

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

**DECISION OF THE HEARING OFFICER**

**STUDENT, b/n/f/ PARENTS,  
Petitioner**

**v.**

**ROCKWALL INDEPENDENT  
SCHOOL DISTRICT,  
Respondent**

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**DOCKET NO. 176-SE-0212**

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Petitioner §  
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ROCKWALL INDEPENDENT §  
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**DECISION OF THE HEARING OFFICER**

**Statement of the Case**

Petitioner Student (“the Student”), by next friends Parents (“the Parents”), requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (“IDEA”), 20 U.S.C. §1400, *et seq.*, against Respondent Rockwall Independent School District (“the District”). Petitioner was represented by attorney Myrna B. Silver. Respondent was represented by attorneys Brandy N. Davis and Charles J. Crawford. The Texas Education Agency (“TEA”) received this due process request and issued the notice of filing on February 22, 2012.

On March 8, 2012, Respondent filed a Notice of Insufficient Complaint and Motion to Dismiss (“Respondent’s Motion”). The Hearing Officer denied the insufficiency challenge portions of the motion and put a procedural schedule in place for Respondent’s Motion. Petitioner filed a response on April 11, 2012, and Respondent filed a Reply on April 20, 2012. On May 13, 2012, the Hearing Officer denied Respondent’s Motion by written order and put a revised procedural schedule in place based on the agreement of the parties that set the due process hearing for May 29-31, 2012, and the Decision Due Date set for July 3, 2012. Respondent filed its “Motion to Reconsider and, in the Alternative, to Clarify” prior to the first telephonic pre-hearing conference held on May 21, 2012. On May 24, 2012, the Hearing Officer denied the request for reconsideration and amended the contested issues and requested relief.

The due process hearing took place as planned on May 29-30, 2012. At the conclusion of the testimony on the second hearing day, the parties requested leave to file written closing statements in this proceeding by July 3, 2012, with the Decision Due Date extended to July 17, 2012. Subsequently, the parties sought leave for additional time to file written closing statements granted for good cause shown. Both parties timely filed their written closing statements by the deadline on July 24, 2012, and the record closed with receipt of Respondent’s amended closing statement filing on July 30, 2012. The Decision of the Hearing Officer timely issued on August 7, 2012.

Petitioner complains of the following actions and inactions of Respondent Rockwall ISD during the applicable statutory period:

1. Whether the District’s Spring 2012 Individualized Educational Program (“IEP”) for the Student was reasonably calculated to provide a free, appropriate public education (“FAPE”), including:
  - a) Appropriate and timely evaluation of the Student prior to designing the IEP; and,
  - b) Placement into a behavioral classroom including appropriate support and services for the Student?
2. Whether the District proposed an appropriate educational placement of the Student, based on the Student’s educational needs, in the least restrictive environment (“LRE”), including:

- a) Provision and consideration of a continuum of alternative placements; and,
  - b) Demonstration of obvious predetermination of the Student's placement without consideration of parental input or the Student's individual needs?
3. Whether the District's failure to consider parental input constituted a failure to allow meaningful participation of the parents that resulted in a denial of FAPE for the Student in Spring 2012?
  4. Whether the District delayed the initiation and completion of the Student's Full and Individual Evaluation ("FIE") to determine present levels of academic achievement and functional performance in all areas of need?
  5. Whether the Parents should be reimbursed for all out-of-pocket expenses incurred during the applicable statutory period as a result of the District's failure to provide a FAPE to the Student, including any and all expenses incurred by the parents for educational services to address the Student's educational needs?
  6. Whether the Parents should be reimbursed for the costs of the Student's enrollment at the \*\*\* for the Spring 2012 semester, including travel expenses, tuition, books, and all other associated costs with the \*\*\*?

As relief, Petitioner requests reimbursement from the District for all non-medical out-of-pocket expenses, including but not limited to reimbursement for the Student's Spring 2012 semester tuition to the \*\*\* resulting from: a) failure to develop an IEP reasonably calculated to provide a FAPE for the Student; b) failure to provide an appropriate placement for the Student; and, c) failure to develop an appropriate transition program for the Student.

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 and the Parents reside within the jurisdictional boundaries of the District. At the time of the hearing, the Student was \*\*\* years old and attended the \*\*\* ("\*\*\*"), a private school located within the \*\*\* Independent School District in \*\*\*, Texas. [Pleading file; Petitioner's Exhibits ("P.Ex.") 2 and 6].

2. The Student has a history of \*\*\*, school absences, \*\*\*, anxiety issues, and out-of-control aggression issues. [R.Ex. 8 at 248; Tr. at 259].

3. The Student had problems with peers beginning in \*\*\* grade in the District. These problems continued to plague the Student as student's schooling continued. Student reported bullying by student's peers in \*\*\* grade, and in \*\*\* grade, assault by another student, resulting in \*\*\* for the Student. [Tr. at 28-29].

### **2009-2010 – \*\*\* Grade**

4. Before the beginning of the 2009-2010 school year, the Parents had the Student evaluated by a psychologist and a psychiatrist. The evaluation concluded student had Attention Deficit Disorder ("ADD") and depression. The Parents brought this information to the District. [P.Ex. 12 at 1, 3, and 29; Transcript ("Tr.") at 29-31].

5. In February 2010, the District performed an FIE of the Student. The FIE report found the Student eligible for special education services as a student with an Emotional Disturbance ("ED") but did not find eligibility of Other Health Impairment ("OHI") due to ADD or Attention Deficit Hyperactivity Disorder ("ADHD"). The FIE report included input from teachers and the Parents regarding symptoms of

ADD/ADHD and the District submitted an OHI form to the Student's psychiatrist to document ADHD. When the psychiatrist returned the OHI form, the diagnoses did not include ADHD but instead noted Major Depression and Eating Disorder Not Otherwise Specified. [P.Ex. 2 at 3 and 29, 12 at 7-8; Tr. at 27].

6. The Student's initial Admission, Review, and Dismissal Committee ("ARDC") meeting took place on February 24, 2010. The Student's initial IEP included a behavioral intervention plan ("BIP") but did not include a functional behavioral assessment ("FBA") as the basis for development of the BIP. Goals and objectives put in place at this meeting addressed only behavioral concerns for the Student and did not address academics. The minutes of this ARDC meeting specify that the Student would be able to use the \*\*\* for help with stress situations and to help student with continued instruction in the classroom. The schedule of service page does not indicate time for the \*\*\* and does not specify any counseling as a related service to address the Student's ED. [P.Ex. 15].

7. The Student's behavioral problems increased after implementation of the February 2010 IEP. The Student received detention, in- and out-of-school suspension, student's grades decreased, and student was truant on multiple occasions. [Tr. at 33-34].

**2010-2011 – \*\*\* Grade**

8. \*\*\* of the 2010-2011 school year, the Student \*\*\*. Student \*\*, and as a result, was suspended for 45 days into the disciplinary alternative education program ("DAEP"). In the DAEP placement, the Student frequently slept, got into trouble, and reported bullying behaviors from other students. On at least \*\*\* occasions during student's DAEP placement, student was hospitalized in short-term in-patient and day programs for student's behaviors, with attention to the Student's need for counseling, evaluation, and medication management. [Tr. at 33-39 and 44-45].

9. At the conclusion of the Student's DAEP placement, the Student experienced severe anxiety, resisted going to school, would not stay in school for a full school day, and frequently called student's Parents from school to come pick student up. Because the Student's short-term placements were ineffective, student's psychiatrist recommended residential placement. [P.Ex. 14 at 23; Tr. at 44-45].

10. The ARDC convened on December 8, 2010, at the conclusion of the DAEP placement. The Parents asked the District to place the Student into a residential facility, but the District refused. Instead, the District proposed placement of the Student into the \*\*\* classroom. The minutes of this meeting note the Parents' willingness to try this placement but also wanted to see "progress such as passing classes and not calling home." By this meeting, the ARDC completed a counseling evaluation and the Student's IEP specified counseling as a related service for 15 minutes every other week. The ARDC changed the Student's goal and objectives for Independent Study Skills and for Behavior at this meeting. [P.Ex. 14 at 6, 14, 21, and 23].

11. The December 2010 ARDC developed an annual transition goal with objectives as follows:

G/O*	*(Goal = G; Objective =0)      **(Mastery Criteria = MC)	MC**	Evaluation Method
G	[Student] will obtain information on *** programs at ***	Mastery Criteria	Evaluation Method
O-1	Identify the skills needed to do (identified) ***	100%	Data Collection
O-2	Learn about and demonstrate self advocacy skills (accommodations and assistive technology)	100%	Data Collection
O-3	State how disability affects: (instruction) (***) (***)	100%	Data Collection

[P.Ex. 14 at 13].

12. On the advice of the Student's psychiatrist and the Parents' insurance company, the Parents withdrew the Student from the District and placed the Student in \*\*\* ("\*\*\*\*") during the \*\*\* 2010. The Student attended \*\*\* from \*\*\* to \*\*\*. At \*\*\*, the Student tried to catch up on school work. Student's program included intensive individual counseling, family counseling, medication management, and thorough evaluation by a psychiatrist and psychologist. [Respondent's Exhibit ("R.Ex.") 8 at 235-294; Tr. at 137-138].<sup>1</sup>

13. At \*\*\*, the Student's psychiatric evaluation at student's admission diagnosed student with "Major Depressive Disorder with Psychotic Features" and "Oppositional-Defiant Disorder, Chronic, Severe," with "Rule Out" diagnoses for Mood Disorder Secondary to Cerebral Dysrhythmia, ADHD, Anxiety Disorder NOS, and Conduct Disorder. Student had a Global Assessment of Functioning ("GAF") level of 15, and the admitting psychiatrist assessed the Student's risk of acting out aggressively to be "high" in a less restrictive environment. In a psychological evaluation on December 17, 2010, student's diagnoses included "Major Depressive Disorder, Recurrent Severe without psychotic features" and "Oppositional Defiant Disorder (chronic and severe)" with "Rule Out" impressions of ADHD, Mood Disorder Secondary to Cerebral Dysrhythmia. Student exhibited a GAF level of 25 at this time. The psychologist recommended intensive individual therapy because "therapy will be extremely difficult," and noted that the Student had a very high potential for developing drug and alcohol problems. [R.Ex. 8 at 242-251].

14. \*\*\* performed a neuropsychological evaluation of the Student in January 2011, revealing average range verbal and non-verbal intellectual functioning. Student scored in the average to low average range for: a) auditory and visual attention; and, b) working memory. The report found a sufficient discrepancy between student's estimated intellectual abilities and student's math score that warranted "at least consulting with [the Student's] home school district regarding student's undergoing a more extensive psychoeducational evaluation to rule out a Mathematics Disorder." [R.Ex. 8 at 235-241].

15. At \*\*\*, the Student received instruction through the \*\*\* School. Minutes of the Student's annual ARDC meeting through the \*\*\* School on February 15, 2011, show the Student accessed the general education curriculum with accommodations in an academic setting of between 8 to 12 students in a class, with faculty/staff available at all times, and escorts between classes. The \*\*\* School discovered the Student did not receive any credit for the first semester of student's \*\*\* grade year at the District. Student made the following grades at \*\*\*: \*\*\* – English \*\*\*; \*\*\* – Math; \*\*\* in \*\*\*; and, \*\*\* – \*\*\*. [R.Ex. 8 at 256-299].

16. By the Student's discharge from \*\*\* on February 21, 2011, student increased student's ability to manage internal emotional states with improved coping and problem-solving skills. Discharge recommendations included continued therapy on interpersonal relationships, self-motivation, and recognition of thinking errors. [R.Ex. 8 at 256].

### **\*\*\* Enrollment – February 2011**

17. After discharge from \*\*\*, the Parents believed that the Student continued to need a therapeutic environment rather than the District in order to learn. The Parents investigated several schools, ultimately selecting \*\*\* and enrolling the Student on February \*\*\*, 2011. The District never proposed or agreed to the Student's placement at \*\*\* in February 2011. [P.Ex. 13 at 7; Tr. at 49, 81-82, and 125-126].

18. \*\*\* is a \*\*\* private school \*\*\*. \*\*\*. [P.Ex. 6 at 3; Tr. at 173-175 and 181].

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<sup>1</sup> All references to pages in Respondent's exhibits omit the leading Bates stamp zeroes.

19. Although teachers are not required to be certified at \*\*\*, at the time of the due process hearing, all but one of the teachers was “Texas certified” according to \*\*\*, Director of \*\*. \*\* provides a structured therapeutic environment to its students with a 1:8 teacher/student ratio but with one-on-one instruction in all subjects. \*\* described that \*\* students have learning differences, but not necessarily academic differences. [P.Ex. 6 at 1; Tr. at 175-186].

20. At \*\*, all students have a 15-minute break each hour with 45 minutes for their schoolwork. The students can gather in a lunch area to socialize by playing games, listening to music, talking on their cell phones, and other similar things. The 15-minute breaks allow \*\* staff opportunities to observe how \*\* students are socializing and provides staff with time to encourage positive peer experiences for socialization by giving individual students projects to do with peers. Students with behavior consequences earn “points” and upon reaching a certain point level of around 120 points, these students must sit during break time with headphones restricting their socialization time. [P.Ex. 9 at 2(0:03-0:04); R.Ex. 5 at 131-149; Tr. 100-101, 177, 209, and 321-322].<sup>2</sup>

21. The \*\* director, \*\*, described the structured tight environment at \*\* with constant supervision by teaching staff utilizing a “tutoring type of rapport” with the students with capacity in each room for 20 to 25 students and a total school capacity of between \*\* students. There are \*\* self-contained core classrooms. The teacher moves from student to student within that environment for instruction. All students have organizers, space to spread out their work, and individual desks that face the wall. Science is the only class utilizing a more traditional classroom with lecturing, notes on the board, and labs. Teacher-student ratios range from 1:8 as the maximum, 1:5 for all math classes, and 1:1 for all \*\* classes. At the DLC, students are not allowed to make zeroes and must master the material at 80% or above. [Tr. at 175-181 and 185-186].

22. At a review ARDC meeting on March 10, 2011, the ARDC discussed the Student’s release from \*\*, student’s \*\* evaluations including the ADHD finding, student’s attendance at \*\*, and student’s medications. During Fall 2010, the Student had \*\* in-patient, \*\* out-patient, and \*\* diagnostic placement at \*\* as well as \*\* overnight stay at \*\* for student’s emotional issues. [P.Ex. 13 at 7].

### **First Due Process Complaint – July 2011**

23. In July 2011, the Parents filed a due process complaint against the District. On October 6, 2011, the Parents and the District entered into a Settlement Agreement in which Petitioner released Respondent from any and all claims arising for educational services by the District through December 20, 2011. As part of this agreement, the District reimbursed the Parents for the Student’s private school tuition for the 2010-2011 school year and for the Fall 2011 semester of the 2011-2012 school year. At the time the Parents signed the Settlement Agreement, they understood that the District was reimbursing them only for the Fall 2011 semester of the 2011-2012 school year. [P.Ex. 1 at 1-4; Tr. at 22 and 92-93; Tr. at 126].<sup>3</sup>

24. The Settlement Agreement provisions specified that the Parents would give no less than 30 days notice of their intent to re-enroll the Student in the District if they would like to return during the 2011-2012 school year to allow the District to: a) schedule an ARDC meeting at a mutually agreeable time; b) to review the Student’s progress; c) consider any new evaluations; and/or, d) revise the Student’s IEP. [P.Ex. 1 at 2 (paragraph 6)].

### **2011-2012 – \*\* Grade**

<sup>2</sup> P.Ex. 9 is a compact disc (“CD”) of the ARDC meeting held on December 14, 2011. For convenience, the CD markers are referenced by track (hour/minute). For example, the first track in the first hour at the third minute marker corresponds to 1(0:03).

<sup>3</sup> Petitioner filed this first due process complaint, received by TEA as Docket No. 266-SE-0711 and assigned to the undersigned Hearing Officer, on July 25, 2011. Based on the parties’ settlement, this docket was dismissed on October 20, 2011.

25. The Student continued in \*\*\* placement for the Fall 2011 semester. Near the end of the Fall 2011 semester, the Parents contacted the District in accordance with the Settlement Agreement to let the District know they would like to re-enroll the Student for the Spring 2012 semester. The District scheduled an ARDC meeting for December 14, 2011. [Tr. at 93-94].

26. The District’s Special Education Director, \*\*\*, the Executive Director for Special Programs, \*\*\*, and the LSSP, \*\*\*, gathered general information on the \*\*\* program in preparation of the Student’s possible return to the District. \*\*\* spoke with the \*\*\* Director by telephone. \*\*\* and \*\*\* visited the \*\*\* campus. \*\*\* admitted at hearing, “We had information not so much about [the Student], but about how the program runs and some of the supports that [the Student] had found useful there.” The District’s \*\*\* school counselor also spoke with the \*\*\* Director regarding grades and transcript issues. [Tr. at 381-382, 423-425, and 456-461].

27. There is no information in the record regarding specific observation of the Student within the \*\*\* setting by District staff in preparation for, or after, the December 2011 ARDC meeting.

**Evaluation Data**

28. Both Parents attended the ARDC on December 14, 2011, with the assistance of an advocate, Mara LaViola. Documents from the December 2011 ARDC meeting do not reflect review of the \*\*\* evaluations of the Student. The ARDC discussed whether the Student’s evaluation was current, but did not discuss the District’s February 2010 FIE or the evaluation data from \*\*\*. The District’s Executive Director for Special Programs, \*\*\*, stated that this data had been discussed in previous ARDC meetings. [P.Exs. 2 at 1-2 and 29, 9 at 1(0:03-0:05); R.Ex. 5 at 94-95; Tr. at 245-246].

29. The December 2011 ARDC meeting did not include a “Review of Existing Evaluation Data” (“REED”). [P.Exs. 2 at 2, 9 at 1(0:03-1:11); R.Ex. 5].

30. During the December 2011 ARDC meeting, the Parents’ advocate requested an FBA; District ARDC documents incorrectly state that the District made this request. District participants agreed with the request and planned to complete the FBA within 45 school days to ensure enough time for the Student to “settle in” and to take some data on student’s transition into the District. [P.Exs. 2 at 24 and 31, 9 at 2(1:07-1:12); R.Ex. 5 at 161-162; Tr. at 246, 265, 280-281, 355-356, and 463].

**\*\*\* and Transition IEP**

31. The December 2011 ARDC discussed the Student’s change from \*\*\* to pursuing \*\*\*. The December 2011 Transition IEP was based on earlier information from the Student in the previous year and does not reflect the discussion of \*\*\*. [P.Exs. 2 at 10 and 29, 9 at 1(0:10-0:12); R.Exs. 4 at 63, 5 at 97-98].

32. December 2011 ARDC participants discussed the Student’s transition needs – both for returning to the District as well as transitioning needs \*\*\*. Because the Student \*\*\*, the Student needed \*\*\*. As the District did not provide a copy of the changes made at the December 2011 ARDC documents to the Parents or their advocate to sign until the end of the ARDC meeting, the Parents and advocate were not aware that ARDC documents show the \*\*\* agreed to by all participants. [P.Exs. 2 at 12, 9 at 5(0:35 - 0:37); R.Exs. 4 at 63, 5 at 188-190; Tr. at 275-277 and 387-388].

33. The December 2011 ARDC discussed a transition plan for the Student’s return to the District as follows:

G/O	*(Goal = G; Objective =0) **(Mastery Criteria = MC) Observation (Ob); Data Collection (DC); Teacher-made Tests (T); Daily Work Samples/Classroom Performance (DW/CP)	MC**
G	[Student] will acquire the skills to successfully transition to *** by	By next annual

	mastering the following objectives at the specified mastery level	ARDC meeting
O-1	[Student] will define interests and abilities related to ***	80% Ob, DC
O-2	[Student] will earn a passing grade in academic course by participating in in-class discussions/activities utilizing various study skills and actively preparing for tests/quizzes	90% DC, DW/CP, T
O-3	[Student] will identify attitudes and behaviors necessary for ***	70% Ob, DC
O-4	[Student] will learn about and demonstrate self advocacy skills (accommodations and assistive technology)	70% Ob, DC

[P.Ex. 2 at 10].

34. The Parents expressed concern during the December 2011 ARDC review of the transition plan that the District had not yet proposed any duplication of the \*\*\* program, successful to date for the Student, but instead discussed previously proposed components. District ARDC members assured the Parents that the ARDC would “talk about other things in a minute.” [P.Ex. 9 at 1(0:12-0:14); R.Ex. 5 at 99].

### **Academic Achievement and Functional Performance**

35. The December 2011 ARDC meeting did not include specific discussion of the “Present Levels of Academic Achievement and Functional Performance” (“PLAAFPS”) section on its own, but the Parents and advocate brought up and discussed PLAAFPS in the context of other issues. Neither the Parents nor the advocate saw the PLAAFPS section of the ARDC meeting documents during the meeting, did not know that only limited items were checked under the behavior category as areas impacting the Student’s academic and functional performance (attention, compliance, and social interactions), and would have asked for additional items to be checked. The December 2011 PLAAFPS section are identical to the checked items in the same section in the December 2010 ARDC documents. [P.Ex. 2 at 5 and 15 at 5; R.Ex. 4 at 55; Tr. at 278-280 and 320].

36. There was limited discussion about the Student’s PLAAFPS at the December 2011 ARDC meeting. The Special Education Director, \*\*\*, commented that the Student’s \*\*\* grades “looked great” and student was “doing beautifully.” The Parents’ advocate commented on the Student’s present levels on arrival at school, with no trouble on school arrival at \*\*\* or \*\*\*. The District ARDC participants agreed to remove the attendance objective. [P.Exs. 2 and 9 at 1(0:22-0:23) and 2(0:01-0:07); R.Exs. 4 and 5 at 104 and 130-133; Tr. at 251 and 312-314].<sup>4</sup>

37. The December 2011 goals and objectives for the Student do not state student’s PLAAFPS. [P.Ex. 2 at 8-11; R.Ex. 4 at 45-48 and 58-61].

### **Behavioral Goals, Objectives, and BIP**

38. The Parents and their advocate disagreed with the December 2011 ARDC proposed behavioral goal and objectives for the Student because they did not reflect the Student’s actual levels of performance. District ARDC participants added additional evaluation criteria suggested by the Parents and their advocate into the objectives. The behavioral goal, to increase benefit from classroom instruction, included four objectives (mastery criteria and evaluation method shown in parentheses): a) follow school rules especially regarding use of \*\*\* (85% – observations, data collection); b) arrive to school on time and stay at school throughout the day (80% – observations, data collection); c) complete academic work with passing grades (70% – observations, data collection, daily work samples/classroom performance); and d) describe and practice how to respond to negative peer interactions (70% – observations, data collection). [P.Ex. 2 at 11; R.Ex. 4 at 46 and 59].

<sup>4</sup> R.Ex. 5 includes a written transcript in four-page format (totaling 522 pages) of the ARDC held on December 14, 2011. For consistency, references to this exhibit will be to Respondent’s page number in the bottom right corner rather than the individual numbers on each page of the four-page format.

39. The Student maintained grades in the “A” and “B” range at \*\*\*. The Parent’s advocate told the December 2011 ARDC that requiring a 70% passing grade for the Student in student’s behavioral objectives would allow student to regress. In response, the ARDC discussed changing the language to “maintain ‘A’s and ‘B’s” with mastery criteria at 90%, but the ARDC documents do not reflect these discussed changes. [P.Exs. 2 at 11 and 9 at 2(0:07-0:09); R.Exs. 4 at 46 and 59, 5 at 133; Tr. at 103 and 313-314].

40. The Parents and their advocate did not agree with the BIP discussed at the December 2011 ARDC meeting because it was not based on any data. At hearing, Ms. LaViola recalled no ARDC discussion of appropriate reinforcers and consequences for the Student; neither student nor the Parents saw the completed BIP page of the December 2011 ARDC meeting documents during the meeting. On this page, multiple items are checked, including “lunch detention” as a consequence or a “pat on the back” as a reinforcer, both of which the Parents’ advocate would not have agreed were appropriate for the Student. [P.Ex. 2 at 7; R.Ex. 4 at 57; Tr. at 269-270 and 320-322].

### **December 2011 ARDC Meeting Documentation**

41. The Student has ongoing health issues that include \*\*\* concerns. At student’s \*\*\* placement, student took \*\*\* to address \*\*\*. The Parents told the December 2011 ARDC that the Student was \*\*\* due to anxiety about returning to school but documents from the meeting do not note the Student’s ongoing health concerns. [P.Ex. 2 at 4; R.Exs. 4 at 54 and 8 at 255; Tr. at 264].

42. During the December 2011 ARDC meeting, participants discussed and extensively revised the proposed goal and objectives for Study Skills based on suggestions from the Parents’ advocate, Ms. LaViola. The ARDC planned for the Study Skills IEP to be implemented in the \*\*\*. [P.Exs. 2 at 8 and 5 at 7; R.Ex. 4 at 47 and 62; Tr. at 306].

### **Credits Earned**

43. The Parents and their advocate expressed concern to the December 2011 ARDC over the few credits earned to date by the Student that were recognized by the District. The Parents brought it to the attention of the District that the Student had not earned any credits at all during student’s Fall 2010 semester when student was in the DAEP and subsequently \*\*\*. At the time of this meeting, the Student was still classified as a \*\*\*. [P.Exs. 2 at 31, 9 at 1(0:17-0:19) and 2(0:59-1:06); R.Exs. 4 at 82, 5 at 101 and 158-161].

44. The Parents brought documents to the ARDC for review reflecting the Student’s credits earned at \*\*\*, but the District ARDC participants did not review this information during the meeting. Instead, the District members gave the Parents forms to sign for release of the “official” transcript documentation, the Parents signed the release forms, and the Parents’ advocate discussed dealing with credit issues outside the ARDC meeting in an administrative meeting. [P.Ex. 9 at 1(0:16-0:20); R.Ex. 5 at 100-102 and 208].

### **Proposed Classes and \*\*\***

45. The December 2011 ARDC discussed only “generic” and not specific classes that the Student would take on the schedule of services, with agreement expressed by the Parents’ advocate that the details would be “hashed out” regarding specific classes in an administrative meeting to be held at an unidentified future time. [P.Ex. 9 at 5(0:41-0:42); R.Ex. 5 at 192 and 207-208].

46. The Parents discussed the Student’s current Spanish class at the \*\*\* with the ARDC in December 2011. Because the Spanish class was a one-year course, if the Student transferred mid-year, student would not receive any credit from \*\*\*, the accredited institution that granted the credit for the coursework done at \*\*\*. The District’s counselor, \*\*\*, explained that the Student would have to make up

the first semester of Spanish if student transferred into the second semester of Spanish for the Spring 2012 semester. \*\*\* suggested that they continue this discussion in the administrative meeting, but did not set a date for such a meeting. [R.Ex. 5 at 207; Tr. at 156-157, 221-222, 235, and 261-262].

47. The \*\*\* would serve as the Student's special education setting, based on December 2011 ARDC documents. [P.Ex. 2 at 20-21; R.Ex. 4 at 71-72; Tr. at 343-344].

48. The \*\*\* proposed by the December 2011 ARDC was basically the same class proposed by the December 2010 ARDC just prior to the Student's \*\*\* placement. District ARDC members described this class as a way for the Student to slowly integrate into general education classes. [P.Ex. 9 at 5(0:24-0:25); R.Ex. 5 at 182; Tr. at 99, 334-335].

49. At the due process hearing, licensed specialist in school psychology ("LSSP"), \*\*\* explained how the District used general information from the \*\*\* program to create a plan for the Student. \*\*\* was involved in both the December 2010 and the December 2011 ARDC meetings for the Student. In both meetings the ARDC proposed the transitions program, but the ARDC was not able to implement the program in 2010 because the Student did not return. In the December 2011 ARDC meeting, \*\*\* recalled the ARDC proposal to put the Student under the \*\*\* with changes to the Student's counseling goals, working on the Student's self-esteem, recognizing triggers for anxiety, and practicing ways to cope with the triggers. This proposed program would vary according to what the Student's needs were day by day with the Student working with the teacher to "kind of brainstorm, problem-solve what student needed, but we would encourage student to be out in as many classes as student could." [Tr. at 456-462].

50. Previously in 2010, the Student was only in \*\*\* before student went to the DAEP. Between the DAEP and before student went into the \*\*\* placement, the Student was on the \*\*\* list with monitoring by a special education teacher with student's general education teachers, but student was never pulled away for any time in that program. [Tr. at 478-479].

51. The \*\*\* Director, \*\*\*, testified at the due process hearing that she was unfamiliar with what the District offered and could not say whether the District's proposed program was appropriate for the Student. [Tr. at 216-217].

### **Frequent Breaks**

52. The Student benefited from the 15-minute breaks each hour at \*\*\*. With an attention span no greater than 50 minutes, the 45 minutes allotted to academic work each hour helped student attend to student's work. The 15-minute breaks also help student transition from one class to another, serving as a natural reinforcer as all the other students are doing the same thing. Under the \*\*\* point system, students who are late receive additional points. Upon reaching a certain point level, students must sit during the 15-minute breaks with headphones instead of enjoying the socialization of the break periods. As the Student did not want to be deprived of student's break time enjoyment, the Student's behavior improved greatly with the \*\*\* point system and 15-minute break situation. [ P.Ex. 9 at 2(0:03-0:04); R.Ex. 5 at 131 and 148-149; Tr. at 321-322].

53. In the December 2011 ARDC meeting, the District's LSSP, \*\*\*, stated that breaks could be built into the Student's program, but did not clarify how this would be implemented. The Parents and their advocate expressed concern about how these breaks could be implemented in the District's school curriculum, especially since breaks would result in the Student walking into the classroom 15 minutes late. At hearing, the advocate expressed concern that the 15-minute breaks could result in a loss of educational opportunity for the Student and also expressed concern about appropriateness of the library setting for these breaks. The minutes of this meeting state that the ARDC was unsure regarding the details of implementation of the frequent breaks at the current time, but the campus principal agreed to

work with staff on “tardies” related to this accommodation. [P.Exs. 2 at 31 and 9 at 2(1:13-1:16), 5(0:27-0:31); R.Exs. 4 at 82 and 5 at 148, 165-167, and 183-185; Tr. at 99-100 and 289-299].

54. At hearing, the District’s Special Education Director, \*\*\*, recalled that District staff during an on-site visit to \*\*\*, observed the smaller teacher to student ratio, breaks between classes, student academic support, and the students’ ability to earn [free] time at the end of the school day. \*\*\* identified things observed in the \*\*\* setting that the District discussed for implementation for the Student, including breaking down student’s assignments and the smaller teacher-to-student ratio. Regarding breaks between classes, \*\*\* confirmed that the District discussed adding breaks to “provide something that looked similar, if not identical, but similar” to \*\*\*. [Tr. at 382 and 390].

55. There is no documentation in the December 2011 schedule of services of any break time for the Student. [P.Ex. 2 at 21; R.Ex. 4 at 72].

### **Monitoring of the Student**

56. The December 2011 ARDC meeting participants discussed possible “covert monitoring” of the Student in school hallways, an issue brought up by the Parents’ advocate. The Parents remained concerned after this meeting about how the Student would be protected from other students who had bullied the Student. [P.Ex. 9 at 1(1:10-1:11); R.Ex. 5 at 129; Tr. at 102-104].

57. At the due process hearing, the Parents and their advocate expressed concern that the program discussed at the December 2011 ARDC meeting could not be implemented on a practical level and did not understand how the \*\*\* would work. It appeared the Student would be expected to self-pace, yet would also be expected to be in a general education classroom and keep up with classes. If the Student took 15-minute breaks between classes at the District, the advocate questioned how the Student could be readily engaged at all times for student’s work. Also, if the Student ended up receiving student’s instruction in the \*\*\*, then student would be in a more restrictive setting than in \*\*\* and would not have the interaction with peers available in the \*\*\* placement. [Tr. at 100-103 and 343-344].

### **Parents’ Proposal – December 2011 ARDC Meeting**

58. Near the end of the December 2011 ARDC meeting, the Parents said that while they wanted the Student to return to the District, they did not believe mid-year was the right time. Instead, the Parents proposed that the Student be allowed to complete the 2011-2012 school year at \*\*\*, look at some transitional things to “ease student” back into the school such as taking an elective class at the District’s \*\*\* campus, and look to the beginning of a school year to bring student back to the District. When the father asked District ARDC participants what would happen if the Student returned and was not successful, as the Parents had worked very hard to get the Student “caught up” at the current time in student’s \*\*\* placement, no one answered his question. Instead, District ARDC members proposed reconvening the ARDC on December 20, 2011. [P.Exs. 2 at 32 and 9 at 7(0:04-0:11), 8(0:02-0:03); R.Exs. 4 at 83 and 5 at 216, 222].

59. The December 2011 ARDC meeting ended without a completed IEP and with no decision made about the Student’s placement. [P.Ex. 9 at 7(0:01-0:18) and 8(0:01-0:07); R.Ex. 5 at 214-223; Tr. at 108-109, 121-123, 131, 143, 386-387, 418-421, 427-428, and 481].

60. On December 13, 2011, \*\*\* Director, \*\*\* wrote a letter at the request of the Parents concerning the Student’s return to the District. The Parents shared this letter near the conclusion of the December 2011 ARDC meeting. In the letter, the \*\*\* Director reported that the Student currently functioned well in the \*\*\* program with drastic improvement in student’s organization and time management skills, work ethic, and grades on assignments, but lacked the confidence and skills necessary to structure student’s work for a smooth transition to public school. According to the \*\*\* Director, it would be in the Student’s best interest to attend \*\*\* for one more semester in Spring 2012 for

adequate preparation prior to a transition to public school. By starting at the beginning rather than the middle of a school year, the Student would avoid mid-year issues of instruction in the public school beginning at a different point in the second semester than where instruction at \*\*\* ended in the first semester. Additionally, the \*\*\* Director stated that the Student's social transitioning would be eased by starting at the beginning of a school year rather than at mid-year. [P.Exs. 2 at 32 and 9 at 7(0:08-0:09); R.Exs. 4 at 49, 83 and 5 at 217-218; Tr. at 127-128, 170, 191-194, and 230-232].

### **December 2011 Communications – District and Parents**

61. In electronic communications (“E-mail”) between the Parents and the District on December 16, 2011, the District’s Executive Director of Special Programs, \*\*\*, requested rescheduling the ARDC meeting set for December 20, 2011, to a date workable for participants between January 9 – 13, 2012. \*\*\* proposed moving the ARDC meeting to allow the District’s legal counsel to attend the ARDC meeting “because of the unique placement you presented.” In reply, the father asked for consideration of the need to get the Student back into school after the holiday as it would not be “fair” to keep the Parents and the Student in limbo throughout the holiday break. The father asked if the ARDC would agree to keep the Student in the \*\*\* placement until the parties came to a conclusion. \*\*\* responded that if the Parents agreed to waive their five-day notice for the District’s attorney to attend, the ARDC meeting could go forward on December 20, 2011. [P.Ex. 4 at 5-6; R.Ex. 3 at 38-39].

62. The Parents did not waive five-day notice for an ARDC meeting with the District’s legal counsel on December 20, 2011, did not submit any corrections to the December 2011 ARDC meeting documents, and did not submit a parent statement. On December 17, 2011, the father sent an E-mail to \*\*\* detailing concerns about carefully transitioning the Student back to the District with consideration of student’s fragile mental state and the opinions of professionals that currently work with student to ensure student does not regress. Just as the District consulted with their attorney, the Parents felt it necessary to consult with their attorney. Based on the advice of legal counsel, the Parents did not want to return to an ARD but expected a response within five days regarding the Parents’ request to keep the Student at \*\*\* for Spring 2012 to work out a transition back to the District. [P.Ex. 4 at 45; R.Ex. 3 at 38; Tr. at 361-363].

63. On December 20, 2011, \*\*\* sent a letter to the Parents stating that the December 2011 ARDC did not finish, and as a result, there was no IEP in place for the Student when school resumed in January 2012. However, \*\*\* suggested that the substantive goals, objectives, and schedule of services drafted by the December 2011 ARDC meeting “can serve [the Student] in the interim” until the ARDC could convene in early January 2012. Additionally, the letter informed the Parents that the District rejected their proposal for the Student to return to \*\*\* for the Spring 2012 semester as the District found no services or accommodations provided by \*\*\* that could not be provided by the District. The letter invited the Parents to provide any additional information regarding the \*\*\* placement for consideration by the ARDC in January 2012. [P.Ex. 4 at 7; R.Ex. 7 at 227].

64. The December 2011 ARDC participants never discussed using the substantive goals, objectives, and schedule of services as an “interim IEP” for the Student. [P.Exs. 2 and 9; R.Exs. 4 and 5; Tr. at 117-118].

65. On December 22, 2011, the Student’s father sent an E-mail reply to \*\*\* letter of December 20, 2011. The Parents believed the goals, objectives, and schedule of services were still in development at the end of the December 2011 ARDC meeting and did not agree to their implementation. The E-mail stated the Parents’ belief that the District could not provide a FAPE to the Student, so the Parents thought they were left with “no choice but to re-enroll” the Student at \*\*\* for Spring 2012 given “the current circumstances and the District’s inability to work with in developing a reasonable, workable, plan that would ensure [the Student’s] continued growth and educational success, and an appropriate program.” The E-mail included the Parents’ expectation that all fees and expenses for Student’s Spring 2012 semester at the \*\*\* placement should be reimbursed by the District. [P.Ex. 4 at 3-4; R.Ex. 3 at 36-37].

66. The Student's father sent an E-mail to \*\*\* on December 27, 2011, stating intention to get the Student back to the District full time by summer/fall of 2012. As a result, Spring 2012 at \*\*\* would allow time for the Student's transition in a program where the Student was successful and also time for the Parents and ARDC to work on a reasonable and workable IEP/BIP. The father wanted to know if the ARDC would agree to the Parent's transition proposal – if so, would be willing to come back to an ARDC meeting in January and if not, the father did not see the point in going to an ARDC meeting. [P.Exs. 4 at 2 and 6 at 1-5; R.Ex. 3 at 35; Tr. at 145-146].

67. On December 27, 2011, \*\*\* replied via E-mail that the District stood ready, willing, and able to provide the Student with a FAPE if and when the Parents decided to re-enroll the Student. Should the Parents change their minds about bringing student back for Spring 2012, \*\*\* told the Parents that an ARDC meeting could be scheduled on January 3, 2012, prior to the start of school on January 5, 2012. [P.Ex. 4 at 2; R.Ex. 3 at 35-36].

### **\*\*\* Spring 2012 Tuition and Expenses**

68. Tuition expenses at \*\*\* for the Spring 2012 semester were \$5,500 with the deposit of \$500 due on November 15, 2011. The Parents had to make a decision whether to re-enroll the Student at \*\*\* to ensure that the Spring 2012 tuition had been paid. At hearing, neither the Student's father nor the \*\*\* director recalled the date Spring 2012 semester tuition payment was due, but the \*\*\* director clarified that parents must sign a promissory note for the tuition. Although parents may pay off the promissory note interest-free, it is not pro-rated if a student leaves early and parents remain obligated for the entire amount of tuition. In addition to the tuition, there is an approximate fee of \$250 for each course through \*\*\* that must be paid prior to the start of the new semester to ensure enough materials. [Tr. at 148, 196-198, 221-222, and 226-230].

69. The Parents paid for the full year of Spanish for the Student in Fall 2011 through \*\*\* at \$200 per semester or \$400 for the full 2011-2012 school year. [Tr. at 222].

70. The Parents produced no other evidence of fees, medical expenses, or out-of-pocket expenses at hearing.

### **Counseling**

71. Around the time the Student was \*\*\* in November 2010, the Student began counseling with licensed clinical social worker \*\*\*. At this time, the Student reported student had no friends in the District and also reported the bullying incidents to \*\*\*. [Tr. at 55-58].

72. Initially, \*\*\* counseled the Student once a week to address sleeping trouble, anxiety, and morning panic attacks that made it difficult to get to school. By contrast, the Student made significant progress by the time of the due process hearing when counseling sessions had decreased to twice a month. \*\*\* noted improvement in the Student's symptoms since attending \*\*\*, with depression symptoms going away, diminishment in anxiety, and increases in the Student's grades and energy level. The Student also made several good friends at \*\*\* with whom student could "hang out" for \*\*\*. [Tr. at 55-62].

73. \*\*\* does not believe it is in the Student's best interest to ever return to the social and learning environment of the District. By contrast, \*\*\* believes \*\*\* provides the necessary environment for the Student, allowing student to feel safe and perform "to student's maximum potential academically." [P.Ex. 10; Tr. at 63].

74. The \*\*\* Director, \*\*\*, provides counseling services to \*\*\* students. She holds an undergraduate degree in Psychology and Education and a graduate degree in Counseling. Although she went through the entire program, the \*\*\* Director did not pursue a Licensed Professional Counselor

certificate. The bulk of the \*\*\* Director's work is counseling \*\*\* students on guidance issues, dealing with feelings, how to decrease anxiety, and helping students deal with situations or people. She primarily uses one-on-one counseling but, depending on the situation, uses group counseling when needed. [Tr. at 133, 172, 187, and 225-226].

75. There is no evidence in the record that the Student regressed with counseling from \*\*\* at \*\*\* and private counseling services with \*\*\* in Fall 2011.

76. The December 2011 ARDC proposed counseling for the Student for 30 minutes every other week when the District's counselor would be at the Student's campus. This was the same amount of counseling previously put in place at the December 2010 ARDC before the Student went to the \*\*\* placement. The December 2011 counseling goal and objectives are the same as the December 2010 goal and objectives, with the addition of "data collection" as an evaluation method. [P.Exs. 2 at 9 and 21, 5 at 6, and 14 at 21; R.Ex. 4 at 48, 72, and 89].

77. Petitioner did not present corroborating evidence regarding the specific details of alleged bullying incidents reported by the Student as the Student was reluctant to release the names of the other students out of fear. Likewise, Respondent did not present any evidence to rebut these alleged past bullying incidents, but expressed willingness to go forward with communication between the campus principal and the Parents regarding any future bullying issues. [P.Ex. 9 at 1(1:06-1:10); R.Ex. 5 at 127-129; Tr. at 284-285].

78. There is no evidence in the record that the FBA that the Parents agreed to at the December 2011 ARDC meeting ever took place. [P.Ex. 2 at 31; R.Ex. 4 at 82; Tr. at 268].

### **Replication of the \*\*\* Program**

79. The District's Special Education Director, \*\*\*, and the LSSP, \*\*\*, believe the District's proposed program discussed in the December 2011 ARDC meeting provided many of the services and accommodations that, by the Parents' report, benefitted the Student at \*\*\*. At hearing, both District ARDC members stated it was not necessary to replicate the \*\*\* program in order to provide the Student with a FAPE. [Tr. at 383-384 and 463-464].

80. The Parents and their advocate did not demand that the District replicate all the \*\*\* program for the Student at the six-hour December 2011 ARDC meeting, but, beginning in the first hour of the meeting, did ask how the District could replicate some of the things that were successful at \*\*\*. The Parents and their advocate discussed these items throughout the ARDC, such as hourly 15-minute breaks, hallway monitoring, and maintaining the grade increase student made at \*\*\*. [P.Ex. 9 at 1(0:13-14), 2(0:07-0:08), and 2(1:10-1:16); R.Ex. 5 at 99, 133, and 148].

### **Legal Standard**

Public school districts receiving federal funding must develop and provide an appropriate program to eligible students with disabilities. 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 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 LRE; 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. No particular weight is given to any of these factors over the other(s). The Fifth Circuit has treated the *Michael F.* factors as indicators of when an IEP meets the requirements of IDEA, but has not held that district courts are required to consider them or to weigh them in any particular way. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F.3d 285, 293 (5<sup>th</sup> Cir. 2009). *See also, e.g., Houston Indep. Sch. Dist. v. V.P.*, 566 F.3d 459, 467 (5<sup>th</sup> Cir. 2009); *Adam J. v. Keller ISD*, 328 F.3d 804, 810 (5<sup>th</sup> Cir. 2003); *Bobby R., supra*, at 347.

Under IDEA and its implementing regulations, a procedural violation does not result in a denial of FAPE unless the violation results in the student’s loss of educational opportunity or seriously infringes upon the parents’ opportunity to participate in the provision of FAPE for the student. 34 C.F.R. §300.513(a)(2); *Adam J., supra*.

The applicable limitations period in this dispute runs forward from the October 2011 Settlement Agreement that released all FAPE claims up through December 20, 2011, and put specific agreements in place for any future re-enrollment of the Student.<sup>5</sup> Petitioner, as the party challenging the District’s program under IDEA, bears the burden of proof to establish by a preponderance of the evidence that the 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)

In this dispute, Petitioner seeks reimbursement of private school placement and bears the burden to prove the appropriateness of the private school placement to show an entitlement to private placement reimbursement. *Sch. Comm. of Town of Burlington, Mass. v. Dept. of Educ. of Mass.*, 471 U.S. 359, 369 (1985), 105 S.Ct. 1996, 2002. The IDEA does not categorically prohibit reimbursement of private school placement costs even if the student has not previously received special education and related services from the public school. *Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2484, 2490-2496 (2009).

If parents unilaterally withdraw an eligible student with disabilities from a public school district and place the student into private school, public school authorities may be ordered to reimburse parents for private school expenses *only if* the parents establish that: 1) an IEP calling for placement into the public school was inappropriate under IDEA; and, 2) the private school placement by the parents was proper under IDEA. *Burlington, supra*, at 370, 105 S.Ct. 1996, 202-203 (emphasis in the original); *See also Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993), 14-16, 114 S.Ct. 361, 366. IDEA’s implementing regulations allow a school district to present evidence at a due process hearing to show whether or not a hearing officer should reduce or deny reimbursement of these costs if certain conditions apply. *See* 34 C.F.R. §300.148(d).

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<sup>5</sup> P.Ex. 1.

## Discussion

This controversy concerns a student with longstanding and serious emotional issues who previously attended the District, became IDEA-eligible at the District for ED, continued to have serious emotional issues resulting in multiple hospitalizations, and ultimately began receiving student's education in a private placement selected by the Parents at a private school, \*\*\*, without the input or approval of the District. This dispute becomes more complicated, however, because the Parties settled a previous due process complaint in October 2011 with the "Settlement Agreement" that specifically addressed possible re-enrollment of the Student back into the District "during the 2011-2012 school year" with three steps.<sup>6</sup> It is undisputed that the Parents timely gave notification of their intent to re-enroll the Student in Fall 2011 and the District timely convened an ARDC meeting on December 14, 2011. The parties disagree, however, on whether the District considered the Student's evaluation and current progress prior to revising the Student's IEP with full participation of the Parents and their advocate.

### **Evaluation Review**

When the ARDC convened on December 14, 2011, the District ARDC participants determined that the Student's evaluation was "current" because the District's February 2010 evaluation was less than three years old. 34 C.F.R. §300.303(b)(2). However, the ARDC did not discuss the available evaluation on the Student in the form of a REED for review of all existing evaluation information. 34 C.F.R. §300.305(a). Under IDEA and its implementing regulations, a school district *must*, as part of an initial evaluation or a reevaluation, review existing evaluation data on an eligible student, including: 1) evaluations provided by the parents of the student; 2) current classroom-based, local, or State assessments, and classroom-based observations; and, 3) observations by teachers and related service providers. 20 U.S.C. §1414(c)(1); 34 C.F.R. §300.305(a)(1) (emphasis added). On the basis of a REED review, together with input from the parents of an eligible student, the ARDC must then make a further determination of any modifications that are needed to the special education and related services for the student. 34 C.F.R. §300.305(a)(2). The December 2011 ARDC did not discuss the \*\*\* evaluation results, evaluation data more recent than the District's February 2010 FIE. Of interest, the \*\*\* neuropsychological examination in January 2011 noted the presence of ADHD with a recommendation that the Student's home school district perform more psychoeducational evaluation to "rule out" a Mathematics disorder.<sup>7</sup> Although the District had a copy of the full \*\*\* evaluation data at the March 2011 ARDC meeting, the December 2011 ARDC did not discuss this evaluation and get any input from the Parents to consider whether there was a need for more evaluation.<sup>8</sup>

The District ARDC participants agreed to perform an FBA of the Student at this meeting after the Parents' advocate requested this evaluation, noting that the ARDC did not refuse any evaluation requests. I find this scant explanation for why District ARDC participants failed to look at all available evaluation data – data in the District's possession since approximately March 2011 – and discuss other assessment areas suggested by professionals who treated the Student. A school district is required to assess an eligible student in all areas of suspected disability. 34 C.F.R. §300.304(c)(4). Although District ARDC members made a visit to \*\*\* for general information, no testifying witness could recall the exact date of the visit and no one reported actual observation of the *Student* within \*\*\*. Based on the record before me, I conclude the District did not undertake any new evaluation efforts prior to the December 2011 ARDC meeting – including requesting simple updates from current teachers at \*\*\*. Neither did the ARDC discuss the *possibility* that more evaluation was now indicated to assess possible math problems or ADHD – the areas the \*\*\* evaluations previously identified as needing more review.

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<sup>6</sup> P.Ex. 1 at page 2 (paragraph 6) (emphasis added).

<sup>7</sup> R.Ex. 8 at 235-236.

<sup>8</sup> P.Ex. 13 at 7.

## Current Progress at \*\*\*

The December 2011 ARDC meeting did not include classroom observation information from the Student's current private school teachers. There is no indication that the District requested such information from \*\*\* or invited any \*\*\* staff to come to the December 2011 ARDC meeting to report on the Student's progress and needs. 20 U.S.C. §1414(c)(1)(A); 34 C.F.R. §§300.320(a)(1) and 300.324(b).<sup>9</sup> Instead, the Parents with the assistance of their advocate, attempted to tell the District how the Student performed at \*\*\*. As discussed above, the District put on evidence through testimony of three witnesses regarding "general" information gathering about \*\*\* with a phone call presumably close-in-time to the December 2011 ARDC meeting and an on-site visit at an unspecified date. There was no review of the Student's recent work samples at \*\*\*. The District provided no information of any observation by District staff *specifically of the Student* within the \*\*\* setting in preparation for the December 2011 ARDC meeting.

Under IDEA and its implementing regulations, an IEP must contain a statement of an eligible student's PLAAPS. 20 U.S.C. §1414(d)(1)(A)(I); 34 C.F.R. §300.320(a)(1). The record before me shows the District did not specifically discuss the Student's present functioning in the December 2011 ARDC, but the documentation of the meeting filled out the PLAAPS section.<sup>10</sup> As the December 2011 meeting progressed and the participants began to revise the Student's previous IEP goals and objectives, the testimony and ARDC documentation is silent on discussion of the Student's PLAAPS during individual goal/objective discussions. As a result, the goals and objectives and corresponding mastery levels, are based on conjecture without a clear understanding of the Student's current levels.

## Previous 2010 Placement and Program

Respondent asserts that the District never had a chance to implement the last agreed-upon placement and program developed in December 2010 because the Student withdrew from the District. The District readily admitted it is this placement and program that the District used as a "starting point" for the December 2011 ARDC meeting discussions.<sup>11</sup> The District's December 2011 proposed program placed the Student into the \*\*\* using many elements of the previously-agreed 2010 program during that ARDC meeting.<sup>12</sup> By contrast, Petitioner argues that the District December 2011 ARDC members indeed came to the ARDC with a program to offer the Student, yet pre-determined the program as they offered no alternative program but the \*\*\*.

The evidence before me shows that Respondent, indeed, did not get to implement the 2010 IEP for the Student because of the serious on-going emotional needs, the DAEP placement, and absences that led to the Student's long-term placement into \*\*\*. With the Student's subsequent parental placement at \*\*\*, the evidence shows student made steady gains through Spring 2011 and into Fall 2011 not only in behavior improvement but also with peer interactions. Student's academic progress greatly improved, and the District acknowledged student was "doing very well" with "A's" and "B's."<sup>13</sup> This was a marked improvement in the Student's functioning levels in Fall 2010 when student \*\*\* and when student \*\*\* in the 2011-2012 school year. The preponderance of the evidence established that the Student's self-esteem increased in student's program at \*\*\* together with student's on-going private counseling sessions. Student made significant academic improvement with grades measured under strict standards through \*\*\*, a fully accredited entity. I conclude that the Student was in a very different place emotionally and academically at the end of the Fall 2011 and had made great strides in student's \*\*\* placement.

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<sup>9</sup> P.Exs. 2 at 33-34 and 9 at 1(0:01-0:03); R.Exs. 4 at 84 and 5 at 93.

<sup>10</sup> P.Ex. 2 at 4; R.Ex. 4 at 54.

<sup>11</sup> Tr. at 404-405.

<sup>12</sup> P.Ex. 14 at 22-23; Tr. at 390.

<sup>13</sup> P.Ex. 9 at 1(0:14-0:15); R.Ex. 5 at 100.

Review of the \*\*\* placement proposal by the December 2011 ARDC meeting is confusing at best. While the December 2011 ARDC documents show a self-contained setting for the Student, the ARDC discussed letting the Student go to the general education setting as often as tolerated, with the \*\*\* teacher accompanying student to classes. It remained unclear, however, how this would be accomplished, how student could take 15-minute breaks to re-group between classes, and how student would be able to keep up with student's work even with daily "check-ins" with teachers to monitor student's organizational skills. The December 2011 ARDC had no information that the Student would be able to tolerate a large general education class without the one-on-one support and the therapeutic environment student currently had at \*\*\*. 34 C.F.R. §300.117. It is understandable that the Parents and their advocate would want more clarity as to how this Student, currently in a \*\*\* private \*\*\* school, would be able to make the change to a \*\*\* public \*\*\* school with enough supports and scheduling in place to ensure student did not regress under the pressure to self-monitor. Also, the Parents had great concern about credit recoupment. The vague plan to have an "administrative meeting" outside the December 2011 ARDC meeting to discuss such issues left these important issues unclear.

Petitioner argues that Respondent did not consider a continuum of placements for the Student, but only the \*\*\* placement in the December 2011 ARDC. The record evidence of the December 2011 ARDC meeting discussions and documentation supports Petitioner's view. Respondent's argument that the Parents waited until the end of the ARDC meeting to discuss their proposal is not borne out by careful review of this meeting discussion.<sup>14</sup>

Respondent argues that as the ARDC planned to come back to finish the meeting, the Parents' refusal to return to an ARDC meeting kept the District from completing the IEP, from evaluating the Student, or ultimately placing the Student into any program. Respondent believes this case is thus not ripe and requires further factual development. See, e.g., *Monk v. Huston*, 340 F.3d 279, 282 (5<sup>th</sup> Cir. 2003) (noting general ripeness principles direct courts to dismiss a case or issue for lack of ripeness if it is abstract or hypothetical). I disagree. In the case before me, the Student faced the possibility of a very real risk if student returned to the District without a proper program in place even though the Student's Parents fulfilled the 30-day notice requirement set out in the Settlement Agreement for notification of their intent to re-enroll the Student in Spring 2012.

Obviously, the possibility of the Student's return for Spring 2012 was envisioned by the phrase "return during the 2011-2012 school year" in the Settlement Agreement when, in another paragraph of the same agreement, the Parents released the District of its obligation to provide a FAPE "up through December 20, 2011."<sup>15</sup> When ARDC did not conclude the Student's IEP on December 14, 2011, the ARDC appropriately scheduled another meeting on December 20, 2011, cancelled only when the District decided to involve its legal counsel. Now the District had to notify the Parents within five days of the new meeting date, or had to obtain waiver of consent from the Parents. 34 C.F.R. §§300.322 and 300.503; 19 TEX. ADMIN. CODE §§89.1015 and 89.1045. At this juncture, the Parents likewise contacted their legal counsel, refused to waive the five-day notice requirement, and sent additional communication to the District as the Parents grappled with the quickly-approaching issue – where would the Student be attending school in January 2012?

Ultimately, the Executive Director responded to the Parents' request by written letter on December 20, 2011, making it clear that there were "no services or accommodations" provided by \*\*\* that the District believed it could not provide, yet the discussion at the end of the December 2011 ARDC meeting did not include any response to the Parents' transition request. This letter proposes an "interim IEP" – although no one discussed the concept in the December 2011 meeting. I find that this rejection of the Parents' proposal was outside the ARDC process and kept the Parents from fully participating in

<sup>14</sup> Respondent's Amended Closing Argument at 5-6. Compare, e.g., P.Ex. 9 at 1(0:12-0:14); R.Ex. 5 at 99.

<sup>15</sup> P.Ex. 1 at 2 (paragraphs 4 and 6).

the decision-making process. See, e.g., *W.G. v. Target Range School District No. 23*, F.2d 1479 (9<sup>th</sup> Cir. 1992) (school district had to conduct an IEP meeting that fully included the parents in the process with meaningful input). The invitation for the Parents to return to an ARDC meeting in January in this letter ignored the need to make a clear decision about where the Student would go to school. The subsequent communications between the parties did not lessen this issue for the Parents with the offering of a January 3, 2012, date for a meeting.

On the record before me, I conclude that the District's ARDC members pre-decided not to offer any other placement to the Student even though the preponderance established the efficacy of \*\*\* placement for this Student at this time. Even though the Parents and their advocate were able to speak at the ARDC meeting with input to goals and objectives, the District offered no other placement options. *Id.* at 1484-1485. This was a procedural violation that deprived the Student through student's Parents meaningful participation in the ARDC process. See also *Knable v. Bexley City Sch. Dist.* 238 F.3d 755, 766 (6<sup>th</sup> Cir. 2001)(school district representatives decided not to offer intensive applied behavioral analysis services despite evidence of individual need for those services).

I find that the District failed to comply with the procedural requirements of IDEA regarding the development of the program offered to the Student in December 2011. I look to whether this program was reasonably calculated to provide a requisite benefit to the Student that would not produce regression.

Applying the four factors of *Michael F.* to this dispute, the educational plan offered by the District in December 2011 was not based on the Student's current performance. The offered placement at the \*\*\* was not the LRE as a special education setting. The District's plan did not clarify how the Student would make incremental progress, if at all, into the general education classroom setting. The offered program delivery was unclear – including what classes, where breaks would be held, and a myriad of other details left unspecified in such a way that no "interim IEP" existed after the December 2011 ARDC. Finally, the academic and non-academic benefits of the proposed program are also unclear, such as only "generic" classes had been specified and the non-academic factors of lunch, hallway issues, and breaks were likewise vague that could address the Student's unique needs. I conclude that the offered December 2011 program did not provide the Student with a FAPE under the *Michael F.* factors. *Michael F.*, *supra*, at 253.

It was highly likely that the Student, if overwhelmed, would regress. The Student had great success in student's private placement with one-on-one instruction and in a smaller setting without any additional hospitalizations. It was understandable that the Parents feared this serious risk and decided to keep the Student in the \*\*\* placement under the time crunch of the December 2011 offering from the District. The preponderance of the evidence before me established that the Student made progress in student's private placement, the Student earned academic credits from an accredited institution, and student's symptoms lessened. The placement was reasonably calculated to allow the Student to continue to receive an educational benefit. I find that it was appropriate for the Parents to continue this private school placement for the Spring 2012 semester and are entitled to reimbursement of the tuition and fees only for the Spring 2012 semester. Compare, *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1008 (5<sup>th</sup> Cir. 2010).

Finally, I turn to whether the Parents were unreasonable in their refusal to go back to an ARDC meeting in late December 2011 or in early January 2012 before making the decision to go forward with the Spring 2012 enrollment at \*\*\*. I decline to make such a finding as the Parents' actions were reasonable under these unique facts. While I decline to reduce the award, I likewise do not award any future tuition to the Parents as requested and limit reimbursement to the Spring 2012 enrollment and \*\*\* expenses only, excluding the 2011-2012 Spanish \*\*\* course paid in Fall 2012.

## 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. The applicable statutory period in this dispute runs from the date of the signed Settlement Agreement, October 6, 2011, forward. 20 U.S.C. §1400, *et. seq.*, and its implementing regulations; 19 TEX. ADMIN. CODE §89.1151.
2. Petitioner, as the party who challenged the school district's eligibility determination or offer of services under IDEA, bears the burden of proof in this dispute. Petitioner met this burden to show the proposed December 2011 program offered to the Student was not reasonably calculated to provide progress rather than regression or trivial educational advancement. *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000); *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. Petitioner met the burden to prove the December 2011 program offered by Respondent did not provide a free appropriate public education ("FAPE") to Petitioner.<sup>16</sup> 34 C.F.R. §§300.17, 300.101, 300.148, and 300.513(a).
4. Petitioner met the burden to show the proposed December 2011 educational program and placement of the Student was not based on the Student's current and unique educational needs, was not in the least restrictive environment, and did not consider a continuum of alternative placements. 34 C.F.R. §§300.114(a)(2), 300.115, 300.116, 300.117, 300.303(b)(2), 300.304(c)(4), 300.320(a)(1), and 300.324(b); 19 TEX. ADMIN. CODE §89.1055(e).
5. Petitioner met the burden to show predetermination of the Student's placement at the Admission, Review, and Dismissal Committee ("ARDC") meeting in December 2011 that constituted a procedural error. This error denied the Parents opportunity to be full participants in the December 2011 ARDC meeting and impeded the Student's right to a FAPE. 34 C.F.R. §§300.305(a), 300.322, 300.324(b), 300.327, 300.501, 300.503, and 300.513(a)(2); 19 TEX. ADMIN. CODE §§89.1015, 89.1045, and 89.1050(h); *Adam J. v. Keller ISD*, 328 F.3d 804 (5<sup>th</sup> Cir. 2003).
6. Petitioner met the burden to show the private placement of the Student at the \*\*\* ("\*\*\*\*") was appropriate and reasonably calculated to enable the Student to receive educational benefits. 34 C.F.R. §300.148(c).
7. Petitioner met the burden to show the Student's private counseling services and counseling services available at \*\*\* in Spring 2012 were appropriate to meet the Student's counseling needs and resulted in educational benefit. 34 C.F.R. §§300.34(c)(2) and 300.148(c).
8. Petitioner met the burden to show an entitlement to reimbursement for the Spring 2012 tuition in the amount of \$5,500.00 and Spring 2012 course fees for

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<sup>16</sup> For ease of reference, abbreviations are repeated in this section.

\*\*\*, specifically excluding the 2011-2012 Spanish course, \*\*\* administered at the private placement at \*\*\*. 34 C.F.R. §300.148(c).

9. Petitioner did not meet the burden to show entitlement for reimbursement for the 2011-2012 Spanish \*\*\* course in the amount of \$400.00 paid in Fall 2011 \*\*\* administered at the private placement at \*\*\*, and did not meet the burden to show entitlement to any other fees, out-of-pocket expenses, or medical expenses. 34 C.F.R. §300.148(c).
10. Petitioner took reasonable action to re-enroll the Student in the private placement of \*\*\* for Spring 2012 after the December 2011 ARDC meeting. 34 C.F.R. §300.148(d).

## 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 **GRANTED** as follows:

Petitioner is entitled to reimbursement for the Spring 2012 tuition to \*\*\* in the amount of \$5,500.00;

Petitioner **SHALL**, within 10 working days of this order, present proof of payment of this amount to the District.

Petitioner is entitled to reimbursement for all \*\*\* course fees incurred within the Spring 2012 Semester at \*\*\* for the Student for coursework through \*\*\*, specifically **excluding** any reimbursement for the 2011-2012 Spanish \*\*\* course paid in Fall 2011;

Petitioner **SHALL**, within 10 working days of this order, present proof of payment for any such \*\*\* coursework to the District.

Respondent **SHALL**, within 20 working days of receipt of proof of payment from Petitioner specified above, **REIMBURSE** Petitioner for the tuition and coursework fees specified above.

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

Signed this 7<sup>th</sup> day of August 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/ PARENTS,  
Petitioner

§  
§  
§  
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§

BEFORE A SPECIAL EDUCATION

v.

HEARING OFFICER

ROCKWALL INDEPENDENT  
SCHOOL DISTRICT,  
Respondent

FOR THE STATE OF TEXAS

SYNOPSIS OF DECISION

ISSUE 1: *Whether the District’s Spring 2012 Individualized Educational Program for the Student was reasonably calculated to provide a free, appropriate public education (“FAPE”)?*

HELD: For the Student

CITATION: 34 C.F.R. §§300.17, 300.101, 300.148, and 300.513(a);  
*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 2: *Whether the District proposed an appropriate educational placement of the Student, based on the Student’s educational needs, in the least restrictive environment?*

HELD: For the Student

CITATION: 34 C.F.R. §§300.114, 300.115, 300.116, and 300.117;  
19 TEX. ADMIN. CODE §89.1055(e).

ISSUE 3: *Whether the District’s failure to consider parental input constituted a failure to allow meaningful participation of the parents that resulted in a denial of FAPE for the Student in Spring 2012?*

HELD: For the Student

CITATION: 34 C.F.R. §§300.305(a), 300.322, 300.324(b), 300.327, 300.501(c), 300.503, and 300.513;  
19 TEX. ADMIN. CODE §§89.1015, 89.1045, and 89.1050;  
*Adam J. v. Keller ISD*, 328 F.3d 804, 810 (5<sup>th</sup> Cir. 2003).

ISSUE 4: *Whether the District delayed the initiation and completion of the Student’s Full and Individual Evaluation to determine present levels of academic achievement and functional performance in all areas of need?*

HELD: For the Student

CITATION: 34 C.F.R. §§300.303(b)(2), 300.304(c)(2), 300.305(a), 300.320(a)(1), and 300.324(b).

ISSUE 5: *Whether the Student’s parents should be reimbursed for all out-of-pocket expenses, including expenses for educational services, incurred during the applicable statutory period as a result of the District’s failure to provide a FAPE?*

HELD: For the Student

CITATION: 34 C.F.R. §§300.148 and 300.513(a).

ISSUE 6: *Whether the Student’s parents should be reimbursed for the costs of private placement for the Spring 2012 semester, including travel expenses, tuition, books, and all other associated costs?*

HELD: For the Student

CITATION: 34 C.F.R. §§300.34(c)(2), 300.148 and 300.513(a).