

**BEFORE A SPECIAL EDUCATION HEARING OFFICER  
STATE OF TEXAS**

**STUDENT,  
bnf PARENT  
Petitioner,**

§  
§  
§  
§  
§  
§  
§

v.

**DOCKET NO. 296-SE-0710**

**BEAUMONT INDEPENDENT  
SCHOOL DISTRICT,  
Respondent.**

**DECISION OF THE HEARING OFFICER**

Introduction

Petitioner, Student (“Petitioner” or “Student”) brings this action against the Respondent Beaumont Independent School District (“Respondent,” “the school district,” or, “BISD”) under the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. § 1401 et. seq (IDEA) and its implementing state and federal regulations.

Party Representatives

Student was represented throughout this litigation by his legal counsel Dorene Philpot, Attorney at Law assisted by her co-counsel Rion Sanders. Respondent was represented by its legal counsel Don Henslee and Heather Rutland of Henslee Schwartz LLP as lead counsel and Nancy Hart and Melody Chappell of Wells, Peyton & Greenberg as co-counsel. \*\*\*, Residential Facility and Compliance Monitor, and \*\*\*, Assistant Superintendent, took turns as the party representative during the due process hearing.

Resolution Session and Mediation

The parties met in a Resolution Session on July 19, 2010 but were not successful in reaching an agreement. The parties also attempted mediation on August 11, 2010 but it was not successful either.

Procedural History

Petitioner filed his initial request for hearing on July 7, 2010. An initial Scheduling Order was issued on July 8, 2010 setting the case for hearing on August 26-27, 2010. Petitioner filed a Motion for Ruling on Stay Put on July 27, 2010. A prehearing conference was conducted on August 4, 2010 with counsel for both parties. The issues and items of requested relief were identified, confirmed and clarified. The hearing was continued and reset, by agreement, for August 25-27, 2010 to add a third consecutive day of hearing. The parties also agreed to attempt mediation.

Respondent filed a Motion to Apply One Year Statute of Limitations and Motion to Dismiss on August 6, 2010. On August 13, 2010 the parties submitted a joint request for continuance of the August hearing dates in order to provide Petitioner with more time to respond to Respondent's motions, provide both parties with more time to prepare for the hearing and to resolve the preliminary issues raised by the various pending motions. A second prehearing conference was conducted on August 17, 2010. The hearing was reset for October 20-22, 2010 by agreement.

An Order on Petitioner's Motion for Ruling on Stay Put was issued on August 18, 2010. The statute of limitations issues remained pending. Petitioner requested the October hearing date be continued to resolve an unexpected scheduling conflict that arose for Student's mother with her employment. A third prehearing conference was conducted on September 16, 2010 and the hearing was reset by agreement for October 28, 29 and November 2, 2010.

Disputes then arose over discovery, the disclosure deadline, and Petitioner's request to use telephone testimony. The hearing officer issued several preliminary orders resolving these issues. The due process hearing was conducted on October 28, 29 and November 2, 2010. On the third day of hearing Petitioner moved to exclude the testimony of \*\*\*, a BISD special education teacher and \*\*\*, Respondent's consulting and testifying expert. The motion was taken under advisement, the record remained open to allow Respondent to submit a written response, and the motion remained pending for resolution in this Decision. Respondent submitted its response on November 24, 2010. The parties submitted written closing arguments by agreement and the Decision of the Hearing Officer was extended to December 30, 2010. The parties agreed to the hearing officer's request to extend the Decision deadline to January 7, 2011 due to an unexpected death in the family that put the hearing officer behind schedule.

#### Overall Broad FAPE Issue

Petitioner submitted the following broad issue for decision in this case: whether the school district provided Student with a free, appropriate public education (FAPE) within the meaning of the Individuals with Disabilities Education Act (IDEA) beginning in the 2003-2004 school year up through the present.

#### Petitioner's Issues

Petitioner submitted the following sub-issues:

##### *Assessment Issues:*

1. Whether the school district failed to timely and appropriately evaluate Student in all areas of special need and, if not, whether that resulted in a substantive educational harm and violation of IDEA;
2. Whether the school district failed to assess and address Student's communication needs, and if not, whether that resulted in a substantive educational harm and violation of IDEA;

Decision of the Hearing Officer

Docket No. 296-SE-0710

Page 2 of 28

*FAPE Issues:*

3. Whether Student needed and continues to demonstrate a need for speech, occupational therapy (OT), physical therapy (PT), in-home training, and parent training in order to receive FAPE;
4. Whether the educational program provided to Student failed to include the use of peer-reviewed, scientifically based methods of instruction and, if not, whether that resulted in a substantive educational harm and violation of IDEA;
5. Whether the extended school year services (ESY) provided in the summer of 2009 and the summer of 2010 provided Student with FAPE;
6. Whether the Individual Educational Plan (IEP) in effect during the relevant time period included objective and measurable goals and objectives based on Student's present levels of performance and whether Student's IEPs addressed all areas of need and, if not, whether that resulted in a substantive educational harm and violation of IDEA;
7. Whether the school district failed to properly implement Student's IEPs; specifically and for example, whether the school district failed to provide timely and appropriate progress reports on IEP goals and objectives from all service providers, whether all IEP services were delivered and/or provided (for example in-home training) and, if not, whether that resulted in a substantive educational harm and violation of IDEA;
8. Whether the Admission, Review & Dismissal Committees (ARD) appropriately addressed Student's needs related to his autism; and specifically whether the ARD failed to appropriately address the items stated in "the autism supplement" [19 Tex. Admin. Code § 89.1055 (d)(1)-(11)] and to include those services in Student's IEPs during the relevant time period;

*Procedural Issues:*

9. Whether the school district failed to provide Student's mother with the requisite prior notice at all required junctures;
10. Whether all required members attended ARD meetings during the relevant time period including specifically whether there was a person in attendance who was knowledgeable about the availability of school district resources as required by 34 C.F.R. § 300.321 (a)(4) and 19 Tex. Admin. Code § 89.1050 (c)(1)(D), and if so, whether that resulted in a substantive educational harm and violation of IDEA;

*Placement Issue:*

11. Whether Student was and is now being educated in the least restrictive environment within the meaning of IDEA and, if not, whether that resulted in a substantive educational harm and violation of IDEA; and,

*Compensatory Relief:*

12. Whether Student is entitled to compensatory relief in the form of educational services and/or payment and/or reimbursement for parental expenses for private placement.

Respondent's Issues

Respondent submitted the following additional issues:

13. Whether the hearing officer has jurisdiction to award attorney's fees;
14. Whether Petitioner failed to exhaust his administrative remedies by failing to submit the issues stated in his initial request for hearing and the claims asserted during the prehearing conference to an ARD prior to filing his request for hearing; and,
15. Whether any portion of Petitioner's claims are barred by the one year statute of limitations applied in Texas.

Requested Relief

Petitioner requests the following items of relief:

1. Reimbursement to Student's mother for past expenses incurred for private placement and private related services; specifically -- placement at \*\*\*, physical therapy, and transportation costs related to the private placement and PT services;
2. Reimbursement for the cost of the private, outside psychological evaluation and report conducted by \*\*\* in November, 2009;
3. Private placement at \*\*\* at public expense for the 2010-2011 school year including the cost of related services such as OT, PT, speech, and parent training beyond the cost of the basic tuition and transportation (including mileage);
4. The school district conduct evaluations in all areas of need including specifically evaluations for OT, PT, speech, in-home training, assistive technology, and parent training; and,

5. Any other relief deemed appropriate by the hearing officer based on the presentation of the evidence at the hearing.

Respondent requests dismissal of Petitioner's request for attorney's fees; dismissal of any and all portions of Petitioner's claims arising outside the one year statute of limitations period applied in Texas; and, dismissal of all of Petitioner's IDEA claims for failure to exhaust administrative remedies.

#### Statute of Limitations

Under IDEA a parent or agency must request an impartial due process hearing within 2 years of the date the parent knew or should have known about the alleged action that forms the basis of the complaint. *20 U.S.C. § 1415 (f); 34 C.F.R. §§300.507 (a) (2); 300.511 (e)*. However, if the State has its own time limitation for filing a request for hearing then the state rule applies. *20 U.S.C. §1415(f) (3) (C); 34 C.F.R. §§ 300.507(a) (2); 300.511 (e)*.

In Texas, a parent must request a due process hearing within one year of the date the complainant knew or should have known about the alleged action that serves as the basis for the hearing request. *19 Tex .Admin. Code. § 89.1151(c)*.

There are two exceptions to the application of the statute of limitations rules under the IDEA. Claims that arose prior to the State's one year statute of limitations are not barred if the parent was prevented from requesting the hearing due to –

- (i) specific misrepresentations by the local education agency that it had resolved the problem forming the basis of the complaint; or
- (ii) the local education agency's withheld information from the parent that was it was otherwise required to provide. *20 U.S.C. §1415(f) (D); 34 C.F.R. § 300.511 (f) (1) (2)*.

Petitioner filed his request for hearing on July 7, 2010. Under the one year statute of limitations rule in Texas he is limited to IDEA claims that arose beginning on July 7, 2009 up through the hearing. Petitioner contends the school district failed to provide him with FAPE beginning in the 2003-2004 school year – 6-7 years ago. Respondent contends those claims are barred by the applicable one year statute of limitations.

#### Prior Written Notice

A school district must provide written notice that meets certain regulatory criteria whenever it proposes to initiate or change (or refuses to initiate or change) the identification, evaluation, or educational placement of the child or the provision of FAPE. *34 C.F.R. § 300.503 (a) (b)*. The school district must also give the parent a copy of the IDEA's procedural safeguards at least once a year and upon initial referral, request, receipt of a state complaint, under certain disciplinary procedures not relevant here,

and/or parental request. 34 C.F.R. § 300.504 (a) (1)-(4).

As the findings of fact below show, the credible evidence established the school district provided Student's parents with the requisite copy of procedural safeguards at various ARD meetings over the years. Whether Student's parents chose to read, review, or act upon those safeguards or not is not determinative of the limitations issue.

Instead the law requires parents file a request for hearing within one year from the time they either *knew or should have known* of the school district's action that forms the basis of the complaint. 34 C.F.R. §§ 300.507 (a) (2); 300.511 (e) (*emphasis added*); 19 Tex. Admin. Code § 89.1151 (c). At any point along the way Student's parents, if they were dissatisfied with the educational program provided or proposed, could have and did have the right to a due process hearing or to file a state complaint.

### Misrepresentations

As the findings of fact below show the parties had disagreements and discussions over educational services and Student's educational progress over the years. However, there is little evidence to establish that any statements made by school personnel rose to the level of a "specific misrepresentation" within the meaning of the law for limitations purposes. More than mere disagreement must be in evidence before the application of the statutory limitations period can be abandoned. *See, Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 U.S. Dist. LEXIS 91442, pp. 4-5(D.C. Pa. 2008)*

Neither the IDEA nor its implementing state or federal regulations clarify the scope of what constitutes a "misrepresentation" for purposes of meeting the exception to the statute of limitations rule. The case law provides some guidance. The alleged misrepresentation must be intentional or flagrant. Petitioner must establish not that the school district's provision of FAPE was objectively inappropriate but instead that school district personnel subjectively determined Student was not receiving FAPE and intentionally misrepresented that fact to his parents. *Evan H. v. Unionville-Chadds Ford Sch. Dist., supra(holding that school district's failure to identify student as eligible for special education did not constitute a specific misrepresentation where there was no evidence school district determined student was eligible and specifically misled parents otherwise); G.G. v. El Paso Ind. Sch. Dist., Dkt. No. 010-SE-0906(SEA Tex. 2006)(lack of competence in provision of services, documentation and communication by school district was negligence but not specific misrepresentation for purpose of invoking exception to SOL rule).*

Petitioner essentially argues the school district's failure to provide Student with FAPE over the years constitutes a "misrepresentation" for limitations purposes. To read the term "misrepresentation" to include actions by a school district anytime it fails to remedy an educational problem is too broad. Such an interpretation would "swallow the rule

Decision of the Hearing Officer

Docket No. 296-SE-0710

Page 6 of 28

established by the limitation period.” *Evan H. v. Unionville-Chadds Ford Sch. Dist.*, 2008 U.S. Dist. LEXIS 91442 at p. 5, no. 3. This reasoning applied in a Pennsylvania case where the parent alleged the school district repeatedly misrepresented that the student was doing well and making significant progress. The parents protested the student’s needs were not being met and alleged the school district misled them by withholding test score information. *Sch. Dist. of Philadelphia v. Deborah A.*, 2009 U.S. Dist. LEXIS 24505, pp. 3-4 (D.C. Pa. 2009).

The Pennsylvania court held that at most the parents demonstrated the student’s IEP’s were deficient but that the exception would “swallow the rule” if all that was required was merely a showing the IEP’s were inadequate. In hindsight, a parent may consider the school district’s assessment of student progress to be wrong but that does not rise to the level of a specific misrepresentation to meet the statute of limitations exception. *Id.*

Petitioner’s other arguments that the statute of limitations rule should not apply to minors or to a “continuing violation” or that the Texas Education Agency does not possess the requisite authority to promulgate a statute of limitations rule are similarly without merit. The state’s one year statute of limitations rule has been consistently upheld in Texas. *See, McDowell v. Fort Bend Ind. Sch. Dist.*, 737 F. Supp., 386 (S.D. Tex. 1990); *Texas Advocates Supporting Kids With Disabilities v. Texas Education Agency*, 112 S.W. 3d 234 (Tex. App. – Austin 2003, no pet.); *Marc V. v. North East Ind. Sch. Dist.*, 455 F. Supp. 2d 577 (W.D. Tex. 2006), *aff’d on appeal*, 242 Fed. App. 271 (5<sup>th</sup> Cir. 2007).

Respondent’s Motion to Apply One Year Statute of Limitations shall be granted and Petitioner’s claims are limited to those arising on or after July 7, 2009.

#### Attorney’s Fees

A court, in its discretion, may award reasonable attorney’s fees to a parent who is a “prevailing party” in a special education case. 34 C.F.R § 300.517. A special education hearing officer in Texas has no such authority but instead is limited only to making a finding, upon request of a party, as to whether the opposing party unreasonably protracted the final resolution of the issues in controversy or whether the parent’s attorney provided the school district with appropriate information in the due process complaint. 19 Tex. Admin. Code § 89.1185 (m) (1) (2). To that extent Petitioner’s request for attorney’s fees shall be dismissed as outside the jurisdiction of the hearing officer although Petitioner is free to pursue his request for attorney’s fees in an appropriate judicial forum if he meets prevailing party status. 34 C.F.R. § 300.517.

#### Exhaustion of Administrative Remedies

Respondent argues that Petitioner’s claims should be dismissed because he did not first present his complaints to an ARD Committee for consideration and possible resolution.

Decision of the Hearing Officer

Docket No. 296-SE-0710

Page 7 of 28

There is no such requirement under IDEA. A parent may file a request for hearing on any matter relating to the identification, eligibility, identification, or educational placement of a child with a disability and/or provision of FAPE to the child. 34 C.F.R. § 300.507 (a). There is no statutory or regulatory provision that bars a parent from seeking a due process hearing without first going before an ARD Committee. *Letter to Lenz, 37 IDELR 95 (OSEP 2002) (imposition of any additional notice requirements in a manner that restricts the issues that may be heard in a due process hearing inconsistent with the IDEA)*. While a parent's ability to secure reimbursement for private placement without first providing notice to the school district may be limited or denied no such requirement extends to invoking due process. 34 C.F.R. §§ 300.148 (d); 300.507 (a); *See also, Mattie G. v. North East Ind. Sch. Dist., Dkt. No. 503-SE-895 (SEA Tex. 1995)*. Respondent's Motion to Dismiss shall be denied.

#### Petitioner's Motion to Exclude Testimony

During the due process hearing Petitioner objected to the testimony of Respondent's proffer of \*\*\* teacher employed by the school district. Petitioner argued \*\*\* testimony was not relevant. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Tex. R. Evid. 401*. Furthermore, a non-expert witness may testify in the form of opinions or inference so long as the testimony is limited to opinions or inferences that are rationally based on the perception of the witness or the determination of a fact in issue. *Tex. R. Evid. 701*. \*\*\* testimony was offered by Respondent as relevant evidence on the issue of whether the school district could provide Student with FAPE. \*\*\* testimony was also relevant to the issue of compensatory relief. Therefore Petitioner's objection to \*\*\* testimony is overruled.

The school district identified \*\*\* as a witness by the disclosure deadline. At the beginning of the due process hearing the school district requested \*\*\* be allowed to remain in the hearing room as an exception to application of "the rule." Respondent argued \*\*\* was the school district's consulting and testifying expert and therefore essential to the school district's defense. *Tex. R. Evid. 614(3); 702*. Petitioner did not object to \*\*\* presence during the hearing but did move to strike her testimony when Respondent proffered her testimony. Petitioner was allowed to take \*\*\* on voir dire.

Petitioner made a number of technical arguments regarding \*\*\* expert opinion but the record reflects \*\*\* was well qualified to testify on appropriate educational programming for children with autism and as such could assist the trier of fact in understanding the evidence or to determine a fact issue. *Tex. R. Evid. 702*. Furthermore, Petitioner could not show that the underlying reasoning or methodology of \*\*\* opinions were not scientifically valid or could not be properly applied to the facts at issue. In addition Petitioner had the opportunity to vigorously cross examine \*\*\* and present contrary proof. In sum, Respondent's proffer of \*\*\* expert testimony met the requisite standards of reliability and relevance. *See, Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)*.

Petitioner also argues \*\*\* testimony should be stricken because it merely offers some evidence of subsequent remedial measures and, as such, is irrelevant to the issue of whether the school district provided Student with FAPE in the past. I disagree. \*\*\* expert opinion is relevant to the question of fashioning appropriate relief if the FAPE and/or placement issues are resolved in Petitioner's favor. *See, Tex. R. Evid. 401, 407(a)*. Petitioner's Motion to Strike \*\*\* testimony shall be denied.

### **Findings of Fact**

1. Student is eligible for special education as a student with autism and speech impairment. (Respondent's Exhibit 25, p. 426, referred to hereafter as "R. Ex. \_\_\_\_")(R. Ex. 32, p. 489). There is no dispute about Student's eligibility for special education under IDEA. (R. Ex. 32, p. 489). Student has also been identified with cortical processing delays, overall developmental delay, and poor visual-motor integration. (R. Ex. 25). Student can also be described as a student with mental retardation. Developmental delays are part of Student's overall profile. (Hearing Transcript Volume II, p. 72, referred to hereafter as "Tr. Vol. \_\_\_\_, p. \_\_\_\_").
2. Student was diagnosed as an infant with "\*\*\*\*" (R. Ex. 2, pp .501-502, 506) (R. Ex 4, p. 25) (R. Ex. 29, p. 406). Developmental delay is predicted for children with \*\*\* and there is some speculation that the disorder may result in autism. (Tr.Vol. II, pp. 153-54). Student falls within the moderate range of deficit in intellectual functioning with accompanying moderate deficits in adaptive behavior. Student needs to develop social and communication skills, functional academic skills and attention to tasks. (Petitioner's Exhibit 6, pp. 96-97, referred to hereafter as "P. Ex. \_\_\_\_, p. \_\_\_\_") (R. Ex. 31, p. 933).
3. Student was first referred to the school district for speech services in October 2006 at age \*\*\*. (R. Ex. 2). At the time of his initial referral Student was diagnosed with severe receptive and expressive language and articulation delays. (R. Ex. 4, p. 8) (R. Ex. 22 p. 473). Student enrolled in the school district on \*\*\*, 2007 and was placed in a \*\*\* program. (R. Ex. 3, pp. 632, 637) (R. Ex. 4, pp. 8, 19). Student was not identified by the school district as a student with autism until June 2008. (R. Ex. 25).
4. The school district served Student in a \*\*\* known as "\*\*\*\*" for three years through the 2009-2010 school year. (R. Ex. 4, pp. 13-14) (R. Ex. 5) (R. Ex. 6). At the time of the due process hearing Student was \*\*\* years old soon to be \*\*\*. (R. Ex. 35, p. 980). IEP's were developed by the various ARD Committees over the three school years. The IEP's contained objective measureable goals and short term objectives based on present levels of performance that addressed Student's cognitive, motor, self care, communication and behavioral needs. (R. Ex. 6, pp. 94-98, 119)(R. Ex. 9, pp. 263-272, 277)
5. Student exhibits a number of sensory deficits specifically in sensory processing and modulation. (R. Ex. 30). He has an immature development of the nervous system which adversely affects learning and behavior. Student needs OT to address his sensory needs,

Decision of the Hearing Officer

Docket No. 296-SE-0710

Page 9 of 28

including a “sensory diet” with increased opportunities for deep pressure/pressure touch and vestibular sensations. He also needs proprioceptive input such as jumping, climbing, pulling, pushing, and carrying heavy books. (R. Ex. 28, pp. 250-251). He needs the sensory diet to help him stay calm, give him personal boundaries, enhance attention, and “feed” the brain. Student needs OT once a week for 30 minutes each session to work on continued development of motor skills, visual-motor skills and sensory integration. (P. Ex. 27, p. 209).

6. Student exhibits a dynamic coordination deficit – i.e., he does not have the coordination necessary for functioning across all environments in order to participate in school. In addition, Student does not exhibit sufficient strength to perform daily living activities such as putting on his pants. (Tr. Vol. II, p. 214). Student needs physical therapy on a regular basis to increase lower, upper and core strength, static and dynamic balance, dynamic and static coordination and gross motor skills. (R. Ex. 33, p. 653). Student benefitted from private PT services secured at parental expense that addressed these needs. (Tr. Vol. II, pp. 217-220).
7. Student is below average for word meanings, following oral directions and comprehending classroom discussion. Expressively he has poor performance in displaying an adequate vocabulary, grammar, retelling a story in sequence and organizing ideas and factual information. Emotionally Student has difficulty adapting to new situations, accepting responsibility for his actions, working cooperatively with others, initiating activities independently and resisting becoming discouraged by difficulties or minor setbacks. (R. Ex. 32, pp. 482, 487, 494).
8. Student continued in the \*\*\* program with direct speech services for the 2009 summer ESY. (R. Ex. 7, pp. 165, 167-168, 190)(R. Ex. 37, p.124). Student’s need for ESY was well documented. (R. Ex. 37, pp. 122-123, 128). The school district also agreed to fund an after school care program in summer 2009 at parental request. (R. Ex. 8, pp. 228, 234-235).
9. Summer 2009 ESY services consisted of two components: a school district program for the month of June and a second component at school district expense through \*\*\*. (R. Ex., p. 228). \*\*\* is a non-profit educational institution that implements an applied behavior analysis program (ABA). The school district funded an 8 week full day ABA training program with speech therapy at \*\*\* for the summer 2009. (R. Ex. 38).
10. Applied Behavior Analysis (ABA) is a known and effective treatment of autism. ABA utilizes the principles of behavior to assess, shape and modify socially important behaviors with the aim of generalizing the behavior successfully to the real world. There is no single approach to ABA; instead there are several approaches and strategies that fall under the ABA “umbrella” that have been shown to be effective. (R. Ex. 35, p. 984-985). There is no standard ABA program – a program falls under the ABA umbrella if it utilizes the principles of behavior analysis research. (P. Ex. 27, p. 212).

11. There is considerable empirical evidence to support the use of ABA methods in the treatment of autism. (Tr. Vol. II, p. 65). Student needs 20-40 hours per week of intensive ABA programming. He also needs year round programming. It is reasonable to expect that without it he will regress. Skill acquisition is a critical factor for Student. (P. Ex. 31) (Tr. Vol. II, pp. 20, 112-114). The program at \*\*\* meets the requisite criteria to qualify as an effective ABA program. (R. Ex. 35, p. 985) (Tr. Vol. III, pp. 148-150).
12. Student needs in home training. (P. Ex. 2) (R. Ex. 36). There was a delay in initiating in home training services during the 2008-2009 school year. (R. Ex. 36, p. 575). The school district agreed to provide 10 additional 60 minute in home training sessions as compensation for the delay. (R. Ex. 36, pp. 576, 583). Ten in home training sessions were provided beginning on May 6, 2009 through August 31, 2009. Sixteen more in home training sessions were provided from September 2009 through April 2010. (R. Ex. 36, pp. 568-574, 592-615).
13. The in home trainer worked on a wide variety of functional and behavioral skills. (R. Ex. 36, pp. 204-214). Student benefitted from the in home training. (R. Ex. 36, pp. 592-615). Student's parents were able to see what the in home trainer did and apply the strategies at home. (Tr. Vol. II, p. 169). Student and his family continue to need in-home and parent training and can be expected to need that support for some time. (Tr. Vol. I, pp. 170-171) (Tr. Vol. II, p. 109). However, in home training was suspended at the end of the 2009-2010 school year. (Tr. Vol. II, pp. 169-170).
14. An annual ARD convened on September 9, 2009. (P. Ex. 5, p. 56)(R. Ex. 9, p. 256). The ARD was duly constituted with the necessary members in attendance. (P. Ex. 5, p. 86) (R. Ex. 9, p. 286). The ARD agreed Student needed to continue direct speech therapy with eight thirty minutes sessions every six weeks. (P. Ex. 5, p. 73) (R. Ex. 9, p. 284). The ARD also agreed Student needed an updated speech evaluation due by December 8, 2009. (R. Ex. 9, pp. 256-257).
15. The September 2009 ARD reviewed the autism supplement confirming Student's need for extended educational programming, a daily schedule reflecting a minimum of unstructured time, in-home training, positive behavioral supports, parent/family training and support, and a suitable staff to student ratio. In September 2009 there were five students in the \*\*\* classroom staffed by one teacher and one paraprofessional. (R. Ex. 9, pp. 259-260) (P. Ex. 5, p. 60) (R. Ex. 9, p. 260) (P. Ex. 5, p. 59).
16. At the September 2009 ARD Student's mother shared a number of concerns about Student's educational progress and program. She asked whether Student could benefit from physical therapy and raised questions about the severity of Student's autism. She also requested the school district enroll Student in \*\*\* outreach ABA program. The school district agreed to fund the outreach ABA program at \*\*\* for two days per week for one hour per session. (P. Ex. 5, p. 84)(R. Ex. 9, p. 284). The ARD agreed to reconvene in the spring

of 2010 to plan Student's 2010 summer ESY. (P. Ex. 5, p. 85)(R. Ex. 9, p. 285).

17. The September 9, 2009 ARD was amended to correct parental contact information on transportation and ESY forms and to confirm the parental request for a physical therapy evaluation. (R. Ex. 11, p. 305). Student's mother signed the consent for the PT evaluation on September 18, 2009. (R. Ex. 34, p. 395). The PT evaluation was to be completed by November 20, 2009 and an updated speech/language evaluation by December 8, 2009. (R. Ex. 34, p. 397). There is no evidence in the record that the PT evaluation was ever completed by the school district. The updated speech/language evaluation was not completed until January 25, 2010. (R. Ex. 32).
18. Student continued in the \*\*\* program during the 2009-2010 school year. Student had difficulty sitting at a table to do work. An increase in noise level resulted in an increase in activity – Student would jump up and down, run away from the table, the classroom, in the cafeteria and during school assemblies. He became upset during fire drills. Student does not adapt well to change – he often played alone and cried when he didn't get his way. The challenge for the \*\*\* teacher was keeping his attention. He made some minimal progress in the \*\*\* program showing a love of music, interest in the alphabet, and learning to color independently. (Tr. Vol. I, pp. 62, 125)(Tr. Vol II., pp. 32, 41) The \*\*\* teacher kept Student's parents informed of his progress in meeting IEP goals by sending a record of daily assignments home with progress reports every six weeks. Related service progress reports were shared at ARD meetings with some speech reports somewhat more often. (Tr. Vol. II, pp. 39-42, 168-169)(Tr. Vol. III, pp. 111-112).
19. Despite long standing and significant behavior issues the school district did not conduct a functional behavior assessment (FBA) or develop or implement a specifically tailored Behavior Intervention Plan (BIP) to address Student's behavioral needs. (P. Ex. 31) (R. Ex. 25) (Tr. Vol. II, pp. 76, 142) (Tr. Vol. III, pp. 115-116).
20. A duly constituted ARD was conducted on April 30, 2010. (R. Ex. 12, pp. 320, 345). The ARD reviewed the updated speech/language evaluation and revised the speech/language IEP to reflect the recommendations of the evaluation. The speech/language IEP addressed a number of Student's communication needs with measureable goals and objectives. (R. Ex. 12, p. 343). The ARD also agreed on Student's continued need for OT. The ARD reviewed and discussed Student's educational progress towards meeting IEP goals and objectives. No in-home training report was available to the April 2010 ARD. (R. Ex. 12, pp. 329-332, 343). The ARD prepared an IEP of measureable goals and objectives based on present levels of performance addressing cognitive skills, fine and gross motor skills, communication skills, and self help skills for the summer 2010 ESY program. (R. Ex. 12, pp. 326-328) (R. Ex. 13, pp. 520-521).
21. Student's mother submitted a number of requests to the April 2010 ARD. She requested a two week summer camp in August; one month of ABA therapy with extended care at \*\*\* in

July; continuing \*\*\* outreach ABA therapy 2-3 days a week for the 2010-2011 school year (or in the alternative -- full time placement at \*\*\*); the use of video-modeling as an instructional technique; adding “\*\*\*\*” to his educational program (\*\*\*); a “board maker” and related software to assist in creating a schedule for Student; and, reimbursement for parental expenses for the extended after school program provided by \*\*\* the previous school year. (R. Ex. 12, pp. 343-344, 349, 351-352, 356).

22. The school district took the set of six parental requests under consideration and promised to notify Student’s mother of its decision. (R. Ex. 12, p. 344). Both the OT and Student’s \*\*\* teacher supported the use of video modeling. (P. Ex. 29, p. 290) (R. Ex. 12, pp. 343, 380). The school district proposed researching the use of video modeling and scheduling an ARD the following spring semester to discuss it. (R. Ex. 14, p. 374). The school district ultimately facilitated parental access to a program known as “\*\*\*\*” which paid for 10 sessions of \*\*\* therapy. (Tr. Vol. II, p. 176). Student benefits from the \*\*\* therapy because it provides him with opportunities for social interaction, coordination and strength. (Tr. Vol. II, p. 222). The school district agreed to the board maker with technical assistance to be provided by school personnel. (R. Ex. 14, p. 374). The school district ultimately ordered the board maker but it was not available until August 5, 2010 after this litigation was initiated. (P. Ex. 16, p. 140).
23. Another ARD was conducted on June 4, 2010 to continue discussions regarding Student’s educational needs and to address the six parental requests. (P. Ex. 28) (P. Ex. 29, p. 298) (Tr. Vol. III, pp. 82-83). Student’s \*\*\* teacher submitted a written report of his progress and her recommendations. She noted he continued to need working on self help skills and that while Student is capable of learning he also required “a lot of redirecting and breaks in between ...” and that it was “hard to keep him on task” even though the class that year was small. (R. Ex. 14, p. 374, 380). In the \*\*\* class Student resisted teacher requests, had great difficulty paying attention and could barely sit still. Although listening to music helped at least 70% of the time he had difficulty sitting at the table doing work. (Tr. Vol. II, pp. 27-28).
24. Student exhibits deficits in basic self care skills. Student worked on \*\*\* for three years but was never successful \*\*\* in the \*\* class. Although Student’s IEP included some objectives addressing self help skills the school district had no specific plan to teach Student \*\*\*. (Tr. Vol. II, p. 75). \*\*\* had been a skill and IEP goal for Student since his initial enrollment in the school district. He had not been successful in mastering \*\*\* skills in the school district’s program. (Tr. Vol. II, pp. 159-160, 167).
25. \*\*\* implemented a focused \*\*\* program with Student. (R. Ex. 42, pp. 739-745). The \*\*\* \*\*\* program is a written plan with a protocol and data collection components. Positive reinforcement and consequences for \*\*\* were also aspects of the \*\*\* program. (R. Ex. 42, pp. 742-745). Student made significant progress in \*\*\* at \*\*\*. (Tr. Vol. I, pp. 179-181, 279).

26. The June 2010 ARD discussed summer 2010 ESY services. Student's mother continued to express concerns that the school district was not adequately meeting Student's needs compared to the progress made during the 2009 ESY program and outreach therapy at \*\*\*. The June 2010 ARD proposed a two week ESY program of six weeks at the school district in a \*\*\* class for seven hours per day four days a week with speech and occupational therapy and a month long summer program at \*\*\* including speech and OT. The school district agreed to provide transportation to \*\*\* and to Student's summer daycare. (R. Ex. 14, pp. 375-375).
27. The ARD also discussed the continuation of the \*\*\* ABA outreach program. The school district proposed re-assessing Student's ABA program and in-home training needs at the beginning of the next school year in September 2010. (R. Ex. 14, p. 375). Arrangements for reimbursing Student's mother for the cost of extended care were also reached during the June 2010 ARD. (R. Ex. 14, p. 375).
28. A mix-up and miscommunication occurred between Student's mother, the school district and \*\*\* over Student's 2010 ESY program. The parties intended Student would begin at \*\*\* on \*\*\*, 2010. (P. Ex. 29, p. 310). However, \*\*\* was not ready to receive Student on that date because neither the school district nor Student's parents provided \*\*\* with proper notification. (P. Ex. 29, p. 326) (Tr. Vol. III, pp. 94-95). Therefore, Student's summer 2010 ESY program at \*\*\* did not begin until \*\*\*, 2010. (Tr. Vol. II, pp. 159, 166).
29. An annual ARD was planned for September 2010 but the parties never met again to discuss or design a program for the current 2010-2011 school year. (Tr. Vol. I, pp. 134-135) (Tr. Vol. III, p. 130). No IEP was designed at the June 2010 ARD for the 2010-2011 school year. (Tr. Vol. III, p. 83). The school district now proposes placement in a Life Skills class with an ABA component. (P. Ex. 21) (Tr. Vol. II, pp. 180) (Tr. Vol. III, p. 165).
30. The Life Skills class was split shortly after the current 2010-2011 school year began – there were \*\*\* students in the class at the beginning of the year. Student would have been in the class of \*\*\*. By the due process hearing the Life Skills class proposed for Student was down to \*\*\* students. Two paraprofessionals assist the teacher. All the students are students with autism – \*\*\*. The Life Skills teacher uses a lot of sign language with the students. (Tr. Vol. III, pp. 28-29, 3145-48).
31. Two of the Life Skills students are on a \*\*\* schedule and have \*\*\* IEP's although Student's mother did not see evidence that the \*\*\* schedule was being implemented when she visited the class to observe. (P. Ex. 21) (Tr. Vol. II, p. 187) (Tr. Vol. III, pp 31-32). The school district's autism consultant visited the Life Skills teacher 4-5 times in the fall of 2010 to help the teacher in structuring the class to operate more efficiently. The consultant provided the teacher with feedback, some training, and modeled behavioral techniques. (Tr. Vol. III, pp. 39-40). The Life Skills teacher spends about 45 minutes of direct 1:1

instruction with each student each day. (Tr. Vol. III, p. 167). While the Life Skills program includes some ABA strategies the program is evolving to better serve the needs of \*\*\* age students with autism. The autism consultant was retained to assist the school district in making improvements to its autism programs. (Tr. Vol. II, p. 264)(Tr. Vol. III, pp. 77-79, 123, 125, 127, 164-165, 211-212, 217-220).

32. Student's mother provided the school district with written notice of her intent to withdraw Student from the school district and place him at \*\*\* on \*\*\*, 2010. She requested reimbursement for the private school placement. (P. Ex. 10). The school district provided the requisite prior written notice of its response to this request with a letter from the school district's special education director on August 23, 2010. (P. Ex. 14). Student's parents unilaterally placed Student at \*\*\* for the 2010-2011 school year and he has remained at \*\*\* since the summer 2010 ESY program in July 2010. (P. Ex. 10) (Tr. Vol. I, p. 249).
33. At \*\*\* Student is currently working on "learn to learn" skills as well as basic language, self care and basic academics under the Assessment of Basic Language and Learning Skills (ABLSS) -- a curriculum/assessment tool that task analyzes behavior across a multitude of objectives and closely aligned with the ABA approach (Tr. Vol. I, pp. 157-158) (Tr. Vol. II, p. 67) (Tr. Vol. III, p. 213). Student's IEP at \*\*\* is a combination of the school district's summer 2010 ESY IEP and additional goals developed by \*\*\* to address skill deficits identified by the ABLSS. (Tr. Vol. I, pp. 159-160, 189-191).
34. When Student first attended \*\*\* in July 2009 he could not \*\*\* for any meaningful amount of time, demonstrated virtually no \*\*\* skills, had difficulty attending to task and \*\*\*. By the time the hearing took place Student was on a one hour schedule for \*\*\* (\*\*\*), could take care of \*\*\*, verbalized well and showed an overall improvement in behavior. (Tr. Vol. I, pp. 180-181, 249-250). Student is sitting and eating in the cafeteria, become more involved in small group activities and plays with the other children \*\*\*. (Tr. Vol. I, pp. 249-250, 279-280).
35. At \*\*\* Student is interested in interacting with everyone. His primary mode of communication is verbal and he knows a lot of words. His receptive language is better than his expressive. He can follow commands. (Tr. Vol. I, pp. 174-175, 253-254). Student has good receptive language, is very compliant and social during his 1:1 ABA therapy at \*\*\*. He has some verbal ability but it is not particularly spontaneous and shows some echolalia as well as some motor stimulation (i.e., spinning). He is easily re-directed, a good learner and absolutely "teachable." (Tr. Vol. III, pp. 169-171).
36. The atmosphere at \*\*\* during 1:1 ABA therapy is very positive and upbeat. Student demonstrates a higher level of performance, language skills and behavior during individual ABA therapy compared to that demonstrated in a clinical evaluation setting or in other reported settings, including the \*\*\* class. (P. Ex. 31) (Tr. Vol. II, pp. 95, 147).

37. The \*\*\* special education teacher has never attended a school district ARD for Student, has never been contacted to discuss Student or invited to attend an ARD by the school district. No one from the school district has ever asked her how Student is doing. (Tr. Vol. I, p. 192). No \*\*\* teachers or other staff have ever been invited to the school district to attend an ARD for Student. (Tr. Vol. I, pp. 252-253, 274-275).
38. There are currently \*\*\* students, including Student, in the \*\*\* ABA day program. (Tr. Vol. I, pp.276-277). \*\*\*. Student also attends the after school extended day program where he works on his IEP and also participates in art activities and social skills training. Some non-disabled children and/or non-disabled siblings of \*\*\* students attend a few after school and summer programs. (Tr. Vol. I, pp. 278-279, 282, 285-286).
39. Student's day at \*\*\* is highly scheduled and structured – every minute of his time is spent actively engaged in learning with a staff member from the moment he enters the school building. He receives intensive 1:1 ABA therapy 30-40 hours per week. A team of 3-4 teachers rotate throughout the day working 1:1 or in a small group with Student – this is to avoid Student becoming dependent on a single instructor and to cover for occasional staff absences. (Tr. Vol. I, pp. 232, 280-282).
40. Placement in a Life Skills class in a public school setting is not appropriate for Student at this point in time. He is not ready. (Tr. Vol. I, pp. 165-166). He is \*\*\* and has emotional regulation issues that would interfere with his ability to interact appropriately with peers. He does not have the social or self awareness or skills needed to benefit from interacting with non-disabled peers. The public school does not have the ability to provide Student with the type of highly structured intervention he needs. (Tr. Vol. II, pp. 103-104). There is a marked difference in Student's behavior depending on the level of structure between learning environments. The least restrictive environment for Student is the setting that can provide him with the level of structure that he needs. \*\*\*, rather than a special education classroom in the public school, provides him with that structure at this time. (P. ex. 31) (Tr. Vol. II, pp. 94-95, 101-102, 147, 229).
41. Student's parents received copies of procedural rights under IDEA over the years beginning in 2006. (P. Ex. 1, p. 21) (P. Ex. 5, p. 90) R. Ex. 2, p. 511) (R. Ex. 4, pp. 17, 49) (R. Ex. 5, pp. 50, 58) (R. Ex. 6, p. 111) (R. Ex. 8, p. 240) (R. Ex. 9, p. 250). Student's parents were active participants in every ARD meeting, contributed their thoughts and ideas to the educational decision-making process and the school district often accepted or at least considered their suggestions and proposals. (P. Ex. 4, 5, 9, 28, 29).
42. The cost for placement and related services at \*\*\* for the current school year (2010-2011) is follows: ABA day school program (8:30 – 2:30) monthly tuition \$4,200; Extended day program (2:30 – 5:00) \$45/day; Outreach ABA therapy sessions \$50/session; physical therapy, \$35/15 minutes; occupational therapy, \$35/15 minutes; and speech therapy, \$35/15 minutes. (P. Ex. 25).

43. In 2009 Student's parents paid \*\*\* \$234.00 for extended day care on July 20 and July 27, 2009. (P. Ex. 27, p. 206). Student's parents paid \*\*\* \$1,820.49 for behavior treatment and extended day services from August 23, 2010 to August 31, 2010. (P. Ex. 27, p. 206A). Student's parents paid \*\*\* \$4,516.47 for behavior treatment and \$945.00 for extended day programming for the month of September 2010. (P. Ex. 27, pp. 206B-206C). Student's parents paid \*\*\* \$4,516.47 for ABA behavior treatment and \$945.00 for extended programming for the month of October 2010. (P. Ex. 27, pp. 206D-206E).
44. A physical therapy evaluation was conducted on May 6, 2010 by a private, outside physical therapist. Student was referred for a PT assessment by his pediatrician due to decreased coordination, balance and strength subsequently confirmed by the assessment. (P. Ex. 8, pp. 100-101) (R. Ex. 33, pp. 652-653) Student's parents paid for 10 private PT services from May 22, 2010 to August 7, 2010 at a cost of \$ 100 per session. There was no cost for the PT evaluation. (P. Ex. 8, p. 101A).

## **Discussion**

### Assessment Issues

The evidence showed that the school district failed to conduct a number of appropriate assessments for Student within the relevant one year statute of limitations period beginning in July 2009. The school district never conducted an FBA despite Student's obvious and significant behavioral issues. The school district also failed to conduct a physical therapy assessment even though it agreed to do so. Furthermore, the school district failed to conduct a formal assessment to clearly identify Student's intellectual and adaptive behavior capabilities or to consider the possibility of mental retardation. Student's parents secured an outside assessment in November 2009 for that purpose but there is no evidence as to the cost of that expense. Any other complaints regarding the school district's failure to conduct timely assessments fall outside the one year statute of limitations period.

### Assessment of Communication Needs and Failure to Address Communication Needs

Although the school district was somewhat tardy in conducting an updated speech/language evaluation (it was due December 8, 2009 but wasn't completed until January 25, 2010) there was insufficient evidence in the record to show the delay caused a substantive educational harm. A January 2010 ARD considered the results of the evaluation and updated Student's speech IEP accordingly. The speech IEP included measureable goals and objectives addressing Student's functional communication needs. At most Student lost two weeks or so of working on an updated speech/language IEP although the evidence showed he continued to receive speech/language services throughout. Petitioner argued that the school district should have taught Student sign language but the evidence showed that Student is largely verbal and prefers verbal communication – therefore the use of sign language is not particularly appropriate for Student. Petitioner did not

Decision of the Hearing Officer

Docket No. 296-SE-0710

Page 17 of 28

meet his burden of proof on this issue. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

#### FAPE: Related Service Needs

Petitioner contends he needed and continues to need speech, OT, PT, in home training and parent training in order to receive FAPE. The evidence showed that beginning in July 2009 the school district provided speech, OT and in home training either through direct services during the school year or as a component of Student's ESY summer programs at \*\*\* in 2009 and 2010. There was also evidence that Student continues to need in home training but the school district suspended in home training at the end of the 2009-2010 school year.

The evidence showed that Student needed and benefits from PT and that the school district not only failed to conduct an agreed upon PT assessment but failed to provide Student with PT as a related service. There was also some evidence that parent training is a necessary component of an effective educational program for students with autism and virtually no evidence that the school district provided Student's parents with such training with the exception of some technical assistance in using the boardmaker and observations of some in home training sessions. Therefore, Petitioner met his burden of proving the school district failed to provide Student with PT and parent training and failed to continue to provide the in home training he needed in order to receive FAPE. However, Petitioner did not meet his burden of proof on the OT or speech services issues. *Schaffer v. Weast*, *supra*.

#### FAPE: Failure to Use Peer Reviewed, Scientifically Based Methods of Instruction

The credible evidence showed that while the ABA program provided during summer ESY and currently being provided to Student as a full day student at \*\*\* is based on peer reviewed, scientifically based methods of instruction the evidence related to the school district's instructional methods used in the \*\*\* and proposed Life Skills programs was minimal at best. There was very little credible evidence in the record that explained the school district's methods of instruction. While there is some evidence that the school district's programs included some ABA strategies (supported by the evidence to be a peer reviewed, scientifically based method of instruction) Petitioner raised a legitimate question as to whether the school district's instructional methods met this IDEA requirement. *See*, 34 C.F.R. §§ 300.35, 300.320 (a) (4).

#### FAPE: Summer ESY 2009 and 2010

The record establishes Student was provided with an appropriate ESY program in 2009 and 2010. In 2009 my review of the ESY program is restricted to the program delivered beginning in July 2009 under the statute of limitations rule. The ESY program beginning in July 2009 was provided at \*\*\* – it consisted of 8 weeks of ABA therapy, related services and a focused \*\*\* program. Extended programming in the form of after school care and a summer camp were also provided during the 2009 summer. There was evidence that the summer 2010 ESY program at \*\*\* did not begin until \*\*\* because of a mix up in communicating with \*\*\* by both parties. The school district

Decision of the Hearing Officer

Docket No. 296-SE-0710

Page 18 of 28

did provide Student with educational and related services in a \*\*\* class in \*\*\* until \*\*\* was ready to receive him. The 2010 ESY program at \*\*\* also included ABA therapy, related services and an ultimately successful \*\*\* program.

However, Student's parents paid for private PT services during the 2010 summer because the school district did not offer those services. Student's parents also had to arrange and pay for extended day programming at \*\*\* for the month of August 2010. Therefore, to the extent that ESY services in 2009 and 2010 were provided at \*\*\* and paid for by the school district those services provided Student with FAPE. However, to the extent that Student's parents had to pay for any related services and/or extended day programming in the summer of 2009 (after July 7, 2009) or in the summer of 2010 Petitioner met his burden of proving those aspects of the ESY services did not provide FAPE. *Shaffer v. Weast, supra*.

#### FAPE: Measurable and Objective IEP Goals

Petitioner contends the IEP's implemented by the school district did not include objective measureable goals and objectives nor were they based on Student's present levels of performance – as such Petitioner contends the IEP's do not meet IDEA regulatory standards and thus denied Student FAPE. A review of the IEP's implemented beginning in July 2009 confirm they included measureable goals and objectives based on present levels of performance. Although the IEP documents and ARD paperwork do not include particularly expansive descriptions of Student's present levels of performance they do include the necessary statements and conform to the technical format required by the IDEA. 34 C.F.R. § 300.320 (a) (1) (2) (3). Whether the IEP's as implemented provided Student with the requisite meaningful educational benefit, however, is another matter as discussed below. *See, Polk v. Cent. Susquehanna Int. Unit 16, 853 F. 2d 171, 183 (3d Cir. 1988)(educational benefit must be meaningful and more than “de minimis” or “trivial”;* *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F. , 118 F. 3d 245, 248 (5<sup>th</sup> Cir. 1997)(the educational benefit cannot be a “mere modicum or de minimis” but instead produce progress not regression or trivial advancement).*

#### Failure to Implement IEP – Failure to Provide Services

Petitioner did not meet his burden of proof on this issue. *Shaffer v. Weast, supra*. The evidence showed that within the relevant one year statute of limitations period the school district provided the services it agreed to provide; speech, OT, and in home training services were all provided as contemplated by the relevant IEP's and ARD meeting agreements. While there was a delay in initiating in home training services, that delay occurred outside the one year statute of limitations period and the school district compensated for that delay by providing additional in home training services.

#### Failure to Implement IEP - Failure to Provide Progress Reports

The evidence showed that the \*\*\* teacher sent progress reports and a record of daily assignments

Decision of the Hearing Officer

Docket No. 296-SE-0710

Page 19 of 28

home every six weeks. The record also shows progress reports for related services were sent less often – speech reports somewhat intermittently but all related services reports were shared at ARD meetings. The IDEA merely requires that an IEP include a description of when periodic reports on the child’s progress towards meeting IEP goals will be provided to the parent. Such reports may be issued periodically, quarterly or concurrently with report cards. *34 C.F.R. § 300.320 (a) (3) (ii)*. The IEP’s all included the requisite description. The evidence supported the school district’s compliance with the stated schedule of providing progress reports every six weeks. Therefore, the school district met its responsibility in this regard *Id.*

#### Were Student’s Needs as a Student with Autism Addressed?

Under state law an ARD must consider a number of additional items for inclusion in the student’s IEP that address the unique and special needs of students with autism. *19 Tex. Admin. Code § 89.1055 (e) (1)-(11)*. This set of additional strategies is commonly known as “the autism supplement” to the IEP. The law does not require each and every one of the 11 different strategies be included in a student’s IEP but merely that the ARD *consider* them and *when needed addressed* in the IEP. *19 Tex. Admin. Code § 89.1055 (e) (emphasis added)*.

The evidence showed the 11 items were considered at the ARD meetings during the relevant time period. However, the evidence also showed that the school district failed to include or effectively implement some of the items (such as failure to develop a BIP, lack of parent training support, and suspension of in home training services). The evidence showed that Student needed those strategies in order to receive a meaningful educational benefit from his education. *Michael F., supra; Polk v. Cent. Susquehanna Unit 16, supra*. Therefore, while the ARD Committees met their responsibility to *consider* the 11 strategies listed in the state regulation the IEP’s failed to *address* all of his needs as a student with autism. *19 Tex. Admin. Code § 89.1055 (e) (emphasis added)*.

#### Procedural Issue: Did the School District Provide the Requisite Prior Written Notice?

The evidence showed that the school district provided Student’s parents with the requisite notice of its decisions and responses to parental requests through a combination of ARD meetings, ARD documents, email communications, and with the special education director’s letter refusing the request for placement at \*\*\* for the current school year. Student’s parents were also provided with notice of procedural rights throughout the relevant time period and could have and did pursue their procedural rights to convene ARD meetings and to file a due process request. Therefore, even if the school district did not provide the requisite notice there was no substantive harm for any such error in failing to do so since Student’s parents were active participants in all educational decision-making and were able to exercise their procedural rights. *See, 300.513 (a) (2)*.

#### Required Members at ARD Meetings

The evidence supports the conclusion that the ARD meetings conducted during the relevant time period were duly constituted with the requisite members. Petitioner appears to take the position

Decision of the Hearing Officer

Docket No. 296-SE-0710

Page 20 of 28

that because an administrator needed time to check on the feasibility of responding to parental requests the ARD did not include the required school district representative with knowledge about the availability of school district resources. *See, 19 Tex. Admin. Code § 80.1050 (c) (1) (D)*.

An administrator's request for time to consider whether to commit school district resources or even to evaluate the availability of school district resources in response to parental requests does not mean the administrator was not a proper ARD participant. While the time taken and the form of the response may be factors in a particular case on the ultimate question of whether a specific IEP did or did not meet a student's needs appropriately it does not mean the ARD was not duly constituted. The evidence in this case shows the required members did attend and participate in ARD meetings for Student. *Id.*

#### Placement: Least Restrictive Environment

The IDEA requires that to the maximum extent appropriate children with disabilities including children in public school, private institutions or other care facilities are educated with children who are not disabled and that separate classes, schooling or other forms of removal from the regular education environment occur only if the nature or severity of the disability is such that education in the regular class with the use of supplementary aids and services cannot be achieved satisfactorily. *34 C.F.R. § 300.114 (a) (2) (i) (ii)*. There is no real dispute between the parties that the nature and severity of Student's multiple disabilities mean he needs education in a self contained educational setting. The evidence established that at this point Student is not prepared to interact with his non-disabled peers in the regular education setting.

The school district argues that Student at least has *some* opportunity to interact with non-disabled peers with placement in a special education class on a regular \*\*\* school campus and that placement at \*\*\* offers virtually no such opportunity. While the evidence showed to the contrary (i.e., there is also *some* opportunity at \*\*\* to interact with non-disabled peers) the preponderance of the evidence demonstrated that the least restrictive environment for Student at this point in time is at \*\*\* where his significant needs are appropriately met. *Id.*

#### Compensatory Relief: Payment and/or Reimbursement for Educational Services and Private Placement

When parents remove their child from public school reimbursement for the expenses of the private schooling may be an appropriate form of relief. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 292-293 (5<sup>th</sup> Cir. 2009). In order to receive such reimbursement and/or private placement at public expense Petitioner must first prove that the school district's IEP was not appropriate and second, that the private placement was proper under the IDEA. *Sch. Comm. of Burlington v. Dept. of Educ. of Mass.*, 471 U.S. 359, 369 (1985); *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

#### First Prong – Was the School District's Program Appropriate?

In Texas the Fifth Circuit has articulated a four factor test to determine whether a school district's program meets IDEA requirements. Those factors are:

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

*Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5<sup>th</sup> Cir. 1997).

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 for reimbursement purposes. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5<sup>th</sup> Cir. 2009). Application of the four factors to the evidence in this case supports the conclusion that the school district's program was not appropriate.

*Individualized:* The evidence did show the summer 2009 ESY program in July 2009 at \*\*\* was individualized because it met Student's needs for ABA therapy, extended day programming and related services. However, the evidence showed the summer 2010 ESY program did not include the physical therapy Student needed to address his coordination deficits and that in home training was suspended at the end of the 2009-2010 school year. The evidence also showed that the school district did not individualize Student's behavioral needs when it failed to conduct an FBA or to design and implement a BIP specifically tailored to address his significant and unique behavioral needs.

Furthermore, the school district failed to provide Student's parents with the support they needed to work with Student at home and out in the community. In addition, the proposed Life Skills program for the 2010-2011 school year was initially too large in terms of an appropriate teacher-student ratio for Student. The evidence showed that he needs significant 1:1 instruction. Although the class size was reduced and the ratio later remedied that was not the case when the parties were discussing Student's needs for the upcoming school year. In addition, the school district's proposed Life Skills program does not offer the intense individual ABA therapy Student still needs. Although there was evidence the Life Skills program includes ABA strategies and continues to evolve and improve, Student's individualized needs require a more fully developed, systematic behavioral approach to instruction.

*Least Restrictive Environment:* The evidence showed that removal from the regular education

Decision of the Hearing Officer

Docket No. 296-SE-0710

Page 22 of 28

setting and instruction in a specially designed program that addresses the nature and severity of Student's significant needs is appropriate. Student is not prepared to interact with non-disabled peers in the regular education setting. His exposure to non-disabled peers in a self contained special education campus on \*\*\* school campus is minimal at best and not particularly critical at this point. While he will at some point need to transition into a more integrated educational setting that time is not yet here for Student.

*Services Provided in Collaborative Manner by Key Stakeholders:* While there was evidence that the school district was willing to consider parental requests and responded to those requests there was also evidence that the school district failed to communicate effectively with \*\*\* staff or include \*\*\* staff in any ARD meetings or conferences. This was important because \*\*\* staff provided outreach ABA therapy, summer ESY services and some related services as part of Student's educational program with the school district. There was virtually no evidence of effective collaboration between the school district and \*\*\* staff which would have been beneficial to Student – especially to address self care needs \*\*\*, effective behavioral interventions, and collection of behavioral data to evaluate educational progress. Having agreed to involve the \*\*\* in Student's education it was incumbent upon the school district to collaborate with \*\*\* but the evidence showed it failed to do so.

*Positive Academic and Non-Academic Benefits:* The preponderance of the evidence showed that Student received only minimal benefit from the school district's program – his behavior, self care needs, and language development continued to be significant needs throughout the relevant time period. The evidence showed that he made progress during summer ESY programs at \*\*\* and through private outside physical therapy but there was little evidence that he made more than trivial progress in the \*\*\* programs and the proposed Life Skills program for the current school year was not reasonably calculated to provide Student with the requisite meaningful educational benefit. The proposed program lacked Student's need for significant 1:1 ABA therapy and instruction, an individualized BIP based on an FBA, physical therapy, continued in home training and parent training.

#### Second Prong: Was the \*\*\* Program Appropriate?

The second prong of the reimbursement analysis asks whether the educational program provided by the private school was appropriate. *Burlington, 471 U.S. at 370*. The private school program need not necessarily meet every specific requirement of the IDEA but only that it be "otherwise proper" under IDEA. *Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 13, 15 (1993)*. See also, *Richardson Ind. Sch. Dist. v. Leah Z., 580 F. 3d 286, 294 (5<sup>th</sup> Cir. 2009)*. The evidence showed that it did.

The \*\*\* IEP clearly consisted of ABA therapy with communication and behavior as the main focus of instruction. The goals and objectives were drawn from the ABLLS, a specific assessment tool and behavioral curriculum that identified Student's needs and skill gaps. Progress in meeting \*\*\* IEP goals and objectives were measured using the ABLLS. The \*\*\*

Decision of the Hearing Officer

Docket No. 296-SE-0710

Page 23 of 28

IEP also clearly contemplated and was in fact delivered in an intensive, highly structured 1:1 instructional arrangement. OT, speech, and extended school day programming were also features of the \*\*\* educational program.

Student made progress in the \*\*\* program. The \*\*\* program is provided all year long. It utilizes objective behavioral data that allows continuous adjustment to meet Student's complex needs. It utilizes a well researched, peer-reviewed, scientifically based approach shown to be effective in teaching children with autism. For these reasons I find the \*\*\* program is appropriate under IDEA and that Student's parents are therefore entitled to reimbursement for the cost of educational services Student needed and continues to need at this point in time.

### **Conclusions of Law**

1. A special education hearing officer in Texas has no authority to make an award of attorney's fees. Instead, a prevailing party may be awarded reasonable attorney's fees by a court of competent jurisdiction in its discretion. *34 C.F.R. § 300.517.*
2. Petitioner was not required to exhaust his administrative remedies by first presenting his claims to an Admission, Review & Dismissal Committee before he could proceed with initiating a request for a due process hearing. *34 C.F.R. § 300.507 (a); Letter to Lenz, 37 IDELR 95 (OSEP 2002).*
3. Petitioner's claims arising prior to July 7, 2009 are barred by the one year statute of limitations rule applied in Texas. *20 U.S.C. § 1415 (f); 34 C.F.R. § 300.507; 19 Tex. Admin. Code § 89.1151 (c).*
4. Respondent failed to timely and appropriately conduct a physical therapy evaluation, a functional behavioral assessment and an intellectual/adaptive behavior assessment within the relevant one year statute of limitations period. The remainder of Petitioner's claims regarding the failure to evaluate are outside the relevant limitations period. *Id.*
5. Petitioner did not meet his burden of proving the Respondent failed to assess and address Student's communication needs or to prove that even if there was such a failure Petitioner did not prove a resulting substantive harm. *Schaffer v. Weast, 46 U.S. 49, 62 (2005); 34 C.F.R. §§ 300.303, 300.324 (a) (iii); 300.513 (a) (2).*
6. Petitioner met his burden of proving he needs speech, occupational therapy, physical therapy, in home training and parent training in order to receive a free, appropriate public education. *34 C.F.R. §§ 300.17, 300.34 (a) (c) (6) (8) (15).*
7. Petitioner met his burden of proving the school district's program lacked clarity in the use of peer-reviewed, scientifically based methods of instruction. *34 C.F.R. §§ 300.35, 300.320 (a) (4).*

8. Respondent provided an appropriate ESY program in the summer of 2009 but failed to provide certain related services and extended day programming in the summer of 2010 although other aspects of the summer 2010 program were appropriate. 34 C.F.R. §§ 300.17, 300.34 (a); 300.106; 19 Tex. Admin. Code § 89.1065.
9. The Individual Educational Plan (IEP) in effect during the relevant time period provided by Respondent included objective and measureable goals and short term objectives based on present levels of performance and thus met IDEA requirements. 34 C.F.R. § 300.320 (a) (2).
10. The IEP in effect during the relevant time period provided by Respondent failed to address all of Petitioner's needs as a student with autism and thus resulted in a substantive harm under IDEA. 34 C.F.R. §§ 300.8(c) (1), 300.513(a)(2)(i)(iii); 19 Tex. Admin. Code § 89.1055 (e).
11. Petitioner did not meet his burden of proving the Respondent failed to provide Petitioner's parents with timely and appropriate reports on Petitioner's progress in meeting IEP goals and objectives. *Schaffer v. Weast, supra*; 34 C.F.R. § 300.320 (a)(3).
12. Petitioner did not meet his burden of proving Respondent failed to provide the related services stated in his IEP within the relevant one year limitations period or that a failure to do so resulted in a substantive harm under IDEA. *Schaffer v. Weast, supra*; 34 C.F.R. §§ 300.323 (c)(2), 300.513 (a)(2).
13. Petitioner met his burden of proving that while the ARD Committee properly considered Petitioner's needs as a student with autism in devising his IEP the Respondent failed to include services and/or goals and objectives to address all of his needs in the IEP. 34 C.F.R. § 300.8 (c)(1); 19 Tex. Admin. Code § 89.1055 (e).
14. Petitioner failed to meet his burden of proving Respondent did not provide Petitioner's parents with the requisite prior written notice under IDEA and, even if it did not, Petitioner did not prove a substantive harm as a result. *Schaffer v. Weast, supra*; 34 C.F.R. § 300.503, 300.513 (a)(2)(ii).
15. Respondent met its responsibility to convene ARD meetings with the members required under IDEA. All ARD meetings conducted during the relevant time period were duly constituted. 34 C.F.R. § 300.321 (a)(1)-(6); 19 Tex. Admin. Code § 89.1050 (c).
16. Petitioner met his burden of proof that private school placement is the least restrictive environment for him at this time. 34 C.F.R. §§ 300.114 (a)(2)(ii), 300.116 (d), 300.148.
17. Petitioner is entitled to compensatory relief in the form of reimbursement for assessments

secured at parental expense, extended school day programming during August 2010, and for private school placement for the current 2010-2011 school year. *34 C.F.R. § 300.148.*

## **ORDERS**

Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief are **GRANTED IN PART AND DENIED IN PART** and Respondent's requests for relief are **GRANTED IN PART AND DENIED IN PART** as follows:

Petitioner's request for attorney's fees is **DENIED** as outside the jurisdiction of the hearing officer;

Respondent's request to dismiss Petitioner's claims for failure to exhaust administrative remedies is **DENIED**;

Respondent's request to dismiss Petitioner's claims that arose prior to the application of the one year statute of limitations rule in Texas is **GRANTED** and such claims are hereby **DISMISSED** as untimely;

Petitioner's request for reimbursement in the amount of \$ 1,000 for the cost of private physical therapy at parental expense is **GRANTED**;

Petitioner's request for reimbursement in the amount of \$1,820.49 for the cost of extended day programming in August 2010 is **GRANTED**;

Petitioner's request for reimbursement for the cost of day care in the summer of 2009 is **GRANTED IN PART AND DENIED IN PART** to the extent that Petitioner is entitled to \$235.00 for day care on July 20 and July 27, 2009 but is not entitled to the cost of day care prior to July 7, 2009;

Petitioner's request for reimbursement of tuition and related costs for placement at \*\*\* is **GRANTED** as follows:

- \$9,032.94 for ABA day program/behavior therapy (September-October 2009)
- \$1,890.00 for extended day programming (September-October 2009)

It is further **ORDERED** that Respondent shall make the reimbursement funds available to Petitioner no later than 30 calendar days from the date of this Decision.

It is further **ORDERED** that Respondent shall cooperate with Petitioner and \*\*\* to set up arrangements for monthly payments to \*\*\* for the cost of Petitioner's continued placement at \*\*\*, including the cost of all therapy, related services, and extended school day programming according to the current rates for those services for the 2010-2011 school year and to the services actually provided to Student each month beginning with the month of November 2010 through May 31,

Decision of the Hearing Officer

Docket No. 296-SE-0710

Page 26 of 28

2011. It is further **ORDERED** that such arrangements shall be finalized between the parties and with \*\*\* in writing no later than 30 calendar days from the date of this Decision and that monthly payments begin no later than 30 calendar days from the date of this Decision. It is further **ORDERED** that Respondent shall provide transportation to and from \*\*\* beginning no later than 10 school days from the date of this Decision.

All other relief not specifically stated herein is **DENIED**.

**SIGNED the 7th day of January 2011**

/s/ Ann Vevier Lockwood \_\_\_\_\_  
Ann Vevier Lockwood  
Special Education Hearing Officer

#### **NOTICE TO THE PARTIES**

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions 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 Sec. 89.1185 (p); Tex. Gov't Code, Sec. 2001.144(a) (b)*.

**BEFORE A SPECIAL EDUCATION HEARING OFFICER  
STATE OF TEXAS**

**STUDENT,  
bnf PARENT,  
Petitioner,**

§  
§  
§  
§  
§  
§  
§

v.

**DOCKET NO. 296-SE-0710**

**BEAUMONT INDEPENDENT  
SCHOOL DISTRICT,  
Respondent.**

**SYNOPSIS**

**Issue:**

Whether school district failed to timely and appropriately evaluate student with autism, speech impairment and possible mental retardation in all areas of suspected need.

**Held:**

**FOR THE STUDENT IN PART AND THE SCHOOL DISTRICT IN PART**

Student needed assessment in physical therapy and although school district agreed to do so never conducted the PT assessment. Student needed assessment in intellectual and adaptive function but school district failed to do so. All other assessment issues fell outside the applicable statute of limitations period. **34 C.F.R. §§ 300.305 (a)(2), 300.507 (a)(2); 19 Tex. Admin. Code § 89.1151 (c).**

**Issue:**

Whether school district failed to assess and address communication needs for student with autism and speech impairment.

**Held:**

**FOR THE SCHOOL DISTRICT.**

Student failed to meet his burden of proof on this issue. An updated speech/language assessment was due in early December but was not completed until after mid January. Student failed to show the delay resulted in a substantive educational harm where the parties convened an ARD meeting, student continued to receive speech services and speech/language IEP was updated at the ARD. **34 C.F.R. §§ 300.303, 300.324(a)(2)(iii), 300.513 (a)(2).**

Synopsis

Dkt. No. 296-SE-0710

Page 1 of 5

**Issue:**

Whether student with autism, speech impairment, sensory and coordination deficits needed speech, OT, PT, in home training and parent training in order to receive FAPE.

**Held:**

**FOR THE STUDENT**

Student with multiple disabilities and significant needs met his burden of proving the need for speech, OT, PT, in home and parent training as related services in order to receive FAPE. **34 C.F.R. §§ 300.17, 300.34(a)(c)(6)(8)(15).**

**Issue:**

Whether school district's \*\*\* program failed to use peer-reviewed, scientifically-based methods of instruction.

**Held:**

**FOR THE STUDENT**

Student met his burden of proving school district's program lacked clarity in the use of peer-reviewed, scientifically-based methods of instruction. **34 C.F.R. §§ 300.35, 300.320 (a)(4).**

**Issue:**

Whether the school district provided student with autism and speech impairment with appropriate ESY services within the relevant one year statute of limitations period.

**Held:**

**FOR THE STUDENT IN PART AND THE SCHOOL DISTRICT IN PART**

School district provided appropriate ESY program in 2009 but failed to provide certain related services and extended day programming in 2010 that student needed in order to receive FAPE although other aspects of 2010 ESY program were appropriate. **34 C.F.R. §§ 300.17, 300.34 (a), 300.106; 19 Tex. Admin. Code § 89.1065**

**Issue:**

Whether student's IEP's in effect during the relevant time period included objective and measureable goals and short term objectives and based on present levels of performance as required by the IDEA.

Synopsis

Dkt. No. 296-SE-0710

Page 2 of 5

**Held:**

**FOR THE SCHOOL DISTRICT.**

IEP's included objective and measureable goals and short term objectives and present levels of performance as required by IDEA. **34 C.F.R. § 300.320 (a)(2).**

**Issue:**

Whether IEP's in effect during relevant time period addressed all areas of student's need.

**Held:**

**FOR THE STUDENT**

School district failed to address all of student's needs as a student with autism and therefore student did not receive the requisite educational benefit from his education in order to receive FAPE. **34 C.F.R. §§ 300.8 (c), 300.513 (a)(2)(i)(iii); 19 Tex. Admin. Code § 89.1055 (e).**

**Issue:**

Whether school district failed to provide student's parents with timely and appropriate progress reports of related service goals and objectives and whether related services were delivered and/or provided in a timely and appropriate manner.

**Held:**

**FOR THE SCHOOL DISTRICT**

Student did not meet his burden of proving school district did not provide related services as stated in student's IEP or that school district did not provide timely progress reports. **34 C.F.R. §§ 300.323 (c)(2), 300.320(a)(3)(ii), 300.513 (a)(2).**

**Issue:**

Whether ARD Committee properly addressed student's needs as a student with autism by failing to appropriately address all items in "autism supplement" i.e., *19 Tex. Admin. Code § 89.1055 (d)(1)-(11)*.

**Held:**

**FOR THE STUDENT**

Student met his burden of proving that while ARD Committee properly considered the items in the autism supplement it failed to include services and/or goals and objectives to Synopsis

Dkt. No. 296-SE-0710

Page 3 of 5

meet all of his needs as a student with autism in the IEP devised by the ARD. **34 C.F.R. § 300.8(c)(1); 19 Tex. Admin. Code § 1055 (e).**

**Issue:**

Whether school district provided student's parents with requisite "prior written notice" at all required junctures.

**Held:**

**FOR THE SCHOOL DISTRICT**

Student did not meet his burden of proving school district failed to provide requisite prior written notice or that even if school district did not, whether that failure resulted in significantly impeding parent's opportunity to participate in educational decision making process. **34 C.F.R. §§ 300.503, 300.504, 300.513(a)(2)(ii).**

**Issue:**

Whether all requisite members attended ARD meetings – specifically if ARD meetings lacked person knowledgeable about the availability of school district resources.

**Held:**

**FOR THE SCHOOL DISTRICT**

School district convened duly constituted ARD meetings. Mere fact that administrator requested opportunity to determine feasibility of number of parental requests at ARD did not mean administrator was not knowledgeable about availability of school district resources. **34 C.F.R. § 300.321(a)(4)(iii).**

**Issue:**

Whether student was educated in least restrictive environment and, if not, whether student entitled to reimbursement for educational services provided at parental expense and for prospective placement at private placement for current school year.

**Held:**

**FOR THE STUDENT**

Student met his burden of proving private school placement was least restrictive environment and that student entitled to compensatory relief in the form of reimbursement for educational services secured at parental expense, extended school day

programming for one summer month and for private school placement with requisite related services for current school year and transportation. **34 C.F.R. §§ 300.114 (a)(ii), 300.116 (d), 300.148.**