

DOCKET NO. 038-SE-1012

STUDENT § **BEFORE A SPECIAL EDUCATION**
§
VS. § **HEARING OFFICER FOR**
§
HOUSTON ISD § **THE STATE OF TEXAS**

DECISION OF HEARING OFFICER

*** (hereinafter “the student”) through student’s next friends *** and *** requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. § 1400 *et. seq.* The Respondent is the Houston Independent School District.

PROCEDURAL HISTORY

Petitioners filed a Request for Due Process Hearing on October 22, 2012, alleging that the Houston Independent School District denied the student a FAPE during the 2011-2012 school year and through the date of student’s withdrawal from HISD in the Fall of 2012. Petitioners unilaterally placed the student in a private school, *** (hereinafter “the private placement”), and seek reimbursement for all costs associated with the private placement from HISD.

The parties appeared for the due process hearing on January 14-16 and January 22, 2013. Petitioners were represented by attorneys Mark Whitburn and Sean Pevsner. Respondent was represented by attorney Hans Graff. Also appearing was the District representative, ***.

Both parties requested an opportunity to submit written arguments and requested an extension of the Decision due date to April 5, 2013, which was granted. The Decision was timely rendered on April 5, 2013 and forwarded to both parties.

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusions of law. References to the court reporter’s record will be designated “RR” followed by the page number. References to the exhibits will be designated “P” for Petitioner or “R” for Respondent, followed by the exhibit number and page number if applicable.

ISSUES PRESENTED BY PETITIONER

Petitioners’ allegations as set forth in the Request for Due Process Hearing are set forth below:

1. Whether the District failed to provide an appropriate education for the student;
2. Whether the District failed to appropriately implement the student’s IEP;
3. Whether the District failed to provide an appropriate placement for the student;

4. Whether the District failed to appropriately respond to the student's behavioral needs;
5. Whether the District's employees were qualified to work with the student;¹
6. Whether the District failed to collaborate with the parent and the parent's treatment provider(s) in developing and implementing the IEP;
7. Whether the District's communications with the parent and failure to collaborate with the private treatment provider interfered with the parent's ability to meaningfully participate in the development of the student's educational program;
8. Whether the private placement for the summer of 2012 was appropriate; and
9. Whether the private placement for the 2012-2013 school year is appropriate.

Although the parent has specifically alleged nine separate issues with regard to the District's program, the issues can be analyzed generally in two categories. The first is whether the program was appropriate under the factors set forth in *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); cert. denied, 522 U.S. 1047 (1998). The second is whether the unilateral private placement chosen by the parents is appropriate.

Petitioners request the following relief:

1. Reimbursement for the student's private program during the summer of 2012;
2. Reimbursement for the student's private placement during the 2012-2013 school year;
3. Prospective private placement;
4. Alternatively, placement in HISD in a setting with a 1:2 teacher to student ratio;
5. ABA² training for HISD paraprofessionals and teachers with a certified BCBA³ with the training to be greater than 5 hours per semester or 1 additional hour of training per semester;
6. An order requiring the District to utilize a "highly qualified" teacher in the student's classroom during the teacher's absence;
7. Reimbursement for private tuition not covered by insurance;
8. Any and all other relief deemed appropriate by the Hearing Officer.

FINDINGS OF FACT

1. HISD first evaluated the student at the age of *** in June, 2006, and identified student as a student eligible to receive special education and related services under the disability categories of Autism and Speech Impaired. R2.

¹ This complaint centers around the teacher's failure to complete the examination requirements to meet the highly qualified standard under NCLB, although he is otherwise properly certified in the area of special education. The highly qualified status may not be the basis for a claim of a denial of FAPE and will not be addressed in this Decision. 20 USC 1401(10)(D).

² Applied Behavioral Analysis

³ Board Certified Behavior Analyst

2. The student's initial ARD Committee convened in September, 2006 and recommended placement in a special education *** and speech therapy services. The parents declined placement but agreed to speech therapy services. P2-16; R36; R37.

3. The student enrolled in HISD for the 2006-2007 school year and received speech services only. Student enrolled for a *** during the 2007-2008 school year, and a portion of the 2008-2009 school year, withdrew and attended a private program in 2008, enrolled in the 2009-2010 school year, and withdrew in February 2010 following a dispute over services with the District. *See* Respondent's Exhibits 36-52 and R67. The history between the District and the Petitioners includes more than 25 ARD Committee meetings, multiple requests for due process hearings, and campus and TEA complaints. A dispute arose between the parties in 2010 over the training of the teacher and staff working with the student. The parents filed a request for due process that was resolved with the District agreeing to fund training for the teacher with the parent's BCBA specific to the student. R83.

4. During the summer of 2010, prior to the beginning of the 2010-2011 school year, the student's teacher received 25 hours of ABA training with the student's private ABA therapist. RR314-320. It is undisputed that the principal agreed to allow the student's private BCBA train staff, including the aides working in the SLC classroom and with the student during the 2010-2011 school year. P55-1-8. According to the parent and the teacher, the teacher sought continued opportunities for consultation with the BCBA during that school year. The BCBA testified that she worked with the teacher and the SLC staff during the 2010-2011 school year with the goal of providing the staff with the tools, which, if implemented, would help move the student gradually to a more inclusive setting. RR669.

5. The student entered *** grade and enrolled in *** program at the beginning of the 2010-2011 school year. R53. The student continued to meet the eligibility criteria for Autism and Speech Impaired.

6. The student's IEP for the 2010-2011 school year included academic, behavioral and social skills goals. The ARD Committee determined that the student required a daily schedule reflecting minimum unstructured time and a specified staff to student grouping ratio. R54. The staff to student grouping ratio deemed necessary for the student was as follows:

Acquisition of new skills	From 1:1 to 2:7
Fluency rate	From 1:1 to 3:5
Maintenance	From 1:2 to 3:5
Generalization	From 2:7 to 2:20
Transitions	From 1:1 to 3:5

According to the Autism Supplement, the basis for the ARD Committee's determination of the staff-student grouping ratio was the student's then current functioning, student's need for behavioral accommodations across settings, and issues with transitions during the school day. R54-

635.

7. The 2010-2011 IEP also contains a Functional Behavior Assessment/Behavior Support Plan identifying the following problematic behaviors: off-task, leaving the assigned area, noncompliance, disruption inside the classroom, emotional outbursts and tantrums, defiance of authority, and negative physical behavior. R54-625. According to the IEP, the ARD Committee reviewed the student's prior evaluations from 2007 and 2009 as well as previous Functional Behavior Assessments in making its determinations. R54-625.

8. The ARD Committee identified the two most problematic behaviors for the student. First, the student had difficulty staying on task, and, for example, would become off task or get out of student's seat 4 to 5 times within a 10-15 minute period of instruction. Additionally, the student creates fantasy situations and engages in echolalia in the form of *** randomly throughout the day to escape or avoid reality. These behaviors were reported to have occurred across a variety of settings, including structured activities, independent seat work or interruption in routine. R54-626. The ARD Committee developed the following behavioral goals for the student:

a. Remain on task during instructional time 5-7 minutes with 2 teacher redirections 3 out of 5 trials, with 60% mastery criteria; and

b. Extinguish *** by responding to a teacher cue to discontinue 3 out of 5 trials, with a 60% mastery criteria.

R54-628.

9. The ARD Committee also determined that the use of a weekly home to school communication journal would be utilized as an alternative to in-home training. R54-632. The teacher testified that the use of the log on a daily basis was beneficial. RR352.

10. The ARD Committee determined that it was necessary to identify teaching strategies needed to implement the IEP. These strategies included the following ABA strategies: task analysis, prompting and prompt fading, shaping, choice-making, consistent classroom routines and expectations, discrete trial training, incidental teaching, antecedent and consequence manipulation, and multiple opportunities across settings. R54-638.

11. At the beginning of the 2010-2011 school year, there were ***students, one teacher, and two full-time aides in the SLC classroom, the student's placement. RR60-62.

12. The number of students in the SLC classroom increased during the 2010-2011 school year, the student's behavior problems increased at home and at school, and student began having more frequent tantrums. RR167. Additionally, according to the parent, the teacher began to fall behind in maintaining the daily log as the class size increased.

13. As an example of classroom issues during this time, the parent testified that she observed the media center teacher dismiss the student to work on the computer prior to administering a lesson to the other students. The other students received modified instruction while the student was removed to the computer. The parent reported the incident to the teacher and the private BCBA intervened regarding this issue. P55-8; RR93-98; 106-107.

14. At the conclusion of the 2010-2011 school year, the student had not mastered any of student's academic, social or behavioral goals. In reading, the student demonstrated 45% mastery on two objectives and 40% mastery on one objective. In language arts, student demonstrated 50% mastery on 3 out of the 4 objectives, but no progress was documented for a fourth objective, *** 3 out of 5 trials. In math, the student demonstrated 40% mastery of all three objectives. In science, student demonstrated 50% mastery toward the objective related to *** and 40% mastery toward the remaining two objectives. In social studies, student demonstrated 45%-50% mastery of the objectives. The student demonstrated 40% mastery of two social skills objectives and 50% mastery on one objective. With regard to the student's targeted behavioral goals (on-task behavior and extinguishing ***), the student demonstrated 40% and 25% mastery respectively, an increase of 5% and 10% over the school year. The criterion for each of the student's IEP goals was 60% mastery. R54-597-613. While there was some progress on the student's academic goals, there was no mastery, and there was no meaningful progression in the student's behavioral goals.

15. At the end of the 2010-2011 school year and at the beginning of the 2011-2012 school year, the parent discussed her concerns with the teacher that the student had not mastered any of student's academic, social skills or behavioral goals. The teacher told the parent he expected the student could master the goals within six weeks. RR132, 155, 166; RR418-420.

16. The District failed to provide the student speech services in the Spring of the 2010-2011 school year due to staffing issues. On April 29, 2011, the ARD Committee met and determined that the District would provide 14 hours of compensatory speech services for the student during the summer of 2011. R56. The compensatory speech was not completed and 7 hours were left owing to the student as of the September 2011 ARD Committee meeting. R59-750.

17. The parent met with the teacher over the summer and discussed her concerns about the student's lack of mastery. According to the parent, the teacher expressed concern about the increased class size for the 2011-2012 school year. RR132-133. Although the teacher denied expressing this concern to her during the summer, he acknowledged that he had anticipated difficulties for the student with the increased class size. RR406-407. I find the parent's testimony regarding the teacher's expression of concern over the impact of the classroom size to be credible. I also find that the teacher minimized the anticipated impact of the change in classroom size during his testimony.

18. At the beginning of the 2011-2012 school year, there was an increase in classroom size from *** students to 1 teacher, to *** students to 1 teacher. The parent began communicating her concerns with the teacher at the beginning of the school year. On one occasion, the parent

reported that when she picked the student up, she observed chaos and the student ***. The aide reportedly was not able to redirect the student and told the parent student had been *** all day. According to the parent, the aide told the parent she used timeout with the student, which was not an intervention that is successful with the student and not on student's BIP. At the time, the student was not able to remain in student's seat for 5 instructional minutes. RR136-138; P8-32; P56-1. The aide testified that she disagreed with the parent's characterization of the event, and stated that student would attempt to ***, but was not able due to ***. She further testified that due to the number of incidents with the student and "handling student," it was difficult to recall all of them in detail, but denied the incident as having occurred as reported by the parent. RR546-547. The two individuals recall the incident differently, but the testimony from both confirms that as early as August of 2012, the student was *** and exhibiting increased behavioral incidents.

19. During the course of the school year, the parent reported that she observed that the aides were not properly implementing the student's behavior plan. For example, they would negatively reinforce behaviors by providing the student with a token or reward to stop undesirable behaviors rather than using the tokens to reward desirable behavior. P124; RR136-138, 184.

20. The parent communicated with the teacher and other District personnel regarding the student's behavior, including self-injurious behaviors, concerns that the aides were not properly implementing the student's behavior plan and about training for the aides. P14; P15; 17; P18; P24.

21. The parent also expressed concerns to the principal and requested training information for the aides prior to the annual ARD meeting in September, 2011. P78; RR142-143.

22. The ARD Committee convened for the student's Annual ARD on September 14, 2011 to develop the student's goals and objectives for student's *** grade year. The majority of the goals and objectives are repeated from the prior school year. *Compare* P54 and P59.⁴ The teacher acknowledged that the goals and objectives were repeated and that the baseline data for them was derived from the student's level of progress at the end of the prior school year. RR418-420. Although the District contends that the IEP goals are actually different because they are tied to *** grade curriculum rather than *** grade curriculum, the student did not master the same goals the previous year, the social skills and behavior goals were repeated, and the teacher's testimony demonstrates that the teacher's intent was to continue the same goals and objectives.

23. The Autism supplement eliminates the staff to student grouping ratio, noting that the student did not require a specific ratio to achieve social/behavioral progress. R-58-707-708. However, this recommendation is inconsistent with the ARD Committee's determination that the student has an intense need for structure and low staff to student ratio. R58-717. According to the parent and District personnel, the elimination of a specified student to staff grouping ratio was due to

⁴ Petitioners in their argument complain of the measurability of the IEP goals. However, Petitioners failed to plead for any relief based on the measurability of the goals, so the complaint is waived. However, the fact that many of the goals are repeated is relevant to the issue of academic and behavioral progress.

a software error. Upon the parent's request, the ARD Committee reconvened on September 28, 2011. Although the ARD Committee then determined that the student does require a specified staff to student ratio as part of student's IEP, the ARD Committee did not include a specified staff to student ratio in the IEP. R59-748-750. The parent's BCBA also testified that the student required a very low staff to student ratio in order to manage behaviors that interfered with learning. RR683-684.

24. The District's progress reports specific to the student's IEP goals do not reflect meaningful progress and there are no progress reports after February 17, 2012. R-64; R-16; P21; P28. There are no progress reports included in the student's ESY IEP on May 23, 2102, even though progress on IEP goals was a factor in determining the eligibility for and the nature of the student's ESY. R63. This was a departure from the practice at other ARD meetings to include IEP progress reports specific to each goal and objective in the IEP. See R54, R57. The parent testified credibly that she did not receive the progress reports and that the teacher stopped providing regular communication logs to her during the course of the school year.

25. The progress reports on their face reflect that the student is "progressing" or "maintaining with regard to student's IEP goals and objectives. R69. However, data collection sheets during the same time frame show 40% mastery in math, when the student's baseline at the beginning of the school year was 30% on one math objective and 40% on three objectives. The social skills data sheets show no increase in mastery from the beginning of the school year to February 17, 2012, when the average for the goal was 40%. The student's baseline for student's social skills goals at the beginning of the school year was also 40%. P21-4-7; R59-737-742. Although the data sheet shows an increase in mastery on some language arts goals from the baseline at the beginning of the school year, the data sheet only tracks two of the objectives from student's IEP. There are no data sheets in the record for reading, social studies or science. P21. Additionally, although there are three measurable objectives for reading that specifically address the student's weakness in reading comprehension, only one of the objectives relating to "wh" questions is measured on the progress report. R69; R58. There are also no social skills progress reports. R69. The parents asked the teacher during an ARD Committee meeting how progress was being measured when they expressed concerns about student's lack of progress. R62-799. This ARD Committee document contains no progress reports or data, although the minutes reflect a discussion of the student's difficulty with reading comprehension and math. The sparse nature of the progress reports and data collection sheets confirms the parent's representation that the district was not providing information to her about the student's progress, and in fact, calls into question whether progress was being tracked at all in a systematic and reliable manner.

26. The data sheets and the progress reports in evidence suggest that the teacher tracked progress for a limited period of time, ending in February of 2012. P21; R59. According to the special education coordinator, the District began using a software program, "Easy IEP" to track data. The software program did not function properly until the end of the school year, so the teacher used the data collection sheets. RR968-969. The teacher testified that he maintained data sheets on a

weekly basis, yet the record does not support this testimony.⁵ Additionally, the teacher could not explain his method of interpreting the data or calculating progress when questioned about the data sheets. RR445, 533-34. Regardless of the method used, the data collection and progress reports are wholly inadequate. The District asserts that the student's passing grades during this same time frame are evidence of student's progress. R68. However, there is minimal confidence in the grades reported given the data, the progress reports, and the teacher's testimony.

27. During the Fall and Spring of the 2011-2012 school year, the parents asked the teacher and other district personnel for data on the student's off-task behavior. RR213-215; P56-14, 20, 41,42. They also asked for data collection regarding the student's self-injurious behaviors at the January 31, 2012 ARD Committee meeting. R62-799 The parent testified that as of the May 23, 2012, ARD Committee meeting, the district had failed to provide her with progress reports or data sheets. RR213-216, 228. When the parent requested the data from the teacher, he told her that the school's LSSP had the data; when the mother contacted the LSSP, she referred the parent back to the teacher. There was also confusion among school personnel as to which behavior the teacher was to track - off-task (which had been requested in the Fall) or self-injurious (which was requested in the Spring). RR217-218, 228.

28. It is undisputed that there was an increase in the student's self-injurious and aggressive behaviors during the 2011-2012 school year. The teacher attributed the behaviors as being in response to frustration with classroom tasks. RR428-430. According to the parent's private BCBA, the student was exhibiting behaviors they had not seen in the home and that had been extinguished through her work with student previously in a clinic setting. RR685-686. Although the principal testified that he believed the student made progress during the 2011-2012 school year, his testimony regarding the student's behavior was inconsistent with the teacher's or the findings of the Functional Behavior Assessment, which the principal acknowledged he had not seen. The principal either minimized the student's behaviors or had insufficient interaction with the student to be reliable in his opinion. RR622-623; RR636-643.

29. According to the parent, during the May 23, 2012 ARD Committee meeting, the teacher initially stated that the student had not mastered any of student's IEP goals during the school year. RR225. The teacher acknowledged that he initially told the ARD Committee that the student had not mastered the goals. RR459. He testified that the student did not regress, but student did not master the goals. RR460.

30. The teacher clarified that because the student was not mastering the goals as adopted by the ARD Committee, he unilaterally lowered the criteria so he could. RR460-61. For example, one of the student's math objectives was that the student would be able to compare and order whole numbers up to 20, less than, greater than or equal to, using sets of concrete objects and pictorial models, three out of five trials. P13-7. Because the student was not able to master the goal approved

⁵ The data collection sheets are exclusively subject to the custody and control of the District, and the District's own exhibits do not contain any further data sheets.

by the ARD Committee, the teacher unilaterally changed the goal to measuring the student's ability to order and compare whole numbers up to 10. P21-1; RR461-462. According to the data sheet, as of February the student was at a 40% mastery of the *modified* goal, even though student was at a 40% mastery of the goal adopted by the ARD committee at the beginning of the year. The data sheet did not track the math objectives for addition and subtraction, but tracked progress for the objective of telling time, which was not an objective adopted by the ARD Committee for the student's math goals. P21-1. The data collection sheet for the math goal is not consistent with the student's IEP or the progress reports.

31. On May 23, 2011, the District proposed an ESY program for the student during the Summer of 2011 to continue working on the student's academic and behavioral goals. R63. The proposed placement was to have the same ratio as the SLC classroom, approximately *** students. During the ARD meeting, the parents inquired about the student's progress toward mastery of student's IEP goals. The teacher initially said student had not mastered student's IEP goals, but after a break and after speaking with other school personnel, he changed his statement and told the parents that three objectives had been mastered. R63-823; RR459-465. The teacher explained that he had not been prepared to discuss IEP progress at the ARD meeting and was not able to provide the parents with data regarding the student's progress. RR459. The teacher also testified that he felt student still had time to master the goals because the annual ARD meeting would not be until the following September. However, this ignores the fact that the discussion was occurring at the *end* of the school year. The teacher's testimony was not credible on this issue. It is more reasonable to conclude that the teacher's first response that the student was not mastering student's goals and objectives was the accurate response given all the evidence. The parents rejected the placement, requesting a private ABA program.

32. The parents requested a recreational therapy evaluation during the September, 2011 ARD Committee meeting. On December 8, 2011, the District's autism team leader acknowledged the request but informed the parent the request would have to be referred to the District's program specialist. R3-1362. On February 13, 2012, the parents made a written request for a Functional Behavior Assessment and OT Sensory Profile. R3-1101. On April 3, 2012, the District's LSSP sent the FBA consent form to the parent by placing it in the student's backpack, after receiving an email from the parent about the status. R3-1383-1384. Neither evaluation was completed by the May 23, 2012 ARD Committee meeting. The Functional Behavior Assessment was completed on June 4, 2012; the recreational therapy evaluation was completed after the ARD meeting on May 29, 2012. R9; P79.

33. The recreational therapy evaluation included recommendations for strategies and goals to address the student's social communication deficits. R9. The FBA makes recommendations for strategies to address the student's behavior and new behavioral goals. P79.

34. The private summer program at *** was administered by a behavior tutor, ***, under the supervision of the parents' private BCBA, ***. *** also currently works with the student as student's private in-home behavior specialist. RR759. During the summer, *** worked with the

student on the targeted behavioral goals - ***, eloping, grabbing and yelling. The tutor also worked with the student on social skills, and academics. P75. According to *** the behavioral issues occurred with such frequency, that they interfered with academics, and occurred with greater frequency in the school setting than in the home program. P75-1. During the summer, changes were made to the interventions used with the student, and this resulted in an overall decline in the interfering behaviors. RR749; 783; P75-2.

35. *** explained the data collected regarding the student's skill acquisition, comparing skills the student had mastered prior to enrolling full-time in HISD and current. The skills were measured using the ABLLS, an instrument used to measure skills in ABA programs. According to the data, the student's acquisition of skills after entering HISD was minimal. P74. The ABLLS measured progress in many areas, including receptive language, labeling, spontaneous vocalizations, syntax and grammar (an area where the student exhibited gains), social interaction, group instruction, reading, math, writing, spelling, gross and fine motor skills.

36. The student enrolled in HISD at the beginning of the 2012-2013 school year, but the parents gave notice approximately one week later of their intent to enroll student in the private placement. A September 4, 2012, email was referenced in HISD's Response to Petitioner's Due Process Complaint in which the parents' attorney informed the District's attorney that the parents were withdrawing the student from HISD and enrolling student in a private school, seeking reimbursement from HISD. (*See Response to Petitioner's Due Process Complaint*). An email exchange between the parent and the teacher on September 14, 2012, makes it very clear that the District was aware of the parent's intent to provide 10 days' notice to the District of their intent to withdraw the student and enroll student in a private school at public expense. R3-1309. In fact, in an email dated September 6, 2012 from the school's attorney to the special education department chair, he instructed the District to pursue the FIE and stated that the parents' refusal to cooperate would be a basis for denying reimbursement. P57-1. Additionally, the parents participated in the student's annual ARD on October 10, 2012, and requested private placement, which was refused by the District. R65; R66. Based on a preponderance of the credible evidence, I find that the District was on notice September 4, 2012, of the parents' intent to withdraw the student and enroll student in private school at public expense.

37. The IEP in place at the beginning of the school year was the IEP adopted in September, 2011. I find based on a preponderance of the credible evidence, that the student did not make meaningful progress under that IEP and the school's program for the 2011-2012 school year through the date of the student's withdrawal was not appropriate.

38. On October 10, 2012, the ARD Committee convened the student's annual ARD after the student had withdrawn from the District. The parents and their attorney participated in the ARD meeting. The ARD Committee reviewed the FIE and additional assessments and developed new goals and objectives based on the student's *** grade TEKS. The ARD Committee repeated one social skills goal relating to turn taking, and that was appropriate given the student's social skills deficits. Additional behavioral goals were adopted based on the recommendations from the FBA.

The ARD Committee also added specific speech therapy goals, including objectives pertaining to pragmatic speech. Although the IEP does not include a specified staff to student ratio, when the student required one in previous years, it is a procedural error that is not a *per se* denial of a FAPE. The ARD Committee also adopted accommodations for individual and small group administration. R65-877-887. These accommodations were not included in the 2011-2012 IEP.

39. During the relevant time period, the student arrived at school late *** per week and left early *** per week for private therapy. RR481. During this same time frame, the student's speech therapy consisted of 30 minutes per week addressing the student's IEP goals in the classroom and campus settings (integrated into the student's school day), as well as indirect services such as consultation and observation. There were no additional speech goals.⁶ R58-720. Additionally, the student's occupational therapy was provided on an integrated basis to support classroom personnel. R58-714. In other words, the District's related services did not result in removing the student from the classroom to work on additional goals. The student's late or early arrival due to private therapies was never discussed at an ARD Committee meeting during the 2011-2012 school year. *See* R58-63. The parent testified, credibly, that the issue of the student's removal from the classroom due to private therapy was never mentioned to him by the teacher or any other school personnel or at any ARD meeting. RR1195. I further find that the testimony of District personnel regarding this issue is not credible under the circumstances. Had removal for private therapy had a negative impact on the student's educational program, it is reasonable to conclude that it would have been addressed during an ARD Committee meeting or by the teacher during the 2011-2012 school year. Based on a totality of the circumstances and a preponderance of the credible evidence, I find that the child's removal from the classroom for private therapy did not interfere with student's progress towards student's academic or behavioral goals. I further find that student's participation in private therapy can and should be accommodated in the same manner as pull-out related services.⁷

40. The student's private placement (the *** classroom of ***) is located on the campus of ***. The *** grade class of *** consists of 18-20 typically developing peers, while the student's *** classroom provides the student with special education services, including an ABA program. RR1199-1200. The student remains in the *** classroom to work on academic and behavioral goals, with inclusion with typically developing peers during lunch, computer, art, library, *** and physical education. RR803, 1200. The goal of the program is to gradually move the student to the general education classroom exclusively, based on the student's progress. RR1199-1201. Although the student works for approximately 1-1/2 hours during the mornings in the *** classroom on a 1:1 basis on academic and behavioral skills, student also spends inclusion time during the latter part of the morning in one of the above classes, lunch and ***. During the afternoon, the student returns to the classroom for approximately 30 minutes of 1:1 training, and then participates in rotations, working on social skills, appropriate computer skills, and academics. The academic curriculum is the curriculum used by ***, modified as required for the student by a certified teacher. RR1218-1219.

⁶ Petitioners did not raise the issue of the adequacy of the speech or occupational therapy services.

⁷ Schools shall excuse the temporary absence of a student with autism spectrum disorder to receive a generally recognized service, including ABA, speech or occupational therapy. Tex. Ed. Code. §25.087(b-3).

Related services are provided privately by the parents. RR1220-1221. According to the student's special education teacher at ***, the student is progressing academically and has mastered 58 goals within student's first 8 weeks in the program. RR1211. The teacher characterized the program as an equal partnership between working on academic skills and behavior skills based on the ABLLS. RR1214, 1217. The program does not consist of exclusively working with the student on discrete trials based on ABLLS data. RR1217-1218.

41. There is collaboration between the private placement and the student's private home ABA program. For example, during the Fall of 2012, the BCBA emailed the teacher at *** when she noticed that the student was having difficulty in math with the home program team. The BCBA attributed this to differences in strategies used in the two settings. The teacher's response was not a defense of her own strategy, but an offer to coordinate their approaches to provide consistency for the student, and she provided information to the BCBA. She also offered to integrate behavior management strategies that were successful in the home program. *See* P-59-12-13; RR705-707. This type of direct collaboration is in contrast to the lack of collaboration between the parents' home providers and the school during the 2011-2012 school year. The District denied the parent's request for direct consultation between their BCBA and campus staff. Rather, the District proposed to have the private BCBA meet with the District's consultant with the ***, who would then visit the campus and share information with the classroom staff. P56-18-23; RR619-621.

42. The BCBA who consults with ***, ***, continually reviews student's progress and adjusts the behavior program when necessary. The most recent behavior program was revised in December, 2012. P60; RR798-801. The student's behavior program requires frequent adjustments because of the nature of student's interfering behaviors. RR802. At the time of the hearing, the behaviors required a more restrictive setting for the student with minimal inclusion time. RR803. The goal of the program is to gradually move the student to a more naturalized inclusion setting. The school accomplishes this by having a shadow track the student's behavior and progress as student participates in the inclusion setting, and then they work on the skills in problem areas, as well as behavioral and academic goals, when student returns to the *** classroom. RR804-805.

43. *** reviewed the ABLLS completed by staff at *** on September 26, 2012, soon after student's enrollment, and explained the student's behavior as of the date of student's enrollment on September ***, 2012. P49; P62. At the time the student enrolled, the student exhibited behaviors that interfered with education, including physical aggression toward others, self, and the environment, verbal aggression, poor attending skills, elopement and self-stimulatory behaviors. P62-1; RR819. *** had last seen these behaviors prior to student's enrollment in HISD, when student was in a private program. RR819. According to ***, the student has not developed new negative behaviors while at ***. RR820. The behavior program being implemented has not yet eliminated the behaviors, but it is decreasing them. RR823.

44. In comparing the ABLLS data from September 26, 2012 (P49), and the ABLLS administered in January, 2013 (P73), the student gained an average of 14 skills per month since student's enrollment in the school. RR838-840; P49; P73.

45. The District called several witnesses to testify about the student's progress. The District's school psychologist observed the student on one occasion. RR885. The District's program specialist testified that observed the student in the classroom on multiple occasions, frequently in a group, but sometimes with the teacher working 1:1. RR949. Although she testified that she went to the campus monthly, she acknowledged on cross-examination that during the 2010-2011 school year, she never went to specifically observe the student. During the 2011-2012 school year, she visited the campus weekly, but acknowledged most visits were brief, frequently observing through the window. The witness could not recall any specific visits and observations of the student. RR976-981. The instructional facilitator for autism observed the student once. RR1043. The itinerant autism teacher also had limited specific recollection regarding the student or her discussions with the teacher, yet based her opinion regarding student's progress on the same. RR-1153-1155. Therefore, I find that the testimony of these witnesses provides limited insight into the student's progress and program because of their limited involvement and afford their testimony little weight.

46. I find, based on a preponderance of the credible evidence, that the District's program at the time the Parents withdrew the student was not appropriate. I further find, based on a preponderance of the credible evidence, that the student has made behavioral and academic progress while in student's private placement and that the placement is appropriate.

DISCUSSION

The educational program offered by the school district is presumed to be appropriate. Petitioner, as the party challenging the educational program bears the burden of proof in showing why the IEP is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). *Schaffer v. Weast*, 126 S.Ct. 528 (2005). This includes the burden of proof with regard to harm or a deprivation of educational benefit. The law does not require that the student's educational potential be optimal or "maximized." Rather, it must enable the student to receive some educational benefit from student's program.

The United States Supreme Court established a two-prong test for determining whether a school district has provided a free appropriate public education. The first inquiry is whether the school district complied with IDEIA's procedural requirements. The second inquiry is whether the student's IEP is reasonably calculated to confer an educational benefit. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S.Ct. 3034 (1982). An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Id.*; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

1. Procedural Sufficiency

IDEIA establishes certain procedural requirements for formulating and implementing a

child's IEP. Procedural flaws do not automatically require a finding of a denial of a free appropriate public education. However, procedural inadequacies that impede the child's right to a FAPE, result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the development of the IEP result in the denial of a free appropriate public education." 20 USC 1415 (f)(3)(E); 34 CFR § 300.513(a)(2); *Adam J. v. Keller ISD*, 328 F. 3d 804 (5th Cir. 2003). In this case, the District and the ARD Committee committed several procedural errors that resulted in a loss of educational benefit to the child and interfered with the parent's meaningful participation in the development of the student's program.

Staff to Student Ratio

The student's IEP for the 2010-2011 school included a specified staff to student ratio based on the student's individualized need for high structure and a low staff to student ratio. The IEP for the 2011-2012 school year does not contain a specified ratio, even though the IEP includes a statement that one is required. R59-748-750. This error in the IEP occurred after the need for a specified staff to student ratio was removed altogether during the first ARD meeting for the school year, and that removal was attributed to a software error.

In Texas, an Autism Supplement must be completed for a student with Autism and shall specify whether the student requires a specified staff to student ratio in order to achieve social and behavioral progress. 19 Tex. Admin. Code §89.1055(e)(7). In this case, although the teacher and the ARD Committee agreed that the student requires a specified staff to student ratio, the ARD Committee failed to specify that ratio in the student's 2011-2012 IEP. Additionally, the teacher acknowledged that there was no change in the student's needs between the 2010-2011 and 2011-2012 school years, other than a campus level determination regarding class size (which is different from a ratio based on the student's individual needs). The only change that appears to have occurred between the 2010-2011 and 2011-2012 school years was the campus decision regarding the size of the SLC classroom.

The failure to include a specified staff to student grouping ratio affected the student's behavioral and academic progress, causing a deprivation of educational benefit, and impeded the student's right to a FAPE. 34 CFR § 300.513(a)(2). The parent began expressing concern about the class size and the effect on the student from the beginning of the school year. According to the parent and the teacher, the student began exhibiting new behaviors that interfered with learning such as off-task behavior, eloping, screaming outbursts, tantrums, aggressive and self-injurious behaviors. RR168-174; 183. The teacher also testified that during the 2011-2012 school year, the student began to exhibit these behaviors and that student did not exhibit the behaviors previously. RR429-431. Other behaviors that interfered with the student's learning included off-task and self-stimulating behaviors that had previously occurred, such as not staying in student's seat, low attention span and ***, but student began to engage in more aggressive and self-injurious behaviors. The fact that these same behaviors were evident when the student first enrolled in the private program confirms the parent's and the teacher's testimony that the behaviors existed and interfered with the student's learning. P-62.

Progress Reports and Evaluation Requests

Additionally, although the parent requested data collection regarding off-task behaviors in the Fall, and then in January regarding self-injurious behaviors, it does not appear based on the record that the data collection occurred in earnest until the end of the school year during the completion of the Functional Behavior Assessment. The teacher stopped communicating with the parent through a daily communication log in the Fall of the school year. RR188. Although a weekly communication log was included as a requirement under the student's previous year IEP, it was eliminated in 2011. R54-632; R-58. It is reasonable to conclude from the evidence, that the class size affected the teacher's ability to collect data and communicate with the parent regarding the student's progress.

The parent testified that she no longer received progress reports specific to the student's IEP goals and objectives as required in 34 CFR 300.320(a)(3)(ii). The evidence in this case supports the parent's testimony. The progress reports and the data collection sheets offered into evidence were inconsistent with each other, did not always track the student's IEP goals, the teacher was unable to articulate the manner in which he interpreted the data, and the special education coordinator acknowledged that the software program utilized by the teacher did not work properly until the end of the school year. The obligation on the part of the District to provide progress reports to the parent concurrent with the issuance of report cards is a procedural requirement. Although the record shows ongoing email communication between the parent and the teacher in which she explains her concerns, defensive email responses from District personnel and the control of information to the parent are not a substitute for providing the progress reports to the parent, which in this case, reflect a lack of progress. Although the parent participated in every ARD Committee meeting and communicated frequently with many personnel in the District, she was not provided progress reports that are vital to the parent's meaningful opportunity to participate in the development of the student's program. 34 CFR § 300.513(a)(2).

The parent requested a Recreation Therapy evaluation in September of 2011 that was not completed until May 29, 2012. The recreational therapy evaluation provides recommendations for the implementation of recreational therapy skills due to the student's social communication deficits. The evaluator made specific recommendations regarding the removal of technology devices during outside time, after observing staff reward the student with ***. R9. The observations of the evaluator were consistent with the parent's concern that *** (a high reinforce) were being used improperly during the school year.

The parent also requested a Functional Behavior Assessment in February 2012, which was not completed until June 4, 2012. The District did not obtain consent until April 2012. The FBA made recommendations for behavioral goals and positive reinforcement strategies that were a departure from goals used during the school year. P79. Not only did the teacher not have the benefit of the assessment during the school year, it was not available to the parent at the May 23, 2012 ARD Committee meeting when the purpose of the meeting was to discuss the student's behavioral goals to be targeted during ESY. R59.

If a District refuses to conduct an evaluation at the request of a parent, it must provide prior

written notice of its refusal. 34 CFR 300.503(a)(2). In this case, the District did not refuse the evaluation, but the unreasonable delay in obtaining consent and conducting the evaluations deprived the parties of timely and necessary information regarding the student and student's behavioral and social needs. This failure impeded the student's right to a FAPE and deprived the parent necessary information regarding the student.

2. Substantive Sufficiency

In this dispute, Petitioner seeks reimbursement of private school placement and bears the additional burden to prove the appropriateness of the private school placement. The IDEA does not categorically prohibit reimbursement of private school placement costs even if the student has not previously received special education and related services from the public school.⁸

If parents unilaterally withdraw an eligible student with disabilities from a public school district and place the student into a private school, the public school may be ordered to reimburse the parents for private school expenses only if the parents establish that (1) the public school's educational program was inappropriate under IDEA, and (2) the private placement by the parents was appropriate. A parental private placement may be found appropriate even if it does not meet the state standards that apply to education provided by a public school. *Burlington School Committee v. Dept. of Education*, 471 U.S. 359, 370 (1985); 34 U.S.C. §300.148(c).

An analysis of this case, then, begins with whether the District's program in effect at the time of the parent's unilateral placement in the Summer and Fall of 2102 was appropriate.

In evaluating whether an educational program is reasonably calculated to confer an educational benefit, the Fifth Circuit Court of Appeals has identified four factors to consider:

1. Is the program individualized on the basis of the student's assessment and performance?
2. Is the program administered in the least restrictive environment?
3. Are the services provided in a coordinated and collaborative manner by the key stakeholders?
4. Are positive academic and nonacademic benefits demonstrated?

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245 (5th Cir 1997); cert. denied, 522 U.S. 1047 (1998).

A. Is the program individualized on the basis of the student's assessment and performance?

⁸ Both parties cite to *Richardson ISD v. Leah Z.*, 580 F.3d 286 (5th Cir. 2009) as the controlling standard for private placement reimbursement. However, the standard enunciated in *Leah Z.* is applicable to residential placement cases. This case does not involve residential placement, so the standard in *Burlington, supra* is applicable.

2011-2012 School Year

In this case, the Petitioners' primary complaint is that the student's academic and behavioral progress suffered with the change in the staff to student ratio in the student's SLC placement. During the student's 2010-2011 school year the ARD Committee determined that the following specified staff to student ratio was required to be implemented with the student's IEP:

Acquisition of new skills	From 1:1 to 2:7
Fluency rate	From 1:1 to 3:5
Maintenance	From 1:2 to 3:5
Generalization	From 2:7 to 2:20
Transitions	From 1:1 to 3:5

This ratio was initially removed from the student's IEP for the 2011-2012 school year. Then, when the ARD Committee reconvened and determined that a specified ratio was required, it failed to include a specified ratio in the student's IEP. The ratio was removed altogether for the 2012-2013 school year. The decision to remove the ratio was not based on the student's assessment and performance. It was predetermined based on campus needs. In fact, the teacher acknowledged that the student requires a 1:1 ratio for acquisition of new skills (not the upper range of 2:7). RR501. Although the teacher testified that the 1:1 ratio was available in his class, there was no requirement based on the IEP that the ratio be implemented, and under the totality of the circumstances, it does not appear to have been consistently implemented due to the student's lack of progress. Additionally, maintenance, fluency and transitions required no more than a 3:5 ratio. It is undisputed that the SLC classroom had 2 aides, 1 teacher and *** students, or a *** ratio. The makeup of the classroom made it impossible for this ratio to be implemented, even if some of the students were away from the class at different times of the day. It is important to distinguish between class size and an appropriate staff to student grouping ratio. The former is a campus decision. The latter is a decision that must be based on the student's individualized needs and can be addressed by the level of support to the classroom. The staff to student ratio (or the failure to specify one) affected the student's progress. Based on the data collection and the progress reports, the student did not acquire new skills. In fact, on most objectives student was at same mastery level in February, 2012 as student was at the beginning of the school year. By May 23, 2012, student had not made meaningful progress towards mastery of student's goals. The teacher characterized it as not regressing. Remaining in the same place is not meaningful progress. It is not even *de minimis* progress.

When questioned about whether he had concerns about the increase in class size in advance of the 2011-2012 school year, the teacher acknowledged that *** students was "quite a bit much" for the nature of the class. RR406-407. The teacher testified that the student's needs with respect to a staff to student ratio were no different during the 2011-2012 school year from student's needs during the prior school year. RR426. The principal testified that the staff-to-student ratio was a campus based decision based on what is appropriate for all students in an SLC classroom in general. RR575-579. The only change that appears to have occurred between the 2010-2011 and 2011-2012 school

years was the campus decision regarding the size of the SLC classroom.⁹ The decision regarding the student's specified staff to student grouping ratio was not individualized to the student's needs.

B. *Is the program administered in the least restrictive environment?*

The student's placement for the 2011-2012 and 2012-2013 school years was in a self-contained classroom, or Structured Learning Classroom (SLC), with general education placement one time per week for art, music and physical education, and two times per week for library. R58. The student had minimal ability to function in the general education setting. For example, the ARD Committee convened early in the school year to revise the student's schedule to remove student from *** due to increased elopement during ***. R60-766. The student could not participate with the other students so student's schedule was changed to provide additional *** (although this could be inappropriate given the potential for negative reinforcement). The student required a highly structured environment, so a self-contained placement was not overly restrictive. There is no dispute that the student requires a self-contained classroom with high structure. However, the least restrictive environment must be the least restrictive environment *appropriate* for the student. By failing to implement a specified staff to student grouping ratio, the District failed to provide an appropriate placement.

C. *Are the services provided in a coordinated and collaborative manner by the key stakeholders?*

The parents and the District have experienced conflict and a lack of mutual trust since the student's initial ARD Committee meeting at the age of ***, with the areas of conflict being delays in evaluation and services, failure to provide speech services, parent requests for collaboration with private service providers, and the parent's desire to maintain the student in a private home ABA program at District expense. If the only area of conflict was the parent's desire to maintain a private ABA program for the student at district expense, the District's assertion that the ultimate dispute is one of educational methodology might be persuasive. However, based on the totality of the record, it is clear that the parents have had many legitimate complaints with HISD.

When the parents first made a referral to special education when the student was *** years of age, the District delayed the assessment and convening the initial ARD Committee meeting for approximately 5 months, resulting in a denial of services and compensatory speech hours from the District. R37-307-310. At that time, the parents requested that the District fund their private ABA program. The District offered *** program, with 1.5 hours of speech therapy per week. When questioned by the parents as to the rationale for the amount of speech therapy, District personnel explained that the amount was a "general time" offered but services (not frequency) would be individualized. The parents rejected the proposed placement but accepted itinerant speech services during the 2006-2007 school year.

When the student attended HISD *** beginning in the 2007-2008 school year, the student was owed compensatory services before the end of the semester. R40-373. In 2009, the District owed the parent reimbursement for transportation from the 2007-2008 school year. R46-498. In the

⁹ The ratio can be addressed with either placing the student in a smaller class or adding an aide to the larger class.

Fall of 2009, the District resisted the parent's requests to have the student's teacher trained by their private ABA therapist when collaboration with outside providers would have been warranted. When the parents requested an opportunity for their private therapist to observe in the classroom, the District denied the request, claiming that the observation would be against District policy. R49-574. Although there is no general entitlement for a parent or his or her representative to observe the student in the classroom, a general policy that absolutely denies that opportunity may affect the degree of collaboration among stakeholders. *See Letter to Mamas*, 41 IDELR 10 (OSEP 2004). Although the District may have reasonably denied the request to pay for the outside provider's observation and placed reasonable limitations on the campus visit, an absolute denial contributed to further deterioration of the relationship of the parties.

In 2007, a Request for Due Process resulted in resolution agreements in which the District authorized Independent Educational Evaluations for OT and PT, an in-home training assessment, and compensatory services. R82. In 2010, another resolution session resulted in the District agreeing to provide funding for the student's teacher to receive training from the private provider. R83-1059. Since the 2010-2011 school year, the District has frequently failed to provide speech services, resulting in further compensatory speech hours.

However, fault in the difficult relationship between the parties does not lie solely with the District. The parent often has unreasonable expectations about classroom observations, resulting in limitations being placed on those visits. R47-505; R48-515; R49-564. The parent requested frequent ARD Committee meetings, most of which have been attended by legal counsel for the district and advocates for the parents and have been contentious. The mother is persistent in emailing her concerns to campus and central administration personnel, and has filed numerous campus and TEA complaints (some of which were justified and some of which were not). The parents can reasonably be perceived by District personnel as micromanaging. District personnel can reasonably be perceived as defensive and dismissive of the parents. While the District has made efforts to respond to parent emails and include the parents in drafting goals and objectives for the student, the cycle of communication between the parents and the District has become defensive and dysfunctional, with meaningful communication about the student's needs being overlooked in favor of the parties defending their respective positions.

During the 2011-2012 school year, the parent requested data collection regarding off-task behaviors in the Fall, and then in January regarding self-injurious behaviors. However, it does not appear based on the record that the data collection occurred in earnest until the end of the school year during the completion of the Functional Behavior Assessment. Additionally, the teacher stopped communicating with the parent through a communication log in the Fall of the school year. RR188. Although a weekly communication log was included as a requirement under the student's previous year IEP, it was eliminated in 2011. R54-632; R-58. It is reasonable to conclude from the evidence, that the class size affected the teacher's ability to collect data and communicate with the parent regarding the student's progress and this negatively impacted the collaboration among key stakeholders in the student's education.

Following the May 23, 2012, ARD Committee meeting, the parent requested an opportunity to visit and observe the proposed placement for the upcoming school year. Her request was denied by the school counselor, although the school principal eventually sent an email with the statement “We need to make this happen.” P56-55-56. This email exchange is further evidence of the breakdown in collaboration among school personnel and the parents.

In sum, both parties have had legitimate complaints about each other. Ultimately, however, the parent’s complaints regarding the 2011-2012 school year stand alone as legitimate, notwithstanding the difficult history with the District. Based on the totality of the evidence, I find that the teacher failed to collect adequate data and failed to provide adequate progress notes regarding the student’s IEP goals and objectives. This failure, along with the decrease in communication between the teacher and the parent (and in fact, the control of communication by the District) shows a failure to collaborate with the parents as key stakeholders in the student’s educational program. Responding to ARD meeting requests and multiple emails does not equate with meaningful communication. Additionally, when the student began to exhibit negative behaviors that impeded student’s learning, the District refused to allow direct consultation between the classroom teacher and the student’s private BCBA with whom the teacher had previously consulted (and who the teacher acknowledged to be a valuable resource). Instead, the District insisted that the consultation with the professional with the most experience with the student be filtered through another contracted BCBA, who would then consult with staff and provide training. This evidences the District’s failure to provide services in a coordinated and collaborative manner with key stakeholders in the student’s educational program.

D. Are positive academic and nonacademic benefits demonstrated?

The parent began expressing concern about the class size and the effect on the student from the beginning of the school year. According to the parent and the teacher, the student began exhibiting new behaviors that interfered with learning such as off-task behavior, eloping, screaming outbursts, tantrums, aggressive and self-injurious behaviors. RR168-174; 183. In some instances, it led to the student being removed from the class. RR175. The teacher also testified that during the 2011-2012 school year, the student began to exhibit behaviors student did not previously exhibit, such as physical aggression and self-injurious behaviors ***. RR429-431. According to the parent, once the student exhibits undesirable behaviors in one setting, student exhibits them in other settings and it becomes difficult to extinguish them. Other behaviors that interfered with the student’s learning included off-task and self-stimulating behaviors that had previously occurred, such as not staying in student’s seat, low attention span and ***, but student began to engage in more aggressive and self-injurious behaviors. The student ***, and would be more aggressive toward the teacher. RR189-190. The progress reports admitted in evidence reflect a lack of meaningful progress in the student’s academic and social and behavioral goals. R69. At the end of the 2011-2012 school year, the teacher initially told the parents that the student had not mastered student’s goals, but then changed his position after a break in the ARD meeting and discussion with a district administrator. R63-832; RR459-465. The teacher’s first statement is more reasonable in light of the data and the progress reports.

The District asserts that to the extent there is a lack of progress, it is the fault of the parents for interrupting the school day with private therapy two days a week. It is undisputed that the parents brought the student to school late one morning per week and pulled student out early one afternoon per week for private therapy. The school must excuse any temporary absences that occur for the purpose of a student with autism participating in recognized services such as ABA, speech or occupational therapy. Tex. Educ. Code § 25.087(b-3). As discussed in the findings of fact, the students' related services of speech and occupational therapy were minimal and provided in primarily an integrated manner in the classroom, working on the student's IEP goals. R58. The parent testified, credibly, that District personnel never raised the issue of the student's removal for private therapies, nor is it mentioned in any of the ARD Committee minutes during the 2011-2012 school year. RR1195. There is no credible evidence that the student's temporary absences to participate in private therapy services interfered with student's education. Participation in these services should be accommodated in the same manner as pull-out related services provided at school.

3. Appropriateness of Private School/Reimbursement and Relief

Reimbursement for private placement is dependent on the parent's proof that the District's program was inappropriate and the private placement is appropriate. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). The private placement may be appropriate even if it does not meet the standards applicable to public schools under IDEIA. 34 CFR §300.148(c). Both the parent's summer program and the private placement are appropriate.

It is important to consider both the private summer program and the private placement at *** together because of the collaboration among the providers. The summer program at *** addressed the student's behavior and academic needs. The purpose of ESY is to prevent severe or substantial regression that cannot be recouped within a reasonable period of time. 19 Tex. Admin. Code §89.1065. In this case, the ARD Committee proposed ESY primarily to address the student's social and behavioral skills, but also agreed to work on academic goals. However, as previously discussed, the parent's ability to evaluate the appropriateness of the school's program was directly impacted by the lack of data regarding the student's progress and the teachers inconsistency. The *** program addressed the student's behavioral and academic goals in an integrated manner, systematically tracked student's progress, and more importantly, adjusted the interventions so the behaviors could begin to diminish, preparing student for ***. The private tutor testified credibly that the student made progress during the summer.

The student's private placement at *** is also appropriate. The student's placement is in the *** Classroom located on the campus of ***. The placement provides the student with special education services, including an ABA program and academic instruction. The student's acquisition of new skills is developed on a 1:1 basis prior to moving the student into a general education setting with typically developing peers. In addition to the ABA program, the student receives academic instruction from a certified teacher using the curriculum used by ***, modified as appropriate for the

student. The student participates in inclusion classes with typically developing peers on a minimal basis currently until student's behaviors do not interfere with learning. However, at the time of the hearing, the student participated in general education art, library, ***, computer skills, ***, lunch and physical education, similar to the general education exposure provided by HISD. The school's BCBA testified that the student has gained an average of 14 skills per month since student's enrollment in the school, based on the ABLLS data. Additionally, they are able to decrease student's interfering behaviors and student has not developed new negative behaviors.¹⁰ The teacher and the parent also testified, credibly, that student has made academic gains, particularly in the area of reading comprehension and writing. There is collaboration between the staff at the private placement and the student's in-home provider wherein the student's behavior plan and academic strategies are coordinated to provide consistency for the student. This level of collaboration was lacking in HISD's program. In summary, I found the testimony of *** staff compelling with regard to the student's progress.

If parents unilaterally withdraw an eligible student with disabilities from a public school district and place the student into a private school, the public school may be ordered to reimburse the parents for private school expenses if the parents establish that (1) the public school did not make a FAPE available to the student *prior to* the student's enrollment in the private placement; and (2) the private placement by the parents was appropriate. *Burlington School Committee v. Dept. of Education*, 471 U.S. 359, 370 (1985); 34 CFR. §300.148(c). In this case, at the time the parents withdrew the student and enrolled student in the *** (summer program) and ***, the student's IEP was the 2011-2012 IEP that I find is not appropriate and denied the student a FAPE, and the placement proposed after the student's withdrawal, risked the same issues due to the lack of a specified staff to student ratio. In other words, there was not significant change in the perspective of the District regarding the student's needs for the 2012-2013 school year. Therefore, the parents were justified in withdrawing the student, enrolling student in the private placement, and seeking reimbursement. The parents entered into a contract with *** in September, 2012, which required payment of tuition for the full-year in 12 monthly installments. P68-4. In other words, at the time the District failed to provide a FAPE, the parent placed the child in an appropriate program and became contractually obligated for the entire year's tuition. However, the services at both *** and *** are partially paid for with insurance. The parents requested reimbursement for the cost of the private placement not covered by insurance. By requesting reimbursement of non-insured costs, and by failing to produce any evidence that such a reimbursement would result in a cost to the parents such as increased premiums or decreased lifetime benefits, the parents waive such complaints. IDEA and its requirements do not relieve insurers from an otherwise valid obligation to pay for services provided to an eligible student. 34 CFR § 300.103. The out-of-pocket costs requested as of the date of the hearing were ***.

Compensatory and prospective relief is available under IDEA as an equitable device to remedy substantive violations. *Burlington School Committee v. Department of Education*, 471 U.S.

¹⁰ There was testimony that the student had begun to exhibit *** behaviors, but the BCBA described this as isolated behavior.

359 (1985). IDEIA requires that relief be designed to ensure that the student is appropriately educated within the meaning of IDEA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9th Cir. 1994). The parent is entitled to limited prospective relief.

Because of the lack of collaboration with key stakeholders and *effective* communication with the parents tracking the student's progress, the prospective relief in this case must relate directly to those issues. The testimony from the student's private placement personnel clearly establishes that the student's ability to gain any meaningful benefit from student's educational program must be carefully planned and implemented, with a gradual transition to less restrictive settings. Therefore, as prospective relief, it is appropriate for the District to consult with the staff of *** to develop a transition for the student's return to HISD. It is also appropriate for the private provider, such as the parent's BCBA or the BCBA consultant for *** to provide training for the staff in HISD who will be implementing the student's plan.

The apparent lack of adequate progress reports during the 2011-2012 school year must also be remedied. The District is under an obligation under IDEIA to provide progress reports at least as frequently as it provides report cards for its general education population. The District shall provide regular progress reports concurrent with report cards to the parents and provide proof to TEA that it has done so by presenting receipts of the reports signed by the parents following each grading period for the 2013-2014 school year.

Because I am ordering the District to develop a transition plan for the student's return to the District in consultation with the private placement staff, I do not order prospective private placement as requested. However, an appropriate program will require collaboration with all stakeholders in the student's education. This will require the District to consult with and obtain information regarding the student's current needs from student's private placement provider(s).

CONCLUSIONS OF LAW

1. The student currently resides within the geographical boundaries of Houston ISD, a legally constituted independent school district within the State of Texas, and is entitled to special education services pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. §1400, et seq., as amended as a student with Autism.

2. The District's educational program is presumed to be appropriate. As the party challenging the educational program proposed by the district, Petitioner bears the burden of proof. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), aff'd 468 U.S. 883 (1984) and must show more than a de minimis deprivation of educational benefit. *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). Petitioner has met that burden.

3. The denial of FAPE in this case was more than de minimis. *Hendrick Hudson District Board of Educ. v. Rowley*, 458 U.S. 176 (1982); *Houston ISD v. Bobby R.*, 200 F.3d 341

(5th Cir. 2000); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). Procedural errors in this case also resulted in a denial of FAPE, impeded the student's access to a FAPE and impeded parental participation in the development of the student's educational program. 34 CFR §300.513(a)(2).

4. The unilateral private placement is appropriate. Petitioner is entitled to reimbursement from HISD for the parent's out-of-pocket costs associated with the the student's summer program and ***. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985).

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, I hereby **ORDER** that the relief sought by the Petitioner is hereby **GRANTED, in part**, as follows:

1. Respondent shall reimburse the parents for the out-of-pocket costs for the private program for the 2012-2013 school year, reduced by any sums paid by insurance.

2. Respondent shall reimburse the parents for the out-of-pocket costs for the private summer program provided to the student during the summer of 2012 which encompasses the same amount of time that would have been provided during the ESY program. The reimbursement rate shall be calculated by the hourly rate of the parents' private program multiplied by the number of hours in the proposed ESY program, reduced by any sums paid by insurance.

3. Respondent shall consult with the student's private providers and the private school to develop a transition plan for the student's return to HISD no sooner than the Fall of 2013. Respondent shall convene an ARD Committee meeting to develop the student's 2013-2014 IEP no later than the last instructional day of the 2012-2013 school year. The IEP shall provide for a specified staff to student ratio based on the students' current needs as determined by the ARD Committee members in consultation with the student's private service providers.

4. Respondent shall provide progress reports to the parents that track the student's IEP goals at a minimum frequency of once per grading period. Respondent shall provide proof to TEA that it has provided the progress reports to the parents by forwarding to TEA a receipt for each progress report signed by the parent within 10 school days of the last day of each grading period. This obligation of the District shall expire at the end of the 2013-2014 school year.

5. Respondent shall consult with the student's private BCBA or personnel from the private placement for the purpose of training all staff who work with the student. The initial training shall occur no later than 15 school days following the student's reenrollment in HISD, and shall be for a duration of at least one hour. Thereafter, Respondent shall allow the private provider a second access to the classroom to observe the student prior to the end of the first semester and provide an additional staff training of up to one hour during the student's second semester. Respondent is only required to provide this relief if the student enrolls during the 2013-2014 school year. The purpose

of the training is to aid the student and the staff in student's transition from the private placement to HISD.

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

NOTICE TO THE PARTIES

This Decision is final and is appealable to state or federal district court.

The District shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(p). The following must be provided to the Division of Federal and State Education Policy of the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating that the Decision has been implemented; or 2.) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

SIGNED this 5th day of April, 2013.

Sharon M. Ramage
Special Education Hearing Officer

SYNOPSIS

Issue No. 1: Whether the District's procedural errors resulted in a denial of FAPE.

Ruling: For the Parent. The failure to include the specified ratio resulted in impeding the student's access to a FAPE and a denial of educational benefit. The student's decline in progress coincided with an increase in the class size and the removal of the specified ratio. The decision to remove the ratio was based on campus concerns rather than the individual needs of the student. Additionally, the District failed to adequately track progress and provide progress reports to the parent.

Citation: 34 CFR §300.513(a)(2); 34 CFR §300.320(a)(3); 19 Tex. Admin. Code §89.1055(e)(7).

Issue No. 2: Whether the District's program during the 2011-2012 school year through the date of withdrawal of the student denied the student a FAPE.

Ruling: For the Parent. The totality of the evidence supports a finding that the student did not make meaningful progress on student's IEP goals, that the placement was not appropriate due to the lack of a specified staff to student ratio, and that the services were not provided in a collaborative manner by key stakeholders.

Citation: 34 CFR §300.17; 34 CFR §300.320

Issue No. 3: Whether the Parent is entitled to reimbursement for the private school program from HISD.

Ruling: For the Parent. The school's program was not appropriate at the time the parent withdrew the student, and the private program was appropriate.

Citation: 34 CFR §300.148(c).

Issue No. 4: Whether the District failed to provide a "highly qualified" teacher and staff for the student.

Ruling: For the District. Although the teacher had special education certification, and failed to complete the examination requirements to meet the "highly qualified" standard, that status is not a basis for determining whether the student was denied a FAPE.

Citation: 20 USC 1401(10)(D)