

TEA Docket No. 125-SE-1219

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

DECISION ORDER

Petitioner, ***, b/n/f Parent & Parent, (Student or Parent) filed an Original Complaint requesting an impartial due process hearing pursuant to the Individuals with Disabilities Education Act ("IDEA"). The complaint was received by the Texas Education Agency on December 18, 2019 and assigned to this hearing officer. Respondent is Elgin Independent School District (District).

Petitioner is represented by Jordan McKnight of the firm Jordan McKnight Law Office. Petitioner was assisted by Debra Liva as student advocate. District is represented by Amy S. Foster, Tyler P. Ezell, and Holly Boyd Wardell of the firm Eichelbaum Wardell Hansen Powell & Munoz, P.C.

I. Statement of Case

The ultimate issue in this case is whether District denied Student a free appropriate public education (FAPE) by failing to develop and implement an Individualized Education Program (IEP) that was reasonably calculated to enable Student to make educational progress in light of

Student's unique circumstances. The hearing officer concludes Student was denied FAPE during the Fall 2019 semester.

District's failure to meet procedural requirements significantly interfered with the Parent's ability to participate and collaborate in a meaningful manner in the development of the IEP. Student's IEP must be reconsidered by the ARD committee for this reason alone.

Conflicting evidence and testimony regarding the student's abilities, performance, and progress leaves genuine irreconcilable questions that cannot be resolved to any parties' satisfaction without further evaluations.

To protect the Parent's opportunity to provide meaningful input, the ARD committee is ordered to use an independent Individualized Education Program Facilitator. In addition, Independent educational evaluations (IEE) are required to enable the ARD committee to address questions of what special education is appropriate for this unique student. The District is ordered to pay for the IEE, and the ARD committee members are ordered to consider the evaluations and to revise the IEP as they may determine appropriate under the IDEA.

Pursuant to 19 TAC §89.1185 (m)(1), Student requests and the hearing officer declines to make a specific finding of fact that the District unreasonably protracted the final resolution of the issues in controversy in the hearing by failing to bring all relevant members to the Resolution Session.

II. Preliminary Matters

A. Jurisdiction

Student alleges violations of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. Section 1400 et seq.), and the Texas Commissioner's and State Board of Education Rules. Student also alleges rights pursuant to Section 504 of the Rehabilitation Act of 1973 (Section 504),

29 U.S.C. §701 *et seq.*, the Americans with Disabilities Act (ADA), as amended by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, the Family Educational Rights Privacy Act (FERPA), 20 U.S.C § 1232g; 34 CFR Part 99, (the IDEA incorporates FERPA by reference through 20 U.S.C.§ 1417(c), the No Child Left Behind Act (NCLBA), Section 1983 of the Civil Rights Act of 1964 (42 U.S.C. § 1983), Title VI of the Civil Rights Act of 1964; and the Technology Related Assistance For Individuals With Disabilities, 29 U.S.C. § 2109.

District requests dismissal of any complaints related to laws outside of the IDEA. A review of the complaint shows that for purposes of exhaustion, Student alleges claims that are beyond the scope of a special education due process hearing.

The jurisdiction of a special education hearing officer in Texas is strictly limited to claims arising under IDEA, 20 U.S.C. § 1400 *et seq.* Specifically, a hearing officer has the authority to determine claims related to the identification, evaluation, or educational placement of a student with a disability or the provision of a Free Appropriate Public Education (“FAPE”) to Student. The hearing officer has no jurisdiction to resolve claims or make an award under any law other than IDEA. 34 C.F.R. §§ 300.507, 300.511; 19 Tex. Admin. Code §§ 89.1151 (a), 89.1170; *Calallen Indep. Sch. Dist.*, 108 LRP 66068 (SEA Tex. 2008) (citing *Tex. Natural Res. Conservation Comm’n. v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002)).

To the extent either party seeks affirmative relief arising under any law other than the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §1400 *et seq.* (2004), such claims are dismissed.

B. Attorney Fees

The complaint gives notice that Student seeks an award or reimbursement of attorney’s fees and litigation costs and fees. Requests for attorneys’ fees and litigation costs, including expert witness costs, are outside the jurisdiction of a special education hearing officer in Texas and therefore are denied. 34 C.F.R. §§ 300.516, 300.517; 19 Tex. Admin. Code § 89.1185(n).

A Parent of a child with a disability may be entitled to an award of attorney's fees as a prevailing party. However, an award of attorney's fees is within the sole discretion of either the federal district court or a state court of competent jurisdiction. To the extent either party seeks an award or reimbursement of attorney's fees or costs, such requests are dismissed.

C. Statute of Limitations

The complaint was filed on December 19, 2019. The one-year statute of limitations period applied in Texas typically bars claims based on events occurring before December 19, 2018. Here, Student's claims are further limited by agreement of the parties "to actions or inactions which occurred on or after June 4, 2019. To the extent that Student has raised any actions or inactions which occurred prior to June 4, 2019, Students are not bringing claims related to those actions." Ex. R. 55. District seeks an order dismissing any claims Student seeks to raise before the June 4, 2019 period as time-barred. 34 C.F.R. § 300.507(a)(2); 19 Tex. Admin. Code § 89.1151(c).

To the extent either party makes any claims arising before June 4, 2019, such requests are dismissed.

D. Extension of Deadlines

The initial scheduling order set the due process hearing for February 4-6, 2020 with a decision due on March 2, 2020. At the mutual request of the parties the hearing was shortened to one day and convened on February 7, 2020.

After a long day of hearing and the unavailability of certain witnesses, the parties requested the hearing be recessed until February 20, 2020, and it was so ordered. Both parties waived their rights under 19 Tex. Admin. Code §89.1185(1) to obtain a final decision in this proceeding within 45 days after the date the complaint was originally filed or amended.

The due process hearing proceeded on February 7, 2020 and February 20, 2020. A record was made by Michael Naegele, C.S.R. 1210, a Texas certified court reporter. A copy was

electronically delivered to the parties.

The parties agreed to submit their closing briefs by April 6, 2020 and to extend the decision due date to May 4, 2020, and it was so ordered. Both parties submitted briefs in a timely manner and this Decision is issued by the agreed ordered deadline.

III. Due Process Hearing

A. Student's Complaint

Student's claims largely revolve around two meetings held during the 2019-2020 school year. The first meeting was held on October ***, 2019. It was an ARD meeting attended by a general education teacher, a special education teacher, evaluation staff, an administrator, and a Parent in attendance with her advocate. The meeting lasted approximately ninety minutes. The dispute is whether Parent was given an opportunity to provide meaningful input and feedback regarding Student's evaluations and educational program.

The second meeting was held on December ***, 2019. It was the resolution session required by the first scheduling order herein. Parent was in attendance with her advocate. District was represented by the District Special Education Director and her administrative assistant. No other members of the ARD committee attended. The dispute is whether District failed to require the appropriate members of the ARD committee to attend, or whether attendance by a sole-decision maker is sufficient to meet the statutory requirements.

B. Student's Proposed Findings

Student confirms the following IDEA issues for decision in this case.

1. District prematurely ended the ARD meeting without reviewing goals, addressing, least restrictive environment ("LRE"), schedule of services, completely reviewing the January ***, 2019 Full Individual Evaluation and Review of Existing Evaluation Data ("REED/FIE')

or the October ***, 2019 evaluation, without reviewing accommodations, Assistive Technology, Extended School Year services (“ESY”) or discussing Student’s dyslexia. The ARD meeting was ended without consideration of all the required parts of developing an IEP; without answering all of Parent’s questions; and without allowing enough time for the ARD committee members, which include Parent, to comprehensively determine and address the individual needs of Student. This resulted in a denial of FAPE to Student as it seriously infringed Parent’s opportunity to participate in the IEP formulation process and denied Student educational opportunity.

2. District’s repeated refusal to review the evaluations as part of the October ***, 2019 ARD meeting deprived Students of rights guaranteed to them under IDEA. 34 CFR § 300.324(a)(1)(iii), 34 CFR § 300.501(a)(1), 34 CFR § 300.501(b)(1)(i), and 20 U.S.C. § 1414(d)(1)(B)(v). District’s procedure of holding a separate meeting to review evaluations that does not follow the requirements of an IEP meeting violates 34 CFR § 300.501(b)(3). This violation denied Parent the opportunity to participate in the IEP formulation process and denied Student educational opportunity.
3. Student was denied a FAPE because the IEP developed as a result of the October ***, 2019 ARD meeting was not individualized to Student, was not reasonably calculated for Student to make meaningful progress, and was not designed to help Student meet grade level standards, in that it did not take into account the cognitive deficits and achievement levels as contained in the January ***, 2019 REED/FIE that would inhibit Student’s ability to learn in a general education program with accommodations, did not take into consideration Student’s diagnosed but not identified issue with Dyslexia, did not create appropriate goals, and did not take into account Parent’s input regarding ESY and Assistive technology.
4. Services were not provided to Parent in a collaborative manner by key stakeholders. The

October ***, 2019 ARD meeting was not held in a collaborative manner. Parent's input was routinely ignored. District insisted that Parent's questions regarding the evaluation should be answered outside of the ARD. Parent's input into the autism evaluation included in the October ***, 2019 evaluation was ignored. Parent's desire to have input regarding dyslexia was ignored. An artificial time limit was set for the ARD meeting which limited and prevented Parent participation.

5. The IEP developed does not contain all services that Student needs in order to learn, including but not limited to dyslexia supports, AT support, speech therapy, and the supports recommended under the Autism supplement.
6. The IEP developed was not reasonably calculated because it was not informed by Parent's input as required in *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).
7. Student is not receiving positive academic and non-academic benefits. District's current assessments demonstrate that Student is reading on a *** grade level despite the fact that Student will be attending *** in the forthcoming school year; Student has performed poorly in ***the STAAR exam, and Student constantly receives failing grades. Student also has not developed friendships, social graces, and confidence/self-esteem that are inherent in having received a FAPE.
8. District unreasonably protracted the resolution of this matter by failing to bring all relevant members of the IEP Team who have specific knowledge of the facts identified in the due process complaint to the resolution session as required by 34 CFR § 300.510.

C. Student's Proposed Resolutions

Student requests the following relief:

1. Order that District provide Student with a FAPE.
2. Order that Parent be made an equal partner in the educational programming for Student.

3. Order District to provide compensatory speech services.
4. Provide Student with self-advocacy training.
5. Order a duly constituted ARD with Parent being made an EQUAL partner.
6. Reimbursement of Parent's expenses related to educational or diagnostic services.
7. Reimbursement of all costs and representation fees that Parent has incurred in filing their due process.
8. Any and all other remedies that Student may be entitled to under the law.

D. District's Response

1. Parent did not attend the 10-day reconvened ARD meeting that was offered on November ***, 2019, though school staff were ready and assembled, to continue to discuss Student's educational needs and Parent's concerns.
2. District tried to set up an ARD meeting on August ***, 2019 to review Student's IEP. Parent's advocate sent an email on August ***, 2019, to District's attorney citing lack of availability and asking why District was trying to schedule an ARD meeting.
3. District tried to set up an ARD meeting on September ***, 2019. Student's advocate then canceled the meeting on September ***, 2019.
4. District sent additional dates to Parent via multiple methods and received no response from her regarding trying to schedule an ARD meeting on October ***, 2019. Parent's advocate canceled the meeting on October ***, 2019.
5. Parent requested additional evaluations for Student to be completed over the summer of 2019. District evaluation staff members contacted Parent six times from July ***, 2019, until August ***, 2019, in attempts to have Parent sign the consent forms for the evaluations she requested.

6. Parent was also contacted multiple times during the fall 2019 semester by evaluation staff to see if she would complete evaluation protocols to assist with the evaluations she had requested. She did not respond but she did ultimately complete and return the evaluation protocols.
7. After the evaluation was completed, District evaluation staff made multiple attempts to set a time to review the reports in detail. Parent did not respond to these offers, and eventually, Parent's advocate declined the offer to review the evaluation with evaluation staff prior to the ARD meeting.
8. An additional offer to review the evaluations was made after the ARD meeting, and Parent has yet to avail herself of that opportunity, instead filing due process against District.
9. Student's claims that District did not make copious efforts to collaborate with Parent and seek her input into her student's education and the ARD process are simply not true.
10. District also denies the claims that Student has been denied FAPE and failed to make progress in fall of 2019. Student continues to maintain passing grades, good attendance, progress on Student's IEP goals and objectives, impressive improvement on Student's reading skills in Student's dyslexia program and demonstrates positive social interactions with Student's teachers and peers.
11. Options regarding Student's IEP have been discussed at properly constituted and noticed ARD meetings, which have included Student's Parent.
12. District has reviewed school records, including attendance records, grade reports, student progress reports, testing results, observations, evaluation data including Full Individual Evaluations, and Parent input in making determinations regarding Student's IEP.
13. District requests an order finding for District on all claims.

IV. Standard of Review

A. Duty to Provide FAPE

IDEA provides an entitlement to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d). *See, White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 378 (5th Cir. 2003).

District has a duty to provide FAPE to all children with disabilities ages 3-21 who are enrolled in the school district. 34 C.F.R. § 300.101(a); Tex. Educ. Code § 12.012(a) (3). District is required to provide eligible students with special education and related services at public expense. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

The school district is responsible for providing these children with specially designed personalized instruction with sufficient support services to meet their unique needs to receive an educational benefit. The instruction and services must comport with a student's IEP. 20 U.S.C. § 1401(9); *Rowley*, 458 U.S. at 188-189, 200-201, and 203-204. To that end, school districts must develop an IEP for each child with a disability. An IEP must specify the special education and related services needed for a child to receive a FAPE. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.320.

B. The IEP

To meet the substantive obligation to provide a FAPE, the school district must offer or have in effect an IEP that is reasonably calculated to meet the child's needs to enable student to make progress appropriate in light of the child's unique circumstances. The adequacy of a given IEP turns on the unique circumstances of the student for whom it was created. *Andrew F.*, 137 S. Ct. at 988.

An IEP is more than simply a written statement of annual goals and objectives and how

they will be measured. It is not a form document. It is constructed only after careful consideration of Student's present levels of achievement, disability, and potential for growth. 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv); *Endrew F.*, 137 S.Ct. at 999.

An IEP is a written statement of annual goals and objectives and how they will be measured. It must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the duration and frequency of the services, and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.323(a).

The IDEA does not require the IEP to guarantee a certain level of accomplishment. It is not required to provide the student with the best possible education. It need not be designed to maximize a student's potential. The issue is not whether the school district could have done more. *Houston Ind. Sch. Dist. v. V.P.*, 582 F.3d 576 (5th Cir. 2009), *cert. denied*, 559 U.S. 1007 (2010).

The inquiry is whether a student received an educational benefit. The school district must provide each student with a meaningful educational benefit—one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist.* 582 at 583; *Michael F.*, 118 F.3d at 247 (citing *Rowley*, 458 U.S. at 188-89); see also *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 810 (5th Cir. 2003).

The question is whether development and implementation of the IEP “was *reasonably* calculated to enable a child to make progress appropriate in light of the child's circumstances.” *Endrew F.*, 137 S. Ct. at 999 (citing *Rowley*, 458 U.S. at 206-07)(emphasis in original).

C. The IEP Goals and Objectives

The obligation to provide a FAPE requires a school district to have in effect an IEP at the beginning of each school year. The ARD committee is required to review student's IEP at least

annually, and to make revisions to address lack of expected progress, re-evaluations, information provided by Parents, and student's anticipated needs. 34 C.F.R. § 300.324(b).

The ARD committee develops the IEP and must consider student's strengths, parental concerns for enhancing student's education, the results of the most recent evaluation data, and Student's academic, developmental and functional needs. 34 C.F.R. § 300.324(a).

A student's "present level of performance" provides the benchmark ... the starting point ... from which to measure student's progress. The next component of every IEP is measurable annual goals designed to allow a student to make progress, if possible, based upon student's circumstances, in the general education environment. Meaningful progress is the key regardless of the educational setting. *Andrew F.*, 137 S.Ct. at 1000.

While "more," "different," or "better" services, goals, or accommodations might be possible, the relevant question is whether the IEP as written is appropriate. *Adam J. v. Keller Indep. Sch. Dist.*, Civ. No. 4:01-CV- 0797-A, 2002 WL 1906001 at *2 (N.D. Tex. Aug. 15, 2002) (finding fact that another plan "might work as well or even better does not mean that defendant has failed to provide plaintiff a FAPE"), *aff'd*, 328 F.3d 804 (5th Cir. 2003).

"The question is whether the IEP is *reasonable*, not whether the court regards it as ideal." *Andrew F.*, 137 S.Ct. at 999 (referencing *Rowley*, 458 U.S. at 206-07). The role of the court is not to "second guess" school officials or substitute their own idea of an appropriate IEP for the opinion of the educational professionals. *C.G. by & through Keith G. v. Waller Indep. Sch. Dist.*, 697 F. App'x 816, 820 (5th Cir. 2017), as revised (June 29, 2017) (citing *Flour Bluff Indep. Sch. Dist. v. Katherine M. by Lesa T.*, 91 F.3d 689, 693 (5th Cir. 1996)).

D. The Four Factor *Michael F.* Test

The Fifth Circuit uses a four-part test to determine whether the IEP is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"

and thus, substantively appropriate to meet IDEA requirements. Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997); see also, Ella R. v. Spring Branch Indep. Sch. Dist., 909 F.3d 754, 765-66 (5th Cir. 2018) (confirming the *Michael F.* test is consistent with the *Andrew F.* standard).

Those factors are:

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

Michael F., 118 F. 3d at 253.

These four factors need not be accorded any particular weight nor must they be applied in any particular way. Instead, they are indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district’s educational program. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

E. Burden of Proof

The educational plan developed by a school district is presumed appropriate and the burden of proof for challenging that program is placed on the party making the challenge. Student must show that District did not provide a FAPE. *Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536-537 (2005).

As applied by the Fifth Circuit, “IDEA creates a presumption in favor of a school system’s educational plan, placing the burden of proof on the party challenging it.” See *R.H. v. Plano Indep.*

Sch. Dist., 607 F.3d 1003, 1010-1011 (5th Cir. 2011); *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993).

In considering the presumption, the Fifth Circuit is mindful of the extensive experience of a student's teachers, not only as qualified professionals in the field of education, but with Student specifically. The Fifth Circuit recognizes the importance of the opinions of those individuals with the most immediate knowledge of a student's performance – the educators who work with student on a daily basis. See *Michael F.*, 118 F.3d at 253-54.

In this dispute Student bears the burden of proof and must overcome the presumption in favor of District's educational plan to establish that District failed to provide a FAPE.

V. Application of the *Michael F.* Four Factor Test

Application of the four factors to the evidence and testimony in this case supports the finding that the School District's program was not appropriate because the IEP cannot be said to be reasonably calculated to provide the requisite educational benefit given Student's unique circumstances. *Rowley*, 458 U.S. at 206-20; *Andrew F.*, 137 S.Ct. at 999-1000 (2017).

Even though some of the four factors can be weighed in District's favor due to Parent's lack of communication and collaboration, the court looks at all relevant factors together to determine FAPE. *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 814–15 (5th Cir. 2012). Whether a student demonstrates positive academic and non-academic benefits is "one of the most critical factors in this analysis." *Id.* (citing V.P. 582 F. 3d at 588).

In this case the evidence and testimony, without more, compel contradictory conclusions and neither is persuasive as to whether Student received positive academic and non-academic benefit. Student's grades, STAAR testing, and performance in class are inherently inconsistent with other measures of performance. In such situations, if a parent of a child with a disability

disagrees with the school district's own evaluation, the parent is entitled to an IEE at public expense so long as the IEE meets reasonable school district criteria. 34 C.F.R. § 300.502(a)(1)-(3), (b)(1).

A. Individualized on the Basis of Assessment and Performance

The IEP is a living document and should be updated to reflect the actual situation as student ages, rather than using the same information year after year without revision. Recognizing that the needs of the child are not stagnant but evolving, the best educational programming will require continued adaptation based on the attention of the providers of support. The IEP should continue to develop goals or objectives to help prepare the child for appropriate involvement in life outside of the public school system. The IEP should consider, integrate, and facilitate *** transitioning.

B. The Least Restrictive Environment (LRE).

The IDEA requires that a student with a disability be educated in general education settings with non-disabled peers to the maximum extent appropriate. Special classes, separate schooling and other removal from the regular education environment should occur 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. This provision requires placement in the "least restrictive environment." 34 C.F.R. § 300.114(a)(2)(i), 300.114(a)(2)(ii).

The determination of whether a student with a disability can be educated in general education settings requires an examination of the nature and severity of Student's disability, Student's needs and abilities, supplemental aids and services, efforts to modify the special education curriculum, and the school district's response to meet Student's individual needs. The educational benefit a student receives while placed in the general education setting must also be considered. *Daniel R.R. v. El Paso Ind. Sch. Dist.*, 874 F. 2d 1036, 1048 (5th Cir. 1989).

The continuum of instructional arrangements must be based on students' individual needs. *Daniel R.R.*; 19 Tex. Admin. Code § 89.63(c). If Student cannot be satisfactorily educated in general education settings with the use of supplemental aids and services, the school district must mainstream Student to the maximum extent appropriate. *Daniel R.R.*

An IEP must reflect that the ARD committee appropriately considered a continuum of educational settings, including mainstream, homebound, hospital class, resource room/services, self-contained – regular campus (mild, moderate, or severe), nonpublic day school, or residential treatment facility.

C. Services Provided in a Coordinated, Collaborative Manner

The third prong of the *Michael F.* analysis requires the “key stakeholders” to provide services in a coordinated and collaborative manner. *Michael F.*, 118 F.3d at 253. The school district is required to ensure parental participation in the ARD process, and it must make consistent efforts to reach consensus with parents over the relevant time period. 19 Tex. Admin. Code § 89.1050 (g).

However, the school district is not obligated to implement every parental request or suggestion. See, *Lachman v. Illinois St. Bd. of Educ.*, 952 F. 2d 290, 297 (7th Cir. 988). No one member of an ARD Committee has veto power over the educational decision-making that is the ARD Committee's overall responsibility. 34 C.F.R. §§ 300.321-300.322. Student must prove the school “failed to implement substantial or significant provisions of the IEP.” *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir.), *cert. denied*, 531 U.S. 817 (2000).

A denial of FAPE can be found if there are procedural violations. To prevail on a claim of a procedural violation of the IDEA, Student must prove that the procedural violations impeded the child's right to a FAPE; significantly impeded Parent's opportunity to participate in the decision making process regarding the provision of FAPE to Parent's child; or caused a deprivation of educational benefit. 34 C.F.R. §300.513(a)(2)(i-iii); *Doug C. v. Haw. Dep't of Educ.*, 720 F.3d

1038, 1043 (9th Cir. 2013). “To constitute a denial of a FAPE, procedural errors must ‘result in the loss of educational opportunity, or seriously infringe the parents’ opportunity to participate in the IEP formulation process.’” *R. E. B. v. Haw. Dep’t of Educ.*, No. 14-15895, at *3 (9th Cir. May 9, 2019)(citations omitted). To do so, Student must present “evidence of...refusal to listen to or consider [Parent’s] input.” *Rockwall Indep. Sch. Dist. v. M.C.*, No. 3:12-CV-4429, 2014 WL 112642573, at *9 (N.D. Tex. 2014), *aff’d*, 816 F.3d 329 (5th Cir. 2016).

Here, Student claims a denial of FAPE because of procedural violations. Specifically, that District violated Parent's procedural rights and seriously infringed on the opportunity to participate in the IEP formulation and decision-making process. See, 34 C.F.R. § 300.513 (a)(2)(ii).

D. Academic and Non-Academic Benefits

1. Meaningful Benefits

The Fifth Circuit explains that the ultimate statutory goal of the IDEA, and thus the focus, is on the child’s whole educational experience, and its adaptation to confer ‘benefits’ on the child.” *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 397 (5th Cir. 2012). The determination of whether Student is receiving educational benefit while placed in the general education setting requires an evaluation of both the academic and nonacademic benefits. *Id. Daniel R.R.*, 874 F. 2d at 1048.

A school district is not tasked with attempting to cure a student’s disability or to maximize Student’s educational performance, but rather its duty is to adapt the educational program in such a way that permits student to achieve meaningful educational benefits. See *id.* Student must receive more than a de minimus educational benefit given student’s unique circumstances. *Andrew F.; Rowley*. The benefits received must be meaningful “in light of the child’s circumstances.” *Andrew F.*, 137 S. Ct. at 999.

2. Academic Benefits

The school district is not required to provide Student with the best possible education. The fact that it is possible does not mean that it is required, or appropriate, under the IDEA. Student should be able to derive some actual educational benefit from Student's placement. *Northside Indep. Sch. Dist.*, Dkt. No. 050-SE-1001 (SEA Tex. Jan. 4, 2002).

Although the additional supports recommended by student's experts might "enhance" and "improve" the "gains" and "success" student is experiencing, the IDEA does not require District to implement them. See *Kings Local Sch. Dist, Bd. of Educ. v. Zelazny*, 325 F.3d 724, 731 (6th Cir. 2003) (expert's program showed district how to maximize student's potential, but IDEA does not require it be implemented).

The inquiry is limited to whether Student was provided a meaningful educational benefit that is likely to produce progress, not regression or trivial advancement. Student does not need to improve in every academic and non-academic area to receive an educational benefit. *Houston ISD*, 582 F. 3d at 583.

In this case, if the measurements of Student's abilities are correct, they establish that Student's goals and the services provided by District are not appropriate for Student and are not reasonably calculated to enable the student to receive a meaningful educational benefit. Thus, re-evaluations of the Student's abilities are ordered to obtain the most accurate measurements, and the ARD is ordered to reconsider the IEP with those evaluations.

The failure to complete the ARD meeting denied the child educational opportunity. The failure to identify dyslexia, address it, and design goals and supports around it denied Student educational opportunity. The failure of the committee to rectify the disparity between the REED, which showed that Student was severely disabled, and the PLAAFP which showed that Student was operating on grade level, essentially guarantees that Student is not receiving proper

programming and support, which denies Student educational opportunity.

3. Non-Academic Benefits (Behavioral)

A need for special education and related services is not limited strictly to academics. It also includes behavioral progress and the acquisition of appropriate social skills. *Venus Ind. Sch. Dist. v. Daniel S.*, 36 IDELR 185 (2002). These are an important component of FAPE. Developing non-academic skills and knowledge is essential for Student to learn and succeed with some degree of independence. Here, there is a preponderance of evidence and testimony that Student received non-academic benefits during Fall 2019.

VI. Findings of Fact

Based upon the evidence and testimony the hearing officer makes the following findings:

A. Eligibility Under the IDEA

1. Student and Student's parents reside in the school district. During the 2019-2020 school year, Student attended the *** grade at ***. See, e.g., Ex. R. 3, p. 1. Student is expected to advance to *** at the beginning of the 2020-2021 school year. Ex. R. R. 3, p. 41. The *** closest to Student's stated *** goals would be the ***. Ex. R. 3, p. 341.
2. Student is eligible for special education services pursuant to the IDEA as a student with a Learning Disability in the areas Reading Fluency, Basic Reading Skills, Mathematics Problem Solving, and Other Health Impairment (OHI - ADHD). Student is also dyslexic. Speech Impairment was added during the October ***, 2019 ARD meeting. Res. Ex. 3, p. 1-2.

B. October *, 2019 ARD**

3. On October ***, 2019, an ARD meeting was convened. Student's mother attended. Ex. R. 3, p. 43. Student also attended a portion of the ARD committee meeting to discuss Student's *** goals. Ex. R. 3, p. 41.
4. Attendees for District included Dr. ***, District Special Education Director; ***, District ARD Facilitator; ***, General Education/Dyslexia Teacher; ***, Assistant Principal/Career and Technology Representative; ***, Special Education Teacher/Case Manager; ***, Speech Language Pathologist; ***, Occupational Therapist; ***, Licensed Specialist in School Psychology; and ***, District *** Special Education Specialist; and Amy Foster, Elgin ISD Attorney. Ex. R. 3., p. 43.
5. Parent's advocate attended by telephone necessitating a short delay to arrange the room to accommodate telephonic communications. District complains that Parent did not inform District before the meeting that an advocate would attend by telephone and not in person, although nothing in the IDEA requires Parent to give such advance notice. Ex. R. 3, p. 40. TR. Vol. 1, p. 448, L. 16-18. TR. Vol 1, p. 268, L. 1-14 (Testimony of District Special Education Director). TR. Vol. 2, p. 628-629, L. 16-25, 1-4, (Testimony of District ARD Facilitator).

1. Topics covered at the ARD meeting

6. The special education teacher and case manager reviewed the *** portion of the ARD committee meeting. Ex. R. 41, p. 3; Ex. R. 59a, Timestamp 5:30 – 10:50. She also

reviewed other portions of the IEP, including Student's current levels of performance and progress on current goals and objectives. Ex. R. 3, p. 42, Ex. R. 59a, Timestamp 1:11:20 – 1:18:15.

7. The Speech Language Pathologist reviewed the October 2019 speech evaluation and answered Parent's questions. TR. Vol. 1, p. 376, L. 2-13. TR. Vol. 1, p. 276, L. 20-24; TR. Vol. 1, p. 373, L. 7-8, p. 374, L. 9-10, p. 375, L. 4-7.
8. The Occupational Therapist reviewed the January 2019 occupational therapy evaluation and the October 2019 sensory processing evaluation. TR. Vol. 2, p. 702-703, L. 25, 1-2.
9. A Licensed Specialist in School Psychology reviewed the January 2019 cognitive and achievement evaluation and the October 2019 autism evaluation. TR. Vol. 2, p. 722-723, L. 22-24.
10. The presentation and review of these evaluations were incomplete and frequently interrupted. TR. Vol. 2, 723, L. 1-6. TR. Vol. 2, p. 552, L. 18-23 (Testimony of Special Education Teacher and Case Manager); TR. Vol. 2, p. 629, L. 11-14 (Testimony of District ARD Facilitator). TR. Vol. 2, p. 706, L. 3-5 (Testimony of Occupational Therapist); TR. Vol. 2, p. 724, L. 5-11 (Testimony of Licensed Specialist in School Psychology ("LSSP")).
11. Student's goals were not reviewed thoroughly during the ARD meeting. (Tr. Vol. 1, 574:20-25), (Tr. Vol. 1, 38:7-10, 98:15-19, 192:5-7) (Tr. Vol. 2, 574:20-25). Parent

requested more time to go over the goals but District refused. (Tr. Vol.1, 42:15-25, 43:1-23, 44:10-14).

12. Each of these areas, reviews of new evaluations, the PLAAPF, goals and objectives, schedule of services, accommodations, and LRE, are mandated by law to be addressed, and if any of them are skipped, the ARD was not duly constituted. (Tr. Vol. 1, 317:3-25, 318:1-25). These items, by law, must be completed regardless of how long it takes to complete them. (Tr. Vol. 1, 383:14-19, 451:20-25).

2. Required topics not covered in the ARD meeting

13. Student's dyslexia was not discussed. (Tr. Vol. 1, 37:5-11). Dyslexia was not listed as a unique need or eligibility and no goals were developed to address Student's dyslexia. (Tr. Vol. 1, 35:23-25, 36:1-18, 64:1-11). Parent requested measurable goals related to dyslexia. (Tr. Vol. 1, 357:8-15). Parent has experienced difficulties in getting support with dyslexia for Student. (Tr. Vol. 1, 83:18-25).
14. The 2019 evaluations from January and October were not reasonably reviewed for Parent's understanding. (Tr. Vol. 1, 92:9-14). When Parent asked questions about the evaluations, Parent was told there was not enough time to answer during the ARD meeting. (Tr. Vol. 1, 377:2-9; 457:20-25, 458:1-4) (Also see Ex. R. 59a).
15. Parent raised questions regarding the interpretation and accuracy of the January ***, 2019 REED, which listed Student at a Developmental Reading Assessment ("DRA") level of *** compared to Student's present level of performance. (Tr. Vol. 1, 303; 8-

- 11). Student's expert testified that this translated to a reading level in the middle of *** grade. (Tr. Vol. 1, 303; 8-17). District's expert testified that the DRA level translates to a reading level in the middle of *** grade. (Tr. Vol. 2, 819:8-18). Student's case manager testified that the DRA level of *** was in contradiction to the Lexile level in Student's Present Levels of Academic Achievement and Performance ("PLAAPF") and could not be accurate. (Tr. Vol. 2, 565:15-19, 566:13-17).
16. Parent raised questions regarding inconsistencies between Student's performance levels on evaluations and Student's grades. A Student who tested in the *** percentile on sight words, the *** percentile on phonetic decoding, the *** percentile on fluency, and a DRA level which translates to *** grade, would not typically be successfully working at *** grade level. (Tr. Vol. 2, 819: 21-25, 820:1-2). A Student with these types of disabilities does not usually earn grades as high as the grades Student received. (Tr. Vol. 2, 749:21-25) (Testimony of LSSP). Based on the processing speed and other cognitive deficits noted in the evaluation it would be extremely difficult for this student to be operating in *** grade classroom without additional, modified support. (Tr. Vol. 1. 312:14-23).
17. The PLAAPFs were not reasonably reviewed. (Tr. Vol. 1, 99:14-15, 197:15-16).
18. Parent attempted to ask questions about these inconsistencies at the ARD meeting but was told there was not enough time. Student may be functioning at *** grade level but receiving general education at *** grade level. That has vital implications on

the programming needed for all Student's classes. (Tr. Vol. 304:6-14). District only listed language arts, math, and communication as the areas that Student would be affected by Student's disabilities, but if Student is operating at the level stated in District's January ***, 2019 REED, it would affect Student in all Student's classes. (Tr. Vol. 1307:23-25, 308:1-6).

19. Parent was not able to raise her concerns with irregularities in the Autism evaluation (Tr. Vol. 1, 180:3-20). The Gilliam Autism Rating Scale is designed to collect input from both Parent and district staff. But only Parent completed it. (Tr. Vol. 1, 315:24-25, 316:1-7).
20. The Gilliam was started by one District evaluator who went on leave without ever submitting it. District's new LSSP took over the evaluation. Because he disfavored the Gilliam and felt his evaluation was complete, he did not submit the Gilliam to another teacher for input. Although Parent's information was received the LSSP admits he ignored that feedback. (Tr. Vol. 2, 731:1-24, 732:13-25, 733:1-2).
21. Based on Parent's submission for the evaluation,, identification with autism was very likely. If District staff had also filled out the Gilliam Autism Rating Scale and similar results were received, that could have changed the determination. (Tr. Vol. 1, 316:8-19).
22. Parent wished to address problems with Student's goals at the ARD meeting but was unable to because the goals section was never reached. At 1:10:20 in the recording

(Respondent's 59a), Parent objects when District tries to skip over reviewing the goals individually.

23. Student's goals did not contain measurable baselines. (Tr. Vol. 1, 342:5-25, 343:1-18). Without measurable baselines, it is impossible to determine progress. (Tr. Vol. 1, 342:5-25, 343:1-21).
24. Student is supposedly operating on ***-grade level, but Student's goals were written to elicit *** grade level skills. (Tr. Vol. 1, 309:21-25, 310:1-10).
25. Extended School Year services were not discussed at the meeting. (Tr. Vol. 1, 92:17-20, 99:9-11, 197:8-9).
26. Assistive technology was not discussed at the meeting. (Tr. Vol. 1, 99:12-13). Parent wanted it incorporated in Student's IEP as related to Student's dyslexia, but neither dyslexia nor AT were addressed at the ARD meeting. (Tr. Vol. 2, 884:21-25, 885:1-8, 886:21-25, 887:1-2).
27. Accommodations were not reviewed. (Tr. Vol. 1, 99:16-17, 197:18-19).
28. The schedule of special education services was not reviewed. (Tr. Vol. 1, 99:19-20).
29. It was not normal for a Parent to be told there was not enough time to answer questions about evaluations and that the committee had to move on. (Tr. Vol 1. 458:5-6) (Testimony of District's ARD administrator, based on attendance at hundreds of ARD meeting). Parent's questions should be answered at an ARD meeting, but this Parent's questions were not all answered. (Tr. Vol. 1 465:2-7) (testimony of District's

ARD administrator).

30. Because these required elements were not reviewed, the decisions of the ARD committee were not reasonably informed by the input of Parent, do not provide Student with a FAPE, and are not reasonably calculated to enable this student to make progress appropriate in light of this student's circumstances.
31. The District knows that an ARD committee failed to do its job if that ARD committee fails to address LRE, goals, schedule of services, and Extended School Year services (ESY). (Tr. Vol. 1, 456:2-22, 460:2-7).

3. Premature "completion" of ARD meeting

32. District imposed an arbitrary one-and-one-half hour time limit on the ARD meeting. (Tr. Vol. 1, 191:5-8). Parent was not notified in advance of this time limit. (Tr. Vol. 1, 90:4-13, 191:17-25, 192:1-4).
33. The ARD was conducted to prevent questions from Parent and summarily ended before the announced time limit.
34. District ended the meeting over Parent's objection. (Tr. Vol. 1, 193:13-23, 194:3-5).
35. Parent was asked if she agreed or disagreed with the proposed IEP. Parent declined to agree or disagree. Ex. R. 59a, Timestamp 1:18:20. Parent expressed a willingness to recess and continue the meeting. (Tr. Vol. 1 463:17-19)(Tr. Vol. 2, 646:19-21).
36. District's counsel ended the meeting without canvassing the other members of the ARD committee. (Tr. Vol. 1 463:15-16) (Testimony of District ARD Facilitator).

37. District's ARD Facilitator testified that the ARD was not completed on October ***, 2019. (Tr. Vol. 2 639:23-25). District's Special Education Director also testified that the meeting was not completed. (Tr. Vol. 1, 193:2-7).
38. Because the ARD meeting was not complete, Parent refused to agree or disagree, but District attempted to make Parent register agreement or disagreement. (Tr. Vol 1, 100:22-25, 101:1-3)(Tr. Vol. 2, 646:14-18).
39. District later acknowledged in writing that Parent had not agreed or disagreed. (Ex. R. 3, p.50). Parent neither agreed nor disagreed. (Ex. R. 59a); (Ex. R. 3, page 48)(missing checkmark for agree or disagree on the signature page).
40. Although all the required elements of an Annual ARD were not considered by the ARD committee, District recorded that the ARD was completed on October ***, 2019, indicated that Parent disagreed, and arranged a "reconvene ARD" in accordance with TAC 89.1050(g) (Ex. R. 44; Tr. Vol. 1, 259:3-11).
41. All District staff signed "agree" on October ***, 2019 even though all required elements of the ARD had not been addressed. (Tr. Vol. 2, 645:12-25, 646:1-3).
42. District treated the ARD meeting as completed on October ***, 2019, the same day the ARD meeting was conducted. (Tr. Vol. 2, 641:14-19) (Testimony of District ARD Facilitator) (Tr. Vol. 2, 590:15-19, 640:1-9).
43. Both during and after the meeting, Parent requested to table the meeting and continue it at a later date, because District's imposed time limit on October ***, 2019

had run out. District refused. (Tr. Vol. 1, 102:7-16, 261:6-18)(also see Ex. R. 59a starting at approximately 1:17:50).

44. The October ***, 2019 ARD meeting could have been continued and rescheduled, to allow the parties to come back to finish the agenda, but District only offered a 10-day reconvened ARD. (Tr. Vol. 2, 647:4-25) (Testimony of District ARD Facilitator).

4. Attempts to replace ARD meeting with outside meetings

45. At approximately 23:45 of the recording of the 10/*** ARD meeting, District begins reading the evaluations. (Ex. R. 59a). At approximately 24:20 Parent and the advocate asked the committee to slow down so they can find what page the data that is being read is on. At 24:25 District's counsel responds that "as you know we offered you multiple times to review this." District's counsel then told Parent and advocate that there was limited time.
46. At approximately 36:00 on the recording (Ex. R. 59a) Parent had a question on why Student's processing speed declined from *** on the previous evaluation to *** on the current evaluation. Parent and advocate were asking if that was significant and why it declined from "average" to "low." At approximately 36:45, the LSSP tells Parent "I would be happy to go over this at a later time."
47. Parent and advocate expressed that they wanted to review this in the current ARD meeting and that they didn't understand the evaluations. The LSSP expressed that he didn't do these evaluations, he is only reviewing them, and repeated "I would be glad

to meet with you at another time to go over it, you've had several opportunities." At approximately 37:55 the LSSP explains that he cannot answer the question because he did not do the observation.

48. At 38:40 District's counsel asks Parent and advocate to "save their questions for the end." At approximately 39:08 Parent expresses frustration that the meeting is being pushed along so fast when she doesn't understand, and District's counsel states that is why they asked her to meet with evaluators in a separate meeting outside the ARD. When the LSSP again explains that he cannot answer the question about the processing speed because he didn't do the observations, Parent asks who did the observations. District reluctantly gives her an answer and then at approximately 40:18 again tries to cut off questions by repeating that "this has been provided to you."
49. At approximately 45:25 Parent asks "Why are we skipping paragraphs" in the evaluation. A District employee responded that it was extra detail and that "we can go over that at a different time if you would like." Parent states she wants to go over the report, and that she set aside today to go over the report.
50. At approximately 46:26 the District Special Education Director tells Parent "In the meeting notice there were actually 20 different times that were offered to go over the report." Parent again says she wants to go over the whole reports and District's counsel says "We're not going to have time to do that." District's counsel states they are going to go over broad strokes today and can schedule a meeting (with evaluators)

to go into more detail. Parent says she wants it to be part of the ARD meeting. Parent and advocate object to skipping the rest of the evaluation review.

51. At approximately 48:58 District's counsel states that none of the rest of the committee needs to read the evaluation. Parent objects that she does and that she is part of the committee. District's counsel states "we don't have time for that." Parent objects that she is not being allowed to be a part of the committee and review the evaluations. District's counsel again states that there was no time for this, "that they had made multiple offers to go over it." Parent continues to object that she doesn't understand the report. District's counsel states "That is why we offered multiple times to discuss this with you privately." Parent states "I want to discuss this in ARD where it should be." District's counsel replies "that is not a requirement."

52. At approximately 1:18:15 District's counsel informs everyone that there is limited time left for the meeting. Parent and advocate propose that they come back another time when there is plenty of time to finish the meeting. District's counsel asks if they are in disagreement with the proposals sent ahead of time. Advocate explains that they want to review the proposals and understand. District's counsel repeatedly tries to solicit from Parent that she is in disagreement. Parent and advocate repeatedly state they want to continue the ARD because the committee has not reviewed goals, assistive technology, and other items. Over the objection of Parent, District's counsel proceeds to end the meeting and to schedule a 10-day reconvene ARD meeting.

Advocate asks if they are setting a date to finish the ARD, and District's counsel answers that they are offering only a reconvene.

53. It is clear from a review of the meeting that District repeatedly insisted that there was no time to review the January ***, 2019 REED/FIE (Ex. R. 6) and the new October ***, 2019 Evaluation (Ex. R. 5). District repeatedly insisted that the evaluations should have already been reviewed at a separate outside meeting or could be reviewed at a later meeting but could not be reviewed in full at the ARD meeting.
54. The crux of the disagreement is that District wants to review the evaluations with Parent at a meeting with only the evaluators present and outside of and separate from an ARD meeting. (Tr. Vol. 1, 188:12-17). The full ARD committee would not have been present at this "outside evaluation review" to collaborate. (Tr. Vol. 1, 189:6-9).
55. Collaboration with the ARD committee is required by statute but ARD collaboration would not have occurred at a separate meeting. (Tr. Vol. 1, 189:10-17) (Testimony of District Special Education Director). No statute governs the terms, participants, or requirements of this proposed outside evaluation review. (Tr. Vol. 1, 190:1-8).
56. District insisted that the place to review an evaluation was in an outside meeting and not in the ARD meeting. District's counsel asserted that reviewing the evaluation in the ARD "was not a requirement." (Ex. R. 59a).
57. Using outside meetings to review Parent concerns is a regular practice of District, and one of the purposes is to reduce the time required of the ARD committee members

in ARD meetings. (Tr. Vol. 2, 649:25, 650:1-12) (Testimony of District ARD Facilitator).

The LSSP considers the practice of reviewing the evaluations in a separate meeting a “best practice.” (Tr. Vol. 2, 722:4-7).

58. Parent wanted to review the evaluations at the ARD meeting instead of an outside meeting. (Tr. Vol. 1, 131:8-11). While District staff was aware Parent wanted to review the evaluation at an ARD meeting, District offered only to review the evaluations outside the ARD. (Tr. Vol. 1, 39:4-12).
59. Parent was willing to stay at the ARD meeting as long as necessary to review the evaluations in their entirety. (Tr. Vol. 1, 96:16-25). Parent was told that there was not enough time to review the evaluations at an ARD meeting, and so Parent’s questions were not answered to her satisfaction. (Tr. Vol. 1, 88:2-10).
60. Parent had questions about the new disability eligibility for speech and what was going to be done to address that, but her questions were not answered because District wanted to move on in the meeting. (Tr. Vol. 1, 97:1-24).

C. The 10-day reconvene meeting

61. District refused to continue the ARD meeting on a later date and offered a 10-day reconvene date of November ***, 2019. Parent did not agree. Ex. R. 3, p. 42. Ex. R. 41; Ex. R. 42; Ex. R. 3, p. 50; Ex. R. 43.
62. On November ***, 2019, the school staff convened to hold a 10-day reconvene ARD meeting. Neither Parent nor her advocate attended, so the ARD committee quickly

adopted the IEP and adjourned the meeting. Ex. R. 44.

63. On November ***, 2019, the District ARD Facilitator sent a copy of the ARD report and IEP to Parent. Ex. R. 43. That same day, Parent's advocate emailed District's counsel citing complaints about the ARD committee meeting and requesting another ARD meeting. Ex. R. 47, p. 3.

64. On November ***, 2019, District's counsel responded to Parent's advocate's email, noting that District disagreed with her characterization of the ARD meeting, specifically the statement that it was not a "REAL ARD." District's counsel asked Parent's advocate to explain what issues Parent had with the IEP. Ex. R. 47, p. 1. District sent Parent a Prior Written Notice declining to hold another ARD meeting. Ex. R. 46.

D. Due Process Resolution Session

65. The resolution session was convened on December 30, 2019 within the statutory time limits. The District Special Education Director and her administrative assistant were the only representatives from District who attended the resolution meeting. (Tr. Vol. 1, 199:15-20). District's notice of the meeting did not inform Parent in advance who would be attending the meeting on behalf of District. (Tr. Vol. 1, 275:11-20).

66. Although Student's complaint and request for due process addressed the development of an IEP including speech therapy, the District Special Education Director convened the session without any other members of the ARD committee,

including those who could address the issues raised in Student's complaint. The director represented that she was the sole-decision maker and therefore no other ARD members were necessary. (Tr. Vol. 1, 201:20-25, 202:1-4, 205:2-16). The relevant members of the IEP team were not at the resolution session. Tr. Vol. 2, 800:20-25, 801:1-3, 801:11-20).

E. The IEP – Meaningful Progress

67. Based on inconsistencies, either the January ***, 2019 REED/FIE inaccurately measured student's abilities, or Student's performance level in Student's PLAAPF or Student's grades do not accurately reflect Student's present achievement levels. The REED shows Student has cognitive deficits and low achievement levels, but the PLAAPF shows Student is basically on grade level. Either District's assessment is profoundly wrong, or Student is not receiving services appropriate to Student's individual needs to operate on *** grade level, and the goals were not appropriate or tailored to Student's abilities.
68. The ARD committee did not work collaboratively to review the evaluations, address the inconsistencies, and develop the goals. District insisted on moving the meeting forward and ultimately ending the meeting without fully addressing evaluations or goals prevented this collaborative review and development. If the ARD committee had taken the time to address these inconsistencies, as was prompted by Parent questioning, action could have been taken to provide an appropriate education for

this Student.

69. Some grades and evaluations by District indicate student is doing well and progressing:

- a. Student completes some grade-level work. TR Vol. 1 p. 491, L. 5-7 (Testimony of *** grade *** Teacher); TR. Vol. 1, p. 387, L. 21-23 (Testimony of Special Education Teacher). During the 2019-20 school year, Student's placement was in general education classes for all classes. Ex. R. 3, p. 37. TR Vol. 1, p. 249-250, L. 24-25 (Testimony of District Special Education Director).
- b. Student received the following fall 2019 semester grades: ***. Ex. R. 1, p. 2 (Fall Semester 2019-2020 Report Card). Student is *** in ***, a *** class. Student passed *** for the fall 2019 semester. TR. Vol. 1, p. 250, L. 13-23; TR. Vol, 1, p. 443, L. 17-21.
- c. Student has received speech language therapy since November ***, 2019. Based on an evaluation by Speech Language Pathology Assistant, Student had already mastered one of Student's speech goal objectives by January ***, 2020. Ex. R. 50. Student is making "better than average" progress on Student's speech goals and objectives. TR. Vol. 1, p. 374, L. 16-25. Student is not a student who needs compensatory speech services. TR. Vol. 1, p. 375, L. 1-3.
- d. Student accesses the Wilson Reading program. TR. Vol. 1, p. 17, L. 15-16. Wilson Reading is an Orton-Gillingham approach to reading that is considered a best

practice for teaching students with dyslexia. TR. Vol. 1, p. 18, L. 4-5, 16-20.
(Testimony of General Education/Dyslexia teacher).

- e. Student has been in the dyslexia class for the 2018-19 and 2019-20 school years.
TR Vol. 1, p. 17, L. 5-8. That teacher reports that Student made good progress in Student's dyslexia program and increased Student's reading skills, showing growth in all areas. TR. Vol. 1, p. 21, L. 2-3.
- f. Student demonstrated a 22 percent growth in Student's total mastered and a 14 percent growth in total . TR. Vol. 1, p. 21, L. 1-7. Student demonstrated an additional growth of an estimated 20 percent since October 2019. Id., L. 7-10. Student demonstrated a 28 percent growth in skills mastered, and currently had has *** in that class. TR. Vol. 1, p. 23, L. 8-12, 15.
- g. In August 2018, Student was on Wilson Reading program **. Student progressed to ** by October 2019, and at the time of the hearing, had completed the entire level ** and was beginning level **. TR. Vol. 20, p. 18-25. Generally, each step takes six to twelve weeks and two steps per semester is very typical growth. TR. Vol. 1, p. 25, L. 18-24. (Testimony of General Education/Dyslexia teacher).
- h. Student was working on ** grade level texts. TR. Vol. 2, p. 584, L. 18-20 (Testimony of Special Education Teacher/Case Manager). Student progressed from a Lexile Reading level of ** (** grade) to ** (** grade) during the IEP year. TR. Vol. 2, p. 582, L. 21-25. Student reads at a speed level commensurate

with other students. TR. Vol 2, p. 602, L. 1-3.

- i. During tutoring sessions with the Special Education Teacher/Case Manager, Student's writing improved, and Student's ability to expand on inferences in Student's writing samples increased. TR. Vol. 2, p. 607, L. 5-8.
 - j. Student's math skills, speed level, and degree of progress were comparable to other 504 and special education population students. TR. Vol. 2, p. 609-610, L. 25, 1-6 (Testimony of the Special Education Teacher/Case Manager).
70. Student is receiving non-academic benefits in Student's current placement:
- a. Student has friends at school. TR Vol. 1, p. 25, L. 8, (Testimony of General Education/Dyslexia Teacher); TR. Vol. 1, p. 371, L. 15-18 (Testimony of Speech Language Pathology Assistant); TR. Vol 1, p. 386, L. 19-21, (Testimony of Special Education Teacher); TR Vol. 1. p. 482, L. 10-18 (Testimony of *** Grade *** Teacher); TR Vol 2, p. 554, L. 20-24 (Testimony of Special Education Teacher/Case Manager); TR Vol. 2, p. 707, L. 1-13 (Testimony of Occupational Therapist); TR. Vol 2, p. 727, 17-19 (Testimony of LSSP). The Special Education Teacher has never noticed Student to have any deficiencies in the area of social behavior. TR. Vol. 1, p. 387, L. 1-4.
 - b. Student can be a happy student who is a "sweet kid" and very polite. TR. Vol. 2, p. 706, L. 23-24 (Testimony of Occupational Therapist). Student can "sit and eat lunch with Student's friends, laughing, joking." TR. Vol. 2, p. 707, L. 1-7. Student

can make eye contact with the Occupational Therapist as well as with Student's peers. TR. Vol. 2, p. 707, L. 8-12. Student is a "funny and witty and respectful and kind" student. TR. Vol. 1, p. 19, L. 11-12 (Testimony of General Education/Dyslexia Teacher). The Special Education Teacher has not observed any issues with Student making eye contact with her or with Student's peers. TR. Vol. 1, p. 389, L. 4-10. The *** Grade *** Teacher observed that Student was "a kind ***," had friends, worked well in groups, made eye contact with her and Student's peers, and had no disciplinary issues. TR. Vol. 1, p. 486-487, L. 25, 1-25. TR. Vol. 1, p. 488, L. 7-14. Student was a happy student, had friends, made eye contact with her and was making academic progress. TR. Vol. 2, p. 554-555, L. 18-25, 1-3 (Testimony of Special Education Teacher/Case Manager).

- c. Student's social development is on par with Student's peers; Student's behavior does not make it possible to "pick Student out of the room." TR. Vol. 2, p. 708, L. 6-15 (Testimony of Occupational Therapist). The General Education/Dyslexia Teacher and the Special Education Teacher have not had any discipline problems with Student. TR. Vol. 1, p. 24, L. 5-6; TR. Vol. 1, p. 388, L. 7-9.
- d. The Special Education Teacher and *** Grade *** Teacher have not seen Student having any issues in gaining physical access to the classroom. TR. Vol. 1, p. 391, L. 3-5; TR. Vol. 1, p. 492-493, L. 17-22, 2-5.

71. By other measures, student is not making meaningful progress:

- a. Student failed the STAAR ***. (Tr. Vol. 1, 280:7-17).
 - b. Student failed the STAAR ***. (Tr. Vol. 1, 680:12-13).
 - c. On the the STAAR ***, Student scored an “approaches grade level,” answering ***% questions correctly. Ex. R. 3, p. 13; Tr. Vol. 1, 681:16-25.
 - d. Student receives a concerning number of failing grade reports. (Tr. Vol. 1, 269:5-14); (Tr. Vol. 1, 403:23-25, 404:1-5).
 - e. Student may have significantly more failing grades than are recorded in Student’s Exhibit MM. Student received failing grade alerts for a grading cycle, without receiving any individual failing grade alerts that would cause or trigger that cycle alert. District staff could not explain that anomaly. (Tr. Vol. 1, 416:16-25).
72. The ARD failed to consider thoroughly whether Student is making meaningful progress. It did not investigate the apparent inconsistencies, and it did not allow or consider the required input from Parent.

F. Failure to collaborate and protracting the final resolution

73. The hearing officer specifically finds that neither party protracted the final resolution of this complaint because both parties engaged in conduct that was not collaborative. It will be unfortunate if this level of collaborative effort continues.
74. The success of an ARD meeting depends in part on rules and protocols for behavior of the participants. No one at the due process hearing testified the ARD meeting was a success. It wasn’t. It was undisputed that communication was outside the norms seen

in other ARD meetings. All participants could have acted in a more collaborative fashion resulting in fewer interruptions and delays and benefits to Student. Although both parties have blamed the other, it is right that each bear a fair share of the responsibility, and so neither can be found responsible for prolonging the proceedings.

75. District failed to facilitate Parent's input and participation. District could have recessed the October ***, 2019 ARD and rescheduled to discuss the issues more completely and collaboratively. District effectively insisted on replacing the ARD with informal unregulated meetings. Unless sufficient time is allowed for ARD meetings to engage in reasonable dialogue and consideration by all members, then It is unreasonable to characterize the non-ARD meetings as being a best practice in preparation for a full discussion at an ARD meeting.
76. Parent did not reasonably communicate with District. The record is replete with examples of a pattern of missed opportunities to communicate in ways more typical of people trying to work collaboratively for the benefit of Student.
 - a. Parent could have given prompt consent and provided timely information for the FIE evaluations. TR. Vol. 1, p. 131, L. 18-22; Ex. R. 22; TR. Vol. 1, p. 136, L. 6-15; Ex. R. 20; TR. Vol. 1, p. 218-219, L. 12-25, 1; Ex. R. 21; TR. Vol. 1, p. 219, L. 2-6.
 - b. Parent's advocate sent signed consent forms 20 days after the district requested them. Ex. R. 23.

- c. Parent did not provide completed protocols for speech evaluation until after September ***, 2019, the agreed upon deadline for completion of the evaluations. TR. Vol. 1, p. 139, L. 10-14. Ex. R. 28, p. 1-2.
 - d. On September ***, 2019 the LSSP emailed Parent regarding the status of the protocols. Ex. R. 29, p. 1. TR. Vol. 2, p. 717, L. 15-21.
 - e. On September ***, 2019 Parent returned some of the requested protocols to the speech language pathologist. Ex. R. 31, p. 1.
 - f. On September ***, 2019 the speech language pathologist emailed Parent about completing the remainder of the protocols. Ex. R. 31, p. 3.
 - g. On September ***, 2019 LSSP left a voicemail regarding return of the protocols and scheduling an interview for the evaluation. Ex. R. 40, p. 21. TR. Vol. 2, p. 4-8.
 - h. On October ***, 2019 Parent returned the protocols. Ex. R. 29, p. 2. In an email to the District Special Education Director, the LSSP noted that there was “no way I can score and interpret” the protocols by the end of that day. Ex. R. 29, p. 4.
77. Parent did not reasonably collaborate with District in scheduling matters. The record is replete with examples of a pattern of missed opportunities to collaborate in ways more typical of people trying to work collaboratively for the benefit of Student.
- a. Parent has attended ARD meetings for Student for several years. Previously she would promptly respond and provide dates and times to District, and district staff and Parent would come to together to discuss Student’s education. TR. Vol. 1, p.

128, L. 13-15, 18-25.

- b. Starting July ***, 2019, District sent 7 emails, made 4 telephone calls, and mailed 2 letters to Parent. In those communications, District asked for proposed dates to schedule an ARD meeting. Several scheduled ARD meetings were cancelled or rescheduled at Parent's request. TR. Vol. 1, p. 130, L. 7-9; Ex. R. 15; TR. Vol. 1, p. 124-125, L. 24-25, 1-5; Ex. R. 15; Ex. R. 17; Ex. R. 40, p. 7; TR. Vol. 1, p. 125, L. 19-22; TR. Vol. 1, p. 125, L. 23-24; Ex. R. 20; TR. Vol. 1, p. 218-219, L. 12-25, 1; Ex. R. 24; Ex. R. 25; TR. Vol. 1, p. 227, L. 11-15; Ex. R. 26; Ex. R. 27; Ex. R. 40, p. 7; Ex. R. 40, p. 7; Ex. R. 27, p. 1; TR. Vol. 2, p. 621, L. 8-14; Ex. R. 35; Ex. R. 36.
- c. On October ***, 2019 Parent proposed dates and times for the ARD Meeting. Ex. R. 37. The next day District confirmed that an ARD meeting was scheduled for October ***, 2019. Ex. R. 39. Ex. R. 40, p. 6-7.

78. Parent chose not to utilize processes routinely made available by District. Although the informal conferences offered by District as a best practice do not replace the ARD meeting, Parent might have gained a better understanding of the evaluations and the information provided by District if they had taken place.

- a. District provided Parent with copies of the evaluations and offered to meet to answer questions on at least twelve dates. Ex. R. 39. TR. Vol. 2, p. 722, L. 11-18. Ex. R. 14, p. 5; Ex. P. D, Timestamp 5:19-5:55. Ex. R. 33; Ex. R. 34; Ex. R. 18; TR. Vol. 1, p. 130-131, L. 16-18, 24-25, 1-6; Ex. R. 33; Ex. R. 34; TR. Vol. 40, p.

21; TR. Vol. 2, p. 721, L. 4-16; TR. Vol 2, p. 721-722, L. 21-25, 1-10; TR. Vol. 2, p. 735-736, L. 16-25, 1-6.

VII. Conclusions of Law

1. District is responsible for providing a FAPE for Student under the IDEA, 20 U.S.C. §1400, et seq., and related statutes and regulations in accordance with the standards of *Andrew F. ex rel. Student F. v. Douglas Cty. Sch. Dist.*, RE-1, 137 S. Ct. 988 (2017); and *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997).
2. Student's claims arising outside the one-year statute of limitations in Texas are barred by the statute of limitations. 19 Tex. Admin. Code § 89.1151(c). Student's claims arising before June 4, 2019 are barred by the settlement agreement between the parties.
3. Student bears the burden of proof on all issues raised in the complaint. *Schaffer v. Weast*, 126 S.Ct. 528 (2005); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir.), *cert. denied*, 531 U.S. 817 (2000).
4. Student was denied FAPE during the relevant time period. 20 U.S.C. § 1414(d)(1)(A), (d)(2)(A), (d)(6); 34 C.F.R. §§ 300.320, .323(a); *Andrew F. ex rel. Student F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017).
5. Student met the burden of proof to show that District's provision of special education to Student was inappropriate under the standards of *Andrew F. ex rel. Student F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017); and *Cypress-Fairbanks Ind. Sch. Dist.*

v. Michael F., 118 F. 3d 245 (5th Cir. 1997); 20 U.S.C. §1400, et seq., and related statutes and regulations; and 34 C.F.R. § 300.552; *C.G. v. Waller Ind. Sch. Dist.*, 2017 U.S. App. LEXIS 11139* (5th Cir. 2017); 34 C.F.R. §§ 300.22, 300.323 (a); 19 Tex. Admin. Code § 89.1055 (e).

6. Student was not provided with the requisite educational benefit. *Andrew F. ex rel. Student F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017); and *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997).
7. District impeded Parent’s opportunity to participate in decision-making causing a deprivation of educational benefit. 34 C.F.R. §§ 300.503 (a)(c); 300.504(a)(d); 300.513 (a)(2).
8. District provided opportunities for Parent to review evaluations and ask questions outside the ARD meeting, but those meetings do not replace the ARD meeting, and meetings with individual members of the ARD committee do not replace discussion with all members of the ARD committee. 34 CFR § 300.501(b)(3).
9. District substantially impeded Parent’s opportunity to participate by i) failing to allow sufficient time for questions and input by Parent during the ARD, ii) failing to cover all required topics in the ARD, iii) prematurely declaring the ARD as “completed” before Parent could agree or disagree, and iv) failing to recess the ARD on October ***, 2019, as requested by Parent. 34 CFR §§ 300.501(b), 300.324(a).
10. Even if it was frustrating to schedule meetings or difficult to work with Parent, that

does not excuse District's failure to allow Parent to participate in the ARD and provide meaningful input. *See Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1055 (9th Cir.2012) (“[P]articipating educational agencies cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming Parents.”); *see also Target Range*, 960 F.2d at 1485 (holding that the school district could not blame Parents' choice to leave an IEP meeting for its own failure to create an IEP with the participation of the appropriate parties). *Doug C. v. Hawaii Dep't of Educ.*, 720 F.3d 1038, 1045 (9th Cir. 2013).

11. A 10-day reconvene ARD is offered only if a Parent disagrees with the proposed IEP. 19 TAC 89.1050(g)(1).
12. District failed to have the requisite members of the ARD at the Resolution Meeting. 34 CFR § 300.510.
13. District did not unreasonably protract the proceedings considering the actions taken by Parents. 20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3).
14. Student's claims arising under any laws other than the Individuals with Disabilities Education Act are outside the jurisdiction of a special education hearing officer in Texas. 34 C.F.R. §§ 300.503 (a); 300.507; 19 Tex. Admin. Code § 89.1151 (a).
15. Student's requests for an award of attorneys' fees and litigation costs are outside the jurisdiction of a special education hearing officer in Texas. 34 C.F.R. §§ 300.516, 300.517; 19 Tex. Admin. Code § 89.1185 (n).

VIII. Orders

Based upon the foregoing findings of fact and conclusions of law, **IT IS ORDERED:**

1. District shall contract for Independent Educational Evaluations (IEEs) in the areas of autism, occupational therapy, speech, cognitive, achievement, dyslexia, dysgraphia, dyscalculia, and auditory processing, at District's expense, within 10 days after receiving the requisite consent form(s) signed by Parent. Within 5 days of receiving this order District shall mail Parent the requisite consent form(s) for approval signature. Such evaluations shall be conducted in accordance with the evaluators schedule and be performed and completed as soon as feasible taking into account COVID-19 precautions in place by the District.
2. District shall contract for an independent Individualized Education Program Facilitator under Texas Education Code Sec. 29.020 to serve the ARD committee for the Spring 2020 and Fall 2020 semesters. Such ARD meetings shall be conducted in accordance with the facilitators schedule and be convened and completed as soon as feasible taking into account COVID-19 precautions in place by the District. The meeting for the Spring 2020 semester must be convened within 20 days of this order.
3. The ARD committee must review, discuss, and collectively consider the results of the IEEs, appropriate data, frequency of collection, and manner and frequency of reporting for Parent.
4. The ARD committee must consider student's strengths, parental concerns for

enhancing student's education, the results of the most recent evaluation data, and Student's academic, developmental and functional needs.

5. The IEP must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the duration and frequency of the services, and the location of services.
6. Student's requests for reimbursement of Parent's expenses related to educational or diagnostic services are DENIED.
7. Claims arising before June 4, 2019 are DISMISSED.
8. Student's requests for attorneys' fees and litigation costs are DISMISSED.
9. Student's claims arising under any law other than the Individuals with Disabilities Education Act (IDEA) are DISMISSED.
10. To the extent either party seeks an award or reimbursement of attorney's fees or costs, such request is DISMISSED.
11. To the extent either party seeks affirmative relief arising under any law other than the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §1400 et seq. (2004), such claims are DISMISSED.
12. All other requested relief not specifically granted herein is DENIED.

SIGNED on May 4, 2020.

RAY E. GREEN

Special Education Hearing Officer

For the Texas Education Agency

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NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 19 Tex. Admin. Code §89.1185(p); Tex. Gov't Code, Sec. 2001.144(a) (b).