

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

**STUDENT,
bnf PARENTS,
Petitioner,**

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v.

DOCKET NO. 225-SE-0511

**LEWISVILLE INDEPENDENT
SCHOOL DISTRICT,
Respondent.**

DECISION OF THE HEARING OFFICER

Introduction

Petitioner, Student bnf Parents (“Petitioner” or “Student”) brings this action against the Respondent Lewisville Independent School District (“Respondent,” or “the school district”) 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

Petitioner was represented throughout this litigation by petitioner’s legal counsel Dorene Philpot of the Philpot Law Firm. Student’s parents, *** and ***, were present throughout the due process hearing. In addition, Ms. Philpot was assisted at the due process hearing by her co-counsel, Barbara Hannon and Paralegal Melanie Watson.

Respondent was represented throughout this litigation by its legal counsel Nona Matthews with the law firm of Walsh, Anderson, Gallegos, Green & Trevino. In addition, ***, Executive Director of Special Education for the school district was also present during the due process hearing as its party representative. Petitioner requested an open hearing and a few observers attended portions of the hearing over the four day hearing period.

Resolution Session and Mediation

A Resolution Session was conducted on June 10, 2011 but it was not successful in resolving the issues between the parties. The parties also attempted mediation on July 12, 2011 but it was not successful either despite the best efforts of the mediation participants.

Procedural History

This case was continued twice – first to resolve scheduling conflict for Petitioner’s counsel and to allow the parties to attempt mediation before proceeding to hearing; the second to allow both parties time to prepare cross motions for summary judgment and time to resolve a statute of limitations issue prior to the hearing. There were a number of scheduling conflicts for both parties that posed obstacles to rescheduling the hearing until late October 2011. The parties ultimately agreed to conduct the due process hearing on October 26, 27, and 28, 2011.

On October 12, 2011 Petitioner submitted a Motion for Continuance of the October hearing dates because two of petitioner’s essential witnesses were not available. The Motion was denied. Instead the record of the hearing would be left open and a final day for hearing was scheduled, by agreement, for November 19, 2011. That date was subsequently rescheduled by agreement for January 20, 2012 in order to resolve a scheduling conflict that later arose with the November date.

The due process hearing was conducted on October 26, 27, and 28, 2011 and completed on January 20, 2012. The parties requested an opportunity to submit written closing arguments and legal briefs. The parties selected February 27, 2012 as a mutually agreeable date for the submission of written closing arguments and legal briefs. Written closing arguments and legal briefs were submitted by both parties in a timely manner. The Decision of the Hearing Officer was extended to March 26, 2012 in accordance with the agreement of the parties and the regulatory requirements of the IDEA.

Issues

Petitioner submitted a broad issue for decision in this case: Whether the school district failed to devise appropriate Individual Educational Plans (IEP's) for Student in the least restrictive environment within the past four years, and if so, whether that failure constitutes a denial of a free, appropriate public education (FAPE) by causing substantive educational harm within the meaning of IDEA.

Petitioner submitted the following specific issues:

1. Whether the school district's failure to provide Student with FAPE significantly impeded the family's opportunity to participate in the decision-making process and, if so, whether that constitutes a violation of the Individual with Disabilities Education Act (IDEA);
2. Whether the school district failed to properly consider the "autism supplement" [i.e., *19 Tex. Admin. Code § 89.1055 (e)(1)-(11)*] and all appropriate services in designing an IEP for Student;
3. Whether the school district failed to conduct timely and appropriate assessments in all areas of suspected disability and, if not, whether Student's parents are entitled to reimbursement for Individual Educational Evaluations (IEE's) obtained at parental expense;
4. Whether the school district changed Student's educational placement to a behavior class outside the Admission, Review & Dismissal Committee (ARD) process and, if so, whether that constitutes a violation of IDEA;
5. Whether the school district failed to offer to reconvene an ARD meeting following the impasse at the June 2010 ARD and, if so, whether that constitutes a violation of IDEA;
6. Whether Student's educational placement in an allegedly crowded classroom full of distractions and without the autism supports student needed was a failure to provide Student with FAPE in the LRE;
7. Whether the school district failed to properly implement Student's IEP -- for example whether the school district failed to provide Student parents with the requisite progress reports in a timely manner; and if so, whether that constitutes a violation of IDEA;
8. Whether the school district failed to devise appropriate and measureable goals and objectives based on Student's present levels of performance that addressed all areas of need, including (for example) whether Student needed IEP goals and objectives addressing student's lack of social skills;
9. Whether Student needed extended school year services (ESY) in order to receive FAPE and whether the school district's failure to consider or offer ESY services constitutes a violation of IDEA;
10. Whether the school district failed to use scientifically-based, peer reviewed methods of instruction with Student and, if so, whether that constitutes a violation of IDEA ;

11. Whether the school district failed to respond in a timely manner to the August 17, 2010 parental request for access to Student's educational records and to Petitioner's request for records included in Petitioner's request for hearing filed on May 27, 2011;
12. Whether the school district failed to provide Student's parents with the requisite prior written notice "at all required junctures" including specifically in response to a parental request for private placement and whenever the school district ignored or denied parental requests for a change of placement or additional services; and,
13. Whether the school district withheld information it was otherwise required to share with Student's family including specifically all evaluations in all areas of suspected disability, prior written notice, and IEP progress reports and, if so, whether that constitutes a violation of IDEA.

Respondent's Issues

Respondent filed a Partial Motion to Dismiss for Lack of Jurisdiction, Notice of Insufficiency and Ten Day Response to Complaint on June 6, 2011. Respondent identified the following defensive issues for decision in this case:

14. Whether Student's claims arising under any law other than the IDEA should be dismissed for lack of jurisdiction as well as whether Student's claims for attorney's fees under the IDEA should be dismissed as outside the hearing officer's jurisdiction; and,
15. Whether any and all of Student's claims arising outside the one year statute of limitations period applied in Texas should be dismissed and specifically that all claims arising prior to May 27, 2010 should be dismissed under *19 Tex. Admin. Code § 89.1151 (c)*.

Requested Relief

In addition to a request that the hearing officer make findings of fact and conclusions of law that establish petitioner's right to relief under IDEA Petitioner seeks the following specific items of relief:

1. Reimbursement for private placement and related services, evaluations and transportation costs (i.e., mileage) incurred by Student's parents;
2. Private placement and related services at the school district's expense for one year prospectively at *** School;
3. Compensatory educational services as an equitable remedy the amount and scope of which to be determined by the hearing officer and at the hearing officer's discretion (for example, an extension of the IEP for one year or additional hours of related services); and,
4. An IEE at the school district's expense.

Respondent's items of requested relief are as follows:

5. Dismissal of all of Petitioner's claims arising under any law other than the IDEA;
6. Dismissal of all claims arising outside the one year statute of limitations period and specifically all claims that arose prior to May 27, 2010; and,
7. Dismissal of all claims for attorney's fees and other litigation expenses under the IDEA.

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Statute of Limitations and Jurisdictional Issues

The jurisdictional issues raised by Respondent were dismissed as outside the hearing officer's jurisdiction in the Order on Respondent's Partial Motion to Dismiss issued on June 17, 2011. All claims arising under any law other than the IDEA were dismissed. The statute of limitations issue was resolved in Respondent's favor in the Order on Statute of Limitations issued on September 20, 2011 and reaffirmed in the Order on Petitioner's Motion for Reconsideration on Statute of Limitations issued on October 14, 2011. Those orders dismissed Petitioner's claims that arose before May 27, 2010 as outside the one year statute of limitations rule applied in Texas.

FINDINGS OF FACT

1. Student was first diagnosed at age *** with Pervasive Developmental Disorder –Not Otherwise Specified (PDD-NOS) – an autism spectrum disorder -- and Attention Deficit Hyperactivity Disorder (ADHD). These diagnoses were confirmed by Student's current treating psychiatrist at age *** in *** (Transcript Volume I., pp. 48-49, 74) (referred to hereafter as "Tr. Vol. ___, p. __") (Petitioner's Exhibit 8, p. 4) (referred to hereafter as "P. Ex. __-__") and again in subsequent recent assessments. (P. Ex. 38) (P. Ex. 32-36). Students with PDD exhibit significant delays in multiple aspects of child development including language, social, and emotional skills. The cause is unknown. PDD-NOS is a diagnoses used for patients who don't meet the precise criteria of other autism spectrum disorders. (Tr. Vol. I., pp. 107-108).
2. Student qualified for special education as a student with autism/PDD, speech impairment and non-categorical Early Childhood disability by the *** Independent School District at age ***. (P. 3). Student's eligibility for special education as a student with autism and a speech impairment was confirmed at age *** by the Lewisville Independent School District. (P. Ex. 4) (P. Ex. 5) (P. Ex. 32-35).
3. Student's cognitive functioning is significantly below the average range when compared to same age peers. Appropriate instruction for Student must recognize and take into consideration student's cognitive issues. (P. Ex. 32-48, 32-50). Student demonstrates areas of cognitive strength and areas of cognitive weaknesses. (Respondent's Exhibit 19)(referred to hereafter as "R. Ex. __"). Student has been described with moderate cognitive impairment in previous evaluations. (P. 16).
4. Student exhibits severe pragmatic, receptive and expressive language delays. (P. Ex. 39-1, 39-10). Student performs well below average academically in reading, math, and writing skills. Communication, social skills and daily living skills are also below average. (P. Ex. 32-59). Student's overall level of intellectual functioning falls within the borderline range with strengths in visual-spatial skills, visual perception, and visual learning and memory. (P. Ex. 32-58) (P. Ex. 38-13). Strengths also include student's long term memory and ability to figure out electronics such as computers, phones and cameras. (P. Ex. 32-37). Working memory, maintaining attention and concentration, and staying on task are challenges for Student. (P. Ex. 32-54).
5. Student has a history of impulsivity, hyperactivity, anxiety, obsessive thinking, emotional outbursts, defiance, irritability, and periodic aggression. Student's limited ability to tolerate frustration coupled with extreme impulsivity can lead to acting out and aggressive behavior at times. Student's aggression is usually very impulsive and short lived. (P. Ex. 24-3) (Tr. Vol. I., pp. 63-64, 70) (R. Ex. 5).

6. Student has difficulty transitioning from one activity or situation to another, becomes upset with new situations or by a change in plans, difficulty playing with other children, seems unaware of social conventions, needs an excessive amount of reassurance if things are changed, and, requires specific instructions to begin tasks. (P. Ex. 32-55). Student exhibits deficiencies in social reciprocal behavior that interferes with student's everyday social interactions at both home and school. (P. Ex. 32-56). Student can over react to problems and small events trigger big reactions. (P. Ex. 32-54). Student's adaptive behavior and overall behavior levels are consistent with student's overall intellectual abilities performance. In sum student demonstrates mild deficits in all adaptive behavior domains. (P. Ex. 32-51).
7. Student exhibits significant difficulty with attention and executive functioning. (P. Ex. 32-58). Issues with attention and concentration can be manifestations for children with ADHD and PDD. The additional identification of ADHD for a student identified with PDD does not impact the student's educational programming. (Tr. Vol. I., pp. 142-143)(Tr. Vol. III, p. 708). Student has moderate ADHD and there is no real dispute between the parties that student's attentional deficits interfere with student's learning. (Tr. Vol. I, p. 203) (R. Ex. 8) (R. Ex. 19).
8. Student has a negative reaction to loud noises. Student tends to become overwhelmed with sensory overstimulation. Student can become anxious which leads to acting out behavior. Sensitivity to loud noises is common for students with PDD. (Tr. Vol. I., pp.61, 284). Student needs reduced noise and external stimulation in student's learning environment and 1:1 assistance if student has an aggressive outburst. (P. Ex. 24-3) (Tr. Vol. I., p. 62). It is beneficial to remove Student from the classroom when a classmate is having a meltdown. (Tr. Vol. I., pp. 71-72). Some behaviors can be attributed to the effects of medications. (Tr. Vol. I., pp. 77-78).
9. Student participates in ***, a local athletic league for children with special needs known as *** and a ***. Student's father ***. (Tr. Vol. II., p. 460, 485-486)
10. Student needs a small, structured classroom environment with no more than 10-12 students with a low student to teacher staff ratio that addresses student's significant behavioral, social, and academic needs. Student requires frequent redirection to the instructional stimuli as well as to complete work. Student needs one to one staff to student ratio for learning new material, during transitions, and during less structured times of the school day to ensure student's safety, the safety of others and to provide the frequent redirection student needs.
Student needs individually-based instruction geared to student's academic level using methods that utilize the way student learns with a minimum of noise, staffed by professionals educated in behavior management. (Tr. Vol. IV, pp 850-851) (P. Ex. 32-59) (R. Ex. 8-26).
11. Student needs a BIP to address physically aggressive behaviors and to increase compliance. Student also needs Extended School Year (EYS) services due to student's rate of acquisition of skills and need for consistent programming. Student requires a structured classroom schedule with active engagement and a visual work-break schedule. Socially, Student needs to participate in *** as well as social stories, role playing, and modeling appropriate social interaction. Student needs concrete, meaningful learning opportunities to draw out skills student has in isolation and to make connections between student's learning and student's environment. (P. Ex. 32-59) (R. Ex. 8-26 to 8-27).
12. Student needs speech therapy to address student's expressive and receptive language deficits. Student also needs an Occupational Therapist to address sensory processing needs and handwriting difficulties. Student needs a sensory diet integrated into student's daily schedule. (P. Ex. 32-59 to 32-60).

13. Student's psychiatrist currently manages various medications prescribed to address Student's ADHD, anger, and aggression. (Tr., Vol. I, p. 49). Student presents with a very complicated profile and copes with a combination of disabilities that have overlapping symptoms which make medical treatment very difficult. (R. Ex. 5). A number of changes and adjustments were made to Student's various medications in response to behavioral issues throughout *** grade 2010-2011 school year and into the summer thereafter. (P. 19-1, 19-4, 19-7) (P. Ex. 20-7) (P. 21-22) (P. Ex. 29-1, 29-5) (Tr. Vol. I, pp 50, 53, 78, 80-82, 85-86). Student's current medications include: ***. (Tr.Vol. I., pp. 51-52).
14. Student began *** grade in the 2009-2010 school year in a regular education class with pullout to the resource room for language arts. (P. Ex. 18-6) (R. Ex. 1-25). Student also received direct speech therapy services twice a week for 25 minutes each session, direct occupational therapy bi-weekly for 25 minutes per week and adapted PE as a consult to the regular PE class once every six weeks for 15 minutes. Social skills were provided by a special education teacher once a day for 30 minutes each day. Student initially received science and social studies instruction, specials, and homeroom with student's regular education peers. (P. Ex. 18-6, 18-8) (R. Ex. 1-25). Student's state mandated formal assessment was changed from the TAKS to the TAKS-ALT for *** grade because student could not perform academically at the *** grade level. (Tr. Vol. I, pp.223-224).
15. OT services for Student were integrated with academic skills in the school district's program as a consult service. The Occupational Therapist provided support in Student's classroom. There were no specific OT goals or objectives stated in student's *** grade IEP. (Tr. Vol. I., pp. 136-137)(Tr. Vol. III, p. 689)(R. Ex. 1).
16. The *** grade IEP included measureable annual goals that Student would develop skills to master grade level TEKS in PE, science, and social studies. (R. Ex. 1-13). A Speech therapy IEP included an annual goal that Student would employ developmentally appropriate communication skills needed for personal, social and/or educational control with measureable objectives that addressed a number of communication skills. (R. Ex. 1-14, 1-15). The *** grade IEP also included appropriate and measureable goals and objectives for math and reading/language arts that addressed needs identified by assessment data. (P. Ex. 19A-21, 19A-22).
17. In *** grade Student support and encouragement to attempt and complete tasks. Student did not comprehend information well when taught in a group so student's special education teacher presented new information in a different manner one on one and modified the work. Student needed step by step reminders to get materials out of student's backpack as well as the steps of an activity. Student had good word call and spelling skills but continue to struggle with reading comprehension and handwriting. (P. Ex. 32-37).
18. Student did not have the social skills to approach peers appropriately to initiate social interactions. (P. Ex. 32-29, 32-31). Student can also react negatively to changes in student's daily routine and has trouble with unexpected transitions. Student can become very upset and anxious leading to acting out behavior. Student's impulsivity creates a need for intervention before student acts out by ***. (P. Ex. 24-3) (Tr. Vol. I, pp. 63-64, 70). Behavioral issues, including ***, arose in September and October 2009. (P. Ex. 19-5, 19-6). Student's behavior in *** grade was significantly different from *** grade. (Tr. Vol. I., pp. 248, 258). The change in behavior coincided with *** at the beginning of *** grade. Student's parents became very concerned about student's aggressive behavior. (P. Ex. 29).
19. Attention issues in the classroom were also a concern. An annual ARD was conducted on October 16, 2009. Progress on current IEP goals were reviewed and discussed. IEP and goals and objectives were adjusted and agreed to. Direct occupational therapy services were increased to every other week. (P. Ex. 19A-31). The October 16, 2009 ARD also discussed the behavioral issues. Student's parents notified the school district of recent medication adjustments aimed at addressing some of the behavioral issues. (P. Ex. 19A-31).

20. Unfortunately, Student continued ***. Student was also non-compliant with teacher requests. In *** grade, the use of negative “natural consequences” to correct Student’s acting out behaviors was not particularly effective. These included being sent to the principal’s office, in-school suspension, and out of school suspension. There was no BIP in place at that time. (P. Ex. 19A-11 to 19A-13). On November 3, 2009 the principal placed Student in the Academic Life Skills (ALS) class as a disciplinary measure. (Tr. Vol. II, p. 528)(R. Ex. 4-6). The campus principal and educational diagnostician requested assistance from special education staff as they became concerned for Student’s safety and the safety of others. (Tr. Vol. II., p. 626). (P. Ex. 20-4, 20-8).
21. A Student Intervention Team (the team) met on November 11, 2009 to discuss Student’s increasing aggressive behavior. The Team designed a number of interventions including: conducting a Functional Behavior Assessment (FBA) and parent training. The team recommended changing student’s placement from regular education and resource class to full time placement in the ALS class. The recommendation to change Student’s placement to full time in the ALS classroom was not solely for disciplinary reasons but also in order to meet student’s needs. (P. Ex. 21-7 to 21-8, 21-21). The team anticipated developing a re-integration plan to return Student to student’s regular education setting. A manifestation ARD was also scheduled for November 12, 2009. (P. Ex. 20-11) (P. Ex. 21-1, 21-2).
22. A licensed school psychologist (LSSP) and behavior interventionist were brought on board. The FBA was conducted on November 11, 2009. The FBA identified several antecedents to Student’s problem behaviors at school. Sensory issues did not appear to be behavioral triggers. (P. Ex. 21-8, 21-9) (P. Ex. 21-11, 21-12).
23. The manifestation determination ARD was conducted on November 12, 2009 to address Student’s increasingly aggressive behaviors. (P. Ex. 21)(R. Ex. 2-13). Student’s parents reported recent medication changes. (P. Ex. 21-21). The manifestation ARD discussed the FBA and determined the behaviors were a manifestation of Student’s disability. (P. Ex. 21-21). The LSSP drafted a BIP that was adopted by the ARD.
24. The BIP used positive intervention strategies, negative consequences (such as loss of privileges), redirection, processing in a private area, isolation, setting limits, giving choices, teaching and practicing replacement behaviors, social stories, compliance trials, and a behavior sticker chart as strategies to address Student’s behavioral needs. (P. Ex. 21-13 to 21-16) (R. Ex. 2-3 to 2-5) (Tr. Vol. II, pp 533-536). The behavioral interventions used by ALS staff would have been the same whether Student was identified as a student with OHI based on student’s ADHD rather than autism. (Tr. Vol. III, p. 708). The BIP was effective and Student’s negative behaviors decreased significantly once the BIP was implemented. (Petitioner’s 21-8 to 21-12)(Tr. Vol. I., pp. 176-177, 181, 183).
25. The manifestation ARD agreed to continue Student’s placement in the ALS class for all core academics, regular education specials but continued reading/language arts instruction in the resource room at parental request. (Tr. Vol. II, pp. 536-537)(P. Ex. 21-17, 21-19, 21-21) (R. Ex. 2-11). The manifestation ARD also agreed on the need for a counseling assessment. The counseling assessment was scheduled to be completed by January 13, 2010. (R. Ex. 2-11, 21-21).
26. The ALS class was staffed by a special education teacher and two aides. An aide accompanied Student to student’s specials classes and escorted student to resource class for reading/language arts. There were 4-6 students and 3 adults in the ALS class. A specific aide was not assigned to Student but both aides were available to meet student’s needs in the ALS classroom. (Tr. Vol. I., pp. 157-158, 159-160)(Tr. Vol. III, p. 680).

27. The ALS program addresses the needs of students with intellectual disabilities, Other Health Impairment, autism and, learning disabilities. (Tr. Vol. III, p. 677). The number of students in the ALS classroom varies greatly. There were computers in the ALS classroom. Student was provided with a study carrel, a daily schedule on student's desk, and a behavior-sticker chart with a list of reinforcement activities. (Tr. Vol. III, p. 681).
28. Student's desk was placed ***. Each day the teacher worked 1:1 with Student for approximately 45 minutes on math. Student was accompanied by the paraprofessional to specials classes. *** Student went to the resource room for reading/language arts instruction. *** student received 1:1 instruction from the teacher in science and social studies while most of student's classmates went to inclusion classes for those subjects. (Tr. Vol. III, pp. 681-683).
29. Under the BIP Student was provided with a daily behavior chart – daily behavioral data was collected on a point sheet and used to determine reinforcements between home and school. The format of the point sheet was adjusted in January 2010 to increase Student's opportunity to be reinforced more often for appropriate behavior. The teacher discussed the adjustment with Student's mother by phone and they worked together to design the revised behavioral chart. (R. Ex. 29) (Tr. Vol. III, p. 685-686, 687-688). The ALS teacher was supported on a weekly basis by a special education behavioral interventionist who observed Student in the classroom, made specific recommendations, and worked on the BIP. (Tr. Vol. III, pp.688-689)(P. Ex. 34-20 to 34-22).
30. The ALS teacher communicated with Student's parents frequently via the daily behavior point sheet, at pick up time, and when parents were on campus for various volunteer activities. (Tr. Vol. II, pp.467-468). Student's mother also frequently communicated with special ed staff via email throughout the *** grade year. (P. 32).
31. At the end of every 6 weeks the ALS teacher updated Student's progress in meeting IEP goals and objectives. The teacher used input from all of Student's providers in preparing the progress reports. The progress reports were provided to Student's parents at the end of each six week grading period along with the regular report card. Year end IEP progress reports were also reviewed at the annual ARD. (R. Ex. 21-46 to 41-52) (Tr. Vol. I., pp. 136-137, 274). (Tr. Vol. III, p. 765).
32. The teacher recorded Student's level of mastery on IEP forms. (R. Ex. 1-46 to 1-52) (R. ex. 21-46 to 52) (Tr. Vol. I., p. 274) (Tr. Vol. III, p. 699). IEP progress reports are stored electronically; therefore, the information was cumulative with each subsequent grading period updating the student's progress. The database does not store each 6 week individual progress report nor does the school district maintain paper copies of the reports sent to parents. (Tr. Vol. III, pp. 720-721).
33. Student's ability to remain attentive in class varied greatly – there were days student could be very attentive and others not at all. Student was often able to string 2-3 "good" days together and then have a "bad" day. (Tr. Vol. III, pp. 710-711). Student's aggressive behavior also varied – there were periods of time when student was not aggressive at all and others when student was. (Tr. Vol. III, p. 702)(R. Ex. 1-52). Some days were better than others. (P. Ex. 21-22).
34. Student reacted to loud noises in student's ALS classroom including doors closing, fire alarms, outbursts from classmates, and the school bell. Student would ***. Student required staff intervention for re-direction that often took several attempts. (Tr. Vol. III, p. 737). Student's parents provided *** for use at school to ***. (Tr. Vol. I., p.290). Student would use *** as needed and then later ***. (Tr. Vol. III, p.742). Student and student's classmates were removed from the classroom whenever another classmate had a meltdown. Those transitions were difficult for Student. (Tr. Vol. III, pp. 711-712).

35. There were *** students, including Student, in the resource room for LA/reading that year. The resource class was staffed by a special education teacher and one paraprofessional. The teacher split the students into two groups – the aide worked with one group and the teacher with the other; Student was in the teacher's group. Student was not able to work independently in the resource class. Student was in the resource class for approximately one hour per day. The resource room was a small, quiet environment. (Tr. Vol. III, pp. 757, 769, 778-779).
36. Student had few behavioral issues in the small, quiet resource setting although student also forgot instructions easily, had trouble staying seated, and daydreamed. (P. Ex. 32-37). In the resource room Student did not initiate social interaction with peers although the teacher encouraged student to do so. (Tr. Vol. III, pp. 776-777)(P. Ex. 32-38).
37. The resource teacher spent about $\frac{1}{2}$ of each class period working 1:1 with Student while the resource room aide worked with the other 3 students. Student did well with 1:1 instruction in learning new material. (Tr. Vol. III, pp. 757, 765-766, 777-778, 779). The resource teacher felt Student's cognitive abilities were higher than what student presented. She used student's ability to draw to express ***self and demonstrate understanding. (Tr. Vol. III. p. 783)(P Ex. 32-38). Keyboard typing activities were integrated into the resource class with OT support. Student's progress was slow because student was so distractible using the computer keyboard and often abandoned the typing lessons. (Tr. Vol. III, p. 764).
38. Student's parents and psychiatrist decided student needed *** in *** 2009 due to increased aggressive and non-compliant behavior both at home and at school. The purpose of *** was to address and manage student's aggressive behavior, to identify behavioral triggers and effective interventions, and, provide parent training. (P. Ex. 24-2) (Tr. Vol. I, pp. 62, 87-88, 151). Student's parents struggled to cope with Student's aggressive behavior during this period. ***. (P. Ex. 35-4). Student was not in school for much of *** 2009 due to *** and ***. (P. Ex. 24-1) (Tr. Vol. II., p. 538).
39. Student's medications were changed ***. Student showed definite behavioral improvement after student's *** although student continued to exhibit behavioral issues. (Tr. Vol. I., p. 89). Medication changes continued in March 2009 and again in June 2010. (R. Ex. 7-15) (R. Ex.9-4) (Tr. Vol. I, pp. 90, 92-94, 105).
40. The counseling evaluation recommended by the November manifestation ARD was completed on January 13, 2010. A copy of the evaluation was provided to Student's parents on January 26, 2010. The counseling assessment concluded Student would benefit from support in the areas of social skills and coping skills. (R. Ex. 3). The counselor recommended special education counseling and proposed a counseling IEP with goals and objectives targeting peer interaction and coping skills to deal with anxiety, frustration, and anger. (P. Ex. 27-9 to 27-11) (R. Ex. 4-3). Counseling services once a week for 20 minutes for the remainder of fourth grade and then bi-weekly services from June 2010 through October 2010 were added to Student's program as recommended by the counseling assessment. (R. Ex. 3) (R. Ex. 4-6 to 4-8).
41. An ARD was conducted on February 17, 2010 to review the counseling assessment and the results of the December medical evaluations. (Tr. Vol. II, p. 539)(P. Ex. 28-10, 28-13) (P. Ex. 25-1). The ARD adopted the proposed counseling IEP. (P. Ex. 28-10). Some physiological brain abnormalities and brain activity were discovered. (P. Ex. 27-5)(R. Ex. 4). As a result, Student received neurological therapy twice a week for 23 weeks. (P. Ex. 28-10). Recommendations from Student's physicians were also discussed. (P. Ex. 24-2, 24-3) (R. Ex. 4-8).
42. The February 2010 ARD also discussed Student's heightened sensitivity to loud noises. The occupational therapist was charged with the task of investigating this concern and to develop strategies to address it. (P.

- Ex. 28-10). As a result, the occupational therapist developed and attempted strategies and interventions for a sensory diet for Student beginning in January 2010. (Tr. Vol. I, pp. 219-220, 234-235). The Occupational Therapist also worked with Student on handwriting and visited the ALS classroom on a regular basis. The sensory diet helped Student re-focus when student went off-task or when student became anxious or impulsive. The ALS teacher began implementing the sensory diet with OT support. (Tr. Vol. II, pp. 540-541). The sensory diet was formalized as a component of Student's educational program at a subsequent ARD conducted on March 25, 2010 ARD. (Tr. Vol. III, pp. 689-690)(R. Ex. 7-7).
43. After the February 2010 ARD Student engaged in at least two more aggressive behavioral incidents despite the presence of an aide. (P. Ex. 29-3). Student also had difficulty at home. (P. Ex. 29-10). Student needed adult supervision during transition times which appeared to be especially problematic. (P. Ex. 29-3 to 29-10). In March 2010 Student's psychiatrist noted that Student was significantly more aggressive than student had been in the past. The psychiatrist admitted recent medical efforts were short-lived or ineffective. The psychiatrist concluded that ongoing medical treatment was likely to control Student's anger, aggression, and impulsivity but "this may take some time as we try different medications to evaluate for response." (P. Ex. 30-1).
44. A second manifestation ARD convened on March 25, 2010 to address Student's continuing aggressive behaviors. (P. Ex. 32-2, 32-3) (P. Ex. 32-5, 32-6, 32-9). Some changes were made to Student's BIP. "Close proximity to staff" was added as a behavioral strategy to minimize the risk of escalating aggressive behavior. (R. Ex. 7-7). An addendum to facilitate implementation of Student's BIP was also developed at the March 2010 ARD. (Tr. Vol. II, pp. 542-544)(P. Ex. 31-2, 32-10, 32-25 to 32-27) (R. Ex. 7-6 to 7-9). The revised BIP included the use of "social stories" to address Student's need to develop social skills and to express himself appropriately. The revised BIP also included the use of "compliance trials" and using student's study carrel as a private place to process behavior. (R. Ex. 7-8) (Tr. Vol. II, pp. 534-536) (Tr. Vol. III, pp. 691-692, 694-695).
45. By April 2010 school staff noted a sharp decline in behavioral incidents (i.e., physical aggression, non-compliance, leaving an assigned area); Student had no office referrals for the month of April. (P. Ex. 32-38) (Tr. Vol. II, p. 547). Once Student's medication was adjusted the aggressive behavior was virtually eliminated. However, student continued to exhibit non-compliant behavior almost daily. (P. Ex. 32-31).
46. An FIE was conducted by the school district and a report issued on May 28, 2010. (P. 32-34) (R. Ex. 7-15) (R. Ex. 8). The FIE noted academic deficits and behavioral issues. (P. Ex. 32-35). The FIE included information from Student's parents with their input on a wide variety of topics including behavior, language, social skills, academics, sociological and medical history, strengths and weaknesses, and adaptive living skills. (P. Ex. 42-1 to 42-22).
47. The LSSP participated in the FIE. She conducted observations in student's ALS, resource, and small group speech/language classes. The LSSP noted that Student had a lot of success in student's ALS class working 1:1. Student required more assistance than student's classmates and a lot of help from staff in completing activities in the resource class. In the small group speech/language class Student required more frequent prompts and re-direction than student's classmates. (R. Ex. 8-2) (Tr. Vol. II, p. 550).
48. Student's social and emotional functioning was also assessed. The results showed behavior consistent with an autism spectrum disorder. The FIE also confirmed deficits in executive functioning and an inability to inhibit impulsivity. The LSSP concluded Student continued to be eligible for special education as a student with an autism spectrum disorder. (R. Ex. 8-19 to 8-24) (Tr. Vol. II, p. 556). The LSSP did not identify Student as a student with Other Health Impairment based on student's ADHD. An additional diagnosis of ADHD is contraindicated under the DSM-IV-TR when an autism spectrum disorder has been identified. However ADHD and autism can be co-morbid conditions. (Tr. Vol. II, p. 556-557, 558, 565, 567-568).

49. Overall Student made progress in the school district's program for the 2009-2010 school year in reading, written language, math, and speech. (R. Ex. 18-3) (R. Ex. 21-25 to 21-37, 21-41 to 21-50) (R. Ex. 23). Student also made progress in social skills and in the use of pragmatic and expressive language. (R. Ex. 18-3) (R. Ex. 21-46 – 21-47). Student's behavior also improved with a decrease in office referrals and aggressive behavior. (R. Ex. 18-3) (R. Ex. 21-23, 21-24). Student made progress by meeting all expectations on the TAKS-ALT tests for reading, writing and math and with commended performance in math. (Tr. Vol. III, p. 706)(R. Ex. 9-2) (R. Ex. 23).
50. An ARD convened to review the results and recommendations of the FIE on June 8, 2010. The FIE showed Student required a smaller staff to student ratio in order to learn new material and during transitions to decrease the chance of aggressive behaviors. The June 2010 ARD recommended continued placement in the ALS class and to discontinue language arts in the resource room. The ALS placement offered the proper staff to student ratio Student needed. The June ARD also recommended ESY and in-home training. (R. Ex. 9-15 to 9-19).
51. The June 2010 ARD continued to recommend the TAKS-ALT for all subjects. (P. Ex. 34-32 to 34-33). The proposed schedule of services for the upcoming 2010-2011 school year (i.e. *** grade) included instruction in a special education classroom setting with modified curriculum in Language Arts. The proposed program also included social skills and related services including: integrated speech therapy 25 minutes twice a week, integrated occupational therapy 25 minutes once every two weeks, Adaptive PE on a consult basis for 15 minutes once every six weeks, direct counseling 20 minutes once every two weeks and consult counseling 15 minutes two times each 6 weeks, and daily use of assistive technology. (P. Ex. 34-37, 34-38A). The assistive technology devices and services included: ***, the sensory diet, a visual task schedule, a multiplication chart (for math), a spacer guide and adaptive paper (for writing tasks). (P. Ex. 34-30) (R. Ex. 9-34).
52. The June 2010 ARD also amended the March 2010 BIP as a component of the proposed program for *** grade. The BIP focused on two main areas: Student's need to eliminate aggressive acts and increase compliance with teacher directives. (P. Ex. 34-19). The "autism supplement" was discussed and reviewed during the June 2010 ARD. A number of items from the autism supplement were included into Student's proposed program including 1:1 student/teacher ratio (for new material, transitions, and behavioral issues) and a 1:2 student/teacher ratio for re-teaching and reinforcement. (P. Ex. 34-38) (P. Ex. 69) (R. Ex. 9-10 to 9-14). The BIP included a number of scientifically-based, peer reviewed strategies and interventions that addressed Student's behavioral needs. (Tr. Vol. II, pp. 534, 578-579)(P. Ex. 34-42 to 34-44) (R. Ex. 9-19 to 9-24) (R. Ex. 26).
53. The June 2010 ARD also agreed the Adaptive PE teacher should continue to support the regular education teacher on a consult basis and that Student would be accompanied by special ed staff to student's *** class. (P. Ex. 34-23) (R. Ex. 9-25). The June 2010 ARD proposed appropriate academic goals for math, reading and language arts, speech therapy, social studies and science. (P. Ex. 34-23, 34-25 to 34-29) (R. Ex. 9- 26 to 9-31). The June 2010 ARD also proposed a counseling IEP with goals and objectives aimed at addressing student's needs to develop appropriate coping skills and peer interactions. (P. Ex. 34-29A) (R. Ex. 9-32).
54. The June 2010 ARD proposed continuing the use of the sensory diet. The diet included a set of classroom accommodations aimed at enhancing Student's ability to interact, follow routines, and complete academic tasks. The diet was "a menu of options" for the teachers to use throughout the school day depending on Student's needs each day. The set of sensory options fell under three categories: calming, organizing, and reducing sensitivity to sensations (including minimizing auditory distractions). (P. Ex. 34-31) (R. Ex. 9-35).

55. Student's parents declined the offer of in-home training and voiced grave concerns about the proposed full time placement in the ALS class. However, they both signed their agreement on the ARD documents. (R. Ex. 9-43, R. 9-44) (P Ex. 35-2 to 35-4). The school district mailed a Notice of Refusal to Student's parents responding to the areas of disagreement on June 28, 2010 including a copy of procedural safeguards and a letter from the Special Education Director that referenced the parental right to a due process hearing. (P. Ex.35-8 to 35-10) (R. Ex. 11).
56. On August 17, 2010 Student's mother submitted a written request for an IEE noting her disagreement with the school district's May 2010 FIE. (P. Ex. 36-1 to 36-3). The school district agreed to the IEE request and sent Student's parents written confirmation along with information about the IEE process on August 20, 2010. (R. Ex. 14). Student's parents submitted a second letter on August 19, 2010 with notice of their intent to withdraw Student from the school district, enroll student in a private school, and, seek reimbursement for the private placement. (P. Ex. 37-5, 37-9) (R. Ex. 13).
57. On August 27, 2010 the school district sent a letter to Student's parents responding to their notice of intent to withdraw Student and seek reimbursement for private placement. (P. Ex. 37-1 to 37-2). The school district proposed an ARD meeting for September 7, 2010. (P. Ex. 37-3- 37-4) (R. Ex. 15-1, 15-2). The meeting was rescheduled at parental request to September 17, 2010. (R. 17-1). The day before the ARD Student's parents requested the meeting be postponed until some pending private evaluations were completed. (R. Ex. 16-1). The meeting was ultimately conducted on September 30, 2010 without the participation of Student's parents despite the requisite notice. (P. Ex. 37-5 to 37-13) (R. Ex. 16) (R. Ex. 18-7).
58. The September 30, 2010 ARD reviewed Student's progress for the 2009-2010 school year and concluded the public school program proposed at the June 8th ARD continued to be appropriate. The school district refused the request for private placement at school district expense. (R. Ex. 18-4).
59. Student's parents unilaterally placed student at a private school called *** for the summer of 2010 and continued placement there into the 2010-2011 school year. The purpose of the private placement was to stabilize Student's behavior and keep student's anxiety in check. Student's parents also arranged for private academic tutoring 3 times a week and private speech therapy while student attended ***. (Tr. Vol. I., p. 449). Student made academic and behavioral progress at ***. (Tr. Vol. IV, pp. 907, 909, 912-913).
60. Following Student's year at *** student's parents unilaterally placed student at *** School where student is currently enrolled. (P. Ex. 70) (Tr. Vol. II, p. 449). Student appears more at ease and less stressed or anxious at ***. Student has also made some academic progress. (Tr. Vol. IV, pp. 857-858, 860)(P. Ex. 72). Student's parents believe they made the right decision by withdrawing student from the public school. (Tr. Vol. I., p. 55) (Tr. Vol. I., p. 57) (Tr. Vol. I., pp. 84, 91). At present, Student's parents continue to provide student with private tutoring but the frequency of the tutoring sessions has decreased to 1-2 times a week. (P. Ex. 69-16) (Tr. Vol. I., p. 315).
61. An IEE was ultimately conducted on November 9, 2010 but was not shared with the school district until an ARD conducted on May 23, 2011. (R. Ex. 19) (R. Ex. 21). The IEE included a neuropsychological and speech/language assessment. (R. Ex. 19) (R. Ex. 20) (Tr. Vol. II., pp. 523-524, 659) (Tr. Vol. IV. pp. 864, 865). It appears the neuropsychological was conducted through referral from an advocate and not through the school district's IEE process. (P. Ex. 31-1) (R. Ex. 28-13 to 28-21).
62. Both the IEE and the speech/language evaluation were largely consistent with the findings of the school district's FIE and prior assessments. (Tr. Vol. II, pp. 573-574, 575, 576)(R. Ex. 20). Many of the recommendations in the IEE were included in the IEP proposed at the June 8, 2010 ARD. (R. Ex. 21-12, 16-22). The only differences were in the use of certain assessment instruments, the interpretation of some of the cognitive ability data, and the identification of Student as a student with a disability. (R. Ex. 8) (R. Ex. 19).

63. Student's parents submitted a request for a copy of Student's educational records to the campus principal on August 17, 2010. (R. Ex. 28-1). The request was forwarded to the Special Education Department and Communications office. (R. 28-2). The school district compiled Student's extensive set of educational records and notified Student's parents on September 1, 2010 that the records were available for inspection and review and copies for purchase. (R. Ex. 28-3, 28-4). A few records were not available from an employee who was on a leave of absence. (R. 28-4). Student's parents retrieved the records on September 10, 2010. (R. Ex. 28-9 to 28-12). The school district provided Student's parents with a copy of the school district's FIE, prior written notice, IEP progress reports, report cards and ARD documents. (Tr. Vol. I, pp. 274, 275, 276)(Tr. Vol. III, p. 699)(R. Ex. 11) (R. Ex. 21-46 to 21-52) (R. Ex. 22).

DISCUSSION

Burden of Proof

The burden of proof in an administrative due process hearing challenging an IEP is on the party seeking relief. In this case, Student's parents challenge the educational program proposed at the June 8th and September 30th 2010 ARD meetings. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The central question in challenging the IEP is whether the proposed program is reasonably calculated to provide Student with a meaningful educational benefit. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203-204 (1982); *Polk v. Cent. Susquehanna Int. Unit 16*, 853 F. 2d 171, 180, 182 (3d Cir. 1988). This means the party challenging the IEP must, in essence, prove a negative; i.e., that the proposed program is *not* reasonably calculated to provide Student with a meaningful educational benefit and instead is more likely to provide either merely a de minimis or no benefit. *Id.* This is a very high burden of proof. The preponderance of the evidence shows that Petitioner could not meet petitioner's burden in this particular case. *Schaffer v. Weast*, *supra*.

Reimbursement for Private Placement

Failure to Provide FAPE

Petitioner's claims that the school district failed to provide Student with FAPE during the 2009-2010 *** grade school year fall outside the one year statute of limitations period. 34 C.F.R. § 300.511 (e); 19 Tex. Admin. Code § 89.1151 (c). Petitioner's FAPE claims that fall within the one year statute of limitations period include the proposed IEP for summer of 2010 EYS and the 2010-2011 *** grade school year. In this jurisdiction four factors must be considered in determining whether a proposed program is reasonably calculated to provide a free, appropriate public education within the meaning of IDEA. Those factors include: (i) whether the program is individualized on the basis of the student's assessment and performance; (ii) whether the program is administered in the least restrictive environment; (iii) whether the services are provided in a coordinated and collaborative manner by key stakeholders; and, (iv) whether there are positive academic and non-academic benefits. *Cypress-Fairbanks Ind. Sch. Dis. V. Michael F.*, 118 F. 3d 245, 253 (5th Cir. 1997).

These 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. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 289, 294 (5th Cir. 2009). Application of the four factors to the proposed program at issue supports the conclusion that the program was appropriate within the meaning of IDEA.

The evidence showed that the proposed educational program at issue addressed Student's complex individual set of needs and was based on extensive assessment including student's academic and behavioral performance the preceding year. The proposed plan was to be delivered in a special education setting with the low staff to student

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ratio Student needed along with opportunities for mainstreaming in PE and ***. The proposed plan was to be implemented through the coordination and collaboration between school district staff including special education teachers, aides, behavioral specialists, an occupational therapist, speech therapist, adaptive PE teacher and regular education PE teacher.

IEP progress reports were to continue to be provided every six weeks with the regular report cards to Student's parents. The school district also offered in-home training as a means of parental support and communication. Overall, the evidence showed the proposed educational plan met the four factors and was therefore reasonably calculated to provide Student with FAPE. *Cypress-Fairbank Ind. Sch. Dist. v. Michael F., supra*. Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast*.

Failure to Consider Autism Supplement and All Appropriate Services

The evidence showed the school district did consider all the items and appropriate services required by state and federal law in designing the proposed program at issue. *19 Tex. Admin. Code § 89.1055 (e) (1)-(11)*. For example, the plan proposed extended school year services, a daily schedule with a minimum of unstructured time, in-home training, positive behavior support strategies, suitable staff to student ratio, and, social skills and supports. The law does not require the IEP of a student with autism to include every single item noted in the autism supplement -- only those that are appropriate for each student based on the student's individual needs. *19 Tex. Admin. Code § 89.1055 (e) (for students with autism the strategies described shall be considered and, to the extent practicable and when needed, addressed in the IEP)*. In this case, the proposed educational plan for Student properly considered the items and included several. Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast, supra*.

School District's Assessment and Parental Right to Publicly Funded IEE

The parents of a child with a disability have a right under IDEA to an independent educational evaluation subject to certain parameters. *34 C.F.R. § 300.502 (a) (1)*. If the school district agrees to the IEE the criteria under which the IEE is obtained, including the location of the evaluation and the qualifications of the examiner must be the same as the criteria the school district uses when it conducts an evaluation. *34 C.F.R. § 300.502 (e)*. The school district is required to provide the parents information about where the IEE may be obtained and the agency criteria the school district applies in granting the IEE. *34 C.F.R. § 300.502 (a) (2)*.

The evidence shows the school district agreed to the parental request for an IEE on August 20, 2012 and provided Student's parents with a Notice of Procedural Safeguards, a list of sources for the IEE, and the school district's Operating Guidelines for IEE's which outlined the procedures to be followed in securing the IEE. Petitioner did not prove that the IEE obtained by Student's parents met the school district's criteria.

Although there was some disagreement between the school district's FIE and the IEE with regard to Student's cognitive abilities that difference was not significantly material in terms of educational programming. Both evaluations were fairly consistent in their overall results and recommendations. Furthermore, both assessments concluded Student's attentional deficits interfered with student's ability to learn. A mere disagreement between the experts in the use and interpretation of certain assessment instruments or data does not inevitably lead to the conclusion that the school district's evaluation was not appropriate. Reasonable minds may differ. That is not the standard by which the right to a publicly funded IEE is measured.

Instead, the school district's evaluation must meet the evaluation criteria established under the IDEA. *See, 34 C.F.R. § 300.304*. Petitioner did not meet petitioner's burden of proving the school district's FIE failed in that regard or that the school district refused the parental request for an IEE. The evidence showed to the contrary. Instead, Petitioner's right to reimbursement for the IEE hinges on whether the IEE met the school district's IEE

criteria. There was insufficient proof to make this determination in the record. Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast*

Placement Decision Outside ARD Process

Petitioner's claim that the school district changed Student's placement outside of the ARD process is outside the one year statute of limitations. The claim appears to be related to the principal's decision to remove Student from student's regular *** grade class in early November 2009 as a short term remedy to address Student's increasing negative behaviors. A Student Intervention Team met in early November 2009 to address the behavioral issues. Any claims related to those decisions and actions fall outside the one year statute of limitations as they occurred prior to May 27, 2010. 34 C.F.R. § 300.511(e); 19 Tex. Admin. Code § 89.1151 (c). Even if the claims fell within the limitations period Petitioner did not meet petitioner's burden of proof on this issue because a duly constituted manifestation ARD meeting convened in November 2009 and agreed to the change in placement. 34 C.F.R. § 300.116; *Schaffer v. Weast, supra*.

Failure to Reconvene June 2010 ARD Meeting

The school district must offer parents a single opportunity for a ten day recess when mutual agreement about the student's IEP is not achieved at the ARD meeting 19 Tex. Admin. Code §89.1050 (h) (1). During the recess the parties are to consider alternatives, gather additional data, prepare further documentation, and/or obtain additional resource persons who may assist the ARD in reaching mutual agreement. The date, time and place for continuing the ARD is to be determined by mutual agreement prior to the recess. 19 Tex. Admin. Code § 89.1050 (h) (2) (3).

The evidence in this case shows that an ARD meeting was conducted on June 8, 2010 to review the May 2010 FIE and design Student's educational program for the 2010 summer and upcoming *** grade year. The evidence also shows that at that meeting, while Student's parents expressed a number of concerns about the school district's proposed program and placement, they signed their agreement to the ARD documents at the end of the June meeting. Therefore, as a technical matter, the June ARD ended in mutual agreement even though Student's parents subsequently reconsidered their position. Therefore, the requirement to recess for ten school days did not technically apply. 19 Tex. Admin. Code §89.1050 (h) (1).

The evidence also showed that the school district apparently understood that Student's parents were in disagreement with at least some aspects of the proposed program because the school district sent a Notice of Refusal to Student's parents on June 28, 2010. The parties continued to communicate by exchanging letters and notices – Student's parents requested an IEE and also provided notice of their intent to place Student in a private school. The school district agreed to the IEE, provided information about IEE procedures, and provided Student's parents with notice of their procedural rights during this time period.

The evidence showed another ARD was scheduled and conducted on September 30, 2010 after providing Student's parents with the required notice. Student's parents did not attend the September ARD because they felt the pending private evaluations should be completed first. That was certainly their choice and an understandable position. However, the opportunity to reconvene was provided following the series of communications between the parties over the summer. Under these facts, even if the school district should have offered a ten day recess (which I do not conclude it was required to do) there was no substantive educational harm as result. 34 C.F.R. § 300.513 (a) (2).

Educational Placement in the LRE

A parent is entitled to reimbursement for the unilateral private placement of a child with a disability if the public school's program does not provide the student with a free, appropriate public education *and* the private school's program does. *Sch. Comm. of Burlington v. Dept. of Educ. of Mass.*, 471 U.S. 359, 370(1985); *Florence Cnty. Sch.*

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Dist. v. Carter, 510 U.S. 7, 15 (1993). The evidence showed that the recommended placement for Student in the ALS classroom with mainstreaming opportunities in PE and fine arts was reasonably calculated to provide student with a free, appropriate education in the least restrictive environment. 34 C.F.R. § 300.114. The ALS classroom provides Student with the appropriate staff to student ratios student needs for both instruction and to monitor and guide student's behavior. The school district is not required to maximize Student's potential nor that an IEP be designed according to parental desires. *Rowley*, 458 U.S. at 201; *Roark v. District of Columbia*, 460 F. Supp. 2d 32, 35 (D.C. D.C. 2006). Evidence that Student made quantitatively or qualitatively more progress at the two private placements does not mean the school district's proposed program and placement was not appropriate under IDEA.

Proof that loving parents, as here, can craft a "better" program than the public school district does not in itself entitle them to reimbursement. It is well settled that parents who choose unilaterally to place their child in a private school without the agreement of the school district do so at their own risk. Parents are entitled to reimbursement only if the school district's proposed program is not appropriate under IDEA. In this case I conclude the school district's proposed program and placement were appropriate. Therefore, Student's parents are not entitled to reimbursement for the unilateral private placements at *** and *** School. See, *Sch. Comm. of Burlington v. Dept. of Educ.*, 471 U.S. at 370. Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast, supra*.

IEP Implementation

Any claims regarding the school district's alleged failure to properly implement Student's IEP during the 2009-2010 school year fall outside the one year limitations period. 34 C.F.R. § 300.511 (e); 19 Tex. Admin. Code § 89.1151 (c). Furthermore, the evidence showed that IEP progress reports were provided to Student's parents every six weeks and at the annual ARD. Even if IEP implementation claims fell within the limitations period Petitioner did not meet petitioner's burden of proving the school district failed to implement the components of petitioner's IEP in that regard. *Schaffer v. Weast, supra*.

Appropriate IEP Goals and Objectives Based on Present Levels of Performance

Petitioner's claims that the IEP implemented during the 2009-2010 *** grade school year was not appropriate fall outside the one year statute of limitations period and must be dismissed. 34 C.F.R. § 300.511 (e); 19 Tex. Admin. Code § 89.1151 (c). Furthermore, the evidence showed the IEP proposed at issue contained appropriate goals and objectives that were based on present levels of performance. Indeed, the evidence showed that a considerable amount of evaluation data was considered, reviewed and utilized by the ARD committee in formulating IEPs for Student. The evidence showed the proposed goals and objectives met and addressed Student's complex and interrelated cognitive, behavioral, social, and, emotional needs based on a variety of assessment data compiled by the school district as well as review and consideration of data from medical providers, other assessment sources, and Student's parents. Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v Weast, supra*.

ESY

The evidence also supports the proposed program for summer 2010 ESY services. The proposed program included a specific behavior plan with a focus on the two major areas of behavioral concern: aggression and non-compliance. The proposed summer program also contemplated academic instruction with accommodations that included a number of strategies and supports recommended by Student's medical providers and from various evaluations. Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v Weast, supra*.

Scientifically-Based, Peer Reviewed Methods of Instruction

The evidence supports the conclusion the school district utilized scientifically-based, peer reviewed methods of instruction. The LSSP prepared a report to explain to Student's parents how it used scientifically-based, peer reviewed instruction with Student and the reasonable inference is those methods would continue to be utilized in the proposed program at issue. There was no real evidence to the contrary. Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast, supra.*

Parental Access to Educational Records

Under IDEA the school district must permit parents to inspect and review educational records that are collected, maintained, or used by the school district. The school district must respond to a parental request for inspection and review "without unnecessary delay" and no more than 45 days after the parental request has been made. 34 C.F.R. § 300.613 (a). The school district may charge a fee for any copies of the records made for the parents. 34 C.F.R. § 300.617. The evidence showed the school district met its obligations under the IDEA to provide Student's parents with the requisite access to records within the required timeframe. I find no violation of the IDEA in this regard.

Prior Written Notice and Other Information to Parents

The evidence demonstrated the school district provided Student's parents with the requisite prior written notice of its refusal to place Student in a private school by mailing its Notice of Refusal on June 28, 2010. The notice also included a copy of procedural safeguards and an explanatory letter from the Director of Special Education. The evidence also showed the school district responded appropriately to a subsequent parental request for an IEE with information about the school district's IEE procedures. The evidence also confirmed that the school district met its obligations to provide Student's parents with IEP progress reports, report cards, copies of ARD documents, and the FIE. Petitioner did not meet petitioner's burden on this issue.

CONCLUSIONS OF LAW

1. All of Petitioner's claims, other than those which arise under the Individuals with Disabilities Education Act are dismissed as outside the hearing officer's jurisdiction under IDEA. 34 C.F.R. § 300.507 (a); 19 Tex. Admin. Code §§ 89.1151; 89.1170.
2. Petitioner's claims arising before May 27, 2010 are dismissed as outside the applicable one year statute of limitations rule applied in Texas. 20 U.S.C. § 1415 (b) (6); 34 C.F.R. § 300.507 (a) (1) (2).
3. The proposed educational program and placement for 2010-2011 (including extended school year services for summer 2010), was reasonably calculated to provide Petitioner with a meaningful, educational benefit in the least restrictive environment, and therefore a free, appropriate public education. *Bd. of Educ. of Hendrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997); *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 289 (5th Cir. 2009); 34 C.F.R. § 300.114. Petitioner did not meet petitioner's burden of proof on this issue. 34 C.F.R. § 300.114; *Sch. Comm. of Burlington v. Dept. of Educ. of Mass.*, 471 U.S. 359 (1985); *Schaffer v. Weast, supra*.
4. Petitioner did not meet petitioner's burden of proving Respondent failed to consider the autism supplement and all appropriate services in designing petitioner's educational program. *Schaffer v. Weast*, 546 U.S. 49 (2005); 19 Tex. Admin. Code § 89.1055 (e) (1)-(11).
5. Petitioner did not meet petitioner's burden of proving the independent educational evaluation (IEE) met Respondent's criteria or that the school district's evaluation was not appropriate; therefore Petitioner is not entitled to reimbursement for the cost of the IEE from Respondent. *Schaffer v. Weast, supra*; 34 C.F.R. §§ 300.304; 300.502(a) (10)(2) (e).

6. Respondent did not change Petitioner's placement without making the decision in a duly constituted Admission, Review & Dismissal Committee (ARD) meeting. This claim fell outside the one year statute of limitations period nor did Petitioner meet petitioner's burden of proof on this issue. *34 C.F.R. §§ 300.116; 300.511(e); 19 Tex. Admin. Code § 89.1151 (c).*
7. Respondent was not under an obligation to offer Petitioner a ten-day recess of the ARD meeting conducted on June 8, 2010 when Petitioner's parents agreed with the proposed IEP by signing the ARD document despite also raising concerns on some aspects of the IEP. The duty to recess and reconvene arises only when an ARD cannot reach mutual agreement. *19 Tex. Admin. Code § 89.1050 (h).*
8. Petitioner's claims that Respondent failed to properly implement Petitioner's IEP fell outside the one year statute of limitations. *34 C.F.R. §§ 300.320 (a) (30(ii); 300.511 (e); 19 Tex. Admin. Code § 89.1151 (c).* Furthermore, Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast, supra.*
9. Petitioner's claims that the IEP implemented during the 2009-2010 school year did not contain appropriate goals and objectives based on present levels of performance fell outside the one year statute of limitations. *34 C.F.R. §§ 300.320 (a) (1) (2); 300.511 (e); 19 Tex. Admin. Code § 89.1151 (c).* Furthermore, Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast, supra.*
10. Petitioner's claims that Respondent failed to use scientifically-based, peer reviewed methods of instruction during the 2009-2010 school year fell outside the one year statute of limitations. *34 C.F.R. §§ 300.320 (a) (4); 300.511 (e); 19 Tex. Admin. Code § 89.1151 (c).* Furthermore, Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast, supra.*
11. Respondent met its obligations under IDEA to provide Petitioner's parents access to petitioner's educational records in a timely manner. Petitioner did not meet petitioner's burden of proof on this issue. *34 C.F.R. §§ 300.613; 300.617.*
12. Respondent met its obligations under IDEA to provide Petitioner's parents with the requisite prior written notice and other information otherwise required under IDEA. Petitioner did not meet petitioner's burden of proof on this issue. *34 C.F.R. §§ 300.501(a); 300.502; 300.503; 300.504.*

ORDERS

Based upon the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Petitioner's requests for relief are **DENIED**.

It is further **ORDERED** that all other claims for relief not specified herein are **DENIED**.

SIGNED the 26th day of March 2012

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).*

Decision of the Hearing Officer

Dkt. No. 225-SE-0511

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

STUDENT,	§	
bnf PARENTS,	§	
Petitioner,	§	
	§	
	§	
v.	§	DOCKET NO. 225-SE-0511
	§	
	§	
LEWISVILLE INDEPENDENT	§	
SCHOOL DISTRICT,	§	
Respondent.	§	

SYNOPSIS

ISSUE:

Whether Petitioner's claims arising under any law other than the Individuals with Disabilities Education Act (IDEA) should be dismissed as outside the jurisdiction of a special education hearing officer in Texas.

HELD: **FOR THE SCHOOL DISTRICT**

Jurisdiction of special education hearing officer in Texas strictly limited to those issues specifically stated in the IDEA. All other claims dismissed for want of jurisdiction. **34 C.F.R. § 300.507 (a); 19 Tex. Admin. Code §§ 89.1151, 89.1170**

ISSUE:

Whether Petitioner's claims arising more than one year from the date Petitioner filed the request for hearing should be dismissed as outside the statute of limitations period applied in Texas.

HELD: **FOR THE SCHOOL DISTRICT**

Petitioner did not prove the two exceptions to application of the one year statute of limitations period applied in Texas. All claims arising more than one year from the date Petitioner filed the request for hearing dismissed. **20 U.S.C. § 1415 (b) (6); 34 C.F.R. § 300.507(a) (1) (2)**

ISSUE:

Whether parents entitled to reimbursement for unilateral private placement for school district's alleged failure to provide student with PDD, ADHD and speech impairment a free, appropriate public education during the 2009-2010 school year and for proposed program

and placement in self contained special education setting with regular education PE and *** for 2010-2011 school year, including extended school year services.

HELD: **FOR THE SCHOOL DISTRICT**

Claims regarding failure to provide FAPE for 2009-2010 school year fell outside one year statute of limitations. Proposed program and placement reasonably calculated to provide student with FAPE with small staff to student ratio, individualized, 1:1 and 1:2 instruction, behavior intervention plan, sensory diet, social skills, related services of OT, speech therapy and adaptive PE that met student's complex and interrelated cognitive, behavioral, social, academic needs. Petitioner did not meet burden of proof on this issue. **34 C.F.R. § 300.17;** **34 C.F.R. § 300.511 (e); 19 Tex. Admin. Code § 89.1151 (c)**

ISSUE:

Whether school district failed to consider "autism supplement" and all appropriate services in proposed program for 2010-2011 school year and summer 2010 EYS for student with PDD, ADHD, and speech impairment.

HELD: **FOR THE SCHOOL DISTRICT**

Petitioner did not meet burden of proof on this issue. Evidence showed autism supplement was considered by ARD in designing student's IEP for upcoming EYS and next school year and number of items noted in the supplement were incorporated into student's program. Student did not meet burden of proof on this issue. **19 Tex. Admin. Code § 89.1055 (e)(1)-(11)**

ISSUE:

Whether student entitled to IEE at school district expense.

HELD: **FOR THE SCHOOL DISTRICT**

Student failed to prove IEE met school district's criteria or that school district's assessment was not appropriate under IDEA. **34 C.F.R. § 300.502**

ISSUE:

Whether school district made change in placement decision outside of ARD process and therefore whether placement decision violated IDEA.

HELD: **FOR THE SCHOOL DISTRICT**

Temporary disciplinary placement decision by principal to address student's escalating aggressive behavior outside one year statute of limitations. Even so, Student Intervention Team met and recommended continued placement made by principal and manifestation

ARD meeting convened shortly thereafter and agreed with team's recommended change in placement from regular education class with resource room for reading/language arts to self contained special education setting. ARD also agreed to parental request for continued resource room for reading/language arts. **34 C.F.R. §§ 300.116; 300.511 (e); 19 Tex. Admin. Code § 89.1151 (c)**

ISSUE:

School district not required to offer recess of June 2010 ARD meeting where parents signed agreement in ARD documents despite raising number of concerns about program and placement proposed at ARD.

HELD: FOR THE SCHOOL DISTRICT

Offer of recess only required where ARD does not result in mutual agreement. Parents signed agreement with ARD decisions. School district also followed up ARD with Notice of Refusal to address parental concerns raised at the ARD. **19 Tex. Admin. Code § 89.1050 (h)**

ISSUE:

Whether school district failed to implement provisions of student's IEP during 2009-2010 school year; specifically, whether school district failed to provide parents with IEP progress reports.

HELD: FOR THE SCHOOL DISTRICT

Petitioner's claim for failure to provide IEP progress reports during 2009-2010 school year as required by student's IEP fell outside one year statute of limitations period. Even so, evidence proved to the contrary. **34 C.F.R. §§ 300.320 (a)(3)(ii); 300.511 (e); 19 Tex. Admin. Code § 89.1151 (c)**

ISSUE:

Whether student's IEP for 2009-2010 school year failed to include appropriate goals and objectives based on student's present levels of performance.

HELD: FOR THE SCHOOL DISTRICT

This claim fell outside one year statute of limitations period. Even so, evidence proved to the contrary. **34 C.F.R. §§ 300.320 (a)(1)(2); 300.511 (e); 19 Tex. Admin. Code § 89.1151 (c)**

ISSUE:

Whether school district failed to use scientifically-based, peer reviewed methods of instruction during 2009-2010 school year.

HELD: FOR THE SCHOOL DISTRICT

This claim fell outside one year statute of limitations period. Even so, evidence proved to the contrary; school district's LSSP prepared detailed chart that explained how methods and various aspects of student's program were based on scientifically-based, peer reviewed methods of instruction for use at ARD meeting scheduled to discuss student's progress and proposed program for upcoming year. **34 C.F.R. §§ 300.320 (a)(4); 300.511 (e); 19 Tex. Admin. Code § 89.1151 (c)**

ISSUE:

Whether the school district failed to provide student's parents with access to educational records.

HELD: FOR THE SCHOOL DISTRICT

School district responded in timely manner to parental request for student's extensive set of educational records and provided those records to parents within regulatory timeframe. School district permitted to charge parents reasonable fee for copying educational records that totaled over 3,000 pages. **34 C.F.R. §§ 300.613; 300.617**

ISSUE:

Whether the school district provided student's with requisite prior written notice and other information it was required to provide under IDEA when it refused to place student at private school or reimburse parents for unilateral private placement.

HELD: FOR THE SCHOOL DISTRICT

School district did provide requisite prior written notice of its refusal to fund a private placement at school district expense along with responding in a timely manner to parental request for an IEE by providing written agreement to the IEE with information about IEE procedures that met regulatory requirements. **34 C.F.R. §§ 300.501 (a); 300.502; 300.503; 300.504**