

DOCKET NO. 019-SE-0910
AND
DOCKET NO. 289-SE-0710

STUDENT § BEFORE A SPECIAL EDUCATION
b/n/f PARENTS §
§
V. § HEARING OFFICER FOR THE
§
ABILENE INDEPENDENT §
SCHOOL DISTRICT § STATE OF TEXAS

Decision of Hearing Officer

On January 12-13, 2011, a due process hearing was held in the above styled and numbered matter. Following the presentation of each party's evidence, and without objection, Respondent moved for a continuance to allow the parties an opportunity to file written closing arguments. The parties agreed to a filing deadline of February 21, 2011. The decision due date was extended to March 11, 2011 in accordance with the regulatory timeline. At all times during the course of the proceedings, Petitioner was represented by Christopher Jonas, attorney at law. Respondent was represented by Denise Hays, attorney at law.

HELD for Respondent.

Procedural History

On July 1, 2010, Petitioner, Student ("Student"), by next friend, parent ("Parent"), filed a request for due process hearing under the Individuals with Disabilities Education Improvement Act 2004 ("IDEA") in Docket No. 289-SE-0710. On August 24, 2010, Respondent filed Respondent's Counterclaim in support of its Full and Individual Evaluation ("FIE"). Following Respondent's notices of insufficiency of complaints, Petitioner's requests to amend petitioner's complaint were granted twice, and on September 19, 2010, Petitioner third request to amend was denied. Petitioner then filed a request to correct petitioner's second amended complaint. Respondent filed Respondent's Opposition to Petitioner's Request to Correct and Motion to Dismiss, and Petitioner filed a response. On September 23, 2010, this hearing officer denied the request to correct the second amended request and dismissed without prejudice Petitioner's complaint and request for due process hearing. Respondent's counterclaim remained as the only issue in Docket No. 289-SE-0710.

On September 24, 2010, Petitioner filed another Request for Special Education Due Process Hearing and Required Notice in Docket No. 019-SE-0910. On October 4, 2010, the two matters were

consolidated. By order of the hearing officer, on October 5, 2010, Parent, Petitioner's other parent, was joined in the consolidated cases as Petitioner's next friend.

The hearing officer granted a motion for continuance for good cause and the hearing was continued from November 8, 2010 to January 12, 2011.

Issues and Requests for Relief

Petitioner alleged a denial of a free, appropriate public education ("FAPE"), and brought forth the following issues which were confirmed at the first prehearing conference held after the two matters were consolidated:

1. Whether the District's full and individual evaluation ("FIE") of May 12, 2010 is appropriate and whether Petitioner is entitled to an independent educational evaluation ("IEE") at Respondent's expense;
2. Whether the District failed to implement or comply with the November, 2008 Individualized Education Program ("IEP") behavioral support strategies during the fall, 2009 until *** 2009 when the Student was placed on homebound instruction;
3. Whether the District failed to prepare the Student for classroom to classroom transition and the "level system" at *** in the fall, 2009;
4. Whether, in the fall, 2009, District staff failed to collaborate or coordinate Petitioner's education program with petitioner's previous year's staff;
5. Whether the District failed to allow the use of the *** device during the fall, 2009;
6. Whether the District failed to provide physical therapy ("PT") for sensory integration as required in the November, 2008 IEP;
7. Whether the District failed to fully inform the Parent regarding the following:
 - a. The extent of transition support that the Student needed to move successfully into the new classroom at *** in the fall, 2009;
 - b. Respondent's failure to allow use of the *** device;
 - c. Petitioner's behavior difficulties; and
 - d. Whether such failures prevented the Parent from being sufficiently able to participate in the Admission, Review, and Dismissal Committee ("ARDC") meetings during the fall, 2009; and
8. Whether the District failed to timely identify and classify the Student as a student with autism ("AU").

Petitioner requested the following relief:

1. Provision of FAPE in the least restrictive environment ("LRE");
2. Reimbursement for private IEE;
3. One year of compensatory educational services; and
4. An order to hold an ARDC meeting to implement the decision.

Initially, Petitioner requested reimbursement for a *** device. Respondent made payment for the device, and Petitioner withdrew such request.

Respondent requested a finding that the District's May 12, 2010 FIE is appropriate and that Petitioner is not entitled to an IEE at District expense.

Findings of Fact

Based upon the evidence and argument of the parties, the undersigned hearing officer makes the following findings of fact and conclusions of law. Citations to the transcript will be designated as “Tr.” followed by the volume and page number. Citations to exhibits will be designated as “P” for Petitioner and “R” for Respondent, followed by the exhibit number.

1. The Student resides within the geographical boundaries of the Abilene Independent School District. At the time of hearing, Petitioner was *** years old. Tr. Vol. I, pg. 37
2. Petitioner has a history of behavior difficulties at home and at school. The Student is noncompliant if student cannot be in control of situations. Student is argumentative, defiant, threatening, and uses profanity to adults. Tr. Vol. II, pgs. 41-43, 294-299; P-68, 69; R-11
3. The Student has an intelligence quotient of ***. Student demonstrates *** basic reading and listening comprehension skills. Mathematics is a relative *** for student. Student has *** skills in writing sentence-length responses to a given prompt. Student’s oral expression is in the *** range overall, with *** oral word fluency. R-5, 10, and 45
4. Throughout student’s years in the District, the Student has made good grades and worked on grade level. R-16; P-23; R-62;
5. Over time, the Student has been diagnosed with ***, Attention Deficit Hyperactivity Disorder (“ADHD”), Speech Impairment (“SI”), and Asperger’s Disorder (“Asperger’s”). Tr. Vol. I, pgs. 225-229; P-44; R-5, 8, 11, 98
6. Consistently, the Student has been eligible for special education services under the classifications of Other Health Impairment (“OHI”) due to attention deficit disorder/attention deficit hyperactivity disorder (“ADD/ADHD”), and SI. Student has a ***. In the fall, 2007, the District added AU as a classification. In 2010, it removed the AU classification. Tr. Vol. I, pgs. 38-39,45; R-10
7. In November, 2008 ARDC the Student needed redirection to be cooperative, was sometimes defiant and inconsistently respected authority. Student worked on grade level curriculum with special education support and modifications including ***. Speech therapy (“ST”) services and PT for sensory integration on a consultation basis were recommended. Positive behavior support strategies were in place. P-30
8. In the 2008-2009 school year, the Student had ***, and attended a regular education *** grade class at *** School (“***”). Tr. Vol. II, pgs 21-25 175
9. In March, 2009, after the Student exhibited anger issues, used profanity, made threats, and became noncompliant and disruptive, the Parent agreed to the Student’s placement in a small group setting at the ***. P-29; R-15

10. Student's goals were in written language, math, science, social studies, reading, and adaptive social skills. Student received ST and PT. Student's supports and accommodations included "slow down student's work so student won't rush", a point sheet, and ***. Behavioral strategies included positive interventions. Student was in a small group setting which allowed teaching of social skills. Tr. Vol. II, pg. 67; P-29; R-15;
11. At the end of *** grade, the Student successfully ignored student's typical triggers. Student had a desire to help others which helped student to learn control. R-16
12. During the summer, 2009, the ***. Both regular and special education students attend ***. Tr. Vol. II, pgs. 21-25, 175; R-15
13. The Student began *** grade (2009-2010 school year) at *** in a self contained classroom with a 6:2 student/teacher ratio. The Parent wanted more academic classes. For that reason, the Student's teacher was changed from *** to ***. Tr. Vol. II, pgs 25-29; pg. 286
14. Student continued to have access to ***. Adaptive P.E. goals and special education counseling were added. PT consult services continued. P-27; R-14; R-16
15. A level system was used at *** as a behavioral strategy. A student began on level one and could progress to level two if student completed all of student's work within a 24-hour time period. As a student progressed from one level to another, student received rewards. This behavioral strategy was used with the Student, and was individualized for student's needs. Daily Point Sheets were kept, discussed with the Student, and sent home to the Parent. Tr. Vol. II, pgs. 68-73; 170-171; 287-288, 313; P-37; R-57
16. The Student understood the level system when student attended ***. Tr. Vol. I, 165-166; Tr. Vol. II, pgs. 39-40
17. In the fall, 2009, *** implemented the Student's individual positive behavior support strategies, as follows: forewarn of changes in routines/transitions, provide consistent predictable environment; reinforce appropriate behavior immediately with praise attention, reduce stressful situations, provide cool down time when upset, and allow the Student to verbalize/"blow off" when upset with the teacher. P-37; R-14; Tr. Vol. II, 289-293; 301-302; 307-308; 313-317
18. Social skills lessons were taught in the fall, 2009. In addition, throughout the day as behaviors arose, *** used those as ongoing teaching lessons. Tr. Vol. II, pg. 289
19. On September 24, 2009, the Student refused to complete an assignment. The staff attempted to redirect student, and student refused. Student then played with a small object and, ignoring the teachers' requests, student refused to put it away. Student wrote curse words on a white board and the teachers ignored student's behaviors. Student was given choices, but ignored them. The

staff asked student to go to ISS for time out, and student refused. The staff then took student to ISS at which time student kicked and screamed. Progressively, the Student's behaviors escalated from rudeness and noncompliance to screaming, cursing, and physical aggression. There is disagreement about whether the ***. The staff ***. Student continued to ***. The Parent was called to come to school, and arrived during *** procedures. The Student's aggressive behaviors continued after the Parent came to school. The family met with the Superintendent of Schools who, at the Student's request, allowed student to move from Level I to Level III. Tr. Vol. I, pgs. 209-210; Tr. Vol. II, pgs. 86-88; 294-299; P-61; R-24; R-57

20. The Parent and ***, Special Education Administrator for the District, met and developed support strategies for the Student. Tr. Vol. II, pgs. 88-89; R-28
21. The Student attended school fairly regularly from August to ***, 2009. After that date, except for ***, the Student did not attend school for approximately 2 months. Student was placed on homebound ("HB") in ***, 2009. Tr. Vol. II, pgs 25-29, 93-94,98; P-21, 23,56; R-31, 37, 40 and 55
22. During student's first six weeks of *** grade, the Student made behavioral progress. Student progressed in student's personal goals which were respect adult authority, reduce signals and use appropriate tone of voice. Campus-wide goals included starting and finishing work on time, following directions, and being respectful to others. Tr. II, pg. 75; P-23; R-22, 55, 62
23. In November, 2009, the Parent gave consent for a neuropsychological evaluation. The Parent's advocate suggested that Dr. *** conduct the assessment and the District agreed. The ARDC developed academic goals, as well as adapted PE, speech, PT and special education counseling. At the Parent's request, the ARDC agreed to provide a word processor for a writing accommodation. The District agreed to provide staff training in the area of social skills. The support strategies that the Parent and *** developed were accepted. P-21; R-37, 101
24. The *** ARDC agreed to provide HB services. P-56; R 40
25. Dr. *** completed a neuropsychological evaluation on January 31, 2010. The reason for the referral to Dr. *** was to clarify the Student's cognitive and behavioral status and to generate recommendations for student's educational program. Tr. Vol. II, pg. 183; R-42
26. As part of her evaluation, Dr. *** reviewed school and medical records and information from previous assessments. She interviewed the Parents who completed the Parent Rating Scale of the Behavior Assessment System for Children 2nd Edition ("BASC-2") and the parent form of the Social Responsiveness Scale (SRS). Two of the Student's most recent teachers completed the

teacher forms of the BASC-2, the SRS, and the Vineland Adaptive Behavior Scale Second Edition (“Vineland”). R-42

27. Dr. *** interviewed the Student and observed student at home and during the evaluation session. She administered the Differential Ability Scales Second Edition (“DAS II”), selected subtests of the NEPSY II, and informal measures of sensory and motor function. She administered the Autism Diagnostic Observation Schedule (“ADOS”). R-42
28. The Student displayed average ability to focus and maintain student’s attention to a simple auditory vigilance task. Student maintained focus after a long period with no targets presented. Student’s performance was improved on more complex tasks indicating that student is better able to focus when student perceives accurately the demands of the task and when student is required to be more actively engaged. R-42
29. The report reflected that the Student’s auditory and tactile perceptions were intact. Student displayed adequate fine motor control and programming. Student had some difficulty maintaining the motor sequence until task completion. Student initiated conversational interactions and responded appropriately to questions and comments. The Student’s nonverbal reasoning was in the ***. R-42
30. Student exhibited a significant difficulty inhibiting an over-learned or habitual response. R-42
31. On the BASC-2, none of the Student’s clinical scales was rated as clinically significant by all three raters. Scales that were rated as clinically significant by two raters and as at risk by the third included hyperactivity, aggression, depression, atypicality and withdrawal. R-42
32. All three raters of the BASC-2 rated the Student as clinically significant on the content scales of emotional self control and executive functioning. R-42
33. Using the SRS, the Student’s Parent rated student in the severe range for all aspects of social responsiveness. One teacher rated student as mildly impaired in the areas of social cognition and social communication; the other teacher rated student as normal in all areas. R-42
34. Dr. *** reported that while many of the behaviors exhibited by children with spectrum disorders appear to be similar to those of other children, the etiologies may be very different, with a greater preponderance of cognitive deficits underlying the spectrum-related behaviors and dictating different treatment approaches. R-42
35. The neuropsychologist recommended the following for the Student:
 - a. More active engagement to help student maintain student’s attention and process information including taking notes or checking off points as they are covered;
 - b. Shortened assignments if master can be demonstrated, rather than or in addition to extra time for completion;

- c. Consider alternative response modalities when feasible, and determine whether assistive technology access is warranted; tangible rewards for completion of written assignments; and
 - d. Work with the Student to reinforce student's organization and self-monitoring skills and cognitive flexibility to consider alternative approaches and solutions to problems. Tr. 230-231; R-42
36. In March, 2010, the ARDC accepted Dr. *** neuropsychological evaluation, requested that she complete achievement and autism assessments, and collaborate with the AU team to make a multidisciplinary assessment. The committee agreed that the Student would transition from HB to *** for *** a day beginning ***, 2010. All the ARDC agreed with placement and programming at that meeting. Tr. Vol. II, pgs. 232-233; P-17; R-44
37. As transition to ***, *** met with student's assigned teacher to discuss implementation of the ARDC recommendations. An informal staffing was held to discuss student's return to ***. R-52
38. The Student returned to *** on ***, 2010 for *** daily instruction. Student's day was to increase to *** on ***, then follow a transition plan to a general education setting with a paraprofessional. Tr. Vol. I, pg 37; Tr. Vol. II, pgs. 29-33; R-44, 52
39. A multidisciplinary team ("MDT") conducted the 2010 FIE. The team included two educational diagnosticians, three speech language pathologists, and two licensed specialists in school psychology, one of which was Dr. *** Tr. Vol. II, pgs.238-239, 248-250; P-12; R-50, 101
40. The 2010 MDT gathered information from parents, teachers, and the Student's physician. Previous evaluations and observations were reviewed and considered along with current data and tests results. Observations of the Student were conducted. P-12; R-50; Tr. Vol. II, pgs.177-181
41. The District conducted a speech evaluation using/reviewing a number of instruments. The results indicated that the Student's fluency abilities were within the *** range. Student exhibited adequate fluency strategies to help student manage student's ***. P-12; R-50
42. The physical therapist conducted the PT evaluation. The school nurse screened the Student's vision, hearing and fine and gross motor skills. P-12; R-50
43. Recommendations were made as a result of the assistive technology evaluation, as follows: speech-to-text software and training for the Student regarding the use of software for production of assignments, and continued modification to allow student to type lengthened assignments. P-12; R-50
44. Dr. *** administered the Wechsler Individual Achievement Test-3rd Edition. The Student has *** reading, writing, oral language and receptive language skills. Mathematics performance was in the *** range. R-42

45. Two teachers observed the Student in student's one to one setting with student's HB teacher. Student spoke spontaneously, asked and answered questions, used facial expressions during social interactions, and made eye contact. Student transitioned from play to academic work without difficulty. Student laughed appropriately and took turns easily. Student used *** speech, including prolongations and repetitions, but did not appear to be frustrated with the ***. Student exhibited defiant behaviors during one observation and spoke in a rude tone. R-46
46. According to student's HB teacher, the Student has typical communication capabilities. Student raises questions when confused through verbal and nonverbal cues. Student exhibits no repetitive behaviors or need to adhere to a set schedule. A change to a scheduled preferred activity presents a problem for student. Student responds well to rules that student helps to establish. R-46
47. As additional information, the MDT requested that the Parent complete the Autism Diagnostic Interview. The interview provides a MDT with a quantitative indicator for comparison scores for diagnoses on the autism spectrum. Despite more than one request, the Parent did not return the diagnostic interview. Tr. Vol. I, pg. 197, Tr. Vol. II, pgs 237-238; P-8; 51; R-75
48. After a ***, 2010 behavioral incident, the Parent stopped sending the Student to school. As of the hearing date, student had not returned. Tr. Vol. I, pg. 230; Tr. Vol. II, pg. 33-39; R-52
49. The August 18, 2010 ARDC recommended eligibility as SI and OHI. It developed goals in social skills, counseling, behavior and math, and agreed to placement general education at the Student's home campus with modifications and support services. PT and ST consultative services were recommended along with special education counseling and social skills training. The Parent agreed with all decisions except for the removal of AU as an eligibility classification. P-8; R-78
50. The August 18 ARDC recommended accommodations, as follows:
- a. Provision of a variety of ways to respond to classroom assignments;
 - b. Provision of shortened assignments when mastery was demonstrated;
 - c. Check for understanding;
 - d. Special education support;
 - e. AT to complete assignments
 - f. Access to an aide;
 - g. Allow breaks as needed for sensory integration exercises;
 - h. Positive reinforcers; and
 - i. Implementation of behavior contract developed in collaboration with the Student.
51. The Parent requested an IEE at District expense, and the District refused. P-8; R-78
52. In September, 2010, the Parent obtained an IEE for Asperger's Disorder. Dr. *** diagnosed the Student with Asperger's Disorder and considered student's symptoms to be relatively mild in a

1:1 setting with an adult. She predicted more evident symptoms in more complex or socially demanding situations. P-44

53. Dr. *** reviewed records provided by the Parent and interviewed the Parents and the Student. The Parents completed four different rating scales or checklists. P-44
54. On the Achenbach Child Behavior checklist, both Parents rated the Student in the clinical or borderline range for withdrawal or depression, social problems, thought problems, and aggressive behavior. P-44
55. On the BASC-2, the Parents rated the Student in the clinical or at-risk range for hyperactivity, aggression, depression, odd or immature behavior, withdrawal, attention problems, difficulty adapting to change, poor social skills, difficulty working with groups, and difficulty with functional communication and with activities of daily living. P-44
56. On the Australian Asperger's Rating Scale interview, the Parents indicated significant symptoms consistent with Asperger's. On the Asperger Syndrome Diagnostic Scale, the Parents' ratings suggested a diagnosis of Asperger's is very likely. P-44
57. One Parent completed the Autism Spectrum Rating Scale. The results indicated significant symptoms of an autistic spectrum disorder. P-44
58. The Student's drawings suggested characteristics of social deficits, atypical ways of responding to emotions, poor impulse control, and some emotional immaturity. P-44
59. Dr. *** did not observe the Student in the home or school environments. She did not have direct information from other professionals or school personnel. Tr. Vol. I, pgs. 282, 294-300, 311-312
60. In *** grade, on the Texas Assessment of Knowledge and Skills ("TAKS"), the Student was *** in reading and math. In *** grade, student *** in reading and math. In *** grade, student *** in reading, was *** in science, and *** in math. Student was awarded the President's Education Award for academic excellence and achievement in the area of science. Tr. Vol. II, pgs 43-45; R-21; R-58; R-60
61. After the Student *** on the math test, the District offered ***. The Parent did not access *** and did not bring the Student to ***. Tr. Vol. II, pgs 45-47
62. In the fall, 2009, the Student's teacher, ***, met with student's previous teacher, ***, to discuss strategies that worked with the Student. *** met with the two teachers to review a profile sheet of the Student, and to discuss transition and IEP requirements. *** was one of *** support team. The teachers' rooms were three doors apart, and they had walkie-talkies and telephones if needed for support. Tr. Vol. II, pgs. 48-49; 285-287

63. The Parent provided a *** device for the Student that student used during speech therapy. Student could have used it at other times if student so desired although student's father preferred that student not use it in class. The Student's IEP did not include the device as an accommodation or modification until November, 2009. Tr. Vol. II, pgs. 284-285; P-21, 23, 27, 29, 30; R-37
64. The Student's November 4, 2008 IEP provided for PT as a related service in the amount of 30 minutes, 4 times per semester. The therapist made the services available in the fall, 2009, and went into the home during HB. Tr. Vol. II, 320-339; P-30
65. Historically, when the Student's behaviors related to sensory issues, they did so when student was over-stimulated in a larger group setting. The Student would want to flee the scene, and did not want any confrontation with adults. Tr. Vol. II, pgs. 324-326
66. The Student benefitted from sensory integration exercises. The *** staff was aware of student's sensory integration needs. *** had a list of sensory integration exercises, and the equipment was in her room. A nearby gym had other equipment for student's use. In *** classroom in the fall, 2009, student had access to sensory integration equipment in *** classroom and the gym. Tr. Vol. II, pgs. 285, 321-326

Discussion

Petitioner pled no exceptions to the Texas statutory one year limitations period. Tex. Admin. Code § 89.1151(c). The applicable limitations period is from September 24, 2009 to present.

The Appropriateness of the District's May 10, 2010 FIE

Unless a parent and school district agree otherwise, a child who receives special education service must be reevaluated every three years. In conducting the evaluation, the school district shall use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information including information provided by the parent that may assist in determining whether the child is a child with a disability and the content of the child's individualized education program. The school district shall not use any single measure or assessment as the sole criterion for determining whether the child is a child with a disability and must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. Additionally, the school district shall ensure that the assessments are selected and administered pursuant to the IDEA. The ARDC must review existing evaluation data including evaluations and information provided by the child's parents, and identify any necessary additional data to determine whether the child is a child with a disability as defined in the IDEA. 34 C.F.R. §§ 300.303-300.311.

In November, 2009, at the request of Petitioner's advocate, the ARDC agreed to use the services of Dr. *** for a neuropsychological evaluation. The evaluation was discussed in detail during the November 17 ARDC meeting. The committee explained to the Parent that there would be observations in the home and school, and interviews with the Parent. The consent was reviewed by the Parent's legal representative, and the Parent gave written consent on November 12, 2009.

The report was completed January 31, 2010. Dr. *** used the BASC-2, SRS, the Vineland, DAS II, NEPSY II and the ADOS as assessment tools. The tools provided information relative to the Student's cognitive and behavioral status. Dr. *** reviewed available school and medical records and information from previous assessments, and interviewed the Student. The ADOS scores indicated that the Student did not meet the threshold established for a diagnosis of AU with regard to the communication domain and or the reciprocal social interaction domain.

In Petitioner's Post-Hearing Argument and Brief, Petitioner complains that Dr. *** should not have used the ADOS as an assessment tool for her neuropsychological evaluation. Petitioner presented no evidence that the ADOS is an inappropriate tool for a neuropsychological assessment. It should be noted that in 2007, the Parent referred the Student to Dr. *** for a psychological evaluation. Among other instruments, Dr. *** used the ADOS and the BASC-2 as evaluation tools in her psychological assessment.

Petitioner also asserts that the ADOS was an assessment for autism, and that consent was not given for that purpose. Petitioner did not plead this allegation and cannot bring it forward via petitioner's post hearing argument. 34 C.F.R. § 300.511

The ARDC accepted Dr. *** neuropsychological evaluation report. It then requested that Dr. *** complete achievement testing and AU assessment in collaboration with the AU team to make a multidisciplinary assessment as part of the three year reevaluation.

Petitioner argues that Dr. *** did not contact the Student's physician, Dr. *** for information, and did not review prior evaluations. It is accurate that Dr. *** did not contact Dr. ***, nor was she required to do so under the IDEA. Dr. *** contributed an OHI eligibility form that was accepted by the ARDC. Dr. *** report reflects a review of several previous evaluations of the Student.

The May 12, 2010 FIE included previous and current achievement test results, current adaptive physical education and assistive technology evaluations, and Dr. *** neuropsychological evaluation. The AU team gathered other updated information. The FIE included parent information, previous and current intellectual information, and OHI eligibility information from Dr. ***. It included teacher information, and speech/language evaluation results. There was no evidence presented to show that the

evaluation instruments used were not technically sound instruments, or that they were not selected and administered pursuant to the IDEA.

The MDT included two educational diagnosticians, three speech language pathologists, and two licensed specialists in school psychology. In connection with the determination of the Student's AU eligibility, the MDT reviewed existing data, conducted classroom observation, received teacher information, and Dr. *** evaluations.

As additional information, the MDT requested that the Parent complete the Autism Diagnostic Interview. The interview provides a MDT with a quantitative indicator for comparison scores for diagnoses on the autism spectrum. Although requested to do so on more than one occasion, the Parent did not provide the requested information. While this diagnostic tool could have been helpful to the MDT, the Parent's refusal to provide it to the team is not held against the District. The MDT used several other sources of data in making its recommendation that the Student did not qualify as having autism or other pervasive developmental disorders.

Contrary to Petitioner's arguments, the District did not use any single measure or assessment as the sole criterion for determining whether the child is a child with a disability. Numerous assessment tools were used to continue eligibility as SI and OHI, and discontinue eligibility as AU.

Petitioner's challenge to the District's FIE fails. Respondent carried its burden of proving that its May 12, 2010 FIE was appropriate. 34 C.F.R., §§300.301-300.306; *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *J.M. v. Lake Travis Indep. Sch. Dist.*, No.A-07-CA-152-SS (W.D. Tex. Filed Aug. 10, 2007). Petitioner is not entitled to be reimbursed for the expense of its IEE. 34 C.F.R. § 300.502.

Implementation of Behavioral Support Strategies during the fall, 2009 until HB Placement

Although the November, 2009 AU supplement was not attached to the subsequent ARDC documents of March, 2010, the evidence reflects that the support strategies were implemented. The Student's teacher, ***, testified that she implemented these strategies and, additionally, used the level system with the Student with modifications for student's needs. At student's preference, *** provided student with an enlarged area in which to work.

The Student's positive behavior support strategies were a) forewarn of changes in routines/transitions b) provide consistent predictable environment c) reinforce appropriate behavior immediately with praise attention d) reduce stressful situations e) provide cool down time when upset, and f) allow to verbalize/"blow off" when upset with the teacher.

There was no evidence that the Student's routine was changing, or that the environment was inconsistent at the time of the *** incident. There was no evidence of a stressful situation at the time of

the behavior. The staff ignored student's behaviors which provided a cool down opportunity for student. There was no evidence that the Student was upset with student's teacher at the time. The reason for student's behavior is unclear. The staff attempted to redirect the Student, ignore student's behaviors, and offered choices, all of which student ignored. After student refused a request to take a time out, the staff took student to ISS. Student then began to kick and spit at staff and ***. Petitioner failed to carry petitioner's burden of proving that the District did not implement the behavior support strategies in the fall, 2009.

Classroom to Classroom Transition and the Level System at *** in the Fall, 2009

and

Collaboration/Coordination of the Student's Education Program between with Spring, 2009 and Fall, 2009 Staff

The Student's IEP did not require a transition plan for student's move from *** classroom to ***. Although there was no written transition plan for the Student's change of teachers in the fall, 2009, ***, ***, and *** met and reviewed the Student's profile, discussed what strategies worked with student, and reviewed student's education program. The *** campus is a small environment, and the staff is familiar with the students. When the Student was in *** classroom, student was three doors down from student's former classroom with ***. The two teachers could communicate with walkie-talkies if necessary. *** was part of *** support team.

The evidence clearly supports the Student's understanding of the level system. While in *** classroom, the Student was on the level system, and the Parent reported satisfaction with student's placement and progress. The system was continued when student began in the fall, 2009 in *** classroom. The Student understood the system and negotiated with the teacher in regard to progression on the system. Student explained the system to student's psychologist, Dr. ***. After the September 24 behavior incident, student negotiated student's way to level 3 with the District Superintendent.

Petitioner failed to carry petitioner's burden of proving that the Respondent failed to prepare the Student for the level system or student's change from one classroom to another. Petitioner failed to prove that the Respondent did not collaborate or coordinate with each other regarding the Student's fall, 2009 education program.

Use of *** device during the Fall, 2009

The Parent purchased the *** device for the Student. During the course of these proceedings, the Respondent reimbursed the Parent for its cost. The Student was successful in speech therapy and the device was helpful in that respect. The *** was not included in the Student's IEP until November, 2009.

On September 24, the Student was playing with the device, but would not show it to the staff who believed it to be a video game. After the Student's behaviors escalated and student was removed from the classroom, the *** device was taken from student on that day. That was the first time that *** had seen the *** device. Other than the September 24 incident, there was no testimony that the Student was not allowed to use the *** device. Student's teacher testified that student could have used it if student had wanted to do so, and that she understood that student used it during speech therapy. Petitioner failed to carry petitioner's burden of proof regarding failure to allow the use of the *** device in the fall, 2009.

Provision of PT for Sensory Integration required in November, 2008 IEP

The evidence supports that the District made PT consult services available. It was thwarted in its attempts to provide the services in the fall semester due to the Student's failure to attend school for two months. The services were attempted twice during the time that the Student was not in school. In addition to attending ARDC meetings, the PT teacher provided services two other times during the fall, 2009.

However, Petitioner's issue specifically alleges that the District failed to provide PT for sensory integration "as required in the November, 2008 IEP." During the hearing, Petitioner confirmed that the May, 2009 IEP replaced the November, 2008 IEP regarding PT as a related service. Issues that pre-date September 24, 2009 are outside the statute of limitations period. Since the November, 2008 IEP was not in effect on September 24, 2009 or thereafter, as pled, this issue is moot, and therefore, DISMISSED with prejudice.

Failure to Fully Inform Parent so as to be able to Participate in ARDC meetings in fall, 2009

Petitioner failed to present credible evidence to support petitioner's contention that the Respondent failed to fully inform the parent regarding the extent of transition support needed to move from one classroom to another classroom on the *** campus. The level system was used in both classrooms. The classrooms were a few doors away from each other. Because the campus is small, the staff knew each other and was familiar with the students. The Parents participated in the May 20, 2009 ARDC meeting when the placement to *** was discussed, and they agreed to the placement. *** met with the Parent regarding the move from classroom to classroom.

Petitioner failed to carry petitioner's burden of proving that the District failed to allow the use of *** device. The device was not part of the Student's IEP until November, 2009. Except for September 24 when the device was taken from the Student, there was no credible evidence that the District failed to allow its use.

When the Student had a behavior problem on September 24, 2009, the District contacted student's Parents who came to the school. Prior to that day, daily behavior sheets were sent home and the Parent was aware of the Student's behavior issues. At the Parent's request, the behavior sheets included more detail. Student's psychologist, Dr. ***, noted the several discussions with the Parent about the Student's behaviors, at school and at home. Following the *** incident, the Student did not attend school for approximately two months. Student was then provided HB instruction until ***, 2010 when student transitioned back to ***. Student stopped attending school in ***, 2010 and has not returned.

Throughout student's years at the District, the Parent and the District have communicated regularly. *** met with her to discuss behavior strategies. The parties communicated via emails.

Petitioner failed to carry petitioner's burden of proving that the Respondent failed to fully inform the Parent and that such failures prevented the Parent from being able to participate sufficiently in the ARDC meetings during the fall, 2009.

Identification and Classification as a student with AU

The Student has had a variety of diagnoses throughout student's lifetime. Except for Dr. ***, Dr. ***, and the District's 2007 FIE, the evidence indicates that other professionals carried forward the Asperger's diagnosis from various records that they reviewed rather than rendering diagnoses after their own evaluations. Dr. *** report did not support the classification of AU. The District's 2007 FIE supported an AU classification. Dr. *** supported a diagnosis of Asperger's.

The following table describes student's diagnoses and eligibility determinations:

Reported By	Date	Diagnosis	Note	Tr. /Exhibit #
District's FIE	9.29.2004	Eligibility: OHI/SI		R-4
***, M.D.	2.9.2005	ADD	No evaluation for Asperger's; characteristics consistent w/ *** & are also seen in ADD & Asperger's; did not believe Student "classic" Asperger's	Tr. Vol. I, pgs 57-58
***	3.9.2007	***		R-98
***, Ph.D.	5.31.2007	ADHD; possible Asperger's Disorder	Features of Asperger's: reduced ability to identify and process complex social cues; angers too easily; becomes excessively upset at small events	P-34; R-5
***, M.D.	7.19.2007	Bipolar Disorder; ADHD, Asperger's	No evidence of actual evaluations conducted	P-34
Abilene ISD's FIE	9.29.2007	Eligibility: AU, SI, OHI	ASDS: Probability of Asperger Syndrome: Likely; Gilliam Asperger's Disorder Scale: Probability of Asperger's: high/probable BASC-Teacher Rating Scales: At risk in areas of hyperactivity, adaptive skills, adaptability, leadership and study skills; BASC-Parent Rating Scales: At risk in areas of eternalizing problems, hyperactivity, aggression, conduct problems	R-10
***, Ph.D.	Oct & Nov. 2007	Asperger's Disorder	ADOS did not support classification of AU; *** impacts behavioral and social problems	P-33
***, Ph.D.	2008-2010	***, Asperger's Disorder	No evaluations conducted	P-68; Tr. Vol. I, pg. 152

AISD's FIE	5.12.2010	Eligible as SI and OHI	ADOS: Student did not meet threshold established for diagnosis of autism spectrum disorder re: communication or reciprocal social interaction domains; BASC-II Rating Scales- all raters: clinically significant in areas of emotional self control and executive functioning; SRS-Parent: severe all aspects social responsiveness; one teacher-mildly impaired in social cognition and social communication; 2d teacher rated normal in all areas; Vineland: Teacher: consistent ratings	R-50
***, Ph.D.	9.16.2010	Asperger's Disorder	ASDS (by Parent): Diagnosis Asperger's/very likely AU Rating Scale (by Parent): significant symptoms of AU	P-44

Dissatisfied with the removal of the AU classification, Petitioner obtained a private evaluation specifically for Asperger's from Dr. ***. She conducted assessments, and reviewed various documents. Her only direct information came from the Parent and the Student. She did not collaborate with anyone from the District. The Parent was not sending the Student to school, thus, Dr. *** did not observe the Student in a school setting. Dr. *** diagnosed the Student with Asperger's and acknowledged that the symptoms were mild.

The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision ("DSM-IV-TR") states, "The essential features of Asperger's are "severe and sustained impairment in social interaction and the development of restricted, repetitive patterns of behavior, interests, and activities. The disturbance must cause clinically significant impairment in social, occupational, or other important areas of function." The impairment in reciprocal social interaction is gross and sustained. For a diagnosis of Asperger's, the DSM IV-TR requires more than mild symptoms .

While in the District, the Student made good grades and worked on grade level. Although student experienced difficulty with social interaction and wanted to be in charge of social situations, there was insufficient evidence to show that student's reciprocal social interaction rises to the level of gross and sustained.

The Student exhibits restricted focus and has certain interests that student prefers to discuss, but student can be redirected to other subjects. Despite student's *** which student has learned to manage with some success, the Student communicates verbally, as well as non-verbally.

The Student makes eye contact with others, converses successfully, laughs appropriately, and takes turns. Student's language is average for student's age, and student uses sentences correctly in conversational discourse with no speech abnormalities that are specific to autism. Student does not echo others' speech or use stereotyped or odd words or phrases. Student's affect is generally appropriate, and student displays appropriate pleasure in interactive participation. Student's social overtures are generally restricted to student's own interests. Student uses verbal and nonverbal behaviors for social interchange. Student exhibits no age-inappropriate stereotyped behavior or restricted interest that limits

social interaction. Student tends to be concrete in student's interpretations of events and can have a fairly rigid view of how things happened or the reasons for the event. Student has difficulty recognizing facial affect and matching appropriate affect to contextual cues.

There is a distinction between a *diagnosis* of AU and *classification* of AU under the IDEA. A diagnosis of Asperger's, a form of autism, does not fully satisfy the requirements of a child with a disability under the IDEA.

A child classified with a disability of autism means a child evaluated as having autism and who, by reason thereof, needs special education and related services. Autism means a developmental disability significantly affecting verbal *and* nonverbal communication *and* social interaction that adversely affects a child's *educational* performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. *emphasis added* 34 C.F.R. § 300.8. Students with pervasive developmental disorders are included under the category of AU. 19 TAC § 89.1040. Dr. *** diagnosis of Asperger's with mild symptoms, and her *prediction* of more severe symptoms in more complex or socially demanding situations cannot overcome the legal requirements for eligibility as AU under the IDEA. The credible evidence does not support Petitioner's allegation that the District failed to identify student as AU.

The purpose of the IDEA requirement for three year reevaluations is to determine whether a child continues to have a disability under the IDEA. Its purpose is to identify how the child is doing in school, what student's educational needs are at that time, and what changes need to be made to student's IEP to help student meet student's annual goals and objectives and participate, as appropriate, in the general curriculum.

It is important to understand that, rather than the "label", the child's needs drive the development of student's special education program. In its 2010 reevaluation, the District found that the Student continues to have a disability under the IDEA, but the classifications did not include AU. Despite the removal of AU, the District recognized that, as in the past, student has weaknesses in social skills, speech, and behavior. Regardless of the classifications for eligibility, the District addressed those needs in the current IEP. It developed goals and objectives in special education counseling, social skills/speech therapy, and behavior. Recognizing student's *** in math, the District developed math goals, as well. It put in place accommodations that address behavior and student's sensory integration needs.

At the time of hearing, the Student had not attended school in the District since ***, 2010. Although the Parent purchased educational computer programs for student, the extent and quality of

academic study actually completed at home is unclear. The Student is a bright young *** who has the ability to progress academically. Cooperation between the Parent and the District is necessary to student's educational future, and the parties are strongly encouraged to keep student's needs foremost in their minds.

Provision of FAPE

Public school districts must comply with the IDEA procedures for identifying children with disabilities who need special education, and delivering appropriate services as necessary to provide a free and appropriate public education (FAPE). 20 U.S.C. §1412(a)(1); *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, (1982); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

The Fifth Circuit has further defined a free appropriate public education by delineating 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*, 118 F.3d at 253. Petitioner raised no issue regarding the administration of student's program in the least restrictive environment.

The District recognized the Student's needs for social skills instruction, PT for sensory integration issues, ST, counseling, specialized instruction in math, and behavior management. These needs are reflected in student's assessments and the District consistently based student's educational program on those individualized needs. Student's IEP modifications and accommodations include among others, typing lengthened assignments, access to a speech-to-text software program to assist in completion of lengthened assignments, access to an instructional aide, positive reinforcers, a behavior contract, and breaks for sensory integration exercises.

Consistently, District staff provided the Student's services in a coordinated and collaborated manner, and responded positively to the Parent's input. In response to parental request, a word processor was provided. The District reimbursed the Parent for the *** device. Support strategies were devised by *** and the Parent and accepted by the ARDC. The Student made good grades and worked on grade level. Student learned to self-monitor and evaluate student's fluency strategies and maintain student's fluency in low-stress speaking situation for 5 minutes. Student did not get flustered during *** moments. Student's improvement in speech was such that direct ST is no longer necessary. Petitioner failed to prove that student was denied FAPE.

Conclusions of Law

1. The Student is a student entitled to special education and related services under the provisions of IDEA, 20 U.S.C. §1400, *et seq.*, and related statutes and regulations.
2. The Abilene Independent School District is a legally constituted independent school district operating as a political subdivision of the State of Texas.
3. The Respondent's 2010 FIE is appropriate. 34 C.F.R., §§300.303-300.306; *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *J.M. v. Lake Travis Indep. Sch. Dist.*, No.A-07-CA-152-SS (W.D. Tex. Filed Aug. 10, 2007).
4. Petitioner is not entitled to an IEE at Respondent's expense. 34 C.F.R. § 300.502.
5. Respondent complied with the November 2008 IEP behavioral support strategies in the fall, 2009. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984).
6. Respondent prepared the Student for classroom to classroom transition and the level system at *** in the fall, 2009. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984).
7. In the fall, 2009, District staff collaborated and coordinated Petitioner's education program with student's previous year's staff. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984).
8. Petitioner failed to meet its burden of proof that the District failed to allow the use of the *** device during the fall, 2009. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984).
9. Petitioner failed to meet its burden of proof that the District failed to provide PT for sensory integration as required in the November 2008 IEP. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984).
10. The District fully informed the parent of transition support needs, the use of the *** device, and Petitioner's behavior difficulties and did not prevent the Parent from being sufficiently able to participate in the ARDC meetings during the fall, 2009. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984).
11. The District's removal of AU as an eligibility classification was not in error. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984).
12. The District provided FAPE to Petitioner. 34 C.F.R. § 300.101; *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997); *Richardson Ind. Sch. Dist. V. Leah Z.*, 580 F. 3d 286 (5h Cir. 2009).

Order

Based on the foregoing findings of fact and conclusions of law, IT IS ORDERED that all relief requested by Petitioner is DENIED.

SIGNED on March 8, 2011.

/s/ Brenda Rudd

BRENDA RUDD

Special Education Hearing Officer

For the State of Texas

NOTICE TO 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).

DOCKET NO. 019-SE-0910
AND
DOCKET NO. 289-SE-0710

STUDENT § BEFORE A SPECIAL EDUCATION
b/n/f PARENTS §
§
V. § HEARING OFFICER FOR THE
§
ABILENE INDEPENDENT §
SCHOOL DISTRICT § STATE OF TEXAS

SYNOPSIS

Did the school district deny Petitioner FAPE by its failure to do the following:

Issue Number 1: Whether the District’s May 12, 2010 Full and Individual Evaluation is appropriate

Held: For the school district

Citation: 34 C.F.R., §§300.303-300.306; *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff’d*, 468 U.S. 883 (1984); *J.M. v. Lake Travis Indep. Sch. Dist.*, No.A-07-CA-152-SS (W.D. Tex. Filed Aug. 10, 2007)

Issue Number 2: Whether the Petitioner is entitled to an IEE at school district expense

Held: For the school district; Petitioner is not entitled to an IEE at district expense

Citation: 34 C.F.R. § 300.502; *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff’d*, 468 U.S. 883 (1984)

Issue Number 3: Whether the District failed to implement or comply with the November, 2008 Individualized Education Program behavioral support strategies during the fall, 2009 until *** 2009 when the Student was placed on homebound instruction

Held: For the school district

Citation: 34 C.F.R. § 300.323; *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff’d*, 468 U.S. 883 (1984)

Issue Number 4: Whether the District failed to prepare the Student for classroom to classroom transition and the “level system” at *** in the fall, 2009

Held: For the school district

Citation: 34 C.F.R. § 300.323; *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff’d*, 468 U.S. 883 (1984)

Issue Number 5: Whether, in the fall, 2009, District staff failed to collaborate or coordinate Petitioner’s education program with petitioner’s previous year’s staff

Held: For the school district

Citation: 34 C.F.R. § 300.323; *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997); *Richardson Ind. Sch. Dist. V. Leah Z.*, 580 F. 3d 286 (5^h Cir. 2009).

Issue Number 6: Whether the District failed to allow the use of the *** device during the fall, 2009

Held: For the school district

Citation: 34 C.F.R. § 300.320; *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984)

Issue Number 7: Whether the District failed to provide physical therapy for sensory integration as required in the November, 2008 IEP

Held: For the school district

Citation: 34 C.F.R. § 300.323; *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984)

Issue Number 8: Whether the District failed to fully inform the Parent regarding the following:

The extent of transition support that the Student needed to move successfully into the new classroom at *** in the fall, 2009;

Respondent's failure to allow use of the *** device;

Petitioner's behavior difficulties; and

whether such failures prevented the Parent from being sufficiently able to participate in the Admission, Review, and Dismissal Committee ("ARDC") meetings during the fall, 2009

Held: For the school district

Citation: 34 C.F.R. § 300.322; *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984)

Issue Number 9: Whether the District failed to timely identify and classify the Student as a student with autism

Held: For the school district

Citation: 34 C.F.R. § 300.8; *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984)

Issue Number 10: Did the school district deny the Student a free, appropriate public education?

Held: For the school district

Citation: 34 C.F.R. § 300.101; *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997);