

DOCKET NO. 251-SE-0613

STUDENT, b/n/f/ PARENT and PARENT, Petitioner	§ § § §	BEFORE A SPECIAL EDUCATION
v.	§ §	HEARING OFFICER FOR
WALLER INDEPENDENT SCHOOL DISTRICT, Respondent	§ § §	THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Petitioner *** (“the Student”), by next friends, *** and *** (“the Parents”), requested a due process hearing pursuant to the Individuals with Disabilities Education (“IDEA”), 20 U.S.C. §1400, *et seq.*, against Respondent Waller Independent School District (“WISD” or “the District”).

Sean Pevsner and Mark Whitburn, attorneys with the firm of Whitburn & Pevsner, P.L.L.C. in Arlington, Texas, represented Petitioner. Christopher P. Borreca and Lucie S. Tredennick, attorneys with the firm of Thompson & Horton, L.L.P. in Houston, Texas, represented Respondent.

ISSUES

Petitioner alleges that WISD denied the Student a free appropriate public education (“FAPE”) that resulted in harm to the Student, significantly impeded the parents’ opportunity to participate in the decision-making process, and/or caused a deprivation of educational benefits during the applicable period by the following:

1. Whether the District developed an individualized education program (“IEP”) based on assessment and performance, resulting in Student’s progress rather than regression, by failure to include the following: a) Proper data gathering; b) Personnel specifically trained to work with autistic students, such as a board certified behavior analyst (“BCBA”); c) Proper behavior intervention plan (“BIP”); and, d) Meaningful IEP goals;
2. Whether the District administered the Student’s program in the least restrictive environment (“LRE”);
3. Whether the District provided educational services in a coordinated and collaborative manner by key stakeholders to address concerns of the Student’s parents; and,

4. Whether the Student received academic and non-academic benefits under the District's educational program, including a social skills plan.

As relief, Petitioner seeks an order of the Hearing Officer requiring the District to provide an appropriate IEP for the Student in the least restrictive environment, including:

1. Compensatory educational services for failure to provide a FAPE for Extended School Year ("ESY") services during Summers 2012 and 2013;
2. Provision of an appropriate educational program based on the Student's unique needs by having a proper data-gathering method;
3. Provision of properly-trained personnel working with the Student, including training on autism and training specific to the Student;
4. Provision of an appropriate ESY program for the Student in Summer 2014, if required by the Student, in duration and frequency based on the needs of the Student;
5. Reimbursement for privately-obtained Applied Behavior Analysis ("ABA") and speech therapy services; and,
6. Prospective private school placement at school district expense for the Student.

PROCEDURAL HISTORY

On June 17, 2013, Petitioner filed the initial due process complaint through a non-attorney advocate with the Texas Education Agency and the initial scheduling order issued setting the hearing for August 1, 2013, and the Decision Due date for August 31, 2013. Petitioner filed two amended complaints in this proceeding. The first amended complaint, filed two days after filing the original complaint, was filed on June 19, 2013. The second amended complaint, filed after Petitioner retained legal counsel, was filed on August 12, 2013.

On June 28, 2014, Respondent filed a counterclaim with Respondent's response to the due process complaint. The parties negotiated resolution of the counterclaim to allow Respondent to conduct a Full and Individual Evaluation ("FIE") of the Student. Respondent filed a notice of non-suit on September 27, 2013. On October 3, 2013, the counterclaim was dismissed without prejudice. On October 21, 2013, Respondent sought a ruling on the FIE request when negotiations between the parties deteriorated and on October 25, 2013, Respondent additionally sought reinstatement of the counterclaim limited to the issue of an in-home training evaluation. Both motions were granted for good cause shown on December 16, 2013. On March 27, 2014, the Hearing Officer granted an unopposed motion for evaluation of the Student in the home and private school educational placements.

Extensive pre-hearing discovery and multiple telephonic pre-hearing conferences have occurred over the life of this dispute. The parties sought and were granted for good cause shown three continuance requests prior to the hearing, setting the due process hearing for May 5-9, 2014, and the Decision Due Date for June 1, 2014. On May 5, 2014, the hearing proceeded as planned. On May 7, 2014, the parties jointly sought additional hearing days in June 2014 to accommodate witness scheduling issues that were unforeseen prior to start of the

hearing. On May 9, 2014, the parties sought an extension of the Decision Due Date to July 2, 2014, granted for good cause shown, to accommodate the additional hearing days.

The open hearing took place on May 5-9 and June 4-6, 2014. At the conclusion of the hearing, the parties jointly requested, and were granted, a deadline for written closing statements be set at August 18, 2014, and the Decision Due Date be extended to September 22, 2014. The parties timely filed their written closing statements and the record closed on August 18, 2014. The parties filed a joint motion to extend time for the Decision Due Date to October 27, 2014, granted for good cause shown. The Decision was timely rendered and transmitted to the parties on October 27, 2014.

STIPULATIONS OF THE PARTIES

The parties agreed that a one-year statute of limitations applies to this proceeding, or events and concerns arising one year prior to June 17, 2013. The parties further stipulated the following:

1. The Student is a ***-year-old student born ***.
2. The Student was a student at WISD during the 2011-2012 and 2012-2013 school years.
3. The Student currently resides with the Student's parents in the WISD boundaries.
4. The Student's last day as a student in WISD was the last school day of the 2012-2013 school year – June 5, 2013.
5. The Student has not returned to WISD as a student during the 2013-2014 school year.
6. The Student is identified as a student with autism (“Au”) and speech impairment (“SI”).
7. While a student in the WISD, the Student attended the *** (“****”) class at *** (“****”).
8. The Student attended a summer program in WISD during the summer of 2012.
9. While a student at WISD, the Student received related services of speech, occupational therapy (“OT”), and was offered services of special transportation.

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

FINDINGS OF FACT¹

Background

1. The Student showed pervasive developmental delays in the Student's early years. Around January ***, the Student was diagnosed with autism and began receiving ABA instruction from facilities specializing in ABA. [Tr. I:31-36].

2. As an *** (“****”) student, the Student would have been *** as of ***. The Parents chose not to refer the Student to special education services at WISD for six additional months until May 2011. [Tr. III:533-537].

¹ References to the transcript of this proceeding are noted by volume number (Tr. I, Tr. II, Tr. III...) and page number (example: “Tr. I:___”). References to Petitioner's Exhibits (“P.Ex.”) and Respondent's Exhibits (“R.Ex.”) list the exhibit number and the page number (example: “P.Ex. 3 at 3; R.Ex. 3 at 3”). Unnecessary lead zeros in the pagination of exhibits are omitted (example: “00035” would appear as “35”).

3. The Student learned *** from an early age by watching videos.² By report of the Parents, the Student learned *** based on the Parents' informal testing. [Tr. I:31-36, 125].

4. Prior to enrollment at WISD, the Student attended ***, an ABA facility that used *** into its program for student between June 2010 and August 2011. The personnel from *** used the Student's videos to adjust the program more closely to the Student's instructional history. [Tr. I:36].

May 2011 FIE

5. On May 31, 2011, WISD first evaluated the Student with an FIE at age **. At the time of this evaluation and by report of the Parents, the Student received 35 hours per week of services from ABA therapists in a one-on-one ABA therapy setting. Previously, the Student received *** services from ***. The Parents did not provide records of this ABA therapy or ***services to WISD. [P.Ex. 5 at 1-17; R.Ex. 23 at 1-17, R.Ex. 24].

6. The Student's May 2011 FIE reviewed and considered previous evaluations, developmental history, and a speech and language assessment by **. The review also included private evaluation from *** that diagnosed the Student with "PPD-NOS/Autism/mild mental retardation" and indicated that the Student had developmental delays and significant language deficits. [P.Ex. 5; R.Ex. 23; R.Ex. 24; Tr. III:515].

7. WISD evaluators gathered new data using observation, interview of the Parents, information from other professional staff, and the Student using a Home Language Survey, Nurse's Information Form, observation of the Student, and a Language Sample. WISD educational diagnostician, ***, was in charge of combining reports. Ms. *** observed the Student *** during the assessment. [P.Ex. 5; R.Ex. 23; R.Ex. 24 at 51-56; Tr. III:513-514, 516].

8. Tests and evaluation instruments administered in the 2011 FIE included the Adaptive Behavior Assessment System, Battelle Developmental Inventory, 2nd Edition, ***, Behavior Assessment for Children-2 ("BASC-2"), Pervasive Developmental Disorders Screening Test, and the ***. [P.Ex. 5 at 2; R.Ex. 23 at 2].

9. The BASC-2 is a behavior rating scale with clinical, adaptive, and content scales. On the 2011 FIE administration of the BASC-2, the Student did not exhibit any "significant" scores on the clinical or content scales of the BASC-2, but showed "at risk" clinical scores in Atypicality (tendency to behave in ways that are considered "odd") and Attention Problems (tendency to be easily distracted and unable to concentrate more than momentarily). On the content scale, the Student had "at risk" scores in Anger Control (tendency to become irritated and/or angry quickly and impulsively coupled with the inability to regulate affect and self-control) and Developmental Social Disorders (tendency to display behaviors characterized by

² The Parents reported the name of the video series as " ***."

deficits in social skills, communication, interests, and activities – including self-stimulation, withdrawal, and inappropriate socialization). [P.Ex. 5 at 8-9; R.Ex. 23 at 8-9].

10. The Student’s BASC-2 adaptive scale scores during the 2011 FIE , the Student made “significant” scores on Social Skills (skills necessary for interacting with peers and adults in home, school, and community settings), Activities of Daily Living (skills associated with performance of everyday tasks in an acceptable and safe manner), and Adaptive Skills (composite scale reflecting the presence of core characteristics of adaptive behavior for home and school functioning). The Student scored at the “at-risk” level on Functional Communication (ability to express ideas and communicate in a way others can understand). [P.Ex. 5 at 8-9; R.Ex. 23 at 8-9].

11. ***, WISD speech therapist at ***, served on the evaluation team for the Student’s 2011 FIE. A certified teacher, Ms. *** served as a public school speech therapist for 13 years. Ms. *** was not able to administer the ***, at the time of the 2011 FIE because the Student could not comply with testing procedures. The completed 2011 FIE report states that the evaluating speech pathologist observed the Student *** during the evaluation session. [P.Ex. 5 at 6; R.Ex. 23 at 6; R.Ex. 28 at 16-17; Tr. VIII:2183].

12. The May 2011 FIE report noted that the Student appeared overactive, distracted, and did not evidence language skills during the direct observation component on May 26, 2011. The Student expressed language through gestures, ***, and vocalizations. A report from the *** in June 2010 states that the Student previously received speech therapy services with a focus on oral motor skills and articulation at ***. [P.Ex. 5 at 3, 5, 7, 12-13; R.Ex. 23 at 3, 5, 7, 12-13].

13. The FIE determined that the Student met eligibility criteria for Au and SI. Dr. ***, former WISD school psychologist, performed the assessment section of the 2011 FIE. Although the Student showed characteristics of Intellectual Disability, the report did not recommend classification under that disability area at this time. Instead, the report recommended that the Student’s emotional and behavioral issues should be further considered because these issues could affect the Student’s functioning in all areas. [P.Ex. 5 at 12; R.Ex. 23 at 12; Tr. III:568-570].

14. In the 2011 FIE, Dr. *** recommended:

- taking advantage of opportunities to reinforce or encourage the Student’s desired behaviors, including reinforcement or encouragement if the Student responded to the Student’s given name or made an effort to share;
- encourage reinforcement of language use due to the Student’s language deficits;
- practice behaviors in multiple locations; and,
- identification of primary and secondary reinforcers with updating on a regular basis. [Tr. III:571-578].

15. The Student’s 2011 FIE did not recommend development of a Functional Behavioral Assessment (“FBA”) or a BIP for the Student’s behavior. [Tr. III:624-625].

2011-2012 School Year

16. In preparation for the 2011-2012 school year, the Student's Admission, Review, and Dismissal Committee ("ARDC") convened on June ***, 2011. The Parents and WISD participants agreed on the Student's IEP and the ARDC accepted the recommendations of the May 2011 FIE report, determining the Student eligible for special education services as a student with Au and SI. [R.Ex. 7].

17. Neither Parents or WISD staff requested ESY services for 2011 summer months at the ARDC meeting of June ***, 2011. At this time, there was no documentation indicating regression on the Student's goals. Had the Parents provided records from the Student's ***program or if the Student had entered WISD directly after ECI, then WISD would have information at this first ARDC meeting to use for the determination of a need for ESY. [R.Ex. 7 at 23; Tr. III:536-537].

18. The Parents declined the offer of special education transportation, electing to transport the Student themselves. [R.Ex. 7 at 16-17, 23].

19. The Student's 2011-2012 IEP specified delivery of 180 minutes of special education services within *** classroom with a daily 30-minute session of direct speech services with goals and objectives that address the Student's need in the following areas:

- social/emotional;
- self-help;
- cognition;
- expressive language including functional language;
- semantic language;
- articulation; and,
- personal care services ("PCS"), specified "as needed" basis to assist with *** and transitions from class to class and within the classroom. [R.Ex.7 at 9-13, 23].

20. The Student's *** classroom for the 2011-2012 school year was staffed by special educators who used positive behavioral supports. The *** classroom had a general six-to-two ratio (student-to-staff) with times for one-to-one or one-to-two small group teaching for the Student as based on observed needs of the Student. [R.Ex. 7 at 4].

21. At WISD, most *** students *** program because of ***. There is no *** program at WISD. [Tr. VI:1513].

22. At the June 2011 ARDC meeting, the Parents requested that the Student attend *** in the *** class, resulting in a *** program. In January 2012, the Student *** and moved to a different *** classroom taught by ***. [R.Ex. 7 at 23; Tr. VIII:1738-1740].

23. After the Student began the 2011-2012 school year, the ARDC convened, recommended, and added OT services in October and December 2011. [R.Ex. 5 at 2, R.Ex. 6 at 2, R.Ex. 25].

24. Ms. *** served as the Student's speech therapist during the 2011-2012 school year. After performing the Student's initial evaluation in Fall 2011, Ms. *** did not observe the Student using multiple *** context. At the end of the 2011-2012 school year, Ms. *** felt that the Student needed additional *** (“****”) training. [Tr. VIII:2188-2189].

May 2012 ARDC Meetings

25. On May ***, 2012, and again on May ***, 2012, the ARDC convened at the end of the Student's first year in WISD to plan the 2012 summer months and the 2012-2013 school year. Both meetings included the Parents and the Student's teacher, ***. At these meetings, the ARDC:

- reviewed present levels of progress, evaluation data, and goals for the 2012-2013 school year;
- determined continued eligibility for speech, PCS, and OT services;
- determined that a behavior plan was not needed;
- continued placement in a highly structured classroom staffed by trained special educators;
- specified use of positive behavioral supports of a behavior chart, behavior goals, accommodations, and positive reinforcers. [P.Ex. 15 at 3; R.Ex. 4 at 3, 32-33].

26. During the May 2012 ARDC meetings, the Parents expressed concerns about proximity controls on the playground and asked for explanation about how progress charting was done. Ms. *** briefly explained how she documented progress. [P.Ex. 15 at 32; R.Ex. 4 at 32; Tr. VII:1826, 1829].

27. The May 2012 ARDC agreed to a 2012-2013 *** program in the *** classroom for the Student with 360 minutes of special education services each day as requested by the Parents. [P.Ex. 15 at 18 and 32; R.Ex. 4 at 18 and 32].

28. The IEP specified direct services each week of speech for two 30-minute individual sessions and one 30-minute group session totaling 90 minutes. For OT services, the IEP specified weekly direct services of 30 minutes and a monthly consult of 15 minutes. [P.Ex. 4 at 18; R.Ex. 4 at 18].

29. At the meeting on May ***, 2012, the ARDC considered and approved the Student's OT goal and presented proposed speech goals by Ms. *** that she believed were attainable for the Student, including:

- trying to achieve ***;
- seven verbal words;
- choosing from a field of two objects or pictures; and,
- answer three /wh/ questions about a short narrative.

The Parents believed that the proposed speech goals were too simple. The Parents asked for the meeting to end to allow the Student's private therapist, ***, to review the proposed speech goals.

Ms. *** is a certified speech language pathologist with a private practice in ***, Texas. [P.Ex. 7 at 1-4 and 15 at 10; R.Ex. 4 at 10, 32; Tr. VIII:2191-2194].

30. When the ARDC reconvened on May ***, 2012, Ms. *** offered to use ***'s private speech therapy goals as the basis for revising the Student's school speech goals. The Parents agreed to this suggestion and the ARDC adopted the following speech goals and objectives:

- approximating new words in thematic units;
- labeling quantity concepts;
- identifying present progressive verbs;
- identifying a given object upon request with presentation of two items;
- identifying environmental sounds;
- following two-step directions;
- participation in joint attention and turn-taking activities for five turns;
- requesting an activity or preferred item through verbal approximation, ***, or verbally;
- responding to a request for attention by providing eye contact and pausing activity; and,
- production of final and initial consonants when omitted. [P.Ex. 15 at 14-17; R.Ex. 4 at 14-17, 33; Tr. VIII:2192-2193].

31. *** reviewed the Student's progress information gathered from observation and evaluations during the Spring 2012. Using this information, she prepared the proposed goals for 2012-2013. Because the Student had not progressed as quickly as anticipated in some areas, some previous goals were discontinued and rewritten and additional new goals added. The May 2012 ARDC accepted Ms. ***'s goals and objectives to address areas of social/emotional development, self-help skills, and cognitive skills. [P.Ex. 15 at 11-13; R.Ex. 4 at 11-13; Tr. VII: 1755-1756].

32. The Student's 2012-2013 social/emotional development goals and objectives focused on the following:

- following one-step directives;
- initiation of peer interactions in an appropriate manner;
- remaining on task;
- use a visual schedule; and,
- use of a Picture Exchange Communication System ("PECS"), ***, and vocalizations to communicate needs. [P.Ex. 15 at 11-12; R.Ex. 4 at 11-12].

33. The Student's 2012-2013 self-help skills goals and objectives included the following areas: a) demonstration of proper table manners in the cafeteria; b) letting the teacher know when the Student needs to ***; c) ***; and, d) use of the *** on a ***. [P.Ex. 15 at 12-13; R.Ex. 4 at 12-13].

34. The Student's 2012-2013 cognitive skills goals and objectives to be addressed included: a) identification of colors from an array; b) grouping up to 5 items upon request; c) identification of body parts; d) identification of the Student's first name; e) identification of

letters of the alphabet; and, f) receptively identifying numbers 1-10. [P.Ex. 15 at 13-14; R.Ex. 4 at 13-14].

35. At the May 2012 ARDC meetings, the Parents expressed concern that the Student would regress over the coming summer months. Service providers considered the amount of time spent in the Student's *** classroom on academics as a basis for the Summer 2012 services. The ARDC agreed to Summer 2012 services of three times a week of two hours over nine weeks. The services were designed to maintain the Student's skills learned in the 2011-2012 school year and WISD participants considered options to allow the Student to socialize with peers, ruling out a bilingual program at another *** campus because instruction in two languages would be confusing. Another option of programming at the local "YMCA" was ruled out because of the location. The ARDC decided that the program should take place at ***. [P.Ex. 15 at 33; R.Ex. 4 at 33; Tr. I:58-59, 166-167, Tr. VI:1584, Tr. VII:1747-1748].

36. The May 2012 ARDC meetings did not discuss speech therapy services for Summer 2012 and the Parents did not raise concerns about speech therapy services over the summer months. [Tr. VIII:2190-2191].

Summer 2012

37. The Student's Summer 2012 program took place at the Student's *** campus. The program focused on the Student's academic objectives – matching primary colors, searching for toys out of sight – and personal care skills including *** and ***. Activities used in the program were based on the Student's objectives, such as ***, puzzles, color-matching activities, and working on letters. [P.Ex. 15 at 33; R.Ex. 4 at 33, 39-40 and R.Ex. 22; Tr.VII:1746-1750, 1754, 1762].

38. Ms. *** documented the Student's Summer 2012 progress with teacher observation and communicated the information to the Parents in daily conferences. Ms. *** usually spoke to the Student's parent each day. Ms. *** did not retain any work samples from the Student from Summer 2012, instead giving all the completed work to the Parents. [Tr. V:1309-1311, Tr. VII:1762, 1790, 1824-1825].

39. During her work with the Student, Ms. *** observed that the Student responded well to reinforcers that were of specific interest to the Student, such as stickers and stuffed animals. If the Student was not interested in a specific item, it was not an effectual reinforcer. [Tr.VII:1787].

40. Ms. *** believes that the Student retained previously-learned skills during the inside the lines when coloring rather than scribbling. The Student also successfully participated in *** activities, and was able to self-feed snacks using utensils. [Tr. III:763-762; Tr. VII: 1826-1827].

41. The Parents also enrolled the Student in the *** for private ABA programming in Summer 2012. In August 2012, a BCBA from *** performed a Verbal Behavior Milestones Assessment Placement and Program ("VB-MAPP") assessment of the Student using Levels 1, 2, and 3 to determine the Student's level of skills. The VB-MAPP assessment has five components

that are designed to provide a representative sample of a student's existing verbal and related skills including "mand" (prompting and reinforcing requests for items), tact, echoic, listener, motor imitation, play skills, social skills, visual perceptual and matching to sample, and linguistic structure. The BCBA determined that the Student had manding skills up to and including spontaneous manding skills. [P.Ex. 10 at 1, 5-6; P.Ex. 21 at 19-27,128-132, Tr. IV:812].

42. WISD staff were not aware of the Summer 2012 programming at *** in Summer 2012 and the Parents did not provide information from the *** services to WISD. [P.Ex. 21 at 19-27; Tr. I:128-132, Tr. V:1296-1298; Tr. VII:1808].

2012-2013 School Year

43. The Student's IEP developed by the May 2012 ARDC meetings began on the first school day of the 2012-2013 school year. Ms. ***, a certified special education teacher, taught the Student's *** classroom. Ms. *** previously met the Student and the Student's parent during Ms. ***'s summer instruction during a casual meeting of an hour or less. The Student did not exhibit maladaptive behavior during the meeting. [R.Ex. 28 at 33; Tr. I:181-184, Tr. VII:1767-1768].

44. Ms. *** began employment with WISD in August 2012. Ms. *** holds lifetime certification in the following professional and provider areas: a) Educational Diagnostician (Prekindergarten ("PK")-12); b) Supervisor (PK-12); c) Elementary Self-Contained (1-8); d) English (1-8); e) Language and/or Learning Disabled (PK-12); and, f) Early Childhood Education – Handicapped (PK-6)³. [P.Ex. 42 at 33-35; R.Ex. 28 at 33-37; Tr. I:180-182].

45. Early in the 2012-2013 school year, Ms. *** used the Nickel Developmental Checklist to obtain baseline data on the Student. Ms. *** does not recall what happened to the original copy of the Nickel Developmental Checklist that reflected the Student's data. [R.Ex. 51 at 14; Tr. II:403-404].

46. Throughout the 2012-2013 school year, Ms. *** sent the Student's daily paperwork home to the Parents in a purple folder. This information included a behavior chart with boxed areas and a "smiley face" check sheet. Ms. *** took daily notes and put them in her students' purple folders throughout the entire 2012-2013 school year. [Tr. I:193-197].

47. Ms. *** used several different charts during the 2012-2013 school year, tracking progress information with pluses and minuses. As the school year progressed, Ms. *** discovered that one type of charting might work for personal care issues, but another type of charting might work better for academic issues, revising her charting when she found another charts she preferred. Ms. *** recorded some types of data in the *** classroom each day and tracked other types of data based on when a particular student was in a "teaching mode," based on what Ms. *** believed appropriate for a particular student. When Ms. *** recorded data, she offered at least 10 trials. [P.Ex. 34; R.Ex. 11; Tr. I:236-240].

³ Grade levels are represented in brackets.

48. Ms. *** used the data sheets she compiled for her own needs. Ms. *** consolidated all the data that she took from other formats, including observational data, into a compilation of data. [P.Exs. 16 and 34; R.Exs. 10 and 11; Tr. I:236-237, Tr. II:288].

49. The Parents sent a *** to WISD to be used as a reinforcer. Because the Student liked to throw the *** in the classroom and try to get it, WISD staff decreased (“faded”) the use of the ***. [Tr. I: 218, Tr. II:296-298, 301, 383, 392, Tr. VI:1549-1550, Tr. VII:1906].

50. Ms. *** observed once in the Student’s *** classroom during the 2012-2013 school year to make a video requested by the Parents. The video showed the Student’s participation in “circle time” calendar activities. At hearing, Ms. *** did not recall that the Student exhibited any memorable malbehaviors during the observation. [Tr. III:547-548].

51. In September 2012, WISD hired an autism consultant, ***. Ms. *** has 45 years of education experience including classroom experience, with 43 years of work with autistic students. Ms. *** has a master’s degree and is trained in ABA and sign language. Ms. *** is certified to teach elementary through eighth grade, language and learning disability, physically handicapped, English as a Second Language, and Emotional Disturbance. At the time of the hearing, Ms. *** served as an educational consultant for five school districts. Ms. *** is ***, a ***. WISD hired Ms. *** to implement a zoning classroom structure in all the District’s *** classrooms, including the Student’s *** classroom with Ms. ***. [R.Ex. 28 at 31; Tr. VII:1852-1853, 1898].

52. Ms. *** set up a zoning system within Ms. ***’s *** classroom in Fall 2012. The zones were individually color coded and divided by partitions that allowed for sight over the top yet that physically divided the space. Students used schedules and all students in the room participated in group activities in the morning, the afternoon, at lunch, and outside. Each student had the opportunity to work one-on-one with every adult in the room and to do independent work. After finishing this process, the classroom had the following zones:

- a waiting area with chairs;
 - a bathroom;
 - a sink;
 - an independent work area;
 - a group area;
 - a dress up area;
 - a sand table area;
 - a computer;
 - a “calm-down” area;
 - zones for each of the adults; and,
 - within each zone, a one-on-one area and one or more independent areas for activities.
- [Tr. VII:1858-1866].

53. Ms. *** believes that a zoned classroom allows adults to limit access to unwanted behaviors by creating smaller spaces. In a zoned classroom that has been set up well, adults are

able to redirect students with ease. The limited space in the classroom zones makes it difficult for students to escape an activity or run off. [Tr. VII:1863-1866].

54. Ms. *** made a total of 33.5 visits to the Student’s classroom during the 2012-2013 school year, making visits at least once a week. The duration of each visit was six hours. [R.Ex. 43; Tr. VII:1873-1874].

55. Every student in Ms. ***’s zoned classroom had the opportunity for one-on-one instruction with each of the three adults regularly staffing the classroom. The *** class also interacted with the adjacent class at lunch together at the same table in the cafeteria. [Tr. VII:1866, 1994].

56. Ms. ***’s zoned *** classroom included an area staffed by a paraprofessional where students were assigned individual tasks on their level. The tasks centered on self-care skills – tasks that a student ultimately needs to perform independently – including bathroom sequencing of brushing teeth and other domestic or vocational skills. The paraprofessional used “silent teaching” or nonverbal teaching to guide an individual student correct completion of these tasks using the least amount of prompts necessary. Silent teaching is effective to teach a sequence of skills by allowing an adult to “move out of the picture” and to avoid a student becoming dependent upon individual prompts. [Tr. VII:1867-1869].

57. Ms. *** observed that Ms. ***’s *** students had two recess periods and recommended that there only be one recess period of unstructured time. After the Student and other classmates became successful using the new classroom zones, Ms. *** instructed the students on use of the playground equipment. [Tr. VII:1898].

58. Ms. ***’s class used edible reinforcers with all students in the classroom with a plan to quickly “phase out” or extinguish the edible reinforcers. [Tr. VII:1899].

59. By the Spring 2013 semester, Ms. *** had a basket of toys assembled targeted to the students’ preferences. Each student could choose their own reinforce after completion of the work asked of them. Ms. *** also used token economy systems with the *** students by filling a card with tokens to earn their reinforcements. Ms. *** used picture icons and symbols with the *** students in the 2012-2013 school year, especially with the Student, to increase vocalizations and mimic language. [Tr. VI:1519; Tr. VII:1899-1900].

60. The Student responded well with the systems in Ms. ***’s classroom, The classroom used reinforcers selected by and for the Student. The Student responded well to *** and ***, but was not interested in *** during this period. The Student was easily directed from maladaptive behaviors. After observing 33.5 six-hour days in the Student’s classroom, Ms. *** observed that the Student was happier and smiled all the time. [Tr. VII:1897, 1906-1907].

61. The Parents expressed concern about the Student’s transitions from home-to-school during the 2012-2013 school year, reporting that the Student increasingly grew agitated to the point of screaming as the Student traveled closer to school in the car. Once at school, the

Parents reported difficulty getting the Student out of the car and into the school building. [Tr. I:132; Tr. V:1251-1253].

62. Ms. *** wrote out the Student's schedule when the Parents requested more information about the Student's behavior during the 2012-2013 school year. In response to the Parents' concerns about home-to-school transitioning, Ms. *** observed the parent bringing the Student to school on three occasions to see if there were additional supports or strategies that would assist transitioning. After observing three smooth morning home-to-school transitions, Ms. *** did not see a need to offer changes to the Student's program. [R.Ex. 43 at 13; Tr. VII:1887-1888, 1902].

63. During the Fall 2012 semester, WISD staff used the PECS book developed by the Student's private speech therapist, ***, to work on the Student's need to use communication strategies across multiple modalities and to promote consistency across settings. The Student, however, was not interested in using the PECS book, flipped through the pictures like a magazine, and did not use the PECS book to request items. Instead, the Student would attempt to *** instead of use the PECS book. In response to these attempts, Ms. *** and other WISD service providers positively reinforced the communication attempts made by the Student. [Tr. VI:1629, Tr. VII:1902-1903].

64. The Student used several *** for communication during Fall 2012 and no regression in *** ability appeared during this period. Neither Ms. *** nor any other WISD staff observed the Student using multiple *** since the Fall 2011 evaluation. [Tr. II:367-369; Tr. VIII:2189-2190].

65. The Student's parent reported that the Student came home *** on at least two occasions during the 2012-2013 school year while in Ms. ***'s class. The Parents sent *** to school and reported that the Student's backpack would come home with *** in the backpack. At hearing, the Student's parent did not remember picking up the Student with *** from school during the 2011-2012 or Summer 2012 while the Student was in Ms. ***'s class. [Tr. I:171-172; Tr. V:1315-1316].

66. Ms. *** recalled that the Student would on occasion have *** and the ***, a standard procedure in most *** classrooms. Ms. *** never sent students home with *** if she knew about a ***. [Tr. II:416-417].

67. From Ms. ***'s observations of the Student in the *** classroom between September and October 2012, the Student did not exhibit maladaptive behaviors other than whining and fatigue. Ms. *** noted that the Student did not exhibit "group behavior" – the ability to sit at a table, and imitate what was presented – on the first day of Ms. ***'s observation, September ***, 2012. Ms. *** also noted that the Student liked to get up to get a lunch box and backpack. [R.Ex. 43 at 6; Tr. VII:1869-1873].

68. During the 2012-2013 school year, Ms. *** provided the Student's speech therapy services in Ms. ***'s *** classroom. The Student received individual speech therapy

four times a week for 15-minute sessions and group speech therapy one time a week for a 30-minute session. [Tr. VIII:2198-2200].

69. Ms. ***'s session notes during September 2012 detail the Student's use of a combination of *** and verbal approximation. During this period, the Student said "bye" to Ms. *** as the Student left for a speech session and verbally imitated Ms. *** to say the word *** – the only word Ms. *** heard the Student say during the 2012-2013 school year. [P.Ex. 39 at 13 and 16; R.Ex. 13 at 13 and 16; Tr. VIII:2189].

October 2012 ARDC Meeting

70. On October ***, 2012, the Student's ARDC convened by request of the Parents to discuss speech services, OT services, and to start discussion of 2013 ESY services for possible regression. Based on data of the Student's speech session notes, Ms. *** found the Student's speech goals to be inappropriate and too advanced when considering the Student's rate of progress on the speech goals and determined the Student's "successes over the overall rate of attempts" to determine a "percentage of success." Ms. *** expressed concern that the Student would not be successful with the current goals. The ARDC agreed that the speech goals were, in fact, too advanced. [P.Ex. 14 at 3, and 9-10; R.Ex. 3 at 3, and 9-10; Tr. VIII:2194-2197].

71. The October 2012 ARDC unanimously adopted simplified speech goals that continued some of the Student's speech goals in a new form. The revised goals focused on building a foundation of speech skills for the Student rather than "overestimating" the Student's current skill level. The simpler goals included use of ***, production of seven verbal words, choosing an activity/object from a field of two pictures, and, attending to a short narrative to answer three "wh" questions. [P.Ex. 14 at 10; R.Ex. 3 at 10; Tr. VIII:2191-2196].

72. At the October 2012 ARDC meeting, the Parents reported that the Student's private speech therapist, ***, noted slower progress on speech goals and had lowered the private therapy speech goals. The ARDC discussed having the Parents sign a release to allow Ms. *** to contact Ms. ***. [P.Ex. 14 at 16; R.Ex. 3 at 16].

73. The October 2012 ARDC discussed use of the PECS book used by the Student's private speech therapist, Ms. ***, for encouragement of communication between home and school settings. [P.Ex. 14 at 16-17; R.Ex. 3 at 16-17].

74. At the October 2012 ARDC meeting, the Student's parent expressed concern about Summer 2013 services, requesting that WISD begin to determine what services would be available. The WISD Director of Special Education, ***, attended this meeting. Ms. *** explained that she could not answer those questions at that time because all the data had not yet been collected concerning regression and recoupment. [P.Ex. 14 at 16-17; R.Ex. 3 at 16-17, Tr. VI:1525-1526].

75. The Parents discussed their concerns in the October 2012 ARDC meeting that one-on-one proximity control of the Student was not maintained on the playground. The Student's parent reported observation of the Student on the playground without appropriate proximity control and the Student began to run some distance from the playground in the

direction of a highway before staff successfully grabbed the Student from behind. In response, District ARDC participants acknowledged the playground supervision concerns, promised to visit with school staff about safety concerns, and noted that the new classroom schedule now had a reduced recess time of 15 minutes. [P.Ex. 14 at 17; R.Ex. 3 at 17; Tr.1:70, Tr. V:1254, Tr. VI:1524-1525].

76. Prior to the October 2012 ARDC meeting, the Student experienced trouble sleeping and changes to medications. The Student's psychiatrist made frequent changes to the Student's medications based on parental reports of trouble falling asleep and behavior problems in the home. [P.Ex. 3; R.Ex. 46 at 7-8; Tr. I:133-135].

77. The Parents also expressed concerns about the sleep and medication problems in the October 2012 ARDC meeting. Around 2:00 p.m. each school day, an hour before regular dismissal time, the Student began to *** for the Student's backpack, whine, and wanted the Student's parent. ARDC participants thought the Student's school day was too long given the sleep problems at night and agreed to shorten the school day to increase the Student's chance to have a successful school day by ***. After stabilization of medication and sleep issues, the ARDC planned to return the Student to a full day at the end of Fall 2012. [P.Ex. 14 at 16; R.Ex. 3 at 16; Tr. VI:1512].

78. *** of the *** students in the Student's 2012-2013 *** classroom in October 2012 had a shortened school day. [Tr. VI:1521].

79. The October 2012 ARDC meeting concluded with discussion of proximity controls, structure of the *** class, and length of the school. All participants agreed that the current placement was the LRE for the Student. [P.Ex. 14 at 17; R.Ex. 3 at 17].

November 2012 ARDC Meeting

80. The ARDC convened for a brief ARDC meeting on November ***, 2012. The purpose of this meeting was to address the Parents' concerns about regression of the Student's behavior and speaking skills. The Parents reported that the Student previously had 20 words, but now had regressed and communicated mostly ***. The Parents also reported a decrease in the Student's ***, a failure to sleep well on a regular basis, and the Parents voiced concern about aggression from the Student directed to other students. [P.Ex. 13 at 10; R.Ex. 2 at 10; Tr. I:77].

81. At the November 2012 ARDC meeting Ms. *** reported that the Student was progressing well in speech therapy, compliant and interactive most of the time, picked up new skills, attempted to imitate sounds when Ms. *** modeled sounds or words, listened to directions, followed some directions, and followed through on some tasks. Because of this progress, Ms. *** believed that the Student was progressing under the current speech program. Ms. *** noted that the Student was manageable in the classroom. [P.Ex. 13 at 10; R.Ex. 2 at 10; Tr. VIII:2200-2201, Tr. VIII:2203, Tr. VIII:2207-2208].

82. The November 2012 ARDC reviewed the Student's behavior. Ms. *** disagreed with the Parents' perceptions that the Student had regressed in speaking and behavior based on

her previous observations and data. Instead, Ms. *** believed that the Student was moving toward goal mastery and classroom behaviors were not significant. [P.Ex. 13 at 10; R.Ex. 2 at 10; Tr. VI:1527-1529].

83. Observations by Ms. *** in the Student's *** classroom prior to the time of the November 2012 ARDC meeting also showed that the Student was making progress in the ***zoned classroom. The Student followed the classroom zones, showed more independence, and to some degree, was able to follow a picture schedule. Ms. *** recalled discussion of the Student's behaviors at school surrounding the 2:00 p.m. hour when the Student was tired as being attributable to typical tiredness or possibly to medication regulation issues. [Tr. VI:1528-1530].

84. At the November 2012 ARDC meeting, participants discussed use of formal measures for ongoing assessment and tracking of the Student's progress, including the Assessment of Basic Language and Learning Skills ("ABLLS") skill tracking system. The ABLLS tracking system is similar to the VB-MAPP but tracks data differently. The November 2012 ARDC participants also discussed the following:

- the Student's sleep problems at home;
- the Parents' request for a video of the Student's appropriate and inappropriate behaviors at school;
- discussion about the Student's past ABA therapy and questions about ABA training for staff;
- agreement from Ms. *** agreement to check on ABA training;
- discussion of how IEP success is measured and input from Ms. ***'s *** classroom data collection methods including charting the Student's behavior;
- the Parents' request for observation of the Student in the *** classroom by the Student's private psychologist ***; and,
- discussion of confidentiality form/scheduling requirements for the observation. [P.Ex. 9 at 1-4, P.Ex. 13 at 11; R.Ex. 2 at 11; Tr. I:76-81, Tr. V:1296, Tr. VI:1552, 1531,1623].

85. The November 2012 ARDC recommended an FBA for the Student and agreed to complete the FBA by January 31, 2013. The meeting concluded without making changes to the Student's programming. [P.Ex. 13 at 11; R.Ex. 2 at 11; Tr. VI:1530].

Private Observation – November 2012

86. The Student's private psychologist, Dr. ***, observed the Student in the *** classroom on November ***, 2012, and issued a written report of the observation including findings and recommendations. In Dr. ***'s opinion, WISD did not use formal skill tracking measures to track and monitor the Student's progress, did not appropriately use reinforcers, and used only limited strategies for promoting language. [P.Ex. 29; R.Ex. 26 at 43-47].

87. Dr. ***'s written report recommended the following:

- a formal preference assessment to determine sensory modalities that most motivate the Student;
- a paired choice assessment to identify reinforcers;
- *** toys to encourage speech and language as a motivator;
- staff training on positive reinforcement;
- staff monitoring by the trainer on proper use of reinforcement;
- a structured technique to encourage independence (“Wait, Ask, Say, Show, Do”) with five seconds in between steps;
- sand or visual timers to cue how much time prior to going home;
- music in the classroom to help calm the Student;
- a structured three-prompt approach for verbal approximations to promote verbal language development, accepting ***, PECS, or gestures as back-up responses after three prompts have passed; and,
- an alternative lunchroom to encourage eating and reduce distractibility. [P.Ex. 29 at 4-5; R.Ex. 26 at 46-47].

88. Ms. *** observed Dr. *** during the classroom observation of the Student. Although the report states the observation took two hours, Ms. *** remember that the observation took 15-30 minutes total. Ms. *** also recalled that the observation time was less than the scheduled evaluation. [P.Ex. 29 at 3; R.Ex. 26 at 45; Tr. II:298-307, Tr. VI:1540-1543].

89. Dr. *** did not talk with the Student’s school speech therapist, Ms. ***, regarding the use of PECS during the observation. [Tr. VI:1552].

90. Upon receipt of Dr. ***’s report, Ms. *** was surprised to see the purpose of the observation – to assess the Student’s functioning and progress in the Student’s current setting – as Ms. *** thought that the purpose of the observation was to come give additional input on the 2:00 p.m. time of day issues that the Student experienced in the *** classroom. [P.Ex. 29 at 1; R.Ex. 26 at 43; Tr. VI:1542-1543].

91. Ms. *** disagreed with several factual statements in Dr. ***’s written report including:

- statements that *** students /three adults present in the *** classroom at the time of the observation (maximum number of students in the *** classroom was *** and during Dr. ***’s evaluation; only *** students, one teacher, and two paraprofessionals were in the room);
- statements about Ms. ***’s data collection as inaccurate and without acknowledgement of all the positive reinforcement present in the *** classroom;
- failure to ask questions from Ms. *** during the evaluation or record written notes of the observation; and,
- recommendations regarding the affect of staff (affect described as calm and quiet with little range of facial expression; recommendation to increase to obtain increased responsiveness from the Student. [Tr. VI:1542-1546].

92. During Dr. ***'s brief observation of the Student, Ms. *** observed Ms. *** use breathing techniques successfully to redirect the Student for completion of an assigned task. [Tr. VI: 1548].

93. According to the Parents, the Student does not like loud noises; WISD staff found that the Student responded better to a calming voice. [R.Ex. 29 at 5; Tr. VI:1545-1546].

94. The Parents provided Dr. ***'s written report to the District but do not recall meeting with Ms. *** to discuss the written report. Ms. *** recalls a meeting with the Parents after receipt of Dr. ***'s report but did not get to talk to Dr. ***. [Tr. I:144, Tr. V:1306-1308, Tr. VI:1557].

STAR Instrument

95. Following the November 2012 ARDC, Ms. *** and Ms. *** met to discuss and choose an assessment instrument for ongoing measurement of the Student's progress. The "STAR" assessment instrument was chosen through recommendation for use with a non-verbal student. The STAR instrument serves not only an assessment tool, but also includes the curriculum used to develop receptive, expressive, and spontaneous language. [P.Ex. 27; R.Ex. 10 at 2-10; Tr. VI:1552-1556, Tr. VII:1944-1947].

96. The STAR instrument breaks down skills into "target skills" for observation of an individual student performing a targeted skill or for setting up a situation with the targeted skill and then responding on whether the individual student is able to perform the specific target and how often. There are three levels on the STAR instrument in increasing difficulty. [Tr. VII:1945-1947].

97. Ms. *** trained Ms. *** on how to use the STAR instrument. Both educators administered the STAR assessment at Level I to the Student on the first administration on January 10, 2013. Ms. *** administered the STAR a second time by herself in early May 2013, determining at that time that the Student was not ready for Level 2. The results of the two administrations showed the Student had made progress. [Tr. VI: 1575-1576, Tr. VII:1946-1947].

98. Ms. *** arranged for ABA training for WISD staff through Dr. *** at the District on January 11, 2013. Both Dr. *** and Dr. *** are doctorate level board-certified behavior analysts ("BCBA-D"), own a business together called *** and have co-authored "how-to" books on teaching students with autism. They stress the importance of breaking down tasks into minute steps, writing appropriate instructional objectives, and targeting the four levels of learning a new skill – acquisition, fluency, maintenance, and generalization – in the objectives. [P.Ex. 45 at 62; R.Ex. 29 at 85; Tr. VI:1394, 1559, Tr. VII:1911-1912, 1914-1916].

99. During the 2012-2013 school year, the Student occasionally behaved ways typical for a ***- to ***-year-old student who becomes frustrated at school including tears, tantrums, not following directions, and not completing work. [Tr. II:293].

100. Dr. *** served as the WISD school psychologist who conducted the assessment section of the 2011 FIE of the Student. Dr. *** also performed the 2013 FBA and subsequently

wrote the Student's BIP. Dr. *** performed approximately 30 FBAs during his career at WISD before retiring in June 2013. He reviewed Dr. ***'s report in preparing his 2013 FBA of the Student but could not speak to the accuracy or credibility. [P.Ex. 20 at 1-5; R.Ex. 26 at 1-5; Tr. III:568, 585, 597-598, 603, and 617].

101. In preparation for the FBA in November and December 2013, Dr. *** worked with Ms. *** on behavior documentation by supplying sample forms and information on computing percentages, documentation of observations, tracking successes and failures of behaviors. In January 2013, Dr. *** again worked with Ms. *** concerning some observed behaviors of the Student such as putting things in the Student's mouth and leaving an activity area to go get the Student's backpack when the Student wanted to go home. Dr. *** directly observed the Student in the classroom, discussed any behaviors that needed to be addressed, but noted no problematic behaviors from the Student. [P.Ex. 45 at 53(1)-54; Tr. III:582-588].

102. Dr. *** saw Ms. *** use varied reinforcement of the Student's language during his observations in the *** classroom, but Dr. *** wanted to increase the reinforcement. Initially, Dr. *** and Ms. *** identified three behaviors for the Student to work on as part of the FBA: placing inappropriate objects in the Student's mouth; darting at and grabbing individual's objects inappropriately; and, selecting a schedule icon without a full physical prompt. A fourth behavior, going to get the Student's backpack in preparation for leaving for home at the end of the day, was added to the list of behaviors. [Tr. III:597-599].

103. Dr. *** conducted multiple observations for his 2013 FBA of the Student. During these observations, he did not observe the Student pulling hair, spitting, running away from the classroom, grabbing other students, hitting others, or biting. During his observation of the Student on January 25, 2013, the Student was participating, received verbal and physical redirection, was patted on the shoulder, and received ***. [P.Ex. 20 at 31-33; R.Ex. 26 at 34-36; Tr. III:620-621, Tr. III:623-624, Tr. III:627-632].

104. Dr. *** completed the FBA and issued the written FBA report on January 31, 2013. [P.Ex. 20 at 1; R.Ex. 26 at 1].

105. The Student did not exhibit significant maladaptive behaviors between November 2012 to April 2013, based on the documentation of Ms. *** and Dr. ***. [R.Ex. 26; Tr. II:313-314].

106. Ms. *** observed Ms. ***'s classroom on an almost daily basis as she delivered the Student's speech therapy services. Throughout the 2012-2013 school year, Ms. *** observed the Student's behavior to be very manageable in the *** classroom and did not believe the Student required a formal BIP. [Tr. VIII:2208].

April 2013 ARDC Meeting

107. The ARDC convened to discuss the completed FBA and to develop a BIP for the Student on April ***, 2013. The Student's parent initially attended the meeting and agreed with the results of the FBA and the BIP developed by Dr. ***. When the Student's parent arrived at

the ARDC meeting, the parent asked about ESY services. The ARDC discussed a skill maintenance program for Summer 2013, but the Student's parent would not agree to this program. Instead, the Student's parent wanted the program to be called ESY services – not a maintenance program. The ARDC participants agreed to adjourn the meeting and come back at a later time. [R.Ex. 32; Tr. VI:1702-1703].

108. Ms. *** attended the meeting on April ***, 2013. She brought her data and paperwork to the meeting to answer any questions regarding data collection and record-keeping. The Parents did not ask to see Ms. ***'s data at this meeting. [Tr. VI:1718-1719].

109. The signatures of persons attending the April 2013 ARDC meetings were taken by ***, an educational diagnostician for WISD. It is WISD procedure to gather names of ARDC meeting attendees when an ARDC meeting is adjourned or “tabled” to ensure the same persons return for a reconvened meeting. [R.Ex. 32 at 2; Tr. VI:1562-1563].

110. The Parents agreed to return to an ARDC meeting in May 2013, and the meeting was set at a workable time for the Parents to bring their advocate, Louis Geigerman, to the ARDC meeting. [P.Ex. 45 at 97(1)-101; R.Ex. 61 at 34-36; Tr. VI:1577-1578].

111. The Parents were upset that WISD recommended summer programming to maintain the Student's skills for Summer 2013. Ms. *** asked Ms. *** to write a letter regarding the Student's regression and recoupment of skills during the 2012-2013 school year. Ms. *** wrote the letter on April 21, 2014, detailing the Student's quick recoupment of skills after holiday breaks and steady progress toward planned goals. [R.Ex. 34 at 2-4; Tr. VI:1564-1565].

112. The Parents expressed continued frustration that WISD did not see regression in the Student. By electronic communication dated April 22, 2013, the Student's parent acknowledged “the excellent progress [the Student] has made since January.” [P.Ex. 45 at 91(7)-91(8)].

113. There were numerous attempts to reconvene the April 2013 ARDC by the District on April ***, April ***, and May ***, 2013. However, the Parents informed WISD that they did not want to return to the ARDC meeting and intended to withdraw the Student. The Parents provided 10-day notice of their intent to withdraw the Student with intent for placement in *** for private programming on May 6, 2013. [P.Ex. 45 at 100-101; R.Ex. 32 at 1, R.Ex. 61 at 36, R.Ex. 62; Tr. I:94-95, Tr. VI:1563, 1576-1578].

114. Because the Student could be easily redirected, Ms. *** did not believe that the Student needed a BIP for any behaviors exhibited during the 2012-2013 school year. Ms. *** observed the Student tantrum in Ms. ***'s class on one occasion in late April or early May 2013. After Ms. *** redirected the Student, the Student had not calmed in response. Ms. *** stepped in and modeled appropriate behavior, used a firm voice and *** to tell the Student to stop and sit, and the Student calmed. [Tr. VI:1512, 1526, Tr. VII:1884-1885, 1948-1949].

May 2013 ARDC Meeting

115. Ms. *** began drafting some minutes for the April 2013 ARDC meeting using the software template that she continued to use when the ARDC reconvened on May ***, 2013. [R.Ex. 1 at 6; Tr. VI:1705-1706].

116. The purpose of the May 2013 ARDC meeting was for annual review of Student's programming and behavioral needs for Summer 2013 and the 2013-2014 school year. WISD staff, the Parents, their advocate, and the Student's private ABA therapist, ***, attended the meeting. The ARDC continued the Student's eligibility as Au and SI and continued speech and OT services. Participants discussed the Student's functioning levels, including information that the Student was now able to integrate into crowded areas without serious behavior concerns. [P.Ex. 12 at 62 and 65; R.Ex. 1 at 70 and 73].

117. In the May 2013 ARDC meeting, the Parents expressed belief that the Student had made progress during the 2012-2013 school year, but believed that the progress had been made from January 2013 forward. The Parent's advocate, Mr. Geigerman, stated that the Parents disagreed with the District's data regarding progress. [P.Ex. 12 at 65; R.Ex. 1 at 73].

118. Ms. *** reported to the May 2013 ARDC participants that the Student mastered most of the speech goals introduced in October 2102 with high mastery levels and proposed additional speech goals that included a functional component to the oral/motor speech goals and used multiple communication modalities to address expressive and receptive language, pragmatics, functional needs, and apraxia. Apraxia is a motor-planning disorder of speech with a neurological basis. Proposed goals included:

- functional language needs – verbalization for a preferred choice or activity (“I want ___”);
- functional language needs – verbal word approximation of a word for current needs and wants (including bathroom activities with verbal prompt (What do you need?)) accompanied by sign language);
- ability to ask for things by acquisition of developmentally appropriate communication skills (by imitation and repetition);
- pragmatic language needs: verbal production of each classmate's name (with pictures and verbal name labels); and,
- oral-motor needs – apraxic tendencies and strengthening expressive language skills by communication skills development (using imitation and repetition). [R.Ex. 69 at 1-10; Tr. VIII:2089-91, Tr. VIII:2092-2097].

119. The May 2013 ARDC considered the Student's Present Levels of Academic Achievement and Functional Performance (“PLAAFPS”) and reviewed the Student's goals and objectives for Autism Shaping Behavior, Reading, Math, Science, Social Studies, Help Needs, Speech, Language Communication, OT, and Physical Education. [P.Ex. 12 at 20-52; R.Ex. 1 at 28-60].

120. The Student's 2013-2014 Autism Behavior Shaping goals included goals with a variety of objectives that addressed the behaviors in the Student's draft FBA and BIP, including the following:

Target Behavior	Objectives
Alternate Response to Schedule Card in Mouth	Carry Next Icon/Picture on Schedule to Next Activity
Response to Verbal Prompt– “Check your schedule.”	Carry Next Icon/Picture on Schedule to Next Activity
Follow Verbal/Visual Prompt to Open Backpack	Focus on Unzipping Backpack
Follow Verbal/Visual Prompts to Move to Appropriate Work Zone – “Check your ticket.”	Select Schedule Ticket from Individual Schedule, then Move to Work Area

[P.Ex. 12 at 20-28; R.Ex.1at 28-36].

121. The Student’s 2013-2014 proposed goals and objectives included responding to requests, receptive language identification, rote counting, imitation of actions, and need communication. [P.Ex. 12 at 30-40; R.Ex. 1 at 38-48].

122. The May 2013 ARDC proposed 360 minutes per day of academic special education instruction with weekly direct OT services outside the classroom, 15-minute direct speech therapy in the classroom four times a week, one 30-minute integrated speech therapy session each week in a special education setting, and 180 minutes per day of direct personal care services. [P.Ex. 12 at 58-59; R.Ex. 1 at 66-68].

123. The May 2013 ARDC proposed placement of the Student in a self-contained special education classroom for the 2013-2014 school year, but proposed continued placement in the *** classroom for the remainder of the 2012-2013 school year. ARDC documentation includes selection of LRE concerns that implementation of the Student’s program in the general education classroom would eliminate essential components of the general education curriculum. [P.Ex. 12 at 56 and 65; R.Ex. 1 at 65 and 73].

124. The Parents and their advocate did not agree with the proposed 2013-2014 placement in a self-contained special education classroom because of questions about the student-to-teacher ratio and the composition of the class. [P.Ex. 12 at 65; R.Ex. 1 at 73].

125. The May 2013 ARDC participants agreed to an in-home training evaluation and declined the opportunity to reconvene the ARDC within 10 school days. [P.Ex. 12 at 65-66; R.Ex. 1 at 73-74].

126. Because WISD data at the time of the May 2013 ARDC meeting did not show that the Student exhibited a pattern of regression and recoupment, the May 2013 ARDC initially recommended a six-week summer program for maintenance of critical skills at school two hours a day for three days a week. The Parents and Mr. Geigerman disagreed with this proposal and ***, the Student’s private ABA therapist, recommended an eight-week summer program of services of five hours a day for four days a week. Ms. *** presented no supporting data for the proposal. The Parents disagreed with the proposed program as inadequate. [P.Ex. 12 at 65; R.Ex. 1 at 73; Tr. I:94].

127. The Student had opportunities to interact with non-disabled peers while attending WISD during lunch, recess, and special programs. During lunch periods in the cafeteria, WISD staff worked with the Student in the natural environment to teach how to get in line, how to wait, and how to function as a typical student in the cafeteria, including putting up the cafeteria tray. [Tr. VI:1547, 1555-1556].

June 2013

128. On June 13, 2013, WISD sent a Notice of Proposal to the Parents containing further adjustments to proposed summer services for a four-week summer school program consisting of three hours a day for five days a week from June 10 – July 12, 2013, and additional programming of two hours a day for three days a week before school resumed for the 2013-2014 school year. The purpose stated on the notice was to maintain skills learned during the 2012-2013 school year and to prevent possible regression of learned skills. [P.Ex. 45 at 104(1)-104(2); R.Ex. 1 at 3 and R.Ex. 46 at 21-22; Tr. VI:1567-1568].

2012-2013 Private Program

129. ***, the Student's private speech therapist, re-evaluated the Student's speech and language needs on May 28, 2013. Ms. *** found that the Student had a profound language impairment in all areas including semantics, syntax, and pragmatics. [P.Ex. 6 at 15; R.Ex. 38 at 1].

130. Around March 2013, the Parents hired *** to provide private ABA therapy in the Student's home. At hearing, Ms. *** testified that she had been certified through a private ABA therapy provider, ***, to provide in-home ABA therapy training as an "ABA therapy tech." Ms. *** had six months of training with *** to work in-home providing ABA therapy. Ms. *** did not recall who issued her certification. [Tr. V:1124-1125; Tr. V:1170-1172].

131. On June 13, 2013, the Parents rejected the proposed Summer 2013 services. Instead, the Parents set up an in-home ABA program for the Student created by *** based on her observations of the Student. The program consisted of seven hours of instruction five days a week over the summer months. The Student's parent reported that Ms. *** upgraded the Student's goals after two weeks of this private program. [P.Ex. 45 at 104(1); R.Ex. 46 at 21; Tr. I:95].

132. From the time the Student left WISD in June 2013 until August 2013, the Student did not have access to non-family member children. The Student was educated at the Student's house with a one-on-one private in-home ABA behavior tech. [Tr. V:1127, Tr. V:1140-1141].

133. *** educated the Student from April 2013 until February 2014 with the private in-home ABA program. During this period, Ms. ***'s only supervision was provided by a consultant doctorate-level BCBA ("BCBA-D"), Dr. **. On July 19, 2013, Dr. ** made a single observation of the Student and noted that the Student demonstrated positive rapport with Ms. **. [P.Ex. 7 at 10-14; Tr. VI:1418-1419, 1427-1429, 1448].

134. Dr. ** and her colleague, Dr. **, prepared an independent FBA evaluation report of the Student. Dr. ** has a PhD in Education with a concentration in special education,

focusing on autism and developmental disabilities. Dr. *** did her dissertation in the area of manding and has worked with students with autism for over 15 years in public and private schools and other contexts. [P.Ex. 44; Tr. VI:1394; Tr. VI:1418-1419].

135. Dr. *** noted only one negative behavior of whining during the Student's independent FBA observation. Dr. *** conducted a mand topography assessment ("MTA") to see the Student response to various communication topographies. Four mand topographies were targeted during the MTA: a) iPad/iPod loaded with Proloquo2go; b) Go Talk One; c) Big Mack Communicator; and, d) signs. The results of the MTA demonstrated that the Student independently manded using the Go Talk, indicating that the Student is able to learn communication topographies very quickly. [P.Ex. 44 at 9 and 11; Tr. VI:1460].

136. Among the conclusions of the independent FBA report, Dr. *** stated that the Student requires a consistent and comprehensive communication system and focused attention on behavioral needs for the Student's educational plan. Dr. *** recommended the consistent availability of assistive technology devices for the Student. [P.Ex. 44 at 12].

2013-2014 Private Program

137. In August 2013, the Student enrolled in a *** program at a private, *** school, *** in ***, Texas. From August 2013 until January 2014, the Student attended the two-day program. One of the conditions of the Student's enrollment at *** was having a trained adult shadow with the Student at all times. [R.Ex. 45 at 3 and 14].

138. When Ms. *** left employment with the Parents in February 2014 to pursue her college degree, the Parents retained a BCBA, ***, and two ABA therapists to work with the Student in the in-home private program. This program included:

***:

- certified special education and general education teacher
- experience in public and private schools with autistic students (around nine years);
- observed the Student for a week prior to the departure of Ms. ***;
- currently working for certification as a Board Certified Associate Behavior Analyst ("BCABA"); and,
- assisted the Student primarily in the *** program.

***:

- began work with the Student in March 2014;
- *** in ***;
- experience working as Play/ABA Facilitator with autistic children; and,
- assisted the Student primarily in the Student's home environment. [P.Ex. 7 at 15-16; Tr. I:97, Tr. IV: 808-811, 883, 1051, Tr. V:1223].

January/February 2014 FIE

139. In January 2014, WISD re-evaluated the Student and issued the written report on February 14, 2014. The FIE was conducted as an "arena" assessment – with all evaluators in the same room as the Student – in *** counseling office. The evaluation included two licensed

school psychologists, a licensed speech/language pathologist, an occupational therapist, an educational diagnostician, interview information from the Parents, and completion of some checklists, rating scales, and an interview by the Student's parent. [P.Ex. 41; R.Ex. 17; Tr. VII:2003, Tr. VII:2006-2009].

140. Mr. ***, a Licensed Specialist in School Psychology with two master's level degrees since 1998, was the lead evaluator. Mr. *** did not know the Student when the Student attended WISD. Mr. *** performs intellectual, academic, and psychological assessment, counseling, autism assessments, behavior consultations, attends ARDC meetings, writes and reviews reports and evaluations, and consults with teaching staff. Mr. *** is able to interpret the psychological testing of students by others. In preparation for the 2014 FIE, Mr. *** reviewed the Student's special education records and existing evaluation information from 2010 and 2011. [P.Ex. 41; R.Ex. 17 and R.Ex. 28 at 19 and 41-43; Tr. VII:2003, Tr. VII:2008-2009, Tr. VII:2012-2013].

141. The 2014 FIE report concluded that the Student continued to qualify for special education as Au and SI, with continued need for OT services. The Student exhibited significant delays in receptive and expressive language, showed some fine motor concerns, and exhibited emotional and behavioral concerns related to autism. Although the Student exhibited delayed adaptive behavior and cognitive ability that was commensurate with prior evaluations, evaluators did not determine qualification of the Student as ID. [P.Ex. 41; R.Ex. 17; Tr. VII:2010-2011].

142. *** is a certified teacher and licensed and certified speech language pathologist with a master's degree in education. Ms. *** has her certificate of clinical competency from the American Speech and Hearing Association. With 26 years of education experience, 24 of which are as a speech pathologist, she has worked throughout her career with autistic students including serving as a Life Skills classroom teacher during her first two teaching years. Ms. *** has been at WISD since 2013. She had formal PECS training and has taught other teachers and paraprofessionals how to use the PECS system, but also observed providers use PECS effectively without formal PECS training. Her duties include delivery of speech therapy and performance of speech and language, in-home, and in-home training evaluations. An in-home evaluation is designed to coordinate home and school environments for benefit of a student. [R.Ex. 28 at 38-40; Tr. VIII:2060-2063].

143. Ms. *** performed the speech/language portion of the 2014 FIE. Ms. *** did not know the Student when the Student was enrolled in WISD. As part of the evaluation, Ms. *** reviewed the Student's 2011 FIE and previous WISD speech IEP goals and objectives. Based on the needs identified in the 2011 FIE, appropriate programming for the Student's 2011 speech and language needs would address the following:

- articulation weaknesses;
 - expressive goals/objectives for verbalization production and encouragement to use ***;
 - goals and objectives to increase vocabulary;
 - functional goals for meeting wants and needs (asking for / commenting on things); and,
 - goals and objectives for following directives and receptive language.
- [Tr. VIII:2071-2072].

144. Ms. *** reviewed the Student's May 2012 goals and objectives for appropriateness for the Student's needs at that time. She noted that the goal calling for progress on acquisition of developmentally appropriate semantic language structures had two objectives. First, the expressive vocabulary objectives required the Student to name things in thematic units and in play, so that it had meaning for the Student. Second, the objective for identification and labeling of quality concepts (size, shape, and texture) encouraged understanding that vocabulary can be categorized. Ms. *** determined that all the May 2012 goals and objectives to appropriately address the Student's areas of need and were presented in a way that had application or meaning to the Student. [R.Ex. 4 at 15-17; Tr. VIII:2076-2079].

145. The Student willingly entered the room for the arena evaluation, but required redirection and focus to complete assessment tasks, including the Stanford Binet Intelligence Scales, 4th Edition ("Stanford-Binet"). On the Stanford-Binet, the Student's overall non-verbal intelligence quotient measured at ***. [P.Ex. 41 at 10; R.Ex. 17 at 10; Tr. VII:2010-2011].

146. The 2014 FIE report included information completed by the Student's parent, including the BASC-2, demonstrating "at risk" scores for Atypicality and Withdrawal on the clinical scale ratings. On the adaptive scales, the ratings showed "at risk" scores on Adaptability and Social Skills. The ratings showed "clinically significant" scores on Activities of Daily Living and Functional Communication. Ratings by the Student's parent on the Autism Spectrum Rating Scales indicated concerns in the areas of social/communication and unusual behaviors. [P.Ex. 41 at 7-8; R.Ex. 18 at 7-8].

147. The 2014 FIE behavioral recommendations for the school setting included: a) a learning environment with highly structured routines; b) association of classroom rules with clearly defined and consistently implemented rewards and consequences; c) limitation of activities for the Student without engagement in activity; d) visual and verbal presentation of material whenever possible with use of a visual schedule; e) encouragement for the Student to complete less appealing tasks by following less preferred activities by more preferred activities by using a specific phrase as an introduction, "First you do (insert less appealing activity) and then we'll do (insert more appealing activity)." [P.Ex. 41 at 8; R.Ex. 17 at 8].

2014 Private Program Development

148. Ms. *** has almost 20 years of experience in ABA-related issues. She began working with the Student on February 24, 2014. Ms. *** met with Ms. *** to review what goals and skills used with the Student. Ms. *** designed a program using the VB-MAPP information available on the Student, data from other ABA facilities that the Student had attended, and her observations of the Student in multiple environments. [P.Ex. 7 at 5-7; Tr. IV:898, Tr. IV:907, Tr. IV:911-916].

149. Ms. *** determined that the Student had a history of elopement, escape behavior, flopping, grabbing, screaming, and tantrums, but did not observe much negative behavior in the initial observations of the Student. [Tr. IV:915-916].

150. Ms. *** evaluated the Student beginning late March for a three-week period, completing her evaluation with a written report issued on April 15, 2014. [P.Ex. 25 at 4; Tr. IV:922-925, Tr. IV:952]. She selected the VB-MAPP as an appropriate assessment tool to allow comparisons with five previous assessments done by other ABA facilities. On the VB-MAPP, Ms. *** believed that the Student had regressed on spontaneous manding between August 2012 and the 2014 evaluation. [P.Ex. 25; Tr. IV:923-924; Tr. IV:946].

151. Ms. *** supervised both Ms. *** and Ms. *** and oversaw their work with the program through observation, telephone calls, and team meetings to coordinate correct implementation of the program. [Tr. IV:920-922].

152. The program for the Student designed by Ms. *** included discrete trial training (“DTT”), a more intensive training that breaks skills down into discrete steps using prompts, errorless teaching, and fading prompts systematically at a table. The program also included natural environment training (“NET”), or training throughout the day in natural environments. The program alternated between times of DTT and NET throughout the day with intense table time instruction for DTT and activities in the natural environment for NET. [P.Ex. 25 at 14; Tr. IV:962-965].

153. Ms. *** developed a BIP for the Student’s private program that focused on two behaviors, elopement and crying/fussing/whining:

Behavior Description	Function	Prevention	Consequence
Elopement: Leaving Assigned Area	Escape	Work for Short Periods Mix Easy/Difficult Tasks Quick Teaching Pace Make It Fun Conduct Preference Assessments* (*if better reinforcers needed)	Bring Student Back to the Room and Complete Original Task
Crying Fussing Whining:	Tired Escape	Teach Student to Ask for Break Teach Student to Use Signs/Words (Instead of Crying, Fussing, Whining)	Student Gets Nothing for Crying, Fussing, Whining

[P.Ex. 25 at 14; Tr. IV:965-900].

April 2014 – Private School and Home Observations

154. Ms. *** and Ms. *** made three observations together in the home and school settings in 2014. Ms. *** did not know the Student prior to the 2014 observations. In the Student’s home program, Ms. *** and Ms. *** observed the following:

- activities appeared to be entirely child led with no evidence of following less preferred activities with highly preferred activities, as suggested by previous evaluation data;
- no requirement for compliance with the therapist’s directions before the Student received given items;
- extensive help given to the Student with eating activities, including being directly fed and food put directly on the Student’s fork. [R.Ex. 30 at 11-16; Tr. VII:1930, Tr. VIII:2059, Tr. VIII:2089Tr. VIII:2125].

155. Ms. *** and Ms. *** did not observe *** in either the home of *** setting. [R.Ex. 30 at 15; Tr. VII:1929-1930, Tr. VIII:2119-2120].

156. Ms. *** and Ms. *** saw no use of visuals during their observations in the Student's home. Visuals can be photos, line drawings, print outs, or can be on an augmentative communication device so long as a student understands the meaning. In the *** program, the Student followed the routine, but there was not a highly structured environment in the Student's classroom and no visuals were used. [R.Ex. 30 at 10-18; Tr. VII:1927-1928,1930, Tr. VIII:2109, 2112, 2117].

157. During the 2014 observations in the *** classroom, Ms. *** observed the Student participate in circle time and successfully use *** previously used by the Student while attending WISD. At times, the Student *** and tried to follow verbal directions, but was not able to do so. [Tr. VII:1933-1935].

158. Errorless learning methods, a preferred method of learning used with ABA therapy, focus on teaching students with the largest number of prompts and “fading out” to the least number of prompts to be able to accomplish a task independently. To avoid students repeatedly practicing a task the wrong way and to avoid losing instructional time, it is important to ensure that a student completes the task without errors each time. [Tr. VII:1922-1925, 1936].

159. Ms. *** and Ms. *** observed the Student make repeated errors during observation at *** when completing matching and handwriting tasks with the Student's therapist. [R.Ex. 30 at 12; Tr. VII:1936-1939].

160. The Student threw a tantrum during the observation of the *** classroom by Ms. *** and Ms. ***. To end the tantrum, the Student's therapist brought a preferred activity to the Student. [R.Ex. 30 at 11; Tr. VIII:2118-2119, Tr. VIII:2125].

161. Ms. *** does not believe the *** program is appropriate to meet the Student's needs. Other students in the Student's *** classroom are age *** and ***, with the Student at age ***, so the Student is not with same-age peers. The *** program does not provide special education services for enrolled students, does not use errorless learning methods on a regular basis, and does not use visual or picture representations. [Tr. VII:1949, Tr. VIII:2112].

162. Not all speech therapists keep data in the same way. As therapists are responsible for making determinations of student progress or lack of progress on goals and objectives, the therapist needs to understand their own data. [Tr. VIII:2106].

163. At hearing, Ms. *** noted that the Student's ability in 2011 to *** through the *** was accompanied by lower language levels in other areas such as grunts, vocal sounds, and gestures. Ms. *** noted that there had been an increase in the Student's skill level between the 2011 and 2014 evaluations, but thought it was not possible for the Student to have made these gains in a short period of months based on her knowledge of students with autism. [Tr. VIII:2166-2167].

May 2014 Private Program

164. At the beginning of May 2014, the Student attended an in-home one-on-one ABA therapy program at the Student's home. The Student also received private speech therapy sessions twice a week and attended the *** program *** three days a week with non-disabled *** and *** year-old students. An ABA therapist shadowed the Student in the *** class at all times to provide one-on-one supervision. [R.Ex. 45 at 3; Tr. I:97-98, Tr. V:1160-1161, Tr. V: 1205-1206].

DISCUSSION

This dispute concerns a student qualified for special education and services due to Au and SI who attended WISD from 2011 until June 2013. At that time, the Parents unilaterally withdrew the Student and chose to continue the Student's education by means of a private educational program assembled by the Parents. This private program includes ABA in-home services delivered by private providers, private speech therapy, and enrollment in a private *** program. The dispute also concerns summer services provided by WISD to the Student in Summer 2012 as well as the summer services offered by WISD – but refused by the Parents – in the Summer 2013.

Petitioner alleges that the WISD program deficiencies would have continued forward into the 2013-2014 school year and beyond, leaving the Parents no choice but to retain private service providers and a private school to provide services to address the Student's needs. Petitioner further alleges that the resulting private program assembled by the Parents delivered a successful program to the Student which culminated in great success for the Student. By contrast, Respondent denies that the Student requires a private program of services delivered through private providers in a home and private school setting in order to access an appropriate education. Respondent believes that the District provided a FAPE to the Student at all times and also offered a FAPE for the services declined by the Parents.

Applicable Law: Free Appropriate Public Education (“FAPE”)

The primary purpose of IDEA is to ensure that all students with disabilities have available a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education,

employment, and independent living.⁴ Students with disabilities are guaranteed a “basic floor of opportunity” under IDEA that includes specialized instruction and related services that are individually designed to provide an educational benefit to the student.⁵

The U.S. Supreme Court established a two-part test for determining whether a school district provided a FAPE to a student under IDEA: 1) did the school district comply with IDEA’s procedures; and, 2) was the IEP reasonably calculated to confer educational benefit to the student.⁶ Under *Rowley*, the U.S. Supreme Court clarified that the IDEA “cannot be read as imposing a particular substantive standard upon the states.”⁷ The educational benefit must be more than a “mere modicum” and not *de minimis*.⁸

The Fifth Circuit established criteria for determining when an educational program is reasonably calculated to provide educational benefit and set out four factors to consider as indicators of whether an educational program is reasonably calculated to provide meaningful benefit:

- The program is individualized on the basis of the student’s assessment and performance;
- The program is administered in the LRE;
- The services are provided in a coordinated and collaborative manner by the key stakeholders; and,
- Positive academic and non-academic benefits are demonstrated.⁹

The Fifth Circuit has not held that the four factors must be applied in any specific way.¹⁰ Instead, the four factors serve as indicators of the appropriateness of an educational program and are intended to guide a court in a fact-intensive inquiry for evaluation of whether an educational program conferred an educational benefit.¹¹

⁴ 20 U.S.C.S. § 1400(d)(1)(A); 34 C.F.R. § 300.1.

⁵ *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189 (1982).

⁶ *Rowley*, 458 U.S. at 176.

⁷ *Rowley*, 458 U.S. at 200.

⁸ *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 246-248 (5th Cir. 1997).

⁹ *Michael F.*, 118 F.3d at 247-249.

¹⁰ *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

¹¹ *Id.*

After the school district officials and parents agree to an IEP, the school district must put the IEP into effect.¹² Failure to implement a material or significant portion of the IEP can amount to a denial of FAPE, but the party challenging the implementation of the IEP must show that the failure to implement was more than a *de minimis* failure to implement all IEP elements. Instead, the challenging party must show that the school board or other authorities failed to implement substantial or significant provisions of the IEP.¹³

In the Fifth Circuit, a student's placement is appropriate if the placement is designed to meet the student's individual needs and includes the services needed for the student to be able to receive a benefit for the instruction even if the placement is not the best placement for the student.¹⁴

A hearing officer must make a determination that a student did not receive a FAPE based on substantive grounds.¹⁵ In matters alleging procedural violations, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child, or caused a deprivation of educational benefit.¹⁶

A school district's educational program is presumed appropriate and the party challenging a school district's eligibility determination or offer of services under the IDEA bears the burden to prove that the child has been denied FAPE.¹⁷ In this proceeding, Petitioner has the

¹² 20 U.S.C.S. § 1414(d)(2)(A); 34 C.F.R. § 300.323; *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012).

¹³ *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000). *See also Corpus Christi Indep. Sch. Dist. v. C.C.*, 59 IDELR 42 (S.D. Tex. 2012).

¹⁴ *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 808, 810 (5th Cir. 2003); *see also Michael F.*, 118 F.3d at 252 (stating that the IEP must be designed to meet the student's individual needs and must include sufficient support services to allow the student to benefit from the instruction).

¹⁵ 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(1).

¹⁶ 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

¹⁷ *Schaffer v. Weast*, 126 U. S. 528 (2005); *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom.*, *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).

burden to show why the IEP and services provided to the Student were not appropriate under IDEA. Petitioner has not alleged procedural violations of IDEA took place or that the District failed to implement substantial portions of the Student's IEP. Instead, Petitioner's alleges that the District used inappropriate methods for implementation of the Student's program. Petitioner's allegations appear to suggest that *more* benefit might have accrued to the Student through small adjustments to the Student's program. Yet, the District is not required to *maximize* the Student's educational potential with any service that might produce a benefit to the Student. Instead, the District is required to deliver a meaningful educational benefit to the Student that is reasonably calculated to produces progress rather than regression or trivial educational advancement.¹⁸

A. Summer 2012 and 2012-2013 School Year

The evidence in this record established that WISD developed the Student's IEPs using assessment data – including the 2011 FIE information and all information provided to the District by the Parents from the Student's physician and speech therapist. The ARDC made determinations that additional data needed to be gathered to make recommendations for the Student's programing, such as an OT assessment and an FBA. The record before me shows that all evaluators – school district and private sector – agreed that the Student had significant speech and language deficits and qualified as a student with autism.¹⁹ The Student had features of an intellectual disability of mild to moderate severity, and might qualify for special education services under the classification of intellectual disability.²⁰

Petitioner alleges that the District ignored a pattern of regression when the Student began the 2012-2013 school year. The Student, however, had only been a student within WISD for one year prior to the beginning of the 2012-2013 school year. At this time after the Student's first school year in the District, WISD could not have evidence that the Student regressed after every year school year.

¹⁸ *Rowley*, 458 U.S. at 176.

¹⁹ P.Ex. 5 at 14-15; R.Ex. 23 at 14-15.

²⁰ P.Ex. 5 at 12; R.Ex. 23 at 12.

Services for Summer 2012 consisted of approximately 54 hours one-on-one services with the Student's familiar teacher, Ms. ***, in a program based on the Student's academic objectives and personal care skills ***.²¹ Ms. *** testified that she knew the Student's functioning to of the end of the Spring 2012 semester and used that information to understand the Student's functioning as of that time period.²² Ms. *** believed that the Student progressed in the program over Summer 2012 and easily transitioned between home and the summer program.²³ During the hearing, the Parents indicated pleasure with the Summer 2012 services provided by Ms. ***.²⁴ The evidence is sufficient to find that the Summer 2012 services were appropriate for the Student.

B. Data Gathering

Petitioner challenges whether the District's personnel gathered data appropriately on the Student during the pertinent period. Petitioner challenges the District's manner of collecting data, presenting testimony and written evidence describing ABA principles for data gathering. In Petitioner's view, the District's data gathered was insufficient, inaccurate, or missing so that the resulting Student's program could not accurately monitor or develop to address the Student's need.

Petitioner's challenges to data collection focus in part on ABA gathering methods of discrete trial training, with allegations that WISD evaluators did not gather discrete trial information on the Student.²⁵ For example, Petitioner points to the failure of Ms. ***, the Student's Spring 2012 classroom teacher, to keep "data" from Summer 2012, and as a result, Petitioner appears to further allege that there was no baseline data available for the 2012-2013 teacher, Ms. ***, to have at the beginning of the school year.²⁶ By contrast, Respondent believes that District staff gathered sufficient data throughout all periods of the Student's program at

²¹ P.Ex. 15 at 33; R.Ex. 4 at 33.

²² Tr. VII:1827.

²³ Tr. VII:1762-1763.

²⁴ Tr. V:1315-1316.

²⁵ Tr. VII:1784, 1790.

²⁶ Petitioner's Closing Argument at 4-5.

WISD in a purposeful and meaningful manner that allowed District staff to make informed recommendations for the Student's program, goals, and objectives.

It is undisputed that the Student received an ABA program of services with private providers prior to enrollment in WISD.²⁷ The testimony and exhibits in this dispute show the Parents continued to provide ABA services to the Student in Summer 2012 but did not share the information from the program with the District.²⁸ Therefore, the District did not have other data about the ABA services at the time of the initial development of the Student's IEP for the 2011-2012 school year. While the May 2011 and May 2012 ARDC meetings are outside the applicable limitations period in this dispute, the decisions at those meetings formed the basis for the Student's program in place for Summer 2012 going forward. Based on review of the genesis of the IEP in place from June ***, 2012, the preponderance of the evidence shows that the ARDC considered the information that WISD had available at the time together with other information from the 2011-2012 school year, including input from staff working with the Student, input from the Parents, school records, the 2011 FIE and the underlying documents reviewed in that evaluation process.

Under IDEA and its implementing regulations, there is no one required manner for a school district's data collection for preparation and review of IEP goals and objectives; information on a student can take a multitude of forms such as observation, evaluation results, educational records, checklists, and a myriad of other possible types of records. The ARDC members who develop, review, and revise a student's program are required to not only consider a student's strengths and the concerns of parents for a student's education, but must consider the results of the most recent evaluation of the student, and the academic, developmental, and functional needs of the student.²⁹ The ARDC must also consider special factors, including positive behavioral interventions and supports and other strategies to address behavior, communication needs of the student, and assistive technology device and service needs.³⁰

²⁷ Tr. VII:1808

²⁸ Tr. V:1296-1298.

²⁹ 34 C.F.R. § 300.324(a)(1); 19 TEX. ADMIN. CODE § 89.1050(a). In Texas, the Individualized Education Program ("IEP") Team is referred to as the Admission, Review, and Dismissal Committee ("ARDC").

³⁰ 34 C.F.R. § 300.324(a)(2).

Although IDEA and its implementing regulations require a "statement of measurable annual goals," it does not require a statement of quantifiable baselines.³¹ Instead, IDEA requires baselines to contain "a statement of the child's present levels of academic achievement and functional performance."³² There is no specification in IDEA as to how baseline data should be collected other than to include a statement of a student's present performance levels.³³

Review of the exhibits and testimony in this record demonstrates that the District included statements of the Student's PLAAFPs in all of the Student's IEPs.³⁴ The hearing testimony from the staff working with the Student explained their adjustments to the Student's program each school year and for the summer programs. These adjustments included reviews of past performance, input from the key stakeholders including the Parents and the Student's providers, and evaluations of the Student.

The Student's Spring 2012 and 2012 Summer teacher, Ms. ***, understood the Student's functioning for Summer 2012 having taught the Student and her written documents from the spring teaching that included progress reports were transmitted to the next teacher.³⁵ I found the testimony of the Student's 2012-2013 classroom teacher, Ms. ***, credible about the manner in which the 2012-2013 school year began, the process of transforming the classroom into a zones, and the process the teacher went through teaching the *** classroom for her one year of service at WISD. Ms. *** described the way she collected information on the Student's daily performance, using "sticky" notes and small pieces of paper for the notations and using the "purple notebooks" with daily behavior information.³⁶ Ms. *** transferred this information into charts and graphs for easier communication of the data with others.³⁷ This information was

³¹ 20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2).

³² 20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320(a)(1).

³³ *Lanthrop R-II Sch. Dist. v. Gray*, 611 F.3d. 419, 427 (8th Cir. 2010) (Finding that IDEA does not mandate specific "baseline" data; instead, IDEA requires a statement of the student's present levels of educational performance and a statement of measurable annual goals, including benchmarks for short-term objectives)

³⁴ *See, e.g.*, P.Ex. 15 at 20, 29, 32, 35, 38, and 40; R.Ex. 1 at 28, 37, 40, 43, 46, and 49.

³⁵ Tr. VII:1825-1826.

³⁶ Tr. I:193-197.

³⁷ *See, e.g.*, P.Ex. 34; R.Ex. 11.

confirmed by Ms. *** and Ms. ***, and Petitioner did not introduce evidence to refute the accuracy of this information.³⁸

Additional daily logs were kept by Ms. ***, the speech therapist, who worked with the Student that tallied successes on speech trials.³⁹ Ms. *** prepared charting and a book on the *** that the Student was working on at school, as well as working with the ARDC to revise all the speech goals in Fall 2012 because of the Student's specific performance progress during speech therapy.⁴⁰ Ms. *** communicated with the Student's private speech provider, Ms. ***, in Fall 2012, again changing the speech goals to align with the private speech therapy goals and progress toward mastery of the goals.⁴¹ Ms. *** also prepared speech goals for the Student's 2013-2014 school year that were presented in the May 2013 ARDC meetings.⁴² I found Ms. ***'s testimony credible and give weight to the observations recorded by Ms. *** during the delivery of speech services to the Student during the 2012-2013 school year.

Petitioner presented evidence from the Student's private providers through testimony and exhibits, including ABA therapist tech ***, ABA therapists *** and ***, BCBA ***, and speech language pathologist **. The hearing testimony of these witnesses described the varied ways in which they collected data and could interpret their own notations about that data regarding a specific entry regarding the Student's progress.⁴³

The District staff that also collected and kept data on the Student could testify from their data regarding whether or not the Student showed progress. Additionally, these witnesses could also from direct recollection testify regarding the Student's overall progress. Taking all the evidence as a whole, I conclude that the District staff used their collected information effectively to inform the Student's programming.

³⁸ Tr. VI:1521-1523.

³⁹ P.Exs. 38 and 39; R.Exs. 13 and 14.

⁴⁰ P.Ex. 11, P.Ex. 14 at 16; R.Ex. 3 at 16.

⁴¹ P.Ex. 14 at 10, 16; R.Ex. 3 at 10, 16.

⁴² P.Ex. 12; R.Exs. 1 and 69.

⁴³ See, e.g., testimony of ABA therapy tech *** at Tr. V:1143-1144 regarding the Student's progress and entries in R.Ex. 68 at 40, 69.

C. Trained Personnel

Petitioner alleges that the WISD staff was not properly trained to work with autistic students, and specifically not with the Student. Petitioner argues that the District trained staff erroneously to reinforce negative behaviors by improperly giving desired items in an effort to calm the Student when the proper approach for the Student would be to give the Student access to the PECS or another communication alternative.⁴⁴ Such approaches, according to Petitioner, did not properly follow the Student's IEP that called for ABA teaching strategies.

Respondent presented written documentation of the credentials of WISD staff and providers. WISD Special Education Director, ***, observed the Student's providers and also gave input and assistance to the development and ongoing review of the Student's IEPs.⁴⁵ Both Ms. *** and Ms. ***, the Student's classroom teachers, had extensive experience working with autistic students.⁴⁶

Respondent also presented extensive testimony concerning the training and consulting efforts made during the 2012-2013 school year when Ms. ***, an expert with 43 years of working with autistic students with training in ABA principles, consulted in the District to set up zoned classrooms within all the *** classrooms and provided training to WISD staff. Specific to the Student's classroom, Ms. *** spent 33.5 six-hour school days with at least weekly visits, inside Ms. ***'s classroom beginning September 2012 through the end of the 2012-2013 school year.⁴⁷ Over the course of the school year, Ms. *** worked directly with Ms. *** during this process, trained District staff, attended and participated in the Student's ARDC meetings during this time and was familiar with the strengths and weaknesses of the Student.⁴⁸ I give great weight to the testimony of Ms. *** after extensive observation and work in the Student's classroom over the course of the 2012-2013 school year that pre-dates the filing of this litigation. Ms. ***'s documentation and observations of the Student and service providers were balanced and detailed.

⁴⁴ Tr. III:695-696.

⁴⁵ Tr. VI:506-508.

⁴⁶ Tr. III:320, Tr. VII:1736.

⁴⁷ R.Ex. 43; Tr. VII:1873-1874.

⁴⁸ Tr. VII:1907.

The specific methodologies that a school district chooses to use are not mandated by IDEA but are left up to the school district, even when a parent's preference is for a specific methodology such as ABA or having a BCBA employed by the school district, and the ARDC must look at the individual needs of a student in development and implementation of the program.⁴⁹ The Parents chose to employ ABA therapists and a BCBA to provide educational services to the Student, but there is no requirement that the District must hire a BCBA to work with autistic students. In fact, the Parents chose to employ a non-certified ABA behavior tech to serve as the Student's teacher that was a high school graduate with ABA training to implement the Student's private program from summer through fall of 2013.⁵⁰

The record evidence and hearing testimony shows that both WISD staff and the consultants working with the Student were appropriately certified and had many years of experience with autistic students using a variety of methodologies that included ABA therapy.

D. Behavior Methods

Petitioner challenges the manner in which WISD dealt with the Student's behavior and believes that the District failed to manage the Student's behavior appropriately without putting a BIP in place while the Student attended WISD. The Parent reported their frustrations regarding the Student's behavior at home and school, reporting that the Student exhibited tantruming, hitting other students, having difficult home-to-school transitions, sleep issues, medication changes, eloping behavior on the playground, and screaming.⁵¹

Respondent defends the District's program regarding the Student's behavior at all times pertinent to this dispute, including the proposed formal BIP ready for implementation by the District at the end of the 2012-2013 school year that would have been operative had the Student

⁴⁹ See *County Sch. v. Z.P.*, 399 F.3d 298 (4th Cir. 2005) (A hearing officer cannot reject a methodology selected by a school district because the hearing officer believes a different methodology would be better for a student. After FAPE requirements are met, the methodology determinations are left to a school district).

⁵⁰ Tr. V:1124-1125; Tr. V:1170-1172.

⁵¹ See, e.g. Tr. I:69, 132; Tr. V:1251-1253, 1255-1260.

returned to school for the 2013-2014 school year.⁵² However, District staff working with the Student during the pertinent period of this dispute repeatedly found that the Student's behaviors were manageable with behavioral goals and objectives in the Student's IEP. By contrast to the behavioral impressions of the Parents, WISD staff working with the Student found that the Student's malbehaviors occurred infrequently, were not chronic, and did not interfere with the Student's learning or the learning of others.⁵³ For example, Ms. ***'s hearing testimony contrasted to that of the Parents regarding three home-to-school transitioning events. On the first transition directly observed by Ms. ***, the parent was arranging the Student's *** in the car and then both the Student and parent walked into the school building. On the second transition, the parent carried the Student in and set the Student down without incident. On the third transition, both the Student and parent walked in together and the Student smiled upon seeing Ms. **. Because these transitions seemed smooth to Ms. **, she offered no additional supports, strategies, or changes to the Student's daily routine.⁵⁴

There is only little evidence in the record to show that the Student exhibited severe behavior problems and if so, they were not evidenced at school. In considering the conflicting views of the Parents and school staff regarding the manageability of the Student's behavior, the preponderance of evidence in this dispute shows that the few behavior problems that the Student demonstrated in the classroom could and were easily redirected. The record before me also established that the ARDC approved an in-home training evaluation, the Parents gave written consent, and the Parents ultimately revoked the consent while the Student attended WISD. The District also previously offered Parental Training, but the Parents did not request the training, so WISD did not provide parental training to the family.⁵⁵

Under IDEA and its implementing regulations, the ARDC must consider the use of positive behavioral interventions and supports, and other strategies, to address a student's

⁵² P.Ex. 12 at 65 and P.Ex. 20; R.Ex. 1 at 73 and R.Ex. 26.

⁵³ See, e.g., Tr. II:380-382, Tr. V:1184.

⁵⁴ Tr. VII:1887-1888.

⁵⁵ See, e.g., P.Ex. 15 at 3; R.Ex. 4 at 3

behavior if the behavior of that student “impedes the [student’s] learning or that of others.”⁵⁶ There was no evidence in this dispute that the Student’s behavior interfered with the learning of other students.

Review of the Student’s behavior over the pertinent period at WISD demonstrates that the Student could be redirected from problem behaviors when those behaviors interfered with the Student’s own learning.⁵⁷ I conclude from the plethora of evidence before me that the District was not required to prepare and put in place a BIP during the Student’s time of enrollment before the prospective development of a proposed BIP that took place in the last part of the 2012-2013 school year.

Turning to the FBA prepared by the District, the Parents requested an FBA to address their concerns about the Student’s behavior during the ARDC process and WISD agreed to complete the FBA by January 31, 2013. I turn to the question of whether the FBA triggered a mandatory BIP development.

First, there is no evidence or allegation that the District removed the Student from the Student’s placement for any time period that might trigger disciplinary requirements of IDEA and its implementing regulations for a mandated FBA after a removal of more than ten days.⁵⁸ Second, state regulations at § 89.1055(e)(4) of the Texas Administrative Code concerning students with autism requires an ARDC to consider “positive behavioral support strategies” that include several options, including “a Behavior Intervention Plan developed from a Functional Behavioral Assessment that uses current data related to target behaviors and addresses behavioral programming.”⁵⁹ This provision suggests that a BIP *may* result from an FBA but does not *require* the development of a BIP. Instead, the provision mandates, however, the use of “positive behavior support strategies” without specifying the format for the strategies.⁶⁰ The ARDC retains flexibility to consider the options that are best for a student. Applying these

⁵⁶ 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i).

⁵⁷ *See, e.g.*, Tr. V:1184, Tr.VII:1947-1948.

⁵⁸ 34 C.F.R. §300.530(d)(1)(ii) (relating to disciplinary removals; no disciplinary removal of any length is a part of this dispute).

⁵⁹ 19 TEX. ADMIN. CODE § 89.1055(e)(4).

⁶⁰ *Id.*

provisions to the current dispute, the ARDC agreed to perform an FBA and did so by January 31, 2013. A claim that the FBA should have been prepared earlier or was not properly conducted fails as the production of an FBA is not required under IDEA or Texas law to develop a BIP. Third, Respondent granted Petitioner's request for an independent FBA and that assessment was completed.⁶¹ The assessor of this report, Dr. ***, does not focus on problem behaviors but instead on mand topography.⁶² This was consistent with the District's FBA process by Dr. ***.⁶³

After consideration of the applicable law, testimony, records, and argument of the Parties, I conclude that the District properly developed the proposed BIP and was ready to implement the BIP by April 2013. However, the decision of the Parents to ultimately withdraw the Student and to refuse to waive the five-day consent for the implementation of the BIP prevented the adoption and implementation of the BIP.⁶⁴

E. IEP Goals

A student's special education program must be reasonably calculated for the student to receive a meaningful educational benefit at the time the educational program is developed.⁶⁵ Whether a student received a "meaningful benefit" must be considered in relationship to a student's potential.⁶⁶ In the dispute before me, the assessment and evaluation of the Student revealed indicators of ID qualification that impact the Student's potential.⁶⁷ As a result, the goals and the measures of progress on the goal objectives are impacted by the Student's limitations.

After review of all the Student's goals and objectives in this dispute through the student's enrollment within WISD in 2011, the IEPs for the Student considered the unique needs of this

⁶¹ P.Ex. 12 at 65, P.Ex. 44; R.Ex. 1 at 73

⁶² P.Ex. 44 at 7-12.

⁶³ P.Ex. 20; R.Ex. 26.

⁶⁴ P.Ex. 12 at 66; R.Ex. 1 at 74.

⁶⁵ *Rowley*, 458 U.S. 176, 102.

⁶⁶ *Council Rock Sch. Dist.*, 109 LRP 64559 (SEA PA 2008) (FAPE provisions are considered in light of the student's ability to learn with slow learning curve appropriate for with cognitive limitations and autistic behavior; citing *In re Educational Assessment of M.P.*, Spec. Ed. Op. 1812 at 7 n. 51 (April 12, 2007)).

⁶⁷ 34 C.F.R. § 300.324; 19 TEX. ADMIN. CODE § 89.1055(a)(4).

Student for ***, visuals, and vocalization by including the Student's strengths in imitation, redirection response, and response to multi-modal language input. The abundant testimony elicited at the due process hearing confirmed that the ARDC considered the Student's responses to issues of transitions and structure before designing a plan that allowed the Student to be more successful in interactions with typically-developing peers. The Student made progress in ***, feeding self, and was able to attend special school programs with other students as well as made progress on communication with a combined approach to language that included ***, vocalizations, and assistive technology devices.⁶⁸

1. ESY Planning for 2012 and 2013

Petitioner challenges the District's approach to summer services for the Student for the 2012 and 2013 summers as not designed to be meaningful or to meet the Student's unique needs. Respondent defends all planning activities for both summer service planning periods as meaningful and specifically designed to meet the Student's needs.

Under the Texas Administrative Code, ESY services must be documented from formal or informal evaluations provided by a school district or parents, and must demonstrate that a student has regressed or is likely to regress in one or more critical skill levels of the student's IEP.⁶⁹ This determination must take place annually, must be individually determined, and must use both the informal and formal evaluations of school districts and parents.

The record before me established the individualized determinations of the Student's need for services for both summer planning periods. The District considered the Student's performance and assessed needs in 2012 and ultimately determined the need for services to transition in different settings and self-help skills for a one-on-one program of services unique for the Student.

During the summer planning period for Summer 2013 services, the Parents wanted more services and were not satisfied with the amount offered by the District. The Parents presented the recommendation of the ABA therapist tech for more services without presenting a basis for

⁶⁸ See, e.g., Tr. II:338-344, Tr. VII: 1826-1827.

⁶⁹ 39 C.F.R. §300.106; 19 TEX. ADMIN. CODE § 89.1065.

the service amount.⁷⁰ Ultimately, the Student did not attend the offered services. I find no violation occurred in the summer planning process for ESY services by the District for either summer. Neither is there evidence that the Student regressed during the 2012-2013 school year in this dispute, as previously discussed. The Student made progress, albeit slow and commensurate with the Student's cognitive abilities in areas addressed by the IEPs including behavior. There were no chronic school malbehaviors at the end of the Spring 2013 semester and the Student's behavior at home also improved without further discussion of sleep issues.

The impact of the summer private services provided to the Student by the Parent's chosen providers is virtually impossible for this Hearing Officer to dissect from the WISD services provided to the Student during the pertinent period and I decline to do so. Regardless of the source of the progress, the Parents confirmed that the Student had made progress in the Spring 2013 semester.⁷¹

2. Other IEPs

As previously discussed, the Student's various IEPs in all areas addressed the Student's unique needs that included behavior, speech, communication, spontaneous communication, use of speech, and delivery of these skills in a skill-building approach that reduced prompts and increased independence. The proposed IEPs for the 2013-2014 year continued this approach and increased expectations gradually for the Student's progress. I find that the Student's IEPs were individualized and measureable at all times pertinent to this dispute.

F. Academic and Non-Academic Benefits

The parties disagree about the benefits the Student made under the District's program in this dispute. As previously discussed, the Parents admit progress was made but wish to attribute the Student's progress to the private programming in Spring 2013. District personnel also agree that the Student progressed. As the party bearing the burden of proof in this dispute, Petitioner failed to meet the burden to prove that the Student did not receive academic and non-academic benefit under the District's program. The evidence before me established that WISD personnel

⁷⁰ Tr. V:1746-1750.

⁷¹ P.Ex. 45 at 91(7)-91(8).

paid attention to and made adjustments for the Student's non-academic needs due to sleep problems, medication changes, and home behavior issues.⁷²

G. LRE for Program Implementation, Private Placement Appropriateness, and Socialization

The Student's *** classroom at WISD afforded the Student the opportunity to interact in an environment in which the Student could be successful in instruction, behavior, communication, and all areas addressed by the Student's special programming. This program also included opportunities for socialization with non-disabled peers of the same age. The record before me shows that the Parents did not have an issue with this placement until May 2013 – immediately before removing the Student from WISD for private schooling.

The Student's private program is an in-home program with interaction in the *** setting with non-disabled students who are younger than the Student. The Student has a constant adult shadow at all times. Petitioner provided credible evidence of the expertise of the most recent home providers in the private program with Ms. ***, Ms. ***, and Ms. ***. I found their testimony sincere and credible about the current services they deliver in the private program that was revised in March/April 2014 that are tailored to the Parents' choice of ABA methodology. By contrast, the earlier programming by the ABA therapist tech in the Student's private program was not provided by a credentialed teacher and lacked true oversight for the high school graduate ABA therapist tech during the period of Summer 2013 through Fall 2013.

While Petitioner argues that developmentally, the *** children in that program are at the same level as the Student, the Student previously was with same-age peers while in WISD and was moving towards demonstrated independence in settings like the cafeteria on tasks such as self-feeding.

Based on the evidence in this record, I do not find that Petitioner met the burden to prove that WISD's program failed as the LRE for the Student.

H. Coordination and Collaboration of Key Stakeholders

⁷² Tr. I:133-135.

The large record before me of testimony and exhibits fails to support Petitioner's contention that the program was non-collaborative. At all times during the Student's education at WISD, the Parents have been fully included in meetings, given updates, had the opportunity to talk with WISD staff working with the Student, and gave input into the process by voicing and writing their concerns, bringing private providers to ARDC meetings, receiving approval for observation of the WISD classroom by their chosen evaluator, and the like. Petitioner fails to meet the burden to prove otherwise.

CONCLUSION

After review of every document in evidence in this record, review of the lengthy transcript, and careful consideration to the argument of the parties in their written closings, I do not find that Petitioners met the burden to prove that the program offered by the District was inappropriate.

I conclude, based on the abundant evidence before me, that the Student received an individually-designed program that addressed the Student's needs due to disability areas of Au and SI as developed in Spring 2012 for Summer 2012, Fall 2012, and Spring 2013. The plan was developed with current assessment, information and data concerning the Student and addressed the services needed to receive a benefit under this program for as well as the Student's academic and non-academic settings. This program was developed by the key stakeholders and was administered in the LRE appropriate to meet the Student's needs and delivered educational benefit to the Student during these periods.

I further conclude that the proposed program designed in May 2013 for implementation in Summer 2013 and the proposed 2013-2014 program were also designed to provide educational benefit to this Student through IEPs for all areas of need that were based on performance, input of all stakeholders, and the Student's present performance. Petitioner did not meet the burden to prove that the Student's campus provided an inappropriate or unsafe environment and the Student made progress at the end of the

2012-2013 school year in an environment that continued to be least restrictive for the Student.

Accordingly, I deny all relief to Petitioner.

Conclusions of Law

1. Respondent is the local educational agency responsible for determining the Student's eligibility for special education and related services under the IDEA. 20 U.S.C. §1400, *et. seq.*, and its implementing regulations.
2. Petitioner, as the party who challenged the school district's eligibility determination or offer of services under the IDEA, bears the burden to prove that the Student has been denied a FAPE in the summer of 2012, the 2012-2013 school year, proposed programming for summer of 2013, and the 2013-2014 school year. *Schaffer v. Weast*, 126 S.Ct. 528 (2005); *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom., Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); 34 C.F.R. § 300.101.
3. Petitioner bears the burden to prove an entitlement to reimbursement for private school placement and also bears the burden to establish that the private school made an appropriate education available to the Student. *Sch. Comm. of Burlington v. Dep't of Edu.*, 471 U.S. 359. 369-370, 105 S.Ct. 1996, 202-203 (1985); 34 C.F.R. § 300.148.
4. The IEPs developed and implemented by the District were appropriate and provided an educational benefit to Petitioner. The IEPs developed by the District for implementation in the summer of 2013 and 2013-2014 school year, including the Student's BIP, were calculated to provide the Student with a meaningful educational benefit. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 246-248 (5th Cir. 1997); 34 C.F.R. §§ 300.117, 300.320(a), 300.323, 300.324; 19 TEX. ADMIN. CODE §§ 89.1050(a), 89.1055(a)(4), (e)(4).
5. The IEPs in place for the summer of 2012 and the 2012-2013 school year met the *Michael F.* factors. They were reasonably calculated to confer educational benefit to the Student if the District had been given the opportunity to implement the IEPs. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 246-248 (5th Cir. 1997); 34 C.F.R. §§ 300.16, 300.117, 300.320(a), 300.323, 300.324; 19 TEX. ADMIN. CODE §§ 89.1050(a), 89.1055, 89.1065.
6. Respondent provided services in a coordinated and collaborative manner by key stakeholders to address concerns of Petitioner. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 246-248 (5th Cir. 1997); 34 C.F.R. §§ 300.322, 300.324; 19 TEX. ADMIN. CODE §§ 89.1050(h), 89.1055(e).

7. Petitioner received academic and non-academic benefits under the District's educational program that included programming to address the Student's need for socialization. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 246-248 (5th Cir. 1997); 34 C.F.R. § 300.324; 19 TEX. ADMIN. CODE § 89.1055(e).
8. The LRE in which to educate the Student was in the *** classroom while the Student attended WISD, and now is the self-contained special education classroom. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 246-248 (5th Cir. 1997); 34 C.F.R. § 300.114, 300.115, 300.116.
9. Petitioner has not carried the burden of proof on any issue in this dispute.
10. All relief requested by Petitioner is denied.

ORDERS

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

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

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

Signed this 27th day of October 2014.

/s/ Mary Carolyn Carmichael

Mary Carolyn Carmichael
Special Education Hearing Officer

NOTICE TO THE PARTIES

This Decision of the Hearing Officer is a final and appealable order. Any party aggrieved by the findings and decision made by the Hearing Officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 34 C.F.R. §300.516; and 19 TEX. ADMIN. CODE §89.1185(n).

DOCKET NO. 251-SE-0613

STUDENT, b/n/f/ § BEFORE A SPECIAL EDUCATION
PARENT and PARENT, §
Petitioner §
v. § HEARING OFFICER FOR
WALLER INDEPENDENT §
SCHOOL DISTRICT, §
Respondent § THE STATE OF TEXAS

SYNOPSIS OF DECISION

1. Whether the District denied the Student a free appropriate public education that resulted in harm to the Student, significantly impeded the Parents’ opportunity to participate in the decision-making process, and/or caused a deprivation of educational benefits?

HELD: For the District

34 C.F.R. § 300.101.

Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 188-189 (1982); *Schaffer v. Weast*, 126 S.Ct. 528 (2005); *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff’d on other grounds sub nom., Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

2. Whether the District developed an individualized education program (“IEP”) in the summer of 2013 and 2013-2014 school year based on assessment and performance that included: a) Proper data gathering; b) Personnel specifically trained to work with autistic students; c) Proper behavior intervention plan; and, d) Meaningful IEP goals?

HELD: For the District

34 C.F.R. §§ 300.117, 300.320(a), 300.323, 300.324;

19 TEX. ADMIN. CODE §§ 89.1050(a), 89.1055(a)(4), (e)(4).

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

3. Whether the District developed an IEP for the summer of 2012 and the 2012-2013 school year based on assessment and performance that included: a) Proper data gathering; b) Personnel specifically trained to work with autistic students; c) Proper behavior intervention plan; and, d) Meaningful IEP goals?

HELD: For the District

**34 C.F.R. §§ 300.106, 300.117, 300.320(a), 300.323, 300.324;
19 TEX. ADMIN. CODE §§ 89.1050(a), 89.1055, 89.1065.**

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

4. Whether the District administered the Student's program in the least restrictive environment?

HELD: For the District

34 C.F.R. § 300.114, 300.115, 300.116.

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

5. Whether the District provided educational services in a coordinated and collaborative manner by key stakeholders to address concerns of the Parents?

HELD: For the District

34 C.F.R. §§ 300.322, 300.324;

19 TEX. ADMIN. CODE §§ 89.1050(h), 89.1055(e).

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

6. Whether the Student received academic and non-academic benefits under the District's educational program, including a social skills plan?

HELD: For the District

34 C.F.R. § 300.324;

19 TEX. ADMIN. CODE § 89.1055(e).

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