

STUDENT	§	BEFORE A SPECIAL EDUCATION
b/n/f PARENT	§	
	§	
v.	§	HEARING OFFICER FOR THE
	§	
KILLEEN INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

DECISION OF HEARING OFFICER

On June 5, 2013, Petitioner filed a due process hearing and complaint. The hearing convened on November 18, 2013. All all times during the proceedings, next friend, *** (“Parent”), represented Petitioner, *** (“Student”), *pro se*. Holly Wardell, attorney, represented Respondent, Killeen Independent School District (“District”). At the hearing, ***, Special Education Coordinator for District was present. Andrea Stevens, legal assistant to Holly Wardell and Matthew Coleman, associate, were present.

PROCEDURAL HISTORY

The parties participated in an unsuccessful resolution session on June 19, 2013. Subsequently, the parties participated in a failed mediation session. Four extensions of the decision due date for good cause were granted prior to the two-day hearing. Following the hearing, a deadline for filing closing arguments was scheduled. Respondent timely filed closing arguments. Petitioner filed no closing arguments.

ISSUES FOR HEARING AND REQUESTS FOR RELIEF

The issues for hearing are as follows:

1. Whether the District denied Student a free, appropriate, public education (“FAPE”), including the following allegations:
 - a. District bullied, harassed, intimidated, [***], discriminated, and retaliated against Student and Parent;
 - b. Denied Student rights granted to all other students;
 - c. Caused Student to be denied participation in extra-curricular activities;
 - d. Failed to allow Parent access to Student’s teacher from September, 2012- June, 2013;
 - e. Failed to provide prior written notice within the past one year;
 - f. Refused to provide Parent with a list of questions that District wished to ask Student’s private physician and requested information that staff is not trained to interpret;
 - g. Refused to communicate with Parent regarding Student;
 - h. Failed to train staff and aides in the child’s area of disability;

- i. Failed to keep records of related services; and
 - j. Denied Student's request for intra-district transfer to *** school in 2012-2013;
2. Whether District failed to properly identify Student with a disability needing special education or related services, specifically as follows:
 - a. Failed to identify Student by its refusal to accept Student's diagnoses provided by Dr. *** ("Dr. ***"); and
 - b. Refused to allow Student to be evaluated by qualified independent evaluator's psychologist selected by Parent;
3. Whether District failed to properly evaluate Student, specifically as follows:
 - a. Failed to complete Student's re-evaluation on March 14, 2013;
 - b. Failed to re-evaluate Student by conducting a District full, individual evaluation ("FIE") as Parent requested in August, 2011 and November, 2011;
 - c. Changed Student's FIE after signing assurances of completion;
 - c. Falsified facts in Student's re-evaluation/FIE; and
 - d. Misrepresented that an Other Health Impairment form ("OHI") is required for completion of Student's re-evaluation/FIE and the absence of an OHI form caused District's refusal to complete Student's re-evaluation/FIE according to regulations;
4. Whether District failed to properly convene and hold admission, review and dismissal ("ARD") meetings, specifically as follows:
 - a. Failed to timely conduct a parent-requested ARD meeting on March 6, 2013;
 - b. Failed to have Student's teacher present at ARD meetings in October, 2012, November, 2012, and May, 2013;
 - c. Denied Parent meaningful input in the ARD meetings of October 23, 2012, November 6, 2012, and May 3, 2013;
 - d. Conducted an ARD meeting without Parent on May 17, 2013;
 - e. Failed to convene the May 17, 2013 ARD meeting at a mutually agreeable date and time;
 - f. Deliberate delay of ARD meeting and subsequent cancellation of the ARD after Parent requested relevant documents prior to such meeting; and
 - g. Predetermined Student's placement and services before the April-May, 2013 ARD meetings;
5. Whether District denied Parent's request to have prior written notices provided via electronic mail on May 3, 2013 and May 17, 2013;
6. Whether District failed to develop and comply with an appropriate individualized education program ("IEP") based on Student's unique needs, specifically as follows:
 - a. Changed Student's individualized education program ("IEP") without the presence of Parent on May 17, 2013;
 - b. Failed to prevent punishment for actions/inactions that are manifestations of Student's disability;
 - c. Refused to accept Student's classwork and assignments;
 - d. Refused to provide tutoring support to Student;
 - e. Denied Student Content Mastery Class ("CMC") for test and quizzes;
 - f. Denied Student CMC for classwork;
 - g. Failed to modify Student's assignments;
 - h. Denied Student accommodations for ***; and
 - i. Failed to offer extended school year services ("ESY") for the summer, 2013; all or part of which caused Student to fail the STAAR assessment;

7. Failed to provide records within 45 days from Parent request; and
8. District alleged that Petitioner entered into a settlement agreement dated February 22, 2013 in which all claims arising prior to that time were waived, and pled the affirmative defense that the one year statute of limitations is not applicable due to waiver or release of claims.

As relief, Petitioner requested the following relief:

1. An order directing District to pay for private placement as selected by Parent;
2. An order directing District to pay all expenses related to a transfer out of District;
3. An order directing District to provide a personal in class aide for Student;
4. An order directing District to provide FAPE in the least restrictive environment (“LRE”) for all subject areas in an inclusion class;
5. An order directing District to provide oral administration of tests and classwork;
6. An order directing District to provide reduced pen to paper task;
7. An order directing District to allow Student four extra days to complete assignments;
8. An order directing District to provide IEP progress reports every two weeks;
9. An order directing District to provide an assignment notebook for Student that is checked by each teacher;
10. An order directing District to hold a Parent requested parent-teacher conference within 3-5 calendar days of request, and further, limit attendance at any parent teacher conferences to Parent, teacher, inclusion support teacher for each subject;
11. Any an all remedies as determined by the hearing officer;
12. An order directing District to allow Student’s teacher to request ARD for Student;
13. An order prohibiting District’s contract attorney or employee-attorney, both present and future, from attending the ARD meetings;
14. An order directing District to provide Parent with prior written notice via electronic email at *** and via fax at ***;
15. An order directing District to allow Student to select student’s seat in class;
16. An order directing District to allow Student rest periods;
17. A order directing District to develop a corrective action plan to train Student’s teachers, campus nurses and aides in the areas of Student’s disability included by not limited to ***, post traumatic stress syndrome, and food allergies;
18. An order directing District to assure the presence of all of Student’s teachers at ARD meetings;
19. An order directing District to have each teacher complete and provide Parent with teacher input forms;
20. An order directing District to provide Parent with all relevant documents referenced in ARD meetings at least five calendar days before an ARD meeting;
21. An order directing District to accept Dr. *** neurological evaluation and diagnosis of Student;
22. An order directing District to reimburse Parent for Dr. *** evaluation;
23. An order directing District to allow Dr. *** (“Dr. ****”) to complete Student’s evaluation according to her schedule;
24. An order directing District to promptly provide Dr. *** with Student’s educational records and to include Student’s Parent with all communications with Dr. *** regarding Student’s independent evaluation;

25. ***;
26. An order directing District to provide ESY services to Student;
27. An order directing District to provide FAPE in the LRE in all inclusion support classes for the recommended graduation plan;
28. An order directing District to set Student's IEP goals' mastery level at 80% or higher for all classes;
29. An order directing District to reteach difficult concepts and retest on any and all assignments where Student receives less than 70%;
30. An order directing District to modify Student's assignments;
31. An order directing District to refrain from penalizing Student for days that student forgets student's ID badge;
32. An order directing District that Parent's electronic mail address be placed permanently in Student's IEP and provided to each of student's teachers;
33. An order directing District to maintain detailed records of all related services to Student;
34. An order directing District to provide a scribe for Student;
35. An order directing District to refrain from giving Student a zero for any assignments, and at Parent or Student request, allow alternate assignments;
36. An order directing Student's teacher to encourage student and refrain from blaming Student for student's disability; and
37. A corrective action plan that trains District's staff regarding the purpose of providing tutoring to Student.

Affirmative Defense/Action Barred in Whole or in part by Waiver and Release of Claims

On February 22, 2013, the parties entered into a Compromise Settlement Agreement in which Parent waived any cause of action that she may have held as next friend, parent and lawful guardian of Student against District and its employees. Based on the waiver, all allegations in the instant action that occurred prior to February 22, 2013 are DISMISSED.

Claims that Fall Outside Hearing Officer's Jurisdiction

Petitioner claims that District denied Student's request for intra-district transfer to a *** school. Transfer policies are within the purview of a District, and are outside the jurisdiction of a special education hearing officer. As such, Petitioner's claim is DISMISSED.

FINDINGS OF FACT

Based upon the evidence presented at hearing that pertains to the remaining issues as pled by the parties, this hearing officer makes the following findings of fact and conclusions of law. Citations to the transcript are designated as "T" followed by page number. Citations to exhibits are designated as "P" for Petitioner, "R" for Respondent, and "J" for Joint Exhibit, followed by the exhibit number.

1. District is responsible for the provision of special education services to Student who resides within the geographical boundaries of District. R-2; J-1
2. During the 2012-2013 school year, Student was in the *** grade in *** school within District. Until May 17, 2013, Student's eligibility classifications were emotional disturbance ("ED") and OHI. T-89
3. In the Fall, 2012, Parent gave consent for District to conduct an FIE for achievement and psychological and a Functional Behavior Assessment ("FBA"). Student was passing all but one class and the failing grade resulted from late and incomplete assignments. J-4
4. The October, 2012 ARD committee considered information from Parent's outside evaluator, Dr. ***, a neuropsychologist who conducted a neuropsychological evaluation and reported diagnoses of attention deficit/hyperactivity disorder ("ADHD"), mathematics disorder, cognitive disorder not otherwise specified due to ***, among others. Dr. *** determined Student's global assessment functioning ("GAF") at 50/100 (moderate impairment). The ARD meeting ended without agreement and a reconvene ARD meeting date was set for November 5. Prior written notice was given. J-4; T-110
5. Dr. *** is not a Licensed Specialist in School Psychology ("LSSP"). For this reason, District did not accept his neuropsychological evaluation P-18 T- 110, 244, 248, 253, 413, 504-505, 559-560
6. Dr. *** is not a medical doctor. For this reason, the ARD committee did not accept his diagnosis of ADHD. P-18; T-243, 252, 558
7. In the fall semester, 2012, Student was in general education class with inclusion instruction in core subjects. Student had 30 minutes per week of CMC in the special education setting. Student's accommodations included check for understanding, CMC and one extra day for tests, quizzes and class assignments, preferential seating near instructor, and small group testing. J-3; R-15
8. District conducted an FBA on February 21, 2013. The report indicated that Student's non-compliance, withdrawal, and off task behaviors interfered with learning. Student's behaviors were to avoid an academic activity. Student had *** absences out of 117 days, the majority of which were cleared by parent and/or medical notes. No behavior intervention plan was recommended due to adequate accommodations currently in place for Student. J-6

9. In February, 2013, Parent requested that Student be allowed an elevator pass and a water bottle. District does not require a pass to access the elevator, and all students are allowed a water bottle. P-22, T-100-101
10. Parent and District entered into a Compromise Settlement Agreement (“Agreement”) on February 22, 2013. Parent waived any cause of action she may have otherwise held against the District, its board of trustees, and district employees. R-1
11. Approximately two weeks following the Agreement, Parent requested an ARD meeting. District responded to Parent’s request, and pointed out the terms of the Agreement that addressed the timing of an ARD meeting. The Agreement required Parent to provide certain documents following which District would call an ARD meeting within 15 days. Parent had not complied with the obligations of the Agreement. R-3; T-471-474
12. On March 19, 2013, District sent a certified letter to Parent asking if Parent would comply with the obligation of the Agreement. District offered to find a physician and take Student for an evaluation to update the OHI diagnosis if Parent would sign consent. J-3
13. Although Parent had not provided the items that Parent agreed to provide in the Agreement, an ARD meeting was scheduled for April 9, 2013. R-4
14. On April 3, Parent requested numerous documents to be delivered 48 hours prior to the scheduled April 9 ARD meeting. District cancelled the April 9 meeting in order to compile the requested records. The documents were available for review on April 26. The ARD meeting was rescheduled for May 3, 2013. R-3; T-472-477, 534
15. At some point prior to the Agreement, an independent evaluator began to perform a District funded IEE, but did not complete the evaluation. Following the Agreement, District contacted the evaluator about completing the evaluation and she was unavailable to do so. District notified Parent. District provided Parent with a copy of its IEE criteria. Parent was unable to find an independent evaluator that complied with District criteria who was willing to conduct the IEE. J-3; R-4; T-153, 491-502
16. District’s FIE was completed March 14, 2013. The Behavior Assessment Scales for Children-2 and Clinical Assessment of Behavior results reflected that Student did not meet eligibility criteria for ED. The Woodcock-Johnson III achievement test reflected that Student was in the low range in math reasoning and brief mathematics. Student’s standard score in reading comprehension was in the very low range. Student’s overall intellectual ability reflected that

Student is in the low average range of others the same age. Results of the Adaptive Behavior Assessment System-II indicated that Student's overall level of adaptive behavior is extremely low. J-5; T-397-399

17. A medical doctor, Dr. ***, completed an OHI form, indicated that Student had an orthopedic impairment, but did not state the impairment. District requested consent to speak to the doctor and Parent refused. Due to irregularities in the form, District did not accept an eligibility of orthopedic impairment. J-1; T-69-71, 139, 562
18. Parent requested a meeting to review Student's March 14 FIE. District met with Parent and reviewed the FIE on April 26, 2013. P-6; T-114, 428-429
19. Due to a typographical error, District staff made a correction to the General Adaptive Composite results in Student's FIE report. P-6; T-240-241, 413, 523-524
20. Parent requested that the FBA report include a break down in attendance by class periods. District complied with the request. T-413-414, 523-524
21. District sent Parent notice of Student's failure in three courses on March 21, 2013. The notice informed Parent that the courses were ***. P-4, pg. 85
22. In the Spring, 2013, Student did not meet the performance standard for the Texas statewide assessment. On the day of the writing assessment, Student was ***. District provided intense remediation along with tutoring in math and reading J-2, pg. 73-74; T-100, 422-423
23. An ARD meeting convened on May 3, 2013 to review results of District's evaluations. Student qualified as a child with a specific learning disability in the areas of math calculation, math reasoning, reading comprehension, and listening comprehension. Student no longer qualified as ED. Student was failing classes. Student had *** days with attendance issues. The committee believed that the absences impacted Student's educational progress. District requested to speak with Student's doctor to determine if chronic health concerns or other medical issues related to the absences. Parent refused. Parent provided updated dietary statements. The information was provided to the nurse. District committee members believed Student needed more direct, specialized instruction in a resource class with a lower student-to-staff ration and specialized instruction geared to student's deficits. District committee members recommended Student's placement in resource class for math and reading. J-1; T-291, 418, 425-426

24. The ARD committee offered to take Student to a doctor to determine OHI eligibility due to ADHD. Parent refused. J-1
25. District committee members recommended a change in Student's placement from inclusion to resource in math and reading. J-1; T-291, 418, 425-426
26. The ARD committee added an extra day to complete assignments. T-291, 418, 425-426
27. Parent requested and received a hearing and vision test for Student. The May 3 ARD committee considered Parent-requested accommodations. Some accommodations were in place for Student such as 1:1 support through tutoring. Others were adopted. Some requests were not covered due to Parent's departure from the meeting that ended in disagreement J-1; R-21; T-51, 99, 401, 420, 565-566
28. Prior to Parent's departure from the May 3 meeting, a 10-school day reconvene-ARD meeting ("10-day reconvene ARD") was scheduled for May 17. Parent told the committee to set the time and date, confirmed that the 10-day reconvene ARD was scheduled for a Friday, and agreed to be present. J-1; R-3, 21; T-479-480
29. On May 16, 2013, Parent emailed the Director of Special Education that the May 17 reconvene-meeting date and time did "not work for her." Parent provided available dates that fell outside the 10-day deadline, and gave no reason for her unavailability. P-5
30. District held the scheduled 10-day reconvene ARD on May 17, waited 15 minutes for Parent who did not attend. The committee reviewed and updated Student's present levels of academic performance, including new information that was gathered during the 10-day recess. It revised goals and short term objectives based on the additional information. Accommodations were reviewed and updated. The committee discussed each of the remaining Parent's requests for accommodations, accepted some, and declined others as not appropriate for Student to receive FAPE. Student's placement was changed to resource class for reading and math. This change in placement moved Student to the Minimum High School Plan. P-5; J-2; T-480-482
31. Prior Written Notice was sent to Parent. Notice of the May 17 meeting was provided via two other communications. R-3, pg. 212
32. After the May 17 10-day reconvene ARD, Parent requested another 10-day reconvene-meeting on May 22 and May 31. District declined. P-5; T-486

33. Parent requested ARD meetings in July, August, and September, 2013. In lieu of convening a meeting, District requested assistance through the Texas Education Agency (“TEA”) mediation process. District sent Prior Written Notice to Parent. R-3, pg. 219-221; 226-229, 231-234
34. In July, 2013, Parent requested an occupational therapy (“OT”) evaluation. District refused and sent Prior Written Notice to Parent. J-3 pg. 222-224; R-12; T-488-489
35. Parent knew that University Interscholastic League (“UIL”) rules require student to be passing all classes in order to participate in UIL competitions. In April, 2013, Student was academically ineligible to participate in a UIL ***. P-2, P-14 pg. 196; Tr 341-343, 516
36. In the current school year, following Student’s annual ARD meeting in November, 2013, Student’s disability remained as specific learning disability in the areas of listening and reading comprehension, and mathematics calculation and problem solving. The committee considered Parent provided OHI information that was not signed by a medical doctor. Goals were adopted in *** and general reading. The committee developed a goal in general academics due to Student’s history of failure to turn in assignments. Student was placed in resource classes for reading and math, 50 minutes each, daily. Student was placed in inclusion class for English Language Arts, Science and Social Studies for 102 minutes each, weekly, and content mastery class for 30 minutes weekly. The committee determined that Student would participate in the state examination called the STAAR Modified exam for ***.
R-2
37. The ARD committee adopted accommodations including small groups, and preferential seating. Student is on a minimum high school graduation plan. Parent refused to give consent for a counseling evaluation or for District to communicate directly with Student’s medical providers. Parent asked for homebound placement, but did not explain why Student was unable to attend school. The committee did not agree to homebound placement or on a shortened school day. Parent disagreed with the ARD committee recommendations, and a reconvene meeting was scheduled for November 15, 2013. Prior Written Notice was given to Parent. R-2
38. Student has a history of absences from school, the majority of which have been for medical reasons or by parent notes. During the 2012-2013 school year, Student was absent all or part of *** days. From the time the current FIE was requested and the date it was completed,

Student missed approximately *** class periods. Due to Student's absences, the District evaluator had difficulties completing the evaluation. J-8; R-8; T-56, 199, 350, 396-397, 402, 447-448

39. Student received one discipline referral during the 2012-2013 school year. The referral was for forgetting Student's ID badge. R-10 ; T-514
40. Student passed two classes during the 2012-13 school year. T-89
41. District staff communicated with Parent. P-2, 14; T-105, 133, 208-209, 211, 220, 284-285, 289
42. District did not substantiate any claims of bullying of Student. T-503, 515, 520-521
43. A minimum graduation plan is a plan whereby a student may receive modified curriculum. Another aspect of the plan is that a student is not required to complete two years of a foreign language, or four math or sciences. More electives are available under the plan. A student graduating under a minimum plan must attend a community college prior to enrolling in a four-year university. Once a student moves into resource classes, the graduation plan changes to a minimum graduation plan, and a parent's approval is not required. T-62, 416-417, 444, 453
44. District accommodated for Student's ***. T-82-84, 190, 223, 265, 279, 285
45. District provided tutoring support for Student, including specialized tutoring provided by a teacher of Parent's choice. T-57, 184, 185, 216, 510-512
46. District provided content mastery class for Student for small group, tests and quizzes. T-135, 183
47. District staff receives training by District employees and outside instructors. Trainings provided are CPI, trainings about various disabilities, and trainings regarding the provision of services. T-324; 518-519
48. A general education teacher, special education teacher, and career and technology representative were present at Student's ARD meetings. T-415, 424
49. District's usual practice is to send physical copies of prior written notices rather than via electronic mail. T-525
50. Student enrolled in summer school, 2013, missed two days in the first week and was administratively dropped per District policy. T-502
51. ***. R-6; T-509-510

52. Because Student did not earn sufficient credits in the 2012-2013 school year to be classified as a *** grader, currently, Student is repeating the *** grade. T-89
53. Student is given the same rights as all other students. District employees have not retaliated against Parent. T-516

DISCUSSION

Standard of Review

A petitioner who challenges the school district's eligibility determination or offer of services under the IDEA bears the burden to prove that the child has been denied a FAPE. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005). This includes the burden of proof with regard to harm or a deprivation of educational benefit. The law does not require that the student's educational potential be optimal or "maximized."

The school district's plan is presumed to be appropriate. *R. H. v. Plano Indep. School Dist.*, 607 F.3d 1003 (5th Cir. 2010). The party attacking the plan bears the burden of proof, by a preponderance of the evidence, of demonstrating why it does not comply with the IDEA. *Id.* at 1010-11.

When a parent challenges the appropriateness of an IEP, two questions must be asked: whether the state has complied with the procedural requirements of the IDEA, and then, whether the IEP developed through such procedures was "reasonably calculated to enable the child to receive educational benefits." *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

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 child'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 the key stakeholders; and 4) Are positive academic and non-academic benefits demonstrated? *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

Identification of Student in Need of Special Education Services

While Dr. ***, who diagnosed Student with ADHD, is a neuropsychologist, he is not a licensed physician. Texas law requires that the multidisciplinary team that collects or reviews evaluation data in connection with the determination of a student's eligibility based on other health impairment must include a licensed physician. 19 TAC §89.1040.

Although Dr. *** holds a doctorate degree in neuropsychology and behavioral medicine, he is not an LSSP. District considered the evaluation but refused to accept the report due to the absence of LSSP credentials.

Although Petitioner alleged that District refused to allow Student to be evaluated by an independent evaluator selected by Parent, there was no evidence to support the allegation. On the contrary, District was willing to fund an IEE by an individual who met District criteria. After much effort, Parent located a willing evaluator who later found it difficult to work with Parent and ultimately withdrew from the evaluation.

Evaluation

Petitioner alleged that District misrepresented to Parent that an OHI form is required for completion of Student's FIE. Credible witness testimony refuted this allegation. Petitioner complained that District failed to complete Student's re-evaluation on March 14, 2013. The report is dated March 14, 2013.

District's FIE included observation of Student, a home/language survey, information from Parent and teachers, and educational records. Trained personnel administered tests in conformance with instructions provided by the producers. Testing, evaluation materials and procedures used in the evaluation were selected and administered so as not to be racially or culturally discriminatory. Previous evaluations were reviewed along with Parent- provided information including a neuropsychological evaluation report from Dr. **. District's 2013 FIE was properly conducted. 34 C. F. R. §300.304. The report was corrected due to a typographical error, and there was no evidence of falsified facts in the FIE. Petitioner failed to carry the burden of proving the allegation that District failed to properly identify Student with a disability.

Admission, Review and Dismissal Committee Meetings

Parent requested an ARD meeting for March 6, 2013, approximately two weeks following the mediation. In the mediation agreement, Parent agreed to provide certain documents. Parent had not complied. In the Agreement, District agreed to convene an ARD meeting within 15 school days

following receipt of those documents. Despite the failure to provide the documents, District and parent exchanged several emails in an effort to schedule an ARD meeting. Difficulties were encountered due to STAAR testing and Spring Break. District offered to hold an ARD meeting on April 9, 2013, and Parent agreed.

On April 3, Parent made a records request, and asked that the records be provided 48 hours prior to the April 9 ARD meeting. Due to the volume of requested records, District cancelled the ARD meeting. District was required to comply with the request without unnecessary delay and before any meeting regarding an IEP. 34 C. F. R. § 300.613. Witness testimony showed that the records request took some time to retrieve.

The IDEA requires districts to schedule ARD committee meetings at a *mutually* agreed time and place. 34 C. F. R. § 300.322 (a) (2) *emphasis added*. Although District did not hold the ARD meeting on March 6, as requested, Petitioner failed to carry the burden of proving the allegation that District deliberately delayed scheduling the ARD meeting.

During the applicable time period, both a general education and a special education teacher were present at ARD meetings. Petitioner brought forth no evidence to the contrary. 34 C. F. R. §300.321.

At the May 3 ARD meeting, the committee began an item-by-item discussion of Parent-requested accommodations. A review of the audiotape of the meeting shows that the meeting became contentious with each party interrupting the other, and with both parties speaking over the other. Parent ultimately walked out of the meeting. The committee had not completed going through Parent's requests. Petitioner failed to show that District excluded Parent's input in bad faith. *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003).

Although Petitioner alleged that District predetermined Student's placement and services before the April and May, 2013 ARD meetings, Petitioner failed to carry petitioner's burden of proof. District and Parent met in April to review the current FIE; however, that was not an ARD meeting. Placement needed to be determined, but the May 3 meeting recessed. Additional information was gathered by District and discussed during the May 17 reconvene ARD meeting at which time the committee determined placement.

While Petitioner's issues do not specifically complain about Student's placement in resource class rather than continuing in inclusion classes, the evidence reflects that Parent disagreed with such

placement. However, Petitioner failed to present evidence that District predetermined either Student's placement or student's services, or that they are inappropriate.

May 17 Reconvene ARD Committee Meeting without Parent Participation

Petitioner does not dispute that the May 3, 2013 ARD meeting was held by mutual agreement. Neither does Petitioner dispute that the reconvene ARD meeting was scheduled by mutual consent.

Parent complains that the May 17 reconvene meeting occurred in her absence. On May 16, when Parent emailed District that May 17 was "not a good time" for her, she provided other dates that fell outside the 10 day rule, and gave no other explanation for her intended absence.

When mutual agreement about all required elements of the IEP is not achieved at an ARD committee meeting, Texas rules allow the party who disagrees to have a *single opportunity* an ARD committee recess. The recess shall be for a period of time not to exceed ten school days. The date, time, and place for continuing the ARD committee meeting shall be determined by mutual agreement prior to the recess. 19 T.A.C. §89.1050(h)(1) and (3), *emphasis added*.

It is important to keep in mind the purpose of the IDEA: to provide disabled students a free appropriate public education and to protect the educational rights of those students. Parent participated in the May 3 meeting, and was offered an additional, single opportunity to participate in the May 17 meeting per the Texas rule. In other words, Parent had not one, but two opportunities to participate in the decision-making of the ARD committee. Parent failed to take advantage of the second opportunity to participate in the development of Student's education program.

District's first obligation is to provide a FAPE to Student, even if in doing so, it violates a procedural rule. In May, 2013, Student was failing several subject areas. Student had numerous absences from school. Student would not turn in student's work or complete assignments. A new FIE had been completed and reflected a change in Student's educational needs and eligibility. The ARD committee needed to review the results of District's FIE, consider eligibility classification, and discuss and accept new goals and objectives based on the FIE. It needed to determine Student's placement. All of these things were necessary for District to provide FAPE. Ultimately, District's decisions coincided with the recommendations made at the May 3 ARD meeting. Parent failed to prove a denial of FAPE due to District's holding the 10-day reconvene ARD meeting in compliance with the Texas 10-day reconvene rule.

Request for E-Mailed Prior Written Notices

A parent of a child with a disability may elect to receive notices required by §§ 300.503, 300.504, and 300.508 by an electronic mail communication, if the public agency makes that option available. 34 C. F. R. § 300.505. Testimony at hearing indicated that District's usual practice is to send notices by physical mail rather than electronic mail. The testimony leads one to think that District may, at times, send notices by electronic mail. However, Petitioner failed to elicit sufficient evidence to support the allegation that Parent requested emailed prior written notices on May 3 and May 17, 2013 or that District makes the *option available to a parent*.

Individualized Education Program

Student's IEP was changed at the May 17, 2013 ARD meeting. While it is true that the changes were made in Parent's absence, District was obligated to provide FAPE to Student and develop a program based upon the assessments and Student's performance.

Petitioner failed to present any evidence that District refused to accept Student's classwork and assignments. Testimony showed that one of student's instructors ***. The evidence clearly shows that District provided tutoring support and CMC for tests, quizzes, and classwork. Student did not always take advantage of the opportunities. When Student ***, District staff accommodated student by ***.

Petitioner presented no evidence that District punished for actions/inactions that were manifestations of Student's disability. Student's single disciplinary infraction was a failure to have student's student identification badge with student. The ARD committee discussion indicated that the committee believed Student was capable of accomplishing this task.

Petitioner presented no evidence to support a need for ESY in the summer, 2013. Petitioner alleges that the failure to offer ESY in the summer 2013, at least in part, caused Student to fail the STAAR assessment. This allegation is illogical since the STAAR assessment occurred in the Spring, 2013 and before the summer, 2013.

Provision of Records within 45 Days

When a parent requests to inspect and review education records relating to his child, a school district must comply with the request without unnecessary delay and before any meeting regarding an IEP, ... and in no case more than 45 days after the request has been made. 34 C. F. R. § 300.613. Petitioner presented no evidence to support the allegation that District failed to provide records within 45 days from Parent request.

Free Appropriate Public Education

Is the educational program individualized on the basis of the child's assessment and performance? During the major portion of the applicable timeframe, Student's program was based on a 2010 FIE. The assessment complied with the requirements of IDEA. Student's 2010 FIE recommended eligibility under the classification of ED.

A new FIE was conducted during the spring, 2013 and complied with the requirements of IDEA. The psychological evaluation indicated that emotional disturbance was no longer the qualifying disability. Based on the FIE, Student qualified as a student with a learning disability in the areas of math calculation, math reasoning, reading comprehension, and listening comprehension. Consideration was given to Student's academic performance and attendance. As a result of each FIE, goals and objectives were developed, and accommodations were put into place for Student.

Following the 2013 FIE, accommodations were put into place such as check for understanding, have Student repeat instructions, 2 extra days for tests, quizzes, and class assignments, content mastery class for tests, quizzes, and class assignments as requested by Student, break assignments down into smaller parts (known as "chunking"), small group testing, and preferential seating to minimize distractions. New goals in math and general reading were adopted. A general academics goal was adopted to assist Student in turning in assignments.

The evidence supports a finding that the Student's program was reasonably calculated to enable the child to receive educational benefits, and was individualized on the basis of assessments and performance.

Is the program administered in the least restrictive environment? Student was previously in general education class with inclusion support. The evidence reflects that Student was failing classes and did not complete or turn in student's assignments. Student did not pass the STAAR assessment. Despite the efforts of Student's inclusion teacher to assist student, Student continued to fail. As a result of the current FIE, Student's placement included resource classes for math and reading.

It is understandable that Parent wants Student to be in the less restrictive setting of general education class with inclusion support although at the time of hearing, Parent had requested a more restrictive setting of homebound placement. However, based on Student's new evaluation results and student's history of failing classes, the least restrictive placement is a resource setting for reading and math to address both student's learning disabilities and student's failure to complete work.

Are the services provided in a coordinated and collaborative manner by the key stakeholders?

Parent and District have a long history of disagreements regarding the Student's education program. Parent has filed numerous complaints against District and grievances against its employees. ARD meetings ended in disagreement and the parties participated reconvene ARDs. Despite the contentious nature of the relationship, Parent has provided input both at ARD meetings and through email communications to teachers and other District staff. Parent requested several accommodations for Student that were individually considered, some of which were accepted by the committee.

Parent conferences have been held. ARD meetings have taken place at Parent request. Even though the ARD committee did not accept Parent's outside evaluator's report, it considered his recommendations. Although cooperation was strained and difficult, District staff provided services to Student collaboratively with key stakeholders.

Are positive academic and non-academic benefits demonstrated? Student has shown that student is capable of making positive academic and non-academic benefits. Student passed English and *** during the 2012-2013 school year. Student participated in ***. Student experienced no serious disciplinary problems. Unfortunately, Student had numerous absences during which student missed instruction in student's classes. Although the absences indicated they were for medical reasons, no credible evidence was presented to substantiate those reasons.

District offered an array of services that Student failed to use. Student had access to content mastery class, but often did not access it. Student was offered summer school, but attendance was an issue again, and Student was dropped from the roles. District offered specific tutoring in addition to regular tutoring, but Student did not take regular advantage of the opportunity.

If District were allowed to access to Student's doctors and to conduct a counseling evaluation, and, if Student attended school regularly and accessed the numerous available opportunities for additional support, one wonders what Student might achieve. Regardless, the evidence indicates Student made positive academic and non-academic benefits.

CONCLUSION

1. Petitioner currently resides within the geographical boundaries of Killeen Independent School District, a legally constituted independent school district within the State of Texas, and is entitled to special education services pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400, et seq.

2. Killeen Independent School District's educational program is presumed to be appropriate. As the party challenging the educational program proposed by District, Petitioner bears the burden of proof. *R.H.,v. Plano Indep. School Dist.*, 607 F.3d 1003 (5th Cir. 2010); *Schaffer v. Weast*, 126 S.Ct. 528 (2005). *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), aff'd 468 U.S. 883 (1984) An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). Petitioner failed to meet that burden.

3. Petitioner failed to meet the burden of proving that Killeen Independent School District denied Student a FAPE. *Hendrick Hudson District Board of Educ. v. Rowley*, 458 U.S. 176 (1982); *Houston ISD v. Bobby R.*, 200 F.3d 341(5th Cir. 2000); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

ORDER

After due consideration of the record, the foregoing findings of fact and conclusion of law, all of Petitioner's requested relief is DENIED.

SIGNED and ENTERED on January 20, 2014.

_____/S/_____
BRENDA RUDD
Special Education Hearing Officer
For the State of Texas

NOTICE TO THE PARTIES

The decision issued by the hearing officer is final, except that any party aggrieved by the findings and decision made by the hearing officer, or the performance thereof by any other party, may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States A civil action brought in state or federal court must be initiated not more than 90 days after the date the hearing officer issued his or her written decision in the due process hearing. 20 U.S.C. §1415.