

STUDENT b/n/f PARENT	§	BEFORE A SPECIAL EDUCATION
v.	§	HEARING OFFICER FOR THE
COPPERAS COVE ISD	§	STATE OF TEXAS

**DECISION OF THE HEARING OFFICER**

**I. Statement of the Case**

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 (hereinafter referred to as "Respondent" or "School District"). Petitioner (hereinafter referred to as “Petitioner” or “Student”) filed a written request for a due process hearing which was received by the Texas Education Agency (“TEA”) on April 29, 2013, which was styled and docketed as shown above. Petitioner was represented at the Due Process Hearing by petitioner’s next friend, Parent, with the assistance of the Parent Advocate, Phyllis Nairn of Killeen, Texas. Respondent was represented by Attorney Jennifer M. Engdale of the law firm Powell & Leon LLP in Austin, Texas. The Due Process Hearing in this matter was held on Friday, June 7, 2013 in the Copperas Cove Independent School District’s Administrative Building located at 703 West Avenue D, Copperas Cove, Texas 76522. At the conclusion of the hearing, the parties agreed that the Decision of the Hearing Officer would be issued on or before Saturday, July 13, 2013.

The Prehearing Order in this case confirmed the issues of this Due Process Hearing. Petitioner’s Request for Special Education Due Process Hearing and Required Notice (“Complaint”) 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 did not provide Petitioner with a FAPE which resulted in substantive harm during the 2012-2013 school year. Respondent did not provide the following special education programming and related services:

- a. Social skills training, social stories, appropriate Individualized Education Program (“IEP”), social skills goals and objectives;
- b. Behavior intervention strategies, positive behavioral supports;
- c. Assistive Technology (AT”); and
- d. Personal safety so that Petitioner was not subject to bullying.

2. Respondent did not appropriately assess, address, monitor and intervene in social/behavioral needs which resulted in substantive educational harm and a violation of IDEA including multiple incidents of Petitioner being hurt physically due to bullying incidents; Respondent did not keep Petitioner safe from bullying.

3. Respondent did not provide an education to Petitioner that included the use of peer-reviewed scientifically based methods of instruction and strategies and interventions that address the unique educational needs of Petitioner. Respondent did not develop an appropriate plan and provide appropriate social skills training programs for Petitioner to meet unique behavioral and social needs so that the Petitioner could interact appropriately in the Least Restrictive Environment (“LRE”).

4. Respondent did not develop and implement an appropriate IEP, with appropriate support services and related services. Respondent did not consider present levels of performance when developing and designing IEP goals and objectives and did not use objective data in amending IEP/BIP goals and objectives as needed. Respondent did not develop IEP goals and objectives that contained objectives and measurable goals based on present levels of performance and did not address all areas of need. Petitioner’s IEP was inappropriate because:

- a. It did not address deficits in social skills and writing;
- b. It did not include an appropriate Behavioral Intervention Plan (“BIP”) based on appropriate evaluations and recommendations of evaluators; and
- c. It did not provide both positive academic and non-academic benefits to Petitioner.

5. Respondent did not devise and implement an appropriate Functional Behavioral Assessment (“FBA”) and did not devise and implement an appropriate BIP to address Petitioner’s Attention Deficit Hyperactivity Disorder (“ADHD”) and/or Autism and unique individual needs.

6. Respondent did not individualize Petitioner’s program for petitioner’s needs, and did not include in home training, Occupational Therapy (“OT”), Physical Therapy (“PT”), AT, Speech, and other related services including a daily schedule that meets the individual unique needs with minimal unstructured time. Respondent and Admission, Review and Dismissal Committee (“ARDC”) failed to appropriately address Petitioner’s needs related to Autism and ADHD, and failed to appropriately address and assess needs for services as outlined in the Autism supplement and as requested by the Parent on multiple occasions.

7. Respondent discontinued IEP goals and objectives that were not mastered.

8. Respondent provided a program to Petitioner that did not produce progress but noted regression in behavior and social skills.

9. Respondent did not maintain or provide Parent with data as requested on IEP goals and progress.

10. Respondent did not honor Parents’ requests for Individual Educational Evaluations (“IEE”) in In-Home Training, AT and Speech.

11. Respondent did not provide Prior Written Notice when denying requests for assessments and IEP amendments.

12. Respondent did not schedule a ten day reconvene Admission, Review and Dismissal (“ARD”) meeting and provide Prior Written Notice at the last ARD.

13. Respondent did not appropriately train administrators, teachers, and staff who were working with Petitioner regarding petitioner’s IEP, BIP, petitioner’s specific disabilities and the medication agreements.

14. Respondent did not administer medications as prescribed.

As relief in this Special Education Due Process Hearing, Petitioner requested that the Hearing Officer order Respondent to do the following:

1. Provide all IEEs requested by Parent at Respondent’s expense with Parent selected provider.

2. Devise IEPs that meet Petitioner’s specific unique educational needs so that Petitioner will be provided a FAPE in the LRE to provide services included in the Autism Supplement according to Commissioners Rules TAC §89.1055 to include positive behavior support strategies based on information such as: antecedent manipulation, replacement behaviors, reinforcement strategies and data based decisions which adequately address issues and behaviors related to Autism.

3. Contract with Dr. \*\*\* to conduct at least five (5) training sessions for all administrators, teachers, and staff members working with Petitioner for the 2012-2013 school year and five (5) training sessions for the first semester of the 2013-2014 school year in how to work with Petitioner. This includes paying the hourly rate plus travel of Dr. \*\*\* to work with staff in developing appropriate and measurable IEP goals and objectives including social skills not to exceed 25 contact hours including follow up, revision and revising based on data and accountability related issues related to compliance and implementation.

4. Provide AT, OT, PT, In-Home Training, and all other related services including those outlined in the Autism Supplement due to Petitioner as a result of denials or failure to assess in all areas of need.

5. Provide compensatory services for the past school year at district expense with an independent contractor and provide or pay for transportation services in accordance with district policy.

6. Provide all other relief subject to the Hearing Officer’s power and authority under IDEA.

In its response to the Complaint, Respondent denied that Petitioner was entitled to any of the requested relief and resolutions.

After considering the evidence of record, 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 student who resides within Copperas Cove Independent School District. Student attended \*\*\* School for the first time in the 2012-2013 school year, and attended \*\*\*. Petitioner received special education during the 2012-2013 school year and related services as a student with the disabilities Autism and Speech Impairment (“SI”).

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

3. Petitioner was diagnosed with Autism at approximately \*\*\*. Petitioner’s grandmother \*\*\* noted some developmental delays. Parent then instituted a variety of interventions, including Early Childhood Intervention, social groups, Speech Therapy, OT, and a variety of community activities. Parent and grandparent took Student to sporting events, shopping and other outings associated with an active family lifestyle. The interventions were initiated to allow Student to go to school and be in the general education classroom, and not in a self-contained classroom. One of Student’s parents is in the military and is sometimes deployed. Petitioner is familiar with a military lifestyle, including ceremonies and family support offered to the many families in the military community that includes School District.

4. Petitioner was diagnosed as having “high functioning autism” at \*\*\* years of age by petitioner’s \*\*\* physician, \*\*\*. Before Student was enrolled in any public school program, Petitioner received OT twice a week for a total of five (5) hours; Physical Therapy once a week for one (1) hour; Playgroup once a week for 1.5 hours, and Applied Behavior Analysis (“ABA”) twice a week for a total of four (4) hours. Student’s \*\*\* physician recommended that the therapies continue, that Student be enrolled in \*\*\* at age \*\*\*, and noted that Student would likely require special education throughout \*\*\* school age years.

5. Student previously attended a \*\*\* program in a neighboring school district which found Student eligible for special education as a student with Autism as the primary disability and SI as the secondary disability. The eligibility was based on a March 4, 2010 Full and Individual Evaluation (“FIE”).

6. At an ARD convened on February 29, 2012 in the previous school district, Student’s eligibility was changed because all members of the ARDC agreed that, based on assessment data, Student “no longer meets eligibility criteria as a child with Speech Impairment. [Student’s] disability is changed from AU/SI to AU.” A Speech/Language evaluation of February 23, 2010, and a Speech/Language Communication Report/Evaluation dated November 14, 2011 was referenced, but not included in the February 29, 2012 ARD documents.

7. Student takes the following medications daily: 1.5 milligrams (mg) of \*\*\* three (3) times daily; 2 mg \*\*\* daily; and 20 mg of \*\*\* daily for symptoms of ADHD and sleep issues.

8. Respondent convened its first ARD for Petitioner on September 12, 2012. The purpose of the ARD was a Transfer/Annual ARD and to Review Existing Evaluation Data (“REED”). The September 12, 2012 ARDC agreed that the following additional evaluations were needed: Psychological assessment; Speech assessment; and OT assessment. Parent consented to the assessments and requested an assessment to see if in-home training was needed.

9. Notwithstanding the change in eligibility made by the previous school district, Respondent began and continued to provide services to Student as a child with the primary disability of Autism and the secondary disability of SI. During the hearing, Respondent stated that school personnel had not seen the February 29, 2012 ARD documents until shortly before the hearing, and that Respondent was not aware that Student was found not to have a special education disability of SI. Respondent was also not aware that Student had a BIP in the previous school district and did not provide a behavior plan for student.

10. The September 12, 2012 ARDC members noted that Student was doing well in the general education \*\*\* classroom. The ARDC determined that Student would receive OT two (2) times per six (6) weeks; Speech services for 15 minutes two (2) times per six (6) weeks; and that all special education services would be in the general education classroom. The September 12, 2012 ARDC determined that Extended School Year (“ESY”) services were not necessary at this time.

11. The September 12, 2012 ARD ended in mutual agreement among all members, including Parent.

12. On November 5, 2012, Respondent convened an ARD to review the evaluation data. In addition to the Psychological, Speech and OT assessments agreed to at the previous ARD, the ARDC also reviewed IQ and Achievement assessments. The evaluations indicated a continued need for OT interventions and assistance at home in scheduling and routines. During the ARD, school personnel stated that Student did not meet eligibility criteria for SI, Autism, or Intellectual Disability, and that Student no longer qualified for special education and related services. Before the ARD convened, Parent had requested IEEs in the areas assessed by School District, and during the meeting Parent put a request in writing for IEEs in the following areas: IQ and Achievement; Psychological; OT; and In-Home Training.

13. The November 5, 2012 ARDC determined that Student’s fine and gross motor skills had benefited from OT accommodations, such as the pencil grasp and use of the Slant Board. Student’s OT assessment revealed that Student generally has good self-care needs but can become distracted. Student’s Parent expressed concerns of Student’s \*\*\* difficulty and ability to \*\*\*.

14. School District performed an OT evaluation by \*\*\*, MSOTR, Occupational Therapist, in October, 2012, which was reviewed by the ARDC at the November 5, 2012 ARD, and also at the April 25, 2013 ARD. Using a variety of testing instruments, including Occupational Therapy Documentation of School Function; Beery, et al; tests for Visual Motor Integration, Visual Perception, and Motor Evaluation; clinical evaluations; review of Student folder, and teacher interview; the OT concluded that Student had adequate fine motor skills to manipulate classroom supplies, but had deficits in Visual Motor integration (below average range), Visual Perception (below average range), and Motor Coordination (very low range) which “appear to be affecting written expression.” The Occupational Therapist recommended providing the

starting point of letters and numbers, visual models for letters and numbers and multi-sensory mediums for learning. Because Student had difficulty getting started in the day, full body exercises were recommended to “help regulate petitioner’s system.” The OT evaluation contained the following conclusion:

*Under the Individuals with Disabilities Education Act (IDEA), occupational therapy is defined as a related service. Related services are those services that are deemed necessary for a student to benefit from special education. Currently, [Student] does not have an identified need for special education. The ARD committee should discuss options to support [Student’s] school participation and success if student is not eligible for special education.*

Under questioning, the Occupational Therapist stated that the OT accommodations “did play a key part in [Student’s] progress that [Student] made throughout the year,” and that those accommodations should continue “to be provided through whatever [legal] avenue they can be provided.”

15. During the November 5, 2012 ARD, the In-Home Assessment was discussed and Student’s Parent was provided with resources to assist with Student in areas of scheduling and routines.

16. Respondent continued to provide special education and OT to Student, pending completion of the IEEs. The ARD documents state that Parent disagreed with the ARDC decision [as to eligibility], but that “the decisions within the deliberations were agreed upon.” The signature page indicates that the November 5, 2012 ARD ended in mutual agreement among all ARDC members, including Parent.

17. Respondent convened a Brief ARD at Parent’s request on February 20, 2013. Parent requested the ARD to address behavior problems, especially a recent behavior incident. On February 6, 2013, after a difficult morning, Student stood up in class and stated that \*\*\*. Respondent addressed the behavior incident by calling in the general education counselor, who talked to Student about saying inappropriate things in class and controlling anger.

18. The February 20, 2013 ARDC members discussed Student’s academic progress and classroom behaviors, and added specific behavior supports to Student’s IEP, including the use of a Social Story developed by Parent. The ARDC agreed to provide an IEE Speech Evaluation, because the previous speech evaluation addressed only articulation, and not broader issues of Speech/Language Impairment, such as pragmatic speech.

19. During the February 20, 2013 ARD, Parent addressed concerns regarding Student’s recent meltdown and re-occurring difficulties with behavior and frustrations in class, such as the difficulty when large groups are present during dismissal time. The ARDC discussed concerns that Student’s parent is having with Student’s handwriting skills; the number of times Student yells at friends; and reports of other students antagonizing Student by moving close when Student is upset and poking at student. The (general education) classroom teacher stated that a paraprofessional comes to class for 45 minutes each morning to assist Student in practicing handwriting skills. General education teacher further commented that Student has decreased the amount of yelling at friends to occur during transition times.

20. During the February 20, 2013 ARD, the Occupational Therapist stated that Student has visual and motor difficulties. After further discussion of Student’s accommodations that have been implemented

into the classroom, the ARDC concluded that Student has shown progression and improvement in handwriting since the beginning of the school year. The classroom teacher expressed concerns that Student still has one (1) to two (2) behavior incidents daily involving yelling.

21. In response to Student's behavioral issues, the February 20, 2013 ARDC determined that Student will receive the following behavioral supports in the general education classroom:

- a. Clearly defined limits;
- b. Frequent reminders of rules;
- c. Positive reinforcements;
- d. Frequent eye contact/proximity control;
- e. Private discussion about behaviors;
- f. Opportunity to help teacher; and
- g. Supervision during transition activities.

22. Respondent also provided social skills training in small counseling groups led by the general education counselor. The group discussed age appropriate topics related to social success in a school setting. Respondent also provided Social Stories, and when the Social Story was rejected by Parent, agreed to use the Social Story developed by Parent.

23. \*\*\*, M.S., Licensed Specialist in School Psychology ("LSSP"), provided a Psychological Evaluation dated October 6, 2012, and concluded that Student no longer qualified for special education as a student with Autism. \*\*\* report stated: "Student's behavior patterns and existing developmental condition does not appear to be consistent with the State of Texas' educational eligibility criteria for a student with autism or other pervasive developmental disorder," and that "Student appears to be capable of understanding and complying with all the usual classroom and school rules. [Student] should be expected to follow the district's Student Code of Conduct and continue to behave appropriately in school and to make acceptable academic progress." Notable findings from \*\*\* report include:

- a. Speech tone was babyish and articulation errors were noted;
- b. Student tends to have meltdowns at home;
- c. Student appeared happy; played appropriately with a letter matching game; and made good eye contact;
- d. Teacher reports Student is "on target" academically, but also, tattles excessively; complains a lot of physical pains; struggles with fine motor skills; requires a lot of redirection; and often attempts to answer oral comprehension questions, but answers are "often" not on target with the question, needing prompting and activation of prior knowledge to move toward the correct answer;
- e. On the Behavior Assessment System for Children, Second Edition, ("BASC-2") the classroom teacher reported Below Average scores typical of children with autism in the following domains: Sensory/Perceptual approach behaviors; Ritualisms; resistance to change; social pragmatic problems; semantic/pragmatic problems; specific fears and aggressiveness;

- f. On the BASC-2, Parent noted Clinically Significant scores in the following areas: Depression; Atypicality; emotional self-control; controlling and maintaining mood and behavior; overcoming stress and adversity; and reacting negatively when faced with changes in everyday activities and routines; and
- g. The purpose of the evaluation was to determine eligibility in a school setting; the evaluation was not related to treatment in a clinical setting.

The LSSP also noted a significant discrepancy in the assessment information provided by Parent as compared to the assessment information provided by the classroom teacher, and so she used the Childhood Autism Rating Scale, Second Edition (“CARS-2”). Student’s scores on the CARS-2 fall within the “Extremely Below Average” range, indicating minimal to no symptoms of an Autism Spectrum Disorder.

24. Dr. \*\*\*, Ph. D., a practicing neuropsychologist and LSSP provided an IEE dated April 18, 2013. Dr. \*\*\* concluded: “These evaluation results support the presence of autism at a level of severity that would establish eligibility for special education services, and there does appear to be an educational need for specialized instruction to allow [Student] to develop the skills necessary for active and appropriate participation in the school setting.” Dr. \*\*\* observed Student extensively over the course of a day in the classroom setting, and noted difficulties with peer interaction, and disparate responses and consequences to Student’s needs. Recommendations from Dr. \*\*\* report include:

- a. Student needs a high level of structure and behavioral support to do student’s best;
- b. Student has a high ambient arousal level which, in combination with the absence of structure and consistency, may result in frustration and associated emotional outbursts;
- c. Student needs to be taught age-appropriate strategies for self-regulation of emotional state and response to common stressors;
- d. Student needs to develop pragmatic language and social skills through modeling, social scripts and social stories, and supported practice in high frequency social situations;
- e. Student needs to develop higher level social skills, including negotiation and conflict resolution through group instruction in general education and special education settings; and
- f. Student needs to develop compliance and functional independence skills so that Student can approach academic tasks “ready to learn.”

Dr. \*\*\* recommended that replacement behaviors for the current maladaptive outbursts be taught and explicitly reinforced, including immediate delivery of a clear, dramatic and unmistakable reinforcer after the occurrence of the target behavior. Dr. \*\*\* stated that the recommended interventions “need to be at a level and intensity and a consistency that would be consistent with specialized instruction,” and disagreed that the general education classroom interventions were sufficient. Dr. \*\*\* does not provide In-Home Training.

25. Based on her observations and evaluation, Dr. \*\*\* concluded that Petitioner had an educational need for special education because Student’s Autism was such that it significantly affects

student's academic or educational performance in school and specifically causes disruptions in social interactions and emotional regulation.

26. The last ARD for Student was convened on April 25, 2013. The purpose of the ARD was to review the IEEs which had been completed and to discuss Student's continued eligibility for special education. School personnel stated that while Student did have a disability, Student did not have an educational need for special education and related services. School personnel stated that Student's needs as a child with Autism could be served through a §504 program.

27. During the April 25, 2013 ARD, Student's parents notified School District that Student is receiving OT services outside of the school. Student's teachers and Dr. \*\*\* each noted Student's struggle with handwriting and suggested that School District continue to monitor Student's progress.

28. During the April 25, 2013 ARD, Dr. \*\*\* reported that Student needs more specialized designed instruction to acquire needed skills. Dr. \*\*\* further stated that Student's Autism is a bigger concern than Student's handwriting skills. Student's Parent reported that Student is having social related problems in the classroom. Dr. \*\*\* reported that Student is having difficulty relating to others and that Student is not capable of behaving like peers and needs a more specific level of instruction to address social communication deficits.

29. The April 25, 2013 ARDC concluded that while Student's report cards indicate Student needs improvement in handwriting and math, Student has improved and made progress. The April 25, 2013 ARDC concluded that Student's disability can be addressed through Section 504 accommodations in the general education setting. Parent, Student's Advocate, and Dr. \*\*\* disagreed, and Parent subsequently filed this Request for Special Education Due Process Hearing. The April 25, 2013 ARD did not reconvene, because the Request for Due Process Hearing and Required Notice was filed to address the disagreement between the Parent and the other members of the ARDC.

30. Student has demonstrated a limited mastery of the \*\*\* curriculum, which focuses on preparing students for the more rigorous academic requirements beginning in \*\*\*. According to Student's report card, Student "Needs more practice and support" in Writing; has demonstrated a "Sufficient level of performance" in Reading/Language Arts, Science/Health, and Art/Theatre Arts; and has demonstrated a "High level of performance" in Mathematics (even though all Student's scores were "below average" on the Texas Early Mathematics Inventories), P.E. and Music.

31. According to Student's general education classroom teacher, and the Music and P.E. teachers, Student has participated in the \*\*\* curriculum with the aides and interventions which were provided to address the disabilities, and has done well academically. Respondent's witnesses, including the classroom teacher and the general education counselor testified that all Student's behaviors, including those which resulted in disciplinary infractions and significant disruptions of classroom routine were "typical \*\*\* behavior." The general education counselor even testified that Student's \*\*\* was typical, and upon further questioning, not beyond what a general education counselor could expect to hear from a student in \*\*\*.

32. It was undisputed that Student mastered student's IEP Speech Therapy goals of producing age-appropriate sounds in structured sentences and in conversation with some age appropriate articulation issues. All witnesses testified that Student was able to communicate effectively in the school setting. Goals and objectives relating to Language Arts/Handwriting included forming upper and lower case letters, writing student's full name, and writing simple sentences were being worked on but not mastered. Goals and objectives relating to Mathematics included writing digits zero through nine with special paper, or with assistance and various prompts, and were works in progress but not mastered as of April 12, 2013.

33. Student did not have IEP goals and objectives related to behavior or social skills. Respondent did not provide an FBA or BIP. Respondent did implement classroom strategies for behavior support, including a behavior chart, praise, redirection, modeling appropriate speech and behavior in problem settings, and providing locations for cool down and time out. The behavior interventions and strategies were not peer-reviewed autism related strategies, were not systematically or consistently applied, and became less effective in the Spring Semester 2013.

34. Respondent did not provide an FBA as requested by Petitioner, nor did Respondent provide any Prior Written Notice regarding the refusal.

35. Respondent noted that Student was subject to some bullying from a classmate and tried to separate the two (2) students in the general education classroom. Student was subject to inappropriate interference and ridicule by other students, which was not always noted or addressed by the classroom teacher. Student was stated to engage in "excessive tattling" by almost all school personnel, but there was no information about the subject matter of Student's "tattling," why the reports were considered excessive, or whether they were related to bullying.

36. Student's behavior deteriorated in the Spring Semester 2013 and none of the School District evaluations, which were all completed before the November 5, 2012 ARD, related to Student's escalating bad behavior, which resulted in 27 recorded disciplinary incidents from February 4, 2013 to May 28, 2013. None of the School District witnesses offered a definite explanation for the behavior, but offered various theories, including the strain of a Due Process Hearing, \*\*\*, and a change or withholding of medication, which were all discounted by Parent.

37. In Student's Behavior Journal, which began in late January, 2013, the classroom teacher reported 40 days of significant behavior problems out of a total of 68 days where any information was provided, or approximately 59% of school days. Petitioner had behavior problems 14 out of 18 days from May 1, 2013 to May 24, 2013.

38. Notwithstanding Student's academic mastery in all areas other than Writing, Student had consistent behavior problems which were not addressed by an FBA or by any behavior interventions implemented by Respondent. Student's most significant problem behaviors included: Getting upset and not calming down; Yelling and screaming; \*\*\*; Making inappropriate noises; Refusing direction or noncompliance; \*\*\*; Kicking walls and furniture; Throwing \*\*\* on the carpet or floor; Kicking the teacher; and \*\*\*. Other problem behaviors reported by the classroom teacher included: \*\*\* when walking down the hall; Spitting; Sticking student's tongue out at others; Crawling on the floor; \*\*\*; and Calling people \*\*\*.

39. Responses to Student's behavior included: Sticker rewards; Time out; Counting to calm down; Social Stories; Ignore and redirect; Praise for "using student's words," "using hands to help, not hurt," and modeling appropriate behavior for peers; High fives; Redirection; Relocation to a "buddy" classroom; General education counselor intervention and small group counseling; Assistant Principal intervention; and Removal to front office.

40. Student's classroom teacher testified that Student's "meltdowns" during Spring Semester 2013 occurred most often during unstructured times such as lunch or transition times near the end of the day or going from one classroom to another, and were often the result of Student's failure to regulate student's emotional responses to peer interactions. Student's classroom teacher testified that Student's behavior outbursts interfered with the learning environment.

41. Respondent did not provide ABA therapy to Student in the school setting; Parent provided private ABA therapy. Although School District's Autism Specialist provided "about 30 workshops focusing around ABA, structured teaching, and sensory integration," Student's classroom teacher had no training in ABA therapy. Respondent's Autism Specialist stated that Student was observed to be bright and high functioning, and was deemed not to need extensive Autism services because Student appeared to be virtually indistinguishable from nondisabled peers.

42. Respondent did provide a daily schedule for the entire \*\*\* classroom with limited unstructured school time which Student was allowed to manipulate, a Behavior Journal, headphones for noise and distraction reduction until no longer requested, and OT and Speech Therapy as related services. Respondent administered medication daily for Student in the nurse's office.

43. There was no evidence that Respondent did not provide Parent with: Appropriate administration of medications; Data as requested on IEP goals and progress; IEEs for In-Home Training and Speech; and Prior Written Notice when denying requests for IEP amendments.

44. Parent attended every ARD, communicated regularly with the classroom teacher, especially through the daily Behavior Journal. Parent also provided information and insights on Student's behaviors outside of school, so that successful interventions could be coordinated and applied across school, home and community settings.

### **III. Discussion**

A determination of special education eligibility must be based on an appropriate assessment. In this case, Respondent relied primarily on the eligibility evaluation made early in \*\*\* year by its LSSP to determine that Student did not meet the definition of child with Autism under IDEA. The definitions of Autism under Federal and Texas regulations implementing IDEA, are set out below:

<b>34 Code of Federal Regulations, §300.8 Child with a disability.</b>	<b>19 Tex. Admin. Code, §89.1040 Eligibility Criteria.</b>
<p>(c) <i>Definitions of disability terms.</i> The terms used in this definition of a child with a disability are defined as follows:</p> <p>(1) (i) <i>Autism</i> means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.</p> <p>(ii) Autism does not apply if a child’s educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section.</p>	<p>(c) Eligibility definitions.</p> <p>(1) Autism. A student with autism is one who has been determined to meet the criteria for autism as stated in 34 CFR, §300.8(c)(1). Students with pervasive developmental disorders are included under this category. The team’s written report of evaluation shall include specific recommendations for behavioral interventions and strategies.</p>

Under State and Federal IDEA regulations, Autism must affect verbal and nonverbal communication and social interaction, and must adversely affect a child’s educational performance. *The Texas regulations also focus on the behavioral aspects of Autism and require specific behavioral interventions and strategies.*

As to eligibility determinations, Texas regulations state that the determination must be made by the ARDC, pursuant to evaluations or re-evaluations conducted pursuant to Federal regulations implementing IDEA. Federal regulations at 34 C.F.R., §300.8(a)(2)(i) state: “if it is determined, *through an appropriate evaluation under §§300.304 through 300.311*, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.” It was undisputed that Student continued to need OT to address motor skills deficits so that Student could learn to produce handwritten letters and numbers. After review of the record in this case, it appears to the Hearing Officer that the October 6, 2012 evaluation by the District’s LSSP was not an appropriate evaluation which could support Respondent’s determination that Petitioner was not eligible for special education for the following reasons:

1. It did not take into account that Student had needed a BIP at the previous school district;
2. It significantly discounted information provided by Parent, and did not consider Student’s earlier diagnosis of ADHD;
3. It did not consider the later evaluation provided under the IEE by Dr. \*\*\*; and

4. It did not address in any way Student's significant behavior problems of the second semester, which had a significant impact on student's education.

In other words, the October 6, 2013 evaluation failed to meet the extensive requirements under Federal regulations for assessing children and determining eligibility through a collaborative evaluation process, involving the use of a variety of assessment tools and strategies to determine present levels of academic performance and educational needs. (See, 20 U.S.C.A. §1414, 34 C.F.R. §§300.300-300.311) Given Student's changed behavior in the second semester, the October 6, 2012 evaluation, which was limited as outlined above, was not an appropriate evaluation for eligibility determination as of the date of the Due Process Hearing.

The LSSP's October 6, 2012 evaluation was more focused on some of the characteristics of Autism observed in children who are more disabled than Petitioner, including the inability to: make eye contact, participate in social interactions, tolerate sensory stimuli, and avoid perseveration in stereotypical and ritualized behaviors. Petitioner was able to make eye contact, to participate in social interactions (with decreasing effectiveness), and follow simple instructions. But, Petitioner's nonverbal communications and behaviors, extreme noncompliance and inability to follow direction, increasing inability to self-regulate emotional responses appropriately, and some odd behaviors, such as \*\*\*, were having an impact on Student's education and the education of the other students in \*\*\* class. And, Respondent never provided any ABA therapy or other peer-reviewed, scientifically based interventions to address classroom behavior, mainly because Respondent had determined that Student was not eligible early in the school year. Respondent never determined the basis of Student's out of control behavior, which, on its face, was inconsistent with maintaining a safe learning environment; Respondent did not provide consistent behavior supports and interventions to reduce the frequency or the intensity of the behaviors. The general education responses provided by Respondent were not effective in addressing Student's needs for behavior supports and assistance with social interactions and nonverbal communication. The communication disparities between Petitioner and petitioner's peers identified in Dr. \*\*\* evaluation, the testimony of the classroom teacher, the entries in the Behavior Journal, and Parent's input all point to a continuing need for special education and related services to address Student's unique needs based on a previous determination of Autism.

This Decision of the Hearing Officer is concerned with two questions:

1. Is Petitioner a child with a disability, eligible for special education and related services?
2. Did Respondent provide Petitioner with a free appropriate public education and the 2012-2013 school year?

Because the Hearing Officer has determined that Petitioner remained eligible for special education, based on the eligibility agreed to by the ARDC before the inappropriate evaluation, this decision is not a determination of whether Petitioner's needs could be met under a plan developed under §504 of the Rehabilitation Act of 1978. The Hearing Officer is only authorized to consider matters related to the obligations of the State Educational Agency (TEA) and the Local Educational Agency (Respondent) to implement the Individuals with Disabilities Education Improvement Act. Accordingly, if Petitioner is eligible for special education, then Petitioner is entitled to special education and all the procedural safeguards under IDEA, regardless of

whether Respondent could, alternatively, provide similar services and accommodations under a §504 plan. If a student has a disability and a demonstrated educational need for specialized instruction and related services, then the student must be served under IDEA.

A child with a disability with a demonstrated need for special education is entitled to a free appropriate public education until the child is dismissed from special education. Respondent never dismissed Petitioner from special education, but instead, gave Petitioner the opportunity to contest the LSSP's determination of non-eligibility through IEEs and continued access to the ARDC and additional behavior services through April, 2013, at which time Dr. \*\*\* IEE was presented. During the time from the November 5, 2012 ARD through this Due Process Hearing, Respondent provided primarily general education services and did not provide the educational and behavioral interventions available to Petitioner under IDEA, other than OT.

The facts in this case are similar to another due process hearing involving a young male student with Autism. (See, Decision of the Hearing Officer, *Student v. Cypress-Fairbanks ISD*, TEA Docket No. 064-SE-1106, January 11, 2008). In that case, the student was recognized as having Asperger's Syndrome, a high functioning form of Autism. Like Petitioner, that student's skills far exceeded concerns of maintaining eye contact, excessive stereotypical, ritualized or self-stimulatory behavior, and general inability to communicate or make a social connection. But, as is the case with Petitioner, the main educational concerns were behavioral, social and emotional. In that case, reimbursement for private school placement was denied when, after continuing behavioral problems, the school district proposed to put in place a variety of peer-reviewed, scientifically based interventions based on an FBA and an ARDC developed BIP. In the instant case, Respondent's continued minimization of disability related behavior problems and refusal to address Petitioner's behavioral needs with appropriate interventions was not justifiable, simply because of Petitioner's limited mastery of the \*\*\* curriculum made possible through petitioner's IEP, coupled with Petitioner's sincere desire to behave better.

This is Petitioner's case, not Respondent's, and so Petitioner has the burden of proving, not just that violations of IDEA occurred, but that Petitioner was denied a FAPE. In *Cypress-Fairbanks Independent School District v. Michael F.*, 931 F. Supp. 474. S.D. Tex. 1995, *affirmed as modified*, 118 F.3d 245, 5th Cir. 1997, *cert denied*, 522 U.S. 1047, 118 S.Ct. 690, the Fifth Circuit announced a clear framework for evaluating whether a free appropriate public education has been provided in the form of a four (4) prong test:

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

As to the second prong, there was no evidence that Student's placement in the general education classroom was not the LRE—in fact, that general education placement had been Parent's goal since Student was diagnosed with Autism. As to the fourth prong, Student obtained some positive academic benefits through student's IEP, including support for student's major area of weakness, motor skills and handwriting. Petitioner also obtained a sufficient level of performance in all subject areas except Writing and will be in

\*\*\* next year. Petitioner has been generally described as a happy child, who is anxious to please adults. Student has also received positive recognition at school and has demonstrated sporadically some social skills associated with classroom success, such as assisting others in small groups, or being shown some coping methods to use when student becomes upset. Student's demonstrated mastery of the \*\*\* curriculum and specific IEP goals and objectives indicated positive academic benefits. Petitioner and Respondent both identified non-academic benefits Student obtained, including a generally happy outlook, and instances of positive social interactions and participation in peer groups both in and out of school.

Consequently, Petitioner's case must rest on the questions of whether Petitioner's IEP was individualized on the basis of petitioner's assessment and performance, and whether the services were provided in a coordinated and collaborative manner by the key stakeholders. Petitioner alleged numerous procedural violations, including the failure to provide Prior Written Notice in denying Parent requests for an FBA, and IEEs in the areas of In-Home Training, AT, and Speech. In fact, Respondent never provided the requested FBA for Petitioner, which would be required under 34 C.F.R., §300.306(c)(i) to accurately consider Petitioner's adaptive behavior. It appears that Petitioner's program was not sufficiently individualized on the basis of both assessment and performance. Specifically, the Hearing Officer concludes that Respondent's determination of eligibility is fatally flawed because it was not based on an appropriate evaluation under §§300.304-300.311. Simply put, the LSSP's determination in the October 6, 2012 evaluation that Student's "behavior patterns and existing developmental condition" were not consistent with Autism or a pervasive developmental disorder were not consistent with the evidence of Student's maladaptive behaviors, difficulties with social interactions, and escalating behavior problems, which occurred during the Spring Semester 2013. More importantly, Respondent did not address Petitioner's changing behavioral profile and refused to do more than speculate about the causes, rather than providing an FBA and associated behavior interventions. This refusal of Petitioner's request, even when the interventions Respondent provided proved largely unsuccessful in developing Petitioner's emotional self-regulation skills, amounted to a denial of FAPE during the Spring Semester 2013.

Finally, as to Petitioner's claims, the evidence demonstrated that Respondent questioned Petitioner's eligibility for special education and sought to serve Petitioner under §504 early in the school year. After the evaluations, Respondent largely discounted all input which was contrary to its early decision that Petitioner was not a child with a disability under IDEA. As a result, the credibility of Respondent's early evaluation has to be questioned in the face of changes in Petitioner's needs chronicled by the classroom teacher, Parent, the IEE, and even Respondent's own OT expert and the ARDC as to Petitioner's motor skills deficits. And, an eligibility determination must be based, not just on an assessment by a qualified professional, but an "appropriate evaluation," which includes parent input and information about the child's [current] adaptive behavior. Where an eligibility determination does not address a child's current functional performance or discounts inputs and experience contrary to the conclusion, then it is impossible to conclude that the IEP is appropriately individualized and that services are provided in a collaborative manner by the key stakeholders.

Federal regulations provide that a parent is entitled to an IEE upon request unless the school district promptly requests a due process hearing to defend its own evaluations. (*See*, 34 C.F.R. §300.502.) Respondent did not request a due process hearing, but relied on its October 6, 2012 evaluation to support its lack of obligation to comply with IDEA, even as the ARDC continued Petitioner's classification as a child

with the primary disability Autism and the secondary disability SI, and continued to provide special education and related services until the April 25, 2013 ARD. Because Respondent did not defend the appropriateness of its evaluations, or give any reason for not requesting a due process hearing beyond its assumption of immunity from IDEA violations based on its flawed evaluation and determination of non-eligibility, the Hearing Officer cannot find that Petitioner is not entitled to the requested IEEs in In-Home Training, AT and Speech.

#### **IV. Conclusions of Law**

1. Petitioner is a student who resides within the School District who had been determined to be eligible for special education as a child with a disability, and to have an educational need for special education. [20 U.S.C. §1401(3); 34 C.F.R. §300.8(c)(1); 19 T.A.C §89.1040(c)(1).]

2. Respondent has a responsibility to provide Student with a free appropriate public education (FAPE), including specialized instruction and related services to address student's unique needs. [20 U.S.C. §1400(3), §1412; 34 C.F.R. §300.100-§300.102; 19 T.A.C §89.1001.]

3. Petitioner proved that Respondent had not provided an appropriate re-evaluation to support a determination that Petitioner was no longer eligible for special education, by failing to engage in the collaborative process required to determine Petitioner's current levels of performance, function, and adaptive behavior, and ignoring Petitioner's demonstrated individual needs in the areas of behavior and social skills. [20 U. S. C. §1414; 34 C.F.R. §300.301-§300.306, §300.310-§300.311, and §300.122; 19 T.A.C. §89.1040(a)(b)]

4. Petitioner proved that Petitioner needs an Functional Behavioral Assessment (FBA) to determine Student's needs for positive behavior supports and interventions, and to identify appropriate peer-reviewed scientifically based interventions to be included in an appropriate Behavior Intervention Plan (BIP) as part of an IEP, consistent with Student's unique needs as a student with Autism. [20 U.S.C. §1411(e)(3)(C)(xi), §1414(d), especially (d)(1)(i)(IV), (d)(3)(B)(i), and (F)(i)-(ii); 34 C.F.R. §300.35, §300.530 (d)(1)(ii); 19 T.A.C. §89.1040, §89.1050, §89.1055.]

5. Petitioner proved that Respondent did not provide requested Independent Educational Evaluations (IEEs) for In-Home training, AT and Speech (pragmatic and social speech issues), and did not promptly defend its own evaluations, such that Petitioner is entitled to the requested IEEs at Respondent's expense and subject to Respondent's reasonable policies for provision of IEEs. [20 U.S.C. §20 U.S.C. §1414, §1415(b)(1) and (d)(2)(A); 34 C.F.R. 300.502.]

6. Respondent proved that Petitioner was not in need of Speech Therapy for articulation, based on dismissal from Speech Therapy in the previous school district and Student's mastery of the Speech articulation goals.

7. Petitioner proved that Petitioner's general education classroom teacher who provided instructional services throughout Petitioner's school day was not highly qualified or properly trained in peer-reviewed scientifically based methods for addressing behavior needs associated with Autism, including training in Applied Behavior Analysis (ABA) therapy, and that the general education classroom teacher did

not provide instruction in behavior management which Petitioner needed. [20 U.S.C. §1401(10); 34 C.F.R. §300.18; 19 T.A.C. §89.1131]

8. Respondent did not prove that Petitioner did not need the specialized instruction and related services that Petitioner received in the 2012-2013 School Year, by reason of not having an educational need for special education. The evidence established that Respondent's October 6, 2012 assessment was not an appropriate basis for determination of eligibility under IDEA, that Petitioner continued to need physical education in the form of OT provided under the IEP in order to make the progress student made in handwriting, and that Petitioner also needed behavior services to allow student to access the curriculum in Spring Semester 2013. [20 U.S.C.A. §20 U.S.C. §1414; 34 C.F.R. §300.301-§300.306, §300.310-§300.311, and §300.122; 19 T.A.C. §89.1040, §89.1050.]

9. Finally, Petitioner proved that Respondent's failure to address Petitioner's Autism and related behavior issues in Spring Semester 2013, especially following a February 6, 2013 stated \*\*\*, was a denial of a FAPE during that time. Respondent's determination that Petitioner had the ability to follow the Student Code of Conduct was proven erroneous. [20 U.S.C. §1401(19); 34 C.F.R. §300.17; 19 T.A.C. §89.1001. See, *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, esp. pp. 206-207, *Cypress-Fairbanks Independent School District v. Michael F.* 188 F. 3d 245 (Fifth Cir. 1995), cert. denied.]

## **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 be GRANTED IN PART.

Respondent is hereby ordered to do the following:

1. Convene an ARD no later than the first day of the 2013-2014 school year to develop collaboratively an interim IEP, including goals and objectives to address Petitioner's unique needs, especially in the areas of behavior and OT. If evaluations and recommendations are available from the In-Home Training, AT and Speech IEEs, that evaluation data must be considered by the ARDC.
2. Within 10 days of the date of this Order, provide the following IEEs requested by Petitioner: In-Home Training, AT, and Speech, and require completion of the evaluations within 30 days of the first day of the 2013-2014 school year.
3. Complete an FBA within 30 days of the first school day of the 2013-2014 school year to be used in developing positive behavior support strategies and specialized behavior instruction and interventions based on peer-reviewed scientifically based research which will address Petitioner's unique needs for behavior services.
4. Convene an ARD within ten (10) school days of completion of the FBA and the IEEs to consider the evaluation reports and recommendations, and amendment of Petitioner's IEP, especially in the areas of positive behavior supports and interventions and appropriate behavior instruction and services.
5. Before September 30, 2013, provide an ABA training workshop and one (1) day of training related to Autism generally and to Petitioner's IEP specifically, to Petitioner's teacher(s) and other personnel providing instruction and educational

services to Petitioner in \*\*\* to train Student's teachers to oversee implementation of peer-reviewed scientifically based instructional strategies and behavior interventions included in Petitioner's IEP.

6. Provide compensatory services to Petitioner in the form of ABA therapy for Petitioner for one (1) hour two (2) times a week for six (6) weeks to be completed on or before September 1, 2013, to assist Petitioner in developing replacement behaviors for the maladaptive school behaviors demonstrated by Petitioner in Spring Semester 2013.
7. All relief not specifically granted herein is hereby DENIED.

ISSUED in Austin, Texas this 12<sup>th</sup> day of July, 2013.

\_\_\_\_\_  
/s/  
Gwendolyn Hill Webb  
Special Education Hearing Officer

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

**SYNOPSIS**

**Issue:** Was Respondent’s determination that Petitioner was no longer a child with a disability, Autism, with an educational need for special education and related services made in accordance with the substantive and procedural safeguards of IDEA?

**Federal Citation:** 20 U.S.C. §20 U.S.C. §1414; 34 C.F.R. §300.301-§300.306, §300.310-§300.311, and §300.122; *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, esp. pp. 206-207  
*Rowley*, 458 U.S. 176, esp. pp. 206-207.

**Texas Citation:** 19 T.A.C. §89.1040, §89.1050.

**Held:** Where the evidence showed that Respondent’s evaluation was made early in the school year, discounted information from Parent and the IEE it had provided at School District expense, and escalating behavior issues of a \*\*\* student, Respondent’s determination of non-eligibility was not made in accordance with IDEA requirements for evaluation and determination of eligibility.

**Issue:** Did Respondent deny Petitioner a FAPE where Respondent’s limited provision of special education, related services, and procedural safeguards was predicated on the assumption that, based solely on Respondent’s LSSP evaluation, Petitioner was not eligible for special education and therefore Respondent could not be held to have violated IDEA from the point of that determination?

**Federal Citation:** 20 U.S.C.A. §20 U.S.C. §1414; 34 C.F.R. §300.301-§300.306, §300.310-§300.311, and §300.122;

**Texas Citation:** 19 T.A.C. §89.1040, §89.1050, *Cypress-Fairbanks Independent School District v. Michael F.* 188 F. 3d 245 (Fifth Cir. 1995), cert. denied.

**Held:** IDEA has extensive requirements for collaboration in the evaluation process leading to determination of eligibility, and development of an IEP. Where it was shown that Respondent’s determination of non-eligibility was not based on an appropriate evaluation, Respondent could be held to have violated IDEA by not providing appropriate evaluations, not providing an appropriate IEP developed through a collaborative process of the IEP team, and by virtue of its failure to provide procedural safeguards guaranteed under IDEA.