

DOCKET NO. 312-SE-0716

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

DECISION OF HEARING OFFICER

I. PROCEDURAL HISTORY

Petitioner, STUDENT (Student), by next friend PARENT (Mother) (collectively, Petitioner) requested an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), with such request (the Complaint) being received by the Texas Education Agency (Agency) on July 21, 2016, and assigned to this Hearing Officer on July 22, 2016. The Respondent to the complaint is the Northside Independent School District (District). Petitioner alleges the District committed numerous violations of the Individuals with Disabilities Education Act (IDEA) and deprived Student of a Free Appropriate Public Education (FAPE). The District denied Petitioner’s allegations. The Hearing Officer finds that Student was denied a FAPE. Therefore, Petitioner’s requested relief is **PARTIALLY GRANTED** as set out below.

II. LEGAL REPRESENTATIVES

Petitioner was represented throughout this litigation by Elizabeth Angelone and Sonja Kerr of the Cuddy Law Firm. Respondent has been represented throughout this litigation by Elvin Houston and John Muniz of Walsh & Gallegos, *et. al.*

III. RESOLUTION MEETING

The Resolution Meeting did not occur. On November 30, 2016, after the due process hearing, Petitioner's counsel reported that Petitioner requested a Resolution Meeting and Mediation on several occasions but the District declined. This information was not brought to the Hearing Officer's attention until well after the record closed.¹ Because Petitioner did not request that the Hearing Officer intervene to accelerate the due process hearing timeline, the Hearing Officer determines Petitioner constructively waived the Resolution Meeting.²

IV. HEARING ISSUES

The issues before the Hearing Officer were identified in Order No. 5 issued on August 26, 2016, following the initial prehearing conference.³ The order noted that during the prehearing conference, Petitioner acknowledged that the Complaint filed on July 21, 2015, consisted of a complete statement of the issues in this case, and the District agreed it was provided an opportunity to seek clarification.⁴ In the Complaint Petitioner alleged that the District denied Student a free appropriate public education (FAPE) and raised the following issues for decision in this case:

A. FAPE:

- 1. Did the District fail to provide Student with a FAPE within the meaning of the IDEA from March 2015 to the end of May 2015 and whether the proposed IEP for the 2016-2017 schoolyear was reasonably calculated to provide Student with a FAPE?**

Petitioner alleges the following mixed questions of law and fact in support of this legal issue of whether Student was provided with FAPE:

¹ E-mail from Elizabeth Angelone, Petitioner's Counsel, to Hearing Officer (Nov. 30, 2016, 11:30 CST) (on file with Hearing Officer).

² 34 C.F.R. § 500.510(b)(5).

³ See 19 Tex. Admin. Code § 89.1185(e)(2).

⁴ PHC Tr. at 9-16.

- a. Did the District fail to correctly identify Student's cognitive abilities (*i.e.* Student's IQ) thus denying a FAPE during the relevant time period?
- b. Did the District fail to properly write Present Levels of Performance and goals and objectives in meaningful and measurable ways to accurately track IEP progress from March 2015 through May 2015 and in the proposed June 2016 IEP?
- c. Did the District fail to track Student's progress and IEP goals contained in the February 2015 IEP for the time period spanning March 2015 through May 2015, and did the District fail to provide Petitioner with the requisite progress reports for the same time period?
- d. Did the District fail to consider and ensure positive behavioral support programming for Student during the relevant time periods?
- e. Did the District fail to provide or propose necessary speech language services to Student during the relevant time periods?
- f. Did the District fail to provide or propose adequate social skills training for Student during the relevant periods?
- g. Did the District fail to provide or propose in-home training for Parent during the relevant time periods?
- h. Did the District fail to provide or propose assistive technology for Student during the relevant time period?
- i. Did the District fail to provide appropriate Extended School Year (ESY) services for the summer recess between the 2014-2015 and 2015-2016 schoolyears?
- j. Did the District fail to provide or propose for Student strategies including those based on peer-reviewed, research based educational programming practices for a child with autism as required by Texas regulations (*i.e.* the Autism Supplement), and were Student's autism supplements contained in the February 2015 IEP for the relevant time period of March 2015 through May 2015 and in the proposed June 2016 IEP, deficient?
- k. Did District fail to identify and provide services for dyslexia and/or dysgraphia during the relevant time period?

B. Evaluation:

1. Did the District fail to evaluate Student in all areas of suspected disability including central auditory processing and behavior during the relevant time periods?
2. Did the District unlawfully deny Mother's request for an independent central auditory processing evaluation?
3. Did the District's December ***, 2014, Reevaluation indicating Student had an intellectual disability deny Student a FAPE for the February 2015 IEP during the relevant time period of March 2015 through May 2015?

C. Procedural:

1. For the relevant time period of March 2015 through May 2015 did the District fail to provide parents with the requisite Prior Written Notice impeding Student's right to a FAPE, and/or significantly impede Petitioner's parents of the opportunity to meaningfully participate in the decision-making process regarding the provision of a FAPE to Student, and/or impeded or caused a deprivation of educational benefit to Student?
2. Did the District pre-determine the 2016-2017 proposed individualized educational program (IEP) and fail to take into account input from Student's teacher and the independent educational evaluation (IEE)?

D. Petitioner's Requested Relief:

1. A finding that the District denied Student a FAPE for the relevant time periods.
2. The District provide an appropriate prospective educational placement for Student for the 2016-2017 schoolyear.
3. The District pay for private Applied Behavior Analysis (ABA) therapy and provide Assistive Technology services including evaluation in an amount equal to the deprivation Student has endured.⁵
4. The District issue compensatory services, specifically speech language therapy and social skills for the failure to provide Student with those services. In the event

⁵ At hearing, without objection, Petitioner modified this request to abandon the request for Applied Behavior Analysis therapy and amended the request to compensatory behavior and social skills services.

Mother is unable to locate a provider to provide speech language and social skills therapy in ***, she request the Hearing Officer order the District to fund the costs associated with the Student's transportation to and from the location where any such services will be provided.

5. The District reimburse Petitioner for out-of-pocket expenses for the 2015-2016 school year or alternately, provide the Student with compensatory educational services, in an amount to be determined, for the failure to provide Student with an appropriate program during the years disputed herein.
6. The District fund an independent educational evaluation for auditory processing; alternatively, if Mother is able to obtain the evaluation on her own, that the evaluation be publicly funded.
7. The District provide funding for a Board Certified Behavioral Analyst to conduct a functional behavioral assessment and develop an appropriate behavior intervention plan for Student; alternatively, if the Parent is able to obtain the evaluations on her own, that the evaluation be publicly funded.
8. The District provide the Parent with Parent Counseling and Training developed for parents of students with autism.
9. The District will pay the Parent's reasonable attorney's fees and expenses in conjunction with representation in this matter.
10. To award any additional relief that the Hearing Officer finds necessary to ensure that Student is provided with a FAPE including transportation or transportation costs to any services deemed appropriate by the Hearing Officer.

V. STATUTE OF LIMITATIONS

The Statute of Limitations (SOL) was raised by the District as an affirmative defense and was the subject of an evidentiary prehearing conference conducted on August 16, 2016, and resolved in Order No. 6, which determined that the accrual date for this complaint was March ***, 2015.

VI. HEARING AND EXTENSIONS OF THE DECISION DUE DATE

The hearing was held on September 14-16, 2016, before Hearing Officer David A. Berger, at the District's Teacher Resource Center, 5651 Grissom Road, Leon Valley, Texas.

At the conclusion of the hearing, both Parties asked for the opportunity to submit written closing arguments. At the request of the Parties, the decision due date was extended on the record, for good cause, to November 14, 2016,⁶ to allow time for preparation of the hearing transcript and for the Parties to submit written briefs. Order No. 7 issued on October 28, 2016, granted Petitioner's unopposed request to extend the decision due date to November 14, 2016. Finally, Order No. 8 issued on November 3, 2016, granted Petitioner's unopposed second request to extend the decision due date to December 5, 2016. This decision is timely and rendered to the Parties on December 5, 2016.

VII. FINDINGS OF FACT

Based upon the evidence and argument of the Parties, the Hearing Officer makes the following findings of fact:

1. Student, *** school student, resides with Parents within the geographical boundaries of the District.
2. Student began receiving services from the District in ***, as a ***-year-old in the *** (***).⁷ Student attended District schools for *** years—*** through ***. Student ***.
3. Student initially became eligible to receive services under the IDEA on December ***, 2007, while attending *** after the Admission, Review, and Dismissal Committee (ARDC) met to review Student's Full and Individual Initial Evaluation (FIE). The evaluation determined that Student was eligible to receive special education services for receptive and expressive speech impairments.⁸

⁶ Tr. at 1077-79.

⁷ RE-A, B.

⁸ PE-41 at 7-8; PE-39 at 2 (“[Student] qualifies for special education services as a Student with a speech impairment.”).

4. The following ARDC meetings and/or IEP preparation and revisions were performed on the following dates:
- a. ARDC Eligibility Review: June ***, 2016;⁹
 - b. ARDC Brief Form (Parent in-home Training): March ***, 2015;¹⁰
 - c. ARDC Brief Form (Parent in-home Training): March ***, 2015;¹¹
 - d. ARDC Annual Reevaluation: February ***, 2015;¹²
 - e. ARDC Annual/Reevaluation Review: February ***, 2015;¹³
 - f. IEP Amendment (Transportation): February ***, 2014;¹⁴
 - g. Incomplete Autism Documentation: February ***, 2014;¹⁵
 - h. ARDC Annual Review: February ***, 2014;¹⁶
 - i. Reevaluation Review: December ***, 2014;¹⁷
 - j. Parent Requested ARDC (Brief Form) to discuss specialized services: October ***, 2013.¹⁸
 - k. ARDC Annual Review: April ***, 2013;¹⁹
 - l. ARDC Brief Form (Change of Schedule): September ***, 2012;²⁰
 - m. Reevaluation Review: May ***, 2012;²¹
 - n. Annual Reevaluation Review: May ***, 2011;²²
 - o. ARD Amendment (Schedule of Services): June ***, 2010;²³
 - p. ARDC Change of Placement: May ***, 2010;²⁴
 - q. ARDC Brief Form (Review OT Eval.): March ***, 2010;²⁵
 - r. FIE: February ***, 2010;²⁶

⁹ PE-1.

¹⁰ PE-11.

¹¹ PE-12.

¹² PE-14.

¹³ PE-16.

¹⁴ PE-18.

¹⁵ PE-19.

¹⁶ PE-20.

¹⁷ PE-16.

¹⁸ PE-21.

¹⁹ PE-59.

²⁰ PE-22.

²¹ PE-24.

²² PE-25.

²³ PE-26.

²⁴ PE-60.

²⁵ PE-61.

²⁶ PE-27.

- s. ARDC Annual Review: October ***, 2009;²⁷
 - t. Reevaluation Review: September ***, 2009;²⁸
 - u. ARDC Annual Review: December ***, 2008;²⁹
 - v. ARDC Change of Placement/Annual Review: December ***, 2007;³⁰
 - w. Reevaluation Review: December ***, 2007;³¹
 - x. ARDC Admission Meeting: March *** 2007;³² and
 - y. FIE: January ***, 2007.³³
5. On December ***, 2014, Student's ARDC met and determined that Student also qualified for special education services for autism.³⁴
 6. Autism was determined to be Student's primary eligibility, with the speech impairments considered secondary.³⁵
 7. On May ***, 2015, Mother withdrew Student from District schools, effective immediately, and gave written notice that a due process complaint was being filed for alleged FAPE violations.
 8. The Complaint was filed on July 21, 2016.
 9. On July 21, 2016, Mother provided notice in the Complaint that she would seek reimbursement for private placement and compensatory relief for educational services.³⁶
 10. Student was *** during the 2015-2016 schoolyear by a private *** paid for by Mother.³⁷
 11. Mother's cost for the private *** is ***.³⁸
 12. Petitioner seeks reimbursement for out-of-pocket expenses of \$37,727.69.³⁹

²⁷ PE-30.

²⁸ PE-31.

²⁹ PE-38.

³⁰ PE-39.

³¹ PE-40.

³² PE-62.

³³ PE-41.

³⁴ PE-14.

³⁵ PE-7 at 1; PE-16; PE-20.

³⁶ PE-10; 34 C.F.R. § 148(a).

³⁷ PE-1 at 2: "[Student] was not enrolled at [District] for the 2015-2016 SY. Student has been *** and is planning to return to [District] in the fall." See 34 C.F.R., §§ 300.130; .134(c)-(d); 19 Tex. Admin. Code § 89.1096(a)(2), (b).

³⁸ PE-46.

13. Petitioner proved up reimbursable expenses of \$30,181.69.
14. An ARDC convened on December ***, 2014, reviewed the reevaluation and correctly declined to add intellectually disabled to Student's eligibility.
15. Educational goals were not adequately developed for Student in Student's February 2015 IEP and in the proposed June 2016 IEP because of the following:⁴⁰
 - a. Student's curriculum was not modified nor were services devised, discontinued, or altered based upon the 2014 reevaluation.
 - b. Many of Student's educational goals were based upon progress reports that contained missing data, were incomplete, and did not include present levels of academic achievement and functional performance (PLAAFP).
 - c. Data regarding Student's language abilities is critical to measuring Student's progress, and monitoring progress is essential to writing effective goals for Student's speech impairment disability.⁴¹
 - d. Where goals were devised for Student, they often repeated the same goal from previous years and failed to document progress or a lack thereof.⁴²
 - e. Certain goals were based on subjective opinions, were not updated, contained no baseline of present levels of performance measured in percentages, and were not based upon objective data.⁴³
16. As of the December 2014 Reevaluation Review and further documented in the February 2015 IEP, Student demonstrated math skills at the *** grade level even though Student was in the *** grade.⁴⁴
17. The February 2015 IEP reported Student's math level as grade level ***, but required Student to master ***-grade-level standards at 90% accuracy, from annual to annual ARDC meeting.

³⁹ The Hearing Officer only considered expenses incurred after the accrual date of March 8, 2015. For claims partially reimbursed by insurance, the Hearing Officer only considered Petitioner's actual out-of-pocket expense.

⁴⁰ Tr. at 36-38; PE-20 at 32.

⁴¹ *Id.*

⁴² *Compare* PE-16 at 2 *with* PE-14 at 3; *Compare* PE-25 at 2 *with* PE-16 at 9.

⁴³ *Compare* PE-16 at 2 (Reevaluation Review of December ***, 2015) *with* PE-14 at 3 (Review of Existing Evaluation Data (REED) of February ***, 2015) each noting that Student has difficulty responding appropriately to "wh" questions (who, what, when, where, why, and how questions) and actually documenting a regression in Student's ability to respond to "wh" questions from 2012 through 2015. Neither document stated progress nor reflected whether Student could ever appropriately respond to "wh" questions. *Compare* PE-25 at 2 (2011 IEP--Science: noting Student's strength as "enjoys class science experiments.") *with* PE-16 at 9 (Annual IEP review of February ***, 2015—Science PLAAFP: "[Student] participates in science lab experiments.").

⁴⁴ PE-14 at 4; PE-16 at 9; Tr. at 285.

18. The 90% accuracy standard for math Level ***etermination was higher than that of Student's non-disabled peers.⁴⁵
19. At the time of Student's February 2014 IEP, Student's strength was recognizing *** and Student's needs were working on Student's reading comprehension and developing independence.⁴⁶
20. The December 2014 Reevaluation and the February 2015 IEP reported Student could read and comprehend at a ***-grade level.⁴⁷
21. The February 2015 IEP reported Student decoding and comprehending at grade level (Level ***of DRA).⁴⁸
22. The IEP from March 2015 reported that Student dropped in reading skills during the last grading period of Student's ***-grade year (from DRA Level ***in March 2014 to Level ***in June 2014).
23. Student began Student's ***-grade year at DRA Level ***but progressed back to Level ***by January 2015.⁴⁹
24. The underlying PLAAFPs (*e.g.*, Science) were dropped and disappeared from Student's February 2015 IEP and the proposed June 2016 IEP without explanation.⁵⁰
25. Student's ARDC convened on June ***, 2016, to review evaluations, determine current IDEA eligibility, and discuss the IEP for the 2015-2016 schoolyear.⁵¹
26. The June 2016 IEP was developed based on the December ***, 2014 assessment, the last assessment completed.⁵²
27. The June 2016 IEP contained five annual goals, each with multiple objectives, for the following subjects: Reading, Math, English Language Arts and Reading, Social Studies, and Behavior.⁵³

⁴⁵ PE-14 at 8.

⁴⁶ PE-20; Tr. at 280.

⁴⁷ PE-14 at 2; PE-16 at 8, 11; Tr. at 280.

⁴⁸ PE-14 at 2; Tr. at 280-81.

⁴⁹ PE-11 at 5; Tr. at 282.

⁵⁰ ***; PE-1 at 4; PE-20; PE-24 at 10. ***; PE-1 at 10; PE-14 at 9-10; ***; Tr. at 651-63; PE-14 at 2, 7; ***; Tr. at 663-64; PE-14 at 4, 8; ***; Tr. at 664-65; PE-14 at 9; *See* 34 C.F.R. § 300.320(a)(3)(i)-(ii).

⁵¹ PE-6 (Dr. ***' report); PE-7 (Dr. ***'s IEE report).

⁵² PE-1 at 2.

⁵³ PE-1 at 7-11.

28. After Student's withdrawal from school on May ***, 2015, the District ceased providing periodic progress reports on Student's IEP goals.⁵⁴
29. During the relevant time periods Student failed to show meaningful educational progress because:
- Student could read and comprehend at about a *** grade level at the time of the *** Reevaluation.⁵⁵
 - Student could decode and comprehend at a *** grade level (Level ***of DRA) at the time the ARDC met to discuss the February 2015 IEP.⁵⁶
 - By the March 2015 IEP, Student experienced a drop in reading skills during the last grading period of Student's *** grade year.
 - Student dropped from DRA Level ***in March 2014 to Level ***in June 2014, beginning Student's *** grade year at Level ***, but progressed back to Level ***by January of 2015.⁵⁷
30. As of the December 2014 Reevaluation, Student's math skills were at the ***-grade level.⁵⁸
- Student was able to solve *** at the *** grade level;
 - Student was able to perform ***, with reminders to ***;
 - Student was able to follow an example to solve ***.⁵⁹
31. A new evaluation was drafted on December ***, 2014, and the ARDC convened on February ***, 2015 to conduct a reevaluation review.⁶⁰
32. On February ***, 2014, the ARDC convened for Student's annual review for the 2013-2014 schoolyear.⁶¹ An annual IEP (February 2014 IEP) was developed and approved for the remainder of the 2013-2014 schoolyear and for the first half of the 2014-2015 schoolyear.⁶²

⁵⁴ Tr. at 366; 34 C.F.R. § 320(a)(3)(ii); 19 Tex. Admin. Code § 89.1050(a)(1).

⁵⁵ PE-16 at 11; Tr. at 280.

⁵⁶ PE-14 at 2; Tr. at 280-81.

⁵⁷ PE-11 at 5; Tr. at 282.

⁵⁸ PE-16 at

⁵⁹ PE-16 at 9; Tr. at 285.

⁶⁰ E-16 at 1.

⁶¹ PE-20 at 27.

⁶² PE-20.

33. Student's next IEP was developed and approved on February ***, 2015.⁶³
34. Student's final IEP was not developed until the end of the schoolyear on June ***, 2016.⁶⁴ Consensus was not reached on this IEP.
35. Student did not have a current IEP for the last 2 grading periods of the 2015-2016 schoolyear. Student's previous IEP expired in February 2016.⁶⁵
36. The lapse in IEP coverage was due to Mother unilaterally withdrawing Student from the District and choosing *** placement on May ***, 2015.⁶⁶ The unilateral withdrawal was "effective immediately" and did not provide the District with 10-day notice prior to withdrawal.⁶⁷
37. The ARDC's reevaluation report of December ***, 2014, and approved at the meeting on February ***, 2015, noted: "[Student] struggled with receptive and expressive vocabulary, formulating a sentence with appropriate grammar, understanding sentence structures, following directions of increasing length and complexity, and explaining nonliteral statements."⁶⁸
38. Mother requested additional speech-language testing at the February ***, 2015, reevaluation meeting.⁶⁹ The District conducted the additional testing. The 2015 speech-language testing revealed regression from the 2012 evaluation. In 2012, on the Comprehensive Assessment of Spoken Language (standard scores), Student scored in Nonliteral Language: ***, and in Pragmatic Judgement: ***.⁷⁰ In the 2015 speech-language testing Student scored in Nonliteral Language: ***, and in Pragmatic Judgement: ***.⁷¹ The District considers any standard score below *** to be an indication of speech impairment.⁷²
39. In late February or early March 2016, Mother requested a publically funded IEE based on the December 2015 reevaluation review.⁷³

⁶³ PE-14.

⁶⁴ PE-1 at 1, 41.

⁶⁵ Compare PE-20 at 1 with PE-1at 1.

⁶⁶ PE-10.

⁶⁷ 43 C.F.R. § 300.148(a)-(b).

⁶⁸ PE-16 at 2.

⁶⁹ PE-16 at 3.

⁷⁰ PE-16 at 2.

⁷¹ PE-16 at 3.

⁷² PE-16 at 3, "NISD considers a SS [standard score] of below *** to indicate a speech impairment in that area;" Tr. at 59, "The Reevaluation Committee had concerns about "receptive and expressive language and...some academic needs."

⁷³ PE-7 at 1.

40. The IEE was conducted by ***, Ph.D., NCSP, Licensed Specialist in School Psychology (LSSP), and her report is dated March ***, 2016. Dr. *** recommended a central auditory processing disorder evaluation.⁷⁴
41. A central auditory processing disorder is an impairment of the use of auditory information in the central nervous system. Children who have auditory processing deficits typically demonstrate poor auditory attending skills as well as delays in receptive language development. They may also have limitations in auditory memory and retrieval.⁷⁵
42. During the same time period, Mother retained ***, MD, who was qualified to perform an IEE because:
- a. Dr. *** is a developmental and behavioral pediatrician who has been in practice as a physician since 1993;⁷⁶
 - b. Developmental and behavioral pediatricians have training in general pediatrics and then specialize in diagnosing children with developmental difficulties;⁷⁷
 - c. Dr. ***' medical practice emphasizes autism-related disorders and learning disabilities.⁷⁸
43. Student's verbal IQ is very low (***), due to Student's language deficits. In contrast, Student's nonverbal score is in the average range (***).
44. Student has a severe language-based learning disability:
- a. There was a ***-point difference in Student's verbal and nonverbal IQ scores (over *** standard deviations) which is consistent with a severe language-based learning disability;
 - b. Student has difficulty with complex, language-based processing and learning;
 - c. Student continues to have severe pragmatic language deficits;
 - d. Student's language-based learning disability impairs Student's ability to appropriately use syntax, comprehend others, and express ***self fluently;
 - e. Student's standard achievement test results are at the level of a *** to *** year-old child.
45. Complex language skills are essential for academic learning.

⁷⁴ PE-7 at 16.

⁷⁵ PE-43 at 3; Tr. at 143 (testimony of Dr. ***): "It's a [auditory processing disorder] a disorder of processing auditory information and translating it into meaningful understanding, into comprehension. So it's not an ear problem. It's a brain problem. It happens after the ear and in the brain."

⁷⁶ PE-34; Tr. at 102.

⁷⁷ Tr. at 102-03.

⁷⁸ PE-34 at 2.

46. Student needs visual support for all academic and language based tasks including:
- a. Support for attention control;
 - b. More intense 1:1 speech and language therapy to make meaningful progress in academics; and
 - c. Appropriate support to ensure Student achieves at Student's cognitive potential.⁷⁹
47. Based on Dr. ***'s IEE recommendation, Mother requested another IEE to assess for a central auditory processing disorder. On March ***, 2016, the District denied the request for a central auditory process disorder IEE on the basis it wanted to perform its own assessment.⁸⁰
48. The District never conducted a central auditory processing assessment.⁸¹
49. Mother retained ***, Au. D., to perform a central auditory processing disorder evaluation on August ***, 2016.⁸² Dr. *** concluded that the results of her evaluation and testing were consistent with a central auditory processing disorder;⁸³ however, she could not conclusively diagnose the disorder because of Student's comorbidities of autism and a language disorder.⁸⁴
50. Because of Student's complicated diagnostic challenges a central auditory processing disorder cannot be ruled out.⁸⁵
51. A language disorder is separate and distinct from a central auditory processing disorder and a child can suffer from both.⁸⁶
52. Language disorders are frequently the result of hearing deficits, and a central auditory processing disorder is neurological.
53. Based upon the results of her testing, Dr. *** recommended Student:⁸⁷
- a. Follow up with Dr. *** to consult on auditory testing results and seek Dr. ***' recommendations.

⁷⁹ PE-6 at 14.

⁸⁰ RE-T.

⁸¹ Tr. at 36.

⁸² PE-43.

⁸³ Tr. at 479.

⁸⁴ Tr. at 483.

⁸⁵ Tr. at 485.

⁸⁶ Tr. at 479.

⁸⁷ PE-43 at 4.

- b. Concerned that Student's may suffer from an undiagnosed physiological condition,⁸⁸ Dr. *** recommended Student undergo an Auditory Brainstem Response evaluation to further investigate auditory function.
 - c. Use of a sound field FM system in order to improve the signal-to-noise ratio, making it easier for Student to listen.
 - d. Conduct a speech/language evaluation.
 - e. Consideration of computer based remediation programs such as Fast Forward, Earobics, or CAPDOTS.
 - f. Repeat testing in 1 year to monitor development of the central auditory nervous system.
54. The record contains no evidence that the ARDC ever considered Dr. ***'s report and recommendations.⁸⁹
55. Student's proposed June 2016 IEP concluded that Student could not participate in the educational process without assistive technology, devices and/or services and documented specific devices and/or services needed or required.⁹⁰
56. Student's proposed June 2016 IEP failed to sufficiently document the specific devices and services because:
- a. The accommodations section referenced an undefined acronym of "FMNV," that remained undefined in the IEP and throughout the hearing.
 - b. An inference that FMNV pertains to *** assistive technology system is not appropriate.⁹¹
 - c. *** assistive technology system is ***.
 - d. The Student ***—*** and permits a student to focus on the teacher's message.⁹²
57. Based on Student's well documented disabilities of autism, speech-language disorder, and probable central auditory processing disorder, *** assistive technology device is essential for Student to make meaningful educational progress.
58. The District's proposed June 2016 IEP would not provide Student with a FAPE, because it was not shown to provide Student with the assistive technology found necessary by the ARDC meeting on June ***, 2016.⁹³

⁸⁸ Tr. at 486.

⁸⁹ 34 C.F.R. § 300.502(c)(1).

⁹⁰ PE-1 at 6.

⁹¹ See Tr. at 340.

⁹² Tr. at 340.

⁹³ See PE-1 at 6; Tr. at 344 (testimony of ***, District Speech Pathologist):

59. Student was unable to participate in the educational program or make reasonable progress toward mastery of IEP goals and objectives without assistive technology, devices and/or services.⁹⁴
60. The District has an affirmative duty to identify and assess all areas of suspected need.⁹⁵
61. The District was on notice in its December ***, 2014, reevaluation report that a central auditory processing disorder was a suspected area of need when it found that Student struggled with receptive and expressive vocabulary, formulating a sentence with appropriate grammar, understanding sentence structures, following directions of increasing length and complexity, and explaining nonliteral statements.⁹⁶
62. Student's receptive and expressive deficits were commented upon by the District after conducting speech-language testing as far back as ***, when it found that Student had difficulty with receptive and expressive vocabulary.⁹⁷
63. The District's December ***, 2014, reevaluation, Dr. ***'s IEE, and Dr. ***' outside evaluation all indicate a longstanding need for a central auditory processing disorder evaluation. The District has no way to determine whether it is providing appropriate language-speech services and what accommodations would be the most effective until Student is comprehensively assessed for a Language Based Learning Disability, including but not limited to, a central auditory processing disorder.
64. The District's failure to comprehensively assess Student for a Language Based Learning Disability, including a central auditory processing disorder, would have denied Student an appropriate individualized program of education that permitted Student to receive meaningful benefit if the June 2016 IEP had been implemented.
65. For this decision, the only procedural requirements pursuant to the IDEA, federal, and Texas rules, including provision of Prior Written Notice, are those requirements that existed after March 8, 2015--the accrual date.
66. After Mother provided the District written notice of her intent to withdraw Student from the District on May ***, 2015,⁹⁸ the ARDC met on June ***, 2016, to review the proposed IEP for the 2015-2016 schoolyear (ironically, after that schoolyear had ended).⁹⁹ The Prior Written Notice section of the IEP did not address whether the District would

⁹⁴ PE-1 at 6.

⁹⁵ 34 C.F.R. § 300.304(c)(3)-(4), (6).

⁹⁶ PE-16 at 2.

⁹⁷ RE-A at 2.

⁹⁸ PE-10.

⁹⁹ PE-1 at 1.

approve or deny the private placement, and did not address reimbursement for the 2015-2016 or the 2016-2017 schoolyears.¹⁰⁰

67. The District significantly impeded Mother's participation in the IEP process, denying her meaningful participation. As a key stakeholder, a parent must have equal access to critical and accurate information, such as evaluations of the student's ability to learn, and progress reports. The evidence showed the District denied Mother this information.
- a. The District failed to provide Mother with progress reports regarding Student's speech services and in all academic areas which interfered with Mother's right to meaningfully participate in the development of Student's program.
 - b. The only evidence of progress reporting was vague and incomplete at best.¹⁰¹
 - c. Mother did not know where Student was academically or what Student's abilities actually were. Mother and Student's *** could not figure out "where Student was" academically, and both unsuccessfully requested that information from the District.
 - d. Progress reports were not available and grades simply reported Student's participation.
68. Mother received the Notice of Procedural Safeguards (NOPS) on February ***, 2016 and historically at least several times a year and after every meeting.¹⁰² Mother admitted that if she lost a copy of the NOPS she knew she could go to the District's website and obtain another copy.¹⁰³ Mother's ability to collaboratively participate in the ARDC IEP process was not impeded by a failure to provide NOPS.
69. The District repeatedly failed to provide Mother with Prior Written Notice (PWN):
- a. Lack of PWN about reduction of speech and language services;¹⁰⁴
 - b. Lack of PWN about speech and language hours;¹⁰⁵
 - c. Lack of complete PWN about the December 2014 reevaluation indicating Student had an intellectual disability;¹⁰⁶

¹⁰⁰ PE-1 at 27; Tr. at 32; 34 C.F.R. § 300.503(a)(2), (b)-(c).

¹⁰¹ See e.g. PE-20 at 30-33.

¹⁰² PHC Tr. 153-54.

¹⁰³ PHC Tr. at 154.

¹⁰⁴ PE-21 at 1; RE-I (PWN failed to offer a "description" of actions proposed or refused and why).

¹⁰⁵ PE-20 at 16-17 (The February ***, 2014 IEP stated Student was to receive 18.5 hours of speech therapy. No Prior Written Notice regarding this change was included). PE-14 at 25 (The February ***, 2015 reevaluation contained no progress reports yet Student's speech services were reduced from 18.5 hours and through the third nine weeks of the 2015-2016 school year to 9.5 hours with no fourth nine weeks grading period speech schedule, without explanation, progress reports, or PWN).

¹⁰⁶ PE-14 at 29. Mother disagreed with the results of the February 2015 evaluation. PWN did not describe, explain, or even mention, Mother's rights when disagreeing with evaluation results; however, the PWN did reference the NOPS which were provided on February ***, 2015. PE-14 at 31.

- d. Lack of sufficient PWN denying ESY during 2015;¹⁰⁷
 - e. Lack of PWN when denying parent request for Central Auditory Processing Disorder;¹⁰⁸
 - f. Lack of PWN when issuing “ready, willing and able” letter of September ***, 2015;¹⁰⁹ and
 - g. Lack of PWN when further reducing speech hours in ***.¹¹⁰
70. Failure to provide Mother with PWN was a substantive procedural error that impeded Mother’s ability to participate in the IEP development process.
71. Student attended District schools for *** years – *** and *** (***) through ***. During those *** years Student never progressed beyond a *** grade reading level. That lack of progression is evidence of Student’s severe Language Based Learning Disability (*i.e.* Student’s levels of achievement are not commensurate with Student’s cognitive abilities).¹¹¹
72. Children with severe Language Based Learning Disabilities can be taught to read beyond the *** grade level using visual techniques and supports.¹¹²
73. The following subjects were addressed in both of Student’s 2014-2015 and in Student’s 2015-2016 IEP goals: Reading, Math, English Language Arts and Reading, Social Studies, Science, Speech Therapy-Language, and Behavior.¹¹³

¹⁰⁷ PE-14 at 31, 39.

¹⁰⁸ District’s Director of Special Education agreed that when a request for an evaluation is made, the District has a duty to evaluate in all areas of need and disability, and if the District fails to evaluate in all areas of need and disability, the parent has the right to request an IEE in any area that the District did not evaluate. Tr. at 33-34. She explained that although the District paid for Dr. ***’s testing which recommended Student be evaluated for a central auditory processing disorder (CAPD), the District never evaluated Student for CAPD. Tr. at 35-36. The Director conceded that the District denied Mother’s IEE request for an IEE in auditory processing and that the letter communicating this denial did not constitute PWN nor did the June 2016 IEP. Tr. at 34-35; RE-T. The Director testified that she found no consent for the auditory processing disorder, and if one had been offered, it should be in Student’s educational records. Tr. at 81-82.

¹⁰⁹ The District’s Director of Special Education testified that she was aware that Mother had provided written notices of intent to unilaterally place Student. Tr. at 29. On September ***, 2015, the District issued a “ready, willing and able letter” to inform Mother that she has the right to re-enroll Student and that the District stands ready to implement the existing IEP. RE-R; Tr. at 70-71. In response to Mother’s second written notice, the District held an ARDC meeting in June 2016. Tr. at 29-31. The District’s PWN does not indicate whether the District would or would not pay for a private placement for Student. PE-1 at 27; Tr. at 31-32. The Director conceded that the District did not provide PWN at the IEP meeting in June 2016 (Tr. at 29-31) or through a letter dated March ***, 2016. RE-R; Tr. at 32-33.

¹¹⁰ PE-1 at 22, 27-28.

¹¹¹ Tr. at 122.

¹¹² Tr. at 123.

¹¹³ PE-1 at 7-11; PE-14 at 7-11.

74. As reflected in the table below, in the proposed June 2016 IEP, most of Student's goals were modified to lower performance expectations (*i.e.* in most subjects Student was required to demonstrate less mastery to achieve the goal). Other goals (social studies, science, and speech therapy) were carried over verbatim from the 2014-2015 IEP:¹¹⁴

February 2015 IEP		June 2016 IEP
Reading	***	***
Math	***	***
English	***	***
Social Studies	***	***
Science	***	***
February 2015 IEP		June 2016 IEP
Speech Therapy	***	***
Behavior	***	***

75. Student suffers from a severe Language Based Learning Disability; however, Student's proposed 2016-2017 IEP inexplicably reduced Student's direct speech therapy services. In Student's September 2012 IEP, Student received 17.5 hours of direct speech therapy,¹¹⁵ and in the February 2015 IEP, Student received 22.5 hours of direct speech therapy for the schoolyear.¹¹⁶ The proposed June 2016 IEP provided a mere 5.5 hours of direct speech therapy for the entire schoolyear.¹¹⁷
76. Practicing language skills in the general education classroom did not provide equivalent nor adequate services:
- There was no tracking or data compiled as to what Student's language skills were in the general education classroom.¹¹⁸
 - Neither the general education teacher nor the speech pathologist was assigned responsibility for monitoring Student's speech and language goals in the general education classroom.¹¹⁹
 - None of Student's classroom teachers (general and special education classrooms) received training on Student's language-speech goals and objectives or on

¹¹⁴ Compare PE-1 at 7-11 with PE-14 at 7-11.

¹¹⁵ Tr. at 316-17.

¹¹⁶ PE-14 at 25; Tr. at 325.

¹¹⁷ PE-1 at 22.

¹¹⁸ Tr. at 318.

¹¹⁹ Tr. at 318.

collaboratively providing equivalent speech-language therapy type services in the general education classroom.¹²⁰

77. *** has been certified as a teacher for 20 years and holds certifications in hearing impaired, auditory impaired K through 12, language arts in grades *** through ***, and English as a second language for grades *** through ***.¹²¹
78. Ms. *** began tutoring Student in *** 2015 while Student was still attending the District.¹²² After Student withdrew, ***. Ms. *** testified both as a fact witness and an expert witness in *** of children with auditory disabilities.
79. Ms. *** met with and conferred with Student's teacher requesting access to Student's educational records but was only allowed to see Student's prior IEP.¹²³ Ms. *** was seeking information to guide her ***. The teacher continually referred back to the February 2015 IEP that listed goals but did not provide accurate information on Student's current levels of performance.
80. Student's reading and comprehension has either been miscalculated or Student has shown regression:
- a. Reevaluation of December ***, 2014, states that Student's performance in reading suggests Student is able to read and comprehend information at about the beginning *** grade level."¹²⁴
 - b. The February 2015 IEP noted that Student is able to decode and comprehend ***-grade level stories, Fountas/Pinnell DRA Level ***.¹²⁵
 - c. In March 2015 Ms. *** determined that Student was reading independently at the *** level.¹²⁶
81. In ***, Ms. *** determined that while receiving 1:1 academic instruction *** and when not attending the District, Student exhibited one year's growth in reading fluency and two-thirds of one year's growth in reading comprehension.¹²⁷

¹²⁰ Tr. at 318-19.

¹²¹ Tr. at 275.

¹²² Tr. at 276.

¹²³ Tr. at 278.

¹²⁴ PE-16 at 11.

¹²⁵ PE-14 at 2. See PE-56 (DRA – Developmental Reading Assessment Level Correlation Chart) listing DRA Level *** as ***** grade reading.

¹²⁶ Tr. at 280; PE-42 at 1 (***' Progress Report of ***).

¹²⁷ Tr. at 284; PE-42.

82. Student's *** Reevaluation Review Committee documented the following concerning Student's math performance:
- STRENGTHS: [Student] is able to solve *** (***-grade level). Student can *** ***. Student is able to follow an example to solve ***.
 - BASELINE: Working at the *** level according to the STAR Math Assessment.
 - [Student] has difficulty understanding word problems (what the problem is asking Student to do, which operation to choose, how to make a plan to solve the problem).¹²⁸
83. Under *** instruction Student's basic math skills have advanced to the beginning *** grade level, and Student's ability to solve word problems that rely on reading concepts and vocabulary, marginally improved to the ***** grade level.¹²⁹
84. Student's *** Reevaluation Review Committee documented the following concerning Student's writing abilities:
- [Student] is able *** (***-grade level).
 - BASELINE: [Student] is able to write a complete sentence.¹³⁰
85. In March 2015, Student was unable or unwilling ***. By May 2016, *** Student to ***. Student demonstrated two years of writing growth in the one year *** Student.¹³¹
86. *** successfully incorporated educational technology into Student's curriculum. Student uses a laptop to access educational programs (*e.g.* *** which is an educational program that provides grade level instructional videos—videos that accommodate Student's strength in visual learning—in science, social studies, and history designed to reinforce instructional concepts being presented by the teacher). *** Student to touch type on the laptop.¹³²
87. Student's IEP's for the 2014-2015 and 2016-2017 schoolyears were not adequately individualized on the basis of Student's assessments and performance:
- In the proposed June 2016 IEP the goals were written without any input or consultation with *** for approximately *** months by the time the ARDC convened.¹³³
 - The goals are not measurable and did not reflect Student's true educational needs.

¹²⁸ PE-16 at 9.

¹²⁹ Tr. at 285; PE-42.

¹³⁰ PE-16 at 9.

¹³¹ Tr. at 285-86; PE-42.

¹³² Tr. at 286-89.

¹³³ Tr. at 289-91, 309.

- c. The frequency of speech therapy services was inadequate.¹³⁴
 - d. The District's failure to assess Student for a central auditory processing disorder, and its refusal to consider Dr. ***'s and Dr. ***'s evaluations and reports, ensured that any IEP that did not identify and accommodate Student's auditory processing disorder, was not adequately individualized on the basis of Student's assessments and performance.
88. Student did not receive a meaningful educational benefit under the February 2015 and the proposed June 2016 IEPs:
- a. Any academic educational benefit derived from those IEPs was trivial and/or *de minimus*.
 - b. After attending District schools for *** years, Student could only read at the *** grade level.¹³⁵
 - c. Student's math and writing skills stagnated while in the District.¹³⁶
 - d. Student last attended District schools in the 2014-2015 schoolyear.
 - e. Had Student returned to the District for the 2015-2016 schoolyear, the IEP would not have provided a meaningful educational benefit because the goals were not measurable, were not supported by true/current PLAAFs (Student had been *** instruction for *** months at the time the goals were written), and the IEP failed to identify, accommodate, and provide services for Student's presumed additional IDEA eligibility for a central auditory processing disorder.
89. At all times while attending District schools, Student received and enjoyed nonacademic educational benefits through mainstreaming and social interactions with Student's nondisabled peers.¹³⁷
90. The District's behavioral support programming for the 2015-2016 schoolyear was considered, but was not appropriately devised and implemented.
- a. Both the February 2015 IEP and the proposed June 2016 IEP contained functional behavioral assessments and behavior intervention plans (BIPs).¹³⁸
 - b. Behaviors reported were failure to follow adult directives (although Student's behavior was not disruptive and Student was easily redirected).¹³⁹
 - c. No description of Student's responses to the identified stimuli was reported.
 - d. The antecedent behaviors were strikingly similar to a behavioral assessment conducted in ***.¹⁴⁰

¹³⁴ See note 58.

¹³⁵ Tr. at 280; PE-42 at 1 (*** Progress Report of ***).

¹³⁶ Tr. at 285; PE-42.

¹³⁷ See e.g. Tr. at 771-75.

¹³⁸ PE-14 at 33; PE-1 at 29.

¹³⁹ PE-14 at 34-35.

¹⁴⁰ PE-30.

- e. No specific data was collected to pinpoint what specifically was going on prior to Student's behavioral reaction. School staff could not tell if Student met this behavioral goal during testimony while reviewing social skills in the IEP which stated Student was to receive thirty minutes per week of social skills instruction.
- f. There was no data to support Student's behavioral progress or whether Student mastered any replacement behaviors that were taught. The 2015 social skills IEP lacked baseline data and the teacher did not monitor Student's progress towards certain social skills goals.
91. Student's February 2015 IEP behavior goal: "... [Will] comply with directive ***." ¹⁴¹
92. The June 2016 IEP contained the same behavioral goal, but lowered the objective required to master the goal without explanation: "... [Student] will comply with directive ***." ¹⁴²
93. The June 2016 ARDC reviewed existing behavior data that was available to address Student's behavior needs in the proposed IEP, but did not propose conducting an updated behavior assessment.
94. Student's February 2015 IEP and the proposed June 2016 IEP failed to adequately "program" positive behavior supports.
95. The District failed to provide Student necessary speech language services from March 2015 through May 2015.
96. Student's proposed June 2016 IEP did not address social skills training and was not adequate to address the needs of this autistic Student. ¹⁴³
97. The February 2015 ARDC meeting agreed that there was a need for Parent In-Home Training, based on the information in the Parent In-Home Needs Assessment. The ARDC was to meet and complete an IEP ARD supplement to add the parent in-home training by March ***, 2015. ¹⁴⁴
98. On March ***, 2015, the ARDC conducted a brief meeting in an attempt to clarify parent in-home training but found instead that in-home services are not needed at this time. At the same time, the ARDC identified Parent/Family training services, goals and objectives for in-home training, and provided for *** weekly *** in-home training sessions. ¹⁴⁵ The

¹⁴¹ PE-14 at 11.

¹⁴² PE-1 at 11.

¹⁴³ PE-1 at 21, 29-35.

¹⁴⁴ PE-14 at 29.

¹⁴⁵ PE-11 at 8.

- same document identified In-Home/Community Based or Viable Alternative Services to be provided with goals and objectives, and a training agenda.¹⁴⁶
99. In the March ***, 2015 ARDC meeting, the committee wrote Student did not qualify for in-home training but Student did qualify for “Viable Alternative Services” yet withdrew the *** weekly *** in-home training sessions offered seven pages later in the same document.¹⁴⁷
100. The June 2016 IEP (Deliberations) conditioned parent in-home training on Student re-enrolling.¹⁴⁸
101. At no time has the District provided Mother/family with in-home training.¹⁴⁹
102. The District correctly determined that Student needed in-home training and/or viable alternative services but failed to provide this necessary service.¹⁵⁰
103. The District failed to provide assistive technology identified as essential for Student to make meaningful educational progress.
104. Student’s February 2015 IEP, determined that Student did not qualify for extended school year (ESY) services.¹⁵¹
105. For ESY services there must be adequate documentation of regression, or a documented reasonable expectation that Student will exhibit severe or substantial regression.¹⁵²
106. Student’s reevaluation of December ***, 2014, determined that Student’s reading abilities remained at the *** grade level (*i.e.* Fountas & Pinnell DRA Level ***);¹⁵³ however, as previously noted, the same Reevaluation Committee stated: “[Student’s] performance in reading suggests that Student is able to comprehend information at about a beginning *** grade level (DRA Level ***).”¹⁵⁴ The level of accomplishment between Levels *** and *** is one-half of a schoolyear (*i.e.* ***** grade reading level to beginning *** grade reading level).¹⁵⁵

¹⁴⁶ PE-11 at 8.

¹⁴⁷ Compare PE-11 at 1 with PE-11 at 8.

¹⁴⁸ PE-1 at 25.

¹⁴⁹ Tr. at 546:

¹⁵⁰ 19 Tex. Admin. Code § 89.1055(e)(3), (6).

¹⁵¹ PE-14 at 29, “ESY was discussed, and ARDC will meet to determine eligibility for ESY.” See 34 C.F.R. § 300.106(a)(2); 19 Tex. Admin Code § 89.1055(e)(1).

¹⁵² 19 Tex. Admin. Code § 89.1065(2).

¹⁵³ PE-16 at 8; See PE-56.

¹⁵⁴ PE-16 at 11.

¹⁵⁵ PE-56.

107. Considering the December ***, 2014, reevaluation during the February 2015 IEP meeting, the ARDC determined that Student's reading skills had regressed and determined that Student did not require ESY to obtain a FAPE.¹⁵⁶
108. Student's reading ability never advanced beyond the ***-***-grade level for any sustained period of time.¹⁵⁷
109. Student's February 2015 IEP in effect during the relevant time period of March 2015 through May 2015 contained an Autism Supplement¹⁵⁸ lacking strategies based on peer-reviewed research based educational programming practices for a child with autism.
110. The District failed to collect minimally adequate data for Student. The proposed June 2016 IEP determined Student did not qualify for ESY even though the District had no data from which to base the decision. There was also some evidence Student regressed in reading in *** grade.¹⁵⁹
111. Conclusory statements in the February 2015 IEP and the proposed June 2015 IEP are identical to previous Autism Supplements from Student's tenure with the District.¹⁶⁰ The Autism Supplement in Student's IEP failed to address any research-based practices such as those associated with discrete-trial strategies, structured learning, augmented communication, *etc.*
112. Because the District failed to appropriately use the Autism Supplement, the District failed to ensure that the ARDC considered programs and settings based on Student's assessment of behavior, social skills, communication, academics, methodologies, and self-help skills. The February 2015 IEP and the proposed June 2016 IEP failed to explain or describe how Student is allegedly generalizing skills from one environment to another when determining Student did not need in-home or community based training.
113. The February 2015 IEP and the proposed June 2016 IEP also fail to indicate if any support resources were provided to parents or if parent training was provided or if any teacher training was required.
- a. There is no explanation as to why it was not warranted much less indicated.
- b. While the ARDC did "check the box" related to future planning, the February 2015 IEP and the proposed June 2015 IEP fail to consider skills necessary to function in current environments but rather states: "Parents are

¹⁵⁶ PE-14 at 26.

¹⁵⁷ Compare PE-21 at 12, PE-16 at 8, PE-14 at 2, and PE-1 at 2.

¹⁵⁸ PE-1 at 33-36.

¹⁵⁹ PE-11 at 5 *Alamo Heights Independent School District v. State Board of Education*, 790 F. 2d 1153 (5th Cir. 1986) (holding trial court's assessment that student would suffer at least substantial regression without continuous, structured programming was supported by the record and student was entitled to summer programming).

¹⁶⁰ Compare PE-14 at 38-41 with PE-1 at 34-39.

provided information concerning non-school agencies for futures planning.”¹⁶¹

114. Petitioner did not address or present evidence concerning dyslexia and dysgraphia; therefore, that issue is deemed abandoned.

VIII. DISCUSSION

A. Burden of Proof

The IDEA creates a presumption that a school district’s decisions made pursuant to the IDEA are appropriate and that the party challenging the decisions bears the burden of proof at all times.¹⁶² Petitioner must, therefore, establish that the alleged violations resulted in a denial of FAPE or other substantive violation of the IDEA. The IDEA creates a presumption in favor of the education plan proposed by the school district and places the burden of proof on the party challenging the plan.¹⁶³ Petitioner bears the burden of proof on all issues at hearing.¹⁶⁴ Petitioner must, therefore, overcome the presumption in favor of the District’s education plan, and establish that the District failed to provide Petitioner with a FAPE, by establishing that: (1) the District failed to comply with the procedures set forth in IDEA; or (2) the IEP developed by the District through the IDEA’s procedures was not reasonably calculated to enable Student to receive a meaningful educational benefit.¹⁶⁵

B. FAPE

The first issue in this case is whether the District failed to provide Student with FAPE during the 2014-2015 schoolyear (from March 2015 to end of May 2015) and whether the

¹⁶¹ RE-K at 39.

¹⁶² *Schaffer ex rel. v. West*, 546 US 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005), *see also White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003); *Teague Indep. Sch. Dist. V. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993).

¹⁶³ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 536-537 (2005); *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1010-11 (5th Cir. 2011).

¹⁶⁴ *Id.*

¹⁶⁵ *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 207-208, 102 S.Ct. 3034, 3051 (1982).

proposed program contained in the June 2016 IEP is consistent with the standards established by the IDEA. The centerpiece of the IDEA is the Individualized Education Program (IEP).¹⁶⁶ “The IEP is the result of collaboration between parents, educators, and representatives of the school district, sets out the child’s present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives.”¹⁶⁷

An IEP is more than a written statement of annual goals and objectives and how they will be measured. An IEP also must include a description of a student’s related services, supplementary supports and services, instructional arrangement, program modifications, supports for school personnel, designated staff to provide services, and the duration and frequency of the services, as well as the location where the services will be provided.¹⁶⁸

C. Misidentification of Intellectual Disability

The IDEA imposes an affirmative duty upon school districts to assess/reassess children in all areas of suspected disability.¹⁶⁹ When conducting Student’s reassessment, the Licensed Specialist in School Psychology (LSSP) was required to select testing instruments that actually measure what the test purports to measure and not Student’s impaired receptive and expressive language.¹⁷⁰

On December ***, 2014 the District conducted Student’s three-year reevaluation. The reevaluation found Student continued to be eligible for special education and related services as a student with autism and speech impairment.¹⁷¹ The reevaluation included cognitive testing

¹⁶⁶ *Murphy v. Arlington Cent. Sch. Dist. Board of Educ.*, 297 F.3d 195, 197 (2d Cir.2002) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988)); see 20 U.S.C. § 1414(d) (defining and describing the development, review, and revision of an IEP).

¹⁶⁷ *Murphy*, 297 F.3d at 197 (quoting *Honig v. Doe*, 484 U.S. at 311, 108 S.Ct. 592).

¹⁶⁸ *Sebastian M.*, 116 LRP 9953 (HO RubINETTE, TEA 2016).

¹⁶⁹ 34 C.F.R. § 300.304(c)(4).

¹⁷⁰ 34. C.F.R. § 300.304(c)(3).

¹⁷¹ PE-16.

conducted by the District's LSSP.¹⁷² Student's testing results led the LSSP to conclude that Student also met the eligibility criteria as a student with an intellectual disability.

The ARDC rejected the LSSP's erroneous finding that Student meets eligibility criteria as a student with an intellectual disability. The ARDC was aware of Student's receptive and expressive language disability and did not add intellectual disability as an additional eligibility. Therefore, the ARDC process worked as intended; the key stakeholders were presented with a professional recommendation and applied that recommendation to Student based upon Student's individual circumstances and needs. The ARDC collaborated with Mother and listened to her input and disagreement that Student met the criteria for an intellectual disability and declined to identify Student as intellectually disabled.

There was no credible evidence of any adverse collateral consequences as a result of the LSSP's conclusion that Student met eligibility criteria as a student with an intellectual disability in Student's educational records. Potential adverse consequences are merely speculative and do not undermine an otherwise valid IEP. The record is clear that no services were added, withdrawn, reduced, or altered in anyway based upon the LSSP's erroneous conclusion. The cognitive testing conducted by the District through the LSSP was wrong. The outside evaluations clearly and convincingly establish that Student has average intelligence and does not suffer from an intellectual disability. However, Student did not demonstrate any prejudice or loss of educational opportunity as a result of the LSSP's flawed assessment and the error did not result in a denial of a FAPE.

D. Did the District fail to properly write Present Levels of Performance and IEP goals and objectives in meaningful and measurable ways to accurately track Student's progress from March 2015 through May 2015 and the 2016-2017 schoolyear?

The IDEA requires the IEP include a statement of the child's present level of academic achievement and functional performance. This statement must include:

¹⁷² PE-16 at 8.

- How the child's disability affects the child's involvement and progress in the general education curriculum;
- A statement of measurable annual goals, including academic and functional goals, designed to (i) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (ii) Meet the child's other educational needs that result from the child's disability; and
- A description of benchmarks or short-term objectives for children with disabilities who take alternative assessments aligned to alternative achievement standards.

A description of how the child's progress toward meeting the annual goals described above will be measured (*e.g.* using percentages) and when periodic reports on the progress of the child is making toward meeting the annual goals (*e.g.* quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.¹⁷³

An IEP must also include a present level of educational performance.¹⁷⁴ Vagueness in a student's present level of educational performance is contrary to IDEA's requirements.¹⁷⁵ Without a clear identification of a student's present levels of performance, the IEP cannot set measurable goals to evaluate the child's progress, and determine which educationally related services are needed.¹⁷⁶ The present level of performance statement helps establish a baseline, or starting point, for measuring the student's progress.

Much like IEP goals, the IEP should express this performance statement in objectively measurable terms.¹⁷⁷ If the statement does not consider the unique needs of the child, establish a baseline for establishing goals and monitoring progress, or allow informed parental participation

¹⁷³ 34 C.F.R. § 300.320(a)(1)-(3); *See also* 19 Tex. Admin. Code § 89.1055(a)-(b).

¹⁷⁴ *Buser ex rel. Buser v. Corpus Christi Indep. Sch.*, 51 F.3d 490, 493 (5th Cir. 1995) (citing 20 U.S.C. § 1401(a)(20)).

¹⁷⁵ *See Escambia County Bd. Of Educ. v. Bendton*, 406 F. Supp. 2d 1248 (S.D. Ala. 2005).

¹⁷⁶ *Kirby v. Cabell Cnty. Board of Ed.*, 46 IDELR 156 (S.D.W. Va. 2006).

¹⁷⁷ *See O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692 (10th Cir. 1998); *Chase v. Mesa County Valley Sch. Dist. No. 51*, 53 IDELR 72 (D. Colo. 2009).

in the IEP process, then the IEP may be found to deny FAPE.¹⁷⁸ Finally, the absence of a present level of academic achievement and functional performance is more than a mere harmless procedural error; it prevents district staff from determining whether a student has made progress.¹⁷⁹

Many of Student's present levels of performance are too vague. Student's present level of performance statements do not indicate how Student's language deficits impact Student's abilities nor do they reflect the true nature of Student's disability. The IEPs simply make blanket statements such as: "****."¹⁸⁰ Reading information was derived from a singular DRA score and anecdotal information that reported, "needs work in comprehension." Math present levels of performance and goals were equally generic and uninformative. Such vague and meaningless statements fail to meet the requirements of the IDEA.

In 2014, Student was reported to be functioning at the *** level in mathematics.¹⁸¹ In 2015 as a *** grader, the District reported that Student was "working multiple years below Student's current grade placement" and had difficulty understanding word problems.¹⁸² Yet in 2015, Student's math goal unrealistically required Student to exceed *** grade level standards regarding *** with 90% accuracy.¹⁸³ No baseline data for this goal was provided. The LSSP testified there was no percentage of accuracy to measure whether Student was mastering Student's math goals.¹⁸⁴ The District Case Manager testified that Student's math skills were "splintered," but the IEP does not identify them.¹⁸⁵

¹⁷⁸ See, e.g., *Friedman v. Vance*, 487 Fed. Appx. 968, 24 IDELR 654 (D. Md. 1996) (not designated for publication); and *J.D. v. Portland Pub. Schs.*, 224 F.3d 60 (2nd Cir. 2000); See also *Conemaugh Twp. Sch. Dist.*, 23 IDELR 1233 (SEA PA 1996).

¹⁷⁹ *N.S. by Stein v. District of Columbia*, 709 F. Supp. 2d 57, 68-69 (D.D.C. 2010).

¹⁸⁰ PE-14 at 2.

¹⁸¹ PE-16 at 9.

¹⁸² PE-14 at 4.

¹⁸³ PE-14 at 8.

¹⁸⁴ Tr. at 664.

¹⁸⁵ Tr. at 177, 180, 184.

Student's present reading level in the June 2016 IEP simply states Student's strength is ***. Student's overall reading ability fell at the *** grade level and Student's reading comprehension fell to the *** grade level.¹⁸⁶ No mention was made of Student's decoding deficits or the barriers to comprehension. However, the IEP set a goal that required Student to make grade-level inferences and conclusions with 100% accuracy.¹⁸⁷ Even the Special Education Director could not determine Student's present levels of performance in any area,¹⁸⁸ and conceded that Student's present levels of performance statements were not compliant.¹⁸⁹

Even when data was available to the District, the ARDC did not seek collaboration with *** special education teacher. School staff did not seek input from the *** as to Student's progress over the last year in order to provide accurate and updated PLAAFPs for the proposed June 2016 IEP.¹⁹⁰ Rather, the ARDC used the prior year's present level of performance statement for the proposed June 2016 IEP.¹⁹¹ Additionally, even though consent had been authorized for the District to obtain the evaluation results from the outside private evaluators, the District failed to consider those results in drafting PLAAFP statements and relied solely on the District's evaluation.¹⁹² Mother did not receive any progress reports in which to meaningfully participate in designing Student's educational program save one that was incomplete and provided nothing more than subjective, conclusory, and blank statements.¹⁹³

Student's IEP also contained science present levels of performance that were subjective and vague. By *** grade, Student was required to meet the same science standards as Student's non-disabled peers despite Student's severe communication disorder and Student's *** grade functional abilities in math and reading.¹⁹⁴ By 2015, a present level in science disappeared

¹⁸⁶ PE-14 at 2.

¹⁸⁷ PE-14 at 7.

¹⁸⁸ Tr. at 38.

¹⁸⁹ Tr. at 42-47.

¹⁹⁰ Tr. at 290-91.

¹⁹¹ Tr. 786-87.

¹⁹² Tr. at 754-55.

¹⁹³ PE-20 at 30-33 (***, Annual Review).

¹⁹⁴ PE-14 at 8.

altogether yet Student was required to meet the same standard of mastery of performance in science required of Student's non-disabled peers.¹⁹⁵

Student's present levels of performance for social studies are similarly vague and meaningless and were insufficient to inform the ARDC.¹⁹⁶ In *** grade, Student's strength in science was that Student "participates." This same level of performance remained unchanged up through 2013. But by 2015 Student was expected to master *** grade curriculum at a level commensurate with Student's non-disabled peers—even though Student was reading on a *** grade level and had a severe language disorder.¹⁹⁷ Moreover, the PLAAFPs failed to inform or describe to the ARDC how these disabilities impacted Student across settings. Science and social studies PLAAFPs then disappeared altogether yet unrealistic and unmeasurable goals remained in Student's *** IEP.¹⁹⁸

In conclusion, the IEPs for the 2015-2016 and 2016-2017 schoolyears contained vague, meaningless, and unmeasurable present levels of performance, goals, and educational objectives that were not individualized for Student based on assessment and evaluation and, therefore, denied Student a FAPE.¹⁹⁹

E. Did District fail to track Student's progress and goals during the 2015-2016 school year and/or did NISD fail to provide Petitioner with progress reports on the one goal and four objectives?

The IDEA requires that the IEP include "a description of how the child's progress toward meeting the annual goals ... will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided." However, even where progress reports are missing, inadequate, or incorrect, such errors are harmless when there is

¹⁹⁵ PE-14 at 8.

¹⁹⁶ See PEs-1, 14, 16, and 25.

¹⁹⁷ PE-14 at 2, 7.

¹⁹⁸ PE-14 at 2-4.

¹⁹⁹ *In re Student with a Disability*, 59 IDELR 205 (SEA N.Y. 2012) (holding IEP for student with central auditory processing deficit did not accurately reflect Student's needs).

substantial evidence of the parents' active participation in student's education and an awareness of student's progress.²⁰⁰

Many of Student's educational goals were based upon progress reports that contained missing data, were incomplete, and did not include present levels of academic achievement and functional performance (PLAAFP); consequently, adequate educational goals could not be developed for Student based upon Student's progress reports.

F. Did District fail to provide appropriate Extended School Year services for all relevant time periods?

School districts are required to provide extended school year services (ESY) to IDEA-eligible students when necessary to provide a FAPE.²⁰¹

The ARDC determines, on an individual basis, whether ESY services are necessary to provide a FAPE.²⁰² Not all students who fail to make progress under an IEP will be eligible for ESY services. ESY services are typically necessary when an interruption in a student's educational programming during school breaks will jeopardize the educational gains made while school was in session.²⁰³

In Texas, when considering the appropriateness of ESY services, the key factor for the ARDC to consider is whether the student will experience significant regression in the absence of an educational program and whether the time it will take to re-learn the lost skills is excessive. If the student will experience regression during the break from school that the student will not be able to recoup within the required timeframe upon return, then ESY services should be made available.

²⁰⁰ *Douglas County School Dist. Re-1*, 798 F.3d at 1335 (10th Cir. 2015).

²⁰¹ 34 C.F.R. § 300.106(a); *Yaris v. Special Sch. Dist.*, 555 IDELR 394 (8th Cir. 1983); *cert. denied* 476 U.S. 1172 (1986); *Crawford v. Pittman*, 555 IDELR 107 (5th Cir. 1983); *Annette K. v. Hawaii Dep't of Educ.*, 60 IDELR 278 (D. Hawaii 2013).

²⁰² 34 C.F.R. § 300.106(a)(2).

²⁰³ *See Jackson Johnson v. District of Columbia*, 59 IDELR 101 (D.D.C. 2012); *See Alamo Heights School District v. State Board of Education*, 557 IDELR 325 (5th Cir. 1986) (linking the entitlement to ESY services to the regression/recoupment analysis).

The ARDC may consider a range of factors when conducting the regression/recoupment analysis, including:

- The degree of regression suffered in the past;
- Exact time of past regression;
- Ability of the parents to provide educational structure within the home;
- The student's rate of progress;
- Student's behavioral and physical problems;
- Availability of alternative resources;
- Ability of student to interact with non-disabled children;
- Areas of the student's curriculum that need continuous attention;
- Student's vocational needs; and
- Whether the requested services are "extraordinary" for the student's condition, as opposed to an integral part of a program for populations of students with the same disabling condition.²⁰⁴

The record is silent on whether the District ever considered the ESY factors.

G. Did District fail to consider and ensure positive behavioral support programming for Student?

When a student's behavior impedes the student's learning or that of other students, an IEP team must consider the use of positive behavioral interventions and supports, and other strategies to address the behavior.²⁰⁵ These behavioral interventions and supports are IDEA related services.²⁰⁶

During the relevant time periods the District did consider positive behavioral support, but the sufficiency of these supports were lacking. Both the February 2015 IEP and the proposed June 2016 IEP contained functional behavioral assessments and behavior intervention plans (BIPs).²⁰⁷

²⁰⁴ *Johnson v. Independent School Dist. No. 4 of Bixby, Tulsa County, Okl.*, 921 F.2d 1022 n.9 (10th Cir. 1990).

²⁰⁵ 34 C.F.R. § 300.324(a)(2)(i).

²⁰⁶ 34 C.F.R. § 300.34(a), (c)(10); *see also* 19 Tex. Admin. Code § 89.1055(e)(4) (mandating positive behavioral support strategies for autistic students).

²⁰⁷ PE-14 at 33; PE-1 at 29.

The Behavior Intervention Plan (BIP) was developed for Student in 2015 but was generic and vague.²⁰⁸ Behaviors reported were failure to follow adult directives (although Student's behavior was not disruptive and Student was easily redirected).²⁰⁹ The antecedent behaviors were strikingly similar to a behavioral assessment conducted in 2009.²¹⁰ No description of Student's responses to the identified stimuli was reported. No specific data was collected to pinpoint what specifically happened prior to Student's behavioral reaction. School staff could not tell if Student met this behavioral goal during the hearing while reviewing social skills in the IEP which stated Student was to receive *** of social skills instruction. In the social skills IEP proposed for 2016, Student was to receive social skills instruction during Student's *** for an unspecified amount of time.²¹¹ However, the evidence showed the *** was primarily focused on peer conflict resolution and was more of a behavior support rather than social skills training.²¹² Furthermore, the teacher was not a Board Certified Behavior Analyst (BCBA) and not trained to provide ABA or similar services. There was no data to support Student's behavioral progress or whether Student mastered any replacement behaviors that were taught. The 2015 social skills IEP lacked baseline data and the teacher did not monitor Student's progress towards certain social skills goals.

The District failed to ensure adequate positive behavioral support programming during the relevant time periods.

- H. Did District fail to provide necessary speech language services to Student?
Did District fail to provide adequate social skills training for Student?
Did District fail to provide in-home training for Parent?
Did District fail to provide assistive technology for Student?**

²⁰⁸ PE-14 at 33-37.

²⁰⁹ PE-14 at 34-35.

²¹⁰ PE-30.

²¹¹ PE-1 at 35.

²¹² Tr. at 772.

Speech and language services, social skills training and in-home and parent training are related services under the IDEA.²¹³ An IEP is not defective merely because it does not include related services requested by the parents. The IEP need only include those related services that are necessary for the student to receive a FAPE.²¹⁴

As part of the developmental process, the IEP team must also consider whether the child needs assistive technology devices and services.²¹⁵ An assistive technology device may be special education,²¹⁶ a related service, or a supplementary aid and service. The IEP team decides what device to provide, and categorizes the device as an item of special education, related services, or supplementary aids and services. The acquisition and maintenance of an assistive technology device is the responsibility of the District, not the parents.²¹⁷ A delay in providing a necessary assistive technology device may result in the denial of a FAPE.²¹⁸

Furthermore, the IEP must include the projected start date for the beginning of the services outlined in the IEP, which includes related services. This start date is determined by the ARDC.²¹⁹

I. Did District fail to provide Student with appropriate individualized program of education that permitted Student to receive meaningful benefit during the 2015-2016 schoolyear, rather than a minimal or trivial educational advancement?

1. Deficient IEPs for Lack of Individualized Measurable Goals?

²¹³ 34 C.F.R. § 300.34(a), (c)(14)-(15).

²¹⁴ 34 C.F.R. § 105(a); *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769 (D.C. Cir. 2012); *A.L. v. Chicago Pub. Sch. Dist. No. 299*, 57 IDELR 276 (N.D. Ill. 2011) (rejecting parents' claim that the district was required to provide assistive technology).

²¹⁵ 34 C.F.R. § 300.324(a)(2)(v).

²¹⁶ *Letter to Goodman*, 16 IDELR 137 (OSEP 1990); 34 C.F.R. § 300.105(a).

²¹⁷ *See Letter to Cohen*, 19 IDELR 278 (OSEP 1992).

²¹⁸ *R.P. v. Alamo Heights ISD*, 703 F.3d 801 (5th Cir. 2012).

²¹⁹ 34 C.F.R. § 300.320(a)(7).

Student's educational goals were not individualized on the basis of Student's assessment and performance.²²⁰ The purpose of IEP goals is to allow the IEP team, the parents, and the district to measure a student's progress in a specific area of need.²²¹ "In the absence of meaningful, measurable goals and objectives, there can be no 'appropriate and meaningful education or developmental interventions for a child with autistic spectrum disorder.'"²²²

An IEP goal is appropriate if a person unfamiliar with the IEP (i.e. a "stranger") would be able to implement the goal, implement the assessment of the student's progress on the goal, and determine whether the student's progress was satisfactory. *City of Chicago School District 299*, 110 LRP 70455 (SEA Ill. 2010).

Not only did Student's IEPs fail to pass the "stranger test," Student's needs and mastery of goals could not even be determined by District school staff that who familiar with Student. In many instances, Student was simply provided goals that every non-disabled student was required to master. A goal that addresses 70% mastery of TEKS simply expresses the standard that is required for all students (not just students who receive special education services), and does not provide the specially designed instruction the student needs from a special education professional in order to be able to access/progress in the TEKS.²²³ Even if these goals were tailored to Student's needs, goals without an underlying starting baseline fail to provide objective measures by which progress can be measured and thus, is a denial of FAPE.²²⁴ Worse yet, Student was

²²⁰ See *Cypress Fairbanks*, 118 F.3d. 245.

²²¹ *Los Angeles Unified Sch. Dist.*, 110 LRP 34448 (SEA CA 06/03/10).

²²² See *Escambia Cnty Bd. Of Educ.* 406 F. Supp. 2d 1248 (S.D. Ala. 2005) (finding vague present levels of performance in two of the student's IEPs to be contrary to IDEA's requirements and consequently, a denial of FAPE).

²²³ See e.g. PE-25 at 9.

²²⁴ *Texarkana School Dist.*, 115 LRP 46616 (SEA Ark. 2015):

The key question is whether the student made gains in Student's areas of need. A finding that a child's goals are vague or immeasurable generally leads to a ruling that the district denied FAPE. See, e.g., *Independent Sch. Dist. No. 701 v. J.T.*, 45 IDELR 92 (D. Minn. 2006) (an IEP's statement that a student would "improve Student's functional academic skills from a level of not completing assignments independently to a level of being able to read, write and do basic math skills independently" was too vague to permit measurement of the student's progress); and *Anchorage Sch. Dist.*, 51 IDELR 230 (SEA AK 2008), *aff'd*, 54 IDELR 29 (D. Alaska 2009) (the Hearing Officer determined that the lack of clear, measurable goals in a child's IEP precluded an objective measurement of the child's progress).

required to meet the same grade-level standards as non-disabled peers at 70% for all academic areas in *** grade—rendering the academic portion of the IEP meaningless and not individualized to Student’s needs.²²⁵

2. Lack of Data and Progress Monitoring?

In this case Student’s relevant IEPs were deficient because objective data was not gathered and maintained, progress reports—to the extent they existed—were grossly deficient and did not inform the ARDC of Student’s progress or regression. Student’s grades could not be used to determine progress as they were based on “participation” and, therefore, were not a measurement of academic progress or regression.

Grades can be indicia of the efficacy of an IEP and a corresponding educational benefit;²²⁶ however, grades based upon participation fail to measure academic progress and in this case, standing alone, grades do not support an inference that the IEP was adequate and provided an educational benefit. The inference that grades were a reflection of an adequate IEP and an educational benefit is further undermined by the District’s decision to socially promote Student from *** to *** grade with an “Accelerated Instruction Plan.”²²⁷ In the critical area of speech, the District’s speech therapist conceded at hearing that careful, objective measurement of Student’s skills was necessary—but was not kept.²²⁸ Consequently, lack of data led to the creation of vague and unmeasurable goals, or unrealistic goals that stated minimal academic standards for nondisabled students.

²²⁵ RE-I.

²²⁶ See *Klein Independent School Dist. v. Hovem*, 690 F. 390, 398 (5th Cir. 2012) ([Student’s] IEPs were sufficient because they were “reasonably calculated to enable [student] to achieve passing marks and advance from grade to grade” in mainstream classes.) (emphasis added).

²²⁷ PE-13.

²²⁸ Tr. 313-15. See *Grapevine-Colleyville Independent School District*, 28 IDELR 1276 (SEA Tx. 1998) (“Because of this lack of data, the ARD Committee has been hampered in its efforts to refine [student’s] program. As a result of the lack of precision, many of [student’s] educational objectives have reappeared from year to year with little, if any, modification.”).

3. Failure to Comply with Autism Supplement?

The District repeatedly failed to comply with the requirements of Texas Administrative Code § 89.1055 (the Autism Supplement) in considering whether Student needed additional peer-reviewed, research-based educational programming and addressing those needs in all of Student's IEPs. The District failed to collect minimally adequate data for Student. The proposed July 2016 IEP determined Student did not qualify for ESY because of a "lack of documented regression;" even though the District had no data from which to base the decision.²²⁹ Interestingly, the same IEP provides a daily transportation schedule to and from ESY.²³⁰

Conclusory statements in the February 2015 IEP and the proposed June 2016 IEP are identical to previous Autism Supplements from Student's tenure with the District.²³¹ The Autism Supplement in Student's IEP fail to address any research-based practices such as those associated with discrete-trial strategies, structured learning, augmented communication, *etc.*

Because the District failed to appropriately use the Supplement or misused it by simply checking the boxes, the District failed to ensure that the ARDC considered programs and settings based on Student's assessment of behavior, social skills, communication, academics, methodologies, and self-help skills. The IEP failed to explain or describe how Student is allegedly generalizing skills from one environment to another when determining Student did not need in-home or community based training. The IEP also fails to indicate if any support resources were provided to parents or if parent training was provided or if any teacher training was required. There is no explanation as to why it was not warranted much less indicated. While the ARDC did "check the box" related to futures planning, the IEP fails to consider skills necessary to function in current environments but rather states: "Parents are provided information concerning non-school agencies for futures planning."²³² Consequently, for these reasons the District failed to comply with the Autism Supplement.

²²⁹ PE-1 at 25.

²³⁰ PE-1 at 38.

²³¹ Compare PE-14 at 38-41 with PE-1 at 34-39.

²³² RE-K at 39.

4. Did Student's IEP Confer a Meaningful Educational Benefit?

In this jurisdiction there are four factors which are indicators of whether an IEP is reasonably calculated to provide the requisite meaningful educational benefit under the IDEA: “(1) the program is individualized on the basis of the student’s assessment and performance; (2) the program is administered in the least restrictive environment [LRE is not at issue in this case]; (3) the services are provided in a coordinated and collaborative manner by the key “stakeholders;” and (4) positive academic and non-academic benefits are demonstrated.”²³³ It is left to the discretion of hearing officers to decide what weight to give any of the factors.²³⁴

5. Individualized on Basis of Assessment and Performance?

The preponderance of the evidence shows the District did not devise and implement an individualized educational program on the basis of the Student’s assessment and performance. Because of the District’s failures to adequately evaluate, establish objectively based present levels of performance, and goals, its lack of data collection and progress monitoring, District staff were limited in their ability to understand the nature and severity of Student’s disabilities and to plan and implement an appropriate program for Student. Student’s educational program was not individualized on the basis of Student’s assessment and performance. The District’s failed to adequately evaluate, monitor progress and adjust Student’s program accordingly. The District failed to assess Student for a suspected and now presumed central auditory processing disorder. These facts, taken together show the District failed to understand Student’s disabilities; consequently, Student’s IEPs were essentially recycled year after year and thus were not individualized on the basis of Student’s assessment and performance.

Student’s goals in successive IEPs were mere iterations of the same goals year after year without the benefit of standardized evaluation or any progress monitoring to measure Student’s progress or to accurately and comprehensively gauge Student’s present levels of performance.

²³³ *Michael F.*, 118 F.3d at 253 (5th Cir. 1997).

²³⁴ *Richardson Independent School District v. Michael Z.*, 580 F.3d 286, 293 (5th Cir. 2009).

Progress towards mastery of Student's goals was not monitored, reviewed, or appropriately adjusted based on Student's individualized needs. Student's failure to make meaningful educational progress was because the District failed to know what Student needed.²³⁵ A student's failure to make measurable progress toward IEP goals is evidence that the District's IEP was flawed.

6. Least Restrictive Environment

The issue of whether Student was placed in the least restrictive environment was not a contested issue at hearing.²³⁶

7. Services Provided in Coordinated and Collaborative Manner by Key Stakeholders?

The evidence showed the District significantly impeded Mother's participation in the IEP process, denying her meaningful participation.²³⁷ As a key stakeholder, a parent must have equal access to critical and accurate information, such as evaluations of the student's ability to learn, and progress reports. The evidence showed the District denied Mother this information.

The District failed to provide Mother with progress reports regarding Student's speech services and in all academic areas which interfered with Mother's right to meaningfully participate in the development of Student's program.²³⁸ The only evidence of progress reporting was vague and incomplete at best.²³⁹ Mother did not know where Student was academically or what Student's abilities actually were. Mother and Student's private teacher could not figure out

²³⁵ *Henrico*, 433 F. Supp. 2d 657 (E.D. Va. 2006) (finding that the district's failure to accurately measure the student's progress and recycling of student's goals contributed to the denial of FAPE); *see also Board of Educ. Of Cnty. of Kanawha v. Michael M.*, 95 F. Supp. 2d 600, 609 n.8 (S.D. W. Va. 2000) ("...the fact that the program is unsuccessful is strong evidence that the IEP should be modified during the development of the child's next IEP. Otherwise, the new IEP would not be reasonably calculated to provide educational benefit in the face of evidence that the program has already failed.")

²³⁶ Petitioner's Closing Brief at 36 n.5.

²³⁷ *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 576 (2007)), at 11.

²³⁸ *El Paso Independent School District*, 142-SE-0207, 108 LRP 40199, (TEA 2007).

²³⁹ *See e.g.* PE-20 at 30-33.

“where Student was” academically, and both unsuccessfully requested that information from the District. Progress reports were not available and grades simply reported Student’s participation.

The credible evidence showed the parent received the Notice of Procedural Safeguards (NOPS) most recently on February ***, 2016 and historically at least several times a year and after every meeting.²⁴⁰ Mother admitted that if she lost a copy of the NOPS she knew she could go to the District’s website and obtain another copy.²⁴¹ Mother’s ability to collaboratively participate in the ARDC IEP process was not impeded by a failure to provide NOPS.

Petitioner also argues the District repeatedly failed to provide Mother with Prior Written Notice (PWN). Failure to provide Mother with PWN is not a mere procedural error. The purpose for providing PWN is to ensure that a parent understands the special education and related services that an LEA has proposed or refused to provide to a student. If a parent does not understand the services being proposed, it suggests that the parent could not have agreed to the proposed services.²⁴²

In addition, the evidence showed school staff failed to collaborate or coordinate with Student’s ***. The District failed to provide the *** or Mother with information requested to determine Student’s present levels of functional performance. The District also failed to contact the *** or Mother for information as to Student’s educational progress in developing the proposed IEP for the 2016-2017 schoolyear even though Student was out of the District for the entire previous school year.

8. Positive Academic and Non-Academic Benefits?

The preponderance of the evidence showed Student failed to make progress both academically and non-academically while attending the District because the District failed to

²⁴⁰ PHC Tr. 153-54.

²⁴¹ PHC Tr. at 154.

²⁴² *Letter to Boswell*, 49 IDELR 196, (OSEP 2007) (discussing LRE’s obligation to ensure a non-English speaking parent has a means to understand the content of an IEP and the ability to participate in the IEP meeting).

properly evaluate, correctly gather and use objective data, and write appropriate IEPs. When a student fails to make progress within a reasonable period of time, the District must convene an IEP meeting to address the student's lack of progress.²⁴³ The District did not conduct ARDC meetings to discuss Student's failure to make progress. As a result, Student continued to receive the same ineffective services year after year. A district's continuation of inadequate services is denial of FAPE.²⁴⁴

Moreover, Student has a serious speech and language disorder.²⁴⁵ Each child's IEP must contain "[a] statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child...."²⁴⁶ These services must be defined by a projected date for the beginning of services, anticipated frequency, location and duration of services. Student's speech and language PLAAFP statements, IEP goals, and services failed to identify Student's instructional and related service needs. The frequency and duration of direct speech services, as stated in the IEPs, are confusing and contradictory.

The evidence showed from 2013-2016, (** grade through ** grade), Student's speech and language present performance levels never changed and were simply a report of updated numerical scores obtained in 2014 without adequate interpretation of their meaning. The only progress report in evidence was completely blank in terms of progress toward Student's speech goal.²⁴⁷ In the proposed June 2016 IEP, Student's speech goal remained the same. There was no baseline to support the speech/language goal; the speech/language IEP goals were simply the same goals from Student's ** grade IEP. The District failed to incorporate any data from **

²⁴³ 34 C.F.R. §300.324 (b)(ii)(A); *Dublin City Sch. Dist.*, 115 LRP 30436 (SEA OH 2015).

²⁴⁴ *District of Columbia Pub. Schs.*, 49 IDELR 267 (SEA DC 2008) (noting that a student's present levels of performance remained stagnant for several years); *Unionville-Chadds Ford Sch. Dist.*, 47 IDELR 280 (SEA PA 2007) (finding a district should have addressed a child's reading deficiencies when it became apparent that the student was not making any progress); and *Department of Educ., State of Hawaii*, 47 IDELR 238 (SEA HI 2007) (criticizing the ED's decision to continue an ineffective reading program despite the student's lack of progress over a three-year period).

²⁴⁵ PE-6, 7.

²⁴⁶ 34 C.F.R. §300.320 (a)(4).

²⁴⁷ PE-20 at 32.

private speech evaluation obtained by Mother on February ***, 2016, in order to update or revise Student's speech/language goals.²⁴⁸

Despite this lack of progress, the District repeatedly reduced Student's speech services and repeatedly failed to provide Mother with PWN regarding these reductions. An IEP must include sufficient information about the amount of services that will be provided so that the agency's level of commitment to the student will be clear.²⁴⁹ Mother testified she was not aware until the hearing that Student's speech services had been reduced.²⁵⁰ The manner in which the IEP identifies Student's schedule of services is confusing even to District staff. Student's Special Education Case Manager could not identify from the IEPs how many hours Student was supposed to receive nor could she identify why the services were reduced.²⁵¹

Student's repeated speech goals demonstrate Student made no meaningful academic progress in speech. Despite this significant lack of progress, services were actually reduced without notice to the parent.²⁵² Progress was not reported and when it was, progress reporting was not aligned with Student's goals and was based on subjective observation, not objective measures related to Student's goals.

The evidence also showed that while attending the District, Student never progressed beyond the *** grade in reading and mathematics. Student could not *** even though Student was a *** grader.²⁵³ Math and Reading goals were repeated year after year; in some cases IEP

²⁴⁸ Compare PE-1 at 2-3, 11 with PE-8 at 3.

²⁴⁹ 34 C.F.R. § 300.324(a)(4).

²⁵⁰ Tr. at 497-98, 542.

²⁵¹ Tr. at 185-91:

- Q. If a parent came to you and said, "How many hours is my child going to receive for speech," in looking at that document [PE-1 at 22], how would you respond?
- A. I could not answer. I would defer to the speech and language therapist who drafted this. *Id.* at 191.

²⁵² Tr. at 497-98, 542.

²⁵³ PE-16 at 9; Tr. at 285-86.

goals were based on grade-level standards and created without data from which to derive meaningful and measurable goals.

It is undisputed that by the end of *** grade Student did not read beyond the *** grade level. Despite this, Student's subsequent reading goal required Student to master *** grade level reading comprehension skills, such as inferencing and drawing conclusions at a mastery level of 100%.²⁵⁴ Student's reading PLAAFPs and goals were lacking and vague.

The *** assessed Student's reading level as a *** grader to be at a *** level.²⁵⁵ The Special Education Case Manager admitted she did not know exactly where Student was in in terms of phonics or decoding, could not determine how many *** Student knew, or even knew how Student learns to read.²⁵⁶

Additionally, it is entirely unclear what math skills, if any, Student actually mastered and at which level Student allegedly did so. It is undisputed Student was functioning multiple years below Student's grade placement when Student left the District.²⁵⁷ From 2014 to 2015 Student made no meaningful progress in math; Student continued to function at a *** grade level.²⁵⁸ However, the evidence also showed Student is capable of learning. After leaving the District and *** Student progressed in mathematics from a functional level of *** grade to *** grade.²⁵⁹

Despite Student's failure to make meaningful progress in speech, reading, writing, and math, the District not only refused to address the deficiencies and adjust Student's IEP

²⁵⁴ PE-14 at 7.

²⁵⁵ Tr. 279-80.

²⁵⁶ Tr. at 233-34.

²⁵⁷ PE-14 at 4.

²⁵⁸ PE-14 at 4.

²⁵⁹ Tr. at 285.

appropriately, but also actually reduced critical speech services.²⁶⁰ The District's continuation (and reduction) of inadequate services was a denial of FAPE.²⁶¹

While Student was given passing grades in the content, progress could not really be measured by grades as Student's grades were based on participation and were reported as "accommodated." School district grading policies require a classroom teacher to assign a grade that reflects the students' relative mastery of an assignment.²⁶² No one at the District could say what Student's levels of mastery of any goal or assignment was while Student was a student in District. Because the District failed to accurately report Student's progress through any other means, there simply is no demonstrable measure of progress beyond *** grade mastery while Student was in the District; yet Student continued to be socially promoted despite continuing to fail the State of Texas Assessments of Academic Readiness (STAAR) exam and not mastering Student's IEP goals. Student's goals remained largely unchanged or were changed without documentation of mastery or explanation of why they were abandoned. ARDC meetings to discuss Student's lack of progress did not occur.

In conclusion, all the *Michael F.* factors, with the exception of LRE, indicate Student's IEP's were not reasonably calculated to provide a meaningful educational benefit.²⁶³

J. Evaluation

²⁶⁰ See table, *supra*.

²⁶¹ performance remained stagnant for several years and denied student a FAPE); *Unionville-Chadds Ford Sch. Dist.*, 47 IDELR 280 (SEA PA 2007) (finding that a district should have addressed a child's reading deficiencies when it became apparent that the student was not making any progress); see *Department of Educ., State of Hawaii*, 47 IDELR 238 (SEA HI 2007) (criticizing the ED's decision to continue an ineffective reading program despite the student's lack of progress over a three-year period); see also *Dublin City Sch. Dist.*, 115 LRP 30436 (SEA OH 06/17/15) (a district failed to act despite awareness that the student was not making progress to improve communication skills; thus, denying student FAPE).

²⁶² Tex. Educ. Code § 28.0216.

²⁶³ *Michael F.*, 118 F.2d at 253.

The second legal issue in this case is whether the District failed to evaluate Student in all areas of suspected disability including central auditory processing and whether the District unlawfully denied Mother the requested central auditory processing evaluation?

The District has an affirmative duty to evaluate in all area of suspected disability.²⁶⁴ The regulations define “other health impairment” as “having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli that result in limited alertness with respect to the educational environment.”²⁶⁵ The impairment must be attributable to “chronic or acute health problems” and must have an adverse effect on the child’s educational performance.²⁶⁶ The regulations contain a non-exhaustive list of chronic and acute health problems, which does not include central auditory processing disorder.

A central auditory processing disorder is a disability.²⁶⁷ On Dr. ***’s recommendation, Mother requested a central auditory processing IEE. Under the IDEA, a parent of a child with a disability is entitled to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency.²⁶⁸

A parent may request a publicly funded IEE to assess an area that was not covered by the district’s evaluation.²⁶⁹ The District had reason to suspect Student had a central auditory processing deficit when it reviewed Dr. ***’s report. The District refused Mother’s request for an independent IEE for central auditory processing because it proposed conducting its own central auditory processing assessment first. However, the evidence showed the District never

²⁶⁴ 20 U.S.C. § 1414(b)(3)(B).

²⁶⁵ 34 C.F.R. § 300.8(c)(9).

²⁶⁶ *Id.*

²⁶⁷ *Houston Indep. Sch. Dist. v. Juan P. b/n/f Sylvia P.*, 566 F.3d 459 (5th Cir. 2009) (opinion withdrawn), *cert. denied*, 1305 S.Ct. 1892 (2010) (recognizing that failure to provide services for a central auditory processing evaluation denied FAPE).

²⁶⁸ 34 C.F.R. §300.502(b)(1)

²⁶⁹ *See Letter to Baus*, 115 LRP 8855 (OSEP, 2015) (stating “when an evaluation is conducted in accordance with 34 C.F.R. §§300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs”); *see also Letter to Carroll*, 116 LRP 46076 (OSEP 10/22/2016).

did so.

K. Procedural Violations

The third legal issue in this case is whether the District failed to comply with all procedural requirements of the IDEA and Texas law including provision of PWN, and by doing so has the District impeded Student's right to a FAPE, significantly impeded Mother's opportunity to meaningfully participate in the decision-making process regarding the provision of a FAPE to Student, or impeded or caused a deprivation of educational benefit to Student?

A violation of the IDEA based on a procedural error can only rise to the level of a substantive error if: (1) the error impedes the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the IEP process; or (3) caused a deprivation of educational benefits.²⁷⁰ Procedural deficiencies will not justify setting aside an IEP when the deficiencies do not compromise Student's right to an appropriate education, hamper the parents' right to participate in the formation of the IEP, or cause deprivation of educational benefits.²⁷¹ A district's "substantial compliance" with the IDEA's IEP implementing rules will suffice to save a partially defective IEP.

The District was required to provide Parents NOPS at least once per year and before any consent for evaluation.²⁷² The District was also required to give parents PWN at a reasonable time before it proposed to initiate or change or refused to initiate or change the identification, evaluation or educational placement of the child or the provision of FAPE to the child.²⁷³ PWN must include a description of the action proposed or refused, an explanation of why the District is proposing or refusing the action, a description of each evaluation procedure, assessment,

²⁷⁰ 20 U.S.C. § 1415(f)(3)(E)(ii); *see also Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003); *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 520-21 (6th Cir. 2003).

²⁷¹ *See Seth B. ex rel. Donald B. v. Orleans Parish School Bd.*, 819 F.3d 961, 978 (5th Cir. 2016) (reviewing IEE reimbursement the Fifth Circuit held, "We are persuaded that substantial compliance also suffices in the IEE context. 34 C.F.R. § 300.502 nowhere demands perfect adherence to agency criteria.").

²⁷² 20 U.S.C. § 1415(d)(2).

²⁷³ 20 U.S.C. § 1415(c); 34 C.F.R. § 300.503(a)-(c).

record or report the district used for the proposal or refusal, a statement that parents have protection, sources for parents to obtain assistance to understand, a description of other options the IEP team considered and why those options were rejected and a description of other factors relevant to the district's proposal or refusal.²⁷⁴

Failure to provide the parent with PWN is not a mere procedural error. The purpose for providing PWN is to ensure that a parent understands the special education and related services that an LEA has proposed or refused to provide to a student. If a parent does not understand the services being proposed, it follows that the parent could not have agreed to the proposed services.²⁷⁵

PWN must provide sufficient detail to allow parents to participate in their child's educational services decisions in an informed way.²⁷⁶ The failure to provide a PWN is a denial of FAPE and seriously infringes on the Parents' right to meaningful participation in the IEP process.²⁷⁷

L. Did District Predetermine the 2016-2017 Proposed IEP?

Petitioner argues the District failed to invite the IEE provider to the ARDC to discuss the results of the IEE thus predetermining the District's outdated evaluation results were the ones that would continue to be used by the District when creating an IEP for Student.²⁷⁸

²⁷⁴ 20 U.S.C. §1415(c)(3); 34 C.F.R. §300.503 (b); *see also Letter to Atkins-Lieberman*, 56 IDELR 141 (OSEP 2010); and *Letter to Anonymous*, 59 IDELR 14 (OSEP 2012).

²⁷⁵ *Letter to Boswell*, 49 IDELR 196, (OSEP 2007).

²⁷⁶ *Smith v. Squillacote*, 19 IDELR 265 (D.D.C. 1992); *Santa Rosa City High Sch. Dist.*, 38 IDELR 260 (SEA CA 2003); *See Fern Ridge Sch. Dist. 28J*, 16 IDELR 676 (SEA OR 1990) (finding that the notice the parents received was deficient because it required them to read between the lines).

²⁷⁷ *See Fern Ridge Sch. Dist. 28J*, 16 IDELR 676 (SEA OR 1990) (notice the parents received was deficient because it required them to read between the lines); *Student v. Riesel Independent School District*, 116 LRP 28346, TEA Dkt. No. 102-SE-1115 (HO Carmichael, 2016) (finding failure to provide notice of change in services denied FAPE), appeal pending at *C.M. v. RISD/RISD v. C.M.*, *Civil Action No. 6:16-cv-00206* (W.D. Texas).

²⁷⁸ Petitioner's closing brief at 47.

The IDEA requires the District to ensure that Parents are members of any group that makes decisions about their child's educational placement.²⁷⁹

Predetermination occurs when District members of the IEP team unilaterally decide a student's placement in advance of an IEP meeting. For example, in *Deal v. Hamilton County Board of Education*, 42 IDELR 109 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005), when parents requested that the district fund an ABA program, the IEP team refused and indicated its policy prevented it from considering a program other than the one in which it had invested. In *Hamilton County Board of Education*, during IEP meetings, the district allowed the parents to voice their opinion and present evidence regarding an appropriate program for their son, but it already had decided on Student's placement and educational methodology.

If a school district predetermines a disabled student's placement and excludes the parents from participating in the decision-making process it has committed a procedural error. When the evidence presented at hearing shows that parents were actively engaged in the IEP formation process, such evidence will go far to defeat a claim of predetermination and may render a procedural violation harmless. However, the mere presence and opportunity of a parent to speak at ARDC IEP meetings does not, standing alone, equate to an adequate opportunity to participate. Participation must be more than a mere form; it must be *meaningful*.²⁸⁰ Procedural violations of this type are actionable only if they impede the parent's participation in the IEP process or result in educational harm.²⁸¹

District personnel are permitted to preplan, create a draft IEP, and discuss the "way ahead" prior to an ARDC meeting. The difference between "preparation" and "predetermination" is such conduct is only considered harmless as long as school officials are "willing to listen to

²⁷⁹ 20 U.S.C. §§ 1414(e), 1415(b)(1); 34 C.F.R. §§ 300.327; .501(c)(1).

²⁸⁰ *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 812 (5th Cir.2003) (citing *Target Range*, 960 F.2d at 1484, and holding that "even if the determination of [the child's] IEP was procedurally deficient in some respects, he has not established that any procedural deficiency resulted in a loss of educational opportunity or infringed his parents' opportunity to participate in the IEP process"); *see also N.L. v. Knox County Schools*, 315 F.3d 688 (6th Cir.2003) (stating that school officials must be willing to listen to the parents and must have open minds).

²⁸¹ *Cooper v. District of Columbia*, 64 IDELR 271 (D.D.C. 2014).

parents” and “come to the meeting with suggestions and an open mind, not a requisite course of action.”²⁸²

If shown that there was no way that anything Parents said, or any data Parents produced, could have changed the District’s determination of appropriate placement, then Parent’s participation was no more than after the fact involvement.

If Petitioner meets their burden of showing Parents were precluded from meaningfully participating in the ARDC meetings and IEP development because the District had predetermined placement and/or services, then the District will have committed another procedural violation of the IDEA. Again, a procedural violation can only cause substantive harm when it seriously infringes upon Parents’ opportunity to participate in the IEP process²⁸³ or results in the loss of an educational opportunity.

“The mere fact that the IEP may not have incorporated every request from the parents does not render the parents ‘passive observers’ or evidence any predetermination.”²⁸⁴

In this case, Mother was an active and engaged parent throughout Student’s tenure at the District.

Petitioner did not meet Student’s burden of showing Mother was precluded from meaningfully participating in the ARDC meeting and IEP development because the District predetermined placement and/or services. As previously discussed, by failing to provide PWN or adequate PWD, the District committed a *substantive* procedural violation of the IDEA by

²⁸² *Knox County Schools*, 315 F.3d 688, 693-95 (6th Cir.2003); *R.P. v. Alamo Heights Independent School Dist.*, 703 F.3d 801, 811 (5th Cir. 2012) (“Under Federal regulations, not every conversation about a child is a statutorily-defined meeting in which parents must participate.”); See 34 C.F.R. § 300.501(b)(3) (“A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.”).

²⁸³ *Knable v. Bexley City School Dist.*, 238 F.3d 755 (6th Cir. 2001); see also *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 208, (1982) (“Congress sought to protect individual children by providing for parental involvement . . . in the formulation of the child’s individual educational program.”).

²⁸⁴ *J.E. and C.E. v. Chappaqua Cent. Sch. Dist.*, 68 IDELR 48 (S.D.N.Y. 2016).

impeding Mother's meaningful participation in the IEP development process; however, predetermination is a separate issue. The record contains insufficient evidence to find that the District members of the June 2016 ARDC "had their minds made up" and "would not change their position despite anything Mother said or any data Mother might have presented."

M. Scope of Reimbursement Relief

"When a state receiving IDEA funding fails to provide a FAPE, the child's parent[s] may remove the child to a private school and then seek tuition reimbursement from the state."²⁸⁵ In this case, the IEPs at issue failed to provide a FAPE and Petitioner is entitled to reimbursement for the cost of the private placement if: (1) the proposed IEP was inadequate to offer the child a FAPE and (2) the private education services obtained by the parents were appropriate to the child's needs.²⁸⁶ Petitioner met Student's burden of showing the IEPs at issue failed to provide Student with FAPE. Furthermore, Petitioner proved the private placement services were appropriate because Student made meaningful academic progress in the private *** program. Therefore, Petitioner is entitled to reimbursement for the cost of the private placement.

In Order No. 6, the Hearing Officer held if Petitioner prevailed at hearing, any time limit for compensatory educational services will follow the holding of *G.L. v. Ligonier Valley School Dis't. Auth.*, 802 F.3d 601 (3d Cir. 2015) (allowing parents to seek compensation for injuries going back more than two years (one year in Texas)). Subsequently, the Hearing Officer could find no administrative decisions or judicial cases within the Fifth Circuit that address this issue. The Federal District Courts, even those within the same Circuit, appear to be split on this issue. Compare *Hill v. District of Columbia*, 2016 WL 450697 n.4, Case No. 14-CV-1893 (D.D.C. Aug. 26, 2016, mem. op.) (citing *Ligonier Valley* the District Court held the IDEA's two year SOL applies to awards of compensatory educational services) with *Darmarcus S. v. District of Columbia*, 2016 WL 2993158, Case No. 15-851 (D.D.C. May 23, 2016, mem. op.) (holding

²⁸⁵ *A.B. v. Lawson*, 354 F.3d 315, 320 (4th Cir. 2005) (citing *Sch. Comm. of Burlington v. Dep't of Ed.*, 471 U.S. 359, 369-70 (1985)).

²⁸⁶ *A.B. v. Lawson*, 354 F.3d at 320 (citing *Burlington*, 471 U.S. at 370); see *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 13-15 (1993).

“Adopting the Third Circuit’s analysis, this Court concludes that as long as the complaint is filed within two years of the KOSHK [known or should have known] date, plaintiffs are entitled to full relief for that injury.”). Therefore, the Hearing Officer declines to apply the holding in *Ligonier Valley* to this case.

IX. CONCLUSIONS OF LAW

1. The District is an LEA responsible for complying with the IDEA as a condition of the State of Texas’ receipt of federal funding, and the District is required to provide each disabled child with a FAPE pursuant to the IDEA, 20 U.S.C. § 1400 *et seq.*
2. Petitioner bears the burden of proof on all issues raised in Petitioner’s Complaint. *Schaffer ex rel. v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).
3. The Texas one-year statute of limitation (SOL) applies to Student’s IDEA claims in this case. Student’s IDEA claims accrued on March ***, 2015. *See* Order No. 6. All issues in Petitioner’s Complaint that arose before March ***, 2015 are time barred by the SOL. 19 Texas Administrative Code § 89.1151(c).
4. The compensatory educational services awarded to Petitioner are limited to events that occurred and expenses incurred within the one year statute of limitations period as applied in Texas; *i.e.*, on or after March ***, 2015. 19 Texas Administrative Code § 89.1151(c).
5. Student does not meet eligibility criteria as a student with an intellectual disability. 34 C.F.R. § 300.8(c)(6). The report of Student meeting Agency eligibility criteria as a student with an intellectual disability was a harmless procedural error that did not result in the loss of an educational opportunity or impede Mother’s participation in Student’s educational program. *R.B., ex rel. F.B.v. Napa Valley Unified School Dist.*, 496 F.3d 932, 938 (9th Cir. 2007).
6. The District failed to include accurate and appropriate Present Levels of Performance in Petitioner’s IEPs. IEP goals and objectives were not written in meaningful and measurable ways capable of tracking Petitioner’s progress in the February 2015 IEP and the proposed June 2016 IEP. Those IEPs contained vague, meaningless, and unmeasurable present levels of performance, and IEP goals and objectives that were not individualized for Student based on assessment and evaluation. The District’s failure to design appropriate IEPs for Petitioner were, therefore, not reasonably calculated to provide Petitioner with the requisite educational benefit. 20 U.S.C. § 1414(d), 34 C.F.R. § 300.320(a), 19 Texas Administrative Code § 89.1055(a); *Buser ex rel. Buser v. Corpus Christi Indep. Sch.*, 51 F.3d 490, 493 (5th Cir. 1995).

7. During the relevant time period from March 2015 through May 2015, the District failed to track Student's progress and mastery of IEP goals. The District failed to provide Petitioner with timely and accurate progress reports. Progress reports contained missing data, were incomplete, and did not include present levels of academic achievement and functional performance (PLAAFP). 34 C.F.R. § 300.320(a)(2)(3).
8. The lack of timely and accurate progress reports impeded Mother's ability to meaningfully participate in the ARDC as a key "stakeholder." *Michael F.*, 118 F.3d at 253 (5th Cir. 1997); *Douglas County School Dist. Re-1*, 798 F.3d at 1335 (10th Cir. 2015); 20 U.S.C. § 1414(d); 34 C.F.R. § 300.320(a).
9. The District failed to propose an appropriate individualized program of education that was reasonably calculated to provide Petitioner with a meaningful benefit in the February 2015 IEP (during the relevant time period from March 2015 through May 2015) and in the proposed June 2016 IEP. *Bd. Of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-207 (1982). *See also Escambia Cnty Bd. Of Educ.* 406 F. Supp. 2d 1248 (S.D. Ala. 2005);
10. The District repeatedly failed to comply with the requirements of Texas Administrative Code § 89.1055 (the Autism Supplement) in considering whether Student needed peer-reviewed, research-based educational programming in Student's IEPs, including those that were implemented or proffered during the relevant time period. The misuse of the Autism Supplement contributed to the denial of FAPE. 19 Tex. Admin. Code § 89.1055 (e).
11. The District failed to comply with all procedural requirements of the IDEA by failing to provide the parent with the requisite PWN. By doing so the District impeded Student's right to a FAPE, significantly impeded Mother's opportunity to meaningfully participate in the decision-making process regarding the provision of a FAPE to Student and impeded or caused a deprivation of educational benefit to Student. 34 C.F.R. § 300.513(a)(2); *Smith v. Squillacote*, 19 IDELR 265 (D.D.C. 1992); *Santa Rosa City High Sch. Dist.*, 38 IDELR 260 (SEA CA 2003);
12. The District did consider but failed to ensure positive behavioral support programming for Student in the February 2015 IEP and in the proposed June 2016 IEP.
13. The District failed to provide Petitioner with appropriate speech language services. *Dublin City Sch. Dist.*, 115 LRP 30436 (SEA OH Jun. 17, 2015).
14. The District failed to propose appropriate social skills training for Student in the February 2015 IEP. That IEP did not address social skills training and was not adequate to address Student's needs as a student with autism.
15. The District failed to provide necessary in-home training for Parent. 19 Texas Administrative Code § 89.1055(e)(3), (6).

16. The District failed to provide necessary assistive technology for Student. 34 C.F.R. § 300.105(a); 19 Tex. Administrative Code § 89.1056.
17. The District failed to evaluate Student in all areas of suspected disability including central auditory processing and behavior. 34 C.F.R. §300.304(c)(4)(5).
18. The District wrongfully denied Mother an IEE for a central auditory processing evaluation. 20 U.S.C. § 1414(b)(3)(B). 34 C.F.R. § 300.502(b)(2).
19. The District failed to propose appropriate Extended School Year (ESY) services for the 2015-2016 and the 2016-2017 schoolyears. The preponderance of the evidence showed Student demonstrated substantial regression in reading that supported Petitioner's need for ESY. 19 Texas Administrative Code § 89.1065(2).
20. The District did not predetermine the 2016-2017 proposed IEP. Petitioner failed to meet Student's burden of proof on this issue. *Schaffer v. Weast*, 546 U.S. 49 (2005); 34 C.F.R. §§ 300.327, .501(c)(1).

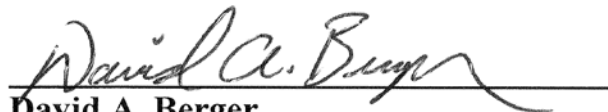
IX. ORDER

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

1. The District will provide \$18,800.00 *** x 12 months *** (***) for not providing 10 day notice prior to withdraw) = \$18,800.00) to fund the necessary prospective services and tuition for 15 months of appropriate compensatory private placement. The current private *** placement *** is an appropriate private placement. The duration was determined by the cost of weekly tuition: *** x 9 month schoolyear for 2015-2016 + 3 months (March 2015 through May 2015).
2. Within sixty days of this order becoming final, the District will fund a functional behavioral assessment and develop a behavior intervention plan, performed and drafted by a Board Certified Behavioral Analyst who meets District criteria; and the District shall provide compensatory behavior and social skills services for a period of 15 months, at frequency warranted by the evaluation, and at a location mutually agreeable to the Parties. The District may exercise its right to conduct the evaluation so long as the evaluator is a Board Certified Behavioral Analyst. If the location of the evaluation and/or services is not at the current *** placement, the District shall provide transportation or mileage reimbursement to and from the location where the evaluation is to take place and services are to be provided.
3. The District shall reimburse Petitioner for out-of-pocket expenses for the 2015-2016 schoolyear in the adjusted amount of \$30,181.69.

4. Within sixty days of this decision becoming final, the District will provide compensatory speech language therapy and services for a period of 15 months, at frequency warranted by evaluation. The evaluation will be conducted by a qualified independent audiologist who meets District criteria, who will assess for central auditory processing, and the evaluation shall be funded by the District. The compensatory speech and language services shall be provided at a location mutually agreeable to the Parties. If the location of services is not at the current *** placement, the District shall provide transportation or mileage reimbursement at the current level set by the Texas Comptroller, to and from the location where services are to be provided.
5. The District will provide Mother with four months of in-home Parent Counseling and Training developed for parents of Students with Autism and at frequency warranted by evaluation. The in-home Parent Counseling and Training shall begin within sixty days of this decision becoming final.

SIGNED December 5, 2016.


David A. Berger
Special Education Hearing Officer
For the State of Texas

NOTICE TO THE PARTIES

This Decision of the hearing officer is a final and appealable order. Any party aggrieved by the findings and decision made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States.²⁸⁷

²⁸⁷ 20 U.S.C. § 1451(i)(2); 34 C.F.R. § 300.516; 19 Tex. Admin. Code § 89.1185(n).