

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

DECISION OF HEARING OFFICER

Petitioner *** (the Student), by next friend *** (Father) and *** (Mother) (collectively, Petitioner) requested an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 *et seq.* The respondent to the complaint is the Killeen Independent School District (District). Based on the evidence the Hearing Officer finds that the District violated IDEA in that it failed to evaluate, and properly address, the behavioral issues experienced by the Student. For this reason, the District failed to provide a Free Appropriate Public Education (FAPE) and the Hearing Officer orders appropriate relief

I. ISSUES

In Order No. 7, issued on June 26, 2015, the Hearing Officer directed the parties to confer and submit a list of agreed issues remaining and the relief sought. In response, and in the post-hearing written closing arguments, the parties identified the following issues addressed in the hearing as a denial of a FAPE:

- (1) Did the District fail to devise an appropriate Individual Education Plan (IEP) for the Student;
- (2) Did the District implement the Student’s IEP as written or change the IEP without parental input;
- (3) Did the District appropriately evaluate the Student;
- (4) Did the District comply with the Student and parents’ procedural rights;
- (5) Did the Student suffer bullying such that Student was denied FAPE; and
- (6) Did the District deny the parents an Independent Educational Evaluation (IEE)?

The Petitioner also submitted two additional issues which were not agreed to by the District:

- (7) Was Petitioner's due process hearing request filed in bad faith; and
- (8) Did the District obstruct an observation and evaluation by a provider?

As far as relief requested, at the hearing and in closing arguments, Petitioner asserted that, in the event that the District is found to have denied the Student FAPE, the District should be ordered to pay for private services and placement; pay for related services of weekly occupational therapy, speech therapy, and Applied Behavior Analysis (ABA); pay for the IEE provided by ***, Ph.D.; and pay for miscellaneous expenses such as mileage. The District denies that it failed to provide the Student FAPE.

II. PROCEDURAL HISTORY AND JURISDICTION

Petitioner filed a Request for a Due Process Hearing (Complaint) on February 6, 2015, with a subsequent Complaint containing two additional allegations filed on April 24, 2015. An Order of Consolidation was entered by the Hearing Officer on April 27, 2015. The parties requested a continuance of the hearing and extension of the decision date to accommodate scheduling conflicts and to allow sufficient time for the parties to conduct discovery. This request was granted for good cause. The parties attended a resolution session, which was unsuccessful. The parties also participated in mediation in June 2015. The mediation was unsuccessful.

The hearing was held July 8-10, 2015, in Killeen, Texas. At Petitioner's request, the hearing was open to the public. Petitioner was represented by attorneys Dorene Philpot and Yvonnilda Muñiz. The District was represented by attorney Holly B. Wardell. At the conclusion of the hearing, the parties requested an extension of the decision deadline to allow time for the preparation of a transcript and written closing arguments. This request was granted for good cause. Accordingly, the decision deadline was extended to September 14, 2015. This Decision was timely issued and forwarded to the parties on or before September 14, 2015.

Because a due process hearing must be requested within "one year of the date the complainant knew or should have known about the alleged action that serves as the basis for the request," pursuant to 19 Texas Administrative Code § 89.1151(c), the one-year statute of limitations began on February 6, 2014, or one year preceding the Complaint filed on February 6, 2015. Therefore, any discussion in this decision of events occurring prior to February 6, 2014, is for background purposes only.

III. SUMMARY OF DECISION AND APPLICABLE LAW

A. Summary of Decision

The Student is ***-year-old student with autism (primary disability) and speech impairment (secondary disability). Until ***, Student was enrolled in *** in Killeen. It is undisputed that the Student has limited communication skills: Student's ability to *** and respond to speech is intact, but Student has difficulty communicating by speech. As a result, Student *** to communicate with Student's teacher, but had difficulty interacting at school with Student's *** peers or other educational personnel.

Petitioner asserts that the Student's IEPs have not facilitated an effective plan to accommodate Student's communicative and academic skills. Petitioners cite the District's refusal to *** the Student *** so that the Student can receive direct *** instruction, and the District's failure to conduct evaluations to identify the source of, and goals related to, the Student's communicative struggles.

Petitioner also claims that, as a result of not addressing the communication issues, the Student has developed behaviors that impede Student's learning. In particular, Petitioner maintains that the District should have provided a Functional Behavioral Assessment (FBA) to identify the source of the problem behavior and a Behavioral Intervention Plan (BIP) to devise behavioral redirection strategies. Petitioner has paid for private ABA therapy and related services.

The District counters that the Student's IEP, developed collaboratively with the Admission, Review, and Dismissal (ARD) committee (ARDC), appropriately executes a strategy of ***, referred to as "****," that employs various ***. The District also maintains that *** would be counterproductive to Student's speech abilities because Student is ***, and that appropriate evaluations and related services have been provided by the District. The District also points out that its request for further evaluations, and review of the IEP, for the upcoming school year has been rejected by the parents. Both parties agree, however, that these issues have resulted in a breakdown of communication between the parents and the District. The Student is now enrolled in a private placement.

Based on the evidence, the Hearing Officer finds that the Petitioner has met the burden of proof to show that the District did not provide FAPE in that the District failed to properly evaluate, and address, the Student's maladaptive behavior of ***. Instead, District Staff chose an inappropriate method to impede the behavior: ***, in an effort to prevent the child from ***. The evidence showed the Student's ***. Eventually, the Mother filed

a complaint with Child Protective Services (CPS) and a grievance with the *** principal. Under the circumstances, the District should have provided an FBA and designed a BIP in a collaborative manner, so that the underlying issues could be addressed. The failure to do so denied the Student FAPE.

In all other areas, however, the Petitioner failed to meet the burden of proof that the District did not provide FAPE in regards to the Student's communication and other issues as raised in the Complaint.

B. Applicable Law

The primary purpose of IDEA is to ensure that all children with disabilities have available to them FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.¹ IDEA guarantees a student with a disability a "basic floor of opportunity" consisting of specialized instruction and related services that are individually designed to provide the student with an educational benefit.² The educational benefit must be more than a "mere modicum" and not "de minimis."³

The Fifth Circuit has established a four-factor test to determine whether the school district's educational program meets this standard in providing the student with a free, appropriate public education under the IDEA.⁴ Those four factors are: (1) was the program individualized on the basis of the student's assessment and performance?; (2) was the program administered in the least restrictive environment?; (3) were the services provided in a coordinated and collaborative manner by key stakeholders?; and (4) were positive academic and non-academic benefits demonstrated by the program?⁵ These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program.⁶

A petitioner who challenges the school district's eligibility determination or offer of services under the IDEA bears the burden to prove that the child has been denied FAPE.⁷ However, the burden of proof is shifted in

¹ 20 U.S.C. § 1400(d)(1)(A).

² *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89 (1982).

³ *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 246-48 (5th Cir. 1997).

⁴ 118 F. 3d at 247-248.

⁵ *Id.*

⁶ *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

⁷ *Schaffer v. Weast*, 546 U. S. 49 (2005).

regard to issues related to a parental request for an IEE. In this case, Petitioner requested an IEE. Under 34 C.F.R. § 300.502(b)(2), the District must either cover the cost of the IEE or file a due process complaint to show that its evaluation was appropriate.

IV. FINDINGS OF FACT

Based upon the evidence and argument of the parties, the Hearing Officer issues the following findings of fact.

1. The Student, date of birth of ***, resides with Student's parents in the boundaries of the District.
2. The District is a political subdivision of the State of Texas and is responsible for providing Student a FAPE in accordance with IDEA, 20 U.S.C. § 1400, et seq., and the rules and regulations promulgated thereto.
3. When Petitioner's Complaint was filed on February 6, 2015, the Student was attending the *** in the District.
4. On ***, the Student was diagnosed with Autistic Disorder by ***, Ph.D., with ***, based on the Autism Diagnostic Observation Schedule Module 1. Pet. Ex. 3 at 1-2. Dr. *** noted that the Student had communication weaknesses including a lack of ***, ***, facial expressions, and ***. *Id.* at 3.
5. The District determined the Student was eligible for special education and related services under the IDEA as a child with Autism and a speech impediment. Resp. Ex. 10 at 1.
6. In ***, *** was the teacher for the *** class and had the Student in her class. She characterized Student as a very happy and social child, who was non-aggressive and compliant, and demonstrated very strong receptive skills of listening to and responding to *** *** words. Tr. at 451.
7. Ms. *** found the Student to be within the realm of normal intelligence and not low-functioning intellectually. Tr. at 469.

Evaluations and ARD meetings

8. In the *** years that Petitioner attended ***, *** ARD meetings were held to develop and review Student's IEPs: ***, and ***. Resp. Exs. 1-6. A full individual evaluation (FIE) for the Student was completed in ***. Resp. Ex. 10.

*** FIE

9. The *** FIE occurred when the Student was *** years old and *** (***) to *** in the District. The reason for the FIE was that the Student was non-verbal, with behavior and sensory issues. Resp. Ex. 10 at 1. The evaluation showed that the Student exhibited a severe language impairment, which adversely affected Student's educational functioning and social communication skills. The speech therapist noted that the Student's oral mechanisms were found to be adequate for speech production, i.e. no physiological

problems were observed, but the Student's speaking fluency, articulation and vocal quality could not be evaluated. *Id.* at 9. Student's cognitive functioning scores were delayed for adaptive behavior, social-emotional, and communication but average for the physical domain scores. *Id.* at 12.

10. The Student was also considered nonverbal, used *** interact with others, did not *** with others, and ***. Student used ***. Student did not ***. Student did not ***.
11. Student presented with a delay in all areas of receptive and expressive language. Student's strength was the ability to express different ***.
12. The FIE recommended behavioral interventions and strategies consisting of structured supportive setting with a high emphasis on communication skills, a small class size with increased staff-to-student ratio, and frequent one-on-one instruction or *** on certain tasks in order to stay on task. Resp. Ex. 10 at 21.

***** ARD**

13. An initial ARDC meeting was held in *** to review the FIE and implement Student's educational program. Pet. Ex. 8. The ARDC determined that Student's *** communication was *** and Student *** what Student wanted. *Id.* at 8. The IEP goal was to increase receptive and expressive language skills. *Id.* at 3. The IEP, however, did not contain a goal to teach the Student ***. Tr. at 107, 109.
14. The *** IEP noted that the Student had difficulty expressing Student's needs, interacting with others, responding to oral instructions, and did not appear to be interested in games or other children. Pet. Ex. 8 at 4. The ARDC recommended sensory breaks, physical prompting, use of incentives, adaptive materials, and non-verbal prompts. Pet. Ex. 8 at 17.
15. The *** IEP established that speech and occupational therapy was necessary. Pet. 8 at 23. The Student was scheduled to receive speech therapy (ST) for three 30-minute sessions every 4.5 weeks, and occupational therapy (OT) for four 15-minute sessions every 9 weeks.
16. The District's Special Education Coordinator, ***, considered it appropriate that the *** IEP did not contain goals for ***, a recommendation for Extended School Year Services (ESY), a recommendation for a sensory evaluation, or more extensive OT or ST services because the Student was *** and it was not known what Student's needs were at the time. Tr. at 113, 116-118, 120.

***** ARD**

17. In ***, a revision ARDC meeting was held, at Petitioner's request, to consider ESY. Pet. Ex. 9 at 1. The ARDC concluded that ESY was not needed because the Student was expected to recoup previously mastered skills within a reasonable time after school resumed. *Id.* at 30. The records reviewed by the ARDC showed that, at that time, the Student was performing at appropriate age or grade level for language arts, reading, math, science and social studies, but performing at a delayed level with language and communication and behavioral and emotional development. *Id.* at 8-12.
18. The IEP progress reports from the *** school year indicated that the Student had progressed towards mastery of the goals related to appropriate ***. Student also made progress with Student's motor skills such as *** without staff support.

***** ARD**

19. In ***, an annual ARD meeting was held. Pet. Ex. 10. Speech continued to be an issue. The committee noted that the Student was using at least *** in the classroom, including ***; Student was learning ***; and Student was ***. Student was also using the *** (***) *** Student needed or wanted. Student's verbalization skills continued to lag, however, and Student was only able to articulate *** in the classroom. *Id.* at 5.
20. The goals and objectives indicated that the Student would be encouraged to communicate using ***. Pet. Ex. 10 at 12. The Student would also use ***, would use ***, and would stay in Student's assigned area with a minimum of staff support. *Id.* at 12-14.
21. The ARDC recommended an Assistive Technology Evaluation. Pet. Ex. 10 at 16.
22. ***. Pet. Ex. 10 at 20. ***. *Id.* at 22.
23. A formal *** was not necessary in *** because the Student was receiving *** instruction from Student's teacher, ***, as well as other *** such as ***, words, and assistive technology. Tr. at 124-125.
24. Concerning the Student's behavior, the ARDC noted that the Student exhibited oppositional behavior and had trouble working independently. Pet. Ex. 10 at 6. Student was frustrated when the appropriate way to ***. Student struggled with attention and staying on task. *Id.*
25. Although Ms. *** observed the Student *** and she attributed this behavior to sensory overload, there is no indication that this was discussed at the *** ARD meeting. Tr. at 451-52.
26. Ms. *** used her own plan to deal with the Student's ***. Ms. *** helped the Student calm down and redirected Student to ***, but Student would *** instead when Student did not want to comply with her direction. Tr. at 452, 454-55. No FBA or BIP was discussed, recommended, or completed.

***** ARD**

27. The *** ARDC meeting discussed the Assistive Technology (AT) Team Evaluation Report (AT Report) dated ***.
28. The AT Report recommended that the Student continue in an environment with multiple opportunities to communicate, that the Student would benefit from a ***, and that the Staff should support these strategies. Resp. Ex. 12.
29. The *** ARDC recommended preferential seating and ***. Resp. Ex. 12 at 14.
30. Although it was not specifically stated in the ARD report, Ms. *** trained personnel in the District on the ***. Tr. at 144.

***** ARD**

31. The *** ARDC meeting was held to address parent frustration that the ***-year-old Student was not able to communicate with Student's parents. Pet. Ex. 12 at 11.
32. The ARDC reported that the Student had relative strength in receptive skills as compared to Student's expressive skills. Student was receptively able to identify ***. Student showed interest in ***, was able to ***, and was able to ***. Pet. Ex. 12 at 13.
33. The Student's special education teacher, ***, attended the *** and *** ARDC meetings. She presented updated IEP goals and objectives based, in part, on the Student's individual performance on the Brigance assessment, a standardized assessment tool that assesses individual students' skills in areas such as social, emotional, behavioral, academic, cognitive, speech and language, physical, fine motor, and gross motor development. Tr. at 523. The ARDC committee approved goals and objectives in the areas of social skills, reading and writing, self-help, math, and speech-language. Pet. Ex 12 at 7-9.
34. The ARDC considered the parents' request to provide *** instruction to the Student, as Student's ***. Pet. Ex. 12 at 36. The ARDC declined because the Student had no ***, and *** were the best method to facilitate learning. The ARDC recommended that the Student continue with verbal and nonverbal communication and AT. *Id.* The ARDC also considered the request to place the Student in the *** class. *Id.* The ARDC declined because the Student was *** and benefited from the "language-rich" *** classroom.
35. The ARDC committee also declined the request to increase OT services because current data indicated that current OT consult was sufficient for FAPE. The ARDC also declined ESY services. Pet. Ex. 12 at 36
36. Parents disagreed with the ARD meeting and another ARD was scheduled.
37. Although the Student was continuing to ***, and the teacher was aware of the behavior, no discussion of an FBA or BIP was discussed.

***** ARD**

38. The ARDC continued discussion of *** placement. The ARDC informed the Mother that the Student ***. Resp. 1 at 27. Ms. *** reported that she *** in the classroom. *Id.*
39. As for communication, the ARDC considered the Mother's request for *** but "as [the Student] is ***, that *** with [the Student] are the best methods to facilitate learning at this time. [The Student] will continue to receive verbal and nonverbal communication, as well as assistive technology to increase Student's communication abilities." Resp. Ex. 1 at 27. The ARDC approved ESY.
40. Ms. *** was providing a form of *** instruction in that when she was ***, she was ***. Tr. at 86.
41. IEP progress reports from the *** school year indicate that the Student was making progress in all areas.
42. The Student's IEP progress report for the first grading period indicated that Student mastered Student's self-help goals of *** without prompting. The Student needed continued practice and instruction in

participating in daily routine activities, including staying in assigned area with minimum staff support and attending to task. Student needed support with *** but was able to ***. Resp. Ex. 17 at 535.

43. The Student's IEP progress report for the second grading period of the *** school year addressed the Student's progress on the new goals and objectives adopted by the ARDC the *** ARD meetings. The report indicated that the Student had mastered one objective, was progressing on seven of Student's objectives, and was maintaining skill level on three objectives. Resp. Ex. 17 at 535-536.
44. The Student's IEP progress report for the third grading period of the *** school year indicated that the Student had mastered two objectives, was progressing on eleven of Student's objectives, and was maintaining skill level on two objectives. Resp. Ex. 17 at 537-538.
45. Ms. *** did not think that an FBA or BIP was necessary because the pattern of behavior had to be continual or constant and to a high degree. Tr. at 89-91.
46. ***'s individual plan to deal with the ***. This reaction to the Student's behavior interfered with the Student's ability to learn because Student became even more distracted by ***.

Dr. *'s *** IEE**

47. In ***, the Mother notified the District that she was requesting an FIE and for the District to pay for the FIE. In the request, the Mother stated that "we noticed that *** during the day at school" Pet. 22 at 46.
48. ***, the special education coordinator, sent the Mother a letter, dated ***, stating that "[the District] will approve your request to provide funding for an independent Full Individual Evaluation, including IQ and achievement for [the Student]."
49. The letter explained the FIE criteria and provided a list of four individuals that met the same credentials as the District assessment staff. A form was attached that listed the four individuals, along with a block marked "other." The letter stated that the Mother would need to return the enclosed form so that the District staff could make the final arrangements and complete a contract with the person selected.
50. On ***, Mother sent an email to Ms. *** requesting ***, Ph.D., for the evaluation. Dr. *** had performed some work regularly 3 or 4 years ago for the District. There was no question raised by the District that Dr. *** met the qualifications.
51. A contract was not drawn up by the District, although the District staff assisted Dr. *** to arrange a time for observation of the Student. Dr. *** was able to schedule and complete the FIE on ***.
52. Dr. *** submitted a bill for *** and the bill has not been paid. The scores for the IQ and achievement were not reported in the FIE report, although Dr. *** had billed for testing.
53. Dr. *** reviewed school records and previous assessment documents, interviewed the Student's parents, and observed the Student for a total of 12 hours at home and school.

54. Dr. *** found that the Student had strong short-term nonverbal memory as measured through recognition of objects; Student's nonverbal reasoning skills were well above average; and Student's overall visual perceptual matching, spatial orientation and fine motor coordination were average. Student's capacity to learn depends on modality of presentation and the nature of the material but ranges from low average to above average. Tr. at 182. She also concluded that there was no reason to believe that Student could not become a verbal communicator, but *** could facilitate that development ***. Tr. at 226.
55. Dr. *** recognized that the Student's greatest weakness was Student's receptive language skills but Student's vocabulary was actually strong, suggesting that Student is well able to learn, and that cognitive limitations are not holding Student back. Tr. at 182. She found the primary barrier to the Student's progress was Student's communication skills and recommended that Student's education program be focused on Student's communication skills with an organized, recognized and consistent instruction in ***. Tr. at 183-84, 189. She acknowledged that the Student is capable of learning and Student was initiating opportunities to communicate. Tr. at 184.
56. Dr. *** found that the Student's behavior of *** was maladaptive behavior. Tr. at 190-91. The solution of the school employees to *** made it inconvenient for Student to engage in the behavior, but the better practice would have been to evaluate the reason for the behavior so that it could be addressed. Tr. at 192. She recommended an FBA, which would have identified and evaluated the behavior and suggested alternative methods to meet the Student's needs. Tr. at 192-93. She also recommended a BIP that would be part of the IEP, which could be periodically evaluated. Tr. at 193-94.
57. Dr. ***'s report does not recommend private placement, because at the time of the report in ***, only education through the District was considered.

Communication Issues

58. As to the communication issues raised in the Complaint, Petitioner, as the party challenging the educational plan provided to Student, did not meet its burden of proof that the District failed to provide FAPE by establishing that 1) the District failed to comply with the procedural requirements of IDEA, or 2) the District failed to design and implement a program that was reasonably calculated to enable Petitioner to receive educational benefits.
59. Ms. *** was able to communicate with the Student using many modalities: ***, ***, ***, ***, ***, and ***. Tr. at 459, 460-62.
60. The Student's receptive skills were one of Student's strongest attributes and there was no evidence presented that the Student was ***.
61. Although the Student's IEP did not contain a *** instruction plan, Ms. ***'s level of *** was sufficient to meet Student's needs. Tr. at 463, 489-90.
62. ***'s credible testimony established that she had used *** and *** with the Student every day. She fostered the Student's ***, ability to work in a group setting and participate in activities, and ability to work on assigned tasks. She used ***, ***, ***, ***, ***, and *** to a limited degree, as well as ***.

63. The District developed an appropriate individualized program that provided the Student with the communication tools, i.e. *** and other forms of communication, that Student needed to show progress both academically and functionally.
64. ***, the Student's speech therapist through the District, was also part of the individualized plan of communication assistance provided to the Student. Her research indicated that an individualized program that was best for the Student would not include *** because the Student could *** and received instruction by listening and following directions. Tr. at 831.
65. The District's educational program was administered in the least restrictive environment.
66. As far as speech, ***, and multi-modality teaching, the educational program services were provided in a coordinated and collaborative manner by key stakeholders.
67. The Student had demonstrated academic and nonacademic progress in the area of communication.

Behavioral Issues

68. Petitioner has met the burden of proof to show that the District did not provide FAPE in only regard: the District failed to properly evaluate, and address, the Student's maladaptive behavior of ***.
69. Although District employees were aware in *** that the Student was exhibiting problem behavior, such as ***, the District did not provide, nor did the ARDC discuss or request, an FBA to identify the purpose of, and address, the problem behavior, nor did the ARDC collaboratively discuss or propose a BIP. Tr. at 737.
70. District Staff chose an inappropriate method to impede the behavior: ***, in an effort to prevent the child from ***. The Student's ***.
71. The Mother filed a complaint with Child Protective Services (CPS) and a grievance with the *** principal.
72. After the complaint and grievance were filed, the conflict between the Mother, the Student, and the teacher became so negative that the teacher ***.” ***.
73. The friction between the parents and the District staff affected the objectivity of the educational program administered to the Student, including the plan for future services through the skills program, which resulted in educational harm.
74. The teacher's recommendation for placement in the skills class despite the Student's academic achievements, the teacher's ***, and the friction and lack of communication with the school staff, were all shown to have affected the delivery of meaningful educational benefits, which ultimately motivated the parents to remove the Student from the District and enroll the Student in a private placement.
75. Under the circumstances, the District should have provided an FBA and designed a BIP in a collaborative manner, so that the underlying issues could be addressed. The failure to do so denied the Student FAPE.

V. DISCUSSION

The evidence basically focused on two fundamental issues: First, has the District denied the Student FAPE by failing to devise and implement an IEP that provided the Student meaningful communication strategies, namely *** instruction and *** communication, enabling Student to progress academically and interact with teachers and peers? Second, did the Student develop or exhibit maladaptive behavior that was not properly evaluated and addressed in Student's IEP such that it interfered with the Student's education and denied the Student FAPE?

In the hearing, Petitioner offered 45 exhibits that were admitted into evidence, and Respondent offered 34 exhibits that were admitted into evidence. The following witnesses testified:

- ***, the District special education coordinator for various District campuses;
- ***, Ph.D., a neuropsychologist who evaluated the Student;
- ***, a board-certified associate behavior analyst, who provided private services for the Student;
- ***, former *** aide for the Student's *** Teacher;
- ***, former instructional aide for the Student's *** Teacher;
- ***, former substitute aide for the Student's *** Teacher;
- ***, *** teacher at *** and ***;
- ***, the Student's *** Teacher, who teaches ***;
- ***, the Student's *** Teacher, who teaches ***;
- ***, special education resource specialist and advocate;
- ***, licensed specialist in school psychology (LSSP) with the District;
- ***, LSSP with the District;
- ***, former special education coordinator with the District;
- ***, a speech/language pathologist with the District; and
- Mother

A. Original Evaluation and * Class**

On ***, the ***-year-old Student was first diagnosed with Autistic Disorder by Dr. *** with ***.⁸ Dr. *** noted that Student had communication weaknesses including a lack of ***, ***, facial expressions, and ***.⁹ With this diagnosis, Student's parents decided to send the Student to *** (***) and to begin ABA therapy through a private provider.¹⁰ The Student began ABA therapy with *** when Student was *** years old.

When the Student was ***, *** the Student was non-verbal but able to ***.¹¹ The *** section of the application, submitted to the District, documented that an OT and ABA assessment were requested and that progress would be established when these evaluations were completed.¹²

In preparation for *** and to provide information for Student's IEP, the Student underwent an FIE, psychological evaluation, and speech/language evaluation. Based on the evaluations, an ARDC was convened in *** to consider the IEP. The ARDC noted that the Student had limited communication abilities, Student's *** communication was "other," Student used ***, and Student ***.¹³ It was also noted that the Student had difficulty expressing Student's needs, interacting with others, responding to oral instructions, and did not appear to be interested in games or activities that other children liked. The ARDC agreed that Student's teacher would need to incorporate sensory breaks, physical prompting, incentives, adaptive materials, and non-verbal prompts.¹⁴

No sensory evaluation was offered to help in preparing the IEP at that time. Dr. ***, a psychologist who conducted an FIE in ***, believed that the sensory evaluation should have been completed by the occupational therapist at this first opportunity when the Student was *** because sensory issues are frequent with autistic children.¹⁵ Dr. *** pointed out that failure to address sensory issues can cause maladaptive behaviors to develop.¹⁶ She explained that a sensory diet helps the child to re-regulate themselves.¹⁷

⁸ Pet. Ex. 3 at 1-2.

⁹ *Id.* at 2.

¹⁰ *Id.* at 2-3.

¹¹ Pet. Ex. 21 at 12-13.

¹² *Id.* at 21-22.

¹³ Pet. Ex. 8 at 3; Tr. at 109.

¹⁴ Pet. Ex. 8 at 17.

¹⁵ Tr. at 217.

¹⁶ Tr. at 217-218.

¹⁷ Tr. at 218.

Ms. ***, the District Special Education Coordinator for several campuses, testified concerning the efforts made to support the Student's communication issues. She testified that although there is no *** teacher at ***, the *** teachers incorporated *** in their daily teaching by ***. She also testified that the Student's *** was discussed at every ARD meeting. She agreed, however, that there was no specific requirement to teach *** in the Student's goals or objectives in the *** IEP. But, because the Student was ***, Ms. *** would not have expected goals for teaching ***.¹⁸

In ***, a revision ARD IEP meeting was held, at Petitioner's request, to consider ESY services.¹⁹ The ARDC concluded that ESY was not needed at this time. The records also reviewed by the ARDC showed that the Student, at that time, was performing at appropriate age or grade level for language arts, reading, math, science and social studies, but performing at a delayed level with language and communication and behavioral and emotional development.²⁰ The IEP, again, contained no provisions for a sensory evaluation or any behavioral evaluation.

Ms. *** was the Student's teacher in the *** school year. She had the Student in a class, along with *** other students, for ***.²¹ She characterized the Student as a very happy and social child, who had strong receptive skills, was non-aggressive, and compliant.²² She testified that the Student's primary communication was ***. She stated that she employed ***communication.²³ A District tech person, Ms. ***, trained her on using *** with the Student, according to Ms. ***.²⁴

Ms. *** also testified that she used *** in her classroom, although there was no *** component in Student's IEP. She agreed that the Student needed *** and not just ***.²⁵ But, she also stated that she had a very strong relationship with the Mother and even texted the Mother to tell her to "keep fighting" for a *** class. Ms. *** was satisfied, however, that her level of *** was sufficient to meet the Student's needs in her class.²⁶

¹⁸ Tr. at 109.

¹⁹ Pet. Ex. 9 at 1.

²⁰ *Id.* at 8-12.

²¹ Tr. at 449.

²² Tr. at 451.

²³ Tr. at 459-460, 462.

²⁴ Tr. at 508.

²⁵ Tr. at 462-463, 465-466, 497.

²⁶ Tr. at 489-490.

As for the Student's progress in her class, Ms. *** described it as "phenomenal" because by the end of school year, the Student could do things Student could not do when Student initially came in to her class: have Student's needs met, make ***, ***, and ***.²⁷ She pointed out that Student mastered many of Student's goals and made progress with nonacademic areas like socialization, playing with peers, showing concern, initiating play, getting involved with activities, sitting still, ***.²⁸ She believes that the Student has normal intelligence and disagrees that Student is low-functioning intellectually and that Student should be in a non-academic "skills class" in the upcoming *** school years as proposed in Student's latest IEP.²⁹

Concerning behavioral issues, Ms. *** testified that she did see the Student ***, but it was not an everyday occurrence.³⁰ She testified that when Student ***, she would judge if there was a sensory overload, and if so, she would calm Student down or redirect Student to ***.³¹ She found that Student would *** when Student did not want to comply with directions.³² She had heard about the Student *** class with Ms. ***, and she did not consider *** appropriate nor was it in Student's IEP.³³

In ***, Ms. *** participated in the annual review ARD.³⁴ She testified that the IEP was developed in a collaborative manner, yielded positive academic results, and that the Student was in the least restrictive environment.³⁵ The ARDC noted that the Student was using at least *** in the classroom, including ***; Student was learning ***; and Student was ***. Student was also using *** to communicate and ***. At the time of the ARD, however, Student's verbalization skills continued to lag and Student was only able to articulate *** in the classroom.³⁶ The goals and objective indicated that the Student would be encouraged to communicate using ***.³⁷ The Student would also be directed to ***, would use ***, and would stay in Student's assigned area with a minimum of staff support.³⁸ The ARDC recommended an Assistive Technology Evaluation.³⁹

²⁷ Tr. at 503.

²⁸ Tr. at 454, 467-469, 503, 505-506, 513.

²⁹ Tr. at 469; Resp. Ex. 1 at 23.

³⁰ Tr. at 454-455.

³¹ Tr. at 451-452.

³² Tr. at 452.

³³ Tr. at 482.

³⁴ Pet. Ex. 10.

³⁵ Tr. at 502.

³⁶ Pet. Ex. 10 at 5.

³⁷ *Id.* at 12.

³⁸ *Id.* at 12-14.

³⁹ *Id.* at 6.

The ARDC also recommended that the ST and OT services be reduced. Although she was not present at this meeting, Ms. *** speculated that the services were reduced because the Student was showing progress.⁴⁰ She verified that the services ***.⁴¹

As to behavior, the IEP states that “*** exhibits oppositional behavior and has trouble working independently.”⁴² No FBA or BIP was recommended by the ARDC at that point, although it was becoming apparent that the Student was *** on a regular basis. ESY was approved by the ARDC to prevent regression on significant skills after breaks. Specifically, the ARDC determined that Student required continued instruction in language/ communication, social skills, and behavioral skills.⁴³

An *** ARDC meeting was convened to follow-up on an Assistive Technology Team Evaluation Report (AT Report). The AT Report, which was supported by staff, recommended that the Student be provided multiple opportunities to communicate, that the Student be furnished with ***, and that Staff support these strategies.⁴⁴

B. * Class**

Ms. *** is a board-certified associate behavior analyst (BCaBA) who has worked with the Student since Student was *** years old. Her clinic is located in ***. She has been providing ABA services to the Student ***. Shortly before the Student’s annual *** ARD meeting, she provided the District with a letter outlining the progress she had made with the Student in her privately-provided ABA therapy.⁴⁵ In the letter, she stated that her main goal was to teach the Student a way to communicate with others. She observed that *** was Student’s preferred way to communicate but that Student could understand verbal directions from her.

Her letter summarized the progress that the Student achieved with her therapy: ***. She also noticed an improvement in behavior because Student was able to gain access to Student’s needs ***. She also observed that Student was trying to ***. Ms. *** concluded that the Student has benefitted through *** and would continue to

⁴⁰ Tr. at 116.

⁴¹ Tr. at 138-139.

⁴² Pet. Ex. 10 at 6.

⁴³ *Id.* at 27.

⁴⁴ Resp. Ex. 12.

⁴⁵ Pet. Ex. 4.

increase Student's vocalizations. An Assessment Summary dated ***, was attached to her letter. In the assessment, she recommended that behavior intervention occur four to eight times per month to work towards increasing appropriate behaviors and reducing problem behaviors and barriers to learning.⁴⁶

At the hearing Ms. *** testified that an FBA assessment would include the VB-MAPP, a test that compares the child with typically developing peers to measure development. A functional behavioral assessment enables the reviewer to find out the function of behavior and then create a behavioral intervention plan.⁴⁷ Ms. *** believes that the present once per week schedule is insufficient for the Student and she would recommend 20 hours per week of ABA therapy, which includes academics, communication, visual perception, independent play, social interaction, imitations skills, and group skills.⁴⁸

Another witness, ***, the Student's speech pathologist with the District, testified that she has attended the Student's ARD meeting this past year, provided speech therapy along with *** to the Student, and observed Student in the classroom.⁴⁹ Ms. *** was present at the *** ARD meeting when the Mother asked for the Student to be placed at the ***. Ms. *** disagreed with that placement because the Student ***.⁵⁰ Instead, Ms. *** advocates a strategy of ***, or a multi-modality method of teaching, rather than *** as the sole means of instructing Student to communicate.⁵¹ *** should be used as a tool, along with other modalities and services such as speech therapy, she stated.⁵²

Ms. *** explained that "****" means that the teacher would only instruct ***; but for the Student, this would be detrimental because Student *** student.⁵³ Student's parents, teachers, and peers communicate with Student verbally, she pointed out, and *** incorporates both *** and ***.⁵⁴ Besides, learning *** , which is not necessary in this case.⁵⁵

⁴⁶ *Id.* at 24.

⁴⁷ Tr. at 267-272, 293.

⁴⁸ Tr. at 285-286.

⁴⁹ Tr. at 829-831.

⁵⁰ Tr. at 831.

⁵¹ Tr. at 833-835.

⁵² Tr. at 837.

⁵³ Tr. at 838.

⁵⁴ Tr. at 839.

⁵⁵ Tr. at 839.

Ms. *** agreed, however, that there had never been an evaluation to determine whether Student fits the criteria for apraxia of speech, a physiological disorder that can be diagnosed and evaluated.⁵⁶ She had asked for an evaluation to be completed in *** to determine if apraxia was present, but the parents had not consented. The last ARDC had not recommended any further evaluations.⁵⁷ Lastly, Ms. *** testified a skills placement, as proposed in the *** ARD for the upcoming *** school year, was appropriate because it is a language-rich environment that uses *** communication.⁵⁸

The annual *** ARDC meeting included addressing “parent frustration that the *** Student was not able to communicate with Student’s parents.”⁵⁹ The ARDC considered the parents’ request that the District provide *** instruction to the Student, as Student’s ***.⁶⁰ The ARDC declined this request because the Student had no ***, and *** were the best method to facilitate learning. The ARDC recommended that the Student continue with verbal and nonverbal communication and AT.⁶¹

The ARDC also considered the request to place the Student in the *** class.⁶² The ARDC declined because the Student was *** and benefitted from the “language-rich” *** classroom. The Parents disagreed with the ARDC and another ARD was scheduled in ***. The *** ARD was held but no resolution was reached on the *** placement or *** instruction request.

Ms. *** was the Student’s teacher in the *** class for the *** school year. She attended both ARD meetings held during the year that Student was in her class and testified that the ARDC studied the Brigance assessment to develop goals for Student.⁶³ The Brigance assessment (Brigance) scores children in different developmental areas—social, emotional, behavioral, academic, cognition, speech and language, physical, fine

⁵⁶ Tr. at 846-847.

⁵⁷ Tr. at 847.

⁵⁸ Tr. at 847.

⁵⁹ Pet. Ex. 12 at 11.

⁶⁰ *Id.* at 36.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Tr. at 522-523.

motor and gross motor—and compares the scores by age equivalent. The Brigance was given to the Student in *** and in ***.⁶⁴

Ms. *** testified that the Brigance shows how much progress the Student has made in Student's total development. In ***, when Student was *** years ***old, Student had a raw score of *** with five areas in the ***-year-old age equivalency, eight areas in the ***-year-old age equivalency, and with one area in the ***-year-old age equivalency (literacy).⁶⁵ Then, in ***, when Student was *** years *** old, Student had a raw score of ***, with six areas in the ***-year-old age equivalency, four areas in the ***-year-old age equivalency, and three areas in the ***-year-old age equivalency (academic/cognitive, literacy, and gross motor). The last Brigance test, in ***, when Student was *** years *** old, again showed progress. Student had a raw score of ***, with two areas in the ***-year-old age equivalency, six areas in the ***-year-old age equivalency, three areas in the ***-year-old age equivalency, and two areas in the ***-year-old age equivalency (physical development and fine motor).⁶⁶ Ms. *** testified that these scores show that Student has made excellent progress at the District, not just on the overall scores, but in the individual score areas also.⁶⁷

The goals and objectives for the *** school year shows how the Brigance translated into the PLAAFP (present level of academic achievement and functional performance), according to Ms. ***.⁶⁸ The ARDC was trying to find the areas where Student need specialized instruction: working with ***, using *** ***, and making choices.⁶⁹

Ms. *** testified that she was using a multi-modality approach to teach the Student, employing all different forms of communication such as language, ***.⁷⁰ She was developing her *** by *** every day and listening to Student's ***, but she would also give Student *** for the things Student needed.⁷¹ The Student had access to *** but chose not to use it, according to Ms. ***.⁷²

⁶⁴ Tr. at 523-524.

⁶⁵ Resp. Ex. 25 at 798.

⁶⁶ *Id.* at 817.

⁶⁷ Tr. at 525.

⁶⁸ Resp. 1 at 4; Tr. at 530-532.

⁶⁹ Resp. 1 at 5; Tr. at 530-531.

⁷⁰ Tr. at 560-561.

⁷¹ Tr. at 561.

⁷² Tr. at 562.

As for behavioral issues, Ms. *** confirmed that ***. She testified that at first it started because the Student ***. She then used *** as a “sensory strategy,” because Student had difficulty with *** and needed sensory input to stop the behavior.⁷³ She also *** to prevent Student from ***.⁷⁴ She continued to use *** until the parents got upset, and filed a CPS complaint and a grievance with the District. Ms. *** was aware that the sensory strategy had not been recommended or discussed with the occupational therapist. She speculated that the Student’s behavioral issues stemmed from Student’s disrupted routine; Student’s *** and routines are very important with autistic students.⁷⁵ The Student did not need an FBA or a BIP, she stated.⁷⁶

Ms. ***’s aide, ***, testified that the Student was constantly ***. She stated that she ***, with Ms. ***’s approval, to give Student a task so that Student would ***.⁷⁷ The *** was meant to prevent Student from ***.⁷⁸ She testified that after the situation was addressed with the principal, *** was no longer used.⁷⁹ The relationship between Ms. *** and the Mother became very tense, according to Ms. ***.⁸⁰

The Mother testified that the Student came home almost every day ***.⁸¹ At the holidays, the Mother was unable to find any ***.⁸² Her understanding from talking to the teachers was that Student *** when Student did not want to stop an activity and Student was frustrated.⁸³ On ***, Mother filed a grievance with the District, alleging that her *** with ***.⁸⁴ She stated that the Student was humiliated and that the Student indicated to a CPS investigator that *** was “normal,” i.e. a commonplace practice. The Mother noted that there was no parental permission or involvement in this decision.

⁷³ Tr. at 563.

⁷⁴ Tr. at 595.

⁷⁵ Tr. at 565-566.

⁷⁶ Tr. at 545.

⁷⁷ Tr. at 350.

⁷⁸ Tr. at 351.

⁷⁹ Tr. at 350.

⁸⁰ Tr. at 362.

⁸¹ Tr. at 924.

⁸² Tr. at 925.

⁸³ Tr. at 926.

⁸⁴ Pet. Ex. 35 at 1.

On ***, Principal *** responded by letter that he had interviewed the teacher and aides and determined that the Student “showed no signs of humiliation, embarrassment or distress in having ***; in fact, both aides and the teacher stated that Student used *** and motions to indicate to them that Student would like ***.”⁸⁵ Dr. *** denied the grievance and concluded that the teacher had the discretion to use behavioral strategies as needed.⁸⁶

After the CPS and grievance were filed, Ms. *** ***. She testified that she felt like the working relationship that she had with the parents had been damaged.⁸⁷ She ***, because she realized the conflict was with the parents and not her relationship with the Student.⁸⁸

In her *** FIE, Dr. *** discussed maladaptive behavior; she considered the Student’s *** during school as maladaptive behavior.⁸⁹ Student was also *** to the exclusion of anything else, “stimming” on them.⁹⁰ She pointed out that the solution by the school was ***. Dr. *** explained that it is typical symptomatic behavior of a child on the autism spectrum to engage in self-stimulatory behavior for various reasons.⁹¹ So rather than make it inconvenient for the Student to engage in stimulatory behavior, there needed to be an evaluation of why Student was doing the behavior so the cause can be addressed directly, according to Dr. ***.⁹² She explained that if the behavior is not addressed and just avoided (***), then the replacement behavior may be more difficult to deal with than the original behavior.⁹³ The FBA would identify the function of behavior and then identify an alternative way for child to meet the need.⁹⁴

⁸⁵ *Id.* at 11.

⁸⁶ *Id.*

⁸⁷ Tr. at 614.

⁸⁸ Pet. Ex. 22 at 54; Tr. at 614-615.

⁸⁹ Tr. at 190-191.

⁹⁰ Tr. at 191.

⁹¹ Tr. at 192.

⁹² Tr. at 192.

⁹³ Tr. at 192.

⁹⁴ Tr. at 193.

She testified that a BIP was needed. A BIP is a specific plan for providing alternative ways to deal with needs.⁹⁵ The BIP would be part of the IEP and would be evaluated periodically to see if interventions designed based on the FBA were effective.⁹⁶

C. The FIE Request and Current Placement

*** was the District Special Education coordinator until ***. She testified that she responded to the Mother's *** request for an FIE and for payment of the FIE by the District.⁹⁷ In the request, the Mother stated that "we noticed that almost all [the Student's] *** at school" ⁹⁸ Ms. ***'s letter, dated ***, to the Mother stated that "[the District] will approve your request to provide funding for an independent Full Individual Evaluation, including IQ and achievement for [the Student]." The letter explained the FIE criteria and provided a list of four individuals that met the same credentials as the District assessment staff.⁹⁹ A form was attached that listed the four individuals, along with a block marked "other." The letter stated "[h]owever, you will need [sic] return the enclosed form with your choices so that we can make the final arrangements and complete a contract with whomever [is selected]. This will need to be completed before the assessment takes place."¹⁰⁰

According to Ms. ***, the Mother never returned the form. On ***, Mother sent an email to Ms. *** requesting Dr. *** (who had performed some work regularly three or four years ago) perform the FIE.¹⁰¹ ***, the special education director's secretary, contacted Dr. ***'s office about this particular evaluation.¹⁰² According to Ms. ***, Dr. *** never responded to the request for an FIE for the Student and a contract was never drawn up by the District.¹⁰³ With the help of District personnel, however, Dr. *** was able to schedule and complete the FIE on ***. Dr. *** submitted a bill for ***, which has not been paid to date.¹⁰⁴

⁹⁵ Tr. at 193.

⁹⁶ Tr. at 193-194.

⁹⁷ Pet. Ex. 22 at 45-46; Tr. at 781-782.

⁹⁸ Pet. Ex. 22 at 46.

⁹⁹ Pet. Ex. 22 at 48; Tr. at 781-782,884.

¹⁰⁰ Pet. Ex. 22 at 49.

¹⁰¹ *Id.* at 59.

¹⁰² Tr. at 785.

¹⁰³ Tr. at 786.

¹⁰⁴ Pet. Ex. 22 at 11.

There was controversy addressed by numerous witnesses concerning the District's plan for the Student for the *** school year. Ms. *** testified that she put the Student on a list of students who were recommended for "skills class" for ***.¹⁰⁵ She explained that skills class is a program for students with lower cognitive function.¹⁰⁶ There were *** children who were on the list.¹⁰⁷ The most recent ARD, dated ***, reflects that a skills placement is recommended for the *** school year, and states that "Student requires a highly structured small class setting with a low staff-to-student ratio to progress toward mastery of goals and objectives."¹⁰⁸

Dr. *** testified that she disagreed with the appropriateness of the Student's placement in the District's skills class, as proposed in the *** ARD for the *** school year. She explained that skills class refers to programs that are designed to emphasize functional skills, and not academic skills. It is a lower level with regards to academic rigors. For instance, skills class works on toileting, eating, and other functional life skills but has limited academics, such as reading signs rather than phonological processing required for reading.¹⁰⁹ Based on the review of the documents, observations, and testing, Dr. *** concluded that placement in a life skills setting would not be appropriate.¹¹⁰ Student is not indicated as a student with an intellectual disability, according to Dr. ***.¹¹¹

On ***, Mother notified ***, Ph.D., the Executive Director for the District Special Education, that she was withdrawing the Student from school and placing Student in a private placement, *** (***).¹¹² On ***, Dr. *** responded that the campus had been trying to schedule an ARD meeting for ***, which was rescheduled for ***.¹¹³ The ARD never occurred.

*** testified that she is a *** teacher at ***, which is the private school portion of ***. She is not a certified teacher but she has a bachelor's degree in education.¹¹⁴ She testified that the Student is in her class, she

¹⁰⁵ *Id.* 22 at 51.

¹⁰⁶ Tr. at 103.

¹⁰⁷ Tr. at 104.

¹⁰⁸ Resp. Ex. 1 at 23.

¹⁰⁹ Tr. at 185.

¹¹⁰ Tr. at 184-185.

¹¹¹ Tr. at 186.

¹¹² Pet. Ex. 22 at 164.

¹¹³ *Id.*

¹¹⁴ Tr. at 400.

uses *** with Student as Student's primary communication, and Student is *** now.¹¹⁵ She explained that the school offers small classes with *** students, and there are small groups where she can work with one or two students at a time. She works with the Student for two or three hours one-on-one. Her class is a very calm atmosphere and prevents sensory overload, according to Ms. ***.¹¹⁶ She pointed out that there is ABA staff and OT and ST on premises.

As to *** training, she testified that she is not *** and she took a class ten years ago.¹¹⁷ Her *** training consists of attending the training class, watching videos, and reading online.¹¹⁸ She also agreed that *** is not an accredited school, and that no teacher at ***. In a letter prepared by ***, the founder of ***, she states that all teachers are certified, which is not a true statement, as conceded by Ms. ***.¹¹⁹ She testified that the future plan is to have 50-60% of the students at *** within the disabled population.

VI. ANALYSIS

A. Communication Issues

As to the communication issues raised in the Complaint, the Hearing Officer finds that Petitioner, as the party challenging the educational plan provided to Student, did not meet its burden of proof that the District failed to provide FAPE by establishing that (1) the District failed to comply with the procedural requirements of IDEA, or (2) the District failed to design and implement a program that was reasonably calculated to enable Petitioner to receive educational benefits. *Schaffer v. Weast*.¹²⁰ Instead, the evidence showed that the District did provide FAPE to the Student as required by the four-factor test established by the Fifth Circuit in *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*¹²¹

As to the first factor, the District developed an appropriate individualized program that provided the Student with the communication tools, i.e. *** and other forms of communication, that Student needed to show

¹¹⁵ Tr. at 424-425.

¹¹⁶ Tr. at 427.

¹¹⁷ Tr. at 433.

¹¹⁸ Tr. at 433.

¹¹⁹ Pet. Ex. 40 at 11; Tr. at 442.

¹²⁰ 546 U.S. 49 (2005).

¹²¹ 118 F.3d 245, 246-248 (5th Cir. 1997).

progress both academically and functionally. The evidence showed that when the Student was *** years old, Student entered the *** with Ms. *** as Student's teacher. Her class was relatively small, with *** students and *** aides. She was aware through Student's initial evaluations and through the ARD that *** that the Student's difficulty with communication was a barrier to Student's success.

She testified credibly that she taught Student using ***, by incorporating *** so that Student could associate the two together. She also used multi-*** in her class: ***. She explained how she worked with Student on Student's ***; social skills of staying in Student's area, following directions, participating in class; and Student's fine motor skills such as ***. It is obvious that the Student received individualized attention in line with the Student's needs and progress.

Ms. ***, likewise, worked with the Student to foster Student's communication skills using a *** form of communication. The evidence showed that in order to develop Student's individualized plan, she administered the Brigance assessment which looks at developmental areas, including social, emotional, behavioral, academic, cognition, speech and language, physical, fine motor and gross motor. Based on Student's score in those areas, the ARDC developed goals and objectives to help foster Student's progress in those areas. The test was given three times: at the end of the *** school year and in *** school year.

Ms. ***'s credible testimony established that she used *** and *** with the Student every day. She fostered the Student's ***, ability to work in a group setting and participate in activities, and ability to work on assigned tasks. She used ***, ***, ***, ***, ***, and the *** to a limited degree, as well as ***.

Ms. ***, the Student's speech therapist through the District, was also part of the individualized plan of communication assistance provided to the Student. She observed the Student, provided therapy, and attended Student's ARD meeting. She was convinced through her research that an individualized program that was best for the Student should not include *** because the Student could *** and received instruction by listening and following directions. In fact, the evidence showed that the Student's receptive skills were one of Student's strongest attributes and there was no evidence presented that the Student was ***. She saw no reason for the Student to communicate only *** when Student was capable of assimilating into the community as *** student. Student also started developing speech and saying some words. This indicated that the *** communication strategy individualized to the Student's needs was productive.

The second factor fashioned by the Fifth Circuit is whether the District's educational program was administered in the least restrictive environment. There was very little controversy on this factor raised by the parties in regards to the communication or behavioral issues. The evidence showed that the initial evaluation performed in *** when the Student was *** years old recommended that the Student's educational program should include a supportive setting with a high emphasis on communication skills; a small class size with increased staff-to-student ratio; and frequent one-on-one instruction on certain tasks in order to stay on task. Both *** classes were small with a supportive setting with at least one teacher and two aides, and frequent one-on-one instruction. This is the least restrictive environment that was appropriate for Student and was provided by the District.

The third factor to be considered is whether the educational program services were provided in a coordinated and collaborative manner by key stakeholders. The record is replete with evidence that the District complied with this requirement as to the Student's communication issues. There were *** ARD meetings held over the *** years that the Student attended the District. The records show that the Mother attended each meeting along with the teachers, speech therapist and others involved in the Student's education.

During that time, the record is rife with e-mails, text-messages, and daily reports showing that the teachers were communicating with the parents and school staff regarding the Student's education. The District also provided IEP progress reports to the parents during each grading period. It should be noted, however, that the outside therapists were not present at the ARDC but the Mother explained that she did not want school staff communicating with the providers without her present.

The evidence also showed, in regard to the third factor, that the District tried to schedule further ARDs to discuss Dr. ***'s *** report and to fashion an educational plan for the *** school year after a discussion of Dr. ***'s recommendations, including the skills placement issue. The parents refused those efforts and instead, withdrew the Student from the District.

The strongest evidence of the District's adherence to the factors established by the Fifth Circuit to determine whether meaningful education benefits under IDEA have been provided is the academic and nonacademic benefit demonstrated by the evidence in regards to the Student's communication improvement. When the Student was first evaluated in ***, it was shown that the Student exhibited a severe language impairment, which adversely affected Student's educational functioning and social communication skills. The speech therapist noted that Student's oral mechanisms were found to be adequate for speech production, but

speaking fluency, articulation and vocal quality could not be evaluated. Student's cognitive functioning scores were delayed for adaptive behavior, social-emotional, and communication, but average for physical domain scores. Student was considered nonverbal, ***, did not *** with others, and ***. Student used ***. Student did not ***. Student did not ***.

The evidence shows that in the area of communication, the Student has made significant progress. For instance, Ms. *** described Student's progress as "phenomenal" because by the end of the *** school year, the Student could do things Student could not do when Student came in to her class. She pointed out that Student mastered many of Student's goals and made progress with nonacademic progress in areas like socialization, ***.

In Ms. ***'s class Student made similar progress. The Student's IEP progress report for the first grading period indicates that Student mastered Student's self-help goals of ***, and ***. The Student needed continued practice and instruction in participating in daily routine activities, including staying in assigned area with minimum staff monitoring and attending to task. Student needed support with *** but was able to ***.

Another sign of progress was the Brigance Assessment. In ***, when the Student was *** years *** old, Student had a raw score of ***. Then, in ***, when Student was *** years *** old, Student had a raw score of ***. The last Brigance test, in ***, when Student was *** years *** old, again showed progress. Student had a raw score of ***. These scores show that Student has made progress at the District, not just on the overall scores but in the individual score areas also.

B. Behavioral Issues

As to the behavioral issues raised in the Complaint, the Hearing Officer finds that Petitioner, as the party challenging the educational plan provided to Student, met its burden of proof that the District did not provide FAPE. The evidence showed that the District failed to design and implement a program that was reasonably calculated to enable Petitioner to receive educational benefits. *Schaffer v. Weast*.¹²² In this regard, the evidence showed that the District failed to provide FAPE to the Student as required by the four-factor test established by the Fifth Circuit in *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*¹²³

¹²² 546 U.S. 49 (2005).

¹²³ 118 F.3d 245, 246-248 (5th Cir. 1997).

Regarding the first factor, the District did not develop an appropriate individualized program on the basis of the Student's assessment and performance. On this factor, the evidence demonstrated that the District failed to assess the Student's known behavioral issue and then failed to devise an IEP that could have addressed the behavior. It was demonstrated persuasively that there were numerous opportunities presented to assess whether the Student had behavioral issues. When the Student first began ***, the parents had submitted an application to the District documenting that an OT and ABA assessment were requested, and that progress would be established when these evaluations were completed. No ABA assessment was ever undertaken by the District.

The Student underwent an FIE, psychological evaluation, and speech/language evaluation. Based on the evaluations, an ARDC was convened in *** to consider the IEP. The ARDC noted that the Student had difficulty expressing Student's needs, interacting with others, responding to oral instructions, and did not appear to be interested in games or activities that other children liked. The ARDC agreed that Student's teacher would need to incorporate sensory breaks, physical prompting, incentives, adaptive materials, and non-verbal prompts. Yet no sensory evaluation was offered even though sensory breaks were recommended.

Dr. ***, a neuropsychologist who evaluated the Student, testified authoritatively that the sensory evaluation should have been completed by the occupational therapist at this first opportunity when the Student was *** because sensory issues are frequent with autistic children. She pointed out that failure to address sensory issues can cause maladaptive behaviors to develop and that a sensory diet would have helped the Student regulate ***self.

Dr. *** was correct in her analysis. Beginning at age ***, the Student began regularly *** to express Student's frustration. Ms. *** and Ms. ***, the *** teachers, both testified that they were aware that the Student had this behavioral issue. Yet, the evidence showed that there were *** ARD meetings throughout this *** year period but not one of the meetings reflected any discussion by those intimately familiar with Student's issues to address Student's behavior.

The behavior escalated in the *** class for *** to the point that *** as a behavior control strategy. Various witnesses, including the Mother and an aide, described the behavior as occurring on a daily basis. Dr. *** recognized the Student's behavior as maladaptive and testified persuasively that trying to make it inconvenient for Student to engage in the behavior was not the solution. She testified that if the immediate self-stimulating behavior was physically prevented, the need or underlying cause would remain and it could result in the Student

acting out in a much worse, replacement, self-stimulating behavior. So, an FBA and sensory evaluation should have been part of Student's IEP as recommended by the ARDC so that a BIP could have been devised.

As to Ms. ***'s testimony that an FBA or BIP was not necessary because the pattern of behavior had to be continual or constant and to a high degree, the evidence showed that the pattern of behavior was continual as verified by the Mother's testimony that *** and by the aide's testimony that *** was happening constantly. Further, if the pattern of behavior was infrequent, then the teacher would not have had to address the issue of ***. The greater weight of the evidence showed that the behavior identified by Ms. *** as triggering an FBA or BIP was occurring.

Rather than ***, the correct approach would have been to raise the issue at an ARDC meeting and then evaluate why the Student was "stimming" and needed such self-stimulating behavior. Then the root cause could be addressed and hopefully the need for self-stimulating behavior would decline, and make education more effective. Thus, on this first factor, the District failed to provide FAPE by failing to assess and address maladaptive behavior in a systematic manner, with a proper behavioral assessment, sensory assessment, and a cohesive and appropriate behavioral plan.

The second factor fashioned by the Fifth Circuit is whether the District's educational program was administered in the least restrictive environment. There was very little controversy on this factor raised by the parties in regards to the communication or behavioral issues. However, it bears note that, despite the fact that *** incidents occurred in the special education classroom among just a few students, there was negative attention drawn to the Student by *** by other teachers' discussion of the situation.

The third factor to be considered is whether the educational program services were provided in a coordinated and collaborative manner by key stakeholders. The evidence demonstrated that by failing to discuss or evaluate the behavior and sensory issues as part of the ARDC, there was never a team approach to the educational program services delivered as a solution to the behavior or sensory issues.

A child who cannot speak clearly or communicate feelings or ideas can become extremely frustrated and may act out as a result. This is what has occurred in this case with the Student expressing frustration when Student was told to stop an activity that Student was enjoying. Dr. *** pointed out convincingly that an FBA would have identified and evaluated the behavior and suggested alternative methods to meet the Student's needs. This could have been discussed at the ARDC in a collaborative manner.

Clearly a key stakeholder in an individualized education program is the Mother. In this case, when the Mother found out that her *** ***, she filed a complaint with CPS and a grievance with the District. She indicated that the Student was humiliated and that the Student told a CPS investigator that *** was common practice. The Mother's uncontroverted testimony was that there was no parental permission or involvement in this decision.

Another key stakeholder in an individualized education program is the Student's teacher. In this case, the conflict between the Mother, the Student, and the teacher became so negative that ***." ***:

The teacher's *** makes it clear that the teacher questioned her ability to communicate effectively with the Student or other classmates. The filing of a CPS complaint and grievance must have been very disheartening to a teacher who devised a plan to stop the Student from the behavior in the most effective way she could devise. The failure to assess and devise a coordinated plan to deal with the behavioral issues is more of a systemic failure that escalated to the point where key stakeholders, including the Mother and the teacher, could not work collaboratively together to provide educational services for the Student. Thus, the District's failure to address the behavior in an appropriate manner such as an ARDC meeting during the *** years that this behavior occurred, was established as a missed opportunity to foster communication and deescalate tension between the Student's parents and teacher.

The fourth factor established by the Fifth Circuit is for the Hearing Officer to determine whether positive academic and nonacademic benefits to the Student were demonstrated by the evidence. Here, the evidence showed that the Student improved "phenomenally" in the communication, academic, and nonacademic areas while in ***. Student's Brigance scores had improved almost two-fold ***. Student mastered many of Student's goals and made progress with nonacademic progress in areas. Yet, there was controversy addressed by numerous witnesses concerning the District's plan for the Student for the *** school year, as Student's teacher put the Student on a list of students who were recommended for "skills class" for ***.

The Hearing Officer heard from various credible witnesses, Ms. ***, Dr. ***, and the Mother, who all agreed that the Student has normal intelligence, was not low-functioning, and should not be in the skills class.

The testimony from these witnesses is persuasive that the friction between the parents and the District staff affected the objectivity of the educational program administered to the Student, including the plan for future services through the skills program, which resulted in educational harm and abrogated the positive academic benefits achieved in the communication arena. The teacher's recommendation for placement in the skills class despite the Student's academic achievements, the teacher's request to remove the Student from her class based on her perception that the behavior was interfering with her ability to teach, and the friction and lack of communication with the school staff, were all shown to have affected the delivery of meaningful educational benefits, which ultimately motivated the parents to remove the Student from the District and enroll the Student in a private placement.

Therefore, after considering all the factors, the Hearing Officer concludes that the Petitioner established that the District failed to provide a FAPE to the Student as to the behavioral issues.

C. Payment for the IEE

The burden of proof is shifted in regard to issues related to a parental request for an IEE. In this case, Petitioner requested an IEE. Under 34 C.F.R. § 300.502(b)(2), the District must either cover the cost of the IEE or file a due process complaint to show that its evaluation was appropriate. The District granted the request for an IEE, and did not file a due process complaint seeking a hearing on Petitioner's request. Thus, on this request, the District bears the burden of proof.

The Hearing Officer concludes that the District has not met the burden of proof to show that it should not cover the cost of the IEE by Dr. ***. The evidence showed that a letter granting the IEE was sent to the parents. The District became aware through an e-mail that Dr. *** was going to conduct the IEE and worked with Dr. *** to arrange a schedule for her to observe the Student. Dr. *** had done work for the District in the past so there is no question that she met the qualifications.

The District should have arranged for payment once it became apparent that Dr. *** had been chosen to conduct the IEE. The District must pay the cost of *** to Dr. *** for the IEE. However, the evaluation was designed to have an achievement and IQ component and the scores must be furnished by Dr. *** to the District.

To summarize, as to the communication issues, the Hearing Officer finds that FAPE was provided to Petitioner. Moreover, Petitioner failed to meet the burden of proof, as alleged in the Complaint, that the District:

- Failed to properly devise and implement an IEP to provide ***;
- Changed an IEP without written parental input;
- Failed to properly evaluate the Student so that a strategy could be developed to foster Student's communication skills; and
- Failed to comply with the parents' procedural rights.

As to the behavioral issues, the Hearing Officer concludes that Petitioner has shown that the District failed to provide FAPE by establishing that the District did not design and implement a program that was reasonably calculated to enable Petitioner to receive educational benefits. Further, Petitioner met the burden of proof that FAPE was not provided by establishing that major requirements of the four-factor test set out by the Fifth Circuit were not satisfied.

D. Other Issues

As to the Petitioner's remaining allegations, including those related to the subjects below, Petitioner has failed to meet her burden of proof, and no violation of IDEA has been shown as to the following issues:

- Changed an IEP without written parental input;
- Failed to comply with the parents' procedural rights;
- Bullied the Student such that it denied the Student a FAPE;
- Denied the Parent an IEE;
- Filed a due process hearing request in bad faith; and
- Obstructed an observation and evaluation by a provider.

V. APPROPRIATE RELIEF

As stated throughout this decision, there were two primary issues that dominated the hearing: whether Petitioner was provided appropriate communicative strategies and whether the District devised proper behavioral assessment and solutions. As discussed in prior sections, the Hearing Officer concluded that Petitioner did not provide FAPE in the behavior realm.

Because the Hearing Officer finds that the District delivered FAPE in a satisfactory manner on communication issues, the Hearing Officer does not find that private placement is appropriate. Private placement may be found appropriate for a child with a disability, who previously received special education and related services in public

school, if the hearing officer finds that the agency had not made FAPE available to the child in a timely manner and that the private placement is appropriate.¹²⁴ The evidence showed that *** does not have smaller classes, certified teachers, certified *** teachers, and is not an accredited school. The evidence shows that *** does not provide any services not offered by the District. No evidence was presented to establish that the private placement is appropriate.

The evidence, however, shows that the Student has been receiving ABA services through a private provider. The services provided by ***, a BCaBA, were “appropriate,” in that they constituted behavioral intervention and academic instruction that Student should have been receiving pursuant to Student’s IEP.

As to the FBA, sensory evaluation, and BIP, if the Student re-enrolls in the District, the District must hire an independent specialist, approved by Mother, to oversee the planning and delivery of an ABA program to Student. The program may include delivery of services by District personnel, but the District personnel must be properly trained pursuant to the plan devised by the chosen specialist. The specialist must confirm in writing that the program is fully in place, with the necessary assessments, planning, and training complete. The ARD must also consider whether a *** is appropriate for the Student, considering the FIE by Dr. ***.

Lastly, the District must pay for the IEE completed by Dr. ***. Because the IEE had an IQ and achievement component, Dr. *** must either turn over those results or complete those components of the IEE in order to receive payment.

V. CONCLUSIONS OF LAW

1. Petitioner met its burden to prove that the District failed to provide Student with a FAPE, because the District failed to devise and deliver an FBA, sensory evaluation or BIP, individualized on the basis of the Student’s assessment and performance, and failed to meet Student’s behavioral and educational needs. 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.101; *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 246-248 (5th Cir. 1997); *Schaffer v. Weast*, 546 U.S. 49 (2005).
2. Petitioner met *** burden to prove that the District violated IDEA by failing to notice and convene an ARD to discuss the events leading up to the CPS investigation and grievance and consider IEP amendments to address problems, and that this failure resulted in educational harm. 20 U.S.C. § 1414(d)(4); 34 C.F.R. § 300.101, .322, .513; *Schaffer v. Weast*, 126 U. S. 528 (2005).

¹²⁴ 34 C.F.R. § 300.148.

3. Petitioner did not meet the burden to prove that the District committed any other alleged denials of FAPE, including procedural errors under the IDEA that resulted in the deprivation of an educational benefit. 34 C.F.R. §§ 300.101, .513; *Schaffer v. Weast*, 546 U.S. 49 (2005).
4. Petitioner is entitled to appropriate relief, including compensatory education, for the educational deficit created by the District's failure to provide FAPE from February 6, 2014, to the date of issuance of this decision. *School Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985).
5. The Student is entitled to compensatory services in the areas of behavioral intervention.
6. The District is capable of providing the compensatory services and of providing FAPE.
7. The private provider of educational services, ***, was not proven to be reasonable or appropriate for Student.

ORDER

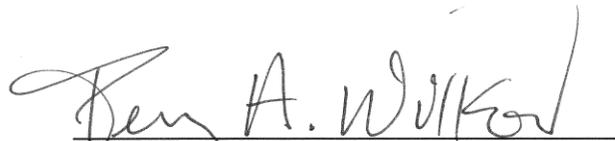
1. Upon the Student's re-enrollment in the District, the District shall convene an ARD committee meeting to address the issues and decisions contained in this decision.
2. The District shall provide or contract with a specialist trained in ABA to: (1) ensure assessment of Student using assessment methods the specialist deems appropriate; (2) develop a comprehensive BIP for the Student with an ABA program, including specific curriculum based on the results of the assessments; (3) include in the plan a description of the services to be delivered and an explicit identification of who will deliver the services; (4) include in the plan specific requirements for the amount and nature of the training to be provided to anyone, including any District staff, who will be involved in delivering any of the ABA therapy to Student, to ensure that all ABA therapy providers are competent to deliver the services; (5) include in the plan specific provisions for daily data collection and for weekly analysis, and modification of goals and objectives based on the data; (6) include in the program standards for oversight by the specialist; (7) oversee and implement the program; and (8) determine if the skills program is appropriate, given Dr. ***'s assessment. The program shall be fully implemented as soon as possible. The specialist overseeing the program shall confirm in writing to Mother when the necessary assessments, planning, and training are complete.
3. The ARD committee meeting shall devise a plan for the provision of compensatory education to address Student's lack of FAPE that began February 6, 2014, to date. Student is due any appropriate rehabilitative, developmental, or enriching services and activities that further Student's education and training. *In re Educational Assignment of Joseph J.*, Spec. Ed. Op. No. 1027 (2000).
4. The District shall reimburse Mother for the cost of services provided by ***'s organization to Student from the earliest date of service in *** until the date of this Decision. The District shall further pay for additional such expenses incurred after the date of this Decision for five hours of ABA therapy per week for 12 months from ***'s organization. The ABA therapy hours may be provided concurrently with the other compensatory service hours so long as ABA strategies are applied and results are recorded.
5. Mother shall provide authorization for the District to perform the assessments necessary, as noted above.

6. The District shall pay Dr. *** within thirty days of this Decision. Dr. *** must either complete or provide the IQ and achievement test results that were authorized as part of the IEE
7. All other relief is denied.

NOTICE TO PARTIES

This Decision of 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. 19 Tex. Admin. Code § 89.1185(n).

SIGNED on September 14, 2015.



Penny A. Wilkov
Special Education Hearing Officer
For the State of Texas

SYNOPSIS

Issue No. 1: Did the District fail to properly identify and assess Student in all areas of suspected disability?

Held: For the Student. The District did not properly assess Student in all areas of suspected disability. The Student developed behavioral issues which were addressed in an inappropriate manner.

Citation: 34 C.F.R. § 300.304(c)(6).

Issue No. 2: Did the District fail to provide FAPE to Student?

Held: For the Student On the behavioral issue, the District did not provide an individualized program on the basis of Student's assessments and performance, or in a coordinated, collaborative manner by key stakeholders, which resulted in positive academic and non-academic benefits for Student.

Citation: 34 C.F.R. § 300.101.

Issue No. 3: Was Petitioner entitled to an IEE at the District's expense?

Held: For the Student. Petitioner was entitled to an IEE at the District's expense.

Citation: 34 C.F.R. § 300.502(b)(2).

Issue No. 4: Should Student be reimbursed for private services provided to Student for the *** school year.

Held: **For the Student.** Petitioner met Petitioner's burden of proof that the District failed to offer FAPE to Student for the 2014-2015 school year for the behavioral issues. Student established that reimbursement for services is appropriate.

Citation: 34 C.F.R. § 300.148.