DOCKET NO. 369-SE-0815

STUDENT b/n/f PARENT AND PARENT Petitioner	§	**BEFORE A SPECIAL EDUCATION**
	§	
	§	
v.	§	**HEARING OFFICER FOR**
	§	
BASTROP INDEPENDENT SCHOOL DISTRICT,	§	
	§	

seeks to establish that the FIE is appropriate, and that while Petitioner may obtain an IEE at personal expense, the IEE may not be obtained at public expense.[2]

[1] **In a counterclaim, the District**

[1] **Respondent's First Original Answer at 4.**

[2] **Respondent Ex. 4 at 8, 10.**

The hearing officer finds that Student was not denied a FAPE as alleged; the ARD committee meetings met all requirements at issue;[3] the 2014-

b. Petitioner's Sub-issues

(i) Did the District fail to implement Student's IEP as written?

(ii) Did the District fail to devise an appropriate IEP for Student?

(iii) Did the District fail to adequately evaluate all areas of suspected disability in accordance with the IDEA?

(iv) Did the District fail to conduct the annual ARD meeting in compliance with the timeline?

(v) Did the District fail to conduct the tri-annual FIE within the appropriate timeline?

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statements; implementing IEPs; developing *** and ***;[11] meeting physical education requirements; and providing accommodations with fidelity;

c. provide in-service training in assistive technology devices and services to ensure all teachers who work with Student are trained;

d. assure Petitioner that accommodations will consistently be provided to Student;

e. provide compensatory services including, but not limited to, tutoring during the 2015-16 school year to address the lack of an appropriate education program for Student during the 2014-15 school year;

f. provide a *** evaluation;

g. provide an IEE for all areas of suspected disability;

h. pay for a neuropsychological IEE in areas of suspected disability;

i. pay for IEEs for occupational therapy, speech, and assistive technology;

j. provide a recreational/leisure assessment, counseling assessment, and an adaptive/functional behavioral assessment;

k. complete a ***/*** assessment and invite representatives from local and state agencies (under the State's Memorandum of Understanding) to the ARD committee meeting for the purpose of evaluating and designing a ***/*** IEP that includes a *** arrangement for Student to include compensatory services;

l. contract with mutually agreeable specialist(s), or in the absence of agreement, an educational agency or university, to develop a comprehensive educational program for Student using IEEs and other assessment methods the specialists deem appropriate including curriculum, counseling, occupational therapy, assistive technology assessment and planning, recreational/leisure services, parent training and counseling services, and direct 1:1 or small group instruction or other teacher support. The program is to include: appropriate goals aaoupa goar((ndum).m)-6(nt)-2(t)-2(r)3(nt

burden of showing why the IEP and resulting placements were inappropriate under the IDEA.[15] To prevail, Petitioner must, therefore, establish that the District violated the IDEA regarding Petitioner's delineated issues.

On its counterclaim, the District bears the burden to prove that the FIE of Student was appropriate.[16] To prevail, the District must, therefore, prove that the FIE meets all standards under the IDEA.[17]

II. HEARING

The hearing was held November 17-20, 2015, before Sharon Cloninger, hearing officer, at the District's Boardroom, 906 Farm Street, Bastrop, Texas 78602. Petitioner was represented by lead counsel Elizabeth Angelone; co-counsel Andrew K. Cuddy, a member of the New York bar who appeared pro hac vice; and co-counsel Michael Heagerty. Attorney Charlotte Salter and co-counsel Kelly Shook represented the District.

During the due process hearing, the parties requested that the deadline for written closing briefs be extended to December 30, 2015, and that the decision due date be extended to January 16, 2016, for good cause.[18] This decision was timely issued.

III. RULING ON MOTIONS IN PETITIONER'S CLOSING BRIEF

A. Denying Motion to Exclude District's Designated Expert Witnesses

At the hearing, after "invoking the Rule," Petitioner requested exclusion of the District's

hearing officer denied Petitioner's motion and permitted occupational therapist ***, physical therapist ***, and ***, Ph.D., Licensed Specialist in School Psychology (LSSP), to remain in the hearing room. Petitioner reasserts the motion in Petitioner's Closing A

Under 19 Texas Administrative Code § 89.1185(h), "[g]ranting a motion to exclude witnesses from the hearing room shall be at the hearing officer's discretion." Accordingly, Texas Rule of Evidence 614 does not strictly apply to this proceeding and it was not necessary for the District to demonstrate that its designated experts met any of that rule's exemptions in order for them to remain in the hearing room.

Given that the bases of expert opinion can include facts or data made known to the expert at the hearing,[24] and the District's counterclaim relates directly to testimony provided by Petitioner's expert witnesses, it was within the hearing officer's discretion to permit the District's designated experts to hear the testimony, in particular, of Petitioner's expert witnesses. Resulting opinions formed by the District's experts could "assist the trier of fact to understand the evidence or to determine a fact in issue[.]"[25] Accordingly, Petitioner's motion is denied.

B. Denying Motion to Lift Statute of Limitations

Petitioner asserts that the 1-year statute of limitations should not have been imposed for this proceedingPees1 2555.80(f)-1nc 0.00-4()-2(i)-6(t)-6BDC 0 ue[555.8aulf,eenbetn41 -1.72 Tpr03 Tw 1026 T

forming the basis of the [Complaint]" or that the District withheld information from Parents that was required to be provided to them.[29] As such, Petitioner did not prove that either of the legal exceptions to the 1-year statute of limitations apply to this case. Petitioner's motion is denied.

IV. FINDINGS OF FACT

Based upon the evidence and argument of the parties, the hearing officer makes the following findings of fact:

Background

1. Student resides with Parents within the boundaries of the District.[30]

2. The District is a recipient of federal funds and must comply with the IDEA, including developing and implementing an appropriate IEP for Student, designed to ensure services and placement in the LRE, and reasonably calculated to confer meaningful educational benefit.

3. Student is *** years old and in the *** grade.

4. Student first enrolled in the District in *** in the *** grade.[31]

5. Based on an FIE completed in 2008 by the *** (Student's previous school district), Student met disability criteria as a child with a Specific Learning Disability (SLD) in Reading Comprehension, Math Calculation, and Written Expression.[32]

6. An FIE completed by the District in November 2011 showed Student no longer met disability criteria for SLD, but Student was determined to be eligible for special education services due to Other Health Impairment (OHI) because of a *** disorder that began in *** 2011.[33]

7. Following *** ***, the District conducted another FIE.[34] As a result of the 2012 FIE, Student was identified as a child eligible to receive special education services as a child

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[29] 19 Tex. Admin. Code § 89.1151(d).

[30] Respondent Ex. 1 at 447; Respondent Ex. 2

with a Speech Impairment (SI) and OHI, and was provided with the instructional service of speech therapy and the related services of physical therapy, occupational therapy, and assistive technology.[35]

8. Student's ***. The *** *** *** activity; however, following ***, Student experienced *** which affected the use of Student's ***. Student also experienced temporary loss of speech/language skills and impairment of cognitive skills.[36]

9. Student has not ***.[37]

10. Student presents with a lack of functional use of Student's *** ***. ***, ***; Student has learned to ***. Student's *** also resulted in executive function deficits that affect Student in the home, school, and community. Student's ability to perform age-appropriate tasks for fine motor, visual motor, and gross motor skills such as self-care activities, has been impacted by Student's disability.[38]

11. Since *** 2012, Student has regained many of the skills Student lost following ***. Student's learning capacity at school has significantly improved since Student's 2012 ***.[39]

12. However, information dated September ***, 2015, from Student's physical medicine doctor, indicates Student continues to experience "decreased balance and steadiness" due to ***.[40]

13. Following ***, Student was restricted by Student's physician to *** until *** 2013. In *** 2013, Student's physicians allowed Student to attend *** but restricted Student from participation in ***. Student was *** years old and in the *** grade.[41]

14. An annual ARD committee meeting was held on September *** 2013.[42] Student continued to receive services in the general education classroom with inclusion support, with the

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[35] Petitioner Ex. 22 at 269, 283-284; Respondent Ex. 1 at 368.

[36] Petitioner Ex. 29 at 340; Respondent Ex. 2 at 567, 575-576, 588, 599; Respondent Ex. 4 at 21-22; Respondent Ex. 23 at 12.

[37] Petitioner Ex. 29 at 340; Petitioner Ex. 87; Petitioner Ex. 89; Respondent Ex. 2 at 567, 575-576, 588; Respondent Ex. 23 at 12.

[38] Petitioner Ex. 6; Respondent Ex. 4 at 21-22.

[39] Petitioner Ex. 6; Petitioner Ex. 8.

[40] Petitioner Ex. 29 at 340; Petitioner Ex. 87; Petitioner Ex. 89; Respondent Ex. 2 at 567, 575-576, 588; Respondent Ex. 23 at 12.

[41] Petitioner Ex. 22 at 283; Respondent Ex. 1 at 37, 204.

[42] Respondent Ex. 1 at 220-274.

related services of speech therapy, occupational therapy, physical therapy, and assistive technology being provided.[43]

15. During 2014-15, Student received all academic instruction in the general education setting and passed the *** grade.[44]

16. Student has friends and socializes with Student's peers in the general education environment.[45]

17. Student's behavior is not a concern.[46]

18. As proposed in the 2015-16 IEP yet to be adopted, Student will receive all but Student's *** instruction in the general education setting. In 2015-16, Student receives support from special education co-teachers in Student's academic classes. Student's t icnto beS umad [(y)-4(d)]TJ 0

21. In 2014-15, Parents and teachers communicated with each other to ensure Student's testing accommodations were followed.[50]

22. In 2014-15, Student's math teacher did not follow Student's IEP accommodations at the beginning of the school year but the situation improved after the math teacher left. The *** teacher did not initially give Student tests one-on-one but the situation improved.[51]

23. At an October ***, 2014 continuation of a brief ARD committee meeting, Father expressed concern that a particular teacher was not providing Student with a copy of class notes as required by the accommodations in Student's IEP. ***, Assistant Principal, stated she would address the issue with the teacher after the meeting. The ARD committee revised the accommodation so that Student would receive class notes at the beginning rather than at the end of class. Ms. *** notified Student's teachers of the change.[52]

24. On October ***, 2014, Ms. *** reminded Student's math and resource math teachers to request oral administration of Student's tests to give Student plenty of time to process and work the problems.[53]

25. On December ***, 2014, Student was not provided oral administration of a test as required.[54]

26. On January ***, 2015, Ms. *** again sent all of Student's teachers a copy of Student's special education paperwork.[55]

27. On January ***, 2015, Special Education Coordinator *** was consulted by Ms. *** about Student's "extra day" accommodation for tests.[56]

28. On January ***, 2015, when a teacher offered to allow Student to take Student's *** test in a small group and/or have it read to Student, in accordance with Student's accommodations, Student declined.[57]

29. On February ***, 2015, Ms. *** sent Student's math teacher a spreadsheet of Student's accommodations.[58]

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[50] Tr. at 1166 (Ms. ***); Respondent Ex. 23 at 20; see also, for example, Petitioner Ex. 148 at 1255-1256.

[51] Respondent Ex. 23 at 18.

[52] Respondent Ex. 1 at 413, 424; Petitioner Ex. 148 at 1283.

[53] Petitioner Ex. 158 at 2041, 2046, 2048.

[54] Petitioner Ex. 158 at 2116.

[55] Petitioner Ex. 158 at 2263-2280.

[56] Petitioner Ex. 158 at 2306. Ms. *** last name is now "***."

[57] Petitioner Ex. 158 at 2347, 2361.

[58] Petitioner Ex. 158 at 2259, 2381-2382.

39. On April ***, 2015, Student's science test was not orally administered because Student opted to remain in the classroom for the test.[68]

40. On at least one occasion in the spring of 2015, Student's math teacher sent an electronic copy of class notes to Parents after Parents told him Student's notes did not make it home. The math teacher also agreed with Parents that Student could to turn in *** Student's homework.[69]

41. On May ***, 2015, Student's *** teacher emailed a copy of the final review to Mother after Student left the final review in the classroom.[70]

42. Ms. *** reminded Student's math teacher on June ***, 2015, that Student's final examination should be individually orally administered.[71]

43. On June ***, 2015, Ms. *** arranged for individual oral administration of Student's final exam in ***.[72]

44. On June ***, 2015, Ms. *** arranged for Student's English final exam to be orally administered and for Student to be escorted to and from the final exam by an adult in accordance with Student's accommodations.[73]

45. In 2015-16, Student continues to be educated under Student's 2014-15 IEP pending Parents' acceptance of the IEP developed at an ARD committee meeting that began in September 2015 and concluded on October ***, 2015.[74]

46. In 2015-16, accommodations have been inconsistently implemented. Student sometimes refuses accommodations but, Mother said, refusal should not be a choice.[75]

47. On September ***, 2015, Student requested a copy of class notes from Student's math teacher, pursuant to one of the accommodations in Student's IEP. After the teacher did not provide the notes, Student texted Student's case manager, who then spoke with the teacher. The teacher questioned the validity of Student's request; the case manager confirmed that providing Student with notes at the beginning of class was an accommodation. Assistant Principal Ms. *** then spoke with Student and said that the teacher was not available to give Student the notes at the beginning of class because the teacher had a meeting before

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[68] Petitioner Ex. 159 at 2695.

[69] Petitioner Ex. 158 at 2376-2380, 2383-2386; Petitioner Ex. 159 at 2633.

[70] Petitioner Ex. 159 at 2758.

[71] Petitioner Ex. 159 at 2778.

[72] Petitioner Ex. 159 at 2781.

[73] Petitioner Ex. 159 at 2784.

[74] Tr. at 1200-1201 (Ms. ***).

[75] Tr. at 552, 1391 (Father); Petitioner Ex. 4 at 19-22; Respondent Ex. 23 at 18.

that class period. When Student left the meeting with Ms. ***, Student was very angry because Student's accommodations were not being followed and Student felt like Student is a bother when Student advocates for ***self. On September ***, 2015, the math teacher ***. That same day, the teacher did not provide Student with another of Student's accommodations—a modified test.[76]

48. In October 2015, Student refused to be pulled out of class for occupational therapy because Student felt the occupational therapist had called Student a *** at a recent ARD committee meeting.[77]

49. Mother cited the math teacher's *** and the occupational therapist telling Student Student had been *** as examples of retaliation. Mother would like for District teachers and administrators to have training to learn how to be sensitive to Student and not retaliate against Student when Student advocates for ***self.[78]

Student's progress

50. Progress reports issued every 6 weeks during 2014-15 indicate Student had either mastered, was progressing toward, or was continuing to work on objectives related to Student's IEP goals. The progress reports also indicated whether the progress at the time was sufficient for Student to achieve a particular IEP goal by the next annual ARD date in September 2015.[79]

51. Student mastered all of the 2014-15 IEP goals, obtaining more than trivial progress under the IEP and thus receiving an educational benefit.[80]

52. Petitioner's assertion that Student failed *** 2014-15 and an ARD committee meeting was not convened to discuss Ro(P)Tj 0gatailed ***

2015, Ms. *** notified Student or Student's teacher that someone else would need to be available to *** Student and asked Student or Student's teacher to arrange for someone else to *** Student.[92]18

70.

79. Student did not *** in *** class. Student provided *** answers.[109]

80. Student did not *** in *** where Student provided *** responses without difficulty.[110]

81. ***, MA, CCC-SLP, Lead Speech-Language Pathologist, and Assistive Technology Coordinator for the District, emailed Mother in January 2015 to help Mother access an *** with *** at the *** grade level so Mother could assist Student at home in Student's reading and comprehension of ***, which Student was

106. Beginning in 2015-16, the District provided occupational therapy services for Student on October ***, November ***, and November ***, 2015, through a licensed/certified occupational therapy assistant supervised by Ms. ***. Student had refused occupational therapy services from Ms. *** on October ***, 2015, due to a conflict between them, and occupational therapy was not provided on October ***, 2015, due to Parents' request that occupational therapy be placed on hold.[138]

107. To assist Student with projects that require ***, the District has made available to Student *** so Student can ***.[139]

108. At the beginning of the 2015-16 school year, Mother confirmed that Student had received benefit from the occupational therapy provided by the District over the previous year but noted the benefit could have been partly due to occupational therapy Student concurrently received at *** and at home.[140]

109. In Ms. ***'s opinion, Student benefitted from the occupational therapy services.[141]

Physical therapy

110. Student has received direct physical therapy services from the District since ***. Student initially was only able to *** following Student's ****** for *** and received physical therapy services *** Student's academic day. Since then, Student has progressed, tolerating *** of instruction. ***.[142]

111. Physical therapy logs kept by District physical therapist Ms. *** indicate that Student was provided with 37 physical therapy sessions from August ***, 2014, through June ***, 2015.[143]

112. For 2014-15, Student received physical therapy services weekly and during *** to integrate safe and appropriate activities into Student's program. Emphasis was on improving Student's *** during Student's *** program to allow Student to *** into Student's routine for lifelong management of Student's *** issues.[144]

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[138] Tr. at 555-560 (Father); Tr. at 943 (Ms. ***); Tr. at 1188-1191 (Ms. ***); Petitioner Ex. 148 at 1180-1181; Respondent Ex. 34 at 1-2, 6-7.

[139] Tr. at 943 (Ms. ***).

[140] Petitioner Ex. 4 at 36; Petitioner Ex. 158 at 1980-1983; Respondent Ex. 23 at 8, 9, 23.

[141] Tr. at 937 (Ms. ***).

[142] Petitioner Ex. 22 at 283.

[143] Petitioner Ex. 9; Petitioner Ex. 19 at 220-255; Respondent Ex. 1 at 513-548. It is unclear if the March ***, 2015 physical therapy session involved Student or only a conversation with Mother. The session is counted in the total. Respondent Ex. 1 at 535; *see also* Respondent Ex. 7.

[144] Petitioner Ex. 22 at 283.

113. Ms. *** provided Parents with physical therapy exercises for Student to do at home.[145]

114. Student mastered Student's physical therapy IEP goals for 2014-15, which also assisted Student in obtaining the one *** ***.[146]

115. In October 2015, Mother confirmed that Student had received benefit from the physical therapy provided to Student by the District during the previous school year.[147]

116. For the 2015-16 school year, the District provided Student with physical therapy sessions on October ***, and ***, 2015, as of the November ***, 2015 report date.[148]

117. In 2015-16, Student *** and is able to *** as well as *** without assistance.[149]

118. ***. Student has demonstrated that Student is very responsible in ***.[150]

119. Due to Student's progress in the area of ***, the September 2015 ARD committee recommended that the provision of *** be discontinued but that Student continue to be allowed to ***.[151]

Speech and language therapy

120. Speech and Language Therapy logs kept by District Speech and Language Therapist *** show that Student was provided with 22 sessions of speech therapy from September ***, 2014, to May ***, 2015.[152]

121. At the beginning of 2014-15, Student was owed and received compensatory sessions of speech therapy for sessions that were not provided in the 2013-14 school year.[153]

122. By May ***, 2015, Student had received all required speech therapy for the 2014-15 school year.[154]

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[145] Petitioner Ex. 148 at 1213-1214; Petitioner Ex. 159 at 2710.

[146] Tr. at 1073 (Ms. ***); Petitioner Ex. 159 at 2741; Respondent Ex. 4 at 55.

[147] Respondent Ex. 23 at 10.

[148] Respondent Ex. 34 at 3-5. The hearing officer notes that the due process hearing began November 17, 2015, so any subsequent physical therapy sessions are not in the report.

[149] Tr. at 1023-1024; 1032 (Ms. ***).

[150] Tr. at 1021, 10-25-1026, 1030-1033 (Ms. ***).

[151] Respondent Ex. 4 at 57.

[152] Respondent Ex. 1 at 550-559; Respondent Ex. 7.

[153] Tr. at 1069, 1071-1072 (Ms. ***); Petitioner Ex. 9; Petitio n153 etition 9; Petit2n4212n4212.4(i)2.9(n)-4(g)8(o)-4(

123. At the beginning of the 2015-16 school year, Mother confirmed that Student had received benefit from the speech therapy provided to Student by the District the previous school year.[155]

Student's 2014-15 IEP considered at May 2015 ARD committee meeting

124. At an ARD committee meeting held on May ***, 2015, the occupational therapy, physical therapy, and speech therapy providers reported to Father that they were on track to complete Student's services for the 2014-15 school year.[156]

125. At the May ***, 2015 ARD committee meeting, Mother asked if someone could help Student and Student's teachers learn how to navigate Student's assistive technology.[157]

126. The May ***, 2015 ARD committee meeting report states *** Student's *** did not meet Student's needs at that time. The report suggests that *** should be investigated for Student. It was noted that as math expectations increase, additional assistive technology options in the area of math should be investigated.[158]

127. In 2015-16, an assistive technology team will help with the implementation of assistive technology for Student.[159]

128. At the May ***, 2015 ARD committee meeting, Mother expressed concern that teachers were not always giving Student Student's class notes, one of Student's required accommodations.[160]

129. At the May ***, 2015 ARD committee meeting, ***, Special Education Administrator, reviewed the process of first contacting the teacher, then the case manager, then the campus administrator when accommodations are not provided.[161]

130. At the May ***, 2015 ARD committee meeting, Mother asked *** Student as part of Student's *** support when Ms. *** is not available. When Ms. *** is not available, she lets Student and Student's teacher know. The ARD committee agreed to develop a formal plan for Student's *** when Student's "buddy" is unavailable.[162]

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[155] Respondent Ex. 23 at 11.

[156] Petitioner Ex. 20 at 257; Respondent Ex. 1 at 454.

[157] Petitioner Ex. 20 at 257; Respondent Ex. 1 at 454.

[158] Petitioner Ex. 154 at 1680.

[159] Petitioner Ex. 20 at 257; Respondent Ex. 1 at 454.

[160] Respondent Ex. 1 at 454.

[161] Respondent Ex. 1 at 454.

[162] Petitioner Ex. 20 at 257; Respondent Ex. 1 at 454.

146. ***.[178]

147. Because Student ***, Student may ***.[179]

148. ***.[180]

149. A *** ARD committee meeting is held any time from when a student ***.[181]

150. The ARD committee developed seven measurable annual IEP goals for Student, with corresponding objectives, some to be completed by June 2015 and others by September 2015.[182]

151. Student's academic IEP goals for mathematics, science, language arts, and social studies were to be implemented by general education teachers and special education teachers in a general education classroom and the methods of evaluation were to include teacher made tests, work samples, observations, and teacher reports/feedback, with progress reports every 6 weeks.[183]

152. Student's 2014-15 IEP included speech therapy and the related services of occupational therapy, physical therapy, and assistive technology.[184]

153. The functional IEP goal and objectives for the related service of occupational therapy were implemented by the occupational therapist, general education teacher, and special education teacher, in the general education setting. The methods of evaluation included data collection, work samples, teacher reports and feedback, and observations. Progress coincided with the issuance of report cards. The completion date was September ***, 2015.[185]

154. The combined academic and functional IEP goal and objectives for the instructional service of speech and language therapy were completed by September ***, 2015, outside the general education classroom, with implementation by the speech language pathologist and speech language pathologist assistant. The methods of evaluation included data collec 0.004 63h559(al)-6

observations, consultation with teachers, and student conferences. Progress reports coincided with the issuance of report cards.[186]

155. The functional IEP goal and objectives for the related service of physical therapy were completed by

161. In a doctor's order dated August ***, 2014, Student's physician Dr. *** asked the District to allow Student to substitute physical therapy and occupational therapy for ***.[193]

162. At the annual ARD committee meeting on September ***, 2014, Parents requested that Student's physical therapy and occupational therapy services be substituted for Student's *** requirement.[194] The ARD committee determined that Student would be enrolled in *** class, with modifications, which would allow Student to *** under Texas Education Agency guidelines.[195] At the continuation of a brief ARD committee meeting on October ***, 2014, an academic goal related to *** was added to Student's IEP. Implementers were a physical therapist, Student's *** teacher, and a paraprofessional, with evaluation by data collection and observations, and progress reports to be provided every 6 weeks.[196]

163. Modifications and accommodations necessary to enable Student to be involved in and to progress in the general education curriculum included a number of adaptations for the

Student's thoughts in writing assignments, and in developing Student's mechanics and proofreading skills.[202]

168. Some of the adaptations for instructional delivery contained in the 2015-16 IEP, such as giving Student extra time for oral and written responses in class and on *** assignments, are to accommodate Student's slow processing speed.[203]

169. In developing Student's 2015-16 IEP, the ARD committee considered PLAAFPs for speech therapy, occupational therapy, physical therapy, reading, math, and social studies.[204]

170. In drafting Student's September 2015 IEP, the ARD committee considered Teacher Input Forms submitted in August 2015.[205]

171. Because Student appeared to be making progress on Student's IEP goals and objectives in Student's 2015-16 *** co-teach setting, the ARD committee recommended that Student continue to receive *** instruction in the general education setting.[206]

172. Because Student requires a slower pace of instruction that cannot necessarily be duplicated in the language arts general education setting, the ARD committee recommended that Student receive language arts instruction in the resource setting in 2015-16 due to the class size being smaller than the general education class size.[207]

173. A specific program called *** is used with language arts students in the resource room. *** is specific to comprehension and there is also a written component.[208]

174. Father disagreed with the ARD committee's recommendation that Student be placed in the resource classroom for language arts.[209]

175. At a continuation of the September ***, 2015 annual ARD committee meeting, the committee determined that Student will receive all academic education and related services/other services in the general education setting except for *** minutes per day of *** in the special education resource room and *** minutes *** a week, for *** weeks of

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assistive technology services in the special education setting, and speech and language therapy in the speech therapy room.[210]

176. Students who are instructed in the resource room have access to the general education curriculum.[211]

177. In considering the LRE, the ARD committee determined that the benefits of Student's placement outweigh anticipated harmful effects.[212]

178. In considering the LRE, the ARD committee determined that Student will have the opportunity to participate with students without disabilities in nonacademic, extracurricular, and other activities.[213]

179. Student's draft IEP as presented at the September ***, 2015 annual ARD committee meeting contains the goal that by September ***, 2016, Student will demonstrate improvement in Student's emotional functioning and coping skills as evidenced by demonstrating completion of three short-term objectives in individual counseling sessions in a special education setting.[214]

180. At the October ***, 2015 conclusion of the September ***, 2015 annual ARD committee meeting, Ms. *** recommended that, instead of continuing to receive direct occupational therapy services, Student receive *** minutes per *** weeks of consultation services from an occupational therapy provider. Consultation includes working with teachers regarding the requirements of an activity as well as working with Student regarding how to adapt or modify the activity or task so Student can perform the activity or task independently.[215]

181. At the October ***, 2015 conclusion of the reconvened annual ARD committee meeting, Ms. *** recommended that speech therapy continue to be provided to Student.[216]

182. At the October ***, 2015 continuation of the September ***, 2015 annual ARD committee meeting, the ARD committee determined that Student meets the following Health Classification for Special Education: *** (***). A member of the healing arts licensed to practice in Texas has provided the school with written documentation concerning the nature of the impairment and the expectationy st-2(or)3( )]TJ 0300u61/.o56B39(e)4(x)-4(a)4(c)4(t)-2(i

183. At the October ***, 2015 conclusion of the September ***, 2015 annual ARD committee meeting, Ms. *** recommended that Student be dismissed from physical therapy services based on the results of the physical therapy evaluation conducted for the 2015 FIE.[218]

184. The District considered a September ***, 2015 letter from Student's physician Dr. *** that stated in order to maximize Student's safety and stability while ***, ***.[219]

185. One of Student's accommodations is to ***.[220]

186. As part of the 2015-16 IEP yet to be accepted by Parents, the ARD committee recommended removing *** school, as Student is able to effectively *** without assistance.[221]

187. At the October ***, 2015 reconvened ARD committee meeting, the ARD committee recommended assistive technology sources to provide Student with training on uses of Student's *** for academic tasks. For the first 6 weeks, it is recommended that Student receive instruction twice weekly for 3 weeks; for the subsequent 6 weeks, it is

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201. A preponderance of the evidence establishes that the District devised an appropriate IEP for Student for 2015-16 except that, because Student is ***, a *** evaluation should have been completed before the ARD committee developed Student's ***[236] and Student's assistive technology needs should have been updated.

202. A preponderance of the evidence establishes that the District failed to develop an appropriate 2015-16 IEP because Student's *** as contained in the IEP is not based on information obtained from a *** assessment.

203. A preponderance of the evidence establishes that the District failed to develop an appropriate 2015-16 IEP because Student's assistive technology goals and objectives contained in the IEP are not based on a formal assistive technology evaluation.[237]

Sub-issue 3
Did the District fail to adequately evaluate all areas of suspected disability in accordance with the IDEA?

204. An initial evaluation of Student in September 2006, prior to ***, showed average abilities and mild features of a mathematics disorder.[238]

205. Based on an FIE completed in 2008 by Student's previous school district, Student met disability criteria as a child with an SLD in Reading Comprehension, Math Calculation, and Written Expression.[239]

206. A reevaluation completed by the District in November 2011 showed Student no longer met disability criteria for SLD, but Student was eligible for special education services due to OHI because of a ***.[240]

207. After Student's ***, an October 2011 *** evaluation of Student by ***, Ph.D., Pediatric Neuropsychologist, revealed a significant decline in neurocognitive functioning.[241]

208. Following Student's May 2012 ***, the District completed an FIE in September 2012 to determine current levels of functioning and eligibility for additional special education services. The 2012 FIE consisted of speech/language, assistive technology, occupational therapy, and physical therapy evaluations, which covered Student's areas of suspected disability.[242]

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[236] 34 C.F.R. § 300.320(a)(7)(b), Tex. Educ. Code §§ 29.011, 29.0111; 19 Tex. Admin. Code § 89.1055(h)(i).

[237] Respondent Ex. 4 at 38.

[238] Petitioner Ex. 30 at 344-345; Petitioner Ex. 85; Respondent Ex. 24 at 1880.

[239] Petitioner Ex. 29 at 340; Respondent Ex. 2 at 567, 575-576, 588; Respondent Ex. 23 at 12.

[240] Petitioner Ex. 29 at 340; Respondent Ex. 2 at 567, 575-576, 588; Respondent Ex. 23 at 12.

[241] Petitioner Ex. 30 at 344-345; Petitioner Ex. 85; Respondent Ex. 24 at 1880.

[242] Petitioner Ex. 107 at 817.

209. *** in 2013 found general improvements in cognitive functioning since Student's *** neuropsychological assessment in October 2011. While improvements were noted compared to Student's functioning in 2011, there was continued evidence of a generalized decline in Student's overall cognitive performance compared to Student's overall cognitive performance in 2006.[243]

210. In October 2014, Parents privately obtained a neuropsychological assessment from ***, Ph.D., ABPP, Licensed Psychologist, at ***, ***. The assessment was not provided to the District until November 2015, in accordance with the disclosure deadline for the due process hearing.[244]

211. Dr. ***'s assessment showed that Student has relative strengths in a number of areas including narrative memory, list-learning ability, social competence, and receptive vocabulary and that Student's areas of weakness include substantial challenges in motor functioning *** that affect both gross and fine motor skills. Dr. *** noted that Student has significant challenges in processing speed in verbal, visual, and motor domains and cognitive flexibility. In terms of memory, Student does better when information is presented verbally rather than visually.[245]

212. Dr. ***'s October 2014 report stated that on language functioning, Student's

speech/language therapy. She also recommended instruction in adaptive tools.[248] She said Student should continue to work on functional academic skills ***.[249]

215. An ARD committee meeting was held on May ***, 2015, to consider the REED.[250]

216. There is no evidence that between completing the 2012 FIE and the May 2015 ARD committee REED meeting, either Parents or anyone else raised the possibility with the District that Student had areas of suspected disability that had not been evaluated, or that the District suspected Student had areas of disability that had not been evaluated.

217. At the May 2015 REED meeting, the ARD committee determined that updated testing was needed in the areas of occupational therapy, physical therapy, speech and language skills, cognitive abilities and achievement abilities in reading, writing, and math in order to better inform the ARD committee for Student's educational programming.[251]

218. At the May 2015 REED meeting, the ARD committee, including Parents, determined that no formal assessment in the area of assistive technology was needed.[252]

219. At the May 2015 REED ARD committee meeting, Parents agreed that no additional physical/medical, sociological/cultural, or emotional/behavioral assessments were needed.[253]

220. A *** assessment was not requested or discussed during the May 2015 REED ARD committee meeting. A *** assessment may be provided separately from the FIE.[254]

221. A preponderance of the evidence establishes that all areas of suspected disability were addressed at the May 2015 REED ARD committee meeting and Student was evaluated in those areas of suspected disability for the September 2015 FIE.

222. A preponderance of the evidence establishes that since Student's enrollment in the District in 2011, the District has evaluated Student in all areas of suspected disability. Further, based on the psychological evaluation results of the 2015 FIE, the District

223. The District timely held an annual ARD committee meeting on September ***, 2014, less than one year after the September *** 2013 annual ARD committee meeting.[255]

224. The District held an annual ARD committee meeting on September ***, 2015,[256] *** school days after the 1-year deadline.

225. A preponderance of the evidence establishes that the District timely conducted the September ***, 2014 annual ARD committee meeting.

226. A preponderance of the evidence establishes that although the September ***, 2015 annual ARD committee meeting was held 8 school days after the annual deadline, it was held in conjunction with the ARD committee's consideration of the FIE that was due on September ***, 2015. Holding the annual ARD committee meeting *** school days late constitutes a *de minimis* procedural error with no educational impact on Student.

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Sub-issue 5

Did the District fail to conduct the tri annual FIE within the appropriate time c

234. On May ***, 2015, Mother provided consent for the District to conduct a full psychological evaluation as part of the FIE and checked the box acknowledging that she could revoke her consent at any time.[264]

235. An FIE was timely completed on September ***, 2015.[265]

236. A preponderance of the evidence establishes that the District timely conducted Student's 2015 FIE, within 3 years of the 2012 FIE.

Sub-issue 6

Did the District fail to provide appropriate assessments, including cognitive assessments, and cmnitivmha-6(b)2(ilitie)6((a0(esination >>7.0 26.82),)d (0 Td (-1 Tf 0.00.4526.82)Tj 2(nd)22(a)-6y))4(

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251. At the October ***, 2015 continuation of the September ***, 2015 annual ARD committee meeting, the District requested an adaptive behavior assessment.[281]

252. Dr. *** explained that the adaptive behavior assessment was requested because Student's cognitive skills indicate more testing is needed in the area of adaptive behavior to determine if Student has an ID. She described the additional services Student could be eligible for *** if Student were diagnosed with an ID ***.[282]

253. An adaptive skills evaluation includes assessing activities of daily living such as communication, dressing, showering, cooking, and also functional academic skills such as counting change; self-regulation and self-direction skills, such as being able to work toward long-term vs. short-term goals; and emotional regulation.[283]

254. Parents, who have never requested an adaptive functioning assessment, declined to consent to the adaptive behavior evaluation because results could discourage Student if Student were to realize the implications of the ID eligibility.[284]

255. A preponderance of the evidence establishes that the District provided appropriate assessments, including cognitive assessments, and related services assessments in the areas of academic instruction, occupational therapy, and physical therapy.

256. A preponderance of the evidence establishes that, because Student was *** September ***, 2016, a *** assessment should have been conducted before the ARD committee devised *** for the 2015-16 IEP.

257. A preponderance of the evidence establishes that, because Student does not always use Student's *** and Student's need for additional training, other options for assistive technology should have been explored via an assistive technology evaluation.

Sub-issue 7
Did the District fail to consider all relevant information during the ARD committee meetings?

258. In the Complaint, First Amended Complaint, and Petitioners' Closing Brief, Petitioner did not specify what relevant information the ARD committee failed to consider.[285]

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[281] Respondent Ex. 4 at 23.

[282] Petitioner Ex. 14 at 166-167.

[283] Tr. at 191-192 (Dr. ***).

[284] Tr. at 187-190, 271 (Dr. ***); Respondent Ex. 4 at 54.

[285] Petitioner alleges that some of Student's PLAAFPs were missing or incomplete in the September ***, 2014 ARD committee report. First Amended Complaint at 3, Fact 13. But it is not clear from the allegation that the missing PLAAFPs are the "relevant information" the ARD committee failed to consider.

259. Petitioner presented insufficient evidence to prove that the District failed to consider all relevant information during the ARD committee meetings held between August ***, 2014, and October ***, 2015.

Sub-issue 8

Did the District fail to comply with Student's and Parents' procedural rights by failing to have all required and/or necessary members present during ARD committee meetings?

260. At the September ***, 2014 ARD committee meeting, Father expressed concern that the counselor had not been present at any previous ARD committee meetings and stated Parents' decision regarding Student's *** class might have been different had the counselor been present. The counselor, ***, was present at the September ***, 2014 ARD committee meeting.[286]

261. At the September ***, 2014 annual ARD committee meeting, all required members were present.[287]

262. A brief ARD committee meeting was held on September ***, 2014, to address related services counseling, ***, and revisions to the September ***, 2014 ARD committee deliberations at Parents' request. No contention was made that any required or necessary member of the committee was absent.[288]

263. The brief ARD committee meeting was continued on October ***, 2014, to review Student's participation in *** n

266. All persons who were invited to attend the September ***, 2015 ARD committee meeting were present except for the District representative and the ***. But ***, ***, was in attendance.[292]

267. All required members of the ARD committee were present at the October ***, 2015 continuation of the September ***, 2015 annual ARD committee meeting.[293]

268. All required members of the ARD committee were present at the October ***, 2015 continuation of the September ***, 2015 annual ARD committee meeting.[294]

269. A preponderance of the evidence estab

275. Multi-disciplinary team members used assessment tools and strategies that provided relevant information that directly assisted the ARD committee in determining Student's educational needs. The multi-disciplinary team also made recommendations for the ARD committee to consider when meeting on September ***, 2015 to review the FIE.[300]

Psychological Evaluation

276. Dr. ***, who has been an LSSP since 2009 and a licensed psychologist since 2012, became the District's Evaluation Supervisor in August 2015. She has evaluated between 30 and 60 students per year to determine eligibility and programming for special education services under the IDEA.[301]

277. Dr. *** completed

speed. Student's FSIQ was calculated to be ***, with a percentile rank of ***, which is within the lowest 1 % for students Student's age.[308]

284. Student's FSIQ score of *** was consistent with testing results from 2011 (standard score of ***) and 2013 (standard score of ***).[309]

285. Dr. *** attempted to give Student the NEPSY-II, a widely-used measure of neurocognitive processes including memory, learning, attention, and theory of mind. Clinicians use one or more batteries of the NEPSY-II to investigate areas of interest or concern.[310]

286. Memory subtests of the NEPSY-II were attempted with Student to better investigate Student's short-term and long-term memory abilities. Student demonstrated significant frustration and limited engagement and motivation toward testing tasks. Student became increasingly frustrated and testing was discontinued. Due to discontinuation of the subtests, scores from the NEPSY-II could not be considered a valid estimate of Student's abilities.[311]

287. Following discontinuation of the NEPSY-II test, Student *** and Student wondered if Student had to do the testing. Student was concerned that testing was affecting Student's classroom time and Student's ability to get Student's work done.[312]

288. Dr. *** administered the Kaufman Test of Educational Achievement, Third Edition (KTEA-III) to measure Student's academic skills. The widely-used standardized test was given in order to provide standard comparisons between Student's achievement development and that of other children Student's same age.[313]

289. Dr. *** administered the KTEA-III to Student in accordance with the instruction manual.[314]

290. The KTEA-III results indicated that Student's academic skills are consistent with Student's cognitive abilities. Student demonstrated the strongest skills in basic reading ability, achieving a score in the borderline range of ability. Student's math computation skills were slightly lower and also fell within the borderline range of ability. Student's skills in reading comprehension, math reasoning, and written expression all fell in the extremely low range of ability. Student's academic skills appear to best advantage on tasks Student can learn

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[308] Tr. at 464-465 (Dr. ***); Tr. at 1306 (Dr. ***); Petitioner Ex. 14 at 160; Respondent Ex. 2 at 586-587; Respondent Ex. 18 at 417-466. Note that the test in evidence is the WISC-V, not the WISC-IV, as referenced in Respondent Ex. 2 at 586.

[309] Petitioner Ex. 14 at 160-161; Respondent Ex. 2 at 587-588, 593.

[310] Respondent Ex. 2 at 587-588; Respondent Ex. 18 at 371-410.

[311] Tr. at 168, 231-232, 1305 (Dr. ***); Petitioner Ex. 148 at 1182; Respondent Ex. 2 at 587.

[312] Petitioner Ex. 4 at 23-25; Petitioner Ex. 14 at 140, 158; Petitioner Ex. 158 at 1919-1921.

[313] Respondent Ex. 2 at 590-592; Respondent Ex. 18 at 270-370.

[314] Tr. at 1334, 1351, 1365 (Dr. ***).

298. In conducting her evaluation, Ms. *** considered information from 2012 *** speech and language reports for Student.[323]

299. Ms. *** administered the Expressive Vocabulary Test, Second Edition Form B, which is a norm-related test that measures a person's expressive language. Student achieved a score of ***, based on a mean of 100, with a percentile

305. Ms. *** recommended that Student continue to receive speech therapy services to remediate speech and language difficulties and further support academic success.[330]

306. A preponderance of the evidence shows that the evaluation prepared by Ms. *** appropriately addresses Student's need for the instructional service of speech therapy.

307. Ms. *** presented the evaluation at the annual ARD committee meeting held on September ***, 2015.[331]

Occupational Therapy Evaluation

308. Ms. *** earned her master's degree in occupational therapy in 1981 and is a licensed occupational therapist. She has worked in school settings for about 15 of the 34 years she has been in practice.[332]

309. Ms. *** conducted the occupational therapy evaluation of Student for the FIE.[333]

310. As part of her evaluation, Ms. *** reviewed records on August ***, 2015, and interviewed teachers and observed Student on August ***, 2015, and September *** 2015.[334] Ms. *** reviewed all of Student's occupational therapy records, occupational evaluations, progress reports, and IEP goals and objectives for occupational therapy. No outside occupational therapy evaluations were available for her to review.[335]

311. Dr. *** stated that based on VMI test results, Student has the visual motor skills of ***-year-old. In Ms. ***'s opinion, Student's skill level is delayed in relation to Student's peers but is adequate for reading and writing, because ***-year-olds can read and write. As such, no occupational therapy has been provided related to improving Student's visual motor skills.[336]

312. Ms. *** noted Student has made significant progress since the 2012 FIE. Student has successfully *** and is able to independently complete the majority of functional fine motor tasks needed at school, including the completion of *** work.[337]

313. Ms. *** found Student to have ***.[338]

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330 Petitioner Ex. 14 at 178; Respondent Ex. 2 at 595-596, 605.

331 Respondent Ex. 4 at 6, 25.

332 Tr. at 281-282 (Ms. ***); Ms. ***'s curriculum vitae is at Respondent Ex. 29.

333 Respondent Ex. 2 at 579-583, 602.

334 Respondent Ex. 2 at 598.

335 Tr. at 299-300 (Ms. ***); Petitioner Ex. 14 at 141.

336 Tr. at 963-965 (Ms. ***).

337 Respondent Ex. 2 at 598.

338 Respondent Ex. 2 at 580.

314. Ms. *** concluded Student will continue to need occupational therapy due to ***, which will not change without ***.[339]

315. Ms. *** conducted a neuromuscular assessment on September ***, 2015. According to the neuromuscular assessment results, Student continues to experience increased ***.[340]

316. Ms. *** conducted a School Function Assessment (SFA) of Student on September *** and September ***, 2015.[341]

317. The SFA is a criterion-referenced assessment of the functional motor skills required in an educational setting. It is composed of multiple subsections that evaluate through observation, interview, and testing, different types of tasks that may be performed by a student during a typical day at school.[342]

318. The SFA does not use standard scores. Rather, the SFA assesses whether a student has the ability to perform certain tasks that would typically be mastered by a certain age. For instance, by the time a child is 6 years old, he should be able to tie his shoes. On the SFA, a 6-year-old is either at 100 % or not on ***. The SFA is designed to assess skills for children at the *** through *** levels; there is no SFA designed for *** students.[343]

319. The SFA subsections related to functional *** were completed as part of Student's evaluation. The areas evaluated included using materials; set up and clean up; eating and drinking; hygiene; clothing management; *** work; and computer and equipment use.[344]

320. On the SFA, Student did not meet the criterion score for writing because Student's writing speed of *** letters per minute, or *** words per minute, is not a speed comparable to that of most students Student's age.[345]

321. Student's IEP accommodations and modifications address Student's slower production of writing in the classroom.[346]

322. On the SFA, Student demonstrated that, *** provided by the District, Student is able to independently ***. Student received a criterion score of *** related to using the computer.

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[339] Tr. at 953 (Ms. ***); Respondent Ex. 2 at 582-583, 598.

[340] Respondent Ex. 2 at 599-600.

[341] Petitioner Ex. 14 at 154-155; Respondent Ex. 2 at 581-582, 598, 600-601; Respondent Ex. 18 at 411-416; Respondent Ex. 22.

[342] Tr. at 302 (Ms. ***); Petitioner Ex. 14 at 154; Respondent Ex. 2 at 581-582, 600; Respondent Ex. 22.

[343] Tr. at 302, 307 (Ms. ***).

[344] Tr. at 304 (Ms. ***); Petitioner Ex. 14 at 153-155; Respondent Ex. 2 at 600-601.

[345] Tr. at 308 (Ms. ***).

[346] Tr. at 308-309 (Ms. ***).

> Although Student could perform most of the tasks, such as turning the computer on, Student's typing speed brought Student's overall score down. Student's typing speed ranged from *** letters per minute, or about *** words per minute. If Student chose to, Student could use Student's *** to independently complete academic projects that require word processing.[347]

323. Ms. *** conducted the Beery Developmental Test of Visual Integration, Sixth Edition

330. The priorities of educationally-based and clinically-based occupational and physical therapy are different. The therapists are equally trained and licensed, but the approach and goals for each setting are different. Some students have a medical need for therapy but not an educational need. A school district provides related services only as needed to support the student in meeting his or her educational goals. A doctor's order or prescription is considered by the ARD committee but does not determine therapy services.[355]

331. Therapy services are discontinued when the ARD committee determines there are no longer any goals, accommodations, or staff/student training that require the intervention of a therapist, and the expertise of the therapist is no longer a necessary component of the student's educational program in order for the student to continue achieving identified academic, developmental and functional outcomes of the IEP.[356]

332. In a September ***, 2015 letter considered by the District, Student's treating physician Dr. *** stated that Student would continue to benefit from receiving occupational therapy in the school setting.[357]

333. Ms. ***, occupational therapist with ***, evaluated Student on October ***, 2015, to address increased difficulty with activities of daily living and school tasks. She reported that Student continues to ***. She reports it takes Student extra time to complete school work ***.[358]

334. Ms. *** stated in October ***, 2015 and October ***, 2015 letters considered by the District that Student would highly benefit from ongoing occupational therapy services at school to address continuing deficits in Student's school environment.[359] In the letters, Ms. *** noted that Student reports the inability to ***.[360]

335. In her letters, Ms. *** recommended accommodations for Student to include the continuation of *** required to complete the task; and continued school occupational therapy services to increase Student's participation in school-related tasks and success as a student.[361]

336. Based on Student's progress and ongoing needs, Ms. *** requested, in an October ***, 2015 letter considered by the District, that Student be provided occupational therapy to

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[355] Respondent Ex. 13 (generally), and at 1411, 1412.

[356] Respondent Ex. 13 at 1412.

[357] Petitioner Ex. 15.

[358] Petitioner Ex. 6; Petitioner Ex. 8.

[359] Petitioner Ex. 3; Petitioner Ex. 6; Respondent Ex. 4 at 21-22.

[360] Petitioner Ex. 3; Respondent Ex. 4 at 21.

[361] Respondent Ex. 4 at 21.

continue addressing fine motor skill and executive function deficits and ensure that Student continues to progress through schooling without barriers that hinder Student's learning.[362]

337. The occupational therapist at *** has provided Student with ***. ***. ***.[363]

Physical Therapy Evaluation

338. Ms. *** is a physical therapist with more than 20 years of experience. Since 2001, she has

345. Ms. *** found that Student demonstrated improvements in ***.[371]

346. The evaluation results support Ms. ***'s recommendation that Student does not qualify for academic-based physical therapy services.[372]

347. Ms. *** presented the evaluation at the September ***, 2015 annual ARD committee meeting.[373]

348. In a September ***, 2015 letter considered by the District, Student's treating physician

Student, staff, and parents should be provided training on current software, and the use of additional software programs for written expression and math should be considered.[380]

354. Parents' request for an assistive technology evaluation was considered at the Ociber ***, 2015 continuation of ie annual ARD cmmitteg. [381]

355. The District agreed to conduct an assistive technology evaluation.[382] The evaluation will include information about adaptations io the device that will work best for Student's independent utilization of the device.[383]

356. As of November 2015, Parents had not given consent for the District to conduct the assistive technology evaluation because of the pending due processing hearing.[384]

357. An assistive technology evaluation could assess whether Student, who receives oral administran of tets a a n accommodation, could benefit from replacing *** work with auditory dictation or auditory presentation.[385]

358. A preponderance of the evidence establishes that, in light of the changes Student has experienced since *** 2012 assistive technology evaluation, an updated assistive technology evaluation could provide citical informan to theRD committe for selectingsistivehnology thaould asist Studet in reding, writing, ad ma.

*** evaluation is pendin

359. Student's *** services were discussed at the October ***, 2015 continuation of the September ***, 2015 anuaRD committe meting, including Student's ***.[386]

360. The District agreed with Parents' request to conduct a *** valuation.[387]

361. As of the November 2015 due process hearing, Parents had not given consent for the Distric conduct the*** evaluation. [388]

380

362. A preponderance of the evidence establishes that a *** evaluation should have been conducted before the September 2015 annual ARD committee meeting so results could be considered by the ARD committee in developing Student's ***.[389]

***

363. On September ***, 2014, the ARD committee accepted Student's STAAR *** assessments in *** exam scores ***.[390]

364. In the fall of 2014, Student was ***, although Student was *** grade, because Student lacked a ***. Student's designation was changed from *** to ***.[391]

365. Student began the 2014-15 school year with *** students and was enrolled in all of Student's classes for the *** year. There was no impact to Student's *** as Student was with *** grade students, receiving *** instruction. The *** showed that Student would ***.[392]

366. Student *** in 2014-15. As of June 2015, Student had ***, which ***.[393]

367. The ***.[394]

368. The ARD committee determined at the October ***, 2015 continuation of the September ***, 2015 annual ARD committee meeting that Student's IEP will be used as Student's ***.[395]

FIE Conclusion/Statement of Disability

369. Based on a review of Student's testing history, Student's cognitive and physical abilities have been impacted significantly as a result of Student's ***StudeJ -s

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communication with peers, teachers, and family. By reason of Student's disabilities, Student needs special education services, which may include speech therapy.[401]

375. Student's cognitive and communication deficits *** require specially-designed instruction in order to achieve academic success. The evaluators suggested that the ARD committee consider continuation of special education support within the general education classroom, addition of speech/language therapy, and specific classroom accommodations and modifications relating to physical and cognitive limitations.[402]

376. The evaluators made general instructional recommendations for Student's IEP. Since an FIE needs to supply information to develop IEPs for 3 years, providing specific recommendations would limit the applicability of the FIE.[403]

Appropriateness of FIE

377. The District has established by a preponderance of the evidence that the members of the multi-disciplinary team who conducted Student's FIE are well-credentialed, trained, and experienced.

378.

382.

B. Parents' Testimony

Father acknowledged that Student does not have the skills to ***. He said the District has done nothing to help Student with skills of independent living.[414] Student is not capable of ***. Father has been working with Student daily on ***.[415] Father does not think Student's classes in ***, ***, and *** will help Student in Student's ***.[416]

One of Student's IEP goals is to *** at home, which Father does with Student. But nobody from the District has contacted him to verify that he and Student are doing the home exercise program.[417] Father has worked with Student on ***, which takes Student 15 or 20 minutes to accomplish, by which time Student's back aches and Student is frustrated. Father does not understand how the District can claim Student has mastered ***.[418]

Mother agrees with Father's testimony.[419] She stated that Parents have reached out to the District many times, but Student has not been getting the help Student needs.[420]

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Dr. *** found the District's 2015 FIE to be incomplete with regard to guiding the development of Student's IEP.[429] Memory and learning are areas that should have been addressed, and Dr. *** should have followed through on that testing after first receiving incomplete results.[430] However, the two measures used by Dr. *** are fairly consistently used for educational evaluations.[431] Dr. *** saw less emphasis in the FIE on what kind of program would be most appropriate for Student and more emphasis on test scores and whether they established a new eligibility category.[432] Dr. *** said a broader range of classroom observations would have been helpful because, ***, there is the potential for Student to ***. Dr. *** also noted that Dr. ***'s observation of Student in the *** classroom did not include much in way of reading, writing, or math.[433]

Dr. *** feels the FIE could have provided more specific guidance to the ARD committee in the way of instructional strategies for Student, given Student's functional level. The FIE focused on accommodations but not on modifying the instructional process or the information presented to Student.[434] For instance, Student's processing speed was determined to be an issue but was not addressed in accommodations that would assist Student if Student is among students with faster processing speeds.[435] Auditory skills seemed to be a relative strength but Dr. *** did not see any accommodations or recommendations to alter the presentation of information to take advantage of Student's auditory skills, such as using books on tape, as opposed to requiring reading.[436]

in developing alternatives and a more realistic but still very positive perception of ***self, in terms of Student's abilities, both personally and in comparison to peers Student's age.[437]

Dr. *** believes the 2014-15 IEP goals and objectives are not individualized to Student based on Student's strengths and weaknesses. She said there is no indication of how the District

to struggle when asked to interpret or use visual spatial information, such as maps or diagrams.[449] But Dr. *** said evaluation information most beneficial to teachers tends to be prescriptive rather than spread out.[450] Almost everything that is written in the FIE relates to accommodations or external factors, not to instructional strategies on how to interact with Student given Student's level of ability to process and retain information.[451]

2. Testimony and Report of ***, Licensed Speech-Pathologist

Ms. *** is a Licensed Speech-Pathologist with a professional credential as an Assistive Technology Professional.[452] She has been a speech pathologist for 43 years and an assistive technology professional for 18 years. She conducts between 20 and 30 evaluations a year.[453] She testified on Petitioner's behalf as an expert witness.[454]

a. Speech Language Impressions and Recommendations

According to Ms. ***'s November ***, 2015 report, overall, results from speech language evaluations have been reflected in the development of Student's speech language goals and objectives throughout the years, with Student's progress noted in the records reviewed by Ms. ***. She noted that new goals and objectives were developed each year that built upon the previously achieved goals and/or additional goals were added that met Student's language needs.[455]

An area of concern for Ms. *** is Student's standard score of ***, well below average, on the Pragmatic Judgment subtest. She said records indicated a speech IEP goal was written for Student to express Student's feelings during 2013-14, but there is no record that the goal was

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[449] Tr. at 465-467 (Dr. ***).

[450] Tr. at 469 (Dr. ***).

[451] Tr. at 473-474 (Dr. ***).

[452] Petitioner Ex. 152.

[453] Tr. at 497-498 (Ms. ***).

[454] Tr. at 499 (Ms. ***).

[455] Petitioner Ex. 154 at 1673.

mastered, and it was not included in the IEP for the 2014-15 school year. The September ***, 2015 informal assessment indicated Student demonstrated adequate ability to acknowledge and interpret nonverbal social cues. Ms. *** recommended that the District develop appropriate

quality or quantity of work. The District also should designate who will provide technical support and training to classroom staff and a timeline for support. Finally, the District should select a staff member to gather trial data information and write a summary by the trial end date to submit for

conducted between 20 and 30 evaluations per year.[464] Ms. *** did not observe or meet Student.[465] Ms. *** testified as one of Petitioner's designated expert witnesses.[466]

Ms. *** said that of the two tests administered by Ms. ***, the Beery VMI, which is a visual motor test, was appropriate for Student.[467] But Ms. *** did not understand how Ms. *** obtained the results she did on the SFA, since the test is for children ages *** and Student was *** years old at the time of the evaluation.[468]

Regarding the 2014-15 IEP occupational therapy goals, Ms. *** was concerned with the lack of documented progress. For instance, regarding ***, progress notes for single occasions in November and December 2014, and again in February 2015, do not indicate progress toward mastery.[469] Overall the first progress report, dated September ***, 2014, showed "W," or working toward goals. Ms. *** conceded it was too early after implementation of the IEP for Student to have made much progress. The second progress report, dated April ***, 2015, states the goals and objectives but contains no notes from the occupational therapist, she said.[470] In addition, there is no documentation in the second progress report about how supplemental aids were used or if teachers were trained to use them.[471]

Regarding the 2015 FIE, Ms. *** did not think the occupational therapy evaluation was adequate to design a program for Student going forward. For instance, information contained in the SFA cannot be scored and information from the SFA related to Student's ability to use classroom materials, self-care, and fine motor skills, is not included in the evaluation report.[472]

464

She questioned the accuracy of at least one notation in the SFA. A handwritten note says "*** with moderate assistance." Ms. *** explained that "moderate assistance" is at least 50 % physical assistance but what was reported was "occasional verbal cues." By comparison, "partial performance" means Student is able to do part of the tasks independently; "inconsistent performance" means Student can sometimes, but not consistently, complete a task.[473]

In addition, Ms. *** reviewed Dr. ***'s October ***, 2014 letter to the District, which states that Student's fine motor coordination and speed is in the "severely impaired range ***" [sic]. He also reports that visual motor integration is in the severely impaired range, at approximately the ***-year-old level and is significantly lower than Student's borderline performance the previous year. Ms. *** noted that, although Dr. ***'s letter was reviewed as part of the FIE process, the District' evaluation did not state Student is functioning at the ***-year-old level, leading Ms. *** to believe the District's evaluation leaves out pertinent information.[474]

In her November ***, 2015 report based on a review of the District's occupational therapy records for Student, Ms. *** described the difference between educational occupational therapy, in which goals and objectives are established to help the student successfully participate in Student's education, and medical occupational therapy, which is based on physical impairment or medical need.[475] Ms. *** formulated recommendations after reviewing data and information reported from the District's occupational therapist, Parents, an out-patient therapist, a neuropsychologist, and educational records including but not limited to ARD committee reports, treatment notices, progress notes, IEP goals/objectives, evaluation data/results, and reported functional abilities as they relate to activities of daily living.[476]

that the District's occupational therapist reported Student has achieved independence with the recommended functional tasks. However, Student's physician Dr. *** (in October 2014), the *** occupational therapist (in October 2015), and Parents, indicated Student has not achieved independence with the functional tasks and activities of daily living. Dr. *** reports "significant difficulty" with executive function skills including initiation, working memory, planning/organizational skills. Ms. *** notes that each of the aforementioned skills is necessary for Student to be successful in the educational environment.

instruments administered to Student by psychologists and neuropsychologists since 2008; and issues related to the cognitive, psychological, intellectual, functional and academic performance and abilities of Student. She evaluates anywhere from 30 to 60 students per year, including students with *** and she has received training in evaluating children with ***. Her testimony and expertise in IDEA requirements and the administration of FIEs and reevaluations was necessary for the District to defend the September 2015 FIE.[487]

The purpose of Dr. ***'s evaluation was to establish overall cognitive and achievement levels as requested by the ARD committee. All of Student's cognitive skills, as documented over the past few years, were reported to be well below average. Student, who has a global cognitive deficit, would be expected to have deficits in memory and executive functioning. Therefore, Dr. *** chose general measures in order to establish general levels of functioning.[488]

Dr. *** began her evaluation by reviewing Student's records,[489] including a report from Dr. ***, neuropsychologist, who said Student has an executive functioning impairment. Dr. *** explained that executive functioning is the part of the brain involved in managing other cognitive processes, such as memory and attention and self-regulation. She further stated that an executive functioning impairment could impact Student's participation in Student's academic programming by causing difficulty with planning, organizing ideas and materials, maintaining attention, and working toward long-term goals. Dr. *** also found Student to have language impairment. Dr. *** said Student's language appeared to be one of Student's stronger abilities, but that overall, Student's skills are below average.[490]

Dr. *** gave Student the KTEA-III, a norm-referenced test of academic skills and achievement, comparing students to other students their age.[491] Test results showed Student's academic achievement levels to be below average.

which is decoding words; but the score of *** is in the borderline range and the *** percentile is significantly below average (***% of students Student's age perform better). Student's next highest score was math computation. Dr. *** observed Student was very good at using strategies and techniques, had obviously been taught rules to follow, and was very methodical in how Student tried to answer the questions, which helped Student out.[492] In writing, Student had a difficult time organizing Student's thoughts and ideas.[493]

Dr. *** acknowledged that the KTEA publisher would report a grade equivalency of Student's scores as being at the *** level. But Dr. *** would not use grade equivalency for planning Student's curriculum; she believes a better estimate of Student's grade level performance would come from classroom-based assessments. She testified that Student is not performing at the *** grade level, cannot be taught at that level without modifications, and without assistance, cannot move at the same pace as non-disabled students.[494]

Dr. *** also evaluated Student using the WISC-IV, the new assessme

make slash marks for Student's answers; Dr. *** turned the test pages for Student so Student would not be slowed down. Similarly, because the test cannot be modified, Dr. *** could not allow Student to use a calculator for the math portion. Because other students do not use a calculator to take the test, allowing Student to use one would not result in an accurate assessment of Student's ability compared to other children Student's age.[498] Cognitive testing results and Dr. ***'s observations show that Student often has trouble understanding or conveying more complex information.[499] The WISC-V included assessment of Student's short-term memory. Dr. *** ascertained that Student needs re-teaching due to Student's memory issues.[500]

Although a memory test was not specifically requested by the May 2015 REED ARD committee, Dr. *** was interested in evaluating Student's visual memory impairment by using the NEPSY-II, a neuropsychological assessment tool.[501] After Student became frustrated, Dr. *** stopped the subtest and could not report accurate results. Dr. *** could not re-administer the subtests on another day without experiencing practice effects which would invalidate the tests. Had the May 2015 REED ARD committee specifically requested memory testing, Dr. *** would have made more of an effort to test Student's memory, she said.[502]

Dr. *** made a "general instructional recommendation" that Student "will learn information at a much slower rate compared to Student's general education peers." She recommended providing "new material and skills in a setting with a low teacher-to-student ratio where the pace of instruction can be modified to fit [Student's] needs."[503] She pointed out that in the general education setting, with the inclusion teacher, the teacher-to-student ratio is lowered in

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[498] Tr. at 273-274 (Dr. ***).

[499] Tr. at 260-261 (Dr. ***); Petitioner Ex. 14 at 161.

[500] Tr. at 184, 256 (Dr. ***).

[501] The District's Notice of Evaluation informed Parents of the areas to be assessed but not which assessment instruments would be used. Since memory is a cognitive skill, and Parents had consented to an assessment of Student's cognitive skills, Dr. *** did not obtain specific consent from Parents to conduct the NEPSY-II subtests. Tr. at 199-200, 203-204 (Dr. ***).

[502] Tr. at 180-184, 231-232 (Dr. ***)

[503] Tr. at 243 (Dr. ***); Petitioner Ex. 14 at 168.

the classroom.[504] Dr. *** has seen students with abilities similar to Student's be successful in placements ranging from inclusion settings, resource settings, and with life skills instruction. The best placement depends on where the student is able to succeed, she said.[505]

Dr. *** testified that a *** for Student was considered by the September 2015 ARD committee.[506] Souracemh.

Dr. *** was involved in developing Student's counseling goals and objectives for the 2015-16 IEP. She did not formally assess Student's social and emotional needs because a formal assessment was not requested by the May 2015 ARD committee. Instead, she used a combination of her own observations and information obtained during other formal assessments as well as Student's counseling evaluation from 2013. Dr. *** observed Student to work very hard during three of the four times Dr. *** met with Student for formal assessments. Dr. *** was impressed with Student's attention and effort. Dr. *** is concerned about helping Student improve Student's emotional functioning and coping skills.[510]

Dr. *** believes Student is improving although it is difficult to make a direct comparison between early assessments and current assessments, given the intervening onset of the ***. But based on the fact that Student's achievement, relative to other children Student's age, is actually higher than Student's related cognitive skills, Dr. *** believes Student is exhibiting some growth.[511]

3. Testimony of Ms. *, Physical Therapist**

Ms. *** is a physical therapist and District employee who has worked with Student since 2012-13.[512]

An adaptive *** evaluation was not necessary because Student could participate in General TEKS. Therefore, to ***, Student *** in 2014-15.[513] Ms. *** did not recommend that Student participate in *** due to safety issues with ***.[514] But, Ms. *** testified, Student was able to meet TEKS for fitness. Although there are no TEKS for ***, Student's 2014-15 IEP goals for *** were based on the TEKS for fitness.[515]

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[510] Tr. at 228, 230-231 (Dr. ***); Respondent Ex. 4 at 37.

[511] Tr. at 246-247 (Dr. ***).

[512] Tr. at 356 (Ms. ***); Ms. ***'s curriculum vitaeis at Respondent Ex. 30.

[513] Tr. at 360, 364 (Ms. ***).

[514] Tr. at 360 (Ms. ***); Petitioner Ex. 4 at 148.

[515] Tr. at 358-360 (Ms. ***).

Ms. *** initially

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1. Applicable Law

coordinated and collaborative manner by the key "stakeholders;" and (4) positive academic and nonacademic benefits are demonstrated.[527]

In determining whether there were demonstrable academic and nonacademic benefits from the IEP at issue, the Fifth Circuit determined that a disabled child's development should be measured not by his relation to the rest of the class, but rather with respect to the individual student. Further, (i)-6(n)-4()-1(ceam-10(r))-10(r-4(o)-)-10(-4(t)-6(a(4(s)-5(i)-6(t)-6(i)-6(p-14(t)-1(keod)-4(ecl)a)-10(-4(n

evaluation, as well as information from Student's treating physicians, teacher observations,[532] input from Parents, grades, and informal assessments by providers of related services.[533] The information was used to develop Student's PLAAFPs.[534] With that information, the ARD committee developed IEP goals and objectives to address Student's needs, and a number of accommodations were provided to ensure Student could make educational progress. IEP progress reports generated about every 6 weeks indicate Student made progress on and, by the end of the year, mastered Student's IEP goals. Student passed all of Student's *** classes.[535] In addition, Student's IEP proposed for 2015-16 is based upon the 2015 FIE results.[536] At the September 2015 and October 2015 ARD meetings, the committee discussed Student's individual needs at length, and also discussed at length whether any changes to accommodations, supports, goals, or services were required.[537]

Second, the District asserts that Student is being educated in the LRE, as mandated by the IDEA,[538] which creates a strong preference for educating children with disabilities in the general education setting.[5392(n)2(s)1(e)6(ttin)-8]TJ EM/-2(m)-2(d f)-7q[F2(n1 0 Td ( )Tj9)Tj9sd711.Eo 551.2238,12(A)-11D0 0 8.c 0 Tw Tc275014 Tw 0.51 s

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Student's classes. The occupational therapist presented the recommendations at the October ***, 2015 reconvened ARD committee meeting.[555]

record is silent as to whether Student, Parents, or Student's teachers requested additional training. The record is also silent as to whether Student or Parents informed the District that Student was not using *** ***. Not using the assistive technology did not prevent Student from making educational progress; there is no evidence that Student would have made more progress if Student had consistently used ***.[560]

forth supra, the Fifth Circuit has summarized the Rowley

- A statement of measurable annual goals, including academic and functional goals designed to 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 meet each of the child's other educational needs that result from the child's disability;[572]
- 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;[573]

information about the child provided to, or by, the parents; the child's anticipated needs; or other matters.[586]

b. Petitioner's Argument

Petitioner contends the District failed to develop an appropriate IEP, including a failure to appropriately evaluate Student, develop appropriate PLAAFPs, develop meaningful and measurable goals and objectives, report meaningfully on short-term goals and objectives, and ***. In addition, Petitioner contends the District violated numerous key procedural requirements that impeded Student's right to a FAPE and significantly impeded Parent's meaningful participation.[587]

Petitioner argues that the District did not comport with IDEA requirements when writing goals for Student, who cannot be taught at the *** grade level without modifications.[588] In particular, when writing IEP goals aligned with State standards, the ARD committee must consider how a child's disability impacts his or her ability to advance toward attaining the annual IEP goals. If a child is performing below grade level, the IEP goals should be ambitious but achievable, even if their attainment does not result in the child reaching grade level that year.[589] Also, Petitioner states that a goal such as "70 % mastery of grade-level TEKS" does not meet IDEA requirements for a measurable goal.[590] For instance, in Dr. ***'s opinion, Student's IEP should have broken out goals to separate the higher-level reasoning component from the lower-level reading component that still causes Student great difficulty.[591]

Petitioner states that the *** goal o2 372PTp lod (.c 0 Tw 10(*)-17.87)]TJ -0.4(nc)--6 g do [(l)-2(dv)-

Petitioner argues that the District did not provide meaningful progress reports to Parents in 2014-15.[597] In particular, the final progress report, which states Student achieved all of Student's IEP goals and objectives, is completely misleading and thus significantly deprives Parents of meaningful participation in the IEP development process, by deceiving Parents as to Student's actual achievement.[598]

Petitioner concludes that Student's IEP establishes unrealistic requirements while failing to individualize Student's IEP goals by addressing Student's significant skill deficits in reading, writing, and math. Petitioner argues that the District did not provide documentation establishing that Student met Student's 2014-15 IEP goals or that Student achieved a meaningful benefit from the challenge of being held to the exact same academic standards as Student's nondisabled peers while receiving no specialized instruction to address Student's core deficits.[599]

c. District's Argument

The District disagrees with Petitioner's contention that Student's IEP academic goals are inappropriate because they are aligned with the TEKS.[600] Under the IDEA, IEP academic goals must relate to a state's curriculum standards; the curriculum standards in Texas are the TEKS.[601] The Department of Education recently emphasized that it is essential that students with disabilities be exposed to the same standards of achievement as their nondisabled peers, but with modifications, accommodations, and supports as set forth in the students' IEPs.[602] The District argues that Student's IEP goals are directly aligned with the DOE's recommendations, and provide

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violation of a failure to have Student's IEP in place at the beginning of the school year in 2014-15 and 2015-16.[609] Petitioner did not provide sufficient evidence to controvert the District's contention that Student mastered Student's 2014-15 IEP goals, except for Father's assertion that Student has not mastered ***

trial/investigation for a text reader. Ms. *** also recommended that because Student enjoys ***, the District consider an assistive technology trial/investigation to compare Student's *** for various activities. The hearing officer finds that a formal assistive technology evaluation would assist the District in determining exactly what assistive technology might aid Student's ability to function and learn the curriculum at an optimum level according to Student's potential. Without the evaluation, Student's 2015-16 assistive technology IEP goal was not adequately individualized and Student has been denied a FAPE as a result.

3. Did the District fail to adequately evaluate all areas of suspected disability in accordance with the IDEA?

a. Applicable Law

In conducting the FIE, the District was required to assess Student in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;[610]

b. Petitioner's Argument

Petitioner asserts the District should have conducted assistive technology, ***, and adaptive *** evaluations, and additional tests to assess Student's memory, as part of the 2015 FIE. As such, the hearing officer should award an IEE, Petitioner argues. [611]

c. District's Argument

The District states that Petitioner presented no evidence to support a failure to evaluate in all areas of suspected disability. Student's areas of suspected disability were discussed at the May ***, 2015 REED meeting, in which the ARD committee determined that additional assessment

[610] 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)((4).

[611] Petitioner's Closing Brief at 13-19.

data was needed in the areas of cognitive and achievement testing, occupational therapy, physical therapy, and speech, but that further intellectual and/or related services testing was not warranted.

On September ***, 2015, Parents requested that assistive technology and *** evaluations be added to the FIE. At the ARD committee meeting that began on September ***, 2015, the District agreed to provide those evaluations. As of the November due process hearing, Parents had not provided consent. In addition, based on 2015 FIE results, the District requested an adaptive skills evaluation to determine whether the additional eligibility of ID should be added but Parents declined to provide consent.[612]

d. Analysis and Conclusion

In the First Amended Complaint, Petitioner states that Student was not evaluated in "all areas of suspected disability, including learning disabilities in math and reading." But the FSIQ and achievement testing performed for the 2015 FIE relate specifically to math and reading achievement.[613] An assistive technology assessment does not evaluate an area of suspected disability; rather, the evaluation determines how assistive technology can benefit a child in his or her areas of disability. Therefore, although the hearing officer holds that an assistive technology evaluation should be conducted, such an evaluation does not relate to an.07 To2763(i)-2(c)4(di)-2(t)-2

The IEP Team must review a child's IEP periodically, but not less frequently than annually to determine whether the child's annual goals are being achieved and to revise the IEP as appropriate.[614]

the District argues that those tests were not originally included in the scope of the FIE so failure to complete them within the FIE timeframe does not render the FIE untimely.[620]

d. Analysis and Conclusion

The uncontroverted evidence is that the District conducted an FIE in 2011, when Student first enrolled in the District; completed an FIE on September ***, 2012, following Student's ***; and timely completed an FIE on September ***, 2015. The District conducted the tri-annual FIE within the appropriate timeline.[621] Petitioner did not prevail on this sub-issue.

6. Did the District fail to provide appropriate assessments, including cognitive assessments, and related services in the areas of academic instruction, occupational therapy, physical therapy, and assistive technology?

a. Applicable Law

To the extent that this sub-issue relates to Parents' September ***, 2015 request that assistive technology and *** evaluations be conducted for the 2015 FIE, the District had 15 days to respond to the request. Specifically, when a parent submits a written request for an FIE to the appropriate district personnel, the district must, within 15 days of the request, notify the parent of its proposal or refusal to conduct the requested evaluation.[622] To the extent that this sub-issue relates to the appropriateness of the 2015 FIE, additional law related to providing appropriate assessments is set out in the section regarding the law applicable to the District's counterclaim, infra.

b. Petitioner's Argument

[620] District's Closing Argument at 33-34.

[621] 34 C.F.R. § 300.303.

[622] 19 Tex. Admin. Code § 89.1011(b).

Petitioner contends that Student should be evaluated for adapted ***.[623] Petitioner argues that because Student cannot participate in regular *** due to Student's disability, the District must perform an adapted *** evaluation. The District's refusal to do so denies Student a FAPE.

c. District's Argument

The District disagrees with the contention of Petitioner's expert, Dr. ***, that the FIE is incomplete because additional mermongye e e e ern(t)-2(ud-5(t)-1(i))4(n(ar)e (al)-ot)-2(ud)- c(n)-4(er)-dum4-1

The District argues that Petitioner's expert Ms. ***'s criticism of the SFA is unfounded. Ms. *** testified that the SFA is normed for students from *** through ***. However, Ms. *** explained that the purpose of the SFA was to provide additional information about Student's school functioning, and there is no similar test for *** students. Ms. *** did not testify that similar testing is available, that the SFA was improperly administered, or that the SFA did not provide accurate data related to Student's functioning at school.[627]

d. Analysis and Conclusion

The evidence shows the District conducted all assessments requested by the ARD committee at the May ***, 2015 REED meeting. However, because Student is ***, a *** assessment should have been conducted before Student's 2015-16 IEP was devised.[628]

Petitioner proved that the District should conduct an assistive technology evaluation. The evidence shows Student does not *** provided by the District because ***, and Student does not feel that Student, Parents, or Student's teachers are properly trained on the device. Given that the last assistive technology assessment was completed in 2012, and the evidence shows that Student's abilities have chan nohe eTpe T* [(a)4(biw)2(s)-1(t)-2(s)-2 eTpe T* (e)4(s)64(t)-2(be)4(c)4(a)4(us)-1(e)4( )

d. Analysis and Conclusion

Petitioner did not identify in the Complaint, the First Amended Complaint, at hearing, or in Petitioner's Closing Brief what relevant information the ARD committee failed to consider. Without that information, the hearing officer cannot find that Petitioner prevailed on this sub-issue.

8. Did the District fail to comply with Student's and Parents' procedural rights by failing to have all required and/or necessary members present during ARD committee meetings?

a. Applicable Law

In Texas, the ARD committee is the IEP team defined in federal law and regulations.[632] As relevant to this proceeding, the ARD committee must include the parents of the student; not

b. Petitioner's Argument

Petitioner's Closing Brief does not address this sub-issue.

c. District's Argument

Petitioner failed to present any evidence to support this allegation.[636] Petitioner's sole argument during the hearing was that *** were not present for the September 2014 annual ARD committee meeting, ***. But Petitioner presented no evidence that Parents requested the presence of ***.[637] Petitioner provided no evidence as to how failure to invite outside agency representative(s) to any of the ARD committee meetings at issue caused a deprivation of educational benefits.

d. Analysis and Conclusion

In reviewing the ARD committee reports related to the accrual period in this proceeding, the hearing officer found only one reference to the possibility that a required ARD committee member was not in attendance. At the September ***, 2014 annual ARD committee meeting, Father stated that had the counselor been present at a previous meeting, which was held before the accrual period, Parents might have made a different decision regarding Student's *** class. But a counselor is a provider of a related service and is not ordinarily a mandatory member of the ARD committee. Thus, even if the counselor had not attended a meeting during the accrual period, her absence would not necessarily have constituted a violation of Parents' and Student's procedural rights. Otherwise, the evidence supports a finding that all required members of the ARD committee were present at meetings held during the accrual period, in accordance with 34 C.F.R. § 300.321(a)(3). Petitioner did not prevail on this sub-issue.

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[636] District's Closing Argument at 37-38.

[637] ***.

C. Was the 2015 FIE appropriate?

1. Applicable Law

Each public agency must conduct an FIE, in accordance with 34 C.F.R. §§ 300.304 through 300.306, before the initial provision of special education and related services to a child with a

- Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about Student, including information provided by Parents, in determining the content of Student's IEP;[645]

- Conduct an evaluation that is sufficiently comprehensive to identify all of Student's special education and related service needs, whether or not commonly linked to the disability category in which Student has been classified;[653]

- Use assessment tools and strategies that provide relevant information that directly assists persons in determining that the educational needs of Student are provided;[654]

- Review existing evaluation data, including evaluations and information provided by Parents; current classroom-based, local, or State assessments, and classroom observations; and observations by teachers and providers of related services;[655] and

- Ensure that Student is observed in Student's learning environment (including the regular classroom setting) to document Student's academic performance and behavior in the areas of difficulty by at least one qualified professional.[656]

2. District's Position

The District contends that the FIE complies with all IDEA requirements. Specifically, Student was evaluated by a qualified multidisciplinary team that used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. The District further argues that the FIE provided the information necessary to develop Student's educational program, assessed Student in all areas of suspected disability, and was sufficiently comprehensive to identify all of Student's educational needs and needs for related services. The District points out that Petitioner's expert witnesses Dr. *** and Ms. *** were not able to identify any assessments that were not conducted in accordance with IDEA standards.[657]

3.

Petitioner contends that the FIE did not meet standards and failed to identify all of Student's special education needs and needs for related services. Petitioner argues that the District failed to evaluate Student in numerous areas, including *** needs, adaptive behavior, sensory needs, assistive technology, sign language, parent training, in-home training, and applied behavioral analysis.[658]

Petitioner specifically disagrees with the following aspects of the FIE:

- **FIE should have included assistive technology and *** evaluations.** Petitioner contends that, given Student's changes since Student's ***, an updated assistive technology evaluation is critical for determining what assistive technology will be of most benefit to Student. Also, a *** evaluation should have been conducted to determine ***; failure to conduct the assessment *** is a procedural violation ***. Petitioner argues that the District could have honored Parents' September ***, 2015 request that assistive technology and *** evaluations be included in the 2015 FIE because the September ***, 2015 FIE deadline could have been extended pursuant to Tex. Educ. Code § 29.0041.[659]

- **FIE incomplete and lacking detail and specificity for Student's educational program**

The District did not prove that the FIE is comprehensive enough to be appropriate. The individual evaluations that were conducted as part of the 2015 FIE meet all IDEA requirements and are appropriate. But assistive technology and *** evaluations should have been conducted and were not.

Each multidisciplinary team member except for Ms. ***, who conducted the speech/language assessment, testified at the due process hearing, establishing that the IDEA requirements for conducting the individual evaluations were met. That is, the evaluations were conducted in compliance with 34 C.F.R. §§ 300.502(b)(2)-(3), 300.301, and 300.303 through 300.311.

Specifically, as set out in the Findings of Fact, the multidisciplinary team members are trained and knowledgeable. The evaluations were based on a variety of assessment tools, including information provided by Student's teachers and medical providers; observations of Student in Student's learning environment; and a review of Student's educational records and all previous evaluations by Student's prior schools and private evaluators that were provided to the District. Further, tests were administered to Student in accordance with their respective instruction manuals and in a mode most likely to yield accurate information about Student.

Dr. ***'s contention that Dr. *** should have made a second attempt to test Student's memory was rebutted by Dr. ***'s explanation that a memory test was not specifically requested by the ARD committee to be part of the FIE; that other tests in the psychological evaluation measured Student's memory; and that she could not re-administer the NEPSY-II subtests on another day without experiencing practice effects which would invalidate the tests. Also, Dr. ***'s explanation of why specific instructional strategies are no

required to provide each disabled child in its jurisdiction with a FAPE, pursuant to the IDEA, 20 U.S.C. § 1400 et seq

2. Parents of students with disabilities are

12. Petitioner did not prove that the inconsistent implementation of some of Student's 2014-15 IEP modifications and accommodations resulted in a lack of meaningful educational progress for Student pursuant to the IEP and services Student received in accordance with the IDEA. *Bobby R.*, 200 F.3d at 348-349; 34 C.F.R. § 300.323.

Sub-issue 2: Appropriateness of Student's 2014-15 and 2015-16 IEPs

13. Student's 2014-

22. The September ***, 2015 FIE was timely completed within 3 years of the September ***, 2012 FIE. 34 C.F.R. § 300.303(b)(2).

Sub-issue 6: Did the District provide appropriate assessments?[63]

23. The District conducted all of the assessments that were agreed upon by the ARD committee, including Parents, at the May 2015 REED meeting. 34 C.F.R. §§ 300.303, 300.305.

24. Because Student is ***, the District should have conducted a *** evaluation before devising Student's 2015-16 IEP. ***.

25. Because Student's last assistive technology evaluation was in 2012, and Student has not regularly used *** provided to Student by the District for more than a year because ***, and Student needs more training on it, the District should have conducted an assistive technology evaluation for the ARD committee to consider in developing Student's 2015-16 IEP. 34 C.F.R. § 300.304(c)(6).

26. The District timely responded on September ***, 2015, to Parents' September ***, 2015 request that assistive technology and *** evaluations be added to the 2015 FIE. 19 Tex. Admin. Code § 89.1011(b).

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27. A parent is entitled to only one IEE at public expense each time2(puA)2(dm)0 (ng-ID 26 >>B7ua)4(t)-2

the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States.[664]

[664] 20 U.S.C. § 1451(i)(2); 34 C.F.R. § 300.516; 19 Tex. Admin. Code § 89.1185(n).

Citation: ***.

Sub-issue 3: Whether the District failed to adequately evaluate all areas of suspected disability. **i** **H**

Citation: Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 62, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).

Sub-issue 8: Whether the District failed to comply with Student's and Parents' procedural rights by failing to have all required and/or necessary members present during ARD committee meetings.

HELD: For the District. All required ARD committee members attended ARD committee meetings held between August ***, 2014, and October ***, 2015.

Citation: 34 C.F.R. § 300.321; 19 Tex. Admin. Code § 89.1050(a), (c)(1).

Issue: Whether the District's Full and Individual Evaluation (FIE) of Student was appropriate.

HELD: For Petitioner. The District did not establish that the FIE was comprehensive enough to be appropriate under the IDEA. The FIE was not comprehensive enough because it did not include *** and assistive technology evaluations.

Citation: 34 C.F.R. § 300.304(c)(6).