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| STUDENT <i>b/n/f</i> | § | BEFORE A SPECIAL EDUCATION |
| PARENTS, | § | |
| Petitioner, | § | |
| V. | § | HEARING OFFICER |
| TEMPLE INDEPENDENT | § | |
| SCHOOL DISTRICT, | § | |
| Respondent. | § | FOR THE STATE OF TEXAS |

DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

**I.
STATEMENT OF THE CASE**

Petitioner, Student *b/n/f* Parents (Petitioner” or “Student”), requested a Due Process Hearing pursuant to the Individuals With Disabilities in Education Act (“IDEA”), 20 U.S.C. §1400 *et. seq.*, contending that Temple Independent School District (“Respondent” or “the District” or “TISD”) denied Student a free, appropriate, public education (“FAPE”) when it violated IDEA in the following particulars: 1) Student’s Individual Education Plan (“IEP”) does not contain meaningful goals and objectives concerning Student’s health and safety at school; 2) Student’s IEP does not contain measurable standards of progress; 3) Student’s Behavior Intervention Plan (“BIP”) is inappropriate; 4) TISD failed to meet Student’s **; 5) TISD failed to contact the parents timely in a crisis situation; 6) Student’s IEP was not implemented effectively or appropriately; 7) TISD failed to follow Student’s BIP in contacting the parents in a timely manner; 8) Student’s IEP is not being delivered in the least restrictive environment (“LRE”); 9) TISD violated Student’s IEP by leaving him in an unsafe setting; 10) TISD failed to follow recommendations of the experts in developing a program and placement for Student; 11) TISD failed to follow and provide the services agreed upon in the mediated Compromise Settlement Agreement of October 3, 2003; and 12) TISD failed to consider or develop integration with Student’s peers. Petitioner seeks 1) residential placement, 2) compensatory services, and 3) reimbursement for reimbursable fees and costs.

**II.
PROCEDURAL HISTORY**

On June 15, 2004, the Texas Education Agency (“TEA”) received the Request for Due Process Hearing filed by Petitioner and assigned the case Docket No. 342-SE-0604. TEA assigned the case to the undersigned Hearing Officer on June 16, 2004. On June 24, 2004, the parties were notified that the prehearing telephone conference would be held on July 1, 2004, that the Due Process Hearing was scheduled for July 16, 2004, and

that the Decision due date was July 30, 2004. Due to conflicting schedules, the prehearing telephone conference was re-scheduled for July 26, 2004.

On July 26, 2004, the telephone conference convened as scheduled. In attendance were the following: 1) Mr. and Mrs. **, Petitioner's parents; 2) Ms. Susan Graham, Respondent's counsel; 3) the court reporter; and 4) the undersigned Hearing Officer. During the telephone conference the parties discussed the issues and scheduled the Due Process Hearing for September 7-9, 2004, and extended the Decision Deadline to September 23, 2004.

On August 12, 2004, Petitioner filed a Motion to Extend Limitations, requesting that limitations be extended beyond the October 3, 2003, mediated Compromise Settlement Agreement. Respondent filed its opposition to this request.

On August 24, 2004, Petitioner filed a Motion for Continuance and a Second Amended Request for Due Process Hearing. Respondent filed an objection to Petitioner's continuance request. After reviewing the new filings, the undersigned Hearing Officer requested a second prehearing telephone conference.

The second prehearing telephone conference convened on August 30, 2004. In attendance were the following: 1) Mr. and Mrs. **, the undersigned Hearing Officer. The parties discussed and agreed upon the additional issues for the Hearing. Respondent informed the Hearing Officer that the Custodian of Business Records for Scott & White Hospital had declined to comply with the subpoena previously issued by the Hearing Officer.¹ Respondent requested that the Hearing Officer order Petitioner's parents to sign a consent form for the release of the requested medical documents.

On September 3, 2004, the Hearing Officer issued Orders 1) Granting Petitioner's Motion for Continuance; 2) Denying Petitioner's Motion to Extend Limitations; and 3) Granting Respondent's Motion to Compel Medical Release. By agreement of the parties, this Order specified that the Hearing was re-scheduled for October 6-8, 2004, that the location would be at the Heights Baptist Church in Temple, Texas, and that the Decision Deadline was extended to October 23, 2004.

On September 17, 2004, the parties convened for a third prehearing telephone conference. In attendance were the following: 1) Mr. & Mrs. **, Petitioner's parents; 2) Mr. David Beinke, Petitioner's advocate; 3) Mr. **, Petitioner's uncle; 4) Judge **, Petitioner's grandfather; 5) Ms. Graham, Respondent's attorney; 6) the undersigned Hearing Officer; and 7) the court reporter. The undersigned Hearing Officer convened this telephone conference to discuss the status of discovery and the issue of releasing Petitioner's medical records. During this almost two-hour telephone conference, the parties reached agreement on the parameters of the medical documents to be released and specific discovery requests made by Petitioner.

¹ Respondent requested, and the undersigned granted, the issuance of a subpoena directed to the Custodian of Business Records for Scott & White Hospital because Petitioner alleged health and safety issues and self-injurious behavior.

The parties made their Disclosures timely. On October 6, 2004, the undersigned Hearing Officer convened the Due Process Hearing at the agreed neutral location, Heights Baptist Church in Temple, Texas. In attendance were the following: 1) Mr. & Mrs. **, Petitioner's parents; 2) Mr. Beinke, Petitioner's advocate; 3) Ms. Sheri Madaris, Petitioner's advocate; 4) Mr. **, Petitioner's uncle; 5) Judge **, Petitioner's grandfather; 6) Dr. **, Petitioner's expert witness; 7) Mr. **, Petitioner's second cousin and expert witness; 8) Ms. Graham, Respondent's attorney; 9) Mr. **, Respondent's Director of Special Education; 10) the undersigned Hearing Officer; and 11) the court reporter.² Respondent objected to the numbers of attendees on the Petitioner's side of the table. Based upon Petitioner's decision to maintain a closed Hearing, the undersigned granted, in part, Respondent's objection, ruling that the following would be allowed to remain throughout the Hearing: 1) Mr. & Mrs. **; 2) Mr. Beinke; 3) Mr. **; and 4) Dr. **. Mr. ** would be allowed to remain after he testified.

Petitioner requested a brief recess to discuss settlement. At approximately 1:00 p.m., the parties announced their agreement to negotiate settlement and jointly requested a three-week continuance of the Hearing. Pursuant to this agreed request, the undersigned Hearing Officer continued the Due Process Hearing until October 26-28, 2004. The parties and Hearing Officer agreed that no additional Disclosures would be allowed. The Decision Deadline was extended to November 11, 2004.

The parties were unable to settle their disputes. Accordingly, the Due Process Hearing convened as agreed on October 26-28, 2004, at the Heights Baptist Church, Temple, Texas. In attendance throughout the Due Process Hearing were the following: 1) Mr. & Mrs. **; 2) Mr. Beinke, Petitioner's advocate; 3) Mr. Kacir, Petitioner's advocate and technical aide; 4) Ms. Graham and Ms. Denise Hays, Respondent's attorneys; 5) Mr. **, Respondent's Director of Special Education; 6) Ms. **, LSSP, behavior specialist, and testifying expert for Respondent; 7) the undersigned Hearing Officer; and 8) the court reporter. Dr. ** and Mr. ** attended and observed a portion of the Hearing as experts for Petitioner.

Prior to taking testimony, the parties introduced their documentary evidence and lodged various objections.³ Mr. Kacir announced at this Hearing that he was appearing as technical aide and counsel, not attorney-of-record, to the Petitioner's parents. Over Respondent's objection to his sudden appearance as counsel, Mr. Kacir was allowed to assist and counsel Petitioner's parents throughout the Hearing. Next, Respondent informed the Hearing Officer that one of its important experts, Ms. **, was out of state and her testimony would have to follow the Hearing on a fourth day either in person or via telephone conference. Petitioner's objection to Respondent's failure to make Ms. ** available was overruled, based, in part, on the fact that Ms. ** was previously available for

² Judge ** announced that while he is an attorney, he was not serving in that capacity. Mr. Kacir announced that while he was also an attorney, he was serving in an advisory capacity to the parents only. Also in attendance was Ms. **, staff counsel for the Sunset Advisory Commission. Ms. ** was allowed to attend the Hearing as an observer by agreement of all parties.

³ Over the course of the Hearing, Petitioner introduced and played several CDs. The Respondent vigorously objected to these CDs, many of which were replications of tapes Mr. ** had made secretly in communicating with the District administrators and educational staff. After listening to the CDs, the undersigned admitted all of them into evidence with the caveat that they were, for the most part, unintelligible as to who was speaking and what was being said. That which could be deciphered, but not corroborated in other sworn testimony, was given no evidentiary weight.

the Hearing set October 6-8, 2004, which was re-scheduled, at the initial request of Petitioner, to allow for settlement talks. Finally, Respondent objected to Petitioner's request to take the testimony of Dr. ** by telephone. The undersigned overruled the objection and allowed Dr. ** to testify by phone.

On the first day of Hearing, October 26, 2004, Petitioner called four witnesses on direct: 1) Mr. **, Petitioner's second cousin who is a licensed specialist in school psychology and a licensed professional counselor⁴; 2) Ms. **, a board-certified behavior analyst who provided services to Student through her contract with the District; 3) Dr. **, a licensed professional counselor and doctor of pharmacy at Scott & White Hospital; and 4) Dr. **, a future family member and medical doctor specializing in psychiatry and currently a resident in the pathology department of Scott & White Hospital.⁵

On the second day of Hearing, October 27, 2004, Petitioner recalled Mr. ** on direct, as well as six additional witnesses on direct: 1) Ms. **, a certified special education teacher at TISD who worked with Student in Spring 2004; 2) Ms. **, a teacher's assistant at TISD who has worked with Student during the relevant timeframe of this proceeding; 3) Mr. **, 4) Ms. **, a certified special education teacher, formally with TISD, who worked with Student between August 2002 and May 2004 in the Life Skills Class; 5) Mr. **, a certified special education teacher at TISD who worked with Student in May 2004 in the Life Skills Class and who currently works with Student in the ** class; and 6) Mr. **, TISD's Director of Special Education. At the conclusion of the Hearing on October 27, 2004, Petitioner rested, subject to rebuttal testimony, if any.

On the third day of Hearing, October 28, 2004, Respondent presented its opening statement and began the presentment of its case-in-chief. Respondent called three witnesses on direct: 1) Mr. ** 2) Ms. **, and 3) Ms. **, LSSP and behavior specialist for TISD. Because the District had several additional witnesses to call in addition to Ms. **, the parties agreed to reconvene in person for a fourth day of Hearing on November 10, 2004. The Petitioner's parents continued to object to convening the Hearing at the District's facilities; accordingly, Petitioner's parents were instructed to notify everyone by November 3, 2004, of the neutral location for the final day of Hearing.

The undersigned convened a fourth telephone conference on November 4, 2004, to address issues raised by Mr. ** involving presentment of rebuttal witnesses and the number of hours needed to conclude the Hearing. Petitioner sought approval to bring an undisclosed expert pediatric neurologist in rebuttal. Respondent objected and the objection was sustained. Petitioner also sought a continuance of the November 10, 2004, Hearing on the grounds that Petitioner might need an extra day for rebuttal, given the fact that Mr. Kacir, Mr. **, and Dr. ** would have to leave the Hearing by 4:00. The Respondent did not object to a fifth day of Hearing as long as the Hearing convened as scheduled on November 10, 2004. The undersigned denied Petitioner's request to

⁴ Mr. **'s testimony was cut short to allow for Ms. **, the parties agreed that Mr. ** could resume testifying at 8:00 a.m., October 27, 2004.

⁵ Dr. ** testified that she is engaged to marry Mr. Kacir, Student's uncle.

reschedule the fourth day of Hearing. The Petitioner provided location information for the fourth day of Hearing.

The fourth day of Hearing convened on November 10, 2004, at the Frank Mayborn Civic and Convention Center in Temple, Texas. In attendance were the following: 1) Mr. & Mrs. **; 2) Mr. Beinke, Petitioner's advocate; 3) Mr. Kacir, Petitioner's counsel and technical aide; 4) Ms. Graham and Ms. Hays, Respondent's attorneys; 5) Mr. **, Respondent's Director of Special Education; 6) Ms. **, LSSP, behavior specialist, and testifying expert for Respondent; 7) the undersigned Hearing Officer; and 8) the court reporter. Respondent called six witnesses on direct: 1) Ms. **, an expert in autism spectrum disorders who observed and worked with Student and his Admission, Review, and Dismissal Committee ("ARDC") under a contract with the District; 2) Ms. **, a functional skills teacher with TISD who currently works with Student; 3) Ms. **, school nurse for TISD who has provided Student with his medication on a daily basis for three years; 4) Ms. **, occupational therapist for TISD who has provided occupational therapy to Student for over ten years; and 5) Ms. **, the ** Coordinator for TISD. Respondent rested and Petitioner re-called Mr. ** and Dr. **, and called Mrs. **, as rebuttal witnesses.

The Due Process Hearing concluded on November 10, 2004. The parties agreed to file post-hearing briefs by December 17, 2004. The undersigned instructed them to contact her if they needed additional time. The parties and Hearing Officer agreed to extend the Decision Deadline to December 27, 2004. Later, Respondent sought an extension of time to file its post-hearing brief to December 20, 2004. Over Petitioner's objection to this request, the undersigned granted both parties an extension until December 20, 2004, to file their briefs. Both parties filed post-hearing briefs on December 20, 2004, and agreed to extend the Decision Deadline to December 30, 2004.

III. FINDINGS OF FACT

1. Student is an ** year-old young man who resides with his parents and ** within the jurisdictional boundaries of TISD. Student and his family have lived in Temple all of Student's life.
2. Student qualifies for special education services as a student with autism, speech impairment, and mental retardation. Student has an IQ of **. Student is verbal.
3. TISD is a political subdivision of the State of Texas and a duly incorporated independent school district. TISD is responsible for the delivery of special education services to Student.
4. Student's mother, Mrs. **, ** has the legal authority to prosecute this due process proceeding on his behalf.
5. Student is a large young man, being approximately **. Over the past couple of years, Student, **, has become increasingly more difficult to handle when he gets overly stimulated or agitated. When Student becomes agitated, his behavioral

outbursts may escalate to a crisis Level 4 or 5. At Level 4 Student may throw objects, hit his head with his palms repeatedly, scream, and bite his shirt. At Level 5 Student becomes physically aggressive toward others and throws items at others.

6. Antecedents for Student's behavioral outbursts appear to be a) placement in an environment with too many people; b) people invading his personal space; c) too much noise, such as screaming or crying babies; and d) too many unexpected changes or choices.
7. Prior assessments and observations conducted by specialists in autism indicate that communication is a major issue for Student. The specialists recommend that visual cues, social stories, and calendars be incorporated into Student's BIP to help him with communication skill development. Developing better communication skills will improve his behavior. Progress on skill development in targeted behaviors is measured through data collection strategies.
8. Student has received numerous evaluations in autism, speech, occupational therapy, assistive technology and in-home training.

IEP/BIP ISSUES:

9. Student's IEPs provide for educational placement in a self-contained, special education classroom with a focus on daily living skills.
10. In Fall 2003, Ms. **, LSSP and behavior specialist with TISD, conducted a functional behavioral analysis ("FBA"), which is an informal, on-going assessment to identify behaviors, antecedents, consequences, and replacement behaviors. This assessment was accomplished by use of Ms. **'s data collection system, Daily Behavior Reports, and Incident and Debriefing Reports.
11. During school year 2002-2003, Student had no more than ten (10) Level 4 incidents at school and no Level 5 incidents.
12. On August 21, 2003, September 9, 2003, October 13, 2003, and December 12, 2003, Student's ARDC met and reviewed and revised his BIP. As of the date of the October 13, 2003, ARDC meeting, Student had one Level 5 incident at school.
13. Student's BIP contained a goal and objectives that addressed health and safety as well as the use of restraints only in extreme circumstances. The BIP required that Mr. ** be called when Student reached a Level 3. This was not a recommendation of the ARDC but was pursuant to the parents' insistence.
14. Following the December 12, 2003, ARDC meeting, in-home training was implemented.
15. In Spring 2004, the District retained Ms. **, an expert in autism, to provide consultation services regarding Student. Ms. ** observed Student over many hours at school and home. She met with Student's parents and teachers. She reviewed

his prior assessments. She concurred that it is important to work on Student's communication skills to improve his behavior.

- 16 Student's ARDC met numerous times during Spring 2004. On April 8, 2004, the Committee met and revised his BIP to address the increase in Level 4 and 5 incidents. The longest interval of crisis-free behavior was four weeks, between January 29 and February 28, 2004. Ms. ** attended and participated in this meeting. She made suggestions, which were incorporated into Student's revised BIP. The Committee also incorporated two objectives pursuant to the recommendations from a recent speech/language assessment.
- 17 The Committee met again on April 28, 2004, May 14, 2004, and May 21, 2004, to discuss IEP goals and objectives for school year 2004-2005, as well as extended school year ("ESY") services. The parents were in disagreement with many ARDC decisions at these meetings. They expressed concern that the goals and objectives did not appear to address ** skills; goals and objectives seemed to be redundant from prior years, which they inferred to be a sign of regression; the amount of time suggested for ESY was insufficient. The parents requested residential placement or private summer school, which the ARDC declined.
- 18 During school year 2003-2004, the frequency of crisis behavior ranged from one (1) to three (3) per month. Statistically, Student remained crisis free eighty-eight percent (88%) of the time.
- 19 Student's 2003-2004 teachers report that Student made progress in communicating with his teachers and fellow students; he improved his behavior and progressed on his behavior goals. Student often could verbalize his wants and cooperated in de-escalating his behavioral outbursts.
20. In Summer 2004, Student attended ESY and his teacher reported progress on his goals and objectives. There was one reported crisis level incident during ESY.
21. On September 8, 2004, Student's ARDC met and discussed concerns of the parents, as well as modifications of goals and objectives for school year 2004-2005. The Committee reported that between October 6, 2003, when his BIP was developed, and the end of ESY, Student had fourteen (14) crisis incidents. The Committee reviewed Student's progress on goals and objectives during school year 2003-2004 and adopted some new goals and objectives. The Committee did not review Student's ** ("**") due to time constraints, which required continuing the meeting to a later date. The parents did not agree with the proposed program but allowed it to proceed. Subsequently, Mr. ** attempted to reconvene the ARDC meeting to discuss ** and other issues but the parents declined to attend.
22. As of the date of the Hearing, Student has increased his ability to remain on task from thirty (30) minutes to forty-five (45) minutes. His current teacher reports that he can easily be redirected with a verbal prompt from across the room when he gets off task. Student responds to social reinforcers.

23. Student currently attends ** class and enjoys **; Student has shown spontaneity in dealing with other students and expressing his feelings.
24. As of November 10, 2004, Student had three (3) level 4 incidents and one (1) Level 5 incident since the beginning of school year 2004-2005. In all four (4) incidents Student was able to regain his composure and continue his school day.
25. Student's BIPs and IEPs were based on his assessments and performance.
26. Student's BIPs and IEPs contained goals and objectives that addressed health and safety issues.
27. Student's BIPs and IEPs contained measurable goals and objectives.
28. Student's teachers have appropriately collected data to measure his progress on his goals and objectives.
29. Student demonstrated positive benefits academically and non-academically under his BIPs and IEPs.
30. The key stakeholders provided services to Student's in a coordinated and collaborative manner.
31. Student's BIPs and IEPs were administered in the LRE.
32. Student's teachers and support staff have been, and are, implementing his IEPs and BIPs.

**** ISSUES:**

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CRISIS CONTACT WITH THE PARENTS ISSUE:

37. The October 2003 ARDC agreed to the parents' request that Mr. ** be contacted when Student reached a Level 3 behavior. The ARDC did not recommend this procedure. The September 2004 ARDC requested that this requirement be removed from Student's BIP. The parents refused.

38. Student's BIP requires that Mr. ** be called if Student reaches a Level 5 behavior and all proposed interventions have failed. This is an appropriate component to Student's BIP.
39. Daily reports were sent home reflecting Student's daily behavior, schoolwork, outings, and other activities. Debriefing reports were provided to the parents when an incident occurred.
40. Because Student's BIP requires that Mr. ** be called when a Level 3 incident occurs, Mr. ** has been contacted many times, although many times Student's behavior de-escalated and never reached Level 4 or 5.
41. The evidence was insufficient to prove that the District failed to timely contact the parents in a crisis situation.

INTEGRATION WITH PEERS/LRE ISSUES:

42. Petitioner's claims regarding lack of integration and violations of LRE contradict the request for residential placement.
43. Student's placement in the self-contained Life Skills Class is appropriate, based upon his multiple assessments. Student has some opportunity to interact with non- or less-, disabled peers in the cafeteria at lunch and when visitors come to his classroom. Student attends and enjoys some school activities, such as **. He goes on outings into the community with his teachers and fellow students.
44. The Life Skills Class, with monitored activities outside the classroom, is the least restrictive environment for Student.

UNSAFE SETTING ISSUE:

45. Student hits his head with open palms when he reaches crisis Level 4-5. During incidents at school, Student also has struck a teacher and a principal; he has thrown and broken objects. There is no evidence that Student or anyone else was seriously injured.
46. Student's behavior escalates when he becomes overly stimulated or agitated by loud noises, sudden change, babies crying, screaming. There was insufficient evidence to establish that these Level 4-5 incidents derive from the District's failure to follow Student's BIP or IEPs.
47. There is no evidence that Student has been left alone or placed in an unsafe setting during one of these crises. The evidence proves that Student's teachers, aides, and administrators follow the BIP in trying to de-escalate the crisis behavior when it occurs.

MEDIATED SETTLEMENT AGREEMENT ISSUE:

48. The October 3, 2003, mediated Compromise Settlement Agreement required Respondent to provide ABA training, geared to the educational needs of Student, to all persons who have direct and routine contact with Student.
49. The October 3, 2003, Mediated Settlement Agreement is unambiguous.
50. The individuals required to be trained were those who provided educational/instructional services to Student. This did not include the nurse and administrators.
51. Respondent trained all staff contemplated by the mediated Compromise Settlement Agreement.

IV. DISCUSSION

Under IDEA, all state school districts receiving federal funding must provide all handicapped children FAPE. 20 U.S.C. §1412(1) & 1414(d). The determination of whether a school district has provided a student with FAPE is two-fold: 1) the school district must comply with the procedural requirements of IDEA, and 2) the school district must design and implement a program "... reasonably calculated to enable the child to receive educational benefits." *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175, 206-207 (1982).

In this case, Petitioner has alleged violations under both FAPE prongs. The various complaints actually fall under two main FAPE issues: 1) Respondent breached the mediated Compromise Settlement Agreement dated October 3, 2003, and 2) Respondent failed to develop and deliver an educational program that provided Student an appropriate education in the least restrictive environment.

A.

RESPONDENT DID NOT BREACH THE MEDIATED COMPROMISE SETTLEMENT AGREEMENT.

As part of the settlement reached in October 2003, Respondent agreed to the parents' request to retain the services of Ms. **, an autism specialist, to assess Student's educational needs, including the training and instructional needs of the staff and Student in the school, home, and community. Respondent also agreed to hire Ms. ** to provide ABA training to selected staff, with such training to be specific to the educational needs of Student, and provided to all persons who have direct and routine contact with Student.

Petitioner alleges that Respondent failed to comply with the agreement in the following ways: 1) Ms. ** did not fully evaluate Student in the school, home, and community settings; and 2) Respondent failed to train all persons who have direct and routine contact with Student, *i.e.*, the school nurse and assistant principals.

1. Ms. ** Provided Services In Compliance With The Agreement.

No one argued that the mediated Compromise Settlement Agreement is ambiguous. To the contrary, the parties claimed it was unambiguous, but continued to proffer differing interpretations of the agreement. Contrary to the Petitioner's interpretation, the agreement did not require Ms. ** to perform *formal* assessments in the areas of school, home, and the community. Ms. ** spent many hours assessing Student in all of these areas. She observed him at home; observed him at school; and consulted with his parents and teachers on several occasions. She conducted four training sessions with the staff and participated in the April 8, 2004, ARDC meeting. Her suggestions were adopted by the Committee and implemented by the staff.

Ms. ** was evaluating all areas of Student's life when she spent time at home with him and his parents, when she observed him for hours in the school setting, when she conferred with District personnel, and when she reviewed his previous formal and informal evaluations.

2. Ms. ** Provided Services In Compliance With The Agreement.

Ms. ** was hired to provide ABA training to select District personnel who worked with Student "with such training to be specific to the educational needs of Student and to be provided to all persons who have direct and routine contact with Student" (mediated Compromise Settlement Agreement). By this statement, the District agreed to train all school personnel who worked on Student's educational needs. This includes all of his teachers and support staff in the classroom. It does not include District personnel, such as the school nurse or administrators, whose contact with Student is minimal and not in the instructional arena.

The evidence established that the ABA training was provided to Student's teachers and other staff members who worked with Student in an instructional capacity.

B.

PETITIONER'S PROGRAM AND PLACEMENT FROM OCTOBER 3, 2003, WERE APPROPRIATE.

The remainder of Petitioner's claims and issues attack Student's education program and placement during the past year.

Student is profoundly handicapped and his disabilities have been difficult to address at times by all involved with Student. Over the past couple of years, Student has had an increase in Level 4 and Level 5 behaviors at school, home, and in the community. When these occur, they are very stressful to Student and those working to de-escalate his behaviors. The family is particularly concerned about his health and safety and the safety of others, believing that the District has failed to adopt and implement appropriate BIPs that focus on helping Student a) identify, and cope with, the antecedent stressors that result in a Level 4 or 5 incident, and then b) de-escalate his behaviors before they reach the crisis point. Simply put, the parents believe that Student's disabilities are beyond the scope of training and experience of District employees.

In addition to the health and safety issue, Student's parents allege that the District has allowed Student to regress on academic and behavior skills that he already

mastered. They believe that this occurred because 1) the District has not provided IEPs with measurable goals and objectives; 2) the IEPs have not been implemented by his teachers and support staff; 3) the goals and objectives are redundant from year to year; 4) the goals and objectives do not comport with recommendations of the experts; 5) the IEPs contain no appropriate ** goals and objectives; and 6) Student's program is not delivered in the least restrictive environment.

To ascertain the educational benefits of an IEP, the reviewing entity must examine whether the student has received the "basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational benefit to the handicapped child." *Hendrick Hudson Central School District v. Rowley*, 458 U.S. at 200-01. Although the school district need only provide "some educational benefit," the educational program must be meaningful. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). The educational benefit cannot be a mere modicum or *de minimis*. It must be likely to produce progress, not regression or trivial educational advancement. *Houston Independent School District v. Bobby R. and Caius R.*, 200 F.3d 341, 347 (5th Cir. 2000).

In *Cypress-Fairbanks Independent School District v. Michael F.*, the Court set forth four factors that can aid in evaluating whether a student is receiving the "basic floor of opportunity, or access to specialized instruction and related services which are individually designed to provide educational benefit" to that student: 1) whether there is an individualized program based on the student's assessment and performance; 2) whether the individualized program is administered in the least restrictive environment ("LRE"); 3) whether the services are provided in a coordinated and collaborative manner by the key stakeholders; and 4) whether positive benefits are demonstrated both academically and non-academically.

1. Student's Individualized Program Was Based On His Assessments And Performance.

Through the years Student has been evaluated many times. He has been evaluated for autism, speech, occupational therapy, assistive technology, in-home training, and functional behavioral and ** skills. Based upon these assessments and Student's performance, his ARDC has crafted an educational program that addresses his unique needs in the areas of behavior (health and safety), academics, life skills, and **.

a. Health and Safety Issues:

A crucial component of Student's educational program is the health and safety of Student and others. Student's parents are terrified that Student will hurt himself or others when he engages in self-injurious or aggressive behaviors. Because of his autism, Student becomes extremely agitated when he is placed in certain circumstances. Evaluations and observations have shown that Student is agitated by loud noises, such as crying babies or screaming; unanticipated changes in his schedule; invasion of his personal space by others; and crowded surroundings. When agitated, his behavior can escalate to a Level 4 or 5, in which he may throw objects, hit his head with his palms repeatedly, scream, bite his shirt, or become physically aggressive toward others.

Accordingly, developing BIPs that address these behaviors is very important to Student's acquisition of knowledge and life skills. Student's ARDC did just that.

Dr. ** conducted the most recent Full Individual Evaluation ("FIE") in January 2003. She determined that communication is a crucial need for Student and recommended that goals and objectives targeting his behavior problems should focus on his communication deficits. She recommended use of picture schedules, visual cues of all kinds, social stories, and calendars. These suggestions were incorporated into Student's BIPs.

At the beginning of school year 2003-2004, Ms. ** conducted an FBA and developed data collection sheets to identify and define target behaviors, antecedents, consequences, and replacement behaviors unique to Student. The data she collects is reviewed regularly to see if the strategies and techniques are working. Ms. **, an autism specialist, concurred with this strategy, affirming that an FBA is an on-going process involving identifying antecedents and consequences and that Student is receiving an on-going FBA.

Ms. ** met often with Student's parents to discuss their concerns and recommendations. She likewise attended many ARDC meetings during the past year to present her on-going data collection and make recommendations regarding Student's behavior. Student's ARDC reviewed his BIPs and made changes based on any new information gathered.

Through her evaluation of Student, Ms. ** determined that improving Student's communication skills improves his behavior. She attended the September 2004 ARDC meeting and agreed with Ms. **'s data collection strategy.

Ms. ** observed Student in school and at home and consulted with his parents and teachers on several occasions. She participated in an ARDC on April 8, 2004, and made suggestions that were incorporated into his BIP. She concurs that it is important to work on Student's communication skills so that his behaviors can be modified.

Student's ARDC also developed IEPs that target health and safety issues. These IEPs contain communication goals and objectives that are implemented by his teachers and support staff. His life skills goals and objectives address personal identification responses, pedestrian safety signs and procedures, community signs, and personal hygiene.

Student's evaluators were "heard" by the ARDC. The Committee crafted goals and objectives in academics, behavior, health and safety, and life skills that provide for mastery and evaluation criteria. These goals and objectives are measurable.

b. ** Issues:

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2. Student's Program Was Administered In The Least Restrictive Environment.

Petitioner's claim in this area is perplexing. On the one hand, Petitioner alleges that he is being warehoused in the self-contained classroom with minimal contact with his non-disabled peers. On the other hand, Petitioner seeks residential placement, which is by far *more* restrictive than Student's self-contained classroom.

Student spends the lion's share of his school day in the self-contained Life Skills Class, which has a very low staff-to-student ratio: nine (9) students, two (2) special education teachers, and three (3) teaching assistants. However, he does have some opportunities to leave this setting and mingle with less-, or non-, disabled peers. Student goes to lunch in the cafeteria each day with non-disabled students; he goes to a regular education ** class, **; he goes to adaptive PE, and swimming; he is allowed to go to the nurse's office once a day for his medications. Student apparently enjoys attending **.

Student's placement in the Life Skills Class is based on the recommendations of his evaluators and teachers. He needs the structure and the low student-teacher ration. Student's placement is the least restrictive environment for his very special needs.

3. Student's Services Were Provided In A Coordinated And Collaborative Manner By The Key Stakeholders.

There is no dispute about the numbers of times the parents and District informally met, spoke on the telephone, or attended ARDC meetings over the past year. The numbers are somewhat staggering. The documentary evidence, live testimony, and recordings obtained by Mr. **, some obtained secretly, show that Student's immediate, and extended, family provided, and received, almost daily input regarding Student's progress in every area, especially behavior.

During school year 2003-2004, Mr. ** transported Student to school, walked him to his classroom, and visited with Student's teachers and support staff. Student's family attended multiple ARDC meetings throughout the past year. The family provided information regarding target behaviors and strategies; they participated in assessments, including the in-home training and FBA assessments; they participated in the ** process; they requested hiring outside specialists, Ms. ** and Ms. **, to which the District agreed in the mediated Compromise Settlement Agreement; they opened their home and worked with these specialists.

The District sent home hundreds of pages of progress notes, Daily Behavior Reports, and de-briefing reports. Data was collected daily, monitored, and when needed, the data formed the basis for modifications to Student's BIPs.

Student's teachers were certified special education teachers with years of experience. The support staff was trained by experts chosen by the parents in every program they requested.

Student's family argued that the District was not cooperating in contacting the parents in a timely manner during a crisis situation and that such inaction placed Student and others in a dangerous situation. However, the evidence showed otherwise.⁶

Student's BIPs required that Mr. ** be called during a Level 5 situation. It also required that he be called when a Level 3 incident ensued. The ARDC did not agree with this last contact requirement, but acquiesced because it was something the parents insisted upon. In Fall 2004 the ARDC requested that this contact requirement be discontinued, but the parents refused. Accordingly, anytime Student reached a Level 3 behavior, the District had to contact him. Testimony revealed that many times Student de-escalated from a Level 3 behavior without any need of intervention. Certainly, the record is clear that the District contacted Mr. ** during a crisis Level 3 only because he requested this contact and not because the District needed his intervention.

The record established that the key stakeholders worked very closely, efficiently, and effectively. When there was a need for assessments in addition to the on-going FBA, they were done. When the assessments called for additional or modified services, they were developed. When Student reached crisis, he was ultimately de-escalated by District and/or family.

Student's behavior is always going to be an issue because of his autism. Sounds or events that would not trouble ** profoundly affect Student. The District and his family, immediate and extended, have worked diligently toward helping Student modify his behavior so that he can access knowledge and life skills. Notwithstanding the Petitioner's allegations, Student's teachers and aides are aptly trained and accomplished in dealing with him during a crisis situation.

4. Student Made Academic And Non-Academic Progress.

Petitioner claims that he has regressed in his life skills, academics, and behavior to such a point that the District must provide him with residential placement so that regression can be stopped and acquired skills maintained. This is not supported by the record.

No teacher or administrator or expert who evaluated Student testified that he was not making progress. To the contrary, the overwhelming evidence proved that Student, despite his profound disabilities, is progressing academically and non-academically under his education program.

Ms. **, who collected daily data and recorded crisis incidents, testified that Student was eighty-eight (88%) percent crisis free during school year 2003-2004. This was not contradicted by credible testimony. During Summer ESY 2004, Student had only one crisis level behavior. Student's current teacher, Ms. **, testified that as of the last day of

⁶ Although Student's parents insisted that they were not being called timely during a crisis, they also complained that Mr. ** was being called too often, which had negatively impacted his employment.

Hearing, November 10, 2004, Student had had three (3) Level 4 incidents and one (1) Level 5 and in all four incidents Student was able to de-escalate and remain at school.

Additionally, Ms. ** testified that Student is making progress in his academic, social, and communication skills. Student now is able to stay on task from thirty (30) to forty-five (45) minutes on activities he enjoys. When he gets off task, she can generally re-direct him by verbal prompts from across the room. Student is exhibiting spontaneous interactions with other students and is expressing his feelings.

Ms. **, Ms. Mathesen, and Mr. ** noted improved communication skills with teachers and students. All of these teachers are certified in special education with years of experience in working with special needs and autistic children.

Ms. ** and Ms. ** likewise testified that Student was making progress on his behavior goals and objectives. Both are experts in autism and working with autistic individuals.

Contrary to Petitioner's claims of regression, the testimony revealed that Student is making slow, steady progress. While some of his IEP and BIP objectives are similar over the years, this does not indicate, per se, regression on the part of Student. Student has great difficulty generalizing information from one setting to another. Therefore, activities that the District observes as mastered do not always transfer into home or community settings. That is why certain goals and objectives have to be re-visited each year. Further, while some of these goals and objectives appear to be identical, they are not. Discreet changes have been made requiring additional processing on the part of Student to accomplish the tasks.

It was Petitioner's burden to prove his allegations that his program and placement were inappropriate and that the District deprived him of FAPE when it failed to comply with certain portions of the mediated Compromise Settlement Agreement. *Tatro v. State of Texas*, 703 F2d 823 (5th Cir. 1983), *aff'd* 468 U.S. 883 (1984). Petitioner failed to meet this burden. Accordingly, all relief requested is denied.

**V.
CONCLUSIONS OF LAW**

1. Student is a student who is eligible for special education services, based upon his classification of autism, speech impairment, and mental retardation, as mandated under the provisions of IDEA and its implementing regulations. 20 U.S.C. §1400 *et seq.*
2. Student's program and placement from October 3, 2003, were appropriate and reasonably calculated to enable him to receive educational benefits. *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175, 206-207 (1982); *Cypress-Fairbanks Indep. School District v. Michael F.*, 118 F.3d 245, 245 (5th Cir. 1997).
3. TISD appropriately implemented Student's IEPs and BIPs from October 3, 2003. *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175, 206-207 (1982); *Cypress-Fairbanks Indep. School District v. Michael F.*, 118 F.3d 245, 245 (5th Cir. 1997).
4. TISD appropriately implemented the mediated Compromise Settlement Agreement dated October 3, 2003.

**VI.
ORDER**

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the relief requested by Petitioner be DENIED.

Finding that the public welfare requires the immediate effect of this Decision, the Special Education Hearing Officer makes it effective immediately.

SIGNED this 30th day of December 2004.

/s/
Deborah Heaton McElvaney
Special Education Hearing Officer

07546/Decision

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