

**DOCKET NO. 226-SE-0517**

<b>STUDENT, B/N/F</b>	§	<b>BEFORE A SPECIAL EDUCATION</b>
<b>PARENT and PARENT,</b>	§	
<b>Petitioner</b>	§	
<b>v.</b>	§	<b>HEARING OFFICER FOR</b>
<b>LEANDER INDEPENDENT SCHOOL</b>	§	
<b>DISTRICT,</b>	§	
<b>Respondent</b>	§	<b>THE STATE OF TEXAS</b>

**DECISION OF THE HEARING OFFICER**

**I. PROCEDURAL HISTORY**

Student, \*\*\*, b/n/f Parent and Parent (Petitioner) brings this action against the Leander Independent School District (Respondent, or the School District ) under the Individuals with Disabilities Education Act, as amended, 20 U.S.C. § 1401 et. seq (IDEA) and its implementing state and federal regulations.

There are three primary issues in this case. First, whether the School District denied Student a free appropriate public education (FAPE) during the 2016-17 school year. The second issue is whether the Petitioner is entitled to reimbursement for the unilateral private placement of Student. Third, whether The School District violated Parent and Student’s procedural rights under the IDEA, resulting in a denial of a FAPE. The hearing officer concludes that:

1. The School District provided Student with a FAPE during the relevant time period;
2. Petitioner is not entitled to reimbursement for the unilateral private placement of Student; and
3. The School District violated Parent’s procedural rights at the September \*\*\*, 2016 Admission Review and Dismissal committee meeting by significantly impeding Parent’s opportunity to meaningfully participate in the decision-making process regarding the provision of FAPE to Student.

**A. Legal Representatives**

Student was initially represented in this litigation by Student's legal counsel, Sonja Kerr, and her co-counsel, Devin Fletcher, both with the Cuddy Law Firm. On March 6, 2018, Mr. Fletcher and the Cuddy Law Firm withdrew as counsel for Petitioner. Ms. Kerr continued to represent Petitioner, but was no longer affiliated with the Cuddy Law Firm. The School District has been represented throughout this litigation by its legal counsel Kelly Shook of Walsh Gallegos Treviño Russo & Kyle, P.C. and by her co-counsel, Jennifer Wells, General Counsel for the School District.

**B. Resolution Session**

The parties held a Resolution Session on June 2, 2017, but were unable to reach an agreement.

**C. Continuances**

Three continuances were granted in this case. On June 29, 2017, a continuance and extension of the decision due date was granted for good cause, at both parties' request, to accommodate availability of Student's mother and critical witnesses for Respondent. The due process hearing was continued from July 6 and 7, 2017 to September 6 and 7, 2017 and the decision deadline was extended for good cause from August 5, 2017 to October 9, 2017. On July 18, 2017, Petitioner requested a continuance and extension of the decision due date to accommodate a scheduling conflict for Petitioner's counsel. The hearing was continued from September 6 and 7, 2017 to October 3 and 4, 2017 and the decision deadline was extended for good cause from October 9, 2017 to November 6, 2017. On October 8, 2017, Petitioner's request for a continuance and extension of the decision due date was granted for good cause to accommodate availability of witnesses who were on extended medical leave. The parties selected March 20, 2018 as the date to continue the hearing to take the testimony of the witnesses who were unavailable on October 3 and 4, 2017. To accommodate the March 20, 2018 hearing date, the decision deadline was extended for good cause to April 13, 2018. At the joint request

of the parties, the decision due date was extended for good cause to May 18, 2018, to allow for post-hearing briefing with the benefit of the hearing transcript.

#### **D. Preliminary Motions**

Several preliminary motions were disposed of by written orders to resolve a sufficiency challenge, jurisdictional matters and Petitioner's motion to recuse. On August 18, 2017, Respondent filed a plea to the jurisdiction and challenged the sufficiency of Petitioner's amended complaint. Order No. 8, issued on August 25, 2017, denied both the plea to the jurisdiction and the sufficiency challenge. Petitioner submitted a letter requesting the hearing officer recuse himself from the case. The motion to recuse was denied by both the hearing officer and the second review hearing officer.

### **II. DUE PROCESS HEARING**

The due process hearing was conducted on October 3 and 4, 2017 and March 20, 2018. Petitioner was represented by Petitioner's legal counsel Sonja Kerr and Devin Fletcher at the October 3 and 4, 2017 hearing sessions and by Ms. Kerr only at the March 20, 2018 session, following the withdrawal of Mr. Fletcher and Student's law firm as counsel for Petitioner. In addition, Student's parents, \*\*\* and \*\*\*, also attended the hearing. Respondent continued to be represented by its legal counsel Kelly Shook and Jennifer Wells. In addition, \*\*\*, Director of Special Education for the School District, attended the hearing as the party representative. The hearing was recorded and transcribed by a certified court reporter.

At the conclusion of the hearing the parties requested the record remain open and the decision be extended for good cause to May 18, 2018 in order to allow submission of written closing arguments on the seminal issues in this case. Those pleadings were submitted by both parties in a timely manner.

### III. ISSUES AND REQUESTED RELIEF

#### A. Petitioner's Issues

Petitioner submitted the following issues:

#### FAPE

1. Whether the school district failed to devise an appropriate Individualized Education Program (IEP for Student for the 2016-17 school year) and therefore failed to provide Student with a FAPE under the IDEA within the one year statute of limitations period that applies in Texas;
2. Whether the School District repeatedly refused to consider increased or improved special education instruction and related services for Student during the 2016-2017 school year;
3. Whether the School District denied Student a FAPE reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances and one that was appropriately ambitious in light of Student's circumstances and one that afforded Student a chance to meet challenging objectives;
4. Whether the School District denied Student appropriate direct instruction in reading, math, and writing;
5. Whether the School District is denying Student a FAPE designed to meet Student's unique educational needs and consistent with the requirements of the IDEA as described within the *Andrew F.* decision, including providing an IEP that is reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances, and one that is appropriately ambitious in light of Student's circumstances and that provides Student a chance to meet challenging objectives;
6. Whether the School District denied Student extended school year services (ESY) for the summer of 2017 and failed to fairly and correctly determine Student's need for ESY. And, if so, whether it was done so without regard to any data based approach of determination;
7. Whether the School District denied Student appropriate assistive technology (AT), including devices, software, and training and use of AT in conjunction with other services;

#### Parental Participation

8. Whether the School District failed to ensure the collaborative, cooperative Admission, Review, & Dismissal Committee (ARD)/IEP process required by the IDEA and Texas law

and significantly impeded parental involvement in the IEP process during the 2016-2017 school year.;

9. Whether the School District significantly impeded meaningful parental involvement by limiting parental access to observe in classrooms for a period of time, refusing or delaying the provision of information and data, ignoring or summarily refusing parental request or limiting free discussion of the ARD committee about Student's need for meaningful direct special education instruction for reading and math, delaying the provision of counseling, refusing to participate in mediation, and refusing to convene an ARD committee meeting to consider Petitioner's request for private schooling for Student;
10. Whether the School District failed to comply with prior written notice as required by the IDEA and Texas law by issuing the three page letter from Respondent's Special Education Director on May \*\*\*, 2017; and
11. Whether the School District failed to comply with prior written notice each time it summarily refused or denied a parental request during the 2016-2017 school year.

**B. Respondent's Legal Position and Additional Issues**

Respondent generally denies all allegations that Student was denied a FAPE. Respondent also asserts that if any procedural violation might have occurred, it did not result in the denial of a FAPE for Student. Respondent further asserts that Petitioner's claims that implicate a delay in adopting and implementing an IEP are barred by the doctrine of laches as the delays were caused by Student's Parents frequent scheduling and rescheduling of IEP meetings.

**C. Petitioner's Requested Relief**

Petitioner requests the following items of requested relief:

1. The School District prepare an IEP for Student that is designed to meet all of Student's unique educational needs;
2. The School District reimburse Parent for the costs of Student's private school education at \*\*\*;
3. The School District provide Student with compensatory education or reimbursement for tutoring in an amount equal to the deprivation of education Student has experienced;

4. The School District reimburse Petitioner for all costs of private evaluations and tutoring incurred by Student's parents from August \*\*\*, 2016, to the present.

#### IV. FINDINGS OF FACT

1. Student is a \*\*\* year old \*\*\* grade student who resides within the geographic boundaries of the School District. During the 2016-17 school year, Student attended \*\*\* Grade in the School District. During the 2017-18 school year, Student attended \*\*\* Grade at the \*\*\* from the beginning of the school year to March \*\*\*, 2018. Student finished \*\*\* Grade at \*\*\*, a public charter School, attending from March \*\*\*, 2018 to the end of the school year.<sup>1</sup>

#### Prior Litigation

2. On May 20, 2016, Petitioner filed a request for a due process hearing against Respondent, alleging violations of the IDEA (the May 2016 complaint). The case was assigned Docket No. 267-SE-0516. The due process hearing on the May 2016 complaint was held on July 18 and 19, 2016.<sup>2</sup>
3. On August 22, 2016, a decision was issued resolving the issues raised in the May 2016 complaint. The hearing officer found Student had a disability and required special education services to address Student's Specific Learning Disability (SLD) for written expression and an Other Health Impairment (OHI) for Attention Deficit Hyperactivity Disorder (ADHD) and \*\*\* (\*\*\*). The hearing officer also found the School District denied Student a FAPE by failing to initiate special education services beginning on February \*\*\*, 2016.<sup>3</sup>
4. The hearing officer ordered the School District to convene an ARD committee meeting to implement an IEP for Student consistent with the Full Individual Evaluation (FIE) completed by the School District on January 4, 2016. Specifically, the hearing officer ordered the School District to convene an ARD committee meeting and for the ARD committee to revise an IEP originally drafted in January of 2016, but never implemented.<sup>4</sup>
5. The School District appealed the hearing officer's decision on the May 2016 complaint to federal district court. On January 30, 2018, the federal court issued an order on the parties cross motions for judgement on the administrative record. The federal court

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<sup>1</sup> Joint Exhibit (J.Ex.) 6; Petitioner's Exhibit (P.Ex.) 15.

<sup>2</sup> P.Ex. 30, page(p.) 2.

<sup>3</sup> P.Ex. 30.

<sup>4</sup> P.Ex. 30 (See Conclusion of Law 13).

concluded Student qualifies as a child with a disability in need of special education and related services.<sup>5</sup>

6. The School District conducted an initial FIE of Student during the 2015-16 school year, issuing a FIE report on January 4, 2016.<sup>6</sup> The initial FIE determined Student met eligibility criteria for special education services in the categories of SLD and OHI for ADHD and \*\*\*.<sup>7</sup> In the prior litigation, the hearing officer concluded the initial FIE was appropriate. This determination was not addressed on appeal by the federal court.<sup>8</sup>

### **Student's Disability**

7. Student has a varied academic profile. Student exhibits average, or near average, abilities in the areas of basic reading, reading fluency, reading comprehension, math calculation, math reasoning, oral expression and listening comprehension paired with deficits in written expression.<sup>9</sup> A physician has diagnosed Student with ADHD.<sup>10</sup> Student displays a tendency towards inattentiveness to a significant degree across all settings.<sup>11</sup>
8. Children with ADHD are disorganized in the way they input and output information. They are very impulsive and easily distracted. They struggle to moderate their mood and behavior.<sup>12</sup> Children with \*\*\* have difficulty with \*\*\*.<sup>13</sup>
9. To address Student's processing speed weakness, Student needs accommodations including oral discussions, activities to improve Student's rate and fluency, strategies to increase the rate of task completion, shortened directions, lecture script outlines, limited copying activities, small group test administration, extra time for reading texts, extra time for processing of information and extra time on assignments.<sup>14</sup>
10. On standardized evaluations, Student scores very low on \*\*\* and scores slightly below average in \*\*\* and \*\*\*.<sup>15</sup> Student's hand writing is difficult to read at times due to poor spacing and inconsistent letter formation, size and line placement.<sup>16</sup>

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<sup>5</sup> P.Ex. 31.

<sup>6</sup> J.Ex. 1.

<sup>7</sup> J.Ex. 1, p. 39.

<sup>8</sup> P.Ex. 31.

<sup>9</sup> J.Ex. 1, p. 35.

<sup>10</sup> J.Ex. 2.

<sup>11</sup> J.Ex. 1, p. 39.

<sup>12</sup> Transcript (TR) at 83.

<sup>13</sup> TR at 85.

<sup>14</sup> J.Ex. 1, p. 40.

<sup>15</sup> J.Ex. 3, p. 5; P.Ex. 25, p. 3.

<sup>16</sup> J.Ex. 1, p. 4; P.Ex. 25, p. 5.

11. To accommodate Student's writing difficulties, the School District recommended the volume of required writing be reduced, the number of items needed to be completed in an assignment be reduced, extra time to complete written work and the option of responding orally.<sup>17</sup>
12. As part of the FIE, the effectiveness of Student's hand writing was compared to the effectiveness of Student keyboarding. \*\*\*. Student is capable of effectively using speech to text dictation software.<sup>18</sup> The School District did not conduct formal trials of speech to text software in the classroom with Student.<sup>19</sup>
13. When a student's \*\*\* have a significant impact on their hand writing, technology is the next step for addressing a student's writing.<sup>20</sup> The School District recommended that Student have access to a keyboard to type written assignments beyond short answer or several sentences in length.<sup>21</sup> Student is able to effectively utilize the functions of a computer. Student is not \*\*\*; Student \*\*\*.<sup>22</sup>
14. Student has functional fine motor skills to physically access Student's \*\*\*, Student's \*\*\*. Student possesses adequate manipulation and dexterity skills to open containers and use scissors.<sup>23</sup>
15. The School District did not conduct a formal assistive technology evaluation of Student.<sup>24</sup>

#### **ARD Committee Meetings and School District Evaluations during the 2016-17 School Year**

16. On September \*\*\*, 2016, the School District convened an ARD committee meeting to implement an IEP for Student in accordance with the hearing officer decision in the prior litigation.<sup>25</sup> The IEP drafted at this meeting contained a goal to address Student's writing with direct instruction measured by Student's work on a standardized \*\*\* assignment and a goal for increasing Student's rate of reading grade level texts.<sup>26</sup>
17. The September \*\*\*, 2016 IEP included a set of accommodations for Student: extra time for written assignments, the opportunity to give oral responses, transcription assistance

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<sup>17</sup> J.Ex. 1, p. 40.

<sup>18</sup> J.Ex. 1, p. 4 and 36-37.

<sup>19</sup> TR at 603.

<sup>20</sup> TR at 573.

<sup>21</sup> J.Ex. 1, p. 38.

<sup>22</sup> TR at 578-579.

<sup>23</sup> J.Ex. 3, p. 2.

<sup>24</sup> TR at 276 and 379.

<sup>25</sup> J.Ex. 6, p. 1.

<sup>26</sup> J.Ex. 6, p. 4.



- with test answers and extra time on assessments. The IEP included instructional adaptations for Student: repetition and explanation of instructions, frequent feedback, reminders to check answers before submitting assignments, the use of graphic organizers and structured reminders of breaks. The IEP included as behavioral accommodations: private conferences related to inappropriate behavior, frequent breaks when Student's movement increases and reminders to stay on task. The IEP also allowed Student a sensory break or opportunity to go to the restroom when Student was \*\*\*.<sup>27</sup>
18. Under the September \*\*\*, 2016 IEP, Student was allowed access to a keyboard \*\*\* hours of assistive technology trials for math. These were the only assistive technology items contained in the IEP.<sup>28</sup>
  19. The IEP placed Student in general education classes for all subjects with \*\*\* minutes per day of inclusion support by a special education teacher.<sup>29</sup> \*\*\* fifteen minute occupational therapy indirect consultations per \*\*\* week grading period were also provided in the IEP to support Student's writing and assistive technology needs and to assist the teachers with addressing Student's sensory needs.<sup>30</sup>
  20. The ARD committee determined Student did not need ESY services, because Student did not exhibit significant regression that could not be reasonably recuperated within the first eight weeks of school.<sup>31</sup>
  21. At the September \*\*\*, 2016 ARD committee meeting, the School District staff took the position Student did not qualify for services under IDEA, despite the hearing officer's decision in the prior litigation. The School District staff also stated they were only implementing services to comply with the hearing officer's decision in the prior litigation. During this meeting, the School District repeatedly indicated Student did not need special education services, and instead that services under Section 504 of the Rehabilitation Act were more appropriate for Student. The School District disagreed with its own IEP proposed at this meeting.<sup>32</sup>
  22. At the September \*\*\*, 2016 ARD committee meeting, Parent requested direct occupational therapy services, an assistive technology evaluation and services to address \*\*\*. The School District refused all of these requests, limiting the discussion at the ARD to implementing the IEP drafted, but not implemented, in January of 2016, as the School District staff believed the hearing officer ordered in the prior litigation. The School District refused to consider Parent input for the development of Student's IEP goals and special education services. The School District did not revise Student's IEP as ordered in

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<sup>27</sup> J.Ex. 6, p. 5.

<sup>28</sup> J.Ex. 6, p. 5 and 9.

<sup>29</sup> J.Ex. 6, p. 8.

<sup>30</sup> J.Ex. 6, p. 9.

<sup>31</sup> J.Ex. 6, p. 9.

<sup>32</sup> J.Ex. 6, p. 12-14; TR at 387-388.

- the prior litigation. Parent agreed with the IEP so that services for Student could be initiated. However, Parent did not agree with some of the content of the IEP.<sup>33</sup>
23. The School District provided Parent with a notice of procedural safeguards and Prior Written Notice of the proposed IEP at the meeting on September \*\*\*, 2016. In the prior written notice, to justify the services offered in the IEP, the School District cited the hearing officer decision in the prior litigation, while again indicating it disagreed with the decision and believed the services to be unnecessary. In the notice, to justify refusing Parent's request for occupational therapy, an assistive technology evaluation and services to address \*\*\*, the School District cited the hearing officer's determination that the FIE was appropriate and the services requested by Parent were not identified as necessary in the FIE.<sup>34</sup>
24. On October \*\*\*, 2016, the School District convened an ARD committee meeting to address teacher and parent concerns about Student's off task behaviors and to make changes to Student's IEP writing goals.<sup>35</sup> The committee agreed to reduce Student's paper and pencil tasks in favor of keyboarding on a computer, because Student is more successful with writing tasks on a computer. The committee adjusted Student's writing goal to focus on Student improving Student's writing \*\*\* consistent with the writing \*\*\* for all \*\*\* Graders. An accommodation was added to allow Student to perform \*\*\* to accommodate Student's difficulties with \*\*\*. To address concerns related to Student's off task behavior and \*\*\*, the committee proposed conducting a functional behavior assessment (FBA) for Student. As additional accommodations for Student, the ARD committee added no penalty for \*\*\*, providing a copy of class notes, using a word processor and \*\*\* a keyboard for completing assignments.<sup>36</sup> The ARD committee reached consensus on the changes proposed at the October \*\*\*, 2016 meeting.<sup>37</sup>
25. The School District provided Parent a Prior Written Notice of the changes proposed at the October \*\*\*, 2016 ARD committee meeting. The School District cited progress on goals, parent information, teacher information and updated performance levels to support the changes to Student's IEP.<sup>38</sup>
26. On October \*\*\*, 2016, the School District provided Parent with a notice of proposal to evaluate and consent to evaluate to conduct the proposed FBA to determine whether Student's behavior interferes with Student's learning or the learning of other students. The School District provided a notice of procedural safeguards with the evaluation notice

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<sup>33</sup> J.Ex. 6, p. 12-14 and 19; TR at 263-264.

<sup>34</sup> J.Ex. 6, p. 16.

<sup>35</sup> J.Ex. 7, p. 1.

<sup>36</sup> J.Ex. 7, p. 2-3.

<sup>37</sup> J.Ex. 7, p. 2-3 and 8.

<sup>38</sup> J.Ex. 7, p. 8.

and consent. Parent signed the consent to evaluate on October \*\*\*, 2016. Parent later also consented to a psychological evaluation for Student.<sup>39</sup>

27. On November \*\*\*, 2016, the School District convened Student's ARD committee at Parent's request.<sup>40</sup> Student's writing goal was modified at Parent's request to require Student to independently accomplish the goal. Parent requested modifications to Student's reading goal related to concerns over Student's comprehension and fluency. The School District declined this request because Student's teacher's had no concerns about Student's reading fluency and comprehension. Parent also requested Occupational Therapy (OT) services to address Student's hand writing with a focus on cursive writing. The School District refused the request because cursive hand writing is not a focus of instruction for any students in the School District. Parent requested a spelling goal for Student, but the School District refused this request since spelling is being addressed through accommodations. The School District also declined Parent's request for dyslexia services, because Student did not qualify for the dyslexia program. Finally, Parent requested a formal assistive technology (AT) evaluation. The School District responded that AT trials were underway with Student, but refused to conduct a formal AT evaluation because Student was making progress on Student's IEP.<sup>41</sup>
28. The School District provided Parent Prior Written Notice following the November \*\*\*, 2016 ARD committee meeting. The notice stated that fluency and spelling goals were declined because they were not required to meet Student's needs in making progress in the general education curriculum. Dyslexia services were refused because Student did not meet criteria for the dyslexia program and an AT evaluation was refused because Student was making progress on Student's IEP and AT was not required for Student to benefit from Student's education. The School District refused OT services, because they were not necessary for Student to benefit from Student's education.<sup>42</sup>
29. On December \*\*\*, 2016, the School District produced a report detailing the findings and recommendations of the FBA and psychological evaluation.<sup>43</sup>
30. The results of the FBA showed Student is off task more than Student's typically developing peers, which interferes with Student completing work and attending in the classroom.<sup>44</sup> Student is most often off task during group instruction or while working independently.<sup>45</sup>

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<sup>39</sup> J.Ex. 9.

<sup>40</sup> J.Ex. 10, p. 1.

<sup>41</sup> J.Ex. 10, p. 2-3.

<sup>42</sup> J.Ex. 10, p. 5.

<sup>43</sup> J.Ex. 11.

<sup>44</sup> J.Ex. 11, p. 1 and 5.

<sup>45</sup> J.Ex. 11, p. 6.

31. The FBA further found Student has difficulty staying on task in order to complete Student's work. Student's distractibility, inattention, impulsivity, and hyperactivity impact Student's ability to maintain focus and concentration. Student enjoys positive peer attention and Student avoids tasks requiring sustained attention by \*\*\*.<sup>46</sup>
32. The psychological evaluation revealed Student does not have an inability to learn that cannot be explained by intellectual, sensory or health factors; Student's learning difficulties are related to Student's SLD and OHI. Student is able to build and maintain satisfactory interpersonal relationships with peers and teachers. Student has friends at school, interacts appropriately socially with peers and has appropriate interactions with Student's teachers. Student has accurate perceptions of the social situations at school, displays logical thought, is able to problem solve, feels remorse for actions, makes amends for conflicts and does not have inappropriate types of behaviors or feelings under normal circumstances. Student does not report feeling depressed and Student displays no symptoms of depression at school. Student has exhibited some physical symptoms associated with school problems (i.e. \*\*\*), but these symptoms are not exhibited to a marked degree. Student does not meet criteria for an Emotional Disturbance (ED).<sup>47</sup>
33. The School District's December \*\*\*, 2016 report did not recommend psychological services or a behavior intervention plan for Student.<sup>48</sup> The report recommended teaching Student self-monitoring to help Student monitor Student's own use of time, the use of a timer to allow Student to check Student's own attention to task, praising Student for employing self-assessment strategies, collaborating with Student to create and implement an organizational system and continuing to allow movement breaks for Student.<sup>49</sup>
34. Student does not require specialized behavior intervention to address Student's off task behavior. Student can be effectively redirected by routine interventions by classroom teachers.<sup>50</sup>
35. On January \*\*\*, 2017, the School District convened an ARD committee meeting to review the FBA and psychological evaluation.<sup>51</sup> Both Parent and the School District were represented by lawyers at this meeting. Parent's lawyer limited Parent's ability to directly engage in discussions with other members of the ARD committee, limited Parent's ability to directly express ideas and concerns and prematurely adjourned the meeting to accommodate her schedule.<sup>52</sup>

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<sup>46</sup> J.Ex. 11, p. 18.

<sup>47</sup> J.Ex. 11, p. 15-17.

<sup>48</sup> J.Ex. 11, p. 18-19.

<sup>49</sup> J. Ex. 11, p. 18.

<sup>50</sup> TR at 500.

<sup>51</sup> J.Ex. 12, p. 1.

<sup>52</sup> J.Ex. 12, p. 2-5.

36. At the January \*\*\*, 2017 ARD committee meeting the FBA and psychological evaluation were reviewed. Parent disagreed with the report's conclusion that Student did not meet criteria for ED. Parent requested two hours per week of counseling to address Student's \*\*\*. The School District proposed \*\*\* per week, \*\*\* thirty minute sessions, of counseling services for Student and daily check in and check out with a special education teacher for Student. The School District's proposed counseling and check in and out were added to Student's IEP.<sup>53</sup>
37. The School District provided Parent with Prior Written Notice on January \*\*\*, 2017. The notice stated the School District refused to identify Student as a student with an ED because Student did not meet ED criteria. The notice also confirmed the School District's proposal to add two thirty minute sessions per week of counseling to address areas of concern.<sup>54</sup>
38. Following the January \*\*\*, 2017 ARD committee meeting, the School District added a counseling goal to Student's IEP to assist Student with utilizing coping strategies for Student's \*\*\* and a behavior goal to address Student's off task behavior.<sup>55</sup>
39. After the January ARD committee meeting the School District delivered counseling services to Student addressing self-monitoring strategies to assist Student with \*\*\* and off task behavior.<sup>56</sup>
40. On April \*\*\*, 2017, the School District proposed an amendment to Student's IEP to address Student having been absent for the first administration of the \*\*\* Grade State of Texas Assessment of Academic Readiness (STAAR) assessments.<sup>57</sup> The School District proposed small group instruction \*\*\* times per week for both math and reading to address Student passing the next administration of the STAAR assessments.<sup>58</sup> Parent did not agree to the proposed IEP amendment.<sup>59</sup>
41. On April \*\*\*, 2017, Parent sent a letter notifying the School District of the family's plan to place Student in private school following the conclusion of the 2016-17 school year. Parent gave notice of a request for reimbursement from the School District for the cost of private school, OT services, behavioral and psychological supports and tutoring beginning in the summer of 2017 and continuing into the next school year. Parent requested the opportunity to discuss the private placement in mediation with the School District.<sup>60</sup>

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<sup>53</sup> P.Ex. 12, p. 2-5; TR at 351.

<sup>54</sup> J.Ex. 12, p. 7-8.

<sup>55</sup> J.Ex. 12, p. 8-9.

<sup>56</sup> TR at 514.

<sup>57</sup> J.Ex. 15, p. 1.

<sup>58</sup> J.Ex. 15, p. 3.

<sup>59</sup> P.Ex. 9.

<sup>60</sup> J.Ex. 28.

42. On May \*\*\*, 2017, the School District sent a letter in response to Parent's April \*\*\*, 2017 letter. The School District took the position it provided Student with A FAPE, complied with the hearing officer's decision in the prior litigation, held ARD committee meetings and conducted evaluations to address parental concerns, added counseling services to Student's IEP, informed Parent of the right to request an Independent Educational Evaluation (IEE) related to the School District's ED evaluation and provided a program that allowed Student to make educational progress.<sup>61</sup>
43. The School District attempted to schedule an ARD committee meeting with Parent in April, May and June of 2017.<sup>62</sup> The School District was unable to convene an ARD committee meeting during this time, because the School District and Parent were unable to agree on a date for the meeting.<sup>63</sup>
44. The School District requested that Parent fill out a brief questionnaire related to the parental request to participate in mediation. When a parent makes a request for mediation, it is School District practice to have a parent fill out a short questionnaire to clarify and specify the issues to be mediated. Parent did not fill out the mediation questionnaire.<sup>64</sup>
45. In September of 2016, Parent requested the opportunity to observe Student in class. In November of 2016, Parent exchanged emails with school principal about a classroom observation of Student. Principal arranged a time to meet with parent to discuss the classroom observation. Parent first agreed to the meeting and then declined to attend.<sup>65</sup> Principal offered to allow Parent to observe Student at school on January \*\*\*, 2017, but Parent declined this offer.<sup>66</sup> Parent observed Student for half of a school day on March \*\*\*and \*\*\*, 2017.<sup>67</sup> Parent was accompanied by a School District staff member during her observation.<sup>68</sup>
46. Individuals who serve as advocates for parents of students with disabilities attended ARD committee meetings with Parent during the 2016-17 school year. In the opinion of the advocates, Parent input was not considered during ARD committee meetings and the atmosphere of the meetings was not collaborative. According to the advocates, Parent's

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<sup>61</sup> J.Ex. 29.

<sup>62</sup> J.Ex. 16; TR at 293-294 and 356-357.

<sup>63</sup> TR at 277.

<sup>64</sup> TR 358-359.

<sup>65</sup> R.Ex. 9, p. 5-6.

<sup>66</sup> TR at 655.

<sup>67</sup> P.Ex. 6; TR at 265-266.

<sup>68</sup> TR at 355.

request to have Student's \*\*\* addressed and for direct OT services for Student were not addressed by the School District.<sup>69</sup>

### **Student's 2016-17 School Year**

47. Student began the 2016-17 school year demonstrating retention of a significant portion of the Math concepts from the prior school year.<sup>70</sup>
48. Student understood Math instruction delivered in a general education classroom and made progress in Math during the 2016-17 school year.<sup>71</sup>
49. Student effectively utilized the accommodation of \*\*\* during the 2016-17 school year.<sup>72</sup>
50. Student began the 2016-17 school year reading at a level higher than expectations for the beginning of \*\*\* Grade. During the 2016-17 school year, Student made significant progress in reading, finishing the year at a level significantly higher than expectations for the end of \*\*\* Grade.<sup>73</sup>
51. Student made progress in writing during the 2016-17 school year and was writing at grade level expectation for \*\*\* Grade.<sup>74</sup>
52. Student's special education teacher and Student's general education teachers collaborated on strategies for meeting Student's needs and delivering instruction to Student. Student's teachers consistently and regularly delivered the accommodations and modifications set out in Student's IEP.<sup>75</sup>
53. All students on the campus Student attended in 2016-17 had the opportunity to redo assignments. Students were allowed to redo any assignment \*\*\*. Students were required to redo any assignment \*\*\*. Student redid assignments throughout the 2016-17 school year and did so at a rate commensurate with Student's nondisabled \*\*\* peers.<sup>76</sup>
54. Student exhibits some signs of \*\*\*, \*\*\*. At the beginning of the 2016-17 school year, Student made frequent complaints to Student's teachers and numerous visits to the campus nurse related to \*\*\*. However, Student's \*\*\* reduced significantly after the first two months of the school year. Student's teachers and the campus nurse communicated

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<sup>69</sup> TR at 72-73, 191-192 and 214-215.

<sup>70</sup> R.Ex. 17, p. 1-2; TR at 409-410.

<sup>71</sup> TR at 414-415.

<sup>72</sup> TR at 431-432.

<sup>73</sup> TR at 589-590.

<sup>74</sup> TR at 598-599.

<sup>75</sup> TR at 586 and 623-625.

<sup>76</sup> TR at 406-407.

with each other about Student's \*\*\*. Student's \*\*\* did not have a significant impact on Student's educational progress.<sup>77</sup>

55. During the 2016-17 school year, Student first used \*\*\* in the classroom, because Student was familiar with this device. Student was then provided \*\*\* for Student's exclusive use to give Student access to a \*\*\*. Later in the school year, Student was provided \*\*\* for Student's exclusive use to facilitate Student's \*\*\*.<sup>78</sup> Student was not allowed to bring either \*\*\* home.<sup>79</sup>
56. Student's hand written work was difficult to read and of concern to Student's teachers.<sup>80</sup>

### Outside Evaluations and Services

57. On February \*\*\*, 2017, Student was evaluated by an independent Occupational Therapist not associated with the School District. The independent Occupational Therapist recommended skilled occupational therapy (OT) services twice a week for Student to address \*\*\*, sensory processing, behavioral responses to sensory processing, executive functioning, written expression and \*\*\*.<sup>81</sup> The independent occupational therapist based the recommendations for Student on a clinical model for OT services, rather than an educational model for OT services. The recommended OT services are not necessary for Student to benefit from special education services.<sup>82</sup>
58. In July and August of 2017, Student was evaluated by an independent psychologist not associated with the School District. This evaluation took place after Student was withdrawn from the School District and was not shared with Student's ARD committee for consideration. The independent psychologist found Student possesses intellectual capacity significantly above Student's same-aged peers, has a relative weakness in processing speed and is functioning below expectations for Student's measured intelligence in the areas of math, written expression and reading. The independent psychologist concluded Student has a SLD in math, written expression and reading and has ADHD based on diagnostic history, reported symptoms from Parent, behavioral observations and test results.<sup>83</sup> The independent psychologist also concluded Student did not meet criteria for an ED.<sup>84</sup>
59. The independent psychologist attributed Student's learning difficulties to Student's

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<sup>77</sup> J.Ex. 11, p. 14; J.Ex. 12, p. 29; TR at 434-435, 479 and 616-618.

<sup>78</sup> TR at 426-427.

<sup>79</sup> TR at 447.

<sup>80</sup> TR at 613.

<sup>81</sup> P.Ex. 25.

<sup>82</sup> TR at 780.

<sup>83</sup> P.Ex. 20, p. 10-12

<sup>84</sup> TR at 145-146.



ADHD and concluded addressing Student's ADHD is the primary educational need. The independent psychologist recommended a consultation with a psychiatrist for medication options for Student's difficulties with \*\*\* and ADHD, individual \*\*\* for Student, a social skills group at school to help Student build self-esteem, individual sessions with a school counselor, placement in \*\*\* at school and OT for sensory and motor issues. As academic accommodations, the independent evaluator recommended extra time for assignments and tests, small group test administration, preferential seating, note taking assistance, copies of teacher's \*\*\*, the use of a keyboard for writing and the use of graph paper for math.<sup>85</sup>

60. \*\*\* is a private school in \*\*\*, serving students in grades \*\*\* through \*\*\* grade. It is accredited \*\*\*. The classes at \*\*\* typically have fifteen students and one teacher. Students requiring additional academic assistance have access to \*\*\*. The school provides accommodations and modifications to its students with disabilities. \*\*\* Grade students at \*\*\*, including Student, are provided with \*\*\* computer for their individual use. The tuition for Student at \*\*\* for the 2017-18 school year is \*\*\*. It costs an additional \*\*\* for Student to access \*\*\* for academic support.<sup>86</sup>

## V. DISCUSSION

### A. Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a Free Appropriate Public Education (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)*. Under IDEA a school district has a duty to provide a FAPE to all children with disabilities residing within its jurisdictional boundaries between the ages of 3 and 21. *34 C.F.R. § 300.101 (a)*. The evidence showed Student was a child with a disability residing within the jurisdiction of the School District and thus the School District had the duty to serve Student under IDEA.

The seminal issue in this case is whether Student's parents are entitled to reimbursement for the costs of a unilateral private placement at \*\*\*. The central question is whether the School

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<sup>85</sup> TR at 131-132; P.Ex. 20, p. 10-12.

<sup>86</sup> P.Ex. 16; P.Ex. 17; P.Ex. 18; Transcript (TR) 225-260.

District proposed and provided an appropriate educational program for Student and, if not, whether the private placement is appropriate for Student.

As detailed below, the School District designed and implemented an IEP reasonably calculated to provide an educational benefit to Student and provided special education services during the 2016-17 school year that allowed Student to make educational progress. The School District did, however, impede Parent's ability to meaningfully participate in the September \*\*\*, 2016 ARD committee meeting by failing to consider Parent's input into Student's IEP goals and special education services.

### **B. Burden of Proof**

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.<sup>87</sup> *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F. 2d 127, 131 (5th Cir. 1993). Therefore the burden of proof is on Student to prove the IEP at issue was not reasonably calculated to enable Student to make educational progress given Student's unique, individual circumstances. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

### **C. Reimbursement for Private Placement**

A parent is entitled to reimbursement for the unilateral private placement of a child with a disability if the public school's program does not provide the student with a FAPE and the private school's program is appropriate. *Sch. Comm. of Burlington v. Dept. of Educ. of Mass*, 471 U.S. 359, 370 (1973). In this case the first issue is whether the School District's program was appropriate. If not, the second issue is whether Student's private placement at \*\*\* is appropriate. *Burlington*, 471 U.S. at 370. The private placement need not meet all State requirements for reimbursement purposes so long as the private placement meets

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<sup>87</sup> There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 292 n. 4 (5th Cir. 2009).

Student's individualized needs and is therefore appropriate. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 13, 15 (1993). If both prongs of the *Burlington* test are met the hearing officer may also consider whether reimbursement should nevertheless be reduced or denied. 34 C.F.R. § 300.148 (d).

### **1. Provision Of FAPE**

To determine whether a school district's program was appropriate, a hearing officer must analyze whether a school district provided a FAPE to a student. A FAPE is special education, related services, and specially designed personalized instruction with sufficient support services to meet the unique needs of the child in order for the child to receive an educational benefit. The instruction and services must be provided at public expense and comport with the child's IEP. 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). While the IDEA guarantees only a "basic floor of opportunity," the IEP must nevertheless be specifically designed to meet Student's unique needs, supported by services that permit Student to benefit from the instruction. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. at 188-189.

#### **a. IEP**

In meeting the obligation to provide a FAPE a school district must have in effect an IEP for each child with a disability at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. A child's 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 where the services will be provided. 34 C.F.R. §§ 300.22, 300.323 (a).

To meet its substantive obligation under the IDEA, a school district must offer an IEP that is reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances. The adequacy of a given IEP turns on the unique circumstances of the

student for whom it was created. *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017)*. While the IEP need not be the best possible one nor must it be designed to maximize a student's potential, the school district must nevertheless provide the student with a meaningful educational benefit – one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist. v. VP, 582 F. 3d 576, 583 (5th Cir. 2009) cert. denied, 559 U.S. 1007(2010)*.

The question in this case is whether the IEP designed by the School District for the 2016-17 school year was reasonably calculated to provide the requisite educational benefit given Student's unique circumstances. *Rowley, 458 U.S. at 206-20; Andrew F. v. Douglas Cnty. Dist. RE-1, 137 S. Ct. 988 (2017)*. The School District's FIE, which was adjudicated to be appropriate in the prior litigation, identified Student as a student with a SLD in written expression and a student with an OHI based upon a diagnosis of ADHD and \*\*\*. The IEP designed and implemented by the School District at the September \*\*\*, 2016 ARD committee meeting contained a goal to address Student's written expression deficits, a goal to address reading as a related need, and provided inclusion services with a special education teacher during \*\*\* instruction to ensure the needs and goals were being addressed.

The September IEP also addressed Student's written expression deficits and \*\*\* issues through accommodations including extra time for written assignments, transcription assistance for test answers, the use of graphic organizers and access to a keyboard \*\*\*. This IEP addressed Student's ADHD through adaptations and accommodations including repetition and explanation of instructions, frequent feedback, reminders to check answers before submitting assignments, structured reminders of breaks, reminders to stay on task and private conferences for inappropriate behavior.

Moreover, throughout the 2016-17 school year, the School District modified Student's IEP based upon Student's progress and to address concerns raised by both Parent and Student's teachers. In October of 2016, Student's IEP was modified to: reduce Student's paper and pencil tasks in favor of keyboarding to increase Student's success on written assignments; to allow Student to \*\*\* to accommodate Student's difficulty with hand writing; and Student's writing goal was adjusted to

focus on the writing \*\*\* consistent with the writing \*\*\* for all \*\*\* Graders. Student's writing goal was again modified at Parent's request in November of 2016 to address independent accomplishment of the goal. Once again in January of 2017 Student's IEP was modified, following the School District completing a FBA and psychological evaluation in response to concerns raised by Parent and Student's teachers. In January, twice weekly counseling services were added to Student's IEP to address issues with \*\*\* and a behavior goal and daily check in and out with a special education teacher were added for Student to help address off task behaviors.

Petitioner argues in order for Student's IEP to have met Student's unique needs the IEP should have contained services for \*\*\*. However, the FIE deemed appropriate in the prior litigation determined Student to be of average intelligence, \*\*\*. In addition, the evaluation introduced at hearing by Petitioner which concluded Student has higher than average intelligence was completed after Student had been withdrawn from the School District and was never presented for consideration by Student's ARD committee. At no point during the 2016-17 school year did Parent request \*\*\* services for Student. Under these facts, the School District had no reason to address Student's needs as \*\*\*.

In sum, the IEP designed by the School District In September of 2016 and modified throughout the 2016-17 school year was reasonably calculated to provide Student with the requisite educational benefit. *Andrew F. v. Douglas Cnty. Dist. RE-1, 137 S. Ct. 988 (2017)*.

**b. Application of the Four Factor Test**

To determine whether the School District's program was appropriate for Student, a hearing officer must determine whether the School District offered and provided a FAPE to Student. The Fifth Circuit has articulated a four factor test to determine whether a Texas school district's program meets IDEA FAPE requirements. Those factors are:

- The program is individualized on the basis of the student's assessment and performance;
- The program is administered in the least restrictive environment;

- The services are provided in a coordinated, collaborative manner by the “key” stakeholders; and,
- Positive academic and non-academic benefits are demonstrated.

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

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

**i. The program is individualized on the basis of the student’s assessment and performance**

Student’s program, through goals, adaptations, accommodations and direct special education services, addressed Student’s SLD and OHI, as identified in the FIE. Student’s program was modified during the 2016-17 school year as Student’s needs changed and additional evaluation data was gathered. The program provided accommodations in the form of indirect OT services, reduced writing tasks and access to a keyboard to address Student’s \*\*\* deficits. Since direct OT services were not necessary for Student to benefit from Student’s special education services, the School District was not required to go beyond the indirect OT services. *34 CFR Section 300.34(a)*.

The program also provided counseling services to address Student’s \*\*\*. Petitioner argues the School District should have gone further than the \*\*\* weekly counseling to address Student’s \*\*\*. However, neither the School District, nor Petitioner’s independent psychologist found Student met criteria as a student with an ED. In addition, Student’s \*\*\* did not persist throughout the school year and did not significantly impact Student’s educational performance. Thus, the services provided by the School District were sufficient to address Student’s \*\*\* issues.

Student exhibited an identified deficit in hand writing that impacted Student’s ability to effectively complete Student’s assignments. The School District identified keyboarding and AT

as means for addressing Student's hand writing issues. By specifically identifying AT in Student's IEP, the School District clearly recognized AT was necessary as special education, a related service or a supplemental aid or service Student needed in order to access and make progress in the general \*\*\* Grade curriculum. *34 CFR Section 300.105(a)*. However, the School District took no systematic approach for assessing and identifying the appropriate AT for addressing Student's identified needs. Instead, the School District started by having Student use \*\*\*, changed to \*\*\* and then to \*\*\* without first conducting an AT evaluation or otherwise measuring the effectiveness of those devices in supporting Student's educational performance. The School District should have evaluated Student's AT needs in Student's classroom and trained Student on the use of Student's AT. *34 CFR Section 300.6(a) and (e)*. In addition, the School District should have considered whether Student would have benefitted from bringing Student's AT home to complete homework or refine Student's AT skills. *34 CFR Section 300.105(b)*. It was only because Student's general education teachers made extra effort to \*\*\* Student's hand writing that Student's \*\*\* hand writing and lack of AT use had minimal impact on Student's educational performance.

However, even with the deficiencies related to AT, when viewed as a whole, Student's program was individualized on the basis of Student's assessments and needs. *Klein Independent School District v. Per Hovem, 690 F. 3d 390, 391 (5th Cir. 2012)*.

**ii. Program is administered in the least restrictive environment**

The IDEA requires that students with disabilities be educated in general education settings with nondisabled students to the maximum extent appropriate. The IDEA has a strong preference in favor of educating students with disabilities in general education settings with their nondisabled peers. However, if a school district cannot satisfactorily educate a student with a disability in the general education setting, then the school district may remove the student from the general education setting and place them in special education classes. *20 U.S.C. § 1412 (a)(5); 34 C.F.R. § 300.114(a) (1) (2) (i) (ii)*. This requirement of the IDEA is referred to as a school district's obligation to educate a student in the least restrictive environment (LRE). *Id.*

Student was served in general education classes with inclusion support from a special education teacher and accommodations and modifications delivered by Student's general education teachers. This arrangement allowed Student to be educated entirely with Student's nondisabled peers and to participate in nonacademic services with Student's nondisabled peers to the maximum extent appropriate. Under this arrangement Student's needs were met and Student was educated in the LRE.

**iii. The services are provided in a coordinated, collaborative manner by the key stakeholders**

The services delivered to Student were the product of multiple ARD committee meetings during the 2016-17 school year, resulting in a program that evolved to meet Student's changing needs and modified services in accordance with new evaluation data. Parent concerns related to \*\*\* were addressed through the addition of counseling and goals and modifications were added to address Parent and teacher concerns related to behavior. Student's general education teachers and Student's special education inclusion teacher worked collaboratively to ensure Student's special education services were delivered and Student's adaptations and accommodations were consistently and effectively delivered. Student's teachers and the campus nurse worked together to address Student's \*\*\*. The special education services delivered to Student during the 2016-17 school year were provided in a coordinated and collaborative manner by the key stakeholders.

**iv. Positive academic and non-academic benefits are demonstrated**

During the 2016-17 school year, Student made progress in writing, \*\*\*. Student's reading level also increased during the school year. By the end of the year Student was reading above grade level. Student effectively utilized Student's accommodations, such as \*\*\* and extra time on assignments, to make progress in \*\*\* and \*\*\*. As the school year progressed and Student became comfortable with Student's teachers Student's \*\*\* significantly reduced. In sum, Student made positive academic and nonacademic benefits during the 2016-17 school year.

**2. Appropriateness of Private Program**



The second prong of the reimbursement analysis asks whether the educational program provided by the private school was appropriate. *Burlington*, 471 U.S. at 370. The private school program need not necessarily meet every specific requirement of the IDEA but only that it be “otherwise proper” under IDEA. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 13, 15 (1993). See also, *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5<sup>th</sup> Cir. 2009). Having concluded that the School District provided FAPE to Student, it is not necessary to analyze the appropriateness of Student’s private placement at \*\*\*. *Burlington*, 471 U.S. at 370.

#### **D. Extended School Year Services**

In Texas the need for ESY is based on documentation that shows, in one or more critical areas addressed in the student’s IEP, that the student exhibits or may reasonably be expected to exhibit severe or substantial regression that cannot be recouped or that the student has been or will be unable to maintain one or more acquired critical skills in the absence of ESY services. *19 Tex. Admin. Code § 89.1065* (emphasis added). Student entered the 2016-17 school year at, or above, the academic levels Student finished the 2015-16 school year. Student showed no signs of experiencing regression over breaks that cannot be recuperated in a reasonable time. The School District’s determination that Student did not require extended school year services is appropriate.

#### **E. Procedural Violations**

Petitioner alleged the School District committed several procedural violations during the 2016-17 school year. When allegations of procedural violations are raised, a hearing officer may find a school district denied a student a FAPE if the procedural errors impeded the students right to a FAPE, significantly impeded a parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the student or caused a deprivation of educational benefit to the student. *34 C.F.R. §300.513 (a) (2)*. Petitioner first alleges the School District impeded Parent’s right to participate in the decision-making process by delaying and limiting Parent’s ability to observe Student at school. There is no parental right to observations of a child’s classroom. State and local policy control who has access to the classroom. *Letter to Mamas*, 42 IDELR 10 (OSEP

2004); See also, *Student v. West Costa Unified Sch. Dist.*, 66 IDELR 36 (N.D. Cal. 2015)(no requirement under IDEA parent may observe school district's assessment; parent's demand to observe via one-way mirror unreasonable and imposed improper conditions on assessment). In this case, the School District had the discretion to limit, and even deny, Parent's opportunity to observe Student in Student's classroom. The School District acted reasonably, and within its discretion, when it engaged in a dialogue with Parent before granting permission for an observation and when it imposed conditions on the observation. The School District did not impede Parent's ability to participate in the decision-making process by limiting Parent's ability to observe Student.

Petitioner next alleges the School District committed a procedural violation by asking Parent to fill out a brief questionnaire before participating in mediation. Mediation under the IDEA is voluntary for all parties. 34 C.F.R. §300.506(b)(1)(i). This means the School District is free to participate, or not, in mediation in any special education dispute. The School District had the discretion to ask Parent to fill out the questionnaire before deciding whether to voluntarily participate in mediation. Since mediation is voluntary, the School District did not commit a procedural violation by not participating in mediation in this case.

Petitioner next alleges Parent was significantly impeded from participating in the decision-making process during ARD committee meetings during the 2016-17 school year. When it convened the September \*\*\*, 2016 ARD committee meeting, the School District was under orders from the prior litigation to "revise" Student's IEP. However, at this ARD committee meeting, the School District refused to consider any input from Parent related to revising the IEP goals, adding special education services or conducting further evaluation to determine Student's specific needs. The School District even documented its refusal to consider Parent's input in the ARD committee deliberations and the prior written notice. The School District went so far as to disagree with the IEP it had drafted and proposed at the September ARD committee meeting. The School District's actions at the September \*\*\*, 2016 ARD committee meeting significantly impeded Parent's ability to participate in the decision-making process regarding the provision of FAPE to Student. 34 C.F.R. §300.513 (a) (2).

In the ARD committee meetings subsequent to the September \*\*\*, 2016 meeting, the

School District provided Parent the opportunity to participate in the decision-making process. Parent was an active participant in ARD committee meetings, the School District was responsive to input from Parent and Student received FAPE through the program that was designed and implemented. The School District conducted evaluations in response to concerns raised by Parent, added counseling services at Parent's request and modified goals with Parent input.

Petitioner also alleges the School District violated prior written notice requirements by sending a letter, instead of issuing prior written notice, to respond to Parent's letter noticing the intention to privately place Student. To ensure the opportunity of full reimbursement for the placement at \*\*\*, Parent sent a letter to the School District noticing the intent to privately place Student for the summer and at the beginning of the following school year. *34 C.F.R. § 300.148(d)(1)(ii)*. Nothing in the federal regulations specifically requires a school district to respond to a private placement notice. The federal regulations do require prior written notice to the parent within a reasonable time before the school district proposes or refused to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE. *34 C.F.R. § 300.503 (a)*. It can be argued that the School District's refusal to pay for Student's private placement is a refusal to change placement within the meaning of the federal regulation. If this is the case, then the School District was required to send Parent a prior written notice in response to the private placement letter. While the School District's letter responding to the private placement does not cover all of the prior written notice elements, it is responsive to the private placement request and provides an explanation for the refusal to pay for the private placement. Moreover, during the relevant time period, the School District was attempting to schedule an ARD committee meeting at which the private placement request could have been more fully explored.

For all procedural violation allegations outside of the September \*\*\*, 2016 ARD committee meeting, Petitioner failed to meet Petitioner's burden of proving the school district violated student or parental procedural rights under the IDEA. Throughout the 2016-17 school year, the school district provided Student's parents with the requisite Prior Written Notice (PWN), notice of ARD meetings, consent for evaluations notices, and ARD documents. *34 C.F.R. § 300.503 (a) (c)*. The record supports the conclusion the school district met its responsibilities under these procedural safeguards. Furthermore, even if there were any other procedural violations, Petitioner failed to

prove those violations, if any, impeded Student's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefit. 34 C.F.R. §300.513 (a) (2).

## VI. CONCLUSIONS OF LAW

1. The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F. 2d 127, 131 (5th Cir. 1993).
2. Respondent provided Petitioner with a free, appropriate public education and devised an appropriate IEP for the 2016-17 school year that provided the requisite educational benefit. Petitioner did not meet Petitioner's burden of proof on this issue. *Andrew F. ex. Rel. Joseph F. v. Douglas Cnty. Sch. Dist.*, *supra*; *Schaffer ex rel. Schaffer v. Weast*, *supra*; *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, *supra*; 34 C.F.R. §§ 300.22, 300.323 (a); 19 Tex. Admin. Code § 89.1055 (e).
3. Petitioner did not meet Petitioner's burden of proving entitlement to reimbursement for the unilateral private placement. *Schaffer ex rel. Schaffer v. Weast*, *supra*; *Burlington, Supra*; *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, *supra*; *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, *supra*; 34 C.F.R. §§ 300.1, 300.17.
4. Petitioner met Petitioner's burden of proof to show Respondent violated student and parental procedural rights under the IDEA at the September \*\*\*, 2016 Admission, Review and Dismissal committee meeting by significantly impeding Parent's opportunity to participate in decision-making regarding the provision of a free, appropriate public education. *Schaffer ex rel. Schaffer v. Weast*, *supra*; 34 C.F.R. §§ 300.503 (a) (c); 300.504(a) (d); 300.513 (a) (2).
5. In all other aspects, Respondent complied with student and parental procedural rights under the IDEA. Any other procedural violations, if any, did not impede Petitioner's right to a free, appropriate public education, significantly impede the parent's opportunity to participate in decision-making regarding the provision of a free, appropriate public education, or cause a deprivation of educational benefit. 34 C.F.R. §§ 300.503 (a) (c); 300.504(a) (d); 300.513 (a) (2).

## VII. ORDERS

Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief are **GRANTED IN PART AND DENIED IN PART** as follows:

1. To ensure Parent is able to fully participate in the decision-making regarding the provision of a Free Appropriate Public Education for Student, the School District must utilize an independent Individualized Education Program Facilitator under Texas Education Code Section 29.020 to facilitate an Admission Review and Dismissal committee meeting for Student, should Student reenroll in a School District school or express the intent to reenroll in the School District within one year of this order.
2. All other requests for relief not specifically stated in these Orders is hereby **DENIED**.

**SIGNED May 18, 2018.**



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**Steve Elliot**  
**Special Education Hearing Officer**  
**For the State of Texas**

### **VIII. 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. 20. U.S.C. § 1415 (i)(2); 19 Tex. Admin. Code Sec. 89.1185 (n).