

**DOCKET NO. 335-SE-0715**

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

**DECISION OF HEARING OFFICER**

STUDENT (Student), by next friends PARENT (Father) and PARENT (Mother) (collectively, Petitioner) requested an impartial due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The Tomball Independent School District (Respondent or the District) is the respondent to Petitioner’s complaint. Petitioner alleges that the District has not placed Student in the least restrictive environment (LRE), as required by the IDEA. The District’s position is that Student’s placement meets LRE requirements. The hearing officer finds that Student’s current placement meets LRE requirements.<sup>1</sup> Therefore, Petitioner’s requested relief is denied.

**I. DUE PROCESS HEARING REQUEST**

Petitioner filed a Request for a Due Process Hearing (Complaint) on July 7, 2015. In the Complaint, Petitioner alleged that the District denied Student a Free Appropriate Public Education (FAPE) in the following ways:

1. The District inappropriately determined Student’s placement for the 2015-2016 school year and denied Mother and Father (collectively, Parents) the right to meaningful participation in the development of Student’s Individualized Education Plan (IEP).<sup>2</sup> The District drafted

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<sup>1</sup> 34 C.F.R. §§ 300.114, 300.116.

<sup>2</sup> 34 C.F.R. § 300.501(b)(1), (c)(1). The IDEA specifically calls for parent participation in meetings where the “identification, evaluation and educational placement” and the provision of a FAPE to a child are being discussed.

an IEP for Student on \*\*\* 2014, determining Student's schedule of services for the 2015-2016 school year. However, it was not until \*\*\* 2014, that the District held an Admission, Review, and Dismissal (ARD) committee meeting in which all committee members, including Parents, were present to discuss placement options and review the potential harmful effects to Student of placement in a self-contained special education classroom for the majority of Student's school day. The school-based committee members refused to consider any placement other than what was proposed in the \*\*\* 2014 IEP.<sup>3</sup> Despite meeting four additional times over the remainder of the 2014-2015 school year to discuss Student's placement, the ARD committee refused to consider or provide Student with any additional time in the general education \*\*\* setting for the 2015-2016 school year than what was originally proposed at the \*\*\* 2014 ARD committee meeting.

2. The District denies Student the right to receive a FAPE in the LRE to the maximum extent appropriate by requiring placement in a life skills classroom<sup>4</sup> for the majority of Student's academic instruction,<sup>5</sup> despite the fact that Student has made excellent progress on all of Student's IEP goals and objectives and exhibits appropriate behavior in all educational settings.<sup>6</sup>

For relief, Petitioner seeks:<sup>7</sup>

1. a finding that the District violated Student's rights as a student with disabilities under IDEA by predetermining Student's placement in a self-contained special education classroom, and through its exclusionary strategies, denied Student a FAPE, which Student is entitled to receive in the LRE;
2. for the District to be ordered to include Student in the general education \*\*\* classroom at Student's home campus of \*\*\* for the entirety of Student's school day, including all core academics, ancillary classes (music, art, and physical education), recess, and lunch, for the 2015-2016 school year;<sup>8</sup>

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<sup>3</sup> 34 C.F.R. §§ 300.116(a)(1), (b)(2), (d), (e), 300.322(a).

<sup>4</sup> The life skills classroom is a special education classroom.

<sup>5</sup> In the 2015-2016 school year, Student receives \*\*\* hours of academic instruction in the general education classroom, and \*\*\* hours of academic instruction in the special education classroom (minus \*\*\* minutes per day, \*\*\* times per week, for speech therapy). Overall, Student spends \*\*\* hours of the school day in the general education setting, including lunch, recess, and ancillary classes. Petitioner Ex. 19 at 208; Respondent Ex. 2 at 2-5, 2-6, 2-9, 2-10; Respondent Ex. 3 at 3-8; 3-30.

<sup>6</sup> 34 C.F.R. § 300.114.

<sup>7</sup> Complaint at 12-13.

<sup>8</sup> At the hearing, Petitioner modified this proposed remedy. Petitioner now requests that Student spend an additional 1 hour and 10 minutes per day in the general education setting, for a total of \*\*\* hours and \*\*\* minutes of the 7-hour school day. Tr. at 108-110 (Father's testimony).

3. that the District be ordered to contract—within 30 days of the date of the hearing officer’s decision—with one or more professionals, who are not employees of the District, who have the necessary qualifications, who are knowledgeable and experienced in implementing evidence-based programs to support students with disabilities in the general education setting, and who have been approved by Petitioner, to perform the following functions:
  - a. conduct an evaluation to determine what supplementary aid and services Student needs to make progress in the general education setting;
  - b. train Student’s teachers on methods for including Student in age-appropriate regular education classes; and
  - c. re-evaluate Student’s need for support in the general education setting at least once during the 2015-2016 school year;
4. find that Petitioner is the prevailing party entitled to attorney’s fees;<sup>9</sup>
5. find that the hearing officer has jurisdiction only of claims arising under the IDEA;<sup>10</sup> and
6. order such other and further relief as the hearing officer may deem just and proper.

## II. ISSUE AND BURDEN OF PROOF

### A. Issue

The issue before the hearing officer, as set out in Order No. 2, is whether Student is receiving instruction in the LRE. In the Complaint, Petitioner proposed that Student should receive all academic instruction in the general education setting. The District responded that Student should receive a combination of special education and regular education instruction, as proposed during the \*\*\* 2014 ARD committee meeting by school-based committee members.

At the hearing, Petitioner revised the remedy requested in the Complaint. Instead of seeking to have Student placed in a general education setting for the entire day, Petitioner now seeks for Student to spend an additional 1 hour and 10 minutes in the general education setting,

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<sup>9</sup> The requested relief for prevailing party’s attorney’s fees was dismissed in Order No. 2 as being outside the hearing officer’s jurisdiction.

<sup>10</sup> This finding was included in Order No. 2, issued July 28, 2015.

for a total of \*\*\* hours and \*\*\* minutes of the school day, including more time in core academics, with \*\*\* hour and 50 minutes spent in the special education classroom per day, instead of the \*\*\* hours per day proposed by the District.<sup>11</sup> The time allotted for special education would include the current \*\*\* sessions with a speech therapist \*\*\* times per week. Specifically, Petitioner requests that Student spend the \*\*\*, an additional \*\*\* minutes for English/Language Arts (ELA), and an additional \*\*\* minutes for math, in the general education classroom.<sup>12</sup> The revised requested remedy comports with the recommendation of Petitioner's expert witness, \*\*\*, Ph.D., that Student spend 75 percent of Student's day in the general education setting.<sup>13</sup>

## **B. Burden of Proof**

The IDEA creates a presumption that a school district's decisions made pursuant to the IDEA are appropriate and that the party challenging the decisions bears the burden of proof at all times.<sup>14</sup> To prevail, Petitioner must, therefore, establish that the District's decision to provide Student with \*\*\* hours daily in a general education setting and \*\*\* hours per day in a special education setting does not meet the LRE requirements of IDEA and thus denies Student a FAPE.

## **III. HEARING**

The hearing was held September 9-11, 2015, before Sharon Cloninger, hearing officer, at the District's Staff Development Center, 1302 Keefer Street, Suite B, Tomball, Texas. Lead counsel Sarah Beebe, co-counsel Christine Nishimura, and co-counsel Dustin Rynders represented Petitioner. Attorney Amy C. Tucker represented the District.

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<sup>11</sup> Tr. at 278, 370; see Respondent Ex. 3 at 3-3. The instructional day is 360 minutes long; the entire school day lasts for 420 minutes, or 7 hours. Respondent Ex. 1 at 1-3, 1-4.

<sup>12</sup> Tr. at 108-110 (testimony of Father).

<sup>13</sup> Tr. at 212, 230. Student would spend \*\*\* hours and \*\*\* minutes per day in general education if Dr. \*\*\*'s recommendation is adopted.

<sup>14</sup> *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005); see also *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d. 373, 377 (5th Cir. 2003); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993).

During the July 28, 2015 prehearing telephone conference, the parties requested that the decision due date be extended to October 30, 2015, to allow time for the preparation of the hearing transcript and for the parties to submit written briefing.<sup>15</sup> The request was granted, for good cause, on the record. This decision was timely rendered and forwarded to the parties on October 29, 2015.

#### IV. FINDINGS OF FACT

Based upon the evidence and argument of the parties, the hearing officer makes the following findings of fact:

1. Student resides with Parents within the boundaries of the District.
2. The District is a recipient of federal funds and must comply with the IDEA, including developing and implementing an appropriate IEP for Student, designed to ensure services and placement in the LRE, reasonably calculated to confer meaningful educational benefit.
3. Student was diagnosed with \*\*\*.
4. In \*\*\* 2012, the District commissioned a Full and Individual Evaluation (FIE) of Student to determine whether Student had a disability or disabilities that necessitated special education services. Based on the FIE, the District found Student to be eligible for special education services under the categories of Speech Impairment and Other Health Impairment (OHI), due to the \*\*\*.<sup>16</sup>
5. The District's special education classes typically require a smaller student-to-teacher ratio than a general education class. Classes are supported by a certified special education teacher and trained paraprofessionals. Services may be provided by Licensed Specialists in School Psychology, Occupational Therapists, Physical Therapists, Speech-Language Pathologists, a Certified Teacher of the Visually Impaired, Orientation and Mobility Specialists, and Adapted Physical Education teachers. Additional support may be provided by the District-wide Behavior Coach, Program Specialists, and campus and District administrators.<sup>17</sup>

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<sup>15</sup> See Order No. 8, issued July 28, 2015, adopting the parties' requested dates.

<sup>16</sup> Petitioner Ex. 2; Respondent Ex. 10.

<sup>17</sup> Petitioner Ex. 40 at 453; Respondent Ex. 17 at 17-5.

6. The District's special education program is a restrictive placement and should only be considered when a student's needs cannot be supported in the general education setting through other service delivery models. District procedures for program placement must be followed.<sup>18</sup>
7. On \*\*\*, 2012, an initial ARD committee meeting was held with District personnel and Parents in attendance to review Student's FIE and determine Student's levels of educational performance and need.<sup>19</sup>
8. The \*\*\*, 2012 FIE noted that Student displayed no emotional or behavioral problems that would negatively affect Student's ability to learn; that Student got along well with others; and that Student had friends in Student's community and at school.<sup>20</sup>
9. In an ARD committee meeting held on \*\*\*, 2013, Parents expressed concern that the District's recommendation that Student attend the District's \*\*\* (\*\*\*) for \*\*\*, \*\*\*, would be more than Student could handle in addition to \*\*\*. Although the District remained willing for Student to attend \*\*\*, Parents opted to use \*\*\* so that Student could attend \*\*\* and \*\*\*.<sup>21</sup>
10. Petitioner was enrolled in \*\*\* in \*\*\* 2013.<sup>22</sup> Although Parents would have preferred Student to attend school closer to home and among peers from Student's own neighborhood at \*\*\*, the District only provided \*\*\* at \*\*\*.<sup>23</sup>
11. The District convened an annual ARD committee meeting on \*\*\*, 2013, and established an IEP containing six goals with a targeted mastery date of \*\*\* 2014.<sup>24</sup> In accordance with the IEP, Student attended \*\*\* for \*\*\* hours per day, \*\*\*, including \*\*\* hours per day in a special education setting and \*\*\* hour per day in a general education classroom, without modifications. Student attended a \*\*\* \*\*\*.<sup>25</sup>
12. While in \*\*\*, Student continued to demonstrate good behavior, causing no major disruptions to the general education environment, receiving no behavioral reports, and never demonstrating behavior necessitating a Behavioral Intervention Plan (BIP) or

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<sup>18</sup> Petitioner Ex. 40 at 453; Respondent Ex. 17 at 17-5.

<sup>19</sup> Petitioner Ex. 3; Respondent Ex. 9.

<sup>20</sup> Petitioner Ex. 2; Respondent Ex. 10.

<sup>21</sup> Petitioner Exs. 4, 5, 6.

<sup>22</sup> Petitioner Ex. 6.

<sup>23</sup> Petitioner Ex. 8; Respondent Ex. 6 (generally); Respondent Ex. 6 at 6-17 (Placement of Services).

<sup>24</sup> Petitioner Ex. 8; Respondent Ex. 6 (generally); Respondent Ex. 6 at 6-17 (Placement of Services).

<sup>25</sup> Respondent Ex. 6 (generally); Respondent Ex. 6 at 6-31 through 6-34; Respondent Exs. 7, 8.

specific IEP goals to address behavior problems.<sup>26</sup> Student currently exhibits no behavior problems.<sup>27</sup>

13. Student mastered two of Student's six IEP annual goals after only \*\*\* months at school. Student's \*\*\*, 2014 progress report indicated continued progress, with goal mastery expected by the next annual ARD committee meeting to be held in \*\*\* 2014.<sup>28</sup>
14. According to the \*\*\*, 2014 progress report, Student had mastered two of Student's IEP goals and had made adequate progress or was working on the remaining four goals.<sup>29</sup>
15. Student's progress on Student's IEP goals was primarily due to instruction Student received from Student's special education teacher at \*\*\*. Student could have made more progress had Student attended \*\*\* \*\*\* instead of \*\*\*.<sup>30</sup>
16. The District convened an annual review ARD committee meeting on \*\*\* 2014.<sup>31</sup> The ARD committee considered placement of Student in the LRE for Student's upcoming year in \*\*\*.<sup>32</sup> The \*\*\* 2014 ARD committee meeting was the first time that discussion of Student's schedule of services for the 2015-2016 school year took place with the full committee. The IEP itself, including the proposed schedule of services, was drafted by the District's IEP team on \*\*\* 2014, without input from Parents.<sup>33</sup>
17. The District recommended including Student in the general education setting for \*\*\* hours and \*\*\* minutes of the instructional day, including \*\*\* minutes per day of fine arts or physical education, and \*\*\* minutes per day each of English Language Arts (ELA), math, science, and social studies. \*\*\* hours of the instructional day would be spent in the special education setting.<sup>34</sup>

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<sup>26</sup> Tr. at 462 (testimony of \*\*\*, Student's \*\*\* special education teacher); Tr. at 191 (Testimony of Dr. \*\*\*); Petitioner Ex. 13 at 151; Petitioner Ex. 19 at 217; Respondent Ex. 5 at 5-20; *see also* Petitioner Ex. 13 at 142 and Respondent Ex. 5 at 5-11, in which the \*\*\* 2014 ARD committee does not recommend a BIP for Student.

<sup>27</sup> Tr. at 51 (testimony of Father).

<sup>28</sup> Petitioner Ex. 9.

<sup>29</sup> Petitioner Ex. 11.

<sup>30</sup> Tr. at 430, 452 (testimony of Ms. \*\*\*).

<sup>31</sup> Petitioner Ex. 13 at 132 and Respondent Ex. 5 at 5-1 incorrectly list the meeting date as \*\*\* 2014, which was the IEP team meeting date. Respondent Ex. 5 at 5-32. The ARD committee meeting was held on \*\*\* 2014. Petitioner Ex. 13 at 161, 167-168; Respondent Ex. 5 at 5-30, 5-31, 5-36, 5-38; Tr. at 72 (testimony of Father).

<sup>32</sup> Petitioner Ex. 13 at 145-147; Respondent Ex. 5 at 5-13 through 5-15.

<sup>33</sup> Respondent Ex. 19 (generally), and at 19-6, 19-7.

<sup>34</sup> Respondent Ex. 5 at 5-16, 5-42. The instructional day is 360 minutes long, leaving 15 minutes of the instructional day unaccounted for in the proposed plan. Presumably the time is filled during morning announcements, lunch, and recess, which comprise the remainder of the 420-minute school day. Petitioner Ex. 19 at 208; Respondent Ex. 1 at 1-3, 1-4.

18. Given Student's progress on Student's goals and objectives<sup>35</sup> and good behavior, Parents disagreed with the school-based committee members' placement proposal. Parents found the proposed schedule of services to be premature because it had been formed almost \*\*\* before Student was scheduled to \*\*\* \*\* to \*\*\*.<sup>36</sup>
19. The school-based ARD committee members recommended that Student receive part of Student's instruction in a special education setting because placement only in the general education classroom would prohibit Student from reaching all goals and objectives in Student's IEP, even with the use of supplementary aids and services. Further, the modifications required for Student to achieve Student's IEP goals and objectives could not be implemented in the general education classroom without eliminating essential components of the general curriculum/activity.<sup>37</sup> The ARD committee considered the potential harmful effect to Student of being removed from the general education setting as being the lack of opportunity for appropriate role models; Father disagreed with the ARD committee conclusion that Student would suffer no harmful effects by being removed from the general education setting.<sup>38</sup>
20. While the full ARD committee agreed that Student should pursue new annual goals due to Student's progress on the previous year's goals, Parents insisted that no placement decision should be made for \*\*\* before Student's progress over the coming months could be observed. Parents were in agreement with Student's IEP, which guides the placement decision, for the remainder of the 2014-2015 school year,<sup>39</sup> but continued to request a different placement for \*\*\*. The school-based ARD committee members agreed to reconvene later in the school year to discuss Student's schedule of services for \*\*\*.<sup>40</sup> The ARD committee did not reach a consensus.<sup>41</sup>
21. Because Parents disagreed with Student's proposed placement, they filed a Special Education Complaint with the Texas Education Agency (TEA) on \*\*\*, 2015.<sup>42</sup> Their complaint stated that Student could attend the general education classroom, and be in the same learning activities as other mainstreamed students, with accommodations for Student's disability, and supplemental aids and services. Parents stated that District staff had neither considered nor discussed with Parents the potential accommodations, modifications, and/or supplemental aids and services (behavior interventions, paraprofessional, assistive technology, equipment, environmental modifications, etc.) that

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<sup>35</sup> Petitioner Exs. 9, 11, 12.

<sup>36</sup> Petitioner Ex. 13 at 167-168; Respondent Ex. 5 at 5-30, 5-31.

<sup>37</sup> Petitioner Ex. 13 at 145; Respondent Ex. 5 at 5-14.

<sup>38</sup> Petitioner Ex. 13 at 136; Respondent Ex. 5 at 5-15; Tr. at 70 (testimony of Father).

<sup>39</sup> Tr. at 61 (testimony of Father).

<sup>40</sup> Petitioner Exs. 13, 49; Respondent Ex. 5 at 5-31.

<sup>41</sup> Respondent Ex. 5 at 5-30.

<sup>42</sup> Petitioner Ex. 14; Respondent Ex. 19.



- could allow Student to remain in the regular classroom and make progress in the general curriculum.<sup>43</sup>
22. In their Special Education Complaint filed with TEA, Parents listed the potential harmful effects of not placing Student in general education as a lack of opportunity for appropriate role models, stigmatization, lack of opportunity for social interaction, decreased self-esteem, and overall a huge setback for Student who had been “doing great” in the general education classroom at the \*\*\*.<sup>44</sup>
  23. TEA issued its Special Education Complaint Investigative Report on \*\*\*, 2015, finding that the District had ensured that Student’s IEP team determined Student’s 2015-2016 educational placement in accordance with 34 C.F.R. §§ 300.114 and 300.116.<sup>45</sup>
  24. Parents requested reconsideration of TEA’s Special Education Investigative Findings. On \*\*\*, 2015, TEA issued its Notice of Reconsideration of Special Education Investigative Findings, concluding that the \*\*\*, 2015 investigative report should not be amended.<sup>46</sup>
  25. While Parents considered the \*\*\* 2014 IEP team determination for Student’s placement to be premature, the IEP team made the determination in accordance with 34 C.F.R. §§ 300.114 and 300.116 and nothing prevented the IEP team from reconvening to review Student’s progress and 2015-2016 educational placement.<sup>47</sup> The IEP team considered all aspects of the LRE and determined no potential harmful effects to Student’s placement.<sup>48</sup>
  26. The ARD committee reconvened on \*\*\*, 2015, to determine Student’s \*\*\* programming for the 2015-2016 school year.<sup>49</sup> The committee agreed that lunch and recess will be in the general education setting.<sup>50</sup> Parents asked the District to consider providing Student with more academic instructional time in the general education \*\*\* classroom than was proposed in the \*\*\* 2014 IEP, but the District did not agree to deviate from the IEP in spite of Student’s consistent progress toward meeting Student’s annual IEP goals.<sup>51</sup> Specifically, Parents requested \*\*\* hour and \*\*\* minutes in the special education setting, rather than the \*\*\* hours proposed by the District. Consequently, the ARD committee did not reach a consensus, and recessed until \*\*\*, 2015.<sup>52</sup>

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<sup>43</sup> Petitioner Ex. 14 at 173; Respondent Ex. 19 at 19-6; *see also* Petitioner Exs. 15, 16.

<sup>44</sup> Petitioner Ex. 14 at 173; Respondent Ex. 19 at 19-6; *see also* Petitioner Exs. 15, 16.

<sup>45</sup> Petitioner Ex. 17; Respondent Ex. 20.

<sup>46</sup> Petitioner Exs. 18, 20; Respondent Ex. 21.

<sup>47</sup> Respondent Ex. 20 at 20-7.

<sup>48</sup> Petitioner Ex. 20 at 230.

<sup>49</sup> Petitioner Ex. 19; Respondent Ex. 4.

<sup>50</sup> Petitioner Ex. 19 at 208; Respondent Ex. 4 at 4-2.

<sup>51</sup> Petitioner Ex. 19 at 207-209, 216-219, 227-228.

<sup>52</sup> Respondent Ex. 4 at 4-17.

27. When the ARD committee reconvened on \*\*\*, 2015, Parents attempted to present videos of Student working at home to demonstrate that Student had made progress toward the IEP goals beyond what had been documented by the District.<sup>53</sup> The school-based committee members refused to view the videos because there were not videos of Student working in a school setting, for comparison.<sup>54</sup>
28. Between \*\*\* 2014 and the \*\*\*, 2015 ARD committee meeting, Student made steady progress on all of Student's new IEP goals, mastering Goal 6, which was accordingly removed from the IEP.<sup>55</sup>
29. At the \*\*\*, 2015 ARD committee meeting, Parents continued to propose that, in \*\*\*, Student spend more time in the general education classroom where they believe Student will make more progress than in a special education setting. The school-based committee members rejected the proposal based on Student's Present Levels of Academic Achievement and Functional Performance (PLAAFP).<sup>56</sup>
30. At the \*\*\*, 2015 ARD committee meeting, Parents agreed with the District's recommendation that speech services would be increased to \*\*\* minutes, \*\*\* times per week, for a total of \*\*\* sessions \*\*\*-week grading period for the 2015-2016 school year.<sup>57</sup>
31. Only after Parents filed a complaint with the TEA on \*\*\*, 2015, did the school-based members of the ARD committee agree to view the videos.<sup>58</sup>
32. TEA's Special Education Investigation Report issued \*\*\*, 2015, concluded that the District was not required to review the videos in order to consider Parents' concerns about Student's IEPs or placement. However, the ARD committee had already viewed the videos at the \*\*\*, 2015 ARD committee meeting.<sup>59</sup>
33. On \*\*\*, 2015, the ARD committee met to consider changes to Student's schedule of services. The ARD committee viewed Parents' home videos for the purpose of developing Student's goals and objectives. The home videos showed Student performing tasks described in Student's first three IEP goals. The ARD committee agreed to make changes to Student's first three IEP goals, as well as to Goal 5 and Goal 7.<sup>60</sup>

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<sup>53</sup> Petitioner Ex. 21 at 240; Respondent Ex. 3 at 3-7.

<sup>54</sup> Respondent Ex. 3 at 3-7; Respondent Ex. 15; Respondent Ex. 22 at 22-7.

<sup>55</sup> Tr. at 457-460 (testimony of Ms. \*\*\*); Petitioner Ex. 19 at 213, 218; Petitioner Ex. 21 at 241; Respondent Ex. 3 at 3-8; Respondent Ex. 15.

<sup>56</sup> Petitioner Ex. 21 at 235, 241; Respondent Ex. 3 at 3-4, 3-9; Respondent Ex. 4 at 4-14.

<sup>57</sup> Petitioner Ex. 21 at 241; Respondent Ex. 3 at 3-8.

<sup>58</sup> Petitioner Ex. 22; Respondent Ex. 18 at 18-4 through 18-6; Respondent Ex. 22.

<sup>59</sup> Petitioner Exs. 27, 29; Respondent Exs. 16, 23 at 23-6; *see also* Petitioner Ex. 23.

<sup>60</sup> Petitioner Exs. 24, 53, 54, 55; Respondent Exs. 1 at 1-6, 1-7; 2 at 2-1 through 2-5, 2-8 through 2-33.

34. At the \*\*\*, 2015 ARD committee meeting, the school-based committee members decided not to alter the plans for Student's placement because they believed the small special education setting provides more instruction opportunity for Student to make progress on Student's goals and objectives. Father disagreed with the schedule of services, stating that there are many students with varying abilities in \*\*\* and he wants Student to have the same opportunities as other students. In Father's opinion, Student's IEP goals and objectives could be taught in a general education classroom. The ARD committee recessed without reaching an agreement about Student's placement.<sup>61</sup>
35. The ARD committee reconvened on \*\*\*, 2015, to discuss Student's placement. Father disagreed with the proposal that Student be in a special education setting for \*\*\* hours per day as being too much time out of the general education classroom. Father requested that Student receive instruction solely in a general education setting where, he said, Student can achieve Student's goals and objectives with supplementary aids and services. Brigance testing<sup>62</sup> and data from \*\*\*, Student's \*\*\* special education teacher,<sup>63</sup> showed Student was functioning well below Student's same-aged peers. Ms. \*\*\* reported that for Student to achieve Student's goals and objectives, Student requires a smaller setting as well as specialized instruction that cannot be completed only in the general education classroom.<sup>64</sup>
36. At the \*\*\*, 2015 meeting, the ARD committee discussed the possible harmful effects of placing Student in the special education classroom for part of the day. Father informed the school-based committee members that Student is very aware of Student's segregation from Student's classmates. He expressed great concern that Student's placement in a special education classroom would result in stigmatization, a lack of opportunity for social interaction with peers who do not have disabilities, decreased self-esteem, and diminished access to the full range of curriculum available in the general education \*\*\* classroom. Although the school-based ARD committee members assured Father that they understood these concerns, they did not alter the proposed schedule of services and the committee did not reach a consensus.<sup>65</sup>
37. The entire ARD committee agreed at the \*\*\*, 2015 meeting that, for the 2015-2016 school year, Student would participate in lunch, recess, specials (physical education and fine arts), and part of Student's academic day in the general education setting. Father requested that Student spend \*\*\* hour and \*\*\* minutes (rather than the \*\*\* hours proposed by the District) in the special education setting<sup>66</sup>

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<sup>61</sup> Petitioner Ex. 24; Respondent Exs. 1 at 1-6, 1-7; 2 at 2-5, 2-1 through 2-33.

<sup>62</sup> Petitioner Ex. 25; Respondent Ex. 38.

<sup>63</sup> Petitioner Ex. 26; Respondent Exs. 34, 35.

<sup>64</sup> Petitioner Ex. 28; Respondent Ex. 2 at 2-6, 2-7, 2-24, 2-25; Respondent Exs. 33, 35.

<sup>65</sup> Petitioner Ex. 28 at 372-373; Respondent Ex. 2 at 2-7, 2-8.

<sup>66</sup> Petitioner Ex. 28 at 372-373; Respondent Ex. 2 at 2-7, 2-8, 2-24, 2-25.

38. During the \*\*\*, 2015 ARD committee meeting, Father repeatedly asked why Student could not receive instruction in the regular \*\*\* classroom with Student's peers who do not have disabilities when all children \*\*\* at varying skill levels. The District maintained that certain of Student's IEP goals were prerequisites to the skills being taught in \*\*\*, such as \*\*\*. Goals 1, 2, 3, and 5, which relate to \*\*\*, and \*\*\*, are written at the prerequisite level.<sup>67</sup> Father, however, insisted that much of \*\*\* focuses on \*\*\*, and what little specialized curriculum is required for Student could be provided with paraprofessional support and coordination between special and general education staff. The school-based ARD committee members did not agree to deviate from the schedule of services first developed in the \*\*\* 2014 IEP.<sup>68</sup>
39. Although Student began attending Student's home campus of \*\*\* at the start of the 2015-2016 school year, no staff from that campus attended any of the \*\*\* ARD committee meetings that took place between \*\*\* 2014 and \*\*\* 2015, despite requests from Parents that staff from that campus participate in the meetings.<sup>69</sup>
40. Student's IEP was amended on \*\*\*, 2015, to correct errors in Student's previous ARD paperwork.<sup>70</sup>
41. The Amended IEP shows that, in the fall of 2015, Student's general education time would consist of \*\*\* minutes per week of fine arts; \*\*\* minutes per week of physical education; and \*\*\* minutes per day each of language arts, math, science, and social studies.<sup>71</sup>
42. The Amended IEP shows that, in the fall of 2015, Student's special education curriculum would include \*\*\* minutes per day each of Intervention-Language Arts and Intervention-Math, and \*\*\* minutes per day each of Language Arts and Math. In addition, during the \*\*\* hours per day allotted for special education, Student would receive speech therapy for \*\*\* minutes, \*\*\* times per week.<sup>72</sup>
43. Petitioner's expert Dr. \*\*\*, Inclusion Evaluator,<sup>73</sup> prepared an Inclusion Evaluation Report<sup>74</sup> on \*\*\*, 2015, in which he recommends that:

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<sup>67</sup> Respondent Ex. 2 at 2-7, 2-14 through 2-16, 2-18.

<sup>68</sup> Respondent Ex. 2 at 2-7.

<sup>69</sup> Complaint at 7. The hearing officer notes that the ARD committee was composed of the required members. 19 Tex. Admin. Code § 89.1050(a); 34 C.F.R. § 300.321. However, pursuant to 34 C.F.R. § 300.321(6), other individuals who have knowledge or special expertise regarding the child may be included at the discretion of the parent. The record contains no evidence of Parents' request or of the District's refusal to honor the request.

<sup>70</sup> Respondent Ex. 1 at 1-3.

<sup>71</sup> Respondent Ex. 1 at 1-3.

<sup>72</sup> Respondent Ex. 1 at 1-3.

<sup>73</sup> Petitioner Ex. 34 (Dr. \*\*\*'s *curriculum vitae*).

<sup>74</sup> Petitioner Ex. 41; Respondent Ex. 24.

- a. efforts should be made to improve Student's expressive language skills and Student's communication with others, especially peers (by adding IEP goals addressing such skills as making eye contact, initiating and responding to communication/questions to/from others, including peers; pragmatic language; and oral language skills); and a system of communication should be established for Student (such as \*\*\*);
  - b. an IEP goal should be added that targets cooperative play and cooperative task activities with Student's typical peers;
  - c. an IEP goal should be added to increase Student's response rate to teacher directives;
  - d. accommodations, adaptations, and supports to help ensure that components of the \*\*\* curriculum are not eliminated for Student when Student is in the general education classroom should include the use of peer buddies, modified assessment practices, more verbal prompts, being able to manipulate/hold something in Student's hands while sitting quietly, the use of tiered questioning, pre-teaching or priming Student, and the modification of learning activities to accommodate Student's \*\*\* challenges;
  - e. as much as possible, incorporate music, songs, dance, and movement into Student's learning activities;
  - f. integrate speech and language instruction into Student's \*\*\* class;
  - g. ensure that there is a common planning time for a special education support teacher to work weekly with Student's \*\*\* teacher to help plan and adapt lessons when needed and to address problems when they develop; and
  - h. select a \*\*\* teacher who has a positive attitude about working with Student and who sees Parents as helpful resources in meeting the teacher's needs and Student's needs.
44. Dr. \*\*\*'s recommendations as contained in his \*\*\*, 2015 Inclusion Evaluation Report recognize that Student's academic time should be split between the special education classroom and the general education classroom.<sup>75</sup>
45. Dr. \*\*\* recommends that Student spend 75 percent of Student's school day in the general education setting.<sup>76</sup>

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<sup>75</sup> Petitioner Ex. 41 at 468-470; Respondent Ex. 24 at 24-3, 24-5.

<sup>76</sup> Tr. at 212, 230 (testimony of Dr. \*\*\*).

46. Dr. \*\*\* observed Student in Student's general education setting for most of the day on \*\*\*, 2015, after which he prepared an addendum to his Inclusion Evaluation Report.<sup>77</sup> The \*\*\*, 2015 addendum adopts the \*\*\* 2015 inclusion report and adds the following:
- a. Dr. \*\*\* reinforced the recommendations from his \*\*\* 2015 inclusion report that accommodations, adaptations, and supports should include peer buddies, tiered questions, priming, the integration of speech and language services into the \*\*\* setting, and the addition of an IEP goal in the area of following directions and responding to task requests.
  - b. Dr. \*\*\* recommended partial participation for Student, meaning that Student's learning objectives do not have to be the same as those of Student's typical classmates.
  - c. Dr. \*\*\* recommended that Student be taught life skills that match those exhibited by Student's typical peers, such as \*\*\* and be as independent as possible in the lunchroom.
  - d. Dr. \*\*\* recommended fading of the paraprofessional, acknowledging that her role could not be completely eliminated but suggesting that she do less for Student.
  - e. Dr. \*\*\* recommended that the \*\*\* curriculum be taught to Student at Student's level of functioning, focusing on the essential understandings and big ideas in the curriculum so that Student could sit side-by-side with typical classmates but with different learning objectives.
  - f. Dr. \*\*\* points out that his impression of Student's teachers and school staff was very positive: they all appeared to be very energetic, enthusiastic, competent, and caring when working with Student.
47. Student's Progress Report dated \*\*\*, 2015, shows that Student was continuing to work on IEP Goals 1-5 and 7 and had not yet mastered them.<sup>78</sup>
48. As of \*\*\* 2015, Student was making slow, inconsistent progress and was functioning below Student's same age, typical peers, at a \*\*\* to \*\*\* age level, as far as adaptive behavior skills, and a little under \*\*\* in communication skills.<sup>79</sup>

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<sup>77</sup> Petitioner Ex. 56 at 5-8; *see also* Tr. at 203-204 (testimony of Dr. \*\*\*).

<sup>78</sup> Respondent Ex. 33 at 33-1, 33-2.

<sup>79</sup> Tr. at 430-434 (testimony of Ms. \*\*\*); Respondent Exs. 34, 39.

- 49. Based on Student’s PLAAFP, for Student to achieve all of Student’s goals and objectives, Student requires a smaller setting as well as specialized instruction that cannot be solely completed in the general education setting.<sup>80</sup>
- 50. Placement of Student in the general education classroom only would prohibit Student from achieving all IEP goals and objectives, even with the use of supplementary aids and services.<sup>81</sup>
- 51. Implementing Student’s IEP in the general education classroom only with the needed modifications would eliminate essential components of the general education curriculum and/or activity.<sup>82</sup>
- 52. The District’s recommended placement for Student will not result in any harmful effects for Student.<sup>83</sup>
- 53. Student’s 2015-2016 daily schedule, as set out below, represents placement in the LRE:<sup>84</sup>

<b>Time</b>	<b>Activity</b>	<b>General Education</b>	<b>Special Education</b>
***	***		
***	***		***
***	***	***	
***	***		***
***	***	***	
***	***		***
***	***	***	
***	***	***	
***	***		***
***	***	***	
***	***	***	
***	***	***	
***	***	***	

- 54. The preponderance of the evidence establishes that the ARD committee properly considered Parents’ input in establishing and amending Student’s IEP goals and objectives, and in determining Student’s placement, and Parents were not denied the opportunity to provide meaningful input into the placement decision.

<sup>80</sup> Respondent Ex. 2 at 2-6 through 2-8.

<sup>81</sup> Respondent Ex. 20 at 20-7.

<sup>82</sup> Respondent Ex. 20 at 20-7.

<sup>83</sup> Respondent Ex. 20 at 20-7.

<sup>84</sup> Petitioner Ex. 30.

55. The preponderance of the evidence establishes that, for the 2015-2016 school year, Student's placement of \*\*\* hours per day in special education and \*\*\* hours per day in general education comports with the LRE requirements of the IDEA.
56. The preponderance of the evidence establishes that Student's placement ensures that Student will be educated with Student's non-disabled peers to the maximum extent appropriate, as required by the IDEA.

## V. APPLICABLE LAW

### A. The IDEA and its Implementing Regulations

The IDEA, the Texas Education Code, and the rules promulgated by the Texas Commissioner of Education and the State Board of Education require the District to guarantee certain procedural and educational rights to parents of children with disabilities. Under the IDEA and its implementing regulations, school districts in Texas must afford children with disabilities a FAPE, which is defined as “special education and related services that

[a]re provided at public expense, under public supervision and direction, and without charge; [m]eet the standards of the [State educational agency] . . . ; [i]nclude an appropriate preschool, elementary school, or secondary school education in the State involved; and [a]re provided in conformity with the [IEP] that meets the requirements of [34 C.F.R.] §§ 300.320 through 300.324.<sup>85</sup>

The LRE requirements under the IDEA require each public agency to ensure that

[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and [s]pecial classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>86</sup>

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<sup>85</sup> 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

<sup>86</sup> 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i), (ii). Supplementary aids and services means aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with §§ 300.114 through 300.116. 34 C.F.R. § 300.42.



Placement decisions must be made by a group of persons, including the parents, and other persons knowledgeable about the child, the evaluation data, and the placement options.<sup>87</sup> Placement decisions also must be determined at least annually; based on the student's IEP; take into consideration any potential harmful effects to the student; and ensure that a student is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.<sup>88</sup>

### **B. The *Daniel R.R.* Test**

The Fifth Circuit has established a two-prong test for determining whether a school has complied with the LRE requirements.<sup>89</sup> The two-part test asks “whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child,” and, if not, “whether the school has mainstreamed the child to the maximum extent appropriate.”<sup>90</sup>

As to the first part of the test, the court identified four factors to be considered: accommodations in regular education; educational benefit; overall educational experience; and effect on the regular classroom environment.<sup>91</sup>

## **VI. DISCUSSION**

### **A. Overview of the Evidence**

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<sup>87</sup> 34 C.F.R. § 300.116(a)(1).

<sup>88</sup> 34 C.F.R. § 300.116(b), (d), (e).

<sup>89</sup> *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989); *see also Brillon v. Klein Indep. Sch. Dist.*, 100 Fed.Appx. 309, 312 (5th Cir. 2004); *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1011-1015 (5th Cir. 2010).

<sup>90</sup> *Daniel R.R.*, 874 F.2d at 1048.

<sup>91</sup> *Daniel R.R.*, 874 F.2d at 1048-1049. Each of the factors is discussed in the Analysis section of this Decision.

Petitioner offered 56 exhibits, of which 52 were admitted.<sup>92</sup> The District offered 39 exhibits, which were admitted. The following witnesses testified:

- Father
- Mother
- Dr. \*\*\*, Special Education Consultant<sup>93</sup>
- \*\*\*, the District's Executive Director of Special Services<sup>94</sup>
- \*\*\*, Program Specialist, Tomball Independent School District
- \*\*\*, Student's \*\*\* teacher, \*\*\*<sup>95</sup>
- \*\*\*, Student's \*\*\* teacher, \*\*\*<sup>96</sup>
- \*\*\*, Student's \*\*\* teacher, \*\*\*
- \*\*\*, Student's Special Education teacher, \*\*\*

## B. Background

Student, who is \*\*\*, resides with Student's parents within the District's geographical boundaries. Student is a \*\*\* who is \*\*\*.<sup>97</sup> Student currently attends Student's home school, \*\*\*, spending \*\*\* hours per day in the general education setting and \*\*\* hours per day in the special education setting, minus \*\*\* minutes per day, \*\*\* times per week, for speech therapy.<sup>98</sup>

### 1. Student's Eligibility for Special Education Services

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<sup>92</sup> Petitioner exhibits 1-34, 39-42, and 44-57 were admitted. Petitioner exhibits 35-38 were offered but not admitted over the District's objection, which was sustained; Petitioner Ex. 43 was not offered or admitted.

<sup>93</sup> Dr. \*\*\*'s *curriculum vitae* is at Petitioner Ex. 34.

<sup>94</sup> Ms. \*\*\*' *curriculum vitae* is at Petitioner Ex. 42.

<sup>95</sup> Ms. \*\*\*'s Professional Development Portfolio is at Petitioner Ex. 46.

<sup>96</sup> Ms. \*\*\*'s Professional Development Portfolio is at Petitioner Ex. 47.

<sup>97</sup> Respondent Ex. 5 at 5-3, 5-19 through 5-20.

<sup>98</sup> Petitioner Ex. 24 at 279-280; Petitioner Ex. 30.

The District first determined Student to be eligible for special education services in \*\*\* 2012, \*\*\*, based on an FIE completed that same month.<sup>99</sup> The ARD committee met on \*\*\*, 2012, and determined that Student has both qualifying disabilities of OHI, due to a \*\*\*, and Speech Impairment, and a need for special education services.<sup>100</sup>

## 2. Student's \*\*\*: \*\*\* 2013-\*\*\* 2015

In \*\*\* 2013, when Student was \*\*\* years old, Parents enrolled Student in \*\*\* for \*\*\* and sent Student to a \*\*\* \*\*\*.<sup>101</sup> \*\*\*.<sup>102</sup> Although the District had recommended and was ready to provide Student with \*\*\* for \*\*\*,<sup>103</sup> Parents felt \*\*\* would be too much for Student and opted for \*\*\* in \*\*\* and the \*\*\*. Student also \*\*\* \*\*\* and \*\*\* \*\*\* during the 2014-2015 school year.<sup>104</sup> At \*\*\*, Student received \*\*\* hours of special education daily and was included in the general education classroom for \*\*\* hour daily, during which time Student's special education teacher and general education teacher were co-teachers.<sup>105</sup>

Ms. \*\*\*,<sup>106</sup> Student's \*\*\* special education teacher at \*\*\* from \*\*\* 2013 through \*\*\* 2015, testified that, while Student made progress in meeting Student's goals, more progress would have been made had Student attended \*\*\* \*\*\*. She attributed almost 100 percent of Student's progress to instruction Student received in the special education classroom because instruction in the general education classroom was beyond Student's abilities.<sup>107</sup> Ms. \*\*\* explained that, in the general education classroom, Student required assistance from a teacher almost the entire time,

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<sup>99</sup> Petitioner Ex. 2; Respondent Ex. 10.

<sup>100</sup> Petitioner Ex. 3 at 22; Respondent Ex. 9 at 9-1.

<sup>101</sup> Tr. at 426 (testimony of Ms. \*\*\*).

<sup>102</sup> Tr. at 426 (testimony of Ms. \*\*\*).

<sup>103</sup> Tr. at 426 (testimony of Ms. \*\*\*).

<sup>104</sup> Tr. at 443-444 (testimony of Ms. \*\*\*).

<sup>105</sup> Tr. at 427, 443-444 (testimony of Ms. \*\*\*).

<sup>106</sup> Petitioner Ex. 46.

<sup>107</sup> Tr. at 430, 452; *see* Petitioner Ex. 11 (Student's \*\*\*, 2014 Progress Report).

including hand-over-hand assistance a lot of the time.<sup>108</sup> As of \*\*\* 2015, Student was making slow, inconsistent progress and was functioning below Student's same age, typical peers, at a \*\*\* to \*\*\* age level, as far as adaptive behavior skills, and at a little under \*\*\* in communication skills, she said.<sup>109</sup>

Ms. \*\*\*,<sup>110</sup> Student's \*\*\* teacher at \*\*\* from \*\*\* 2013 through \*\*\* 2015,<sup>111</sup> testified that Student required teacher assistance 100 percent of the time when Student was in the \*\*\* classroom. Otherwise, Student would lose focus and not complete the task at hand. Ms. \*\*\* said the curriculum had to be modified for Student.<sup>112</sup>

Regarding some of Dr. \*\*\*'s recommendations, both Ms. \*\*\* and Ms. \*\*\* said that, at \*\*\* and \*\*\*, they implemented peer buddies, pre-teaching, and common planning as co-teachers, with varying levels of success.<sup>113</sup>

Student's \*\*\* teachers, who both were interviewed by Dr. \*\*\* in \*\*\* 2015, reported that Student was able to follow class routines; fit in with the group; was energetic and had good gross motor skills; over the past year, learned to sit longer and be more independent in completing tasks such as \*\*\* and \*\*\*; and was motivated to learn new things.<sup>114</sup> Dr. \*\*\* acknowledged that neither of Student's \*\*\* teachers is certified in special education and he does not know if they are certified regular education teachers. He admitted he does not know how many teachers were in the classroom, what curriculum was followed, or if the \*\*\* had goals and objectives for Student. The \*\*\* teachers did not provide him with Student's progress reports or work samples.<sup>115</sup> Dr. \*\*\*

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<sup>108</sup> Tr. at 433, 453-454.

<sup>109</sup> Tr. at 430-434; Respondent Exs. 34, 39.

<sup>110</sup> Petitioner Ex. 47.

<sup>111</sup> Tr. at 411.

<sup>112</sup> Tr. at 404-405.

<sup>113</sup> Tr. at 408, 441-442; Petitioner Ex. 56.

<sup>114</sup> Petitioner Ex. 41 at 467.

<sup>115</sup> Tr. at 213-217.

conceded that Student's progress, as reported by the \*\*\* teachers, could have been due to the special education instruction Student received at \*\*\*.<sup>116</sup>

### C. Parents' Testimony

Father testified that it is important for Student to be included as much as possible in general education because \*\*\* are very important for any child, and now is the time for Student to learn how to deal with typical peers and to develop skills to be able to deal with the real world.<sup>117</sup> Father is concerned that by being removed from the general education setting, Student will be stigmatized by being segregated from Student's typical peers; will have a lack of opportunities to learn the regular curriculum; will lose opportunities to socialize with Student's typical peers; and is not going to learn enough.<sup>118</sup>

Mother would like for Student to feel Student belongs in the general education classroom, which Student will not feel if Student is in that classroom only part of the day.<sup>119</sup> And, Mother testified, it is not enough for Student to be physically present in the general education classroom; Student could be segregated, even when in the general education classroom, if the proper resources are not implemented.<sup>120</sup>

Father testified that, beginning with the \*\*\* 2014 ARD committee meeting, Parents requested that Student be given another hour in general education, which was rejected at that meeting and subsequent ARD committee meetings held \*\*\*, \*\*\*, and \*\*\*, 2015; and at the reconvened meeting on \*\*\*, 2015.<sup>121</sup> One more hour in the general education setting would have satisfied Parents, he said.<sup>122</sup> He said Student's current schedule of services differs from that

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<sup>116</sup> Tr. at 216-217.

<sup>117</sup> Tr. at 65.

<sup>118</sup> Tr. at 70-71.

<sup>119</sup> Tr. at 267.

<sup>120</sup> Tr. at 263.

<sup>121</sup> Tr. at 71, 86-88, 92, 98.

<sup>122</sup> Tr. at 78; *see also* Tr. at 262-263 (testimony of Mother).

proposed at the \*\*\* 2014 ARD committee meeting only in that one more \*\*\* speech therapy session per week has been added.<sup>123</sup>

Father now would like to change Student's current schedule of services to include Student in the \*\*\* as well as to add \*\*\* minutes each of time in ELA and math.<sup>124</sup> He said when he learned that Student was not going to be in the general education setting for the \*\*\*, he was shocked, because Student was going to \*\*\* as part of the group.<sup>125</sup>

At the \*\*\*, 2015 reconvened ARD committee meeting, Father disagreed with the school-based ARD committee members that Student's IEP Goals 1, 2, 3, and 5—related to \*\*\*—could not be worked on in the general education setting. He pointed out that not all \*\*\* students know \*\*\*; this is what they \*\*\*.<sup>126</sup>

Father complained that Parents had a lack of opportunity for input in ARD committee meetings, even though the ARD committee met for a total of about \*\*\* hours in \*\*\* meetings held in \*\*\*, \*\*\*, and \*\*\* of 2015.<sup>127</sup> He agreed that prior to the last meeting, changes were made to Student's IEP, but he said the changes were not meaningful. He believes the only meaningful changes were made at the \*\*\*, 2015 ARD committee meeting, after the ARD committee viewed Parents' home videos of Student.<sup>128</sup>

Father disagrees with the contention that at the \*\*\*, 2015 ARD committee meeting he sought to have Student's goal mastery percentage dropped from 80 percent to 70 percent simply so Student could spend more time in general education.<sup>129</sup> He testified that he did not want

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<sup>123</sup> Tr. at 98; Petitioner Ex. 24 at 279.

<sup>124</sup> Tr. at 107-109.

<sup>125</sup> Tr. at 101-103.

<sup>126</sup> Tr. at 97.

<sup>127</sup> Tr. at 121-122.

<sup>128</sup> Tr. at 123, 129.

<sup>129</sup> Ms. \*\*\* attended two of Student's ARD committee meetings. She testified that Student's goals were changed at Father's suggestion. Specifically, the accuracy percentage for mastery of some of Student's goals was changed so

Student's passing rate to be easier; he wanted it to be fair. That is, students who do not have disabilities pass with grades of 70 percent or higher, so Student should be held to the same standard. He believes Student will eventually be able to demonstrate mastery of Student's goals at an 80 percent accuracy rate.<sup>130</sup>

#### **D. Dr. \*\*\*'s Testimony**

Dr. \*\*\*, a faculty member in the \*\*\* at the \*\*\*, prepared an Inclusion Evaluation Report for Student in \*\*\* 2015 after meeting with Parents and Student's \*\*\* teachers.<sup>131</sup> He prepared an addendum to the Inclusion Evaluation Report after observing Student at \*\*\* on \*\*\*, 2015, mainly in the general education setting, because his focus was on Student's interactions in the general education environment.<sup>132</sup> Dr. \*\*\* explained that, while LRE is a legal term, "inclusion" is more of a movement, the idea being that a child with disabilities should be more than simply physically present in a general education classroom; the child should be learning and receiving benefit from the general education setting.<sup>133</sup>

Dr. \*\*\* testified that, \*\*\*. \*\*\*.<sup>134</sup> A child with disabilities who is not involved with the general population will not have the role models or the higher expectations in the general education environment that are so important for a student's growth, he said.<sup>135</sup> Being included with typical students now will promote Student's successful inclusion beyond school, he added.<sup>136</sup> Noting how

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that, if Student could master the goal, Student's participation in the general education classroom could be increased. Tr. at 466.

<sup>130</sup> Tr. at 113-115. The hearing officer notes that only Goals 1, 2, 3, 5, and 7 will be mastered if Student demonstrates 70 percent accuracy; Goals 4, 8, and 9 require 80 percent accuracy for mastery. Petitioner Ex. 24 at 284-290. The hearing officer also notes that Father disagreed with the school-based committee members' proposal to change the accuracy rate from 80 percent to 70 percent for Goals 1 and 2, but agreed to the accuracy rate changes made to Goals 3, 5, and 7. Petitioner Ex. 24 at 273-275; *see also* Tr. at 131-133.

<sup>131</sup> Tr. at 139; Petitioner Ex. 41.

<sup>132</sup> Tr. at 140, 223; Petitioner Ex. 56.

<sup>133</sup> Tr. at 146-147.

<sup>134</sup> Tr. at 147-148, 247-248.

<sup>135</sup> Tr. at 148-149.

<sup>136</sup> Tr. at 152.

well Student did at Student's \*\*\*, Dr. \*\*\* feels Student will do well in the general education setting because "the best predictor of future success in inclusion is past success in inclusion."<sup>137</sup>

Dr. \*\*\* believes Student would receive the maximum benefit from Student's general education placement if Student were to spend 75 percent of Student's day in general education, where specialized instruction also could be provided.<sup>138</sup> He stated additional time should include the \*\*\*, \*\*\* minutes of math; and more time during the ELA block.<sup>139</sup> He said Student should continue to receive special education support for about 25 percent of Student's day, but that the current \*\*\* hours per day is not necessary.<sup>140</sup>

In Dr. \*\*\*'s opinion, Student's IEP goals can be implemented in the general education classroom, particularly if the general education teacher and special education teacher collaborate.<sup>141</sup> He pointed out that it is feasible to meet a wide range of needs in a \*\*\* class by using strategies such as differentiating instruction.<sup>142</sup> He also recommended that Student's speech therapist could suggest some ways for Ms. \*\*\* to address Student's articulation of language in the general education setting.<sup>143</sup>

He said one of the most misleading parts of the inclusion concept is that a student with disabilities should be able to fully participate and do what everyone else is doing in the general

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<sup>137</sup> Tr. at 149-151; Petitioner Ex. 41. Dr. \*\*\* admitted that he did not know if the progress reported by Student's \*\*\* teachers, who are not certified in special education, was due to Student's specialized instruction in \*\*\*. Tr. at 215-217. He said he did not talk with Student's \*\*\* teachers as part of preparing his inclusion evaluation. Tr. at 218-219. He also acknowledged that he did not make a request ahead of time to interview Student's current teachers so he was not able to do so on the day he observed Student. Tr. at 219.

<sup>138</sup> Tr. at 212, 230. Student currently spends \*\*\* hours per day in general education. The hearing officer calculates that if the general education time were increased to 75 percent of the 7 hour school day, Student would spend \*\*\* hours and \*\*\* minutes in general education and \*\*\* hour and \*\*\* minutes in special education.

<sup>139</sup> Tr. at 209-212.

<sup>140</sup> Tr. at 212, 249-250.

<sup>141</sup> Tr. at 161, 164-167 175, 236; Petitioner Ex. 24 at 284-290.

<sup>142</sup> Tr. at 168-171.

<sup>143</sup> Tr. at 179-180, 233-234.



education classroom.<sup>144</sup> Instead, partial participation can be part of inclusion. He gave an example of partial participation for Student as, if typical students are working on \*\*\*, Student could work on one of Student's \*\*\*.<sup>145</sup>

Dr. \*\*\* does not believe the District has implemented all of the supplementary aids and services that Student needs in accordance with the District's Placement Considerations, which states in part that the District's developmental program should only be considered when a student's needs cannot be supported in the general education setting through other service delivery modules.<sup>146</sup> In his opinion, if the supplementary aids and services were implemented, Student's access to the general education classroom could be increased.<sup>147</sup> Dr. \*\*\* considered Student's past progress in arriving at his recommendation to increase the time Student spends in general education.<sup>148</sup> Dr. \*\*\* further testified that, if Student's time in general education was increased and Student had all the necessary aids and services, Student could still make progress, and possibly even more progress, toward mastering Student's goals.<sup>149</sup>

Dr. \*\*\* also recommended that pre-teaching and re-teaching should be used for Student. He said that pre-teaching, or priming, could occur in as little as 15 minutes for something very simple, such as \*\*\*. The priming could be reinforced in the general education classroom; for example, Student could be asked to show the other students how to \*\*\*, which would allow Student to participate in the class.<sup>150</sup> Dr. \*\*\* explained that by "priming," he means preparing Student for a certain skill, not for an entire lesson in the general education classroom.<sup>151</sup>

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<sup>144</sup> Tr. at 560.

<sup>145</sup> Tr. at 563.

<sup>146</sup> Tr. at 207-208; Petitioner Ex. 40 at 453.

<sup>147</sup> Tr. at 206-207, 209; *see also* Tr. at 202-205; Petitioner Ex. 39.

<sup>148</sup> Tr. at 243.

<sup>149</sup> Tr. at 207, 229-230.

<sup>150</sup> Tr. at 201-202.

<sup>151</sup> Tr. at 558.

Dr. \*\*\* recommends that additional IEP goals be developed for Student in three areas. First, he feels Student needs a coherent system of communication, such as using a communication device, signing, gestures, and oral language.<sup>152</sup> When Dr. \*\*\* observed Student in Ms. \*\*\*'s classroom, he did not see Student signing or using an assistive communication device. He did see Student \*\*\* some, but he did not see Student demonstrate much expressive language.<sup>153</sup> He acknowledged that Student's current IEP goals include "\*\*\*\*," which he defined as a combination of \*\*\*\*. But he said he saw no evidence that \*\*\*\* was being used for Student.<sup>154</sup>

Second, Dr. \*\*\* recommends that social interaction, especially with peers, be worked on in the general education setting. He pointed out that there are many opportunities for peer interaction during lunch, recess, and at the social stations in the classroom. But, he said, the paraprofessional's presence is an impediment to the other children approaching Student.<sup>155</sup> Dr. \*\*\* said that, hopefully over time, the paraprofessional, who he believed to be hovering too much over Student on the day of his observation, will "fade" and peer support will take over, being that the goal is for Student to function with as little adult support as possible.<sup>156</sup>

Third, Dr. \*\*\* recommends that an IEP goal be added related to following directions.<sup>157</sup> He said Student's \*\*\* teachers told him Student follows directions about 75 percent of the time. Pursuing this goal in the academic setting would assist Student because, as he put it, "that's what a lot of school is all about. You have to do what the big person says."<sup>158</sup>

Dr. \*\*\* testified that a person with intellectual disabilities who learns something in one setting, such as the special education classroom, has difficulty applying it or using it in a different setting, such as general education, due to the change in environment and people around the person.

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<sup>152</sup> Tr. at 183-184, 186.

<sup>153</sup> Tr. at 185.

<sup>154</sup> Tr. at 187-188; Petitioner Ex. 24 at 290.

<sup>155</sup> Tr. at 188-190.

<sup>156</sup> Tr. at 228, 569, 571.

<sup>157</sup> Tr. at 190-191.

<sup>158</sup> Tr. at 191-192, 221-222.

For that reason, he believes, it makes less sense to prepare Student in the special education setting to be in the general education classroom,<sup>159</sup> the implication being that it would be better for Student to learn in the general education classroom in the first place.

## **E. Testimony of District Personnel**

### **1. Testimony of \*\*\***

Ms. \*\*\*, the District's Special Education Director, testified that the ARD committee makes individual decisions for children based on their individual needs, including placement decisions.<sup>160</sup> Staff is trained on the LRE requirements, she said.<sup>161</sup>

### **2. Testimony of \*\*\*, District Program Specialist for the Low Incidence Population**

Ms. \*\*\* oversees the District's self-contained special education programming, ages 3 to 21, District 5, and works to support the classrooms. She is a certified special education teacher and worked as a speech pathologist for 5 years.<sup>162</sup>

Ms. \*\*\* was with Dr. \*\*\* on the day he observed Student. She said she did not see Student exhibit frustration due to an inability to communicate, as reported by Dr. \*\*\*.<sup>163</sup> Regarding Dr. \*\*\*'s recommendations to improve Student's oral language skills, Ms. \*\*\* said systems of communication must be directly taught then practiced in a small group setting,<sup>164</sup> such as the special education classroom. She noted that quite a few of Dr. \*\*\*'s recommendations relate to pragmatic and social language. Yet, at the time of the 2012 FIE, Student qualified in the area of

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<sup>159</sup> Tr. at 566.

<sup>160</sup> Tr. at 353-354, 363-364, 366; Petitioner Ex. 24 at 279; Petitioner Ex. 39 at 448.

<sup>161</sup> Tr. at 363.

<sup>162</sup> Tr. at 464.

<sup>163</sup> Tr. at 474-475.

<sup>164</sup> Tr. at 470.

expressive and receptive language; pragmatic speech was not an area of concern.<sup>165</sup> Ms. \*\*\* said the ARD committee agreed on Student's speech goals.<sup>166</sup> However, if the new FIE, due in \*\*\* 2015, establishes deficits in pragmatic speech, she suggested the ARD committee would consider goals and objectives in that area.<sup>167</sup>

Ms. \*\*\* found Dr. \*\*\*'s recommendation that the speech therapist coordinate her letter sounds instruction with the \*\*\* teacher to be a suggestion of collaboration between the speech therapist and Ms. \*\*\*.<sup>168</sup> But, she said, due to the developmental hierarchy for speech and language, some of the speech therapist's targeted goals and objectives would not be appropriate for collaboration with Ms. \*\*\* or Ms. \*\*\*.<sup>169</sup>

Ms. \*\*\* does not agree with Dr. \*\*\*'s recommendation that Student spend 75 percent of Student's day in general education.<sup>170</sup> She believes the ARD committee erred on the side of maximizing Student's general education time. Ms. \*\*\* has some reservations about the amount of time Student spends in general education, due to the amount of intensive, repetitive, and direct instruction Student needs to make meaningful progress.<sup>171</sup>

Dr. \*\*\* recommended that more performance-based assessments and observations be done before a placement decision is made for Student.<sup>172</sup> Ms. \*\*\* pointed out that, at one of the ARD committee meetings in the spring, the school-based committee members requested that a review

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<sup>165</sup> Tr. at 471-472.

<sup>166</sup> Tr. at 501.

<sup>167</sup> Tr. at 472-473, 520-523. In that regard, Dr. \*\*\* testified that the next FIE could give the ARD committee information that might be helpful in developing measurable goals in the areas he has recommended. Tr. at 240.

<sup>168</sup> Tr. at 507.

<sup>169</sup> Tr. at 508-509.

<sup>170</sup> Tr. at 493-494, 514.

<sup>171</sup> Tr. at 486-488, 493-494, 514.

<sup>172</sup> Tr. at 244-245.

of existing evaluation data (REED) be conducted in the spring. However, Parents did not provide their consent and requested that the REED be conducted in the fall instead, she said.<sup>173</sup>

Ms. \*\*\* testified that Student's teachers are familiar with and use inclusion strategies recommended by Dr. \*\*\* such as peer buddies, tiered questioning, and pre-teaching.<sup>174</sup> She does not agree with Dr. \*\*\*'s recommendation that 15 minutes of pre-teaching would be enough time for Student to be primed for a general education activity. Student has received instruction in the District for \*\*\* years and has demonstrated need for a lot of repetition to learn things. Ms. \*\*\* opined that 15 minutes of priming would not give Student all the skills Student would need to fully participate in an activity without modifications or accommodations.<sup>175</sup>

Ms. \*\*\* testified that the ARD committee's recommendation that Student be taught with a modified curriculum for ELA, math, social studies, and science comports with Dr. \*\*\*'s recommendation that Student be taught at Student's level of functioning, focusing on essential understanding and big ideas.<sup>176</sup> But, she said, the ARD committee does not want Student to be sitting in the general education classroom just to be there: Student needs to be making meaningful progress.<sup>177</sup>

For instance, Ms. \*\*\* testified, when she and Dr. \*\*\* observed Student during \*\*\*, Student rarely paid attention to Ms. \*\*\*'s instruction. Instead, Student was very distracted at times and would go over to the paraprofessional, who was sitting 8-to-10 feet away. By contrast, in the special education classroom, Student was eager to participate, \*\*\*, and \*\*\*. There, Student independently tried to participate without being prompted by the paraprofessional, Ms. \*\*\* said.<sup>178</sup>

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<sup>173</sup> Tr. at 472-473, 520-523.

<sup>174</sup> Tr. at 481.

<sup>175</sup> Tr. at 485-486.

<sup>176</sup> Tr. at 491-492; Petitioner Exs. 41, 56. Ms. \*\*\* testified that, according to Student's \*\*\* 2012 FIE, Student's cognitive development quotient is \*\*\*, which is a percentile rank of \*\*\*. Tr. at 487-488; Respondent Ex. 10 at 10-7.

<sup>177</sup> Tr. at 492-493.

<sup>178</sup> Tr. at 495-496.

Ms. \*\*\* disagreed with Dr. \*\*\*'s observation that the paraprofessional was hovering over Student. She explained that Student was observed on the \*\*\* day of the school year, when all of the \*\*\* students are learning their routines; Student needs more assistance in the general education environment at this time to establish routines.<sup>179</sup> She noted that, in the cafeteria, Student sat with typical peers while the paraprofessional roamed the cafeteria just like other cafeteria monitors.<sup>180</sup> On the playground, the paraprofessional was within 10-to-15 feet of Student until Student showed interest in \*\*\* and the paraprofessional helped Student \*\*\*. When Student showed interest in \*\*\*, the paraprofessional modeled \*\*\* for Student then stepped away when Student \*\*\*.<sup>181</sup> Ms. \*\*\* explained that the goal is for Student to be as independent as possible but also to ensure that Student is safe and understands what it takes to interact with Student's peers.<sup>182</sup>

Regarding Dr. \*\*\*'s recommendation that Student \*\*\*, Ms. \*\*\* said it would not be appropriate at this time but that it is a goal. That is, the District would not want a paraprofessional with Student \*\*\*. Student will transition to \*\*\* once Student has mastered \*\*\*, such as \*\*\*, she said.<sup>183</sup>

### **3. Testimony of Student's \*\*\* and \*\*\* Teachers**

In Ms. \*\*\*'s opinion, Student's placement in special education for \*\*\* hours per day is appropriate and the ARD committee maximized the amount of time Student should be in the general education classroom. Ms. \*\*\* based her opinion on Student's progress on Student's goals and objectives, formal and informal assessments, and on curriculum modifications that needed to be made for Student during the \*\*\* years that she taught Student. She explained that Student needs a small setting, such as a special education setting, where Student is less distracted and can

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<sup>179</sup> Tr. at 477-478, 516.

<sup>180</sup> Tr. at 478.

<sup>181</sup> Tr. at 479-480.

<sup>182</sup> Tr. at 480.

<sup>183</sup> Tr. at 475-477.

move at a slower pace in order to make meaningful academic progress.<sup>184</sup> For those reasons, Ms. \*\*\* disagrees with Dr. \*\*\*'s opinion that all of Student's goals can be implemented in the general education \*\*\* classroom.<sup>185</sup> She also disagrees with Dr. \*\*\*'s opinion that Student could master Student's goals if Student were to spend 75 percent of Student's school day in the general education setting. However, she said, Student's goals learned in the special education classroom can be reinforced in the general education classroom.<sup>186</sup> She further testified that Student would suffer no harmful effects from being removed from the general education classroom and would only benefit from being in the special education classroom.<sup>187</sup>

Ms. \*\*\*, who was Student's \*\*\* teacher for \*\*\* years, also disagrees that Student can master Student's goals if Student were to spend 75 percent of Student's school day in the general education classroom, as recommended by Dr. \*\*. Ms. \*\*\* said that spending less than \*\*\* hours per day in special education could have a negative impact on Student. Because Student's levels of performance are below typical students Student's age, Student needs more support to be successful and make meaningful progress, she said.<sup>188</sup> Ms. \*\*\* believes the ARD committee maximized the amount of time Student should spend in the general education setting.<sup>189</sup> Ms. \*\*\*'s opinion is based on Student's current performance and functional levels, and data collected over Student's \*\*\* years at \*\*\*.<sup>190</sup>

Ms. \*\*\* also disagreed with Dr. \*\*\*'s suggestion that if Student were pre-taught a skill for 15 minutes in the special education classroom, Student could be successful with that skill in the general education classroom. Ms. \*\*\* believes Student would need more than 15 minutes of pre-teaching.<sup>191</sup>

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<sup>184</sup> Tr. at 434, 437, 439.

<sup>185</sup> Tr. at 437.

<sup>186</sup> Tr. at 438-439.

<sup>187</sup> Tr. at 440.

<sup>188</sup> Tr. at 409.

<sup>189</sup> Tr. at 410.

<sup>190</sup> Tr. at 405-406.

<sup>191</sup> Tr. at 440.

Both Ms. \*\*\* and Ms. \*\*\* disagreed with Dr. \*\*\*'s statement that Student can get upset and frustrated when Student is not understood.<sup>192</sup> Ms. \*\*\* testified that she only saw Student become frustrated or upset if Student was asked to do something and did not want to do it.<sup>193</sup> Ms. \*\*\* similarly observed that Student only became upset when Student wanted something and did not get it.<sup>194</sup>

Ms. \*\*\* attended the ARD committee meetings held in the \*\*\* 2015. She said the ARD committee modified Student's goals and objectives at Parents' request so that Student could work on the goals in a general education setting when Student began \*\*\*, thus spending as much time as possible in the general education classroom.<sup>195</sup> She said the ARD committee considered Parents' input at the meetings.<sup>196</sup>

Ms. \*\*\* confirmed that, in the \*\*\* 2015, the ARD committee simplified Student's goals at Parents' request. She said Parents made the request so it would be easier for Student to achieve Student's goals, allowing Student to spend more time in the general education classroom.<sup>197</sup> She agreed with Parents' request that Student could possibly be included in the general education classroom during \*\*\*.<sup>198</sup>

#### **4. Testimony of \*\*\*, Student's \*\*\* Teacher**

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<sup>192</sup> Petitioner Ex. 41.

<sup>193</sup> Tr. at 442.

<sup>194</sup> Tr. at 407.

<sup>195</sup> Tr. at 424-425.

<sup>196</sup> Tr. at 425-426, 448-449; Petitioner Ex. 24 at 273.

<sup>197</sup> Tr. at 406-407.

<sup>198</sup> Tr. at 422.



Ms. \*\*\* is Student's general education \*\*\* teacher and is familiar with Student's IEP,<sup>199</sup> including the modifications and accommodations listed in the IEP.<sup>200</sup> Student uses \*\*\* in Ms. \*\*\*'s classroom.<sup>201</sup> Ms. \*\*\* already uses many of the strategies recommended by Dr. \*\*\*. For instance, she differentiates instruction according to the needs of her students.<sup>202</sup> She also utilizes peer buddies and pre-teaching, and coordinates with the special education teacher, speech therapist, and occupational therapist.<sup>203</sup>

Ms. \*\*\* testified that Student comes to her classroom at \*\*\*.<sup>204</sup> The students \*\*\*. The children, including Student, are called on to participate.<sup>205</sup>

From \*\*\*, after Student has returned to the special education classroom, \*\*\*.<sup>206</sup> From \*\*\*, while Student is still in the special education classroom, \*\*\*, then practice the lesson. From \*\*\*, the students have \*\*\*. From \*\*\*, students \*\*\*.<sup>207</sup>

Student joins the rest of Ms. \*\*\*'s class for lunch, from \*\*\*, then returns to the special education classroom.<sup>208</sup>

At \*\*\*, Ms. \*\*\*; currently, she is teaching \*\*\*.<sup>209</sup>

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<sup>199</sup> Tr. at 283.

<sup>200</sup> Tr. at 294-298.

<sup>201</sup> Tr. at 299-300; Respondent Ex. 5 at 5-11.

<sup>202</sup> Tr. at 291, 321-323; *see* Petitioner Ex. 56.

<sup>203</sup> Tr. at 292-294, 321-323. However, Ms. \*\*\* testified that Student would need more than one 15-minute session of pre-teaching, as suggested by Dr. \*\*\*; Student would need multiple pre-teachings. Tr. at 325.

<sup>204</sup> Tr. at 303.

<sup>205</sup> Tr. at 303-304.

<sup>206</sup> Tr. at 304-305.

<sup>207</sup> Tr. at 305-306.

<sup>208</sup> Tr. at 308.

<sup>209</sup> Tr. at 308.

After that, Student joins the general education class from \*\*\* for a \*\*\* lesson. Student also goes to recess with the general education class, from \*\*\* until \*\*\*, then returns to the special education classroom.<sup>210</sup>

Beginning at \*\*\*, Ms. \*\*\* has the students do \*\*\*, where students work independently or with a partner on a \*\*\* skill that Ms. \*\*\* has taught.<sup>211</sup>

At \*\*\*, Student rejoins the general education class for the rest of the day, participating in \*\*\*.<sup>212</sup>

Ms. \*\*\* believes Student likes both her class and the special education class. She does not believe Student, who always appears to be happy, feels left out when Student returns to special education. She said the only time she has seen Student appear to be upset is when Student did not get to do something Student wanted.<sup>213</sup> Ms. \*\*\* believes there are no harmful effects to Student when Student leaves the general education classroom to go to special education.<sup>214</sup>

Although Student's goals and objectives appear to be straight out of the Texas Essential Knowledge and Skills (TEKS), Ms. \*\*\* described how Student's goals and objectives do not represent the curriculum and instruction she provides. For example, she said the typical students \*\*\*. As far as \*\*\*, she said students are learning things such as \*\*\*. She said the typical students will learn \*\*\* and will build a strong foundation for \*\*\* during their \*\*\* year.<sup>215</sup>

Ms. \*\*\* testified it would be difficult for Student to meet Student's goals if Student were to spend 75 percent of Student's school day in the general education setting, as recommended by

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<sup>210</sup> Tr. at 308-309.

<sup>211</sup> Tr. at 310-311.

<sup>212</sup> Tr. at 310-311.

<sup>213</sup> Tr. at 312-314.

<sup>214</sup> Tr. at 325.

<sup>215</sup> Tr. at 316-317. Ms. \*\*\* also testified that while Student's goals and objectives look a lot like the \*\*\* curriculum, they are different. That is, the \*\*\* TEKS deal with application and synthesizing of information. Student's goals are more concrete and do not require Student to synthesize or apply Student's knowledge. Tr. at 489-491.

Dr. \*\*\*,<sup>216</sup> Ms. \*\*\*, who is certified in special education, works with Student on Student's goals but does not believe all of Student's goals can be implemented in her classroom. In her opinion, Student needs a smaller setting, a different pace, and a lot of repetition to master Student's goals.<sup>217</sup>

As decided by the ARD committee, Ms. \*\*\* modifies 100 percent of the \*\*\* curriculum to meet Student's needs.<sup>218</sup> And, at least right now, Student needs a paraprofessional to be with Student the entire time Student is in general education because if Student is left unattended, Student simply sits without working. Ms. \*\*\* said one goal is to get Student to be independent as the year goes by.<sup>219</sup>

Ms. \*\*\* testified that Student's academic time in general education has been maximized as far as meeting Student's goals. In fact, Ms. \*\*\* stated, Student could benefit from spending more time in special education during the time Student currently spends in math and ELA in the general education setting.<sup>220</sup> But she believes Student could be included in her classroom during \*\*\*.<sup>221</sup>

## 5. Testimony of \*\*\*, Student's Special Education Teacher

Ms. \*\*\* testified that, including Student, there are \*\*\* students in her classroom, ranging from \*\*\* through \*\*\*, all with their own IEP goals.<sup>222</sup> Student's progress towards goal mastery is based on Student's performance in Ms. \*\*\*'s class, not Ms. \*\*\*'s class.<sup>223</sup> Ms. \*\*\* said that besides working on Student's goals, she uses a research-based modified curriculum that includes

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<sup>216</sup> Tr. at 319.

<sup>217</sup> Tr. at 282, 317.

<sup>218</sup> Tr. at 319, 324; Respondent Ex. 3 at 3-18. As an example of a modification, Ms. \*\*\* explained that when the rest of the class worked \*\*\* which is not one of Student's goals \*\*\*, Ms. \*\*\* had Student \*\*\*. Tr. at 321.

<sup>219</sup> Tr. at 320.

<sup>220</sup> Tr. at 318-319, 327-329.

<sup>221</sup> Tr. at 327.

<sup>222</sup> Tr. at 394.

<sup>223</sup> Tr. at 385; Petitioner Ex. 24 at 284.

all kinds of prerequisites and grade-level TEKS.<sup>224</sup> The slower pace of the modified curriculum is appropriate for Student, she said.<sup>225</sup>

Ms. \*\*\* would like to see Student spend more than \*\*\* hours per day in special education so she could provide Student with an assistive technology evaluation and teach Student how to use it as a communication system that would allow Student to respond and participate better in the general education classroom.<sup>226</sup> She pointed out that, of the \*\*\* hours Student spends in special education, Student spends \*\*\* minutes \*\*\* times per week in speech therapy, and some of the time is spent \*\*\*.<sup>227</sup> Ms. \*\*\* would also like to have more time to work with Student on \*\*\* because, in her experience, once students \*\*\*, everything else starts falling into place.<sup>228</sup> \*\*\* have become less frequent since the beginning of the school year, she said.<sup>229</sup>

Ms. \*\*\* testified that if Student were to have increased time in the general education setting, Student would be left behind. At this point, Student needs extra help staying focused and a lot of prompting.<sup>230</sup> Currently, Ms. \*\*\* takes Student to Ms. \*\*\*'s class for \*\*\*.<sup>231</sup> She also collaborates with Ms. \*\*\*, sharing lesson plans; Ms. \*\*\* tries to mirror in her classroom what Student will be doing in the general education classroom.<sup>232</sup> She believes 15 minutes of pre-teaching, as recommended by Dr. \*\*\*, could be adequate to prepare Student for some, but not all, activities in the general education classroom.<sup>233</sup>

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<sup>224</sup> Tr. at 374-375.

<sup>225</sup> Tr. at 376.

<sup>226</sup> Tr. at 376-378.

<sup>227</sup> Tr. at 401.

<sup>228</sup> Tr. at 377.

<sup>229</sup> Tr. at 392.

<sup>230</sup> Tr. at 378-379.

<sup>231</sup> Tr. at 390-391; *see also* Tr. at 532, 534, 536 (testimony of Ms. \*\*\*).

<sup>232</sup> Tr. at 379-380.

<sup>233</sup> Tr. at 381, 389.

## VII. ANALYSIS

Petitioner did not prove that Student's placement for \*\*\* hours per day in the general education setting and \*\*\* hours per day in the special education setting fails to comport with the LRE requirements under the IDEA. The evidence shows that Student is receiving a FAPE that is being provided, to the maximum extent appropriate, in the general education classroom, in accordance with 34 C.F.R. §§ 300.114 and 300.116.

### A. Parties' Positions

Petitioner and the District agree that Student's school day should be divided between general education and special education. They do not agree on how much time Student should spend in each setting. Although Petitioner initially requested that Student spend the entire school day in general education, Petitioner now seeks an additional 1 hour and 10 minutes per day in general education. Dr. \*\*\*, Petitioner's expert, recommends that Student spend 75 percent of Student's day, or an additional 1 hour and 15 minutes daily, in general education.

Petitioner essentially argues that Student can make academic progress and master Student's IEP goals by spending only 1 hour and 50 minutes per day, rather than \*\*\* hours per day, in the special education classroom. The evidence does not support Petitioner's argument. In fact, the evidence shows that, more likely than not, it would be detrimental to Student's academic progress and progress on Student's IEP goals if Student were to spend less than \*\*\* hours per day in special education.

The District requests a finding that Student's placement in special education for \*\*\* hours per day meets the LRE requirements of the IDEA. When it comes to determining a student's educational needs, the Fifth Circuit has specifically declined to create any presumption in favor of the parents' experts.<sup>234</sup> Instead, the Fifth Circuit has repeatedly emphasized the importance of

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<sup>234</sup> *Christopher M. by Laveta McA. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1292 (5th Cir. 1991) (affording considerable deference to the school personnel who worked with the student daily over the opinions of the student's pediatrician and diagnostician regarding a student's educational needs).

opinions of the educational professionals who work with the student at school each day.<sup>235</sup> In that regard, District personnel, including Student's \*\*\* special education teacher and \*\*\* teacher, who spent \*\*\* years with Student, and Student's \*\*\* teacher and current special education teacher, all testified that Student must spend at least \*\*\* hours per day in special education in order to master Student's IEP goals. The hearing officer is persuaded by their testimony and the evidence of record that the District has complied with the LRE requirements of the IDEA.

## **B. The District's Compliance with LRE Requirements**

In determining whether Student's placement comports with the LRE requirements of the IDEA, two questions must be answered, in accordance with criteria set out in 20 U.S.C. § 1412(a)(5) and 34 C.F.R. § 300.114(a)(2), and in *Daniel R.R.*:<sup>236</sup>

- (1) Can education in the general classroom, with the use of supplemental aids and services, be achieved satisfactorily for Student?
- (2) Has the District included Student in the general education classroom to the maximum extent appropriate?

### **1. Can education in the general classroom, with the use of supplemental aids and services, be achieved satisfactorily for Student?**

#### **a. Accommodations in Regular Education**

The District must provide supplemental aids and services to Student, and modify the regular education program, when including Student in the general education classroom.<sup>237</sup> The

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<sup>235</sup> *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d at 245, 253-54 (9th Cir. 1997) (finding teachers who worked with student daily had most immediate knowledge of student's school performance); *see also A. D.*, 503 F.3d at 384 (giving deference to firsthand testimony of teachers who worked with the student daily regarding the student's need for special education over the opinions of experts who were not privy to the information).

<sup>236</sup> *Daniel R.R.*, 874 F.2d at 1048-1050; *see also Oberti v. Board of Educ. of Clementon Sch. Dist.*, 995 F.2d 1204, 1217-1218 (3rd Cir. 1993).

<sup>237</sup> *Daniel R. R.*, 874 F.2d at 1048; *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 189, 102 S.Ct. 3034, 3042, 73 L.ED.2d 690, 701 (1982); 20 U.S.C. § 1401(33); 34 C.F.R. § 300.114(a)(2); 19 Tex. Admin. Code § 89.63(c)(1).

District need not provide every conceivable supplemental aid or service to Student, and Student's regular education teachers need not devote most of their time to Student. In addition, educators are not required to change the curriculum beyond recognition to operate a "class within a class."<sup>238</sup>

In Student's case, Student's general education teacher, Ms. \*\*\*, is also a certified special education teacher; Student is provided with speech therapy \*\*\* times per week; the District has provided Student with a paraprofessional to accompany Student throughout the school day; and Student's adaptive technologies include \*\*\*.

Further, Ms. \*\*\*—who is familiar with Student's IEP—provided examples of how she modifies lessons and activities for Student in her classroom. She testified that 100 percent of the \*\*\* curriculum must be modified for Student.<sup>239</sup> Even at the end of \*\*\*, 100 percent of the curriculum had to be modified for Student.<sup>240</sup> Although not in the general education setting, Ms. \*\*\* testified that in the special education classroom, she uses a modified curriculum in her classroom that permits Student to work on TEKS at Student's own pace, in addition to Student's IEP goals.

Dr. \*\*\* testified that Student's time in regular education could be increased if his recommended supplemental aids and services were implemented.<sup>241</sup> This argument was rejected by the Fifth Circuit: "While Plaintiff's experts opine that better accommodations could be undertaken, the District is not required to provide every conceivable supplementary aid or service to assist the child."<sup>242</sup>

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<sup>238</sup> *Daniel R.R.*, 874 F.2d at 1049; *Brillon*, 100 Fed. Appx. at 313.

<sup>239</sup> Tr. at 319 (testimony of Ms. \*\*\*).

<sup>240</sup> Tr. at 404 (testimony of Ms. \*\*\*); Tr. at 428 (testimony of Ms. \*\*\*).

<sup>241</sup> The District argues that regardless of the inclusion strategies utilized, the gap between Student's cognitive abilities and those of Student's typical peers will not be narrowed; the reason Student cannot grasp the \*\*\* curriculum has nothing to do with what inclusion strategies are used. Respondent's Closing Argument at 12, N 4.

<sup>242</sup> *Brillon*, 100 Fed.Appx. at 312-313 (citing *Daniel R.R.*, 874 F.2d at 1048).

**b. Educational Benefit**

The next factor examines the extent to which Student will receive an educational benefit from regular education, focusing on Student's ability to grasp the essential elements of the regular education curriculum.<sup>243</sup>

The evidence shows that Student requires intensive, repetitive, direct instruction, in a small setting, to progress academically. Such instruction is primarily available in the special education classroom. Therefore, the nature and severity of Student's disability does not allow Student to make meaningful educational progress without \*\*\* hours per day of special education instruction.

**c. Overall Educational Experience<sup>244</sup>**

Balancing the benefits to Student of the overall educational experience shows that, in general education, Student interacts well with Student's typical peers (e.g. \*\*\*). Student participates at Student's level of functioning in the general education classroom (e.g. \*\*\*). More than likely, both Student and typical peers benefit from their interaction. And, as Dr. \*\*\* explained, Student's inclusion in the general education setting will promote Student's ability to be included in the community in general, now and in the future.

But Student also benefits from the time Student spends in special education. There, Student is taught the modified TEKS curriculum,<sup>245</sup> works on Student's IEP goals, and is pulled out for speech therapy.

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<sup>243</sup> *Daniel R.R.*, 874 F.2d at 1049.

<sup>244</sup> *Daniel R.R.*, 874 F.2d at 1049-1050. If a student shows awareness and some positive reaction to being with peers who do not have disabilities, then such interaction weighs in favor of inclusion; *see also Oberti*, 995 F.2d at 1216. The fact that a child with a cognitive disability may have limited potential for academic achievement in the regular classroom does not mean the child cannot receive educational benefit in that environment due to interaction with non-disabled peers, social development, and self-care.

<sup>245</sup> The IDEA requires special education students to be provided services that "meet the standards of the [State Education Agency]" and "include an appropriate preschool, elementary school, or secondary school education" in compliance with State standards. 34 C.F.R. § 300.17(b)(c). In Texas, the State standards for any particular grade level are found in the TEKS. *See, e.g.*, Petitioner Ex. 57 (the \*\*\* TEKS).



The evidence shows that experiences in both settings are beneficial to Student. There is no evidence that additional time in general education would improve Student's overall educational experience. In fact, there is some evidence that spending less time in special education could be detrimental to Student's overall educational experience in that Student requires the smaller setting and intensive instruction to make progress in both academic and life skills.

**d. Effect on the Regular Classroom Environment<sup>246</sup>**

The evidence is undisputed that Student's behavior is appropriate and Student requires no BIP. But the evidence also shows that Student requires attention 100 percent of the time in the regular education classroom, whether from Ms. \*\*\* or the paraprofessional, or Student will not do Student's work.<sup>247</sup> Student's cognitive levels prevent Student from following along with Ms. \*\*\*'s instructions; instead, at least when observed by Dr. \*\*\*, who was accompanied by Ms. \*\*\*, Student distracted \*\*\*self by playing with Student's clothing or interacting with the paraprofessional.<sup>248</sup>

**e. The District's LRE Meets the First Prong of the Daniel R.R. Test**

Even with the use of supplemental aids and services, and modification of the curriculum, education in the general education classroom cannot be satisfactorily achieved for Student. The District has made reasonable efforts to accommodate Student in the regular classroom. The educational benefit available to Student in the regular classroom, with appropriate supplemental aids and services, is less than the educational benefit provided by dividing Student's day between the general education classroom and the special education class. Thus, the current placement that involves time in both the general education and special education classrooms is the placement that is most beneficial for Student's progress.

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<sup>246</sup> *Daniel R.R.*, 874 F.2d at 1049-1050.

<sup>247</sup> Tr. at 320 (testimony of Ms. \*\*\*); Tr. at 404 (testimony of Ms. \*\*\*); Tr. at 433 (testimony of Ms. \*\*\*).

<sup>248</sup> Tr. at 494 (testimony of Ms. \*\*\*).

**2. Has the District included Student in the general education setting to the maximum extent appropriate?**

The District must provide a continuum of alternative placements to meet the needs of children with disabilities for special education and related services, including instruction in regular classes and special classes, and the provision of supplementary services in conjunction with regular class placement.<sup>249</sup>

As the Fifth Circuit stated:

The school must take intermediate steps whenever appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess. The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops.<sup>250</sup>

Petitioner accepts Student's inclusion with typical peers for \*\*\* hours per day during lunch, recess, snack time, physical education, fine arts, social studies, and science, and part of ELA and math. However, Petitioner seeks inclusion of Student for an additional \*\*\* in ELA and math, and for the \*\*\* .

The evidence shows that Student begins Student's day \*\*\* Ms. \*\*\*'s class for \*\*\*. In that Student is already included in the \*\*\* in the general education classroom, the hearing officer sees no need to increase Student's general education time by that particular \*\*\*, leaving at issue only Petitioner's requested additional \*\*\* in ELA and math.

Petitioner did not specify in which additional \*\*\* of the ELA block Student should be included, whether it should be when students are working at \*\*\*. The only \*\*\* block of math time that Student does not attend in Ms. \*\*\*'s class consists of students working independently or

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<sup>249</sup> 34 C.F.R. § 300.115.

<sup>250</sup> *Daniel R.R.*, 874 F.2d at 1050.

with a partner \*\*\*. In that none of those activities, on their face, would involve the kind of intensive instruction required for Student to make academic progress without demanding so much of Ms. \*\*\*'s attention that she would be required to ignore the other students, there would be a possible negative effect on the other students to include Student in the general education classroom for an additional \*\*\* of academic instruction.<sup>251</sup>

The hearing officer finds the District has maximized Student's inclusion in the general education classroom. The District cannot educate Student satisfactorily in the general education classroom, even with modifications to the curriculum and the use of supplemental aids and services, all of which constitute sufficient support. Implementing Student's IEP in the general education classroom only with the needed modifications would eliminate essential components of the general education curriculum and/or activity.<sup>252</sup> Such an effort is not required under the law.<sup>253</sup>

The evidence shows that the educational environment in which Student makes progress is the special education environment. Therefore, to provide a FAPE for Student, Student should continue to receive special education services for at least \*\*\* hours per day, in accordance with Student's unique needs as set out in Student's IEP.<sup>254</sup> However, because Student's opportunity to associate with typical peers is an important part of Student's nonacademic education, it is appropriate for Student to spend \*\*\* hours per day in the general education setting,<sup>255</sup> where Student will interact with typical peers for some academic instruction, and all of physical education, music, fine arts, recess, and lunch time.

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<sup>251</sup> *Daniel R.R.*, 874 F.2d at 1049. The hearing officer recognizes that the possible negative effect on other students of Student's inclusion in the general education classroom falls under the first prong of the *Daniel R.R.* test. However, there is no evidence that there would be a negative effect on other students if Student's time in general education was increased; that is, the factor is relevant as to whether Student's time in general education has been maximized. Therefore, the hearing officer takes the liberty of discussing negative effects under the second prong of the *Daniel R.R.* test.

<sup>252</sup> Respondent Ex. 20 at 20-7.

<sup>253</sup> *Daniel R.R.*, 874 F.2d at 1036.

<sup>254</sup> 20 U.S.C. §§ 1412(a)(5)(B), 1414(d); *Brillon*, 100 Fed.Appx. at 311-315 (stating that removing a second-grader from mainstream social studies and science classes because he could not keep pace with the curriculum did not violate the LRE requirements).

<sup>255</sup> 34 C.F.R. § 300.117.

Petitioner did not meet Petitioner's burden to overcome, by a preponderance of the evidence, the presumption that the ARD committee's decision was correct when it determined that the LRE for Student would include \*\*\* hours daily in the special education classroom.

### C. Conclusion

The District's placement of Student comports with the LRE requirements of the IDEA. Therefore, Petitioner did not prove the allegations at issue and Petitioner's requested relief is denied.

## VIII. CONCLUSIONS OF LAW

1. The Tomball Independent School District (the District) is a local educational agency responsible for complying with the 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. STUDENT (Student), by next friend PARENT and PARENT (collectively, Petitioner) bears the burden of proof on all issues raised in the proceeding. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).
3. In \*\*\* 2012, the District correctly determined that Student was a child with one or more of the IDEA enumerated disabilities who, by reason thereof, was eligible for special education and related services. 34 C.F.R. § 300.8(a)(1).
4. Petitioner did not prove that the District refused to consider any placement for Student other than what was proposed in the \*\*\* 2014 IEP or at the \*\*\* 2014 ARD committee meeting. 34 C.F.R. §§ 300.116(a)(1), (b)(2), (d), (e), 300.322(a).
5. Petitioner did not prove that the District denied Parents the right to meaningful participation in the development of Student's IEP or placement. 34 C.F.R. § 300.501(b)(1), (c)(1).
6. Student's placement meets the LRE requirements of the IDEA. 34 C.F.R. §§ 300.114, 300.116.

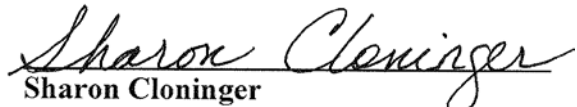
7. Petitioner did not prove that the District's placement of Student fails to meet the LRE requirements of the IDEA, resulting in denial of FAPE to Student. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

### ORDER

Having considered the evidentiary record and the foregoing Findings of Fact and Conclusions of Law, the hearing officer hereby orders as follows:

The hearing officer denies Petitioner's requested relief.

**SIGNED October 29, 2015.**

  
Sharon Cloninger  
Special Education Hearing Officer  
For the State of Texas

### 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.<sup>256</sup>

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<sup>256</sup> 20 U.S.C. § 1451(i)(2); 34 C.F.R. § 300.516; 19 Tex. Admin. Code § 89.1185(n).

**DOCKET NO. 335-SE-0715**

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

**SYNOPSIS**

**Issue:** Whether Student’s inclusion in the general education setting for \*\*\* hours per day and in the special education setting for \*\*\* hours per day meets the Least Restrictive Environment (LRE) requirements under IDEA

**HELD: For the District.** Under the LRE requirements of the IDEA, the District is required to

**Citation:** 20 U.S.C. § 1412(a)(5); 34 C.F.R. §§ 300.114, 300.116; *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989).