

STUDENT	§	BEFORE A SPECIAL
BNF PARENTS	§	EDUCATION
Petitioner	§	
v.	§	HEARING OFFICER FOR THE
	§	
AUBREY ISD	§	
Respondent	§	
	§	STATE OF TEXAS

**FINAL DECISION OF THE HEARING OFFICER**

**STATEMENT OF THE CASE**

Petitioner, Student \*\*\* and student's next friend and parents, \*\*\* and \*\*\* (hereinafter referred to collectively as Petitioner and individually as Student or Parents), brings this action against Respondent Aubrey Independent School District (hereinafter Respondent, the District, or AISD) under the Individuals With Disabilities Education Improvement Act, as amended, 20 U.S.C. §1401 et. seq. (IDEA) and its implementing state and federal regulations.

By order dated January 13, 2013, the Hearing Officer set forth the following issues to be resolved in this proceeding, with the following requests for relief:

**ISSUES AND RELIEF RAISED BY PETITIONER**

1. Petitioner alleges that Respondent's FIE of \*\*\* did not adequately or accurately evaluate student in all identified areas of need. As a result, Petitioner alleges that student's IEP and placement from \*\*\* until the conclusion of the \*\*\* school year were not appropriate, do not address student's educational needs, and have failed to result in adequate progress.
2. Petitioner alleges that Respondent denied student a free appropriate public education from \*\*\* until the conclusion of the \*\*\* school year based on the following particulars:
  - a. Inappropriate placement;
  - b. Inappropriate IEPs that failed to address all areas of educational need, failed to establish necessary baseline data, and failed to include proper goals and objectives;
  - c. Failed to properly address and include services related to the Autism supplement as required by law; and
  - d. Failed to collaborate with parents on a regular basis, thus denying parents meaningful participation in the ARD process.

3. Petitioner alleges that student has been inappropriately denied an Independent Functional Behavioral Assessment.
4. Petitioner alleges that Respondent failed to provide summer services as required by IDEA, thus requiring Petitioner to obtain private services during the summer of 2012 for which Petitioner seeks reimbursement.

For relief, Petitioner seeks an Independent FBA; an appropriate placement, IEPs, and services for Student with highly trained and experienced staff; and, in the alternative, private placement if an appropriate IEP and placement cannot be obtained within Aubrey ISD; and reimbursement for private placement during the summer of 2012 and for private related services obtained by Student's parents.

In addition, Petitioner seeks to extend the statute of limitations to \*\*\* when Student entered the District based on alleged withholding of information and misrepresentations by the District. The issue of whether one of the exceptions to the statute of limitations enumerated in IDEA applies to this case will be an issue to be presented and resolved at the due process hearing.

### **ISSUES AND RELIEF RAISED BY RESPONDENT**

1. Whether Petitioner's claims must be limited to those arising on or after March 20, 2011, one year prior to the date of filing the instant due process request, due to the one-year statute of limitations in Texas?
2. Whether the evaluator chosen by Petitioner to complete the Independent FBA (\*\*\*) satisfies the reasonable and lawful criteria of the District's policy pertaining to IEEs? Specifically, Respondent alleges that Petitioner's chosen evaluator does not meet its appropriate criteria in that the evaluator is not independent because Petitioner seeks relief in this cause in the form of reimbursement for services rendered by the evaluator, as well as prospective private placement at the evaluator's place of business. Respondent further alleges that the evaluator does not have the appropriate licensure. Finally, Respondent alleges that the assessment instruments proposed by the evaluator (VMAPP or ABLES) are not appropriate for the evaluation being performed.

In addition to the issues set forth above, Respondent also alleges that the cost of the independent FBA greatly exceeds the IEE cost criteria set forth in Respondent's policy. The issue pertaining to the cost of the independent FBA has been previously litigated and decided by the Hearing Officer. (Order On Petitioner's Entitlement To IEEs In Excess Of Respondent's Cost Criteria issued on September 7, 2012; Order Denying Respondent's Motion For Reconsideration Regarding IEE issued on October 17, 2012; Correspondence Concerning Respondent's Request For Evidentiary Hearing dated November 23, 2012). Respondent's objection to the Hearing Officer's ruling on the cost issue is noted for the record; however the issue will not be relitigated at the due process hearing.

3. Respondent also raised an issue concerning Petitioner's entitlement to independent evaluations in all areas that exceed Respondent's maximum allowable costs set forth in its cost containment policy. This issue was also resolved by interim order following the submission of affidavit evidence and legal argument by the parties. (Order On Petitioner's Entitlement To IEEs In Excess Of Respondent's Cost Criteria issued on September 7, 2012; Order Denying Respondent's Motion For Reconsideration Regarding IEE issued on October 17, 2012; Correspondence Concerning Respondent's Request For Evidentiary Hearing dated November 23, 2012). Respondent's objection to the Hearing Officer's ruling on this issue is also noted for the record.

For relief, Respondent seeks the application of the one-year statute of limitations in this cause, a determination by the Hearing Officer that Petitioner's chosen evaluator is not appropriate to conduct the independent FBA sought by Petitioner, and a determination by the Hearing Officer that Petitioner was not entitled to obtain IEEs in excess of Respondent's cost criteria.

### **AMENDMENT TO ISSUES AT HEARING**

At the due process hearing in this matter, the parties reviewed the issues and relief set forth above and indicated that Petitioner's Issue #3 and Respondent's Issue #2 pertaining to the Independent Functional Behavioral Assessment had been resolved prior to hearing. (Transcript of Due Process Hearing, p. 14; hereinafter cited as T. 14).

Respondent again urged this Hearing Officer to reconsider the prior ruling on Respondent Issue #3 pertaining to the cost of Petitioner's IEEs. Respondent requested that the Hearing Officer make a determination that the cost of the IEEs was in excess of Respondent's cost criteria policy and that no special circumstances justified the excess cost. Respondent did not request reimbursement from Petitioner for the costs of the IEE, but simply a ruling on the issue in its favor. (T. 15-16). In response, I granted Respondent permission to introduce evidence on this issue to develop the record; however I declined to reconsider the issue or the ruling. For a full discussion of this issue and the Hearing Officer's rationale, see correspondence concerning Petitioner's Motion to Enforce Hearing Officer's Order Granting Request for IEE, Respondent's Motion to Enforce Hearing Officer's Order, Respondent's Request for Evidentiary Hearing dated November 23, 2012.

### **PROCEDURAL HISTORY**

Petitioner filed the instant request for due process on March 20, 2012. Myrna Silver, Attorney at Law, represents Petitioner in this proceeding. Cynthia Buechler, Attorney at Law, represents Respondent.

The parties met in a resolution session on March 27, 2012, but did not reach resolution of the issues in dispute.

A pre-hearing conference was held on April 9, 2012. An Order Following Pre-Hearing Conference was entered on April 16, 2012 outlining the issues in dispute and extending the decision due date for good cause at the request of both parties. The parties requested a lengthy continuance of the initial hearing dates and decision due date to allow time to resolve significant pre-hearing disputes concerning Petitioner's requested IEE and Respondent's requested evaluation of Petitioner. In order to resolve those issues and allow time for the completion of the evaluations, I granted the continuance requested and reset the due process hearing to October 2-4, 2012 with a decision due date of October 29, 2012.

On July 30, 2012, I entered an Order Granting Permission To Petitioner To Amend Request For Due Process and Second Revised Scheduling Order. The due process hearing dates remained the same, but the decision due date pursuant to IDEA was changed to October 10, 2012. The parties met again in a resolution session to address Petitioner's amended request for due process on or about August 13, 2012, but did not reach resolution of the issues in dispute.

I held a second pre-hearing conference following the amended due process request on August 10, 2012. At that time, the parties jointly requested a continuance of the due process hearing and an extension of the statutory decision due date to allow time to complete the assessments in advance of the hearing. Finding that judicial economy and efficiency warranted completion of the evaluations before the hearing, I found good cause to grant the parties' request and reset the due process hearing to November 13-16, 2012, with a statutory decision due date of December 12, 2012.

On October 25, 2012, the parties jointly requested a third continuance of the due process hearing and the statutory decision due date to allow time to complete the assessments in advance of the hearing. Disputed legal issues caused delays in conducting and completing the assessments by the hearing dates. By order dated November 8, 2012, I found good cause to grant the parties' request for a continuance because of the importance of having the assessments in advance of the hearing; however, I informed the parties that no further continuance would be granted barring unforeseen emergencies. I reset the due process hearing to February 4-7, 2013 due to complications with scheduling during late December 2012 and January 2013, with a decision due date of March 6, 2013.

On January 29, 2013, Petitioner requested a continuance of the due process hearing and an extension of the statutory decision due date due to a death in student's counsel's family. Respondent had no objection. By order dated January 30, 2013, I found good cause to grant Petitioner's requested continuance and reset the hearing to the first mutually available dates of counsel: April 30, May 1, 2, and 7, 2013. The decision due date was set for June 3, 2013.

The due process hearing took place in the administrative offices of Aubrey ISD on April 30, May 1, 2, and 7, 2013. At the close of the hearing, the parties jointly requested an extension of the statutory decision due date to allow for the filing of post-hearing briefs. I found good cause to grant the request in light of the complex factual and legal issues in the case and reset the decision due date to July 31, 2013.

On June 19, 2013, Respondent requested a brief extension of the statutory decision due date to allow for additional time to file post-hearing briefs. For cause, Respondent indicated a personal conflict of counsel. Petitioner objected to extending the time to file post-hearing briefs, but did not object to extending the decision due date. I found good cause to grant Respondent's request and reset the decision due date to August 5, 2013 to allow for additional time for filing the post-hearing briefs.

### **FINDINGS OF FACT**

Based on a review of the testimonial and documentary evidence submitted in this cause, I find the following facts to be established based on a preponderance of the credible evidence:

1. Student lives with student's siblings and Parents within the geographical boundaries of AISD, a political subdivision of the State of Texas and a duly incorporated school district. Student is currently \*\*\* years old and has been deemed eligible for special education and related services based on the IDEA eligibility categories of Autism and Speech Impairment. (Petitioner Exhibit, 4, page 1; Respondent Exhibit 10) (hereinafter cited as P. 4, p. 1; R.10) (Petitioner and Respondent submitted duplicate exhibits of many of the same school records; I will cite to Petitioner's Exhibits for these duplicate exhibits rather than providing dual cites).
2. Student \*\*\* and became eligible for services from AISD pursuant to IDEA. Student had previously received early childhood intervention services. (P.4, p. 20). Student's first evaluation was completed by \*\*\* in \*\*\*, when Student was \*\*\*. \*\*\* administered an abbreviated Autism Assessment Screener and found that Student met the IDEA disability definition of Autism. In relevant part, the evaluation noted that Student had no words, rarely oriented student's gaze toward items, did not respond to student's name or to touch, imitated vocalizations but not motions, and engaged in no pretend play. (P.1).

#### **District's Initial Evaluation of Student- \*\*\***

3. Upon referral to AISD for services at age \*\*\*, AISD completed its initial evaluation of Student for special education services on \*\*\*. Due to documented developmental and language concerns, AISD

utilized a Transdisciplinary Play-Based Assessment and Autism Evaluation for its initial Full and Individual Evaluation (FIE) of Student (hereinafter referred to as FIE #1), an appropriate assessment tool for a child like Student. (P. 32, p. 53; Testimony of Petitioner's Expert \*\*\*, T. 584-585; hereinafter cited as P Expert, T. 584-585).

4. Student's Play-Based Assessment found significant deficits in the areas of **Communication, Social/Emotional, Fine Motor, Self-Help, Cognitive/Academic, and Behavior**. Student's social/emotional age was atypical and could not be determined; student's overall developmental age for communication skills was 6 months; student's fine motor age was assessed at 15 months; and student's overall cognitive skill at 12-18 months. (P.3, pp. 1-9). The Autism Evaluation confirmed that Student met the IDEA eligibility criteria of Autism. (P.3, p. 20). At the time of the evaluation, Student was non-verbal, unable to follow simple commands, did not initiate interaction, and became upset if anyone tried to play with student. (P.3).
5. AISD's FIE #1 was completed by a multi-disciplinary team, included a variety of assessment tools and strategies to gather functional, developmental, and academic information about Student, and included information provided by Parents. (P.3). FIE #1 met the evaluation criteria of IDEA and appropriately determined Student's eligibility under IDEA.
6. An evaluation completed by \*\*\* in \*\*\* (though not provided to the District until \*\*\*) confirms the findings of FIE #1, noting that Student was completely non-verbal and relied on physical manipulation, touching, crying, tantrums, aggression, and pushing away to request objects or actions and to protest. \*\*\* saw no evidence of Student's ability to take turns, imitate actions or sounds, understand verbal cues even in familiar environments, use familiar objects in conventional play, respond to student's name, share emotion, or regulate student's emotions and behavior. (P. 10; R.31, p. 5).
7. An Admission, Review, and Dismissal Committee (ARDC) convened on \*\*\* with all necessary ARDC members in attendance, and admitted Student to special education based on the categories of Autism and Speech Impairment.

#### **Student's First IEP - \*\*\***

8. Based on the results of FIE #1, the ARDC developed Student's first IEP. The IEP included a detailed statement of Student's present levels of academic achievement and functional performance (PLAAFP) based on assessment results, along with a statement as to how Student's disability affects student's participation in activities and the curriculum. In relevant part, the PLAAFP description noted the following skills:

**Academic:** *Student has difficulty looking when student's name is called, imitating sounds/words, indicating refusals appropriately, pointing to designated objects/pictures, \*\*\*, following simple one-step directions, staying in designated area, and staying engaged in a given activity.*

**Speech:** *Student is non-verbal and uses facial expressions, vocalizations, and simple gestures to communicate student's feelings and desires. Student does not seek eye contact, joint attention, or affection from others.*

**Behavior:** *Student uses some gestures to communicate desire for something, a need for help, or displeasure. Student is able to show pleasure for an activity. Student does not respond when student's name is called, does not seek out others, does not respond to directives, and does not imitate sounds/words or activities. Student prefers to play in isolation and becomes upset when*

*others come too close. Student has difficulty attending to instruction or other non-preferred activities.*

**Occupational Therapy:** *Student scribbles on a dry erase board and blew up a balloon. Student does not maintain focus and flits from one object to another. Student might stay in one area, but will move on when someone else enters the space with student. Student is dependent on others for dressing skills. Student is a very picky eater and eats only a few foods and drinks only \*\*\*.* (P. 4, p. 2).

9. Student's IEP contained five measurable academic and functional goals in the areas of **social/communication** (responding to name; imitating sounds/words; indicating refusal with words, gestures, pictures, or a voice output device; and pointing to a desired object to indicate a want or need while using one word utterances, gestures or pictures); **self-help** (indicating need for \*\*\*); **behavior** (follow one-step simple directions; stay in a designated area; and stay engaged in an activity for 5-10 minutes); **academic** (imitate sounds/words; request more of a preferred item or another turn; indicate refusals appropriately; choose preferred item by pointing; and choose preferred activity by pointing to a picture of the item); and **fine motor** (draw vertical and horizontal lines and circular lines; remain in seat and attempt to \*\*\*; and appropriately manipulate cause/effect toys). (P.4, pp. 4-8).
10. The areas of Student's needs closely dovetail with the \*\*\* that address behavior, social interaction, communication, and appropriate emotional responses. (Teacher \*\*\*, T. 159).
11. Student's IEP provided for \*\*\*, short instructions, visual aids, frequent breaks, supervision during transitions, full-time inclusion in a general education \*\*\* classroom with special education support via a special education certified teacher, access to a teacher assistant throughout the instructional day, occupational therapy, and speech therapy. (P.4, pp. 9-18).
12. The general education \*\*\* classroom at AISD was \*\*\*. The class served students with disabilities and those without. The ARDC did not consider any alternatives to the \*\*\* general education classroom for Student when deciding where to implement student's IEP. (\*\*\*, T. 236).
13. The ARDC completed the Autism Supplement, providing for social stories, a visual schedule, an In-Home Training Evaluation (IHT), positive support strategies, access to an instructional aide throughout the school day, staff support and training in behavior from District support staff, and use of teaching interventions based on research based strategies for students with autism. (P.4, pp. 21-23).
14. Student's IEP met the procedural requirements of IDEA. Student's goals and objectives addressed each of the documented areas of need that resulted from student's disability in FIE #1 and were designed to enable student to be involved and make progress in the general education classroom and curriculum.
15. The ARDC also requested an Assistive Technology Evaluation, which was completed in \*\*\*, and made recommendations for transitional pictures, PECS if verbal requests are not achieved within a reasonable amount of time, a single message switch for use during circle time, repeatable storybooks, and continued monitoring of student's communication needs for additional assistive technology as needed. (P.5).

### **Implementation and Effectiveness of Student's First IEP**

16. During \*\*\*, Student's IEP was implemented by Teacher \*\*\* (Teacher #1); Instructional Aide \*\*\* (Aide); Speech Therapist \*\*\* (ST #1); Occupational Therapist \*\*\* (OT); and support from LSSP \*\*\* (LSSP, T. 1062). Speech therapist \*\*\* (ST #2) replaced therapist \*\*\* in the \*\*\*. Student's \*\*\* class had approximately \*\*\* students (\*\*\*) with IEPs) with Teacher #1 and the Aide. (Teacher #1, T. 43-45).

17. Teacher #1 described Student as of the beginning of \*\*\* as follows: student could not \*\*\*. Student could not tolerate the other students in student's space and showed aggression if they came close to student. Student did not interact with other students at all, could not \*\*\* or stay in even a large designated area, required 1:1 for all seated work, use of preferred activities as very frequent reinforcement, physical prompting and hand-over-hand support, and modification of expectations for seat work. Teacher #1 testified that the PLAAFP statement in Student's IEP was accurate. (Teacher #1, T. 48-63).
18. Student began school with a strong interest in \*\*\* and was able to \*\*\* early in the \*\*\*. (P.9, pp. 3, 21, 27). Student's interest in \*\*\* served as both as a reinforcer for preferred activities and a self-calming mechanism.
19. When Student \*\*\*, it took months for student to progress to stay in a particular spot and just sit with other children. Student required either Teacher or Aide near student at all times. (Teacher #1, T. 48-57).
20. In working with Student during \*\*\*, Teacher #1 used the following strategies to support student's progress: First/Then, preferred activities as reinforcement while gradually extending expectations, physical and hand-over-hand prompting, visual schedules, peer modeling, prepping for transitions, sensory interactions, picture cues, and extensive documentation.
21. The OT supported Student in the classroom with fine motor activities. (Teacher #1, T. 100).
22. ST #1 provided 1:1 speech services in the classroom and in the speech therapy room, along with consultation with Student's teachers, who also worked on student's speech goals and objectives. (ST #1, T. 983-985). Student's speech goals were revised in \*\*\* to better address Student's behaviors based on student's performance at school for almost \*\*\*. (P.7, pp. 7, 20). Student progressed in speech during \*\*\*. By the end of the semester, student could \*\*\*, use the word "no" or "done" to indicate refusal, stay with the group more consistently, line up with the class, and begin to imitate. (SP#1, T. 967-968).
23. Teacher #1 completed a detailed and extensive daily communication journal for Parents throughout the \*\*\*. (P.9; R.25). In \*\*\*, entries indicate that Student was adjusting to the classroom environment, beginning to tolerate interactions with other children, decreasing aggression toward other children, and beginning to participate in \*\*\*. (See, for example, P.9, pp. 17, 18, 38, 39, 40).
24. Student's progress was not consistent and Student demonstrated increased aggression in early \*\*\*. Teacher #1 consulted with LSSP and ST #1 to devise a plan, which was effective in decreasing aggressive behaviors. Entries during the remainder of \*\*\* document notable progress in the areas of social interaction, communication, compliance, and self-regulation. (P.9, pp. 55, 58-64).
25. IEP progress data from \*\*\* also document progress on Student's goals and objectives for the period of \*\*\*. (P.8, pp. 20-30).
26. Communication journal entries in the \*\*\* reflect Student's continued progress toward involvement in classroom routines and social interactions. (P.20, pp. 1-68).
27. IEP progress data from \*\*\* indicated that Student made notable progress and was close to mastery on many of student's goals and objectives at the end of the IEP year, but student did not obtain mastery primarily due to lack of consistency and independence in demonstrating the skills. Teacher #1's comments on the IEP Progress Reports document Student's progress toward mastery. (P.17, pp. 1-27; P.14, pp. 50-56). As Teacher #1 explained, although student's performance was not consistent enough

to constitute mastery, there was a “huge difference from where student started- we had a long way to go.” (Teacher #1, T. 236, 241).

### **Student’s Second IEP - \*\*\***

28. Student’s annual ARDC convened on \*\*\* to review progress and develop Student’s IEP for the coming year. The PLAAFP statement in \*\*\* notes the following skills that were gained from the prior year: foundational skills for verbal communication, including mutual engagement, imitation of words and sounds, and some spontaneous verbal requests for assistance; demonstrated understanding of communicative intent, recognizing that saying a word can produce a desired result, i.e. saying “open” to get an object out of a container; easy tolerance of other children playing or working near Student; transitions well inside and out of the classroom; responds to student’s own name and to familiar songs; complies with simple directives; follows one-step directions; uses some words to communicate (done, no, help); participates in classroom routines (throws away trash and cleans up \*\*\*); stays in designated area for short amounts of time with a group; stays and sits \*\*\* with adult support even though student would prefer not to stay; easily redirected after resistance; initiates \*\*\* and independently \*\*\*; allows adult assistance; and repeats sounds and words with prompts. (P.14, pp. 2-3).
29. Student had also acquired additional skills not delineated in the PLAAFP statement: Student was able to maintain focus for approximately 15 minutes with prompts; Student was more compliant in OT and more easily redirected; student participated in class activities without resistance; student could make routine transitions within the school setting without picture schedules and with only verbal prompts, though student still needed visual schedules and social stories for schedule changes. (P.14, p. 25).
30. Student’s \*\*\* IEP contained 7 annual goals that were devised based on student’s performance to date. Student’s goals and objectives in O.T. and Communication continued to address the same areas from the previous year, with amendments such as increasing the level of independence expected or the mastery level. (OT, T. 318-319). The IEP also included new goals and objectives in the areas of \*\*\*, fine motor, \*\*\*, functional skills, and speech. (P.10, pp. 5-11). The remainder of Student’s IEP and services stayed the same, except that speech and O.T. time were increased in response to parent concerns. The Autism supplement was reviewed and completed, with the ARDC again offering an in-home training assessment that Parents declined. (P.14, pp. 18-24, 26).
31. Student’s \*\*\* IEP met the procedural requirements of IDEA. Student’s goals and objectives addressed each of the documented areas of need that resulted from student’s disability, and were designed to enable student to be involved and make progress in the general education classroom and curriculum.
32. At the ARDC meeting, school staff reviewed Student’s progress over the IEP year. Parent expressed concern with Student’s progress in the areas of self-help and communication, and reported Student acting out physically and verbally at home and in the community. To address Student’s behaviors, Parents requested a Functional Behavioral Assessment (FBA), which the ARDC agreed to provide. (P.14, p. 26).
33. Petitioner also requested an Independent Educational Evaluation (IEE) in all areas, to which the District offered to conduct an updated FIE. The instant litigation was filed on March 20, 2012, raising issues pertaining to the requested IEE as well as the provision of a free appropriate public education (FAPE) to Student.

### **Student’s FBA, BIP, and ESY Services- \*\*\***



34. LSSP \*\*\* and School Psychologist \*\*\* (Psychologist) completed Student's FBA in \*\*\*. The FBA consisted of six observations of Student in different settings over a 2 ½ week period, as well as information from Parents and Teacher #1. (P. 15; LSSP, T. 1068-1069; Psychologist, T. 1249-1250).
35. Student's behavior, as of \*\*\*, had improved significantly from \*\*\*. When Student began the \*\*\* program, student \*\*\* staff and \*\*\* when transitioning from a preferred activity. In \*\*\*, when faced with that frustration, Student occasionally put student's hand over student's ears or dropped to the floor, but would then quickly comply with verbal redirection or a physical prompt. (P.15, p. 2). Student's problem behaviors in the classroom were infrequent. (P.15, p. 4).
36. When given a directive in the home and community settings, Student continued to respond with \*\*, grabbing, and \*\*\*, as well as screaming and \*\*\*. (P. 15, p. 2). Escalation of behaviors occurred at home considerably more than at school. (P.15, p. 4).
37. The FBA found that Student was generally compliant and easily redirectable at school, and teachers were able to easily address student's behaviors with visual supports, good rapport, and typical classroom behavior management strategies. (Psychologist, T. 1251-1258; LSSP, T. 1069). During the observations, the examiners noted the following specifics, in relevant part: the use of hand-over-hand, visual, and verbal prompt pairings, \*\*\*, attention to task in speech therapy for twenty minutes, independent \*\*\*, close proximity to and interaction with peer \*\*\*, mutual engagement, accepting affection from a peer, and a need for an average of 12 physical prompts per ten minute period. (P.15, pp. 2-3).
38. The FBA recommended: a Behavior Intervention Plan (BIP) to provide consistency across environments, pairing of visual cues and activity baskets to reduce dependence on staff prompts, continued in-class support throughout the day, and an In-Home and Community Based Training assessment. (P.15, p. 6).
39. An ARDC convened over three sessions in \*\*\* to review the FBA and discuss Extended School Year (ESY) services. Significant conflict surfaced and erupted at the ARDC meetings, with Parents expressing the following concerns: AISD's failure to timely provide information for review in advance of ARDC meetings or minutes after the meetings; Student's failure to make progress despite AISD's representations of progress, Student's improper placement; and that staff is not trained or familiar with the disability of Autism, do not accurately define compliance, active engagement, and redirection, and do not understand Student's unique educational needs. (P.16, pp. 61-65).
40. From this point in time forward, relations between the parties became increasingly strained and the lack of trust between the two was evident.
41. Parent agreed that Student needed a BIP, but disagreed with the FBA and the proposed BIP. The ARDC, without Parent's agreement, adopted Student's BIP, with the targeted behavior of increasing task completion. The BIP incorporated the recommendations of the FBA in selecting strategies. (P.16, pp. 42-43).
42. AISD offered appropriate ESY services, including speech and occupational therapy, but Parent declined ESY from the District in favor of a private program offered by \*\*\*, a private ABA-based program. Student did not receive OT or speech therapy services at \*\*\* or have typically developing or age appropriate peers. (P. 16; \*\*\*, T. 651, 709-711, 716).
43. At \*\*\*, Student did not display the skills demonstrated at AISD. Because of student's behaviors and lack of skills, \*\*\* worked with student on a 1:1 basis on many of the same goals as student had worked

on at AISD (compliance, requesting, engagement, off task behaviors). (\*\*\*, T. 673-674). \*\*\* provided Parent with a daily communication log very similar to that provided by Teacher #1 and Teacher #2. (P.22).

44. Student made progress during the summer at \*\*\*, as student did at AISD during the school year. (\*\*\*, T. 694-695). Video clips of Student at \*\*\* and AISD illustrate different approaches to working with Student. (P.39; R.30). \*\*\* offers a traditional ABA-based program with 1:1 discrete trial training and very small ratios designed to shape behaviors and improve communication. (\*\*\*, T. 651). AISD offers inclusion in a general education setting with access to typically developing peers who provide language and social role models; ABA strategies and specialized instruction are applied in the natural environment of the classroom to support Student's progress and access to the general education curriculum. (Teacher #1, T. 212; Diagnostician, T. 1030-1031; LSSP, T. 1086-1087; \*\*\*, T. 1147)

### **Implementation and Effectiveness of Student's Second IEP**

45. During \*\*\*, Teacher \*\*\* (Teacher #1); Instructional Aide \*\*\* (Aide); Speech Therapist \*\*\* (ST #2); Occupational Therapist \*\*\* (OT); and LSSP \*\*\* again implemented Student's IEP. In the \*\*\*, Teacher \*\*\* (Teacher #2) replaced Teacher #1. Teacher #2 was also dual certified in general and special education. (Teacher #2, T. 1095). Staff worked together to implement Student's IEP and ST #2 communicated with Student's private speech provider to ensure consistency of goals and services across settings. (Teacher #2, T. 1111; ST #2, T. 990; P.31, pp. 8-10).

46. Staff provided specialized instruction to Student utilizing First/then, a daily picture schedule, core vocabulary board, and picture icons. (ST #2, T. 992). They also employed modeling and practice for social training early in the year and progressed to social stories and pictures as student became more interested. (ST #2, T. 992-993).

47. Student ended the \*\*\* school year with the following competencies: student's attention span increased to 10 minutes or completion of a task; student responded to student's name and directives; student tolerated other students and adults in student's space; student made substantial progress \*\*\* such that student was able to independently \*\*\*; at times, student could remain \*\*\* for the entire time; student made significant progress on the \*\*\* TEKS; had functional speech \*\*\*, could \*\*\* at times. (Teacher #1, T. 209-211, 226-234; ST #2, T. 994; Teacher #2, T. 1097). Teacher #1 characterized Student's progress over the course of the year as "significant." (Teacher #1, T. 210-211).

48. Toward the end of the \*\*\*, Student began using a core vocabulary board and \*\*\*. Student demonstrated improved eye contact, better relationships with adults, increased attention to tasks, and more spontaneous functional use of language. (\*\*\*, T. 942-943, 947-949; ST #2, T. 1003).

49. Weekly communication reports during \*\*\*, and in particular \*\*\*, support the existence of increased language usage at school (\*\*\*) as well as increased participation \*\*\*. (P.20, pp. 69-103; P.17, pp. 32-37; R.24).

50. On \*\*\*, the ARDC convened to review Student's program and placement in light of concerns raised by Parent. Parent did not attend. After updating Student's PLAAFP, the ARDC reviewed and revised Student's IEP goals and objectives. The ARDC primarily amended existing goals to change mastery levels, specify levels of independence, or clarify the goal; however, new goals were added to address eating, \*\*\*, and the use of the \*\*\*. (P.26, pp. 5-18). The ARDC agreed to Parents' request of a \*\*\* program, and recommended additional speech therapy time, both 1:1 and consultative for staff,

additional OT time, an In-Home Training assessment, and behavioral consultants to assist staff with strategies to further support Student's progress. (P.26, p. 46; ST #2, T. 104).

51. IEP Progress Reports dated \*\*\* indicate that Student had mastered some goals, but was primarily progressing on student's goals and objectives with sufficient progress to achieve the goal by student's next annual ARDC. (P.21, pp. 1-13).
52. Like Teacher #1, Teacher #2 also provided detailed daily data sheets documenting Student's entire day by time block, indicating what student worked on and the level of prompt or assistance student received. (P.21, pp. 15-102). These records, as well as Teacher #2's testimony, document Student's progress during \*\*\* with increased use of language, increased socializing with both adults and peers, progress in fine motor skills, progress in eating at school and in the cafeteria with other children, increased tolerance of other students in student's space, and increased attention span. (P.21; Teacher #2, T. 1098-1108).
53. IEP Progress Reports dated \*\*\* reflect mastery of numerous objectives and continued work on others. (P. 21, pp. 103-121).
54. Student attended \*\*\* on \*\*\* during \*\*\*. Student worked on very similar goals as at AISD: manding/matching/motor imitation/echoics; \*\*\*; stay on task; and tracing/copying horizontal and vertical lines. Progress documentation reflects Student was demonstrating many of the same skills exhibited at AISD. (p.29).

#### **Student's Third IEP – \*\*\***

55. Student's annual ARDC convened on \*\*\* to review program and progress, including the results of Student's IEE by \*\*\*. The ARDC statement of PLAAFP provided detailed descriptions of competencies in every area. Student's competencies represented meaningful progress from \*\*\* PLAAFPs. Examples include: primarily communicates using single word, simple gestures and picture communication symbols; uses language to label objects, make requests and refusals; has growing expressive vocabulary of over 60 words that student uses spontaneously in school environment; uses a core vocabulary board; understands and follows routine instructions; level of focus has increased and continues to be easily redirected when off-task; increased use of language to communicate wants and needs; increased social interaction with peers; increased social learning as student demonstrates attempts to imitate peers; will turn and look or make eye contact when name is called; \*\*\*; eats preferred food independently; demonstrates \*\*\* academic skills. (R.29, pp. 3-4).
56. The ARDC adopted new speech and OT goals for Student that reflected more complex skills. The ARDC document submitted into evidence is incomplete. (R.29, pp. 6-11).

#### **Updated Assessment Data of Student- \*\*\***

57. Petitioner obtained an IEE, completed on January 18, 2013, from \*\*\*. (P.32). Respondent completed a reevaluation FIE (FIE #2) of Student on \*\*\* (R.31).
58. Standardized assessment data is difficult to obtain on Student due to Student's communication deficits and the level of prompting needed. On both the IEE and FIE #2, scores were described as possibly underreporting Student's likely capabilities. Further, both evaluations contained testing that could not be reported in standardized scores because of Student's inability to complete the testing in accordance with manual instructions. (IEE, P.32, pp. 32, 54, 56; FIE #2, R.31, pp. 7, 8, 35, 36).

59. Student's scores on formal assessment measures reflect lower capabilities than student actually has. (\*\*\*, T. 1051-1053)

**\*\*\* IEE**

60. Dr. \*\*\*, a principal of \*\*\*, presented the findings of the multidisciplinary Autism Evaluation of Student completed by \*\*\*. Dr. \*\*\* is a highly qualified expert in the field of autism, has developed a model of intervention for students with autism, and has done substantial training, assessment, teaching, and publishing in the area of autism.
61. The IEE includes detailed information about Student that includes informal, formal, and anecdotal assessment. Detailed information was obtained from Parents via interview and from staff via questionnaire, including Teacher #2, ST #2, and Aide. Information obtained confirmed that Parent views more severe symptoms of Autism in the home and community environment than staff observe at school.
62. Dr. \*\*\* observed Student in student's classroom, hallway, and \*\*\*on one day for a period of approximately 3 hours. Dr. \*\*\* characterized what she observed as demonstrating social isolation and non-compliance. (\*\*\*, T. 625, 629). Dr. \*\*\* characterization was based on Student working on different tasks than other children, not sitting independently or participating fully \*\*\*, and not socializing with other students in the class. Dr. \*\*\* characterization is not supported by the day-to-day documentation maintained by Teacher #1 and Teacher #2 of many of Student's days in the classroom.
63. Test results in the area of language confirmed significant delays in expressive and receptive language. Student's language consisted of some words, 2-3 word phrases, and vocalizations. Staff input on Student's communicative capabilities was consistent with information provided on Student's IEPs and Progress Reports. Dr. \*\*\* observed Student, over several days, to use communication to request, reject, and respond to others. (P.32, p. 33)
64. Formal assessment of communication included the \*\*\* assessing receptive and expressive language; however, standard scores could not be obtained because of the level of cueing and prompting required. (P.32, p. 32). The Auditory Comprehension Subscale, which evaluates how much receptive language a child understands, was administered and Student demonstrated abilities at \*\*\*. On the Expressive Communication Subscale, measuring how much language a child can use, Student demonstrated scatter skills up to \*\*\* or \*\*\*. (P.32, p. 32).
65. Dr. \*\*\* acknowledged that OT is not her area of expertise; however she reported that Student did not display fine motor and visual-motor skills of the level she would expect and of a typical child student's age. On the Developmental Test of Visual Motor Integration (VMI), Student scored a standard score of \*\*\*, just within the average range. (P.32, pp. 51-52).
66. In the area of cognitive and developmental assessment, the IEE administered several measures. On the Stanford-Binet, Student obtained a full scale IQ of \*\*\*, but the examiner believed it not to be an accurate reflection of Student's capabilities. (P.32, p. 54). On the Developmental Activities Screening Inventory (DASI-II), Student demonstrated \*\*\* skills in the \*\*\* range, and a developmental quotient of \*\*\*, with scatter skills through \*\*\*. Again, the examiner thought that Student was capable of more than student displayed. (P.32, p. 56).
67. Other testing measures confirmed the presence of Autism, and significant deficits in communication, adaptive skills, and executive functioning. (P.32). Scores reflected that Parent viewed Student's

disability behaviors as more severe than school staff did. Dr. \*\*\* testified that the higher scores in the school environment could be due to the greater degree of structure and consistency in that environment, or to school staff being unaware of the symptoms of the disability of Autism. (\*\*\*, T. 599).

68. Consistent with AISD, Dr. \*\*\* concluded that Student is eligible for special education services based on the categories of Autism and Speech Impairment. The assessment data reported in the IEE is substantially similar to that reported in FIE #2. Dr. \*\*\* acknowledged that Student has made some progress while at AISD; however, she concluded that Student has not made meaningful progress. Dr. \*\*\* defined meaningful progress as more progress than can be attributed to the mere passage of time. In contrast, Dr. \*\*\* is looking for meaningful and age-appropriate progress. (\*\*\*, T. 614-615). She testified that Student is “not where you would want a \*\*\* year old to be.” (\*\*\*, T. 627).
69. Dr. \*\*\* testified that test scores are not as significant in measuring progress as how Student actually functions at school on a day-to-day basis. (\*\*\*, T. 624-625, 629).
70. The IEE concluded that Student requires a more highly structured self-contained special education class with a smaller student to teacher ratio that is designed for students with autism. Such a class would provide Student with necessary opportunities for direct 1:1 or small group instruction in communication and social skills, and would allow for part of Student’s day to be spent in discrete trial training based on ABA strategies. (\*\*\*, T. 611-612; 616-618).

## **FIE #2**

71. AISD administered a multi-disciplinary FIE of student with a team of personnel in \*\*\*. Like the IEE, FIE #2 utilized a variety of testing instruments and gathered information from a wide variety of sources. (R.31, pp. 1-2).
72. Formal testing of Student’s communication skills and language abilities included the Evaluating Acquired Skills in Communication-3<sup>rd</sup> Edition (EASIC3), the Communication Matrix, and the Clinical Evaluation of Language Fundamentals (CELF-P-2). (R.31, pp. 7-9).
73. On the EASIC3, Student obtained an overall developmental language skills score of \*\*\*, with scatter skills of up to \*\*\* for receptive language and \*\*\* for expressive skills. While AISD reports great gains on the Communication Matrix from its earlier administration to Student in \*\*\*, I find no record of the Communication Matrix scores in Student’s earlier testing data. On the CELF-P-2, only raw scores could be reported due to modifications that were provided in testing administration. Student’s raw score was \*\*\*, but no interpretation of the score was provided. (R.31, pp. 7-8).
74. Student’s communication scores reflect meaningful progress in communication from student’s original evaluation, which measured Student’s communication skills at the \*\*\* level. These scores are consistent with skills that Student demonstrates in the classroom setting. (ST #1, T. 974-976; ST #2, T. 1007-1014; \*\*\*, T. 920-921).
75. The Peabody Developmental Motor Scale Second Edition (PDMS2) is a standardized test that measures gross and fine motor skills of children and assesses their competence relative to same age peers. Student was able to participate in the standardized administration of the PDMS2, which itself demonstrated great progress. (ST #1, T. 973). Student’s overall Fine Motor Quotient (the combined score of subtests administered) fell in the average range, indicating meaningful progress on fine motor skills and attention to task from FIE #1, where student scored in the \*\*\* range with significant delays. (OT, T. 335-336; \*\*\*, T. 1190-1192).

76. Student's documented progress in fine motor skills and attention to task on FIE #2 are consistent with skills that Student demonstrates in the classroom setting. (ST #1, T. 976; OT, T. 342).
77. In the area of sensory processing, the data reflected significant differences between home and school environments. (R.31, pp. 19-24; OT, T. 335-336). Data indicates that Student's demonstrated sensory needs were effectively met in student's classroom with the use of the \*\*\*, and frequent breaks. (R.31, p. 24; \*\*\*, T. 1183-1185).
78. As reported on the IEE, data collected on FIE #2 confirmed that Student demonstrates more severe behaviors in the home and community environments than at school.
79. Classroom observation conducted for FIE #2 documented Student's ability to comply with routine simple instructions with verbal prompts, communicate basic needs and desires with gestures and words, demonstrate approval and rejection with appropriate communication, allow others in close proximity during play and tolerate interference from peers, participate in class activities within a structured routine, initiate contact with adults and request affection, engage with peers at \*\*\*, utilize spontaneous speech. The observation also reflected Student's inability to engage in classroom activities or remain in a group at all times, student's continued challenges with social interaction and communication, and student's need for sensory stimulation. (R.31, pp. 11-13).
80. Observation of Student in the cafeteria reflected student's ability to remain in the cafeteria setting with support, with peers seated at the other end of the table. Student ate student's lunch and drank and did not interact with peers, but tolerated them as well as the noise, traffic, and smell of the cafeteria. FIE #2 documented progress in the area of feeding from the \*\*\* school year; specifically, that Student ate lunch with minimal prompts; student's food preferences remain limited, but have expanded; and student understood and tolerated the stimuli and social routines of the cafeteria such as wiping mouth and hands, putting away trash and lunch tray, and remaining quietly in student's seat during the lunch period. (R.31, pp. 14-17).
81. As with the IEE, other measures confirmed the presence of Autism, and significant deficits in communication, adaptive skills, social skills, and executive functioning. (R.31, pp. 28-34). Results from the Autism Diagnostic Observation Schedule (ADOS) when compared to the \*\*\* administration of the ADOS indicated notable improvement in Student's engagement, eye contact, and communication. (R.31, pp. 28-29; P.3, p. 19; LSSP, T. 1073).
82. With respect to cognitive and academic skills, accurate assessment results were again difficult to obtain and results were reported to be an estimate of Student's level of functioning. (R.31, p. 36; \*\*\*, T. 1051-1053). The AISD diagnostician testified that Student's standard score of \*\*\* on the Cognitive domain of the \*\*\* correlates with the age equivalency of \*\*\*, representing growth from Student's \*\*\* cognitive measure of approximately \*\*\*. (R.31, pp. 34-35; \*\*\*, T. 1047-1048).
83. The Assistive Technology portion of FIE #2 found that Student's pointing skills had progressed sufficiently to make effective use of \*\*\* for educational gains. (R.31, pp. 31-42).
84. Overall, the results of FIE #2 were consistent with the educational documentation of progress for Student and demonstrated meaningful progress in the areas of language and communication, fine motor and attention skills, behavior, social interaction and engagement, and self-help.

## **The Witnesses**

85. Teacher #1 had 18 years experience in \*\*\* education, with both general and special education certifications. She testified at length and her testimony demonstrated her skill, knowledge and expertise in working with \*\*\* children, her expertise in behavioral techniques and management, and her specific knowledge and understanding of Student and student's needs. I find Teacher #1 to be highly capable, diligent, and attentive to Student's needs.
86. Teacher #1 complained to AISD during \*\*\* about the difficulty of educating Student in her classroom because of the high demands placed on her time and its impact on other children. As a result, she believes she was asked to resign from AISD or face termination. She testified in this proceeding under subpoena and no longer worked for AISD. Teacher #1 had no motive in this proceeding to tell anything but the truth and I found her testimony to be balanced as to Student's progress and continued challenges, credible, and persuasive on the issues of Student's participation and progress in her classroom. (Teacher #1, T. 36-44).
87. The day-to-day service providers who worked with Student, such as student's speech therapists, occupational therapist, and LSSP had direct knowledge of Student's capabilities over time and I find their testimony to be credible as to student's abilities in the classroom. I found them to be truthful in their descriptions of Student's capabilities, progress, and ongoing challenges.
88. The experts and consultants retained by AISD in \*\*\* following the filing of this action testified to observations they made of Student and student's classroom over periods of varying lengths. (\*\*\*, \*\*\*, and \*\*\*). While I credit their observations of specific events observed, I find their testimony overall to be less persuasive than the staff who worked with Student directly, as these witnesses had no familiarity with Student over time and had not reviewed student's educational records. I further find their testimony to have been biased by the pending litigation between the parties.
89. Petitioner's expert, Dr. \*\*\*, testified credibly to the contents of the \*\*\*evaluation. Dr. \*\*\* offers considerable expertise and knowledge on the evaluation and education of students with autism. Dr. \*\*\* believes that Student should have made more progress at AISD than student did, and could have made more progress with a more restrictive setting. However, Dr. \*\*\* offered no basis for her conclusion that Student should have made more progress other than stating that Student was not at the level we would expect of a typical \*\*\* year old.
90. Mother testified truthfully to her frustrations with the pace of Student's progress at AISD, student's continued challenges in the home and community, her lack of trust of AISD, and her preference for Student to be educated in an ABA classroom with an ABA therapist.

## **Statute of Limitations**

91. Petitioner presented no evidence to establish that Parents were prevented from filing a due process complaint prior to March 20, 2012 due to either of exceptions to the statute of limitations set forth in 34 C.F.R. § 300.511(f).

## **General Fact Findings**

92. Student has made meaningful progress during student's \*\*\* years at AISD as a result of acquiring demonstrated skills in the areas of communication/language, behavior, self-help skills, social engagement and interaction, fine motor skills and attention to task, and \*\*\* skills. While Student's

progress is not always consistently demonstrated across settings, and student's skills are not consistently and independently demonstrated day-to-day, the evidence reflects a clear trend toward mastery.

93. The record reflects that Student has demonstrated the following progress in the area of **behavior/social**: no longer reaches for, \*\*\* staff's or faces and arms; \*\*\* independently without \*\*\*; tolerates children in proximity and engages with them at times in the classroom; tolerates participation in \*\*\* routine, including passing objects with other students and accepting affection from them; complies with directions in the school setting with relative ease; transitions within and outside of the classroom and participates in routines; tolerates larger environments with greater ease such as the cafeteria and school assemblies; and has improved attention span for both preferred and non-preferred activities.
94. The record reflects that Student has demonstrated the following progress in the area of **self-help** skills: \*\*\*; eats some lunch and snack on an almost daily basis for an expanding list of foods in the school setting; tolerates non-preferred foods in proximity; self-feeds; and \*\*\*.
95. The record reflects that Student has demonstrated the following progress in the area of **communication** skills: engages in \*\*\*; spontaneously uses words; has an expressive vocabulary list of approximately \*\*\* words; makes verbal requests for assistance, breaks, or objects with simple verbal prompts and visual cues; follows verbal commands from familiar adults coupled with visual prompts; responds to communicative attempts by reaching for objects or labeling objects; and uses verbal and non-verbal communication to comment on and request objects, request actions, and to protest.
96. Student's inclusion at AISD in the general education classroom and the activities of student's general education peers, such as \*\*\*, assemblies, and \*\*\*, provides educational benefits to student even though student requires specialized instruction and supplementary aids and services in order to be served in that setting. (Teacher #1, T. 212; Diagnostician, T. 1030-1031; LSSP, T. 1086-1087; \*\*\*, T. 1147).

## DISCUSSION

### I. The Legal Standards of IDEA

The purpose of IDEA is to ensure that all children with disabilities have available to them a free, appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. *20 U.S.C. § 1400 (d)*. Under IDEA, AISD has a duty to provide a free appropriate public education to all children with disabilities residing within its jurisdictional boundaries between the ages of 3 and 21. *34 C.F.R. § 300.101 (a)*. AISD owes this duty to Student.

IDEA requires Respondent to provide Student with a free appropriate public education that consists of "personalized instruction with sufficient services to permit the child to benefit educationally from that instruction." *Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982)*. In *Rowley*, the court developed a two prong analysis to determine if a school district has met its obligation to provide a free appropriate public education: 1) whether the district complied with the procedural requirements of IDEA, and 2) whether the district offered a program to the student that was reasonably calculated to provide educational benefit. *Id. at 206-207*.<sup>1</sup>

The essence of determining whether a substantive violation of IDEA has occurred is whether the school's program has provided the student with the requisite educational benefit. IDEA does not require an education that maximizes a student's potential; rather, the school must provide an education that is reasonably calculated to enable the child to achieve *some* benefit. *Some* benefit means an educational program that is meaningful and



offers more than a *de minimus* educational benefit; it must be “likely to produce progress, not regression or trivial educational advancement.” *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5<sup>th</sup> Cir. 1997).

Although courts have not adopted a specific substantive standard to determine when a free appropriate public education has been provided, the Fifth Circuit in *Michael F.* identified four factors to consider in analyzing a school’s program: 1) is the program individualized and based on 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; and 4) are there demonstrated positive benefits both academically and non-academically to the student.

Case law dictates that Student has the burden of proof to establish a violation of IDEA in this case and that Respondent’s program deemed presumptively appropriate. *Tatro v. State of Texas*, 703 F.2nd 823 (5<sup>th</sup> Cir. 1983), *aff’d* 468 U.S. 883 (1984); *Schaffer v. Weast*, 546 U.S. 49 (2005).

Applying these standards to the evidence presented, I find that Petitioner failed to prove that Respondent denied Student a FAPE for the period of March 20, 2011 through January 25, 2013.<sup>ii</sup>

## **II. The Parties’ Positions**

Petitioner’s primary contention is that Respondent has denied Student a free appropriate public education during student’s tenure at AISD. In support of student’s position, Petitioner points to evidence corresponding to each of the four indicia of a free appropriate public education set forth by the Fifth Circuit in *Michael F.*, *supra*. In particular, Petitioner argues that Respondent failed to consider or provide student with a continuum of placements as required by IDEA because the only placement available within AISD for \*\*\* is the general education \*\*\* class student attended at the \*\*\*. Petitioner believes the failure to consider and make available alternative placement options is itself a violation of a free appropriate public education. But beyond that, Petitioner asserts that student’s general education classroom at \*\*\*, even with the supports and services provided, was not student’s least restrictive environment under IDEA because student was unable to learn, progress, and access the general education curriculum in that setting. Petitioner seeks placement in a smaller, more structured communication classroom that is specifically designed to meet the needs of a \*\*\* with Autism. Mother testified that she seeks an ABA-based classroom taught by an ABA therapist.

Respondent counters that Petitioner’s placement in the general education classroom at \*\*\* is exactly what student needs. Respondent emphasizes IDEA’s mandate to include children with disabilities to the *maximum* extent appropriate with typically developing peers and point to a multitude of benefits Student has realized by student’s exposure to and interaction with typically developing peers in student’s general education classroom. Respondent further argues that because Petitioner has clearly made progress in that setting, it would be a violation of IDEA’s least restrictive environment mandate to remove student from general education to place student in a self-contained setting with only children with disabilities.

## **III. The Evidence**

Both parties presented a tremendous amount of evidence in support of their respective positions. I carefully read each assessment, test and subtest result, progress note, communication log entry, IEP progress report, PLAAFP descriptor, therapy log, ARD document, and email; watched each of the videos submitted of Student at school and at student’s private program; and reviewed the testimony of the eighteen witnesses in considering whether Student made sufficient progress in student’s placement at AISD. Much of the evidence consistently

pointed to Student's progress toward developing critical skills in student's demonstrated areas of need; however, some of it also suggested that Student's progress has been very slow and minimal.

In sorting through which of the evidence is most probative on this critical question, I note the following: although the parties initially enjoyed a collaborative and exceptionally communicative relationship, this broke down rather rapidly when the parents expressed displeasure with Student's progress and sought independent assessments and additional data from the school in \*\*\*. I find the breakdown in communication and collaboration to result from the actions of both parties and assign no greater blame to one. The significance of this breakdown is that from that point forward (\*\*\*), the parties have been involved in highly contested litigation which I find has tainted the reliability of some of the evidence introduced.

I give great weight to the extensive documentation of Student's progress made contemporaneously by student's teachers and speech therapists for the sole purpose of educational record keeping and communicating with Parent. Teacher #1 (Student's teacher for \*\*\*) did an exceptional job of documenting detailed progress information based on specific skills and challenges demonstrated by Student on a day-to-day basis. She recorded her documentation largely before any disagreements between the family and school surfaced, and before the instant highly contested litigation ensued. The purpose of her documentation was solely for educational reasons. In addition, Teacher #1's testimony was balanced and credible, acknowledging her frustration with the overload she felt Student's placement in her class caused and her resulting termination of employment from the District (which she believes is related to complaining about the understaffing in her classroom); while at the same time, speaking honestly of Student's achievements and difficulties. I found her assessment of Student's progress to be particularly credible and reliable.

I also give great weight to the assessment data and observations collected by the evaluators who conducted Student's FIEs, FBA, and student's independent IEE. This includes the information collected from Parents during the assessment process.

Respondent offered the testimony of several witnesses who were retained by the District around or after the time this dispute arose to observe in Student's classroom, consult with staff, and offer testimony as to the appropriateness of student's program and student's progress. Petitioner objected to the testimony of these individuals on the grounds that Parent provided no consent for them to observe or work with her child.<sup>iii</sup> Respondent countered that these individuals were working on behalf of AISD, providing educational services at the District's request.

I find nothing in IDEA that would preclude these individuals from testifying on the grounds asserted by Petitioner. That said, I do not find their testimony to be as credible or probative as the evidence previously outlined. These individuals testified to the appropriateness of Student's placement and to student's progress over time without having reviewed student's assessments, IEP, or progress data. In addition, the District retained each of these experts after the instant litigation ensued to observe in the classroom and then testify. The content of their testimony was in lock-step with each other and was wholly in support of the exact position delineated by the District, lacking any of the nuanced perspective of this Student's "on and off" progress that the evidence and other witnesses, including school witnesses, clearly document. While I certainly do not entirely discount their testimony, I find the assessment and progress data provided by "regular" school staff, Parent, and assessment providers to be more persuasive on the issues of Student's progress and appropriate placement.

#### **IV. The Indicia Of A Free Appropriate Public Education**

The four factors identified in *Michael F.* need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5<sup>th</sup> Cir. 2009). Even so, the Court also states that the demonstration of educational benefit to a student is the "most significant" and that positive educational benefit will generally militate against a finding that an IEP is inappropriate. *Klein ISD. v. Hovem*, 690 F.3d 390, (5<sup>th</sup> Cir. Tex., 2012, cert denied 2013 U.S. LEXIS 2325 (March 18, 2013). Progress must include both academic and non-academic areas, including social skills, developmental skills, and functional skills. *Venus ISD v. Daniel S.*, 36 IDELR 870 (D.C.N.D. TX 2002).

##### **A. Is The Program Individualized Based On Assessment And Performance?**

Student's initial program at AISD was developed by the ARDC in \*\*\* based on the results of FIE #1. FIE #1 was administered in accordance with the procedural requirements of IDEA and properly identified Student's disabilities and areas of need. The ARDC carefully considered the results of the assessment, as well as a detailed statement of Student's then present level of academic achievement and functional performance to devise student's IEP. The IEP included goals and objectives designed to address each of Student's deficits and provided for access to supplementary aids and services (access to a full-time instructional aide and other items as outlined in the Autism Supplement) and related services. (Petitioner contests the procedural sufficiency of some of the IEP's goals and objectives, but as previously discussed, these procedural defects are only actionable if they result in educational harm to Student.) Student's placement in the general education \*\*\* class with special education support was likewise tailored to student's specific needs, with the provision of those supports the ARDC believed to be reasonably necessary for student to succeed in that setting.

The record reflects that Student's program was continually updated by the ARDC as needed based on both performance and assessment. The ARDC met in \*\*\* following the completion of Student's AT evaluation to review that evaluation, discuss ESY services, and update goals. Student's annual ARDC met in \*\*\* and reviewed updated progress and revised student's program accordingly. The ARDC met again in \*\*\* to review a completed FBA, discuss updated performance, and Student's ESY needs. When Student returned for the \*\*\* school year, the ARDC again met in \*\*\* to update goals and objectives and revise Student's program, based on both performance and to respond to concern's raised by Parents. The ARDC met in \*\*\* for Student's annual ARD and reviewed updated progress information and assessment results from \*\*\* to devise a new IEP for the upcoming IEP year.

Petitioner argues that Student's IEP was not individualized to student because student's placement did not provide a suitable staff-to-student ratio and student did not have a BIP to address behaviors that impeded learning. The placement issue will be addressed fully in the discussion of least restrictive environment. With regard to a BIP, the evidence is clear that the ARDC and staff working with Student considered and provided effective, positive behavioral strategies and supports to address Student's behaviors even though student did not have a BIP. Student's teachers testified that behavior management was not an issue in the classroom. When Student demonstrated inappropriate behaviors during \*\*\*, student's teacher conferred with the LSSP and ST to devise a plan, which was clearly effective in addressing the behavior. I find the failure to include a BIP in Student's initial IEP does not establish that the IEP failed to address Student's individualized needs.

The evidence demonstrates that Student's program was tailored to student's individualized needs as identified by ongoing review of student's performance and available assessment data.

##### **B. Are Services Provided In A Coordinated And Collaborative Manner?**

Student's services were clearly provided in a coordinated and collaborative manner by the AISD personnel who worked together to serve student. The LSSP, OT, ST, and classroom teacher worked together effectively to provide Student with an array of services to support student's development and to address student's IEP goals and objectives. The evidence also reflects that, when asked, AISD personnel collaborated with Student's private therapy providers to coordinate services and exchange information.

Petitioner nonetheless argues that this indicator of a free appropriate public education was not satisfied because of the Parents' lack of meaningful participation in the provision of student's services. Specifically, Petitioner points to the lack of available placement options within AISD for them to consider, the ARDC's failure to truly consider Parents' concerns and perspective about Student's education, and AISD's treatment of Petitioner's independent evaluators.

The record reflects that the parties worked together smoothly and without issue until \*\*\* when Parents expressed concern about Student's progress and requested additional evaluations. In fact, the evidence shows that Student's teachers did an outstanding job of informing Parents on a daily basis of Student's progress. From that point forward, and especially following the filing of this action in \*\*\*, the relationship between Parents and school personnel deteriorated and was characterized by a lack of trust and collaboration. Although the evidence supports Petitioner's contention that the District reacted negatively to Parents' requests for information and additional evaluation; it does not demonstrate, as Petitioner suggests, that the responsibility for the lack of collaboration falls solely on the District. Rather, the evidence shows that the District continued to offer services it believed necessary for Student (In-Home Training assessment), engaged a speech therapy supervisor and a behavior specialist from the Denton County Special Education Cooperative (of which Respondent is a member) to review Student's services and offer recommendations to the staff in light of Parents' expressed concerns, and revised Student's IEP in \*\*\* to provide additional services requested by the Parents (\*\*\*, increased time in speech and OT).

The evidence demonstrates that the lack of collaboration proven was between AISD and Parents, and not among AISD staff or between AISD staff and private providers. Despite the tension, disagreements, and contentious litigation, AISD has continued to offer services to Student in an effort to be responsive to Parents' concerns. I find that Parents were not denied meaningful participation under IDEA.

### **C. Is The Program Administered In The LRE With Demonstrated Benefits?**

#### The Legal Framework of LRE and FAPE

A primary mandate of IDEA is the requirement that an IEP place a student with disabilities in the least restrictive environment (LRE) for student's education. IDEA provides:

*To the maximum extent appropriate, children with disabilities, ... are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that the education in regular classes with the use of supplemental aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1452(1)(5)(A); 34 C.F.R. § 300.114(a).*

*Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989) is the seminal Fifth Circuit case addressing the least restrictive environment mandate of IDEA. Indeed, the Fifth Circuit recently confirmed that *Daniel R.R.* provides guidance for factor two of the *Michael F.* test. *R.H. v. Plano ISD*, 54 IDELR 211 (5<sup>th</sup> Cir. 2010). *Daniel R.R.* is particularly instructive given the facts of this particular case.

In *Daniel R.R.*, the court discussed at length the need to consider together the twin mandates of IDEA to provide a free appropriate public education and, to do so, in the least restrictive environment. The Court instructed that school districts must both include students with disabilities to the maximum extent appropriate *and* tailor each child's educational placement and program to his/her special needs. As such, to evaluate whether a challenged placement satisfies the least restrictive environment mandate of IDEA, the placement must be evaluated in tandem with the child's individual needs and their ability to obtain satisfactory results in the general education environment. The inquiry is fact intensive and requires striking the proper balance between the two requirements of IDEA.

In determining whether a student has been included in the general education environment to the maximum extent appropriate, the Court cautioned against relying primarily on whether a student receives an educational benefit in the general education classroom for two reasons. First, an IDEA-eligible student's failure to learn at approximately the same rate or level as a typical peer cannot be the primary basis for excluding the student from the general education environment because that would defeat the entire purpose of IDEA; namely, to require inclusion of students with disabilities in the mainstream educational environment, "...we cannot predicate access to regular education on a child's ability to perform on par with nonhandicapped children." *Daniel R.R., supra at 1047*. Second, whether a child will benefit educationally from general education is relevant and important to the "least restrictive environment" analysis, but the test of benefit is not one and the same as the *Rowley* standard of educational benefit. Rather, the inquiry must look to see if inclusion in the general education environment itself provides benefits to the particular child. In other words, as the Court explained, if a child derives benefit from the language and behavior models of typical peers, then general education may constitute that child's least restrictive environment even if s/he is unable to absorb all of the general education curriculum. The task is ultimately a balancing act.

Based on its analysis of the balancing involved, the *Daniel R.R.* Court set forth a flexible two-part test for determining the least restrictive environment under IDEA: 1) Can education in the regular classroom, with the use of supplemental aids and services be achieved satisfactorily for a given child; and 2) If it cannot and the school intends to provide special education or to remove the child from the regular education, has the school mainstreamed the child to the maximum extent appropriate? *Id at 1048*. The specific and fact-intensive inquiry must balance IDEA's requirements to provide inclusion in the general education environment to students with disabilities, while also tailoring each child's educational placement and program to his/her unique needs. *Id at 1044*.

Applying the legal standards to the evidence in this case, I find that Student's placement in the general education \*\*\* class at AISD, with supplementary aids and services, properly balances the twin mandates of IDEA to include Student to the maximum extent appropriate while meeting student's individual educational needs.

#### Lack of Availability of Continuum of Placements

Petitioner correctly points out that IDEA requires that a continuum of placements be available to meet the needs of children with disabilities for special education and related services. (*34 C.F.R. § 300.115*). Petitioner argues that it is abundantly clear that AISD failed to comply with this provision of IDEA.

I concur that the evidence demonstrates that AISD did not have available within its district an alternative placement for Student. It is equally clear that AISD did not consider whether a placement outside the District's general education \*\*\* class would be necessary to meet Student's needs. However, case law is clear that a failure to provide a continuum of placements under IDEA is a procedural violation of the Act. *Daniel R. R.*,

*supra* at 1043; *R.H. v. Plano ISD*, 607 F. 3d 1003 (5<sup>th</sup> Cir. 2010). A procedural violation of IDEA constitutes a denial of a free appropriate public education only if the procedural inadequacy causes substantive harm, either by impeding the child's right to a free appropriate public education or significantly impeding the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education. 34 C.F.R. § 300.513.

I have previously found that Parents had the requisite opportunity to participate in the decision-making regarding the provision of a free appropriate public education to Student. Although I recognize that Parents strongly believe that the lack of other placement options for Student significantly impeded their rights under IDEA, the evidence shows that Parents participated in all ARDC decisions and voiced their concerns about Student's placement. The fact that a disagreement continued to exist does not prove that Parents were impeded in their opportunity to participate in making decisions about Student's education.

Whether AISD's failure to provide a continuum of placements impedes Student's right to a free appropriate public education turns on whether Student's placement and program are appropriate under IDEA and satisfy the indicia of a free appropriate public education. As such, the failure to provide a continuum of placements is not itself actionable without a finding that Student's placement was inappropriate and denied student a free appropriate public education.

#### Was Student's Education Satisfactorily Achieved In The \*\*\* Classroom?

Student's placement at AISD has been in the general education classroom with supplementary aids and services for the full day; as such, student has been included *to the maximum extent appropriate* in general education. Under the first prong of *Daniel R.R.*, the question then is whether that has been satisfactorily achieved. This requires an analysis of the benefits received by Student, both from inclusion itself and from student's educational program.

#### Benefits of Inclusion

The evidence is clear that Student has received substantial benefit from student's inclusion in the general education classroom. Exposure to typically developing peers supports Student's language development and social engagement. The evidence demonstrates that Student is able to (and does) make use of that exposure, as student has begun to imitate peers in both sound and action and engage with peers in the classroom and at circle time. The presence of typically developing peers is a tangible and important benefit to Student provided by student's placement in the \*\*\* classroom.

Even with the clear benefits provided by the inclusion setting, Student's placement would not be appropriate if student cannot obtain educational benefit from student's placement in general education. This inquiry focuses on Student's progress in the classroom and whether student obtained the meaningful educational benefit promised by a free appropriate public education. Under IDEA, there is a fine, and often, elusive line between benefit and meaningful benefit. Even Petitioner's expert, Dr. \*\*\*, acknowledges that Student made some progress at AISD; she does not, however, view it as meaningful. Petitioner argues that Student has failed to consistently and independently master student's IEP goals and objectives and make meaningful progress in the areas of student's demonstrated deficits.

#### Meaningful Educational Progress

The evidence shows that Student made demonstrable progress over student's \*\*\* at AISD, but that progress is slow. Student's \*\*\* during the period in question compounds the challenge of determining whether the progress student has made constitutes trivial or meaningful progress for several reasons. First, formal

assessment data is difficult to obtain because of Student's limited communication and compliance skills. Second, Student's behaviors and deficits are difficult to fully tease out and understand because they, at times, \*\*\*. As such, AISD's failure to completely extinguish such behaviors is not necessarily a failing of Student's IEP and placement. Finally, at Student's \*\*\*, it is virtually impossible to discern what Student's reasonable rate of progress would be expected to be. Without accurate cognitive data or any track record of performance in school, there is no good evidence of exactly how far Student could reasonably be expected to have progressed during the \*\*\* period student has been served by AISD.

Petitioner's expert, Dr. \*\*\*, testified that Student failed to make meaningful progress because student was not where you would expect a \*\*\*-year old to be. Clearly, Dr. \*\*\* standard of meaningful progress is not what is contemplated by IDEA. As cautioned by the court in *Daniel R.R.*, children with disabilities may not learn at the same rate as their typical peers. Rather, IDEA instructs that meaningful progress must be measured against the Student's individual levels of current academic and functional performance. *34 C.F.R. § 300.324*. Measured in this way, the evidence demonstrates that Student has made meaningful progress in each of student's areas of need: communication/language, social/behavioral, self-help, pre-academic, and functional skills. Assessment data of Student shows growth in the area of communication and language from a \*\*\* level in \*\*\* to at least a \*\*\* level in \*\*\* and perhaps more. Using conservative estimates, Student had made at least \*\*\* years progress in a \*\*\* year period. Given the nature of Student's disabilities, I find this to be meaningful progress in this key area of need. Cognitively, the assessment data is less clear-cut, but still supports meaningful growth. In the area of fine motor skills and attention span, the data similarly shows significant gains. Beyond testing data, performance data confirms Student's meaningful progress in the classroom in each of student's areas of need. Student's teachers and related service providers credibly documented and testified to concrete examples of progress made by Student during the past two years. As Dr. \*\*\* testified, the day-to-day functioning of Student is even more important in determining progress than assessment data.

In sum, when balancing the mandate of IDEA to include Student to the maximum extent appropriate in the general education environment while simultaneously providing student with a program and placement tailored to student's individual needs, I find that Student's placement at AISD in the \*\*\* classroom constituted student's least restrictive environment. I further find that Student was satisfactorily educated in the \*\*\* classroom because student received benefits from student's inclusion and made meaningful educational progress under IDEA.

### **CONCLUSIONS OF LAW**

1. Respondent Aubrey ISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA and its implementing federal and state regulations. Aubrey ISD is Student's resident district under IDEA for all time periods relevant to this action.
2. Student bears the burden of proof on all issues raised in this proceeding. *Schaffer ex. rel. Schaffer v. Weast, 546 U.S. 49 (2005)*.
3. Student failed to prove that Respondent denied student a free appropriate public education between \*\*\*. Respondent's program satisfied the indicia of a free appropriate public education and provided Student with demonstrated academic and non-academic benefits as required by IDEA. *34 C.F.R. § 300.101*.
4. Student's placement in the general education \*\*\* class at Aubrey ISD satisfies the least restrictive environment mandate of IDEA. *34 C.F.R. § 300.114*.

## ORDERS

After due consideration of the record, and the foregoing Findings of Fact and Conclusions of Law, this Hearing Officer **ORDERS** that all relief sought by Petitioner is hereby **DENIED**.

It is further **ORDERED** that all other items of relief not specifically awarded herein are hereby **DENIED**.

Finding that the public welfare requires the immediate effect of this Final Decision and Order, the Hearing Officer makes it effectively immediately.

**SIGNED** and **ENTERED** this 5<sup>th</sup> day of August 2013.

/s/ Lynn E. Rubinett

Lynn E. Rubinett

Special Education Hearing Officer for the State of Texas

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<sup>i</sup> Petitioner alleged procedural violations of IDEA pertaining to student's initial evaluation by AISD, the failure to consider a continuum of placements, and student's IEPs. It is well settled that procedural violations constitute a denial of a FAPE only if the procedural inadequacies impeded the child's right to a free appropriate public education, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education, or caused a deprivation of educational benefit. *34 C.F.R. 300.513(a)*. Because I find that Student was not denied a free appropriate public education, was not deprived of an educational benefit, and Parents' opportunity to participate was not significantly impeded, Student's procedural violations do not constitute a denial of a free appropriate public education to Student.

<sup>ii</sup> Although Petitioner asked that the statute of limitations be extended beyond the one-year period for \*\*\*, Petitioner presented no evidence to establish either of the exceptions to the statute of limitations set forth in 34 C.F.R. § 300.511(f). Further, Petitioner did not pursue this issue in petitioner's closing brief. As such, Petitioner has failed to establish petitioner's entitlement to extend the statute of limitations beyond March 20, 2011.

<sup>iii</sup> Parent also alleged FERPA violations although the evidence indicated that the individuals involved did not review records. This Hearing Officer does not have jurisdiction to adjudicate alleged violations of FERPA.



TEA DOCKET NO. 211-SE-0312

STUDENT	§	BEFORE A SPECIAL
BNF PARENTS	§	EDUCATION
Petitioner	§	
v.	§	HEARING OFFICER FOR THE
	§	
AUBREY ISD	§	
Respondent	§	
	§	STATE OF TEXAS

**SYNOPSIS**

**Issue:** Whether Respondent failed to provide Student with a free appropriate public education from \*\*\*?

**Held:** For the District. Student failed to prove that Respondent denied student a free appropriate public education between \*\*\* Respondent's program satisfied the indicia of a free appropriate public education and provided Student with demonstrated academic and non-academic benefits as required by IDEA.

**Cite:** *34 C.F.R. § 300.101*

**Issue:** Whether Student's placement in the general education \*\*\* class at Aubrey ISD satisfies the least restrictive environment mandate of IDEA?

**Held:** For the District. Student's placement in the general education \*\*\* class at Aubrey ISD satisfies the least restrictive environment mandate of IDEA.

**Cite:** *34 C.F.R. § 300.114.*