

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

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioner Student by next friends *** and *** (“Petitioner” is sometimes referred to within this Decision as “Student,” “Parent,” or “Petitioner”) brings this appeal, pursuant to the Individuals with Disabilities Education Improvement Act 20 U.S.C. § 1400 et seq., (hereinafter referred to as “IDEA”), against Respondent Tyler Independent School District (hereinafter referred to as “Respondent,” “School District,” or “District”). Petitioner filed a written Request for a Due Process Hearing and Required Notice (“Complaint”) which was received by the Texas Education Agency (“TEA”) on August 27, 2012 which was styled and docketed as shown above. Petitioner was represented by Attorneys Dorene Philpot of Philpot Law Office in Galveston, Texas and Yvonnilda Muniz of Law Office of Yvonnilda Muniz, PC in Austin, Texas. Respondent was represented by Attorneys Gwendolyn “Gigi” Maez and Nona Matthews of Walsh, Anderson, Gallegos, Green and Trevino in Irving, Texas. The Due Process Hearing in this matter was held from Tuesday, October 2, 2012 through Thursday, October 4, 2012 in the Tyler Independent School District Administrative Offices. Following the conclusion of the hearing, the parties agreed that written closing arguments would be filed by Monday, November 5, 2012, and that the Decision of the Hearing Officer would be issued on or before Thursday, November 8, 2012.

A Prehearing Conference was held on Friday, September 14, 2012, at which time the issues to be addressed in the due process hearing were defined. Petitioner’s Request for Special Education Due Process Hearing and Required Notice raised the following issues regarding the special education identification, evaluation, placement, programs and services of Petitioner, and Respondent’s alleged denials of a free appropriate public education (“FAPE”):

1. Respondent has failed to devise an appropriate Individualized Education Program (“IEP”) for Student in the Least Restrictive Environment (“LRE”), resulting in a denial of a Free Appropriate Public Education.
2. Respondent has not offered the Student placement and services in an already up and running program that the District admits student needs.

3. Respondent has sent District staff to observe and learn about how to provide an Applied Behavioral Analysis (“ABA”) program at the Student’s private placement.

4. Respondent has ignored Petitioner’s requests to see the District’s proposed program, and Petitioner suspects that no such program exists.

5. Respondent can produce no evidence that the proposed program has had any success with any particular student, or any objective data on the efficacy of its programming.

6. Respondent has not provided Student with a one-on-one aide or with the Assessment of Basic Language and Learning Skills – Revised (“ABLBS-R”) to measure Student’s progress, which were both included in student’s IEP.

7. Respondent has not provided Petitioner with honest progress reports. District has given progress reports to Petitioner falsely reporting progress.

8. Respondent has not appropriately considered and incorporated into the Student’s IEP the components of the autism supplement that the Student needs in order to receive a FAPE.

9. Respondent has not devised goals and objectives in all of the Student’s areas of need in the August 24, 2012 IEP and based on present levels of performance because the District has not evaluated the Student recently and does not know what student’s present levels are. The goals devised by Respondent were not sufficient to address the Student’s needs in speech/communication, reading, writing, math, social skills, related services, behavior, occupational therapy, in-home training, life skills, Extended School Year Services (“ESYS”), and assistive technology.

10. Respondent has not offered sufficiently intensive related services to support appropriate goals and objectives.

11. Respondent has not provided prior written notice in response to parent requests, including but not limited to the parents’ multiple requests to observe the District’s ESYS program and the Parents’ request for private placement.

As relief in this Special Education Due Process Hearing, Petitioner requests that Respondent be ordered to do the following:

1. Provide the Student with an appropriate IEP in the LRE that complies with all of the procedural and substantive requirements of IDEA and Texas special education laws.

2. If Respondent cannot or will not provide appropriate services to the Student, Petitioner reserves the right to privately place Student and seek reimbursement.

3. Provide Petitioner with past reimbursement for private services, evaluations and mileage, and fund private placement and related services for a one-year period going forward.

4. Provide Petitioner with compensatory educational services due to District’s denial of FAPE in the amounts and types determined by the Hearing Officer to be appropriate to compensate the Student for any violations of law the Hearing Officer finds.

5. Provide Petitioner with any relief that the Hearing Officer deems appropriate or which is recommended by the Student's experts and evaluators.

6. Provide Petitioner with reimbursement for attorney's fees and expenses, and any expert witness fees.

In its response to the Complaint, Respondent generally denied all the allegations set forth by the Petitioner. Respondent stated that the District provided Petitioner with an IEP reasonably calculated to provide a FAPE. Respondent also stated that the Student's autism supplement was fully considered in the August 24, 2012 Admission, Review, and Dismissal Committee ("ARDC") meeting for Petitioner, and incorporated all necessary services and supports in Student's IEP. Respondent asserted that parental requests to view the *** class were never refused and stated that summer ESYS classes had concluded by the time Petitioner requested to see the classroom.

Respondent stated that because it had provided Petitioner with a FAPE in the LRE, Petitioner is not entitled to reimbursement for private placement, private services, private evaluations or compensatory services.

After considering the evidence of record and the arguments of the parties, the Special Education Hearing Officer makes the following Findings of Fact and Conclusions of Law:

II. Findings of Fact

1. Petitioner is a ***-year old in the *** grade. Petitioner has been receiving special education services as a student who has Autism and Speech Impairment ("SI"). Student has autism, impaired language and social skills, poor eye contact with *** and stereotypic motor activity. Student was also diagnosed with severe delays in expressive and receptive communication skills, socialization skills and daily living skills. Student initially qualified for speech therapy with receptive, expressive, pragmatics, syntactic and semantic impairments.

2. Respondent is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing Petitioner a free appropriate public education in accordance with the Individuals with Disabilities Education Improvement Act, 20 U.S.C.A. § 1400, *et seq.*, and the Federal and Texas rules and regulations promulgated pursuant to IDEA.

3. On December 17, 2010 the ARD Committee met for Student's annual meeting. At that time it was determined all assessment data was current and Student continued to meet eligibility criteria as a student with Autism and SI. After a review of Student's progress in the classroom, Student's parents were concerned that Student was not able to generalize skills at home. There was concern that Student was dependent on prompts. The ARDC discussed a 1:1 aide for learning new skills vs. 1:1 aide all day. ESYS were discussed and although the teacher claimed Student experienced no regression over the summer, Student's mother requested

20 hours per week structured differently from the previous summer. The Admission, Review, Dismissal (“ARD”) Meeting recessed.

4. On February 10, 2011, Petitioner put the District on notice that they planned to withdraw Student and seek private placement due to the District’s failure to provide student a FAPE. Subsequently, on February 15, 2011, Petitioner filed a Due Process Complaint with the TEA raising several allegations regarding the District’s failure to provide a FAPE. Student’s parents unilaterally enrolled Student in *** 2011.

5. Student and Student’s family have lived within the jurisdictional boundaries of the District since Student was ***. Until *** 2011, Student attended District schools. At that point, Student’s parents filed a Request for Due Process Hearing alleging a denial of FAPE. The parties were able to reach an agreement and resolve the issues in dispute in mediation.

6. According to Student’s previous teacher in the ***, the District’s self-contained classroom for autistic students, ***, loud noises interfere with Student’s learning. *** recalled Student would react to loud noises by holding student’s ears and would cry depending on the level of the noise. *** also recalled that several students in that class screamed, some multiple times in an hour. *** also believes Student did not receive any social benefit from being in that classroom with those particular students.

7. Student’s reaction to loud noise was corroborated in the recent Occupational Therapy (“OT”) report completed by District on August 10, 2012. Specifically, the report stated “[Student] covers [student’s] ears during loud noises and request for [student’s] *** when they were too loud.” The OT evaluator recommended “a quiet work area that has limited number of both visual and auditory distractions when learning and practicing new skills.”

8. During the time that the Student was educated in ***, the Student required constant monitoring, redirection and enforcement. The Student was supposed to have received ABA therapy, but Student’s para-professional had not completed Board Certified Behavior Analyst (“BCBA”) training. The Student’s teacher in the self-contained classroom had significant concerns about whether the Student received a FAPE during that time.

9. In ***, the students were not given one-on-one education and specialized re-direction. When the Student was left alone Student would***. The Student was required to deal with the adverse behaviors of multiple students and this interfered with Student’s learning. Even though Student’s ARDC would agree to provide it, the District never did provide a full time one-on-one ABA therapy program to the Student.

10. *** is a verbal behavior clinic, based on Skinner’s Analysis of Behavior – a program designed to help children with autism learn how to navigate their social world. *** provides ABA therapy seven (7) hours a day, five (5) days a week ***. Since opening, *** certified behavior analysts have provided consultation services six (6) days a month.

11. Every child at *** goes through a thorough and accurate Functional Behavior Assessment (“FBA”) done by a BCBA. That BCBA writes a highly individualized program based on a very specific and lengthy reinforcement inventory that is performed for each child which is constantly updated. The child’s data

driven program requires every single behavior, positive or negative, be recorded daily and the child's program is updated weekly.

12. Student attended *** from *** 2011 until ***, 2012; the fees for one month of the ABA Therapy services through *** total \$5,584.00. From *** 2011 through *** 2012, Student's next friends paid \$54,936.00 in service fees for the Student to attend ***.

13. *** uses the ABLLS-R Assessment and the verbal behavior map, or VB-MAPP. The VB-MAPP records the behavior of the autistic child and their skills based on their verbal behavior. Then, a basal on each child and the program is established for where the developmental position of the child and where the child needs to be taken, and the program is updated weekly.

14. Referring to a positive behavior or completed tasks as a goal or a "target", each child at *** will go through, at first, one (1) or two (2) goals or targets a week that would be worked up to 27-35 targets a week. After those targets are met, the child is moved on to new objectives and the old targets are moved to "maintenance" targets in the child's program. The following week, the child works on new targets plus the maintenance targets.

15. *** program is almost completely one-on-one because it is based on research on the effective use of ABA. That research shows that for ABA to be effective to the point that a child can approach the behavioral level of age-typical peers, it has to be done early in the child's life and it has to be done intensively. For ***, intensively means one-on-one for 30-35 hours a week.

16. Children with autism typically have a great deal of frustration that is reflected in their behavior because they do not know how to ask for things in their environment. Most of the time an autistic child's behavioral meltdown is caused by an inability to manipulate the environment. *** is designed to specifically teach autistic children how to communicate their wants and needs and how to get those needs and wants taken care of, appropriately. The program is designed as an intensive one-on-one program.

17. *** has highly educated and trained staff. Ninety-five percent of the staff has a bachelor's degree in psychology and seventy percent of those are enrolled in a master's program. Each staff member spends two (2) – three (3) hours with *** and ***, *** BCBA's, in intensive training before they are allowed to even be shadowed by another therapist. When they are shadowed they spend another two (2) weeks working with children with a therapist sitting next to them, guiding them through and making sure that they have presented the verbal instructions correctly and that they are following each child's program.

18. *** is a ***. It is ***. It is very important to be *** because children with autism, like the Student, require continuity. *** is consistent with research that supports the efficiency of *** for autistic children. It would not be appropriate for the Student to have time off from ABA ***. Student would probably regress in such a schedule.

19. There is a difference between "ABA strategy" and "ABA therapy". ABA strategy is a *type* of ABA therapy. An ABA strategy might be, for example, the use of intensive table trainings or intensive trial training. There are many different strategies that can be used under the umbrella "ABA therapy." However,

ABA therapy is the general term that refers to the science of ABA that may incorporate various strategies as necessary for the individual student.

20. An ABA program should be personally supervised by a BCBA who is, optimally, onsite at the facility. ABA is a very individualized treatment that requires data review and ongoing assessment. *** has always had a person who was, at least, in the final stages of BCBA certification. ***, Behavior Analyst at ***, has taken her BCBA boards examination and is waiting for the results.

21. ABA therapy differs from a program that may use ABA strategies. While a program that is not considered as ABA therapy may use some of the strategies used in an ABA therapy program, it is not the same because it is not a faithful implementation of all the important elements of ABA science. ABA therapy requires a BCBA to oversee a program and implement the appropriate strategies in the appropriate way for a particular child, based upon the empirical behavioral data that is gathered on the particular child.

22. Prior to attending ***, Student was educated in a self-contained classroom in the District for autistic children. Student's self-contained classroom is a *** attended by *** autistic students, including Student. Typically, the students in the self-contained classroom were noisy and distracting to Student. The *** is a similarly designed classroom that will have the same *** students assigned to be Student's classmates. The students in the *** are taught in the same manner as Student's old self-contained class.

23. When Student attended the District's self-contained classroom, Student exhibited extremely disruptive behavior at home and was difficult in public social gatherings. Student would engage in self-stimulatory behavior "stim" most of the time and ***. Since attending ***, Student's behavior at home has improved dramatically, Student can be taken out in public without being disruptive most of the time, and Student is able to ***.

24. The ABLLS-R is an assessment tool based on a Criterion-referenced set of skills that can demonstrate a student's current repertoire and provides for the tracking of the student's progressive development.

25. The ABLLS-R is not meant to determine or prioritize the importance of a particular skill nor is it meant to suggest that the attainment of all the skills by a child with a developmental disability would result in "normal development or functioning."

26. The ABLLS-R is an assessment, curriculum guide, and skills tracking system for children with language delays. The ABLLS-R contains task analyses of many of the skills necessary to communicate successfully and to learn from everyday experiences and is comprised of two separate documents: The ABLLS-R Protocol that is used to record scores for each child and The ABLLS-R Scoring Instructions and IEP Development Guide.

27. The ABLLS-R Protocol should not be used without the ABLLS-Guide. The ABLLS Guide serves two purposes: it provides instructions for scoring and completing the skills tracking grids for an individual student; it provides strategies to assist parents, educators, and other professional to use the information obtained from the completed assessment protocol to develop an effective IEP for a child.

28. The Student's educational program is supervised by *** of ***, who has been a BCBA for over 30 years. *** and *** started an ABA clinic when they were working for ***. *** is based on that model.

29. *** and *** wrote the Student's initial assessment and personally observe the Student several times a month. Additionally, *** and ***, two (2) highly trained individuals nearly completing their BCBA certification, ensure that the Student's educational program designed by BCBA's is implemented properly. The Student has a team of individuals who work with the Student throughout the school day. Team members change out every hour and a half to assist the Student in generalizing learned skills and to keep the trainers fresh.

30. Student is a child who still requires a great deal of one-on-one instruction. Student does not function well in a noisy or chaotic environment. At ***, Student's program includes an effort to desensitize Student from sensitivity to noise. However, the typical classroom environment would provide too much stimuli to Student to be able to focus.

31. Student derives a benefit from being around other children, but only to a limited extent. Student has little interest in interacting with others. However, Student has social goals in Student's program at *** that encourage Student to play games with other students. The children with whom Student interacts are, themselves, being instructed through intensive one-on-one therapy. Student is separated from noisy, disruptive students as much as possible because such students increase anxiety and cause Student to become agitated.

32. When Student becomes agitated, Student makes loud, unhappy vocalizations and engages in *** stim. When Student stims it is because Student has lost focus and learning is interrupted. Unrelenting stimming prevents Student from receiving instruction. When Student arrived at ***, Student engaged in almost constant stimming of one type or another.

33. When Student first enrolled at *** in *** 2011, Student was not allowed to stim but attempts to stim were constant. On or about April 12, 2011, a STIM Behavior Intervention Program ("BIP") was developed. It was modified on November 29, 2011 and again on February 16, 2012. A review of the recent STIM BIP compared to the original STIM BIP indicates the progress Student has made on extinguishing stim behaviors. Student's stim behavior has improved to the point that staff are able to control stimming the majority of the time with verbal redirection alone.

34. The behaviors listed on the STIM BIP with consequences include ***. This STIM BIP was first updated on November 19, 2011. Within moderation, the stimming can be used as a soothing action. As part of Student's program at ***, Student was able to choose stimming as a reinforcer and reward for successful task completion. When Student chose stimming as a reinforcer, Student was allowed to sit on a beanbag and stim for a few minutes to work and meet goals. Student now rarely chooses stimming as a reinforcer – maybe once a week or every two weeks. Using interventions that are incongruent, incompatible with stimming, Student's behavior is more under control.

35. When Student first arrived at ***, Student had extremely high rates of motor stereotypy and vocal stereotypy. *** implemented an intense program to teach Student to not to engage in such behavior.

Now, Student will stop engaging in the adverse and unproductive behavior with verbal instruction, without having the need for a manual, hand control procedure. Student has learned a number of signs and is making progress using the assistive technology devices ***.

36. There is a relatively diverse population of autistic children at ***. The youngest student is*** and the oldest student is ***. There are students who are barely recognizable as being autistic and there are severely autistic children.

37. The Director of *** observed Student more than once over a two (2) year period in the previous School District classroom. The *** Director was there to see another child and noticed that Student was usually standing in a corner, stimming.

38. Student has informal extended school day instruction from Monday through Thursday provided by one of Student's instructors from ***. The ABA trainer takes Student into real world, sometimes natural environments, such as the grocery store, to the trainer's residents, or a soccer game. The extended school day instruction, paid for by Petitioner, allows Student to generalize and have the opportunity to practice learned skills as much as possible. The extended school day instruction establishes contingencies to support appropriate behavior and reduce inappropriate behavior in different environments. The goal of this additional instruction is to establish the contingencies in all Student's environments so that Student's appropriate behavior is displayed only in limited environments.

39. There are no other peer-reviewed, scientifically based methods of instruction proven to work with students with autism to the degree that ABA has been shown to work. There is no study that indicates that the varied "eclectic" approach employed by the District's *** is as effective for students with autism of the severity that Student has.

40. Student has made progress in daily living skills, has mastered skills associated with setting the table, folding clothes, setting an alarm clock, making lunch, stuffing envelopes and emptying a trashcan. Student continues to work on tying shoes, bathing and drying off independently and brushing teeth. *** also noted progress in Student's self-care skills, especially with hand washing. When *** arrived at ***, Student had a slight aversion to hand washing due to the texture of the soap but now student actually pumps the soap. She also reported that Student is working on showering and drying off; instead of hand-over-hand tooth brushing, one just needs to point and Student will brush teeth.

41. Petitioner noted that for *** years she asked District to teach Student to *** and now, after one (1) year at ***, Student can finally ***.

42. Progress in skill acquisition include waiting appropriately for one (1) minute (began at 15 seconds), and walking quietly next to Student's teacher without reminder. Currently, Student is working on completing 12 piece jigsaw puzzles without frames, playing board games, labeling (signing) items in each room, receptively identifying items and places, discriminating between items using yes and no, identifying functions, attributes and associated items, sequencing items based on a model, and recreating block designs based on a picture model. Student's academic goals include identifying letters, numbers and sight words.

43. The District's *** class includes individualized behavior plans, Vizzle Autism Software and Learning System, and ABA based behavior modification techniques. A review of the District's service delivery model indicates there is no mention of the availability of extended school day or year round schooling. The *** class curriculum indicates that there is no mention of ABA therapy – just “ABA based” behavior modification techniques. There is no mention of peer reviewed, research based teaching methodologies in the *** class, only “Unique Curriculum linked to standards” and “District approved reading and math programs.”

44. The In-Home and Community Based Training or Viable Alternatives in the Student's IEP does not address the community based training that the District's BCBA claims Student needs. In fact, ***, consulting BCBA, thought it needs to be added to Student's IEP but there are no specific plans at this time for the District to provide it.

45. At the present, Student is still very prompt dependent. During one-on-one instruction Student will still wait to be prompted before providing an appropriate response. Therefore, Student requires trained staff in ABA therapy that will faithfully maintain and review data in order to quickly and appropriately amend Student's individual ABA program. The goal is for Student to use learned skills with minimal or no prompting. Removal of Student from an intense mostly one-on-one ABA environment could cause Student to lose the behavioral skills that Student has learned at ***.

46. The District's consulting BCBA also confirmed that Student's frequency of aggressive behavior has been reduced and Student has learned increased signs.

47. *** (“****”) is a licensed psychologist in the State of Texas and a Licensed Specialist in School Psychology (“LSSP”). She received a B.A. in English/History in ***; an M.A. in School Psychology in ***; completed an ABA approved internship in clinical psychology in ***; and received her Ph.D. in School/Child Clinical Psychology in ***.

48. *** authored the following publications:

- a. ***;
- b. ***;
- c. ***;
- d. ***;
- e. ***;
- f. ***;
- g. ***; and
- h. ***.

49. On September 23, 2012, *** completed a Psychological Evaluation of the Student following six (6) days of evaluations: August 22, 2012; August 25, 2012; September 1, 2012; and September 18, 19, and 20, 2012.

50. *** evaluation included an observation of the Student at ***; an interview with staff at ***; an interview with the Student's family; an observation of the *** classroom at the District; an interview with the

District’s *** staff; and the administration of specific assessment instruments to the Student, and where appropriate, Student’s parents. Based on *** testimony, the Hearing Officer makes the following findings:

- a. New staff at *** undergoes specific training in implement a student’s ABA program. New staff undergo two (2) weeks of training that is a combination of instruction about ABA, observation of ABA and hands-on with a child with a supervisor present. Then, the new staff person is assigned a specific child’s program to learn. They are paired with a supervisor and work with that child for the week. For the first three (3) months they are on probation and are observed “almost constantly” to make sure they are running the program correctly;
- b. *** has two (2) BCBA on staff, and *** is one (1) week away from taking her licensing exam. The two (2) licensed staff people are on site six (6) days a month;
- c. All but two (2) of *** staff have at least a bachelor’s degree and several are working on their master’s in psychology or Special Education. Several staff are working on the BCBA License;
- d. Six (6) *** staff people are trained to work with the Student; four (4) will work with Student on a given day;
- e. The Student works best in a one-on-one setting. The Student has many self-stimulatory behaviors, and if not constantly re-directed, they increase. If the Student is stimulating (“stimming” or “stim”) constantly, Student will not learn; and
- f. The Student was given the following tests with the following scores:

Leiter-R	A nonverbal age-appropriate test of intelligence.	Non-Verbal IQ Score of ***; Fluid Reasoning Score of ***; Spatial Visualization Score of ***.
PEP-3	Non-age appropriate test of developmental functioning.	Overall Communication Skills—*** months; Motor Skills—*** months.

The test measured the following subskills:

- A. Cognitive Verbal/Preverbal (matching objects by shape and color) *** months
- B. Expressive Language (requesting food/help) *** months
- C. Receptive Language (recognition of words) *** months
- D. Fine Motor (use of scissors, crayons, etc.) *** months
- E. Gross Motor (walking, clapping, etc.) *** months

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| F. | Visual-Motor
(imitation of motor actions) | *** months |
| G. | Adaptive Functioning | General Adaptive Composite Score of *** |
| H. | Visual-Motor Integration
(copying lines and circles) | *** years, *** months |
| I. | Behavior Functioning | Significant problems in the area of Withdrawn/
Depressed and mild obsessive-compulsive types of
behavior. Significant inattention, learning problems,
peer relationship problems and emotional liability. |

Based on the Childhood Autism Rating Scale 2-ST (“CARS”), which measures the presence and severity of symptoms associated with autism, the Student’s score of *** falls in the severe range of an autism spectrum disorder. The Student has some sensory integration difficulties as well as a high tolerance for pain and sensibility to loud noises.

- g. The *** class has *** students and no other students came into the class during the day. These students have been together for *** years. The *** teacher, ***, reported completing ABA training as follows: “8 modules” on the computer and then two (2) days working under close supervision. The consulting BCBA for the district comes once a month from her usual employment with another school district to consult in the classroom.
- h. ABA is the only effective intervention/treatment for autistic children that has been supported by research. Autistic children like the Student have extreme difficulty attending to what they are instructed to do without one-on-one training/instruction with a well-trained therapist/teacher. Without this one-on-one approach, autistic children like the Student do not learn.
- i. The *** classroom will not meet the Student’s educational needs and could result in significant regression from the progress that the Student has made over the past 14 months at the ***. The *** “chaotic” environment—relative to the *** setting—and the lack of sufficient District staff training in the principals of behavior management do not provide an appropriate educational setting for the Student. The *** staff needs much more training and direct supervision by a BCBA to be able to provide appropriate ABA techniques in a classroom.
- j. The Student should continue at *** and receive further development of daily living skills instruction. The Student should have an ABA-trained person working with the Student in the home and with student’s parents to help the Student generalize what is learned at *** to the home and community settings. The Student’s PEP-3 results should be used to plan the Student’s academic work.

51. The Student’s ARDC convened on August 3, 2012. The purpose of the meeting was to determine Student’s temporary placement of a transfer student.

52. The Student's August 3, 2012 ARDC reviewed a December 17, 2010 IEP, the District's January 6, 2012 Full Individual Evaluation ("FIE"), and information from Student's parents and former school records. Based on the information presented, the Student's ARDC concluded that the Student met the eligibility criteria as a student with Autism and SI.

53. The Student's August 3, 2012 ARDC determined the following related services to be conducted during a six (6) week grading period between August 27, 2012 through October 8, 2012:

- a. Occupational Therapy for 15 minutes per week, two (2) times per six (6) weeks (30 minutes total);
- b. Transportation for 30 minutes, two (2) times daily;
- c. School Health Services for ten (10) minutes, daily;
- d. Speech Therapy Services for 20 minute sessions, two (2) times a week (10 sessions total); and
- e. Speech Therapy Services 30 minute sessions, two (2) times a week (10 sessions total).

54. The Student's August 3, 2012 ARDC determined that the recommended services are provided on a temporary basis and that another ARD meeting would be held within 30 days from the date the Student is verified as being a student eligible for special education services.

55. The Student's August 3, 2012 ARDC recommended that Student receive assessments in Student's current placement, ***, for accuracy of Student's performance, before August 22, 2012.

56. During the August 3, 2012 ARD meeting, the LSSP commented on the significant improvements in Student's behavior, such as *** and crying, which was also noted in *** report.

57. During the August 3, 2012 ARD meeting, the parties discussed ESYs for the Student, who was receiving services five (5) days a week from ***. The ARDC approved ESYs until August 24, 2012. The Student's goal for ESYs services is that Student could wait for more than 90 seconds using no more than one (1) verbal prompt.

58. Student's August 3, 2012 ARDC determined that the Student's LRE is in the Special Education Classroom setting for Language Arts, Math, Reading, Science and Social Studies. The Student's Art, Choir, and Physical Education ("P.E.") will be in the General Education Classroom setting.

59. Student's parent signed in agreement along with the remainder of the Student's August 3, 2012 ARDC, and Prior Written Notice of the agreed upon recommendations was issued.

60. Student's ARDC convened again on August 24, 2012. The purpose of the meeting was to determine present levels of educational performance and needs and to review evaluation data

61. Student's August 24, 2012 ARDC reviewed an August 21, 2012 FIE, August 21, 2012 Disability/Eligibility Reports for Autism and Speech Impairment, additional existing evaluation data, and

information from Student's parents and school personnel. Based on the information presented, the Student's ARDC concluded that the Student met the eligibility criteria as a student with Autism and SI.

62. Student's August 24, 2012 ARDC determined the following measurable annual goals for the Student within 36 instructional weeks, during the school day:

- a. Student will display no more than two (2) events of physical aggression for six (6) consecutive weeks;
- b. Student will display no more than one (1) event of self injurious behavior for six (6) consecutive weeks;
- c. Student will display no more than two (2) events of stereotypy requiring contingent effort procedure restarts for six (6) consecutive weeks;
- d. Student will accept no without targeted behaviors for 70% of trials for six (6) consecutive probe days;
- e. Student will wait quietly without stereotypy for two (2) minutes for 2/3 daily opportunities for six (6) consecutive probe days;
- f. Using verbal response sign or pointing, Student will label 60 new vocabulary objects or pictures for three (3) consecutive first trial probes;
- g. With no vocal prompt, Student will request using single word responses with item/activity present using sign vocal or AT device for 60 times per day for three (3) consecutive probe days;
- h. When ten (10) objects are placed on the table, Student will move student's finger from object to object with one-to-one correspondence as instructor counts independently;
- i. When told "give this to peer", Student will give item to peer with no more than one (1) prompt two (2) out of three (3) times;
- j. While participating in physical education, Student will participate in conditioning, strengthening and flexibility exercises 4/5 days per week;
- k. When the opportunity naturally occurs, Student will be able to open student's drink container with two (2) or less physical prompts, 70% of trials;
- l. When the opportunity naturally occurs, Student will be able to don clothing as needed during the school day with two (2) or less physical prompts, 70% of trials;

- m. When given a verbal directive, Student will be able to thoroughly wipe student's hand and mouth after eating with five (5) or less physical prompts, 70% of trials;
- n. When given a verbal directive, Student will be able to thoroughly wash/dry hands after toileting with five (5) or less physical prompts, 70% of trials; and
- o. Student will initiate conversation using sign language or a communication device with 70% accuracy.

63. Student's August 24, 2012 ARDC determined that Student has communication needs that should be addressed through supplementary aids and services, IEP, Assistive Technology, and/or speech therapy.

64. Student's August 24, 2012 ARDC determined that additional staff training in ABA is required to implement Student's IEP.

65. Student's August 24, 2012 ARDC determined the Student's LRE to be a special educational setting at the Student's home campus within the District, and recommended that Student receive part or all instruction in a special education setting, based on the following reasons:

- a. Placement in the general education classroom prohibits Student from achieving all goals/objectives in Student's IEP, even though supplementary aids and services are used;
- b. TEKS objectives for Student's assigned grade level exceed Student's present level of educational performance; therefore, Student requires instruction based on present competencies which are significantly below current grade placement;
- c. The modifications required for Student to achieve the goals and objectives in the IEP cannot be implemented in the general education classroom without eliminating essential components of the general curriculum; and
- d. Speech therapy/ Instructional/ Related Services goals and objectives contained in the IEP require a small group or individual setting with trained, licensed, or certified staff in a less distracting environment than a general education classroom.

66. Student's August 24, 2012 ARDC did not consider ESYS services during the ARD meeting.

67. Student's August 24, 2012 ARDC determined the following related services to be conducted during a six (6) week grading period between August 27, 2012 through October 8, 2012:

- a. Occupational Therapy for 15 minutes per week, two (2) times per six (6) weeks (30 minutes total);
- b. Transportation for 30 minutes, two (2) times daily;
- c. Speech Therapy Services for 30 minutes, once per week times a week; and
- d. Assistive Technology 30 minutes consultation/training per week for the first six (6) weeks for training for teacher and Student on use and programming of device, 30 minutes consultation per month after the initial training of the first six (6) weeks.

68. Student's ARDC was not in mutual agreement and did not mutually agree to implement the services reflected in the August 24, 2012 ARD proceedings.

69. Student has already achieved the BIP goals considered by Student's August 24, 2012 ARDC. Continuing these goals would not be appropriate for Student.

70. The District consults with a BCBA, ***, who is employed full time with another school district. This consulting BCBA oversees a program that contains 450 students where she is the lead interventionist. In addition to the full time duties at the other school district, the consulting BCBA works as the owner-director of a private consulting business 19 hours per month. The BCBA takes a personal day from her full time job and provides assistance with the ***, as needed.

71. The District has over a hundred students on the autism spectrum, not including students at a self-contained campus. Allegedly, *** sees every child in the District the one (1) time each month she is in the District, however, *** did not know approximately how many students in District met autism eligibility. None of *** job responsibilities with the District include working directly with students with autism, monitoring their data collection and/or revising student ABA programs, unlike the BCBA's who consult with *** and the *** staff behavior analyst. *** primary duty is to train the District's staff who teach children with various autism spectrum disorders.

72. The District's consulting BCBA designs the ABA trainings for the District. The BCBA provided the first two (2) – three (3) hours of ABA training for the para-professionals in mid-September, 2012. The training modules that some of the *** staff have viewed are not a part of the District's BCBA's training sessions.

73. The District's consulting BCBA is aware that the primary *** teacher and para-professionals have received basic instruction on ABA therapy. However, in the opinion of the District's consulting BCBA, the *** staff is not sufficiently trained at this time. The *** staff require additional "support and follow through."

74. The District's consulting BCBA confirmed that the District did not have ESYS in place for its students in the *** from July 19, 2012—August 27, 2012. The BCBA is not aware of any study that approves of a six (6) week vacation from school for severely autistic children.

75. The consulting BCBA is not familiar with the number of hours necessary to sufficiently train a person to administer ABA therapy. The District's consulting BCBA stated that there is no difference between ABA therapy and ABA strategies.

76. The District's primary teacher for the ***, ***, is a first year teacher with a BS in Electrical Engineering. The *** teacher was hired approximately August 17, 2012. The District's *** teacher has a probationary teaching license received on August 20, 2012. Before being hired by the District for the ***, the *** had not worked as a para-professional or a professional teacher at any school. The District's ** teacher

reviewed eight (8) ABA video trainings modules for teaching autistic children. He has also completed the examination associated with the video training modules successfully.

77. Petitioner's first request to view the ESYS classroom and to schedule an ARD was on July 11, 2012. Her second email request to ***, Special Education Director, again requested to discuss ESYS and schedule an ARD was on July 20, 2012. When she did not receive a response, on July 23, 2012, Petitioner sent her third request. In an email dated July 26, Petitioner made her fourth request to see an ESYS classroom. Later that day, when she met with ***, she was informed there was no ESYS classroom available to observe. On July 30, 2012, Petitioner emailed *** and acknowledged she had been told there was no ESYS classroom available to observe but requested to know when the ESYS classes would be back up so she could observe. This was her fifth request. Finally, on July 31, 2012, *** responded that all ESYS classes had concluded on July 19, 2012, implying there would be no more ESYS classes in District that summer.

78. Petitioner never received a Prior Written Notice regarding requests to observe the ESYS classroom Student would attend. In addition, although the first request to convene an ARD was made on July 11, 2012, an ARD was not convened until August 3, 2012, almost a month later. Student was denied ESYS for a month.

79. Petitioner requested reimbursement for private speech therapy provided by the parent at approximately \$400 a month. Petitioner qualified that statement and stated they are only asking for reimbursement to the extent private insurance does not pay for the services.

80. Petitioner also requested reimbursement for ***, ABA Trainer at ***, services provided to Student after the school day in their home. *** normally works with Student at least two (2) hours a day Monday through Thursday but there may be times he works with Student longer. *** testified that his salary is partially paid for by ***, and Petitioner's provide him with a monthly rental allowance of \$400 and reimburse him for expenses related to Student.

III. Discussion

Student is a ***-year-old with severe autism and speech impairment who has a long history of overwhelming educational and social challenges. Student is non-verbal and tends to stim vigorously and sometimes aggressively when upset, nervous, angry, or even very happy. Student is sensitive to sounds, strangers and the non-controlled actions of classmates. Student does not interact well with others and is best taught by intensive one-on-one ABA therapy. Student functions at a pre-school level in most areas due to student's autism, and does not respond to typical academic curriculum, or even the typical classroom environment where interaction with age appropriate peers is an integral part of Student's education. Student requires aggressive and intensive ABA therapy intervention to address the effects of Student's disability; to allow Student to achieve an educational benefit in *any* setting; and to prepare Student for social interaction in the outside world.

This case presents a challenge because of the limited scope of inquiry (May, 2012 to the present) and the undeniably relevant failures of the District to provide Student with a FAPE in past years. Most of the evidence presented by both parties involved facts occurring before May, 2012. The record shows that in the *** years Student was educated in the self-contained classrooms in the District, Student received minimal educational benefit and made no more than the type of minimal educational progress that the United States Supreme Court and the U. S. Fifth Circuit Court of Appeals discussed in *Board of Education of the Henrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1982), *Cypress Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997) and *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). The District's eclectic approach to the education of a child with Student's disabilities and needs was inappropriate. This case, however, does not require a decision regarding the efficacy of the District's program for Student prior to ***, 2011. This conclusion does not mean that the evidence was not probative. The evidence provides a clear picture of the type of educational program and setting that Student does *not* need. Therefore, the primary issue in this case is whether the District's *current* *** has sufficiently changed from what it had been.

Because Student's parents have not given the District the opportunity to attempt to educate Student for the 2012-2013 school year, the only relevant inquiry in this case is whether the District's *proposed* placement and program for Student is appropriate. The record shows that it is not, at this time, appropriate. After the Student's placement in *** in *** 2011, the District seems to have made some effort to begin to acquire an ABA program, or a program that uses ABA interventions, to educate its children with severe autism. The District now consults with a part time BCBA who has made some effort to train some of the District's staff working in the District's proposed *** placement. Those efforts are an improvement over the pre-***, 2011 program but there are still, clearly inadequate. The District does not even offer continuous ESYS for children with severe autism, which peer reviewed research supports as necessary to prevent a loss of learned skills. Student's proposed *** teacher, ***, appears to be an earnest and potentially effective teacher. He may well be able to provide educational benefit to severely autistic children with Student's needs and challenges *when he is sufficiently trained, experienced and supervised*. This is not the case, at this time. *** lacks the educational background and experience as a teacher, much less an ABA therapy teacher, to be placed in charge of implementing Student's IEP. Moreover, the *** class setting as described is not the appropriate educational environment for Student.

The records also shows that the District should have done a better job monitoring Student's educational progress and program at *** and been prepared for the expiration of the terms of the settlement of Docket No. 127-SE-0211, which provided for Student's placement at ***. The District was aware that Student attended ***

continuously and that the District's funding would end in May, 2012. The District should have contacted Student's parents and set up an ARD meeting to determine Student's educational program in the coming year. Instead, the District was less than forthcoming to Student's parents' inquiries to inspect the changes in the ***, and Student's parents lost funding for ESYS between June 1, 2012 and August 3, 2012.

The record shows that *** is the appropriate, if imperfect, environment for Student's education. Student has made more than minimal educational progress at ***. Student has gotten control of stimming at *** and has addressed some of the other maladaptive behaviors associated with noise sensitivity and reticence toward people. This is due to the intensive one-on-one ABA therapy that Student has received at ***. The ABA therapy interventions by *** have put Student in a position to receive a FAPE that had been denied before Student's placement at the facility. Of course, there are concerns about the Student's potentially limited exposure to age-appropriate peers and other aspects of a usual, state-approved academic curriculum. Student's after school assistance from a *** trainer appears to be helpful in the generalization of skills in a larger environment, but it is not officially included in Student's program IEP, or supervised by ***. However, it is clear that the data driven, dynamic and one-on-one program provided at *** during the school day is the right individualized program for Student.

The District will have another opportunity to develop its ABA therapy based program. Presumably, *** and the rest of the *** staff will gain experience and training in the upcoming school year. Perhaps the District will provide additional, appropriate supervision of the implementation of ABA therapy for children with Student's educational needs. For this reason, the District should be compelled to fund Student's placement at *** for only one (1) year and ESYS, *continuously*, for the next summer. Thereafter, at Student's annual ARD in 2013, the appropriateness of the District's program for Student can be re-evaluated to determine whether Student's transition to the District *** classroom is appropriate.

Petitioner's Specific Allegations

1. Respondent has failed to devise an appropriate Individualized Education Program ("IEP") for Student in the Least Restrictive Environment ("LRE"), resulting in a denial of a Free Appropriate Public Education ("FAPE").

The District has failed to offer the Student what Student requires the most, at this time—an ABA-based predominately one-on-one instructional program. The program offered by Student's August 24, 2012 ARDC appears to continue a largely "eclectic" type educational program to address the most challenging aspects of Student's severe autism and speech impairment. However, the most relevant deficiencies of the District's

program is the educational setting itself and the District's failure to offer sufficiently trained and supervised staff to implement the type of educational program that Student requires.

2. Respondent has not offered the Student placement and services in an already up and running program that the District admits student needs.

The record shows that Student requires an ABA therapy-based program that is administered by appropriately trained teachers and para-professionals. The educational setting requires a relatively calm, one-on-one environment for most of Student's instruction in order for Student to derive educational benefit and progress in life skills, behavioral remediation, social skills and communication centered goals. At the present time, the District's *** is not the appropriate educational setting because of the nature of its classroom environment; its teaching methodology; its curriculum for Student; and its lack of sufficiently trained staff. The record shows that the *** setting and ABA-based program is the appropriate educational placement for Student. It is a placement in which Student can continue to make appropriate educational progress.

3. Respondent has sent District staff to observe and learn about how to provide an Applied Behavioral Analysis ("ABA") program at the Student's private placement.

The specifics of this allegation do not control to this decision. It is not relevant to the particular method that the District used or could have used to acquire a sufficiently trained staff to provide ABA therapy to Student. However, the record shows that, at this time, the District does not have such staff, nor is its program appropriately supervised by a certified BCBA.

4. Respondent has ignored Petitioner's requests to see the District's proposed program, and Petitioner suspects that no such program exists.

The record shows that the District did not respond candidly or timely to Student's parents' request to inspect that the District would offer as the educational setting for the 2012-2013 school year.

5. Respondent can produce no evidence that the proposed program has had any success with any particular student, or any objective data on the efficacy of its programming.

This allegation is not relevant to this decision. It is not important that the District demonstrate whether it has provided any *other* student with a FAPE.

6. Respondent has not provided Student with a one-on-one aide or with the Assessment of Basic Language and Learning Skills – Revised ("ABLLS-R") to measure Student's progress, which were both included in student's IEP.

The issue of whether the District has provided a one-on-one aide to Student has no bearing on this decision because Student has not actually been registered with the District during a time period relevant to this case. The record shows that the District has attempted to assess Student with, at least, a portion of the ABLLS-R. However, that fact does not control this decision.

7. Respondent has not provided Petitioner with honest progress reports. District has given progress reports to Petitioner falsely reporting progress.

This allegation is wholly irrelevant to this decision because the District has not had the opportunity to provide Student's family with any progress reports during a period relevant to this case.

8. Respondent has not appropriately considered and incorporated into the Student's IEP the components of the autism supplement that the Student needs in order to receive a FAPE.

The District's program of the Student for the 2012-2013 school year, as offered by Student's August 24, 2012 ARDC suffers from its failure to implement appropriate one-on-one ABA therapy by sufficiently trained staff.

9. Respondent has not devised goals and objectives in all of the Student's areas of need in the August 24, 2012 IEP and based on present levels of performance because the District has not evaluated the Student recently and does not know what student's present levels are. The goals devised by Respondent were not sufficient to address the Student's needs in speech/communication, reading, writing, math, social skills, related services, behavior, occupational therapy, in-home training, life skills, Extended School Year Services ("ESYS"), and assistive technology.

The record shows that the goals and objectives for Student may not sufficiently correspond to Student's current levels of performance. However, this failure is due to the lack of sufficient access to Student and Student's educational records that was provided by Student's parents. Therefore, the specificity of the goals and objectives of the August 24, 2012 ARDC are not controlling on this decision.

10. Respondent has not offered sufficiently intensive related services to support appropriate goals and objectives.

This allegation is relevant to this decision and was addressed in the discussion of allegations of Petitioner's Specific Allegations 1 and 2, above.

11. Respondent has not provided prior written notice in response to parent requests, including but not limited to the parents multiple requests to observe the District's ESYS program, and the Parent's request for private placement.

The failure of the District to provide Prior Written Notice regarding the Student's parents' request to observe the Districts' ESYS program is not clear from the facts of this case. Any other unspecified "requests" made by Student's parents could not have occurred during a time period relevant to this case.

IV. Conclusions of Law

1. Petitioner is a student who resides within the School District who is eligible for special education as a child with the disabilities autism and Speech Impairment. [20 U.S.C.A. §1400(3); 34 C.F.R. §300.8(c)(4); 19 T.A.C §89.1040.]

2. Respondent has a responsibility to provide Student with a free appropriate public education including reimbursement for Petitioner's private school placement if Respondent did not provide Petitioner a free appropriate public education. [20 U.S.C.A. §1412; 34 C.F.R. §300.300; 19 T.A.C §89.1001.]

3. Petitioner proved that Respondent has failed to offer an educational program that is capable of providing Student a free appropriate public education based on the unique needs of a child with autism and SI. [20 U.S.C. §1414; 34 C.F.R. §300.1, et seq.; 19 T. A. C. §89.1001; *Bd. Of Education v. Rowley*, 458 U.S. 176, 73 L.Ed 2d 690, 102 S. Ct. 3034(1982), *Cypress Fairbanks ISD v. Michael F.* 118 F.3d 245 (5th Cir. 1997)].

4. The District's *** staff is not sufficiently trained to provide Petitioner with an educational program that is based on peer-reviewed research as required by IDEA. [20 U.S.C.§1414(d)(1)(A)(i)(iv); 20 U.S.C.§1400(c)(3), (5)(D), (E); 34 CFR §300.320(a)(4).]

5. Petitioner proved that Student should be placed in a private school at public expense in order for Student to be provided a free appropriate public education. *** is the appropriate educational placement for Student at this time. [20 U.S.C. §1412(a)(1), and §1412(a)(10)(B); 34 CFR §300.104; *Richardson Independent School District v. Michael Z.*, 580 F.3d 256 (5th Cir. 2009); 19 TAC 89.1125 and §89.61; Tex. Educ. Code, §29.008]

V. Order

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer ORDERS that the relief sought by Petitioner is GRANTED. Respondent is ordered to:

1. Provide funding to pay for Student's placement in ***, in the amount of \$5,584.00 per month beginning on November 9, 2012 and ending on August 24, 2013.

2. It is **FURTHER ORDERED** that the District shall reimburse the Petitioner for the expenses incurred from *** for the time period that Student attended said facility during the following range of dates: ***, 2012 to ***, 2012; and ***, 2012 to ***, 2012.

3. It is **FURTHER ORDERED** that the District shall request progress reports and all assessment data regarding Student from *** at the end of the Fall Semester, 2012 and at the end of the Spring Semester, 2013.

4. It is **FURTHER ORDERED** that the District shall convene an ARD on behalf of Student, no later than August 24, 2013, to consider Student's educational program for the 2013-2014 School Year.

5. It is **FURTHER ORDERED** that the District shall implement this ORDER no later than November 19, 2012.

6. All other relief not specifically granted herein is hereby DENIED.

ISSUED in Austin, Texas this 8th day of November, 2012.

_____/s/
Stephen P. Webb
Special Education Hearing Officer

DOCKET NO. 347–SE-0812

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

SYNOPSIS

Issue: Was Petitioner entitled to private placement at public expense for a student with autism and Speech Impairment when it was shown that the School District was not able to implement an appropriate peer-reviewed and research based one-on-one educational program with sufficiently qualified and trained staff.

Federal Citation: 20 U.S.C. §1414(d)(1)(A)(i)(IV); 20 U.S.C. §1400 (c)(3), (5)(D)(E); 34 C.F.R. §300.320(a)(4)

Texas Citation: 19 T.A.C. §89.1050(a)(1)

Held: *For Petitioner.* Respondent has not yet acquired sufficiently trained staff to develop and implement the one-on-one ABA therapy based educational program in an appropriate setting that Student requires.

Issue: Was the requested placement in a private ABA facility at public expense the appropriate placement for Student?

Federal Citation: 20 U.S.C. §1412(a)(1), and §1412(a)(10)(B); 34 C.F.R. §300.14; *Richard Ind. School Dist. v. Michael Z.*, 500 F.3d 256 (5th Cir. 2009).

Texas Citation: 19 T.A.C. §89.1125 and §89.61, Tex. Educ. Code, §29.008.

Held: *For Petitioner.* The private facility provides one-on-one ABA therapy that Student needs to remediate behavioral challenges and is necessary for Student to receive educational benefit.