DOCKET NO. 351-SE-0812

STUDENT, b/n/f/ PARENT,	**§**	**BEFORE A SPECIAL EDUCATION**
Petitioner	**§**	
	§	
	§	
v.	**§**	**HEARING OFFICER**
	§	
EAGLE MOUNTAIN-SAGINAW	**§**	
INDEPENDENT SCHOOL DISTRICT,	**§**	
Respondent	**§**	**FOR THE STATE OF TEXAS**

ORDER ON RESPONDENT'S MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

On August 29, 2012, Petitioner *** ("the Student"), by next friend, *** ("the Parent"), filed a due process complaint ("DPC") *pro se* pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400, *et seq.*, against Eagle Mountain-Saginaw Independent School District ("the District" or "EMSISD"). Petitioner retained Attorney Myrna B. Silver, Attorney at Law in Dallas, Texas, prior to the first PHC and Ms. Silver represented Petitioner for the duration of this proceeding. Attorney Nona Matthews, Walsh Anderson Gallegos Green and Treviño, P.C. in Irving, Texas, represented Respondent in this litigation.

Statement of the Case and Procedural History

The Student in this dispute attended the *** School District ("***") prior to student's enrollment in the District in August 2012. During the 2011-2012 school year at ***, Petitioner disagreed with the December 2011 placement proposed by *** and litigated the dispute through a due process hearing before the undersigned Hearing Officer.[1] After the issuance of the Decision of the Hearing Officer ("*** Decision") that affirmed the *** classroom placement – yet prior to the implementation of that placement for the 2012-2013 school year – the Student enrolled in the District as a new student. When the Parent disagreed with the District's proposed placement of the Student at a centralized classroom placement at *** School rather than at the *** school closest to the Student's home, *** School, the Parent filed this due process complaint on August 29, 2012.

At the time of filing the DPC, Petitioner requested an expedited telephonic pre-hearing conference ("PHC") to address the Student's placement during the pendency of this proceeding. The first telephonic PHC took place on August 31, 2012. In a meeting of the Admission, Review, and Dismissal Committee ("ARDC") to review the Student's previous individualized education program ("IEP") from ***, the parties were unable to agree on the Student's interim placement. The parties declined the opportunity to have a "Stay Put" hearing in this dispute.

The parties jointly waived a resolution meeting in writing on September 12, 2012. On September 13, 2012, Respondent filed a Notice of Insufficiency and Motion to Dismiss, challenging the complaint sufficiency and seeking dismissal for failure to state a complaint regarding any matter under the jurisdiction of the Hearing Officer pursuant to 20 U.S.C. §1415(b)(6)(A) and 34 C.F.R. §300.507(a)(1). A second telephonic PHC took place on September 14, 2012. By written order on September 18, 2012, the

[1] *STUDENT, b/n/f/ PARENT v. *** ISD*, Docket No. ***.

undersigned Hearing Officer found the DPC insufficient and set a deadline for Petitioner to amend the DPC and set deadlines for Petitioner's response and Respondent's reply for the Motion to Dismiss. Petitioner timely amended the DPC on September 28, 2012, and the procedural timelines began again in accordance with 34 C.F.R. §300.508(d)(3)-(4), with the due process hearing set for November 12, 2012, and the new Decision Due Date as December 12, 2012.

On October 9, 2012, Respondent filed a Motion to Dismiss ("MTD") on the first disputed issue and a Motion for Summary Judgment ("MSJ") on the second and third disputed issues. Both the MTD and the MSJ had supporting documentation. The parties timely waived the resolution meeting for the amended complaint and a third telephonic PHC took place on October 16, 2012. For good cause shown, the Hearing Officer granted a brief continuance extending the procedural schedule for discovery, setting response deadlines on Respondent's MTD and MSJ, and re-setting the due process hearing by agreement to November 29, 2012, and the revised Decision Due Date to December 29, 2012.

Petitioner timely filed responses to the MTD and MSJ by October 27, 2012, and Respondent timely filed its replies to Petitioner's responses by November 7, 2012. Prior to the disclosure deadline on November 20, 2012, the Hearing Officer orally announced her ruling granting both the MTD and MSJ and cancelling the due process hearing in a conference call with the parties, with the written order to follow prior to the revised Decision Due Date of December 29, 2012. The Hearing Officer entered and transmitted this written order to the parties on December 27, 2012.

Amended DPC Issues

Based on Petitioner's Amended Request for Due Process, Petitioner complains of the following actions or inactions of Respondent that denied the Student a Free Appropriate Public Education ("FAPE') by the following:

1. Whether the Student's placement as proposed by the District, at a location other than the Student's home campus, is reasonably calculated to provide a FAPE in the least restrictive environment ("LRE");
2. Whether the District pre-determined the Student's placement beginning August 27, 2012, without the input of members of a duly constituted ARDC; and,
3. Whether the District failed to involve the Student's parent beginning on August 27, 2012, in the decision-making process regarding the Student's placement.

As relief, Petitioner seeks the following: a) Compensatory educational services for the Student to address the District's alleged inappropriate proposed placement of the Student without prior notice to the Parent; b) Placement at *** School in the special education classroom and in general education, according to last agreed-upon schedule of services in August 2011 at *** ISD; c) Provision of a one-on-one aide for the Student at all times, independent of the determination by the Hearing Officer of which placement is the LRE for the Student; and, d) All other relief, whether at law or in equity, to which Petitioner may be entitled.

Respondent's MTD and MSJ Issues

Respondent's MTD and MSJ raise the following issues:

1. Whether Respondent is entitled to dismissal of Petitioner's Amended DPC Issue Number One placement location claim because the claim fails to identify, pursuant to 34 C.F.R. §300.507, an issue which is under the IDEA or the Hearing Officer's jurisdiction;

2. Whether the District is entitled to summary judgment on Petitioner's Amended DPC Issue Number Two, alleging failure to hold an ARDC meeting on or by August 27, 2012, because Petitioner pled no facts to support the claim that the District failed to provide Petitioner a FAPE as a result of failure to hold the meeting, and such a meeting was not required for a transfer student; and,
3. Whether the District is entitled to summary judgment on Petitioner's Amended DPC Issue Number Three, alleging failure to involve the Parent in the decision-making process regarding the Student's placement, because the Parent meaningfully participated in the placement decision process.

Issue One: Respondent's MTD and Jurisdiction of the Hearing Officer

Section 1415(b)(6)(A) of the IDEA and its implementing regulations allow parents or a public agency to bring a due process complaint regarding matters related to the identification, evaluation, or educational placement of a student with a disability, or the provision of a FAPE to the student. 20 USCS §1415(b)(6)(A); 34 C.F.R. §§300.503(a)(1-2) and 300.507(a)(1). As such, the jurisdiction of a hearing officer under the IDEA is strictly limited to these claims.

In Respondent's MTD, Respondent asserts that Petitioner's LRE claim as part of the first issue is disingenuous and instead, argues that the first issue concerns solely the location of Petitioner's services within the District. Respondent seeks dismissal of the first issue because Petitioner has not articulated a matter subject to the Hearing Officer's jurisdiction in the first issue, and an order granting dismissal will serve the doctrine of judicial economy and preserve school resources by preventing the necessity of preparing for and completing a due process hearing on this matter.

Respondent presented four attachments to the MTD:

Attachment A: Affidavit of Special Education Director ***, in support of Respondent's MTD
Attachment B: *** Decision, Docket No. ***
Attachment C: Records from the District's ARDC Meeting for the Student (September 10, 2012)
Attachment D: Description of the *** Classroom[2]

Petitioner presents no additional documents in Petitioner's Response but argues that the first issue encompasses concern for both the location and the LRE aspects of the placement proposed by the District and is within the jurisdiction of the Hearing Officer. Petitioner challenges to Respondent's MTD documentation as follows:

Petitioner's Challenges to Respondent's MTD Documentation	
MTD did not include:	• No Business Record Affidavit (no authentication of the business records, affiant statements are hearsay; affiant's statements in reliance of the unauthenticated business records are hearsay within hearsay) • No evidence that the *** program is comparable to the District's classroom at the *** Campus
Attachment A	• No mention of LRE • Statement that ARDC reviewed the *** Decision on September 10, 2012 • No statement of affiant's personal knowledge regarding *** classroom
Attachment C	• Incorrectly states that the ARDC meeting purpose includes review of *** Decision, minutes silent with no statement regarding review/discussion of *** Decision

[2] As referenced in the *** Decision (Docket No. *** (MTD Attachment B) at page 7), *** stands for ***. The *** classroom was a part of the Life Skills program at *** during the 2011-2012 school year on the Student's *** campus. The undersigned Hearing Officer determined that this classroom was appropriate and the LRE for the Student at ***. [Decision of the Hearing Officer, Docket No. ***].

MTD Supporting Factual Information In Respondent's Reply to Petitioner's Response to the MTD, Respondent submitted "Attachment E: Audio Recording of the Student's ARDC Meeting (September 10, 2012)" and also included a supplement to Attachment A, "Business Record Affidavit of *** regarding Attachments B through E to the MTD." Based on my review of Respondent's MTD with attachments, Petitioner's response, and Respondent's reply and Business Record Affidavit, Respondent's MTD Attachments A through E, as amended with the Business Record Affidavit for Attachment A, are admitted into the record of this proceeding. After review of these documents, I make the following Findings of Fact for purposes of the MTD:

1. The Student attended *** during the 2011-2012 school year as a student qualified for special education and related services under the disability classifications of autism, speech impairment, and as student with an intellectual disability.[3] [MTD Attachments B and C].

2. Between October and December 2011, the *** ARDC developed and proposed an IEP for the Student that changed the location of the Student's special education instruction from an isolated one-on-one setting with adult support within a resource setting to a self-contained Life Skills classroom, the *** classroom. [MTD Attachment B – Findings of Fact ("FOF") 71].

3. The *** classroom is a very structured setting with functional academics and vocational-skill focus that combines functional academics with opportunities for students to work on independent living skills, vocational skills, communication, and socialization in an interactive environment. The room includes abundant communication and socialization opportunities with age-appropriate peers throughout the school day, such as cooking and life skills. [MTD Attachment B – FOFs 11, 71, and 97].

4. The staff-to-student ratio in the *** classroom at *** was two adults to *** students in October 2011. This ratio would have increased to three adults and *** students with the addition of the Student and ***. The Student interacted well with other students in the *** classroom. [MTD Attachment B – FOFs 72 and 103].

5. In July 2012, the undersigned Hearing Officer determined the *** proposed IEP to be appropriate for the Student. Before *** had a chance to implement the *** Decision, the Student enrolled in the District. [MTD Attachment A – page 2 and MTD Attachment B – pages 34-36].

6. District personnel reviewed the *** Decision and the approved *** IEP developed between October and December 2011. On August 23, 2012, the District informed the Parent that the Student's approved IEP from ***, as approved in the *** Decision, would be implemented in comparable services on the first day of the 2012-2013 school year at the *** School, in a centralized Life Skills classroom. [MTD Attachment A – page 2 and MTD Attachment E].

7. The District has communicated at all times pertinent to this dispute its intention to implement the IEP determined to be appropriate in the *** Decision. [MTD Attachment A at 3].

8. The District's Special Education Director, ***, gathered additional data from *** regarding the *** classroom and Life Skills classrooms in the Student's former district. The "LifeSkill Unit" was split at *** with students going back and forth between the *** room and "LifeSkill" based on individual

[3] In accordance with the person first respective language initiative in Chapter 392 of the Texas Government Code, the term "intellectual disability" will be used in place of "mental retardation" appearing in the IDEA's implementing regulations. 34 C.F.R. §300.8(c)(6); 19 TEX. ADMIN. CODE §89.1040(C)(5); TEX. GOV'T CODE §392.002; TEX. EDUC. CODE §7.063.

needs and on campuses where this was possible. In the current 2012-2013 school year, the units have been brought back together under the name *** or "***." [MTD Attachment D].

9. The District's Life Skills classroom at *** School serves students who need specialized academic support in order to access the on-grade level Texas Essential Knowledge and Skills and/or course curriculum. This classroom provides a structured program with low staff-to-student ratio that emphasizes increasing independence for communication, self-help, social and living skills. The Life Skills classroom instruction focuses on training to prepare students for transition to ***. The instruction increasingly progresses from classroom to community-based instruction to facilitate skill generalization. [MTD Attachment A at pages 3-4].

10. The District made no material change to the Student's *** IEP, approved by the undersigned Hearing Officer, by implementing this IEP in the District's Life Skills classroom that is materially similar to *** classroom. [MTD Attachments A, B, C, and D].

11. The District considered the concerns of the Parent regarding the location of services for the Student in an ARDC meeting held on September 10, 2012. The ARDC determined, with the Parent in disagreement, that the IEP should continue to be implemented at the *** School. [MTD Attachment A at page 3].

12. There is no Life Skills or other comparable class to the *** classroom at the Student's neighborhood campus of *** School and there is no other classroom on that campus in which the Student's IEP can be implemented. [MTD Attachment A at page 3 and MTD Attachment C at minutes of ARDC meeting (September 10, 2012)].

13. The minutes of the ARDC meeting held on September 10, 2012, do not note specific discussion of the *** Decision by participants. By contrast, the audio recording of this meeting reflects direct discussion of the *** Decision at least 11 times by the following individuals: a) Petitioner's counsel; b) Respondent's counsel; c) the Parent;

    d) ***, District diagnostician; and, e) ***, District Special Education Director. [MTD Attachments C and E].

MTD Discussion Petitioner's Issue One states a claim about the location of Petitioner's services but does not make a claim that the *** Decision was in error regarding the appropriateness of the *** IEP placement into the *** classroom, the placement determined to be the LRE for the Student within ***. In Petitioner's MTD Response, Petitioner alleged that the District's Special Education Director, ***, could not have had personal knowledge of the *** classroom, and also that the ARDC did not discuss the *** Decision. Review, however, of the above MTD factual information shows the contrary as *** and other District staff reviewed the *** Decision that discusses the details of the *** classroom including LRE considerations for the *** program for the Student.

The fact that the minutes of this ARDC meeting fail to mention the discussion clearly articulated on the audio recording of this meeting is understandable as the minutes of an ARDC meeting are not meant to be a transcript but instead a summary of meeting discussion. I conclude that *** and District staff had access to details about the *** classroom as a result of their review of the *** Decision.

Petitioner's LRE concerns the Parent's preference for a campus placement at the Student's neighborhood school, citing the IDEA's implementing regulations at 34 C.F.R. §300.116(b)-(c). Section

300.116 of the IDEA's implementing regulations addresses the placement of eligible students by a public agency as follows:

> In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that –
>
> (a) The placement decision –
>
> (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
>
> (2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;
>
> (b) The child's placement –
>
> (1) Is determined at least annually;
>
> (2) Is based on the child's IEP; and
>
> (3) Is as close as possible to the child's home;
>
> (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
>
> (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
>
> (e) A child with a disability is not removed from education in age-appropriate regular education classrooms solely because of needed modifications in the general education curriculum.

34 C.F.R. §300.116(a)-(e).

The implementing regulations address LRE requirements at §300.114(a)(2), including when an eligible student's removal from the regular educational environment is appropriate, stating:

> (a) General.
>
> (2) Each public agency must ensure that –
>
> (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled; and
>
> (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. §300.114(a)(2).

A disabled student does not, therefore, have an absolute right to assignment at the closest neighborhood school if the nature or severity of the student's disability is such that the neighborhood school assignment is inappropriate because the student's education cannot be achieved satisfactorily. In the instant case, the Student's nature and severity of disability do not allow the Student to be satisfactorily educated in regular education and resource classes with the use of supplementary aids and services, as previously addressed in the *** Decision with a determination of the appropriateness of the *** classroom for the Student. Upon the Student's transfer into the District, the District did not try to change the *** IEP approved in the *** Decision, but instead reviewed and offered a comparable classroom at the District for the Student.

I conclude that Petitioner's first issue does not concern LRE but instead focuses on the Parent's disagreement over the location of Petitioner's services within the District. As this claim does not concern a

matter relating to the identification, evaluation, placement, or provision of FAPE of this Student, I conclude that Issue One is outside my jurisdiction and should therefore be dismissed.

Issues Two and Three: Respondent's MSJ

Summary Judgment Standards Respondent, as the party against whom a claim is asserted, moved for summary judgment in its favor on Petitioner's second and third issues. TEX.R.CIV. PROC. 166a(b). To prove entitlement to a summary judgment, Respondent bears the burden to prove that there is no genuine issue of material fact and that that Respondent is entitled to a summary judgment as a matter of law. Judgment on the motion will be granted when the record on file in the dispute establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion. TEX.R.CIV. PROC. 166a(c). A summary judgment may be based on uncontroverted testimonial evidence of an interested witness or of an expert witness if the evidence is clear, positive, and direct, otherwise credible and free from contradictions and inconsistencies and could have been readily controverted. *Id.* Supporting and opposing affidavits may be submitted as long as they are made on the basis of personal knowledge, set forth facts that are admissible into evidence, and affirmatively show that the affiant is competent to testify to the stated matters. TEX.R.CIV. PROC. 166a(f). A court may allow affidavits to be supplemented or opposed by depositions or by further affidavits. *Id.*

When faced with an MSJ, the non-movant must show that the evidence is sufficient to support a resolution of the factual issues in the non-movant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The evidence must be weighed in the light most favorable to the non-movant, but the mere scintilla of evidence is insufficient to defeat an MSJ. *Cox & Smith, Inc. v. Cook*, 947 S.W.2d 217, 227 (Tex.App. – San Antonio 1998); *Marsaglia v. Univ. of Texas, El Paso*, 22 S.W.3d 1, 4 (Tex.App. – El Paso 1999). When a non-moving party has the burden of proof at trial, the moving party may carry its burden at summary judgment by the presentation of evidence negating an essential element of the non-moving party's claim, or by pointing to specific portions of the record that demonstrate that the non-moving party cannot meet its burden of proof at trial. *Celotex Corp. v. Catrett*, 447 U.S. 317 (1986).

Respondent submitted the following attachments to its MSJ:

Attachment A: Affidavit of Special Education Director ***, in support of Respondent's MSJ
Attachment B: *** Decision, Docket No. ***
Attachment C: Description of the *** Classroom[4]
Attachment D: Records from the District's ARDC Meeting for the Student (September 10, 2012)
Attachment E: E-mail (copy) – Parent (September 26, 2012) to District Diagnostician ***
Attachment F: Letter from Special Education Director *** to Parent (October 2, 2012)
Attachment G: E-mail (copy) – Special Education Director *** to Parent (October 4, 2012)

Petitioner presented an affidavit of the Parent in Petitioner's Response to controvert factual statements of *** in Respondent's MSJ Attachment A. I admit the Parent's affidavit for purposes of the summary judgment.

Petitioner moves to strike *** affidavit and raises additional challenges to Respondent's MSJ evidence, summarized below:

[4] See footnote 2 above (incorporated by reference for MSJ facts).

Petitioner's Challenges to Respondent's MSJ Evidence	
MSJ documentation inadmissable	• Petitioner alleges Respondent's MSJ evidence is not competent evidence and would be inadmissible at trial
MSJ did not include:	• No business record affidavit for Respondent's MSJ Attachments B, C, D, E, F, and G
Attachment A	• Parent's affidavit contradicts claims of personal knowledge by *** (information communicated from District staff to *** resulting in hearsay statements by ***); motion to strike due to hearsay • Factual statements by *** controverted by Parent's affidavit, creating issues of fact
Attachment B	• Motion to strike because no business record affidavit submitted • *** had no personal involvement with *** due process hearing • *** not custodian of records as the District's Special Education Director
Attachment C	• Motion to strike because no business record affidavit submitted; documents are hearsay and not competent summary judgment evidence as a result
Attachment D	• Consists of two documents:1= ARDC Meeting documents (September 10, 2012) 2= *** document (ARDC Meeting – December 12, 2011) • Motion to strike first document as hearsay (110 pages – District's ARDC meeting – September 10, 2012); not authenticated by a business record affidavit • No reference to first document in *** affidavit (Respondent's MSJ Affidavit A) • First document missing first page or is not a true copy of original and is hearsay • Second document missing first page/is not a true copy of original and should be excluded • Motion to strike second document as hearsay (no business record affidavit)
Attachments E, F, and G	• Motion to strike as unauthenticated hearsay documents / not competent summary judgment evidence

MSJ Evidence and Supplemental Evidence In addition to Attachments A-G in Respondent's MSJ motion, Respondent's MSJ Reply supplemented its MSJ evidence with three affidavits of District personnel and an audio recording as follows:

Reply Attachment A: Business Record Affidavit of ***
Reply Attachment I: Affidavit of *** (Special Education Secondary Coordinator)
Reply Attachment J: Affidavit of *** (Diagnostician)
Reply Attachment H: Audio Recording of the Student's ARDC Meeting (September 10, 2012)

With the supplemental evidence in Respondent's MSJ Reply attachments, I find that Respondent provides sufficient evidence to overcome Petitioner's objections to a lack of a business record affidavit for Respondent's MSJ motion. Petitioner's additional challenges to Respondent's MSJ Attachment D are not substantiated after review of the documentation as all pages are included in the attachment. The original MSJ motion references the District's ARDC meeting of September 10, 2012, and I find this evidence relevant to the summary judgment motion. Respondent's MSJ Attachments E and G are admissions by a party-opponent under Texas Rules of Evidence 801(e)(2) and are not hearsay. Respondent's MSJ Attachment F is a letter written by *** and is not hearsay. I admit Respondent's MSJ Attachments B, C, D, E, F, and G as well as Respondent's MSJ Reply Attachments A, I, J, and H into the record for purposes of the summary judgment.

Turning to Petitioner's challenges to Respondent's MSJ Attachment A, Petitioner challenges statements made in the affidavit by *** as hearsay and inadmissible at trial. Based on Parent's affidavit and review of MSJ Reply Attachments I, J, and H filed by Respondent, I am persuaded by Petitioner that the original MSJ affidavit contains, in part, objectionable hearsay regarding statements between other staff and the Parent that were not made on the personal knowledge of the special education director prior to the end of August 2012. I therefore grant Petitioner's motion to strike, and decline to admit, Respondent's MSJ Attachment A. I note that Respondent's MSJ Reply Attachments I and J contain much the same, if not all, the information contained in

the original MSJ Attachment A regarding statements and communications that occurred between the Parent and specific District staff prior to August 24, 2012, and thus virtually overcome any defect in Respondent's summary judgment evidence by the exclusion of MSJ Attachment A from the summary judgment record.

Based on the summary judgment evidence admitted into this record, I make the following findings for purposes of the MSJ:

1. The Student attended *** during the 2011-2012 school year as a student qualified for special education and related services. The Parent litigated the *** proposal to place the Student into the *** classroom for the special education portion of the Student's IEP as developed between October and December 2011.[5] The *** Decision, entered in July 2012, determined the *** classroom to be appropriate for the Student and approved the *** IEP developed between October and December 2011. Prior to the implementation of the *** Decision by ***, Petitioner moved to EMSISD and enrolled the Student on August ***, 2012. [Parent's Affidavit; MSJ Attachment B; MSJ Reply Attachment I].

2. The Student did not attend *** during summer 2012. [Parent's Affidavit].

3. The Parent contacted the District and spoke with the *** School Diagnostician *** in May 2012 and subsequently tried to call the EMSISD Special Education Department to speak to *** in June 2012, but did not receive a return call. *** received notification of the Parents' phone call on July 12, 2012. The Parent and *** spoke on July 18, 2012. The Parent desired to meet with district personnel regarding implementation of the Student's IEP for the first day of school. [Parent's Affidavit; MSJ Reply Attachments I and J].

4. The Parent met with ***, ***, and two other staff members at *** School on August 16, 2012. The Parent brought a copy to this meeting of the Student's IEP from *** dated August 18, 2011. [Parent's Affidavit; MSJ Reply Attachments I and J].

5. The Parent wanted to have an ARDC meeting prior to August 27, 2012, the first day of the 2012-2013 school year. [Parent's Affidavit].

6. On August 22, 2012, a meeting took place at with the *** School principal, diagnostician, assistant principal, special education teacher, diagnostician, and paraprofessionals. The Parent received a copy of notice for an ARDC meeting to be held on August 30, 2012. [Parent's Affidavit; MSJ Reply Attachments I, J, and H (part 2)].

7. The District staff did not initially have all pertinent information for review of the *** Decision and the *** IEP developed between October and December 2011, but reviewed the Student's records with the *** Decision by August 23-24, 2012. At that time, *** and *** contacted the Parent regarding the *** School Life Skills classroom as the site for implementation of the Student's IEP beginning on the first school day instead of the *** School, because the District centralizes this type of service. [Parent's Affidavit; MSJ Reply Attachments I, J and H (part 2)].

8. The Parent disagreed with the District's plan to implement the Student's IEP at *** School and suggested the District contact *** teacher ***, the Student's previous teacher, and the Texas Education Agency. [Parent's Affidavit; MSJ Reply Attachments I, J and H (part 2)].

[5] See footnote 2 above (incorporated by reference for MSJ facts).

9. On the first day of school, August 27, 2012, the Parent brought the Student to *** School instead of *** School. The Parent met with EMSISD staff members ***, ***, and ***. *** explained to the Parent that the District could offer a FAPE to the Student with comparable services to the *** classroom in the *** School campus Life Skills classroom. [MSJ Reply Attachment J].

10. Later in the day on August 27, 2012, *** called the Parent regarding adding EMSISD staff on the ARDC notice as attendees for the scheduled meeting on August 30, 2012. The Parent stated she might bring her attorney to the meeting and would not waive any of her rights, including her right to have five days' notice of ARDC meeting attendees. The Parent did not agree to reschedule the meeting to September 4, 2012, and instead requested the District send out notice of an ARDC meeting for her response. [MSJ Reply Attachment J].

11. On August 27, 2012, the Parent met with EMSISD staff members ***, ***, and *** regarding parental concerns. District staff again explained to the Parent that comparable services for the Student's *** December 2012 IEP could be delivered at the Life Skills Classroom at *** School. [MSJ Reply Attachment J].

12. On August 27, 2012, *** sent out notice of an ARDC meeting for the Student scheduled for September 5, 2012, to include additional district staff and the District's attorney because the Parent indicated an intention to bring an attorney to the ARDC meeting. [MSJ Reply Attachment J].

13. On August 29, 2012, the District sent out notice of an ARDC meeting at *** School on August 30, 2012, as the Parent verbally confirmed willingness to waive the five-day notice requirement and proceed to the meeting as originally scheduled at *** School. When this ARDC meeting notice included the District's attorney, the Parent indicated she would not attend without her attorney if the District's attorney attended the ARDC meeting. The Parent informed the District that her attorney would not be available on August 30, 2012. [MSJ Reply Attachment J].

14. On September 5, 2012, the District sent out notice of an ARDC meeting at *** School scheduled for September 10, 2012, based on the availability of Petitioner's attorney. This meeting convened as scheduled for review of the Student's IEP. The Parent attended with assistance of her attorney. Participants reviewed the *** Decision and the *** IEP developed between October and November 2011 as approved in the *** Decision. District participants determined the *** classroom was the equivalent of the Life Skills classroom at EMSISD. [MSJ Attachments B-D; MSJ Reply Attachments J and H].

15. The District's Life Skills classroom, like the *** classroom, serves special education students who need more supervision and direct instruction on individual goals and objectives. The District's Life Skills classroom and the *** classroom focus on functional academics, independent living, socialization, and communication using an emphasis on preparation of students for future educational and vocational experiences. Both *** classroom and the District's Life Skills classroom emphasize structured activities and repeated practice of skills linked to grade-level curriculum, and then generalization of these skills. [MSJ Attachments C and D].

16. At the ARDC meeting on September 10, 2012, the District responded to the Parent's request for an evaluation of the Student by doing a review of existing data and proposing a Full and Individual Evaluation of the Student. The ARDC, with input from the Parent, specified the areas of the

evaluation, the Parent signed consent for the evaluation, and the District gave the Parent a Notice of Evaluation at the meeting. [MSJ Attachment D; MSJ Reply Attachment H].

17. The Parent never allowed the Student to return for school at the District after ***, 2012. [MSJ Attachment D; MSJ Reply Attachment H].

18. On September 21, 2012, District staff members *** and **** contacted the Parent by telephone to discuss completion of the additional evaluation of the Student discussed at the ARDC on September 10, 2012, suggesting: a) completion of the reevaluation within an educational setting at the *** School by bringing the Student to the campus for one week; or, b) evaluating the Student at the Student's home. The Parent declined these options. On September 26, 2012, in a follow-up voicemail to the Parent, *** offered to discuss additional options for completion of the evaluation. The Parent acknowledged *** voicemail message and replied via E-mail with a request that the District put any proposals in writing and copy her attorney. In her E-mail, the Parent stated, "I can assure you that, until you re-enroll my child at *** School, and provide for student's full-time education per student's IEP, no evaluations will take place." On the same date, the District offered additional evaluation sites of the EMSISD Administrative Building or *** School in writing to the Parent. In response, the Parent repeated that no evaluation would occur until the Student was placed full-time at *** School. [MSJ Attachments E, F, and G; MSJ Reply Attachments J and H].

19. The Parent has not allowed the reevaluation, requested by Petitioner during the ARDC meeting of September 10, 2012, to take place. [MSJ Attachments E and G].

20. The Parent refused to allow the Student to attend any other campus but the Student's home campus of *** School. As a result, the Student has not attended public school during the 2012-2013 school year. [MSJ Reply Attachment H].

MSJ Discussion Petitioner offers the affidavit of the Parent for Issues Two and Three to show there is sufficient evidence to support a resolution of the facts in the Student's favor. *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 249 (1986). This affidavit, as Petitioner's showing of evidence, does not dispute the *** Decision and does not dispute the material equivalency of the District's Life Skills classroom with the *** classroom. Also, the Parent's affidavit does not allege a failure of the District to propose a FAPE for the Student in its Life Skills classroom from August 27, 2012, the first day of school, after the District previously communicated intent to implement the approved *** IEP in a Life Skills classroom at the District comparable to the *** classroom. The summary judgment evidence shows the District communicated this intention to the Parent prior to meeting on August 27, 2012. I conclude that Petitioner has not shown facts demonstrating a genuine issue for trial on Issue Two.

It is undisputed that the Student transferred during summer 2012 into the District, enrolling at on or around August ***, 2012. Neither the IDEA nor its implementing regulations address a public agency's obligation to provide special education services for students who transfer during the summer. In the comments to the 2006 Federal Regulation, the United States Department of Education addressed whether the regulations needed clarification concerning the responsibility of a receiving school district for a student with a disability who transferred during the summer, stating that the IDEA is clear that each school district must have an IEP in place for each student at the beginning of the school year. 71 Fed. Reg. 46682 (2006). Section 300.323(e) of the implementing regulations, addressing IEPs for qualified students who transfer between public agencies within the same state, specifies as follows:

> (e) IEPs for children who transfer public agencies in the same State. If a child with a disability (who had an IEP that was in effect in a previous public agency in the same

State) transfers to a new public agency in the same State, and enrolls in a new school *within the same school year*, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either –

(1) Adopts the child's IEP from the previous public agency; or

(2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§ 300.320 through 300.324.[6]

34 C.F.R. §300.323(e) [Emphasis added].

The Texas Commissioner's Rules at §89.1050(f)(2) reads:

(2) When a student transfers within the state and the parents verify that the student was receiving special education services in the previous school district or the previous school district verifies in writing or by telephone that the student was receiving special education services, the school district must meet the requirements of 34 C.F.R. §300.323(a) and (e), regarding the provision of special education services. The timeline for completing the requirements outlined in 34 C.F.R. §300.323(e)(1) or (2) shall be *30 school days* from the date the student is verified as being a student eligible for special education services.

19 TEX. ADMIN. CODE §89.1050(f)(2) [Emphasis added].

In Petitioner's MSJ Response, Petitioner argues that §89.1050(f)(2) applies to transfers within the state regardless of whether the transfer occurs during a school year or between school years. [Petitioner's MSJ Response at pages 6-7.] In the MSJ Reply, Respondent disagrees with Petitioner's interpretation because 19 TEX. ADMIN. CODE §89.1050(f)(2) refers back to 34 C.F.R. §300.323(e), a provision which only addresses students transferring within the school year. I agree with Respondent. Although 19 TEX. ADMIN. CODE §89.1050(f)(2) and 34 C.F.R. §300.323(e) do not address the transfer *between* school years during the summer months, they provide useful guidance for the current dispute. For example, it would produce a nonsensical result to require school districts to develop new IEPs for transfer students during summer months when school is not in session while districts are not required to do so for students who transfer during the school year.

Just as the IDEA and its implementing regulations do not require a receiving school district to hold an ARDC meeting and create an IEP for eligible transfer students during the summer months, there is likewise no prohibition for a receiving school district to implement an eligible transfer student's current IEP from the former school district – without an ARDC meeting – while the receiving school district prepares a new IEP. *See*, e.g., *In re: Student with a Disability*, 44 IDELR 83 (SEA MT 2005) (if a new district adopts the former district's IEP and the parents agree to its use, the IEP can be implemented). Therefore, there is no requirement for the receiving school district to hold an ARDC meeting to "adopt" the former IEP if the receiving school district and the parents agree to its use. In the current dispute, the Parent did not object to the *** IEP implementation until learning that the Student would not be attending the *** School, the Student's neighborhood school.

Petitioner also argues in petitioner's MSJ Response that a school district must have an IEP in place at the beginning of the school year. [Petitioner's MSJ Response at page 8]. The IDEA's implementing regulations at 34 C.F.R. §300.323(a) reads:

(a) General. At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in § 300.320. [7]

[6] 34 C.F.R. §§ 300.320 through 300.324 of the IDEA's implementing regulations concern the IEP requirements.

[7] See footnote 6 above.

34 C.F.R. §300.323(a) [Emphasis added].

Based on this provision, I agree with Petitioner that an IEP must be in place for the Student at the beginning of a school year. Contrary to Petitioner's position, however, I find that the summary judgment evidence established that the District, in fact, offered the Student a FAPE that included an IEP for the first day of school on August 27, 2012 – the Student's IEP as approved in the *** Decision. This IEP would not expire until the end of November 2012. [MSJ Attachment D – "Schedule of Services" pages]. Unfortunately, the summary judgment evidence also established that the Parent elected not to access this FAPE for the Student.

I note that the District held a meeting of the Student's ARDC on September 10, 2012, well within 30 school days of the first day of school, August 27, 2012. Although the Parent made inquiries to the District by telephone in May 2012 and June 2012 about a future intent to transfer the Student into the District, as argued in Petitioner's MSJ Response, I do not find that these calls began any timeline for holding an ARDC meeting as there was no guarantee the Student would in fact move into the District and enroll based on summer inquiries from the Parent.

I further conclude that an ARDC meeting was not required for the Student's transfer on the facts before me as the Student had a current IEP from *** at the time of student's enrollment in the District. Thus, Respondent was not required to hold an ARDC meeting prior to August 27, 2012, the first day of school. As Petitioner pled no facts to support the claim that the District failed to provide a FAPE to the Student as a result of not holding an ARDC meeting by August 27, 2012, I conclude that Respondent's MSJ on Issue Two should be granted.

Regarding the summary judgment evidence for Issue Three, the record before me shows that the Parent indeed participated in the decision-making process regarding the Student. Petitioner presents no facts in petitioner's MSJ Response to show otherwise. The summary judgment evidence shows the Parent was a full participant in the ARDC process by giving input into times and dates for the meeting to ensure the attendance of her attorney. The Parent attended and participated in the ARDC meeting with the assistance of her attorney on September 10, 2012. At this meeting, the Parent made a request for reevaluation of the Student and the ARDC participants responded by granting the request during the meeting. With the input of the Parent, the ARDC developed a reevaluation plan during the course of the ARDC meeting. [Respondent's MSJ Reply Attachment H]. Based on these facts, I conclude the ARDC participants considered parental concerns, parental feedback regarding the Student's current functioning and needs, and parental desires for the Student during the ARDC meeting on September 12, 2012.

The MSJ evidence established that the District rejected the Parent's desired campus location of *** School because the approved *** IEP could not be implemented within any classroom on that campus. As I do not find that there was a denial of parental participation in this process on the summary judgment facts before me, I conclude that Respondent's MSJ should be granted on Issue Three.

ORDERS

Based upon the foregoing and the record on file to date in this case, it is therefore **ORDERED** that Respondent's Motion to Dismiss on Petitioner's Issue One is hereby **GRANTED** as Petitioner has failed to state a complaint regarding any matter under the jurisdiction of the Hearing Officer.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Judgment is **GRANTED** on Petitioner's Issue Two as a matter of law, as Respondent was not required to hold a meeting of the Admission, Review, and Dismissal Committee by August 27, 2012, and Petitioner pled no facts to support a claim on this issue.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Judgment is **GRANTED** on Petitioner's Issue Three as a matter of law, as the Parent fully participated in the decision-making process and Petitioner presents no facts to show otherwise.

IT IS FURTHER ORDERED that the due process hearing in this matter that was set for November 29, 2012, and verbally cancelled by the Hearing Officer on November 20, 2012, remains cancelled and shall be **DISMISSED** on all three issues from this Hearing Officer's docket. All other relief not specifically stated herein is **DENIED.**

Signed this 27th day of December 2012.

/s/ Mary Carolyn Carmichael

Mary Carolyn Carmichael
Special Education Hearing Officer