

**DOCKET NO. 290-SE-0814**

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

**DECISION OF HEARING OFFICER**

Petitioner \*\*\* (Student), by next friend \*\*\* (Grandmother) (collectively, Petitioner), requested an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 *et seq.* The Respondent to the complaint is the Houston Independent School District (the District). This Decision concludes that the District did not violate IDEA and denies Petitioner’s request for relief.

In the request for hearing, Petitioner alleges that the District denied Student a Free Appropriate Public Education (FAPE). Petitioner raises the following issues, all of which relate to whether the District provided Student a FAPE:

1. Whether, on August 20, 2013, the District failed to provide a FAPE to Student by failing to comply with the procedures set forth in IDEA, by failing to provide Grandparent with prior written notice that the services provided to Student would be changed from 12 hours per week of one-on-one instruction to six hours per week of in-class support.
2. Whether the District failed to provide a FAPE to Student from August 20, 2013 until August 15, 2014 because the August 20, 2013 IEP was not reasonably calculated to provide Student with a meaningful educational benefit.
3. Whether the District failed to provide a FAPE to Student since August 15, 2014, because the August 15, 2014 IEP was not reasonably calculated to provide Student with a meaningful educational benefit.

For relief, Petitioner seeks:

1. The provision of a FAPE, including: the provision of one-on-one instructional special education services in the areas of reading, math, and language arts for Student for at least 12 hours per week; additional compensatory education services for Student in the areas of reading and math;
2. An order promoting Student to the \*\*\* Grade; and
3. Reimbursement of costs.<sup>1</sup>

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<sup>1</sup> Pet. Original Request for Due Process Hearing at 13-14.

## I. PROCEDURAL HISTORY

Petitioner filed Petitioner's request for a due process hearing on August 1, 2014. In the request, Petitioner alleged violations under IDEA and claims pursuant to other statutes. By order dated September 5, 2014, the Hearing Officer dismissed all of Petitioner's claims not arising under IDEA. The hearing was held on September 23-24, 2014. At Petitioner's request, the hearing was open to the public. Petitioner was represented by attorney Stephen Turkett. The District was represented by attorney Hans P. Graff. At the conclusion of the hearing, both parties requested an opportunity to submit written closing arguments and reply briefs. At the request of the parties, the decision due date was extended, for good cause, to November 21, 2014, to allow time for the preparation of the hearing transcript and for the parties to submit written briefing.<sup>2</sup> This Decision was timely rendered and forwarded to the parties on November 20, 2014.

## II. FINDINGS OF FACT

Based upon the evidence and argument of the parties, the Hearing Officer makes the following findings of fact and conclusions of law.

1. Student resides within the geographical boundaries of the District.
2. Student is identified by the District as a student with an other health impairment due to ADHD and a specific learning disability in the area of math calculation.
3. Student lives with Grandmother, who is Student's legal guardian.
4. During \*\*\*, Student attended \*\*\*, a school in the District.
5. Student attended \*\*\*, another District school, for \*\*\* grade.
6. Student began \*\*\* grade at \*\*\* (\*\*\*), a \*\*\* school that is not a part of the District.
7. In February 2013, in the middle of Student's \*\*\* grade year, Student was transferred back to \*\*\*.
8. On March 4, 2013, an Admissions, Review, and Dismissal (ARD) Committee meeting was convened to discuss Student, with Grandmother and Student's special education advocate in attendance.
9. The ARD Committee approved an individualized educational program (IEP) that included instructional and behavioral accommodations for Student. Among many other special education

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<sup>2</sup> Tr. at 458.

services to be provided, the IEP specified that Student would receive 12 hours per week of one-on-one support during the school day.

10. The ARD Committee met again on June 3, 2013, with Grandmother and Student's special education advocate in attendance. At that meeting, the Committee decided to revise the IEP by eliminating the 12 hours of one-on-one support and replacing it with six hours per week of in-class support for Student in math and reading. The in-class support consists of a small group of between two and four special education students working with an instructor. Grandmother disagreed with the revised IEP.
11. The ARD Committee met again on August 20, 2013, with Grandmother and Student's special education advocate in attendance. At that meeting, the Committee again decided to eliminate the 12 hours of one-on-one support and replace it with six hours per week of in-class support for Student in math and reading. Grandmother disagreed with the revised IEP.
12. Prior to implementing the change to six hours of in-class support, the District provided adequate written notice of the change to Grandmother.
13. The ARD Committee met again on August 15, 2014, with Grandmother and Student's special education advocate in attendance. At that meeting, the Committee decided to keep in place the six hours per week of in-class support for Student in math and reading.
14. The preponderance of the evidence establishes that, after Student's \*\*\* grade year, the use of one-on-one support would be unnecessary and possibly counter-productive.
15. The preponderance of the evidence demonstrates that the IEPs developed for Student on August 20, 2013, and August 15, 2014, were individualized on the basis of Student's assessment and performance.
16. The preponderance of the evidence demonstrates that Student derived meaningful, positive academic and non-academic benefits from the IEPs developed for Student on August 20, 2013, and August 15, 2014.

### III. DISCUSSION

#### A. Overview of the Evidence

Both parties offered a number of documents that were admitted in evidence. The following witnesses testified:

- Grandmother;
- \*\*\*, Student's \*\*\* grade teacher;
- \*\*\*, Student's \*\*\* grade teacher;
- \*\*\*, Student's teacher during the summer school session in 2014;

- \*\*\*, Student's English teacher in \*\*\* grade;
- \*\*\*, Student's math teacher in \*\*\* grade;
- \*\*\*, PhD, a child psychologist who testified on Student's behalf;
- \*\*\*, the District's Senior Manager for Special Education;
- \*\*\*, PhD, a Licensed Specialist in School Psychology employed by the District; and
- \*\*\*, PhD, the District's Senior Manager for Child Study.

## B. Applicable Law

As a local educational agency responsible for complying with IDEA as a condition of the State of Texas's receipt of federal education funding, the District is required to provide each disabled child in its jurisdiction with a FAPE,<sup>3</sup> and ensure that such education is offered, to the greatest extent appropriate, in the educational "mainstream," or side-by-side with non-disabled children, in the least restrictive environment consistent with the disabled student's needs.<sup>4</sup> The FAPE provided to a disabled student must be tailored to his particular needs via an individualized education program (IEP), a written statement prepared at a meeting attended by a number of specified participants, such as a qualified representative of the District, a teacher, and the child's parent or guardian.<sup>5</sup> In Texas, the team charged with preparing an IEP is known as an Admission, Review, and Dismissal (ARD) Committee.<sup>6</sup>

The FAPE tailored by an ARD Committee, as expressed in an IEP:

[N]eed not be the best possible one, nor one that will maximize the child's educational potential; rather it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him 'to benefit' from the instruction. In other words, the IDEA guarantees only a 'basic floor of opportunity' for every disabled child. . . . Nevertheless, the educational benefit . . . to which an IEP must be geared cannot be a mere modicum or *de minimis*; rather, an IEP must be 'likely to produce progress, not regression or trivial educational advancement.' In short, the educational benefit that an IEP is designed to achieve must be 'meaningful.'<sup>7</sup>

IDEA creates a presumption in favor of the education plan proposed by the District and places the burden of proof on the party challenging the plan.<sup>8</sup> Petitioner must, therefore, overcome the presumption

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<sup>3</sup> 20 U.S.C. §§ 1400(c) and 1412(a)(1).

<sup>4</sup> 20 U.S.C. § 1412(a)(1), (5); *see also* *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997)(hereinafter, *Michael F.*).

<sup>5</sup> 34 C.F.R. § 300.321.

<sup>6</sup> *Michael F.*, 118 F.3d at 247.

<sup>7</sup> *Michael F.*, 118 F.3d at 247-48 (citations and footnotes omitted).

<sup>8</sup> *Schaffer v. Weast*, 546 U.S. 49 (2005); *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1010-11 (5th Cir. 2010).

in favor of the District's education plan and establish that the District failed to provide Student with a FAPE, by establishing that: (i) the District failed to comply with the procedures set forth in IDEA; or (ii) the IEP developed by the District through the IDEA's procedures was not reasonably calculated to enable Petitioner to receive educational benefit.<sup>9</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>10</sup> As to substantive violations, the Fifth Circuit has established the following four-factor test to determine whether the school district's educational program provides the student with a FAPE:

- (1) Was the program individualized on the basis of the student's assessment and performance?
- (2) Was the program administered in the least restrictive environment?
- (3) Were the services provided in a coordinated and collaborative manner by key stakeholders? and
- (4) Were positive academic and non-academic benefits demonstrated by the program?<sup>11</sup>

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program.<sup>12</sup>

Once school officials and parents agree on the IEP, the school district must put it into effect.<sup>13</sup> The failure to implement a material or significant portion of the IEP can amount to a denial of FAPE; a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP and, instead, must demonstrate that the authorities failed to implement substantial or significant provisions of the IEP.<sup>14</sup>

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<sup>9</sup> *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-08 (1982).

<sup>10</sup> 34 C.F.R. § 300.513.

<sup>11</sup> *Michael F.*, 118 F. 3d at 247-48.

<sup>12</sup> *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

<sup>13</sup> 20 U.S.C.S. § 1414(d)(2)(A); *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012).

<sup>14</sup> *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000). A student's progress is part, but not all, of the materiality analysis. *Id.* at note 2. See also *Corpus Christi Indep. Sch. Dist. v. C.C.*, 59 IDELR 42 (S.D. Tex. 2012).

IDEA provides that the local education agency shall ensure that the ARD Committee revises the IEP as appropriate to address any lack of expected progress toward the annual goals and in the general education curriculum, the results of any reevaluation, the child's anticipated needs, or other matters.<sup>15</sup> The duty to revise the IEP in response to information and events is therefore on the district. It is also the district that sends notifications of ARD committee meetings.<sup>16</sup> A district can conduct an ARD meeting without a parent or guardian in attendance if the parent or guardian is unwilling to attend.<sup>17</sup> The parent or guardian must be notified of the meeting and provided an opportunity to attend and participate.

## C. Evidence Presented

### 1. Grandmother's Testimony

Grandmother testified at the hearing. She explained that Student and Student's \*\*\*. Accordingly, Grandmother has had legal custody of \*\*\* their entire lives. Grandmother lives with and raises Student, Student's \*\*\*, and \*\*\*.<sup>18</sup> Grandmother testified that she noticed, early on, that Student "didn't catch things as quick as the other \*\*\*."<sup>19</sup>

When Student was in \*\*\*, it became apparent that Student was not keeping up with the other students. Student was diagnosed with attention deficit hyperactivity disorder (ADHD) in \*\*\*, and was admitted to a special education program in \*\*\* grade. During \*\*\*, Student attended \*\*\* in the District for \*\*\* years (school years 2009-11). Student attended \*\*\* (also a District school) for \*\*\* grade (school year 2011-12). At some point, Grandmother arranged to have Student receive treatments and therapy from a psychologist (Dr. \*\*\*) and a psychiatrist (Dr. \*\*\*). Prior to Student's \*\*\* grade year, Dr. \*\*\* recommended that Grandmother withdraw Student from \*\*\* and transfer Student to \*\*\* (\*\*\*), which is a \*\*\* school and not a part of the District. According to Dr. \*\*\*, \*\*\* was designed to deal with students with ADHD. Grandmother followed Dr. \*\*\*'s advice and enrolled Student at \*\*\* for Student's \*\*\* grade year (school year 2012-13).<sup>20</sup>

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<sup>15</sup> 20 U.S.C. § 1414(d)(4).

<sup>16</sup> 34 C.F.R. § 300.322.

<sup>17</sup> 34 C.F.R. § 300.322(d).

<sup>18</sup> Tr. at 30-32.

<sup>19</sup> Tr. at 33.

<sup>20</sup> Tr. at 33-36; *see also* Dist. Ex. 15.

Unfortunately, Student did not flourish at \*\*\*. Rather, according to Grandmother, Student's behavior and academic performance worsened. Ultimately, at some point during Student's \*\*\* grade year, Student was \*\*\*, at which point Student was diagnosed with bipolar disorder \*\*\*.<sup>21</sup> During the same year, one of Student's \*\*\*, who was also attending \*\*\*, was a \*\*\*. In response, Dr. \*\*\* recommended that Grandmother transfer \*\*\* out of \*\*\*. So, in February 2013, in the middle of the school year, Student was transferred back to \*\*\*.<sup>22</sup>

At the time of Student's transfer back to \*\*\*, Grandmother expressed a desire that Student should be kept in the classroom as much as possible so as to be exposed to the general curriculum, rather than being removed from the classroom to receive special education services in a separate resource room.<sup>23</sup> On March 4, 2013, an ARD Committee meeting was held for Student at \*\*\*, with Grandmother and Student's Special Education Advocate, Loretta Zayas-Revai, in attendance.<sup>24</sup> At that meeting, the ARD Committee developed an IEP for Student. Among many other special education services to be provided, the IEP specified that Student would receive 12 hours per week of one-on-one support during the school day. Student is identified as a student with an Other Health Impairment due to ADHD and with a specific learning disability in the area of math calculation.<sup>25</sup>

Grandmother testified positively about Student's experience at \*\*\* in the spring semester of \*\*\* grade. Grandmother met Student's teacher, Ms. \*\*\*, and the assistants who provided one-on-one assistance to Student, Ms. \*\*\* and Ms. \*\*\*. Grandmother testified that she had a "great relationship" with Ms. \*\*\*, Ms. \*\*\*, and Ms. \*\*\*. When asked whether Student made academic progress during that semester, Grandmother testified: "[Student] soared. . . . I was very pleased."<sup>26</sup>

On June 3, 2013, the ARD Committee met again. Grandmother and Ms. Zayas-Revai attended. At the meeting, Grandmother expressed her desire that Student start Student's \*\*\* grade year receiving the same level of special education services that Student had received in Student's \*\*\* grade year. Other

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<sup>21</sup> Tr. at 36-39. The diagnosis of bipolar disorder \*\*\* appears to have been made in error, and it does not appear that Petitioner is seeking accommodations for such conditions in this case. For example, all of the witnesses that were asked about it testified that they have observed no symptoms suggestive of this diagnosis. *See* Tr. at 340 (Testimony of Teaching Assistant); Tr. at 388 (Testimony of Licensed Specialist in School Psychology); Tr. at 248-49 (Testimony of Student's expert witness, Psychologist). Accordingly, the Hearing Officer did not consider bipolar disorder to be a disability suffered by Student.

<sup>22</sup> Tr. at 39-40; *see also* Dist. Ex. 15.

<sup>23</sup> Tr. at 92.

<sup>24</sup> Tr. at 40-41; *see also* Dist. Ex. 7.

<sup>25</sup> Tr. at 41-43; *see also* Dist. Ex. 7.

<sup>26</sup> Tr. at 44-45.

members of the ARD Committee advocated providing a reduced amount of services in the coming year. Ultimately, the Committee decided that, among many other provisions, the Student would receive: “60 minutes in class support 3 times a week per subject in reading and mathematics.”<sup>27</sup> Grandmother testified that, at the time of the meeting, she was not troubled by this change. At the hearing, however, she testified that her lack of concern was based on a misunderstanding. She believed that “in class support” meant that Student would continue to receive one-on-one assistance in the classroom. In other words, Grandmother believed that, in Student’s \*\*\* grade year, Student would continue to receive one-on-one support, but at a reduced level of six hours per week instead of the twelve hours per week Student had received in \*\*\* grade.<sup>28</sup> On the other hand, the documentary record suggests that, at the time of the June 3, 2013 ARD Committee, Grandmother *was* concerned about the change to “in class support.” The signature page of the ARD Committee notes indicate that Grandmother “disagreed” with the Committee’s recommendations.<sup>29</sup>

Another ARD Committee meeting was held on August 20, 2013, for the purpose of correcting mistakes in the June 3, 2013 IEP.<sup>30</sup> Grandmother and Ms. Zayas-Revai were in attendance. Grandmother testified that, at that meeting, she spoke with a District employee at the meeting about the meaning of the phrase “in class support.” According to Grandmother, the employee led her to believe that Student would be getting one-on-one support even though the IEP stated that Student would receive “in class support.” Grandmother testified that the employee told her the computer that printed the IEP was somehow “locked,” so that the text could not be changed. But the employee assured Grandmother that Student would be getting one-on-one support. The District made an audio recording of the ARD Committee meeting. However, Grandmother asserts that the District provided her with an incomplete copy of the recording. Specifically, she alleges that the portion of the ARD Committee meeting during which the discussion of one-on-one support took place is not on the recording.<sup>31</sup>

In addition to the six hours of in-class support, the IEP drafted in August 2013 put in place the following educational accommodations for Student: small group administration; extended time for assignments; frequent redirection; frequent breaks; repeated drill and practice; math manipulatives;

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<sup>27</sup> Dist. Ex. 8 at 153.

<sup>28</sup> Tr. at 46-54.

<sup>29</sup> Dist. Ex. 8 at 156.

<sup>30</sup> Dist. Ex. 9.

<sup>31</sup> Tr. at 52, 58, 62-63.



reminders to stay on task; oral administration of tests; supplemental aids (all subjects, mnemonic devices); and teaching of skills in several settings and environments.<sup>32</sup>

In September 2013, Grandmother's health declined, such that she was unable to keep close track of Student's progress in the \*\*\* grade. However, Grandmother testified that Student's grades in the fall semester were generally poor. The next ARD Committee meeting was held on January 8, 2014. Grandmother testified that it was at this meeting that she first learned that Student was not getting one-on-one support. Rather, Student was receiving small group support. Upon learning this fact, Grandmother became very upset. She asked that one-on-one support for the Student be reinstated. The remainder of the Committee declined to do so.<sup>33</sup> Grandmother testified that, by January 2014, all of Student's grades were failing, and Student had great difficulty completing Student's work without one-on-one support.<sup>34</sup>

Another ARD Committee meeting was held on August 15, 2014. At that meeting, Grandmother's request for one-on-one support was again declined.<sup>35</sup> The IEP drafted in August 2013 continued the six hours of in-class support, and put in place the following educational accommodations for Student: activate prior knowledge to enhance understanding; pre-teach vocabulary and/or provide word bank and/or glossary; visual, verbal, and tactile reminders to stay on task; \*\*\*; extended time for assignments, teach time, paper, and project management skills; supplemental aids; math manipulatives; provide immediate feedback for social/behavioral supports; provide a quiet corner/room; oral administration of tests; and provide space for movement or breaks.<sup>36</sup>

## **2. \*\*\* Grade Teacher's Testimony**

\*\*\* (\*\*\*) Grade Teacher) was Student's teacher for the spring semester of 2013. She testified that Student was easily distracted and had difficulty reading at grade level and keeping pace in math. \*\*\* Grade Teacher frequently helped Student on a one-on-one basis. In addition, Ms. \*\*\* and Ms. \*\*\* would help Student on a one-on-one basis. Ms. \*\*\* and Ms. \*\*\* are teaching assistants, not certified teachers. According to \*\*\* Grade Teacher, Student responded very well to one-on-one help.<sup>37</sup>

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<sup>32</sup> Pet. Ex. 17.

<sup>33</sup> Tr. at 59-63.

<sup>34</sup> Tr. at 64-65.

<sup>35</sup> Tr. 66-68.

<sup>36</sup> Pet. Ex. 20.

<sup>37</sup> Tr. at 104-07, 115.

\*\*\* Grade Teacher attended the ARD Committee meetings in March and June 2013. At the June meeting, she expressed her opinion that Student should continue receiving one-on-one support in Student's \*\*\* grade year. When she left the meeting, \*\*\* Grade Teacher was under the impression that Student would be getting six hours per week of one-on-one instruction.<sup>38</sup>

\*\*\* Grade Teacher testified that Student would occasionally leave Student's seat without permission, get involved in verbal altercations with other students, and yell across the classroom. However, Student would respond well when \*\*\* Grade Teacher spoke with Student about Student's behavior. \*\*\* Grade Teacher testified that she had a good rapport with Student.<sup>39</sup>

### 3. \*\*\* Grade Teacher's Testimony

\*\*\* (\*\*\* Grade Teacher) was Student's teacher in the 2013-14 school year. She described Student as a "smart \*\*\*" who has difficulty staying on task. According to \*\*\* Grade Teacher, Student received Student's instruction either as a part of the class as a whole, or at the "small group table," which is located inside the classroom. At times, Student would be unable to finish Student's work without redirection by a teacher. \*\*\* Grade Teacher testified that Student did not have meaningful behavioral problems in her classroom. She also testified that she believes Student has the ability to do the work required of \*\*\* student.<sup>40</sup> During \*\*\* grade, Student received six hours per week of in-class, small group support. The support was given by Ms. \*\*\*. Student also received occasional help outside the classroom from Ms. \*\*\*.<sup>41</sup> The department chair, Ms. \*\*\* would also provide occasional assistance, advice, and support in educating Student. \*\*\* Grade Teacher described the overall approach for educating Student as collaborative and coordinated.<sup>42</sup>

\*\*\* Grade Teacher attended the August 20, 2013 ARD Committee meeting.<sup>43</sup> The IEP developed at that meeting identified a number of educational objectives for Student during the upcoming year, including identifying Student's baseline performance at the time of the ARD Committee meeting, and

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<sup>38</sup> Tr. at 108-10.

<sup>39</sup> Tr. at 113.

<sup>40</sup> Tr. at 117-23.

<sup>41</sup> Tr. at 182-83.

<sup>42</sup> Tr. at 210-11.

<sup>43</sup> Tr. at 123.

setting performance goals for Student. During the ensuing year, \*\*\* Grade Teacher tracked Student's performance on those goals. The results are as follows:<sup>44</sup>

Annual Goal	Student's Baseline Score on 8/20/13 (per IEP)	Student's actual performance by 10/13	Student's actual performance by 12/13	Student's actual performance by 3/14	Student's actual performance by 5/28/14	Goal to be achieved by 8/19/14 (per IEP)
Reading Goal 1	***	***	***	***	***	***
Reading Sub-Goal 1.1	***	***	***	***	***	***
Reading Sub-Goal 1.2	***	***	***	***	***	***
Math Goal 1	***	***	***	***	***	***
Math Sub-Goal 1.1	***	***	***	***	***	***
Math Sub-Goal 1.2	***	***	***	***	***	***
Math Sub-Goal 1.3	***	***	***	***	***	***
Math Goal 2	***	***	***	***	***	***
Math Sub-Goal 2.1	***	***	***	***	***	***
Math Goal 3	***	***	***	***	***	***
Math Sub-Goal 3.1	***	***	***	***	***	***
Reading Goal 2	***	***	***	***	***	***
Behavioral Goal 1	***	***	***	***	***	***
Behavioral Sub-Goal 1.1	***	***	***	***	***	***

Throughout the school year, all \*\*\* grade students (including Student) were given various computerized assessments to test their knowledge of items required for the STAAR test. Student's scores on those tests were as follows:<sup>45</sup>

Assessment Test	Student's Tested Mastery of the Subject
Beginning of the year assessment for math	***
Fall assessment for math	***
Assessment "#3" for math	***
Assessment "#4" for math	***
Fall assessment for English/language arts-reading	***
Fall assessment for English/language arts-writing	***
Spring assessment for English/language arts-reading	***
Spring assessment for math	***
Pre-summer assessment for English/language arts	***
Pre-summer assessment for math	***
Post-summer assessment for English/language arts	***
Post-summer assessment for math	***

\*\*\* Grade Teacher testified that the District uses a computer program called Istation to help determine how well students are reading. Over the course of Student's \*\*\* grade year, Student was tested multiple times on Istation. An Istation report about Student was generated in June 2014. That

<sup>44</sup> Tr. at 126-47; Pet. Ex. 27.

<sup>45</sup> Tr. at 164-77; Pet. Ex. 11.

report ranks Student's overall reading ability at "\*\*\*," meaning that Student was "performing seriously below grade level and in need of intensive intervention," and at a level roughly equivalent to a \*\*\* grade student halfway through the academic year. The report also identifies and ranks Student as to eight subcategories of performance. For six subcategories (\*\*\*,\*\*\*,\*\*\*,\*\*\*,\*\*\*, and \*\*\*), the trendline for Student's assessment scores over the course of Student's \*\*\* grade year was positive, with Student's scores improving over time to one degree or another. For two subcategories (\*\*\* and \*\*\*), however, Student's scores over the course of the year declined. The decline in Student's scores for \*\*\* was particularly sharp.<sup>46</sup>

\*\*\* Grade Teacher testified that Student was given the Stanford Achievement Test (the Stanford Test) at the end of Student's \*\*\* grade year. For each area tested, the Stanford Test assigned Student a "grade equivalent." The results of that test are summarized, by subject matter, as follows:<sup>47</sup>

Assessed Subject	Grade Equivalent
Total Reading	***48
Word Study Skills	***
Reading Vocabulary	***
Reading Comprehension	***
Total Math	***
Math Problem Solving	***
Math Procedures	***
Language	***
Spelling	***
Science	***
Social Science	***
Listening	***
Thinking Skills	***
Basic Battery	***
Complete Battery	***

During the 2013-14 school year, Student passed all of Student's classes. However, Student did not pass the STAAR test for \*\*\* or \*\*\*.<sup>49</sup> \*\*\* Grade Teacher explained that the STAAR test is difficult and not every student, including not every non-disabled student, passes it. \*\*\* Grade Teacher also opined that Student is smart but has difficulty in testing situations.<sup>50</sup> Student's grades for the grading periods throughout Student's \*\*\* grade year ranged in the \*\*\*'s and \*\*\*'s. In all instances, Student's

<sup>46</sup> Tr. at 177-80; Pet. Ex. 10.

<sup>47</sup> Tr. at 180-81; Pet. Ex. 3 at 4.

<sup>48</sup> The number after the decimal represents a month of the school year. Thus, a score of \*\*\* equates to a \*\*\* grade student in his \*\*\* month of school.

<sup>49</sup> Tr. at 201-02.

<sup>50</sup> Tr. at 189.

grades were generally slightly below or slightly above the class average. In no instance were Student's grades the lowest in the class.<sup>51</sup>

\*\*\* Grade Teacher stated, "I don't think that [Student] needs one-on-one. . . . [Student] can do the work. Yes, [Student] needs redirection, but I believe that [Student] can do the work in a small group setting. . . . I think [Student] functions well in a small group setting."<sup>52</sup> She also testified that, by the end of the \*\*\* grade, Student's behavior had markedly improved.<sup>53</sup> \*\*\* Grade Teacher opined that placing Student with one-on-one support would actually be counterproductive because it would hinder Student's ability to learn how to function on Student's own.<sup>54</sup>

#### 4. Summer School Teacher's Testimony

Because of Student's results on the STAAR test, Student was required to attend summer school following Student's \*\*\* grade year to study English/language arts and math (summer 2014).<sup>55</sup> \*\*\* (Summer School Teacher) was Student's teacher during the summer school session. She explained that students who attend summer school because they have failed a class are formally given grades during summer school. On the other hand, students like Student, who did not fail a class during the academic year but are attending summer school because they tested poorly on the STAAR test, are not assigned formal grades. Nevertheless, Summer School Teacher kept informal notes on Student's progress during summer school and calculated that Student would have been given a grade of \*\*\* in math and \*\*\* in reading.<sup>56</sup> In addition, Student was given assessment tests at the beginning and end of summer school. Student's tests scores were as follows:<sup>57</sup>

English/language arts	Pre-summer school assessment score: *** Post-summer school assessment score: ***
Math	Pre-summer school assessment score: *** Post-summer school assessment score: ***

<sup>51</sup> Tr. at 196-201; Dist. Ex. 34.

<sup>52</sup> Tr. at 149.

<sup>53</sup> Tr. at 147.

<sup>54</sup> Tr. at 212.

<sup>55</sup> Pet. Ex. 5; Tr. at 201-02.

<sup>56</sup> Tr. at 327-28; *see also* Pet. Ex. 5 at 1.

<sup>57</sup> Pet. Exs. 6, 7, 8, 9; Tr. 329-30.

Summer School Teacher explained that Student's class consisted of roughly \*\*\* students. During summer school, Student did not get any special education services such as in-class support.<sup>58</sup> Summer School Teacher testified that Student's comprehension in English/language arts improved substantially over the course of the summer, and Student's comprehension in math improved a little bit. According to Summer School Teacher, Student rarely needed to be reminded by the teacher to use the learning strategies Student had been taught.<sup>59</sup>

## 5. English Teacher's Testimony

\*\*\* (English Teacher) is Student's \*\*\* grade teacher for English and social studies.<sup>60</sup> English Teacher described Student's reading skills as being "above quite a few of my students. . . . [Student]'s not off target as far as where the other students are." Student recently tested at a reading level of \*\*\*, which English Teacher testified was the level of most students in her class. A level of \*\*\* roughly equates to a student who reads at the \*\*\* grade level.<sup>61</sup> When asked whether Student ought to be getting one-on-one support, English Teacher testified that the in-class support that Student receives "seems to be adequate." She also testified that she is able to manage Student's behavior in the classroom and keep Student on task, although on most days she has to redirect Student more than three times and Student occasionally has trouble finishing Student's work in class. English Teacher explained that \*\*\* (Teaching Assistant) is assigned to provide in-class support to four students in her class, including Student. At the time of the hearing, Student had a grade of \*\*\* in English Teacher's class.<sup>62</sup>

## 6. Math Teacher's Testimony

\*\*\* (Math Teacher) is Student's \*\*\* grade teacher for math and science. About Student, Math Teacher testified: "I don't see any disparity in [Student's] behavior that would be outside of a normal \*\*\* grader or a \*\*\* year old, developmentally. . . . Most of the time [Student]'s on task. [Student]'s a typical \*\*\*, likes to talk, but when you redirect [Student] [Student]'s redirectable."<sup>63</sup>

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<sup>58</sup> Tr. at 325.

<sup>59</sup> Tr. at 332-34.

<sup>60</sup> Tr. at 337-39.

<sup>61</sup> Tr. at 339.

<sup>62</sup> Tr. at 340-47.

<sup>63</sup> Tr. at 355.

Math Teacher explained that Teaching Assistant is assigned to provide in-class support to two students in her class, one of whom is Student. Math Teacher disagreed with the notion that Student should be getting one-on-one support. According to Math Teacher, Student “does very well with group work” and is a “team player” who does not want the stigma of being singled out for special treatment, such as receiving one-on-one support or in-class support but would rather be treated like a “regular kid.”<sup>64</sup>

Math Teacher has implemented a number of steps to accommodate Student’s special needs. Student \*\*\* to reduce distractions. Student has various “math aids” and other resources that Student uses. Student is being taught math at the \*\*\* grade level and, according to Math Teacher, “[Student] can do the work.”<sup>65</sup> As to the appropriateness of the level of instruction Student is receiving, including the in-class support, Math Teacher testified,

It’s very appropriate and it’s just right for [Student’s] age level. . . . It’s right where [Student] needs to be as far as academically. All the supports are there. [Student] utilizes them. And they were starting to contribute more to [Student’s] attentiveness and [Student’s] success. Because [Student]’s now seeing other kids that are working and [Student] wants to be a part of that as well. . . . Just right. It’s just right.<sup>66</sup>

As to Student’s ability to perform well on tests, Math Teacher testified that Student does fine in a quiet environment but would do less well in an environment with distractions. Student rarely needs to be redirected three or more times in a day in Math Teacher’s class. Likewise, Student never has trouble finishing work in the class.<sup>67</sup>

According to Student’s IEP, Student’s performance level on math at the beginning of Student’s \*\*\* grade year was estimated to be \*\*\*. Math Teacher testified that Student is now performing in the \*\*\*, with Student’s grades on individual assignments ranging from \*\*\* to \*\*\*.<sup>68</sup> According to Math Teacher:

So this is not an underperforming kind of thing. [Student] can do the work as long as you stay on [Student] and as long as you get [Student] to initiate it. Whether it’s in a small

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<sup>64</sup> Tr. at 356-58.

<sup>65</sup> Tr. at 358.

<sup>66</sup> Tr. at 359.

<sup>67</sup> Tr. 361-65.

<sup>68</sup> Tr. at 366, 370.

group setting or a large group setting, the issue is the initiation with [Student] and getting it done and just making sure [Student]'s still on task.<sup>69</sup>

## 7. Psychologist's Testimony

\*\*\*, PhD (Psychologist) is a neuropsychologist whose practice specializes in school children. She testified on Student's behalf. Psychologist reviewed some, but not all, of Student's educational records. She has never met Student.<sup>70</sup> Based upon her review of the records, Psychologist described Student as a person who: has difficulty maintaining Student's attention during a given task; but who is bright, with "essentially average skills in a lot of the areas that were tested;" performs relatively well on tests that are administered "in a very quiet and structured environment with a one-on-one person working with [Student];" and "does a good job of storing information [and] learns relatively well" but has "fluency" difficulties, meaning that Student has difficulty quickly retrieving information from Student's memory. Psychologist testified that Student's attention and retrieval problems should not be treated as behavioral problems. Instead, Student should be given more intensive instruction. When asked whether Student needed one-on-one instruction for 12 hours per week, Psychologist was equivocal but generally supported the idea: "I think, you know, certainly the specific amount of time depends upon what [Student's] needs are. But I would say that probably with the intensity of . . . the activity that you're looking at it probably would need to be that intense at least at the beginning."<sup>71</sup>

Psychologist opined that Student was not making academic progress. She testified that the "primary indicators" of this fact were Student's test results from the Stanford Tests and Istation. Secondly, Psychologist relied on the fact that Student had failed the STAAR test. As to the Stanford Test results, Psychologist's "primary focus" was on the fact that Student's national percentile rankings went down as Student progressed from \*\*\* through \*\*\* grade. On cross examination, however, she acknowledged that the percentile ranking measures Student's performance against all students in the United States, including non-disabled students. She therefore conceded that the percentile ranking is not a good measure for evaluating the individual progress of a special education student. She also agreed that the age and grade equivalent scores on the Stanford Tests from year to year are not a valid measure of Student's progress.<sup>72</sup> As to the STAAR test, Psychologist testified as follows:

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<sup>69</sup> Tr. at 370-71.

<sup>70</sup> Tr. at 235-36.

<sup>71</sup> Tr. at 219-28.

<sup>72</sup> Tr. at 237-45.



Q: So if [Student] did not meet [the STAAR] standard, it doesn't necessarily mean that [Student] has not made progress?

A: Correct.<sup>73</sup>

## 8. Special Ed. Manager's Testimony

\*\*\* (Special Ed. Manager) is employed by the District as Senior Manager for Special Education \*\*\*. She has experience in teaching children with ADHD. She \*\*\* with ADHD. She has met Student and has a working knowledge of the educational plan for Student. Special Ed. Manager testified that one-on-one assistance would not be appropriate for Student because it would be a "very restrictive placement" which would engender dependence in Student. She explained:

We generally reserve a one-on-one for a child who is really struggling, cannot stay in class, is having severe medical issues and concerns. We really wouldn't want someone to become dependent – like [Student] to become dependent on another person to be constantly prompting them.<sup>74</sup>

She also pointed out that, when a student is provided one-on-one instruction, the quality of the instruction might be diminished because one-on-one instruction is typically provided by a lesser-qualified individual than the classroom teacher.<sup>75</sup> Special Ed. Manager testified that placement in the general education classroom with in-class support is the least restrictive environment for Student.<sup>76</sup>

According to Special Ed. Manager, a great number of students at \*\*\* (including non-disabled children) did not pass the STAAR test, so many in fact that the school has been given an \*\*\*.<sup>77</sup> She also pointed out that Student has attended \*\*\* different schools. She opined that this, and the fact that Student switched from a \*\*\* school to \*\*\* mid-year, might have impeded Student's academic progress. She explained that \*\*\* schools have different curriculum calendars than District schools, which might have made it hard for Student to catch up with Student's classmates when Student re-enrolled at \*\*\*.<sup>78</sup>

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<sup>73</sup> Tr. at 246.

<sup>74</sup> Tr. at 261.

<sup>75</sup> Tr. at 262-63.

<sup>76</sup> Tr. at 292.

<sup>77</sup> Tr. at 265-66, 314-16.

<sup>78</sup> Tr. at 268-70.

Special Ed. Manager testified that, in determining whether Student has made academic progress, it is best to focus on Student's daily grades and Student's progress toward the goals outlined in the IEP.<sup>79</sup>

She opined that Student has benefitted, both academically and non-academically from Student's current placement.<sup>80</sup> According to Special Ed. Manager, if a special education student makes progress toward a goal identified in an IEP but does not fully achieve that goal, it still means that the student has made academic progress.<sup>81</sup>

Special Ed. Manager disputed Grandmother's testimony that the computer which printed Student's IEP was somehow "locked," so that the text which stated "in class support" could not be changed "one-on-one instruction." She explained that such language is specifically typed into the IEP by someone attending the ARD Committee and is not locked or preprinted.<sup>82</sup>

Special Ed. Manager was skeptical of the value of Istation for assessing Student's abilities. She explained that when a student is using Istation, Student gets little to no assistance from a teacher. Because there are clusters of zeroes in Student's answers on Istation tests, and because there was a wide range of accuracy to Student's answers, Special Ed. Manager opined that it was possible that Student was merely clicking through the test without trying to correctly answer many of the questions. For this reason, Special Ed. Manager stated, "My conclusion would be that [Student] is not receiving a great deal of benefit from the Istation and the fact that Student is not focused on the program."<sup>83</sup>

## 9. LSSP's Testimony

\*\*\* is a Licensed Specialist in School Psychology (LSSP) employed by the District. She has a PhD in clinical psychology and is licensed as a psychologist. She regularly evaluates students with disabilities.<sup>84</sup> A full and individual evaluation (FIE) was prepared for the Student in 2011. LSSP is one of the two professionals who together prepared a re-evaluation of Student on August 20, 2013.<sup>85</sup>

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<sup>79</sup> Tr. at 270-71.

<sup>80</sup> Tr. at 292-93.

<sup>81</sup> Tr. at 277-78.

<sup>82</sup> Tr. at 272-74.

<sup>83</sup> Tr. at 289-91.

<sup>84</sup> Tr. at 372-75.

<sup>85</sup> Dist. Ex. 4 at 27-54.

As part of the re-evaluation, LSSP asked Grandmother, \*\*\* Grade Teacher, and another teacher at \*\*\*, Ms. \*\*\*, to subjectively rate Student's behavior in 28 different categories, such as aggression, attention problems, social skills, anger control, and so on. Each behavior to be rated was then placed on a rating scale whereby a number below X would be considered "average," a number between X and Y would be considered "at risk," and a number above Y would be considered "clinically significant." Ms. \*\*\* rated none of Student's behaviors as clinically significant. \*\*\* Grade Teacher rated \*\*\* behaviors as clinically significant. Grandmother, on the other hand, rated 17 behaviors as clinically significant.<sup>86</sup> LSSP testified that the survey is designed to evaluate the reliability of the answers given by the person making the ratings. According to LSSP, the validity indices for the answers given by \*\*\* Grade Teacher and Ms. \*\*\* fell within the "acceptable" range, meaning that their responses "may be viewed with confidence."<sup>87</sup> On the other hand, the validity indices for the answers given by Grandmother indicated that Student's responses should be viewed with "extreme caution."<sup>88</sup>

LSSP generally described Student as full of energy, eager to please, enjoying having classroom duties, having difficulty sitting still, able to do Student's work, and a "socially engaging kiddo." When asked whether Student needs one-on-one instruction, LSSP testified, "No, [Student]'s capable. . . . [O]ur job is to prepare [Student], you know, to be able to make it. To give [Student] just the minimum support so that [Student] can learn."<sup>89</sup> According to LSSP, the biggest barrier to Student's success at school is Student's difficulty focusing and sustaining Student's focus.<sup>90</sup>

#### **10. Child Study Manager's Testimony**

\*\*\*, PhD, (Child Study Manager) is employed by the District as the Senior Manager of Child Study. He is trained in educational psychology, special education, and as a diagnostician. He manages the testing of students within the District. He has been involved in the educational process for Student.<sup>91</sup>

Child Study Manager explained that a good way to determine whether a child is making academic progress is to look at Student's scores from the Woodcock-Johnson Normative Update Tests of

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<sup>86</sup> Dist. Ex. 4 at 31-32.

<sup>87</sup> Dist. Ex. 4 at 31; Tr. at 382.

<sup>88</sup> Dist. Ex. 4 at 32; Tr. at 383.

<sup>89</sup> Tr. at 385-86.

<sup>90</sup> Tr. at 393.

<sup>91</sup> Tr. at 411-13.

Achievement (Woodcock-Johnson) from year to year. A child's Woodcock-Johnson scores are printed on a form that includes multiple columns. According to Child Study Manager, the numbers in the "W" column constitute the child's actual test scores (as opposed to other columns that rank the child in relation to other students). For this reason, if a child's scores in the W column increase from year to year, this demonstrates that the child is making progress.<sup>92</sup> In this case, Student took the Woodcock-Johnson test in fall of \*\*\* grade and the spring of \*\*\* grade. Student's "W" column scores are as follows:<sup>93</sup>

Subject	W-Score 11/7/2011	W-Score 3/25/2013
Brief Achievement	***	***
Broad Reading	***	***
Broad Math	***	***
Broad Written Language	***	***
Brief Reading	***	***
Basic Reading Skills	***	***
Reading Comprehension	***	***
Brief Math	***	***
Math Calculation Skills	***	***
Math Reasoning	***	***
Brief Writing	447	480
Written Expression	454	480

Child Study Manager testified that the measures of Student's Stanford Test results, such as grade equivalence and percentile, are not particularly helpful in determining whether Student is making educational progress because they measure the child's performance against other students. As a result, Student might in fact be making progress, but this would not be apparent on Student's Stanford score because Student's percentile rank might remain unchanged. Moreover, according to Child Study Manager, Student's Stanford scores over the years are so inconsistent that it is difficult to draw conclusions about Student's progress.<sup>94</sup>

As explained above, over the course of Student's \*\*\* grade year, Student was tested multiple times on Istation. The Istation report dated June 2014 identified and ranked Student as to eight subcategories of performance. For one category in particular (\*\*\*), the trendline for Student's assessment scores over the course of Student's \*\*\* grade year was negative, with Student's scores declining dramatically. However, Child Study Manager noted that the reason for the sharp decline was that in each of the last four times Student was administered the test Student scored a \*\*\*. He explained that Istation tracks how quickly a student answers the test questions. According to Child Study Manager,

<sup>92</sup> Tr. at 416-22; *see also* Dist. Ex. 4 at 48.

<sup>93</sup> Dist. Exs. 3 at 22, 4 at 53.

<sup>94</sup> Tr. at 428-33.

on the occasions when Student scored a \*\*\*, Student took an average of one second to answer each question. This indicates that Student was not really reading and attempting to answer the questions correctly, but was simply clicking through the answers on the computer. Likewise, on other Istation tests in which Student scored poorly, Student often did not really try to correctly answer the question. For example, on some spelling questions, Student would type in “iiii” or “jjjjj,” meaning that Student was not really trying.<sup>95</sup>

Child Study Manager opined that one-on-one instruction is not needed for Student. He identified a number of studies which indicate that students who receive one-on-one instruction do not outperform students who receive small group (such as one-on-three) instruction.<sup>96</sup>

#### D. Analysis

**Issue 1: Whether, on August 20, 2013, the District failed to provide a FAPE to Student by failing to comply with the procedures set forth in IDEA, specifically, by failing to provide Grandparent with prior written notice that the services provided to Student would be changed from 12 hours per week of one-on-one instruction to six hours per week of in-class support.**

Pursuant to IDEA, the District is required to provide a parent or guardian with prior written notice (PWN) anytime it proposes to, among other things, initiate changes to the educational placement or the provision of FAPE to a child.<sup>97</sup> Petitioner alleges that, when the ARD Committee adopted the August 20, 2013 IEP, it failed to provide to Grandmother PWN that, instead of continuing to provide 12 hours of one-on-one support to Student, only six hours of in-class support would be provided.

Petitioner failed to meet Petitioner’s burden of proof on this issue. The IEP put into place on March 4, 2013, explicitly stated that Student would get one-on-one support: “[Student] will receive inclusion services with in-class support. 12 hours a week one on one.”<sup>98</sup> By contrast, the August 20, 2013 IEP states, “[Student] will receive *in class support* for reading and mathematics and *will be mainstreamed into the regular education setting*. [Student] will receive 60 minutes *in class support* 3 times a week per subject in reading and mathematics.”<sup>99</sup> Prior to implementation of the revised IEP, the District provided Grandmother with PWN of

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<sup>95</sup> Tr. at 437-39; Dist. Ex. 28.

<sup>96</sup> Tr. at 441-42.

<sup>97</sup> 34 C.F.R. § 300.503.

<sup>98</sup> Dist. Ex. 7 at 118.

<sup>99</sup> Dist. Ex. 9 at 188 (emphasis added).

the change. The form on which notice was provided to Grandmother, which is entitled: “Notice of Proposal or Refusal 34 CFR § 300.503 & 300.300; 18 TAC § 89.1050,” stated that the District proposed to initiate a change to the provision of FAPE to Student and identified the change as follows: “We are providing regular Education mainstream education with in-class support along with a behavioral plan to address lack of focus. The nurse will also see [Student] for \*\*\*.”<sup>100</sup>

Petitioner contends this notice is insufficiently vague to have put Grandmother on notice that one-on-one support would no longer be provided to Student. The Hearing Officer disagrees. The prior IEP stated that Student would get “one-on-one” support. The subsequent IEP stated that Student would be “mainstreamed” and get “in class” support. Grandmother was in attendance at both meetings and was accompanied by a special education advocate. Under the circumstances, the PWN given to Grandmother provided her with adequate notice of the change.

Grandmother testified that she was told the computer had somehow “locked” the verbiage in the IEP, such that even though the IEP no longer stated that one-on-one support would be provided, she believed Student would continue to receive it. This testimony was unconvincing and was contradicted by two factors. First, Grandmother herself ultimately disagreed with the IEP adopted at the August 20, 2013 meeting.<sup>101</sup> Second, Special Ed. Manager explained, convincingly, that the verbiage in an IEP is never “locked.” In Petitioner’s briefing, Petitioner also makes much of the fact that Grandmother repeatedly told the ARD Committee that she wanted the one-on-one instruction to continue.<sup>102</sup> This, however, is not persuasive. The fact that Grandmother wished for one-on-one instruction to continue did not preclude the rest of the ARD Committee from deciding otherwise. Once the remainder of the Committee did so, they appropriately notified Grandmother of the change.

Even if Petitioner had proved that the District failed to provide PWN, Petitioner would still have the burden of proving that such a procedural violation impeded Student’s right to a FAPE, significantly impeded Grandparent’s opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefit.<sup>103</sup> In this case, Petitioner argues that the procedural violation impeded Student’s right to a FAPE because it resulted in an IEP that did not include one-on-one instruction for Student. This argument fails to two reasons. First, it does not follow that the provision of what Petitioner believes to be adequate notice would have resulted in the inclusion of one-on-one support in the IEP. Stated

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<sup>100</sup> Dist. Ex. 9 at 191.

<sup>101</sup> Dist. Ex. 9 at 194.

<sup>102</sup> Pet. Closing Brief at 15.

<sup>103</sup> 34 C.F.R. § 300.513.

differently, based upon the evidence in the record, the Hearing Officer cannot conclude that if Grandmother had received better notice, then one-on-one support would have been made a part of the IEP. Second, in deciding the other two issues in this case, the Hearing Officer concludes that one-on-one support was not necessary for Student.

**Issue 2: Whether the District failed to provide a FAPE to Student from August 20, 2013 until August 15, 2014 because the August 20, 2013 IEP was not reasonably calculated to provide Student with a meaningful educational benefit.**

As noted previously, the Fifth Circuit has identified four elements to determine whether a district provided a FAPE to a disabled student:

- (1) whether the program is individualized on the basis of the student’s assessment and performance;
- (2) whether the program is administered in the least restrictive environment;
- (3) whether the services are provided in a coordinated and collaborative manner by the key “stakeholders”; and
- (4) whether positive academic and non-academic benefits are demonstrated.<sup>104</sup>

In this appeal, Petitioner does not challenge the second and third elements. Rather, Petitioner contends that the District denied a FAPE to Student because it failed to satisfy the first and fourth elements set out in *Michael F.*

**Sub-Issue 2(a): Whether Student’s August 20, 2013 IEP was individualized on the basis of Student’s assessment and performance.**

The first element requires a finding that the disabled student’s IEP “is individualized on the basis of the student’s assessment and performance.”<sup>105</sup> Petitioner contends that Grandmother, \*\*\* Grade Teacher, and LLSP “all indicated that [Student] required or at least functioned better and learned better with one to one teaching for at least part of the day” and, therefore, failure to include one-on-one instruction in the IEP equates to a failure to provide FAPE.<sup>106</sup> Petitioner further argues that the decision to not include one-on-one instruction in the IEP effectively “ignored the recommendations” of \*\*\* Grade Teacher and LLSP.

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<sup>104</sup> *Michael F.*, 118 F.3d at 253.

<sup>105</sup> *Michael F.*, 118 F.3d at 253.

<sup>106</sup> Pet. Closing Brief at 16.

To a large extent, Petitioner overstates the evidence on this point. Undeniably, Grandmother has consistently and unequivocally wanted Student to receive one-on-one instruction. It is also true that, at the August 20, 2013 ARD Committee meeting, \*\*\* Grade Teacher opined that Student should continue to receive one-on-one instruction. It is much less clear, however, that LSSP believes one-on-one instruction is appropriate or necessary for Student. Petitioner leans heavily upon excerpts from LSSP's re-evaluation of Student to support the contention that LSSP believes one-on-one instruction would be best for the Student. For example, in her re-evaluation report, LSSP repeatedly noted that Student was easily distracted and included comments such as, "One to one redirection serves to decrease [Student's] distractibility, if only momentarily" and "One on one attention serves to calm [Student] down and enhance [Student's] focus."<sup>107</sup> This does not mean, however, that LSSP believes that one-on-one instruction is best for Student. It merely means that LSSP was reporting what she witnessed during the re-evaluation. That is, the re-evaluation took place during Student's \*\*\* grade year, at a time when one-on-one instruction was in place. Therefore, LSSP observed Student's classroom behavior, including the one-on-one instruction, and accurately reported what she saw. It does not follow, however, that LSSP believes that Student should continue to receive one-on-one instruction. Indeed, LSSP explicitly testified that one-on-one instruction was not appropriate for Student.

Moreover, the overwhelming weight of the evidence confirms that the decision to discontinue one-on-one instruction was the right one. All of the teachers who have dealt with Student since one-on-one instruction was discontinued (\*\*\* Grade Teacher, Summer School Teacher, English Teacher, and Math Teacher) testified that one-on-one instruction was unnecessary and would possibly even be counterproductive. \*\*\* Grade Teacher testified that Student functions well in the small group setting that replaced one-on-one instruction and that, over the course of the \*\*\* grade (the first year without one-on-one instruction), Student's behavior improved markedly. In summer school, Student received neither one-on-one nor small group instruction, yet Student's grades improved and Student rarely needed prompting. Math Teacher was adamant that the level of instruction being provided to Student is "just right."

With the exception of Petitioner's expert, every other education professional who testified in the case (Special Ed. Manager, LSSP, and Child Study Manager) also opined that one-on-one instruction was inappropriate and unnecessary for Student. Indeed, Special Ed. Manager indicated that if one-on-one were instituted for Student, the quality of Student's instruction would decline and Student would be

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<sup>107</sup> Pet. Ex. 16 at 10.



placed in a more restrictive educational environment, which is contrary to an overarching goal of IDEA. Even Petitioner's expert witness (Psychologist) was somewhat equivocal about the need for one-on-one instruction. Moreover, the Hearing Officer gives Psychologist's testimony less weight because she is one of the few witnesses at the hearing who had never met, examined, or taught Student.

It is inevitable that, in the ARD Committee process, opinions among participants will differ. The fact that the opinion of Grandmother and \*\*\* Grade Teacher regarding one-on-one instruction was ultimately not incorporated into the IEP developed by the Committee does not mean that those opinions were ignored. Simply put, Petitioner did not meet Petitioner's burden to prove that Student's August 20, 2013 IEP was not individualized on the basis of Student's assessment and performance.

**Sub-Issue 2(b): Whether the August 20, 2013 IEP provided Student with a meaningful educational benefit.**

The fourth element from *Michael F.* requires a finding that the disabled student was provided with "positive academic and non-academic benefits" by the District.<sup>108</sup> Petitioner points to several data points to support Petitioner's argument that the IEP failed to produce meaningful benefits for Student. These arguments are not persuasive. Petitioner argues that Student's "grades fell in every subject during the time the August 20, 2013 IEP was in place."<sup>109</sup> It is true that Student's grades in \*\*\* grade were lower than Student's grades in \*\*\* grade, but the difference is slight: in \*\*\* grade Student received \*\*\*, \*\*\*, and \*\*\*; in \*\*\* grade Student received \*\*\* and \*\*\*.<sup>110</sup> Moreover, Student spent less than half of Student's \*\*\* grade year at \*\*\*, making an apples-to-apples comparison difficult.

Petitioner also relies on Student's Istation, Stanford, and Woodcock-Johnson scores that show Student's performing below Student's grade level in reading and math. However, the District's expert witnesses explained, convincingly, that measurements comparing Student's ability against other students nationwide, such as age- or grade-equivalence rankings and percentile rankings, are not very helpful measures for determining whether Student has personally made academic progress. Student's own expert, Psychologist, initially testified that she determined that Student did not make academic progress "primarily" by relying on the percentile rankings shown in the Stanford and Istation results. She quickly conceded, however, that percentile and age- or grade-equivalent rankings are not good measures of progress.

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<sup>108</sup> *Michael F.*, 118 F.3d at 253.

<sup>109</sup> Pet. Closing Brief at 17.

<sup>110</sup> Dist. Ex. 16 at 340-41.

Petitioner also argues that Student's lack of progress can be measured by the fact that Student "did not pass \*\*\* grade."<sup>111</sup> This is not technically correct. Student had passing grades in all of Student's classes in \*\*\* grade. Student was required to complete summer school because Student, like many other students at \*\*\*, did not pass the mandatory standards of the STAAR test. However, all the experts, including Petitioner's own expert, agree that a student's failure to pass the STAAR test does not necessarily mean that the student has not made progress.

The District points to a variety of information to support the argument that Student has made meaningful progress, both academically and behaviorally. Student passed all Student's classes and received satisfactory conduct grades in \*\*\* grade, and Student had passing grades in summer school. Student's scores on Student's post-summer school assessments were higher than Student's pre-summer school assessments, substantially so for English/language arts. Student's performance during summer school is especially notable because Student received neither one-on-one nor in-class support during that term. Student was passing all Student's classes in \*\*\* grade as of the date of the hearing.

Child Study Manager explained that a good metric for determining whether a child is making academic progress is to look at Student's "W" scores on the Woodcock-Johnson test from year to year. Those scores demonstrate that, in comparing Student's \*\*\* grade year (when Student received one-on-one instruction) to Student's \*\*\* grade year (when Student did not) Student made progress in every area except math calculation. In some areas, the progress was substantial. In others, progress was more limited, especially in math, Student's area of most difficulty.

Similarly, Student made progress on every one of the 14 math and reading goals set out in the August 20, 2013 IEP. At the time of the IEP, Student's baseline scores relating to these various goals ranged from \*\*\*. By the end of the school year, Student's scores ranged between \*\*\*, with Student meeting or exceeding six of the goals. Student's Istation scores throughout \*\*\* grade, while not stellar, showed positive trendlines, with Student's scores improving over time in six of the eight subcategories tested. As to the two subcategories in which Student's scores declined over time, Special Ed. Manager and Child Study Manager explained that the downward trend may be attributable to the fact that Student merely "clicked through" the tests without genuinely attempting to provide correct answers.

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<sup>111</sup> Pet. Closing Brief at 17.

Petitioner attempts to cast doubt on the legitimacy of several of the metrics relied upon by the District to show progress. Essentially, Petitioner argues that the District “cooked the books” in order to make Student’s progress look better than it really was. Petitioner’s effort to impeach the District’s evidence was unsuccessful. For example, Petitioner argued that \*\*\* Grade Teacher “never gave [Student] a zero for incomplete work.”<sup>112</sup> This is misleading. \*\*\* Grade Teacher testified that she never gave *any* of her students zeroes because she wants them to be successful.<sup>113</sup> In other words, when grading, she treated Student no differently from her other students. Similarly, Petitioner suggested that \*\*\* Grade Teacher may have selectively decided which of Student’s grades to enter into her gradebook so as to inflate Student’s overall average.<sup>114</sup> Again, this is misleading. On this point, \*\*\* Grade Teacher testified that not every bit of work that her students do goes in their grade books. She explained:

If there was an assignment, . . . and I realize, ‘Oh, my class didn’t understand this concept.’ . . . I’m not going to take that grade, because . . . I need to re-teach that idea. It needs to be re-taught. So I’m not going to count that grade. I’ll just get the students to look over and move on.<sup>115</sup>

Again, this shows that Student’s grades were handled just like all of the other students.

Taken as a whole, the data relied upon by Petitioner is unconvincing. The data relied upon by the District, however, indicates a fairly consistent history of progress on Student’s part. Admittedly, Student’s progress is less than stellar. IDEA does not, however, require stellar improvement. Rather, the FAPE tailored by the ARD Committee, “need not be the best possible one, nor one that will maximize the child’s educational potential,” but must provide “only a ‘basic floor of opportunity’ for every disabled child,” and it “must be ‘likely to produce progress, not regression or trivial educational advancement.’”<sup>116</sup> In considering all of the evidence, it is clear that Student is receiving both academic and non-academic benefits from the implementation of Student’s IEP.

In summary, the available evidence demonstrates that Student’s August 20, 2013 IEP was reasonably calculated to provide, and resulted in, positive academic and nonacademic benefits for Student. For this reason, Petitioner failed to prove that Student has been denied a FAPE by the District.

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<sup>112</sup> Pet. Closing Brief at 18.

<sup>113</sup> Tr. at 122.

<sup>114</sup> Pet. Closing Brief at 18.

<sup>115</sup> Tr. at 201.

<sup>116</sup> *Michael F.*, 118 F.3d at 247-48 (citations and footnotes omitted).

**Issue 3: Whether the District failed to provide a FAPE to Student after August 15, 2014, because the August 15, 2015 IEP was not reasonably calculated to provide Student with a meaningful educational benefit.**

**Sub-Issue 3(a): Whether Student's August 15, 2014 IEP was individualized on the basis of Student's assessment and performance.**

**Sub-Issue 3(b): Whether the August 15, 2014 IEP provided Student with a meaningful educational benefit.**

Petitioner argues that the August 15, 2014, IEP is “basically a repeat” of the prior IEP and, therefore, is inadequate for essentially the same reasons as the prior IEP.<sup>117</sup> Petitioner provides very little argument and cites to no evidence in the record to support a challenge to the August 15, 2014 IEP. Having already found that the prior IEP provides a FAPE to Student, the Hearing Officer likewise finds that the August 15, 2014 IEP provides a FAPE to Student.

#### IV. CONCLUSIONS OF LAW

1. The Houston Independent School District (the District) is a local educational agency responsible for complying with Individuals with Disabilities Education Improvement Act (IDEA) as a condition of the State of Texas's receipt of federal education funding, and the District is required to provide each disabled child in its jurisdiction with a “free appropriate public education” (FAPE), pursuant to IDEA, 20 U.S.C. § 1400 *et seq.*
2. Petitioner \*\*\* (Student) resides within the boundaries of the District and is eligible for special education services as a student with a Specific Learning Disability in Math Calculation and an Other Health Impairment due to ADHD.
3. Student, by next friend \*\*\* (collectively, Petitioner) bears the burden of proof on all issues raised in this proceeding. *Schaffer v. Weast*, 546 U.S. 49 (2005).
4. Petitioner failed to prove that the District failed to comply with the procedures set forth in IDEA, specifically, to provide adequate written notice to a parent prior to implementation of a change to a student's FAPE. 34 C.F.R. § 300.503.
5. Petitioner failed to prove that Student's August 20, 2013 Individualized Education Program (IEP) was not individualized on the basis of Student's assessment and performance. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
6. Petitioner failed to prove that the August 20, 2013 IEP did not provide Student with a meaningful educational benefit. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

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<sup>117</sup> Pet. Closing Brief at 21.

7. Petitioner failed to prove that Student's August 15, 2014, IEP was not individualized on the basis of Student's assessment and performance. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
8. Petitioner failed to prove that the August 15, 2014, IEP did not provide Student with a meaningful educational benefit. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
9. Petitioner failed to prove that the District failed to provide Student with a FAPE. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

### ORDER

After due consideration of the record, and the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer hereby **ORDERS** as follows:

All of Petitioner's requested relief is denied.

**SIGNED on November 20, 2014.**



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**Hunter Burkhalter**  
**Special Education Hearing Officer**  
**For the State of Texas**

### NOTICE TO THE PARTIES

This Decision of 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. 19 Tex. Admin. Code § 89.1185(n).

DOCKET NO. 290-SE-0814

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

**SYNOPSIS**

**Issue 1:** Whether, on August 20, 2013, the District failed to provide a FAPE to Student by failing to comply with the procedures set forth in IDEA, specifically, by failing to provide Parent with prior written notice that the services provided to Student pursuant to an IEP would be changed.

**Held: For the District.** Pursuant to IDEA, the District was required to provide Parent with prior written notice before the changes to the provision of a FAPE to Student as reflected in the revised IEP were implemented. Prior to implementation of the changes, the District provided the Parent with appropriate written notice of the change.

**Citation:** 34 C.F.R. § 300.503

**Issue 2:** Whether the District failed to provide a FAPE to Student from August 20, 2013 until August 15, 2014.

**Sub-Issue 2(a):** Whether Student's August 20, 2013 IEP was individualized on the basis of Student's assessment and performance.

**Held: For the District.** Student's August 20, 2013 IEP was individualized on the basis of Student's assessment and performance.

**Citation:** *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).

**Sub-Issue 2(b):** Whether the August 20, 2013 IEP provided Student with a meaningful educational benefit.

**Held: For the District.** Student's August 20, 2013 IEP was reasonably calculated to provide, and resulted in, meaningful academic and nonacademic benefits for Student.

**Citation:** *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).

**Issue 3:** Whether the District failed to provide a FAPE to Student after August 15, 2014.

**Sub-Issue 3(a):** Whether Student's August 15, 2014 IEP was individualized on the basis of Student's assessment and performance.

**Held: For the District.** Student's August 15, 2014 IEP was individualized on the basis of Student's assessment and performance.

**Citation:** *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).

**Sub-Issue 3(b):** Whether the August 15, 2014 IEP provided Student with a meaningful educational benefit.

**Held: For the District.** Student's August 15, 2014 IEP was reasonably calculated to provide, and resulted in, meaningful academic and nonacademic benefits for Student.

**Citation:** *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).