

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

**DECISION OF THE HEARING OFFICER**

**STUDENT b/n/f/  
PARENTS  
Petitioner**

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**v.**

**DOCKET NO. 294-SE-0808**

**DALLAS INDEPENDENT  
SCHOOL DISTRICT,  
Respondent**

**REPRESENTING PETITIONER:**

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<b>Student b/n/f</b>	§	
<b>Parents</b>	§	<b>BEFORE A SPECIAL EDUCATION</b>
<b>Petitioner</b>	§	
	§	
<b>v.</b>	§	<b>HEARING OFFICER</b>
	§	
<b>DALLAS INDEPENDENT</b>	§	
<b>SCHOOL DISTRICT,</b>	§	
<b>Respondent</b>	§	<b>FOR THE STATE OF TEXAS</b>

**DECISION OF THE HEARING OFFICER**

**Statement of the Case**

Petitioner, acting through his parents as next friends, requested a due process hearing pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §1400, *et seq.*, as amended. The issues for hearing were as follows:

1. Whether an exception to the one-year statute of limitations should apply, due to specific misrepresentations by the school district or for withholding information from the parents, regarding:
  - a. Failure to provide the student with adequately trained teaching staff with appropriate training in autism during Spring 2007; and,
  - b. Misrepresentation of the in-home training to be received by the student during Summer 2007;
2. Failure to timely evaluate the student for sensory difficulties, or to provide appropriate services to address the student’s sensory difficulties;
3. Inappropriate placement in August 2007 of the student in a class predominantly of non-verbal children, resulting in speech regression;
4. Failure to provide a free appropriate public education (“FAPE”) for the student including a failure to develop a Behavioral Intervention Plan (“BIP”) that adequately addresses the student’s targeted behaviors as identified by the Functional Behavioral Assessment (“FBA”);
5. Failure to address parental concerns for an Admission, Review, and Dismissal Committee (“ARDC”) meeting in Fall 2007 to discuss the student’s school-phobic behaviors; and,
6. Failure to allow the parents to discuss the results of an Independent Educational Evaluation (“IEE”) in occupational therapy and speech, obtained by the parents at school district expense in December 2007, until June 2008.

As relief, Petitioner seeks the following:

1. Placement of the student in the \*\* School at school district expense;
2. Provision of ongoing speech and occupational therapy (“OT”) services to the student;
3. Reimbursement for private speech therapy services to the student; and,
4. Dual-enrollment services to the student, including but not limited to in-home training and parent training.

**HELD, for Respondent, in part; for Petitioner in part.**

### **Procedural History**

Petitioner filed the above-captioned due process complaint with the Texas Education Agency (“TEA”) on August 26, 2008, and the Hearing Officer received the case assignment on August 27, 2008. Myrna B. Silver, Attorney at Law in Dallas, Texas, represented Petitioner. Dianna B. Bowen and Isabel S. Andrade, Bracewell & Giuliani, L.L.P. in Dallas, Texas, represented Respondent. On September 3, 2008, the Hearing Officer issued an order setting the hearing on October 13, 2008, following the required 30-day resolution period, and the Decision Due Date for November 9, 2008. On September 4, 2008, Petitioner requested a continuance due to a previous setting, unopposed by Respondent and granted for good cause shown. The revised procedural schedule set the due process hearing for December 8-9, 2008, and the Decision Due Date extended to January 5, 2009.

On September 11, 2008, Respondent timely filed its Motion to Dismiss for Lack of Jurisdiction and challenged the sufficiency of Petitioner’s due process request. On September 16, 2008, the undersigned Hearing Officer found the due process complaint insufficient in part and allowed Petitioner to amend the due process complaint under 34 CFR §300.508(b)(5). The first telephonic pre-hearing conference occurred on September 23, 2008. On October 2, 2008, Respondent filed a second Motion to Dismiss for Lack of Jurisdiction, denied during the telephonic pre-hearing conference on October 7, 2008. Petitioner timely filed his amended complaint with subsequent written clarification on October 2, 2008, resetting the 30-day resolution period in accordance with 34 CFR §300.508(d)(4) and retaining the current hearing setting and Decision Due Date by agreement of the parties. On October 17, 2008, the parties jointly requested a five-week continuance of the hearing to allow additional discovery following Petitioner’s complaint amendment, granted for good cause shown. The revised procedural schedule set discovery and motion deadlines and reset the hearing to January 12-13, 2009, with a revised Decision Due Date of February 9, 2009.

In accordance with the discovery schedule, Respondent filed its Partial Motion for Summary Judgment (“P-MSJ”) on December 1, 2008. Petitioner filed his response on December 12, 2008, and Respondent filed its reply on December 20, 2008. The Hearing Officer orally ruled on Respondent’s P-MSJ during a telephonic pre-hearing conference, admitting Respondent’s summary judgment evidence Exhibits 1-27, held on January 2, 2009. The due process hearing took place as scheduled on January 12-15, 2009.

Prior to the conclusion of the hearing, the Hearing Officer granted the parties' request for good cause shown to submit written closing argument by March 31, 2009, with an agreed extension of the Decision Due Date to April 15, 2009. Petitioner sought a brief extension of the written closing argument deadline, unopposed by Respondent and granted for good cause shown, extending the deadline to April 3, 2009, and the Decision Due Date to April 20, 2009. By leave of the Hearing Officer, Petitioner sought three additional days and the record closed upon the timely filing of the parties' written closing argument on April 6, 2009. On April 20, 2009, the Hearing Officer issued the Decision of the Hearing Officer.

Based upon the evidence and argument admitted into the record of this proceeding, the Hearing Officer makes the following findings of fact and conclusions of law:

### **Findings of Fact**

#### **Background**

1. Petitioner is a \*\* year-old student who resides within the jurisdictional boundaries of the Dallas Independent School District ("DISD" or "Respondent"). Petitioner is eligible for special education services as a student with autism and speech impairment. [Petitioner's Exhibits ("P.Exs.") 7 and 8; Pleading file].

2. Petitioner began school within DISD after his \*\* birthday as a student in the \*\* class at \*\* Elementary in the spring semester of the 2006-2007 school year. [Transcript ("Tr.") at 84-85; Respondent's Exhibit ("R.Ex.") 9].

#### **Summary Judgment Findings of Fact**

3. Petitioner's mother knew about DISD's obligation to evaluate and provide services to her son prior to his \*\* birthday. Respondent evaluated her son in January 2007 after his \*\* birthday. She chose not to file a due process request regarding alleged deficiencies and timing of DISD's initial evaluation of her son until August 26, 2008, more than two years later. [P-MSJ Exs. 1 at 73-78 and 12].

4. Petitioner's mother was a full participant in her son's ARDC meetings before August 26, 2008, including the meeting held on April 25, 2007. Petitioner's mother visited her son's classroom, was aware of service delivery in the classroom through her direct observation, and chose not to file a due process request regarding any alleged deficiencies in his spring 2007 placement and educational program until August 26, 2008. [P-MSJ Exs. 1 at 78 and 17].

5. Petitioner's mother admitted awareness of alleged violations regarding his Individualized Education Program ("IEP") implementation in the spring of 2007 and during the first week of the 2007 summer program, but did not file a due process request until August 26, 2008. [P-MSJ Ex. 1 at 97-114].

#### **Evaluation and Behavior Background**

6. Petitioner at times resisted dressing and staying clothed. On April 16, 2007, his mother had Petitioner evaluated by a psychologist with Dallas Metrocare, formerly Dallas County Mental Health and Mental Retardation. Petitioner came to the evaluation without a shirt. The

written report states Petitioner's behaviors of concern occurred almost exclusively at home, including self-abusive and physically aggressive behaviors directed at his family, and tantrums. By report of his mother, these behaviors "almost never occur at school." The psychologist recommended continued special education services in the public school, with services appropriate for autism. The psychologist recommended enrollment of Petitioner in speech and OT services with sensory integration therapy/services from an occupational therapist. [R.Ex. 77 at 2; Tr. at 167].

7. There is no evidence in the record that DISD received the Metrocare April 2007 psychological report from Petitioner's mother prior to the Disclosure Due Date in this proceeding.

8. Petitioner's mother requested evaluation of her son's sensory difficulties at the initial February 2007 ARDC meeting. DISD responded to this request by evaluating Petitioner's OT needs on March 20, 2007, and on April 4, 2007. The occupational therapist gathered information from Petitioner's mother and teachers, and observed Petitioner in his school settings of gym, cafeteria, playground, and \*\* class. The written report states Petitioner responded well to the visual structure in place, demonstrated some sensory seeking behaviors, had the ability to access the school environment, and could participate in educational activities. [R.Ex. 13].

9. On April 5, 2007, the ARDC convened and reviewed the report from the DISD occupational therapist. Petitioner's mother attended the meeting. Participants determined Petitioner's needs could be met through OT and made plans to convene for an annual ARDC meeting on April 26, 2007. [R.Ex. 14 at 33-34].

#### **2007 Annual Review of Petitioner's Program**

10. Petitioner's annual ARDC meeting to prepare his 2007-2008 IEP took place on April 26, 2007. Petitioner's mother attended this meeting and all parties signed in consensus. Participants reviewed an FBA of Petitioner's behavior. The ARDC developed and accepted a BIP for 2007-2008 that targeted the behaviors of appropriate transitioning, following a daily routine, and following verbal directions. The ARDC added Extended School Year ("ESY") services during the four-week 2007 summer session. Participants continued the \*\* placement on Petitioner's current campus. [R.Ex. 18 at 21-23; Tr. at 288-292].

11. On April 26, 2007, the ARDC reviewed Petitioner's privately obtained OT report from Comprehensive Therapy Services dated April 10, 2007. Although based on a medical rather than an educational model, the report's conclusions matched DISD's conclusions by DISD's occupational therapist. The ARDC did not change the recommendation for OT therapy for Petitioner from the previous meeting of April 5, 2007. All participants agreed that Petitioner's 2007-2008 IEP would include "Monitor, Level 2" OT services of 30 minutes each six weeks. [R.Ex. 18 at p. 19; Tr. at 255].

12. Near the end of the spring semester of 2006-2007, the DISD lead occupational therapist and Petitioner's occupational therapist prepared a sensory diet notebook for Petitioner, gave it to his \*\* teacher, and provided training on its use to his educators, including his speech therapist. This notebook was used during the 2007-2008 school year together with sensory materials to redirect Petitioner when needed. [R.Ex. 45; Tr. at 229-230, 676, 754-755, 759, and 1064-1066].

13. At the ARDC meeting on April 26, 2007, participants agreed to include 270 minutes of parent training per semester for Petitioner's IEP. In-home services would be offered to the parent in a quantity of two 30-minute sessions per week, with no more than a two-week gap of consecutive direct or in-home parent training during the upcoming summer months. [R.Ex. 18 at 17 and 28].

### **Summer 2007**

14. Petitioner's mother received in-home services during summer 2007 and, at times, denied the offer of additional in-home support. [Tr. at 815 and 836-837].

15. Petitioner did not present evidence regarding any DISD misrepresentation about parent training.

16. On July 30, 2007, the ARDC convened with Petitioner's mother in attendance for a "brief" ARD meeting that continued on August 2, 2007. The ARDC reached consensus on revisions to Petitioner's 2007-2008 IEP, adding 100 minutes of in-home parent training to the 270 minutes of parent training per semester. The ARDC determined that the least restrictive environment ("LRE") for Petitioner would be a combination of the \*\* classroom and the \*\* classroom. Participants also revised Petitioner's IEP goals by discontinuing goals mastered in the 2006-2007 school year, retaining goals not mastered in the 2006-2007 school year, and adding additional goals for the upcoming 2007-2008 school year. [R.Ex. 34; Tr. at 226].

17. The ARDC planned a gradual transition of Petitioner from his familiar \*\* class into the larger \*\* class at the beginning of the 2007-2008 school year. As the \*\* class began one week after the \*\* class began, the ARDC planned for Petitioner to begin the school year with an hour in \*\*, gradually increasing \*\* time to ensure his smooth transition. [Tr. at 232-233, 1058-1059, and 1168].

18. Petitioner received copies of the procedural safeguards on both July 30 and August 2, 2007. Petitioner's mother signed in agreement with all the decisions of the ARDC concluding on August 2, 2007. [R.Ex. 34 at 7].

19. Petitioner received ESY summer services through DISD at the \*\* campus for 16 sessions – four days a week for four weeks – in June 2007. [Tr. at 849-850].

20. After Petitioner's June 2007 ESY program ended through the final week in August 2007, Petitioner attended the private \*\* School, an inclusive \*\*. [Tr. at 814].

### **Evaluation of Petitioner's Sensory Difficulties**

21. Petitioner's mother obtained a private speech evaluation of Petitioner by the Dallas Reading and Language Services in July 2007. The report, dated July 17, 2007, included an evaluation of Petitioner's articulation using a clinical or non-educational model that did not focus on academics. The evaluating speech pathologist admitted during the hearing that the report's long and short term goals are capable of implementation within a school setting; appropriate speech therapy delivery would include a speech therapist going into Petitioner's classroom and providing one-on-one therapy and small group therapy within the classroom. [P.Ex. 17 at 1-6; Tr. at 552, 559-561, and 566-567].

22. The summer 2007 “brief” ARDC participants accepted and reviewed the Dallas Reading and Language Service report of July 2007. Report results substantiated the language components of Respondent’s Full and Individualized Evaluation (“FIE”); at the time of the completed FIE six months earlier, Petitioner’s limited oral expressive skills precluded evaluation in the area of articulation. ARDC participants agreed to emphasize decreasing the level of “supervision/prompts/cues incorporated into goals and objectives” in the goals and objectives. The ARDC retained April 2007 IEP plans to provide 360 minutes of speech in an integrated setting with additional services and related services of transportation, but increased Petitioner’s related services of OT from 30 minutes to 60 minutes with “Monitor, Level 2” services to accommodate working with both the \*\* and \*\* teachers for teacher training, provision of OT materials and equipment to the classroom, and therapist consultation and monitoring. [R.Exs. 8 and 34 at 4 and 8; Tr. at 1054-1057].

### **Fall 2007 at DISD**

23. Petitioner’s fall 2007 began with his enrollment in both the \*\* and the \*\* classrooms on his elementary campus. He remained in the \*\* class for the first week as \*\* started a week later. In his second week of school, Petitioner’s time in the \*\* class included an hour in the morning with an additional half-hour in the afternoon when his \*\* class joined the \*\* class for music, physical education, art, and library activities. His \*\* time gradually increased over the next five weeks. On days he was not tardy, his \*\* time culminated in two and a half hours daily for the week of October 8, 2007. [R.Ex. 34 at 11; Tr. at 86-89 and 206].

24. Petitioner’s \*\* teacher did not have behavior problems with Petitioner after his arrival at school in the morning. When issues arose in the class, the teacher implemented Petitioner’s BIP through the following: a) use of visual supports and schedules for assistance with transitioning and following the daily routine; b) rewarding Petitioner by means of preferred activities and treats; and, c) behavioral redirection by talking with Petitioner at his level or allowing him to focus on a different activity. [Tr. at 89-91 and 290-291].

25. The \*\* teacher observed Petitioner’s progress on his IEP objectives during the brief seven-week period of enrollment within the classroom, including class participation, making choices, word usage, naming objects, learning letter sounds, appropriate responses to yes/no questions, painting and drawing, appropriately playing with toys, progressing and remaining on his toileting schedule, and recognition of numbers, letters, shapes, and colors. [R.Ex. 39; Tr. at 240-249].

26. Petitioner’s \*\* teacher or teaching assistant accompanied Petitioner for the first two weeks in the \*\* classroom to ensure his acclimation to the new environment before Petitioner came to the classroom on his own. The \*\* teacher observed his successful interaction with his more verbal peers, “Other kids in the classroom always wanted to help him. So he became a \*\* favorite.” [Tr. at 249].

27. The \*\* teacher did not have any behavioral problems with him during his six-week attendance in the classroom. Petitioner understood two-step directions, socialized appropriately, and participated well with fine arts activities including painting. At the conclusion of Petitioner’s time in the \*\* classroom, Petitioner was playing games with peers,

talking and playing with classmates, and participating in a beanbag game. He was familiar with the \*\* routine and exhibited improvement in his writing. [Tr. at 1181-1193].

28. Petitioner's speech therapist and \*\* teacher received sensory materials from the DISD occupational therapist who evaluated Petitioner in the spring 2007 semester. Petitioner used some of these materials during his seven-week enrollment to self-regulate his sensory needs, such as the reading rocker. [R.Ex. 45 at 7; Tr. at 638].

29. During the first six-week period, Petitioner received 360 minutes of speech therapy that included individual instruction. His speech therapy was provided in both the \*\* and the \*\* classrooms. He participated in and made satisfactory progress on his speech IEP goals. [P.Ex. 26 at 10-13; R.Ex. 39 at 8; Tr. at 725 and 751-757].

### **Dressing Issues**

30. Petitioner's mother had problems getting Petitioner dressed for school. DISD staff supported Petitioner's mother on this issue. In May 2007, DISD's autism specialist in charge of in-home and parent training coordination and the autism supervisor visited Petitioner's home twice to assist with the morning dressing process. In the first session, the autism specialist gave Petitioner's mother instruction on a visual routine with a picture calendar, introduced the materials to Petitioner, directly assisted him in dressing to ensure understanding, and suggested not allowing any computer time for Petitioner in the morning to help get Petitioner dressed. When the autism specialist returned to Petitioner's home for additional in-home training, Petitioner's mother had not posted the picture calendar and Petitioner was on the computer and not dressed. [Tr. at 90, 806-807, 815, and 828-830].

31. The DISD autism supervisor and the autism specialist made contact with Petitioner's mother at the beginning of the 2007-2008 school year as well as the classroom teachers. No problems were reported as Petitioner settled into the school. When the autism specialist contacted Petitioner's mother to continue in-home training on September 19, 2007, she reported that she had no issues at the time. [Tr. at 815 and 1166].

32. Petitioner did not exhibit dressing problems in the 2007-2008 school year before September 27, 2007. At that time, Petitioner began arriving to school tardy and resisting dressing in the morning for school. Petitioner's mother believed the dressing resistance was a manifestation of his school phobia. She also reported a decrease in his toileting skills. When unable to dress him for school, Petitioner's mother brought her son to school partially clothed or unclothed wrapped in a blanket or raincoat. Once at school, Petitioner's \*\* teacher and assistant teacher were able to get him dressed, or were able to assist Petitioner's mother getting him dressed, and he remained dressed throughout the school day. [Tr. at 90, 255-260, 609-610, 858-860, and 1187-1188].

### **October 2007 Meeting**

33. On October 10, 2007, DISD held a meeting to address concerns of Petitioner's mother. Concerns included getting Petitioner dressed on school days, current speech/OT needs and delivery of services, the impact of non-English speaking peers on Petitioner's speech development in the \*\* class, and preoccupation of classroom staff. Petitioner's mother, \*\* teacher, campus principal, autism specialist, and autism supervisor attended the meeting. DISD staff agreed to provide a parent trainer for dressing assistance, revised Petitioner's lunch schedule for more

interaction with \*\* peers, and preparation of a “social story” to assist Petitioner with transitioning. The autism supervisor agreed to check speech and OT service delivery to ensure amounts were consistent with his IEP. Participants also addressed teacher preoccupation, non-English speaking peers in the \*\* class, and a need for increased peer interaction concerns voiced by Petitioner’s mother. DISD staff believed that all parental concerns had been addressed by the conclusion of the meeting. [R.Ex. 37; Tr. at 266-272 and 839-840].

34. Petitioner’s total \*\* class size varied during his fall 2007. At the beginning of the semester in August, there were two other children in addition to Petitioner, one of whom was verbal. A fourth verbal English-speaking student joined the class in September. By the beginning of October, a fifth verbal Spanish-speaking student joined the class. All instruction in the classroom was in English. One of the children cried when first joining the class, but Petitioner did not show a negative impact in the classroom from the crying peer. [Tr. at 85-87 and 266-267].

35. According to Petitioner’s speech expert, for a child to have an impact from exposure to a bilingual peer, the exposure would have to be consistent and by an individual with an emotional connection to the child. Merely hearing Spanish in the classroom would not negatively impact Petitioner. [Tr. at 471-472].

36. There was no evidence presented to show that Petitioner was adversely impacted by having Spanish-speaking peers in his DISD setting in fall 2007.

37. During the first six-week period of the 2007 fall semester, Petitioner received 360 minutes of speech therapy from DISD as specified under his IEP. The speech therapist went to both the \*\* and the \*\* classrooms to deliver one-on-one therapy and small group therapy within each classroom. Petitioner participated and made satisfactory progress toward his speech IEP goals. The speech therapist communicated often with Petitioner’s mother regarding her son’s progress. [P.Ex. 17 at 1-6 and P.Ex. 26 at 10-13; R.Exs. 39 at 8 and 43 at 4; Tr. at 725, 756-757, and 1180].

38. Petitioner behaved appropriately in his \*\* and \*\* classes during his seven weeks of enrollment. Petitioner’s DISD educators did not observe any self-injurious behaviors from Petitioner during his fall 2007 semester. [Tr. at 752-754].

39. Petitioner’s mother observed Petitioner bang his head on the floor in his classroom. She alleges the \*\* teacher pulled Petitioner by his arm to his chair when he exhibited non-compliance. [Tr. at 861-862 and 865-870].

40. Petitioner’s \*\* teacher denied ever pulling Petitioner by his arm to make him comply with her directives in the \*\* room. [Tr. at 1192].

#### **Withdrawal from DISD**

41. Petitioner’s last class day was October 11, 2007. His mother officially withdrew him from DISD on October 17, 2007. As a result, DISD was not able to implement the plan from October 10, 2007. [P.Ex. 22; Tr. at 206, 272, 671, and 840].

42. After his withdrawal from DISD, Petitioner re-enrolled in the \*\* School where he was enrolled in summer 2007. The \*\* School is run by Dallas Services, a nonprofit organization serving children with disabilities. The executive director of Dallas Services observed Petitioner coming to school without clothing, showing a diminished ability to participate and/or attend in class, and exhibiting more behavioral problems than he had during his summer 2007 attendance at the school. The incidents, “fairly numerous” at his re-enrollment, have decreased. In January 2008, Petitioner continued to have problems at \*\* School interacting with his peers as well as verbally communicating with his teachers and peers. [P.Ex. 29 at 33 and 39; Tr. at 413-416 and 591-592].

43. On November 7, 2007, after Petitioner had left DISD, he had a session with Metrocare where he became “tired and hot so he took off all his clothes except his pull-up and laid down on the floor.” [R.Ex. 77 at 10; Tr. at 174].

44. On November 27, 2007, Petitioner’s mother wrote the campus principal stating her intention to seek reimbursement for Petitioner’s private school placement. On December 12, 2007, Petitioner’s mother gave official notice to the ARDC of her intent to seek reimbursement for the placement. [P.Exs. 10 at 23 and 22 at 2].

### **Three-Day ARDC Meeting**

45. After Petitioner withdrew from DISD, the ARDC met on three separate days – November 8, 2007, December 12, 2007, and January 12, 2008. Petitioner’s mother attended all three days of the ARDC meeting. Participants discussed and rejected Petitioner’s possible placement in a Total Communication (“TC”) class, as TC students are non-verbal and generally more severe on the autism spectrum. The ARDC recommended continuing Petitioner’s placement at the time of his withdrawal – in both the \*\* and \*\* classes. Petitioner’s mother received an explanation of dual enrollment during the meeting. The DISD speech coordinator confirmed dual enrollment as an option for Petitioner. [R.Ex. 50; Tr. at 293, 677, 878-879, and 1074].

46. After Petitioner’s withdrawal from DISD, school district members of the ARDC did not believe Petitioner needed a BIP as he had not exhibited behaviors requiring specific behavioral intervention at the time of his withdrawal. Petitioner’s morning dressing resistance occurred at home rather than in the educational environment. Because Petitioner’s sensory deficits are pervasive, the occupational therapist suggested that the home behaviors might be behavioral rather than sensory in nature and more properly addressed by a modified sensory diet and modified OT services. [R.Ex. 50 at 21; Tr. at 292-293 and 1070-1072].

47. On the second day of the three-day ARDC meeting, Petitioner sought an IEE for OT and speech on December 12, 2007. [R.Ex. 50].

48. At the conclusion of the three-day ARDC meeting, Petitioner’s mother disagreed with the proposed placement in the combination \*\*/\*\* setting. Petitioner’s \*\* teacher believed the disagreement included the option of dual enrollment. [Tr. at 303].

49. There is no evidence in the record that Petitioner’s mother pursued dual enrollment after the three-day ARDC meeting.

50. The IEE for speech and OT took place through the Speech and Language Services of North Texas dated January 12, 2008. [R.Ex. 53].

### **Independent Speech and OT Evaluation Results**

51. Neither evaluator of IEE consulted any DISD staff or requested any records for the IEE. Although the evaluating occupational therapist observed Petitioner to have difficulty concentrating and staying on task, the evaluating speech therapist observed Petitioner to have a “fairly significant attention span.” [R.Ex. 50; Tr. at 512-513].

52. The OT portion of the IEE took place in a private clinical setting using a combination of medical and school models. The medical model is not particularly useful for educators as it calls for more specific amounts of therapy, is more global in nature, and does not focus upon the educational need of the student. The evaluating occupational therapist used results from a Sensory Profile Questionnaire, but did not use the Sensory Profile School Completion assessment to identify school-related areas. During the hearing, the occupational therapist conceded that teacher information should have been included in the report showing Petitioner did not exhibit problems in class, cafeteria, or hallway settings. Had this information been included, the evaluating occupational therapist agreed that the report’s findings would have been impacted. [R.Ex. 53; Tr. at 366-369, 387, 395, 407-408, and 1018-1019].

53. The OT portion of the IEE recommended objectives that are the same or similar to Petitioner’s IEP including use of a sensory diet tailored to Petitioner’s needs, monitoring Petitioner by an individual with a background in sensory processing and sensory integration to identify needs, and the education of teachers and caregivers on appropriate assistance for Petitioner. The occupational therapist recommended 45 minutes of OT for Petitioner three times a week in a one-on-one clinical setting rather than an educational setting. [R.Ex. 53 at 7-8; Tr. at 347, 350-355, and 388-394].

54. The former lead therapist for OT and physical therapy services at DISD described the “best practice delivery model” for the school setting – the integrated service model. This model delivers services directly to the student within the educational instructional arrangement where the skills will be used. At DISD, two levels of delivery are used – Integrated Level and Monitor Level. Both levels are integrated into the school day and include direct contact from the therapist. Petitioner received OT services at Monitor, Level 2 with direct services and teacher consultation. Monitor level services are used with students who evidence ability to function within the instructional arrangement with a goal of maintaining skills. [Tr. at 1021-1024].

55. Petitioner received the “Monitor, Level 2” services specified under his IEP for the 2007-2008 school year until his withdrawal. [Tr. at 1056-1057].

56. The occupational therapist trained the \*\* teacher and provided a copy of Petitioner’s sensory diet notebook. The \*\* teacher applied the sensory diet when Petitioner lost task focus for redirection and to regain his attention, but this was not needed on a daily basis as Petitioner functioned in the classroom routine and environment. Petitioner’s educators, including the \*\* teacher, the \*\* teaching assistant, his speech and OT therapists, implemented Petitioner’s sensory diet during his 2007-2008 attendance at DISD. [Tr. at 237-240, 675-676, 754-755, 790, and 1063-1067].

57. The speech IEE recommended speech therapy for Petitioner from a speech therapist with experience and training for work with autistic children. Petitioner's teacher should implement speech therapy goals throughout the day. Petitioner should receive both through and individual speech therapy, with one-on-one sessions twice weekly. The evaluating speech therapist recommended exposing Petitioner to students with higher functional language levels. During the hearing, the speech therapist viewed a DISD placement of Petitioner in both the \*\* and \*\* classes as a "fabulous suggestion" for him. [R.Ex. 53; Tr. at 490-494 and 514-515].

58. Petitioner's speech program at DISD was consistent with the IEE speech recommendations in both the \*\* and \*\* classrooms. His DISD speech therapist had training and extensive experience working with children on the autism spectrum. Under DISD's integrated service model delivery, Petitioner received group and individual speech therapy within the classroom environment in collaboration with his teachers throughout the day, avoiding missed classroom instruction and allowing the speech therapist to focus on understanding language, taking turns, sharing, and sequencing. [R.Ex. 66; Tr. at 738-739].

### **Receipt and Review of the Independent Speech and OT Evaluation**

59. DISD received the IEE report by facsimile on Tuesday, January 15, 2008. The copy of the written IEE report received by DISD had the wrong student's name twice on the "Recommended Treatment Plan." [R.Exs. 2, 50, 53 at 10 and 54].

60. On Wednesday, January 16, 2008, the ARDC convened for the third day of the three-day ARDC meeting. Petitioner's mother hand-delivered a corrected copy of the report at the meeting. The ARDC would not discuss the IEE at this meeting. [Tr. at 899-900].

61. The written notice for the ARDC meeting for January 16, 2008, checked three boxes under the second section to indicate the purpose of the meeting: a) review of the IEP; b) to determine educational programming/service needs; and, c) "to review your child's program (including any evaluations)." [emphasis in original] [P.Ex. 15 at 44; R.Ex. 50 at 44].

62. DISD received a corrected report directly from the Speech and Language Services of North Texas on January 22, 2008 yet DISD did not send out a notice of meeting to Petitioner's mother for an ARDC to discuss the completed IEE report until February 27, 2008. This notice proposed a meeting date of March 6, 2008. Numerous E-mail transmissions went back and forth between Petitioner's mother and DISD staff to set up the meeting. The meeting was reset to April 10, 2008, but Petitioner's mother had to change the meeting date because of sudden illness. In early May 2008, DISD and Petitioner's mother agreed to meet on June 5, 2008. [P.Ex. 36 at 56 and 62-67; R.Exs. 54, 56 at 28-33, and 80; Tr. at 972-974].

63. The ARDC convened to review the January 2008 IEE on June 5, 2008. Petitioner's mother and her advocate attended the meeting. The DISD Speech Lead Therapist for the Northern Learning Community reviewed the IEE at the June 2008 ARDC meeting. Speech goals proposed by the IEE were more numerous than what the lead speech therapist would recommend in a school setting. The IEE recommended one-on-one sessions twice weekly instead of services offered by DISD in an integrated setting for collaboration of the speech therapist and the teacher. As a result, the speech therapist did not recommend changes to Petitioner's speech goals based on the IEE. [Tr. at 1140-1143].

64. The 2007-2008 program manager for occupational and physical therapy services reviewed the OT part of the IEE at the ARDC meeting on June 5, 2008. Because the report was clinically based, the evaluation was “not very useful” for determining OT services in a school setting. The program manager did not recommend changes to Petitioner’s OT services based on the IEE. [Tr. at 1076].

65. At the ARDC meeting on June 5, 2008, no changes were made to Petitioner’s IEP as a result of the IEE review. DISD members of the ARDC proposed no change in placement from the previous recommendations of the ARDC meeting on January 16, 2008. The June 5, 2008, meeting ended in disagreement. [R.Ex. 56 at 18].

### **Speech Services at \*\* School**

66. The evaluating speech therapist in Petitioner’s private July 2007 speech and language evaluation also provided Petitioner’s speech services at the \*\* School during summer 2007, and again upon his re-enrollment until June 2008. Upon Petitioner’s October 2007 return to the \*\* School, the speech therapist observed speech regression from his previous summer 2007 level. Some of the regression may be attributable to transitioning difficulty back to the \*\* School. Three months later, the speech therapist noted “significant” speech progress. Delivery of the sessions took place in a pull-out format for an hour and a half one-on-one speech therapy and one 30-minute group classroom session once each week. [P.Ex. 17; R.Ex. 34; Tr. at 526, 534, 544-547, 559-570].

### **Teacher Training**

67. Petitioner’s 2007 \*\* teacher, a licensed special education teacher since 1994, is certified to teach grades \*\* through 12. The \*\* teacher received training in the Picture Exchange Communication System (“PECS”), designed for use with autistic children, prior to Petitioner’s enrollment in her class. Training in use of the system includes teaching strategies for using the picture schedules and pictures as communication tools with autistic children. The \*\* teacher attended an \*\* Institute seven years before Petitioner’s enrollment that included information specific to educating autistic children. The \*\* teacher has taught between 16 to 32 autistic students in 16 years of employment with DISD and is familiar with Applied Behavior Analysis (“ABA”) principles for treating autistic individuals. After Petitioner’s withdrawal from DISD, the \*\* teacher training includes recent PECS training in November 2008. [R.Ex. 63 at 24; Tr. at 84, 138-140, 188, 190-197].

68. Petitioner’s \*\* teacher, a licensed classroom teacher since 2006, is certified to teach \*\* through fourth grade. The \*\* teacher attended trainings that qualify her to teach a student with autism. [R.Ex. 64; Tr. at 1196-1198].

### **October 2008 ARDC**

69. On October 23, 2008, DISD convened an annual review ARDC meeting to discuss dual enrollment options for speech and OT services. Petitioner’s mother attended with her advocate. His mother reported a variety of behaviors by her son at the \*\* School in the classroom, hallway, and cafeteria settings, including verbal and physical aggression, non-compliance, withdrawal, impulsivity, fighting, and tearing up his books. At home, he perseverated on objects and occasionally exhibited defiance. These behaviors were confirmed by the executive director of Dallas Services during the hearing, but are seen less frequently by the executive director than his teachers. Petitioner engages in self-abusive behaviors, is at times withdrawn, has struck out at a

classmate, avoids participation, and when frustrated, breaks crayons, toys, and other items. [P.Ex. 9 at 28; Tr. at 439-440].

70. The October 2008 ARDC discussed options for dual enrollment or returning to DISD with time in both \*\* and \*\* classrooms. Committee member proposed OT services for 60 minutes per six weeks, in-home training for 100 minutes per semester, and parent training for 270 minutes per semester. Based on a review of data and parent report, the ARDC completed an FBA and drafted a BIP targeting three behavior goals. All participants agreed that no formal evaluation was needed at the current time. The ARDC discussed the possibility of returning to an ARDC meeting after Petitioner had been dually-enrolled for a period to update and review IEP goals and objectives. The participating speech pathologist offered to get more information, re-work the goals to fit Petitioner's needs, and set a date to reconvene the ARDC meeting. Petitioner's mother rejected the proposed dual enrollment placement. [P.Ex. 9 at 28-29; R.Ex. 60].

71. When the ARDC did not finish the meeting on October 23, 2008, Petitioner's mother received copies of the draft documents. The principal planned to contact Petitioner's mother within five school days to set a date to reconvene the meeting. On October 25, 2008, Petitioner's mother sent the principal an E-mail stating that she "would not attend another ARDC meeting under these conditions." As a result, DISD had not rescheduled the ARDC meeting. On November 12, 2008, the manager of speech, OT, physical therapy, and assistive technology services at DISD wrote Petitioner's mother to assure her that the DISD stood "ready, willing, and able" to provide Petitioner with the options discussed at the meeting on October 23, 2008. [R.Ex. 60].

72. Petitioner's mother did not pursue dual enrollment in response to DISD's letter of November 12, 2008.

73. \*\* School no longer offers speech therapy services to its students as of June 2008 – the time when Petitioner ceased receiving speech services at the private school.

74. On August 4, 2008, a speech pathologist with the Park Cities Speech, Language & Learning Center evaluated Petitioner in his \*\* School \*\* setting. On the Goldman-Fristoe Test of Articulation 2<sup>nd</sup> Edition, his articulation scores fell within the normal range. On two subtests of the Preschool Language Scale-4 ("PLS-4") to assess language abilities, Petitioner scored standard scores of \*\* on receptive language and a \*\* on verbal expression, resulting in a composite standard score of \*\* at the second percentile when compared to age-matched peers. The verbal component of the PLS-4 fell over two standard deviations below the mean established for his age. The speech pathologist recommended "aggressive intervention" to remediate his expressive language difficulties and delineated five therapy goals. The speech pathologist recommended supplementation of speech therapy services in the educational setting with services from the Park Cities Speech, Language & Learning Center. [P.Ex. 25 at 1-3; Tr. at 453].

75. Petitioner received 11 speech sessions from the Park Cities Speech, Language & Learning Center in a clinical setting, ranging between 30 and 45 minutes each for an approximate speech therapy total of 405 minutes, from July 29, 2008, through November 6, 2008. At the request of Petitioner's mother, the speech pathologist wrote a generically-addressed letter on September 4, 2008, stating the speech pathologist's recommendation that Petitioner has significant communication weakness with a recent improvement. [P.Ex. 25 at 4-17].

76. Speech services through the Park Cities Speech, Language & Learning Center are based on a medical rather than an educational model. Petitioner's speech expert explained private speech pathologists are able to address "a whole host of speech/language skills" that may not be addressed in an academic setting. [Tr. at 462-464].

77. At the time of hearing in January 2009, Petitioner remained at the \*\* School in a class of 16 to 20 students, ages \*\* and \*\*, all but four of whom are typically developing students. Although all the students in Petitioner's class are English-speaking, the school would accept a Spanish-speaking student and has more than likely had Spanish-speaking students enrolled with Petitioner. [Tr. at 415-417 and 585].

78. From August through December 2008, Petitioner participated in a 17-week intensive session in Metrocare's autism program. At the time of hearing, Petitioner was transitioning out of the program because of funding issues. The program provides monthly parent training. The representative from Metrocare agreed that Petitioner's placement in a \*\* classroom and a general education \*\* classroom would be consistent with educational recommendations in the Metrocare psychologist's report of April 16, 2007. [P.Ex. 39; Tr. at 148-149 and 170].

79. Attendance is not mandatory at \*\* School. Teachers are not required to be certified educators by the State of Texas or to hold credentials approved by TEA. [Tr. at 579-580 and 599].

80. The teacher/student ratio at \*\* School is higher than the ratio at Petitioner's elementary campus placement. [Tr. at 834].

81. \*\* School does not provide OT services for its students and does not give teachers support of an occupational therapist or OT supports and materials such as a sensory diet or reading rocker. [Tr. at 583-584].

82. Petitioner received copies of the procedural safeguards for all ARDC meetings during the 2006-2007 and 2007-2008 school years. Petitioner's mother admitted at hearing receiving the procedural safeguards for ARDC meetings held July 30, 2007, November 8, 2007, December 12, 2007, and January 16, 2008. [R.Exs. 61 and 62; Tr. at 208 and 1007-1008].

## Discussion

### **Background**

This dispute concerns DISD's 2007-2008 educational program for an autistic \*\*child with speech impairment. Petitioner's mother seeks reimbursement from DISD for unilateral placement of Petitioner in the \*\* School as she believes DISD failed to provide an appropriate program for her son. Petitioner's mother includes allegations concerning DISD's spring and summer 2007 program for her son and seeks a waiver of the applicable one-year statute of limitations. DISD asserts that Petitioner's program was appropriate in all respects, appropriately delivered FAPE to the \*\* student as demonstrated by his progress, and the unilateral private placement reimbursement request should

be denied. Throughout this dispute, Respondent vigorously defends the applicability of the one-year statute of limitations to Petitioner's concerns.

### **Legal Standard**

The 2004 amendments to IDEA clarified that a school district is not required to pay for the cost of education in a private school or facility chosen by a parent if the district made a FAPE available to the child, as consistent with the U.S. Supreme Court ruling in *School Comm. of Burlington v. Dept. of Ed. Mass.*, 105 S.Ct. 1996 (1985). In the discretion of a court or hearing officer, however, private school placement reimbursement may be granted if the school district's program failed, in a timely manner, to offer a FAPE prior to the private placement. 20 U.S.C. 1412(a)(10)(C)(ii). Under IDEA, tuition reimbursement may be ordered if: 1) the public school district has not made FAPE available to the student in a timely manner prior to the private school enrollment; and, 2) the private school placement is appropriate. 34 C.F.R. §300.148(c). Parents seeking reimbursement of a private placement must inform the school district prior to the removal or are subject to a reduction or denial of the request. 34.C.F.R. §300.148(d). A parental placement at a school which is not state approved or does not meet the standards of the state does not itself bar public reimbursement under the *Burlington* standard. *Florence County School District Four et. al. v. Carter*, 114 S.Ct. 361 (1993).

The school district's educational program is presumed appropriate. *Tatro v. Texas*, 703 F.2d 823 (5<sup>th</sup> Cir.1983) *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984). At hearing, Petitioner bears the burden to prove why the student's program and placement are inappropriate under IDEA. *Shaeffer v. Weast*, 546 U.S. 49, 62 (2005). When the school district delivered "some benefit" to the student from his educational program, the school district's program may be found appropriate; school districts are not required to maximize the student's potential or supply every conceivable program that may benefit a student. *Bd. of Educ. v. Rowley*, 102 S.Ct. 3034 (1982). The Fifth Circuit applied a four-factor test to assess whether an IEP is reasonably calculated to confer educational benefit to a student, including: 1) whether the eligible student's IEP was developed in accordance with proscribed procedures, including an individualized program based on the student's assessment and performance; 2) whether the program is administered in the least restrictive environment ("LRE"); 3) whether the program was delivered in a collaborative and coordinated manner by key stakeholders; and, 4) whether positive benefits are demonstrated both academically and non-academically. *Cypress Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-248 (5<sup>th</sup> Cir. 1997). A student's educational potential does not have to be maximized or improved in every area for a student to receive an educational benefit. *Houston Ind. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 350 (5<sup>th</sup> Cir. 2000).

A hearing officer's determination of FAPE must be based on substantive grounds. 34 C.F.R. §500.513(a)(1). In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE *only if* the procedural inadequacies: 1) impeded the child's right to a FAPE; 2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or, 3) caused a deprivation of educational benefits. [emphasis added] 34 C.F.R. §500.513(a)(2).

### **Summary Judgment Standard**

Texas Rules of Civil Procedure allow for a party to file a traditional summary judgment motion with summary judgment evidence. *See* TEX. R. CIV. P. 166a(c). The Texas Rules of Civil Procedure apply in an administrative hearing. 19 TEX.ADMIN.CODE §89.1185. The second type of summary judgment motion is a “no-evidence” motion, which is routinely filed without evidence but may include evidence. *See* TEX. R. CIV. P. 166a(i). The moving party may include, in a single motion, grounds appropriate for a traditional summary judgment motion as well as grounds appropriate for a “no-evidence” summary judgment. *See Binur v. Jacobo*, 135 S.W.3d 646, 650-51 (Tex. 2004).

In a traditional summary judgment motion, the moving party has the burden of establishing that no material fact issue exists, and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). Evidence favorable to the nonmovant must be taken as true and every reasonable inference must be indulged in favor of the nonmovant. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-549 (Tex. 1985). If the movant provides competent summary judgment evidence, then summary judgment should be granted for the movant. TEX. R. CIV. P. 166a(c).

Under a “no evidence” summary judgment motion, the nonmovant bears the burden to defeat the motion, so that the movant may, after adequate time for discovery and without presenting summary judgment evidence, move for summary judgment on the ground that no evidence exists as to one or more essential elements of a claim or defense that a party would have the burden to prove at trial. TEX. R. CIV. P. 166a(i).

In the current dispute, Respondent argues it is entitled to summary judgment under both types of summary judgment motions. Respondent argues Petitioner did not present summary judgment evidence in his response and merely objected to various exhibits in Respondent’s summary judgment exhibits in his response. Petitioner alleged the existence of newly-discovered E-mail evidence, not previously known to Petitioner, and requested he be allowed to go forward with presentation of this evidence at the hearing before ruling on waiver of the statute of limitations issue.

On January 2, 2009, at a telephonic conference to take up the discovery issues and the P-MSJ, the undersigned Hearing Officer allowed Respondent’s business record affidavit to cure Petitioner’s objections to Respondent’s P-MSJ exhibits, admitted the P-MSJ exhibits 1-27. The Hearing Officer granted partial summary judgment on the following issues from the 2006-2007 school year: 1) staff-to-student ratio for instruction; 2) timeliness and thoroughness of Petitioner’s initial evaluation; 3) changes to and implementation of the student’s IEP prior to August 26, 2007; and, 4) issues regarding Petitioner’s behavior prior to August 26, 2007. The Hearing Officer allowed Petitioner to go forward to hearing on two sub-issues in the waiver request concerning teacher training and in-home training.

### **Statute of Limitations**

In Texas, a due process complaint may only set forth alleged violations, which occurred no more than one year prior to the date of the original complaint. 19 TEX.ADMIN.CODE §89.1151. Under IDEA and its implementing regulations, the timeline does not apply if the parent was prevented from filing a due process complaint due to: 1) specific misrepresentations by the school district that it had resolved the problem forming the basis of the due process complaint; or, 2) the school withheld required information from the parent. 34 C.F.R. §300.511(f).

Respondent argues that Petitioner produced no evidence that either exception to the statute of limitations should apply. Petitioner's claims surviving the summary judgment phase allege misrepresentation and/or withholding of documentation by Respondent, discussed separately below.

**A. Appropriate Teacher Training** Petitioner's mother alleges that Petitioner's teachers were not properly trained for working with her autistic son during the spring semester of the 2006-2007 school year and did not have access to school district documents to prove the lack of training. The record evidence and hearing testimony from Petitioner's teachers – both the \*\* teacher and his general education \*\* teacher – show that each teacher received training regarding autism. The credible hearing testimony established the knowledge base of the \*\* teacher, a special educator with multiple years of hands-on experience teaching special needs children including autistic children, familiarity with ABA for use with autistic individuals, training in usage of the PECS system, and documentary evidence of trainings attended. Petitioner produced no evidence that information was withheld that these individuals were unqualified. The preponderance of the evidence shows both teachers were appropriately trained for their respective roles in Petitioner's education. Petitioner did not meet his burden for a waiver of the statutory timeline on this issue.

**B. Parent Training** Petitioner alleges the ARDC “misrepresented” the parent training for the summer months of 2007. Respondent asserts that DISD made no misrepresentation of the services offered over the summer months. In fact, Petitioner's mother refused some of the services offered. After review of the record before me, I find no evidence of “misrepresentation” of the in-home services offered to Petitioner's mother. While there is evidence that Petitioner received less than the amount anticipated, Petitioner's mother refused some of the services, was fully aware of what services had been provided to her, and produced no evidence to show she was prevented from bringing a due process complaint over the actual services received or any omitted services for the summer months. Petitioner did not meet his burden to show a misrepresentation occurred that triggers an exception to the one-year statutory timeframe. Petitioner did not produce evidence to show that any information was withheld regarding parent in-home services that prevented Petitioner's mother from requesting a hearing within the proscribed one-year period.

### **FAPE Allegations**

Petitioner alleges that DISD did not provide him with a FAPE by: a) failing to provide an appropriate placement for him in the \*\* class with non-verbal peers; b) failing to provide appropriate OT services; and, c) development of a BIP that addressed behaviors in the FBA. Respondent believes the record does not support these allegations.

### **2007-2008 Placement**

Petitioner's mother challenges the combination of a \*\* class and a \*\* class. She asserts the inappropriateness of the \*\* class size and composition, insufficient time with \*\* peers, as well as a detrimental impact upon Petitioner from non-verbal \*\* peers. Respondent believes Petitioner's 2007-2008 \*\* and \*\* placement was appropriate, allowed interaction with verbal peers, allowed Petitioner to progress, and was appropriately implemented with a gradual increase of \*\* time to ensure Petitioner's comfort and successful transition to the larger \*\* environment.

Petitioner's mother agreed to the combination of the \*\* and \*\* classrooms for Petitioner during the two-day ARDC in summer 2007. Petitioner did not produce evidence of a negative

impact upon Petitioner from exposure to his bilingual peers in the \*\* class of up to five children. Petitioner's speech expert at hearing gave credible evidence of the factors necessary to impact a child from exposure to a bilingual peer, such as consistency and emotional connection. Although Petitioner presented some evidence of a negative impact from the \*\* class peers, specifically the crying of one child new to the class, the preponderance of the record evidence shows that Petitioner was comfortable in his two classes.

It is undisputed that the \*\* class began a week after the \*\* class in the 2007-2008 school year. Of Petitioner's seven weeks at DISD in the Fall 2007 semester, only six of them included the possibility of time in the \*\* room. Credible hearing testimony from Petitioner's educators established the gradual transition of Petitioner into the larger setting of the \*\* room as Petitioner demonstrated comfort with this setting. Other factors impacted Petitioner's total time in the \*\* classroom through October 11, 2007, including occasional late arrival to school. Yet, the brief six-week period of transition was only a portion of what he would have received, had he remained in his placement throughout the 2007-2008 school year. Based on the evidence before me, Petitioner has not met his burden to show he was improperly transitioned from the \*\* to the \*\* room in an inappropriate manner.

### **Sensory Needs**

Petitioner alleges that Petitioner's sensory difficulties were not evaluated timely by DISD, nor were his sensory difficulties met with appropriate services. By contrast, Respondent points to current evaluation data at the beginning of the 2007-2008 school year. Respondent believes the program developed for Petitioner fully met his educational sensory needs, noting little demonstrated sensory difficulty from Petitioner within his \*\* and \*\* placement.

Respondent evaluated Petitioner's sensory needs as part of the FIE in the previous 2006-2007 school year and considered Petitioner's private OT evaluation for OT services at the "Monitor, Level 2" OT services, or direct services and teacher consultation, for 30 minutes each six weeks for the 2007-2008 upcoming year. Petitioner's mother agreed to increase OT time to 60 minutes each six weeks to accommodate training for the \*\*/\*\* classrooms, to provide OT materials and equipment, and to deliver sufficient consultation/monitoring time. At the beginning of his 2007-2008, all these OT services were in place.

There is no evidence Petitioner's mother shared a private April 2007 evaluation from Dallas Metrocare with DISD prior to document disclosure in this proceeding. Interestingly, the Metrocare report supports DISD's observations of appropriate school behavior by Petitioner, noting issues not seen at school of dressing, self-abusive behaviors, and tantrums, occurring almost exclusively in his home environment. The DISD autism team prepared and began implementation of a sensory diet notebook for Petitioner, ensuring instruction in its use by his teachers and providers.

### **Petitioner's 2007-2008 BIP**

The evidence established the performance of an FBA of Petitioner's behavior and developed a BIP at Petitioner's annual ARDC meeting in April 2007. The preponderance of the evidence established a carry-over of this BIP into the 2007-2008 school year. The BIP targeted the behaviors observed by his educators at school – appropriate transitioning, following a daily routine, and following verbal directions. Petitioner's mother agreed with all the decisions of this meeting, including the development of the BIP.

### **In-home Services**

Respondent provided in-home training and support for Petitioner's 2007-2008 school year. It is undisputed that DISD autism supervisor and the autism specialist visited Petitioner's home in May 2007. Respondent presented convincing evidence that Petitioner's mother received support in her home for dressing issues, the provision of a visual routine and picture calendar, and direct work by the autism team with Petitioner on dressing issues. Yet, the evidence also established that Petitioner's mother did not implement the visual routine as observed by the two occupational therapists on the second visit. Petitioner's mother declined additional in-home services on September 19, 2007, stating no current problems existed.

### **Petitioner's Fall 2007 Behavior**

Eight days after Petitioner's mother reported no current problems on September 27, 2007, Petitioner began resisting dressing, frequently arriving to school late in a state of partial or total undress. Petitioner's mother reported this resistance was due to Petitioner's school phobia. Respondent denies the dressing problems are evidence of school-phobic behaviors, as demonstrated by the testimony and documentary evidence.

Petitioner's dressing issues occurred at his private Metrocare evaluation on April 16, 2007, when Petitioner appeared for the evaluation – in a non-school setting – without a shirt. November 2007 documentation from Metrocare approximately one month after Petitioner left DISD describes Petitioner undressing in a session and laying down on the floor. The DISD autism specialist gave credible testimony of observations during May 2007 home visits of Petitioner recounting his dressing resistance in a non-school context. Finally, once dressed at school, his \*\* teacher and instructional assistant reported he remained dressed with no further problems or removal of clothes. I find that the preponderance of the evidence fails to support the dressing issue as related to a school phobia.

### **Fall 2007 Parental Concerns**

Petitioner's mother complains DISD failed to address in a timely manner her concerns about behavior escalation after September 27, 2007. Respondent disputes this allegation, as DISD scheduled and held a meeting with Petitioner's mother on October 10, 2007, or within two weeks from Petitioner's resistance to dressing on school mornings.

#### **A. October 10, 2007, Meeting**

The meeting with Petitioner's mother on October 10, 2007, included his \*\* teacher, the campus principal, autism supervisor, and the autism specialist who visited Petitioner's home for the May 2007 home visits. Written minutes of this meeting and hearing testimony show specific effort by Respondent to address the concerns of Petitioner's mother in a timely manner and with a written action plan. Issues addressed in the meeting included dressing for school, speech and OT services, and student exposure to Spanish spoken by his peers. The evidence shows Respondent had no chance to implement the plan as Petitioner came to school the following day for the last time on October 11, 2007.

#### **B. Three-day ARDC Meeting**

Following Petitioner's withdrawal on October 17, 2007, DISD gave formal written notice for the first proposed ARD meeting date on November 1, 2007, suggesting a meeting on November

8, 2007, within two weeks of his formal withdrawal from DISD on November 1, 2007. [R.Ex. 50 at 47]. Respondent convened an ARDC meeting that ultimately took three separate meetings in three separate months of November 2007, December 2007, and January 2008. Detailed ARD meeting documents establish the thorough discussion of parental concerns over Petitioner's current behavior. Credible testimony from the DISD occupational therapist and occupational therapy program manager supported the ARDC discussion concerning the inappropriateness of a BIP to address behaviors described by his mother. I note the ARDC responded with alternative suggestions including in-home training with modeling, use of a social story, and visuals to address dressing problems. After review of the record before me, I do not find that Petitioner met his burden to prove Respondent should have developed a BIP for Petitioner's behaviors after his withdrawal from DISD. Instead, I find the preponderance of the evidence overwhelmingly established Respondent's efforts to respond promptly to Petitioner's concerns throughout the Fall 2007 semester of the 2007-2008 school year.

### **2007-2008 Speech Services and Progress**

Petitioner's 2007-2008 program called for therapy to be delivered in the integrated setting of the \*\* and the \*\* classrooms to provide services in the classroom. Petitioner's mother believes her son did not receive the total amount of speech due under his IEP in one-on-one delivery, pointing to small discrepancies in the speech log notations by the speech therapist in rebuttal testimony. Yet, I do not find this rebuttal testimony persuasive. The hearing testimony from Petitioner's speech therapist clarified the hand-written and typed versions of the speech log notations. [Tr. at 720-726]. I find that the preponderance of the evidence shows Petitioner received his total speech time in his integrated setting during the first six weeks of his 2007-2008 school year.

### **ARDC Review of the Speech and OT Independent Evaluation**

When a parent obtains an IEE at public expense or shares an evaluation obtained at private expense with the school district, the evaluation: 1) must be considered by the public agency, if the evaluation meets agency criteria, in any decision made with respect to the provision of FAPE to the child; or, 2) may be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child. 34 C.F.R. §502(c). After Petitioner requested an IEE for speech and OT on December 12, 2007, the second day of the three-day meeting, Petitioner believed that the IEE would be discussed on the final day of that three-day ARDC, January 16, 2008. The credible evidence established that the completed report, dated January 12, 2008, had been faxed to DISD on or about January 15, 2008, the ARDC meeting notice sent to Petitioner indicated review of evaluation, and when Petitioner's mother discovered two typographical errors in the report, she ensured she had a corrected copy when she appeared for the scheduled ARDC meeting. The evidence shows, however, that Respondent refused to discuss the completed IEE at that meeting because of the two errors. As a result, the discussion and review of the IEE was postponed and the record shows that DISD received a corrected copy directly from the provider on January 22, 2008.

Although Respondent's choice to postpone appears somewhat disingenuous, given the total context of the document and the effort of Petitioner's mother to bring a corrected copy, I don't fault Respondent for the choice to obtain an official copy. However, the undisputed record evidence reveals DISD did not issue notice of such a meeting until February 27, 2008, for a proposed meeting on March 6, 2008. From March through May 2008, the meeting was postponed for a variety of factors including unavailability of necessary participants and a sudden illness of Petitioner's mother.

Finally, the ARDC convened and considered the IEE on June 5, 2008, almost five months after the completion of the IEE report, ultimately not changing any recommendations as a result of the IEE.

The IDEA and its implementing regulations are silent as to a timeline for consideration of an IEE. Yet, the regulations pertaining to the IEE process are clear that the information process should not be delayed. *See* 34 C.F.R. 300.502. In this dispute, I nonetheless conclude that a delay of five months for convening the ARDC meeting to review the completed IEE report was not reasonable delay for consideration of the IEE obtained at public expense. Petitioner met his burden to show an undue delay in convening the meeting for review of the new IEE results, resulting in a procedural violation.

### **Determination of FAPE**

Under 34 C.F.R. §500.513(a)(1), a hearing officer's decision on the provision must be based on substantive grounds. For matters alleging a procedural violation, a hearing officer may only find a denial of FAPE for procedural inadequacies if the procedural inadequacies:

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or,
- (iii) Caused a deprivation of educational benefit.

34 C.F.R. §300.513(a)(2)(i)-(iii).

Based on the facts before me, the five-month delay from completion of the IEE to the ARDC review did not impede Petitioner's receipt of FAPE. Petitioner had been withdrawn from DISD and attended school in his private setting. There is no evidence that Petitioner was precluded from participation in the process to convene the ARDC after DISD sent notice of a proposed meeting for March 6, 2008, or that Petitioner was excluded from the scheduling process once the first ARDC meeting notice issued. Further, once the ARDC convened and reviewed the completed assessment, DISD members of the ARDC did not propose changes to the receipt of OT and speech services proposed in the three-day ARDC meeting conclusion on January 16, 2008. The record testimony established the limited usefulness for a school setting of the IEE conclusions from both portions of the evaluation, given the clinical/medical rather than an educational setting of the evaluation. For these reasons, I conclude that the above procedural violation did not impede Petitioner's receipt of FAPE.

I turn to whether Respondent's program meets the four-factor analysis enunciated by the Fifth Circuit. *Michael F.*, supra. The first factor under *Michael F.* is whether the school district developed an educational program based on current assessment data and student performance. The record before me established that the ARDC considered available assessment data – whether performed by the district or independently obtained and timely disclosed by the parent – in the development of Petitioner's 2007-2008 program. The ARDC held meetings to revise and review his program to address educational needs, including the revisions in summer of 2007. At that time, the ARDC revised Petitioner's program following consideration of the Dallas Reading and Language Services speech report to increase Petitioner's articulation and decrease supervision. The program in place for the 2007-2008 school year included OT services of 60 minutes per six weeks, 360 minutes of speech therapy per six weeks, parent training services of 270 minutes per semester, and in-home training skills of 100 minutes per semester. I find that Petitioner's program meets the first factor under *Michael F.*

The second factor is whether Petitioner's IEP was administered within the least restrictive environment. The facts of this dispute establish that Petitioner's placement in both the restrictive \*\* class combined with the less restrictive general education \*\* class, allowed Petitioner exposure to normally-developing peers. The ARDC considered various options, such as a \*\* class placement, but rejected more restrictive placements. The ARDC together with his mother developed his combined \*\*/\*\* placement. I find this placement was the least restrictive placement for Petitioner that resulted in daily contact with non-disabled children with the structure and supports he needed.

The third factor is whether Petitioner's services were provided in a collaborative and coordinated manner by key stakeholders. The overwhelming preponderance of the evidence shows Petitioner's mother participated in the ARDC process, had frequent if not daily interaction with his teachers, and the opportunity for daily observation and access to Petitioner's placement. His teachers, speech, and OT service providers collaborated and worked together to provided services within his school environment in an integrated manner, with on-going input and assistance from the autism team. I find that Respondent delivered Petitioner's program in a consistent manner on a collaborative basis.

The fourth factor is whether Petitioner's program resulted in positive academic and non-academic benefits. As discussed above, Petitioner demonstrated progress on his speech, OT, behavioral, social, and academic skills. The preponderance of evidence established his successful interaction with peers, participation in class activities, demonstrated academic progress in his fine arts skills, progress on his speech and OT goals, and participation with classroom schedules, as well as other goals. I conclude that Respondent's program delivered positive academic and non-academic benefits to Petitioner.

### **Private School Placement**

Petitioner's mother withdrew her son and placed him into the \*\* School as she believes the placement is appropriate, provides him with services, and fosters an environment in which he makes progress on skill deficits. Respondent believes the \*\* School is an inappropriate placement, is not the least restrictive environment, does not have appropriately trained educators, and entirely fails to provide him with an adequate program of necessary services, such as speech and OT.

I conclude that Petitioner's placement for the 2007-2008 school year at DISD was appropriate and provided a FAPE. As a unilateral private placement is not needed for Petitioner to receive FAPE, Petitioner's unilateral private placement was unnecessary and inappropriate. The \*\* School program does not hold TEA certification and is not approved by TEA as an appropriate educational placement for pre-school age or older children. The teacher-to-student ratio is higher at the \*\* School than on the DISD campus of Petitioner's public school program. Petitioner's current \*\* School teacher has minimal training through one three-day workshop on autism. The program does not provide OT services, and is not equipped to provide OT supports and materials needed by Petitioner. Although \*\* School previously offered speech services, those services are no longer available; during the period speech services were provided to Petitioner at the \*\* School, delivery occurred in a clinical rather than an integrated setting.

At the present time, Petitioner receives private speech services from the Park Cities Speech and Language Center. The speech pathologist from this center advocated the use of services from

the center to supplement speech services in an educational setting. [Tr. at 464]. The delivery of services from the Park Cities Speech and Language Center does not provide collaboration with Petitioner's teachers. I conclude that the Park Cities Speech and Language Center is not a necessary placement for Petitioner and is not appropriate. For the above reasons, I conclude that Petitioner failed to meet his burden to prove a need for a private placement at \*\* School or for services from Park Cities Speech and Language Center.

### **Conclusion**

Petitioner received a meaningful educational benefit during the 2006-2007 and 2007-2008 school years in his program. After his withdrawal and unilateral placement into his private school, the program proposed for Petitioner at that time was reasonably calculated to provide the same. *Rowley, supra*. Based on the foregoing, I decline to order Petitioner's requested relief in its entirety.

### **Conclusions of Law**

1. Petitioner qualifies as a student with autism and speech impairment and is entitled to special education and related services at no cost under the provisions of the IDEA, 20 U.S.C.A. §1400, *et. seq.*, and its implementing regulations.
2. Petitioner resides within the jurisdictional boundaries of DISD, a legally constituted independent school district operating as a political subdivision of the State of Texas. DISD is responsible for providing the student with a free appropriate public education. 20 U.S.C. §1412(a)(1); *Hendrick-Hudson District Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C.A. §1412; 34 C.F.R. §300.300; 19 T.A.C. §89.1001.
3. The educational program proposed by the school district is presumed to be appropriate. Petitioner, as the party challenging the educational program offered by Respondent, bears the burden of proof. *Tatro v. State of Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Alamo Heights ISD v. State Board of Education*, 790 F.2d 1153 (5<sup>th</sup> Cir. 1986).
4. Petitioner did not meet his burden to show DISD made specific representations that DISD had resolved the problem forming the basis of the due process complaint or had withheld information from the parent for an exception to the one-year limitations period. 19 TEX.ADMIN.CODE §89.1151; 34 C.F.R. §300.511(f).
5. The educational program developed and implemented during his 2006-2007 and 2007-2008 school years until his withdrawal from DISD on October 17, 2008, and the educational program proposed after his withdrawal from DISD for 2008 implementation, were reasonably calculated to confer educational benefit to Petitioner. *Cypress Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-248 (5<sup>th</sup> Cir. 1997).
6. The least restrictive environment for Petitioner is the general education classroom. DISD's educational program was implemented within the least restrictive environment for Petitioner during the 2006-2007 and 2007-2008 school years within DISD. The proposed

2008 program for Petitioner included time in the general education setting. 34 C.F.R. §300.116.

7. Petitioner, in seeking reimbursement for private school placement, has the burden of establishing that the private school placement was appropriate and available to Petitioner. Petitioner did not meet his burden and the placement of Petitioner at either the \*\* School or the Park Cities Speech and Language Center is inappropriate. 34 C.F.R. §300.148(a)-(c).
8. Petitioner failed to give notice of his intention to seek private placement reimbursement from DISD. Petitioner did not provide this notice prior to withdrawal from DISD. 34 C.F.R. §300.148 (c)-(d).
9. Petitioner did not meet his burden to show a failure of DISD to timely evaluate the student for sensory difficulties and to provide appropriate services to address his sensory needs. Petitioner provided individualized services to address his needs for OT, in-home and parent training services, supports, and collaborative and supportive services for family and educators to assist in meeting Petitioner's sensory needs. 34 C.F.R. §§300.34(a), 300.34(c)(6)-(10), 300.34(c)(15)-(16), 300.303(a), and 300.304(c)(2)-(3).
10. Petitioner did not meet his burden to show Petitioner suffered speech regression from his placement in August 2007. Petitioner made progress in speech under DISD's program with an integrated delivery of speech services. 34 C.F.R. §300.320(a)(4).
11. Petitioner did not meet his burden to show a failure of DISD to address Petitioner's behavioral concerns through development of a behavioral plan based on the student's targeted behaviors as identified by a functional assessment of his behavior. 34 C.F.R. §300.324(c)(2)(i).
12. Petitioner did not meet his burden to show a failure by DISD to address parental concerns in Fall 2007, including the parent's belief that Petitioner exhibited school-phobic behaviors, by convening an ARDC meeting. DISD promptly convened an ARDC following his withdrawal from DISD to discuss parental concerns. 34 C.F.R. §300.324(a)(1)(ii).
13. Petitioner met his burden to show DISD did not convene an ARDC meeting promptly after completion of an OT and speech IEE completed on January 12, 2008. Respondent did not convene the ARDC to discuss the IEE until June 5, 2008. 34 C.F.R. §300.502(c).
14. Petitioner did not meet his burden to show the procedural violation resulting from DISD's delay in holding an ARDC meeting for discussion of OT and speech IEE impeded Petitioner's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding a FAPE to Petitioner, or caused a deprivation of educational benefit. 34 C.F.R. §300.512(a)(2)(i)-(iii).

## **ORDERS**

Based upon the record of this proceeding, the foregoing Findings of Fact and Conclusions of Law,

**IT IS HEREBY ORDERED** that all relief requested by Petitioner is **DENIED**.

**IT IS FURTHER ORDERED** that any findings of fact that are more properly characterized as conclusions of law, and any conclusions of law that are more properly characterized as findings of fact, shall be considered and shall have the same effect as if properly characterized.

**IT IS FURTHER ORDERED** that any and all additional or different relief not specifically ordered herein is **DENIED**.

Signed this 20<sup>th</sup> day of April 2009.

*/s/ Mary Carolyn Carmichael*

Mary Carolyn Carmichael  
Special Education Hearing Officer

#### **NOTICE TO THE PARTIES**

This decision is final and immediately enforceable, except that any party aggrieved by the findings and decision may bring a civil action in any state court of competent jurisdiction or in a district court of the United States as provided in 20 U.S.C. § 1415(i)(2) and 34 C.F.R. § 300.516. 19 Tex. Admin. Code §89.1185(o).