

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

**DECISION OF HEARING OFFICER**

On July 30, 2018, the due process hearing in the instant action was convened. Yvonnilda Muniz and Olivia Ruiz, attorneys, appeared on behalf of Petitioner, \*\*\* (“Student”). \*\*\* and \*\*\* (“Parent”) were present. Cynthia Buechler, attorney, appeared on behalf of Respondent, Austin Independent School District (“District”). \*\*\*, \*\*\*, was present as party representative. Michael Naegle, court reporter, recorded a transcript of the two- day hearing.

**Procedural History**

The request for due process hearing was filed April 14, 2017 and assigned to Hearing Officer Sherry Wetsch. At the time the request was filed, Student was \*\*\* years old and in \*\*\* grade. The parties participated in an unsuccessful mediation session on June 19, 2017. The matter was reassigned to the undersigned-hearing officer on August 29, 2017. For good cause, the hearing was continued several times and the decision due date was extended pursuant to 34 C. F. R. §300.515. Following the hearing, Petitioner withdrew an oral request for trial amendment. The relevant time period for consideration is April 14, 2016 to the date of filing. 34 C. F. R. §300.507; 19 T.A.C. 89.1151.

**Petitioner’s Claims and Requests for Relief**

Following dismissal of issues that fell outside the hearing officer’s jurisdiction, the following issues remained to be heard:

1. Whether Student was denied FAPE;
2. Whether District failed to evaluate Student in all areas of suspected disabilities;
3. Whether District failed to provide an appropriate individualized education program (“IEP”) individualized to meet Student’s needs;
4. Whether District failed to develop goals and objectives that were individualized to meet Student’s unique needs;
5. Whether district failed to provide instruction in Student’s least restrictive environment (“LRE”) on Student’s home campus;
6. Whether District failed to provide a safe environment;
7. Whether District failed to provide Student with appropriate supplementary aids and services unique to Student’s needs;
8. Whether District failed to provide staff trained in autism and experienced in working with children with autism;
9. Whether District failed to conduct an appropriate functional behavior assessment (“FBA”);

10. Whether District failed to develop an appropriate behavior intervention plan (“BIP”);
11. Whether District failed to collaborate appropriately with Parent; and
12. Whether District failed to provide appropriate assistive technology (“AT”).

Petitioner requested the following relief:

1. An independent educational evaluation (“IEE”) at public expense in all areas of suspected disabilities;
2. An IEE FBA at public expense;
3. A speech therapy IEE at public expense;
4. An occupational therapy (“OT”) IEE at public expense;
5. An AT IEE at public expense;
6. Compensatory related services in speech, occupational therapy and assistive technology for the 2016-2017 school year;
7. An order directing District to contract with an independent board certified behavior analyst (“BCBA”) to conduct an independent FBA, assist in the development of a BIP, train staff that works with Student to implement the BIP, and monitor the implementation of the BIP over a school year by conducting observations and consultations with staff at least twice every grading period;
8. An order directing District to provide Student with an IEP based on Student’s present levels of academic achievement and functional performance (“PLAAFP”) tailored to meet Student’s unique education needs with appropriate supplementary aids and services in the LRE;
9. District provide Student with a FAPE for the remainder of the 2016-2017 and 2017-2018 school years at Student’s home school;
10. Compensatory educational services to address District’s failure to implement an appropriate IEP during the 2016-2017 school year;
11. Appropriate extended school year services (“ESY”) during the 2017 summer to address District’s failure to provide appropriate services during the 2016-2017 school year in addition to appropriate ESY services for the summer of 2017;
12. Reimburse Parent for educational services provided in 2016-2017 school year; and
13. Such other and further relief the Hearing Officer deems just and proper.

### **Findings of Fact**

Based on the evidence before this hearing officer, the following are findings of fact in the instant action. Citations to Petitioner’s Exhibits, Respondent’s Exhibits, and Joint Exhibits are designated with a notation of “P,” “R,” and “Jt” respectively, followed by the exhibit number. Citations to the transcript are designated with a notation of “T” followed by the page number.

1. Student resides within the geographical boundaries of District. At the time of hearing, Student was \*\*\* years old. Student is a child eligible for special education and related services as a child with autism, emotional disturbance and speech impairment. P-1-3, 6, 8-10; Jt-13
2. Student is described as a bright, social, creative child with high verbal skills. Student has executive functioning issues that include difficulty with cognitive flexibility, emotional regulation and social problem solving. Student has pragmatic language difficulties. Student has difficulty with impulse control and anxiety, making new friends, and learning social skills. Student has poor task persistence, is highly distractible, and requires frequent redirection and breaks in order to complete

tasks. Student has weaknesses in fine motor skills. Student's behaviors include \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*. P-3, 20; Jt-9; T-39-40, 100, 161-163, 293, 432-434, 606

3. Student attended \*\*\* grade at \*\*\* (“\*\*\*”). Parent became unhappy with the school and stopped sending Student to \*\*\* in \*\*\*, 2015. Parent then home schooled Student for the remainder of that year and throughout Student's \*\*\* grade year (2015-2016). District provided information to Parent regarding special education services for Student through what is called proportionate share funds. P-27; Jt-5, 12; R-12; T-435, 835
4. At the end of Student's \*\*\* grade year, Student wanted to return to District. Parent wanted Student to attend a different campus. Student re-enrolled in District for Student's \*\*\* grade year (2016-2017) and, at Parent request, began attending \*\*\* (“\*\*\*”). P-12; R-3; T-436-437
5. During the summer before Student began at \*\*\*, District conducted a full and individual re-evaluation (“FIE”) including OT, AT, and speech evaluations, and a FBA. For the emotional/behavioral evaluation, District reviewed previous evaluations, school records, conducted behavioral observations, and obtained parent and teacher information and ratings. District conducted Behavior Assessment Scale for Children, 2<sup>nd</sup> edition (“BASC-2”), Behavior Rating Inventory of Executive Function, 2<sup>nd</sup> edition, \*\*\*, Autism Spectrum Rating Scale, Childhood Autism Rating Scale, 2<sup>nd</sup> edition, and interviewed Student. Academic developmental/functional performance was evaluated with the use of parent and teacher information, review of school records, review of the OT evaluation and a review of a 2014 neuropsychological evaluation. The examiner made multiple attempts to administer selected tests from the Wechsler Individual Achievement Tests, 3<sup>rd</sup> edition. Student's avoidance and refusal behaviors impeded the completion of the tests. The examiner used individual non-standardized tasks for observational purposes. J-5
6. Student met eligibility criteria as one with high functioning autism, emotional disturbance, and speech impairment in the area of pragmatic language. Student displayed deficits with fine motor skills, such as handwriting and writing process, and self-regulation that needed to be addressed through OT services. Student displayed deficits in social communication and social interaction, difficulties making friends and developing, maintaining and understanding relationships. The FIE indicated that Student's symptoms caused clinically significant impairment in social, occupational, and /or other important areas of current functioning. Student's cognitive functioning was found to be above average for Student's age. Student demonstrated significant \*\*\* that exceeded what would be typically expected for a student with autism. Jt-5, 6, 7, 8
7. At the time of the August 2016 FBA, Student had been homeschooled; thus, the observations occurred in the home setting. Student responded well to structure that was mutually agreed upon, Student could express \*\*\*self very well, \*\*\*, and particularly enjoyed \*\*\*. Behaviors of concern

included transition difficulties, resistance to directed activities, escape behaviors when asked to do a non-preferred task. Student's behaviors included \*\*\*. When upset, Student \*\*\*. The outbursts could escalate to physical aggression toward objects, self, or others according to Parent report. Student exhibited \*\*\* behaviors, restricted interest, and sensory needs. Student needed to \*\*\*. If not allowed such \*\*\*, Student became anxious and irritable. The report recommended a new FBA to provide data on behavior in the school setting after Student enrolled in District. Jt-8

8. District's school-based OT evaluation used sources that included the Role Evaluation for activities of Living, the Visual-Motor Integration, Beery, an occupational profile and performance of motor skills. The evaluation was done according to instruction manuals. The examiner found that Student needed to increase legible written output, access to environmental modifications and sensory strategies to address \*\*\* and \*\*\*. The evaluator suggested alternative response options, dictation, modified writing assignments, \*\*\*, modified worksheets, strategies to address fine motor skills, among others. Jt-6; T-681-685
9. Because Student had difficulty completing writing tasks and organization District conducted an AT evaluation in accordance with the profession's protocol. District's evaluator recommended trial word processing with spelling assistance including word prediction with auditory feedback, trial speech to text and trial using a digital recorder. Jt-7; T-662-668
10. Sources of data for the speech and language evaluation included review of educational records, observation of Student, parent and teacher reports, informal and formal assessments such as the Comprehensive Assessment of Spoken Language, Pragmatic Language Skills Inventory, social/pragmatic language survey, and teacher and parent language surveys. The evaluation determined that Student has a pragmatic language disorder. Speech therapy was recommended. Jt-5; T-697-702
11. FIE recommendations were as follows: highly structured, therapeutic setting, small student and teacher ratio, inclusion in the general classroom as tolerated, consultation with behavior specialists to develop self-calming and self-soothing strategies, and to assist staff in understanding the difference between \*\*\* and \*\*\*, alternate schedule for use when Student's behavior was disruptive to Student's learning or the learning of others or when there was a safety concern, preferred \*\*\* breaks, \*\*\*, movement breaks after sedentary tasks, \*\*\*, alternative seating, among others. Other recommendations included visual schedules, social stories, transition preparation, minimization of auditory and visual distractions, variety of high-interest instructional materials, and exploration of a variety of tools and strategies to address Student's fine motor skills challenges. Student previously met eligibility for \*\*\*; thus, the FIE recommended continued access to \*\*\* with supports and accommodations. Jt-5

12. The Admission, Review and Dismissal Committee (“ARDC”) met August \*\*\*, 2016 to develop Student’s \*\*\* grade education program and consider Parent’s request for IEEs. Student was eligible for special education as a child with autism, ED, and speech impairment. Jt-4; T-520-522, 551-552, 554-555
13. Student’s IEP contained behavioral accommodations as follows: a highly structured environment, visual schedule, \*\*\*, constant reminder of expectations, warning prior to transitions 5 minutes before a transition, constant reinforcement for expected behaviors, break up task into shorter components, alternate ways of completing academic work other than writing, implementation of a token system, social stories, frequent breaks, additional time, adult assistance, \*\*\*. Jt-4
14. Student’s language and communication accommodations were as follows: highly structured, therapeutic setting with small student and teacher ratio to provide structured, targeted intervention and support to address Student’s social-communication skills and emotional-behavioral needs, inclusion in general classroom as tolerated, and close proximity to teacher. Specifically, the ARDC determined that Student needed a 1:2 staff to student ratio for acquisition of skills, and 1:4 for maintenance of skills, with 1:8 for generalization of acquired skill. Student received \*\*\* minutes 3 of every 4 weeks of direct speech services and indirect services every 4<sup>th</sup> week for \*\*\* minutes. Student had a speech therapy goal with two objectives. Jt-4; T-701-702
15. Student’s AT accommodations included trial mobile tablet technology or laptop technology to support writing, trial word processing with spelling assistance including word- prediction with auditory feedback, trial speech to text, trial use of digital recorder and/or voice recorder to record response, and trial video modeling. Jt-4; T-335-336
16. The IEP included \*\*\* minutes weekly of OT services that included collaboration with Student and staff and monitoring progress. Jt-4; T- 690-693
17. Student required specialized instruction in the area of writing. The ARDC developed a writing goal to increase Student’s writing skills to \*\*\* grade level in the areas of content and organization with the use of AT and accommodations. Jt-4
18. When Student began at \*\*\*, Student’s teacher assessed Student’s skills and determined that Student was on grade level in reading fluency and comprehension. Student’s math problem –solving abilities were strong. At times, Student’s teacher was able to compact Student’s curriculum due to Student’s intelligence. Jt-4; T- 292-293
19. Student’s BIP addressed two behaviors —\*\*\*. Student would \*\*\*. Student would \*\*\*. The BIP included antecedent strategies such as visual supports with target behaviors tied to \*\*\*. Reinforcement systems included incorporation of interest into tasks, \*\*\*, daily practice session

- requesting a break, first/then language, and review of reinforcers. Replacement behaviors to teach were delineated in the BIP, as well as consequences for replacement behaviors. Jt-4, 8; T-317-318
20. Student's behavior goals focused on (a) use of language in an age appropriate manner to communicate with peers and teachers without conflict, and (b) demonstration of understanding and use of a variety of strategies for effective comprehension and expression of language in social situations. Jt-4
  21. Due to Student's difficulty with large numbers of students, behavioral support needs, and need for a small group environment, the ARDC determined placement for Student in a \*\*\* classroom that has a \*\*\* ("\*\*\*\*") program. In addition to speech and OT goals, the committee developed behavior goals to be provided by the behavior specialist. As Student's improvement in social and behavioral goals, the ARDC included an alternate schedule that provided for \*\*\*, \*\*\*, and \*\*\* classes in the general education setting. Jt-4; T-292, 330-331
  22. The \*\*\* program is a structured method to teach behavioral skills. "Behavior" is a broad term that includes both social behaviors and emotional behaviors specific to emotional regulation. Social skills, communication skills and social behavior skills are taught in what is called the \*\*\* classroom. District also uses a \*\*\* ("\*\*\*\*") \*\*\* that has elements appropriate for a child with social deficits and social skills. T-131-133, 151-152, 291, 340
  23. Parent agreed with the decisions made at the August 2016 ARDC meeting. Jt-4
  24. The teacher to student ratio in the \*\*\* classroom during the relevant time period was \*\*\*. Student's teacher used ABA strategies such as discrete trial and pivotal response, along with visual schedules, and positive reinforcement. She used incentive based strategies among other best practices used for children with behavior struggles. Because Student \*\*\*, Student's teacher pretested Student on skills that Student worked on for Student's grade level. If Student showed mastery of a grade-level skill, the teacher moved Student to a \*\*\* grade skill. T-344-348
  25. The teacher and team in Student's \*\*\* classroom were certified for their specific teaching roles. Student's teacher worked with children with autism \*\*\*, and had certification in Satori Alternative to Managing Aggression ("SAMA") techniques. Her training included responsive classroom and Trust-Based Relationship interventions ("TBRI"). The teacher had observed different therapies for student on the autism spectrum such as verbal behavior strategies, but believed Student was much higher functioning and responded better to pivotal response strategies. The team members had multiple years' experience in the \*\*\* program and working with children on the autism spectrum. R-3, 5; T-296-300, 342, 613-615
  26. Student's teacher used curriculum for social skills training such as \*\*\* curriculum. The program takes complex social abstract terms and put them into \*\*\*-friendly terms using a series of characters.

- For example, a character is \*\*\* who has \*\*\* reactions to small problems. Student's teacher also used the Zones curriculum, as well as Dialectical Behavior Therapy. T-301
27. After Student began at \*\*\*, District's BCBA collected data for Student as part of a new FBA. The FBA was conducted to see if any behaviors had changed or any behaviors had different functions based on Student's new environment. The BCBA looked at antecedents, behaviors, and consequences, called "ABC" data. The BCBA was in the \*\*\* classroom an average of 5 ½ hours a week. Student withdrew from \*\*\* before completion of the FBA. P-24; T-606-613
  28. The BCBA consulted with Student's teachers, teaching assistants, administration and other behavior specialists that supported Student. He reviewed Student's progress and behavior and provided suggestions for behavior and teaching. The BCBA also assisted Student's teacher with changes to Student's visuals. P-24; T-606-613
  29. While in the \*\*\* program, Student had support from the \*\*\* team, a BCBA, and OT therapist, speech therapist and use of the recommended assistive technology. Student's BIP was implemented, and data was taken regularly and shared with Parent. T-354-356, 358
  30. On September \*\*\*, 2016 on behalf of Parent and based on Student report, the advocate complained to District \*\*\*. Student reported to Parent that the teacher \*\*\*, \*\*\*. The teacher returned to the classroom. P-23; R-5, 12; T-364-370, 538-545
  31. A few days later while Student's regular teacher was on leave pending the above- mentioned investigation, Parent filed a complaint against Student's \*\*\* teacher, a certified special education teacher. Again, based on Student report, Parent alleged that the \*\*\* teacher \*\*\*. District police investigated the complaint and determined the complaint was "unfounded." P-23, 25; R-4; T-546-549, 724-727
  32. Student's ARDC met again on September \*\*\*, 2016. Parent requested a shortened school day for Student on a trial basis, and cited Student's higher level of anxiety in the mornings due to \*\*\* (\*\*\*). Parent did not feel Student needed to go to \*\*\* or the \*\*\* ("\*\*\*\*") program. The committee discussed available options to address Student's anxiety about \*\*\*. At the time of the meeting, Student's behavioral challenges were resistance during transitions and noncompliance with non-preferred tasks. Based on data that indicated Student improvement, District committee members did not feel a shortened day would provide a FAPE and LRE. District members believed that a regular length school day would better serve Student. The full day would allow Student time for implementation of Student's goals and sufficient time for Student to have breaks throughout the day. It would also provide time for Student to have social interaction with other children. Parent left the meeting before it concluded, and the parent advocate continued to participate on Parent's behalf. The

- meeting ended with no changes made to Student's IEP. The parent advocate indicated that she would recommend that Parent bring Student to school at \*\*\* o'clock. Jt-3; T-592-593, 718-719
33. Following the ARDC meeting and continuing until Student stopped attending school in District, Student came to school at \*\*\*. According to Student's schedule, Student missed \*\*\*. P-18; R-3; T-526
34. On October \*\*\*, 2016, Student \*\*\*. \*\*\*. \*\*\*. Parent was notified. Student acknowledged to Parent that Student did something wrong and thought Student should be punished. Parent disagreed that punishment would occur. Since enrollment at \*\*\*, Student had \*\*\*. The October \*\*\* incident was the only time that Student \*\*\*. P-26; Jt-9, 11; R-12; T-324-328, 442-443, 746-747
35. On October \*\*\*, 2016, Parent emailed the campus principal that she was removing Student from District. Student did not return to school. Parent home-schooled Student for the remainder of Student's \*\*\* grade year. At the time of hearing, Student continued to be home schooled. District notified Parent of the opportunity to receive proportionate share funds for Student. Student had attended \*\*\* about 5-6 weeks. Of that time period, Student had \*\*\* unexcused absences. R-3, 12, T-326-329, 523-524, 528-529, 743-745, 836
36. Student stopped attending District's \*\*\* prior to issuance of progress reports scheduled for every 9 weeks. Jt.-4
37. In April, 2017, Parent wanted to re-enroll Student at Student's home campus, \*\*\* ("\*\*\*"). District determined that \*\*\* lacked the necessary specialized programming described in Student's IEP. District offered \*\*\*. P-19; T-834
38. After Parent filed the instant action, District offered Parent another campus for Student. Parent did not respond. R-12; T-836
39. District convened an ARDC meeting on August \*\*\*, 2017. Student had not been enrolled in District since \*\*\*. Parent chose not to participate in the meeting. District agreed to fund the Parent-requested IEEs in the areas of OT, psychoeducational, speech and language, and AT. At the time Student stopped attending school at \*\*\*, District was in the midst of conducting a FBA. The committee agreed that should Student re-enroll in District, the FBA would be initiated from the beginning and all new data would be collected. District requested new information and/or evaluation from Parent prior to the meeting, and received no response. Based on Student's performance when Student last attended District, the committee agreed that the goals, supports and services contained in Student's last program would appropriately address Student's needs in \*\*\* grade (2017-2018). Jt-13; T-843-845
40. The ARDC met October \*\*\*, 2017 to review evaluation data. Parent chose not to attend. The committee reviewed Petitioner's medically based OT IEE. A medically based report looks at what is



wrong with a child such as whether one can use Student's hands together. District's OT evaluation was functionally based. In other words, it looks at what a child needs in school, such as picking up books and writing. Student displayed difficulty with \*\*\* skills. Adaptive pencil grip was recommended. District's evaluation of self-care skills reflected that Student was below Student's age level. The committee recommended support strategies and consultation with the PE teacher. The committee recommended environmental modification and sensory strategies to address \*\*\*. The committee increased Student's OT services to \*\*\* minutes of direct service 3 out of every 4 weeks, with indirect services of \*\*\* minutes on the 4<sup>th</sup> week. Student's OT needs were to be addressed throughout the course of the instructional day in the natural classroom environment. Jt-2; P-6, 13; T-686-687, 693-694

41. Parent selected a clinical psychologist to conduct an IEE of Student. In December 2017, the independent examiner diagnosed Student with autism, and a specific learning disability ("SLD") in written expression and mathematics fluency and computation. The SLD diagnosis was based on the Diagnostic Statistical Manual, Fifth Edition ("DSM-V"), not upon IDEA's criteria. Petitioner's examiner indicated that Student had anxiety secondary to autism and attention-deficit hyperactivity disorder ("ADHD"), unspecified. Among other recommendations, Petitioner's psychologist recommended ABA to improve social and adaptive skills. Examples of ABA strategies include positive reinforcement, redirection, modeling, and pivotal response. P-3; Jt-1; T-40-43, 51, 63
42. Petitioner's independent speech language pathologist ("SLP") assessed Student's speech and language skills in October 2017. Results of the assessment were consistent with District's evaluation. Since November 2017 through the time of hearing, the independent evaluator worked with Student. She used \*\*\*'s program successfully with Student. T-175-179, 217-218, 704-705
43. District held another ARDC meeting February \*\*\*, 2018 and reviewed results of the IEE. At that time, Student had been homeschooled since \*\*\* 2016. Parent participated by telephone. Parent was again offered information about proportionate share of Part B funds. The committee determined the findings in the IEE regarding Student's \*\*\* were commensurate with its determination of ED. The independent psychologist agreed. Student continued to qualify for special education and related services under the same eligibility categories. The committee requested baseline data from parent to address Student's present levels of academic achievement and functional performance since Student was homeschooled for approximately the past 1½ years. District committee members recommended a counseling evaluation; Parent declined. Prior written notice was sent to Parent. Jt-1; P-13; T-50; T-568-569, 841-842
44. Dr. \*\*\*, LSSP, reviewed the IEE report. He disagreed that Student had a SLD on the basis that the IEE evaluator used a "discrepancy model" to determine a learning disorder and failed to rule out all

other sociological factors. At the ARDC meeting, District members agreed that in order to determine whether a child has a LD, it must be determined that the learning problem is not primarily the result of an ED or motor disabilities. Jt-1; T-104-115

45. Petitioner's IEE report included 22 recommendations. The ARDC reviewed the recommendations and concluded that the IEE recommendations were in Student's IEP and/or Autism Supplement. Examples of the recommendations that the committee determined existed in the IEP were AT OT, speech therapy, ABA strategies, oral output substitutions, accommodations addressing Student's slower processing speed, extended time in all subjects and standardized tests, behavioral accommodations addressing presentations of content, self-select reinforcement system, multisensory approach to learning, access to tutoring, and opportunity to participate in extracurricular activities with non-disabled peers. Jt-1; P-3; T-101-102
46. The ARDC agreed that upon Student's re-enrollment in District, the FBA that was in progress at Student's last attendance would be completed within 10 weeks. The ARDC meeting ended in disagreement. Parent declined a reconvene meeting. Jt-1
47. At the time of hearing, Student had attended the \*\*\* ("\*\*\*\*") for 10 weeks in the spring, 2018. Initially, Student attended from \*\*\*. After two weeks, the time was reduced by an hour. Student exhibited similar behaviors to those that occurred while at \*\*\*: verbal behavior, aggression, physical aggression toward staff and peers, item destruction and elopement. After about 2 weeks, \*\*\* staff saw the behaviors decrease but were not extinguished. The school staff did not see any aggression, elopement, destruction of property, or attempts to harm other in the last month. The staff took data to determine the reason for Student's behaviors, their triggers, and considered what could be done to prevent them. Student's plan changed throughout as the staff sought strategies that worked with Student. The classroom had a 1:3 or 2:8 teacher to student ratio. The children ranged from \*\*\* years of age. \*\*\* staff used ABA strategies, positive and negative reinforcement strategies and pairing. T-226-232, 245-246, 254-262, 492-493
48. District paid for Petitioner's speech, OT, and neuropsychological IEEs. R-9; T-53

### Discussion

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 a FAPE. *Tatro v. State of Texas*, 703 F.2d 832 (5<sup>th</sup> Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005).

The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under § 300.508(b), unless the other party agrees otherwise. 34 C. F. R. § 300.511(d). No agreement was made in the instant action; thus, only those issues raised in Petitioner's request for due process hearing are considered in this decision.

### **District's Evaluation in all Areas of Suspected Need**

The IDEA requires states to have policies and procedures in place to ensure that all children with disabilities and who are in need of <sup>f.l.</sup>~~IEP~~ special education and related services are identified and evaluated. 34 C. F. R. §300.111. Further, a school district must ensure that an IEP is developed, reviewed, and revised for each child with a disability in accordance with §§ 300.320 through 300.324. The content of an IEP is based upon evaluation results. 34 C. F. R. §300.304.

The IDEA requires a school's evaluation to include the use of a variety of assessment tools and strategies to gather functional, developmental, and academic information about the child, including information from the parent. A school must not use any single measure or assessment as the sole criterion for determining eligibility; and must use technically sound instruments that assess the relative contributions of cognitive and behavioral factors. The evaluation materials used to assess a child must not be discriminatory and must be in the child's native language. It must be used for the purposes for which the measures are valid and reliable, and administered by trained personnel in accordance with the instructions provided by the producer of the assessment. Finally, IDEA requires that the child be assessed in all areas related to the suspected disability and that the evaluation be sufficiently comprehensive to identify all of the child's special education needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C. F. R. §§300.301-300.306.

Prior to Student's re-enrollment in 2016, District conducted a re-evaluation FIE that included OT, AT, and speech evaluations, and a FBA in accordance with the requirements of the IDEA. The examiners each had years' of experience and had conducted numerous evaluations in their particular areas.

Petitioner's issues specifically included an allegation that District's FBA was inappropriate; however, Petitioner failed to produce supporting evidence for that allegation. In Petitioner's closing brief, Petitioner specifically stated that Petitioner did not challenge the FBA conducted during the summer of 2016. Further, Petitioner presented no evidence to show that District's evaluation failed to cover any suspected disabilities other than those evaluated in the FIE.

### **Student's 2016-2017 IEP**

While Petitioner alleged that Student's IEP was inappropriate to fit Student's individualized needs, the evidence does not support the issue. 34 C. F. R. §300.320. District's FIE contained diagnoses of autism, ED, and speech impairment. It did not find that Student had a SLD. 34 C. F. R. § 300.309. The FIE contained numerous recommendations that the ARDC adopted. Student's behavior impeded Student's learning; thus, the ARDC developed a BIP.

Because Student was not at grade level in writing, Student's IEP addressed Student's individual writing needs in the areas of content and organization. The goal focused on revision of drafts for coherence, organization, and use of sentence structures, as well as development of drafts by categorizing ideas, and

editing of drafts for grammar, mechanics, and spelling.. The ARDC determined that Student needed no other academic goals. Parent testified that she had no objection to any of Student’s goals and objectives.

The IEP contained speech goals focused on Student’s social communication needs. Both direct and indirect speech services were provided. The IEP included AT equipment that was provided to Student. 34 C. F. R. §300.34.

The IEP contained an OT goal to address Student’s need to increase writing skills in the areas of content and organization. Student received indirect OT services of \*\*\* minutes per month, divided into weekly contact for the first 9 weeks of school. The purpose of such services was to increase Student’s legible written output, functional signature, and Student’s access to writing accommodations, among others. In the October, 2016 ARDC meeting, the team reviewed the OT IEE and increased OT services to \*\*\* minutes of direct services 3 out of every 4 weeks, with \*\*\* minutes of consultation on the 4<sup>th</sup> week. Student did not return to school to receive the increased services. Parent believed that District’s OT goals were acceptable. 34 C. F. R. §§300.5, 300.6, 300.34.

Student’s BIP was based on the summer 2016 FBA. After Student began attending \*\*\*, District’s BCBA began to collect new data from the classroom for another FBA. However, Student stopped attending school prior to the conclusion of the FBA.

The BIP contained two behavior goals to address “escape” and “obtain” behaviors. Student was provided numerous accommodations including a small teacher to student ratio, structured environment, ABA strategies including pivotal response, discrete trial, token economy, and visual schedule. District staff used Positive reinforcement strategies. Student had support from District’s behavior specialist who worked with and trained staff and spent approximately \*\*\* hours a week in Student’s classroom. The BCBA regularly provided strategies to staff for use with Student.

The evidence presented at hearing reflected that District staff took behavior data. Initially, the teacher used what she called point sheets to determine the time of the day that was particularly difficult for Student. Although the information was somewhat difficult for a layperson to interpret, the teacher found the point sheets helpful for her purposes. District staff then began to use a different form for data collection that included more detailed information regarding Student’s behaviors throughout the day. The BCBA assisted Student’s teacher in improving data-collection to accurately state the objective definitions of the behaviors she witnessed.

Petitioner pled a failure to provide supplementary aids and services unique to Student’s needs and a failure to provide appropriate AT services. However, Petitioner failed to carry Petitioner’s burden to prove either issue. 34 C. F. R. §§ 300.42, 300.105, 300.320 (a).

### **Least Restrictive Environment**

District has the duty to educate children in the LRE to the maximum extent appropriate. Removal of children with disabilities from the regular educational environment should occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C. F. R. §300.114 (a)(2). Although attendance at a child's home school is desirable, school districts have the discretion to consider other factors such as advantages of a proposed program located at another school. 34 C. F. R. §300.116. See *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689 (5th Cir. 1996), *cert. denied*.

The 5<sup>th</sup> Circuit developed a two-part test for determining LRE for a child, as follows: 1) can education in the regular classroom, with the use of supplemental aids and services, be achieved satisfactorily for the child? and 2) if it cannot, and if the school intends to remove the child from the regular education setting, has the school mainstreamed the child to the maximum extent appropriate? *Daniel R. R. v. State Bd. of Educ.*, 874 F. 2d 1036 (5<sup>th</sup> Cir. 1989).

The student/teacher ratio and structure of the classroom are critical for Student. Student became over-stimulated and frustrated in past attempts in general education classrooms. Student exhibited difficulty with large numbers of children and lower levels of support. Student needed and continues to need social and behavioral supports. After consideration of Student's needs and Student's FIE, the ARDC committee appropriately determined that the LRE for Student was a \*\*\*, structured classroom, i.e., the \*\*\* that teaches social and behavioral skills.

Student's IEP included opportunities to be with non-disabled children in \*\*\* classes. In addition, the \*\*\* program provided more social opportunities. When Student was able to handle a larger environment, Student's IEP included an alternate plan to allow additional time in general education \*\*\* class.

At the August 2016 ARDC meeting, Parent agreed with Student's IEP including placement. Petitioner wanted Student to attend \*\*\*.

Petitioner's subsequent IEE was consistent with District's determination that Student needs a small, structured learning environment. The testimony at hearing reflected Parent's preference for a small, structured program and enrolled Student in \*\*\*. Student's class at \*\*\* was a small group of children of varying ages. It had a small student/teacher ratio and had no apparent non-disabled children in attendance. Petitioner failed to present sufficient evidence to support the allegation that District's placement in the \*\*\* program at \*\*\* was not the LRE for Student.

### **Student's Safety**

Parent believes Student was unsafe at District schools. Parent believes that because Student is autistic, Student cannot lie. Thus, Parent believed Student's reports against both Student's teacher and the substitute teacher. The credible evidence disputed Student's claims.

The culminating event leading up to Parent's withdrawal from District was Student's \*\*\*. While it is understandable that Parent was concerned when Student \*\*\*, District's response to the incident was prompt. A staff person followed procedure and called District police. Parent's fear that the child might be arrested was based on stories she had heard. Student was not arrested. The \*\*\* occurred once. The outcome was that Student was safe and returned to Student's classroom. The evidence is clear that Student had and continues to have elopement behaviors in various environments.

The IDEA is silent regarding student safety. If lack of safety at school impedes the child's opportunity to receive a FAPE, safety might be considered in an IDEA FAPE dispute. In the instant action, Petitioner failed to prove that District staff abused Student.

Student's elopement issues are ongoing. When Student unexpectedly \*\*\*, Student was returned safely to class. Petitioner failed to carry the burden of proving that District failed to provide a safe environment for Student.

### **Collaboration With Parent**

The credible testimony and documentary evidence supports District's efforts to collaborate with Parent. When Parent requested that Student attend \*\*\*, District agreed. When Parent requested IEEs, District agreed to fund the evaluations.

In September 2016, at Parent request, District held an ARDC meeting to discuss Parent's request for a shortened day. Parent explained reasons for the request, and fully participated in the discussion about a shortened day. District members explained their reasons to support a full day at school; specifically, a full day was needed to serve Student's IEP and provide FAPE while incorporating Student's need for breaks. Further, a full day provided an opportunity to be socially engaged with both disabled and non-disabled peers. The committee discussed Student's wishes to be in school around other children. They indicated that \*\*\* and \*\*\* provided those opportunities. District staff members explained that beginning Student's school day at \*\*\* o'clock would deny Student that opportunity. Parent saw no need for Student to participate in either \*\*\* or \*\*\*.

Ultimately, the ARDC retained a full day schedule for Student. Even though some parental requests may not be adopted by a school district, no one member of an ARDC has veto power over the educational decision-making. That is the ARDC's responsibility. *34 C.F.R. §§ 300.321-300.322*. In the instant action, the record shows the school district made consistent efforts to reach consensus with Student's parents over the relevant time period. When there was disagreement, District offered reconvene meetings. *19 Tex. Admin. Code §89.1050 (g)*. The school district was required to ensure parental

participation in the ARD process, but the IDEA places no obligation to implement every parental request or suggestion. *Lachman v. Illinois St. Bd. of Educ.*, 952 F. 2d 290, 297 (7th Cir. 988).

Parent wants Student to receive ABA therapy. District uses various ABA therapy strategies, but incorporates other methodology as well. The IDEA does not require schools to adopt parental preferences of educational methods. *Lachman v. Illinois St. Bd. of Educ.*, *supra*.

Of the ARDC meetings that Parent attended, the notes reflect that Parent participated in the discussions and the committee considered her requests. District sent data sheets home to Parent. District's communications log reflected daily calls to Parent to communicate Student's progress. Parent and her advocate communicated by email with District staff on numerous occasions. Staff replied and provided requested information. District timely provided Parent with information regarding proportionate shared services for children who are homeschooled or in private school. 34 C. F. R. §§300.131, 300.137. Parent did not take advantage of such services. Petitioner failed to carry its burden of proving that District failed to collaborate with Parent.

### **FAPE**

The IDEA defines FAPE as special education and related services that are provided at public expense, meet the standards of the state education agency, include an appropriate preschool, elementary school, or secondary school education in the State involved, and are provided in conformity with an IEP that meets the requirements of 34 C.F.R. §§ 300.320 through 300.324. 34 C.F.R. §300.17.

The United States Supreme Court established a two-part requirement for determining whether a school district has provided a student FAPE: 1) the school district must comply with the procedural requirements of IDEA, and 2) the school district must design and implement a program reasonably calculated to enable the child to receive an educational benefit. An educational benefit must be meaningful and provide a "basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational benefit to the handicapped child." *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175 (1982). The educational program must be "specially designed" to meet the child's unique needs. *Andrew F. v. Douglas County School District Re-1*; 137 S. Ct. 988.

Although the school district need only provide "some educational benefit," the educational program must be meaningful. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). The educational benefit cannot be a mere modicum or *de minimis*. The program must be likely to produce progress, not regression or trivial educational advancement. *Houston Independent School District v. Bobby R. and Caius R.*, 200 F.3d 341, 347 (5th Cir. 2000). Texas hearing officers have applied

*Bobby R.*, to deny relief for IEP implementation omissions, where a party did not establish denial of educational benefit. *Diego C. v. Corpus Christi I.S.D.*, 104 LRP 8727, 005-SE-0903 (SEA TX 2003).

The Fifth Circuit delineated four factors to consider as indicators of whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational program individualized on the basis of the child's assessment and performance; 2) Is the program administered in the least restrictive environment; 3) Are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) Are positive academic and non-academic benefits demonstrated? *Cypress Fairbanks Independent School District v. Michael F.*, *supra*. The provision of FAPE is determined on the basis of a child's overall education benefit provided to Student through the implementation of the IEP. *Klein Ind. Sch. Dist. V. Per Hovem*, 690 F. 3d 390, 397-398 (5<sup>th</sup> Cir. 2012).

Factor #1: District's FIE was conducted prior to the development of Student's IEP for the 2016-2017 school year. The ARDC committee found Student eligible for special education services as a child with autism, speech impairment, and ED. Petitioner brought no evidence that Student should have been found eligible under other IDEA classifications.

Based on the FIE, the ARDC developed Student's IEP. The IEP included goals and objectives based upon the current FIE and parental input. It provided a detailed list of accommodations along with supplementary aids and services that focused on Student's specific behavioral, social and academic needs. Student received speech therapy, OT and AT support. The ARDC developed a BIP that addressed Student's behavior needs. The BIP included specific antecedent strategies, reinforcements and replacement behaviors. 34 C. F. R. §300.320.

Petitioner argued in Petitioner's closing brief that the achievement portion of the FIE was faulty. As reason, Petitioner pointed out that Student's behaviors prevented completion of certain formal measures. However, Petitioner failed to introduce evidence that Student's achievement level was lower than Student's grade level or that Student needed additional academic goals. Student's \*\*\* grade teacher testified that as Student was successful on \*\*\* grade level skills, she raised Student's skill level to \*\*\* grade. Petitioner failed to prove that District's FIE was not conducted according to IDEA requirements or that Student's program was not individualized on the basis of Student's assessment and performance.

Factor #2: See above discussion regarding LRE.

Factor #3: Student had support from not only Student's classroom teacher and aides, but also from a BCBA, speech therapist, occupational therapist, and assistive technology staff person. Each individual provided the support necessary for Student to benefit from Student's education program. Communications between District staff and Parent were ongoing. Parent participated fully in the ARDC meetings that she attended. District kept Parent informed of Student's activities. Parent wanted daily telephone calls about Student's day at school, and District complied with the request.



Factor #4: In the summer following Student's \*\*\* grade homeschool, Parent reported that when upset, Student yelled, threatened and insulted, and the outbursts could escalate to physical aggression toward objects, self, or others. As recently as spring 2018, after 10 weeks at \*\*\*, Student's behaviors included verbal behavior, aggression, physical aggression toward staff and peers, \*\*\* and elopement. The \*\*\* witness, a BCBA, saw a reduction in aggressive behaviors (none during the last month), but other behaviors continued, and no behaviors were extinguished.

District staff members testified credibly that during the 5-6 weeks at \*\*\*, Student showed improvement in Student's more aggressive behaviors and stalling behaviors. When Student had a "meltdown," the recovery time was faster. In terms of frequency of behavioral occurrences, Student made improvements. Student's dysregulation occurred "pretty often" at first, but began to decrease.

Initially, Student needed a break after a single 5-minute activity. Petitioner argued that on \*\*\*, \*\*\*, Student took many breaks and did little academic tasks. However, upon review of Student's daily activity records as a whole, there is evidence to support the testimony that toward the end of the 5-6 weeks at \*\*\*, Student could work on as many as \*\*\* things for as long as \*\*\* minutes without a break.

Student performed on grade level during Student's few weeks at \*\*\*. When teacher assessments indicated, the teacher introduced a \*\*\* grade level skill.

Socially, Student began to want to be with Student's classmates. Student requested to go to \*\*\* and \*\*\*. Student began to share with fellow classmates. Student invited a buddy to join Student for what was called "\*\*\*\*."

Petitioner finds fault with the amount of time District's BCBA took to prepare a FBA in the fall 2016. The criticism fails to acknowledge the few weeks that Student attended and Student's absences during that time. There was no credible evidence to show that Student suffered a loss of opportunity as a result of any delay that may have occurred.

In the instant action, Student's behaviors impeded Student's learning; thus, Student had a BIP as part of Student's IEP. In Petitioner's closing argument, Petitioner complains that District failed to implement Student's BIP. Petitioner argues that Student was allowed to make decisions regarding Student's instruction although the FIE pointed out that Student responded well to structure that was mutually agreed upon. Petitioner argued that although Student's teacher testified that she held the demand, she provided supports to help Student accomplish that demand. The BIP cautioned staff to keep the demand *if possible* and to avoid setting up a power struggle. Petitioner's expert witness testified that it is important to pair with a teacher in a positive interaction rather than only a negative interaction. Early in Student's time at \*\*\*, Student's teacher paired with Student to learn about Student.

The evidence does not support Parent's belief that District staff is incapable of educating Student. Despite Petitioner's argument that District failed to implement Student's BIP, the evidence supports that

Student made progress during the few weeks that Student attended \*\*\*. Petitioner failed to present evidence to the contrary. Student's educational plan was reasonably calculated to provide the requisite benefits, and Student received more than *de minimis* academic and non-academic benefits during the 5-6 weeks that Student attended \*\*\*. District's program satisfied the requirements of FAPE under *Cypress Fairbanks Independent School District v. Michael F.*

### **Conclusion**

1. The Student is eligible for a free appropriate public education under the provisions of IDEA, 20 U.S.C. §1400, et seq., 34 C. F. R. §300.301 and 19 T.A.C. §89.1011.
2. The Austin Independent School District is responsible for properly identifying, evaluating, and serving the student under the provisions of IDEA, 20 U.S.C. §§1412 and 1414; 34 C. F. R. §300.301, and 19 T.A.C. §89.1011.
3. The Austin Independent School District did not deny Student a FAPE. *Bd. of Hendrick Hudson Int. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).
4. Student's educational program was "*speciallly* designed" to meet Petitioner's *unique* needs. *Andrew F. v. Douglas County School District Re-1*; 137 S. Ct. 988.
5. Petitioners failed to carry the burden of proof to establish a violation of IDEA or a denial of FAPE. *Schaffer v. Weast*, 126 S.Ct. 528 (2005); *Tatro v. State of Texas*, 703 F.2d 832 (5<sup>th</sup> Cir. 1983), *aff'd*, 468 U.S. 883 (1984).

### **Orders**

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that all relief requested by Petitioner is DENIED and that all claims of Petitioner are DISMISSED with prejudice.

SIGNED on September 19, 2018.

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Brenda Rudd  
Special Education Hearing Officer  
For the State of Texas

### **NOTICE TO THE PARTIES**

The decision issued by the hearing officer is final, except that any party aggrieved by the findings and decision made by the hearing officer, or the performance thereof by any other party, 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. A civil action brought in state or federal court must be initiated not more than 90 days after the date the hearing officer issued his or her written decision in the due process hearing. 20 U.S.C. §§1415(i)(2) and (3)(A) and 1415(l).

