



resulting in a denial of FAPE for Student; (3) Whether Respondent failed to educate Student in the least restrictive environment (LRE), and was this a violation of FAPE; (4) Whether during the 2015-2016 and 2016-2017 school years, Respondent failed to provide Parents prior written notice (PWN) pursuant to the IDEA, and was this a denial of a FAPE to Student; and (5) Whether Respondent failed to provide Parents a Notice of Procedural Safeguards prior to completing the October \*\*\*, 2015 FIE, and was this a denial of a FAPE.

Petitioner identified the following mixed sub-issues of law and fact in support of the broad issues above as follows:

I.

Whether Respondent failed to provide Student with a FAPE within the meaning of IDEA during the 2015-2016 and 2016-2017 school years.

- a. Whether Respondent failed to provide Student extended school year (ESY) services during the summer of 2016, and was this a denial of a FAPE.
- b. Whether Respondent failed to timely and fully implement Student's existing Individualized Education Program (IEP) from \*\*\* (\*\*\*) upon Student's arrival in the District in September of 2015, and was this a denial of a FAPE.
- c. Whether Respondent failed to have an appropriate IEP in place for Student from September 2015

j. Whether the March \*\*\*, 2016 IEP was deficient, and was the implementation of it a denial of

- x. During the 2015-2016 school year, did Student stagnate and regress in Student's academic and non-academic skills while in programming at \*\*\*, and was this a denial of a FAPE.
- y. During the 2015-2016 school year, did Respondent fail to provide Student with an appropriate IEP that provided Student a meaningful education benefit, and was this a denial of a FAPE.
- z. Did the March 2016 IEP proposed by Respondent, provide Student with a deficient and inappropriate IEP for the 2016-2017 school year that would result in de minimus or trivial educationaln de(/1i)-2(na)4(ppp2y1)-4(nTw 13.56 00.004 Tt)-6(i)-6(o)-4(n)-4(al)Tj Eh Ie-6(a)4(t)-2(i)-2(on

Whether Respondent failed to educate Student in the LRE during the 2015-2016 and 2016-2017 school years, and was this a denial of a FAPE.

- a. Whether Respondent during the period of September 2015 to November \*\*\*, 2015, failed to provide Student a FAPE in the LRE while the student was enrolled at \*\*\*.
- b. During the 2015-2016 school year, did Respondent fail to provide Student with an appropriate IEP provided in the LRE, and was this a denial of a FAPE

#### IV.

Whether during the 2015-2016 and 2016-2017 school years, Respondent failed to provide Parents PWN pursuant to IDEA, and was this a denial of a FAPE.

- a. Whether Respondent failed to provide Parents PWN that it would not be implementing the IEP from \*\*\*, and was this a denial of a FAPE.
- b. Whether Respondent failed to provide Parents PWN regarding which IEP would be implemented during the period of September and October of 2015, and was this a denial of a FAPE.
- c. Whether Respondent failed to provide Parents with compliant PWN pertaining to the March \*\*\*, 2016 ARD meeting regarding the reasons Student was denied ESY services for summer 2016, and private services or private school as requested by Parents at the March \*\*\*, 2016 ARDC, and was this a denial of a FAPE.
- d. During the 2015-2016 and 2016-2017 school years, did Respondent fail to provide Parents with compliant PWN as to why Respondent failed to provide Student with an autism supplement consistent with Student's unique individualized needs, including ABA based services and including \*\*\*, and was this a denial of a FAPE.
- e. Whether Respondent failed to provide Parents with PWN during the 2015-2016 and 2016-2017 school years when it failed to notify Parents as to why Respondent was not providing Student with 1:1 special education trained (ABA trained) paraprofessional throughout Student's entire school day, and was this a denial of a FAPE.
- f. During the 2015-2016 school year, did Respondent fail to provide Parents compliant PWN as to why supplementary aids and services as outlined in the October \*\*\*, 2015 ARDC/IEP were not provided to Student, and was this a denial of a FAPE.
- g. During the 2015-2016 school year, did Respondent fail to provide Parents with compliant PWN as to the change in use of AT services, and was this a denial of a FAPE.
- h. Whether Respondent failed to report the use of restraints to Parents in writing during the 2015-2016 school year while Student attended \*\*\*, and was this a denial of a FAPE.



Student that is designed to meet Student's unique educational needs, or in the alternative pay for

\*\*\*

2. Student



monitored and prompted back to tasks.<sup>8</sup> Staff at \*\*\* emphasized that without individual support in the classroom, Student would present a considerable safety risk to \*\*\*self. It was believed that Student would benefit from a continued integrated classroom with peers, with small groups, and with an extended day program. Recommendations included individualized instruction for academics and consistent consultation with a specialist trained in working with children with autism, and home-based support for parents.<sup>9</sup> It was noted that Student needed support throughout various times during the day to have meaningful interactions and to expand the repertoire of Student's \*\*\*.<sup>10</sup>

5. Student's IEP from \*\*\* explained that Student needed to continue to increase receptive/\*\*\*, speech intelligibility, and social communication skills.<sup>11</sup> To achieve this Student was to receive \*\*\* sessions a

such as \*\*\*, \*\*\* and communication.<sup>23</sup> Student was excited about coming to school.<sup>24</sup> Student was enthusiastic.<sup>25</sup> Student continued to increase \*\*\*, \*\*\* and \*\*\*.<sup>26</sup> Student's speech language pathologist (SLP) at \*\*\* emphasized that Student made tremendous developmental gains in both the areas of language and social communication.<sup>27</sup> A June \*\*\*, 2015 progress report notes that Student made steady progress in all areas of speech and language development.<sup>28</sup> However, \*\*\*.<sup>29</sup>

#### 11. Student's IEP at



19. Ms. \*\*\* did not get a copy of Student's IEP when Student first came to her class.<sup>53</sup> She implemented what she could from the \*\*\* IEP, however there was a lot she couldn't provide. Student did not have a 1:1 full time aide in the classroom. She did not know what a BCBA was.<sup>54</sup>
20. Ms. \*\*\* \*\*\*\*\*.<sup>55</sup> When Student \*\*\*, Ms. \*\*\* would try to have Student \*\*\* to calm down.<sup>56</sup>
21. In October of 2015, Parents arranged for Student to have a private speech language evaluation. The evaluation found that Student had \*\*\* and a \*\*\*. The evaluation noted that Student's \*\*\* can have a severe impact on Student's \*\*\*, academic development, and \*\*\*. It was noted that if Student \*\*\*. The evaluation concluded that it was imperative that Student receive skilled speech therapy services. It was recommended that Student receive \*\*\* minutes of speech therapy \*\*\* times per month.<sup>57</sup>
22. The District performed an OT assessment on October \*\*\*, 2015, and concluded that Student would benefit from OT services (1) \*\*\*- minute consultative session every \*\*\* weeks for a total of \*\*\* sessions per grading period.<sup>58</sup>
23. A Full and Individualized Evaluation Report (FIE) was completed by the District on October \*\*\*, 2015. This FIE was a reevaluation. The FIE report noted that Student's behavior impedes Student's learning, and the learning of others.<sup>59</sup> The report also notes that Student exhibits significant emotional, behavioral, or attentional problems. Student's overall academic achievement was in the low average range of others Student's age, and Student's adaptive behavior was commensurate with age expectations.<sup>60</sup> It was noted that there was evidence of a \*\*\* which had an adverse effect on Student's educational performance. It was recommended that Student receive direct speech services to improve \*\*\*. The final determination was that Student met the criteria for autism and speech impairment.<sup>61</sup> The FIE report also states that Student needs OT to benefit from Student's education, but did not need AT devices or services.<sup>62</sup>
24. An ARDC meeting was held on October \*\*\*, 2015. Student was determined to be eligible for special education and related services under the categories of autism and speech impairment.<sup>63</sup> The ARDC determined that Student did not have a need for ESY or AT. The October \*\*\* report notes that Student needs specialized instruction in the areas of \*\*\*, autism/\*\*\*, \*\*\*.<sup>64</sup> The ARDC determined that Student needed services as part of Student's IEP in the areas of \*\*\*, positive behavior support strategies, but did not need in-home and community based training as Student did not demonstrate an issue transitioning from school to home. The IEP noted that Student did need specified staff -to- student ratio as part of [(I)33 12(e)-2(

Student's IEP.<sup>65</sup> During \*\*\*, \*\*\*, \*\*\*, and \*\*\*, Student was to have increased staff support to achieve progress on IEP goals and objectives. The IEP also notes that Student needs communication intervention and \*\*\*, but not extended educational programming.<sup>66</sup> Professional educator and staff support services were determined to be needed.<sup>67</sup> The IEP states that Student does not require a Behavior Support and Intervention Plan (BSIP).<sup>68</sup> The report notes that Student does not run in the hallways and follows class rules.<sup>69</sup> Student was reported as \*\*\*, however Student was able to demonstrate the skill \*\*\*. Student seemed to \*\*\*. Student needed reinforcement to remain on task and complete challenging activities.<sup>70</sup> The ARDC determined that Student did not exhibit significant behavioral challenges which adversely affect Student's educational performance or the learning of others, and did not need assistive technology.<sup>71</sup>

25. The October \*\*\*, 2015 IEP states that Student was to receive: \*\*\* minutes of occupational therapy-consultative for \*\*\* minutes \*\*\* every \*\*\* weeks; \*\*\* minutes of \*\*\*/\*\*\* services for \*\*\* minutes \*\*\* per week; \*\*\* minutes of speech/language services-consultation \*\*\* per \*\*\* weeks; speech/language services \*\*\* minutes \*\*\* times per \*\*\* weeks.<sup>72</sup> During the October \*\*\* ARDC meeting, Parent

Subject	Duration and Frequency	Program Area	Location
Occupational Therapy-Consultative	*** minutes *** per *** weeks	Occupational Therapy	General Education
Speech Language Therapy-Consultation	*** minutes *** per *** weeks	Speech Therapy	General Education
Speech Language Therapy-Services	*** minutes *** per *** weeks	Speech Therapy	Special Education
Social Skills/ELAR/ Instructional Services Social Skills/ELAR/ Instructional	*** minutes *** per week	Inclusion	General Education

31. Ms. \*\*\* did not remember which IEP was in effect after the October \*\*\* ARDC meeting.<sup>90</sup> She did not know what a progress report for special education was. She had never seen or helped fill out a special education progress report.<sup>91</sup> She did not track Student's progress towards goals. She did keep notes to help with progress reports, which are not special education progress reports.<sup>92</sup>

32. Ms.





44. Ms. \*\*\* did not believe Student needed a one on one aide all of the time in her classroom. Student could do the same things as everyone else and follow directions. It was when there was a change in routines or something was missing that Student \*\*\*.<sup>130</sup> \*\*\*.<sup>131</sup>
45. Ms. \*\*\* was an instructional assistant at \*\*\*.<sup>132</sup> Ms. \*\*\* worked with Student while Student was in Ms. \*\*\*'s class.<sup>133</sup> She summarized Student's behaviors in a journal.<sup>134</sup> She did not take the notes in order to track progress on Student's IEP goals.<sup>135</sup> Although it would have been helpful for all ARDC members to have her notes, the notes were not provided to Parents.<sup>136</sup> She does not know how many times she gave Student redirections or prompts.<sup>137</sup>
46. Ms. \*\*\* knows of \*\*\* when Student \*\*\*.<sup>138</sup> A \*\*\*.<sup>139</sup> Student would \*\*\* during which Student would \*\*\*.<sup>140</sup> Student would \*\*\*.<sup>141</sup> One time Student \*\*\*.<sup>142</sup> When Student was \*\*\*, she would step back because she was not certified to touch Student.<sup>143</sup> Student tried to \*\*\*.<sup>144</sup> Ms. \*\*\* did not see staff restrain Student.<sup>145</sup> A behavior specialist never came to the classroom to work with Student.<sup>146</sup>
47. When Ms. \*\*\* started working with Student in November Student had trouble communicating with other students. By March students were \*\*\*.<sup>147</sup> Student was also doing better with transitions.<sup>148</sup> She was never told how many hours to spend with Student per Student's IEP. She was given a schedule to go by.<sup>149</sup>
48. An ARDC meeting was held on February \*\*\*, 2016. Student was attending \*\*\*. The ARDC determined that Student was eligible for special education and related services under the disability categories of autism and speech impairment.<sup>150</sup> The ARDC determined that Student was not exhibiting significant behavioral challenges which adversely affect Student's educational performance.<sup>151</sup> It was determined that Student needed AT to receive a FAPE and that Student would have access to \*\*\*.<sup>152</sup>

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<sup>130</sup> Tr. at 852.

<sup>131</sup> Tr. at 853.

<sup>132</sup> Tr. at 999-1000.

<sup>133</sup> Tr. at 1003.

<sup>134</sup> Tr. at 1007; JE18.

<sup>135</sup> Tr. at 1086-1087.

<sup>136</sup> Tr. at 445-446.

<sup>137</sup> Tr. at 1075.

<sup>138</sup> Tr. at 1021.

<sup>139</sup> Tr. at 1027.

<sup>140</sup> Tr. at 1029.

<sup>141</sup> Tr. at 1053.

<sup>142</sup> Tr. at 1053.

<sup>143</sup> Tr. at 1053-1054.

<sup>144</sup> Tr. at 1055.

<sup>145</sup> Tr. at 1054-1055.

<sup>146</sup> Tr. at 1089.

<sup>147</sup> Tr. at 1046-1047.

<sup>148</sup> Tr. at 1062.

<sup>149</sup> Tr. at 1094-1095.

<sup>150</sup> JE9.

<sup>151</sup> JE9 at JE000234.

<sup>152</sup> JE9 at JE000234.







64. In January of 2016 Parents obtained a psychological evaluation from Dr. \*\*\*. Dr. \*\*\* has been a licensed clinical psychologist since 1997.<sup>189</sup> He has a one hundred percent assessment practice to determine if children have various disabilities.<sup>190</sup>
65. Dr. \*\*\* used the Behavioral Assessment System For Children (BASC) to assess Student on January \*\*\* and \*\*\*, 2016.<sup>191</sup> Dr. \*\*\* concluded that Student's intellectual functioning falls within the average range, overall. Dr. \*\*\*









education teacher of the student's failure to meet mastery level for passing standards for each grading period.<sup>248</sup>

79. On March \*\*\*, 2017, Parents had Student evaluated by \*\*\*, a speech language pathologist (SLP).<sup>249</sup> She found that Student had a \*\*\* that affected Student's \*\*\* score with primary delays iw [(s)-5((')3(s)-1( \*\*b2(ude0316



of ABA therapies at \*\*\*.<sup>286</sup> According to Dr. \*\*\*, if a behavior therapist does her job well, then the child will eventually not need her anymore.<sup>287</sup>

89. Dr. \*\*\* notes that the behaviors exhibited by Student at the District were continuing but no FBA was conducted.<sup>288</sup> She noted that there was no evidence of meaningful progress monitoring of Student's IEP by Respondent.<sup>289</sup> She thinks this was significant because if we don't understand what progress is being made, we need better evidence.<sup>290</sup> Dr. \*\*\* noted that Student's IEPs at the District were remarkably similar.<sup>291</sup> The last IEP offered by Respondent is similar to what was offered previously and the previous IEPs did not work.<sup>292</sup> Dr. \*\*\* believes moving Student back to the District would be detrimental to Student.<sup>293</sup>
90. Although it had not yet been implemented, the February 2017 plan compiled by Ms. \*\*\* is an appropriate ABA plan according to Dr. \*\*\*.<sup>294</sup> That plan notes that Student presents with high risk behaviors that impedes with learning and puts Student's safety in harm's way.<sup>295</sup> The plan also notes that Student is able to fully participate in ABA sessions.<sup>296</sup>

Contingent upon Student's success, some 1:1 ABA support was to have been faded and supervision was to occur less frequently.<sup>300</sup>

94.



105. While attending \*\*\* with ABA therapy, Student made social gains and \*\*\* decreased at school to a very low rate.<sup>343</sup> Dr. \*\*\* believes that the improvement in Student's behavior is attributable to the private ABA therapy Student has been receiving.<sup>344</sup>

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**Evaluations Conducted by Respondent**

112. During the September \*\*\*, 2015 ARDC meeting, it was determined that Student should be evaluated

118. Respondent conducted an In -Home Needs Assessment in February of 2016. This evaluation reviewed the area of academics, behavior, communication, community, leisure, self-help, and socialization. The evaluator recommended \*\*\*- minute sessions of parent training for the \*\*\* weeks of the 2015-2016 school year. The evaluator did not recommend in-home training.<sup>367</sup>





reasonably calculated to confer a meaningful educational benefit rather than regression or trivial educational advancement.<sup>385</sup>

The Fifth Circuit has set forth four factors that serve as an indication of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA. These factors are whether (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the LRE; (3) the services are provided in a coordinated and collaborative manner by the key stakeholders; and (4) positive academic and nonacademic benefits are demonstrated.<sup>386</sup>

Petitioner proved that Student was denied a FAPE for the 2015-2016 school year. Respondent failed to propose an appropriate IEP for Student during the 2015-2016 school year. (Therefore, Petitioner has satisfied the first prong for reimbursement of a unilateral private placement for the 2016-2017 school year.) Student was engaging in high risk behavior such as \*\*\*, without a behavior plan. Respondent was not providing needed services such as BCBA therapy for Student. Student was not receiving enough one on one support. The IEP did not include ESY services. Nor was Respondent tracking or measuring Student's performance in a meaningful manner.

Student's IEP from \*\*\* notes that in order for Student to make meaningful progress Student needs a \*\*\* with individualized instruction.<sup>387</sup> Student did not receive this during the 2015-2016 school year

While Student was enrolled in the District, Student exhibited behaviors (\*\*\*) that Student did not exhibit prior to becoming a student in the District, or while a student at \*\*\*. During the 2015-2016 school year Student exhibited behavior regression.<sup>393</sup> These behaviors were affecting Student's ability to participate in the educational program in a meaningful way to such a point that Student began \*\*\*.<sup>394</sup> Additionally, Student was not making progress academically.<sup>395</sup> Parent notified the District regarding Student's regression.<sup>396</sup>

In dev





The IDEA states that the cost of reimbursement may be reduced or denied if: 1) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or 2) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described above.<sup>427</sup>

This notice requirement was created to provide the school system an opportunity before the child is removed, to assemble a team, evaluate the student, devise an appropriate plan, and determine whether a FAPE can be provided. When a school district fails to show any substantive harm caused by a parent's violation of the notice provision, a court may not deny reimbursement on the basis of notice alone.<sup>428</sup>

During an October \*\*\*, 2015 ARDC meeting, Parent notified Respondent that she disagreed with the proposed IEP and was considering private school for Student. Parent notified Respondent she would seek reimbursement from Respondent for the private school.<sup>429</sup> On April \*\*\*, 2016 Parent notified Respondent that they were considering removing Student from school and placing Student at \*\*\*. Parent also told Respondent that Parents had obtained private ABA therapy, speech/language, and occupational

to the private ABA therapy Student has been receiving.<sup>436</sup> Student's father does not think Student can afford another year of transition.<sup>437</sup>

The IDEA makes removal to a private school placement the exception, not the default. The statute was designed to bring disabled students into the public educational system and ensure them a free appropriate *public* education.<sup>438</sup> Therefore, caution is to be used before holding that a school district is required to place a child outside the available range of public options. However, based upon a review of the record, the undersigned finds no basis to deny or reduce re-imbursement for tuition and related expenses at \*\*\* for the 2016-2017 or 2017-2018 school year

Student did not \*\*\*. <sup>444</sup> Student never re-gained that skill while at \*\*\*. <sup>445</sup> Student was regressing academically even with the services provided by Respondent. Petitioners met their burden that Student was entitled to ESY services during the summer of 2016.

Given that Student has made progress through the use of private services provided during the 2016-2017 school year, it is unclear if Student needed ESY services during the summer of 2017. Petitioner did not meet their burden of proof on this sub-issue.

Respondent failed to properly evaluate Student during the 2015-2016 and 2016-2017 School Years.

During the 2015-2016 and 2016-2017 school years, Respondent completed the following evaluations of Student, all of which were done by qualified professionals:

- a. October \*\*\*, 2015- OT evaluation. <sup>446</sup>
- b. October \*\*\*, 2015- FIE. <sup>447</sup>
- c. December \*\*\*, 2015- AT evaluation. <sup>448</sup>
- d. February \*\*\*, 2016-In-home needs assessment. <sup>449</sup>
- e. August 2016 OT assessment. <sup>450</sup>
- f. November \*\*\*, 2016-FIE. <sup>451</sup>

Although Student had behavioral issues at the District, a FBA was not completed for Student, nor did Respondent ask for one. <sup>452</sup> Parent did not know she could ask for one. <sup>453</sup> Mr. \*\*\* testified that in his opinion, the absence of a FBA did not render Student's programs inappropriate at \*\*\* and \*\*\*. <sup>454</sup> However, based upon the behaviors of Student, Mr. \*\*\* would have preferred that one had been done. <sup>455</sup>

This Hearing Officer agrees with Dr. \*\*\* that a FBA for Student was warranted, and that Respondent's failure to complete a FBA equates to Respondent failing to properly evaluate Student pursuant to the IDEA. The District had the responsibility to ensure that the functional performance of Student was evaluated. <sup>456</sup> The evaluation procedures used should have assessed both cognitive and behavioral factors, in addition to physical or developmental factors. <sup>457</sup>

Respondent provided Parents with PWN and Procedural Safeguards during the 2015-2016 and 2016-2017 school years.



The IDEA requires states to establish and maintain procedural safeguards to ensure that children with

Assistive Technology

Petitioner raised the sub-issue of whether Respondent failed to provide Student with AT

7. Respondent's proposed placement for the 2015-2016 and 2016-2017 school years placed Student in the LRE. 20 U.S.C. §1412(a)(5)(A).
8. Respondent failed to develop an appropriate IEP for Student during the 2015-2016 and 2016-2017 school years. 34 C.F.R. §300.320 through 300.324.
9. Respondent failed to provide Student with a FAPE for the 2015-2016 school year including the summer of 2016. 34 C.F.R. §300.17.
10. \*\*\* was a proper placement of Student for the 2016-2017 school year.
11. Respondent failed to provide Student with a FAPE during the 2016-2017 school year. 34 C.F.R. §300.17.
12. Respondent failed to properly evaluate Student during the 2015-2016 and 2016-2017 school years. 34 C.F.R. §300.301 through 34 C.F.R. §300.304.
13. Respondent provided Petitioner PWN pursuant to the IDEA during the 2015-2016 and 2016-2017 school years. 34 C.F.R. §300.503.
14. Respondent provided parents with a Notice of Procedural Safeguards prior to completing the October \*\*\*, 2015 FIE.
15. Respondent is to reimburse Parents for Student's tuition at \*\*\* for the 2016-2017 school year. 34 C.F.R. §300.148.
16. Student's placement at \*\*\* for the 2017-2018 school year is proper.
17. Student's placement at \*\*\* at District expense for the 2017-2018 school year is appropriate.
18. Respondent is to reimburse Parents for mileage transportation to and from \*\*\* for the 2016-2017 and 2017-2018 school years.

## **VII. ORDER**

Having considered the evidentiary record and the foregoing Findings of Facts and Conclusions of Law, the hearing officer orders as follows:

Petitioner's requested relief is denied in part and granted in part. Student is to remain at \*\*\* for the 2017-2018 school year. Respondent is to reimburse Petitioner for all costs of Student's attendance at \*\*\* for the 2016-2017 and 2017-2018 school years, including tuition, cost of additional support services, and mileage transportation to and from school.

Any claim or relief sought in this hearing that has not been specifically granted, is hereby denied.

SIGNED and ENTERED on July 15, 2017.

Sherry Wetsch  
Special Education Hearing Officer  
For the State of Texas

**NOTICE TO THE PARTIES**

This Decision of the Hearing Officer is a final and appealable order. Any party aggrieved by the findings and decision made by the Hearing Officer may bring a civil action with respect to the issues presented at the due process hearing in any State court o