

STUDENT §
V. §
CYPRESS-FAIRBANKS ISD §

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioner brings this appeal by his next friend, pursuant to the Individuals with Disabilities Education Improvement Act 20 U.S.C. § 1400 *et seq.*, (hereinafter referred to as "IDEA"), against Respondent Independent School District (hereinafter referred to as "Respondent" or "School District"). Petitioner (hereinafter referred to as "Petitioner" or "Student") filed a written request for a due process hearing which was received by the Texas Education Agency on November 3, 2006. Petitioner was represented by Attorney Christopher Jonas of Corpus Christi, Texas. Respondent was represented by Attorney Janet Little Horton of the law firm Bracewell & Giuliani, LLP, in Houston, Texas.

All procedural matters have been conducted by agreement of the parties and in accordance with their schedules. An initial telephone prehearing conference was held on December 7, 2006, and a Prehearing Order was issued on December 12, 2006. Disclosure occurred on September 17, 2007, and the due process hearing was held September 25, 26 and 27, 2007 and October 5, 2007 at the School District Administration Building. Petitioner and Respondent requested the opportunity to file written closing arguments and agreed that both parties would file their briefs on November 27, 2007. A Post Hearing Scheduling Order was issued on October 9, 2007 setting forth the agreed upon briefing scheduled and confirming the previously stated decision due date. Petitioner and Respondent filed an agreed motion for an extension of time to file closing arguments, and, in light of the parties' agreement, the Hearing Officer granted the extension by order dated November 26, 2007, so that the parties' briefs were filed on or before 5:00 p.m. on December 3, 2007, and the decision due date was December 31, 2007. On Friday, December 28, 2007, and again on Tuesday, January 2, 2008, the parties and

the Hearing Officer agreed to an extension of time to issue the decision, due to holidays and illness, so that the agreed upon decision due date in Friday, January 4, 2007.

Petitioner states that Respondent has deprived Student of a free appropriate public education because it has been unable to provide an appropriate placement to meet Student's individual needs. Petitioner is attending **** School as of October 18, 2006, and has requested that Respondent pay for the private school placement. Petitioner also asserts that Respondent, in the absence of an appropriate placement, has punished Student for behaviors related to the disability, although Petitioner asserts that the punishments were neither effective nor appropriate. Petitioner complains that Respondent has failed to provide Petitioner with an appropriate placement, and has placed Petitioner in classrooms with "constant over stimulation." Petitioner maintains that Respondent has failed to provide the supports which Petitioner needs in order to be successful in the least restrictive environment, and has threatened to arrest Student. Petitioner states that Student's appropriate placement is a private day school placement. Petitioner also complains that Petitioner is forced to pay for private speech therapy services.

As relief in this due process hearing, Petitioner requests that Respondent pay for the private placement at *** School and provide reimbursement for the monies expended by the parents for the private school placement; that Respondent reimburse the parents for transportation expenses to and from the private placement; and that Respondent provide one year of compensatory educational services or an amount of compensatory educational service deemed appropriate by the Hearing Officer.

Respondent contends that it has not denied Student a free, appropriate public education. Respondent asserts that Petitioner had experienced behavior problems in past school years and has been provided numerous Functional Behavior Assessments ("FBAs") and Behavior Intervention Plans ("BIPs") to address Student's problem behaviors. Respondent noted that previous efforts had been successful, such that some behavioral supports offered previously had not been needed by the end of the last school year. Respondent maintains that Petitioner began the 2006 - 2007 school year successfully, but experienced behavior difficulties after two weeks.

Respondent convened Admission, Review and Dismissal committee meetings (“ARDs”) and provided FBAs and BIPs, but Petitioner did not return to school.

Based upon the evidence and the argument of counsel, the Hearing Officer makes the following findings of fact and conclusions of law.

II. Findings of Fact

1. At the time of the hearing, Student was *** years old and resides within School District.
2. School District is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing Student a free appropriate public education in accordance with the Individuals with Disabilities Education Improvement Act, 20 U.S.C.A. § 1400, et seq., and the rules and regulations promulgated pursuant to IDEIA.
3. Student is a child with a disability who has been determined to be is eligible for special education placement, programs and services as a child with the following disabilities: Pervasive Developmental Disorder, Autism, (Asperger Syndrome), Emotional Disturbance, and Speech Impairment.
4. The primary manifestation of Student’s Autism, Emotional Disturbance and Speech Impairment disabilities is the inability to regulate behavior, to control inappropriate or aggressive verbal and physical outbursts against other persons or the environment, and, generally, to manage situationally appropriate executive functioning, i.e. determining appropriate verbal or physical responses to changing stimuli. Executive function is the ability to plan behavior, to inhibit behavior, and to learn from previous behavior and then plan on changing the previous behavior, emotions or thinking. Student also has great difficulty with pragmatic communication – using language functionally in an interactive way, understanding facial expressions and body language, and managing social interactions and making friends, including determining the impact of his behaviors on others.

5. Student attended *** Grade in *** School in School District in the 2003-2004 school year. Although Student's parent requested information on Student's problem behaviors from teachers, Student's behavior presented few problems and teachers did not always report on student's behavior.

6. Student did not receive Special Education in *** Grade.

7. School District had six grading periods with 27-33 school days in each grading period. In *** Grade, Student had a total of seven absences and four tardies throughout the year, with no absences in the 33 days of the fifth grading period, and no tardies in the last 65 days of school in the fifth and sixth grading periods.

8. Student received good Conduct and Work Habits grades on student's report card in *** Grade. No significant behavior incidents were reported, and Student's Conduct and Work Habits grades were all at least Satisfactory. In Music/Theater Arts, Student received all grades of Excellent except a Satisfactory in the first grading period for Conduct; and Student also received an Excellent conduct grade for Art in the first grading period.

9. Throughout *** Grade, Student received grades ranging from *** (Language Arts, sixth grading period) to *** (Science, sixth grading period) in all his core academic subjects to achieve *** composite average and the following yearly averages in academics: Reading (*** Average), Language (*** Average), Mathematics (*** Average), Science (*** Average) and Social Studies (*** Average).

10. Student was in *** Grade in *** School in School District in the 2004-2005 school year. School District had six grading periods with 27-33 school days in each grading period. Student had a total of 35 absences and seven tardies throughout the year, with no tardies in the first and last grading periods of *** Grade. Most of Student's absences, 21, occurred during the second and third grading periods, before Student was receiving Special Education.

11. During that school year, Student began experiencing significant behavior difficulties at school, including verbal and physical aggression. School District first addressed Student's behavior with parent conferences, positive reinforcements, and behavior contracts. A campus-supported Behavior Plan I was implemented in late September, 2004, and subsequently, in January, 2005, a Behavior Plan II was implemented for Student with school district wide support. School District had a Social Ways Classroom for students with behavior difficulties, but Student was never assigned to that classroom.

12. In Fall, 2004, Student was hospitalized in a psychiatric hospital, but Student's parents gave school district no specific information on the basis for the hospitalization or the therapy received.

13. Additionally, in Fall, 2004 the *** School Assistant Principal gave parent a special education assessment form, which parent returned on November 29, 2004, providing a social case history. The *** School Special Education Referral Committee determined that a full and individual evaluation ("FIE") was needed and Parent granted consent for the FIE on December 3, 2004.

14. Student had 3 ARDs in *** Grade, the initial ARD on January 13, 2005, another ARD on March 13, 2005 to consider additional assessment data, including a functional behavior assessment "FBA," and a final review ARD on May 23, 2005 to consider Extended School Year services ("ESY").

15. Student's initial ARD convened on January 31, 2005 to develop an IEP for Student, after Student's evaluations were completed. In discussing Student's FIE, Speech/Language assessment, dated January 24, 2005, the ARD committee ("ARDC") determined that although Student had one consistent speech error, the vocalic /r/, Student was not in need of Speech Therapy and did not meet eligibility criteria for Speech Impairment. Also as to a potential speech

disability, Parent stated that Student found writing “incredibly difficult,” but stated that speech eligibility could be looked at again next year. Student’s IQ and achievement testing showed his intellectual functioning to be in the normal range, and no learning disability was indicated.

16. The January 31, 2005 ARDC also reviewed Student’s FIE, psychological assessment, dated January 24, 2005. Student’s parent provided additional psychological information to the ARDC in a written statement, noting that Student was diagnosed with bipolar disorder and was being treated with medication, stating also that Student can appear tired, irritable, and explosive, that Student used poor judgment and was easily frustrated, and Student also had negative and hopeless thoughts and fear of failing *** Grade. Parent said Student’s medication helped regulate his moods, but was not always effective, and his behavior was making it difficult to maintain peer and adult relationships. The ARDC also reviewed the parent’s social case history and information provided by Student’s teachers regarding Student’s difficulties with aggression, withdrawal, noncompliance, disruption, social skills and self-management. It was determined that Student met TEA and federal eligibility criteria to receive special education services by virtue of an Emotional Disturbance (“ED”).

17. The January 31, 2005 ARDC performed a functional behavior assessment (“FBA”) for Student, identifying three target behaviors to address in Student’s BIP:

- (a) Physical aggression toward self and others, e.g. biting, hitting, head-butting, kicking, spitting, threatening gestures and throwing objects;
- (b) Noncompliance with adults/authority figures, e.g. refusing to follow directions, refusing to work; and
- (c) Verbal aggression, including inappropriate behavior toward self and others, such as, “I hate you/myself,” name calling, screaming, and yelling out.

The FBA included a detailed analysis for each targeted behavior, which addressed environmental components (in what locations is the behavior most likely or least likely to occur, and with whom is the behavior most likely to occur), identification of conditions likely to precede the behavior, events that typically follow the behavior and their effectiveness, possible behavioral

function for the behavior, reinforcers used and their effectiveness, and suggested reinforcers and consequences for use in the Student's BIP.

18. The January 31, 2005 ARD developed a BIP for Student addressing three behaviors. For each of the three inappropriate behaviors, the BIP identified appropriate behaviors, along with antecedent strategies, skill acquisition needed, reinforcement strategies, and consequences. The three "Inappropriate Behaviors" addressed in the BIP were physical aggression towards self or others, verbal aggression, and noncompliance. Appropriate behaviors identified were self composure, keeping hands, feet and objects to self, and appropriate teacher/peer interactions; appropriate language toward self/adults/peers; compliance with given directions; and start/complete tasks with given directions. The "Antecedent Strategies" (structured environment, proximity control, quiet island, frequent breaks, hand signal, parent/teacher communication, among others), "Skill Acquisitions" (coping strategies, relaxation, verbal communication), "Reinforcement Strategies" (morning, afternoon and intermittent reinforcers, verbal, tangible, visual and/or edible positive feedback, and parent communication), and "Consequences" (loss of or failure to earn reinforcer, cooling off period initiated by teacher, simplified written apology, isolated instruction and parent communication) were the same for all three Inappropriate Behaviors.

19. Behavioral objectives in Student's IEP were: Identify and discuss appropriate coping strategies and problem solving skills to maintain educational success one time per grading period in session or through teacher consultation; following a non-preferred directive 50% of time when given no more than 2 verbal prompts; use predetermined strategies when upset or frustrated, rather than engaging in physical aggression; and use school appropriate language when upset or frustrated.

20. In addition to the BIP and behavioral IEPs, Student's IEP provided that Student would be instructed in the general education classroom with instructional supports and modifications, with In Class Support (an aide) and 30 minutes of social skills instruction once a week in the resource

setting. Indirect, psychological services were to be provided in consultation with Student's teachers.

21. The January 31, 2005 ARDC also determined that additional behavioral data, in the form of an in-depth FBA should be performed by School District's Special Education Coordinator for Behavior and Social Skills, and noted that the FBA should be completed and another ARDC scheduled by April 22, 2005. The FBA was needed to consider: a) whether Student had a particular category of disability; b) the present levels of performance and educational needs of Student; and c) if applicable, the nature and scope of special education and related services needed.

22. All ARDC members, including Student's parent, agreed with Student's special education placement and services, and Student's IEP and BIP.

23. On March 16, 2005, Student refused to begin work after receiving a snack, kicked people, tried to run away from teachers and hit a teacher in the nose. Physical restraint was used for 2-3 minutes. In an attempt to de-escalate the situation, teachers provided choices to Student, gave verbal redirection, employed calming techniques, and asked Student to breathe deep breaths. Student's parents were notified. This instance was one of over 50 instances of the use of restraint on Student in *** Grade.

24. As to annual standardized testing, modifications were included beginning with the March 18, 2005 ARDC Decision-making Process for the Texas Assessment Program.

25. In *** Grade, Student failed the Reading portion of the TAKS test, scoring ***, while the standard is 2100. The March 18, 2005 ARDC decided that Student would be exempt from the TAKS and would take the SDAA for Reading and Math on grade level. The ARDC also determined that Achievement Level *** on the SDAA was the most appropriate level for Student. Student took the SDAA in May of 2005. Student exceeded ARDC expectations by

scoring ***, instead of ***, in both Math and Reading. Student's scores indicate that Student is on grade level (***), and the grade level test administered to Student, while "****" and "*****" indicate the proficiency of knowledge which Student displayed in the test. Scoring a *** meant that Student showed "proficient knowledge and skills related to the TEKS at this level." Accordingly, Student exceeded the ARDC's expectations in performance on the standardized test.

26. A second ARD meeting was convened on March 18, 2005 to develop and review Student's IEP. The primary assessment reviewed was the FBA which was requested at the January 31, 2005 ARD. Other assessments reviewed were the January 24, 2005 FIE, psychological assessment, and FIE, speech/language assessment, as well as information from Student's parents and teachers, and Student's TAKS scores.

27. Student continued to meet special education eligibility as a student with an Emotional Disturbance. Student's problem behaviors during the *** grade were escalating, causing Student to be restrained often during the school year, and giving rise to parent concerns about Student missing too much instruction time due to disciplinary suspensions. The ARDC's main focus at its March 18, 2005 meeting was to address Student's problem behaviors, and to keep Student in the general education class as much as possible.

28. The FBA requested by the ARDC was completed on March 17, 2005 by the Special Education Coordinator for Behavior and Social Skills. Input from School District personnel determined that the main function of Student's problem behaviors was escape from peers and avoidance of non-preferred tasks. Recommendations from the assessment were:

- (a) Provide Student with a high level of reinforcement for positive behaviors and teach replacement behaviors that are just as effective and efficient as his inappropriate behaviors;
- (b) Maintain a consistent behavior management system throughout the day;
- (c) Clearly and explicitly state and model rules;

(d) Use of suspension as a last resort because Student would rather be at home than at school; and

(e) Revise Student's BIP.

29. Student's revised BIP focused on noncompliance (refusing to follow directions, name calling, and yelling out in class) and physical aggression (biting self and others, kicking people, punching people, spitting at people and throwing objects towards people), and omitted the focus on verbal aggression included in the January 31, 2005 BIP. "Antecedent Strategies" (clearly defined limits, visual cues, firm commands), "Skill Acquisition" (coping skills and social skills training) and "Reinforcement Strategies" (sour gummy worms and other food reinforcers, and activity based reinforcers, such as lunch with a friend) were the same for both targeted behaviors. "Appropriate Behaviors" were different for the two targeted behaviors, with Noncompliance having "following directions, using an appropriate voice tone, accepting directions without arguing and/or verbal resistance" and Physical Aggression using "keeping hands, feet, objects and body fluids to oneself," as the appropriate alternative behaviors. Consequences involved immediate removal to a designated area when Student was physically aggressive, while noncompliance consequences allowed intermediate steps of verbal prompting and removal to an area within the classroom to attempt redirection before removal from classroom.

30. The main focus in Student's BIP for both "Antecedent Strategies" and "Consequences" were visual tools, i.e., reminders, rules, and an impulse control sequence.

31. Attached to Student's BIP was a "Protocol for Removal," which outlined the procedures to be followed should Student need to be removed from class due to physical aggression and/or disruptive behaviors that are not able to be redirected. The Protocol identified the procedures for and during Student's removal from the classroom, and Student's transition back to general education class instruction, and also noted specifically that use of restraint (nonviolent physical crisis prevention intervention, or "CPI") on Student and suspension of Student should be used only as last resorts.

32. Student's IEP was changed by the ARDC regarding psychological services from consultation level to 60 minutes of direct psychological services each week.

33. Behavioral objectives in Student's IEP were:

(a) When given an adult/authoritative directive, Student will follow the directive 80% of the time with no occurrences of physical aggression towards, (a) self and (b) others, when given no more than two verbal reminders;

(b) When given an adult/authoritative directive, Student will follow the directive with no occurrences of verbal resistance and/or arguing 80% of the time when given no more than two verbal reminders;

(c) When discussing behaviors and interactions, Student will verbalize or role play appropriate behaviors 80% of the time; and

(d) When discussing behaviors, Student will verbalize or role play how his behaviors impact the emotions of others 80% of the time.

34. All ARDC members, including Student's parent, agreed with the special education placement and services, and Student's IEP and BIP.

35. Another example of Student's behavior difficulties is that, on March 18, 2005, Student stepped on a teacher's foot and hit the teacher in the chest with his head. Student calmed down about 15-20 minutes after this incident and was escorted back to class by the teacher. Upon arriving back at the classroom, Student threw several markers across the room and made an attempt to throw a flower vase. The teacher employed calming techniques, reduced demands and reduced verbal interaction to de-escalate and resolve the situation.

36. An ARD meeting was convened on May 23, 2005 to discuss ESY services. Student continued to meet eligibility as a student with ED. Student's FIE, psychological assessment, and FBA were reviewed, as well as information from Student's parents and teachers. It was noted that Student had been showing improvement in behavioral areas, although School District's behavioral specialist stated that Student "has spent this year in crisis." Student's menu of food

reinforcers was discussed and there was concern that the reinforcers may need to be changed. The ARDC discussed Student's need for social skills as evidenced by his eating alone, even though he was allowed the positive reinforcer of taking a friend to lunch, and that Student has shown some improvement with his coping skills, such as practicing deep breathing techniques. While Student continues to make inappropriate comments, Student no longer seems angry when he makes the comments. Student's physical aggression also lessened. Psychological services were changed to 120 minutes per six weeks. ESY services were offered to Student for half days during both sessions.

37. Behavioral objectives on Student's IEP were as follows:

- (a) When discussing behaviors and interactions, Student will verbalize or role play appropriate school behaviors three out of four sessions; and
- (b) When discussing behaviors, Student will verbalize how Student's behaviors affect the emotions of others three out of four sessions.

38. All ARDC members, including Student's parent, agreed with the special education placement and services, and Student's IEP and BIP.

39. Despite Student's behavior problems and eligibility for Special Education in *** Grade, Student received grades ranging from *** and *** (Social Studies and Science, fourth grading period) to *** (Science, sixth grading period) in all his core subjects to achieve an *** composite average and the following yearly averages in academics: Language Arts (*** Average), Reading (*** Average), Mathematics (*** Average), Science (*** Average) and Social Studies (*** Average).

40. Student's Work Habits in all subjects throughout *** Grade were "Satisfactory," and all Conduct and Achievement grades in P. E., Music and Art were Satisfactory. Student began the year with "Needs Improvement" grades in Conduct in Language Arts, Reading and Math, and then, in the second and third grading periods, "Unsatisfactory" grades in those subjects, plus

Social Studies. In the last three grading periods, when Student began to receive Special Education, all Student's Conduct grades in core academic subjects were Satisfactory.

41. On May 24, 2005, Student kicked a teacher repeatedly, and attempted to kick other students, which prompted the need for physical restraint. Verbal redirection, reduced demands and reduced verbal interaction were all employed to de-escalate the situation, but to no avail. Parents were notified and Internal Tracking Forms were used to record the incident.

42. Although Student struggled with behavior and received significant behavioral supports, Student performed well academically during *** Grade. Student received an Honor Roll Award dated May 25, 2005 for outstanding grades and behavior.

43. Student attended Extended School Year Services during the summer after *** Grade. Student attended 10 out of 12 days the first session, and Student's End of Session Report indicated that Student's behavior was satisfactory and that Student maintained all IEP objectives at or above the level indicated on Student's IEP. Student attended four out of 12 days the second session, and Student's End of Session Report indicated that Student maintained most IEP objectives at the level indicated on the IEP, noting, "Student continues to need prompts to problem solve appropriate responses/behavior when he is not the winner of a game."

44. Student was in *** Grade during the 2005-2006 school year. School District had six grading periods with 27-33 school days in each grading period. Student had a total of ten absences and 6 tardies throughout the year, with no tardies in the last three grading periods of *** Grade. Student had five ARDS in *** Grade, on October 25, 2005, November 30, 2005, December 16, 2005, January 26, 2006, and March 14, 2006.

45. An ARD meeting was convened on October 25, 2005 to review Student's program (including results of any new evaluations), to develop and review Student's IEP and to consider ESY services. Student continued to meet eligibility as a student with ED. An FIE, psychological

assessment, and FBA were reviewed, as well as information from Student's parents and teachers. It was decided that an Occupational Therapy ("OT") assessment, FIE, autism evaluation, and speech and language assessment were all needed, and should be completed by December 6, 2005 and reviewed at another ARD before the Christmas break.

46. Student's parent discussed Student's medication, which was phasing out Risperadol and changing to Abillify and Depakote, which seemed to help Student's depression, but also seemed to increase anxiety and obsessiveness.

47. At the October 25, 2005 ARD, Student's parent also expressed concerns that Student's BIP needed to be modified to increase its effectiveness. The ARD committee decided that the BIP would be reviewed after the requested assessments were completed. The ARDC also discussed the communication log, and Student's parent indicated a desire to know details about behavior incidents at school, which accommodations were being used at school, and information on Student's socialization.

48. All ARDC members, including Student's parent, agreed with the need for additional assessment and the schedule for completion of the evaluations and scheduling the next ARD.

49. An ARD meeting was convened on November 30, 2005 to discuss additional testing. The ARDC decided to add language testing as a component of the autism evaluation requested at the October 25, 2005 ARD.

50. There were no changes to Student's BIP from the ARD meeting of March 18, 2005 until the December 16, 2005 ARD.

51. Student's ARDC convened on December 16, 2005 to review Student's program (including results of any new evaluations), to develop and review the IEP for Student, to consider ESY services, and to review the requested OT, FIE, Autism, and speech and language

evaluations. An FIE, psychological assessment, and FBA were also reviewed, as well as information from Student's parents and teachers. Student continued to meet eligibility as a student with ED. The ARDC determined that Student qualified for special education with a primary disability of Autism, with Emotional Disturbance and Speech Impairment.

52. At the December 16, 2005 ARD, the OT assessment was reviewed, and the ARDC agreed with the evaluator that OT services were not needed at the time, and, also, that, despite Student's difficulty with writing, Student did not meet eligibility classification as a student with a learning disability.

53. At the December 16, 2005 ARD, Student's Behavior IEP was reviewed and updated by the school's psychologist team.

54. The ARDC agreed that Student's BIP should be developed based on a ticket or token economy system. The new BIP targeted three behaviors:

- (a) Physically aggressive towards peers and school staff;
- (b) Not completing classroom assignments; and
- (c) Not staying in assigned area.

The "Antecedent Strategies" and "Skill Acquisition" sections were specifically tailored to each of the "Inappropriate Behaviors."

55. While this was the first mention of using the Token Economy System with Student, the previous BIP had used reinforcers that were earned by Student based on behaviors during 30 minute intervals and daily totals. Student was given the opportunity to choose a reinforcer from a "reinforcer menu" of items and activities chosen by Student at the end of each 30 minute interval, contingent on Student not receiving more than two reminders and no occurrences of physical aggression.

56. While the consequences in the March 18, 2005 BIP were focused on reminders and removal from group areas, the December 16, 2005 BIP's main consequence was "Unable to earn [reinforcer] activity/item." This consequence was listed in every "Inappropriate behavior" category, and was the only consequence for "Not staying in assigned area." In the March 18, 2005 BIP, even though reinforcers were used, the loss of the pre-specified reinforcer was only used if two previous reminders had failed.

57. The March 18, 2005 BIP focused on visual tools, while the December 16, 2005 BIP only discussed visual tools twice, in the form of a visual cueing system and using visual cues/gestures instead of verbal correction, and instead seemed to focus on a more verbal communication with Student. For instance, "Antecedent Strategies" included having periodic conferences with Student, explaining requirements to complete assignment and rewards/consequences that will be used, and using contingency statements.

58. Student's IEP contained goals for language skills at the *** grade level, behavioral, social and counseling goals and objectives. The behavioral IEPs were keeping hands, feet and objects to self, completion of assignments, and staying in assigned area. Pragmatic social skills IEPs included interpreting facial/body language of peers and familiar adults, conversation skills, and identifying appropriate social solutions. Counseling IEPs included role playing to interpret, initiate and maintaining social interactions, and discussion of how behaviors impact emotions during counseling sessions.

59. Behavioral objectives in Student's IEP went from two at the May 23, 2005 ARD to five, and emotional imprinting, social interaction and counseling objectives were all added.

60. Student's parent expressed concern over Student's participation in P.E. and Music class at the December 16, 2005 ARD. It was decided that if Student had difficulty tolerating and staying on task in both of these classes, then Student would be allowed to leave the room and

visit the Principal. In the case of P.E., permitting Student to have P.E. with a paraprofessional or participating in Art class was discussed.

61. The December 16, 2005 ARD committee adopted the schedule of services: General education classroom for Reading, Math, Social Studies and Science; In class support provided for 360 minutes a day; Resource classroom for Language Arts; Speech services will be given using a combination model for 50 minutes, five times every six weeks, with 25 minutes provided in a therapy setting, and 25 minutes provided outside the therapy setting; and Psychological services continued at the level of 120 minutes per six weeks. The ARDC discussed the TEA autism supplement.

62. All ARDC members, including Student's parent, agreed with the special education placement and services, and Student's IEP and BIP.

63. An annual ARD meeting was convened on January 26, 2006 to review Student's program (including results of any new evaluations), and to develop and/or review the IEP for Student. Student continued to meet eligibility as a student with Autism, Emotional Disturbance, and Speech Impairment. The ARD reviewed the following documents: an FIE, psychological assessment, FIE, speech and language assessment, FBA, and Autism assessment, as well as information from Student's parents and teachers.

64. Student's BIP was reviewed and updated. The token economy continued to be used and the same targeted behaviors (physical aggression toward peers and school staff, not completing assignments, and not staying in assigned area) were addressed with antecedent strategies, reinforcement strategies, and consequences identified in the token economy system.

65. The BIP from the December 16, 2005 ARD was modified to state that Student would not have to give up recess or do make up work during recess as a consequence. Also, the use of visual cues was heavily reentered into the BIP. These changes were made to allow Student to

remain in the general education classroom and with peers with an opportunity for social interaction as much as possible. All other components of Student's BIP remained the same.

66. In addition to the BIP, the January 26, 2006 ARDC updated Student's IEP with goals and objectives for speech and pragmatic social skills. Student's parent reported that Student had been using skills taught in the Speech Therapy class. Student's teachers reported that Student is beginning to initiate conversation, such as asking for help when it is needed. Student's IEP did not contain any behavioral objectives.

67. The January 26, 2006 ARDC also suggested that a system of communication be set up between Student's parent and teachers, to monitor Student's progress and patterns of behavior.

68. Student's schedule of services included the same placement and related services adopted in the December 16, 2005 ARD. It was also decided that Student should always participate during recess and that homework will not be mandatory. Student will not be required to make up work during recess.

69. All ARDC members, including Student's parent, agreed with the special education placement and services, and Student's IEP and BIP.

70. An ARD was held on March 14, 2006 to review Student's program (including results of any new evaluations), to develop and/or review the IEP for Student and to consider ESY services. Student continued to meet eligibility as a student with Autism, ED, and Speech Impairment. The ARD reviewed the following documents: an FIE, psychological assessment, speech and language assessment, FBA, and Autism assessment, as well as information from Student's parents and teachers. Student's BIP, IEPs and FBA were reviewed and updated.

71. The March 14, 2006 ARD agreed that ESY services would be provided for two sessions for half a day each, four times a week. Student's in class support was to be implemented 60

minutes per week, per subject. The ARD also decided that there would be no in-class support for the resource class, art or music, because it was not needed.

72. The March 14, 2006 ARDC again decided to provide speech services using a combination model for fifty minutes, five times every six weeks. Twenty-five minutes will be provided in a therapy setting, and twenty five minutes will be provided outside of the therapy setting.

73. The March 14, 2006 BIP targeted “Inappropriate verbal and non verbal responses in social situations with peers and school staff” and “Not completing assignments and participating in activities.” The BIP continued the token economy system and a schedule of reinforcers. The Antecedent Strategies, Skill Acquisition, Reinforcement Strategies and Consequences were the same for both targeted behaviors. A balanced mix of visual and verbal cues continued to be used.

74. Behavioral objectives of Student’s IEP included: Student will respond physically and verbally appropriately in social situations with 90% accuracy; and Student will complete school assignments/activities with 90% accuracy.

75. On May 3, 2006, Student was involved in an argument with other students, during which Student threw several markers and hit a teacher. Student was given a warning and spent a duration of the afternoon in the Principal’s office. Student’s parents were notified and a referral was sent home.

76. In *** Grade, Student received grades ranging from *** (Social Studies, second grading period) to *** (Reading, fifth grading period) in all his core subjects to achieve an *** composite average and the following yearly averages in academics: Language Arts (*** Average) and Reading (*** Average), Mathematics (*** Average), Science (*** Average) and Social Studies (*** Average)

77. Student's Work Habits throughout *** Grade were all satisfactory, and all conduct and achievement grades in P. E., Music and Art were satisfactory. Student's Conduct grades for academic core subjects began the first semester with "Needs Improvement," for all classes except Social Studies in the first grading period, and Mathematics in the third grading period. Second Semester grades, however, were all Satisfactory, except for a "Needs Improvement" in Mathematics the last grading period.

78. In *** Grade, Student took the SDAA in math, reading and writing in May of 2006. Student exceeded ARD expectations for math and science, by scoring ***, instead of **. Student met ARD expectations in writing by scoring **. The January 26, 2006, March 14, 2006 and September 19, 2006 ARDs all stated that Student would take the SDAA for *** Grade in 2007, and was expected to score ** on both Math and Reading.

79. The paraprofessional worked with Student from March, 2005 until May, 2006. The paraprofessional stopped working with Student after an incident on May 3, 2006, where Student was disruptive in another classroom and the paraprofessional was called to assist. Student then ran to the principal's office (the principal was not present) where Student continued to be upset and refused to calm down despite the efforts of at least three adults, including the paraprofessional, to calm him. During the incident, Student broke a picture frame in the principal's office and kicked the paraprofessional. The paraprofessional **. Although Student later apologized and **, the paraprofessional no longer worked with Student after the incident.

80. Student received an Honor Roll Award dated May 24, 2006 for outstanding grades and behavior.

81. **, a psychiatrist in private practice engaged by Student's parents, treated Student beginning in May, 2006. Student was diagnosed with Asperger's Syndrome and prescribed Risperadol and Zoloft. Student's Asperger's syndrome was evident in difficulties with social interaction, repetitive and perseverant behaviors, including difficulty making eye contact and

with reciprocal relationships; difficulty regulating mood (dysregulation) with small emotional triggers eliciting big systemic responses, and low tolerance for frustration and mood irritability. *** also noted that Student had clumsiness, Attention Deficit Hyperactivity Disorder, and anxiety manifested as difficulty being alone at night and a feeling of being slighted and disliked, although Student wanted friends. ***confirmed that Student had displayed physical aggression and that with frustration Student could get explosive or disengage.

82. Student was offered Extended School Year Services during the summer after *** Grade. Student attended 11 out of 28 days. Student's End of Session Report indicated that Student's behavior was "Inconsistent," and that Student maintained one of his IEP objectives (completing school assignments with 90% accuracy), but showed regression on the other IEP objective (responding physically and verbally appropriately in social situations with 90% accuracy). Student's ESY teacher also stated that Student did a good job in class participation with minimal prompting.

83. On June 26, 2006, while participating in ESY services, Student kicked, hit, spit at, head butted, and attempted to bite teachers. Student's teacher provided choices, verbal redirection, calming techniques and reduced verbal interaction to Student, but Student had to be physically restrained. Student's parents were notified of the event.

84. Student was in the *** Grade at *** School in School District for the first grading period of the 2006-2007 school year. Two ARD meetings were convened, including a reconvened ARD, after the first ARD ended in disagreement. During the first six weeks grading period at *** School, Student achieved high grades, ranging from an *** in Reading, to a *** in Social Studies.

85. In the 2006-2007 school year, when Student was in the *** Grade, Student requested changes to his program. Specifically, Student stated that he no longer needed behavior reinforcers, and Student no longer wanted to leave the general education classroom for resource

support in language arts. Student's parent agreed that Student could receive resource support for language arts in the general education classroom.

86. Student's Conduct grades were "Needs Improvement" in Math, Science and Social Studies, and "Satisfactory" in Language Arts, Reading, P. E. and Music. There were no achievement grades for P.E. and Music.

87. During *** Grade, parents of students in Student's class sent an email, expressing concerns about the safety of their children in light of Student's behavior, and "thought something needed to be done" about Student's placement in the class.

88. Student attended *** Grade for two weeks with behavior problems seemingly under control from the classroom teacher's point of view, but Student exhibited significant problem behaviors developed beginning on September 8, 2006.

89. On September 8, 2006, Student was suspended from *** School for 2 days (September 11 and 12, 2006) for misconduct. School District notified Student's parent with the following information:

During recess, another student reported to a teacher that Student call him a "jackass." The teacher approached Student and asked him to leave the game and stand at the fence for 5 minutes. Student left the game. A few seconds later, Student walked back to join the game yelling at the teacher, "you're not the boss of me!" Student then picked up the ball, walked towards the teacher and forcefully threw the ball at her, hitting her on the shoulder. Then Student approached her and forcefully kicked the teacher's right shin, calling her a "fucking bitch!" According to the Code of Conduct upheld by CFISD, this behavior, being disrespectful to school personnel and exhibiting unacceptable physical contact, is considered to be a Level III violation.

90. A meeting was held on September 12, 2007 at School District, where Parent and school district personnel discussed Student's behavior and consequences, prefatory to convening an ARD. School District personnel expressed concern that additional supports and consequences

were necessary. Student's parent believed School District's statements about potential legal consequences of Student's aggressive behaviors were unwarranted, while the principal believed that, due to Student's age, law enforcement involvement was possible, considering Student's aggressive behaviors.

91. On September 13, 2006, another major behavior incident occurred, and Student was suspended for the rest of the day. School District notified Parent of the suspension and reported the following information:

The children were moving to the carpet after playing instruments. Student bumped into an instrument and became upset. Student refused to comply with his certified teacher aide. Student then told his certified teacher aide that his instrument did not work. The teacher told him that[s] the way it was meant to be. Student then was in the process of putting them down, but at the last moment threw the mallets near two students. He then kicked an instrument. Student's aide saw that Student had clenched his jaw and was upset and asked Student to take a walk with him; Student refused and hit his aide. Student's aide then called the principal, as he could see Student was getting more and more upset and angry.

The principal reported that, when Student was removed to the principal's office, Student engaged in physical aggression toward the principal. Student's parent was contacted to pick up student but was unavailable to pick him up

92. An ARD meeting was held on September 19, 2006 at Student's parent's request to review Student's program (including results of any new evaluations), and to develop and/or review the IEP for Student. Student continued to meet eligibility as a student with Autism, ED, and Speech Impairment. The ARD reviewed the following documents: an FIE, psychological assessment, speech and language assessment, FBA, and an Autism assessment, as well as information from Student's parents and teachers.

93. A new plan was developed by the September 19, 2006 ARD in order to address Student's behavior. Student had been increasingly aggressive with teachers and peers.

94. Student's parent reported that Student may not come back to school. Student feels threatened by the school, and Student's parents feel that Student is not welcomed at the school. Student's doctor is recommending that Student stay at home, and parents request homebound services. The ARD assured Student's parent that a plan is in place to be implemented for Student's return to school.

95. An FBA and BIP were developed, reviewed and agreed upon for Student. It was decided that Student would participate in a resource classroom for 45 minutes and will participate in a Social Behavior Class for 15 minutes in the resource class. Core classes will continue to be given in a general education classroom.

96. The September 19, 2006 ARD modified the March 14, 2006 ARD to: include information on Social Behavior Curriculum in the "Skill Acquisition" column; include references to the Protocol for Removal, which was attached to the BIP; remove "Options for free time special activities" from the "Reinforcement Strategies" column; and add more "Antecedent Strategies."

97. The Token Economy System used in the previous BIPs was removed and replaced with an Incentive System. More verbal and visual cues were added into the "Antecedent Strategies," including periodic conferences, visual cues for Student to express himself verbally, and communication facilitated by an adult.

98. In the September 19, 2006 BIP, loss of reinforcer/incentive was not listed as a consequence for either of the targeted behaviors. Instead, mandatory cool downs, isolated instruction (for up to two days), restitution in the form of apologies, picking up or fixing and debriefing were implemented. The Protocol for Removal was also referred to, which is the first time since March 18, 2005.

99. Behavioral objectives for Student's IEP were as follows: Student will keep hands and feet to himself with 100% accuracy; and Student will treat objects appropriately and manage frustration constructively with 95% accuracy.

100. Student's parent disagreed with the ARD committee's proposed BIP in the area where structured instruction was proposed under "Antecedent Strategies." Student's parent also disagreed with suspension being an option for Student, and for law enforcement to ever be called to address Student's behaviors. The ARD ended in disagreement.

101. An ARD meeting was held on October 3, 2006 at Student's parent's request to discuss any educational or related services not proposed by the ARD, to review Student's program (including results of any new evaluations), to develop and/or review the IEP for Student, and to reconvene after a disagreed ARD held on September 19, 2006. Student's parents felt that School District was being punitive towards Student, and were not properly implementing Student's BIP. At this ARD, Student's parent requested private education for Student, and for School District to pay for Student's placement in the private school. School District personnel refused to approve the private placement, stating that School District had a full plan in place for Student, and that they were ready, willing and able to provide Student with a free, appropriate public education ("FAPE"). Also, School District believed it had not exhausted all options with Student's placement in public school, and was not willing to pay for private education when there were still things that could be done by School District.

102. Student's parent stated again that she disagreed with the use of law enforcement, suspension and the rules about isolated instruction. Student's parents believe School District called for the assistance of law enforcement inappropriately and unnecessarily. Student's parents contend that the constable was called to make good on a threat voiced by the principal in a meeting on September 12, 2006, to punish Student for behaviors clearly related to Student's disability, and to *** into Student as to the consequences for continued misbehavior. Student's

parents believe law enforcement should never be called to address Student's aggressive behavior, and that Student's IEP should expressly preclude any and all use of law enforcement.

103. Student's Principal stated that the District remained committed to Student's BIP developed by the ARDC, and that School District personnel had not had a chance to implement the program since the last modification on September 19, 2006, due to Student's absences. Student's Principal clarified that he stated in the meeting on September 12, 2006 that the constable can be contacted and the use of law enforcement cannot be precluded as an option on Student's BIP. School District personnel also explained that School District could not remove the use of law enforcement from Student's BIP.

104. Although the October 3, 2006 ARDC discussed extensively reinstating the BIP and IEP from March 14, 2006, which were deemed effective, as a means of addressing Student's escalating behaviors, the ARD minutes indicate the BIP and IEP for the which all members of the ARDC except the parents reached consensus were not changed from the September 19, 2006 BIP and IEP.

105. From the time Student's initial referral and placement in Special Education, Student's FBAs and BIPs were all developed with the assistance of School District's Special Education Coordinator for Behavior and Social Skills. The coordinator is a teacher, M. Ed. certified in special education, general education, and nonviolent crisis prevention intervention, who is also a trainer in CPI and a Board Certified Behaviors Analyst, who performs FBAs and designs interventions and curriculum for behavior. The special education coordinator also has taught the Adaptive Behavior class in School District and has served as a *** behavior consultant, modeling the verbal behavior correction procedures used there. The coordinator trained staff involved in implementing Student's behavior interventions, including paraprofessionals in *** and *** grade, certified teachers in *** and *** Grade, in class support personnel, Student's mother, two behavior specialists, certified teachers, and one other teacher.

106. School District maintained behavior logs beginning in the *** Grade, kept by Student's teacher, and in class support logs were maintained on Student's desk in 30 minute intervals. For each 30 minute period Student maintained appropriate behaviors, Student would earn a reinforcer from a menu of preferred reinforcers. The behavior logs were visible evidence of Student's compliance with Student's behavior rules, which were posted and did not change. The point sheets were tallied daily and provided to Student's parent, but also reviewed by Student's support team to determine the effectiveness of the interventions.

107. For *** Grade, School District had an Adaptive Behavior teacher certified in special education, general education and an administrative certification for principalship to work on behavior interventions for Student. The behavior specialist prepared a cool-off area for Student, a principal's room set up with rugs and cushions and "squish balls" for Student's comfort and safety while cooling down. There was also a room for Student's isolated instruction up to two (2) days where the principal would remove Student for safety purposes, is Student was deemed to be a danger to himself or others. Student visited the room with his mother, but never returned to School District or *** School to use the room.

108. Student had a paraprofessional who received extensive training from the Special Education coordinator for Behavior and Social Skills during the latter half of the second semester in *** Grade, and from October until almost the end of the school year in *** Grade. This paraprofessional collaborated with Student's teachers, assisted in planning Student's day, and implemented the Daily Point Sheets for compliance with behavioral objectives from Student's IEP. The paraprofessional would provide visual prompts to remind Student to stay on task, and also helped develop alternative strategies to help Student deal with anger and frustration without resorting to verbal or physical aggression. The paraprofessional took many opportunities to discuss Student's behaviors and increase Student's understanding of the behaviors and feelings of others, and also facilitated social interactions between Student and other students. The paraprofessional also implemented instructional modifications, such as administering oral exams.

109. There were several reports on why the constable was called during the incident on September 13, 2006. Two reasons were offered by School District: (1) to report the assault on the in class Support teacher which had occurred in the music room; and/or (2) to assist in calming Student when no *** School personnel were able to do so.

110. Because of fears and uncertainty regarding the role of law enforcement in Student's BIP, the ARDC was unable to reach agreement on Student's *** Grade IEP. Student's parents wanted clarification as to when law enforcement would be involved, and School District personnel insisted the issue of law enforcement involvement should not be included in Student's BIP, especially any statement that law enforcement would never be called. Student's parents also became concerned that consequences for Student's misbehavior included isolated instruction for up to two (2) days were too harsh, considering that Student's disability caused him to be unable to control aggressive and noncompliant behaviors.

111. The Texas Education Agency has also developed requirements for students with autism to be used in the development of IEPs, including consideration of:

- (a) Extended school year or school day programming;
- (b) Minimal unstructured time;
- (c) In-home and community based training;
- (d) Positive behavior support strategies;
- (e) Planning for successful future life in work, community and educational environments;
- (f) Parent/Family training and support;
- (g) Suitable staff to student ration, considering student's developmental and learning level to allow the student to work towards independence;
- (h) Communication interventions;
- (i) Social skills supports and strategies;
- (j) Professional/educator staff support; and
- (k) Teaching strategies based on peer reviewed, research-based practices for students with Autism Spectrum Disorder.

112. Additionally, School District identified 6 necessary components for effective educational programs for students with autism:

- (a) Individualized supports and services;
- (b) Specific curriculum with IEPs to address problems;
- (c) Comprehensible environments, providing predictable schedules and activities;
- (d) Functional approach to problem behavior;
- (e) Systematic instruction, allowing the student to progress through acquiring new skills, demonstrating the knowledge with other people, developing executive function to know when to apply the skill, and improving executive function and self regulation; and
- (f) Family involvement.

113. ESY services were recommended for Student by the May 23, 2005 ARD for 1/2 day, for both sessions. Student also attended the Social Skills ESY program. Special transportation was provided for Student's use.

114. An autism evaluation was requested for Student at the October 25, 2005 ARD. The evaluation was reviewed at the December 16, 2005 ARD, and autism was immediately determined to be Student's primary handicapping condition, followed by ED and Speech Impairment.

115. An ARD/IEP Supplement for Students with Autism page ("Autism Supplement") was considered and added to the December 16, 2005 ARD. It was decided that Student's ARD would be held later in the school year to review data and make decisions. It also noted that Student would be considered for Social Skills over the summer break. The supplement outlined Student's daily school schedule, reflecting minimal unstructured time. It listed the following behavioral objectives: physical aggression toward peers and school staff; cope with frustration effectively; complete assignments; and stay in designated area. It was decided that parent training was needed, and that parents would be invited to district sponsored meetings about autism, would receive information regarding workshops and that parent/teacher communication would continue through the use of the communication notebooks/notes. Staff conferences would also be available at parents' request. Under staff-to-student ratio, it was noted that Student had a paraprofessional that accompanied him throughout the day to provide individual attention during class as needed. The ration in Student's general education classroom was 1:20, and in the

resource classroom was 1:4. It was decided that in-home training was not needed at the time, because Student was generalizing skills learned at school to the home setting.

116. The Autism Supplement was considered again at both the January 26, 2006 ARD and the March 14, 2006 ARD, with additional consideration of extended educational programming. The January 26, 2006 ARD Autism Supplement stated that “data continues to be taken [and] to review data and consider ESY services in the area of social skills.” The March 14, 2006 ARD Autism Supplement stated:

“ESY is recommended. Student will work on the following goals during ESY: Student will respond physically and verbally appropriately in social situations and Student will complete school assignments/activities.”

At the March 14, 2006 ARD, it was decided that Student would have ESY for both sessions, for 1/2 the day, four days per week.

117. The Autism Supplement in the September 19, 2006 ARD was updated for the 2006-2007 school year. It was stated that data would continue to be collected on Student and that ESY services might be discussed at a spring ARD. Student’s class schedule was updated, and parent training and staff-to-student ratio stayed the same. Student’s prioritized behavioral objectives were: physical aggression towards peers and teachers; and aggression toward property and others. The major change from previous Autism Supplements was the inclusion of in-home training. The ARDC concluded that Student was no longer successful at generalizing skills learned at home to the school setting.

118. Student’s parents participated as collaborating members of the ARDCs and never questioned decisions on Speech Therapy, in class supports, or Student’s eligibility classifications after Student was determined to be a child with autism. Because Student struggled with writing, Student received assistance in writing in the resource classroom in his special education program from the *** Grade forward.

119. School District has a continuum of instructional settings available to Student, many of which have been implemented, including:

- (a) Increasing the in-class support time provided by the trained behavior assistant, teacher or aide;
- (b) Continued review and change of Student's BIP based on research supported therapies recommended by district behavior specialists;
- (c) Resource classes with smaller size and more structure;
- (d) Adding a classroom co-teacher for behavior;
- (e) Adaptive Behavior class at another *** school;
- (f) The Redirect Program, which is an inclusion class with a teacher or paraprofessional who enters the classroom to monitor behavior and provide support;
- (g) A self contained Adaptive Behavior class for hours or days until Student is ready to return to the general education classroom; and
- (h) An Adaptive Behavior Center, with small classes structured with behavior support on a separate campus.

Parent strongly objected to School District's more restrictive behavioral placements, considered them punitive, and wanted Student placed in a general education classroom with behavior supports, and the ARDC agreed.

120. It is undisputed that Student's parents informed the ARDC that they were rejecting the placement proposed by School District and intended to enroll Student in private school at public expense.

121. Student was enrolled in *** School as of October 17, 2006 and began attending on that date up until the present time.

122. Student is in a class of five students with two teachers, with the program director and the school psychologist (not a licensed specialist in school psychology) coming into the classroom to observe Student and support the teachers throughout the day.

123. Student receives weekly 30 minute psychological services to assist Student to learn and to be open to learning, especially non-preferred subject mater. Student's school psychologist has determined that Student is making progress in accepting a wide variety of peers, developing relationships with each of Student's classmates and learning to self-regulate and avoid meltdown when Student's wishes are thwarted.

124. Student's support team at *** School includes Student's two classroom teachers, Student's Speech/Language Pathologist, a master's level psychologist, a music therapist, *** School apprenticeship program director and Student's parents. *** School is an "innovative therapeutic education for children with neurological differences," including Asperger's, Tourette's, autism, bipolar disorder, ADHD, and executive function disorder. *** School addresses the special needs of its students with small classes--no more eight students in a class with two teachers, and a staff of psychologists, speech and language pathologists, and special education teachers. The school has three levels, novice, apprentice and challenger. At the novice level, students are learning to respond to adults; at the apprentice level, students are able to follow as adults lead; and at the challenger level, students take the most responsibility for their learning and their social interactions. After reviewing Student's public school records and evaluating Student's executive functioning and learning style, *** School drafted a program for Student to address Student's self regulation, to inhibit emotional control and shifting, in addition to an academic program. Student entered *** School as a novice, and based on a quarterly assessment of 70 behavior objectives, Student progressed to the apprenticeship program.

125. The program director at *** School believes that the environment at *** School is inappropriate for Student, because it is too stimulating, too fast paced, and information was not presented visually, as Student required. Many of the techniques employed at *** School,

however, were similar to techniques used by School District, such as visual cues, previewing daily schedules, structured opportunities for cool down, verbal and activity rewards for reinforcement. Although Student had in class support in the form of an aide, School District did not have as small a student to teacher ratio in the general education class in which Student was placed. Like School District, *** School tracked student's behaviors over short intervals and spent time discussing appropriate behaviors with Student at the end of each classroom activity period.

126. Student behaviors are recorded, monitored and reviewed in a variety of instruments at *** School. At the end of each class, Student spends time evaluating performance in key behavioral areas with the assistance of a teacher. Additionally, Student has a Reflective Journal, which allows Student to consider problem behaviors, consequences, and alternative strategies. Finally, *** School team of teachers and psychologists meets weekly to chart and graph Student's progress on behavioral goals.

127. Unlike School District, *** School's therapies are not based on Applied Behavior Analysis, but are instead based on the developmental individual differences relationship ("DIR") model. DIR is based on the work of Stanley Greenspan and Serena Wieder, and is based on the students' developmental stages, including sensory modulation, motor planning, auditory pre-facing, and language and visual spatial processing. It is also based on individual processing differences, whether a child is over- or under-reactive to stimuli, and how the processing differences affect a student's ability to function. The DIR model assumes that individual processing differences in the way a student perceives language, for example, are the underlying basis for deficits in executive functioning and emotional regulation. Finally, the DIR model focuses on relationships and emphasizes that students with autism will often have difficulty in not understanding their relationships, and developing negative and avoiding behaviors because of the negative reactions of people around them. Ultimately, the goal of *** School for Student was to increase the time that Student was available, both physically and emotionally, for learning. As

with School District, *** School had to address student's avoidance behaviors and difficulties with social interactions.

128. The DIR model uses imaginative and structural play to expose students to situations outside their comfort zones, which provides opportunities for increasing self-regulation. The use of social rewards in the DIR model as opposed to the tangible rewards of the behaviorist model allows students to gain understanding of the thoughts and feelings of others, leading to positive social interactions in a relationship oriented therapy, rather than working for individualized reinforcers, such as tickets or snacks.

129. *** School's responses to inappropriate behavior were similar to responses by School District. *** School staff provided a cool down room, and immediate psychological support when Student was in crisis, sometimes including physical support or restraint. Although not all *** School personnel are trained in nonviolent crisis prevention intervention, physical restraint is sometimes necessary, as is removal from class, when Student is violent or seems a danger to himself or other persons.

130. At *** School, Student had responsibility for daily behavior tracking. A chart was prepared for each of Student's classes, and within each class, and Student was rated on the following behaviors:

- (a) "Did I take a break or ask for help before getting angry?;"
- (b) "I treat others with respect;"
- (c) "I check with adults to make sure my work and my ideas are correct (Is this the right way?);" and
- (d) "I follow a schedule to get where I'm supposed to be/I stay close to the teacher when we are out. I don't walk off or leave without permission."

A place for comments by a teacher was also provided, and the chart was filled out at the end of each class by Student and Student's teacher. The rating system for each targeted behavior was 1

to 5, with the daily points for each behavior score in each class added and then divided by the total number of classes to get an average of Student's behavior on each goal in all classes, such as 4.9 or 3.5.

131. Between October 17, 2006 and May 4, 2007, Student had 65 days where at least one goal had an average of 3.9 or less, meaning the goal was not met on at least one occasion throughout the day. Of those, 19 days had only one column with an average of less than 4.0. Most of these low scores were based on Student avoiding the classroom activity by sleeping under the desk during the class.

132. Between October 17, 2006 and May 4, 2007, Student had ten days where there were two columns with an average of 3.9 or less. Student had 24 days where three columns had an average of 3.9 or less, and 13 days where all four columns averaged 3.9 or less.

133. Between January 9, 2007 and May 1, 2007, there were 10 days where Student had an average of 2.9 or less in at least one of the columns. These days were all accompanied by comments reflecting Student kicking others, destroying other classes' garden projects, walking away from teachers, and insulting teachers and peers.

134. On May 1, 2007, Student scored averages of 2.16, 2.66, 2.66 and 2.71 in all four columns. Student's teacher noted that Student got frustrated and insulted a peer. Then Student stated that he wanted to go home, pushed a peer and walked away from the teacher. The teacher also noted that Student was very disrespectful towards peers. This was the only day of the 2006 - 2007 school year at *** School that Student scored less than 3.0 on all targeted behaviors in one day.

135. Another aspect of *** School's program for Student involved Daily Behavior Scale for Asperger's Disorder with Obsessive Ideation charts. These charts were filled out on a daily basis and had three sections: Obsessions, Other Repetition and Stereotypy, and Somatic Symptoms.

The charts were marked by “Not true or never true,” “Somewhat true or sometimes truer,” or “Very true or often true.”

136. The Somatic Symptoms had two sections and each section had four entries. The top section detailed: “Shows signs of headache,” “Complains of stomach ache,” “Eats a lot **more** or a lot **less** than usual (circle one),” and “Falls asleep or appears to be very sleepy during the day.” The bottom section was entitled “Aggression/Flight” and detailed the following behaviors: “Uses very insulting or aggressive language with others,” “Bites, scratches, kicks or hits *people* (circle behaviors),” “Hits, kicks, or throws *materials*,” and “Runs away from classroom without permission.”

137. During the period of October 31, 2006 through April 5, 2007, there were only 7 days where the Aggression/Flight behaviors were all marked as “Not true or never true.” Every other day had at least one of the Aggression/Flight behaviors marked as “Somewhat true or sometime true” or “Very true or often true.”

138. Of the 7 days where the Aggression/Flight behaviors are “Not true or never true,” Student went home early on two of those days.

139. While at *** School, Student participated in a monthly Self-Regulation and Community Relationships Group. Student’s participation led to ratings on the following factors which were rated 1 through 10. The higher the score, the more positive the feedback was:

- (a) “Was rude or mean verbally or physically/interactions were neutral/was polite and helpful to other members;”
- (b) “Off-task or ignoring topic/some of both/listened and attended to group topic;”
- (c) “Few verbal contributions/some verbal contributions/frequent on-topic contributions;”

- (d) “Off-topic contributions/on-topic but simple or concrete contributions/ insightful contributions;”
- (e) “Refused to follow rules/followed rules with reminder(s)/followed rules without reminder;” and
- (f) “Constant movement around area/some wandering/stayed in assigned area.”

140. Student’s Self Regulation Group scores on the targeted behaviors were as follows:

| | | | | | | |
|--|------------|------------|------------|------------|------------|--|
| TARGETED BEHAVIORS: | | | | | | |
| (a) “Was rude or mean verbally or physically/interactions were neutral/was polite and helpful to other members;” | | | | | | |
| (b) “Off-task or ignoring topic/some of both/listened and attended to group topic;” | | | | | | |
| (c) “Few verbal contributions/some verbal contributions/frequent on-topic contributions;” | | | | | | |
| (d) “Off-topic contributions/on-topic but simple or concrete contributions/ insightful contributions;” | | | | | | |
| (e) “Refused to follow rules/followed rules with reminder(s)/followed rules without reminder;” and | | | | | | |
| (f) “Constant movement around area/some wandering/stayed in assigned area.” | | | | | | |
| The higher the score, the more positive the feedback was. | | | | | | |
| October 19, 2006 Self-Regulation Group Meeting | | | | | | |
| (a) | (b) | (c) | (d) | (e) | (f) | Comments |
| * | * | * | * | * | * | The topics of focus for the session were pacing, impulsivity and referencing. |
| November 16, 2006 Self-Regulation Group Meeting | | | | | | |
| (a) | (b) | (c) | (d) | (e) | (f) | Comments |
| * | * | * | * | * | * | The topics for the session were self-awareness, self-esteem, communication and following directions. |

| December 7, 2006 Self-Regulation Group Meeting | | | | | | |
|---|------------|------------|------------|------------|------------|---|
| (a) | (b) | (c) | (d) | (e) | (f) | Comments |
| * | * | * | * | * | * | The topics for the session were proper ways of dealing with anger, self-regulation and following directions. |
| January 4, 2007 Self-Regulation Group Meeting | | | | | | |
| (a) | (b) | (c) | (d) | (e) | (f) | Comments |
| * | * | * | * | * | * | The topics for the session were tracking sightline trajectories and attending behavior. |
| January 25, 2007 Self-Regulation Group Meeting | | | | | | |
| (a) | (b) | (c) | (d) | (e) | (f) | Comments |
| * | * | * | * | * | * | The topics for the session were communication, code switching and respect. |
| March 1, 2007 Self-Regulation Group Meeting | | | | | | |
| (a) | (b) | (c) | (d) | (e) | (f) | Comments |
| * | * | * | * | * | * | The topics for the session were helping others and referencing an adult. |
| March 22, 2007 Self-Regulation Group Meeting | | | | | | |
| (a) | (b) | (c) | (d) | (e) | (f) | Comments |
| * | * | * | * | * | * | The topics for the session were reading and responding in expected ways to nonverbal and verbal cues from others. |
| March 29, 2007 Self-Regulation Group Meeting | | | | | | |
| (a) | (b) | (c) | (d) | (e) | (f) | Comments |

| | | | | | | |
|--|------------|------------|------------|------------|------------|---|
| * | * | * | * | * | * | The topics for the session were the same as before, reading and responding in expected ways to nonverbal and verbal cues from others. |
| April 4, 2007 Self-Regulation Group Meeting | | | | | | |
| (a) | (b) | (c) | (d) | (e) | (f) | Comments |
| * | * | * | * | * | * | The topics for the session were the same as before, reading and responding in expected ways to nonverbal and verbal cues from others. |
| Average Scores | | | | | | |
| (a) | (b) | (c) | (d) | (e) | (f) | Comments |
| * | * | * | * | * | * | The facilitator often commented that Student participated effectively in the group discussions. |

141. At *** School, Student received Speech Therapy once each week until Summer, 2006, and then the frequency of Speech Therapy was increased. At present, Student receives 50 minutes of Speech Therapy twice per month with a Speech/Language Pathologist, and four times each month with a Speech/Language Pathology Assistant, with supervision by the Speech Language Pathologist, and with a parent present. The DIR model informs Student's Speech Therapy program at *** School. According to Student's Speech Therapist, Student is engaging more often in reciprocal conversation, showing more tolerance for frustration, and also showing an ability to explore negative emotions.

142. Student also showed improvement in pragmatic speech skills at *** School, developing conversational reciprocity, as opposed to just talking incessantly without listening or allowing opportunities for the other person to respond or offer input. Student's Speech Therapist also states that Student is improving in the ability to organize thoughts in an understandable sequence

and to communicate sensory overload, dysregulation and frustration, so that steps can be taken to avoid “melt downs.” The skills Student learns in Speech Therapy are also important to allowing Student to become engaged and available for learning.

143. *** School psychologist did not so much disagree with Student’s Emotionally Disturbed classification as he did not find it very useful in developing therapies to address Student’s difficulties with social and emotional reciprocity and mental inflexibility when challenged.

144. While at *** School in the 2006-2007 school year, Student worked independently with prompting on Stanford testing at Level 1 – normal for *** Grade - and earned the following scores:

Math

| | |
|-----------------|---------------|
| Problem Solving | ***% |
| Procedures | Not Completed |

Language Arts

| | |
|-----------------------|---------------|
| Work Study Skills | ***% |
| Reading Vocabulary | ***% |
| Reading Comprehension | ***% |
| Spelling | Not Completed |
| Language | Not Completed |
| Science | ***% |
| Social Studies | ***% |

145. Student’s academic subject areas at *** School were normal for the *** Grade level, below Student’s previous recorded achievement in ***School. The scope and sequence of *** School curriculum were also not in accordance with national guidelines. Student earned the following grades:

| 2006-2007 School Year | | | | |
|-----------------------|-------------------------|---|-------------------------|-------------------------|
| Subject | 1 st Quarter | 2 nd Quarter | 3 rd Quarter | 4 th Quarter |
| Language Arts | | *** | *** | |
| Keyboarding | | *** | *** | |
| Math | | *** | *** | |
| Music Therapy | | Positive and negative comments on Student's progress and behavior | | |
| Social Studies | | *** | *** | |
| Science | | *** | *** | |

146. As of April 23, 2007, Student was reported to be at the Novice Level in: Ownership of Executive Functioning; Ownership of Social Development; and Ownership of Academic Competence. Student was reported to be at the Apprentice Level in Ownership of self-awareness and self-regulation objectives.

III. Discussion

In this due process hearing, Petitioner complains that Student, who was diagnosed with Autism, Emotional Disturbance and Speech Impairment in *** Grade, had an inappropriate placement in a general education classroom with support of an aide. Petitioner had a history of significant behavior problems dating from the *** Grade, and, with the assistance of a Board Certified Behavior Analyst, Respondent provided BIPs, psychological counseling, IEP behavioral goals and objectives, and classroom assistance to address Student's verbal and physical aggression, noncompliant behavior and work avoidance behaviors. Respondent's special education program for Student was based on behaviorism, a research supported therapy for students with autism. Respondent complied with all procedural requirements of IDEA, and duly constituted ARDCs convened nine times since the initial January 31, 2005 ARD admitting Student into special education in School District until October 3, 2006, when Student withdrew from *** School and enrolled in *** School. Because Student was an intelligent and creative

student who earned good grades and exceeded ARDC expectations in passing annual standardized tests, the ARDCs allowed Student to remain in the general education classroom to take advantage of the general education curriculum and diverse peer role models, including non disabled students and gifted and talented students.

Unfortunately, despite the efforts of the ARDC to fashion an appropriate BIP, addressing all TEA developed autism requirements, and to monitor and review Student's progress on behavior objectives, Petitioner's behavior problems continued, and Petitioner was never able to conquer his tendency to respond to small emotional triggers with big emotional and physical responses that Petitioner referred to as "melt downs." These melt downs included yelling, name calling, tearing up papers, throwing things, spitting, hitting, kicking and refusing to be calmed by adults, to the extent that the use of physical restraint was necessary. After one such melt down incident on September 8, 2006, Petitioner was suspended for two days. Petitioner had just returned to school when an incident in the Music classroom on September 13, 2006 triggered another violent melt down which continued into the Principal's office. Respondent's Principal called the local precinct constable after Student had hit his male certified teacher aide, and when no school personnel could calm Petitioner down. Petitioner remained fearful that Respondent would call law enforcement again, essentially using law enforcement as a part of Student's BIP, especially because Respondent will not commit to identify and specify the role law enforcement will play in Student's IEP. Because of these parental fears and lack of resolution regarding the use of law enforcement personnel, Petitioner withdrew Student from School District, placed Student in a private school for students with disabilities as of October 17, 2006, and requested reimbursement, contending that *** School is Student's least restrictive environment.

The legal standards for requiring reimbursement for the costs of a parents' unilateral placement of a child with a disability in a private school are well established. Specifically, IDEA states that a local educational agency, a school district, is responsible for providing a student with a free appropriate public education with an individualized education plan in effect while the student attends school, including extended year services. Where there is disagreement regarding

a school district's provision of FAPE, and the parents place the student in private school without the consent or over the objections of the ARDC, the issue of denial of FAPE and reimbursement must be presented to a hearing officer in a due process hearing. Then, a school district is only responsible for reimbursement if a hearing officer determines that the public school denied FAPE. Specifically, 34 C.F.R. §300.148 (c) *Reimbursement for private school placement*, states in pertinent part:

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, *** school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by SEA and LEAs.

Consequently, the hearing officer must first apply the two prong test set forth in *Sch. Dist. v. Rowley*, 458.U.S.176, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982) to determine if school district provided FAPE:

Therefore, a court's inquiry in suits brought under 1415(e) (2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Next, the hearing officer must also evaluate Student's IEPs under existing case law standards to determine if it was reasonably calculated to enable Student to receive educational benefits.

The case, *Cypress-Fairbanks ISD v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997) addressed facts strikingly similar to those found in this case and the Fifth Circuit analysis therein informs this decision. As in this case, the *Michael F.* Court considered the need for public school placement, as opposed to private school placement, when a student's disability causes

intermittent and sometimes escalating behaviors that could pose in-school safety risks to the student, his peers and school staff. In that case, the student’s classroom misbehaviors ranged from “relatively minor” [the Court’s words, at p. 249] classroom disruptions that included yelling, inappropriate sexual touching and a “scuffle;” to more serious school fights and disruptions that necessitated the student’s removal from school. As with this case, that student’s parents elected to remove the student from public school and place him in a private institution [*** School] that specialized in a more therapeutic response to the behavioral manifestations of the student’s disability. The Special Education Hearing Officer had awarded the parents’ request for reimbursement of the costs of private placement by noting that the abusive, outrageous and dangerous behavior of the student threatened the safety of the school, resulted in the student’s failure to achieve meaningful educational benefit, and caused the student to have a “generally low self esteem” [*Michael F.* at p. 253].

In affirming the district court’s reversal of the Hearing Officer’s award of reimbursement of private school expenses, the Fifth Circuit employed a very straight-forward analysis of whether the school district’s IEP for the student was designed to provide the student with a free appropriate public education. The Court asked whether:

- (1) the program is individualized on the basis of the student’s assessment and performance;
- (2) the program is administered in the least restrictive environment;
- (3) the services are provided in a coordinated and collaborative manner by the key “stakeholders,” and
- (4) positive academic and non-academic partial benefits are demonstrated.

(Michael F. at p. 253)

The Court concluded that the specificity of the IEP, the student’s partial placement in a behavior modification setting and a program that involved the entire school’s staff satisfied the first three questions. As for the fourth criteria, the Court concluded that the Student’s passing grades and his ability to “pass through the halls between class unaccompanied by school staff constituted significant academic and non-academic benefits achieved by the IEP.” [*Michael F.* at p. 254]. In

short, the Fifth Circuit concluded that such “objective indicia of educational benefit,” showed that the student’s “IEP was reasonably calculated to, and in fact did, produce more than a modicum of educational benefit” for the student [*Id.*, at pp. 253-254].

Despite its high cost and extensive therapeutic support, *** School does not provide an appropriate special education placement for Student. *** School focuses on providing an appropriate therapeutic setting for students, believing that learning self-regulation and improving executive function is essential to successful adult living. But courts have not interpreted FAPE to allow a focus on acquiring adaptive behavior skills to address disabilities as opposed to documented educational progress as measured by passing standardized tests and demonstrating mastery of grade level curriculum. Unquestionably, *** School did not provide as rich an educational experience as Respondent. *** School curriculum was based in the *** Grade range, as opposed to the grade level curriculum which Student had mastered in Public School and for which he received Honor Roll Awards.

Even if the educational opportunities for Student were equal at *** School and School District, *** School would not be Student’s least restrictive environment. Although Petitioner prefers the low student to teacher ratio and therapeutic emphasis of *** School, Student continued to experience the same behavior problems, work avoidance and melt downs at *** School that he experienced in Respondent School District. Student may struggle with self-regulation throughout his school career, even with extensive psychological and educational supports. At the same time, removing Student from the general education classroom deprives Student of peer role models and opportunities for social interaction with non-disabled peers which are real world situations that Student must learn to confront. Opportunities for interacting with non-disabled peers are essential components of “least restrictive environment,” and were valued by Student’s ARDC, including his parents.

Petitioner’s decision to remove Student from the many opportunities of a public education based on the incident involving the constable is their choice. But, reviewing all the

evidence in this case as an independent and impartial Special Education Hearing Officer, I cannot conclude that Respondent denied FAPE, such that private school placement at public expense is warranted. Respondent has available adaptive behavior classes and campuses, and Petitioner does not want Student isolated in those instructional settings in School District. *** School, however, is a more isolated setting than any public school campus. And, considering the behavior and educational progress that Student has made since the admission into special education, as well as his continued behavior difficulties at *** School, it is clear that Respondent's classroom assignment is not the cause of Student's continuing behavior difficulties, as Petitioner contends.

Legally, the standards for requiring reimbursement for the costs of a parents' unilateral placement of a child with a disability in a private school are well established. Specifically, IDEA states that a local educational agency, a school district, is responsible for providing a student with a free appropriate public education with an individualized education plan in effect while the student attends school, including extended year services. Where there is disagreement regarding a school district's provision of FAPE, and the parents place the student in private school without the consent or over the objections of the ARDC, the issue of denial of FAPE and reimbursement must be presented to a hearing officer in a due process hearing. Then, a school district is only responsible for reimbursement if a hearing officer determines that the public school denied FAPE. In this case, the Hearing Officer concludes that Respondent did not deny Student a free appropriate public education.

Petitioner has no plan for Student's return to public school. And, if Petitioner chooses to continue to pay the high cost of *** School tuition, as opposed to the free appropriate public education available from Respondent, there is no legal mechanism to require Student to return to public school. On the other hand, the parties could convene an ARD, develop a transition plan for Student to return to his peers in public school with appropriate supports and services, and discuss candidly the use of law enforcement to allay parental fears and suspicions. Police or constable support may be required at times to protect the safety of students and personnel at the

school, and it is impossible to predict when school personnel may feel the need for law enforcement support to protect school safety. Moreover, it is not the role of a Special Education Hearing Officer or even an ARDC to second guess the need for the intervention of law enforcement in an event which has yet to occur. Consequently, Respondent cannot be faulted for not specifying--*a priori*--the circumstances under which law enforcement may be called, in Student's BIP or IEP. Respondent has proven itself willing to address Student's lack of self-regulation and difficulty with executive functioning. Perhaps Petitioner can move forward past the unfortunate period of September, 2006, and work to return Student to his least restrictive environment with disabled and non-disabled peers and greater opportunities for educational progress.

IV. Conclusions of Law

1. Petitioner is a student in the School District who is eligible for special education services based on their classification as a student who has Pervasive Developmental Disorder, Autism, (Asperger Syndrome), Emotional Disturbance, and Speech Impairment. 20 U.S.C.A. § 1401(3); 34 C. F. R. § 300.7; 19 T. A. C. § 89.1040.
2. Respondent School District has a responsibility to provide Student with a free appropriate public education. 20 U.S.C. § 1400(d); 34 C.F.R. §300.17; 34 C.F.R. §300. 300- 300.328; 19 T. A. C. § 89.1001.
3. Respondent developed and implemented an appropriate IEP for Petitioner in the least restrictive environment which was developed in accordance with IDEA procedural requirements and which was reasonably calculated to enable Student to receive educational benefits. Student's IEP addressed the special TEA requirements for autism/developmental disorders after the diagnosis of autism. 20 U.S.C. § 1414(d); 34 C.F.R. §300.101; 34 C.F.R. §300.148 (c), *Cypress-Fairbanks ISD v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997); 19 T. A. C. § 89.1001, § 89.1040, § 89.1050, § 89.1055(e).

4. Because Respondent proved that it did not deny Petitioner a free appropriate public education, Respondent is not required to reimburse the parents for the cost of Petitioner's enrollment in a private day school. 20 U.S.C. § 1414(d); 34 C.F.R. §300.101; 34 C.F.R. §300.148 (c), *Cypress-Fairbanks ISD v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997)

V. Order

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer ORDERS that the relief sought by Petitioner is DENIED.

SIGNED in Austin, Texas this 4th day of January, 2008.

Gwendolyn Hill Webb
Special Education Hearing Officer

DOCKET NO. 064-SE-1106

STUDENT §
§
V. §
§
CYPRESS-FAIRBANKS ISD §

SYNOPSIS:

Issue: Was Petitioner entitled to reimbursement for Student’s enrollment in a private day school, where Petitioner contended that public school denied Student a free appropriate public education because of placement in a general education class, and involvement of law enforcement in an incident where Student acted out and struck school personnel.

Federal Citation: 20 U.S.C. § 1414(d); 34 C.F.R. §300.101; 34 C.F.R. §300.148 (c), *Cypress-Fairbanks ISD v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997)

Texas Citation: 19 T. A. C. § 89.1001, § 89.1040, § 89.1050, § 89.1055(e).

Held: Petitioner was not entitled to reimbursement for private school placement where Respondent provided a free appropriate public education in the least restrictive environment in accordance with procedural guidelines under IDEA, based on analysis of IEP requirements in IDEA and extant case law, including a Fifth Circuit decision involving Respondent and similar facts.