

**DOCKET NO. 305-SE-0616**

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

**DECISION OF THE HEARING OFFICER**

STUDENT (Student), by next friends, Parents \*\*\* (Father) and \*\*\* (Mother) (collectively, Petitioner), requested an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEA).<sup>1</sup> The Conroe Independent School District (the District) is the respondent to the complaint. As addressed in more detail below, Petitioner alleges that the District failed to place Student in the least restrictive environment (LRE), as required by the IDEA, thereby denying Student a Free Appropriate Public Education (FAPE). Petitioner also alleges that the District predetermined Student’s placement and did not allow Student’s parents (Parents) to have meaningful participation in the development of an Individualized Education Program (IEP) through an Admission Review and Dismissal Committee (ARDC). The District maintains that Student’s placement meets LRE requirements, and asserts that Parents had an opportunity to—and in fact did—provide meaningful input to Student’s IEP. The Hearing Officer finds that Student’s parents were not denied an opportunity to participate in the ARDC meeting and that Student’s placement meets LRE requirements.<sup>2</sup> The IEP is appropriately designed to provide Student with benefit and with an opportunity to succeed educationally. Moreover, no procedural violation was proven. Therefore, Petitioner’s requests for relief are denied.

As discussed below, the hearing was held on November 3-4, 2016, in Conroe, Texas. Petitioner was represented by advocate Karen Mayer Cunningham, and the District was

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<sup>1</sup> 20 U.S.C. §§ 1400 *et seq.*

<sup>2</sup> 34 C.F.R. § 300.114, .116.

represented by attorney Amy C. Tucker. The parties requested an extension of the decision due date to afford them time to file briefs. The request was granted for good cause, and the Decision was timely issued on December 16, 2016

### **I. DUE PROCESS HEARING REQUEST AND ISSUES**

Petitioner filed a Request for a Due Process Hearing (Complaint) on June 30, 2016. In the Complaint, Petitioner alleged that the District denied Student a FAPE in the following ways:

1. The District inappropriately predetermined Student's placement in the \*\*\* classroom during the 2016-2017 school year rather than in \*\*\* classroom and denied Parents the right to participate meaningfully in the he

The District requests all of Petitioner's allegations be denied and that the Hearing Officer make a finding that its Full and Individual Evaluation (FIE) was performed in compliance with the IDEA and thus Petitioner's request for an Independent Education Evaluation (IEE) at the District's expense be denied.

## **II. RESOLUTION SESSION AND PROCEDURAL HISTORY**

The Resolution Session was held on July 14, 2016, but did not result in a settlement.

The hearing was initially set on August 18-

### III. BURDEN OF PROOF AND BACKGROUND INFORMATION

#### A. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.<sup>6</sup> However, the burden of proof is on the District in regard to its claim and requested finding that its FIE was conducted in compliance with all IDEA requirements.<sup>7</sup>

#### B. Background

At the time of the due process hearing, Student was in \*\*\* grade, and resides with Student's Parents within the District's geographical boundaries. Student attends Student's home school.

##### 1. Student's Eligibility for Special Education and \*\*\* Grade IEP

The District first determined that Student was eligible for special education services in the spring of 2013, based on an FIE completed on March \*\*\*, 2013.<sup>8</sup> Student met the criteria for autism and speech/language impairment.<sup>9</sup> At the time, Student was \*\*\* years old.

The ARDC met on December \*\*\*, 2015, to reevaluate Student's intellectual and adaptive behavior, and Student's academic achievement and functional performance because of concerns raised by Student's teachers about Student's academic progress in reading and math. The ARDC acknowledged that Student met the eligibility criteria as a student with autism and speech/language impairment, but directed that additional evaluations beon service2>(c)416(1)10(e)4(va)4(1)2

From December \*\*\*, 2015, to December \*\*\*, 2016, the ARDC set five measurable goals in education for Student and established a Behavioral Intervention Plan (BIP).<sup>11</sup> The ARDC determined that the LRE was for Student to attend \*\*\* minutes per week in the \*\*\* (\*\*\*) \*\*\* classroom, \*\*\* minutes per week in \*\*\* classroom, and the remainder of the day in general education.<sup>12</sup> Student was also provided \*\*\* minutes per week of speech and language therapy.<sup>13</sup> The ARDC did not recommend extending the school year. Parents attended this ARDC meeting.<sup>14</sup>

## **2. The ARDC Meeting for 2016-2017 School Year**

The 2016 FIE report found the cur-7(e)4(po47e5(e)4(po47ev(l)-2(s)-u0(a)4(t)-2(t)-2(on P)-d ((e)-6(c)-

\*\*\*, 2016 ARDC meeting until Friday, February \*\*\*, 2016, when the diagnostician told him that the school was going to place his \*\*\* in the \*\*\* classroom.<sup>19</sup> Father described his response to this as outrage, he was floored.<sup>20</sup> The ARDC meeting was canceled by Parents in order to allow them time to review the proposed IEP.<sup>21</sup>

District Staff’s recommendation that ID be included in Student’s eligibility and that Student be placed in the \*\*\* classroom for special education initiated the deteriorated relations between Parents and District Staff. In addition, Parents testified they are dissatisfied with their opportunity to participate in the development of the draft IEP, to have their changes made during the ARDC meetings, and with the teachers’ lack of data collection and lack of communication with Parents.

The most important meetings, documents, and other matters are presented below with how they are referenced in the Decision and Order:

March ***, 2013 FIE	2013 FIE
December ***, 2015 Review of Existing Evaluation Data	2015 REED
December ***, 2015 ARDC	2015 ARDC
February ***, 2016 FIE	2016 FIE
April ***, 2016 ARDC	2016 ARDC
April ***, 2016 IEP	2016 IEP
September 2016 IEE	2016 IEE

**VI. FINDINGS OF FACT**

1. Student resides with Parents within the District’s boundaries and is eligible for special education services.<sup>22</sup>
2. At the time of the 2016 FIE, Student was

3. Student was found eligible for Special Education services as a student with autism and speech impairment in the 2013 FIE.<sup>24</sup>
4. An 2015 ARDC Report and 2015 REED found the need for additional information due to Student's educational performance, specifically concerns in academics and information retention and whether a disability condition existed with the need for additional special education services.<sup>25</sup>
5. Additional information obtained and reviewed in the 2016 FIE include:<sup>26</sup>
  - a. review of educational records;
  - b. review of home language survey;
  - c. parent information and interview;





19. When the ARDC meeting was canceled by the District, the school Principal met with Parents in an informal meeting.<sup>42</sup>
20. After meeting with Parents, the Principal met with the school-based ARDC members, shared Parent's concerns, and asked them to reconsider the draft IEP.<sup>43</sup>
21. The draft IEP was changed pursuant to Parents' input through the Principal, in that Student's special education setting was changed from all \*\*\* to \*\*\* minutes in \*\*\* and \*\*\* minutes in \*\*\* Room.<sup>44</sup>
22. Parents disagreed, wanting Student to remain in \*\*\* room with \*\*\* curriculum for all special education instruction.<sup>45</sup>
23. Parents disagreed with adding ID to Student's eligibility.<sup>46</sup>
24. Parents provided input into the ARDC's preparation of Student's Present Levels of Academic Achievement and Functional Performance (PLAAFP) and several changes to the PLAAFP were made pursuant to Parents' input.<sup>47</sup>
25. The 2016 ARDC ended with Parents in disagreement.<sup>48</sup>
26. Parents were offered an opportunity to

- b. Educational gaps between Student and Student's peers are widening as Student ages because Student is unable to keep up with the rigors and pace of \*\*\* room curriculum;<sup>52</sup>
  - c. Student needs a learning environment with a smaller student to adult ratio, providing Student with more individual attention and direction;<sup>53</sup>
  - d. Student needs formal social skills and adaptive behavior training;
  - e. Student needs daily living skills to maximize independence;<sup>54</sup>
  - f. The FIE and IEE both suggest Student needs \*\*\* curriculum for Student to progress educationally;<sup>55</sup>
  - g. At this time, \*\*\* teacher is seeing minimal or no progress for Student;<sup>56</sup> and
  - h. Student is not receiving a benefit from the modified general education curriculum.<sup>57</sup>
29. Predetermination did not occur during Staff's pre-2016 ARDC meeting, only a draft IEP was prepared.<sup>58</sup>
30. Student's IEP was not predetermined and was not determined until the 2016 ARDC meeting.<sup>59</sup>

34. Student's special education services are best taught in the \*\*\* classroom with the \*\*\* curriculum.<sup>63</sup>
35. Student's special education teachers worked well with general education teachers and other District personnel to coordinate and implement Student's services.<sup>64</sup>
36. Regular progress reports were provided to Parents and Student's progress, or lack thereof, was tracked by District personnel.<sup>65</sup>
37. While attending the \*\*\* classroom, Student is showing a significant improvement in academic success and Student's frustration is decreased.<sup>66</sup>
38. Both the FIE and the IEE performed at Parents' expense conclude that ID is an appropriate designation for Student, and its inclusion in the IEP is necessary for providing a complete picture of Student's needs and allowing the ARDC to address those needs.

- a. Impeded the student's right to a FAPE; or
- b. Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the student; or
- c. Caused the deprivation of educational benefit.<sup>70</sup>

The Hearing Officer finds that Parents failed to meet their burden of proof. No violation of Student's right to a FAPE was proven, as discussed in the following "FAPE" section. It was not proven that Student's placement was predetermined or that Parents were denied meaningful participation in the development of the IEP, in the 2016 ARDC meeting, or in any portion of the process. The Hearing Officer finds no deprivation of educational benefit due to procedural violations.

Petitioner objected to the District's staff meeting prior to the 2016 ARDC meeting in order to collaborate and prepare a draft IEP. The meeting took place without Parents but with Student's teachers and District evaluators. Student's progress and needs were discussed. Following this meeting, a proposed IEP was drafted, presented to Parents, and eventually discussed at the 2016 ARDC meeting.

Mother testified that for her to have input into the ARD document, she must be allowed to participate in the District's staff meeting.<sup>71</sup> However, the IDEA allows the District to hold preparatory meetings prior to the ARDC meeting in order to develop a proposed IEP.<sup>72</sup> This did not violate the Parents' participation rights, and it is the District's responsibility to prepare the initial draft of Student's IEP.<sup>73</sup> However, the draft IEP is only the starting point for discussions at the ARDC meeting. Parents have a right to participate in the ARDC and to have their opinions heard and considered, with appropriate adjustments to the IEP then made. Parents fully participated in the ARDC meeting and adjustments were made. No procedural violations were

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<sup>70</sup> 20 U.S.C. § 1415(f)(3)(E)(ii); *see also Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 811 (5th Cir. 2003). 34 C.F.R. § 300.513(a)(2)(i)-(iii).

<sup>71</sup> Tr. at 75.

<sup>72</sup> 34 C.F.R. § 300.501(b)-(c).

<sup>73</sup> Tr. at 292-3.

committed by the District when the staff-only, pre-ARDC meeting was held and a draft IEP developed.

Also addressing the parental right of participation, the District must provide notice and make efforts to have one or both Parents at the ARDC meetings. This requirement provides Parents with an opportunity to participate in the development of Student's IEP. If neither parent can attend a scheduled ARDC meeting, the District must use other methods to ensure parental participation, including telephone calls and telephone conference.

Here, the District contacted Parents prior to the meetings to provide information in preparation of the ARDC gathering, albeit only a day or two prior to the initially scheduled 2016 meeting. When Parents requested additional time, it was given. Moreover, when a meeting was canceled at the last minute by the District, the Principal met with Parents, listened to their input and then provided this input to the Staff developing the proposed IEP. The Principal requested that Parents' input be carefully considered, and the record establishes that Staff did just that. The Draft IEP was revised significantly even before the ARDC meeting, based on Parents' input.

Student's special education program and instructional setting, as originally proposed by Staff, were changed from \*\*\* minutes per day in the \*\*\* classroom to \*\*\* minutes per day in the \*\*\* classroom and \*\*\* minutes per day in \*\*\* classroom.<sup>74</sup> The proposed IEP recommended Student remain in general education, as Parents desired, for most of each school day. Parents continued to object, desiring Student not be taught in the \*\*\* classroom and with the \*\*\* curriculum at all. While the IDEA provides parents with a right to have meaningful input, it does not provide parents with the right to dictate an outcome.<sup>75</sup> There was no procedural error in this regard.

Parents also objected to the lack of communication with them while the Draft IEP was prepared and of not being informed of the contents of the Draft IEP until shortly before the proposed ARDC meeting. The call from the District's diagnostician shocked Parents when she advised that the District was recommending that special education services be provided in the

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<sup>74</sup> R-1 at 26.

<sup>75</sup> *White v. Ascension Parish School Board*, 343 F.3<sup>rd</sup> 373 (5<sup>th</sup> Cir. 2003).

\*\*\* classroom, rather than in \*\*\* classroom. This change in educational setting for special education services, the change in curriculum that accompanies this change in rooms, and the designation that Student also be classified as a student with ID underlies most of Parents' concerns and objections to the 2016 IEP.<sup>76</sup>

But the question concerning procedural violations does not rest on whether Parents' concerns were addressed to Parents' satisfaction in the 2016 IEP. Rather, the question is one of whether Parents were provided the opportunity for meaningful input into the 2016 IEP. Both attended the 2016 ARDC meeting. During this ARDC meeting, the PLAAFP's were reviewed line-by-line and several changes were made pursuant to the additional information provided by Parents. During this same meeting, the goals and objectives in the proposed IEP were also reviewed line-by-line, as were the proposed accommodations. Changes were again made pursuant to Parents' input. Moreover, it is important to note that these changes came after the Draft IEP was changed before the 2016 ARDC meeting and pursuant to Parents' input through the Principal, as discussed above.

Ultimately, Parents continued to disagree with any placement in \*\*\*, with the information in the Autism supplement, and with the added secondary classification of ID. They declined the District's invitation to attach individual statements to the ARD document and declined the opportunity to reconvene. While Parents did not get the ARDC to make many of the changes they desired, Parents were effectively and sufficiently included in the process and in preparation of Student's IEP.

The Hearing Officer concludes that Petitioner failed to prove any procedural violations significantly impeded Parents' opportunity to participate in the decision-making process. The record is without evidence that any procedural violations impeded Student's right to FAPE or caused a deprivation of educational benefit.

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<sup>76</sup> These issues are addressed below.

**B. FAPE**

To provide a FAPE, the IEP must be specifically designed to meet Student's unique needs, and supported by services that permit Student to benefit from the instruction.<sup>77</sup> The Fifth Circuit established four factors to review when determining whether the IEP at issue and as implemented was reasonably calculated to provide Student with the requisite meaningful educational benefit under the IDEA.<sup>78</sup> These factors are:

- The program is individualized on the basis of the student's assessment and performance;
- The program is administered in the LRE;
- The services are provided in a coordinated and collaborative manner by key stakeholders; and
- There are positive academic and non-academic benefits demonstrated.

**1. Was the program individualized on the basis of Student's assessment and performance?<sup>79</sup>**

The evidence showed that Student's IEP was developed and individualized on the basis of the 2013 FIE, the 2015 REED, a functional behavioral assessment (FBA) completed on March \*\*\*, 2014, and on additional testing performed for the 2016 reevaluation (2016 FIE), including testing for IQ, educational achievement, and adaptive skills.<sup>80</sup> Proposed goals and objectives were developed and proposed at the 2016 ARDC meeting fully considering the assessments of Staff, Parents, and the expert opinions contained in evaluation reports.

Parents' concerns about Student's ID designation were not proven to be well founded. Parents' paid for the 2016 IEE but its findingnt3(i)-2()-4(rupt)-2(s)-1(.he)4( e)4(x)ceuatde

Parents voiced concerns that the \*\*\* curriculum is not on grade level with the general education curriculum. However, the evidence establishes that Student's disabilities are best addressed with the \*\*\* curriculum. Parents object and fear that the \*\*\* curriculum is effectively giving up on their child. The evidence does not support this interpretation of the ARDC's decision regarding appropriate curriculum for Student. Rather, Student's performance, testing, and other evaluative tools confirm that Student is receiving the appropriate curriculum to allow Student an opportunity to succeed. Moreover, the evidence shows that Student is not making progress in the general education curriculum for reading, even when it is modified.

Maintaining Student in the general education curriculum, even if modified in \*\*\* room, will only lead to a decline in Student's progress made with the \*\*\* curriculum. Moreover, as Student sees progress, Student's discouragement is lessened, perhaps even going away in the \*\*\* classroom. Student is relaxed, able to focus, and attends to the tasks assigned with the \*\*\* curriculum.<sup>81</sup> The evidence establishes that Student will progress more, learn faster, and be provided an opportunity to reach Student's unique potential at this time by continuing to successfully master the \*\*\* curriculum.<sup>82</sup>

## **2. Was the program administered in the LRE?**

The IDEA requires that a student with a disability be educated with non-disabled peers to the maximum extent appropriate and that special education classes, separate schooling and other removals from the regular education environment occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>83</sup> There was no disagreement about the amount of time Student should spend in special education (\*\*\* minutes per day) with the remainder of the day in the general education setting.

It became apparent during the hearing that Petitioner misunderstood \*\*\* . 5h-tm2( t)-2(heo1)-10(e2(ha)4



settings are equally restrictive from an instructional setting perspective. Both are special education classrooms as opposed to general education. LRE requires that children with disabilities be educated with children who are non-disabled to the maximum extent appropriate.<sup>84</sup> There are no non-disabled classmates in either of these special education settings. However, Student does receive inclusion, to the maximum extent appropriate, with non-disabled peers as Student attends general education classrooms for most of each school day. It should be noted that even while in general education classrooms, Student continues to work on Student's IEP goals.

The distinguishing factors between \*\*\* and \*\*\* are the curriculum and student-to-teacher ratios. \*\*\* room \*\*\*.<sup>85</sup> In \*\*\*, \*\*\*.<sup>86</sup> The \*\*\* classroom also has \*\*\*, giving \*\*\* students \*\*\*. This is precisely what the evidence showed would best meet Student's unique needs.

Petitioner urged that Student be given time to meet the IEP goals in the manner prescribed during the 2015 ARDC meeting—100% in \*\*\* classroom. After the 2016 FIE, the school-based members of the ARDC proposed Student receive special education services 100% in the \*\*\* classroom. After reviewing parental concerns, the school-based members of the ARDC agreed to reduce the time for Student in \*\*\* from \*\*\* minutes to \*\*\* minutes. And as agreed to by Parents, Student remains in \*\*\* classroom for the additional special education program—\*\*\* minutes per day.

This is less an LRE issue and more a curriculum and instructional setting issue.<sup>87</sup> The issue does not concern the amount of time Student will spend in the general education classroom. The evidence, including Student's performance while in the \*\*\* classroom, demonstrates that the ARDC's decision to include student in \*\*\* was and is appropriate. In \*\*\* years of instruction in \*\*\* classroom, Student's reading remained at a DRA level of \*\*\* and was not showing any improvement.<sup>88</sup> Student was not able to keep up with the modified general education

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<sup>84</sup> 34 C.F.R. § 300.114(b).

<sup>85</sup> Tr. at 108.

<sup>86</sup> Tr. at 108.

<sup>87</sup> 34 C.F.R. § 300.116.

<sup>88</sup> Tr. at 320.

curriculum. However, when gaps in Student's prerequisite reading skills were properly addressed in the \*\*\* classroom, Student showed huge improvements,



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math. Student's Full Scale IQ score indicated global intellectual functioning within the mildly impaired or delayed range of intelligence. In all areas of IQ tested, Student demonstrated sub-average cognitive ability. It should again be noted that Parents had an outside IEE performed and the results were similar.

The District's FIE provided valuable information and allowed the ARDC to craft an IEP providing the necessary special education services that offered Student a FAPE and a reasonable opportunity to succeed.

Student's IEP is an individualized program based upon Student's unique needs and regardless of the eligibilities listed, each of Student's needs must be addressed. The evidence established that the special education needs and services for Student's autism are not the same as for Student's ID. Petitioner presented no evidence that the FIE was inadequate or that Student's eligibility of ID is inappropriate. Moreover, Parents' disagreement with the eligibility designation of ID does not render the designation inappropriate. The ARDC's inclusion of ID was appropriately made and for Student's benefit and potential success.

## **2. Was the District's FIE conducted according to appropriate procedures?**

Petitioner presented no evidence that the FIE was not appropriately performed under the IDEA. Rather, the testimony and exhibits offered into evidence prove that the FIE was conducted in compliance with all IDEA requirements.<sup>102</sup>

### **D. Summary of Conclusions**

Through application of the IDEA and Fifth Circuit precedent to the facts of this case, clear and convincing evidence establishes that the District acted in a collaborative manner, that the IEP is appropriate in setting the LRE, Student's special education placement, and Student's need for \*\*\* curriculum. Finally, the unrebutted evidence establishes that the District's FIE is appropriate and that Parents are not entitled to an IEE at public expense.<sup>103</sup>

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<sup>102</sup> 34 C.F.R. § 300.304.

<sup>103</sup> 34 C.F.R. § 300.502(b)(3).



### VIII. ORDER

After considering the evidentiary record and the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer hereby orders as follows:

Petitioner's requests for relief are **DENIED**.

  


Tommy L. Broyles

### NOTICE TO PARTIES

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