

STUDENT	§	BEFORE A SPECIAL EDUCATION
	§	
VS.	§	HEARING OFFICER FOR
	§	
HARDIN-JEFFERSON ISD AND	§	
GULF COAST SPECIAL	§	THE STATE OF TEXAS
EDUCATION COOPERATIVE	§	

DECISION OF HEARING OFFICER

Petitioner, Student (hereinafter “Student”) through next friends, *** and ***, hereinafter referred to as (hereinafter “Parents” or “Petitioner”) requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C § 1400 *et. seq.* The Respondents are Hardin-Jefferson Independent School District and Gulf Coast Special Education Co-op.

PROCEDURAL HISTORY

Student filed a Request for Due Process Hearing on June 23, 2014, alleging that Hardin Jefferson ISD and Gulf Coast Special Education Co-op denied the Student a FAPE during the 2013-2014 school year through the date of hearing.

A pre-hearing conference in this proceeding was conducted on July 11, 2014. On July 1, 2014, Respondents filed their Plea to the Jurisdiction. On July 15, 2014, the Hearing Officer issued an Order granting Respondents’ Plea to the Jurisdiction, dismissing all claims outside of the IDEA. Thereafter, on August 5, 2014, Respondent, Gulf Coast Special Education Cooperative filed its Plea to the Jurisdiction and Motion to Dismiss. Subsequently, on August 11, 2014, Petitioners filed their Response to Respondents Plea to the Jurisdiction and Motion to Dismiss the Cooperative as a Party. On August 15, 2014, Respondent Gulf Coast Special Education Cooperative filed its Reply to Petitioners’ Response to the Plea to the Jurisdiction and Motion to Dismiss. On August 22, 2014, the Hearing Officer convened a pre-hearing conference at which said Motion was argued and denied. Thereafter, on August 29, 2014, the Hearing Officer issued an order denying

Respondent's Plea to the Jurisdiction and Motion to Dismiss. On July 31, 2014, Petitioners filed their "Notice" related to the Extended School Year ("ESY"). Respondents construed the notice as an Amended Complaint. Then, on August 5, 2014, Respondents filed their Motion to Strike Petitioners' Amended Complaint or in the Alternative, Notice of Insufficiency. Subsequently, on August 11, 2014, Petitioners filed their Response to Respondents' Motion to Strike Amended Complaint or in the Alternative, Notice of Insufficiency. On August 15, 2014, Respondents filed their Reply to Petitioners' Response to Respondents' Motion to Strike Petitioners' Amended Complaint or in the Alternative, Notice of Insufficiency. On August 22, 2014, the Hearing Officer convened a pre-hearing conference at which time said Motion was argued and denied. Thereafter, on August 29, 2014, the Hearing Officer issued an order denying Respondents' Motion to Strike Petitioners' Amended Complaint or in the Alternative, Notice of Insufficiency.

Also on August 5, 2014, Respondents filed their Expedited Motion and Brief on Stay-Put. Subsequently, on August 13, 2014, Petitioners filed their Response to Respondents' Expedited Motion and Brief on Stay Put. On August 18, 2014, Respondents filed their Reply to Petitioners' Response to Respondents' Expedited Motion and Brief on Stay-Put. Subsequently, on August 20, 2014, Petitioners filed their Sur-Reply Relating to Respondents' Expedited Motion and Brief on Stay-Put. On August 21, 2014, Respondents filed their Sur-Sur-Reply to Petitioners' Sur-Reply Relating to Respondents' Expedited Motion and Brief on Stay-Put. On August 22, 2014, the Hearing Officer convened a pre-hearing conference at which said Motion was argued and denied, and an Order of the Hearing Officer denying Respondents' Expedited Motion and Brief on Stay-Put was issued on August 29, 2014, requiring the District to implement the Student's stay-put special education program at *** in Hardin-Jefferson ISD.

On August 21, 2014, Petitioners filed their Motion to Compel Observations. Subsequently, on August 21, 2014, Respondents filed their Response to Petitioners' Motion to Compel Observations. On August 22, 2014, the Hearing Officer convened a pre-hearing conference at which said Motion was argued and granted, in part. Thereafter, on August 29, 2014, the Hearing Officer issued an order granting Petitioners' Motion to Compel Observations.

The parties participated in a due process hearing on September 9-11, 2014. Petitioner was represented by Dorene Philpot. Respondents were represented by Paula Roalson, Pam Kaminsky and Evelyn Howard-Hand.

On November , 2014, Respondents filed an objection to Petitioner's closing argument and Petitioner's request therein asking the Hearing Officer to take Judicial Notice of documents not presented during the hearing.

On November 13, 2014 Respondent filed a Motion for Extension of the decision due date to allow Petitioner an opportunity to respond to Respondents' objection and to allow the Hearing Officer an opportunity to issue a decision. Good cause was found and the decision due date was extended to December 3, 2014 the decision was timely rendered and forwarded to both parties.

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusion of law. References to the court reporter's record will be designated "T" followed by the page number. References to the exhibits will be designated "P" for Petitioner or "R" for Respondent, followed by the exhibit number and page number if applicable.

ISSUES FOR HEARING AND REQUESTS FOR RELIEF

Petitioner raised the following issues for hearing:

1. Did Respondents fail to devise appropriate IEP's for Student in the least restrictive environment, resulting in a denial of FAPE and harm, significantly impeding Student and Student's parents' opportunity to participate in decision making and /or causing deprivation of educational benefits.
2. Did Respondents fail to implement or change Student's IEP without parental input?
3. Did Respondents fail to devise appropriate IEP's?

REQUESTD RELIEF

1. Continued placement at *** in an applied skills class, resource class, the self-contained class Student is already in, or a combination thereof as deemed appropriate by the Hearing Officer.

2. If Student is placed in a classroom with other Students, then a one on one paraprofessional should be ordered for Student for the times Student is not working one on one with Student's teacher.
3. An inclusion specialist to assisting Respondents in modifying the *** grade TEKS to make them appropriate for use with Student.
4. Applied Behavioral Analysis therapy going forward by a qualified provider plus compensatory time for last school year and summer 2014.
5. That the Hearing Officer order Dr. ***'s recommendations and further order payment of \$3750.00 in fees for Dr. ***'s evaluation.
6. Any other miscellaneous relief that the Hearing Officer determines is appropriate and which might include an order that they get progress reports on the same frequency as ***.
7. Staff training and attendance at the state autism conference in applied behavior analysis therapy
8. Training of staff to work with Student specifically in regards to autism, intellectual disabilities, behavioral interventions and training specific to Student's program and Student's functional levels
9. Staff training in all areas that the hearing officer deems appropriate based on the violations of law found. Training of staff on ABA.

During the hearing, Petitioners were afforded a fair opportunity to offer and solicit evidence and testimony to satisfy their burden of persuasion as assigned under *Schaffer v. Weast*, 546 U.S. 49, 57 – 58 (2005).

FINDINGS OF FACT

1. The Student is a *** year old who qualifies for special education and related services under the IDEA as a Student with an intellectual disability, an autism spectrum disorder, and a speech impairment. R-6
2. The Student's parents are *** and ***. P1
3. The Student resides within the geographical boundaries of Hardin-Jefferson Independent School District. Student's home campus in the District is ***. (R6; T 575)

4. Hardin-Jefferson ISD has entered into an agreement with two neighboring school districts to cooperatively operate their special education program, pursuant to the authority of the Texas Education Code Section 29.007 and Texas Government Code Section 791.001 *et seq.* That Shared Services Arrangement Agreement (“SSA”) is identified as the Gulf Coast Cooperative for Special Education. The purpose of that Agreement, to which both Hardin-Jefferson ISD and its neighbor school district, Hamshire-Fannett ISD, are parties, is to provide for the efficient delivery of legally required special education and related services to eligible Students with disabilities. (R-32)

5. For the 2013-2014 school year, the District identified the Student’s educational placement as ***, in Hamshire-Fannett ISD. *** is located approximately *** from the Student’s home the Student’s parents disagreed with the District’s placement. P-26-9; T. 242-243

Subsequently, Petitioners filed a Request for Due Process Hearing. On August 6, 2013, the parties enter into a settlement agreement (“Agreement”) resolving the Due Process Complaint. Pursuant to the Agreement, the Student would receive special education services in the “same instructional arrangement” as the prior school year. Further, the parties agreed that the educational placement for the 2013-2014 school year would be located on the campus of ***. Also as part of the Agreement, the District agreed to conduct evaluations a psycho-educational evaluation, speech evaluation, and a functional behavior assessment of the Student. The District further agreed to provide for Independent Educational Evaluations (“IEEs”) of the Student in each of those areas, should the Student’s parents disagree with the results of the District’s evaluations. Additionally, the District agreed to provide IEEs in the areas of Occupational Therapy, Adaptive PE, In-Home and Parent Training, and Assistive Technology. (R-1-4) Student’s teacher for the 2013-1014 school year, was Ms. ***. For most of the school year there were *** adults and *** children in Student’s classroom. *** in Student’s class have been identified as ***. T467-470

6. On August ***, 2013 a meeting of the Student’s ARD committee was held. The ARD committee reviewed and considered the following: (1) evaluation data, including the results of a new Assistive Technology Evaluation conducted by the District, (2) the Student’s performance and progress, (3) the

schedule of services for the 2013-2014 school year, (4) assistive technology devices and services, (5) supplementary aids and services, and (6) Individualized Education Programs (“IEP). R2-21-24

7. Under the heading of “Social Skills Strategies”, the following social skills were identified as Student’s area of need: inviting peers to join Student in activities, asking questions, to request information about a person or topic. These skills are reflected in the goals and objectives. The strategies/ supports used to address these needs will include, but are not exhaustive to: social stories, trained peers/peer modeling, incidental teaching, direct instruction, video modeling. Student actively participates in *** and *** and Student’s ***. The *** will have a summer camp which is a good opportunity to work on social skills, a summer camp for children with disabilities which will be providing visual structure and more activities designed with children with ASD. Social Skills will be received daily as an elective. In addition Student will receive Speech therapy- Pragmatic/ social Skills group three 45 minutes sessions per 9 weeks. R2

8. Under the heading of “Professional Educators Staff” information indicates teachers and paraprofessionals will document their training activities and any support provided through consultants. R2

9. The Present Levels of Academic Achievement and Functional Performance (“PLAAFP” indicates the Student meets eligibility as Autistic and Speech Impaired. Student’s documented ASD related deficits include, but are not exhaustive to: receptive and expressive language, pragmatic language, social skills (initiating and maintaining friendships at the level & of the quality one would predict for other children of the same chronological age, general interacting with peers and adults , anxiety, transitioning(change in daily routine & transition from a preferred activity to one that is less preferred ability to sustain attention to task and establishing and maintain eye contact. R 2

10. The PLAAFP also indicates that Student is a bit shy, but is always happy and smiling. It is extremely important that those that directly work with Student know what Student doesn’t prefer. Student dislikes subjects that include ***, ***, and Student’s *** along with any other area that focuses on drawing attention to Student. Student is ***. Student prefers *** and ***. Student does not like ***. If Student

is *** Student will ***. If Student is *** Student will ***. Student does not like *** or ***. Student does not like ***. P 3 14, R 2

11. The Special Ed teacher is responsible for implementing goal is the Special Education teacher. The frequency of progress reporting is every 9 weeks. P3-14 R2
12. During the August ***, 2013 ARD meeting the parents requested Ms. *** attend the State Autism Conference. P 3
13. Ms. *** never attended the conference as requested by the parents and is scheduled to attend the conference this year. At this point Ms. *** is no longer the Student's teacher. T140
14. Both parents participated in and agreed with the decisions made at the August ***, 2013 meeting of Student's ARD committee. Prior Written Notice following the ARD committee meeting was provided to the parents on September ***, 2013. R-2-27-31, 21-22, 19; R-3
15. The evaluations agreed upon by the parties in the August 2013 settlement agreement were completed by the District on November ***, 2013. The evaluation team included an educational diagnostician, a Licensed Specialist in School Psychology, and a speech and language pathologist. Sources of data, in addition to formal measures used in conjunction with the psycho-educational assessment, included a review and analysis of functional behavior by a Board Certified Behavior Analyst (BCBA), informal assessments including the use of curriculum based materials, formal and informal observations, parent information and interviews, teacher information and interviews, and a review of previous evaluation reports and records. R-4; T 690-691
16. The evaluation team was led by ***, a certified educational diagnostician and ***. She also ***. T 686-689, 707-708
17. The November ***, 2013 evaluation report was presented to Student's ARD committee at a meeting held on January ***, 2014. At the meeting, the District's lead evaluator reviewed the results of the evaluation and the instructional implications of same with members of the ARD committee. Student's parents were offered the opportunity to ask questions regarding the evaluations, and they stated their agreement with the report—indicating that it was one of the best evaluations of Student that they had

seen. Further, the parents indicated that they did not intend to pursue the IEEs previously specified in the settlement agreement, with the exception of an OT IEE that already had been conducted. The District repeatedly offered to provide those IEEs (outside evaluations), but the parents declined. R-6, pp. 16-17, 22-24; T. 180-182, 197-198)

18. The District's evaluation included an assessment of Student's emotional, social and behavioral functioning—including a functional behavioral assessment. As part of the functional behavioral assessment, Student was observed in the classroom by a BCBA on *** separate dates in *** of 2013—with each observation lasting a minimum of one hour and up to three hours in a single day. Student was observed to comply with adult directives, follow a routine, transition with verbal prompts, and begin tasks with verbal prompts. Student responded well to visuals implemented into Student's program and was observed referring to the visuals without prompt some of the time. Student remained on task independently or with minimal redirection for the duration of the assignment period. While Student did frequently require assistance to perform academic tasks, the evaluation team attributed that needed assistance to the difficulty of the academic work with which Student was presented, rather than inappropriate behavior or work refusal. R-4; T 733-735

19. At the January ***, 2014 ARD committee reviewed Student's current performance in Student's special education program. Student's *** teacher provided an update regarding Student's gross motor skills and Student's participation in ***. At parent request, the District agreed to include Student in additional days of general education *** activities in addition to Student's *** instructional time. The committee also discussed how to use Student's technology (including ***) to facilitate Student's inclusion in general education activities in the area of science one time per week. In response to the recently completed evaluation report, the ARD committee added an additional goal to Student's speech IEP and increased the frequency of Student's speech therapy from 8 times per 9 weeks to 9 times per 10 weeks. The committee also reviewed the progress made during Parent Training and noted that the needs of the family would be re-assessed to determine if further support was required. R-6

20. During the January ***, 2014 ARD meeting, the committee also considered the anecdotal data provided by Student's special education teacher, who voiced concern that Student had demonstrated regression following ***. She described the techniques being used in the classroom to facilitate progress, including repetition of skills and concepts to reinforce learning. As Student had not yet had sufficient time to recoup the skills in which Student had demonstrated regression, the ARD committee did not update Student's Present Levels of Academic Achievement and Functional Performance ("PLAAFP") or Student's academic IEPs. However, the committee agreed to reconvene on March ***, 2014 to conduct an annual review of Student's special education program. R-6, pp. 16-17; T 556-557
21. At the conclusion of the January ***, 2014 ARD committee meeting, Student's parents inquired about placement options for Student for the 2014-2015 school year. The meeting ended in consensus, with both parents indicating agreement with the decisions of the ARD committee by signing and initialing "agrees" on the ARD committee paperwork. Prior Written Notice following the ARD committee meeting was provided to the parents on February ***, 2014. R6, R-7
22. The annual meeting of Student's ARD committee convened on March ***, 2014 as previously scheduled and agreed to by the parties. Both parents, in addition to their legal advocate, were present for the meeting and participated in the discussion and deliberations of the meeting. (R-8)
23. Among other things at the March ***, 2014 meeting, the ARD committee updated Student's Present Levels of Academic Achievement and Functional Performance, reviewed Student's progress on Student's IEP goals and objectives, proposed new IEP goals and objectives, reviewed and considered the eleven strategies for the education of Students with an autism spectrum disorder, and discussed placement options for Student for the following school year. The District proposed new IEP goals and objectives for Student, Student's parents did not disagree with the proposed goals and objectives Tr. 217:22-25.
24. The District further proposed that Student's IEP be implemented in a highly structured special education setting, specifically proposing a *** program. In response to parent inquiry, District staff explained that services for Students with disabilities requiring *** are provided by the District at a

centralized location in Hamshire-Fannett ISD. The parents disagreed with the location of services, requesting that the District instead create a classroom for Student located at *** within the District. The meeting ended in non-consensus, and the ARD committee agreed to reconvene on April ***, 2014. R-8; T 198-203, 206-208, 217; T. 554

25. At the request of Student's parents, the District's Superintendent and Director of Special Education met with Student's parents and their legal advocate in advance of the April ***, 2014 ARD committee meeting. Options regarding how to meet Student's unique needs, and recommendations for future discussion by the April ***, 2014 ARD committee, were discussed. Tr. 218-219
26. On April ***, 2014, Student's ARD committee reconvened per the agreement of the parties. At that meeting, Student's parents provided the committee with a copy of draft IEP goals and objectives that they wished for the committee to consider for Student. Student's parents again stated their disagreement with the location of services for Students in a *** classroom and then proposed that Student instead receive instruction in *** located at ***. Following discussion, the meeting ended without consensus, and Student's parents submitted a statement of disagreement identifying that they believed that the placement proposed for Student by the District was not the Least Restrictive Environment ("LRE") for the Student. R-9; R-9-22-23, 25-33; T 220-223
27. On April ***, 2014, the District provided Student's parents with Prior Written Notice, describing the actions proposed and refused by the District following the annual meeting of Student's ARD committee in March and April of 2014. Student's ARD committee next convened on May ***, 2014 to discuss Extended School Year Services ("ESY"). Student's parents were both present at and participated in the meeting, which they had requested R-10; T 225-226
28. Agreement reached that the Student would receive the final three weeks of ESY instruction at *** in Hamshire-Fannett ISD to ***. The ARD committee meeting ended in consensus, and Prior Written Notice of the committee's decisions was provided to the parents on June ***, 2014. R-11; R-11, p 12-13; R-12; R-13, p. 4-7

29. Due to a stay put order the Student remained at *** for the 2014-2015 school year. Student's teacher is Ms. **. Student is ** in Ms. **'s class. Ms. ** and when she had an available opportunity she would assist Student. Ms. ** expressed to the Special Education Director that she believed Student's IEP was not appropriate. She explained that several task list could not be accomplished. Specifically she stated that Student was reading below a ** grade level, not at the ** grade level documented in Student's IEP. T 316-317
30. By order of the Hearing Officer, Petitioner's expert was allowed a three hour observation. Dr. ** Ph. D testified at the hearing concerning his evaluation of the Student. T 325
31. Dr. ** is a licensed psychologist and licensed specialist in school psychology. Dr ** prepared an evaluation report T 327 P1, P25. Dr ** has testified as an expert witness in special education proceeding approximately 25 times. The areas he was designated as an expert in were related to assessment. He has also been designated as an expert witness in the past in regard to autism and programing for Students with autism. Dr. ** was considered to be considered expert testimony. T-328
32. Dr. ** observed the Student for a period of three hours. He observed the Student in the Student's instructional setting which was described by him to be **. Dr. ** also observed the Student in the lunchroom, hallways, and special education setting T 330.
33. Dr. ** confirmed the Student has a history of social difficulties. His information was received from the Student's parent which was consistent with what he observed. The social difficulties are within the scope of somebody with an autistic disorder. T 334. Dr. ** said he would be cautious about placing the Student in a ** class as proposed by the District. Before placement in a ** class certain things should be attempted by the District. First Student's sensory needs need to be assessed in a systematic way. Additionally, there is a need for visual and interactive schedules and visual supports that would need to be implemented in a systematic way. Dr ** recommends a behavior intervention plan but a behavior methodology for Student's instruction program to develop independence and foster functional communication. Before Student is moved to a ** class Student a consistent educational plan oriented to Student's needs, data based and attempted

over a period of time. The above are things Dr. *** would like to see a fairly dramatic change as is proposed by the District. T 336

34. Regarding the impact for the travel for the Student between Student's home and the proposed placement of ***, he questions whether the placement guidelines are being followed in regards to having the child's placement as close as possible to where the child lives.
35. Dr. *** by his observations and interaction with the Student concluded the Student has difficulty adjusting to new people. T 341
36. Dr. *** confirmed that during his observation the Student was listening, reading/listening to what was described by the Student's teacher as a ***-grade fiction book. Dr. *** was concerned that the choice of book seemed to far exceed the Student's comprehension level. The Dr. further confirmed that he has not seen any data to support that the Student's reading comprehension level was so well developed that Student would benefit from such a book. Additionally there wasn't really any way of checking the Student's comprehension. Dr. *** had concerns about the instructional approach by the teacher and also there was a considerable mismatch with the curriculum that was presented to Student. The teacher was aware that the Student was not capable of reading the book. T341-348
37. With regards to improving the Student's social skills, Dr. ***'s opinion was that the staff did not foster peer interaction in the lunchroom or other classroom. Dr. *** supports his opinion by indicating the Student was in *** instructional setting, the *** in the instructional setting. Dr. *** further stated the Student has significant social deficits. It would be important to work with the Student on Student's social skills beyond a worksheet and that scope of intervention would be important for the Student as Student's social functioning is going to be an important element in Student's ability to function with increased independence. It would be important for the District to have some form of social skills class or some form of structured interaction that would have to be developed T 348.
38. Student was described as being socially standoffish and rarely interacting with Student's peers would certainly inhibit Student's ability to interact, develop relationship, be part of a community and also may

foster Student's anxiety, as it would be more difficult for Student to develop the comfort that Student gets from being more familiar with people. T359

39. Dr. *** agreed with Ms. *** who stated that that what works best with the Student is one-to-one instruction, hands on activities, visuals. Dr. *** agreed with the teacher's description of the Student T 359

40. Dr. *** found it significant that the Student had a successful performance on Student's STARR test. One support the Student continuing to receive academic instruction rather than solely *** instruction. T

360 Dr. *** indicates that the Student as a general proposition could be taught academic skills and added if we were talking *** I would say know. But he would say yes to functional academics. Dr. *** questioned

the level of the Student's separation did not make sense. When Student went into another classroom there was no attempt to foster interaction at all. Dr. *** stated that interaction with peers could be accomplished

and a lot of classes do without having the person ***. Dr *** was puzzled as to why the Student was ***

and indicates that the Student was not violent or going to injure someone or anything along those lines. Dr

*** wondered why the Student's instruction couldn't be taking place where Student ***. T 429. Dr ***

stated that the District can have peers solve the problem the District can it may take a level of creativity but they can create an appropriate instructional settings ***. Suggestions would be they can match the Student

with other Students either based on functioning level peer one on one relationship. They can set up social skills classes, speech therapy classes, and pragmatic skills classes. They can set up situations in the

lunchroom. School have programs like best buddies and things along those lines. There is a variety of approaches a district can do. T461. Dr *** did not see any attempts to do so in his observations and in the

IEPS that he can recall. T461-462 Ms. *** was the Student's teacher for the 2013-2014 school year at ***.

For the 2014- 2015 school year she is teaching at *** and she is teaching ***. She stated the *** Students that were previously in her class last year, Student's classmates, and ***, were *** and are now in her

class. The parents question why the Student could not be placed in Ms. ***'s class like Student was the following year. The district's response is that Student is not at the same functioning level as the Student's

in Ms. ***'s class If Student had been placed at *** as proposed by the District, Student would have been assigned Ms. ***'s classroom. T p73

41. Ms. *** described herself as a *** teacher. Ms. *** describes a *** class to mean that she works on ***. Her class works on ***. For example ***. She covers grades *** through ***. T73-74 Ms. *** first met Student in the spring of 2014. She was invited by the Special Education Director/Co-op Director to the Student's room to assist with transitioning. She was in the classroom observing and interacting with the Student for three hours. T75-76 Ms. ***'s observation consisted of working on Student's social stories ***. During the visit she also observed Ms. *** using ***, *** and working on a worksheet about the weather. T 87. During her visit she also met with ***. A consultant with the Co-op. Ms. *** was there to assist with ***. T 81

42. Ms. *** has never been invited or attend any of the Student's ARD meetings. Ms. *** never received any in-service training at any time specific to the Student and Student's needs V1 T 74, 76-77,79 Ms. *** was never provided with a copy of the Student's IEP in preparation for Student's placement in her class. She was familiar with one of the Student's goal which was ***. She was made aware of the goal the week before the Due Process Hearing, and after the start of school. Ms. *** confirmed that if the Student had shown up in her class she would not have known anything about Student, however she assumed she would have had some documentation prior to Student's attendance on August 25, 2014 T77-78

43. Even though Respondents' proposed placement is ***, The Special Education Director testified that the Student's IEP could be implemented at ***. T106

DISCUSSION

Standard of Review

A petitioner who challenges the school district's eligibility determination or offer of services under the IDEA bears the burden to prove that the child has been denied a FAPE. *Tatro v. State of Texas*, 703 F. 2d 832 (5th Cir. 1983), *aff'd*, 486 U.S. 883 (1984); *Shaffer v. Weast*, 126 U.S. 528 (2005). This includes the burden of

proof with regard to harm or a deprivation of educational benefit. The law does not require that the Student's educational potential be optimal or "maximized."

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

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

Procedural Compliance

There is no evidence in the record to show the procedural requirements were not complied with. The parents opportunity to participate in the decision- making process regarding the provision of FAPE are well documented in the record.

Substantive Compliance

In evaluating whether an educational program is reasonably calculated to confer an educational benefit, the Fifth Circuit Court of Appeals has identified four factors to consider:

1. Is the educational program individualized on the basis of the child's assessment and performance?
2. Is the program administered in the least restrictive environment?
3. Are the services provided in coordinated and collaborative manner by the key stakeholders?
4. Are the positive academic and non- academic benefits demonstrated?

Cypress Fairbanks Indep. Sch. Dist. V. Michael F., 118 F.3d 245 (5th Cir.1997); cert. denied, 552 U.S. 1047 (1998). The 5th Circuit Court of Appeals has held that the four factors do not necessarily need to be applied in a particular manner or afford the same weight. Rather the factors are tended as a guide in determining whether the Student received a FAPE. *Richardson ISD v. Leah Z.* 58 F.3d 286 (5th Cir. 2009).

**Is the educational program individualized on the basis of the
Child's assessment and performance?**

In applying the relevant factors, it appears the educational program was individualized on the basis of the Student's assessment and performance. The District's proposed IEPs for Student were individualized on the basis of current evaluation data. A Psycho- Educational Evaluation, Functional Behavioral Assessment, Speech and Language Evaluation report was completed by the District in November of 2013. Utilizing the current evaluation data and the PLAAFP, the District proposed IEPs for the Student that contained measurable goals and short term objectives in all areas of instructional needs. The Student requires instruction in functional academics, independent living skills and self-help skills, self-regulation, social skills, and functional communications. The IEP further provided for In- Home and Parenting training to increase independence. The use of a visual schedule IEP contained a statement of the Student's present level of academic achievement. Additionally, measurable annual goals including academic and functional goals were identified. Additionally there is no evidence to show the IEPs were changed without parental knowledge.

Although the educational program was individualized on the basis of the Student's assessment and performance. Review of the testimony in the hearing indicates that often the IEP was not implemented by Student's teachers. *In Van Duyn v. Baker Sch Dist.* 5J 481 F. 3d 770, 47 IDELR 182 (9th Cir. 4/3/7), the ninth circuit held that a school district's failure to implement an IEP must be material to constitute a violation of IDEA. Minor discrepancies between the services actually provided and those specified in the IEP do not constitute a violation. A material failure occurs when the services provided by a school fall significantly short of the IEP services.

The 9th Circuit adopted the reasoning of the 5th and 8th Circuits. U.S. Circuit Judge **Raymond C. Fisher** noted that in *Houston Indep. Sch. Dist. v. Bobby R.*, 31 IDELR 185 (5th Cir. 2000), the 5th Circuit held that a de minimis failure to implement an IEP does not amount to a denial of FAPE. Similarly, the 8th Circuit in *Neosho R-V Sch. Dist. v. Clark*, 38 IDELR 61 (8th Cir. 2003), ruled that a district violates the IDEA when it fails to implement an "essential" element of a child's IEP.

Ms. *** testified that the IEP being implement by the District is the one in effect in August 2013. Ms. *** testified she was working the IEP developed in March and April of 2014. Ms. *** testified that she had not seen the Student's IEP. It is not clear which IEP she is referencing to. Ms. *** further testified that she was aware of only one goal that was contained in Student's IEP; the goal involved ***. Although Ms. *** was never the Student's teacher, it would have been extremely important for her to be familiar with the Student's IEP. The stay put order should have in no way have impacted her preparedness since it was issued the Friday before the first day of school. Since *** was Respondent's placement for the Student, they should have been prepared on day one to implement Student's IEP. Furthermore, the record confirms that Ms. *** was very confused while testifying. It is clear that if the Student had been placed in her classroom at *** she would have not been prepared to meet Student's needs. In response to questioning concerning her lack of preparation she stated that she assumed that she would get some paperwork before the Student was placed in her class.

The teachers' confusion reflect a major lack of communication or miscommunication between the special education teachers and the Special Education Director. Additionally, federal regulations require that each teacher and provider be informed of his or her specific responsibilities related to implementing that IEP, as well as the specific accommodations, modifications and supports that must be provided for the child in accordance with the IEP. 34 CFR 300.323 .Clearly this was not accomplished by Respondents.

Further, evidence that IEP was not being properly implemented can be found in the testimony of Dr. *** who indicated Ms. *** was using a *** grade reading level book to work with the Student. The IEP clearly indicates the Student is at a *** grade reading level.

Another example of lack of communication between the Student's teacher and the Special Education Director is reflected in the testimony of Ms. *** who indicated she believed the Students IEP's were not appropriate. Ms. *** further testified that she discussed her concerns this with the Special Education Director. There was no evidence presented by Respondents to indicate the teacher's comments were even considered or acted upon.

The most egregious example of Respondents failure to implement the IEP is the area of social skills. The PLAAFP indicates the Student meets eligibility as Autistic and Speech Impaired. One of the documented deficits is identified in the area of social skills to include difficulty in initiating and maintaining friendships at the level and of the quality one would predict for other children of the same chronological age, general interacting with peers and adults. It is a reasonable conclusion to draw that Student has not been given an opportunity to develop Student's social skills as recommended in Student's IEP. Presently, the Student is ***. Dr. *** testified that he was puzzled that this was occurring. He further testified that the District, with some of creativity, can create an appropriate instructional settings ***. He suggested as examples that they could match the Student with other Students either based on functioning level or utilizing a peer tutor time role. They can set up social skills classes, speech therapy class, and pragmatic skills classes. They can set up situations in the lunchroom where Student can have more interaction with Student's peers. Dr. *** stated there is a variety of approaches the district can devise. V2 p461. During his observation time, Dr. *** did not see any efforts by the district to include the Student in social interaction with Student's peers. T 461-462

The IEP also required a transition plan, this is important because Student's PLAAFP identifies the Student exhibits anxiety with transitioning to include a change in daily routine. To address this issue Respondents proposed the use of a social story. Although a social story was prepared and Ms. *** spent three hours observing the Student in Ms. ***'s class, Ms. ***'s testimony indicates she was not prepared to begin teaching the Student. The expectation seemed to be that the Student would transition to the placement with minimal assistance. This is inconsistent with Student's IEP which indicates the Student has difficulty in ***. This is supported by the testimony of Dr. *** and Ms. *** who confirmed the Student is uneasy around

strangers. While the evidence indicates the Student may have recognized Ms. *** in Student's social story, if that were accurate, that certainly is not enough to ensure the comfort level with Student's new teacher or to ease Student's anxiety with transitioning to a new daily routine.

Another example of the District's failure to implement the IEP was Respondents failure to provide training to the Student's teachers. Neither Ms. *** not Ms. *** received any training specific to the Student. Ms. *** did not attend the Autism Training as requested by the parents.

In conclusion even if the IEP was individualized to ensure the Student's success it does the Student no good if it is not implemented or if the teachers are confused about what the contents of the IEP are. I agree with the Petitioner's expert when he concluded if the teacher is operating off the wrong IEP then how they can create the appropriate instructional program for the Student. The Student's program should be up and running from day 1 and the evidence show this was not the case. Respondent's failure to implement the Student's IEP as identified above amounts to a material failure and falls significantly short of the services identified in the Student's IEP.

Is the Program Administered in the least restrictive environment?

Once an IEP or the contents of the Student's educational program are determined, the next step is to locate an appropriate placement so that the IEP can be implemented. 65 Fed. Reg. 36,591 (2000). *See* 34 CFR 300.116. Many factors may be considered in making a placement determination, the most important of which are the conformity with the LRE considerations of 34 CFR 300.114 through 34 CFR 300.118, 34 CFR 300.116, and 65 Fed. Reg. 36,591 (2000).

The LRE mandate demands that Students be educated in regular classroom settings to the maximum extent appropriate. 34 CFR 300.114 (a); and *OSEP Memorandum 95-9*, 21 IDELR 1152 (OSEP 1994).

The IDEA requires that: Each public agency must ensure that: To 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 Special classes, separate schooling, or other removal of children with

disabilities from the regular educational 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. 34 CFR 300.114 (a).

The fifth circuit has developed a two prong analysis: the first question is whether education of the Student with a disability in the regular classroom, with the use of supplemental aids and services, can be satisfactorily achieved and if it cannot, whether the school district has provided the Student interaction with non-disabled peers to the maximum extent appropriate. *Daniel RR v. State Board of Education* 874 F.2d 1036, 441 IDELR 433 (5th Cir. 1989)

In applying the 5th circuit standards it appears that Respondent has failed to provide the Student interaction with non-disabled peers to the maximum extent possible. Respondents has made a decision to *** the Student from Student's peers. Dr. *** testified that there is no reason that Student be educated in ***. Respondents maintain that if the Student remains at *** Student will have to be ***. Yet the testimony indicates Ms. *** the Student's teacher for the 2013-2014 school year as well as *** who were the Student's classmates are now at ***. When the Special Education Director was questioned concerning the reason the Student could not in the same classroom with ***, she simply stated the Student's and *** are at a different level than the Student. The Special Education director's argument is not persuasive since the Student and *** were all educated together last year and there was no indication that the Student's educational placement was not appropriate then. Additionally, the fact that the Student is at a different level should not prohibit Student from being around Student's peers. Dr. *** testified that *** was not appropriate. He further testifies that on the day he observed the Student no attempts were made by Student's teacher to foster any interaction with other Students.

Moreover, In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that the child's placement: 1) is determined at least annually; 2) is based on the child's IEP; and 3) is as close as possible to the child's home. 34 CFR 300.116 (b). Unless the IEP of a child with a disability requires some other arrangement, public agencies must

also ensure that the child is educated in the school that he or she would attend if nondisabled.34 CFR 300.116 (c).Each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.34 CFR 300.327.

It appears from the record and the testimony of the parents that no consideration was that the child be educated as close as possible to Student's home. This is supported by the testimony of the current teacher and the Special Education Director. Testimony also indicates the placement is at *** is *** from the child's home. In comparison *** the child's stay put placement is *** from Student's home. It appears the Respondents gave this fact minimal consideration.

Additionally, the long term effect on the Student the parents testified that the Student's physician indicated in a letter that the bus ride would be detrimental to the Student and also possibly a safety concern for others on the bus. Since the Student's physician did not testify this information was not developed to the point where a definite conclusion could be drawn concerning the detrimental effect of the bus ride on the Student. However, the record indicates the physician's letter was in the Respondent's possession prior to the hearing and minimal efforts were made to clarify or obtain more information from the Student's physician

Review of the evidence does not support the requirement that the placement decision was made by the team. The parents were opposed to the placement. Although there position is not the be sole determining factor, it must be given weight. There is no evidence in the record to indicate the parent's decision was considered.

The Special Education Director confirmed the District made a decision to centralize its services at ***, this should not have a negative impact on the Student. Districts may consider the configuration of the service delivery system, availability of space, and administrative convenience. While a district may consider these factors, it may not allow such concerns to dictate the child's placement on the LRE. *Letter to Trigg*,50 IDELR 48 (OSEP 2007). The District provided no credible testimony to rebut the argument that the educational placement was being made for administrative convenience and not in the Student's best interest. In fact the Special Education director testified that all of the Student IEP could be accomplished at ***

Whether the District has made efforts to ensure all services are provided in a coordinated and collaborative.

Schools are required to ensure parents are afforded an opportunity to participate in ARD committee meetings. 34 C.F.R. §300.501(b). Further, the District must ensure that the parents of a child with a disability are members of any group that makes decisions on the educational placement of their child. 34 C.F.R. §300.327.

The record indicates Respondents have worked closely with all key stakeholders in the development and proposed implementation of special education and related services the Student. The testimony indicates Petitioners were provided the opportunity to participate meaningfully in the development of the Student's special education program. The parents attended and participated in every meeting of the Student's ARD committee. They were represented by an educational advocate at each of the ARD committee meetings. Further, upon their request, the Superintendent of Schools and the Director of Special Education convened an administrative meeting to allow the parents to collaborate with the District in preparation for the April ***, 2014 meeting of the Students ARD committee. When Petitioners requested changes in the frequency and duration of instructional and related services during the ARD committee process, Respondents agreed.

The evidence also establishes that Petitioners were provided with required Prior Written Notice, Notice of the Procedural Safeguards, and requested copies of Student records. R-2; R-3; R-6; R-7; R-8; R-9; R-10; R-11; R-12; R-35. The record does not support a finding that the parents were "significantly impeded" from participation.

Are the positive academic and non- academic benefits demonstrated?

The evidence in this proceeding established that Student made educational progress during the relevant time in question. R-8, pp. 6-19. Petitioners have not met their burden of proof to establish that the IEP was not reasonably calculated achieve positive academic and non- academic benefit. The major area of disagreement between the parents and Respondents is the proposed placement of the Student at ***. The Special Education Director testified that the items proposed in the IEP could be accomplished at ***.

CONCLUSION

1. The Student currently resides within the geographical boundaries of Hardin Jefferson Independent School District, a legally constituted independent school district within the state of Texas, and is entitled to special education services pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C § 1400, et seq.
2. Hardin Jefferson Independent School District's educational program is presumed to be appropriate. As the party challenging the educational program proposed by the District, Petitioner bears the burden of proof. *R.H., v. Plano Indep. School Dist.*, 607 F. #d 1003 (5th Cir. 2010); *Schaffer v. Weast*, 126 S. Ct 528 (2005). *Tatro v. State of Texas*, 703 F 2d 823 (5th Cir. 1983), *aff'd* 468 U.S. 883 (1984), an educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).
3. The denial of FAPE in this case was more than de minimis. *Hendrick Hudson District Board of Educ. V. Rowley*, 458 U.S. 176, (1982); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). *Cypress Fairbanks Indep. Sch District v. Michael F.*, 118F.3d 245 (5th Cir. 1997). Failure of Respondent's to administer the Student's program in the least restrictive environment and failure to properly implement material portions of the IEP denied the Student a FAPE.

ORDER

After due consideration, of the record, the foregoing findings of fact and conclusion of law, I hereby ORDER that the relief sought by Petitioner is hereby **GRANTED**, in part as follows:

1. Petitioner shall continue placement at *** in an instructional setting ensuring to the maximum extent appropriate interaction with peers and removing Student from being educated in *** as is presently being done. Respondent shall convene an ARD to determine the appropriate instructional setting in consideration of this decision.

2. Respondent shall provide staff training to work with the Student specifically in regards to autism, intellectual disabilities, behavioral interventions and training specific to Student's program and Student's functional levels
3. Respondent shall ensure that all educators and service providers working with the Student are provided a copy of Student's current IEP and are familiar with the information contained therein.

All other relief not specifically granted herein is hereby **DENIED**

NOTICE TO THE PARTIES

This decision is final and is appealable to state or federal District Court.

The District shall timely implement this decision within 10 school days in accordance with 19 T.A.C. § 89.1185 (p). The following must be provided to the Division of Federal and State Education Policy of the Texas Education Agency and copied to the Petitioner within 15 school days the date of this Decision: 1) Documentation demonstrating that the Decision has been implemented; or 2) If the timeline set by the Hearing Officer for implementing the Decision within the prescribed timeline, and a signed assurance from the Superintendent that the Decision will be implemented.

SIGNED this 3rd day of December, 2014.

/s/ Sandra Garcia Huhn

Sandra Garcia Huhn
Special Education Hearing Officer

DOCKET NO. 268-SE-0614

STUDENT	§	BEFORE A SPECIAL EDUCATION
	§	
VS.	§	HEARING OFFICER FOR
	§	
HARDIN-JEFFERSON ISD AND	§	
GULF COAST SPECIAL	§	THE STATE OF TEXAS
EDUCATION COOPERATIVE	§	

SYNOPSIS

Issue No.1

Did Respondents fail to devise appropriate IEP's for Student in the least restrictive environment, resulting in a denial of FAPE and harm, significantly impeding Student and Student's parents' opportunity to participate in decision making and /or causing deprivation of educational benefits.

Ruling: For the Student

Citation: 34 CFR § 300. 116

Issue No.2

Did Respondents fail to implement or change Student's IEP without parental input?

Ruling: For the Student

Citation: 34 CFR § 323 (c) (2)

Issue No. 3

Did Respondents fail to devise appropriate IEP's?

Ruling: For the District

Citation: 34 CFR § 300.324