C; R.Ex. 34 at 3-8; Tr. at 720-271 and 735-736].

91. In the AC-Eval, \*\*\* determined that the Student is a limited verbal communicator. The Student uses mostly single words for communication, with a few phrases to ask for specific things, and is able to initiate communication. Student's ability to carry on a conversation is limited. At times the meaning of student's communication must be inferred based on the context. [P.Ex. 2C; R.Ex. 34; Tr. at 721-722].

92. After completion of the AC-Eval, \*\*\* determined that the Student exhibited a language impairment due to student's brain's cognitive ability to put words together, to organize words, and to find the words student needs to communicate. The Student is able to use words and is a visual learner. Because word usage is student's primary mode of communication, \*\*\* did not recommend a particular augmentative communication device for the Student. Instead, \*\*\* recommended adding structural supports and visual cues for language to help the Student organize language in student's brain. In \*\*\* opinion, the Student's independence would increase with visual supports like a visual schedule or a visual task list. [P.Ex. 2C; R.Ex. 34 at 3-8; Tr. at 721-725].

93. \*\*\* met with the Parent and reviewed the results at length prior to the November 2011 ARDC. [Tr. at 730-731].

94. At the November 2011 ARDC meeting, the Parent did not agree with the AC-Eval results and wanted the Student to have an iPod. The Parent does not believe that \*\*\* tried the iPod device long enough with the Student to determine effectiveness, questioning why the device did not come home with the Student. [R.Ex. 16 (45:10-48:14); Tr. at 746-749].

95. Both the Parent and the Student's special education teacher, \*\*\*, observed occasions of the Student stimming with use of pictures, cards, or a manipulative device. The Parent reported stimming by the Student by holding and flicking the pictures. Likewise, the Parent does not want the Student to begin stimming if student has a communication board. \*\*\* explained that a communication board is tougher card stock paper as opposed to just paper with lamination. Because the Student is easy to redirect, \*\*\* believes that the Student could be taught not to flip the cards over time. [R.Ex. 34 at 16; Tr. at 629-630].

96. In the November 2011 ARDC meeting, the Student's special education teacher, \*\*\*, reviewed each proposed goal and objective together with the Student's current and previous goals and objectives, including comparison of wording, mastery criteria, and progress toward mastery up to the present time. The meeting lasted over six hours and the Parent gave extensive input and actively participated in the IEP goal and objective revisions. The ARDC included suggestions made by the Parent into the goals. [P.Ex. 2B; R.Exs. 15 and 16 (2:10 – 6:22); Tr. at 198-199].

97. The ARDC again discussed a proposed change of placement for the Student. At the November 2011 ARDC, the Student's teacher, \*\*\*, stated her view that the \*\*\* classroom provides a setting with functional academics, independent living, socialization, and communication that helped students become better communicators and live both independently and appropriately in the world. \*\*\* believed that the \*\*\* classroom would greatly benefit the Student by allowing student to practice student's independence and have time to generalize, to practice communication, and to practice socialization. The Student's IEP can be implemented in a setting with age-appropriate peers rather than in an isolated setting. [R.Exs. 15 at 17-18, 16 (4:56 – 5:04); Tr. at 600-601].

98. At hearing, \*\*\* described how the \*\*\* classroom uses visual supports and tools to individually address the students' communication needs. \*\*\* believes this classroom would be appropriate for the Student. In the \*\*\* classroom, the Student would have many opportunities throughout the day for support structured communication that are not available in a general education classroom. The level of communication within the \*\*\* classroom is closer to the Student's language abilities and understanding. [Tr. at 737-738].

99. In the November 2011 ARDC discussion concerning the Student's placement, the Parent detailed her recent observation of the \*\*\*classroom after the October 2011 ARDC. The Parent described behaviors that the Parent does not want the Student to imitate including: a) inappropriate verbalizations; b) repetitive vocalizations; c)

students moving around out of their seat; and, d) a student slamming a fist on a table. [R.Ex. 16 (5:05 – 5:13); Tr. at 874-876].

100. Students in the mainstream environment at the Student's \*\*\* school campus on occasion make loud noises, use inappropriate curse words, and run around inappropriately in areas like the lunchroom and gymnasium. In the general education population, such behaviors are more rampant. [Tr. at 613-614 and 889-890].

101. The \*\*\* classroom is much quieter than the \*\*\* school lunchroom and gym where the Student interacts with regular education peers. The \*\*\* classroom is geared to teach the \*\*\* students what behaviors are not acceptable. [Tr. at 889-890].

102. The \*\*\* classroom uses discrete trial methods and contains an area where one-on-one discrete trial may be used to learn new material with a door that may be closed if needed. [Tr. at 601-605 and 854].

103. \*\*\* approximates the Student's cognitive functioning level to be approximately equivalent to an IQ of \*\*\*, noting that the Student is not as advanced in communications or academics as most of the other students in the \*\*\* classroom. The Student already interacts well with students from the \*\*\* classroom. [Tr. at 603-604 and 625-626].

104. The Student's educators including the Student's teachers, behavior specialist, speech language pathologists, occupational therapist, administrators, and autism specialist stated their belief that the Student should receive student's special education instruction in a classroom with peers for the upcoming year. [R.Exs. 15 at 17-18, 16 (5:41 – 5:46); Tr. at 188-191, 203, 289-290, 401-402, 404-405, 601-602, 609, 613, 736, 946].

105. The November 2011 ARDC participants made plans to consider 2012 ESY for the Student after the 2012 Spring Break. [R.Ex. 15 at 17].

106. The November 2011 ARDC did not recommend any changes to the Student's general education instruction time and did not recommend any changes to the time specified on the schedule of services. [R.Exs. 15 at 12, and 16 (4:08 – 4:13)].

107. At the conclusion of this meeting, District ARDC members agreed with the proposed changes to the Student's IEP and placement, but the Parent did not agree. Because of the lack of consensus, participants made plans to reconvene the meeting on December 12, 2011. [R.Exs. 15 at 15-19, and 16 (6:13 – 6:22)].

108. The Parent wanted to ensure the Student's stay-put placement outside the \*\*\* classroom. On November 28, 2011, the Parent filed the second docket concerning the Student, Docket No. 083-SE-1111.

109. On December 12, 2011, the ARDC reconvened because of the Parent's disagreement with the ARDC placement recommendations. The Parent attended in person, the non-custodial parent participated by telephone, and a total of 21 individuals participated in the meeting. The meeting was recorded. [R.Ex. 17].

110. Following the ARDC on December 12, 2011, diagnostician \*\*\* sent an E-mail to the Parent regarding the ARDC notice, the signature page, procedural safeguards receipt, and PWN to obtain the Parent's signature. \*\*\* left copies of these documents in a sealed envelope marked "confidential" at the front office for later pick-up, offered a personal meeting with the Parent if preferred, and attached the documents to an E-mail in case the Parent wished to print the documents at home. In reply, the Parent sent an E-mail stating numerous concerns including: a) not wanting the Student's information left at the school front office; b) questioning why the diagnostician had confidential documents at home in order to transmit an E-mail after school hours; c) stating an intention to amend her due process complaint to include a possible breach of confidentiality of the Student's records; d) challenging the PWN as flawed; e) challenging the diagnostician's demeanor at ARDC meetings as inappropriate;

and, f) challenging the diagnostician's request to come to sign the documents when the Parent planned to make a trip to the school. [P.Ex. 4D; R.Ex. 33 at 25-26; Tr. at 769-774].

111. After receiving the Parent's E-mail of December 13, 2011, diagnostician \*\*\* retrieved the sealed envelope of ARDC documents at the school front desk. The envelope was still sealed in the place where the envelope had been originally placed, and there was no breach of confidentiality. \*\*\* ensured that the Parent received a hard copy and a digital copy of the December 12, 2011, ARDC documents. [Tr. at 769-773].

112. The Parent signed the PWN on December 16, 2011. [R.Ex. 17 at 23-25; Tr. at 781-782].

113. The District did not implement the decisions of the ARDC on December 12, 2011, because of the stay-put placement of the Student during this litigation. [Tr. at 781-782 and 987].

114. The Parent made three separate requests for the Student's records from the District. In reply to each request, the District's Records Management Officer, \*\*\*, provided the documents and ARDC recordings on compact discs at no cost to the Parent. [R.Ex. 31; Tr. at 473].

115. Documents provided to the Parent as a result of her three record requests included redaction of all personally identifiable information concerning other students. [Tr. at 474-475].

116. The District provided documentation of the credentials of the individuals who worked with the Student since student's entry into the District for the 2011-2012 school year, including diagnosticians \*\*\*, \*\*\*, and \*\*\*. [R.Ex. 29 at 7 and 8; Tr. at 143-146].

117. The Parent presented no evidence to refute the credentials of the District's diagnosticians \*\*\*, \*\*\*, and \*\*\*.

118. The Parent presented testimony of a second parent, \*\*\*, of a student with a disability who attends the Student's \*\*\* school campus. The second parent previously filed a TEA special education complaint concerning IEE requests, filed a TEA due process complaint, and made records requests on behalf of her own student from the District. In response to one of these records requests, the second parent received a document supplied by the District that appeared to concern the Student. The District redacted all personally identifiable information before providing the second parent with the document. [P.Ex. 9A; Tr. at 444-459].

119. The District's Records Management Officer explained that another student's records may be provided to a parent in certain circumstances. For example, if another parent filed a TEA complaint and the District had to provide documentation in response to the complaint that included information on other students, this information could be provided as part of a record request. All information about other students' records contained in a record response is redacted, page by page, prior to release by the District. [Tr. at 469 and 475].

120. The Parent presented no evidence of unredacted documents relating to the Student produced to other parents or entities.

121. The Parent attended 11 ARDC meetings since the Student entered the District. Many of these ARDC meetings reconvened for a second meeting day. The Parent fully participated in the meetings and agreed with the decisions of all but two meetings: a) the ARDC meeting of July 11, 2011 (the Parent disagreed with the IHT evaluation); and, b) the ARDC meeting of October 27, 2011, subsequently reconvened on November 29, 2011 (the Parent disagreed with less restrictive placement change, goal/objective revisions, and the AC-Eval). [R.Exs. 1-10 and 12-18].

122. The Parent asked for \*\*\* to be removed from ARDC meeting participation after the Parent disagreed with \*\*\* input regarding IHT. [Tr. at 151-152].

123. The District sent progress reports to the Parent for all six-week periods of the 2010-2011 school year. These reports included data regarding the Student's progress on IEP goals and objectives collected on a daily basis by the Student's teacher and paraprofessional. [P.Exs. 3A-3E; R.Ex. 28; Tr. at 837, 847-848].

124. The District provided written daily communication to the Parent from the Student's teachers and paraprofessional using: a) a notebook that went back and forth; and, b) additional written updates during the 2010-2011 school year. In January 2011, the teacher and paraprofessional began sending the Student's homework at the end of each week, as requested by the Parent. [R.Exs. 21 and 22; Tr. at 845-846].

125. By the end of the 2010-2011 school year, the Student wrote student's first and last names with attention to size and spacing, the uppercase alphabet, and some of the lowercase alphabet based on the Handwriting Without Tears program. Student now read approximately 103 to 108 sight words and could read small pre-primer books with an emerging ability to read words together. Student's math skills now included the ability to match number to object and to add using manipulative devices using the TouchMath system requested by the Parent. The Student's communication skills progressed from a few single words to phrases. By the end of the 2010-2011 school year, student could state "\*\*\*\*" and "\*\*\*\*" appropriately in context as well as to ask for what student wanted to receive. [Tr. at 847-851].

126. The Student had access to student's backpack during the school day throughout the 2011-2012 school year. Student also had a special key for student's assigned locker that student used during student's \*\*\*\*-grade year. By the time of the due process hearing in May 2012, the Student routinely used student's locker rather than student's backpack to store student's school materials. [Tr. at 610 and 631-634].

127. \*\*\*\*, the District's paraprofessional who worked with the Student during both school years, observed gains in the Student's performance between 2010 and 2012. At student's enrollment, the Student functioned at a very low level in social, academic, and communication areas. By the end of the 2011-2012 school year, the Student made tremendous gains that were comparable to the gains in the previous 2010-2011 school year. [Tr. at 844-845 and 851-852].

128. The Student's work samples show the Student made progress throughout the 2010-2011 school year. [R.Exs. 19, 22, and 23].

129. At the time of the due process hearing, the Parent had not selected an outside evaluator that meets the District's IEE guidelines to conduct an IEE for an FBA.

130. At hearing, the Parent stated agreement with the District's OT-Eval of the Student and is not seeking an IEE for OT. [Tr. at 821].

131. The Student has ongoing issues with \*\*\*\*. This behavior rarely occurs at school. \*\*\*\*, the Student's special education teacher in 2011-2012, has never seen the Student with \*\*\*\*. \*\*\*\*, the Student's paraprofessional, observed that \*\*\*\* occurred in the general education setting or before student came to school, with noticeable change in student's \*\*\*\* after a school break when student had \*\*\*\*. [Tr. at 599 and 854-855].

132. The Student's BCBA, \*\*\*\*, worked with the Student for four years from April 2007 until the Student \*\*\*\* in 2010. The BCBA provided direct services or worked with supervising tutors through \*\*\*\*. \*\*\*\* provided the Student's therapy between one and three times a week both in the home setting and in the community for generalization. \*\*\*\* also worked with the Student on occasion in a school setting. [Tr. at 1010-1012].

133. \*\*\*\* found it took typically between six months to 24 months to target and replace some specific behaviors. [Tr. at 1014-1015].

134. \*\*\* has not seen the Student in at least two years. \*\*\* recalled speaking with \*\*\*, the District's behavior interventionist, requesting additional records on the Student. \*\*\* asked her office staff to send the Student's program notebook to the District. [Tr. at 1023-1024 and 1028].

135. No District employee ever received seven years of ABA data from \*\*\* provider. [R.Ex. 11 at 7; Tr. at 191-192, 198, 203, 287, 399, and 757].

136. The Parent agrees that the Student made "excellent progress" during the 2011-2012 school year. [Tr. at 403].

137. The District's Director of Special Education, \*\*\*, agreed at hearing that it would have been easier for District staff if the ARDC had simply maintained the Student's current placement outside the \*\*\* classroom with one-on-one adult assistance as desired by the Parent. However, \*\*\* does not believe maintaining the current placement would be better for the Student. [Tr. at 908-909].

### **Legal Standard**

Public school districts must develop and provide eligible students with an appropriate program. The U.S. Supreme Court developed a two-prong test for determining whether a school district's program provides a FAPE: 1) whether the school district complied with the procedural requirements of IDEA, and, 2) whether the school district offered a program to the student that was reasonably calculated to provide educational benefit. *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). An educational program is a meaningful one if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Id.*; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000).

A procedural violation of IDEA does not result in a denial of FAPE unless the violation results in the loss of educational opportunity to the student or seriously infringes upon the parents' opportunity to participate in the provision of FAPE to the student. 34 C.F.R. §300.513(a)(2); *Adam J. v. Keller ISD*, 328 F.3d 804 (5<sup>th</sup> Cir. 2003).

A substantive violation of IDEA occurs when a school district fails to provide the student with an educational benefit. School districts are not required to maximize a student's potential but bear the responsibility to provide an education that allows the student to achieve some benefit from the education. "Some benefit" means an educational program that offers more than minimal educational benefit and is meaningful; the education must be "likely to produce progress, not regression or trivial educational advancement." *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997).

Courts have not adopted a specific substantive standard for determining when a school district delivered FAPE to a student. The Fifth Circuit defined a FAPE by delineating four factors for consideration as indicators of whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational program individualized on the basis of the student's assessment and performance; 2) Is the program administered in the least restrictive environment; 3) Are the services provided in a coordinated and collaborative manner by key stakeholders; and, 4) Are positive academic and non-academic benefits demonstrated? *Id.* at 253.

The Parent pled no exceptions to the Texas statutory one-year limitations period. 19 TEX. ADMIN. CODE §89.1151(c). The applicable limitations period in this dispute is from September 7, 2010, to present. The Parent, as the party challenging a school district's eligibility determination or offer of services under IDEA bears the burden of proof to establish by a preponderance of the evidence that a student did not receive a FAPE. *Tatro v. State of Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 S.Ct. 528 (2005). The District bears the burden of proof to prove the appropriateness of its OT-Eval and AC-Eval, so that the Parent's request for IEEs for both evaluations should not be provided at public expense. 34 C.F.R. §§300.304(b) and 300.502(b)(3).

## **Discussion**

The nexus of this controversy concerns the least restrictive placement for an autistic student in \*\*\* school. The District's proposed placement change does not disturb the Student's general education instructional setting, reduce related service levels, reduce special education instructional time, or reduce the Student's interaction with student's non-disabled \*\*\* school peers. Instead, the proposed placement change moves the location of the Student's special education instruction from isolation into the \*\*\* classroom with age-appropriate peers. While the Student's custodial Parent rigorously opposes this proposal, concerned that the Student will develop undesirable behaviors by exposure to the disabled peers served within the \*\*\* classroom, the District believes the placement change is necessary to give the Student needed access to a less restrictive environment.

### **Issue 1: Date of First ARDC Meeting**

The Parent and District stipulated at the due process hearing that the Student's initial ARDC meeting in the District did not take place on the first school day of the 2010-2011 school year because the Parent was moving and could not attend. Instead, the rescheduled meeting convened on August 27, 2010, because of the Parent's request to reschedule the meeting. I conclude that Petitioner's first issue falls outside the one-year statute of limitations and is without merit.

### **Issue 2: Implementation of the Student's Previous IEP**

The Parent challenged the District's implementation of the Student's IEP from student's previous \*\*\* school placement beginning August \*\*\*, 2010. 34 C.F.R. §300.323(a). The District presented documentary evidence showing the August 2010 ARDC adopted this IEP and included a copy of the Student's \*\*\* IEP in ARDC documents as required by 34 C.F.R. §300.323(f). The previous IEP specified special education for the Student but did not specify in what setting this instruction would take place. The Student's August 2010 ARDC specified two hours of special education instructional service delivery with the remainder of instruction delivered in the general education setting. The hearing stipulations of the parties establish that the Parent agreed with this IEP.

I conclude on the record before me that the District implemented the Student's transfer IEP until the 30-day ARDC revised the Student's program on October 12 and 21, 2010. I further conclude Petitioner failed to meet petitioner's burden of proof on this issue.

### **Issue 3: Written Notice**

Section 300.503(a) of IDEA's implementing regulations mandates that a school district give written notice to parents of a student with a disability within a reasonable time when the district:

- (1) Proposes to initiate or change to identification, evaluation, or educational placement of a student or the provision of FAPE to the student; or,
- (2) Refuses to initiate or change the identification, evaluation, or educational placement of a student or the provision of FAPE to the student.

34 C.F.R. §300.503(a).

This notice must include specific items including an explanation for why the agency proposes or refuses to take action. 34 C.F.R. §300.503(b).

The Parent challenged the District's provision of PWN to the Parent for two separate ARDC meetings: a) the ARDC meeting convened on October 12, 2010, and continued on October 21, 2010; and, b) the ARDC meeting convened October 27, 2011, and later continued on November 27, 2011, discussed separately below.

#### **A. October 2010 ARDC Meeting**

In the Parent's Written Closing Argument ("P-Arg"), Petitioner argues that the ARDC changed each and every goal as well as the placement of the Student during the District's transfer ARDC without providing a written explanation to the Parent. [P-Arg at 1 and 3]. The District contends that the Parent received proper notice in October 2010. [Respondent's Written Closing Argument at 3].

The District sent out written notice of this meeting on October 5, 2010, in the form of a one-page document notifying the Parent of the meeting scheduled for October 12, 2010. This notice did not include checked boxes of information detailing proposed actions. No decisions, however, were made at the meeting on October 12, 2010, as the Parent requested a recess of this meeting to allow all teachers of the Student to attend the second meeting day to finalize the Student's program. The Parent received a three-page written notice at the time of the meeting recess that detailed the items scheduled for the second meeting day including areas of IEP revision, evaluation data, and placement. The District also mailed this notice to the Parent on October 18, 2010, and attended the second meeting day on October 21, 2010, with full participation and with full agreement with the decisions at this meeting. Petitioner did not sustain petitioner's burden to show improper notice took place at the two-day meeting.

### **B. October 2011 ARDC Meeting**

The Parent alleges that the District did not send PWN of the meeting held on October 27, 2011, by "relegating the ARD to the concerns of the Father, of which they claimed to have no information." [P-Arg at 1]. The District offered documentation of multiple efforts to convene this meeting, initially setting the meeting for October 14, 2011, but subsequently changed this date to permit other District participants to attend. Another written notice document went out to the Parent on October 18, 2011, and the Parent signed the notice on October 19, 2011. This written ARDC meeting notice included checks on the majority of informational boxes on the first page of the three-page document. Areas checked included the purpose and reasons for the meeting. The notice added clarification that the District planned to consider all checked items as the "parent has not shared any specific reasons for requesting the ARD." [R.Ex. 13 at 17]. It is likewise undisputed that the Parent attended the ARDC on October 27, 2011, and the ARDC recessed the meeting, as requested by the Parent, to allow time for the Parent to observe the classroom and for the non-custodial parent to gather more information.

On November 11, 2011, the District sent out written notice to the Parent to reconvene the October 2011 meeting for a second meeting date on November 27, 2011, and the Parent signed the notice on November 14, 2011. The three-page notice included multiple checked boxes on the first page for proposed changes and discussion for the upcoming meeting that included the items ultimately discussed and reviewed at the reconvened meeting – including a proposal to change the Student's placement.

The written notifications sent out by the District for both the first meeting day on October 2011 and the second meeting day on November 2011 included discussion items and proposed changes that took place in these meetings, including the proposal for a change of placement for the Student. I conclude Petitioner did not sustain petitioner's burden to show the District sent improper notice for either the October 2011 ARDC meeting day or the November 2011 ARDC meeting day.

### **Issue 4: October 2010 Goal and Objective Revisions**

The Parent alleged that the ARDC gave no explanation for the changes in the Student's IEP goal and objective revisions made at the two-day ARDC meeting in October 12 and 21, 2010. The District documentation of the two meeting days and hearing testimony established the Parent participated in these ARDC discussions.

The Parent provided credible documentary evidence and testimony of her deliberate and focused efforts to work on behavior as a priority with the Student when enrolled in the \*\*\* school district through ABA intensive therapy in the home setting. These efforts included entering into a mediated agreement with the \*\*\* school district to waive the academic goals in the Student's IEP and instead focus on socialization in the public school setting. These efforts by the Parent included an agreement that the Student's general education classes were not for academics but for socialization. [P.Ex. 1A].

After the Student's initial 30 days in the District, the ARDC convened for revision of the Student's goals and objectives from the previous program – the same \*\*\* school district that previously waived the focus on academic goals – to increase the goals to Texas TEKS-based academic standards. These “standards based” academic goals and objectives would allow the Student to progress as all other students. [Tr. at 147-148]. The Parent participated in both meeting days and at the conclusion of the second day, agreed with the goal and objective changes. Petitioner did not meet petitioner's burden to prove this allegation.

#### **Issue 5: Diagnostician Training**

The Parent alleged that the District did not provide competently trained diagnosticians to work with the Student's IEP. The Parent's complaints concerning these individuals are wide-ranging, including allegations of mishandling confidential records to claims of ARDC meeting pre-determination. [P-Arg at 2-12]. By contrast, the District produced the credentials held by the three diagnosticians that worked with the Student since August 2010.

In addition, the District presented hearing testimony from the diagnosticians and other district staff regarding the three diagnosticians' work with and assessment of the Student. I find the preponderance of the evidence before me established the District provided qualified diagnosticians to work with the Student during the applicable period and I conclude Petitioner did not sustain petitioner's burden to prove these allegations.

#### **Issue 6: Valid Progress Report Data**

The Parent alleged the District's progress reports of the Student during the 2010-2011 school year are flawed and do not match the underlying data gathered by District educators. [P-Arg at 5]. Specifically, the Parent believes that the data collected incorrectly reports goals as “independent mastery” that actually used adult support and heavy prompts. As a result, the Parent alleges the results are falsified. The District defended the data collection for the progress reports. Not only did the Student's \*\*\*-grade special education teacher and the paraprofessional aide collect this information, but the written communications between the Student's educators and the Parent shows a steady flow of communication about the Student's progress between school and the Parent.

The Student's paraprofessional aide testified at hearing about the Student's progress during the 2010-2011 and 2011-2012 school years. The Student came to the district with very low functioning levels in academics, social skills, as well as communication skills. \*\*\* gave credible testimony on gains made by the Student during both years that are fully supported by the Student work samples. [R.Exs. 19, 22, and 23]. In contrast to the Parent's claims of a wasted year of progress in 2010-2011, the record before me shows the Student indeed progressed in 2010-2011 at a similar rate to the 2011-2012 \*\*\*-grade year of “excellent progress.” [Tr. at 403]. I conclude Petitioner did not meet petitioner's burden on this issue.

#### **Issue 7: Timely Provision of the IEE Criteria for an FBA**

The Parent alleged that the District's delay in transmitting its IEE criteria impacted the Parent's ability to obtain the IEE for an FBA and is a procedural error. The Parent presented evidence regarding two TEA complaints she filed concerning this issue in April 2011 and June 2011. The District's evidence in this proceeding includes both TEA complaint investigation reports, neither of which substantiated the Parent's complaints.

The record supports that the District delayed transmitting the FBA criteria to the Parent between March 8, 2011, and April 18, 2011. [R.Ex. 36 at 7-8]. One month after the Parent received the criteria, the May 2011 TEA complaint investigation report concluded this delay constituted a procedural error had occurred that “may have” resulted in an unnecessary delay to obtain the IEE for an FBA. At the time of the hearing over a year after the Parent received the IEE criteria, the evidence conclusively shows the Parent has yet to select an evaluator for the Student's IEE for an FBA. I conclude that Petitioner did not meet petitioner's burden to show the untimely provision of the IEE criteria delayed the IEE for an FBA and is not a procedural error that impacted the Student.

#### **Issue 8: Consideration of BCBA Data**

The Parent made repeated reference throughout this proceeding to “seven years of ABA data” from the Student's private BCBA therapy providers in \*\*\*. The Parent presented direct and rebuttal testimony on the

Parent's belief that this data should be at least considered when developing the Student's program. Likewise, the record contains a multitude of references to "seven years worth of data."

The preponderance of the evidence overwhelmingly established, however, that as of the due process hearing date, the District never received seven years of ABA data on the Student. In fact, the District's BCBA, \*\*\*, used current behavioral data on the Student for development of the Student's behavioral goals through evaluation, data collection, and input from the Student's educators. Neither the Parent nor \*\*\* ABA providers supplied the seven years of ABA data to \*\*\* or others at the District. Petitioner did not meet petitioner's burden on this issue.

#### **Issue 9: ARDC Meeting Pre-Determination on June 21, 2011**

The Parent alleged that District ARDC members engaged in "pre-determination" at the ARDC meeting held on June 21, 2011. Petitioner believes that the E-mail communication between the campus principal and the diagnostician shows that the District pre-determines ARDC meetings. [P-Arg at 7]. At hearing, the District fully acknowledged this E-mail communication between the campus principal and the diagnostician, but also provided the context of those communications through hearing testimony of the principal and diagnostician, ARDC documents from the Summer 2011 ARDC meetings, and documentation of the District's formal response to the TEA complaint investigation allegation. After review of the evidence, I do not agree with Petitioner's interpretation of the staff communications.

First, all students on the principal's \*\*\* school receive a \*\*\* for use at school but \*\*\* during the summer months. It is reasonable that the campus principal would be unaware when \*\*\*. Second, the principal initially affirmed the Student's \*\*\* availability for the 2011 ESY session. Third, regardless of any E-mail communications or ARDC meetings, all students on the campus in the 2011 ESY program received a \*\*\* at school – including the Student. At this point, the issue of the \*\*\* became virtually moot. Fourth, documents from the ARDC meeting held on June 21, 2011, as well as the testimony of District witnesses, categorically deny that any ARDC meeting predetermination ever occurred. Finally, the Parent produced no further evidence of ARDC meeting pre-determination. I find Petitioner did not sustain petitioner's burden to prove ARDC pre-determination at this meeting by District personnel, or that the District pre-determined the Student's other ARDC meetings.

#### **Issue 10: Student Records**

In her tenth issue, the Parent alleged that the District did not give the Parent all pertinent records of the Student without "overly" redacting the information. The record established that the Parent made three separate records requests, all records were provided at no cost to the Parent, and the District's Records Management Officer, \*\*\*, gave credible evidence that all records had information properly redacted. [Tr. at 474-477]. Petitioner did not meet petitioner's burden on this issue.

#### **Issue 11: Full Participation of the Parent**

Throughout this proceeding, the Parent alleged that the District kept her from fully participating in the ARDC process, restricted her input into ARDC meetings, restricted her input into the evaluation process, and failed to collaborate in the development of the Student's IEP. The Parent specifically alleged that she made repeated requests to "table" or recess the ARDC meeting in October 27, 2011, but the District ignored her requests. Section 89.101.50(h) of the Texas Commissioner's Rules states the following:

- (h) All members of the ARD shall have the opportunity to participate in a collaborative manner in developing the IEP. A decision of the committee concerning required elements of the IEP shall be made by mutual agreement of the members if possible. The committee may agree to an annual IEP or an IEP of shorter duration.
- (1) When mutual agreement about all required elements of the IEP is not achieved, the party (the parents or adult student) who disagrees shall be offered a single opportunity to have the committee recess for a period of time not to exceed ten school days.

[....]

The requirements of this subsection (h) *do not prohibit the members of the ARDC from recessing an ARD committee meeting* for reasons other than the failure of the parents and the school district from reaching mutual agreement about all required elements of the IEP.

- (2) During the recess the committee members shall consider alternatives, gather additional data, prepare further documentation, and/or obtain additional resource persons which may assist in enabling the ARD committee to reach mutual agreement.

19 TEX. ADMIN. CODE §89.1050(h)(1)-(2) [Emphasis added].

The italicized language above is permissive and does not grant any specific ARDC member an absolute right to “demand” a recess to gather more information. Instead, “the members” have the ability to decide to recess. [Emphasis added].

Unfortunately, the Parent’s lack of trust of the District’s educators’ veracity and motives hampered the collaborative aspects of the ARDC meeting process. After filing this litigation in September 2011, the collaborative process further deteriorated before the October 2011 ARDC meeting. Nonetheless, the ARDC members opted to recess the ARDC on October 27, 2011, allowing the Parent and non-custodial parent the opportunity to get more information. Only upon reaching disagreement at the end of the November 2011 meeting, did the ARDC recess for a “ten-day” recess regarding the areas of disagreement in October 2011 and November 2011. *Id.* Based on the entirety of the record before me, I conclude that Petitioner did not meet petitioner’s burden on this issue.

#### **Issue 12: Appropriate Scheduling of the October 2011 ARDC Meeting**

The Parent challenged the scheduling effort – and the intent behind – the selection of the meeting dates for the October 2011 ARDC meeting. I find this allegation is without merit for the reasons discussed above in Issue 11 and I further conclude Petitioner did not meet petitioner’s burden on this issue.

#### **Issue 13: Access to the Student’s Backpack in 2011-2012**

It is undisputed that the August 2011 ARDC amended the Student’s IEP regarding the Student’s backpack on August 29, 2011, specifying “access to a backpack throughout the day.” [R.Ex. 12 at 4 and 6]. The hearing testimony underscored that, indeed, the Student had access to the backpack. Petitioner did not meet petitioner’s burden on this issue.

#### **Issue 14: Confidential Special Education Record Maintenance**

The Parent challenged the District’s maintenance of the Student’s confidential records. In December 2011, it is undisputed that the District’s diagnostician left the Student’s sealed ARDC documents at the school office front desk. The District presented credible evidence of the communication between the Parent and diagnostician retrieved the unopened records. [R.Ex. 33 at 20-22]. The Parent failed to prove harm as a result of the communications via E-mail at any time in this proceeding or during December 2011, including the brief time the sealed documents remained at the school’s office front desk. Consequently, I conclude Petitioner did not meet petitioner’s burden on this issue.

#### **Issue 15: Evaluation Timelines**

The Parent alleged that evaluation timelines were not followed regarding the OT-Eval and the AC-Eval. 34 C.F.R. §300.304(b); TEX. EDUC. CODE §29.0041. Yet, the evidence established the ARDC set a deadline for completion of both evaluations by October 31, 2011. [R.Ex. 10 at 12]. As both evaluations were completed by this deadline, Petitioner did not meet petitioner’s burden on this issue.

### **Respondent's Counterclaim**

The District brought a counterclaim in this consolidated proceeding to prove the appropriateness of its evaluation. At the time of the due process hearing, the Parent did not pursue an IEE for the OT-Eval, but continued to seek an IEE for an AC-Eval.

The District presented documentary evidence of both the OT-Eval and the AC-Eval procedures, evaluation methods, credentialing and experience of the District's two evaluators (\*\*\*) and (\*\*), instruments used during the assessments, and the additional input of observation data and input from others used in both evaluations. I conclude, based on the testimony and documentary evidence before me, that both evaluations gathered the requisite information from a variety of sources using technically-sound evaluation tools and strategies, to produce thorough assessment of the Student in both OT and communication. 34 C.F.R. §300.304(b). As both evaluations are appropriate, Petitioner is not entitled to have an IEE at public expense for either an OT-Eval or an AC-Eval. 34 C.F.R. §502(b)(3).

### **Placement and LRE**

The vast amount of information supplied by both parties highlighted the isolated one-on-one setting with adult support in which the Student currently receives student's specialized instruction. This setting stands in stark contrast to the \*\*\* setting where the Student would have constant opportunity to interact with age-appropriate peers.

Under IDEA and its implementing regulations, the District is charged with the responsibility to *ensure* that the Student is educated in the least restrictive setting. 34 C.F.R. §§300.114(a)(2), 300.115, and 300.116; 19 TEX. ADMIN. CODE §89.1055(e). In this dispute, the District did not shirk from this responsibility when faced with the Parent's opposition and did not select an easier path of simply agreeing with the Parent to maintain the current special educational instructional placement. [Tr. 908-909].

The Parent clearly articulated her concerns at all times in this dispute that if the Student were placed in the \*\*\* classroom, the Student would come out "more autistic" than when student entered. The fact remains, however, that the Parent's concerns are longstanding since the Student was age \*\*\* and include the Parent's experiences with the Student's previous public school placement and private therapy settings. However, it is undeniable that this Student continues to mature, currently attends \*\*\* school, and will continue to face student's own unique cognitive challenges as student develops into adulthood. The \*\*\* classroom – with the presence of \*\*\* classroom peers – will allow this Student to develop and practice needed skills. I conclude that Petitioner failed to meet petitioner's burden to show the inappropriateness of the \*\*\* classroom for this Student. I further find that the \*\*\* classroom is the LRE for the Student's special education at this time.

Accordingly, I decline to award any relief to Petitioner.

### **Conclusions of Law**

1. Respondent is the local educational agency responsible for determining the student's eligibility for special education and related services under IDEA. 20 U.S.C. §1400, *et. seq.*, and its implementing regulations.
2. Petitioner, as the party who challenged the school district's eligibility determination or offer of services under IDEA, bears the burden to prove that the student has been denied a free appropriate public education ("FAPE").<sup>15</sup> Petitioner did not meet this burden on all issues in this dispute. *Tatro v. State of Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 S.Ct. 528 (2005).
3. Respondent bears the burden to show the appropriateness of its occupational therapy evaluation ("OT-Eval") and augmentative communication evaluations ("AC-Eval"). 34 C.F.R. §§300.304(b) and

<sup>15</sup>

Abbreviations are repeated in this section for ease of reference.

300.502(b)(3); *Tatro v. State of Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 S.Ct. 528 (2005).

4. Respondent's OT-Eval and AC-Eval for the Student were appropriate. Petitioner is not entitled to either an IEE for an OT-Eval or to an IEE for AC-Eval at public expense. 34 C.F.R. §§300.304(b) and 300.502(b)(3); TEX. EDUC. CODE §29.0041.
5. Petitioner did not meet petitioner's burden to show that the proposed placement of the Student into the \*\*\* ("\*\*\*") classroom for special education instruction was inappropriate. *Tatro v. State of Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 S.Ct. 528 (2005).
6. Respondent met its LRE responsibilities for the Student at all times pertinent to this dispute. 34 C.F.R. §§300.114(a)(2), 300.115, and 300.116; 19 TEX. ADMIN. CODE §89.1055(e).
7. Respondent provided a free appropriate public education ("FAPE") to Petitioner. 34 C.F.R. §§300.17, 300.101, and 300.513(a)(1); *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997).
8. Respondent did not commit procedural error in this dispute by transmitting independent evaluation criteria to Petitioner approximately six weeks after granting independent assessment for a functional behavioral assessment in March 2011. The delay did not a) delay the assessment, b) impede the Student's right to a FAPE, c) deprive the Student's parents the right to participate in the ARD process, or, d) deprive the Student of educational benefits. 34 C.F.R. §§300.304(b), 300.320(a), 300.322(a), 300.323, 300.324(b)(1), 300.501(b)-(c), 300.502(a)-(b), 300.503(a)-(b), and 300.513(a)(2); 19 TEX. ADMIN. CODE §§89.1050(h)(1)-(2); *Adam J. v. Keller ISD*, 328 F.3d 804 (5<sup>th</sup> Cir. 2003).
9. Respondent's placement of the Student in the \*\*\* classroom is appropriate for student's special education instruction. 34 C.F.R. §§300.114(a)(2), 300.115, and 300.116; 19 TEX. ADMIN. CODE §89.1055(e).

## **ORDERS**

Based upon the record of this proceeding, the foregoing Findings of Fact and Conclusions of Law,

**IT IS HEREBY ORDERED** that the relief requested by Petitioner is **DENIED**.

**IT IS FURTHER ORDERED** that any and all additional or different relief not specifically ordered herein is **DENIED**.

Signed this 25<sup>th</sup> day of July 2012.

/s/ *Mary Carolyn Carmichael*

Mary Carolyn Carmichael  
Special Education Hearing Officer

## **NOTICE TO THE PARTIES**

This decision is final and immediately enforceable, except that any party aggrieved by the findings and decision may bring a civil action in any state court of competent jurisdiction or in a district court of the United States as provided in 20 U.S.C. §1415(i)(2); 34 C.F.R. §300.516; and 19 TEX. ADMIN. CODE §89.1185(o).

**STUDENT, b/n/f/ PARENT  
Petitioner and Counter-Respondent  
v.**

**NORTHWEST INDEPENDENT  
SCHOOL DISTRICT,  
Respondent and Counter-Petitioner**

**§ BEFORE A SPECIAL EDUCATION  
§ HEARING OFFICER  
§  
§ FOR THE STATE OF TEXAS**

**SYNOPSIS OF DECISION**

**ISSUE 1:** *Whether the District ignored parental requests, resulting in a \*\*\*-day delay of the Student's entrance into school?*

**HELD:** For the District

**CITATION:** 34 C.F.R. §§300.322(a) and 300.323(a)

**ISSUE 2:** *Whether the District properly implemented, beginning August \*\*\*, 2011, the individualized education program ("IEP") from the Student's previous school district?*

**HELD:** For the District

**CITATION:** 34 C.F.R. §300.323(f)  
19 TEX. ADMIN. CODE §89.1050(f)(3)

**ISSUE 3:** *Whether the District provided Prior Written Notice of proposed IEP changes to the Parent for meetings of the Admission, Review, and Dismissal Committee ("ARDC") held in: a) October 2010; and, b) October 2011?*

**HELD:** For the District

**CITATION:** 34 C.F.R. §§300.503(a)-(b) and 300.504(c)(2)  
19 TEX. ADMIN. CODE §§89.1045(a) and 89.1050(h)(6)

**ISSUE 4:** *Whether the District provided a) written statements regarding the reason/rationale for rewriting each goal and, b) an explanation for rewriting the goals/objectives to the Parent during the Student's October 2010 ARDC meetings?*

**HELD:** For the District

**CITATION:** 34 C.F.R. §§300.324(b)(1) and 300.320(a)  
19 TEX. ADMIN. CODE §§89.63(c) and 89.1055(e)

**ISSUE 5:** *Whether, between August 2010 and January 2011, the District used a competently trained diagnostician to develop the Student's IEP?*

**HELD:** For the District

**CITATION:** 34 C.F.R. §300.156(a)  
19 TEX. ADMIN. CODE §89.1040(b)(1)

**ISSUE 6:** *Whether the District provided inaccurate 2010-2011 IEP progress reports to the Parent, thus limiting the Parent's ability to address the Student's lack of progress and resulting in the Student's regression?*

**HELD:** For the District

**CITATION:** 34 C.F.R. §§300.320(a)(3)(11), 300.324(b)(1)(ii)(C), and 300.501(a)(2)

**ISSUE 7:** *Whether the District timely provided a copy of its independent educational evaluation ("IEE") guidelines to the Parent after granting an IEE for a Functional Behavioral Assessment ("FBA") of the Student in February 2011?*

**HELD:** For the District

**CITATION:** 34 C.F.R. §§300.304(b) and 300.502(a)-(b)

**ISSUE 8:** *Whether the Student's ARDC meetings considered seven years of behavioral data from the Student's previous Board Certified Behavior Analysts to develop the Student's IEP and behavioral intervention*

*plan, and to determine the Student's needs for In-Home Training and Extended School Year Services?*

HELD: For the District

CITATION: 34 C.F.R. §§300.324(a)(2) and (b)(1)(ii)(C)

19 TEX. ADMIN. CODE §§89.1055(e)(1)-(3),(4) and 89.1065(2)

ISSUE 9: *Whether the District pre-determined the Student's June 2011 ARDC meeting?*

HELD: For the District

CITATION: 34 C.F.R. §300.501(b)(3)

ISSUE 10: *Whether the District properly provided all Student records to the Parent without overredaction?*

HELD: For the District

CITATION: 34 C.F.R. §§300.322(f), 300.501(a), and 300.613

ISSUE 11: *Whether the District ensured that the Parent was a full participant in the ARDC process?*

HELD: For the District

CITATION: 34 C.F.R. §§300.304(b) and 300.324(b)(1)(ii)

19 TEX. ADMIN. CODE §89.1050(h)

ISSUE 12: *Whether the District held an ARDC meeting in October 2011 at a time convenient to the Parent?*

HELD: For the District

CITATION: 34 C.F.R. §300.322(a)(2)

19 TEX. ADMIN. CODE §89.1045(b)

ISSUE 13: *Whether the District implemented the Student's IEP addendum changes, including use of the Student's backpack throughout the school day, beginning October 2011?*

HELD: For the District

CITATION: 34 C.F.R. §§300.323(d)(2)(ii) and 300.324(a)(4)(i)

ISSUE 14: *Whether the District improperly maintained, and allowed unauthorized access to, the Student's confidential special education records?*

HELD: For the District

CITATION: 34 C.F.R. §§300.32, 300.614, 300.615, and 300.623

ISSUE 15: *Whether the District timely completed the Student's occupational therapy and assistive technology evaluations within evaluation timelines?*

HELD: For the District

CITATION: 34 C.F.R. §300.304(b)

TEX. EDUC. CODE §29.0041

ISSUE 16:<sup>16</sup> *Whether the Student received a free appropriate public education under the District's program?*

HELD: For the District

CITATION: 34 C.F.R. §§300.17, 300.101, and 300.513

*Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982);  
*Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997).

ISSUE 17: *Whether the District's proposed placement change was the least restrictive environment for the Student's special education instruction?*

HELD: For the District

CITATION: 34 C.F.R. §§300.114(a)(2), 300.115, 300.116, and 300.501(c)

19 TEX. ADMIN. CODE §89.1055(e)

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<sup>16</sup> Issues 16 and 17 are broad overall issues in this dispute.