

**BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS**

STUDENT, bnf

PARENTS

Petitioner,

§

§

§

v.

§

DOCKET NO. 268-SE-0709

§

SILSBEE INDEPENDENT

§

SCHOOL DISTRICT,

§

Respondent.

§

DECISION OF THE HEARING OFFICER

Procedural History

Petitioner, Student (“Petitioner” or “**”) brings this action against the Silsbee Independent School District (“Respondent,” “the school district,” or, “Silsbee ISD”) under the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. § 1401 et. seq (IDEA) and its implementing state and federal regulations.

Legal Representatives

Student has been represented throughout this litigation by his legal counsel, Dorene Philpot with The Philpot Law Office. The school district has been represented throughout this litigation by its legal counsel Melody Chappell and her co-counsel Nancy Hart with Wells, Peyton, Greenberg & Hunt.

Resolution Session and Mediation

The parties waived a Resolution Session in writing on July 22, 2009 choosing instead to attempt mediation to resolve the issues in this case. The parties proceeded to mediation on September 1, 2009 but were not successful. Notice of the outcome of mediation was submitted by the parties that same day.

Continuances

Two continuances were granted in this case. The first was to provide Petitioner with an opportunity to complete an outside evaluation and to allow the parties the opportunity of attempting mediation with the benefit of the results of that evaluation. The second was at Respondent’s request to resolve a scheduling conflict for its legal counsel that arose after the hearing was reset the first time. The parties ultimately selected a new set of dates for the hearing by agreement.

Preliminary Motions

Several preliminary motions were disposed of on September 25, 2009 by written orders issued by the hearing officer. Petitioner's Motion for Enforcement of Stay Put Placement was denied. Petitioner's No Evidence Motion for Partial Summary Judgment and Respondent's Motion for No Evidence Partial Summary Judgment were both denied.

Due Process Hearing

The due process hearing was conducted on September 29-30, 2009 and October 1, 2009. It was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by his legal counsel Dorene Philpot and for purposes of the hearing assisted by her co-counsel Susan Heiligenthal, Attorney at Law. In addition, Student's parents, ** and lay advocate ** also attended the hearing.

Respondent continued to be represented by its legal counsel Melody Chappell and Nancy Hart. In addition, **, Director of Special Education for Silsbee ISD, attended the hearing as the party representative.

At the conclusion of the hearing the parties requested the record remain open in order to allow submission of written closing arguments on the seminal issues in this case. Those pleadings were submitted by both parties in a timely manner. The parties agreed to extend the deadline for the hearing officer's decision three additional business days to allow the hearing officer additional time to complete a review of the extensive record on file in this case, conduct the requisite legal research and prepare the decision. The Decision in this case was extended, by agreement, to November 17, 2009.

Issues

Petitioner submitted the following overall, broad issue: Whether the school district failed to devise an appropriate Individual Educational Plan (IEP) and therefore failed to provide Student with a free, appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) within the one year statute of limitations period that applies in Texas; and specifically:

1. Whether the school district failed to convene an Admission, Review & Dismissal Committee meeting (ARD) at parental request for the purpose of designing an appropriate IEP for Student;
2. Whether the school district failed to propose or provide any services for Student within the meaning of the IDEA;
3. Whether the school district failed to propose or provide placement in an autism program defined specifically as a full time, year round Applied Behavior Analysis (ABA) program staffed with a behavioral consultant appropriately trained in ABA and autism;

4. Whether the school district failed to implement the requirements of the Autism Supplement as stated in Title 19 of the Texas Administrative Code Section 89.1055 (e)(1)-(11);
5. Whether Student needs occupational therapy (OT), physical therapy (PT), speech, extended school year services (ESY) and in-home training in order to receive a free, appropriate public education;
6. Whether the school district failed to provide Student's parents with prior written notice of its refusal to convene an ARD meeting or refusal to provide Student with an ABA autism program;
7. Whether the school district failed to conduct a timely and updated Full & Individual Evaluation (FIE);
8. Whether the school district failed to appropriately train school staff to work with Student;
9. Whether Student needs an aide in order to receive a free, appropriate public education and whether the school district failed to assess his needs for an aide;
10. Whether the school district failed to use scientifically based, peer reviewed methods of instruction in its proposed program for Student; and,
11. Whether Student is entitled to compensatory relief as a result of the alleged denial of FAPE.

Requested Relief

Petitioner requests the following items of requested relief:

1. The school district conduct an FIE, including specifically a psycho-educational evaluation to determine his present levels of performance and educational needs, including specifically a determination of Student's baseline abilities using the Assessment of Basic Living & Language Skills (ABLIS) as a component of the overall assessment, as well as specifically assessments for OT, PT, speech, and in-home training;
2. The school district conduct a functional behavior assessment by a trained behavioral specialist in autism and implement a Behavior Intervention Plan (BIP) designed by the behavioral specialist as a component of Student's IEP;
3. The school district design, and/or revise the current IEP to provide Student with an appropriate ABA autism program including the following related services: ABA therapy, speech, OT, PT as well as social skills training and in-home training;

4. The school district provide appropriate training to all staff who work directly with Student each semester for the next two years beginning in August 2009 up through January 2010 and to be comprised of an in-service workshop about the nature and scope of autism, how autism manifests itself in Student particularly, effective behavioral and instructional techniques for working with Student, and a practicum to provide staff opportunities to practice appropriate techniques with students with autism;
5. The school district fund the provision of a year round ABA program at the **, including extended school year services through the summer of 2010;
6. The school district reimburse Student's parents as compensatory relief for the costs of private placement at the ** beginning in March 2008 up through the resolution of the due process hearing, including additional reimbursement for the costs of privately provided speech, ABA therapy, OT, and mileage associated with the private placement and services; and,
7. Attorney's fees and reimbursement for the cost of any expert witness fees.

Findings of Fact

1. Student is a ** with diagnoses of Pervasive Developmental Disorder – Not Otherwise Specified, Atypical Autism (PDD-NOS or PDD), Autistic Disorder, and, Speech Impairment. (Petitioner's Exhibit 2, p. 199 (referred to hereafter as "P. Ex. ___, p. ___") (P. Ex. 5, pp. 30-31) (P. Ex. 35, p. 249); (Respondent's Exhibit 15, pp. 100, 199-200) (referred to hereafter as "R. Ex. ___, pp. ___"). Student meets DSM-IV: TR criteria for autism. Assessment results also suggest the possibility of some degree of intellectual disability although communication and behavioral deficits may mask cognitive functioning. (P. Ex. 5, p. 37) (P. Ex. 35, p. 249) (R. Ex. 14, p. 304). There is no dispute about Student's eligibility as student with autism in need of special education.
2. Student exhibits significant pervasive developmental challenges. His functional communication is significantly limited as well as his ability to communicate needs and maintain personal safety. Student displays deficits in reciprocal social interactions. He has not developed peer relationships appropriate to his developmental level nor exhibit spontaneous interaction with other people. Student exhibits a marked lack of social and emotional reciprocity. (P. Ex. 35, p. 249).
3. Student displays an intense interest in a limited number of activities, is very routine oriented, and can be inflexible. Student has unusual sensory interests such as ** and **, particularly **. Student's developmental disability affects verbal and nonverbal communication, social interaction, self-help, social

functioning and educational performance. (P. Ex. 35, pp. 248, 249). When left to his own devices Student engages in ** behavior. (Transcript Volume II, p.443)(referred to hereafter as “Tr. Vol. ____, p. ____”).

4. Student also exhibits a number of other behaviors that interfere with his ability to learn and engage in appropriate social interactions including **, aggression and **. (P. Ex. 28) (Tr. Vol. I, pp. 133, 138-139).
5. Student has demonstrated difficulties in articulation and all areas of language: receptive, expressive and pragmatic. He is nonverbal, exhibits difficulty in critical thinking skills which involve the understanding of linguistic input and the use of language for expressive purposes. Student needs to develop a functional communication system which might include strategies such as a communication board or the Picture Exchange Communication System (PECS). (P. Ex. 35, p. 249) (R. Ex. 15, pp. 312-313).
6. Student has needs in multiple areas including communication, social skills, functional academics, adaptive behavior, independent living skills and work-based learning. Student needs a curriculum and learning activities that focus on these needs. (P. Ex. 35, p. 250).
7. He needs a systemic behavior-based approach throughout the year. Student needs a highly structured classroom with a high teacher to student ratio and an emphasis on the use of visual cues and visual organization. Student also needs routines and procedures for work tasks, organization, self-care and communication. (P. Ex. 35, p. 250) (Tr. Vol. II, pp. 324-326)
8. Student needs a daily schedule that reflects minimal unstructured time and active engagement in learning activities. An Applied Behavior Analysis (ABA)/discrete trial training type program is an appropriate intervention for Student provided and supervised by properly trained staff. (P. Ex. 35, p. 250). ABA is a well researched, peer-reviewed, scientifically based approach shown to be effective for children with autism. (P. Ex. 41)(Tr. Vol. II, pp. 342-344).
9. Student needs a one-on-one assistant in order to make meaningful educational progress. (Tr. Vol. II, pp. 323-325). He does not have the communication skills to participate in a regular classroom or even a small resource class with a 10:2 student to teacher ratio. (Tr. Vol. II, pp. 492-493).
10. Student has been eligible for special education services beginning at age ** through the Early Childhood Intervention Project Search program (ECI). (P. Ex. 2, p. 4) (R. Ex. 13, p. 192). Beginning in November ** at age ** Student was served by the Lumberton Independent School District (Lumberton ISD) through the Big Thicket Co-op with placement in the ** as a student with a non-categorical early childhood and speech impairment. (P. Ex. 3, p. 25; P. Ex. 5, pp. 30, 37; P. Ex. 6; P. Ex 7; P. Ex. 9; P. Ex. 11, p. 5; P. Ex. 15, p. 103).

Student received speech therapy and in home training from Lumberton ISD as a component of his ** program. (P. Ex.4) (Tr. Vol. II, p 411).

11. The ** is a private school serving children with a variety of special needs, including children with physical disabilities, mental retardation, speech delays, behavioral issues, and children with autism. (Tr. Vol. I, pp. 130, 201) (Tr. Vol. III, pp 574-575). The ** provides occupational, physical, and speech therapy as well as an ABA program specifically for children with autism. (Tr. Vol. III, p. 579). The ** delivers its programs year round with a two week break in the summer. (Tr. Vol. I, pp. 153-154) (Tr. Vol. II, pp. 424-425).
12. Lumberton ISD also provided Student with two hours per week of ABA therapy as an outreach student at the ** as a component of his educational programming in place of in-home training. Parent training at the ** was also provided during the ABA therapy sessions. (Tr. Vol I, p. 151)(Tr. Vol. II, pp. 411-412).
13. Student demonstrates a history of regression when he is not being provided with a highly structured instructional program. He does not respond well to change and has difficulty with transitions. (P. Ex. 17, 20) (Tr. Vol. II, pp. 323, 334). In response to these needs Lumberton ISD provided Student with extended school year (ESY) services in the summer of 2006 and the summer of 2007 as components of the **. (Tr. Vol. II, p. 412). The ESY services included ABA, speech therapy and other educational services. (P. Ex. 15, pp. 108-114) (Tr. Vol. II, p. 412).
14. Student's parents made a unilateral placement for full time day treatment at the ** for the 2007-2008 school year based on his success in the 2007 ESY program at **. Student's parents made the unilateral placement after Lumberton ISD declined to pay for a full time ABA program at the **. (Tr. Vol. I, pp. 151, 153) (Tr. Vol. II, p. 513).
15. The ** ABA program is a very structured, intensive 1:1 approach delivered by an ABA trainer supervised by a certified behavioral analyst. The entire focus of the ** program is on the development of skills that Student needs in order to learn, including appropriate behavior and the development of communication skills. The curriculum is developed on the basis of assessment data and the instructional tasks and activities are designed and implemented on the basis of Student's progress measured by daily academic and behavioral data collection and analysis. A very specific, detailed Behavior Intervention Plan (BIP) is a component of Student's program at **. (Tr. Vol. II, pp.329-330)(P. Ex. 4; P. Ex. 26; P. Ex. 27; P. Ex. 28).
16. At the ** Student was provided with 60 minutes of in home training twice a week, parent counseling and parent training for 60 minutes four times a

semester, direct speech therapy for 20 minutes 56 times a year, and OT for 30 minutes 56 times a year. (P. Ex. 15, pp. 109-110, 114). Student's parents supplemented speech with an outside private therapist. (Tr. Vol. II, pp. 490-491).

17. Student's family moved from Lumberton ISD into the Silsbee ISD in the spring of 2008. (Tr. Vol. II, pp. 525). In March 2008 Student's father approached the local ** school to enroll Student, meet the principal, and learn about the campus and the classrooms. (Tr. Vol. I, pp. 259-260). He brought Student's birth certificate and other similar documents with him to the school. (P. Ex. 40, pp. 312-314) (Tr. Vol. I, p. 259). (Tr. Vol. II, pp. 524-525).
18. Student's father first met with the principal in her office. He informed her Student was currently attending the **. The principal gave Student's father a brief tour of the school and showed him two settings that might be appropriate for Student - a regular education ** class and a ** classroom. (Tr. Vol. I, pp. 260, 285). The principal told Student's father the school would not pay for Student to attend the **. (Tr. Vol. II, pp. 525-526).
19. Student's father was concerned about both settings at the ** school. The regular education class was a big classroom – around 27 students. (Tr. Vol. I, p. 260). The ** classroom had ** students and appeared cluttered and unorganized. The ** class included students of varying ages with a variety of disabilities such as cognitive impairments and cerebral palsy. (Tr. Vol. II, p. 526-527). Student's father asked questions about the number of paraprofessionals on the campus, the availability of teachers, staff training, expectations for children with autism and the school's experience with children with autism. (Tr. Vol. I, pp. 259-261).
20. Student's father also spoke with the educational diagnostician about Student. He told the diagnostician the family recently bought a home in Silsbee and were interested in Student attending public school. Student's father told the diagnostician that Student was currently attending the **. She advised him that the school district would need all the paperwork from the **, including goals and objectives, psychological reports, and eligibility documents. (Tr. Vol. III, pp. 626-627).
21. Student's father completed a form entitled "Silsbee Independent School District Student Enrollment Form-Adds/Re-Entries" (enrollment form) on March 26, 2008. Student's father noted on the enrollment form that Student previously attended Lumberton ISD and was currently attended **. (P. Ex. 40, pp. 303-304).
22. Student's father also completed additional school district forms on March 26, 2008 including a multimedia permission form, a family survey, a home language survey, and a student residency questionnaire. He also signed a

form authorizing the release of all of Student's records from the ** to the public school. (P. Ex. 40, pp. 305-308, p. 310).

23. School district personnel treated these forms in March 2008 as "pre-enrollment" for the following 2008-2009 school year. Under campus policy and practice a student is not formally enrolled unless and until the student actually, physically appears and attends school. (Tr. Vol. I, pp. 63, 254-255, 256-257).
24. The principal was under the impression that Student's father wanted to think things over with Student's mother before making a firm commitment that Student would attend public school. School personnel assumed Student's father would contact the campus again if and when the family was ready to schedule an ARD. (Tr. Vol. I, pp. 262, 264-265).
25. At some point in either April or May 2008 Student's father contacted the principal and notified her that Student would remain at the ** for the remainder of the year. (Tr. Vol. I, pp. 262-263, 265). However, Student's father also notified the principal that Student would attend the ** in the following 2008-2009 school year. (Vol. I, p. 266). The grade level was changed from ** on the original enrollment form paperwork by the registrar. (Tr. Vol. I, pp. 261-262).
26. Student's father faxed copies of the ** 2007-2008 IEP to the educational diagnostician on May 20, 2008. (P. Ex. 22) (Tr. Vol. III, p. 630). An ARD was scheduled to plan and prepare for Student's entry into the public school beginning in August 2008. (Tr. Vol. I, p. 265). The ARD was conducted on May 27, 2008 (the May 2008 ARD). (P. Ex. 23).
27. The members of the May 2008 ARD included Student's parents, the school principal, a teacher, a special education teacher, the educational diagnostician, and two representatives from the ** – the center's executive director and a board certified behavior analyst (BCBA). (Vol. I, p. 124)(Vol. III, pp. 578-579, 580)(P. Ex. 23, p. 175). The ARD reviewed and discussed the IEP that was currently being implemented at the **. The ** IEP consisted of a very specific and detailed set of goals and objectives derived from the Assessment of Basic Learning and Language Skills (ABLBS) an assessment tool closely aligned with ABA. (P. Ex. 23) (Tr. Vol. I, pp. 131-136).
28. The school district proposed placement in a self-contained special education class characterized as a resource/life skills class with regular education PE. (Tr. Vol. II, pp. 420-421)(R. Ex.1). The teacher of the self-contained special education class was not a member of the ARD. (Tr. Vol. II, p. 421).

29. The school district proposed to implement the ** IEP until the special education teacher had an opportunity to observe, work with, and assess Student. The school district contemplated returning to ARD in 30 days after the beginning of the new school year to revise the IEP following the 30 day transition period. (R. Ex. 1) (Tr. Vol. I, pp. 68-69, 284-285) (Tr. Vol. III, pp. 672).
30. Student's parents requested services from the ** to continue. The request was refused. The May 2008 ARD discussed the use of a ** staffer to "shadow" Student as he transitioned into the public school. Although the school district agreed to the use of the shadow it did not agree to pay for the service. (Tr. Vol. II, pp. 416-417) (Tr. Vol. II, pp. 457, 530) (P. Ex. 23, p. 176). The May 2008 ARD decided that Student would initially begin the new school year for a half a day until he could comfortably transition into a full instructional day. (P. Ex. 23, p. 165) (Tr. Vol. II, p. 442) (Tr. Vol. III, p. 663).
31. The May 2008 ARD also agreed on the need for staff training and contemplated that the special education teacher and her paraprofessional would attend a Region 5 conference over the summer and observe Student working with staff at the **. (P. Ex. 23, p. 166). However, the staff training was never scheduled or completed. (Tr. Vol. I, pp. 272-275, 287-288) (Tr. Vol. II, pp. 426-427).
32. Both parents observed the self-contained special education class following the May 2008 ARD and spoke briefly with the teacher. (Vol. II, pp. 422-423, 432-433). The classroom environment was very different from and lacked the intensive structure Student was provided at the **. These differences were unsettling to Student's parents. (Tr. Vol. II, pp. 422-424). Although the special education teacher has some ABA training and training in educational methods for teaching children with autism she is not a BCBA. (R. Ex. 3; R. Ex. 4; R. Ex. 5; R. Ex. 6).
33. Student needed an updated psychological by July 2008. (P. Ex. 23, p. 163). The school district agreed to fund the updated psychological and the ARD selected an outside, private psychologist for that purpose. (Tr. Vol. II, p. 418)(Tr. Vol. III, pp. 634-635). Student's mother signed the requisite consent for a psychological evaluation at the May 2008 ARD. (R. Ex. 1, p. 21) (Tr. Vol. II, pp. 454-456).
34. The psychological was never completed. There was a misunderstanding between the parties about scheduling the appointment. Student's parents thought the school district would set up the appointment. They expected to hear back from the school district or the psychologist but never did. (Tr. Vol. II, pp. 418-419, 523-524, 531). School personnel thought Student's parents

chose to contact the psychologist directly to set up the appointment. (Tr. Vol. I, pp. 289-290) (Tr. Vol. III, pp. 635-636). The educational diagnostician phoned the psychologist to advise him of the district's agreement to fund the evaluation but the school district took no further steps to ensure the psychological was completed. (Tr. Vol. III, pp.695-696). Student's parents secured their own private psychological while this litigation was pending. The cost of that evaluation was \$1,650. (P. Ex. 33, 35).

35. OT, speech and parent training were also discussed at the May 2008 ARD. The members agreed Student needed OT, and speech. The school district proposed 30 minutes of speech therapy for 30 sessions each semester. (R. Ex. 1, pp. 6-7, 11); The school district also proposed 30 minutes of OT for 15 sessions a semester. (R. Ex. 1, pp. 6, 11).
36. The May 2008 ARD agreed that Student needed in home training but no schedule for in home training was proposed at the ARD. Instead, the school district proposed evaluating Student at the beginning of the new school year and then meeting again to "work out" in home training. (P. Ex. 23, p. 165).
37. The May 2008 ARD also agreed that Student's parents needed parent training. The school district proposed paying for Student's parents to attend one workshop or conference in Texas about autism one time a year, provide Student's parents with information about school district parent training sessions, and, provide access to the building counselor and reading material. (P. Ex. 23, p. 165).
38. The May 2008 ARD did not discuss or propose that Student receive any ESY services for the 2008 summer. (P. Ex. 23) (Tr. Vol. III, p. 674).
39. There were no further communications between the parties or additional ARD meetings following the May 2008 ARD until a few days prior to the beginning of the 2008-2009 school year. Student's parents received a one page "welcome" packet including a letter from the special education teacher and another letter from the principal about campus procedures, bus and bell schedules, and tee shirt forms. There have been no other ARD meetings since the May 2008 ARD. (P. Ex. 36) (Tr. Vol. I, p. 277) (Tr. Vol. III, pp. 693, 695).
40. Student's parents did not receive a copy of the notice of procedural safeguards before or after the May 2008 ARD or a copy of the ARD documents despite the good intentions of the educational diagnostician to do so. (Tr. Vol. I, p.509) (Tr. Vol. II, p. 415, 652, 679).
41. Student has made progress at the **. He is now fully potty trained, engages in less self-stimulatory behavior, engages in appropriate play, is beginning to exhibit some communication skills, shown greater independence, and made

marked improvement in social interaction and self help skills. He has also made progress with fine motor, visual-motor, and sensory processing skills. (P. Ex. 19, 24) (Tr. Vol. I, pp. 148-149, pp. 205-206) (Vol II., p.558).

42. The cost of out of pocket private placement at the ** to Student's parents for summer 2008 ESY was \$712.40. The cost of out of pocket private placement at the ** to Student's parents for the 2008-2009 school year was \$4,196.02. The out of pocket cost of private placement at the ** to Student's parents as of the date of the due process hearing for the current 2009-2010 school year is \$999.54. (P. Ex. 31, 32) (Tr. Vol. II, pp. 539-543).

DISCUSSION

Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free, appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. *20 U.S.C. § 1400 (d)*. Under IDEA Silsbee ISD has a duty to provide a free appropriate public education to all children with disabilities residing within its jurisdictional boundaries between the ages of 3 and 21. *34 C.F.R. § 300.101 (a)*. The evidence showed Student was a child with a disability residing within its jurisdiction and thus the school district had the duty to serve him under IDEA.

The seminal issue in this case is whether Student's parents are entitled to reimbursement for the costs of a unilateral private placement at the ** beginning in March 2008 up through the current school year. Petitioner framed the issues in this case in terms of whether the school district failed to provide or propose a set of specific educational components and to comply with certain procedural requirements. When taken together the issues pose the central question of whether the school district provided or proposed an appropriate educational program for Student and, if not, whether the private school program at the ** did.

A free, appropriate public education is special education, related services and specially designed personalized instruction with sufficient support services to meet the unique needs of the child in order to receive a meaningful educational benefit. The instruction and services must be provided at public expense and comport with the child's IEP. *20 U.S.C. § 1401(9); Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 188-189, 200-201, 203-204 (1982)*.

IEP

In meeting the obligation to provide a free, appropriate public education the school district must have in effect an Individual Education Program (IEP) for each child with a disability at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, a

child's IEP also includes a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, and, the duration and frequency of the services and the location where the services will be provided. *34 C.F.R. §§ 300.22, 300.323 (a)*.

Enrollment Issue

Student's enrollment in Silsbee ISD arose as an issue during the course of the due process hearing. Testimony of school district witnesses outlined a school district policy and practice that a student is not "enrolled" until the student physically appears on campus. This view dictated the way the school district approached the design, development and implementation of his IEP.

A number of state and federal regulations apply to a student newly enrolled in a public school district who has been previously served by another school district in Texas. *34 C.F.R. § 300.323(a); 19 Tex. Admin. Code § 89.1050 (f) (2)*. However, it is significant that the regulations refer specifically to *public* schools. The school district's treatment of Student as a "transfer" student was a critical mistake and the May 27th ARD should not have been characterized as a "transfer" ARD. Student was not coming from one Texas public school district to another. Instead, he was coming from a private school to a public school. The regulations that allow one public school to adopt the IEP from the previous public school do not apply when a student comes to the public school from a private school under the plain language of the regulation.

The school district argues that Student's parents are not entitled to reimbursement for his private placement because he never enrolled; i.e., he did not physically appear on the public school's front steps and attend school. The Supreme Court has recently decided otherwise holding that the IDEA authorizes reimbursement for the cost of private special education services when a school district fails to provide a free, appropriate public education and the private school placement is appropriate regardless of whether the child previously received special education or related services through the public school. *Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2009 U.S. LEXIS 4645 at *31(2009)*.

Therefore I conclude that Petitioner's claim for reimbursement is not barred because he was not "enrolled" in the school district but instead must be resolved using another analysis.

ARD Meeting

Petitioner contends the school district's failure to convene an Admission, Review & Dismissal Committee (ARD) meeting at parental request was a denial of a free, appropriate public education. I conclude it was not. The school district had notice in March 2008 that a child with a significant disability now resided within the district's jurisdiction. The school district did not convene an ARD until May 27, 2008. However, even if the ARD was not convened in a timely manner the evidence showed there was

virtually no educational harm in doing so since Student's parents clearly and unequivocally decided not to seek a public school placement for the remainder of the 2007-2008 school year. No substantive educational harm resulted from any procedural error in failing to convene the ARD sooner. *34 C.F.R. § 300.513 (a) (2)*.

FIE

Petitioner also contends the school district failed to conduct a timely and updated Full and Individual Evaluation (FIE) and this resulted in a denial of a free, appropriate public education. The May 27, 2008 ARD clearly contemplated that the school district would fund an updated FIE. The evidence also showed that there was a misunderstanding between home and school about setting up the FIE – the school district thought Student's parents wanted to schedule the appointment and Student's parents thought the school district would take care of it.

Nevertheless, even if the school district thought Student's parents were going to initiate the FIE it should have taken steps to ensure it was completed. The school district, not Student's parents, had the legal responsibility to implement this aspect of Student's IEP. Once the school district had notice of Student's need for an updated FIE the school district had the responsibility to ensure it was completed in a timely manner. The school district should have been proactive in making sure the FIE was completed. *See, 34 C.F.R. § 300.305*.

Reimbursement for Private Placement

A parent is entitled to reimbursement for the unilateral private placement of a child with a disability if the public school's program does not provide the student with a free, appropriate public education and the private school's program is appropriate. *Sch. Comm. of Burlington v. Dept. of Educ. of Mass, 471 U.S. 359, 370 (1985)*. Furthermore, the IDEA does not categorically prohibit reimbursement for private school placement costs even if the child has not previously received special education and related services from the public school. *Forest Grove Sch. Dist. v. T.A., supra; 34 C.F.R. § 300.148 (a)*.

Reduction of Denial of Reimbursement

A hearing officer may reduce or deny the cost of reimbursement if any of the following conditions apply:

- The parents did not inform the most recent ARD prior to the child's removal from public school that they were rejecting the school district's proposed placement by stating their concerns about the school district's proposed program and their intent to enroll the child in a private school at the school district's expense; or,
- The parents did not provide the school district with the requisite written notice to the school district at least ten business days prior to the child's removal from public school; or,

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- The parents did not make the child available for an evaluation when the school district provides the parents with the requisite notice of its intent to evaluate the child, including an appropriate and reasonable purpose for the evaluation; or,
- The hearing officer finds the parents took unreasonable actions.

34 C.F.R. § 300.148 (d) (1) (2).

Statute of Limitations

Respondent raised the issue of whether Petitioner's claims for reimbursement arising prior to July 2008 are barred by the one year statute of limitations applied to special education claims in Texas. *19 Tex. Admin. Code § 89.1151*. If so, Petitioner's claims for reimbursement for private school placement beginning in March 2008 up to July 8, 2008 would be barred. However, the statute of limitations is an affirmative defense and must be formally submitted in a responsive pleading. *Tex. R. Civ. P. 94*.

The school district filed its response to Petitioner's initial request for hearing but did not raise the statute of limitations in that pleading or during the July 27, 2009 prehearing telephone conference or in response to the Amended Notice of Hearing and Revised Scheduling Order that confirmed the issues sent to counsel on the same day. It was not until Respondent submitted its final written closing argument that it raised the statute of limitations defense. Under the procedural facts of this case I find this issue was not raised in a timely manner and therefore the one year statute of limitations rule will not be applied in this case to bar Petitioner's claims arising between March 2008 and July 8, 2008.

Are Student's Parents Entitled to Reimbursement?

In this case I must first determine whether Student's parents are entitled to reimbursement for the costs of his unilateral private placement at the **. *Burlington, 471 U.S. at 370*. If so, I may also consider whether reimbursement should nevertheless be reduced or denied. *34 C.F.R. § 300.148 (d); Forest Grove, supra*.

First Prong: Was the School District's Program Appropriate?

The first prong of the reimbursement analysis asks whether the school district proposed or provided Student with an appropriate program. The evidence showed it did not. First, the evidence showed that the school district's proposed program could not replicate the intensive 1:1 instructional arrangement to provide Student with the highly structured ABA therapy that he needs. The ** IEP goals and objectives were clearly based upon the ABA/discrete trial training and progress was measured by a specific assessment tool aligned with that approach. The school district was not set up to be able to deliver that same highly structured, intensive instructional arrangement that Student needs.

Second, the school district failed to address Student's needs for an extended school year during the summer of 2008 following the May 27th ARD. The evidence showed Student needs ESY because he regresses without it. The ** IEP clearly contemplated the continuation of services through the summer of 2008. The ** IEP specifically refers to and utilizes an instructional school year divided into quarters as opposed to semesters. Consideration of the need for extended educational programming for children with autism is specifically required in Texas. *19 Tex. Admin. Code § 89.10555 (e) (1)*.

Third, the school district failed to ensure completion of the psychological that was due by July 2008. The school district, once it agreed to it, failed to implement that aspect of the ** IEP. *See, 34 C.F.R. § 300.303 (a) (b)*. Furthermore, the school district could not have designed an appropriate program for Student without current evaluation data. *See, 34 C.F.R. § 300.324 (a) (i) (iii)*.

Fourth, the school district failed to ensure adequate preparation of its staff to meet Student's needs when it failed to ensure the ABA staff training agreed upon at the ARD. The evidence showed that the school district made a minimal gesture towards scheduling training with the ** and no effort to send staff to ABA training at Region 5. *See, 19 Tex. Admin. Code § 89.10555 (e) (10)*. The school district's failure in following up and ensuring that the teacher and paraprofessional had an opportunity, at a minimum, to interface with ** staff and learn the techniques and strategies of the ABA approach is further evidence that the school district was not prepared to provide Student with an appropriate educational program.

Fifth, the school district, having agreed to transition Student gradually from the private school to the public school with the support of an ABA trainer from the ** nevertheless refused to fund the cost of that support service. The evidence showed that Student has a need for consistency in his instruction and that change and transitions are very challenging for him. The support that would have been provided by the ABA trainer to both Student and school district staff met that need.

A free, appropriate public education means that the support services are paid for by the school district not the parent. *Rowley, 471 U.S. at 188*. The refusal to pay the cost of the ABA trainer to "shadow" Student as he transitioned gradually into the public school added to parental concerns that the school district did not really understand Student's needs and was not prepared to provide him with an appropriate program.

Sixth, the somewhat vague nature of other aspects of the school district's proposed program added to legitimate parental concerns. The school district did not explain, define, or propose a daily schedule reflecting minimum unstructured time although the ARD noted this was an need for Student. *19 Tex. Admin. Code § 89.10555 (e) (2)*. Similarly, the school district's proposed program noted the need for in-home training but failed to specify how or when Student would be evaluated for that service or how those needs would be addressed. *19 Tex. Admin. Code § 89.10555 (e) (3)*.

Finally, the school district's rejection of 1:1 ABA/discrete trial training with only a vague

commitment to provide staff support with “** training on ABA” did not meet Student’s need for a highly structured classroom with an emphasis on functional communication and the use of objective behavioral data compiled and analyzed on a daily basis.

In sum, the public school district could not possibly implement the ** IEP as it was designed because it did not have adequately trained staff to deliver ABA training nor was it set up to provide Student with the intensive, 1:1 instruction he needed throughout the instructional day.

The Four Factors Test

In Texas the Fifth Circuit has articulated a four factor test to determine whether a school district’s program meets IDEA requirements. Those factors are:

- The program is individualized on the basis of the student’s assessment and performance;
- The program is administered in the least restrictive environment;
- The services are provided in a coordinated, collaborative manner by the “key” stakeholders; and,
- Positive academic and non-academic benefits are demonstrated.

Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997).

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district’s educational program for reimbursement purposes. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009). Application of the four factors to the evidence in this case supports the conclusion that the school district’s program was not appropriate.

First, the school district’s program was not individualized on the basis of assessment and performance because the school district failed to complete the updated psychological and failed to consider the behavioral data that showed Student needs a highly structured instructional setting with 1:1 support. Furthermore, it did not contemplate continuation of ABA/discrete trial training.

Second, the school district’s program would not be administered in the least restrictive environment. Although the IDEA expresses a preference for educating children with disabilities with their non-disabled peers the evidence showed that the self-contained special education classroom with regular PE would not be appropriate for Student. The evidence showed he simply is not ready for the public school because he does not have sufficient communication or behavioral skills to manage the public school classroom environment.

Third, the services were not going to be provided in a coordinated, collaborative manner. The school district refused to provide ABA therapy by qualified personnel or to fund Student's ABA trainer to act as a shadow in supporting his transition from private to public school. The school district did not take the necessary steps to foster the exchange of information between private and public school staff. Furthermore, the school district failed to communicate clearly and effectively with Student's parents in purporting to implement the ** IEP. Student's parents were left out of the process and wondering what the school district was going to do.

Fourth, the experts predicted that Student could be expected to regress both academically and behaviorally under the school district's program given its lack of structure and focus.

For these reasons I find the school district's program was not reasonably calculated to provide Student with the requisite educational benefits and was therefore not appropriate. *See, Cone v. Randolph Cnty. Sch. Bd. of Educ., 2009 U.S Dist. LEXIS 87163 at 9-10 (D.C. N.C. 2009).*

Second Prong: Was the ** Program Appropriate?

The second prong of the reimbursement analysis asks whether the educational program provided by the private school was appropriate. *Burlington, 471 U.S. at 370.* The private school program need not necessarily meet every specific requirement of the IDEA but only that it be "otherwise proper" under IDEA. *Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 13, 15 (1993).* *See also, Richardson Ind. Sch. Dist. v. Leah Z., 580 F. 3d 286, 294 (5th Cir. 2009).* The evidence showed that it did.

The ** IEP clearly consisted of ABA therapy with communication and behavior as the main focus of instruction. The goals and objectives were drawn from the ABLLS, a very specific assessment tool closely aligned with the ABA approach. Progress in meeting ** IEP goals and objectives was measured using the ABLLS. The ** IEP also clearly contemplated and was in fact delivered in an intensive, highly structured 1:1 instructional arrangement by a trained ABA therapist monitored and supervised by a certified ABA behavior analyst. OT, speech, parent training, and extended school year services were also components of the ** IEP.

Student has made progress in the ** program. The ** program is provided all year long. It utilizes objective behavioral data that allows continuous adjustment to meet Student's complex needs. It utilizes a well researched, peer-reviewed, scientifically based approach shown to be effective in teaching children with autism. For these reasons I find the ** program is appropriate under IDEA.

Procedural Safeguards

The cost of reimbursement for a unilateral private school placement cannot be reduced or denied when (among other reasons) the parent's failure to provide the school with the

requisite notice was because the school prevented the parents from providing the notice or the parents had not received the requisite notice of procedural safeguards from the school district. *34 C.F.R. §§ 300.148 (e) (i) (ii); 300.504 (a)*. A copy of procedural safeguards must be given to the parents by the school district (among other conditions not relevant here) at least once a year, upon initial referral for an evaluation, upon receipt of a due process hearing complaint, and upon parental request. *34 C.F.R. § 300.504 (a) (1)-(4)*. The procedural safeguards notice must contain a full explanation of all IDEA procedural safeguards related to, among other provisions, prior written notice and the requirements for unilateral placement of children in private schools at public expense. *34 C.F.R. § 300.504 (c) (2) (8)*.

The credible evidence showed that Student's parents did not receive a copy of the requisite procedural safeguards when Student's father first approached the school district in March, at the May 27th ARD, or at anytime thereafter. Had the procedural safeguards been provided Student's parents would have had notice of their obligation to provide prior written notice to the school district of their intent to place Student at the ** for summer school in 2008 and for the 2008-2009 school year. The failure to provide Student's parents with the requisite notice of procedural safeguards is an equitable factor in determining whether to reduce or deny the request for reimbursement.

The Scope of Reimbursement

The school district failed to implement the IEP it purported to adopt from the ** when it failed to provide Student with extended school year services during the summer of 2008. The school district did not propose an appropriate program for the 2008-2009 school year. The failure of Student's parents to provide the school district with prior written notice of a request for reimbursement for private placement at the ** for the summer of 2008 and for the 2008-2009 school year is mitigated by the school district's failure to provide Student's parents with ARD documents, including a copy of the notice of procedural rights.

The evidence showed that Student's parents felt they had no choice but to assume the costs of continued placement at the ** when the school district failed to follow up on its commitments for an updated psychological and staff training and when the details of how Student's instruction would be delivered were vague. Accordingly, I find that it would not be appropriate to reduce or deny the out of pocket costs to Student's parents of reimbursement for the summer of 2008 and the 2008-2009 school year.

However, I deny the request for reimbursement for the period of time beginning in mid-March 2008 through the end of that school year. The school district should have convened an ARD meeting within 30 days of the date Student's father first approached the school district about his son. However, the failure to do so did not result in any substantive educational harm. The evidence showed that Student's parents never intended that Student would attend Silsbee ISD during the 2007-2008 school year and he continued to receive services from the ** where he had been unilaterally placed by his parents in August 2007 following their disagreement with the Lumberton ISD.

However, I grant Petitioner's request for reimbursement of the out of pocket costs to Student's parents of placement at the ** for the current 2009-2010 school year. By July 8, 2009 Student's parents retained legal counsel and filed a request for a due process hearing. The request put the school district on notice that Student's parents were seeking reimbursement for private placement for the current 2009-2010 school year. The rationale for the notice requirements for reimbursement of the costs of a unilateral private placement is to allow the school district to respond to the request.

This notice provides the school district with an opportunity to either agree to the request or to offer the student a free, appropriate public education. The evidence showed the school district did not reconvene an ARD meeting to address the request nor has it offered any educational program other than the one proposed at the May 27, 2008 ARD. I have already concluded that program was not appropriate.

Other Requested Relief

Student needs continued placement at the ** unless and until he is ready for the larger public school environment. Thus Petitioner's additional requests for an FIE an FBA, implementation of a BIP, an IEP that includes 1:1 ABA therapy, OT, speech therapy and AT, staff training, and, prospective costs of summer school in 2010 are not appropriate items of relief given that he is currently receiving services at the ** for the 2009-2010 school year.

Finally, the evidence did not conclusively establish the need for additional speech and OT beyond what was provided as a component of the **'s program. Petitioner's requests for reimbursement for the costs of the private, outside speech and OT must be also be denied.

Conclusions of Law

1. Petitioner is entitled to reimbursement for the out of pocket cost to Student's parents of private school placement because Respondent failed to provide Petitioner with a free, appropriate public education and the private school placement was appropriate. *34 C.F.R. § 300.148(c)*.
2. Petitioner's reimbursement award may not be reduced or denied for Petitioner's failure to provide Respondent with the requisite notice they were rejecting the placement proposed by Respondent and stating the intent to enroll in a private school at public expense when Respondent failed to provide Petitioner with notice of procedural safeguards. *34 C.F.R. §§ 300.148 (d) (e), 300.504*.
3. Petitioner's claims arising outside the one year statute of limitations in Texas are not barred because the Respondent withheld information from Petitioner's parents (i.e., notice of procedural safeguards) that it was required to provide. *34 C.F.R. § 300.511 (f) (2)*. Furthermore, Respondent failed to raise the affirmative statute of limitations defense in a timely manner. *Tex. R. Civ. P. 94*.

4. A student coming from a private school who presents himself to a public school district is not a “transfer” student or subject to the transfer provisions of IDEA. *34 C.F.R. § 300.323 (e)*.
5. Petitioner is entitled to reimbursement for the cost of a private psychological evaluation for Respondent’s failure to ensure the psychological evaluation was completed within the requisite three year re-evaluation period. *34 C.F.R. §§ 300.304, 300.30*.

ORDERS

Based upon the foregoing findings of fact and conclusions of law Petitioner’s requests for relief are **GRANTED IN PART AND DENIED IN PART** as follows:

1. The school district shall reimburse Petitioner for Petitioner’s out of pocket costs of the placement and program provided by the ** for the following periods of time: June 2008-August 2008, the 2008-2009 school year and the 2009-2010 school year (as of October 1, 2009) as follows:
 - a. \$ 712.40 for summer 2008
 - b. \$ 4,196.02 for 2008-2009 school year
 - c. \$ 999.54 for 2009-2010 school year;
2. The total out of pocket costs of reimbursement shall be paid within 30 school days from the date of this Decision;
3. The school district shall reimburse Petitioner for the cost of the private psychological in the amount of \$1,650 payable within 15 school days from the date of this Decision.

All other requests for relief not specifically stated in these Orders is hereby **DENIED**.
SIGNED the 17th day of November 2009.

/s/ Ann Vevier Lockwood
Ann Vevier Lockwood
Special Education Hearing Officer

NOTICE TO THE PARTIES

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