

**DOCKET NO. 311-SE-0503**

**Student** § **BEFORE A SPECIAL EDUCATION**  
**B/N/F Parent** §  
§  
**VS.** § **HEARING OFFICER**  
§  
**DRIPPING SPRINGS INDEPENDENT** §  
**SCHOOL DISTRICT** § **FOR THE STATE OF TEXAS**

**DECISION OF THE HEARING OFFICER**

**PROCEDURAL HISTORY**

The above-captioned Request for Impartial Due Process Hearing pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. (“IDEA”), was received by Texas Education Agency (“the Agency”) on May 30, 2003, re-assigned to the undersigned Impartial Hearing Officer, and set for hearing on June 20, 2003, with a decision deadline of July 14, 2003. Counsel came upon scheduling difficulties, so the hearing was re-scheduled to August 27-29, 2003, by agreement, with a decision deadline of September 22, 2003. The parties requested a further continuance to conduct evaluation of Student I granted this request and re-set the hearing to September 24-25, 2003, with a decision deadline of October 21, 2003. On September 8, 2003, Petitioner’s counsel withdrew. Substitute counsel filed an appearance and requested additional time to review and amend Petitioner’s complaints. I granted the request and set the hearing on December 8-9, 2003, with a decision due date of January 5, 2004.

On November 19, 2003, Respondent filed a counterclaim. On November 24, 2003, Respondent requested a continuance because of a personal emergency. Petitioner did not object. I re-set the hearing to January 21-22, 2004. On January 11, 2004, Petitioner requested a continuance for medical reasons, and I granted that request and set the hearing for March 8-9, 2004 with a decision deadline of April 5, 2004. On January 25, 2004, Petitioner’s counsel withdrew. The evidentiary hearing took place on March 8 - 10, 2004. Petitioner was represented by his parent and Next Friend Parent, assisted by \*\*\*, parent advocate. Respondent was represented by attorneys Denise Hays and Susan Graham. The hearing recessed to allow more time for additional evidence, and re-convened on April 27, 2004, on which date the presentation concluded and the record closed. The recess required extension of the decision deadline to May 25, 2004. The Decision was entered and mailed to the parties on May 24, 2004.

**STATEMENT OF THE CASE**

As disclosed in the Request for Hearing and clarified in the Pre-hearing Conference, Petitioner alleged that Dripping Springs ISD (“DSISD”) violated Student’s right to a free, appropriate public education in the following manner:

1. Failure to implement a transition plan, included as part of Student's Individualized Education Plan ("IEP"), for moving from \*\*\* grade in Dripping Springs \*\*\* School ("\*\*\*\*") to \*\*\* grade in Dripping Springs \*\*\* School ("\*\*\*\*"), in particular by failing to provide scheduled training for Student's \*\*\* teachers concerning how to accommodate Student's communication disorder so as to communicate effectively with him;
2. Failure to allow Student to fully participate in his May 2003 IEP team meeting;
3. Failure to allow Parent to fully participate in Student's May 2003 IEP team meeting;
4. Failure to take steps to provide Student with appropriate opportunities to participate in extra-curricular activities;
5. Failure to provide adequate supervision for Student during field trips, by someone familiar with his language disorder;
6. Failure to implement Student's assignment notebook as required in his IEP so as to provide his parent with notice of school information such as school activities and field trips;
7. Failure to provide books on tape and reduced classroom assignments as required by Student's IEP;
8. Failure to provide consistently a note-taking transcriber ("scribe") for Student in all classes, as required in his IEP;
9. Failure to provide requested school personnel at Student's IEP team meeting;
10. Failure to provide for meaningful parent participation in IEP team meetings, by inviting the DSISD school attorney to influence the parent inappropriately;
11. Failure to provide appropriate evaluation.

Petitioner requested as relief compensatory educational services, reimbursement by DSISD of evaluations obtained at parent expense, reimbursement of certain parent travel and other expenses in connection with a band trip \*\*\*, and reimbursement of tutoring expenses for days that Student was removed from school and taught at home because of DSISD's alleged failure to implement Student's IEP.

### **FINDINGS OF FACT**

1. Student who also goes by "\*\*\*\*," resides within DSISD and is enrolled in \*\*\*. Student is eligible for IDEA special education. Parent, the Next Friend in this hearing, is Student's mother. Stipulation.
2. Student carries IDEA eligibility classifications of Speech Impairment, Learning Disability, Orthopedic Impairment, and Other Health Impairment. He has ADHD, \*\*\*, and neuro-developmental delays affecting expressive and receptive language, speech articulation, coordination, and math ability. He has difficulty with retrieval and short term memory involving language. He performs slowly in math, reading, and writing. He experiences difficulty with word-finding, and organizing expressive language. His non-verbal abilities

are stronger than verbal abilities. Evaluations mostly have estimated Student's overall intellectual functioning in the average to low average range, but with higher non-verbal abilities. Some non-verbal ability scores are well above the average range. Student's performance can be variable from day to day. R-1; P-3, P-5, P-9, P-11, P-28; Tr. 94-95, 553-554.

3. \*\*\* convened Student's ARDC<sup>1</sup> on 2/1/02 to consider and approve a plan for his transition to \*\*\* grade at \*\*\* for the 2002-2003 school year. The plan required a \*\*\* special education teacher to spend 12 full days at \*\*\* during the spring 2002 semester shadowing Student and conferencing with his special education teacher. The plan required drafting Student's \*\*\* grade instructional modifications, with detailed explanations, before \*\*\* grade classes started. The plan required Student's expected \*\*\* grade teachers to meet with his \*\*\* special education teacher in spring 2002 to review Student's needs and address teacher questions. The plan required Student's \*\*\* special education teacher and the trained \*\*\* special education teacher to meet with Student's other \*\*\* grade teachers at \*\*\* in August 2002 before \*\*\* grade classes started, to review Student's needs once again and specify protocols for discipline and academic issues. The plan required the \*\*\* special education teacher to remain available for consultation as needed after the \*\*\* grade year began. The plan required developing procedures for teachers to inform substitute teachers in Students' classes regarding his needs. P-27; Tr. 315.
4. Student's 3/22/02 annual ARDC met at \*\*\* to develop Student's annual IEP for \*\*\* grade. The IEP required modifications for \*\*\* grade inclusion mainstream academic classes, as well as Band and Study Skills. Modifications included, in pertinent part, the provision of a weekend assignment folder; assignment notebook with teacher assistance to include notice to Parent of materials needed, band schedule/changes, etc.; a separate set of books issued for home; and note-taking assistance. Other modifications addressed Student's language and written expression, including extended time, oral exams at teacher discretion, re-taking tests, and reduced assignments. All ARDC members including Parent agreed with the IEP contents. R-1; Tr. 211-212.
5. Modifications for Student's \*\*\* grade inclusion classes were spelled out in detail in the spring 2002 transition plan. Reduced assignments meant a 50% reduction in expected work product such as math problems, and a 25% reduction of written work product. Extra time for completing assignments meant Student would be allowed 10 extra school days for homework assignment completion and 10 extra days to turn in in-class assignments. Opportunity to respond orally meant Student would be allowed to dictate responses at teacher discretion during school, and to dictate responses to record homework done outside of school. For the assignment folder, accumulated past-due assignments for the week were to be sent home on Friday. Note-taking assistance meant Student must attempt to take notes but a copy of teacher notes or assistance by the inclusion teacher would also be provided, fill-in-the-blank notes would be provided, and copies of overheads or computer generated screen content would be provided. Although other modifications were detailed, these are the principal modifications addressed by Petitioner's complaints. The ARDC, including the parent, agreed to Student's modifications. P-27; Tr. 316-319.

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<sup>1</sup> "ARDC" refers to the Admission, Review, and Dismissal Committee, the group of persons designated under Texas law to fulfill the responsibilities of the IEP Team as set out in 34 C.F.R. 300.344-300.346. 19 T.A.C. §89.1050.

6. DSISD implemented Student's transition plan, with the exception that the \*\*\* special education teacher did not meet with \*\*\* staff before \*\*\* grade classes started on 8/20/02. That task was carried out instead by the \*\*\* teacher who had spent 12 days with Student and his special education teacher receiving training at \*\*\*. That \*\*\* teacher distributed the list and explanation of Student's modifications to his \*\*\* grade teachers, and talked with each of his inclusion teachers and aides about his modifications and what they would need to do, prior to the first day of class. That \*\*\* teacher also served as Student's \*\*\* grade folder teacher responsible for oversight of Student's IEP, and also as his inclusion teacher and support person for part of the \*\*\* grade year. However the teacher was not assigned early in the year to work directly with Student except as his folder teacher. R-3, R-37; Tr. 227, 316, 323-324, 604-610, 644-645, 858, 865, 946, 1077.
7. Student has participated in band since summer 2002. He participated successfully in band \*\*\*. He has actively participated in \*\*\* and band performances at games and pep rallies. \*\*\* provided accommodations for Student, such as making arrangements for \*\*\*, training chaperones, and insuring bathroom access. Tr. 854, 879-80.
8. During the initial days of Student's \*\*\* grade year an upcoming test in World Geography was not noted in his communication notebook. Textbooks for home use were not provided immediately when textbooks were issued, but rather were provided on 8/27/02. Student did not have all his vocabulary words written in his notebook by his scribe for an upcoming test, nor copied for him by the teacher. The apparent omissions involved English, World Geography, and Algebra. Parent met with \*\*\* administrators on or about 8/27/02 and discussed her concerns, and her understanding that Student was supposed to have one-on-one assistance. \*\*\* questioned her understanding in this regard. Parent requested an emergency ARD meeting, and wrote a follow-up letter to DSISD on 8/28/02 stating she was removing Student from school except for first period Band. Parent removed Student from school as indicated on 8/28, 8/29, and 8/30/02. P-12, P-17; Tr. 65-74, 335, 951.
9. Students ARDC met on 8/29/02 to discuss parent concerns about non-implementation of Student's modifications, and specifically concerns that modifications were not communicated to Student's teachers, note-taking assistance was not provided, books were not provided for home use, and work was not included in Student's assignment logbook. The ARDC discussed parent concern over the adequacy of the training provided \*\*\* teaching staff. \*\*\* agreed to provide additional training to address parent concerns, to implement all IEP services the following day, and to check with Student after school every day to make sure he had his assignments. R-3; Tr. 325-328, 866-867.
10. Student's assignment log went missing for a period of time fall 2002. Teachers maintained efforts to communicate with the parent by using notes in Student's notebook, personal communication, and email communication, until another assignment log was made. P-12; R-27, R-38; Tr. 611-620.
11. \*\*\* provided additional training for Student's teaching staff in September, including reviewing Student's assessment and viewing the "Fat City" tape, a video that deals with understanding learning disabilities. Student's band director received this additional training. R-4; Tr. 324-334, 716, 859.

12. Following the 8/29/02 meeting Parent returned Student to school. However it appeared to Parent in the following days that Student was not doing his work, was doodling in History class, and throwing his assignments in the trash. Additionally it appeared Student was not sent to content mastery in World Geography, did not receive instruction in content mastery, and did not receive adaptations in English content mastery on August 30<sup>th</sup>. Parent believed that the transition plan was still not being implemented, and his teachers did not know or did not understand his modifications due to insufficient training. She removed him from school a second time and hired a certified teacher, \*\*\*, to tutor Student at home. Parent notified DSISD of her intention in this regard by letter dated 9/4/02. P-12; Tr. 75-88.
13. Student's ARDC met again on 9/5/02, at which time Parent told \*\*\* representatives that she was once more keeping Student home from school, except for \*\*\*, and providing instruction from a private tutor, due to her belief that \*\*\* was not implementing modifications. Parent also complained that a "sub" had been used as Student's inclusion teacher in one class, that the inclusion aide was not in class all the time, that staff training in Student's disabilities and modifications was not finished before school started, and that Student had reported receiving lecture format in content mastery during one class, and another time received no instruction in content mastery. R-5.
14. The 9/5/02 ARDC discussed returning Student to classes at \*\*\*, that he would need a scribe for writing activities, and that an additional inclusion aide would be trained and assigned starting the following day in Student's Algebra, English, Biology, and Study Skills classes, including content mastery, for translation and transcription when needed. Another special education staff was assigned to assist Student with World Geography. R-5.
15. Student's 9/5/02 ARDC agreed to provide additional training for Student's teachers, to include consultation for Students \*\*\* teachers by his \*\*\* special education teacher; reviewing Student's 8/28/98 psycho-educational assessment report; and discussing language issues with the speech pathologist. Additionally, Student's \*\*\* and \*\*\* counselors were to confer. Additionally, \*\*\* agreed to assist the parent in obtaining a Talking Books membership. Student received tutoring at home for an additional two days. R-5; Tr. 339-355.
16. Parent removed Student from school to receive private tutoring, other than in \*\*\*, for 5 school days total in fall 2002. Student made \*\*\*'s and \*\*\*'s in his academic classes in the first grading period of his \*\*\* grade year, and passed all classes the first semester. R-2; Tr. 227-229, 320.
17. Student's \*\*\* teachers and teaching assistants reviewed his 1998 assessment and viewed the Fat City videotape on 9/6/02. A speech pathologist and instructional supervisor met with Student's teachers at \*\*\* to discuss communication issues and parent concerns, on various dates between 9/16/02 and 9/20/02. Student's \*\*\* special education teacher went to \*\*\* on or about 9/6/02 to observe Student in class and model appropriate teaching strategies. In October 2002, the same teacher spent a day shadowing Student in his \*\*\* classes and met with his teachers after school to consult regarding IEP implementation. P-17; R-4, R-31; Tr. 1079.
18. DSISD responded to parent concerns about Student missing announcements of school social events being displayed on video monitors. DSISD agreed as of 9/27/02 to print out the

announcements and sent them home in Student's notebook. DSISD did not agree to include this service as part of Student's IEP. R-32.

19. Student's ARDC met on 10/4/02 and discussed proper lines of communication for Parent to convey concerns to \*\*\*. \*\*\* staff disagreed with Parent's opinion that communication about available extracurricular social activities was a necessary part of the IEP. The ARDC members discussed alternate means of providing this information, and the information was subsequently provided to Parent via Student's notebook. R-6, R-37; Tr. 105, 359, 877.
20. Student's 10/4/02 ARDC discussed Student's need for taped texts. Student's \*\*\* special education teacher attended this meeting and reported that taped texts were not used with Student at \*\*\* because he read faster and better without them. Student's ARDC did not schedule taped texts as a service or modification in Student's IEP. Parent nevertheless requested for taped texts to be made available for Student, and \*\*\* agreed, but did not make taped texts an IEP modification or service. R-6; Tr. 251-260, 317, 360-61, 1090-1091.
21. Following the 10/4/02 ARDC meeting Parent took the notes of deliberations home for review, and later submitted written clarifications for the ARD record. When the 10/4/02 meeting ended, \*\*\* representatives offered \*\*\* a 10-day recess. Parent declined the recess. Parent later submitted written itemized clarifications and exceptions to the minutes of the 10/4/02 ARD meeting, and these were appended to the ARDC deliberations. These did not include any correction to the statement in the District's minutes that Parent had declined the offer of a recess, nor any request for a recess of the 10/4/02 meeting. R-6.
22. Some time after the 10/4/02 ARDC meeting Student's \*\*\* teacher told Parent that it was not appropriate for them to talk about Student's program at \*\*\* without \*\*\* staff being present, and refused to do so in the future. Student's IEP at that time required only that the \*\*\* teacher be available to consult with \*\*\* staff. Tr. 1098-1106.
23. Student's ARDC convened on 10/14/02 to discuss Student's Algebra class. Student was having difficulty despite two inclusion aides being available in the classroom to help transcribe and provide other support. Parent participated in this meeting and offered suggestions for modifying Student's Algebra instruction. R-7.
24. On 11/5/02 DSISD notified Parent that DSISD's attorney would attend the upcoming 11/8/02 ARDC meeting. Parent objected. Parent requested that the DSISD superintendent attend the meeting, and that Student's special education teacher from \*\*\* also attend "the re-convened session" for the reason that this teacher had been a participant in the 10/4/02 meeting. R-33; P-21, P-23; Tr. 103-104.
25. Student's ARDC convened on 11/8/02 to consider reimbursement for private tutoring, a possible schedule change for Student, and extracurricular considerations. Student's teacher from \*\*\* did not attend. \*\*\* representatives asked for more information about the qualifications of the private teacher whose services Parent wanted reimbursed. Parent did not present this information at the meeting. R-9; P-23.
26. \*\*\* representatives in the 11/8/02 ARDC agreed to investigate parent complaints that an assignment and a testing procedure were not modified as required. Parent complained that Student, although on the \*\*\* honor roll at that time, was not making straight \*\*\*, or achieving optimum success because of questionable implementation of modifications. Parent

and \*\*\* representatives disagreed concerning whether Student's modifications were being fully implemented. The ARDC decided to further investigate talking books as an IEP service as part of Student's assistive technology assessment. \*\*\* staff agreed to address training, to the extent possible, of substitute teachers working with Student. The ARDC discussed communication between school and home regarding schedules of extracurricular activities, and agreed that the District's communication plan mostly had been working. Other matters discussed at the 11/8/02 meeting included whether attendance of DSISD's attorney and a special education administrator was improper, the need for \*\*\*'s Principal to schedule training for substitutes, and whether Parent should have a second chance to request recess of a prior ARDC meeting R-9; Tr. 871.

27. Taped texts for Student's World Geography class were sent home with Parent on 11/15/02. R-26.
28. Student's ARDC convened on 11/22/02. Parent argued to \*\*\* representatives that her refusal to signify agreement at the conclusion of the 10/4/02 ARDC meeting required that the meeting had to be held in recess and re-convened with the same membership. Parent objected that when the ARDC met subsequently on 11/8/02 Student's teacher from \*\*\*, who was present at the 10/4/02 meeting, did not attend. Parent believed that because the meeting was "recessed," DSISD was obligated to reconstitute the meeting with the same people in attendance, and violated IDEA by failing to do so. DSISD did not agree that a re-convened ARDC necessarily had to include all the same people. \*\*\* administration did not tell Student's \*\*\* special education teacher to refrain from participating in Student's ARDs or communicating with Parent. R-9; P-13, P-21; Tr. 114-117, 857.
29. At the 11/22/02 meeting, Parent renewed her request for reimbursement of private tutoring services. \*\*\*, believing that Student's teachers had all received training and did implement Student's IEP, denied reimbursement. DSISD documented this denial, as well as denial of Parent's request to "reconvene" the 10/4/02 ARDC, in a Notice of Refusal dated 12/5/02. R-9, R-10.
30. DSISD obtained a functional communication and assistive technology evaluation of Student from Dr. \*\*\*, who reported her results on 1/16/03. Dr. \*\*\* gathered data from observing and testing Student, interviewing the parent, interviewing teachers, and reviewing school records. Dr. \*\*\* made recommendations, including a trial with the AlphaSmart device, but did not recommend taped texts as an IEP service. R-12; Tr. 472-511.
31. On 1/22/03 Parent requested meetings with all Student's teachers to discuss Student's progress and other concerns. A special education representative responded to Parent that same day to propose a meeting time. Later, DSISD's instructional supervisor and one of Student's former teachers set up meetings with Student's Band teacher and History teacher, on 4/4/02 and 4/9/02 respectively, to further discuss classroom modifications and supports for Student. R-30.
32. Student's ARDC met on 2/7/03 to consider Dr. \*\*\*'s evaluation. Parent disagreed with \*\*\*'s findings, contending essentially that \*\*\* understated the severity of Student's communication disorder and educational needs to such a degree that the report was not appropriate for IEP planning. The ARDC decided to begin a trial with the AlphaSmart for Student but postponed implementation of other \*\*\* recommendations. R-13; Tr. 122, 421.

33. At the 2/7/03 meeting Parent requested an independent educational evaluation because of disagreements with Dr. \*\*\*'s report. Parent presented new information about the tutoring service for which she wanted reimbursement, re-stating her claim that the service was necessary because \*\*\* had failed to implement Student's IEP at the first of the year. R-13; P-26.
34. ARDC deliberations of 2/7/03 reflect that communication home about available extracurricular social activities using hard copy of electronic announcements was being successful, and Parent did not object. R-13.
35. Student's 2/7/03 ARDC recessed, and re-convened on 2/14/03. The ARDC considered a more detailed statement from Parent concerning Student's private tutoring, including itemization of hours billed, charges at the rate of \$100 per hour, and a representation that services were provided by a certified teacher. DSISD maintained that Student's program at \*\*\* had been appropriate. Parent re-asserted her request for an independent evaluation, amending the ARDC record with detailed written objections to Dr. \*\*\*'s report. DSISD issued a second Notice dated 2/20/03 documenting refusal of reimbursement for private tutoring. R-13; P-20.
36. DSISD by letter dated 2/27/03 granted Parent's 2/14/03 request for an independent functional communication and assistive technology evaluation because of her disagreement with \*\*\*'s 1/16/03 report. DSISD provided a list of evaluation criteria and possible evaluators. Parent did not follow up to obtain this independent evaluation. R-18, R-31; Tr. 424-446.
37. Student's ARDC met on 3/21/03 for an annual review. The ARDC discussed that Student was making progress, and expected to advance to \*\*\* grade. It was agreed that \*\*\* would make someone available to transcribe for him in his \*\*\* grade classes with the exception of Band. The modification of extra days for assignment completion was reduced from 10 days to 5 days. A training plan was developed for Student's \*\*\* grade teachers concerning aspects of Student's disability and learning style. The ARDC agreed that individual direct speech therapy was not necessary for Student. As of 3/21/03, by the end of the fourth grading period, Student was passing all of his academic classes. This ARDC recessed to give Parent time to review documentation. R-2, R-15; Tr. 430-32.
38. Student's ARDC re-convened on 3/26/03, approved Student's IEP for the remainder of \*\*\* grade, and agreed to meet later to consider certain issues for the \*\*\* grade IEP. Parent signed consent for Student's re-evaluation. R-15.
39. The assignment and communication notebook created and maintained in Student's IEP was used during much of his \*\*\* grade year, for communicating various information between home and school, and also to study lab. Not all Student's assignments got written in the notebook. Student had difficulty organizing the notebook, and from time to time lost assignments and other materials from the notebook. R-27, 31.
40. Parent agreed and consented for Student to participate in a band trip to South Padre Island in April 2003. Student did participate in this trip, and DSISD arranged to have his medication administered during the trip. The band director in charge of this trip had received training in Student's disability. R-25.

41. During the April 2003 band trip, \*\*\*, The band director phoned Parent directly \*\*\*, and Parent was able to confer \*\*\* concerning Student's disability. Parent traveled to \*\*\* and incurred travel expenses. \*\*\*. Such discretion had been acknowledged in parent and student consent forms. Student suffered no academic or disciplinary consequence from \*\*\* as a result of the \*\*\*, nor did DSISD propose any change of placement. R-25; P-29; Tr. 180-205, 249-250, 438-439, 710-713, 756, 894.
42. Student's ARDC convened on 5/15/03 to discuss the annual IEP, private tutor reimbursement, and staff training. Parent, however, pressed the other Committee members to discuss the band trip \*\*\* and allow Student to present his version of the \*\*\*. After some discussion, \*\*\* representatives refused because they did not consider the \*\*\* to involve any IEP issue. Parent had Student leave the meeting. \*\*\* suggested mediation to try and resolve parent concerns. Parent refused mediation, and demanded to confront the Committee about the \*\*\*. The discussion became emotional, and DSISD discontinued the meeting. R-19; Tr. 189-193, 441-442, 891-893.
43. Support from a note-taking scribe, as a modification in Student's IEP, was made available to Student in his academic classes during the 2002-03 school year. Tr. 597-603, 874-875.
44. By letter dated 5/19/03 Parent, through her advocate, complained to DSISD concerning the \*\*\*. Parent complained that \*\*\* failed to inform \*\*\* of Student's special education needs and "handicaps," particularly his communication and comprehension deficits; and failed to intervene with the \*\*\* "in accordance with the prescribed requirements in the IEP and federal law." Parent sought reimbursement of her time and expenses dealing with the \*\*\*, as well as money damages. P-29.
45. Student's ARDC met on 7/22/03 at parent request to discuss accommodations for the band camp the following week. Parent was represented by counsel at that meeting. DSISD scheduled accommodations of restroom access when needed, and home health service to administer medication. Band schedules and information were to be included in Student's notebook. The \*\*\* band director reviewed Student's modifications, made arrangements for training other band directors, and developed procedures under which student accommodations would be distributed to band chaperones pursuant to release of information. Parent agreed to these accommodations. Parent continued to disagree with DSISD over DSISD's responsibility for \*\*\* actions and other matters during the April 2003 band trip. Parent submitted a parent addendum to the ARDC notes of deliberations. Student attended the summer 2004 band camp and did fine. R-19; Tr. 448-449.
46. Student's ARDC that met on 3/21/03 and re-convened on 3/26/03 increased Student's special education support time for \*\*\* grade, by adding study lab and study skills classes. All the Committee members including Parent agreed with this change. The ARDC on 7/22/03, where Parent was represented by counsel, discussed accommodations but did not revisit the \*\*\* grade schedule. The 7/22/03 ARDC recessed in agreement. Parent submitted corrections to the minutes, that did not address Student's \*\*\* grade class schedule. R- 15, R-17, R-19.
47. Student underwent a psychiatric evaluation for social security with Dr. \*\*\*, M.D., on 8/15/03. Dr. \*\*\* conducted a mental status interview with Student and took history information from Parent Dr. \*\*\* did not review Student's educational records, or consult

with Student's teachers or other school staff. Dr. \*\*\* diagnosed Student with "ADD" and "Specific Developmental Learning Disorders (supposedly five identified)." Dr. \*\*\* did not make recommendations for interventions with Student in the educational setting. P-9; Tr. 388-404.

48. Student's ARDC met on 8/18/03 to discuss Student's \*\*\* grade English IEP and modifications, it being noted that Student had passed \*\*\* grade and earned all his \*\*\* grade credits. This ARDC added resource support for Student in English and math. The ARDC, including Parent, agreed to the schedule change adding resource support. R-20.
49. Dr. \*\*\* reported findings of Student's Full and Individual Evaluation on 9/4/03. In addition to administering tests, Dr. \*\*\* obtained input from the parent, and from Student's classroom teachers including teacher rating scales. \*\*\* used an intelligence test, specifically the Wechsler Intelligence Test for children Third Edition ("WISC"). Student tested average for non-verbal ability and low-average for verbal ability, reflecting weakness in vocabulary, attention, and concentration. Student tested significantly below average for academic skills of math fluency, spelling, writing samples, and writing fluency. Dr. \*\*\* recommended special education services including assistive technology for word processing, modifications such as additional time to complete assignments, and extra support of content mastery or resource class for math, written expression, and language arts. R-21.
50. Dr. \*\*\* conducted a Speech and Language evaluation of Student and reported the results on 9/5/03. Based on observation, testing and teacher information Dr. \*\*\* characterized Student as having mild expressive language deficit, for which he had developed some compensatory strategies, and did not recommend speech and language therapy. R-23.
51. Drs. \*\*\* and \*\*\* both used a variety of nondiscriminatory assessment tools in assessing Student, obtained and considered information from the parent and from current classroom teachers, used measures that were valid for the intended purpose, and possessed ample training to properly administer the procedures they used. They gave tests specifically developed to assess Student's disabilities, and did not utilize procedures that would give invalid results because of those disabilities. Their evaluations were comprehensive enough to address all educational questions within the scope of their expertise, and were relevant to Student's areas of educational need to be addressed by the IEP or through the general curriculum. Their conclusions were drawn from a variety of relevant data sources. R-21, R-23; Tr. 467-583, 775-800.
52. Student's ARDC met on 9/24/03 to go over Student's math IEP and review assessment. Parent objected to Dr. \*\*\*'s assessment complaining that the WISC test \*\*\* used was inaccurate, was inappropriate for Student's disabilities because it is "language based," and was invalid because of a 10-point discrepancy between the verbal and nonverbal scores. Parent also believed the report contained errors including listing Student's condition as ADD instead of ADHD. Parent requested an independent evaluation and an immediate decision from the District on this request. DSISD wanted more time to consider and so did not immediately grant or deny the request. R-24.
53. In the 9/24/03 ARDC meeting Parent also objected to Dr. \*\*\*'s report complaining that use of the picture-vocabulary test was inappropriate, that \*\*\* did not discuss the parent's disagreement with \*\*\*'s prior testing, and that outside speech language pathologists had

raised questions about \*\*\*'s report. Parent requested an independent speech and language evaluation. R-24.

54. DSISD's attorney phoned Parent during the week following the 9/24/03 ARDC meeting to communicate that DSISD would not provide the two independent evaluations requested, but rather would defend DSISD's evaluations in the pending due process hearing . Tr. 129-135.
55. Parent obtained a private psychological evaluation of Student from \*\*\*, Ph.D., an unlicensed school psychologist under supervision of licensed psychologist \*\*\*, Ph.D. Dr. \*\*\* conducted testing with Student, reviewed his education records as provided by Parent, and interviewed Parent. She did not interview or obtain information from Student's classroom teachers or other school staff. Dr. \*\*\* reviewed Dr. \*\*\*'s report on Student and expressed concern about the intelligence test Dr. \*\*\* chose, but did not state that \*\*\*'s testing was invalid. P-11; Tr. 344-388, 785-790.
56. Dr. \*\*\* was of the opinion that Student's cerebral palsy, language disorder, and ADHD, made it preferable to choose tests less dependent on language and response speed. Dr. \*\*\*'s testing yielded scores indicating average intellectual ability, with average verbal abilities and above average non-verbal abilities. Dr. \*\*\*'s academic testing indicated a significant ability-performance discrepancy in written expression, and evidence of difficulty in basic reading skills. Dr. \*\*\* recommended special education with modifications of additional time on tests, scribe assistance for written work, tapes or copies of lecture notes, accommodations for slow performance of oral and written work, specialized dyslexia assistance, and certain assistive technology to assist with reading. Dr. \*\*\* also opined that Student qualified for use of books on tape, and would receive benefit from this in terms of his comprehension. P-11; Tr. 344-388.
57. Parent obtained an independent speech-language evaluation of Student from \*\*\*, M.S., the results of which were reported on 11/16/03. \*\*\* performed clinical observations and administered tests. She did not obtain information from Student's teachers or other school personnel, or review Student's educational records. \*\*\* gave some of the same tests that Dr. \*\*\* had administered less than six months previously. One of those tests should not have been re-administered within six months. \*\*\* and \*\*\* reported generally similar findings, but \*\*\* described Student having more serious deficits in some areas than \*\*\* did. \*\*\* and \*\*\* made similar recommendations, with the exception that \*\*\* recommended delivery of both direct and consultative speech therapy for Student. P10; Tr.409-411, 512-513.
58. Student passed all his \*\*\* grade classes and advanced to \*\*\* grade for the 2003-04 school year. R-1.
59. The school principal at \*\*\* investigated complaints from Parent regarding implementation of Student's modification of reduced assignments, and confirmed that assignments had been reduced. R-37; Tr. 873.
60. One of Student's note-taking scribes tried to get Student to convert his hand dominance in writing. Another teacher made an inappropriate comment when correcting Student in class. \*\*\* administration took action regarding both \*\*\*s. Tr. 955-956; 994-995.
61. Student's \*\*\* grade teachers at \*\*\* received specific training concerning Student's disabilities and the implementation of his IEP, including viewing the Fat City tape and

meeting with the instructional supervisor and speech pathologist concerning his communication and other needs. Student presently has access to a note-taking assistant when he needs help. He has an assignment notebook, but resists using it and has not used it consistently. Student is passing his \*\*\* grade classes, earning credits toward graduation, and showing progress in his communication and social skills. Tr. 206-207, 233-234, 1028-1054.

62. During \*\*\* grade Student has sometimes used his assignment notebook to get information about pending assignments to his study skills class where he receives assistance. When Student has resisted or failed to make use of the assignment notebook, coordination between the parent, the folder teacher, and the study skills teacher has taken place. Student requires continued support in keeping up with assignments and using the assignment notebook. Generally Student does better work when support and direction are provided. Although a good deal of communication has taken place back and forth between Parent and \*\*\* staff, Parent did encounter a significant delay in being able to schedule a meeting with one of Student's \*\*\* grade teachers. P-25, P-28, P-29; Tr. 153-157, 210-211, 1060-1064.
63. Regarding Student's ARDC meetings, on 3/22/02, DSISD did not bring counsel and Parent did not bring her parent advocate. At the 8/29/02 meeting, Parent brought her advocate, that being the same advocate who assisted Parent in this due process hearing. DSISD did not bring counsel. Petitioner's advocate in the 8/29/02 meeting cited DSISD representatives to laws concerning reassignment, and demanded "evidence" of certain contentions by DSISD. On 9/5/02, Parent brought her advocate to the ARDC, and the advocate lodged Petitioner's demand for reimbursement of private teaching services. DSISD did not bring counsel to that meeting. Parent, in correspondence to the principal at \*\*\*, threatened litigation on 4/2/02 and 9/4/02. Parent brought her advocate to the 10/4/02 ARDC meeting, and the advocate discussed Petitioner's understanding about DSISD's legal obligation regarding Student's assignment notebook. DSISD did not bring counsel to that meeting. Parent attended the 10/14/02 ARDC meeting without her advocate, and DSISD did not invite counsel. Legal issues, as such, were apparently not discussed in that meeting. DSISD brought counsel to Student's ARDC on 11/8/02, at which meeting Parent and her advocate were also present and discussed Petitioner's complaint that DSISD had failed to implement Student's IEP, and discussed Petitioner's reimbursement claim and other legal matters. R-1, R-3, R-5, R-6, R-7, R-9, P-12

## DISCUSSION

IDEA requires among other things that an eligible student's IEP be developed in accordance with prescribed procedures, be delivered in a collaborative and coordinated manner by key "stakeholders," and produce meaningful academic and non-academic benefits. Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 247-48 (5th Cir. 1997). A school district's proposed IEP and methodology are presumed to be appropriate. The parent in a case such as this has the burden to prove by a preponderance of evidence that the student's IEP was not developed according to IDEA procedures, or that the IEP as implemented did not provide the student with a free appropriate public education ("FAPE") in the least restrictive environment. Tatro v. State of Texas, 703 F.2d 823 (5<sup>th</sup> Cir. 1983). A school district's substantial failure to satisfy IDEA's substantive or procedural requirements may, if proven, merit prospective or

compensatory relief as necessary to provide FAPE. Burlington Sch. Comm. v. Department of Educ., 471 U.S. 359 (1985); Parents of Student W. v. Puyallup Sch. Dist. No. 3, 21 IDELR 723 (9<sup>th</sup> Cir. 1994).

Petitioner's complaints allege DSISD's failure to implement IEP modifications and services in a coordinated and collaborative manner, and DSISD's failure to permit meaningful parent participation in the IEP process. These complaints state violations of IDEA procedural requirements. IDEA places strong emphasis on procedural compliance. See Board of Educ. v. Rowley, 458 U.S. 176 (1982); Hall v. Vance County Board of Educ., 774 F.2d 629 (4<sup>th</sup> Cir. 1985). But courts have clarified that procedural defects deny FAPE only if they result in the loss of educational opportunity to the eligible student, or seriously infringe the parent's opportunity to participate in the IEP development process. See, e.g., W.G. v. Board of Trustees of Target Range School Dist. No. 23, 960 F.2d 1479 (9<sup>th</sup> Cir. 1995). For example, in Gillette v. Fairland Board of Educ., 725 F.Supp. 343 (W.D. Ohio 1989), a federal district judge upheld a state hearing officer's decision denying relief as a consequence of the school's failure to implement portions of the student's IEP, because "a significant part" of the student's IEP was followed. Furthermore, the student's grades were adequate to pass, and to advance to the next grade. The district judge affirmed that the petitioner was not denied FAPE, and was not entitled to relief for the IEP omissions., Id. at 347.

The Fifth Circuit, which is the federal court of appeals charged with interpreting IDEA for Texas judges and hearing officers, used the Gillette reasoning when it denied relief to a student whose speech services were provided in the summer, and not delivered earlier in the school year as scheduled in the IEP. Houston I.S.D. v. Bobby R., 200 F.3d 341 (5<sup>th</sup> Cir. 2000). In that case, no educational harm occurred because the school had substantially implemented the IEP, and the student showed academic progress that was "more than trivial." Id. at 349. Even if the student had received only trivial benefit in speech, he still would not be entitled to IDEA relief because he received meaningful benefit in other academic areas. "[I]t is not necessary for [the student] to improve in every area to obtain an educational benefit ... IDEA does not require maximization of a disabled student's educational potential." Id. at 350 (emphasis in original). See also Bend-Lapine School Dist. v. T.W., 28 IDELR 734 (9<sup>th</sup> Cir. 1998). The Fifth Circuit explained again, in Adam J. v. Keller I.S.D., 328 F.3d 804 (5<sup>th</sup> Cir. 2003), that IEP procedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of educational opportunity. Texas hearing officers have applied Bobby R. to deny relief for IEP implementation omissions, where the evidence did not establish denial of educational benefit. Diego C. v. Corpus Christi I.S.D., 104 LRP 8727, 005-SE-0903 (SEA TX 2003) (delay in delivering assistive technology); Michelle M. v. Austin I.S.D., 102 LRP 13126, 083-SE-1101 (SEA TX 2002) (omission of testing modifications); James A. v. Spring Branch I.S.D., 102 LRP 10804, 304-SE-0601 (SEA TX 2001) (omission of alternate testing, regular counseling reports). Jared M. v. Killeen I.S.D., 39 IDELR 21, 125-SE-1102 (SEA TX 2003) (omission of behavior plan requirements).

The Petitioner bears a considerable burden of proof to establish both that procedural violations occurred, and that those violations were substantial insofar as they either caused a denial of educational benefit to Student, or interfered with his parent's right to participate

meaningfully in IEP development. Tatro v. State of Texas, 703 F.2d 823 (5<sup>th</sup> Cir. 1983).; Bobby R., supra. I will address, according to the Bobby R. standard, Petitioner's complaints, in the manner in which these were framed for purposes of the pre-hearing orders.

### **Failure to implement Student's plan for transition to \*\*\* school**

DSISD and Parent put much effort into planning Student's transition to \*\*\* school. The plan required DSISD to provide twelve full school days of training at \*\*\* for the special education teacher who would serve as Student's folder teacher at \*\*\*, and to provide a preliminary orientation meeting between Student's \*\*\* special education teacher and his prospective \*\*\* teaching staff, all during spring 2002. Those activities were done. Student's IEP also scheduled Student's \*\*\* teacher to meet with his \*\*\* teachers right before \*\*\* grade classes began and give them information concerning Student's needs and related academic issues. As it turned out, however, Student's \*\*\* teacher did not meet with \*\*\* staff until September and October 2002. Student's \*\*\* folder teacher who had been trained for 12 days at \*\*\* met with the other \*\*\* teachers before classes started, and distributed Student's modifications.

Parents are not legally entitled to choose specific teachers or other instructional personnel to work with an eligible child. As interpreted by the federal Office of Special Education Programs ("OSEP"), IDEA allows school administrators to handle personnel assignments, although the IEP team is not precluded from doing this. Letter to Wessels, 16 IDELR 735 (OSEP 1990). Student's ARDC chose to identify Student's \*\*\* special education teacher by name as a person to provide staff training in the summer before \*\*\* grade classes began, but DSISD was unable to make the teacher available. This was contrary to Student's IEP transition plan. Nevertheless, I find the actions DSISD took to fulfill the transition plan, in the absence of the \*\*\* teacher, were appropriate. The teacher who provided this training was already listed in the transition plan as one of the persons to provide the training. The teacher had already received 12 days of training from Student's \*\*\* special education teacher specifically concerning Student's needs. Apart from the \*\*\* teacher's absence, evidence does not establish any further deprivation of Student's IDEA rights, in regard to how DSISD delivered this training.

There were "hiccups" in implementing Student's \*\*\* grade modifications, particularly during the first weeks of school. Assignment information was not sent home concerning a pending test, and concerning certain vocabulary words. Textbooks for home use were not provided right away. Parent also expressed concern about note-taking assistance not being available consistently in all classes.<sup>2</sup> Petitioner generally alleged other incidents of non-implementation, and blamed these on inadequate staff training. When Parent brought her concerns to the attention of \*\*\* administrators, DSISD convened ARDC meetings on 8/29/02 and 9/5/02 to plan further training. Student's ARDC devoted considerable time to hearing and addressing parent concerns. It is important to keep in mind that these meetings convened within the first three weeks of school, more or less. Despite any omissions shown by the record, or alleged by Petitioner, the evidence establishes that Student made good grades in his first grading

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<sup>2</sup> This modification was left to teacher discretion in the IEP, so it is unclear whether there was an omission, or a question regarding allowable teacher judgment. Petitioner has the burden of proving alleged violations by a preponderance of evidence.

period, passed all his first semester classes, passed \*\*\* grade, was advanced to \*\*\* grade at the conclusion of the 2002-2003 school year, and is now passing \*\*\* grade classes.

Petitioner invites the inference that because DSISD agreed to provide additional training for Student's \*\*\* grade teachers concerning his IEP services and modifications after the 8/29/02 ARDC meeting, and made certain other admissions of record, DSISD tacitly admitted that training prior to that date was inadequate to prepare Student's teachers to deliver appropriate services.<sup>3</sup> Petitioner would have me stretch this evidence too far. The training provided prior to 8/29/02 may have seemed inadequate in hindsight, and Student's fall 2002 ARDCs did schedule more training for \*\*\* teaching staff. But the most that can be inferred in support of Petitioner's contention is that the spring 2002 ARDCs at \*\*\* underestimated training needs of teaching staff at \*\*\*. Petitioner did not challenge in this hearing the appropriateness of Student's IEP and transition plan, as those were developed in spring 2002. The spring 2002 ARDCs reached full consensus on the content of Student's transition plan. Training scheduled by the 8/29/02 and 9/5/02 ARDCs was adequate to compensate for any prior training omissions. And in any event, the evidence establishes that Student received meaningful benefit in fall 2002, and throughout \*\*\* grade.

Much rhetoric during the hearing involved accusations that \*\*\* let Student down, but the bottom line is that DSISD provided sufficient special education and related services at \*\*\* for Student to consistently receive passing grades, advance from grade to grade, and enjoy successful participation in social and extracurricular activities.<sup>4</sup> I find that omissions that occurred in the implementation of Student's IEP were not substantial within the meaning of IDEA. They did not interfere with Student's receipt of meaningful educational benefit in \*\*\*. \*\*\* responded promptly and appropriately to parent concerns about staff training in fall 2002, and other personnel matters. Petitioner's claim for reimbursement of private tutoring is not supported by a preponderance of evidence.

Also, IDEA requires a parent who wants public reimbursement of private school costs to give the public school notice that the parent is rejecting the school's placement, and intends to enroll the child in private school at public expense. The law treats home schooling as a type of private school. Absent such notice, IDEA at 20 U.S.C. §1412(a)(10)(C) states that the public school may reduce or deny requested reimbursement of private school costs:

if ... 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 ... including stating their concerns and their intent to enroll their child in a private school at public expense; or ... 10 business days ... prior to the removal of the child from

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<sup>3</sup> For example the \*\*\* principal wrote Parent on 9/4/02 (P-17) that Student's transition plan in retrospect had not been "comprehensive enough to meet Student's unique needs."

<sup>4</sup> Parent expressed belated concern at hearing about Student needing increased special education support in \*\*\* grade, raising the inference that this resulted from DSISD's alleged failures and omissions. The current placement was not challenged in Petitioner's original complaints. The evidence shows that Parent consistently agreed with all Student's \*\*\* grade schedule changes throughout several ARDC meetings in which she could have made objections. I can only infer from these events that Parent accepted the current placement as appropriate.

the public school, the parents did not give written notice to the public agency [of their intent to seek reimbursement] ....

DSISD did not receive the notice required by IDEA. Even so, exceptions to the notice requirement must be granted if the parent is illiterate or cannot write English, if compliance with the notice requirement would cause physical harm or serious emotional harm to the child, or if the school prevented the parent from providing notice or failed to advise the parent of procedural safeguards. There is not a preponderance of evidence that any of these exceptions applies in Student's case.

### **Failure to allow Parent and Student to participate in Student's May 2003 ARDC meeting**

Student's ARDC convened on 5/15/03 to discuss program issues and Petitioner's reimbursement claim. However, Parent started presenting Student's and her accounts of a recent band trip \*\*\*, and arguing that the \*\*\* resulted from DSISD's failure to implement Student's IEP. After some discussion, \*\*\* representatives decided that the \*\*\* was a law-enforcement matter and not the appropriate subject of an ARDC meeting. Parent had Student leave the meeting. \*\*\* representatives concluded the meeting after Parent lost her temper. \*\*\* representatives proposed mediation, which Parent refused.

Petitioner's claim that DSISD denied to herself and Student the right to participate meaningfully in this particular ARDC requires examination initially of whether Parent had any right under IDEA to insist that the other Committee members discuss her issues about the April 2003 band trip \*\*\*. This entails consideration of what IDEA issues, if any, Parent properly raised according to facts then known to the parties. That will help clarify the appropriateness of DSISD's refusal to consider Parent's further contentions during the 5/13/03 meeting, as well as Parent's claim, asserted during the evidentiary hearing, for reimbursement of costs associated with the band trip \*\*\*.

IDEA gives parents the right to engage as equal participants in IEP meetings. 34 C.F.R. 300.501. According to interpretations by the United States Department of Education, equal participation means participating in the discussion of the child's need for special education and related services, and joining with the other members in deciding what services are necessary to provide FAPE. 34 C.F.R. Part 300, Appendix C. Thus, the scope of IEP team discussions can be limited accordingly. The parent has a right to bring up any concern within that scope of issues. If the parties disagree, and this includes disagreeing about parent participation rights, either the parent or the school district can request a recess of the meeting, request mediation, or initiate a hearing. 34 C.F.R. §§300.506, 300.507; 19 T.A.C. §89.1050(h)(1).

In this instance, during the April 2003 band trip at \*\*\*, \*\*\*. DSISD's band director, who was trained in accordance with Student's IEP and thus knew of Student's disability and needs, took steps to ensure Parent was contacted quickly so she could communicate confidential information about Student to \*\*\*. Band chaperones were assigned to take responsibility for Student in order to minimize \*\*\*. The band director did \*\*\*, not as a disciplinary action under

the student code of conduct but instead pursuant to his discretionary authority for supervising the band trip. DSISD did not propose disciplinary action against Student.

I do not agree with Petitioner that this sequence of events implicates any IDEA issue. First, IDEA safeguards as a matter of law cannot be invoked to \*\*\*, 34 C.F.R. §300.529. DSISD had no authority to \*\*\*. And this individual could have called \*\*\*, even knowing about Student's disability. It is too speculative to second-guess what this individual might have done under different circumstances, and it is not relevant. IDEA further explains that once \*\*\*, IDEA safeguards are not available to challenge \*\*\*. This is true regardless of whether school personnel or, as in this case, a private citizen initiated such action. 20 U.S.C. §1415(k)(9); 34 C.F.R. §300.529. IDEA does not purport to create any basis for either parents or school authorities to \*\*\*. *Id.* DSISD did \*\*\*, but the evidence establishes this was not a disciplinary action, nor did it involve any change in Student's program or placement, or a significant denial of his access to extracurricular activities. DSISD did not propose any disciplinary action, placement change, or change in Student's access to extracurricular activities following the \*\*\*. Petitioner brought no convincing evidence to establish that any action by the band director, or any other school employee or band chaperone, could have further mitigated the \*\*\*. Both leading up to this \*\*\* and subsequently, Student exercised consistently his opportunity to participate in extracurricular band activities and did so without difficulty. After reviewing the lengthy record in some detail, I find that this \*\*\* involved no more than an isolated occurrence, and plainly was not part of any behavior pattern on Student's part that should have triggered ARDC concern, much less more restrictive treatment.

In consideration of the foregoing, DSISD was correct in refusing to discuss the \*\*\* at Student's 5/15/03 ARDC meeting. Alternatively, even assuming that the \*\*\* was an appropriate topic of discussion, DSISD took appropriate steps by offering mediation, when ARDC members reached an impasse and were unable to reach agreement about whether the \*\*\* involved any FAPE issue for discussion.

DSISD representatives in other ARDC meetings at \*\*\* before and after 5/15/03 received and considered parent input, including input specifically concerning band. Student's participation in other band activities was appropriate and beneficial insofar as the evidence discloses. Taking the record as a whole, the parent was not effectively shut out of ARDC participation at \*\*\*. Nor was Student denied FAPE in connection with band activities in general, the April 2003 \*\*\* in particular, or the attempted 5/15/03 ARDC. Petitioner is not entitled to reimbursement for expenses in connection with the \*\*\*, or relief in connection with the 5/15/03 meeting.

Alternatively, according to undisputed evidence the 5/15/03 ARDC deliberations became highly emotional, to the point that the ARDC was unable to discuss the substance of any legitimate IEP concerns. The need for emotional ventilation may be understandable under some circumstances. Still, such ventilation does not constitute participating in the discussion of the child's need for special education, or deciding what services are necessary for the provision of appropriate education, within the meaning of regulations concerning IEP meetings. The 5/15/03 ARDC's inability to discuss, as a Committee, substantive issues concerning Students' IEP

establishes another appropriate reason for DSISD to have concluded the meeting. \*\*\* representatives' proposal of mediation also was consistent with IDEA regulations.

**Failure to ensure appropriate opportunities for Student to participate in extracurricular activities.**

Failure to provide timely information concerning social and extracurricular activities. IDEA regulations at 34 C.F.R. §300.306 require that school districts take steps to provide extracurricular activities for eligible students on an equal-opportunity basis. See Charles J. v. University Interscholastic League, et al., 103 LRP 24379, 159-SE-0103 (SEA TX 1993). IDEA's related least restrictive environment provisions address access for eligible students to interaction with non-disabled peers in such activities. 34 C.F.R. §§300.553.

The greater weight of evidence establishes that, apart from the April 2003 \*\*\*, Student was an active and successful participant in all aspects of band in \*\*\*. Petitioner offered no evidence tending to show that Student was substantially denied any opportunity to participate in extracurricular band, or any other available extracurricular activity. Petitioner expressed concern about information being delivered from school to home regarding scheduling of various social and extracurricular activities at \*\*\* for Student to participate in. \*\*\* took steps to address parent concerns about making sure that information was provided and accessible to Student on an equal-opportunity basis. Petitioner did not raise any objection during the time at issue in this case to Student's access to services in the least restrictive environment. There is no evidence of any significant interference or omission on the part of DSISD in regard to Student's opportunity to participate in any extracurricular activity at \*\*\*.

Failure to provide adequate supervision during field trips by someone familiar with Student's language disorder. The only evidence Petitioner brought in regard to this issue concerned the spring 2003 \*\*\*, where Petitioner alleged that DSISD's lack of familiarity with Student's communication needs led to the unfortunate events already described. Contrary to Petitioner's allegations, the evidence establishes that Student's band director received training concerning Student's needs and instructional modifications, and passed on relevant information to band chaperones on the trip. There is not a preponderance of evidence, nor indeed any evidence that I can ascertain, that DSISD failed to provide appropriate supervision of Student during the band trip. As I have stated, I am unable to identify from the evidence any IDEA issue raised by the circumstances of the band trip.

Failure to implement Student's assignment notebook to provide his parent with notice of school activities and field trips. The preponderance of evidence tends to show that \*\*\* took a variety of steps beginning in October 2002 to make sure that Student's parent was informed regarding upcoming school activities and field trips. Instances when omissions occurred were limited, involving for example failure to inform the parent of certain activities during Homecoming Week. And even though Student was not uniformly enthusiastic about using his assignment notebook as intended, when DSISD was made aware of omissions, the staff responded so that the parent was provided with the requested information. There is not a preponderance of evidence that omissions were substantial, or deprived Petitioner of any

procedural or substantive IDEA rights regarding least restrictive environment or opportunities to participate in extracurricular activities.

### **Failure to provide books on tape and reduced classroom assignments as required by Student's IEP**

Student's IEP has never required provision of taped texts or books on tape, for reasons that are supported by the evidence. DSISD did agree to assist in obtaining talking books for Student, as of the 9/5/02 ARDC, and to investigate his need for talking books or taped texts in the assistive technology assessment. But the agreement to assist in obtaining talking books was not an IEP service. The report of assistive technology assessment contained no recommendation for using taped texts as an IEP service or modification. Indeed, no expert report within the scope of Petitioner's present complaints contains such a recommendation.<sup>5</sup> Absent any IEP requirement for taped texts or talking books, Petitioner's complaint in regard to this issue lacks merit.

Student's IEP does require reduced classroom assignments. I have searched the record for some convincing evidence that the modification of reduced assignments was not implemented, but find no evidence that directly confirms the parent's allegation.<sup>6</sup> The evidence does establish that Student's teachers were aware of his modifications when school started, and that their knowledge of the modifications was supplemented by additional training and consultation following the 8/26/02 ARDC meeting. Teachers had a detailed statement describing how to implement this particular modification. DSISD witnesses who were directly concerned with Student's education during the time in question testified that his modifications generally were implemented. Petitioner has failed to sustain his burden to show a substantial failure of DSISD to carry out the scheduled modification of reduced classroom assignments, or a denial of educational benefit to Student.

### **Failure to consistently provide a note-taking "scribe" for Student in all classes as required by his IEP**

Student's IEP modifications provided for note taking assistance in academic classes, specifying that Student must attempt to take notes himself, but a copy of teacher notes would be provided and note-taking help from the inclusion teacher also made available. The evidence tends to show that inclusion teacher assistance was available as scheduled for Student at all relevant times, and that the use of substitute teachers for this function - a concern to Student's parent - was minimal. Documents showing Student's own note-taking efforts, particularly early in his \*\*\* grade year, establish that this modification was more likely than not followed to the letter. Student's notebook contains a fair amount of doodling and drawing, more so apparently earlier in the school year, but any inference from this concerning his IEP implementation or educational progress is speculative. There was not a preponderance of evidence that omissions

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<sup>5</sup> Dr. \*\*\* opined that Student would be eligible for the talking books program, but did not recommend taped texts as an IEP service or modification.

<sup>6</sup> Parent testified (Tr. 118-119) there was one class where Student's assignments were not reduced but the record does not preponderate to establish what class this was. It also appears from the testimony that Parent chose not to request an ARDC to address this problem because of concern for Student's possible embarrassment over receiving reduced assignments.

in the provision of teacher notes occurred to a substantial extent, or that Student was denied educational benefit by virtue of how the modification of note-taking assistance was carried out.

### **Failure to insure attendance at Student's ARDC meetings of personnel requested by the parent**

Petitioner complains that the District violated IDEA procedures by failing to have Student's DSMS special education teacher attend the 11/8/02 ARDC meeting. Petitioner bases his argument on Parent's understanding that, because the 11/8/02 meeting was a continuation of the 10/4/02 meeting, which Parent claims to have wanted recessed, it was necessary for DSISD to have the same team members, including the \*\*\* teacher, present on 11/8/02,<sup>7</sup> but contrary to Petitioner's contention, the ARDC minutes establish that the 11/8/02 meeting was not a continuation meeting. Parent was offered a recess at the 10/4/02 meeting and declined it. Parent later submitted proposed written corrections to the 10/4/02 ARDC minutes, but did not seek therein to correct the statement in the minutes to the effect that she had declined a proffered recess, or to argue for a belated request., and the district did not ask for a recess on 10/4/02. Thus, the 11/8/02 meeting was not a continuation meeting.

Addressing the \*\*\* teacher's absence from the 11/8/02 meeting, IDEA regulations list the mandatory participants for IEP meetings at 34 C.F.R. §300.344. A teacher from the child's previous grade and campus is not a mandatory participant. Federal regulations at 300.345 facially do not give parents an automatic right to demand attendance of school employees other than those listed in 300.344, but this regulation also provides that the IEP team "may" include other persons is at "the discretion of the parent or the agency." The discretionary-attendance provision is meant to ensure involvement by non-mandatory participants who are brought to the meeting by the district or the parent and who have something relevant to contribute. See 34 C.F.R. §300.344 and Comment.

Omission on the part of one party to bring someone to an IEP meeting who is not a mandatory participant does not violate any express IDEA right of the other party, but it can be inferred that such an omission might preclude effective participation of a party, if the non-mandatory participant's attendance is otherwise essential to the business of the IEP meeting. See Taylor v. Board of Educ., 558 IDELR 243 (NDNY 2986). In this sense, non-mandatory participants may nevertheless be legally required participants if their knowledge is essential to deliberations about an IEP issue on the agenda. See id. Administrative interpretation characterizes these persons as persons who have an "intense" interest in the child. 34 C.F.R. Part 300, Appendix C.

DSISD was not legally required as of 11/8/02 to ensure the \*\*\* teacher's participation in Student's ARDC. This individual obviously was not Student's teacher at that time. The individual already had trained Student's \*\*\* folder teacher, consulted with some \*\*\* staff in spring 2002, and completed two consultations with Student's \*\*\* teachers in fall 2002. As of

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<sup>7</sup> The Commissioner's Rules explain that when ARDC members are unable to reach agreement the party who disagrees is entitled to a single ten-day recess during which the parties can regroup and reconsider. 19 T.A.C. §89.1050(h)(1). The need for a recess has to be decided before the non-consensus meeting ends, since the continuation date must be agreed upon and specified before the recess. 19 T.A.C. §89.1050(h)(3). The rules at §89.1050(h) do not require the identical IEP team membership in the continuation of a recessed ARDC meeting.

11/8/02, the individual was designated only as someone potentially available to consult. The teacher's interest at this juncture, roughly ten weeks into Student's \*\*\* grade year, was far from "intense," as the regulatory interpretation states it. Nor, according to the ARDC notice and deliberations, does it appear this teacher was necessary for the resolution of any issue before the Committee, concerning appropriate services for Student or the provision of FAPE at \*\*\*. Petitioner has not shown by a preponderance of evidence that DSISD violated Petitioner's IDEA rights by refusing to treat the 11/8/02 ARDC meeting as a continuation meeting, or failing to have Student's \*\*\* special education teacher attend that or any subsequent meeting. Nor did the \*\*\* teacher's refusal to engage in private communications with the parent about Student's program at \*\*\* without \*\*\* staff present violate any IDEA right of the parent.

### **Failure to provide for meaningful parent participation in ARDC meetings by inviting DSISD's attorney to influence the parent inappropriately**

Petitioner complains that DSISD's attorney attended ARDC meetings and intimidated the parent in a manner that interfered with parent participation, and also attempted to give the parent legal advice improperly. On the issue of attorney participation, OSEP has taken the general position that attorneys, whether representing parents or school districts, should not attend ARDC meetings. Letter to Diehl, 22 IDELR 734 (OSEP 1995). OSEP bases this position on the policy preference of reducing conflict potential in IEP decision making. OSEP has stated a policy preference, not a legal mandate. OSEP did not support the position articulated in Petitioner's argument to the 11/8/02 ARDC meeting, that a school attorney is never an interested person, and OSEP acknowledged that IDEA does not prohibit either party from bringing counsel to an IEP meeting.

The history of lawyer and advocate appearances, and legal contentions raised in Student's ARDC meetings leading up to the first appearance of DSISD counsel, is illustrative. If a party puts before the ARDC contentions regarding the other party's legal obligations, then it would seem that legal issues, as such, have become part of IEP deliberations. This is not inappropriate or even particularly unusual, given that IDEA involves many legal technicalities. Within the time frame of this case Petitioner, through Parent and his parent advocate, raised legal contentions at ARDC meetings, and subsequently DSISD started bringing counsel. The policy underlying OSEP's caution against lawyers in ARDC meetings is not served, once a party has already begun to introduce contention about legal matters. The record does not establish that DSISD's counsel attempted to intimidate Parent, or to influence her understanding of the law improperly. The record discloses only that counsel asserted DSISD's views about the District's legal obligations vis-a-vis Student and Parent. Parent had the right to bring her advocate, counsel, or both, to Student's ARDC meetings, as did DSISD, regardless of whether the other party had counsel. Diehl, supra. The record establishes that Parent has remained a vigorous advocate for Student's interests in the ARDC process all throughout the time frame at issue in this hearing. Petitioner has not established by a preponderance of evidence that DSISD in bringing counsel to ARDC meetings interfered the ability of Parent to be an equal participant in the ARDC process.

### **Failure to provide appropriate evaluation, and DSISD's counterclaim**

Petitioner complains that evaluation reports of Drs. \*\*\* and \*\*\* are not appropriate, and cites in particular that these reports tend to erroneously minimize the extent and severity of Student's communication disabilities. Parent requested independent educational evaluations because of her disagreement with these evaluations. A parent who disagrees with an evaluation can always obtain an independent evaluation, and can require that the results be considered by the ARDC if the evaluation meets school district criteria, and be presented as evidence in a due process hearing. 34 C.F.R. §300.502(c). The school district may opt to reimburse the independent evaluation at public expense, or to refuse reimbursement and defend the appropriateness of its own evaluation, as DSISD has done in its counterclaim here. 34 C.F.R. §300.502(b)(2) DSISD notified Petitioner without unnecessary delay of its intention to refuse reimburse the independent evaluations requested by Petitioner and defend its own assessment in the pending due process hearing.

When a school district decides to refuse reimbursement for an independent evaluation and defend its own assessment, and the parent pursues outside evaluation at parent expense, the parent can still obtain reimbursement of the outside evaluation by order from a hearing officer. The parent will prevail on such a reimbursement claim, unless the school district proves either that the district's evaluation was appropriate, or the parent's evaluation did not meet school district criteria. Id. School district criteria for evaluations (including independent or outside evaluations) must incorporate all federal requirements for the conduct of evaluations. 34 C.F.R. §300.502(e)(1) and Comment. In this case, it is the federal criteria and not any separate school district criterion that disposes of Petitioner's reimbursement claim.

Federal regulations governing evaluations are found at 34 C.F.R. §§300.530-300.536. These require non-discriminatory testing procedures utilizing the child's native language or other communication mode. §300.532(a). They require, for IEP planning purposes, utilization of a variety of assessment tools and strategies to gather functional and developmental information about the child, including information provided by the parent, and information that is relevant to enabling the child's participation and progress in the general curriculum and determining the content of the IEP. §300.532(b). If tests are used, they must be tailored to assess areas of educational need and not merely designed to provide a single broad intelligence quotient. Tests must be technically sound, validated for the specific purposes for which they are used, and administered properly by trained personnel. §§300.532(c)-(d). If as in Student's case the child has impaired motor or speaking skills, the tests must validly measure such skills. If tests are used that measure other abilities, such as general aptitude or achievement, they must be chosen so that impaired manual or speaking skills do not influence measurement of those other abilities. §300.532(e). The evaluation must be sufficiently comprehensive to address all of the child's special education needs. §300.532(h). If conclusions are reported concerning the child's special education needs, evaluation data must be interpreted to include consideration of information drawn from a variety of sources, including teacher recommendations as well as parent input. §§300.532(b), 300.535; Alexander S. v. San Antonio I.S.D., 39 IDELR 60, 303-SE-0402 (SEA TX 2002).<sup>8</sup>

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<sup>8</sup> When comparing evaluation reports, the presence of different test results, or different inferences derived from test results, does not necessarily mean that one evaluation or the other is inappropriate under IDEA . Student's own evaluations illustrate that different evaluators often obtain

The evidence establishes that the evaluations of Drs. \*\*\* and \*\*\* complied with these federal regulations. Dr. \*\*\* testified about her concern over a WISC score discrepancy in \*\*\*'s results, but did not testify that this invalidated the results, and Dr. \*\*\* established that the WISC is designed to test aspects of performance that are relevant to Student's communication disabilities. In light of \*\*\*'s testimony, \*\*\*'s opinion, that the WISC should not have been used, is not credible. Dr. \*\*\* may have inaccurately recorded Student's type of ADHD medication, but this inaccuracy did not relate to or invalidate \*\*\*'s findings or conclusions in the areas of her evaluation or expertise. Legally, this ends the reimbursement inquiry in DSISD's favor, since the District need only prove that its evaluations met the applicable criteria in order to prevail in its defense, but I also find, in the alternative, that both Ms. \*\*\*'s and Dr. \*\*\*'s evaluations made recommendations concerning Student's purported educational needs, without the benefit of any input from Student's teachers. I have previously held that outside evaluations, insofar as they venture conclusions or recommendations concerning purported educational needs, do not comply with federal standards where no information is obtained from the child's teachers. Alexander S., supra. So the District also prevails because the evidence preponderates that the \*\*\* and \*\*\* evaluations do not satisfy federal criteria, and therefore could not satisfy District criteria.

### **Requested Relief**

There is no question but that public schools must implement the eligible student's IEP. Both school districts and the state education agency must monitor compliance, including when parents raise complaints. Establishing legal liability for the consequences, if any, of IEP omissions, raises issues above and beyond compliance. This is what Bobby R., supra, teaches. Reimbursement requests such as Petitioner asserted require more than a showing of procedural defects. Such requests also require proof of educational harm, interference with effective parent participation in IEP planning, or both.

Petitioner has demonstrated certain omissions by DSISD in the implementation of Student's IEP modifications and services, but Petitioner has not established that Student was harmed educationally. Rather, the evidence shows, and some of Parent's own written and testimonial statements support, that Student's IEP was substantially implemented, and was beneficial. \*\*\* administration was responsive to, and with few exceptions acted promptly to address, concerns Parent brought to the school's attention, and with few exceptions, even considering Student's multiple disabilities, Student has made steady progress in \*\*\* school both academically and socially. Furthermore, Parent has shown herself a committed and forceful participant in Student's educational program at \*\*\*. DSISD has included Parent as an essential and valued member of the IEP team, and has been responsive to her concerns and requests, including requests to convene ARDC meetings.

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somewhat different results, particularly when the student's performance can be variable. What IDEA requires is that evaluators comply with the various regulatory requirements so that their findings will be helpful specifically for educational planning.

My legal conclusion after reviewing four days of often intense testimony, and sizeable volumes of document evidence, is that DSISD substantially implemented Student's IEP, and performed appropriate evaluations. Student has shown meaningful progress both academically and socially. DSISD has treated Parent as an essential member of the IEP team. Student's progress results from collaboration of the key "stakeholders," including Parent, and this is what I believe IDEA drafters intended. My denial of a petitioner's relief request, in this or any other proceeding, should never be interpreted to discourage active parent participation. I believe Student needs for Parent to maintain an active role in his education. My conclusions reflect only that there were certain misunderstandings about how the law regards complaints of this nature.

## CONCLUSIONS OF LAW

1. Dripping Springs I.S.D., is a local education agency and a political subdivision of the State of Texas, and is subject to requirements of IDEA, 20 U.S.C. §1400 et seq., and its implementing federal and state regulations.
2. Student is an IDEA-eligible student to whom Dripping Springs I.S.D. must offer a free, appropriate public education in the least restrictive environment. 20 U.S.C. §1412(a)(1); Board of Educ. v. Rowley, 458 U.S. 176 (1982).
3. Petitioner did not sustain his burden of proof to establish that IEP services provided to Student by Dripping Springs I.S.D. failed to provide Student with meaningful educational benefit in the least restrictive environment. Board of Educ. v. Rowley, 458 U.S. 176 (1982); Tatro v. State of Texas, 703 F.2d 823 (5<sup>th</sup> Cir. 1983).
4. Petitioner did not sustain his burden of proof to establish that Dripping Springs I.S.D. failed to substantially implement Student's IEP in a coordinated and collaborative manner. 20 U.S.C. §§1412(a)(4), 1414(b)(2); Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 247-48 (5th Cir. 1997); Houston I.S.D. v. Bobby R., 200 F.3d 341 (5<sup>th</sup> Cir. 2000).
5. Petitioner did not sustain his burden of proof to establish that Dripping Springs I.S.D. denied Parent's participation or exercise of procedural safeguards in regard to the development or implementation of Student's IEP. 20 U.S.C. §1414(d); 19 T.A.C. §89.1050; Houston I.S.D. v. Bobby R., 200 F.3d 341 (5<sup>th</sup> Cir. 2000).
6. Petitioner did not sustain his burden of proof to establish that Dripping Springs I.S.D. denied Student equal opportunities to participate in extracurricular activities or a placement in the least restrictive environment. 34 C.F.R. §§300.306, 300.553.
7. Dripping Springs I.S.D. satisfied its burden of proof to establish that the challenged evaluations by Drs. \*\*\* and \*\*\* were appropriate. 20 U.S.C. §1414(a).

## ORDERS

In consideration of the foregoing, the following Orders are appropriate.

**IT IS ORDERED** that any and all relief requested by Petitioner herein is **DENIED**.

**SIGNED** this 25<sup>th</sup> day of May 2004.

Finding that the public welfare requires immediate effect of this Decision, this Hearing Officer makes it effective immediately, pursuant to 19 Tex. Admin. Code §157.5(n).



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JAMES N. HOLLIS  
SPECIAL EDUCATION HEARING OFFICER  
FOR THE STATE OF TEXAS

**DOCKET NO. 311-SE-0503**

**Student** § **BEFORE A SPECIAL EDUCATION**  
**B/N/F Parent** §  
§  
**VS.** § **HEARING OFFICER**  
§  
**DRIPPING SPRINGS INDEPENDENT** §  
**SCHOOL DISTRICT** § **FOR THE STATE OF TEXAS**

**SYNOPSIS OF DECISION**

**ISSUE:** Whether Dripping Springs I.S.D. failed to implement Student’s IEP services and modifications.

**CITATION:** 20 U.S.C. §§1412(a)(4), 1414(b)(2); Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 247-48 (5th Cir. 1997); Houston I.S.D. v. Bobby R., 200 F.3d 341 (5<sup>th</sup> Cir. 2000).

**HELD:** For the District.

**ISSUE:** Whether Dripping Springs I.S.D. failed to afford Student’s parent procedural safeguards or denied her right to participate as an equal member of Student’s IEP team.

**CITATION:** 20 U.S.C. §1414(d); 19 T.A.C. §89.1050; Houston I.S.D. v. Bobby R., 200 F.3d 341 (5<sup>th</sup> Cir. 2000).

**HELD:** For the District.

**ISSUE:** Whether Dripping Springs I.S.D. failed to provide Student with a free, appropriate public education in the least restrictive environment.

**CITATION:** 20 U.S.C. §1412(a)(1); Board of Educ. v. Rowley, 458 U.S. 176 (1982)

**HELD:** For the District.

**ISSUE:** Whether Dripping Springs I.S.D. failed to provide Student with a free, appropriate public education in the least restrictive environment.

**CITATION:** 34 C.F.R. §§300.306, 300.553.

**HELD:** For the District.