

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

DECISION OF THE HEARING OFFICER

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

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v.

DOCKET NO. 303-SE-0612

**KLEIN INDEPENDENT
SCHOOL DISTRICT,
Respondent**

REPRESENTING PETITIONER:

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STUDENT, b/n/f/ PARENTS, § BEFORE A SPECIAL EDUCATION
Petitioner §
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v. § HEARING OFFICER
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KLEIN INDEPENDENT §
SCHOOL DISTRICT, §
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DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner *** (“the Student”), by next friends, *** and *** (“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 Klein Independent School District (“the District”).

Petitioner initially appeared *pro se*. At all times during this litigation, Attorney Amy C. Tucker represented Respondent. The Texas Education Agency (“TEA”) received this due process request on June 8, 2012, and issued the notice of filing on June 11, 2012. The initial procedural schedule set the hearing for July 26, 2012, and the Decision Due Date for August 25, 2012. At the first telephonic pre-hearing conference on July 2, 2012, Petitioner announced plans to retain legal counsel. On July 12, 2012, Attorney Michael P. O’Dell gave notice of appearance on behalf of Petitioner. A second telephonic pre-hearing conference occurred on July 13, 2012, and the parties jointly sought a continuance, granted for good cause shown, to allow a two-day hearing setting on September 5-6, 2012, and revising the Decision Due Date to October 6, 2012.

On August 3, 2012, Petitioner filed a brief on the appropriate allocation of the burden of proof in this dispute. Respondent filed a response to Petitioner’s brief on August 9, 2012. After consideration of parties’ filings on the issue, the undersigned Hearing Officer communicated in writing to the Parties the ruling that Petitioner bears the burden of proof in this dispute and deferring analysis and discussion of the burden of proof for the Decision of the Hearing Officer.¹

The hearing convened as planned in the District’s Instructional Center in Klein, Texas, on September 5, 2012. The hearing lasted one rather than the anticipated two days. Prior to the conclusion of the hearing, the parties sought leave to file written closing statements in lieu of oral closing argument. For good cause shown and by agreement of the parties, revisions to the procedural schedule set the deadline for submission of the written closings to October 3, 2012, and extended the Decision Due Date to October 15, 2012. The parties timely submitted their written closings and the record closed on October 3, 2012. The Decision of the Hearing Officer was timely rendered and forwarded to the parties on October 15, 2012.

Petitioner complains of the following actions or inactions of Respondent that have denied the Student a free appropriate public education (“FAPE”):

1. Failure to propose an educational placement in the least restrictive environment (“LRE”) by proposing a more restrictive placement of the Student for 2012-2013 from the resource setting into a developmental classroom for reading, language, and math instruction; and,
2. Failure to provide the *** program for Petitioner during the 2011-2012 school year.

As relief, Petitioner seeks the placement of the Student into a resource setting for reading, language, and math instruction.

¹ Discussion of the Burden of Proof appears in the section “Allocation of the Burden of Proof” below.

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

Findings of Fact

Background

1. The Student resides within the jurisdictional boundaries of the District with student's Parents. At the time of the hearing, the Student was *** years old in the *** grade at *** School. [Pleading file; Joint Exhibit ("J.Ex.") 1 at 24; Transcript ("Tr.") at 68, 124, and 243-244].

2. The Student was ***. Multiple health problems developed for the Student including ***. Student required numerous surgeries to address these issues including ***, ear surgery, and eye surgeries. At age two, student was diagnosed with ***. Over the course of student's life, student's Parents ensured that student receive many recommended therapies including physical therapy, occupational therapy, and speech therapy. Student has made good progress with the assistance of these therapies, including student's ambulation progression from use of a walker, to crutches, and to independent walking. [J.Exs. 4 at 4, 6 at 1, 7 at 1, 8 at 16, and 9 at 1; Tr. at 73-74].

3. The Student currently qualifies for special education and related services under the disability classifications of Orthopedic Impairment ("OI"), Other Health Impairment ("OHI"), and Speech Impairment ("SI"), but does not qualify under the disability classifications of Intellectual Disability or Traumatic Brain Injury. [J.Ex. 1 at 2; Tr. at 20 and 73].²

4. The Student has significant and continuing receptive and expressive language deficits. In August 2011, the District performed a re-evaluation of the Student that included the Clinical Evaluation of Language Fundamentals-4 ("CELF-4"), a test used to determine abilities in the receptive and expressive domains. On the CELF-4, the Student's Core Language Score of *** fell within the 1st percentile. The District's educational diagnostician, *** administered the Kaufman Assessment Battery for Children-II ("KABC-II") to assess the Student's overall intellectual functioning. On the KABC-II, the Student achieved a Standard Score of *** within the 0.1 percentile, or with 99.9% of the Student's peers functioning at a higher level. At hearing, *** explained that this score did not change when the expressive and receptive language subtests were removed. The Student received student's lowest overall score on the KABC-II in the area of Learning, the area that involves student's long-term memory ability. [J.Ex. 4 at 6 and 11-12; Tr. at 100-102].

5. The August 2011 re-evaluation included the Woodcock-Johnson III Tests of Achievement ("WJ III") for assessment of the Student's reading, writing, and math academic achievement. The WJ III is a nationally-normed test that allows comparison to peers across the nation. The Student scored at the "Very Low" level at less than 0.1 percentile on Broad Reading, Broad Math, and Broad Written Expression subtests of the WJ III. On the Basic Reading Skills subtest on the WJ III, student scored at the "Very Low" level at the 1st percentile. [J.Ex. 4 at 30; Tr. at 105-107].

6. Due to student's disabilities, the Student has difficulty in acquiring and retaining new information. At hearing, student's 2011-2012 teachers note that student must practice a skill each day for weeks and months to reach mastery. Once mastered, if the skill is not practiced for a period of time, the Student will exhibit regression after long breaks. Student also exhibits difficulty remembering what student had to eat or what happened at school from the morning to the afternoon. Frequently, student asks a question or tells a story and then forgets that student has done so, repeating the process again throughout the day. [J.Exs. 1 at 2-3 and 9 at 2; Tr. at 48 and 93, 154-157, 175-177, and 205].

7. The Student has significant attention problems that disrupt student's learning despite the use of behavioral interventions. Student's educational program includes a Behavioral Intervention Plan ("BIP") focused on sustained

² The Texas Education Code at §7.063 requires, prospectively, that the State Board of Education Rules use the terms and phrases listed as preferred under the person first respective language initiative in Chapter 392 of the Texas Government Code for proposing, adopting, or amending rules and reference materials, publications, and electronic media. TEX. GOV'T CODE §92.002; TEX. EDUC. CODE §7.063. Currently, IDEA's implementing regulations retain the classification of "Mental Retardation" for students with an "Intellectual Disability." 34 C.F.R. §300.8(c)(6); See also 19 TEX. ADMIN. CODE §89.1040(C)(5). The terminology "Intellectual Disability" will be used in place of "Mental Retardation" in deference to the person first respective language initiative preference.

attention. The Student's behavior, however, does not disrupt others and student's Parents and educators describe student as "delightful." [J.Ex. 1 at 34-36; Tr. at 48, 93, and 194].

8. The Student began taking medication for student's attention issues in approximately *** grade (2010-2011). Resource teacher, *** observed that while the medication has helped with student's attention and frustration issues, student's comprehension difficulties remain. ***, a teacher with *** years of teaching experience who taught the Student for two years, also noted that it takes the Student a long time to remember things and student does not reconnect to things student has previously learned, resulting in a constant "spiraling back" for the Student to be able to move forward under student's educational program. [Tr. at 172-173, 182-183].

9. Because of the Student's significant deficits, all evaluations of the Student since 2008 recommend that student's curriculum focus on functional academic skills designed to increase student's independence and self-sufficiency in the future. Also, since October 2008, the Student's Admission, Review, and Dismissal Committee ("ARDC") recommends instruction within the developmental classroom. [J.Exs. 4 at 35, 8 at 7, 18-19, and 9 at 7; Tr. at 219].

2010-2011 – * Grade**

10. During student's ***-grade year in 2010-2011, the Student received English Language Arts ("ELA"), Reading, and Math in the special education developmental classroom but received Science, Social Studies, and other electives in the general education classroom. In May 2011, the ARDC convened to design student's ***-grade 2011-2012 program. At this point, the Student's educators recommended changing delivery of the Student's science and social studies curriculum to the special education developmental classroom from the general education classroom due to the ongoing increasing difficulty level in the general education classroom. The Student's parents disagreed with this proposal and requested as much resource placement as possible. The ARDC reached a compromise that kept the Student in the developmental classroom for ELA, Reading, Math, Science, and Social Studies classes, but also added an additional seven hours per week of reading and math instruction in a special education resource classroom. As a result, the Student would receive twice the amount of reading and math instruction as other ***-grade students. [J.Ex. 3 at 19 and 25; Tr. at 31].

11. The Student successfully met standards in 2011 on the Texas Assessment of Knowledge and Skills – Alternate ("TAKS-Alt"). [J.Ex. 10; Tr. at 50-51].

12. The deliberations page of the May 2011 ARDC meeting state that the *** program will be a component of the reading instruction in the Student's special education resource classroom, but ARDC documents of this meeting do not state this would be the "only" methodology used with the Student. The *** program is a research-based reading system that assumes a basic reading level of ***. Under the *** umbrella, the program developed a second lower level program – *** – that targets phonics, letter-word identification, and letter-sound combinations down to the pre-kindergarten level. [J.Ex. 3 at 26; Tr. at 228-229].

2011-2012 – * Grade**

13. ***, Executive Director of Student Support Services for the District, suggested the use of the *** program for the Student's reading skills during the May 2011 ARDC meeting. Although the District used *** with the Student several times, student's reading skills were too low and the initial diagnostic testing confirmed it was an inappropriate strategy. The District attempted the lower level program, ***, but that program proved inappropriate for the Student as well. [Tr. at 193 and 228-232].

14. Resource teacher *** had available the *** program as a teaching strategy during 2011-2012, but did not use the strategy with the Student. [Tr. at 188-189].

15. Respondent did not provide notice to the Parents that the *** or *** strategies were not used with the Student. [Tr. at 36 and 232].

16. Petitioner made no allegation, and presented no evidence at hearing, that the reading methodologies actually used with the Student during the applicable time period were inappropriate or that the Student suffered any educational harm as a result.

17. The Parents do not allege any failure to receive periodic progress reports on the Student throughout the pertinent time period of this dispute. [J.Exs. 10-13].

18. By the end of the Student's 2011-2012 ***-grade year, the Student successfully mastered all of student's individualized educational plans ("IEPs") that included the added emphasis of about seven hours of reading and mathematics instruction. [J.Ex. 11; Tr. at 45, 49, 86, 90, 127, 163-164, 183, and 210].

19. Although the Student mastered all student's 2011-2012 goals, student remained at a beginning ***-grade reading level, advancing from level *** to level ***. By the end of the school year, student read many words but continued to struggle with comprehending what student read and also struggled with two-digit numbers at a 70% success level. [J.Ex. 1 at 4 and 25; Tr. at 181-182].

20. ***, developmental classroom teacher with *** years of teaching experience, began teaching the Student in the second half of the 2010-2011 school year. *** discovered that teaching new skills to the Student involved a long process. For example, before the Student could answer basic "who" and "when" questions, student had to read and re-read passages on student's level numerous times, as well as engage in discussion with ***. Even after extensive repetition throughout an entire school year, the Student lost some skills after long breaks and required some re-teaching. *** placed the Student's academic skills near the middle of the developmental class, but placed student's ability to acquire and retain information near the bottom of the developmental class. [Tr. at 150-162].

21. *** developed a State of Texas Assessments of Academic Readiness-Alternate ("STAAR-Alt") for the Student based on student's specific skills using the difficulty level 2 out of 3. As of the date of the due process hearing, the District had not received the results of the STAAR-Alt testing. [Tr. at 51 and 162].

22. Resource teacher, ***, and *** agree that the District's resource classroom is designed for students who fall one to two years academically behind their peers. The purpose of this classroom is to provide the alternative teaching strategies needed by the students to master the general education curriculum – and return to grade level. [Tr. at 173 and 213].

23. The Student's resource setting during 2011-2012 required mostly one-on-one instruction of the Student by student's resource teachers. *** explained that the Student could not be taught in the resource classroom in the same manner as the other ***-graders because the resource instruction level and pace do not meet the Student's needs. While *** other resource students spent approximately one week on a story at a higher reading level using independent reading strategies for comprehension of the material, the Student, by contrast, required multiple weeks at a lower reading level to comprehend passages, all in conjunction with extensive prompting, repetition, and concrete examples. [Tr. at 172-180].

24. The Student's resource math teacher, ***, has *** years of teaching experience. When *** used group work on occasion during the Student's 2011-2012 school year, the resource students working at the same level as the Student were not student's peers, but instead were ***-grade resource students who fell academically between one and two years behind in grade level. Even working in a group with students working at the same level, the Student was unable to keep pace with the ***-grade regular education curriculum and did not obtain a benefit from group math activities. [Tr. at 172-173 and 194-199].

25. *** covered money counting with the ***-grade resource students for about two weeks during the Spring 2012 semester, but the Student worked all year on the goal. *** also had to re-teach the Student certain skills after a long break, such as re-grouping 2-digit addition and counting money. [Tr. at 202-204].

26. Work samples from the Student's work in *** 2011-2012 resource classroom included pages where the Student did not fully pay attention to mathematical signs. On pages done as a group, *** did not believe the Student fully understood the work. [Respondent's Exhibit ("R.Ex.") 1; Tr. at 198-204].

27. At the Student's current *** school campus, the lowest available peers are ***-grade peers. The *** will make the differences between the Student's work and the other resource students more pronounced. *** believes the Student will become "a class within a class" because of the one-on-one instruction student requires for functioning with student's IEP goals in the resource setting. [Tr. at 226-228].

28. Both Petitioner and Respondent agree that the Student made progress and received an educational benefit under student's program in the 2011-2012 school year. [Tr. at 46-47, 80, 85, 90-91, 93, 126-127, and 246].

May 2012 ARDC Meeting

29. On May 7, 2012, the ARDC met to develop a program for the upcoming 2012-2013 school year in anticipation of student's ***. Participants, including the Parents, collaborated to develop and revise student's goals and objectives. Because of the Student's continued slow acquisition of skills during student's *** grade year – despite the doubled emphasis in reading and math skills – the District ARDC participants discussed the Student's continued problems with the content and pace of the general education curriculum as taught within the special education resource classroom. Again the District recommended that the Student's IEPs be implemented in a self-contained developmental classroom for the *** grade. The Parent disagreed with the proposed change and expressed their belief that such a placement would be “giving up” on the Student. Prior to recessing the meeting, ARDC members made plans to gather additional data and reconvene for further discussion on May 30, 2012. [J.Ex. 1 at 26; Tr. at 94].

30. The ARDC reconvened on May 30, 2012. All participants accepted the proposed goals for all subjects. The Parents continued to disagree that the Student required the more intensive developmental classroom setting for all content classes during the reconvened meeting and repeated their request for a resource classroom placement. The Parents agreed to all other parts of the proposed program including related services of a BIP, school health services, speech therapy, and transportation. [J.Ex. 1 at 26-27].

31. At the conclusion of the ARDC meeting on May 30, 2012, the District provided written notice that the disagreed-upon IEP would be in effect as of August 27, 2012, unless the Parents gave notice that they filed for due process. [J.Ex. 1 at 26-27].

32. Both resource teachers of the Student, *** and ***, agreed with the May 2012 ARDC placement recommendation to implement the Student's IEPs within the developmental classroom for the upcoming school year. *** believes that even a ***-grade resource classroom is inappropriate for the Student because of the rapid pace and lack of repetition that the Student requires. [Tr. at 173, 194, and 207-208].

33. The schedule of services specified that the Student's placement was 61% in a self-contained setting for the 2011-2012 school year. The May 2012 ARDC documents also proposed a 61% self-contained setting with the same coding for 2012-2013. [J.Exs. 1 at 24, 2 at 1, and 3 at 24].

34. The Student's case manager, ***, explained at hearing that a resource setting is designed for students who are receiving 50% or more of their educational time in general education, while a self-contained classroom is for students receiving more than 50% of educational time in special education. [Tr. at 29].

35. Participants agreed to the regular education placement for elective courses and all non-academic settings except transportation, resulting in four hours of general education physical education and four hours of elective classes per week for the 2012-2013 school year. Participants agreed that the Student should be in special education for the remainder of student's instruction, including but not limited to, reading, writing, and math instruction. [J.Ex. 1 at 20].

36. The Parents believe that placement into the self-contained developmental classroom would be “giving up” on the Student. At hearing, the Student's mother expressed belief that if the Student were placed in “total developmental” for student's instruction, the District would cease to work on academic skills. [Tr. at 94].

Placement Recommendation

37. The District's educational diagnostician, ***, agrees with the May 2012 ARDC recommendation for the Student's special education instruction to take place in the developmental classroom. *** believes the developmental classroom would provide the Student with the “academic set student needs at the level that student needs.” Whereas a typically developing ***-grader or a ***-grader needing modifications may need to work on *** skills, the Student still needs to work on functional academic skills, including how to count money, adding, subtracting, and reading, to help student be as independent as possible ***. *** believes that the Student's weakness in long-term memory explains the difficulty that the Student has in demonstrating previously-mastered skills after extended breaks. [Tr. at 113-114].

38. The Student has shown consistency in student's scores over the last few years between 2008 and the recent testing in 2011. It is likely that the Student will continue to demonstrate difficulties in the future, indicating student has a ***. In order to work on ***, *** and *** believe placement in the developmental classroom is necessary for student's core subject IEPs. [Tr. at 105, 112-114, and 219-220].

39. From an educational perspective, the District's case manager, ***, and the District's Executive Director for Student Support Services, ***, agreed that a resource setting within the District was less restrictive than a developmental setting. [Tr. at 28-29 and 245].

40. *** does not believe that the 2011-2012 resource classroom was a correct placement for the Student and that student's needs would have been better met if student had received all student's core subjects in the developmental classroom. For example, *** observed the Student in the resource setting sitting in a group of three other students. The group had an assigned task to look at a series of pictures and collaborate about what occurred in the pictures. The Student did not keep up with the group, lost focus, and even with re-direction, could not work on the task. Ultimately, the remaining three students continued the assignment to completion but without the participation of the Student. As a result, the resource teacher returned to work one-on-one with the Student on student's un-completed task. *** believes that the Student's resource teachers delivered one-on-one instruction and other services to the Student in order for student to make progress in the 2011-2012 resource setting. [Tr. at 223-224 and 239].

41. Petitioner presented samples of the Student's work during the 2011-2012 school year. At hearing, the Student's mother agreed that these work samples demonstrate the Student's success and progress during the 2011-2012 school year. [Petitioner's Exhibit ("P.Ex.") 2; Tr. at 93].

42. The Student's 2011-2012 developmental class teacher, ***, identified the work samples presented by Petitioner in petitioner's second exhibit as materials completed by the Student within the developmental classroom. [P.Ex. 2; Tr. at 158].

43. Both the resource and developmental class teachers collaborated to determine the Student's grades during 2011-2012. The grades were primarily from the developmental classroom because that is where student's skills were best assessed. While the Student received extra practice in the resource setting, the majority of work came from the developmental setting. [Tr. at 223-224].

44. Students in a developmental classroom within the District have a focus on functional academics that uses functional or real-life experiences to give context to the learning by making it understandable in something that they would see in life. [Tr. at 221-222].

Legal Standard

Public school districts are charged with the development and provision of an appropriate program to eligible students. 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 an eligible 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 (5th Cir. 2000).

Courts have not adopted a specific substantive standard to determine when FAPE has been provided. The Fifth Circuit further defined a FAPE by delineating four factors to consider as indicators of whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational program individualized on the basis of the student's assessment and performance; 2) Is the program administered in the least restrictive environment; 3) Are the services provided in a coordinated and collaborative manner by key stakeholders; and 4) Are positive academic and non-academic benefits demonstrated? *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).

Allocation of the Burden of Proof

It is well-settled that the party challenging a school district's eligibility determination or offer of services under IDEA bears the burden of proof to establish by a preponderance of the evidence that a student did not receive a FAPE. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Schaffer v. West*, 546 U.S. 49 (2005). As previously discussed, Petitioner challenged the allocation of the burden of proof in this dispute.³ Petitioner argues that Respondent should bear the burden because it is *Respondent*, not Petitioner, seeking to change the Student's placement, whereas the *Petitioner* must file a due process complaint to keep the status quo.⁴ Petitioner argues that the District should be required to prove the necessity of changing the Student's placement in order for the Student to obtain a FAPE based on student's current IEPs.⁵ Petitioner further argues that the Supreme Court envisioned that school districts may file due process requests under IDEA "if they wanted to change an existing IEP but the parents do not consent, or if the parents refuse to allow their child to be evaluated." *Schaffer, supra*, at 51. Petitioner argues that in such case, as in the current dispute, the school district would become the petitioner/plaintiff and seeking relief through attack of the IEP as it currently stands, resulting in the District having the burden of persuasion.

In response, Respondent argues that the burden in an administrative hearing challenging an IEP is properly placed upon the party seeking relief through the due process procedures. *Schaffer, supra*, at 62. In *Schaffer*, the Supreme Court acknowledged that school districts may request due process hearings, but delineated no exception to the normal rule that "the burden of persuasion lies where it usually falls, upon the party seeking relief." *Id.* at 56-58 (citing *Mueller & Kirkpatrick*, Evidence §3.1, p.104 (3d ed. 2003) (for the concept that "the person who seeks court action should justify the request"). Respondent likewise points to the Fifth Circuit's previous holdings that "the IDEA creates a presumption in favor of a school system's educational plan, placing the burden of proof on the party challenging it." *See White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003) (citing *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993)). Respondent argues, and I agree, that in Texas, school districts are not required to initiate a due process hearing prior to the implementation of a change of placement.⁶

When parents disagree with a school district about all required elements of an IEP, the Texas Administrative Code requires the school district to provide parents with a single opportunity for a ten-day recess. *See* 19 TEX. ADMIN. CODE §89.1050(h)(1)-(3). If the ARDC cannot reach consensus at the reconvened meeting, the school district is required to give prior written notice of its decision, include a written statement of the basis for the disagreement in the IEP, allow any disagreeing ARDC members to add their own statement, and then implement the IEP deemed appropriate by the school. 19 TEX. ADMIN. CODE §89.1050(h)(4)-(6). Parents disagreeing with decisions made by an ARDC may request a due process hearing and invoke "stay put." *See* 34 C.F.R. §§300.507(a) (due process complaint filing by parents) and 300.518(a) (student remains in last agreed-upon placement during the pendency of administrative proceeding); 19 TEX. ADMIN. CODE §89.1050(h)(7) (right of parents to file complaint, request for mediation, or due process complaint upon disagreement with ARDC decision).

Neither IDEA's implementing regulations nor state law requires school districts to obtain parental consent prior to implementation of IEP changes after the start of a student's special education services. *See* 34 C.F.R. §300.300 (requirement for parental consent prior to initial provision of special education services). Instead, parental *participation* is required in IEP development – not parental *consent* to the resulting plan. 34 C.F.R. §300.321 (parents are part of the IEP team); 34 C.F.R. §300.322 (right of parents to participate in IEP preparation) [emphasis added].⁷ Texas did not impose additional consent requirements beyond those specified by IDEA and its implementing regulations despite clear authority to do so. *See* 34 C.F.R. §300.300(d)(2) (permitting individual States to require parental consent for services and other

³ See "Statement of the Case" section.

⁴ Petitioner's Brief on Burden of Proof ("P.Br.") at 4.

⁵ P.Br. at 2.

⁶ Respondent's Response to Petitioner's Brief on Burden of Proof ("R.Br.") at 2.

⁷ *See* 19 TEX. ADMIN. CODE §89.1050(a) (in Texas, the "IEP" team is referred to as the "ARDC").

activities other than those contemplated by IDEA). Parental consent is thus not required by State or Federal law before school districts may change an eligible student's IEP.

The language of *Schaeffer* does not require the District to file a due process complaint and have a hearing before implementing proposed changes to the Student's IEP over the disagreement of a parent. *Schaeffer, supra*, at 53. Likewise, a school district's inability to obtain parental consent for IEP changes does not allocate the burden of proof. Instead, the allocation of the burden of proof depends on which party files the litigation – the party that files, be it parents or a school district, bears the burden of proof on their claims of relief. In this dispute, Petitioner was the party required to file the litigation to challenge the District's proposed educational plan for the Student. Consequently, I conclude that Petitioner bears the burden of proof in challenging the legal presumption of appropriateness of the school district's plan, which would include any recommended changes to the Student's program. *See, Michael F., supra*, at 252.

Discussion

This controversy concerns a proposed change of placement for delivery of special education instruction for a student with multiple disabilities of OI, OHI, and SI *** school in the *** grade. The District's proposal changes implementation of the Student's reading, writing, and math IEPs to a developmental classroom in *** school instead of a combination setting of resource and developmental classrooms previously used in the Student's ***-grade year in 2011-2012 on student's *** campus. There is no disagreement between the Parties that the Student made progress last year in the combination setting and mastered all of student's IEP goals. The disagreement centers on the elimination of the resource setting component resulting in a sole developmental setting placement for the Student's academic instruction. The Parents seek to maintain the resource and developmental classroom combination at the Student's *** school campus for the 2012-2013 school year. Because the parties agree on the ***-grade IEPs and general education components of student's program, the dispute narrowly focuses on two issues: 1) the restrictiveness of student's proposed placement in the developmental classroom for the 2012-2013 school year; and, 2) the use of the *** program under the 2011-2012 program.

Restrictiveness of the District's Developmental Classroom

Petitioner alleges that the District's proposed developmental classroom placement in lieu of the resource classroom placement is not the LRE for the Student. Respondent argues that both the developmental and resource rooms are special education settings and the LRE provisions are not implicated in the District's proposed developmental classroom placement for all of the Student's special education instruction in 2012-2013.

The IDEA and its implementing regulations require students with disabilities to be educated to the maximum extent appropriate with non-disabled students and specifies that special classes, separate schooling, or other removal of disabled students from the regular education environment occurs only when 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. 20 U.S.C. §1412(a)(5)(A); 34 C.F.R. §300.114(a)(2). School districts must ensure that a "continuum of alternative placements" is available to meet the needs of students with disabilities for special education and related services. 34 C.F.R. §300.115(a). Subsection (b) of this provision states:

- (b) The continuum required in paragraph (a) of this section must—
 - (1) Include the alternative placements listed in the definition of special education under §300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and,
 - (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.
- 34 C.F.R. §300.115(b).

Respondent argues, and I agree, that this provision fails to distinguish between a resource placement and a developmental classroom. Further guidance is found in §89.63 of the Texas Commissioner's Rules details and defines 11 instructional arrangements, including the following:

Instructional Arrangement	Time in Regular Classroom (per school day)
“Mainstream”	100%
“Resource room/services”	More than 50%
“Self-contained (mild, moderate, severe) regular campus” ⁸	50% or less

19 TEX. ADMIN. CODE §89.63(c)(1), (5)-(6).

Thus, the continuum of placements on a regular school campus differs in the quantity of time the eligible student spends in special education versus regular education classes. As previously stated above, the parties do not disagree about the quantity of the Student’s regular education classes and agree with student’s placement in regular education for electives and all non-academic settings other than transportation. [J.Ex. 1 at 20].

At hearing, the District’s Executive Director for Student Services, Dr. Rosenberg, and the District’s case manager for the Student, Ms. O’Neal, agreed that a resource setting within the District is less restrictive than a developmental setting from an educational perspective. However, this distinction is not made in the above statutory provisions. Simply put, because there is no delineation under applicable provisions on the continuum of placements between a resource class “self-contained” placement and a developmental class “self-contained” placement, the Student’s placement remains a “self-contained” placement regardless of which class student attends.

Consideration of LRE

To determine whether a school district complied with the LRE provisions of IDEA, the Fifth Circuit developed a two-part test examining: 1) whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily; and, if not, 2) whether the school has mainstreamed the child to the maximum extent appropriate. *Daniel R.R. v. St. Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989). The LRE requirement concerns the extent to which special education students are removed from regular education classrooms with non-disabled peers. Under the *Daniel R.R.* test, there is also no distinction between different types of special education classrooms. Applying the *Daniel R.R.* test to this dispute, I conclude that regardless of whether the Student’s IEP is implemented in a special education resource class or a special education developmental class, LRE is not implicated in this dispute.

Consideration of Remaining *Michael F.* Factors

Because LRE is not implicated in this dispute, I turn to the remaining three of the four *Michael F.* factors in consideration of whether Respondent’s proposed program offers a FAPE to the Student.⁹

A. Individualized Program

The documentary evidence in this proceeding supports that the District’s program was developed through assessment crafted to accurately assess the Student’s areas of disability and performance. The testimony of ***, diagnostician, and the detailed August 2011 Re-Evaluation Report described the ongoing deficits and strengths of the Student that will impact student not only in student’s educational program, but throughout student’s entire life.¹⁰

The record before me detailed the Student’s performance in student’s 2011-2012 program evidenced by abundant work samples, written reports of grades and progress, and the specific testimony of the teachers who worked with student during student’s ***-grade year. This testimony highlighted the Student’s on-going educational needs within the resource setting and the developmental setting, including student’s need for a slow pace of instruction, abundant repetition, re-teaching after school/prolonged breaks, and instruction given on the Student’s functional level.

The hearing testimony from the Student’s 2011-2012 developmental class teacher, ***, underscored the Student’s specific need for a lengthy process of instruction with necessary repetition readily available to the Student within the developmental classroom. Additionally, the hearing testimony of the Student’s 2011-2012 resource class teachers *** and *** clarified the differences in the Student’s functioning within the resource classroom as both teachers employed numerous strategies to implement the Student’s IEPs, effectively resulting in one-on-one instruction with the Student for the majority of the time.

⁸ “[R]egular campus” is further defined as a “regular school campus” in this subsection.
⁹ *Michael F.*, *supra*, at 253.
¹⁰ J.Ex. 4 (38-page report dated August 2011).

I found the educators' testimony credible and convincing that the program the Student received in 2011-2012 was individualized to the Student's needs. Despite constant efforts by student's educators, the Student could not keep pace within the resource setting for group activities. It was teacher vigilance that ensured the Student received the quantity of assistance necessary for the Student's comprehension, re-direction, and long-term retention of the material. The record evidence established that the Student needs precisely this type of support and functional level – services that will likewise be available within the developmental setting on the *** campus to help student master core IEP subject areas and move towards independence. I conclude that the District's program was clearly individualized to address the Student's unique needs.

B. Coordination and Collaboration

Petitioner raises the second issue concerning the non-implementation of the *** program in the context of this *Michael F.* factor. Because the District did not specifically report the non-implementation of this program to the Parents during the 2011-2012 school year, Petitioner argues that it is an example of non-collaboration with the Parents.¹¹

The Fifth Circuit addressed this factor of the FAPE standard in *Bobby R.*, stating that there is no *per se* liability under an IEP based on a school district's failure to deliver all services specified in a student's IEP. *Bobby R., supra*, at 349. In the dispute before me, ARDC minutes of the meeting in May 2011 state, "The [ARDC] recommends that *** will be a component of the Resource instruction for reading."¹² At hearing, the Student's educators fully acknowledged that the strategy was not implemented after the pre-implementation testing showed the Student would not benefit from either *** or the lower-level *** strategies. Although the Parents did not receive notification that these strategies ultimately were not appropriate for the Student, the record supports that the Parents received progress updates on student's program. The Parents agreed that the Student progressed under student's program in the resource setting and, in fact, argued that it should be continued. The preponderance of the record before me shows that the District fully included the Parents in the development of the Student's IEPs for the pertinent period. 34 C.F.R. §300.116; 19 TEX. ADMIN. CODE §89.1055. Petitioner failed to prove any educational harm resulted from the non-implementation of the *** methodology during the 2011-2012 school year.

C. Meaningful Educational Benefit

Petitioner does not dispute that Petitioner received a meaningful benefit from the District's 2011-2012 program, but argues that it is this success that mandates continuing a resource classroom for student's 2012-2013 program. While Respondent agrees that the Student received educational benefit in 2011-2012 as a result of the District's program, Respondent disagrees that the success is attributable to the resource setting. Instead, Respondent believes it was the developmental classroom instruction that resulted in this success.

Review of the record before me reveals that although the Student produced and completed school work within the resource class, this same program included essentially a doubled amount of reading and math instruction. Of note, the very work samples produced and acknowledged by Petitioner as evidence of student's success in the 2011-2012 program were in fact produced within the developmental classroom.¹³ I conclude student's resource instruction was not the instruction typically provided within the resource setting, with the Student's 2011-2012 resource educators essentially providing the developmental class instruction student needed within the resource setting to enable student to meet student's goals and objectives.

Conclusion

The Parents expressed concern throughout this dispute that a developmental classroom placement ultimately meant that the District would be "giving up" on this Student and would cease academic instruction. By contrast, the preponderance of the credible testimony and evidence established that the District's proposed 2012-2013 placement in the developmental classroom will *ensure* rather than *hinder* the Student's academic goal instruction by focusing on the core life skills student needs with sufficient practice and repetition available in that setting to help student's transition

¹¹ Petitioner's Closing Argument at 25-26.

¹² J.Ex. 3 at 26.

¹³ P.Ex. 2; Tr. at 93.

toward independence. Within the developmental classroom, student will receive emphasis on necessary skills in essential areas such as reading, adding, subtracting, and money.

On the first issue concerning the District's recommendation that the Student's Reading, Writing, and Math IEPs should be implemented in the developmental rather than the resource classroom, I conclude that this issue fails to implicate LRE. I find for Respondent on the first issue. On the second issue regarding a failure to implement *** within the Student's 2011-2012 resource classroom, this methodology did not deny FAPE to the Student because *** proved to be inappropriate for the Student's level and Petitioner agrees that the Student made progress on reading during student's ***-grade year. I find for Respondent as well on the second issue.

The presumption of the appropriateness of the District's 2012-2013 IEP withstands Petitioner's challenge in this dispute. I conclude Petitioner did not meet petitioner's burden to show the inappropriateness of the District's educational program for the Student. Accordingly, I decline to award any relief to Petitioner.

Conclusions of Law

1. Respondent is the local educational agency responsible for determining the Student's eligibility for special education and related services under IDEA. 20 U.S.C. §1400, *et. seq.*, and its implementing regulations.
2. Petitioner, as the party who challenged the school district's eligibility determination or offer of services under IDEA, bears the burden to prove that the Student has been denied a FAPE. Petitioner did not meet this burden on the issues in this dispute. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 546 U.S. 49 (2005).
3. Petitioner did not meet petitioner's burden to show that the proposed placement of the Student or student's special education reading, writing, and math instruction into the developmental classroom, instead of the resource classroom, was inappropriate. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 546 U.S. 49 (2005).
4. Petitioner did not meet petitioner's burden to show that the non-implementation of the reading methodology entitled *** resulted in educational harm to the Student. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 546 U.S. 49 (2005).
5. Respondent met its LRE responsibilities for the Student at all times pertinent to this dispute. 34 C.F.R. §§300.114(a)(2) and 300.115; 19 TEX. ADMIN. CODE §89.63(c)(1), (5)-(6).
6. Respondent provided a FAPE to Petitioner at all times pertinent to this dispute. 34 C.F.R. §§300.17, 300.101, and 300.513(a)(1); *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
7. Respondent's placement of the Student into a developmental classroom is appropriate for student's 2012-2013 special education instruction. 34 C.F.R. §§300.114(a)(2), 300.115, and 300.116; 19 TEX. ADMIN. CODE §89.1055.

ORDERS

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

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

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

Signed this 15th day of October 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).

DOCKET NO. 303-SE-0612

STUDENT, b/n/f/ PARENTS, § BEFORE A SPECIAL EDUCATION
Petitioner §
 §
 §
v. § HEARING OFFICER
 §
 §
KLEIN INDEPENDENT §
SCHOOL DISTRICT, §
Respondent § FOR THE STATE OF TEXAS

SYNOPSIS OF DECISION

ISSUE 1: *Whether the District’s proposal to place the Student into a developmental classroom from a resource classroom for reading, language, and math instruction violated least restrictive environment requirements?*

HELD: For the District

CITATION: 34 C.F.R. §§34 C.F.R. §300.114(a)(2) and 300.115
19 TEX. ADMIN. CODE §89.63(c)(1), (5)-(6)

ISSUE 2: *Whether the District’s failure to provide the “READ 180” program during the 2011-2012 school year resulted in educational harm to the Student?*

HELD: For the District

CITATION: 34 C.F.R. §300.116
19 TEX. ADMIN. CODE §89.1055

ISSUE 3:¹⁴ *Whether the Student received a free appropriate public education under the District’s program?*

HELD: For the District

CITATION: 34 C.F.R. §§300.17, 300.101, and 300.513(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 (5th Cir. 1997).

¹⁴ Issue 3 is the broad, overall issue in this dispute.