



12. Failure to conduct an ARD meeting at the request of the parents on October 30, 2008 or November 6, 2008.
13. Interfering with the parent's collaborative participation in the ARD process by discouraging the parents from utilizing an interpreter, from requesting an ARD until evaluations were completed and from requesting an adaptive PE assessment.
14. Failure to maintain ADA compliant playgrounds.
15. Failure to provide the psychological assessment to the parent in the parent's native language.
16. Failure to provide an ARD packet in August 2008 to the parents in their native language, including the minutes and the present levels of performance.
17. Failure to conduct a Functional Behavior Assessment or develop a BIP. Penalizing the student by not allowing inclusion time.
18. Failure to properly consider non-ISD assessments, reports, information, data, and professional recommendations from outside providers.
19. Failure to provide a qualified interpreter at ARD meetings, thereby depriving the parents of the ability to be equal participants in the ARD process.
20. Failure to provide the parent education about the student's disabilities, social work services, assistive technology, therapeutic recreation and music therapy.

Petitioner requested the following as relief:

1. Training, supervision and monitoring of ISD staff that provide direct academic instruction to the student upon return to the ISD.
2. Parent training and educational support related to the student's disability.
3. Assessments or IEE's in the area of assistive technology, music therapy, therapeutic recreation, adaptive P.E., and a psychological evaluation.
4. Ongoing independent review of the students' IEP and BIP by an independent consultant.
5. ISD sponsorship of the student in a specialized summer camp specific to his disability.
6. Parent training on the ARD and complaint process.
7. Sponsorship of the parent in statewide, regional or local conferences specific to the child's disability.
8. Training and supervision of the staff in the implementation of the IEP, BIP and the student's modifications and accommodations.
9. Identification of responsible staff for the implementation of the IEP, BIP and modifications.
10. A functional behavioral assessment.
11. Supplemental supports, aids and services that would enable the student to remain in the Least Restrictive Environment.
12. An order requiring the district to provide qualified interpreters at ARD meetings.
13. An order requiring the district to provide ARD documents, notices and invitations to the parents in their native language.
14. Compensatory special education and related services in all academic areas and speech to compensate for a deprivation of FAPE since March 2005, or in an

- amount deemed appropriate by the Hearing Officer.
15. Representational fees and costs.

Held for Petitioner.

### PROCEDURAL HISTORY

Petitioner filed this request for hearing on December 4, 2008. A hearing was held on March 2-4, 2009. Petitioner was represented by attorney Yvonnilda Muniz. The Edinburg Consolidated Independent School District was represented by attorney Dr. Jacques Trevino. At the conclusion of the hearing, both parties requested an opportunity to submit written argument and proposed findings of fact and conclusions of law. The decision due date was extended for good cause to allow an opportunity to submit written argument. The decision due date was extended to April 27, 2009. The Decision was timely rendered and forwarded to the parties.

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusions of law. Citations to the transcript will be designated "T" with a notation of the volume number and page number. Citations to Joint Exhibits will be designated with a notation of the exhibit number.

### FINDINGS OF FACT

1. The Edinburg ISD is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing Student a free appropriate public education in accordance with the Individuals with Disabilities Education Improvement Act, 20 U.S.C.A. § 1400, et seq., and the rules and regulations promulgated pursuant to IDEIA.

2. The student resides within the geographical boundaries of the Edinburg CISD. Edinburg CISD is responsible for providing the student with a FAPE. The student is eligible to receive special education and related services under the eligibility categories of Other Health Impairment and Speech Impairment. The student is \*\* years old and in the \*\* grade.

3. In January, 2005, the parent requested special education services on behalf of the student when he was \*\* years of age based on the student's seizure disorder and developmental delay. The ARD Committee determined that the student was eligible to receive speech therapy services pending the completion of a Full and Individual Evaluation. J EX 1.

4. On February 3, 2005, the student's doctor completed an other health impairment ("OHI") eligibility report. The doctor diagnosed the student with a seizure disorder, hyperactivity, and macrocephaly. J EX 2.

5. The District completed the student's FIE on March 2, 2005. Developmental testing indicated the student was performing below age level. The report recommended a Functional Behavioral Assessment ("FBA") to determine whether a Behavior Intervention Plan ("BIP") was needed. The evaluation also recommended the use of a weighted vest. J EX 2.

6. An ARD committee met to review the FIE on March 14, 2005. The committee determined the student qualified for special education services as Other Health Impaired and Speech Impaired, developed an IEP and placed the student in the campus PPCD program. The ARD Committee also developed speech and occupational therapy goals. J EX 3.

7. The parent withdrew the student from ECISD and placed him in a Headstart program at the end of the 2004-2005 school year. J EX 5; 1 T 137-138; 2 T 64. It is undisputed that the Head Start program was operated independent of the school district and the District provided no services to the student for the school years 2005-2006 and 2006-2007.

8. In August, 2007, the parent reenrolled the student in ECISD when he was ready for \*\*. J EX 5; 2 T 64. When the parent enrolled the student, according to the parent, the District placed the student in a self-contained classroom prior to an ARD Committee meeting. 2 T 64-65. I find the parent's testimony to be credible and further find that District personnel pre-determined the student's placement prior to the ARD Committee meeting and prior to the development of an appropriate IEP.

9. The ARD Committee met on August 28, 2007. At that time, the student had been out of the school district and the public school setting for two full school years. Although the ARD Committee met to review existing data regarding the student, this review occurred after he had been placed in a self-contained classroom. Additionally, the ARD Committee failed to review any data regarding the student's educational program or progress in Head Start. J EX 5; J EX 6. Although the student's special education teacher provided data that purported to be a review of his developmental levels of performance, it appears incomplete in that it reflects a lower developmental level than that reflected in the developmental levels of performance reviewed when the child was \*\* years of age. J EX 3. The teacher apparently completed the document within a day or days of the child re-enrolling in the district. The present levels of developmental performance are dated August 28, 2007. It is not reasonable to conclude that the teacher had sufficient information to adequately assess the child's performance at the time of the ARD meeting.

10. According to the IEP adopted by the ARD Committee, the student was placed in a self-contained classroom and was to participate in the general education curriculum by attending PE and/or music for 45 minutes per day and library 30 minutes weekly. J EX 5. Although the parent initially requested more time in the general education classroom than what was proposed by the remaining members of the ARD Committee, the meeting ended in consensus. T 1:143; J EX 6. The ARD Committee continued the same OT goals which had been adopted in 2005 until a new evaluation could be completed. J EX 5. According to the educational diagnostician, the student needed to remain in the self-contained classroom until his behaviors were more appropriate. 1 T 143. The ARD Committee agreed to continue the student's placement in the self-contained classroom until he developed better social skills and improved focus. T 1 143. Although the District had not seen the student for two years and had not reviewed data from his Head Start program, The ARD Committee based its decisions on the student's evaluation and performance at the age of \*\* years. T 1 175-176; J EX 5.

11. The IEP developed by the ARD Committee meeting on August 28, 2007 provided for approximately 45 short-term objectives in the areas of elementary language arts, math, science and social studies. J EX 5. However, there are no corresponding annual goals. In fact on the IEP form used by the district, the box on the form for “Goal” is left completely blank. J EX 5.

12. On August 28, 2007, the ARD Committee also conducted a review of existing evaluation data. The ARD Committee agreed that additional evaluations and/or data were needed in the following areas: language, physical, emotional/behavioral, sociological, intellectual/adaptive behavior, educational performance and assistive technology. J EX 6.

13. The District completed an OT evaluation on or about October 30, 2007. J EX 7.

14. The District completed a speech evaluation on or about October 1, 2007. J EX 7.

15. The District obtained an updated OHI evaluation on or about September 13, 2007. J EX 7.

16. The District completed an FIE on February 15, 2008. J EX 7.

17. On March 10, 2008, more than 6 months after requesting additional evaluations, the ARD Committee convened to review the FIE, as well as the related service evaluations. J EX 7. The student continued to meet eligibility criteria for other health impaired and speech impaired. Although the student’s special education teacher reported that his behavior impeded progress, the ARD Committee determined that a Behavior Intervention Plan (“BIP”) was not needed. The special education teacher reported that the student needed constant monitoring and had difficulty managing impulsiveness. J EX 7. The special education teacher reported minimal progress in that the student was able to remain seated for group lessons for longer periods of time, able to anticipate his daily routine, was coloring better, and participating in activities such as singing and counting. Of the progress noted, only two areas related to the IEP objectives developed in August 2007 – anticipation of daily routine and remaining seated for group activities. J EX 5. The ARD Committee determined his services and IEPs were to remain the same in all areas except Occupational Therapy. J EX 7.

18. At this ARD meeting, Student’s mother requested additional inclusion time for the student. The minutes state that the ARD committee discussed her request at length but determined that the student needed some more time to work on his socialization skills and to improve his ability to focus. J EX 7.

19. The ARD Committee did not discuss or develop social and behavioral goals for the student at this ARD meeting, although it was an identified need.

20. The ARD Committee did not develop a Behavior Intervention Plan or request a Functional Behavior Assessment at this ARD Committee meeting.

21. At the parent's request, another ARD committee meeting was held on May 15, 2008. At this ARD, the parent requested additional evaluations. The ARD Committee recessed and reconvened on May 19, 2008, and agreed to conduct the following evaluations: psychological evaluation to address the suspected disabilities of emotional disturbance and autism, as well as behavior strategies for ADHD; Physical Therapy; Adaptive PE; and Assistive Technology. J EX 8.

22. The ARD Committee agreed that the student would attend a bilingual summer school program with \*\* (a general education placement). The program was three hours daily for 20 days. T 2 24; 27. A paraprofessional accompanied the student at all times. The student participated in the classroom but not in all the activities due to shyness and a difficult time approaching other children. T 2 57. He did not present with any behavioral problems during the summer. T 2 57. There were times when he became distracted and would leave the room for short periods of time for redirection, however. Typically, over a three to four hour period the student would need to leave the room for about 10 to 15 minutes. While in the classroom, he would require frequent redirection. T 3 29;34.

23. The ARD committee convened on August 28, 2008 to conduct an annual review and review the evaluations completed to date. J EX 10. At that time, the Assistive Technology evaluation was still pending. The evaluations indicated that Student did not meet the eligibility criteria for autism and did not have an educational need for adaptive PE or physical therapy. J EX 10.

24. The psychological evaluation was completed on June 16, 2008. Based on her findings, the LSSP in her report ruled out autism but failed to address emotional disturbance. She testified at the hearing that she ruled out emotional disturbance based on the Student's results on the BASC-2, but acknowledged she did not address this in her evaluation. T 2 204. Additionally, in reviewing the evaluation, the ARD Committee never addressed the eligibility criteria for emotional disturbance. J EX 10. The LSSP made all observations of the student in the self-contained classroom or with his peers from the self-contained classroom. T 1 16; T 2 202. She did not observe the student in the general education classroom or in his summer program. J EX 11; T 1 17; T 2 202; T 3 35.

25. In her report, and before the ARD Committee, the LSSP recommended a consistent routine between home and school, a behavior chart, and parent training classes. The parent expressed an interest in parent training, but the ARD Committee did not recommend it. The committee recommended additional inclusion time to Student's schedule. He was to attend the regular education classroom for 15 minutes in the morning and another 15 minutes in the afternoon. J EX 10. Provisions were in place to increase the student's inclusion time from 15 minutes up to 2 hours per day before an ARD meeting would convene. However, if he did not follow the classroom rules, he would not remain in the general education classroom for more than 15 minutes. J EX 10.

26. The ARD Committee reviewed and adopted a behavior intervention plan that had

been drafted by the special education teacher prior to the ARD Committee. According to the educational diagnostician, the draft BIP would have been presented in handwritten form and then later typed up after the ARD had concluded. T 2 175. The Committee also adopted an IEP for the 2008-2009 school year, which like the previous IEP, contained many short term objectives with no corresponding measurable annual goals. J EX 10.<sup>2</sup> His teacher agreed that the objectives agreed to for the 2008-2009 school year were very similar to the objectives from the 2007-2008 school year. The ARD Committee repeated IEP objectives that had not been mastered. T 1 226;; J EX 12. At the time of the August 2008 ARD meeting, the student had not mastered any of his prior year's occupational therapy goals. J EX 12. Of the approximate 45 short-term objectives in the student's academic areas, the student only mastered 11. His prior year's speech goals were also continued, with no progress report being discussed by the ARD Committee. J EX 10. The educational diagnostician testified that Student had not improved behaviorally since the progress report written in 2007, nor had she seen any improvement in observations of the child. T 1:156.

27. The student currently spends most of his day in a self contained classroom with nine other students ranging from \*\* through \*\* grade and ages \*\* to \*\*. T 1 207; 208. According to the most recent developmental levels of performance, the student functions at the level of \*\* years of age in the areas of cognitive/life skills, self care, gross and fine motor skills, and socialization. The student's exhibits language and communication skills at a \*\* year level. J EX 10, p. 007-008. At the beginning of the 2008-2009 school year the student spent 15 minutes inclusion time in a \*\* classroom at the beginning and end of each school day. In late November 2008, the student's inclusion time was increased to two 20-minute periods per day in the \*\* classroom. T 2 34. He also participates in either PE or music on a daily basis, and goes to the library one time per week, in the general education setting. The student attends PE with the \*\* graders and music with a different \*\* grade class. T 1 209; T 1 211. Library time is spent with his self-contained class and whichever regular education class is in the library at the same time. T 1 209. During the 2007-2008 school year, when the student was in \*\*, he also attended PE, music and library in the general education setting with separate first grade classes. T 1 231; 232.

28. Both of Student's parents' native language is Spanish. Although they speak some English, they achieve a better understanding when things are explained to them in Spanish. T 1:49:12-17. This was also apparent during the due process hearing.

29. District personnel testified that the District used an interpreter at all ARD Committee hearings to assist in conducting the meeting. T 1:58. Typically, the principal served as the interpreter, but the diagnostician or other Spanish speaking staff would also interpret their contributions to the meeting. T 1:58; T 1 255. The principal is qualified to serve as an interpreter in that Spanish is her native language and she is fluent. T 1 255; 256. Unfortunately, a primary contributor to the data reviewed in the ARD Committee meetings is the student's special education teacher, who does not speak Spanish. This person was also responsible for

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<sup>2</sup> Counsel for Petitioner and Respondent referred to the short term objectives in the IEP as the student's "goals and objectives." However, if the objectives are considered goals, the goals are not measurable and few were mastered under the student's IEP.

taking the minutes. Although the principal testified that much of the ARD meetings would be conducted primarily in Spanish, with her serving as an interpreter for the special education teacher, I do not find this testimony to be credible. None of the special education teacher's written contribution was in Spanish and English (for example, the present levels of developmental performance and the behavior intervention plan). J EX 7; 10. It is not reasonable to conclude based on the evidence that the ARD meetings were being conducted in Spanish or that all discussions were being interpreted for the parent.

30. The psychological evaluation was administered in Spanish but prepared and presented to the ARD Committee in English. J EX 11. The LSSP testified that she met with the mother to explain the contents of the evaluation prior to the ARD Committee meeting. T 1 39. However, in light of the evidence that not all discussions were fully translated in the ARD meeting, a failure to translate the psychological evaluation for the parent would have effectively limited the parent's participation in the review of the evaluation.

31. The educational diagnostician acknowledged that the parent called before and after ARD Committee meetings requesting increased time in the general education classroom. T 1 150; T 2 172.

32. The parent contacted the educational diagnostician to request an ARD in November 2008 to discuss increased time in the general education classroom. T 1 172-173. The parent, the diagnostician and the special education teacher met and discussed the child's placement. The teacher explained that the student's time in general education had been increased and she noted it on his behavior chart. However, the parent did not understand the data contained on the behavior chart. The parties initially scheduled an ARD but the principal was unavailable and another date was not set. T 2 84; see also T 2 177; 178.

33. The educational diagnostician recalled another instance where the parent asked for an ARD but could not schedule the ARD Committee meeting without contacting her advocates, so the ARD was never scheduled. T 1:174.

34. Although Student completed \*\* in 2008, his inclusion time while in \*\* grade is in a \*\* classroom. T 1 215. The student currently joins the class for the language arts block in the morning and the math block in the afternoon. T 1:188. The general education teacher testified that the student does well in her class. T 1:191.

35. The teacher testified that the student's behaviors are much like other \*\* students. T 1 198. She testified that she does not see the behaviors identified on the BIP in her classroom. T 1 200. In fact, she feels he acts appropriately and behaves appropriately when in her classroom. T 1 202. He does not get out of his seat, he does not yell out in class or use inappropriate language, he follows classroom rules like his classmates, he does not throw or dump toys around the room nor does he push over shelves or other furniture. T 1 205; 206. The general education teacher uses the same classroom behavior management plan that she utilizes for the rest of the class. T 1 194. The special education teacher also testified that the student's

impulsive behaviors have improved and attributes the behavioral improvement to the student's medication. T 1 214; 216.

36. The student's music teacher has observed no behavioral problems with the student in either the 2007-2008 or 2008-2009 school years. T 1 243. However, the student does not fully participate in class. T 1 243.

37. The parent also testified that no one translated the minutes of any of the ARD meetings to her in Spanish. T 2 129; T 2 83. District staff corroborated her testimony. T 3 23. The principal testified that they write the minutes after ARD is completed and the parent is not able to review the minutes before indicating whether or not she agrees. T 3 23. Sometimes it may take as much as two weeks before she receives a copy of the ARD document. T 2 129.

38. The parents requested the Assistive Technology ("AT") evaluation at the May 19, 2008 ARD. J EX 8. The date of the draft report is November 19, 2008. J EX 18. As of the date of the hearing, this draft report has not been considered by an ARD Committee. T 2 146. Mrs. \*\* testified that it usually takes two or three grading periods to complete an AT evaluation. T 2 1469. The AT team observed Student for about two hours, in the classroom, the gymnasium, and transitioning from one to another. T 2 157; 167. In this case, there was no need to return and bring back equipment. T 2 157. There were no trials on specific devices. T 2 157. An FM trainer was not tried because he did not appear to be overactive. T 2 166. It took over six months to complete an AT evaluation that was based on a two hour observation.

39. Among other things, the AT evaluation recommended the teacher include a classroom/individual daily picture based schedule. J EX 18. According to the evaluator, there was not a classroom or individual daily picture based schedule already in the classroom. T 2 168. Nor were there any tripod grips available for Student as recommended in the evaluation. T 2 168. There were a few visual supports. T 2 168. The evaluator noted that the classroom teachers "still had work to do." T 2 168. There were some software programs in the classroom but not the ones recommended in the report. T 2 168.

## DISCUSSION

### *Did the District Fail to Develop and Provide an Appropriate BIP and IEP*

The educational program offered by the school district is presumed to be appropriate. Petitioner, as the party challenging the educational program bears the burden of proof in showing why the IEP is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983). *Schaffer v. Weast*, 126 S.Ct. 528 (2005). This includes the burden of proof with regard to harm or a deprivation of educational benefit. The law does not require that the student's educational potential be optimal or "maximized" but that it enables to the student to receive some educational benefit from his program.

The United States Supreme Court established a two-prong test for determining whether

a school district has provided a free appropriate public education. The first inquiry is whether the school district complied with IDEIA's procedural requirements. The second inquiry is whether the student's IEP is reasonably calculated to confer an educational benefit. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S.Ct. 3034 (1982). An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Id.*; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000).

## ***1. Procedural Sufficiency***

IDEIA establishes certain procedural requirements in formulating and implementing a child's IEP. Procedural flaws do not automatically require a finding of a denial of a free appropriate public education. However, procedural inadequacies that impede the child's right to a FAPE, result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the development of the IEP result in the denial of a free appropriate public education." 20 USC 1415 (f)(3)(E); *Adam J. v. Keller ISD*, 328 F. 3d 804 (5<sup>th</sup> Cir. 2003). In this case, the District and the ARD Committee committed several procedural errors that resulted in a loss of educational benefit to the child when the child reenrolled in the District in August of 2007.

### ***A. Pre-Determined Placement***

First, the credible evidence suggests the District pre-determined the student's placement in a self-contained classroom prior to convening an ARD Committee meeting to develop an appropriate IEP for the student and then determine where that IEP would best be implemented. The parent testified that the District placed the student in a self-contained classroom on the first day of school before the ARD Committee convened to develop the student's IEP. 2 T 64. Developing a student's IEP and determining the student's placement are separate inquiries, and the placement determination must be made after the IEP has been developed by the ARD Committee. *See Flour Bluff Independent School District v. Katherine M.*, 91 F.3d 689 (5<sup>th</sup> Cir. 1992). The applicable federal regulations require that the placement decision is made by a group of persons, including the parents and other persons knowledgeable about the child. Additionally, the placement must be based on the student's IEP. 34 CFR 300.116

In this case, the decision to place the student in the self-contained classroom was made by district personnel prior to the ARD Committee meeting following the student's enrollment in the District. Additionally, once the ARD Committee met to develop the student's IEP, it failed to consider or obtain current evaluation data, and information from persons with the most current knowledge of his developmental performance, the Head Start personnel.

### ***B. Lack of Current Evaluation Data***

The significant issue in this case is the 2-1/2 year gap in educational services between the time of the initial evaluation and identification of the student and the time of the student's

reenrollment in the District when he began \*\*. In August 2007, the ARD Committee made its decisions regarding the student's IEP goals and objectives as well as placement on data that was not current. As of August 2007, the student had been out of the District and out of the public school setting for a period of two complete school years while enrolled in a Head Start program. The record reflects that the ARD Committee in no way reviewed data regarding the student's program or progress while in the Head Start program. The District asserts that its evaluation from 2005 remained current because pursuant to 34 CFR 303(b)(2), an evaluation must be completed at least triennially. However, the rationale behind this rule presupposes that District personnel and the ARD Committee have had an ongoing review of the child's progress during the years between evaluations. See e.g., 34 CFR 300.324 (requiring the ARD Committee to meet at least annually to determine whether the student's IEP goals are being achieved and to revise the IEP as appropriate to address any lack of progress, the results of any reevaluations, information provided to or by the parents, the student's anticipated needs, and any other matters. 34 CFR 324(b).

Additionally, the District's assertion fails because IDEIA requires that a local education agency shall conduct a reevaluation if the school determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or if the child's parents or teacher requests a reevaluation. 20 USC 1414 (a)(2); 34 CFR 300.303 (a). In this case, the ARD Committee determined that the educational or related service needs of the student warranted a re-evaluation on August 27, 2007. Unfortunately, the evaluations were not completed and reviewed by the ARD Committee until more than 6 months later (2/3 of the school year). In the interim, the ARD Committee readopted the same Occupational Therapy goals that existed in 2005 and academic/developmental goals and objectives that were not tied to the student's present levels of developmental performance.

The next issue concerns whether the FIE in February 2008, and the ARD Committee's consideration of the FIE, as well as the OT and Speech evaluations, were timely under the circumstances.

The District waited six months to complete and review its evaluations after the student reenrolled in ECISD. Even assuming the District was reasonable in concluding that the 2005 evaluation was current for the purposes of determining eligibility in 2007, the data reviewed by the ARD Committee was wholly inadequate to address the student's educational needs as they existed in the Fall of 2007. The District completed a "Review of Existing Evaluation Data" and determined that further assessment was necessary. However, the District then waited six months to complete and review the evaluations. The IDEIA does not impose a mandatory timeline for the completion of a reevaluation once requested by an IEP Team. 34 CFR 300.303. Rather, the inquiry becomes whether the District's delay in completing the reevaluation resulted in maintenance of an inappropriate IEP or placement. Under the circumstances in this case, six months was an unreasonable amount of time given the student's two year absence from ECISD or any public school and given the District's failure to obtain and review any data from the Head Start program. The IEP developed at the August 27, 2007 ARD Committee meeting was not based on current information and therefore did not adequately address the student's educational needs.

Additionally, the District continued to implement Occupational Therapy goals from the student's 2005 IEP from August 2007 until March 2008, when the ARD Committee conducted the review of the OT evaluation. Although the evaluation was completed on October 30, 2007, the ARD Committee did not review the OT evaluation or modify the student's IEP goals until March 10, 2008, resulting in the continuation of goals which were subsequently determined not to be appropriate for the student.

### *C. IEP Goals*

IDEIA requires an IEP to contain a statement of measurable annual goals, including academic and functional goals designed to (a) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (b) meet each of the child's other educational needs that result from the child's disability. 34 CFR 300.320. In this case, the IEP developed on August 27, 2007, continued on March 10, 2008, and developed on August 28, 2008, contains approximately 45 short-term objectives in the instructional areas of elementary reading, elementary written language, elementary math, elementary science, elementary social studies, with no specific, corresponding annual goals. In fact, the area on the IEP form that is set aside to list the student's annual goal is blank in each of the academic areas. J EX 5:28-391 10:29-42. Additionally, many of the academic objectives are not measurable or specific. For example, a science objective requires the student to improve bathroom skills to a more appropriate age-level, without specifying the appropriate age-level skill the student should attain. J EX 10-038. The student's speech goal, though identified, is vague in that it merely states that the student will use developmentally appropriate vocabulary, without specifying the targeted developmental level. J EX 10-043. The IEPs developed by the ARD Committee lack sufficient specificity to determine the extent to which the student may be involved and make progress in the general education curriculum.

### *D. Failure to Develop Appropriate BIP*

When the District completed its initial evaluation of the student in March, 2005, the evaluator recommended that a Functional Behavior Assessment should be completed to develop an appropriate BIP for the student. When the student returned to the District in August, 2007, the District did not conduct an FBA or develop a BIP. In March, 2008, although the student's special education teacher reported that the student's behaviors were impeding educational progress, no FBA was conducted and no BIP was developed. J EX 7. A stated reason for the self-contained classroom placement was that implementing the student's BIP means that other students would not benefit from academic instruction or nonacademic activities. J EX 7. However, the student had no BIP. Under the circumstances, once the teacher determined that the student's behavior was impeding his progress, the ARD Committee should have considered the use of positive behavioral interventions and supports and other strategies to address the behavior at least during the March 2008 ARD Committee meeting, if not at the beginning of the school year. 34 CFR 300.324 (2)(i) In March 2008, the teacher reported that the student needed constant monitoring due to difficulty remaining seated, often interrupts others, loses things necessary to complete tasks, is often defiant, deliberately annoys

others, swears, destroys property, and has poor concentration. J EX 11. However, it was not until August of 2008 that the ARD Committee developed a BIP. J EX 10. The witnesses acknowledged that at the time the BIP was developed, and during the 2008-2009 school year to the date of hearing, the student did not exhibit the behaviors targeted in the BIP. Behaviors which were identified were getting out of his seat during class, yelling out and using inappropriate language, not following classroom rules, throwing and/or dumping toys around the room, and pushing over furniture. (It is important to note that many of the behaviors exhibited during the 2007-2008 school year improved by the beginning of the 2008-2009 school year, and the teachers attributed the improvement to changes in the student's medication. T 1 214, 216). Additionally, the BIP did not address the student's difficulties in maintaining focus in the classroom. J EX 10. The BIP developed by the ARD Committee was not appropriate to meet the student's needs and was no longer based on current data when it was developed.

*E. Failure to Assess Student in All Areas of Suspected Disability*

In May, 2008, the ARD Committee requested a psychological evaluation to determine whether the student met the eligibility criteria for autism and/or emotional disturbance. However, the evaluation only addressed the criteria for autism. J EX 11

A student meets the eligibility criteria for emotional disturbance if he has condition exhibiting one or more of the following characteristics over along period of time and to a marked degree that adversely affects a child's educational performance:

- (1) an inability to learn that cannot be explained by intellectual, sensory or health factors;
- (2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (3) inappropriate types of behavior or feelings under normal circumstances;
- (4) a general pervasive mood of unhappiness or depression;
- (5) a tendency to develop physical symptoms or fears associated with personal or school problems.

34 CFR 300.8(c)(4).

The LSSP that administered the evaluation obtained data from a clinical interview, behavioral observations, an Autism Diagnostic Interview-Revised, the Autism Diagnostic Observation Schedule, the Gilliam Autism Rating Scale, and the Behavior Assessment System for Children-2. Based on the evaluations, she concluded in her report that the student did not meet the criteria for autism. Rather, the results of the evaluation data indicated a student with characteristics of ADHD and language deficits. J EX 11. The LSSP wholly failed to address the suspected disability of emotional disturbance as required by the ARD Committee. Additionally, the LSSP failed to address in her report, behavior strategies for ADHD as requested by the ARD Committee. J EX 8; J EX 11.

*F. Assistive Technology Evaluation*

The IDEIA requires that school districts ensure that assistive technology devices or services are made available to a student with a disability, if required as a part of the student's IEP. 34 CFR 300.105(a). The parents requested an Assistive Technology Evaluation in May 2008, but the evaluation was not completed until November 19, 2008. T 2 160; 262; J EX 18. The evaluator acknowledged that the ARD Committee had not considered the evaluation as of the date of hearing because District personnel believed they could not convene an ARD Meeting to review the evaluation while the hearing was pending. The District has failed to timely convene an ARD meeting to review this evaluation, and recommendations in the report are not being implemented in the classroom. T 2 168.

## 2. *Substantive Sufficiency*

A school risks legal liability if its procedural errors result in substantive educational harm to the student. The procedural errors in this case resulted in more than a trivial denial of FAPE. The failure to appropriately evaluate, develop measurable annual goals, obtain current evaluation data when the student re-enrolled in the District and the action of pre-determining the student's placement, under the totality of the circumstances impeded the student's ability to receive a FAPE, denied the student a FAPE, and interfered with the parent's ability to meaningfully participate in the development of the student's IEP.

In evaluating whether an educational program is reasonably calculated to confer an educational benefit., the Fifth Circuit Court of Appeals has identified four factors to consider:

1. Is the program individualized on the basis of the student's assessment and performance?
2. Is the program administered in the least restrictive environment?
3. Are the services provided in a coordinated and collaborative manner by the key stakeholders?
4. Are positive academic and nonacademic benefits demonstrated?

*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3rd 245 (5<sup>th</sup> Cir 1997); cert. denied, 522 U.S. 1047 (1998).

In applying these factors to the facts of this case, I find that the student's educational program for the 2007-2008 and 2008-2009 school year through the date of hearing was not calculated to and did not provide a meaningful educational benefit. The district's educational program is entitled to a legal presumption of appropriateness. Petitioner bears the burden of proving that it is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983). Petitioner has met his burden.

### *Is the Program Individualized on the Basis of the Student's Assessment and Performance?*

A fundamental principle of IDEIA is that disabled students have access to a free appropriate public education. During the relevant time frame, the preponderance of the

credible evidence establishes that the student accessed no meaningful benefit for his educational program in ECISD.

As stated hereinabove, ECISD failed to obtain current data regarding the student when he reenrolled in the District following a two-year gap in services. ECISD did not obtain information regarding the student's program in Head Start or his progress while there. Rather, the District relied on data that was more than 2 years old to develop the student's IEP, and in the case of his occupational therapy goals, repeated goals that were in effect during 2005 for the 2007-2008 school year. The District unreasonably delayed its reevaluation of the student by 6 months and when it convened to review the data, made no changes to the student's IEP goals and objectives (other than occupational therapy) even though no progress was noted. Additionally, although the special education teacher reported that the student's progress was impeded by his behavior, the District failed to conduct a functional behavior analysis or develop a Behavior Intervention Plan to address those behaviors.

When the ARD Committee convened in March 2008 to review existing evaluation data, it made no changes in the IEP objectives, and then continued most of those objectives in the Fall of 2008 when the student had only mastered approximately 11 of them. Additionally, the OT goals and objectives developed at the March 2008 ARD Committee were not mastered and continued in their entirety. The District likewise continued the Student's speech goals that were developed in the Fall of 2007 when it developed the IEP in August 2008. J EX 5:40; EX 10:44. The continuation of the same IEP goals indicates that the goals and objectives were not mastered or the IEP was not individualized. It cannot be said that the student make meaningful progress given the almost wholesale repetition of the prior year's IEP goals and objectives.

*Are the services provided in a coordinated and collaborative manner by the key stakeholders?*

The record reflects little coordination and collaboration among the key stakeholders in this case. For example, the LSSP in conducting the psychological evaluation limited her observations of the student to his performance in his special education classroom, even though teachers in the regular education setting did not note the same behaviors noted by the special education teacher. J EX 11; T 1 117; T 2 202; T 3 35.

The record also reflects a failure to collaborate with the parents in a meaningful manner. It is undisputed that the parent's primary language is Spanish. Although the student's mother speaks and reads some English, it was apparent to the hearing officer that she gains a more adequate understanding of events when she receives communication in Spanish. The District could have solved this problem had it conducted the ARD meetings solely in Spanish. However, a key participant in the development of the student's educational program, the special education teacher, did not speak Spanish. This person was responsible for developing a draft of the student's BIP, conveying information regarding the student's present levels of developmental performance, and recording the minutes of the ARD meetings. None of these documents were provided to the parent in Spanish. See e.g., J EX 10, p. 07 (present levels of performance), p. 046 (BIP); p. 045 (August 2008 OT IEP); 049 (progress report); J EX 16 p.11-(progress reports

from \*\* year); J EX 17 (2/15/08 FIE). Based on a preponderance of the credible evidence, I do not find it reasonable to conclude that the ARD meetings were conducted primarily in Spanish, with translation to the special education teacher. The parent's testimony that the ARD meetings were primarily in English was more credible under the circumstances. Additionally, a key evaluation, the psychological evaluation was prepared and submitted to the ARD Committee in English. Although the LSSP testified that she met with the parent prior to the ARD meeting to explain the results and report, the parent was deprived of participating in the ARD Committee's discussion of that report as it related to the development of the student's IEP. Again, given the fact that the student's special education teacher and primary source of information for the psychologist did not speak English, it is not reasonable to conclude that the discussion of the psychological was in Spanish during the August 2008 ARD meeting. The failure to adequately interpret or to conduct the entire ARD meeting in the parent's native language deprived the parents of the ability to meaningfully participate in the development of the student's IEP.

*Are positive academic and nonacademic benefits demonstrated?*

Respondent contends that during the school years in question, the student made meaningful progress. However, the record clearly reflects that the student did not master any of the occupational goals developed in March 2007; that the ARD Committee continued the 2007 speech goals when it developed the IEP in 2008, that the student did not master the majority of his 2007 academic objectives. In 2007, the student's teacher identified behavioral issues as an impediment to the student's inclusion in the general education setting. However, the District took no steps to develop and implement and Behavior Intervention Plan which would have provided positive behavioral supports, interventions and strategies to address the behavior. Rather, the District waited until the beginning of the 2007-2008 school year to develop a BIP to address behaviors that the student no longer exhibited. Although there were some behavioral improvements, the student's teacher attributed those improvements to his medication regimen.

*Is the program administered in the least restrictive environment?*

When the child reenrolled in ECISD, the district placed the student in a self-contained placement without first convening an ARD Committee meeting to develop his IEP. The District made no efforts to accommodate the student in the regular education setting prior to concluding that the student would be appropriately served in the self-contained classroom with minimal exposure to non-disabled peers.

The student is entitled to be educated with nondisabled peers to the maximum extent appropriate. *Daniel R.R. v. State Board of Educ.*, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989). In evaluating whether Respondent is educating the student with nondisabled peers to the maximum extent appropriate, there are two inquiries which must be made. The first question is whether education in the regular education classroom, with supplementary aids and services, can be achieved satisfactorily. If not, then we must evaluate whether Respondent has mainstreamed (or proposes to mainstream) the student to the maximum extent appropriate, taking into consideration his particular disability and its manifestations.

In *Daniel R.R.*, the Fifth Circuit discussed several factors in determining whether placement in the regular education classroom is appropriate. These factors include academic benefit, benefit from association with nondisabled students, detrimental effects on the disabled child, and detrimental effects on classmates, taking into consideration the nature and severity of the child's disability. *Daniel R.R.* If it is determined that education in the regular education classroom cannot be achieved satisfactorily, we must next determine whether the child has been mainstreamed to the maximum extent appropriate by reviewing whether the school has taken steps to accommodate him in regular education, including intermediate steps toward a mainstream setting. Mere token gestures are not sufficient. However, the school is not required to provide every conceivable supplementary aid and service to assist the child, or to modify the curriculum beyond recognition. *Daniel R.R.*

In this case, in the 2007-2008 school year ECISD provided a placement for the student in a self-contained classroom for all subject areas except PE and Music instruction was provided in the general education setting. Although the IEP also provided that the student would participate in the general education setting for library time, his exposure to non-disabled peers was dependent upon coincidence based on whether a general education class happened to be in the library at the same time as the Student. The student accessed no other inclusion time during the 2007-2008 school year, although the parent requested it.

Beginning with the 2008-2009 school year, and as of the date of the hearing, the IEP provided for 20 minutes inclusion time during the language arts and math blocks in a general education \*\* classroom, although this time may increase to up to 2 hours, depending on the student's behavior. J EX 10.

In determining whether the general education placement presents any detrimental effects to the student or his classmates, the testimony from the District is inconsistent. The District has suggested that the student's developmental levels of performance require a more restrictive setting for the student to benefit educationally. However, the student has made no progress in his current placement. While there was some evidence that the student's behavior was disruptive at the beginning of the 2007-2008 school year many of the behaviors dissipated once the student was on medication for his ADHD. The student successfully participated in a regular education setting during the summer of 2008. The District has identified no current detrimental effects on the students within the general education placement. The District has made only a token effort to mainstream the student – a token effort that arose out of a predetermined placement decision at the beginning of the 2007-2008 school year.

It may well be that the student's needs require placement for most of his day in self-contained classroom. However, the District has not made adequate efforts to include the student in the general education classroom. The District's evaluations have failed to adequately address the issue.

*Denial of Parental Requests for Changes or Services Without Providing Prior Written Notice.*

A school district is required under IDEIA to provide prior written notice to a parent when it proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. 20 U.S. § 1415 (b)(3) and (c)(1). During the 2007-2008 school year, the parent and the District reached a consensus with the decisions made at each and every ARD meeting. The parent acknowledged that she agreed, albeit reluctantly. The parent's request for additional inclusion time and expression of an interest in parent training (J EX 10) during the ARD meetings did not trigger the prior written notice requirements of IDEIA. The fact that a parent makes a request during an ARD meeting and that request is not immediately accepted does not constitute a denial or refusal of services which requires prior written notice. The process of collaboration by its very nature involves a give and take process where the parties discuss ideas which may either be accepted or rejected by any member or members of the Committee. Ultimately, one must look to the end result of the ARD meeting and determine whether consensus was reached. If the ARD Committee, including the parent, reached a consensus, then the prior written notice requirements are not applicable. See e.g., 19 T.A.C. §1050(h)(6) (when a district implements an IEP with which the parent disagrees, the district shall provide prior written notice as required in 34 C.F.R. § 300.503). Decisions to deny or provide services and accommodations can only be made by a duly constituted ARD Committee. 19 T.A.C. §1050. Assuming, arguendo, that the individual educators failed to respond to the parent's request for additional inclusion time, such a failure would not trigger the prior written notice requirements because they occurred outside the context of an ARD Committee meeting. Additionally, the ARD Committee in this case did address these concerns with the parent at an ARD Committee meeting and an agreement was reached on the student's IEP. The District did not implement an IEP for which there was no consensus.

### **RELIEF**

For relief, Petitioner requests prospective relief and compensatory services that can be categorized in the areas of training of staff, parent training, assessments, ongoing consultative review of the student's program, sponsorship of the student in a specialized summer camp specific to his individual needs, supplemental supports, services and aids to enable the student to be educated in the least restrictive environment, an order requiring the district to provide an interpreter at all ARD meetings and translation of the IEP from English to Spanish, as well as compensatory educational services in all academic areas.

Compensatory relief is available under IDEA as an equitable device to remedy substantive violations. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). IDEIA requires that relief be designed to ensure that the student is appropriately educated within the meaning of IDEA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9<sup>th</sup> Cir. 1994). Thus, determining what compensatory relief is appropriate turns on a consideration of the extent of the denial as well as what services would be needed to provide a free appropriate public education in light of that denial.

In this case, the amount of compensatory services should be measured by the length of time the student was unable to access educational benefit from his program due to the District's failure to develop and implement an appropriate IEP and BIP.

The student's program provided no meaningful educational benefit for the 2007-2008 school year as well as the 2008-2009 school year to the date of hearing for the reasons set forth herein. The statute of limitations applicable based on the pleadings and evidence in this case is one year from the date of filing. In other words, all claims based on the District's acts or omissions occurring prior to December 4, 2007 are barred and will not be considered in determining the appropriate compensatory award. While there is no specific formula which must be applied in determining an appropriate award, the student's progress or lack of progress must be taken into consideration. In this case, the District failed to develop an IEP based on current data when he enrolled in the District in 2007, failed to timely complete and consider appropriate evaluations, failed to evaluate the student in all areas of suspected disability, pre-determined a restrictive placement for the child, failed to develop appropriate, measurable annual goals for the student, and failed to develop an appropriate behavior intervention plan which would enable the student to access an education in the general education setting. The student made no meaningful progress in any of his academic or related services areas in that his speech and occupational therapy goals were repeated during the 2008-2009 school year, and many of the academic objectives were repeated because they had not been mastered. Essentially, the student gained no meaningful educational benefit from his IEP and related services. Therefore, based on the facts in this case, I find that it is appropriate to award the student compensatory educational services in all academic areas and related services, with the total amount of the award to be equal to the amount of instructional time available to the student from December 4, 2007 through the end of the 2007-2008 school year, and from the beginning of the 2008-2009 school year to the date of the hearing, March 2, 2009.

The second element of compensatory relief turns on a consideration of what services are needed to provide a free appropriate public education in light of the denial of FAPE. A logical approach would be to require Respondent to structure the compensatory educational services such that they are proportionately consistent with the schedule of services in place during the school years in question. However, such a rigid approach would not necessarily be consistent with the student's current educational needs. Therefore, the District is Ordered to conduct an assessment, utilizing the personnel and the methodology as recommended by the ARD Committee, to determine the student's current educational needs and the type of services appropriate to respond to those needs, including, but not limited to summer programming, in-home services, parent training, tutoring and any related services the ARD Committee deems appropriate. The District shall then develop a schedule for the provision of compensatory services and complete the services no later than September 1, 2013, or at a later time if mutually agreed upon by the parties. In the event the District provides compensatory educational services over the summer months, these services shall be in addition to and not in lieu of Extended School Year services absent an agreement of the parent.

A significant violation of IDEIA in this case was the pre-determination of the student's placement in a self-contained classroom, with only token attempts to educate the student in the regular education setting. Because of this violation and the District's stated purpose that the student needs to acquire the social skills necessary to remain in a general education classroom, a component of the compensatory educational services shall be provided in the form of summer programming designed to enable the student to develop the skills necessary to derive a benefit from a general education setting. The hours provided over the summers of 2009, 2010, 2011,

2012 and 2013 shall be applied to the overall compensatory award ordered herein.

Additionally, as prospective relief, Respondent shall provide parent training specific to the student's needs as recommended in the psychological evaluation. The District shall also provide training to all campus personnel who work with the student designed to educate them regarding the student's disability and the implementation of his IEP. The District shall provide documentation of this training to the parent and TEA no later than September 1, 2009.

The District shall also provide an interpreter for the parent at all ARD Committee meetings. The District can satisfy this requirement by utilizing district personnel, but must ensure that all components of the student's IEP are translated from English to Spanish for the parent in a manner consistent with Tex. Educ. Code. 29.005.

### CONCLUSIONS OF LAW

1. The student currently resides within the geographical boundaries of Edinburg CISD, a legally constituted independent school district within the State of Texas, and is entitled to special education services pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. §1400, et seq., as amended.

2. The District's educational program is presumed to be appropriate. As the party challenging the educational program proposed by the district, Petitioner bears the burden of proof. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). *Tatro v. State of Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983), aff'd 468 U.S. 883 (1984) and must show more than a de minimis deprivation of educational benefit. *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000). *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000). Petitioner has met that burden.

3. The relevant time period for relief in this case begins on December 4, 2007 and extends through the date of hearing, March 2, 2009. During the relevant time period, ECISD denied the student a FAPE in the least restrictive environment appropriate. His IEP goals were not reasonably calculated to provide an educational benefit, and were not based on current assessment data. Additionally, the student made no academic progress during the relevant time period. Any changes or progress in behavior was attributed by the teachers to his medication change. The denial of FAPE in this case was more than de minimis. *Hendrick Hudson District Board of Educ. v. Rowley*, 458 U.S. 176 (1982); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000).

4. During the relevant time period, the District failed to timely re-evaluate the student upon his reenrollment in the District in the Fall of 2007. This failure to timely re-evaluate the student resulted in a denial of FAPE. *Adam J. v. Keller ISD*, 328 F. 3d 804 (5<sup>th</sup> Cir. 2003).

5. Petitioner is entitled to compensatory education services and prospective relief to remedy the denial of FAPE. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). IDEIA requires that relief be designed to ensure that the student is

appropriately educated within the meaning of IDEIA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9<sup>th</sup> Cir. 1994).

### **ORDER**

After due consideration of the record, the foregoing findings of fact and conclusions of law, I hereby **ORDER** that the relief sought by the Petitioner is hereby **GRANTED, in part**, as follows:

1. Respondent shall provide the student with compensatory education services, consisting of summer programming, in-home services, parent training, tutoring, and any further related services deemed appropriate by the ARD Committee to meet the student's current individual needs. Respondent is ordered to calculate the number of instructional hours available to the student from December 4, 2007 through the end of the 2007-2008 school year, and from the first day of the 2008-2009 school year through the date of hearing, exclusive of absences, and to provide compensatory educational services in an amount equal to that sum. All compensatory educational services shall be completed by September 1, 2013, or at a time mutually agreed upon by the parties consistent with terms hereinabove.
2. Respondent shall conduct an assessment, utilizing the personnel and the methodology as recommended by the ARD Committee, to determine student's current educational needs and the type of compensatory services appropriate to respond to those needs, including summer programming, in-home services, and any related services the ARD Committee deems appropriate.
3. It is ordered that the assessment ordered in paragraph 2 above shall also address the manner in which the student's time in the regular education setting may be increased, and Respondent shall increase the student's inclusion time accordingly.
4. The District shall ensure that an interpreter is present at all ARD Committee meetings to assist the parent. Additionally, all IEP's and supporting documents shall be translated for the parent in a manner consistent with Tex.Educ. Code. 29.005.
5. The District shall provide training to all campus personnel who work with the student designed to educate them regarding the student's disability and the implementation of his IEP. The District shall provide documentation of this training to the parent and TEA no later than September 1, 2009.
6. The District shall convene an ARD Committee meeting to review the Assistive Technology Evaluation completed in this case as well as all other Independent Educational Evaluations which were pending at the time of the hearing. The ARD Committee shall consider the evaluations and adopt the recommendations necessary to provide the student a FAPE.
7. The ARDC shall meet within ten (10) days of receipt of this decision to begin implementation of the relief ordered herein.

All other relief not specifically granted herein is hereby **DENIED**.

**NOTICE TO THE PARTIES**

This Decision is final and is appealable to state or federal district court.

The District shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of Special Education Programs and Complaints at the Texas Education Agency, and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating that the Decision has been implemented; or 2.) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

**SIGNED** this 25<sup>th</sup> day of April, 2009.

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Sharon M. Ramage  
Special Education Hearing Officer

## SYNOPSIS

Issue No. 1: Whether the District failed to appropriately assess the student in all areas of suspected disability?

Held: For the Parent. The ARD Committee requested a psychological evaluation which was to determine the child's eligibility under the autism and emotional disturbance criteria. The evaluation wholly failed to address the criteria for emotional disturbance and the ARD Committee that reviewed the psychological evaluation failed to address it.

Citation 34 CFR 300.304; 14 USC 1414(b); 34 CFR 300.8(c)(4)

Issue No. 2. Whether the District failed to provide a Free Appropriate Public Education when it failed to timely evaluate the student when he re-enrolled in the District and the District had not served the student in two years?

Held: For the Parent. The District failed to develop an IEP based on current data regarding the child when the child returned to the District following a two year absence. The ARD Committee determined that the student's circumstances warranted further evaluation but waited six months to complete its re-evaluation. Additionally, although the District completed related service evaluations within a month of the student's re-enrollment, it failed to convene an ARD Committee meeting to review the evaluation and revise the student's IEP.

Citation: 20 USC 1414(a)(2); 34 CFR 300.303(a); 34 CFR 300.303

Issue No. 3: Whether the District impeded the parent's right to meaningfully participate in the decision making process by failing to interpret the ARD meetings in her native language.

Held: For the Parent. The parent's native language is Spanish. While many of the ARD Committee members were Spanish speaking, the child's special education teacher did not and was responsible for conveying key information during the ARD meetings that was neither interpreted nor translated. This deprived the parent of meaningful participation in the ARD meetings and the development of the student's IEP.

Citation: 34 CFR §322; Tex. Educ. Code § 29.005; 20 USC 1415 (f)(3)(E); 34 CFR §300.513(a)(2)

Issue No. 4. Whether the District failed to provide prior written notice when it denied the parent's request for additional inclusion time and parent training?

Held: For the District. The parent's request for additional inclusion time and interest in parent-training did not result in a non-consensus ARD and thus did not trigger the prior written notice requirements of IDEIA.

Citation: 14 USC §1415(b)(3) and (c)(1); 34 CFR §300.503; 19 Tex. Admin. Code §1050(h);

Issue No. 5: Whether the student's IEP was appropriate?

Held: For the Parent. The IEP goals for Occupational Therapy were not measurable. The Student's IEP lacked measurable goals in academic areas. Additionally, the student failed to master most of his IEP objectives as most objectives were continued for a second school year. The student made no meaningful progress during the 2007-2008 school year and the 2008-2009 school year through the date of hearing.

Citation: 34 CFR 300.320; *Board of Education of Hendrick Hudson Central School District v. Rowley, Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000).

Issue No.6: Whether the District failed to develop an appropriate BIP?

Held: For the Parent. Although the student's teacher (and the ARD Committee) acknowledged that the student's behavior impeded his progress), the District failed to develop a BIP during the 2007-2008 school year, which would have provided positive behavioral interventions, supports and strategies to address his behavior. The District waited an entire school year to develop the BIP, and then targeted behaviors that no longer existed in classroom, which meant the BIP was not individualized and based on current data.

Citation: 34 CFR 300.324(2)(i)

Issue No. 7: Whether the District failed to timely convene an ARD Committee meeting to review its Assistive Technology evaluation?

Held: For the Parent. In May 2008, the parent requested an assistive technology evaluation. The District failed to complete the evaluation until November, 2008. As of the date of the due process hearing, March 2, 2009, the District had not convened an ARD Committee meeting to review the evaluation so the ARD Committee could ensure that appropriate assistive technology devices were made available to the student.

Citation: 34 CFR 300.105(a)

Issue No.: 7 Whether the student's educational program was provided in the least restrictive environment.

Held: For the Parent. The District pre-determined the child's placement when it placed him in a self-contained classroom prior to convening an ARD Committee to develop an IEP. Additionally, the District's subsequent efforts were no more than mere token efforts to mainstream the student.

Citation: 34 CFR 300.116; *Daniel R.R. v. State Board of Educ.*, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989)