

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

**DECISION OF THE HEARING OFFICER**

Petitioner \*\*\* (“the Student”), by next friend, \*\*\* (“the Parent”), requested a due process hearing pursuant to the Individuals with Disabilities Education (“IDEA”), 20 U.S.C. §1400, *et seq.*, against Respondent Mercedes Independent School District (“MISD” or “the District”). Christopher Jonas, Attorney at Law in Corpus Christi, Texas, represented Petitioner. Kevin T. O’Hanlon and Benjamin Castillo, O’Hanlon, McCollom & Demerath in Austin, Texas, represented Respondent.

**ISSUES**

Petitioner complains that the following actions or inactions by Respondent deprived Petitioner of procedural and substantive rights of access to a Free Appropriate Public Education (“FAPE”):

1. Whether Respondent appropriately assigned a qualified and certified tutor for Petitioner’s \*\*\* class;
2. Whether Petitioner’s Individualized Education Plan (“IEP”) contains generalized goals without specific and measurable objectives;
3. Whether Petitioner’s 2013-2014 Language Arts IEP was: a) appropriate for Petitioner; and, b) implemented by appropriate instructional staff; and,
4. Whether Respondent supplied Petitioner’s draft IEPs to Petitioner’s parent prior to or during Petitioner’s most recent three meetings of the Admission, Review, and Dismissal Committee (“ARDC”).

As relief, Petitioner seeks the following as deemed appropriate by the Hearing Officer:

1. Receipt of a FAPE designed to meet Petitioner’s unique and individual needs;
2. Education of Petitioner in the Least Restrictive Environment;
3. Receipt of any and all appropriately implemented modifications, interventions, and services which are effective, goal oriented, and educationally beneficial for Petitioner;
4. Up to two years of compensatory educational services or an amount of compensatory education services deemed appropriate by the Hearing Officer; and,
5. An Order of the Hearing Officer that Respondent convene a meeting of the ARDC to implement the Hearing Officer’s decision.

**PROCEDURAL HISTORY**

On March 26, 2014, Petitioner filed the initial due process complaint with the Texas Education Agency (“TEA”). The initial scheduling order set the hearing for May 1, 2014, and the Decision Due Date for June 9, 2014.

This record includes five telephonic scheduling and pre-hearing conferences with the parties, all recorded by a certified court reporter. Respondent sought an unopposed continuance during the first brief

scheduling conference due to scheduling conflicts, granted for good cause shown and resetting the due process hearing to May 23, 2014, and extending the Decision Due Date to July 7, 2014.

Respondent filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction on April 4, 2014, \*\*\*. The resolution meeting took place without the presence of attorneys and with the Student on April 7, 2014, but the parties were not able to resolve the dispute. \*\*\* on April 15, 2014, and the matter was discussed at the second telephonic conference on April 17, 2014. Because Respondent \*\*\*, Petitioner announced intention to re-file the complaint and discussion included anticipated changes to the procedural schedule that would result from a restart of the timeline with an amended complaint filing. On the same day, Petitioner filed Petitioner's First Amended Request for Due Process. For good cause shown, the Hearing Officer granted Petitioner's First Amended Request for Due Process and reset the procedural schedule for a due process hearing on June 12, 2014.

A third telephonic conference took place following the first complaint amendment on May 9, 2014. The parties discussed whether or not Petitioner wanted the Student to \*\*\* on \*\*\*. Petitioner stated the position that the Student would be entitled to compensatory services even if the Student \*\*\* as Petitioner alleged that the Student \*\*\* from the previous school year. Petitioner asked that the Student be allowed to \*\*\*.

In June 2014, Petitioner filed an unopposed continuance request due to serious health concerns of Petitioner's counsel and the parties began efforts to suggest a revised procedural schedule and clarify the length of the continuance request. The Hearing Officer granted Petitioner's unopposed continuance request for good cause shown, and revising the Disclosure Deadline as on or before 5:00 p.m. on September 26, 2014, resetting the due process hearing to October 6, 2014, and revising the Decision Due Date to November 5, 2014.

Petitioner filed Petitioner's Second Amended Request for Due Process Hearing and an accompanying Motion for Leave to Amend Petition on September 8, 2014. Respondent objected to an additional amendment of the complaint. The Hearing Officer denied the second amended complaint without change to the procedural schedule.

Petitioner asked for a telephonic pre-hearing conference regarding a legible copy of a job description requested by Petitioner through a request for production. The conference took place on September 25, 2014 – one day before the Disclosure Deadline. Respondent agreed to produce a legible copy at the due process hearing site. There was no request by Respondent for a continuance of the procedural schedule or any discussion by the parties of difficulties hindering preparations for the Disclosure Deadline on September 26, 2014, and the due process hearing on October 6, 2014.

Petitioner timely made disclosure prior to the disclosure deadline by 3:16 p.m. on September 25, 2014 with the Hearing Officer and by 10:22 a.m. on September 26, 2014, with opposing counsel. Respondent did not make disclosure on September 26, 2014, and did not request an extension prior to the disclosure deadline. The following communications occurred between counsel for the parties and the Hearing Officer regarding disclosure:<sup>1</sup>

### **September 29, 2014**

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<sup>1</sup> References to the hearing transcript of this proceeding (“Tr.”) and page number (example: “Tr. at \_\_\_”). References to the five telephonic conference transcripts appear as “C.Tr.” followed by the date and page number (example: “C.Tr. (April 17, 2014)”). References to Petitioner's Exhibits (“P.Ex.”) and the sole Joint Exhibit (“J.Ex. 1) list the exhibit number and the page number (example: “P.Ex. 1 at 1; J.Ex. 1 at 1”).

- 11:38 a.m. Petitioner filed Petitioner's Motion to Strike Respondent's Witnesses and Exhibits ("P - Motion");
- 3:45 p.m. Respondent sent electronic mail ("email") communication with attachments of Respondent's exhibit and witness lists with no further explanation of the untimely filing;
- 4:02 p.m. Hearing Officer acknowledgement of receipt of Respondent's disclosure as untimely with no request for an extension prior to the disclosure deadline and setting Respondent's response to P. Motion by 5:00 p.m. on September 30, 2014;
- 4:43 p.m. Respondent filed Respondent's Response to Petitioner's Motion to Strike Respondent's Witnesses and Exhibit List ("P - Response");
- 9:11 p.m. Respondent sent email communication with attachments of an amended exhibit list and seven exhibits.

#### **September 30, 2014**

- 7:01 a.m. Respondent's email request for a telephonic hearing on R. Response;
- 9:24 a.m. Hearing Officer response from out-of-town location allowing Petitioner to reply to R. Response ("P - Reply") by noon, October 1, 2014, and availability to set telephonic conference on pending motions based on the parties' availability on October 2, 2014;
- 9:27 a.m. Petitioner's email reply regarding availability and desire to file P. Reply;
- 9:31 a.m. Petitioner's confirmation of telephonic conference availability anytime on October 2, 2014.

#### **October 1, 2014**

- 3:31 p.m. Respondent's email communication with attachment of Motion to Strike Petitioner's Witness ("R. - Motion");
- 4:00 p.m. Hearing Officer response concerning receipt of R. Motion (setting deadline for Petitioner's response to R. Motion ("R. - Response") and setting telephonic conference for 2:00 p.m. or after 5:30 p.m. on October 2, 2014, based on availability of the parties to take up pending motions);
- 4:08 p.m. Respondent's email (B. Castillo) confirming telephonic conference at 2:00 p.m. on October 2, 2014.

#### **October 2, 2014**

- 1:31 p.m. Respondent's email regarding call-in number for conference call;
- 1:47 p.m. Hearing Officer response with copy of call-in number set out for all conferences in initial scheduling order and call to B.Castillo office number with conference call number;
- 2:02-2:44 p.m. Telephonic conference held;
- 2:06 p.m. Respondent's email (K. O'Hanlon) asking about the dial-in number;
- 3:15 p.m. Hearing Officer reply to K. O'Hanlon email.  
[Pleading File; C.Tr. (October 2, 2014)] Pre-Hearing Transcript (October 2, 2014)].

At the fifth telephonic conference on October 2, 2014, Respondent acknowledged that Respondent missed disclosure due to an internal office issue and had attempted to enter into settlement negotiations with Petitioner on October 1, 2014, requesting that the hearing be moved from October 6, 2014, to October 13, 2014. Petitioner opposed moving the due process hearing. The Hearing Officer granted Petitioner's Motion to Strike Respondent's witnesses and disclosure in accordance with the Texas Commissioner's mandatory disclosure rule at Chapter 89 of the Texas Administrative Code.<sup>2</sup> After argument of the parties, the Hearing Officer denied Respondent's Motion to Strike two of Petitioner's witnesses and further denied the continuance request to move forward to the one-day due process hearing scheduled for October 6, 2014.

<sup>2</sup> 19 TEX. ADMIN. CODE § 89.1180(h)

The due process hearing took place as a closed hearing on October 6, 2014. Prior to the conclusion of the hearing, the parties jointly requested leave to submit written closing statements in lieu of oral closing statements and sought a continuance of the Decision Due Date, granted for good cause shown to December 15, 2014. The Hearing Officer set agreed staggered deadlines for submission of the parties' written closing statements. Petitioner timely filed Petitioner's written closing on November 17, 2014. Respondent timely filed Respondent's written closing on November 24, 2014, at which time the record closed. The Decision of the Hearing Officer timely issued on December 15, 2014.

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 is a \*\*\* year-old student in MISD who qualified for special education services at the beginning in the 2013-2014 school year. Currently, the Student has the primary disability classification of Intellectual Disability ("ID") and secondary eligibility classifications of Emotional Disturbance ("ED"), and Other Health Impairment ("OHI"). [Pleading File; P.Ex. 1 at 12 and 2 at 2-3].

2. Prior to qualification for special education services, the Student received Section 504 services under the Rehabilitation Act of 1973 from the District to address the Student's dyslexia. [P.Exs. 6, 7, 8, and 12 at 1; Tr. at 57 and 215].

3. The Student takes medication for sleep issues, Attention Deficit Hyperactivity Disorder ("ADHD"), depression, and anxiety issues, including \*\*\*, \*\*\*, and \*\*\*. [P.Exs. 1, 5, and 12].

4. The Parent participated and signed in agreement as a member of the ARDC in the Student's multiple-day ARDC meetings held in August 2013 and November 2013. The \*\*\*, \*\*\*, \*\*\* also participated in the Student's ARDC meetings with the Parent. The \*\*\* testified as Petitioner's sole witness at the due process hearing. [P.Exs. 1, 2, and 3; Tr. at 55-262].

5. In June 2013, an evaluation by the District determined that the Student had dyslexia and exhibited average intelligence. The Student's deficits included phonological processing, phonemic decoding, sight words, oral reading comprehension, and fluency. The Student's strengths included untimed reading comprehension. The evaluation report recommended use of study skills/guides, reduction of assignment and level of difficulty, breaking down tasks into component parts, repeat drill and review, immediate feedback, positive reinforcement, provide concrete experiences, and pacing appropriate to the rate of learning. [P.Ex. 11 at 32].

6. In July 2013, the District performed a \*\*\* evaluation of the Student using the \*\*\*, the \*\*\*, and the \*\*\*. The gathered data revealed high \*\*\*. [P.Ex. 13].

### August 2013 ARDC Meeting

7. The Student's initial ARDC meeting took place on August \*\*\*, 2013. The ARDC determined that the Student was eligible for special education services based on ED and OHI. The Parent requested, and was granted, an IEE to rule out ID eligibility. [P.Ex. 1 at 16-17 and 28].

8. The Student's 2013-2014 placement was \*\*\* as recommended by the Student's physician, Dr. \*\*\*. The ARDC agreed to assistive technology services on a sporadic basis and special education counseling

services of 180 minutes per six-week period. The Student's \*\*\* placement included general education services of 25 hours of \*\*\* Class attendance. Through the \*\*\* instruction, the Student received four hours of instruction, including two hours of integrated services in \*\*\* and two hours of integrated \*\*\* instruction. [P.Ex. 1 at 1, 14, 16, 41, and 43-44].

9. The August 2013 ARDC reviewed the Student's Present Levels of Academic Achievement and Functional Performance ("PLAAFP"), previous state assessment results, transition needs, and behavioral needs. The ARDC accepted two goals with 70% mastery level for the 2013-2014 school year. One of the goals had a combined content area with a Language Arts goal focus to address the Student's \*\*\* and \*\*\* classes. The ARDC set 70% mastery of the goal to be achieved by May \*\*\*, 2014. Evaluation methods included benchmarks, teacher reports/feedback, and curriculum based assessments. The goal referenced Texas Essential Knowledge and Skills ("TEKS") curriculum Grade \*\*\* at "\*\*\*\*." [P.Ex. 1 at 7 and 34; Tr. at 206-209].

10. The second goal adopted by the August 2013 ARDC was a Health Education goal with behavior emphasis to address emotion communication, needs, and wants to reduce anxiety. The goal called for 70% mastery by May \*\*\*, 2014, using observations, teacher reports/feedback, and student conferences as methods of evaluation. This goal referenced the TEKS curriculum Grade \*\*\* at "\*\*\*\*." [P.Ex. 1 at 7 and 34; Tr. at 206-209].

11. The August 2013 ARDC reviewed the Student's transition needs and considered the completed assessment results, including a Student Survey for Transition Planning filled out by both the Student and the Parent. The transition planning identified the Student's planed interests in \*\*\* and \*\*\*. [P.Ex. 1 at 4-5].

12. No outside agencies were invited to the August 2013 ARDC meeting. [P.Ex. 1 at 5].

13. The August 2013 ARDC documents concerning transition do not include specific goals and objectives concerning the Student's \*\*\* training, education, \*\*\*. [P.Ex. 1].

### **Dyslexia IEE**

14. In Fall 2013, Respondent provided an independent educational evaluation ("IEE") for dyslexia of the Student at school district expense, as requested by the Parent in the August 2013 ARDC meeting. \*\*\*, and educational diagnostician, performed the assessment and issued the report in October 2013, concluding that the Student did not exhibit dyslexic characteristics, showing no "unexpected" area of strength in relation to other academic areas as compared to dyslexic peers. Instead, the evaluator concluded that the Student exhibited low intellectual deficits. [P.Ex. 14].

### **November 2013 ARDC Meeting**

15. In November 2013, the ARDC meeting convened for a \*\*\* meeting on November \*\*\*, 2013. Ms. \*\*\*, the educational diagnostician who performed the October 2013 IEE, attended the meeting to review the completed evaluation report. The ARDC added ID as a special education eligibility area for the Student. The ARDC revised the Student's goals at this meeting by keeping both August 2013 goals as previously written, and adding two goals to address the classes of \*\*\* and \*\*\*. [P.Ex. 3 at 20-22; Tr. at 205].

16. The new \*\*\* goal added by the November 2013 ARDC referenced TEKS curriculum Grade \*\*\* at "\*\*\*\*." The goal set mastery at 70% by May 30, 2014, with 60% mastery by April 11, 2014, and 50% mastery by February 7, 2014. Methods of evaluation included observations and data collection. [P.Ex. 3 at 20-22; Tr. at 205].

17. The “English Language Arts Reading” goal added by the November 2013 ARDC referenced TEKS curriculum Grade \*\*\* at “\*\*\*.” This goal also called for mastery at 70% by May 30, 2014, with 60% mastery by April 11, 2014, and 50% mastery by February 7, 2014. Methods of evaluation included observations and curriculum based assessments. [P.Ex. 3 at 20-22; Tr. at 205].

18. On the second day of the meeting, the \*\*\* recommended that a paraprofessional attend the \*\*\* class with the Student to assist in focus and preparation for the Student’s \*\*\* examination. The District’s \*\*\* Director, \*\*\*, planned to contact the TEA regarding a paraprofessional as the substitute teacher, Ms. \*\*\*, did not have college credit hours to serve as a paraprofessional aide. The ARDC Minutes of the second meeting day state that the ARDC previously agreed to \*\*\* support for the Student to take place during the Student’s \*\*\* instruction. The ARDC recessed the second meeting day with plans to reconvene the following day for discussion of the sole remaining issue – the provision of an individual to support the Student during the \*\*\* class. [P.Ex. 1 at 17, P.Ex. 2 at 2-4, and P.Ex. 3 at 2-4; Tr. at 104].

19. As planned, the ARDC reconvened on November \*\*\*, 2013. The ARDC discussed Ms. \*\*\*’s report that the person assisting the Student in \*\*\* class did not have to be a licensed instructor. The ARDC reached understanding that this person would need to be skilled and experienced. The Student’s school principal, Ms. \*\*\*, recommended hiring a tutor for 35 hours a week to help the Student in the \*\*\* class. The ARDC ended in consensus. [P.Ex. 2 at 4 and 7, P.Ex. 3 at 4, 7, 15, 18, and 23; Tr. at 196 and 198-201].

20. The \*\*\* believes that, after November 2013, the Student’s paraprofessional aide did not possess the qualifications necessary to support the Student in \*\*\* and \*\*\*, according to the paraprofessional job description. [Tr. at 196-199; R.Ex. 23].

21. The paraprofessional job description includes a requirement that the individual perform any other duties as assigned. [P.Ex. 23].

22. The Student received \*\*\* instruction throughout the 2013-2014 school year from a trained \*\*\*, \*\*\*. During Ms. \*\*\*’s \*\*\*, \*\*\* served as the Student’s substitute teacher beginning \*\*\*, 2013, to \*\*\*, 2013. Ms. \*\*\* is licensed as a \*\*\* by the Texas Department of Licensing and Regulation. The Student’s tutor, \*\*\*, enrolled with a student permit license from the Texas Department of Licensing and Regulation beginning on December \*\*\*, 2013. [P.Ex. 3 at 164-174; Tr. at 196-197].

23. The Student’s \*\*\* teacher, Ms. \*\*\*, kept a \*\*\* student activity log for the Student’s 2013-2014 \*\*\* services. The log details the subjects covered during the \*\*\* sessions. The entries in the documents include reference to \*\*\* vocabulary work. [P.Ex. 6 at 6-8; Tr. at 71-75].

24. \*\*\*, a certified general and special education teacher for grades Early Childhood through 12, served as the Student’s \*\*\* teacher during the 2013-2014 school year as the teacher of record. [P.Ex. 4 at 177].

25. The Student’s ARDC, including the Parent, scheduled a program of appropriate transition services for the Student based on the Student’s abilities and \*\*\*. The Student’s IEP stated that the District would provide two years of compensatory education for the Student in the event that the Student did not pass the \*\*\*. [P.Ex. 1 at 43, P.Ex. 3 at 15, and P.Ex. 13].

26. The November 2013 ARDC documents concerning transition do not include specific goals and objectives concerning the Student’s \*\*\* training, education, \*\*\*. [P.Exs. 2 and 3].

27. The Student attempted, but did not pass, the \*\*\* in 2014. [Tr. at 122-123].

28. The Student has not \*\*\* because of the “stay put” placement in place for the duration of this proceeding. The Student \*\*\* during the Student’s \*\*\*, but has not \*\*\*. [C.Tr. (May 9, 2014) at 7-10].

29. The \*\*\* does not believe that the District provided draft IEPs to the family before ARDC meetings. Draft IEPs, according to the \*\*\*, would help discussion with the Student about available options. The \*\*\* did not specify when the draft IEPs were not provided. [Tr. at 213-214].

30. Petitioner presented no evidence to show that the \*\*\* or Parent were hindered in their ability to participate in the decision-making process of the Student’s ARDC.

### **August-September 2014 ARDC Meeting**

31. The Student’s ARDC convened for annual review of the Student’s program on August \*\*\*, 2014. The Student’s Parent and \*\*\* participated in this meeting. At request of the \*\*\*, the ARDC recessed to re-write the PLAAFP statements. The ARDC reconvened on August \*\*\*, 2014, but at request of the Parent, the meeting recessed. [P.Ex. 4 at 16-17].

32. The ARDC reconvened to conclude the August 2014 meeting on September \*\*\*, 2014. Participants reviewed the Student’s program and services needed to move the Student to \*\*\* success. The ARDC developed a \*\*\* goal for \*\*\* development: to be able to \*\*\* as reported with satisfactory performance 80% of the time. [P.Ex. 4 at 8].

33. The August/September 2014 ARDC agreed to provide compensatory services to the Student after \*\*\* and the \*\*\* requested clarification of what compensatory services would be provided. The Parent and \*\*\* did not agree with the proposed IEP as written and would provide signatures to after receiving and reviewing a copy of the updated IEP. [P.Ex. 4 at 17-20].

34. The August-September 2014 ARDC plans have not been put into effect because of the “stay put” placement of the Student. [P.Ex. 4 at 19].

35. The Parent and \*\*\* were full participants in all of the Student’s ARDC meetings, gave input into the Student’s special education evaluation process, and received an IEE at school district expense upon request to “rule out” ID eligibility. [P.Exs. 1, 2, and 3].

36. The Student’s 2013-2014 ARDC meeting anticipated the Student’s \*\*\* at \*\*\*. [P.Exs. 1, 2, and 3].

37. In May 2014, the District prepared for the Student’s \*\*\* on the \*\*\* along with the Student’s \*\*\* class. The District sought clarification from legal counsel on how to proceed for \*\*\*. [Pleading File; C.Tr. (May 9, 2014) at 6-17; P.Ex. 1 at 44; Tr. at 247].

38. The Student completed all requirements \*\*\*. On May \*\*\*, 2014, the Parent contacted the District with a request to schedule an ARDC meeting to \*\*\* the Student. Counsel for Respondent contacted Petitioner’s counsel on the same date, but Petitioner’s counsel did not consent to allow Respondent to conduct \*\*\* ARDC meeting for the Student. [Pleading File (email dated May 29, 2014)].

39. Based on the “stay put” placement for the pendency of this dispute, the Student was allowed to \*\*\* for the District’s \*\*\* and, as requested by Petitioner’s counsel, has not \*\*\* by the Student. [Pleading file; C.Tr. (May 9, 2014) at 16-17].

40. At the due process hearing, the parties jointly offered Petitioner’s Proposed Settlement Agreement into evidence and the document was admitted into the record. This proposal asks that Respondent “shall submit a \*\*\* and \*\*\* as stated on the 2013-2014 \*\*\*.” [J.Ex. 1].

## DISCUSSION

This dispute concerns \*\*\* student qualified for special education and services due to ID, ED, and OHI who received special education services \*\*\* placement for the Student’s \*\*\* year in 2013-2014. It is undisputed that the Student has \*\*\* from the District and, at the time of the due process hearing, had not passed the \*\*\*. It is also undisputed that Respondent made repeated offers to complete the Student’s \*\*\* with a \*\*\* while adhering to the November 2013 ARDC agreement to provide compensatory services to enable the Student to pass the \*\*\*.

The dispute became further complicated when Respondent failed to properly disclose witnesses and exhibits by the disclosure deadline.<sup>3</sup> Following this event, Petitioner elected to put on a single witness at the due process hearing – the Student’s \*\*\* – and did not call other witnesses on Petitioner’s witness list.<sup>4</sup> The record in this dispute includes 19 of Petitioner’s exhibits and one joint exhibit. The Hearing Officer did not allow Respondent to present any witness or enter any of Respondent’s untimely disclosed exhibits.<sup>5</sup>

Petitioner believes that the Student did not receive a FAPE under the District’s program by multiple failures, including failure to individualize the Student’s program on assessment and performance, failure to \*\*\* for the Student, failure to provide a qualified instructor to assist the Student in \*\*\* class, and failure to individualize goals covering two or three subject areas.<sup>6</sup> Respondent believes that the District offered the Student an appropriate program in accordance with IDEA that delivered an educational benefit to the Student, including fulfillment of requirements to \*\*\* under the \*\*\*, and with a firm commitment to provide up to two years of compensatory services for the Student to pass the \*\*\*.<sup>7</sup>

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<sup>3</sup> See Procedural History, above.

<sup>4</sup> Petitioner’s witness list included four witnesses: the Student, the Parent, the \*\*\*, and one expert witness, a licensed school psychologist selected to perform an independent evaluation of the Student. Petitioner’s witness list contained no school district witnesses; Respondent received Petitioner’s witness list and disclosure at 10:22 a.m. on September 26, 2014, prior to the 5:00 p.m. deadline. See C.Tr. (October 2, 2014) at 13.

<sup>5</sup> 34 C.F.R. §300.512(a)(3); 19 TEX. ADMIN. CODE § 89.1180(h).

<sup>6</sup> Petitioner’s Closing Argument at 4-5.

<sup>7</sup> Respondent’s Closing Argument at 5-14; P.Ex. 3 at 15 and P.Ex. 4 at 19.



**Applicable Law: Free Appropriate Public Education (“FAPE”)**

The primary purpose of IDEA is to ensure that all students with disabilities have available a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.<sup>8</sup> Under IDEA, students with disabilities are guaranteed a “basic floor of opportunity” that includes specialized instruction and related services that are individually designed to provide an educational benefit to the student.<sup>9</sup>

The U.S. Supreme Court established a two-part test for determining whether a school district provided a FAPE to a student under IDEA: 1) did the school district comply with IDEA’s procedures; and, 2) was the IEP reasonably calculated to confer educational benefit to the student.<sup>10</sup> No particular substantive standard is imposed upon states under *Rowley*.<sup>11</sup> The educational benefit must be more than a “mere modicum” and not *de minimis*.<sup>12</sup>

To determine whether an educational program is reasonably calculated to provide an educational benefit, the Fifth Circuit established criteria and set out four factors to consider as indicators of whether an educational program is reasonably calculated to provide meaningful benefit:

- The program is individualized on the basis of the student’s assessment and performance;
- The program is administered in the LRE;
- The services are provided in a coordinated and collaborative manner by the key stakeholders; and,
- Positive academic and non-academic benefits are demonstrated.<sup>13</sup>

The Fifth Circuit has not specified how the four factors must be applied; instead, the factors serve as indicators of the appropriateness of an educational program and are intended to guide a court in a fact-intensive inquiry for evaluation of whether an educational program conferred an educational benefit.<sup>14</sup>

After parents and school districts agree to an IEP, school districts must implement the IEP.<sup>15</sup> Failure to implement a material or significant portion of the IEP can amount to a denial of FAPE, but the party challenging the implementation of the IEP must show that the failure to implement was more than a *de minimis*

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<sup>8</sup> 20 U.S.C.S. § 1400(d)(1)(A); 34 C.F.R. § 300.1.

<sup>9</sup> *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189 (1982).

<sup>10</sup> *Rowley*, 458 U.S. at 176.

<sup>11</sup> *Rowley*, 458 U.S. at 200.

<sup>12</sup> *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 246-248 (5th Cir. 1997).

<sup>13</sup> *Michael F.*, 118 F.3d at 247-249.

<sup>14</sup> *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

<sup>15</sup> 20 U.S.C.S. § 1414(d)(2)(A); 34 C.F.R. § 300.323; *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012).

failure to implement all IEP elements. Instead, the challenging party must show that the school board or other authorities failed to implement substantial or significant provisions of the IEP.<sup>16</sup>

A hearing officer must make a determination that a student did not receive a FAPE based on substantive grounds.<sup>17</sup> In matters alleging procedural violations, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child, or caused a deprivation of educational benefit.<sup>18</sup>

A school district's educational program is presumed appropriate and the party challenging a school district's eligibility determination or offer of services under the IDEA bears the burden to prove that the child has been denied FAPE.<sup>19</sup> In this proceeding, Petitioner has the burden to show why the IEP and services provided to the Student were not appropriate under IDEA. Petitioner alleged both procedural and substantive violations in this dispute.

#### **A. Qualified \*\*\* Instructor**

The evidence in this record established that the District considered the Student's need for support in the \*\*\* class. The ARDC considered the input of the Parent and \*\*\* in the ARDC process and decided to provide a tutor rather than a paraprofessional to assist the Student.

All special education and related service personnel must be certified, endorsed, or licensed in the area or areas of assignment; paraprofessional personnel must also be certified to work with eligible students, general and special education teachers, and related service personnel.<sup>20</sup> However, neither IDEA's implementing regulations nor the Texas Commissioner of Education's rules specifically define "tutor." The record of this dispute shows that the November 2013 ARDC investigated what type of qualification was required to help a student in a \*\*\* class, including telephone calls to the TEA and the Texas Department of Licensing and Regulation and learned that no certification was required for a tutor.<sup>21</sup> After this investigation, all members of

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<sup>16</sup> *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000). See also *Corpus Christi Indep. Sch. Dist. v. C.C.*, 59 IDELR 42 (S.D. Tex. 2012).

<sup>17</sup> 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(1).

<sup>18</sup> 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

<sup>19</sup> *Schaffer v. Weast*, 126 U.S. 528 (2005); *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom.*, *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).

<sup>20</sup> 34 C.F.R. § 300.156; 19 TEX. ADMIN. CODE § 89.1131(a, c).

<sup>21</sup> P.Ex. 3 at 4. The Texas Department of Licensing and Regulation is the regulating body for \*\*\* in Texas.

the ARDC – including the Parent – agreed on a tutor to provide the services who had knowledge and interest in the \*\*\* class to support the Student.<sup>22</sup>

After the ARDC reached agreement on the type of assistant who would provide services, the record before me established that the District hired an individual that had knowledge and interest in the subject. At this same meeting, the ARDC specifically agreed to deliver this assistance to the Student for up to two years to assist the Student in passing the \*\*\*.<sup>23</sup> I conclude that Petitioner did not fail to implement the Student’s IEP for assisting the Student in the area of \*\*\*.

#### **B. IEP Goals and Objectives: Goals Developed by the ARDC**

Petitioner challenges the goals and objectives developed for the Student, both those developed and the goals not developed by the Student’s ARDC. Petitioner presented testimony from the \*\*\* that the goals developed and put in place by the Student’s ARDC included several subjects clustered together under the same goal with additional subject areas added as “after-thought subjects” instead of writing individual goals and objectives.<sup>24</sup> Respondent defends the IEP goals and objectives, noting that the ARDC adopted, by reference and without modification, the goals and objectives directly from the TEKS for the applicable subject area was adopted by the State Board of Education (“SBOE”).<sup>25</sup>

The TEKS are the curriculum standards adopted by the SBOE that apply throughout the State of Texas for measurement of the objectives that general education students must master in order to pass state standardized testing.<sup>26</sup> The ARDC documents in this record support Respondent’s argument. The ARDC adopted the referenced TEKS in the Student’s IEP goals and did not put any proposed modifications in place for the Student’s performance on these TEKS. As a result, the Student received the same curriculum rigor as non-disabled general education students.

Contrary to Petitioner’s position that the ARDC did not consider the Student’s present levels of performance, the evidence in this record shows that the ARDC reviewed the Student’s PLAAFPs for each goal, including review of the Student’s grades and progress toward \*\*\* with the input of the Parent.<sup>27</sup> The Student’s

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Petitioner’s Closing at 5; Tr. at 206-207.

<sup>25</sup> *See, e.g.*, 19 TEX. ADMIN. CODE §§ 110.34, 118.4.

<sup>26</sup> TEX. EDU. CODE § 28.002.

<sup>27</sup> P.Ex. 1 at 2-3, 7, 29-30, 34, P.Ex. 2 at 9-10, P.Ex. 3 at 9-12 and 31-76.

teachers were able to track the Student's progress in the specified TEKS as shown in the completed progress reports that issued at the same interval as student report cards.<sup>28</sup>

The record before me also established that the ARDC listened to the input of Parent and \*\*\* over the multi-day August and November 2013 ARDC meetings regarding the combination of subjects into one goal, adding two additional goals in to the Student's IEP during in the November 2013 ARDC meetings as the ARDC further refined the Student's program of services for the 2013-2014 school year.<sup>29</sup>

I conclude that the IEPs that were included in the Student's 2013-2014 program did reference curriculum standards via the TEKS and decline to find that they are not measurable.

### C. IEP Transition Goals and Objectives

Petitioner challenges the transition planning for the Student by the District regarding goals and objectives, alleging that the District failed to put a Transition Plan in place for the Student. Respondent argues that the District made all necessary transition planning decisions for the Student with the input of the Student, the Parent, and \*\*\*.

Transition planning must include a program of services to address a disabled student's \*\*\*,<sup>30</sup> \*\*\*:

- \*\*\*;
- \*\*\*;
- \*\*\*; and,
- \*\*\*,<sup>31</sup>

In this dispute, \*\*\* Student received \*\*\*,<sup>32</sup> The record of this case supports that the ARDC \*\*\*, and also used input from the Student, Parent, \*\*\*, and educators to develop and individualize transition planning beginning at the August 2013 ARDC tailored a specific \*\*\* program that supported the Student's interest in and plans for a \*\*\*,<sup>33</sup>

The evidence before me established that there was no formal Transition Plan in the Student's ARDC documents that included specifically-designed goals and objectives to address the Student's needs related to

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<sup>28</sup> P.Ex. 15 at 3-4.

<sup>29</sup> P.Ex. 3 at 20-22; Tr. at 205.

<sup>30</sup> 20 U.S.C. § 1414(d)(1)(A)(i)(VIII); 34 C.F.R. § 300.320(b).

<sup>31</sup> *Id.*

<sup>32</sup> P.Ex. 5 at 1-2.

<sup>33</sup> P.Ex. 1 at 43, P.Ex. 3 at 15, and P.Ex. 13.

training, education, \*\*\* until the August/September 2014 ARDC meeting. This non-compliance with the IDEA requirements constitutes a procedural error of IEP requirements for transition planning. The District repeatedly addressed the Student's transition needs regarding \*\*\*, especially regarding the Student's desire to pass the \*\*\*. The record further established that the ARDC did include a formal Transition Plan in the documents of the August/September 2014 ARDC, although the decisions of this meeting were not implemented due to the "stay put" placement and the Parent's refusal to give consent to implement the proposals made at that meeting.

Reviewing the record before me, I do not find that the procedural error of a failure to develop a formal Transition Plan caused harm to the Student with lost educational opportunities or impeded the Student's right to receive a benefit from the District's educational program. By contrast, the program of services tailored the Student's educational program to include a \*\*\* program directly suited to the Student's intended needs, the District provided supports for success in that program, and Petitioner has not shown otherwise.

The Student in this proceeding has an attentive \*\*\* Parent and also the support of a \*\*\* with advanced ability to advocate and support the Student's needs given the \*\*\*'s \*\*\*.<sup>34</sup> Petitioner, however, has not shown that the failure to provide a formal Transition Plan for the Student significantly impeded the Parent and \*\*\*'s rights to be involved in and support the special education of the Student. I conclude that no deprivation of an educational benefit resulted from the lack of a formal Transition Plan.

The Student received \*\*\* with hands-on experience in that program. Petitioner did not prove that the lack of transition goals and objectives impacted the Student and resulted in a deprivation of benefit. By contrast, the transition planning efforts made by the District with the full participation and input of the Student, Parent, and \*\*\* afforded the Student avenues to proceed with \*\*\* for the Student to become \*\*\*. As a result, I do not find that the procedural error denied the Student a FAPE.

#### **D. Language Arts IEP Appropriateness and Implementation**

Petitioner alleges that Respondent did not include sufficient specificity in the Student's Language Arts IEP to be able to determine whether the Student was advancing or not, so that teachers could use their own subjective criteria to interpret the goal without reference to the Student's IEP. As a result, Petitioner believes that it is impossible to individualize the Student's program based on assessment and performance.<sup>35</sup>

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<sup>34</sup> Tr. at 57.

<sup>35</sup> Petitioner's Closing at 4.

Review of the initial Language Arts Goal adopted by the Student's August 2013 ARDC reveals a confusing goal that combines two separate content areas of \*\*\* and \*\*\* using a language arts focus, yet does not provide benchmarks to separate out the class subjects or include additional specific goals for those subjects. This IEP was in place beginning August 26, 2013, with the agreement of the ARDC including the Parent and with the participation of the \*\*\*. As the Student's IEP developed, the record before me shows that the ARDC added two more goals approved by the November 2013 ARDC that specifically separate out the grouped courses and provide specific benchmarks for attaining mastery of those goals. Again the ARDC agreed, with the participation and input of both the Parent and \*\*\*, to adopt these goals. Further, the ARDC decided to retain the combined goal throughout the 2013-2014 school year with input of the Parent and the \*\*\* in November 2013.

The record supports – even with no testimony or exhibits from the District's educators – that the Student progressed under the District's program to the point where the Student, Parent, and \*\*\* wanted the Student to \*\*\* and move forward with plans for \*\*\*.<sup>36</sup> I do not find that the three-month period between the August 2013 and the November 2013 ARDC meetings resulted in an inappropriate program for the Student based on the limited record before me. Based on the record before me, I conclude that Petitioner did not meet the burden to prove a deficiency in the Student's language arts program.

Petitioner also challenged the implementation of Petitioner's Language Arts IEP by appropriate educational staff. The record evidence does not show that any inappropriate Staff delivered the Student's Language Arts program.<sup>37</sup>

#### **E. Parental Requests for Draft IEPs**

Petitioner alleges that the District did not provide draft IEPs to the Parent and \*\*\* prior to or during the three most recent ARDC meetings for the Student. At hearing, the \*\*\* testified that having the draft IEPs in advance of the ARDC meetings “would give us ample opportunity for [the Student] to ask and/or understand some of the discussions that might arise as from the proposed IEPs.”<sup>38</sup> Petitioner offered no additional evidence to establish how the absence the draft IEPs negatively impacted the Student or family.

#### **F. Provision of FAPE**

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<sup>36</sup> J.Ex. 1; P.Ex. 3 at 31-76, P.Ex. 13 at 6-8.

<sup>37</sup> P.Ex. 3 at 169-179.

<sup>38</sup> Tr. at 213-214.

After review of the record evidence before me and as discussed above, I conclude that the District developed the Student's special education program based on the Student's assessment and present performance levels. The program addressed the Student's special education needs in a \*\*\* and also a \*\*\* for further development of the Student's skills. The combination of \*\*\* and general education classroom setting for the \*\*\* class was the least restrictive environment for the Student's educational program and Petitioner did not put on any evidence to show otherwise.

The record before me does not support Petitioner's contention that the program was non-collaborative. At all times during the Student's special education program, the Student, Parent and \*\*\* have been fully included in meetings and gave input into the ARDC process. Petitioner did not meet the burden to prove otherwise.

The evidence in this record further establishes that, even without the Student's final 2013-2014 grade transcript, the Student made progress throughout the Student's educational years within the District without the addition of special education services.<sup>39</sup> After having achieved consistent academic progress with grades and credits earned, the Student is \*\*\* with a \*\*\*.<sup>40</sup>

The District's failure to provide a formal Transition Plan may have diminished the Student's receipt of non-academic benefits with \*\*\* availability.<sup>41</sup> Even if the Student did not receive all possible non-academic benefits because of the absence of a formal Transition Plan, I am not able to conclude on the record before me that a diminishment of non-academic benefits, in fact, occurred. As the party bearing the burden of proof in this dispute, Petitioner failed to meet the burden to prove that that Student did not receive academic and non-academic benefit under the District's program.

Considering all the above factors, I conclude that the Student, in fact, received a FAPE from the Student's program.

### CONCLUSION

After review of the record in this dispute and consideration of the parties' written closing arguments, I do not find that Petitioners met the burden to prove that the program offered by the District was inappropriate and denied FAPE to this Student. The District's procedural error of a failure to provide a Transition Plan did

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<sup>39</sup> Respondent's final transcript was not timely disclosed and this Hearing Officer would not allow the transcript to come into the record of this proceeding. A copy of the Student's transcript as of the January 2014 is found at P.Ex. 3 at 34.

<sup>40</sup> J.Ex. 13; 19 TEX. ADMIN. CODE § 74.12. The \*\*\* requires \*\*\*.

<sup>41</sup> 34 C.F.R. § 300.107.

not impede the Student's receipt of this FAPE, did not impede the Parent's, \*\*\*'s, or the Student's opportunity to participate in the decision-making process regarding the provision of FAPE to the Student, and did not cause a deprivation of educational benefit.

Accordingly, I deny all 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 the 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 the IDEA, bears the burden to prove that the Student has been denied a FAPE under Respondent's program of special education services. *Schaffer v. Weast*, 126 S.Ct. 528 (2005); *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom., Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); 34 C.F.R. § 300.101.
3. During the 2013-2014 school year, Respondent assigned both a certified teacher and a tutor for the Student to implement the Student's IEP as agreed by the ARDC. Petitioner did not meet the burden to prove otherwise. 34 C.F.R. § 300.156; 19 TEX. ADMIN. CODE § 89.1131(a, c).
4. Respondent developed and implemented appropriate Language Arts IEP goals for the Student that are specific and measureable. Petitioner did not meet the burden to prove otherwise. 34 C.F.R. § 300.320(a); 19 TEX. ADMIN. CODE § 110.34; TEX. EDU. CODE § 28.002.
5. Respondent developed and implemented appropriate \*\*\* IEP goals for the Student that are specific and measurable. Petitioner did not meet the burden to prove otherwise. 34 C.F.R. § 300.320(a); 19 TEX. ADMIN. CODE § 118.4; TEX. EDU. CODE § 28.002.
6. Respondent's failure to provide a transition plan for the Student with specific and measurable goals and objectives for the Student's \*\*\* training, education, \*\*\* until the August-September 2014 ARDC meeting was a procedural violation of IDEA. 34 C.F.R. §§ 300.43, 300.320(b).
7. Petitioner did not meet the burden to prove that the procedural violation committed by the District substantially impeded the Student, Parent, or \*\*\* of an opportunity to participate in the ARDC decision-making process. *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003); 34 C.F.R. §§ 300.322, 300.324(a)(1)(ii), 300.513(a)(2)(ii); 19 TEX. ADMIN. CODE §§ 89.1050(h), 89.1055(g).
8. The Student's IEPs developed and implemented by the District were appropriate and provided a meaningful educational benefit to Petitioner. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 246-248 (5th Cir. 1997); 34 C.F.R. §§ 300.320, 300.324, 300.513(a); 19 TEX. ADMIN. CODE §§ 89.1055(a-b),(g).



**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 15<sup>th</sup> day of December 2014.

*/s/ Mary Carolyn Carmichael*

Mary Carolyn Carmichael  
Special Education Hearing Officer

**NOTICE TO THE PARTIES**

This Decision of the Hearing Officer is a final and appealable order. Any party aggrieved by the findings and decision made by the Hearing Officer 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. 34 C.F.R. § 300.516; and 19 TEX. ADMIN. CODE § 89.1185(n).

DOCKET NO. 188-SE-0314

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

**SYNOPSIS OF DECISION**

1. Whether the District appropriately assigned a qualified and certified tutor for the Student's \*\*\* class?

**HELD: For the District**

**34 C.F.R. § 300.156;  
19 TEX. ADMIN. CODE § 89.1131(a - c).**

2. Whether the Student's Individualized Education Program ("IEP") contains generalized goals without specific and measurable objectives?

**HELD: For the District**

**34 C.F.R. § 300.320(a);  
19 TEX. ADMIN. CODE §§ 110.34, 118.4;  
TEX. EDU. CODE § 28.002**

3. Whether the Student's 2013-2014 Language Arts IEP was: a) appropriate; and, b) implemented by appropriate instructional staff?

**HELD: For the District**

**34 C.F.R. § 300.320(a);  
19 TEX. ADMIN. CODE § 110.34;  
TEX. EDU. CODE § 28.002**

4. Whether the District supplied draft IEPs to the Parent prior to or during the three most recent meetings of the Admission, Review, and Dismissal Committee?

**HELD:    For the District**

**34 C.F.R. § 300.322, 300.324, 300.513;  
TEX. ADMIN. CODE §§ 89.1050(h), 89.1055(g).**

- 5. Whether the District deprived the Student of procedural and substantive rights of access to a Free Appropriate Public Education?**

**HELD:    For the District**

**34 C.F.R. §§ 300.320, 300.322, 300.324, 300.513(a);  
TEX. ADMIN. CODE §§ 89.1050(h), 89.1055(a-b),(g).  
*Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997);  
*Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003).**