

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

**STUDENT, bnf
Parent,
Petitioner,**

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v.

DOCKET NO. 180-SE-0413

**RICHARDSON INDEPENDENT
SCHOOL DISTRICT,
Respondent.**

DECISION OF THE HEARING OFFICER

Introduction

Petitioner, Student bnf Parent (“Petitioner” or “the Student”) brings this action against the Respondent Richardson Independent School District (“Respondent,” or “the school district”) under the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. § 1401 et. seq. (IDEA) and its implementing state and federal regulations.

Party Representatives

Petitioner was represented throughout this litigation by petitioner’s legal counsel Myrna Silver, Attorney at Law. Respondent was represented throughout this litigation by its legal counsel Nona Matthews with the law firm of Walsh, Anderson, Gallegos, Green & Trevino.

Resolution Session and Mediation

The parties attempted mediation in lieu of the Resolution Session on May 6, 2013 but it was not successful.

Procedural History

Petitioner filed the initial request for a due process hearing on April 4, 2013. Petitioner amended the request for hearing on April 23, 2013. A Prehearing Order was issued on May 16, 2013 that summarized the legal and factual issues, confirmed the items of requested relief, resolved some discovery issues, and confirmed the scope of Petitioner’s claims were those which arose within the one year statute of limitations period applied in Texas. The Prehearing Order also included a Revised Scheduling Order which reset the due process hearing to July 24-26, 2013 and, at Petitioner’s request, extended the 45 day decision deadline to August 30, 2013.

On June 4, 2013, at Respondent’s request, the hearing officer issued an Order Granting Continuance of the July hearing dates. The due process hearing was reset to September 16-18, 2013 and, at the request of both parties, the 45 day decision deadline was extended to October 18, 2013. On August 9, 2013 the case was re-assigned to this hearing officer. An Order confirming the legal issues and requested relief and addressing outstanding discovery issues was issued on September 9, 2013. The due process hearing was conducted on September 16-18, 2013. Both parties continued to be represented by their legal counsel. In addition, the Student’s parents *** and *** and Jennifer Montgomery (Paralegal to Ms. Silver) were also present throughout the hearing. Mia Martin, General Counsel, (the school district’s co-counsel), and ***, Executive Director for Special Student Services (the school district’s party representative) were also present throughout the hearing.

At the conclusion of the hearing both parties requested an extension of the Decision due date in order to provide the parties with an opportunity to submit written closing arguments and legal briefs following receipt and review of the due process hearing transcript. The parties also requested the extension in order to provide the hearing officer with an opportunity to consider the closing arguments and legal briefs in preparing the Decision. An Order granting the request was issued on September 19, 2013 and the due date for the Decision was extended at the request of both parties to November 15, 2013.

Petitioner's Issues and Items of Requested Relief

Petitioner posed the following broad legal issue for decision in this case as follows: Whether the school district failed to provide Student with a free, appropriate public education in the least restrictive environment during the 2012-2013 school year based upon the following specific allegations:

1. Whether the school district violated the IDEA when it failed to provide Student with an effective behavior plan to allow student to remain in the classroom and receive instruction;
2. Whether the school district violated the IDEA by its improper use of physical restraints resulting in physical harm to Student;
3. Whether the school district violated the IDEA when it failed to provide Student's parents with "notice" of the use of restraints;
4. Whether the school district violated the IDEA when it failed to properly and effectively address Student's problem behaviors as identified in the September 2011 Functional Behavior Assessment and allowed instead for those behaviors to continue to occur;
5. Whether the school district violated the IDEA when it failed to properly and consistently implement a mediated Settlement Agreement which required providing Student with 1:1 support by a trained aide dedicated to Student;
6. Whether the school district violated the IDEA by failing to provide Student with the appropriate support in order to ensure student's participation in *** when Student's mother could not be present;
7. Whether the school district violated the IDEA when it allowed Student to leave the classroom and/or removed Student from the classroom with placement in the Resource Room and whether in doing so student was allowed to avoid academic tasks for an extended period of time without returning to student's regular education classroom to participate in class work;
8. Whether the school district violated the IDEA when school district personnel failed to properly address a behavioral incident that occurred on ***, 2013 resulting in the escalation of Student's behavior, the improper use of physical restraints by school personnel who were not properly trained, and the improper suspension of Student for *** days;
9. Whether the school district violated the IDEA when school district personnel failed to properly address a behavioral incident that occurred on ***, 2013 resulting in the escalation of Student's behavior, the improper use of physical restraint and resulting in physical and emotional harm to Student;
10. Whether the school district violated the IDEA by the use of physical restraint as a behavioral tool that

should have been discontinued and whether its continued use resulted in the failure to provide Student with a free, appropriate public education;

11. Whether the school district violated the IDEA when it secured an FBA from the *** instead of using its own licensed specialist in school psychology (LSSP) to conduct the FBA; and,
12. Whether the school district violated the IDEA when it failed to secure permission from Student's parents for the *** to have access to Student and student's educational records for purposes of conducting the FBA.

Petitioner further contends student's parents provided the school district with the requisite notice on March 24, 2013 of their intent to withdraw Student in order to home school student for the remainder of the 2012-2013 school year and then to place student in a private school for the upcoming 2013-2014 school year.

Petitioner's Requested Relief

Petitioner requests the following items of relief:

1. Reimbursement for the cost of Applied Behavioral Analysis (ABA) from *** beginning on January 21, 2013 up through the summer of 2013 and until Student can begin attending a private school full time three times per week for one hour per session at a cost of \$200/hour;
2. Reimbursement for the costs of private speech therapy not covered by medical insurance during the period Student was home-schooled at a cost of \$69/hour for one hour per week through June 2013 and for the cost of additional speech therapy not covered by medical insurance at \$180/hour one hour per week if Student is not enrolled in a private school with the cost of private speech therapy incurred from January 22, 2013 through June 30, 2013 at \$1,311 and the cost of private speech therapy incurred from July to August 2013 at \$1,080;
3. Reimbursement for the cost of social skills training at *** from February 2, 2013 through April 6, 2013 for one session per week at \$60/per session for a total cost of \$360;
4. Reimbursement for the cost of in-home academic instruction during the period of home-schooling provided by *** at \$390/week for the period beginning on May 1, 2013 through August 1, 2013 and if Student is not enrolled full time at a private school continued academic instruction for 13 weeks at a cost of \$5,070;
5. Reimbursement for private school placement at *** in ***, Texas for one year to include regular school year and extended school year services at a cost of \$118,000 with payment continuing thereafter until the school district is able to provide Student with a free, appropriate public education in the least restrictive environment;
6. Reimbursement for the cost of an occupational therapy (OT) evaluation recommended by *** in the amount of \$225 to be included as a component of Student's IEP; and,
7. Implementation of the program recommendations provided by ***.

Respondent's Position

The school district contends it provided and can continue to provide Student with a free, appropriate public education in the least restrictive environment within the meaning of the IDEA. The school district denies Student's parents are entitled to any reimbursement for private placement, the costs of home-schooling and/or any other items requested reimbursement.

Findings of Fact

1. Student was first diagnosed with Pervasive-Developmental Disorder, Not Otherwise Specified at age *** in March 2007. (Respondent's Exhibit 1, pages 1, 5, referred to hereafter as "R. Ex. __").
2. A psychological was conducted in January 2009 and Student qualified for special education services as a student with Autism by the *** School District in ***. (Petitioner's Exhibit 3, referred to hereafter as "P. Ex. __.") (R. Ex. 3, pp. 1, 4) (R. Ex. 7). Students with autism have disorganized sensory systems and exhibit deficits in communication, social skills, and behavior as well as difficulty with peer relationships. (Transcript, Volume I, page 108, referred to hereafter as "Tr. Vol. __, p. __").
3. Student transferred to the school district from *** in *** 2010 ***. (Tr. Vol. II, pp. 194, 205) (Joint Exhibit A, referred to hereafter as "J. Ex. A.>"). The school district conducted a Full Individual Evaluation (FIE) and issued a report on January 21, 2011. The FIE report included a specific set of instructional recommendations to address Student's behavioral needs. The FIE also recommended that a formal Behavior Intervention Plan (BIP) and Crisis Plan were to be considered in the future. (R. Ex. 17, p. 13). An Admission, Review & Dismissal Committee (ARD), that included Student's parents, met on January 25, 2011 to review the FIE, confirm eligibility for special education, and design an Individual Educational Plan (IEP). (R. Ex. 18).
4. The school district provided special education services to Student as a *** student with Autism and a Speech Impairment. (R. Ex. 18, p. 2). Student attended *** at *** School. (R. Ex. 17, pp. 1, 5). Student attended *** and *** grade at *** School – Student's home campus. (Tr. Vol II, p. 208) (R. Ex. 15, p. 21) (R. Ex. 20, p. 1) (R. Ex. 31, p. 1).
5. The school district conducted a Functional Behavior Assessment (FBA) and completed an FBA report on September 27, 2011. (P. Ex. 12, pp. 34-39) (R. Ex. 22). The FBA identified target behaviors as non-compliance, verbal and physical aggression, and running from adults. The 2011 FBA concluded the function of Student's behavior was to gain attention from adults, escape a task or activity and, as a release when Student was highly stressed, frustrated, or angry. (R. Ex. 22). Student's parents provided input into the 2011 FBA. (R. Ex. 22).
6. An annual ARD, including Student's parents, convened on May 8, 2012 at the end of *** grade and developed a new IEP for *** grade. The new IEP included goals and objectives in the areas of self-control, social skills, writing, articulation, pragmatic language and behavior. (P. Ex. 13) (R. Ex. 27, pp. 1, 5-15, 22). The May 2012 ARD reached consensus on the design of Student's *** grade IEP. (P. Ex. 13) (R. Ex. 27, p. 26).
7. Student's cognitive abilities fall within the high average range of intelligence. (R. Ex. 7). Student functions at or above grade level when compared to classmates and same age peers. (Tr. Vol. IV, p. 619). Student is very bright and performed well academically in *** grade. (Tr. Vol. VI, pp. 793,

795-796, 809)(P. Ex. 31) (R. Ex. 36, p. 2). Although Student has significant cognitive strengths student's maladaptive behaviors interfere with Student's ability to showcase student's intellectual strengths. (Tr. Vol. I, pp. 159, 170-171)(Tr. Vol. VI., pp. 731, 751).

8. Student has a special aptitude for *** and an interest in ***. (Tr. Vol. VI, p. 793)(R. Ex. 17) (R. Ex. 31, p. 51). In *** grade Student and student's father worked together at home learning various ***. By the spring semester Student was able to ***. (Tr. Vol. VI., p. 822).
9. However, Student's parents felt Student was not sufficiently challenged at school and thought student never received any homework nor was student given an assignment notebook. (Tr. Vol. IV pp. 456-457, 460)(Tr. Vol. IV, pp. 456-457). Student's parents provided a communication notebook for use between home and school although it was not intended to be for homework. (Tr. Vol. VI, p. 820). It was not until February 2013 in response to parental complaints that the school district provided Student with the same planner used by all other *** graders. (Tr. Vol. IV, pp. 457-458, 815)(P. Ex. 30). Student's parents continued to express concerns over the homework issue. (Tr. Vol. VI, pp. 820-821)(R. Ex. 39, p. 10). In fact Student was given homework by student's *** grade teacher every day. (Tr. Vol. VI., p. 817).
10. The *** grade IEP also included a set of instructional accommodations to support Student in the classroom including: verbal/visual reminders to stay on task, multiple or frequent breaks, close proximity to staff, use of a visual schedule, visual supports for behavior, transition time, and warnings ahead of time for differences to the daily schedule. (R. Ex. 27, p. 16).
11. The *** grade IEP included a provision that Student could leave the regular classroom for the special education resource class. Consultation and training for school staff and the use of sensory strategies were also features of the IEP. (R. Ex. 27, p. 16). Under the *** grade IEP Student received the following special education services: social skills for 75 minutes/week; an integrated curriculum for 60 minutes/week; speech therapy 90 minutes/week; in-home training 45 minutes/month; OT consultation with Student and school district staff on the use of sensory strategies for 60 minutes/six week grading period; and, in-home and parent training for 45 minutes/month. (P. Ex. 13) (R. Ex. 27, p. 23) (R. Ex. 41) (R. Ex. 43). Student benefitted from and made progress in student's speech therapy in *** grade. (Tr. Vol., VI., pp. 779-780).
12. Student received the rest of student's instruction in the regular education *** grade classroom. Student was supported with a one-on-one trained special education aide – two different aides shared this responsibility. (Tr. Vol. VI., pp. 794-795, 800, 807)(R. Ex. 27, pp. 28, 30, 32). A Behavior Intervention Plan (BIP) was a component of the *** grade IEP. The BIP included interventions and strategies to address Student's non-compliant behavior, verbal and physical aggression, and running from adult-designated areas. (P. Ex. 13) (R. Ex. 27, p. 33). The BIP was based on the September 2011 FBA. (R. Ex. 22).
13. In *** grade Student also participated in *** - *** program for *** grade students ***. ***. (Tr. Vol. II, pp. 238-239)(Tr. Vol. IV, p. 566)(P. Ex. 58). Unfortunately, Student's behavior interfered with student's ability to benefit from the *** program. (Tr. Vol. II, p. 239)(Tr. Vol. VI, pp. 750-751).
14. The school counselor and speech/language therapist also *** that Student participated in during ***. ***. ***. (Tr. Vol. VI., p. 766). Student benefitted from ***. (Tr. Vol. VI., pp. 765-769, 780-783)(P. Ex. 51).

15. However, throughout *** grade Student demonstrated persistent behavioral issues. (R. Ex. 37). Areas of behavioral concerns included: following directions, showing a respectful attitude to others, consistently remaining in assigned location ready to learn, working and moving about the building without disturbing others, exhibiting self-discipline, and resolving conflicts peacefully. (R. Ex. 37, p. 3). Student's progress in mastering *** grade criteria for the behavioral goal and objectives stated in the IEP was somewhat disappointing.
16. Student made minimal progress in demonstrating self control skills in *** grade. (P. Ex. 13A) (R. Ex. 27, p. 5). Beginning in October 2012 Student began exhibiting increased behavioral difficulty including elopement from the *** grade classroom. (Tr. Vol. IV, pp. 557, 558)(Tr. Vol. V, p. 594). The school district became increasingly concerned about Student's escalating behavior. (Tr. Vol. V., p. 594).
17. There is a history of the school district's use of physical restraint with Student beginning in *** through *** grade. (P. Ex. 5) (P. Ex. 37) (R. Ex. 44, pp. 1-2). There were *** physical restraint incidents in *** grade beginning in October 2012 through March 2013. The staff used physical restraint when in their judgment Student's physical aggression or elopement posed an imminent risk of physical harm to others. Staff documented the use of the restraints each time and provided notice to Student's parents. (Tr. Vol. V, p. 686). Behaviors that triggered the use of physical restraint included hitting and kicking school staff, swinging at teachers, ***, slapping a teacher, fleeing the classroom, and, hiding ***. (P. Ex. 26) (R. Ex. 35) (R. Ex. 44, p. 2).
18. The elementary school staff contacted a school district special education administrator for support and assistance. (Tr. Vol. IV, pp. 555-557). The special education administrator observed Student in several educational settings and consulted with other school district professionals including student's teachers and OT therapist. (Tr. Vol. IV, pp. 562, 564, 566, 568-569).
19. The special education administrator then designed a "point sheet" aimed at supporting Student's interest in time and transitioning between activities. The point sheet was also aimed at providing Student with consistent reinforcement for successful behavior with items Student could select from a reinforcement "menu" that included ***. (Tr. Vol. IV, pp. 569, 572) (R. Ex. 45, p. 1). The plan was for Student to complete the point sheet ***self to facilitate understanding of behavioral expectations and improvement in compliance with those expectations. (Tr. Vol. IV, pp. 571, 573)(R. Ex. 45).
20. Student's parents disagreed with the use of the "point sheet" as designed. (Tr. Vol. IV, pp. 574, 576). In response the school district discontinued the use of the "point sheet" the way it was originally designed. (Tr. Vol. IV, pp. 573-574). Instead, the school district agreed to use a daily written schedule designed by Student's mother. (Tr. Vol. IV, p. 577) (P. Ex. 36) (P. Ex. 57) (R. Ex. 40). The daily written schedule provided Student with regularly scheduled breaks with reinforcers whether Student met behavioral expectations or not. This aspect of the schedule concerned school district staff because Student received reinforcement for inappropriate behavior. (Tr. Vol. IV, pp. 577-578)(Tr. Vol VI, pp. 805-806).
21. In response to the continued use of physical restraint Student's parents requested an "emergency" ARD on November 19, 2012 to discuss the need for an updated FBA and revisions and modifications to Student's BIP and IEP to address student's behavior. (Tr. Vol. V, pp. 595-596)(R. Ex. 31) (R. Ex. 39, p. 3). The ARD was scheduled for December 3, 2012 but Student's parents had to cancel the meeting when their attorney could not attend. (Tr. Vol. IV, pp. 430-431). The meeting was re-scheduled but cancelled again due to family illness on the day the ARD was to convene. (Tr. Vol. II, pp. 230-231)(Tr. Vol V., p. 595) (R. Ex. 31, pp. 61, 63-64) (R. Ex. 39, p. 4).

22. The ARD finally convened on January 29, 2013. (Tr. Vol. V., p. 596)(R. Ex. 31). The ARD reviewed an updated FBA prepared on January 4, 2013 by *** (**) at parental request and expense. (Tr. Vol. V, pp. 597-598)(P. Ex. 42) (R. Ex. 31, p. 41). The *** is a private, non-profit that provides residential and day programs to children and adults with autism including educational services, outpatient rehab, and diagnostic and research services. (Tr. Vol. I., pp. 43-44). The *** educational program is rather small and is populated solely by students with autism or other developmental disabilities. (Tr. Vol. III., pp. 325-326).
23. The *** FBA recommended Applied Behavior Analysis (ABA) therapy supervised by a board certified behavior analyst (BCBA) for 5-15 hours per week to develop better social skills, self-help skills and to decrease Student's challenging behaviors. (Tr. Vol. I., p. 102)(P. Ex. 17A, pp. 8-9) (R. Ex. 30, p. 8).
24. ABA is a set of scientifically validated approaches, principles, and strategies to assist students with autism to learn useful behaviors and reduce harmful or challenging behaviors. ABA measures and quantifies behavior then analyzes the data to determine behavioral progress and from there make needed changes to instruction. It is a very systematic, evidence-based approach. ABA must be individualized to meet the student's needs, skills, and preferences. Behavioral changes do not occur quickly – most students require intensive, on-going instruction that builds on step-by-step progress. (Tr. Vol., I, p. 105)(Tr. Vol. III, pp. 253, 264-265)(P. Ex. 17A, pp. 1-2). Student received ABA therapy in *** but individualized one on one ABA therapy was not a component of student's *** grade educational program. (Tr. Vol. I., p. 128)(P. Ex. 13) (R. Ex. 27).
25. The *** FBA also recommended using electronic devices as reinforcers very sparingly during a scheduled time of day and only when Student earned the reward. (P. Ex. 17A, p. 8). The *** FBA emphasized the importance of data collection and providing Student with an enriched environment with tasks of interest to student that were challenging or difficult interspersed with easy tasks. The *** FBA recommended the use of a wide variety of reinforcers and a very specific approach to teaching Student replacement behaviors for coping with transitions and accepting “no.” (P. Ex. 17A, pp. 10-11).
26. The school district proposed conducting its own FBA at the January 29, 2013 ARD. Student's parents agreed. (Tr. Vol. V, p. 598)(R. Ex. 31, p. 41). The parties continued to disagree about the use of the point sheet. It was a tense, difficult meaning and emotions ran high. (Tr. Vol. V., pp. 596-597, 602, 614). The school district also agreed to parental requests to conduct OT and physical therapy (PT) evaluations. (Tr. Vol. II., p. 600)(P. Ex. 15, pp. 2-4) (R. Ex. 31, pp. 41-42). Later on there was apparently a miscommunication about parental consent needed for those evaluations and the necessary consent forms were never provided or received. (Tr. Vol. V, pp. 600-601)(Tr. Vol. VI., p. 823).
27. The January 29, 2013 ARD contemplated revising Student's BIP after the school district's FBA was completed. School district staff assured Student's parents that the *** ABA therapist was welcome to attend future ARD meetings so long as Student's parents provided the requisite consent. The ARD recessed and agreed to reconvene on February 11, 2013. (Tr. Vol. V, pp. 602-603)(R. Ex. 31, p. 44) (R. Ex. 39, p. 6).
28. On ***, 2013 a school district behavior specialist arrived at the elementary school campus to conduct an observation and offer recommendations to address continuing concerns about Student's behavior. (Tr. Vol IV., pp. 492, 520). The behavioral specialist first met Student in *** when she was

involved in a restraint incident there with student. However, the behavior specialist did not know Student well and had not been working with student in *** grade. (Tr. Vol. IV, pp. 491-492, 543, 547-549) (R. Ex. 44, p. 1) (R. Ex. 53).

29. The IEP allowed for self removal when Student became angry or upset. Student could sit on a bench in the hall, go to the special education classroom, or go for a walk outside. Staff reported that when Student used those coping mechanisms student was supervised but given “time to ***self” and, when ready, was often able to return to the classroom. (Tr. Vol. II, pp. 216-217)(Tr. Vol. V., pp. 670, 680)(Tr. Vol VI., pp. 727, 806-807)(P. Ex. 14).
30. Upon arrival the behavior specialist stopped off at the main office, spoke briefly to the principal about Student, and reviewed student’s IEP. She then proceeded to the *** grade classroom where she first observed Student working appropriately on a science assignment and then on a spelling test in the special education resource class. (Tr. Vol IV, pp. 493, 497-498). Back in the regular classroom Student became upset when ***. Student responded with non-compliant behavior. The behavior specialist gave student several directives in an attempt to address student’s behavior. (Tr. Vol. IV., pp. 493, 503, 542-543)(R. Ex. 53)
31. In response Student left the classroom and exited the school building through the front doors. The behavior specialist and a special education aide followed Student outside. (Tr. Vol. IV, pp. 504, 545). The behavior specialist first attempted to verbally coax Student back inside. When those efforts failed she felt the need to restrain Student by holding on to Student’s wrists to lead student back inside the building. (Tr. Vol. III., pp. 365)(Tr. Vol. IV, pp. 504-505)(P. Ex. 32) (R. Ex. 35, pp. 9-10) (R. Ex. 53).
32. The behavior specialist and the special education aide attempted to persuade Student back to student’s classroom. The behavior specialist thought the IEP required cooling off in a classroom and was not aware that Student was also allowed to calm down in a number of locations at school. The behavior specialist continued to use restraint holding onto Student’s wrists as she pulled student first into the ***. Student resisted these efforts alternately tugging away and then sliding or collapsing onto the floor. (P. Ex. 32) (R. Ex. 53).
33. The behavior specialist was able to maneuver Student *** where student continued to struggle by now kicking, yelling, cursing and planting ***self on the floor. (Tr. Vol. IV., p. 506-508, 532)(P. Ex. 32). The behavior specialist continued to restrain Student because she was concerned about student’s safety if student fled the building again or came into contact with classmates ***. (Tr. Vol. IV, pp. 509-510, 533-534, 537). The behavior specialist held onto Student’s wrists as Student continued to resist and slide to the floor as she pulled Student down the hallway back towards the classroom. (Tr. Vol. IV., pp. 511-514)(P. Ex. 32) (R. Ex. 53). When she finally maneuvered Student into the classroom hallway the behavior specialist felt Student was beginning to de-escalate. (Tr. Vol. VI., p. 515).
34. Coincidentally Student’s parents were meeting with the principal at the same time to discuss parental concerns about the school district’s continued use of physical restraint. (Tr. Vol. III., pp. 368-369). The principal and Student’s parents were notified of the situation and soon arrived on the scene. (Tr. Vol. III., p. 372)(P. Ex. 32) (R. Ex. 39, p. 5).
35. Student’s parents were very upset by what they saw. Student’s mother talked to Student and the incident came to an end. (Tr. Vol. IV., pp. 515-516). Student’s parents were deeply distressed by the incident. (Tr. Vol. IV., pp. 439, 516). The behavior specialist received training in the proper use of

restraint within 30 days of the ***, 2013 incident. (Tr. Vol. IV., p. 527) (R. Ex. 58, p. 3).

36. In response to the *** restraint incident Student's parents made a report to ***, 2013. Student's pediatrician also submitted a report to *** on ***, 2013. (Tr. Vol. IV, p. 443)(P. Ex. 32) (R. Ex. 52). Although Student's parents alleged Student *** as a result of the incident *** concluded there was insufficient evidence to support a claim of child abuse. (Tr. Vol. IV., pp. 389-390)(P. Ex. 27) (R. Ex. 52) (R. Ex. 53). Neither *** nor *** took further action after their initial investigations. (Tr. Vol. IV., pp. 439-440)(R. Ex. 52)(R. Ex. 53).
37. Student's parents signed the requisite consent for the school district's proposed FBA on February 8, 2013. (R. Ex. 32). It was Student's parents understanding that a school district licensed specialist in school psychology (LSSP) was going to conduct the FBA. Student's parents expressed some concerns about the LSSP's lack of experience in assigning her to perform the FBA. (Tr. Vol. V., p. 694)(R. Ex. 31, pp.41, 53) (R. Ex. 38, p. 11) (Tr. Vol. V., p. 598-599). The parental consent form for the FBA stated the school district's LSSP would conduct the FBA. (R. Ex. 32). The LSSP was well qualified to conduct the FBA. (Tr. Vol. V., pp. 690, 693)(R. Ex. 38, p. 11)
38. Student's parents cancelled the February 11, 2013 ARD meeting because the school district's FBA had not yet been completed. The parties agreed to reconvene on March 25, 2013. (Tr. Vol. V., p. 604)(R. Ex. 39, p. 9).
39. Instead of using the LSSP the school district contracted with the *** to conduct the FBA proposed at the January 2013 ARD. (Tr. Vol. V., pp. 604, 608)(Tr. Vol. VI., pp. 725-726)(R. Ex. 49). *** is a non-profit organization that uses ABA to work with children with developmental disabilities, including those with autism. (Tr. Vol. VI, pp. 717-718).
40. A board certified behavior analyst (BCBA) was one of two evaluators who worked on the *** FBA. The BCBA was well qualified to conduct the FBA. (Tr. Vol. VI., pp. 719-721)(R. Ex. 49). The *** FBA included a scatter plot of behavioral data from the school district. The BCBA used the data to analyze Student's behavior and formulate her conclusions. (Tr. Vol. VI, pp. 728-729, 734)(R. Ex. 33, p. 6). The *** FBA proposed a new BIP for Student. (P. Ex. 17).
41. From January 7, 2013- March 4, 2013 the *** FBA data showed:
 - *** acts of aggression
 - *** acts of refusal
 - *** acts of elopement.

Student was absent *** days during this time period due to illness or suspension from school. (R. Ex. 33). From September 2012 to March 25, 2013 Student exhibited a pattern of frequent disruptive behavior consisting of interruptions, non-compliance, leaving without permission, touching others or acts of aggression. Student's behavior fluctuated in *** grade. Some days were better than others. (Tr. Vol. V., p. 677)(P. Ex. 20) (P. Ex. 21) (P. Ex. 22) (P. Ex. 23) (R. Ex. 48). Between October 2012-January 2013 Student was suspended out of school *** times. (P. Ex. 24).

42. *** completed its FBA report and proposed a revised BIP on March 18, 2013. (P. Ex. 17). The *** FBA concluded Student's behaviors were consistent with an anxiety disorder and recommended a full psychological evaluation in order to confirm the diagnosis and potential need for medication. (Tr. Vol. VI., pp. 731-732, 752)(R. Ex. 33, p. 4). Many of the recommendations and features of the *** FBA and the proposed BIP were consistent with the *** FBA recommendations. (P. Ex. 17) (P. Ex. 42).

43. An ARD re-convened on March 25, 2013. Student's parents and their legal counsel attended the meeting as did the *** BCBA. (Tr. Vol. V., p. 612)(R. Ex. 31, p. 45) (R. Ex. 39, pp. 12, 12, 15). Student's *** grade teacher reported student was performing well academically. (R. Ex. 31, p. 50). The BCBA reviewed the *** FBA and made recommendations to the ARD. (Tr. Vol. VI, p. 734-735)(R. Ex. 31, pp. 46-47). The school district did not provide a copy of the *** FBA to Student's parents or their attorney prior to the March 2013 ARD meeting so they had very little time to review it beforehand. (Tr. Vol. II, pp. 232, 237)(R. Ex. 31, p. 45).
44. The March 2013 ARD attempted to address parental concerns that Student was being allowed to leave the regular classroom for the resource classroom too often *** for extended periods of time instead of completing schoolwork. (Tr. Vol. II., pp. 215-216). School staff agreed with the *** and *** FBA recommendations that the way Student's *** were being used was not effective. (Tr. Vol. III., p.284) (Tr. Vol. V, pp. 610-611)(P. Ex. 17) (P. Ex. 25) (P. Ex. 33) (R. Ex.31, p. 47) (R. Ex. 33).
45. At the ARD Student's parents presented the school district with a letter stating their request for private placement at school district expense. (Tr. Vol. V, p. 613)(R. Ex. 39, p. 16). The school district members of the ARD disagreed with the request for private placement. (Tr. Vol. V, pp. 613-614)(R. Ex. 31, p. 48). The ARD continued and school staff reviewed proposed revisions to Student's IEP. (Tr. Vol. V, pp. 614-615).
46. The proposed BIP incorporated the recommendations from the *** FBA. (Tr. Vol. VI., pp. 735-736)(R. Ex. 31, p. 11). This included adding the support of a BCBA from *** to supervise, monitor, and consult with school district staff and model ABA strategies and techniques with Student. The BCBA support was scheduled for four hours each day. The duration of the support service was open-ended. The BCBA was also to provide additional staff training. (Tr. Vol. V., p. 617)(Tr. Vol. VI, p. 737)(R. Ex. 31, pp. 48-49).
47. The ARD recommended increasing instruction time in the special education resource class for reading, science, social studies, and, social skills. Check in and check out each day for additional support with the special education teacher was also included. The revised IEP also proposed providing Student with direct instruction in an accelerated *** program at a higher grade level to address student's need for more challenging work. (Tr. Vol. V, pp. 619, 626-627)(R. Ex. 31, pp. 50-51).
48. Student's parents disagreed with the proposed IEP and again requested private placement at school district expense. (Tr. Vol. V., p. 627). The March 2013 ARD ended without consensus. (Tr. Vol. V., p. 628)(R. Ex. 31). At the end of the ARD Student's parents withdrew Student from the school district. (Tr. Vol. IV., p. 441)(Tr. Vol. V, p. 627)(P. Ex. 35) (R. Ex. 39, p. 16).
49. In early May 2013 Student's parents secured a psychological evaluation (the psych eval.) from *** as recommended by the *** FBA. (P. Ex. 18). Sources of data included parent interview, review of records (including some ARD documents, the *** FBA, and a previous *** evaluation) and, other behavior assessment instruments completed by Student's parents and the *** ABA therapist. (P. Ex. 18).
50. The psych eval. conclusions were in large part consistent with the *** FBA and *** FBA recommendations (collectively "the experts"); i.e., that Student needs a very structured school program with exposure to appropriate role-models. The psych eval. and the *** FBA recommended one to one ABA therapy and a BIP. The *** FBA agreed on the need for a BIP utilizing ABA

principles. The psych eval. agreed with the *** FBA recommendation to explore Student's need for pharmacological treatment to address Student's difficulty in regulating emotions and to sustain attention and inhibit impulses. The experts all agreed Student needs continued speech therapy to work on the acquisition of pragmatic language as well as social skills training, a formal OT evaluation, the use of social stories, and, and in-home and parent training. (Tr. Vol. I., p. 67)(Tr. Vol. II, pp. 144, 152-157)(P. Ex. 18).

51. The experts also agreed Student needs a sensory diet with frequent and regular breaks during the school day. Adding relaxation and coping skills as regularly scheduled components of the school day were also recommended by the psych eval. (Tr. Vol. I., pp. 7072)(Tr. Vol. V., pp. 624-625)(Tr. Vol. VI., p. 755). The experts all agreed Student needs a highly structured program with a lot of frequent redirection, a daily schedule, and prompting and reinforcement using ABA principles. (Tr. Vol. II, pp. 155-157)(Tr. Vol. VI., p. 733)(Tr. Vol. VI., pp. 741, 744-746, 754).
52. Student needs to decrease physical aggression, *** and *** as a response to frustration, anxiety or anger. Student needs to increase appropriate transitioning from a preferred activity to a non-preferred activity and to accept "no" without responding with challenging behavior. (Tr. Vol. III, p. 294)(Tr. Vol. VI., p. 749). Student also needs specific social skills instruction to improve appropriate interactions with peers. (Tr. Vol. III, p. 302)(Tr. Vol. VI., p. 754).
53. The parties have had a somewhat adversarial relationship characterized by communication issues and disagreement over Student's educational program, placement, the use of physical restraint, and behavioral point sheets. Student's parents communicated frequently with school personnel voicing concerns and offering suggestions. (P. Ex. 39). There were a number of ARD meetings each year. (J. Ex. A) (P. Ex. 10) (P. Ex. 11) (P. Ex. 12) (R. Ex. 24) (R. Ex. 25) (R. Ex. 26) (R. Ex. 18, pp. 30-31, 33, 41-43) (R. Ex. 19). The parties resolved some differences in mediation at the end of Student's *** grade year. (P. Ex. 9A) (R. Ex. 20) (R. Ex. 23).
54. Since withdrawal from the school district in March 2013 Student received one on one ABA therapy at the *** supervised by a BCBA at parent expense. (Tr. Vol. I., pp. 46, 105)(Tr. Vol. III, pp. 259, 285)(P. Ex. 40). Student received 58 one on one ABA therapy sessions for 45 minutes to 1 hour from the *** from January 7, 2013 through July 30, 2013. (Tr. Vol. I., p. 77)(P. Ex. 43) (P. Ex. 53) (R. Ex. 55).
55. The cost to Student's parents of the one on one ABA therapy from January 2013 through March 2013 was \$ 950.00 (Tr. Vol. I., pp. 80-82) (P. Ex.53, p. 1) (R. Ex. 55, p. 7). The total cost of *** ABA therapy was supplemented by insurance. (Tr. Vol. I., pp. 92, 97). The cost of the *** evaluation was \$250. (P. Ex. 43) (P. Ex. 53) (R. Ex. 55).
56. Coordination and collaboration between key stakeholders was inconsistent. There were misunderstandings and disagreements between home and school about Student's participation in school activities, use and access to the regular *** grade planner, homework, the level of academics, the use of a token reinforcement scheme at home that was not implemented at school, use of a daily printed schedule as opposed to a picture schedule, and, the amount of time Student spent out of the regular *** grade classroom. (Tr. Vol. IV., pp. 466-468)(Tr. Vol. V., pp. 665-667)(Tr. Vo. VI., p. 813).

Discussion

Although Petitioner submitted 12 separate issues (some of which are mixed questions of law and fact) they

can essentially be consolidated into the following legal issues under the IDEA:

1. Whether the school district failed to provide Student with a free, appropriate education during the 2012-2013 school year by failing to provide Student with an effective behavior intervention plan, by the improper use of physical restraints, and the failure to ensure Student's success and participation in the regular education program with appropriate supplementary supports and services; and,
2. Whether the school district committed procedural violations under the IDEA when it contracted with an outside provider to conduct a Functional Behavior Assessment and did not secure parental permission to do so; and, if so, whether that violation resulted in substantive educational harm to Student.

Student seeks reimbursement for a number of outside, third party services and prospective placement at school district expense at a private placement that Student contends meets student's needs.

Free, Appropriate Public Education

The IDEA guarantees a student with a disability must be provided with "a basic floor of opportunity" consisting of specialized instruction and related services which are individually designed to provide the student with an educational benefit. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189 (1982).

However, the educational benefit must be more than a "mere modicum" and not "de minimis." Instead, the IEP must be likely to produce progress and not regression or trivial advancement. The educational benefit the IEP is designed to achieve must be "meaningful." *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 246-248 (5th Cir. 1997).

In this jurisdiction the Fifth Circuit has established a four factors test to determine whether the school district's educational program meets this standard in providing the student with a free, appropriate public education under the IDEA. *Id.* 118 F. 3d at 247-248.

Those four factors are:

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

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program for reimbursement purposes. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

An IEP is to be reviewed as it existed at the time the hearing request was filed. A school district is not entitled to modify the explicit terms of an IEP by testimony at the due process hearing. *Z.F. v. Harrison Cnty.*, 2005 WL 2373729 (D.C. Ind. 2005); see also, *Knable v. Bexley City Sch. Dist.*, 238 F. 3d 755, 768 (6th Cir. 2001); *Union Sch. Dist. v. Smith*, 15 F. 3d 1519, 1526 (9th Cir. 1994)(hearing officer's decision not to consider a placement never formally offered in an IEP should be rigorously enforced).

Therefore, although the school district revised and proposed a new IEP and BIP at the March 2013 ARD, the issue of whether the school district provided Student with a FAPE during the 2012-2013 school year depends on my review of the IEP and BIP designed by the May 2012 ARD that was in effect and implemented in *** grade.

Was the Program Individualized on the Basis of Assessment and Performance?

The BIP in effect was designed on the basis of the FBA conducted in September 2011. Given the uptick that school district staff noted in Student's non-compliant behaviors by November 2012 the school district should have been more proactive and initiated an updated behavioral assessment of some kind in the fall of 2012. Furthermore, Student needed an individualized enrichment program tailored to student's abilities in *** and interest in *** rather than including student in the *** program which was not suitable for student given student's limited pragmatic language and poor social skills.

The evidence showed that by November 2012 the school district had concerns that Student's behavioral needs were not being effectively addressed. However, the school district did not enlist the support of a BCBA until the spring semester in 2013 despite Student's continuing non-compliant behavior throughout the year. Student's parents secured their own updated FBA from the *** in early January 2013. The evidence showed Student needed adjustments to student's BIP and program beginning in the fall semester. The use of point sheets designed by school district staff was not effective.

Use of Restraint

The school district's use of physical restraint was a major point of contention in this case and contributed to Student's withdrawal from school. Petitioner argues the school district used physical restraint too often, used it improperly in a way that caused physical harm to Student, and that the use of physical restraint should have been discontinued. Although I agree that the school district's use of physical restraint was, at least on one occasion, improper, I cannot conclude that the school district can never use physical restraint under the proper circumstances.

It is the policy of the State of Texas to treat all students, including students with disabilities, with dignity and respect. Toward that end the Legislature enacted a statute that places parameters on the use of confinement, restraint, seclusion and Time-Out as either discipline management practices or behavior management techniques. *Tex. Educ. Code § 37.0021; 19 Tex. Admin. Code §89.1053 (a)*.

In Texas "restraint" means the use of physical force or a mechanical device to significantly restrict the free movement of all or a portion of a student's body. *Tex. Educ. Code § 37.0021 (b) (1); 19 Tex. Admin. Code § 89.1053 (b) (2)*. The statute requires a set of procedures for the use of restraint by school district employees. Those procedures must be consistent with professionally accepted practices and standards of student discipline and techniques for behavior management and relevant health and safety standards. The procedures must identify any discipline management practice or behavior management technique that requires training before a school district may use the practice or technique. *Tex. Educ. Code § 37.0021(d) (1) (2)*.

The use of restraint in Texas is limited to "an emergency" and further limited as follows:

- Restraint is limited to the use of such reasonable force as is necessary to address the emergency;
- The use of restraint shall be discontinued at the point at which the emergency no longer exists;
- Restraint shall be implemented in such as way as to protect the health and safety of the student and others; and,

- Restraint shall not deprive the student of basic human necessities.

19 Tex. Admin. § 89.1053 (c) (1)-(4).

A core team of personnel on each campus must be trained in the use of restraint. The team must include a campus administrator or designee and any general or special education personnel likely to use restraint. *19 Tex. Admin. § 89.1053 (d) (1).* A school district employee called upon to use restraint in an emergency, who has *not* received prior training, must receive the training within 30 school days following the use of restraint. *19 Tex. Admin. § 89.1053 (d) (1) (2).* Training on the use of restraint must include prevention and de-escalation techniques and provide alternatives to the use of restraint. *19 Tex. Admin. § 89.1053 (d) (3).* The training must include instruction in professionally accepted practices and standards regarding behavior management and the use of restraint. *19 Tex. Admin. § 89.1053 (e).*

The evidence showed that the use of physical restraint on ***, 2013 was perhaps well-intended but not appropriate because no real emergency existed until Student's behavior escalated in response to the restraint. There was no emergency or reason to continue the use of restraint once Student was back inside the school building. The restraint should therefore have been discontinued at that point. It is entirely understandable that Student's parents were distressed when they observed the use of physical restraint with their child who was crying and obviously upset. The video and photographic evidence are disturbing although neither *** nor *** concluded there was a need for further investigation or intervention. I do not substitute my own judgment for theirs.

However, the incident (along with the continued use of restraint on other occasions) supports the conclusion that Student's behavioral needs were not being effectively met in *** grade. Student was not learning to replace student's inappropriate, reactive behaviors with appropriate responses to situations student found demanding.

Therefore, the school district's continued use of physical restraint during *** grade was a factor that should have prompted the school district to conduct an updated behavioral assessment, revise Student's BIP, and implement a systematic data collection and analysis system at a much earlier point in time.

Student also raised issues with regard to whether the school district failed to provide Student's parents with the requisite "notice" of restraint when used. The evidence showed the contrary. Student's parents were acutely aware of the continuing use of restraint, made their opposition to its use known, and were provided with opportunities to discuss their concerns and urge revisions to the behavior strategies used by school staff.

Was Student's Placement in the Least Restrictive Environment?

The school district must ensure that to the maximum extent appropriate children with disabilities must be educated with non-disabled children and that special schooling or classes, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in the regular education classes with the use of supplementary aids and services cannot be achieved satisfactorily. *34 C.F.R. § 300.411 (a) (2) (i) (ii); Daniel R. R. v. State Bd. of Educ., 874 F. 2d 1036, 1044-1045 (5th Cir. 1989).*

The evidence showed that the student's mix of regular education and special education classes provided some benefit as student was able to make academic progress with the support of special education in the resource classroom and the assistance of an aide. However, without a more effective BIP using ABA principles, teacher training, or consultative support from a BCBA, Student's placement in the regular

education classroom was not a particularly effective environment to support behavioral progress.

Student tended to exploit the special education classroom as a refuge to escape the demands of the regular classroom. While this was better than fleeing the school building or becoming physically aggressive Student was not able to demonstrate consistent behavioral progress at school. The school district's IEP and BIP simply did not provide student (or the teaching staff) with the supplementary aids and services student needed to be successfully mainstreamed. *Daniel R. R. v. State Bd. of Educ.*, 874 F. 2d at 1044-104).

Were Services Provided in Coordinated, Collaborative Manner?

The evidence showed school district staff coordinated and collaborated with one another in implementing Student's IEP and BIP. The credible evidence also showed the school district attempted to respond to and incorporate parental requests and suggestions. However, the evidence also demonstrated that there was a lack of understanding and communication between the school staff and Student's parents. For example, school staff felt locked into implementing a reinforcement schedule they viewed as inappropriate. Student's parents felt their concerns and suggestions were not seriously considered.

The parties did not communicate well with regard to parental observations that Student needed more challenging academic work -- particularly an accelerated, individualized *** program given student was farther ahead of student's same age peers in *** and that boredom could sometimes be a behavioral trigger.

In addition, it does not appear the school district attempted to collaborate with Student's parents in accepting the recommendations and suggestions stated in the *** FBA presented at the January 2013 ARD but instead insisted on conducting its own FBA. Furthermore, the school district did not provide Student's parents and student's attorney with a copy of the *** FBA prior to the March 2013 ARD meeting.

The school district could have utilized the *** FBA that was available at the January 29, 2013 ARD in making revisions to Student's BIP but did not. Although the *** FBA provided the parties with a set of useful recommendations there was an unnecessary delay in making the adjustments needed to Student's BIP and overall educational program.

Furthermore, although Student's parents were told staff from the *** were welcome to attend future ARD meetings, the school district represented the need for parental consent to do so. However, there is no such requirement under the IDEA. Instead the ARD Committee may include -- at the discretion of either party -- individuals who have knowledge or special expertise regarding the child, including related service personnel. *** staff met this criteria. *34 C.F.R. § 300.321 (a)(6); 19 Tex. Admin. Code § 89.1050 (c)(1)(F)*.

On the other hand, the evidence also showed that Student's parents could be somewhat difficult and, at times, confrontational. It is reasonable to infer from the evidence that the involvement of legal counsel and/or a parent advocate in ARD meetings felt somewhat intimidating for school district staff. Overall the evidence showed the school district was simply unable to create or maintain a more positive relationship between home and school through a series of miscommunications, misunderstandings, and the failure to provide clear, straight-forward information to Student's parents.

Academic and Non-Academic Benefits

Although Student made academic progress under the *** grade IEP the evidence also showed that Student's behaviors escalated at worst and improved only minimally at best. Student became increasingly non-compliant and aggressive when confronted with the demands of the classroom. Student manipulated both student's parents and school staff to get what student wanted when student wanted it without learning

appropriate coping strategies or how to express student's needs in an appropriate manner. Certainly when student's non-compliance rose to the level that school staff felt they needed to use physical restraint the school district should have been more proactive in recognizing Student's behavioral needs were not being effectively addressed.

The ***, 2013 use of physical restraint was clearly a very unfortunate episode. The tactics used by the behavioral specialist simply escalated the situation and ended up deepening the rift between home and school. The lack of a protocol and/or Crisis Plan (as previously suggested by the school district's own 2011 FIE) contributed to the dispute over the use of physical restraint. The Student, school district staff, and Student's parents all needed a Crisis Plan to ensure the safety of both Student and others at school.

School district staff were unable to teach Student appropriate replacement behaviors to cope with situations student found challenging without the support of ABA therapy or integration of ABA principles into Student's BIP. The BIP in effect during *** grade did not feature the type of systematic behavior collection and analysis needed in order to assist school staff in making adjustments to behavioral instruction.

Therefore, while the IEP in effect provided the requisite academic benefit it did not provide Student with the requisite meaningful, behavioral benefit. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d at 246-248; *See also, Venus Ind. Sch. Dist. v. Daniel S.*, 2002 U.S. Dist. LEXIS 6247 (N.D. Tex. 2002)(*true measure of educational performance not strictly limited to academics-- student with above average academic performance but also behavioral issues warranted finding student had a disability and was in need of special education*).

Did the School District Violate the IDEA by Contracting with a Third Party Without Explicit Parental Permission?

Student raises the issue of whether the school district violated the IDEA by contracting with the *** for conducting the agreed upon FBA and failing to secure parental permission for doing so. It is well settled that the school district had the unqualified legal right to conduct the FBA with its own choice of evaluation personnel. *Andress v. Cleveland Ind. Sch. Dist.*, 64 F. 3d 176, 178-179 (5th Cir. 1995). In that role the *** evaluators were under the same obligations to observe Student's confidentiality as school district staff. Therefore, parental consent for the *** BCBA to review Student's records, make observations, and conduct the FBA was not required. *See*, 34 C.F.R. §§ 300.622, 300.623.

However, the statement in the parental consent form that the LSSP would conduct the FBA was misleading. It is understandable Student's parents were dismayed when they learned the school district's FBA had not been conducted by the LSSP after all. The school district could have either notified Student's parents that the *** staff would conduct the FBA (in response to parental concerns about the LSSP) or provided Student's parents with more information about the LSSP's qualifications to increase their comfort level in her ability.

Appropriate and Equitable Relief

The school district's failure to conduct an updated behavioral assessment in a timely manner during the 2012-2013 school year leads to the conclusion that Student's parents should be reimbursed for the cost of the *** evaluation secured at their own expense. The evidence showed this cost was \$250.00.

The school district's failure to provide Student with a more effective Behavior Intervention Plan that should have included the systematic collection and analysis of behavioral data, the support and guidance of a BCBA in delivering and implementing individualized behavioral interventions using ABA principles, and, a Crisis Plan, leads to the conclusion that Student's parents are entitled to be reimbursed for the cost of the ABA

therapy provided by the *** from January 2013 up through the March 25, 2013 ARD.

However, at the March 25, 2013 ARD the school district proposed an IEP and revised BIP with all the features lacking in the previous plans. It is in fashioning appropriate relief that the proposed IEP becomes relevant. The proposed IEP and BIP, with the support services of the BCBA, were reasonably calculated to provide Student with the requisite educational benefits. *Rowley, supra.* Furthermore, the school district also provided speech/language services, social skills training, and, in-home and parent training – those services were not really in dispute. The school district provided those services during the 2012-2013 school year and continued to offer those services going forward at the March 25, 2013 ARD.

Student's parents made the choice to withdraw Student from school and put together their own patchwork set of outside services for the remainder of the 2012-2013 school year. They also chose to request prospective private placement. The case law is clear – parents who unilaterally place their children in a private placement do so at their own financial risk. *Sch. Committee of Town of Burlington v. Dept. of Educ., 471 U.S. 359, 373-374 (1985).*

The evidence showed that had Student remained in the public school student would have received all the services student needed that student's parents sought elsewhere at their own expense. The evidence showed the *** educational program could not have provided Student with the exposure to other children and appropriate role models student needed. The school district offered to conduct an updated OT evaluation. Student's IEP was revised to include integration of ABA principles into student's behavior plan with support, monitoring, staff training, and supervision by a BCBA.

I therefore conclude that Student's request for prospective private placement at *** at school district expense, and for reimbursement for the parental costs of home-schooling, *** speech/language therapy, outside social skills training, and an outside OT evaluation are not appropriate forms of relief given the equities in this case. *Sch. Committee of Town of Burlington, 471 U.S. at 374 (equitable considerations are relevant in fashioning relief).*

Conclusions of Law

1. Petitioner met petitioner's burden of proving that Respondent failed to provide Student with a free, appropriate public education during the 2012-2013 school year up through March 25, 2013 because student did not receive the requisite meaningful educational benefit in meeting student's behavioral needs despite making academic progress. *Schaffer v. Weast, 546 U.S. 4962 (2005); Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 246-248 (5th Cir. 1997).*
2. Petitioner did not meet petitioner's burden of proving Respondent committed any procedural errors under the IDEA that resulted in the deprivation of an educational benefit. *34 C.F.R. § 300.513 (a)(2).*

ORDERS

Based upon the foregoing findings of fact and conclusions of law, it is therefore **ORDERED** that Petitioner's requests for relief are **GRANTED IN PART AND DENIED IN PART AS FOLLOWS:**

1. The school district shall reimburse Student's parents in the amount of \$1,200 for the cost of the *** evaluation and the cost to Student's parents of ABA therapy from the *** for the period of time beginning in January 2013 through March 2013 within ten (10) calendar days of the date of this Decision;

2. The school district shall invite Student's parents to an Admission, Review & Dismissal Committee (ARD) to convene within thirty (30) calendar days from the date of this Decision for the purpose of designing a plan to transition Student back to student's home *** campus for the spring semester 2014 and implement the IEP and revised BIP proposed at the March 25, 2013 ARD;
3. The school district shall invite the Board Certified Behavior Analyst (BCBA) from the *** who is and/or has been primarily responsible for implementing Student's Applied Behavior Analysis therapy since January 2013 to participate in the ARD meeting for the purpose of assisting the ARD to prepare for Student's transition back to Student's home *** campus;
4. The school district shall also include a BCBA from the *** who participated in the preparation of the Functional Behavior Assessment to the ARD meeting also for the purpose of assisting the ARD to prepare for Student's transition back to Student's home *** campus;
5. The school district shall submit the requisite parental forms for consent for conducting the proposed Occupational Therapy and Physical Therapy evaluations as previously agreed to by the school district to Student's parents within ten (10) calendar days of the date of this Decision;
6. Student's parents shall deliver any signed parental consent forms for the school district's proposed OT and PT evaluations directly to the school district's General Counsel within ten (10) calendar days from the date the consent forms are sent to Student's parents;
7. The school district shall propose a Crisis Plan to ensure Student's safety at school and a protocol for the use of physical restraint as a topic of discussion at the ARD meeting although the parties are not required by this Order to reach consensus on these matters;
8. The ARD meeting shall also discuss the appointment of a school district staff member who can serve as the point of contact and communication liaison for Student's parents for the spring semester 2014 with the appointment of a "back up" point of contact/liaison if and when the primary point of contact/liaison is not available; the purpose of the appointment of a point of contact/liaison is to facilitate and clarify communications between the parties;
9. The school district shall ensure and make arrangements for an ARD meeting facilitator in order to support productive and constructive discussions during the ARD; the ARD meeting facilitator may not be an employee or former employee of the school district unless both parties agree;
10. Student's parents may decline the invitation to the ARD meeting and may choose to educate Student through a unilateral private placement at parental expense; the school district is relieved of the responsibility of convening the ARD and complying with Item numbers 3, 4, 7, 8, and 9 above if Student's parents decline to participate in the ARD. The school district shall also be relieved of the responsibility of conducting the OT and PT evaluations if Student's parents do not return signed parental consent forms within the timeframe established in Item No. 6 above.

All other relief not specifically stated herein is **DENIED**.

SIGNED the 14th day of November 2013

/s/ Ann Vevier Lockwood
Ann Vevier Lockwood
Special Education Hearing Officer

NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. *19 Tex. Admin. Code Sec. 89.1185 (p); Tex. Gov't Code, Sec. 2001.144(a) (b).*

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

**STUDENT,
bnf Parent,
 Petitioner,**

§
§
§
§
§
§
§
§

v.

DOCKET NO. 180-SE-0413

**RICHARDSON INDEPENDENT
SCHOOL DISTRICT,
 Respondent.**

SYNOPSIS

ISSUE:

Whether school district failed to provide *** grade student with autism and speech/language impairment a free, appropriate public education by failing to provide student with an effective behavior intervention plan, by the improper use of physical restraints, and by failing to ensure student's success and participation in the regular education classroom with appropriate supplementary supports and services.

HELD:

FOR THE STUDENT IN PART AND THE SCHOOL DISTRICT IN PART

Student performed well academically in *** grade but behavioral progress was minimal; student continued to exhibit persistent behavioral issues beginning in fall semester throughout remainder of school year; school district aware of student's need for revised behavioral plan but failed to initiate an update behavioral assessment until spring semester. School district's continued use of physical restraint was a factor that should have led school district to conduct updated behavioral assessment and seek advice and support from qualified BCBA. School district's IEP and BIP were not effective in teaching student appropriate replacement behaviors for coping with situations student found challenging. Communication issues between home and school also a factor.

However, by mid-spring semester school district conducted updated Functional Behavior Assessment by qualified BCBA, revised student's IEP and BIP, and, proposed an appropriate program reasonably calculated to provide student with requisite meaningful educational benefit under the IDEA.

Student's parents entitled to reimbursement for cost of updated FBA secured at parental expense prior to school district conducting its own FBA and for cost of ABA therapy to student for spring semester up until ARD meeting where school district offered student an appropriate program.

All other requests for reimbursement and for prospective private placement at school district expense denied. **34 C.F.R. §§ 300.101; 300.114; 300.148 (a)**

ISSUE:

Whether school district committed procedural violation under IDEA by contracting with outside, third party provider to conduct updated FBA which included review of student's educational records and observing student at school without parental permission.

HELD:

FOR THE SCHOOL DISTRICT.

Once parents provided consent for updated FBA school district entitled to conduct the evaluation with personnel of school district's choice. When parents expressed concerns about the experience level of the school district's LSSP who was first selected to conduct the FBA, school district sought services from qualified, experienced evaluators from non-profit organization on contract with school district to provide school district with services in meeting needs of students with autism. School district's failure to apprise parents of choice of evaluator and to provide parents with copy of completed FBA report prior to ARD meeting contributed to deepening rift between home and school but did not result in a substantive educational harm under IDEA.

34 C.F.R. § 300.513 (a) (2); Andress v. Cleveland Ind. Sch. Dist., 64 F. 3d 176, 178-179 (5th Cir. 1995)