

**STUDENT,  
b/n/f PARENT,  
Petitioner**

v.

**BEAUMONT INDEPENDENT SCHOOL  
DISTRICT,  
Respondent**

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**BEFORE A SPECIAL EDUCATION**

**HEARING OFFICER FOR**

**THE STATE OF TEXAS**

**DECISION OF THE HEARING OFFICER**

Petitioner, \*\*\* (Student), by next friend \*\*\* (Mother) (collectively, Petitioner) requested an impartial due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq. The respondent to the complaint is the Beaumont Independent School District (District or BISD). This Decision determines that the District violated IDEA in several respects and orders appropriate relief.

**I. ISSUES**

Petitioner alleges that the District denied Student a free, appropriate public education (FAPE). Petitioner’s numerous allegations broadly fall into several primary categories: that Student was subjected to abuse and/or inappropriate behavioral interventions; that the behavioral and speech services provided to Student were inadequate; that the District failed to fashion an educational plan for Student with appropriate goals and objectives; that the District failed to comply with Student’s educational plan in a variety of other ways; and that the District committed several procedural violations. Petitioner seeks that the District be ordered to pay for private educational services procured by Mother for Student as of the date of this Decision, pay for future services by an independent provider, and provide various other evaluations and services, including compensatory services.

The District identified these specific issues: (1) Did BISD provide Student with FAPE, or did BISD provide Student with the opportunity to make meaningful educational progress while attending BISD; (2) Did Student suffer abuse, and if so, does it rise to a level of denial of FAPE; (3) Did BISD involve the parent and other stakeholders in the educational process; (4) Did BISD implement the January 2013 Settlement Agreement as required; and (5) Is private placement at public expense justified under the IDEA and facts of this particular case?

## II. PROCEDURAL HISTORY

Petitioner filed the request for a due process hearing on February 24, 2014. In the request, Petitioner made claims under laws other than IDEA and further made a claim for attorneys' fees; by order dated March 17, 2014, the Hearing Officer dismissed those claims. The parties requested a continuance of the hearing and extension of the decision date to accommodate scheduling conflicts and to allow sufficient time for the parties to conduct discovery. The parties waived the resolution session and instead participated in mediation on April 24, 2014. The mediation was unsuccessful.

The hearing was held June 24-26, 2014, in Beaumont. At Petitioner's request, the hearing was open to the public. Petitioner was represented by attorneys Dorene Philpot and Yvonnilda Muñiz. The District was represented by attorneys Heather Rutland and Abraham Barker. At the conclusion of the hearing, the parties requested an extension of the decision deadline to allow time for the preparation of a transcript and written closing arguments. Accordingly, the decision deadline was extended to August 29, 2014. This Decision was timely issued and forwarded to the parties on August 28, 2014.

## III. FINDINGS OF FACT

### Student

1. Student was born \*\*\* and is \*\*\* at the time of this Decision.
2. Student has \*\*\*, a \*\*\* disorder characterized by \*\*\*. Associated issues include \*\*\*. Pet. Ex. 16 at 10.
3. Student lives in a family environment with Mother and Student's step-father and siblings. Student has a close relationship with student's maternal grandmother (Grandmother). Pet. Ex. 16 at 1; Tr. at 466-67.
4. Student is an overall happy, affectionate child who struggles with communication difficulties, a range of impairments (both physical and cognitive), \*\*\*, and unwanted behaviors (relating to aggression and task avoidance). Student cannot speak. Student's ability to understand what others say exceeds student's ability to make student understood. Student has difficulty tolerating changes in student's routine. Pet. Exs. 16, 22, 25.
5. Student's aggressive behaviors include tendencies to bite, hit, scratch, or pinch when frustrated or not wanting to meet academic (or other) demands. Pet. Exs. 16, 22, 25.
6. One of Student's problematic behaviors is \*\*\* as a means of escaping what student does not want to do. Pet. Ex. 22 at 10; Pet. Ex. 40 at 21; Tr. at 163-164. Student also \*\*\* as an avoidance behavior. Pet. Ex. 40 at 21.

7. Student's problematic behaviors, which are related to some degree to student's inability to communicate, have the potential to hinder student's academic progress. Tr. at 374-75.
8. Communication is a critical area for Student's progress. Tr. at 374-75.

### Chronology

9. \*\*\*, Ph.D., a licensed psychologist, performed an independent educational evaluation (IEE) of Student on December 20, 2012, and issued his report on January 13, 2013. Dr. \*\*\* noted behavioral issues, including disruptive and impulsive actions, as well as frustration and aggression toward student and others. Pet. Ex. 16 at 6. Student has difficulty coping with new environments and challenges, and can easily become overstimulated. *Id.* at 1-2, 6.
10. Dr. \*\*\*'s January 13, 2013 report recommended that Student's educational program focus on safety, communication, self-help skills, and self-regulation. He specifically recommended that student's educational program include the following:
  - intensive behavioral intervention, most appropriately an applied behavioral analysis (ABA) approach with an objective curriculum and assessment process by a person trained in ABA, as well as a board-certified behavioral analyst (BCBA) to oversee the program development, staff training, task and behavior analysis, objective modification, maintenance, and mastery, as well as data collection and analysis;
  - an educational plan that is data-based, empirically supported, developmentally-focused, spans home and school, has minimal unstructured time, minimizes gaps of time in program breaks, utilizes trained personnel, uses objectives with a clear structure of developmental steps that are achievable and time-limited (with a focus on weeks in duration and not years);
  - a highly-structured classroom with a small student-teacher ratio, an emphasis on the use of visual clues, and a combination of small group and individualized instruction, with a staff person assigned to Student;
  - minimal unstructured time;
  - visual supports, such as picture schedules;
  - minimization of dependence on prompts;
  - an occupational therapy (OT) and physical therapy (PT) evaluation, including an assessment in conjunction with an augmentative communication specialist to determine the most appropriate communication approach (given Student's fine motor challenges), as well as an assessment for a sensory diet;
  - assistive technology (AT);
  - staff training in \*\*\*;
  - regular parental consultation;
  - consideration of summer educational services;
  - teaching parents behavior management and communication techniques;
  - a functional behavioral analysis and behavioral intervention plan to address Student's inability to stay in student's seat at school, car/bus seat safety, focus, aggression, \*\*\* at school, and elopement;
  - a social skills training program; and
  - evaluation for the use of a specific communication system (e.g., picture exchange system, voice generating device), training in the use of that system, consistency between home and school in the functional use of the system, and review of student's gestures to assess for greater communication. Pet. Ex. 16 at 12-15.

11. On January 17, 2013, Petitioner and the District entered into a mediated settlement agreement (Settlement Agreement). The Settlement Agreement included pledges by the District to:
- incorporate the terms of the Settlement Agreement into Student's individualized education program (IEP);
  - incorporate all of the educational interventions recommended by Dr. \*\*\* in his report;
  - hire a BCBA to oversee Student's ABA program for the remainder of the spring 2013 semester, extended school year (ESY or summer) 2013, and the 2013-2014 school year, including a full-time one-on-one ABA program consistent with the assessment of the independent BCBA, the evaluation of Dr. \*\*\*, and the admission, review, and dismissal (ARD) committee, and a ten-week summer program consisting of a combination of ESY and summer educational services to incorporate and build on the ABA program;
  - pay the BCBA to cooperate with the District's AT coordinator to conduct an AT assessment as part of a full and individual evaluation (FIE);
  - pay for a private OT/sensory assessment by a provider of the parent's choice;
  - provide training on Student's health plan and \*\*\* protocols for all employees working directly with Student;
  - conduct an FIE, to include assessments in the following areas—cognitive, social, behavioral, psychological, adaptive physical education (PE), assistive technology, speech, OT, and PT; and
  - require staff to keep written data on the occurrence, length, and frequency of Student's \*\*\*. Pet. Ex. 32.
12. The ARD committee met on January 24, 2013. Documentation by the physical therapist and occupational therapist suggest that Student's progress toward PT and OT goals in January 2013 was limited. Pet. Ex. 7 at 13-17. However, student mastered seven various IEP objectives between November 2012 and January 24, 2013. *Id.* at 18-21.
13. As a result of the January 24, 2013 meeting, the ARD committee determined to: go forward with an FIE; continue with Student's placement in the \*\*\* classroom; establish new goals and objectives based on Dr. \*\*\*'s IEE; incorporate the terms of the Settlement Agreement into Student's IEP; review Student's ESY program after the FIE is completed; contract with a BCBA to conduct an ABA assessment, oversee student's ABA program, and conduct an AT assessment; conduct an OT assessment and pay for a private OT/sensory assessment by a provider of the parent's choice; train employees on Student's \*\*\* protocol; and provide speech therapy, OT, OT, and personal care services to Student. Pet. Ex. 7 at 57-59.

Mother declined to accept the IEP, in large measure because District personnel recommended that Student be moved to a campus with a special education life skills structured learning program (a more structured environment) for the 2013-2014 school year, but the Settlement Agreement provided that the ABA program would be delivered at \*\*\* through the end of that year. Mother was concerned that moving Student to a new campus would trigger additional \*\*\*. Mother noted on the ARD documentation, "I agree to the terms in my settlement and that's it." *Id.* at 51, 58.

14. Due to the lack of agreement at the January 24, 2013 ARD committee meeting, the committee reconvened on February 5, 2013. The District suggested that, during the current school year, Student and student's present teacher could undertake a series of visits to the proposed new campus so that Student would be comfortable going there the following year and the teacher at the new campus could visit Student at student's current classroom \*\*\* to observe student and receive training from student's

present teacher. Mother agreed to consider the proposal. The ARD committee, in the meantime, decided to plan on Student's continued enrollment \*\*\* for the 2013-2014 year and re-visit the question of that year's placement following Student's upcoming assessments. District Ex. 7 at 331.

15. A March 2013 OT assessment by a private occupational therapist stated that Student does not present with specific sensory processing disorder but would benefit from a scheduled sensory diet. Pet. Ex. 20.
16. A March 2013 ABA assessment by a BCBA with \*\*\* (a behavioral therapy provider) described Student in student's school environment as on task, actively engaged, following many verbal directives from the teacher, and very interactive with both peers and adults. Student hugged too aggressively at times. Student rolled a ball and signed for potty three times. Student made few vocalizations. The assessment noted that a current ABA program was not in place. No use of a Picture Exchange Program (PECS, a system of pictures used for communication) was observed, although a visual schedule was on the desk. The BCBA recommended:
  - use of the assessment tools VBMAPP (Verbal Behavior Milestones Assessment and Placement Program) or ABLLS (Assessment of Basic Language and Learning Skills) by a BCBA to develop a comprehensive ABA program for Student, with corresponding adjustment of student's IEP;
  - more opportunities for "mand" training (prompting and reinforcing requests for items);
  - consideration of using Total Communication (gestures, sounds, signs, visuals) including a language device (Proloquo 2Go or iPad Touch) (communication applications);
  - a full-time intensive ABA program, supervised by a BCBA, for the entire summer, with an updated VBMAPP or ABLLS in the last month; and
  - if Student's aggressive behavior continues, a functional analysis by a BCBA and the development of a behavioral intervention plan (BIP). Pet. Ex. 24.
17. \*\*\*, a non-BCBA behavioral specialist and third-party consultant, and student's case manager performed a functional behavioral assessment (FBA) in March 2013. They observed that Student could follow simple instructions, understand complex instructions, communicate with signing the need to go to the restroom, use sign language to communicate many basic needs, respond to praise during difficult tasks, and use a spoon to eat lunch. They noted negative behaviors (frustration and irritability) were increasing in frequency. They identified the following goals: decreasing unwanted behaviors (e.g., noncompliance with tasks), \*\*\*, communication skills, and decreasing \*\*\* at school. They recommended:
  - one-on-one ABA therapy one time per week for one hour during school time to work on establishing a communication program such as American Sign Language (ASL) or PECS; and
  - in-home ABA therapy one time per week for one hour to reinforce programs at school. Pet. Ex. 26.
18. A March 2013 psychological evaluation produced recommendations that the ARD committee consider use of a PEC system coordinated between Student's speech-language pathologist and student's special education teacher to promote Student's independence in using pictures/icons to communicate. Pet. Ex. 25 at 19-24.
19. In March 2013, the District performed a language evaluation. The evaluation only reported on levels of function. It merely served to confirm that Student's communication abilities were well below average,

that student used gestures and some vocalizations, and that student could understand more than student could express. The evaluation included no assessment for the use of a specific communication system, no discussion of how Student's gestures might be modified to express a greater range of meaning, and no recommendations. Dist. Ex. 1 at 8-11.

20. District personnel performed a March 2013 AT assessment. It noted that Student used icons on a touch monitor and interactive whiteboard and that Student's classroom teacher and paraprofessionals were already using a low-tech visual presentation system developed for identifying Student's wants and needs. The assessors recommended:
  - continued use of interactive whiteboard or touch monitor with developmentally-appropriate software;
  - a trial use of a mid-tech, visual or verbal choice request/communicator to be used in conjunction with student's current form of visual presentations and sign language; and
  - consistency among visual presentations being used for formal language (all visual presentations should be made from the same picture-generating software). Pet. Ex. 25 at 39-40.
21. The March 2013 assessments, along with others performed by the District, were included as part of an FIE generated by the District on March 23, 2013. Pet. Ex. 25.
22. The ARD committee met on April 12, 2013, and recommended changes to the IEP in response to the FIE. Student was identified in this IEP as having intellectual disabilities. Other changes included recommendations for in-home training, community-based training, speech and language therapy, OT (including a sensory diet and use of a \*\*\*), and adaptive PE. However, a full discussion of AT was deferred, along with discussions of summer ABA and ESY services, until further ABA assessment was performed. Pet. Ex. 9. Due to varying recommendations from Ms. \*\*\* and \*\*\*, Ms. \*\*\*'s organization was to provide behavioral services (60 minutes per week) until \*\*\* could perform the assessments and develop a program. The IEP refers to ABA "strategies" being employed in the classroom in addition to the ABA "therapy" provided by behavioral specialists. *Id.* at 14, 28.
23. The ARD committee's recommendation for language was for forty minutes of unspecified speech therapy per week. Pet. Ex. 9 at 27.
24. Mother visited District \*\*\* schools with structured learning classes and liked the classroom at the District's \*\*\* School taught by Classroom Teacher. Tr. at 261-263, 265, 770-71, 815-16.
25. On April 26, 2013, the ARD committee reconvened to discuss the summer program and ABA services. A BCBA was present at the meeting and participated. The committee decided that Student would be provided with a 10-week summer ABA program supervised by a BCBA as follows:
  - Student would participate in the 2013 ESY program at \*\*\*, taught at least for part of the time by Classroom Teacher (to include one hour of ABA therapy per week at school);
  - a behavioral specialist from Ms. \*\*\*'s organization would provide the ABA services; and
  - District staff would receive initial ABA training; the BCBA would provide up to twenty hours of time over the summer; and the summer program would include up to five hours of assessment time.

Staff was to be provided with five hours of initial ABA training per the recommendation of the BCBA. The committee further agreed that Student would move to \*\*\* at the start of the 2013-2014 school year

and be placed in Classroom Teacher's structured learning life skills class. Student's one-on-one aide (paraprofessional) from \*\*\* would follow student to \*\*\*. Pet. Ex. 10.

26. Classroom ABA therapy and in-home behavioral services provided by Ms. \*\*\*'s organization commenced for Student in April 2013. Pet. Ex. 31 at 54-60; Pet. Ex. 40 at 28.
27. Student's teacher in the spring of 2013 was not trained in ABA. Tr. at 954.
28. The VBMAPP or ABLLS assessments were never done, and therefore, an ABA program based on the results was not developed. Tr. at 918.
29. Student attended ESY at \*\*\* in the summer of 2013, and student's teacher (at least for part of the summer) was Classroom Teacher in a \*\*\* room. Pet. Ex. 31 at 64A.
30. The summer 2013 \*\*\* room had approximately ten children, Classroom Teacher, and two paraprofessionals. The children were \*\*\*, with varying levels of disability. Tr. at 266.
31. Ms. \*\*\* prepared an individual behavioral plan in June 2013. Pet. Ex. 40 at 24.
32. A paraprofessional in the ESY program (who did not testify in this hearing) reported that, on August 5, 2013, Student tried to bite Classroom Teacher, who responded by striking Student in the face with the teacher's knee two or three times. Pet. Ex. 36 at 1.
33. On August 7, 2013, Classroom Teacher made a written statement that she recalled nothing like that happening and would not intentionally do that to any child. Pet. Ex. 38 at 46. Classroom Teacher testified that she was moving her knee to prevent Student from biting her, and the two did not make contact. Tr. at 269, 642.
34. The District investigated and concluded no abuse had occurred. The District did not document the investigation, report the matter to any outside authority, or inform Mother about the matter. Tr. at 894-898.
35. The evidence in this case is insufficient to support a finding that, on August 5, 2013, Classroom Teacher attempted to strike Student in the face with the teacher's knee.
36. There is no indication that the end-of-summer ABLLS or VMAPP assessments recommended by \*\*\* occurred.
37. Classroom Teacher had some ABA training in the past but did not attend ABA training related to Student until August 22, 2013. Tr. at 325-27, 919-20. It is unclear how much in-class coaching she received prior to that time or in the fall of 2013. Tr. at 622-25, 644.
38. In the 2013-2014 school year, Student was in Classroom Teacher's structured learning class at \*\*\*. There were six students. The staff consisted of Classroom Teacher and three paraprofessionals, one of whom was assigned to Student. Tr. at 267.
39. Student used small pictures to communicate at school, but there is no evidence student's family received training in the use of the pictures, which were difficult for Student to manipulate. Tr. at 691.

40. For some period of time in late summer and early fall 2013, Ms. \*\*\*'s organization provided in-home ABA services to Student, paid for by the family, that augmented the in-home ABA services provided by Ms. \*\*\*'s organization under its contract with BISD. Pet. Ex. 40 at 37; Tr. at 429-430. Ms. \*\*\* ceased providing private-pay in-home services to Student in late September 2013. Pet. Ex. 40 at 30.
41. Student's one-on-one aide in the fall of 2013 was not compliant with the child's behavioral program. Pet. Ex. 40 at 20; Tr. at 457-58, 565.
42. Mr. \*\*\*'s organization took over the behavioral program and \*\*\*, which did not have a BCBA locally, was no longer involved in providing services to Student. Mother was actively involved in this decision. Tr. at 811-13.
43. At the request of Mother, the ARD committee convened on October 24, 2013. Student's PT progress was reported as slow. The speech therapist and Classroom Teacher reported that Student was doing very well, and documentation reflected some progress in a number of areas. However, Mother reported a lack of progress and Grandmother reported that she believed Student was regressing. Mother expressed concern about: assistive technology, that a PECS system was not in place, and that the pictures used were not consistent across all settings. Mother also expressed a desire to place Student in a private setting because of a lack of progress. Mother stated a belief that an ABA program was not in place. The chosen ABA third-party provider, Ms. \*\*\*, stated that the program would be put into effect immediately upon ARD committee approval.

As a result of the meeting, the committee agreed on the following:

- Ms. \*\*\*'s organization would provide increased ABA therapy—150 minutes of one-to-one therapy four times per week (a total of ten hours) in the school setting;
  - Ms. \*\*\*'s organization would provide sixty minutes of one-to-one ABA therapy three times per week in the home;
  - Ms. \*\*\*'s organization would provide trainers to assist in the implementation of the ABA therapy program for Student and would oversee training of the classroom teachers and/or paraprofessionals to specifically and individually provide ABA therapy for Student. ABA trainers would be available on campus in the classroom for direct therapy with a teacher or paraprofessional present at all times during direct student training;
  - An iPad would be provided to assist with communication with the PECS app, and both "iPad" and "PECS" were listed as "required equipment/assistive technology devices" to be used in Student's classroom environment; and
  - The District would provide training for the PECS program. Pet. Exs. 11, 31 at 65-81.
44. Ms. \*\*\*'s organization began providing ten hours of behavior intervention therapy per week at school for Student beginning on November 4, 2013. Ms. \*\*\*'s behavior trainer also worked with Student's aide for training purposes. Pet. Ex. 40 at 20.
  45. In October or November 2013, Ms. \*\*\* began the initial phases of PECS with Student, but Student was not taught with PECS by others in the classroom setting.
  46. Starting in November 2013, school personnel began reporting increased \*\*\* activity during Student's school day. Pet. Ex 37 at 43-94.
  47. At the end of November 2013, Student began a new \*\*\* medication. Possible side effects included moodiness. Pet. Ex. 40 at 20.



48. In school around the Christmas break of 2013-2014, Student exhibited sleepiness, moodiness, lethargy, and aggression. Student had an overall sad and depressed demeanor. Pet. Ex. 40 at 20.
49. An ARD committee meeting was held on January 17, 2014. District personnel reported considerable progress in some areas and Mother stated she felt there had been progress, too. She was referring to Student's work with Ms. \*\*\*. District personnel stated that no PECS program was in place and that the ultimate goal for speech was to have Student use a program called ProLoQuo2Go (which uses pictures and audio) on the iPad for student's communication needs. The committee agreed on:
- a continuation of ABA therapy (both at school and in the home);
  - an AT plan to send Classroom Teacher, another District employee, and Mother to a two-day PECS training in March 2014 (Classroom Teacher had gone through the training once before);
  - a continuation of the existing IEP goals and objectives for OT and PT;
  - removing Student from the mainstream PE class due to concerns about \*\*\* and overstimulation; and
  - making sure that the nurse checked Student when student \*\*\*.

The IEP specifically requires PECS and an iPad for communication. Pet. Ex. 12; Pet. Ex. 43 (audio recording); Tr. at 691-92.

50. In January and February 2014, Student was increasingly noted to be aggressive in the classroom. Pet. Ex. 37 at 76-94. At school in early February, Student was upset, aggressive, defiant, and often tearful. Pet. Ex. 36 at 23. At around the same time, Student's behavior at home regressed, with problems related to eating, sleeping, aggression, communication, and depression. Pet. Ex. 42 at 3; Tr. at 735-40, 782-84, 788.
51. At around the same time, in early 2014, Mother and Grandmother noted that Student appeared extremely and unusually fearful to be left at school. Tr. at 738-40, 777-79, 787-88.
52. In late 2013 or early 2014, Student's family brought \*\*\* to school at the teacher's request to \*\*\* Student \*\*\*. Classroom staff began \*\*\* Student \*\*\* in the morning. \*\*\* was used because Student often would \*\*\* and \*\*\*. Student began \*\*\* at other times during the day. Staff sometimes forced Student \*\*\*. Pet. Ex. 36 at 23; Pet. Ex. 40 at 20-21; Tr. at 231, 445-48, 592, 602, 710, 757-59, 778-79. It was stressful for Student to be physically forced \*\*\*, and student looked like a "caged animal" while struggling against being \*\*\*. Tr. at 602; Pet. Ex. 42 at 3. Once \*\*\*, Student did not make much effort \*\*\* out, and could probably have \*\*\* \*\*self. Tr. at 445-46. Student had difficulties with gross motor skills and \*\*\*, and student needed to maintain \*\*\*. Tr. at 449, 591. Dr. \*\*\* had noted that student would benefit from routinely taking time to \*\*\*. Pet. Ex. 16 at 14. \*\*\* was used for the convenience of District staff, was not a planned or positive therapeutic intervention, and caused Student repeated distress.
53. Using \*\*\* to address Student's \*\*\* was an inappropriate behavioral intervention. Tr. at 450.
54. On Friday, \*\*\*, Grandmother dropped off Student at school. Upon learning that student photos were going to be taken that day, Grandmother told Classroom Teacher and other school personnel that Student was not to be photographed (due to a concern that the flash could \*\*\*). Classroom Teacher jerked the \*\*\* away from Grandmother and did not seem to be listening. Student was photographed that day. Tr. at 779-80.

55. On \*\*\*, Student was upset and aggressive at school. Pet. Ex. 36 at 23.
56. On \*\*\*, Student was supposed to be \*\*\* but was not completing student's task. Student closed student's eyes. Classroom Teacher told Student she was going to go get "Pepper," referring to a yardstick. Classroom Teacher retrieved a yardstick and hit the table with the yardstick to make a noise, to obtain Student's attention, and to get student to focus on \*\*\*. Pet. Ex. 36 at 17-18, 23; Tr. at 271-73. When the yardstick was slapped on the table, Student jerked awake. Tr. at 596-97, 603-604. This was an inappropriate behavioral intervention. Tr. at 451.
57. The yardstick incident was witnessed by \*\*\*, an ABA trainer who was employed by Ms. \*\*\* and was in the classroom that day to work with Student. Pet. Ex. 36; Tr. at 596-97.
58. Ms. \*\*\* reported that Classroom Teacher, after striking the table, also hit, tapped, or whacked (with a small whack) Student's hand with the yardstick. Pet. Ex. 36; Tr. at 597, 603-05.
59. Classroom Teacher hit, tapped, or whacked (with a small whack) Student's hand with the yardstick on \*\*\*. Pet. Ex. 36 at 17-18; Tr. at 596-597.
60. Using a yardstick in this manner was not one of Student's designated behavioral interventions. Tr. at 604, 637.
61. Ms. \*\*\* immediately called Ms. \*\*\* to report what she had seen. Tr. at 597, 611. However, Ms. \*\*\* believed that Ms. \*\*\* only stated, in that initial telephone conversation, that the table had been hit. Tr. at 471.
62. On \*\*\*, the new classroom aide said, in Student's presence, that Student's behavior made student, student's shoes, and/or student's appearance "ugly." Pet. Ex. 36 at 16, 23; Tr. at 605.
63. Student was capable of understanding such a statement. Tr. at 300.
64. The aide who made the "ugly" remark had not received any ABA training from Ms. \*\*\*. Tr. at 565.
65. Later on \*\*\*, Mother called District personnel expressing concerns about Student's unhappy demeanor, student being forced \*\*\* and possibly left there for long periods, and student being told that student or student's appearance was ugly. Pet. Ex. 36 at 21-22. Mother also called Classroom Teacher and questioned her about the aide's statement about Student being ugly; Classroom Teacher denied that the aide could have made the statement and did not offer to investigate. Classroom Teacher also stated that any increased aggression on Student's part might be due to the weather or the stars. The exchange between Mother and Classroom Teacher was heated, and Mother hung up on the teacher. Tr. at 716-717.
66. Following the events of \*\*\*, Mother decided not allow Student to return to school, in the absence of a meeting with school personnel, due to concerns about the yardstick (being hit on the table), Student's being called "ugly" by an aide, and student being forced \*\*\*. Tr. at 759-760.
67. At some point after the yardstick incident, Ms. \*\*\* learned that Ms. \*\*\* alleged Classroom Teacher had struck Student with the yardstick. Ms. \*\*\* advised Ms. \*\*\* to contact Child Protective Services (CPS) and to make a written statement. Tr. at 594, 597.

68. On February 20, 2014, school personnel met with Classroom Teacher, who admitted to hitting the table with the yardstick. The District made arrangements to assign a new teacher to Student. Tr. at 831.
69. A meeting was held on \*\*\*, with Ms. \*\*\*, Ms. \*\*\*, Classroom Teacher, other District personnel, Mother, and Grandmother. At the meeting, Ms. \*\*\* read a written statement by Ms. \*\*\* setting out her assertions that Classroom Teacher had hit both the table and Student. This was the first time that District personnel and Student's family heard that Ms. \*\*\* stated student had been hit. The meeting ended abruptly, and the District reported the matter to CPS and the District police. Tr. at 274, 479, 833-834; Pet. Ex. 36 at 15, 22.
70. Classroom Teacher was relieved of her classroom duties that day, pending an investigation. Tr. at 834.
71. Student has not attended class at a District school since \*\*\*. Student has not, however, been withdrawn from the District.
72. A CPS investigation later determined that Classroom Teacher had not committed physical abuse—defined for CPS purposes in relevant part as “physical injury that results in substantial harm to the child or the genuine threat of substantial harm from physical injury to the child.” Pet. Ex. 36 at 14; Tr. at 601. Classroom Teacher returned to classroom teaching at \*\*\*, although she was assigned to a different classroom. Tr. at 67.
73. Some data suggests that Student made overall progress at \*\*\* in the 2013-14 year. Pet. Ex. 40 at 11-16, 45-47. However, during the fall 2013 semester, Student made almost no progress in achieving the PT objectives in student's IEP. Pet. Ex. 31 at 22.
74. Some of Ms. \*\*\*'s documentation suggests that Student progressed in various behavioral skills, including decreasing aggression and \*\*\*, even in January and February 2014. Pet. Ex. 40 at 45-47. And Ms. \*\*\*'s data reflect positive gains in some \*\*\* related skills at that time. *Id.* at 33. On the other hand, forms filled out by school personnel indicate, on a day-to-day basis in the classroom, Student's increasingly aggressive behavior from late January into February. Pet. Ex. 37 at 76-94. Similarly, certain of Ms. \*\*\*'s documentation reflects behavioral regression in highly problematic areas (\*\*\*, aggression, prompt dependency, and communication) in the days and weeks leading up to Student's last day at \*\*\*. Pet. Ex. 40 at 8, 10, 19-20.
75. Immediately following student's last day attending school at \*\*\* Student would not sleep, smile, laugh, walk, or eat, and student lost about twelve pounds. After a few weeks of being away from school, Student began to laugh and play again. Tr. at 740-42.
76. Student's behavioral needs were not being effectively met by the District in late 2013 and early 2014.
77. Following a short period of time after Student stopped attending \*\*\*, Ms. \*\*\*'s organization resumed providing ABA services to Student, first in the home and then in a daycare setting. Pet. Ex. 42 at 4. As of May 2014, Student was receiving twelve to fourteen hours of ABA therapy per week from Ms. \*\*\* in the daycare setting. Tr. at 206-07, 430.
78. In late May 2014, Ms. \*\*\* reported that Student had progressed since February and that student's attention span, communication skills, and behavioral skills had improved, although Student still displayed some problematic behaviors. Student generalized skills more readily, compared to student's performance while still attending school at \*\*\*. Ms. \*\*\* recommended continued academic instruction in a small setting, using ABA. Pet. Ex. 40 at 19-20, 43, 45-47, 52-65; Tr. at 436-40.

79. By May 2014, Student's \*\*\* had decreased, and student was calmer. Pet. Ex. 42 at 4; Tr. at 440.
80. Student has not used \*\*\* at all in student's new educational setting. Tr. at 448-49.
81. Following the events of \*\*\*, Mother and District personnel talked and exchanged several emails about various matters, including the provision of related services and possible placements for Student—remaining at \*\*\* (but with a different teacher), moving to another District school, or private placement—but neither party took formal steps to set up an ARD committee meeting. Pet. Ex. 38 at 76-116; Tr. at 719-22, 840-41, 867-67, 935-37.
82. Student has never been withdrawn from BISD. Tr. at 681.
83. In May 2014, Dr. \*\*\* again evaluated Student, and he issued a psychological evaluation report on June 15, 2014. Dr. \*\*\* noted improved self-regulation and compliance. He stated that testing suggested student's ability to comprehend may significantly exceed student's ability to communicate. He said that Student was demonstrating an increased intent to communicate and an increase in student's functional sign language and limited use of PECS. He added, "[I]t is questionable whether [Student's communication] needs were addressed in a consistent, systematic approach throughout the entire time since the last assessment." Pet Ex. 42 at 12. When he observed Student in student's new educational setting with Ms. \*\*\* in a small, structured, ABA program, Student was "very interactive" and "demonstrating communication," student stayed "on task," student appeared "happy," and student was walking much better than he had previously seen student walk. Tr. at 177-178, 192.

Dr. \*\*\* stated, "While this report cannot produce any finding in regard to the presence or absence of abuse, [Student]'s reported symptoms and reactions, as well as the decrease in problematic symptoms, cessation of \*\*\* activity, and increase in functioning certainly suggest that student's prior educational placement was destabilizing." Pet. Ex. 42 at 12.

### **Behavioral Therapy**

84. Being repeatedly forced \*\*\* against student's will, being allowed to remain \*\*\* for hours on multiple occasions, having a yardstick hit on a desk and then hit on student's hand, and being called "ugly" were inappropriate and ineffective responses to behavioral regression and furthered Student's behavioral regression. These actions were behavioral interventions outside Student's IEP and were not part of a program individualized on the basis of assessment and performance.
85. The ABA program failed to comply with the Settlement Agreement and Student's IEP because it was not based on the necessary comprehensive planning developed in light of the needed assessments and it was not delivered full-time.
86. The requirements in the Settlement Agreement and Student's IEP that student be assessed for the development of an ABA program and that the program be full-time were significant or material elements of student's IEP.

### **Communication**

87. Student has not undergone an assessment for the use of a specific communication system (e.g., picture exchange system, voice generating device), nor has student's repertoire of gestures been reviewed to see if the gestures could be modified to express a greater range of meanings more clearly and effectively, as

recommended by Dr. \*\*\* in January 2013. This failure violated Student's IEP from the January 2013 IEP forward.

88. The District never developed an overall plan for Student's communication or implemented Total Communication. These failures violated Student's IEP from spring 2013 forward.
89. The non-PECS picture exchange system used in school with Student violated student's IEP from the January 2013 IEP forward because it was not used uniformly across student's school and home environments, as Dr. \*\*\* had recommended.
90. The District's failure to implement the use of PECS in Student's regular work in student's home classroom environment violated Student's IEPs from October 2013 forward.
91. The requirements that: Student be assessed for the use of a specific communication system; student's repertoire of gestures be reviewed to see if the gestures could be modified to express a greater range of meanings more clearly and effectively; a plan for use of Total Communication be developed and implemented; Student's communication system be used consistently across student's environments; and student use PECS with a iPad were all significant or material elements of student's IEP.

#### **Sensory Diet**

92. Student was never provided with a sensory diet. Tr. at 139, 247, 468. The requirement that student be provided with a sensory diet was a significant or material part of student's IEP.

#### **Post-\*\*\* Related Services**

93. The District's failure to notice an ARD meeting following \*\*\*, was an important missed opportunity to try to regain the family's trust and bring Student back to school for needed services.

#### **Relief**

94. Ms. \*\*\* recommends that Student have at least 30 hours per week of intensive ABA therapy, including academics, OT, speech, and PT, with parent and family training seminars. Pet. Ex. 40 at 21.
95. In his June 2014 report, Dr. \*\*\* recommended an educational program emphasizing an intensive behavioral intervention, including an ABA program of twenty to forty hours per week. He also recommended a functional communication system, likely including a tablet-based picture exchange system and sign language, integrated with the ABA program and consistently applied across all settings. Pet. Ex. 42 at 15-16. He also recommended a functional communication system that will likely include a tablet-based picture exchange program and sign language. *Id.* at 16.

### **IV. DISCUSSION**

This case concerns a child with \*\*\*, a \*\*\* disorder. Most of the violations of IDEA found in this Decision involve, not the failure to fashion an appropriate individualized education program (IEP), but rather the failure to properly implement already agreed-on, significant or material provisions of Student's IEP.

## A. Overview of the Evidence

Both parties offered a number of documents that were admitted in evidence, including Student's successive IEPs for the period in question, evaluations, and other documents related to Student's disability, student's educational placement, and alleged occurrences at student's school.<sup>1</sup> The following witnesses testified:

- Dr. \*\*\*, who was the executive director for the District's special education program until her retirement shortly before the hearing;
- \*\*\*, Ph.D., a psychologist who evaluated Student;
- \*\*\*, an educational diagnostician with the District;
- Classroom Teacher, Student's teacher in the summer 2013 ESY and the 2013-14 academic year;
- \*\*\*, a former teacher and school administrator, now a parent consultant and advocate;
- \*\*\*, a third-party contractor hired by the district (and, at times, by Mother) to provide behavioral evaluation and therapy services to Student;
- \*\*\*, an employee of Ms. \*\*\* who worked directly with Student;
- Mother;
- Grandmother;
- \*\*\*, a special education compliance monitor with the District; and
- \*\*\*, a board-certified behavioral analyst (BCBA) who works as a third-party contractor for the District (but who has not provided any services to Student).

## B. Applicable Law: Free, Appropriate Public Education

The primary purpose of IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.<sup>2</sup> IDEA guarantees a student with a disability a "basic floor of opportunity" consisting of specialized instruction and

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<sup>1</sup> The Hearing Officer intended to admit Petitioner's Exhibit 35 at the hearing, as there was no objection to its admission. However, the transcript is unclear on this point. The Hearing Officer clarifies that this exhibit was admitted.

<sup>2</sup> 20 U.S.C.S. § 1400(d)(1)(A).

related services that are individually designed to provide the student with an educational benefit.<sup>3</sup> The educational benefit must be more than a “mere modicum” and not “de minimis.”<sup>4</sup>

The Fifth Circuit has established a four-factor 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.<sup>5</sup> Those four factors are: (1) was the program individualized on the basis of the student’s assessment and performance?; (2) was the program administered in the least restrictive environment?; (3) were the services provided in a coordinated and collaborative manner by key stakeholders?; and (4) were positive academic and non-academic benefits demonstrated by the program?<sup>6</sup>

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.<sup>7</sup>

Once school officials and parents agree on the IEP, the school district must put it into effect.<sup>8</sup> The failure to implement a material or significant portion of the IEP can amount to a denial of FAPE; a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.<sup>9</sup>

Under IDEA, a parent or agency must request an impartial due process hearing within two years of the date the parent knew or should have known about the alleged action that forms the basis of the complaint.<sup>10</sup> However, if the State has its own time limitation for filing a request for hearing then the state rule applies.<sup>11</sup> In

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<sup>3</sup> *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189 (1982).

<sup>4</sup> *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 246-248 (5<sup>th</sup> Cir. 1997).

<sup>5</sup> 118 F. 3d at 247-248.

<sup>6</sup> 118 F. 3d at 247-248.

<sup>7</sup> *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 294 (5<sup>th</sup> Cir. 2009).

<sup>8</sup> 20 U.S.C.S. § 1414(d)(2)(A); *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5<sup>th</sup> Cir. 2012). To the degree that Petitioner makes allegations that a teacher did not have a copy of Student’s IEP at a given time, *see* Petitioner’s Closing Brief at 18, this Decision does not address them. It is the implementation of the IEPs that is at issue.

<sup>9</sup> *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5<sup>th</sup> Cir. 2000). A student’s progress is part, but not all, of the materiality analysis. *Id.* at note 2. *See also Corpus Christi Indep. Sch. Dist. v. C.C.*, 59 IDELR 42 (S.D. Tex. 2012).

<sup>10</sup> 20 U.S.C. § 1415 (f)(3)(C); 34 C.F.R. §§ 300.507(a)(2), 300.511(e). There are exceptions not applicable here.

<sup>11</sup> 20 U.S.C. § 1415(f) (3) (C); 34 C.F.R. §§ 300.507(a) (2), 300.511(e).

Texas, a parent must request a due process hearing within one year of the date the complainant knew or should have known about the alleged action that serves as the basis for the hearing request.<sup>12</sup> As noted above, Petitioner filed the request for a due process hearing in February 2014.<sup>13</sup> The time frame applicable in this case goes back to late January 2013, when the parties implemented a settlement agreement (Settlement Agreement).<sup>14</sup>

A petitioner who challenges the school district's eligibility determination or offer of services under the IDEA bears the burden to prove that the child has been denied FAPE.<sup>15</sup>

IDEA provides that the local education agency shall ensure that the IEP Team revises the IEP as appropriate to address any lack of expected progress toward the annual goals and in the general education curriculum, the results of any reevaluation, the child's anticipated needs, or other matters.<sup>16</sup> The duty to revise the IEP in response to information and events is therefore on the district. It is also the district that sends notifications of admission, review, and dismissal (ARD) committee meetings.<sup>17</sup> A district can conduct an ARD meeting without a parent in attendance if the parent is unwilling to attend.<sup>18</sup> The parent must be notified of the meeting and provided an opportunity to attend and participate.

In matters alleging procedural violations, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child, or caused a deprivation of educational benefit.<sup>19</sup>

A party denied FAPE is entitled to appropriate relief.<sup>20</sup> If the parents of a child with a disability, who previously received special education and related services in public school, enroll the child in a private school without the consent of or referral by the public agency, a hearing officer may require the agency to reimburse

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<sup>12</sup> 19 Tex. Admin. Code. § 89.1151(c).

<sup>13</sup> To the degree Petitioner alleges that a denial of FAPE occurred prior to the 2013 spring semester, *see, e.g.*, Petitioner's Closing Brief at 11, this Decision does not address such allegations.

<sup>14</sup> Tr. at 27-29. The relevant terms of the Settlement Agreement are discussed later.

<sup>15</sup> *Schaffer v. Weast*, 126 U. S. 528 (2005).

<sup>16</sup> 20 U.S.C. § 1414(d)(4).

<sup>17</sup> 34 C.F.R. § 300.322.

<sup>18</sup> 34 C.F.R. § 300.322(d).

<sup>19</sup> 34 C.F.R. § 300.513.

<sup>20</sup> *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985).



the parents for the cost of that enrollment if the hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer even if it does not meet state educational standards. However, the cost of reimbursement may be reduced or denied if, at the most recent IEP team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense, or, at least ten business days prior to the removal of the child from the public school, the parents did not give written notice to the public agency of their concerns and intent to remove the child from public school.<sup>21</sup>

### **C. Behavioral Therapy Issues**

Student, who is nonverbal, has problematic behaviors. Student can be aggressive, attempting to bite, hit, scratch, or pinch when frustrated or not wanting to meet academic (or other) demands.<sup>22</sup> Student also avoids tasks by \*\*\* or \*\*\*.<sup>23</sup> These behaviors clearly pose challenges to educators who work with student. Beyond being difficult to deal with, the behaviors are important because they are capable of hindering academic progress.<sup>24</sup> Due to student's behavioral needs and their relationship to student's overall academic needs, Student's IEPs prescribed behavioral evaluation and therapy over the course of time at issue in this case, 2013 and early 2014.<sup>25</sup> Petitioner makes a number of allegations related to Student's behavior and the District's response to it. They fall broadly into two categories: (1) alleged inappropriate behavioral interventions; and (2) allegedly inadequate behavioral assessment and therapy, including an inadequate applied behavioral analysis (ABA) program.

#### **1. Inappropriate Behavioral Interventions**

Much attention in the evidence and argument in this case relates to charges of "abuse" lodged by Petitioner. They involve allegations of inappropriately harsh treatment of Student—both physical and verbal—

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<sup>21</sup> 34 C.F.R. § 300.148.

<sup>22</sup> Pet. Exs. 16, 22, 25.

<sup>23</sup> Tr. at 163-64; Pet. Exs. 16, 22, 25. *See also* Pet. Ex. 40 at 21.

<sup>24</sup> Tr. at 1005-06.

<sup>25</sup> Pet. Exs. 7, 9, 10, 12, 16, 32; Dist. Ex. 7.

on the part of school personnel. The District contests the occurrence of the acts and also argues that, even if they did occur, they do not implicate IDEA. This Decision makes no findings concerning “abuse,” a term that was used by both parties but defined by neither.<sup>26</sup> However, Petitioner also presented evidence and argument that the alleged actions constituted highly inappropriate responses to Student’s behavioral problems.<sup>27</sup> This Decision finds that some (although not all) of the alleged events occurred, that they amounted to unauthorized and inappropriate behavioral interventions outside the scope of Student’s IEPs, and that the preponderant evidence establishes a relationship between the proven events and Student’s educational progress. The Hearing Officer therefore concludes that the proven events constituted a denial of FAPE.

Several of these allegations relate to Classroom Teacher, Student’s teacher in the 2013 summer program and in the 2013-14 school year at the District’s \*\*\*. Evidence was introduced at the hearing concerning an alleged link between Classroom Teacher’s own medical diagnoses and her conduct in the classroom. Both parties addressed this question in their post-hearing briefing.<sup>28</sup> However, the issue is not material to the discussion of these events, and this Decision does not address it.

The first alleged incident supposedly occurred in August 2013. This event was not established by a preponderance of the evidence. On August 7, 2013, a paraprofessional in the extended school year (ESY) program made a brief written statement that, two days previously, Student had tried to bite Classroom Teacher, Student’s teacher in the summer of 2013 (and then in the 2013-14 school year). The aide’s written statement said that Classroom Teacher responded by striking Student in the face with the teacher’s knee two or three times.<sup>29</sup> Classroom Teacher made a written statement that she recalled nothing like that happening and would not intentionally do that to any child.<sup>30</sup> Classroom Teacher testified that she was moving her knee to prevent Student from biting her, and the two did not make contact.<sup>31</sup> The District investigated and concluded no abuse had occurred. The District did not document the investigation, report the matter to any outside authority, or

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<sup>26</sup> The only definition in evidence is CPS’s definition of “physical abuse”: physical injury that results in substantial harm to the child or the genuine threat of substantial harm from physical injury to the child. Pet. Ex. 36 at 14. No such abuse has been proven in this case.

<sup>27</sup> Petitioner’s Closing Briefing at 15.

<sup>28</sup> Petitioner’s Closing Brief at 3, 5-6; Respondent’s Closing Argument at 9-10. The Hearing Officer notes that Petitioner’s closing argument concerning this matter relied heavily and inappropriately on materials outside the record. See Petitioner’s Closing Brief at 5-6. The Hearing Officer gives these cited materials, and the arguments relying on them, no weight.

<sup>29</sup> Pet. Ex. 36 at 1.

<sup>30</sup> Pet. Ex. 38 at 46.

<sup>31</sup> Tr. at 269, 642.

inform Mother about the matter.<sup>32</sup> Evidence about possible bruising to Student's face at the time is inconclusive.<sup>33</sup> The aide did not testify at the hearing in this case. The evidence is insufficient to support a finding that, on August 5, 2013, Classroom Teacher attempted to strike Student in the face with the teacher's knee.

The next allegation concerns repeated, inappropriate use of \*\*\*. The evidence establishes that, in late 2013, Student's classroom staff began using \*\*\* (provided by the family at the teacher's request) to \*\*\*.<sup>34</sup> Classroom staff also began using \*\*\* in the morning. \*\*\* was used because Student often would \*\*\* and \*\*\*. \*\*\*, the third-party ABA provider hired by the District to oversee Student's behavioral therapy, testified that, one day, she arrived at school and Student was \*\*\*. Ms. \*\*\* testified that she asked why and was told that Student was \*\*\*. Ms. \*\*\* replied that Student's behavioral program was supposed to address problem behaviors like that, and that they needed to wait Student out and not give in to student's behavior by using \*\*\*. According to Ms. \*\*\*, school personnel were using \*\*\* because "they just didn't want to deal with student's behavior."<sup>35</sup>

Student began \*\*\* at other times during the day. Student remained \*\*\* for hours every day.<sup>36</sup> Staff sometimes forced Student \*\*\*.<sup>37</sup> It was stressful for Student to be physically forced \*\*\*, and student looked like a "caged animal" while struggling against \*\*\*.<sup>38</sup> It is unclear whether the use of \*\*\* ever amounted to "restraint" triggering a reporting requirement because, once \*\*\*, Student could likely \*\*\* \*\*self.<sup>39</sup> Nonetheless, descriptions of how Student was forced \*\*\* strongly indicate that student was highly stressed by the experience. Further, student had difficulties with gross motor skills and \*\*\*, and student needed to maintain \*\*\*.<sup>40</sup> Student's evaluating psychologist, Dr. \*\*\*, had noted that student would benefit from routinely taking

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<sup>32</sup> Tr. at 894-898.

<sup>33</sup> Pet. Ex. 36 at 29-31; Tr. at 898-99, 903-05.

<sup>34</sup> Tr. at 592, 710.

<sup>35</sup> Tr. at 444-45. *See also id.* at 593 (Ms. \*\*\*'s statement of belief that school staff used \*\*\* in order to avoid dealing with Student's behaviors).

<sup>36</sup> Tr. at 592, 628. Ms. \*\*\* testified that from early December to mid-February, Student was always \*\*\* when Ms. \*\*\* was in the classroom, and Ms. \*\*\* was there for several hours per day, four days a week, plus occasional times before and after her usual hours. Student was \*\*\* when Ms. \*\*\* arrived and \*\*\* when Ms. \*\*\* left. Tr. at 581, 592. The evidence does not, however, establish that Student remained \*\*\* all day, as Ms. \*\*\* and Ms. \*\*\* contended, *see* Tr. at 443, 507, 591; they were not in the classroom all day.

<sup>37</sup> Pet. Ex. 36 at 23; Pet. Ex. 40 at 20-21; Tr. at 443-48, 602, 757-59, 778-79.

<sup>38</sup> Tr. at 602; Pet. Ex. 42 at 3.

<sup>39</sup> Tr. at 445-46, 593, 630-31, 711.

<sup>40</sup> Tr. at 449, 591. Classroom Teacher denied that Student was \*\*\* for "prolonged periods," but at the same time said that Student was given a choice of \*\*\* for student's (over two-hour) behavioral therapy, and "most of the time" chose to \*\*\*. Tr. at 628-629. The

time to \*\*\*.<sup>41</sup> Student's IEP did not provide for the use of \*\*\*. It was used for the convenience of District staff, it was not a planned or positive therapeutic intervention, and being forced \*\*\* caused Student repeated distress.<sup>42</sup>

A number of incidents were alleged to have occurred on \*\*\*. They were all highly negative, and they were all proven. On that day, Student was closing student's eyes to avoid \*\*\* and because student was sleepy. In response, Classroom Teacher said she was going to go get "Pepper" (a nickname referring to a yardstick). Classroom Teacher retrieved a yardstick and hit the table near Student with it to get student to open student's eyes and resume \*\*\*. When the yardstick was slapped on the table, Student jerked awake.<sup>43</sup> Classroom Teacher admitted to this conduct.<sup>44</sup> It was not an appropriate behavioral intervention.<sup>45</sup> In fact, upon hearing from Classroom Teacher herself that she had hit the table with the yardstick, the District decided to transfer her to a different classroom.<sup>46</sup>

The preponderance of evidence also supports a finding that, after hitting the table with the yardstick, Classroom Teacher hit, tapped, or whacked Student's hand with the yardstick. Although Classroom Teacher testified that she did not hit Student's hand,<sup>47</sup> the incident was witnessed by \*\*\*, Ms. \*\*\*'s employee who worked directly with Student and who testified persuasively in the hearing in this case.<sup>48</sup> Ms. \*\*\* described the contact with the hand as a "tap" or "small whack." Ms. \*\*\* has no apparent incentive to fabricate what she saw.<sup>49</sup> Ms. \*\*\* testified that Ms. \*\*\* had never given Ms. \*\*\* any reason to doubt her honesty.<sup>50</sup> Two other

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Hearing Officer finds credible Ms. \*\*\*'s testimony that Student was \*\*\* for at least about ten hours per week, was \*\*\* when Ms. \*\*\* arrived, and remained \*\*\* when Ms. \*\*\* left. That Student may have preferred \*\*\* at times did not make it appropriate that student was sometimes forcibly \*\*\* as student struggled or that student remained \*\*\* for long stretches of time.

<sup>41</sup> Pet. Ex. 16 at 14.

<sup>42</sup> Tr. at 444-45, 593.

<sup>43</sup> Tr. at 596-97, 603-604.

<sup>44</sup> Pet. Ex. 36 at 17-18, 23; Tr. at 271-273.

<sup>45</sup> Tr. at 451.

<sup>46</sup> Tr. at 831.

<sup>47</sup> Pet. Ex. 36 at 17-18; Tr. at 271-273, 639-640.

<sup>48</sup> Tr. at 603-605; Pet. Ex. 36 at 23.

<sup>49</sup> The record includes a very brief written statement, dated \*\*\*, from an aide in Student's classroom saying that, on \*\*\*, the aide had witnessed, in a mirror, Ms. \*\*\* hitting Student. Pet. Ex. 36 at 28. The aide did not testify in the hearing. Ms. \*\*\* did testify, and she denied that she had hit Student. Tr. at 600. The evidence also shows that, around the time Ms. \*\*\* allegedly hit Student, Student had in fact been hitting Ms. \*\*\*. Pet. Ex. 36 at 16, 17, 19. With no more than the aide's brief hearsay statement, it is impossible for the Hearing Officer to find that the aide accurately interpreted what she saw in the reflection in the mirror. This accusation does not negatively affect the credibility of Ms. \*\*\*'s testimony in this proceeding. CPS determined that Ms. \*\*\* had committed no physical abuse. *Id.* at 14.

<sup>50</sup> Tr. at 472.

aides in the room made written statements describing the tension in the room that day but making no mention of Classroom Teacher's hitting Student with the yardstick; these aides did not testify, and their hearsay accounts are not as persuasive as Ms. \*\*\*'s testimony. While the District makes much of the fact that it took some days for Ms. \*\*\*, and then Ms. \*\*\*, to communicate everything Ms. \*\*\* saw to CPS and everyone involved,<sup>51</sup> the Hearing Officer finds that that delay does not affect the credibility of Ms. \*\*\*'s testimony. Ms. \*\*\* was clearly taken aback by these events; she testified, "I had never experienced anything like this before."<sup>52</sup> Although CPS later ruled out physical abuse in connection with the incident, CPS's determination only means that CPS found no "substantial harm to the child or the genuine threat of substantial harm from physical injury to the child." The written ruling by CPS did not address the underlying factual question, whether Classroom Teacher hit Student with a yardstick.<sup>53</sup> Using a yardstick to hit, whack, or tap Student was not one of student's designated behavioral interventions and was clearly inappropriate.<sup>54</sup>

Also that day, Student's aide said, in Student's presence, that student's behavior (meaning, presumably, student's aggressive behavior) made student, student's appearance, and/or student's shoes "ugly." Ms. \*\*\* heard the statement and testified about it.<sup>55</sup> The aide herself made a written statement to the effect that she had told the school nurse, in Student's presence, that "when you are being ugly to people, it makes everything you have be the same."<sup>56</sup> Student was capable of understanding such a statement.<sup>57</sup> Ms. \*\*\* testified:

[E]ven if a child can't talk they understand what you're saying. And the[y] don't want to hear that they're ugly. And student can't necessarily help student's behaviors. Student can't express student so student's frustrated. Student's behaviors don't make student ugly. And I didn't think that that was appropriate to say in a school setting about a child.<sup>58</sup>

\*\*\* was Student's last day at \*\*\*. Understandably concerned for student's welfare, student's family picked student up during the school day and did not take student back. Following a short period of time after

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<sup>51</sup> Ms. \*\*\* immediately called her employer, Ms. \*\*\*. Tr. at 597. Ms. \*\*\* believes that she told Ms. \*\*\*, in that conversation, about the hits to both the table and to Student's hand. Tr. at 611. However, Ms. \*\*\* apparently did not understand, until a day or two later, that Ms. \*\*\* saw Classroom Teacher hit, not just the table, but also Student's hand, with the yardstick. *Id.* at 471. Ms. \*\*\* contacted CPS several days after the incident on Ms. \*\*\*'s recommendation. Tr. at 597. Ms. \*\*\* communicated the report about Student's hand to the family and the school at a meeting on \*\*\*, one week after the incident. Ms. \*\*\*'s handling of the information does not affect the credibility of Ms. \*\*\*'s eyewitness account.

<sup>52</sup> Tr. at 597.

<sup>53</sup> Pet. Ex. 36 at 14.

<sup>54</sup> Tr. at 604; Respondent's Closing Argument at 20.

<sup>55</sup> Ms. \*\*\* actually asserted that the aide made several such statements. Tr. at 604-605; Pet. Ex. 36 at 23.

<sup>56</sup> Pet. Ex. 36 at 16.

<sup>57</sup> Tr. at 300.

<sup>58</sup> Tr. at 603.

Student stopped attending \*\*\*, Ms. \*\*\*'s organization resumed providing ABA services to Student, first in student's home and then in a daycare setting, paid for by Mother.<sup>59</sup> As of May 2014, Student was receiving twelve to fourteen hours of ABA therapy per week from Ms. \*\*\* in the daycare setting.<sup>60</sup>

Every one of the above-described acts by school personnel was a reaction to one of Student's known problematic behaviors (aggression or avoidance), for which student's behavioral program, in part, had been devised. Taken together, these negative acts form a picture of a classroom environment likely to have an adverse effect on a \*\*\*, nonverbal child with \*\*\*—to be, as psychologist Dr. \*\*\* suggested in his June 2014 evaluation, “destabilizing”<sup>61</sup> and to produce behavioral regression.<sup>62</sup> The preponderance of the evidence evidence establishes that, in early 2014, Student's behavior was regressing.

Ms. \*\*\*, Mother, and Grandmother all described behavioral regression in Student during student's final weeks in the \*\*\* classroom. Their language was strong. Ms. \*\*\* said that, in \*\*\*, Student was upset, aggressive, defiant, and often tearful.<sup>63</sup> Mother stated that, around \*\*\*, Student exhibited some progress, but student also regressed in a number of ways: student would not eat or sleep, student became unusually and extremely fearful to be dropped off at school, student stopped smiling, and student stopped using any signs to communicate.<sup>64</sup> Likewise, Grandmother described Student in \*\*\* as “really aggressive,” fighting and biting, regressing, refusing to eat, and depressed.<sup>65</sup> Grandmother, like Mother, stated that Student became very frightened of going to school.<sup>66</sup> Following \*\*\*, Mother said, Student would not sleep, smile, laugh, walk, or eat, and student lost about twelve pounds.<sup>67</sup> This severe behavioral regression lasted until Student had been away from school for a few weeks, Mother said.<sup>68</sup> Mother stated that, now, Student is communicative—able to use signs and gestures to say “no,” to say that student is hungry, to indicate that student wants more, and to

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<sup>59</sup> Pet. Ex. 42 at 4.

<sup>60</sup> Tr. at 206-07, 430.

<sup>61</sup> Pet. Ex. 42 at 12. (“While this report cannot produce any finding in regard to the presence or absence of abuse, [Student]'s reported symptoms and reactions, as well as the decrease in problematic symptoms, cessation of \*\*\* activity, and increase in functioning certainly suggest that student's prior educational placement was destabilizing.”)

<sup>62</sup> The District's expert witness in ABA testified that factors in a child's educational environment could cause regression. Tr. at 1001.

<sup>63</sup> Pet. Ex. 36 at 23.

<sup>64</sup> Tr. at 735-40.

<sup>65</sup> Tr. at 782-84, 788.

<sup>66</sup> Tr. at 777-79, 787-88.

<sup>67</sup> Tr. at 740-42.

<sup>68</sup> Tr. at 721-22.

show when student is done eating.<sup>69</sup> Ms. \*\*\* said that, since leaving the \*\*\* classroom, Student has shown “tremendous” abilities and “just student’s whole person has changed.”<sup>70</sup>

The reported data about Student’s performance in \*\*\* and \*\*\* are inconsistent. According to some data, Student made some progress at \*\*\* in the 2013-14 year,<sup>71</sup> and Mother even expressed appreciation of the progress as late as the \*\*\* ARD committee meeting.<sup>72</sup> Some documentation by Ms. \*\*\* suggests progress in various behavioral skills, including aggression and \*\*\*, even in \*\*\*.<sup>73</sup> On the other hand, forms filled out by school personnel indicate, on a day-to-day basis in the classroom, Student’s increasing aggressive behavior from \*\*\* into \*\*\*.<sup>74</sup> Similarly, certain of Ms. \*\*\*’s documentation reflects behavioral regression in highly problematic areas (\*\*\*, aggression, prompt dependency, and communication) in the days and weeks leading up to Student’s last day at \*\*\*.<sup>75</sup> The inconsistency in Ms. \*\*\*’s data might be explained by her having different forms for Student’s performance at home, where student was doing relatively better, versus student’s performance at school; however, the Hearing Officer found her testimony on the purposes of the different forms somewhat unclear and confusing.<sup>76</sup> Her documentation does show progress in many areas from \*\*\* forward.<sup>77</sup> Student’s \*\*\* also lessened in frequency.<sup>78</sup> And student is not using \*\*\* at all in student’s current educational environment.<sup>79</sup>

The District argues that, in order for “abuse” to constitute a denial of FAPE, it must be so severe that the child can derive *no* educational benefit due to the abuse. The case cited by the District in support of this

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<sup>69</sup> Tr. at 741, 744-46.

<sup>70</sup> Pet. Ex. 40 at 66; Tr. at 497.

<sup>71</sup> See, e.g., Pet. Ex. 40 at 11-16, 45-47; Resp. Ex. 10 at 470-482; Resp. Ex. 11 at 544, 568; Tr. at 392-97 (some goals and objectives in Student’s IEP refined over time to be somewhat more challenging).

<sup>72</sup> Pet. Ex. 43 (audio recording of \*\*\* ARD committee meeting). Mother testified that she was primarily referring to Student’s work with Ms. \*\*\*. Tr. at 698-99.

<sup>73</sup> Pet. Ex. 40 at 45-47. And Ms. \*\*\*’s data reflect positive gains in some \*\*\* related skills. *Id.* at 33.

<sup>74</sup> Pet. Ex. 37 at 76-94.

<sup>75</sup> Pet. Ex. 40 at 8, 10, 19-20. These data were apparently not available to District personnel. Tr. at 858-59.

<sup>76</sup> Tr. at 477-78 (indicating that the data showing more regression were from school as opposed to home). *But see id.* at 434, 516 (seeming to say that the more positive data were from school or reflected both environments).

<sup>77</sup> Pet. Ex. 40 at 19-20, 43, 45-47, 52-65. The Hearing Officer is unpersuaded by the District’s suggestion that Ms. \*\*\* fabricated her \*\*\* 2014 data. Respondent’s Closing Argument at 27. The District questions why or how Ms. \*\*\* could have data from \*\*\*, as there was no upcoming ARD to justify an evaluation, and she was not at school when the yardstick incident occurred. But not all evaluative data on Ms. \*\*\*’s charts correspond to ARD meetings. And, Ms. \*\*\* might have relied on reporting by her employee, Ms. \*\*\*; in fact, the chart indicates that assessment might be done by the “trainer,” and Ms. \*\*\* was the trainer. Pet. Ex. 40 at 48. Or, Ms. \*\*\* might have been at school earlier in the day, prior to the yardstick incident.

<sup>78</sup> Pet. Ex. 42 at 4; Tr. at 440.

<sup>79</sup> Tr. at 448-49.

proposition, *M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634, 650 (9<sup>th</sup> Cir. 2004), is entirely unpersuasive. First, it is inapplicable here. *M.L.* involved, not actions by the very educators responsible for administering a child's IEP, but "unremedied teasing" on the part of other students. Second, the standard articulated in *M.L.* is not widely accepted and has expressly been criticized.<sup>80</sup> And third, the instant Decision is not so much concerned with the concept of "abuse" as with clearly inappropriate behavioral interventions. The District also quotes case law saying that "the IDEA provides no protection against assault by a teacher, nor does it provide a remedy for mental and physical injuries."<sup>81</sup> However, the court in that case was discussing a claim against a teacher for punitive damages and medical expenses related to an allegedly tortious assault by the teacher. Again, the instant Decision is concerned with the appropriateness of the District's handling, in the academic context, of Student's identified problem behaviors—subject matter explicitly addressed in student's IEP—not a tort claim for damages.

In summary, in \*\*\*, Student was subjected to a number of specific negative and unauthorized behavioral interventions (including being repeatedly forced \*\*\* against student's will, being allowed to remain \*\*\* for hours on multiple occasions, having a yardstick hit on the desk and then hit on student's hand, and being called "ugly"). No one of these factors, taken singly, necessarily constituted a denial of FAPE. But, taken together, they were inappropriate and ineffective responses to behavioral regression that contributed to further regression. The strong anecdotal evidence of behavioral regression (up to and immediately following \*\*\*), supported by at least some of the documentation, along with the evidence indicating that the incidence of Student's \*\*\* and student's \*\*\* use dropped off following student's leaving the \*\*\* classroom, all point to a determination that Student's behavioral needs were not being effectively met by the District in \*\*\*. The actions by school personnel were behavioral interventions outside Student's IEP, and so were not part of a program individualized on the basis of assessment and performance. The District's mishandling of Student's behavioral needs denied student's FAPE.

## **2. ABA: Failure to Follow Settlement Agreement/IEP**

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<sup>80</sup> See *T.K. v. New York City Dep't of Educ.*, 779 F. Supp. 2d 289, 312-314 (E.D.N.Y. 2011) ("This test is too rigid and too narrow. It fails to acknowledge that a student may have student's academic success stunted as a result of harassment, but still achieve some success. A student who received some educational benefit despite bullying might have received more if not faced with the serious obstacle of peer harassment.")

<sup>81</sup> *E.A.T. v. Socorro Indep. Sch. Dist.*, 2012 U.S. Dist. LEXIS 142296 at \*25 (W.D.Tex. 2012).



ABA is a behavioral intervention program and method of delivering instruction that is most commonly used for autistic children.<sup>82</sup> The January 17, 2013 Settlement Agreement provided for a full and individual evaluation (FIE) and also provided:

BISD will contract with \*\*\*, \*\*\*, or other BCBA [board-certified behavior analyst] from \*\*\*, to conduct an ABA assessment for [Student]. The contract will be in place within 10 business days of the signing of this agreement, or as soon as the District receives all required information from the BCBA. This BCBA will oversee [Student's] ABA program for the rest of the spring semester 2013, ESY 2013, and school year 2013-14. The District will provide a full time one-on-one ABA program to the student consistent with . . . the assessment of the independent BCBA, the evaluation from Dr. \*\*\*, and the ARDC [Admission, Review, and Dismissal Committee]. A 10 week summer program consisting of a combination of ESY and other summer educational services will be developed for [Student] in order to incorporate and build on the ABA program created for [Student] in the Spring of 2013. It is the District's intention to develop and implement a program consistent with the assessment of the independent BCBA, the evaluation from Dr. \*\*\*, and the ARDC. The student's ABA program will be delivered at \*\*\*<sup>83</sup> through May 2014.<sup>84</sup>

The Settlement Agreement was incorporated into Student's IEP.<sup>85</sup>

The District's contract with \*\*\* for consultation and training services was executed on March 5, 2013.<sup>86</sup> \*\*\* performed its assessment on March 27, 2013.<sup>87</sup> The report recommended the use of the assessment tools VBMAPP (Verbal Behavior Milestones Assessment and Placement Program) or ABLLS (Assessment of Basic Language and Learning Skills) by a BCBA to develop a comprehensive ABA program for Student, with corresponding adjustment of student's IEP. The report also recommended a full-time intensive ABA program, supervised by a BCBA, for the entire summer, with an updated VBMAPP or ABLLS in the last month.<sup>88</sup>

As part of the FIE, \*\*\*, a non-BCBA behavioral specialist and provider based in \*\*\*, and student's case manager, \*\*\*, performed a functional behavioral assessment (FBA) of Student. They recommended: one-on-one ABA therapy one time per week for one hour during school time to work on establishing a communication

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<sup>82</sup> Tr. at 16, 25 (undisputed statements by attorneys for both parties about the fundamentals of ABA).

<sup>83</sup> Mother agreed to Student's being moved from \*\*\* to \*\*\* beginning in the fall of 2013. Tr. at 261-63, 770-71, 815-16.

<sup>84</sup> Pet. Ex. 32 at 1-2.

<sup>85</sup> Pet. Ex. 7 at 58; Dist. Ex. 7.

<sup>86</sup> Dist. Ex. 29 at 913-14. Ms. \*\*\*, the District's special education compliance monitor, testified that the contract was not executed within ten days following the Settlement Agreement because the District did not receive all the required information from the BCBA. Tr. at 920.

<sup>87</sup> Pet. Ex. 24.

<sup>88</sup> Pet. Ex. 24 at 4-5.

program such as American Sign Language (ASL) or PECS [Picture Exchange Communication System] and in-home ABA therapy one time per week for one hour to reinforce programs at school.<sup>89</sup>

The ARD committee met on April 12, 2013. The record with respect to ABA therapy becomes confusing at this point, and remains confusing throughout Student's time at \*\*\*. The committee discussed that there were three separate documents concerning ABA: (1) the Settlement Agreement, which provided for a full-time ABA program for spring 2013, summer 2013, and the 2013-14 school year; (2) \*\*\* recommendation, which called for assessment, then a full-time ABA program in summer 2013, followed by more assessment (but had not developed a recommendation for ABA services for spring 2013); and (3) the \*\*\* recommendation, which was for one hour of one-on-one ABA therapy at school and one hour at home per week, plus use of ABA strategies in the classroom. Mother expressed concern about the recommendation by Ms. \*\*\* and Ms. \*\*\* and noted that \*\*\* had not done all of the assessment it needed in order to develop a full ABA program. A full discussion of summer ABA and ESY services was deferred until further ABA assessment was performed and \*\*\* could develop a program. Due to varying recommendations from \*\*\* and \*\*\*, Ms. \*\*\*'s organization was to provide the behavioral services. The ARD document states:

At this time, [Mother] agrees to accept Ms. \*\*\*'s ABA program until \*\*\* is able to develop their recommended program. When \*\*\* is ready to assist in the implementation of the program they have developed, the ARD committee will reconvene to review the program and accept the new program. In addition, at that time, the ARD committee will discuss ESY services and the schedule of services for next year.<sup>90</sup>

Classroom ABA services and in-home behavioral services, provided by Ms. \*\*\*'s organization, commenced for Student in April 2013.<sup>91</sup>

On April 26, 2013, the ARD committee reconvened to discuss the summer program and ABA services. A BCBA was present at the meeting and participated. The committee decided that Student would be provided with a summer ESY program, with one hour per week of ABA therapy provided by Ms. \*\*\*'s organization and supervised by a \*\*\* BCBA. District staff would receive five hours initial training, the BCBA would provide up to twenty hours of time over the summer, and the summer program would include up to five hours of assessment time.<sup>92</sup> The documented plan for the 2013-14 year was for the same services as the interim

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<sup>89</sup> Pet. Ex. 26.

<sup>90</sup> Pet. Ex. 9 at 27-28.

<sup>91</sup> Pet. Ex. 31 at 54-60; Pet. Ex. 40 at 28.

<sup>92</sup> Pet. Ex. 10.

arrangement prescribed for spring 2013: one hour of ABA therapy with a behavior specialist and one-on-one ABA therapy. However, the April 26 documentation also states that \*\*\* would provide the ABA services for the 2013-14 year, which would be “documented in an ARD Amendment once those services are determined.”<sup>93</sup>

In May, the BCBA reiterated the need for VBMAPP or ABLLS assessment.<sup>94</sup> There is no indication in the record that the additional assessment for ABA purposes—the VBMAPP or ABLLS assessments— were ever done. Ms. \*\*\* testified that she did not know whether they were performed.<sup>95</sup> With no such assessments done, an ABA program based on the results of the assessments could not possibly have been developed, as required by the Settlement Agreement and recommended by \*\*\*.

Student attended ESY at \*\*\* in the summer of 2013 in the room of Classroom Teacher.<sup>96</sup> There is no indication that the recommended end-of-summer ABLLS or VBMAPP assessments occurred. \*\*\* administered formal ABA training to Classroom Teacher on August 22, 2013, just prior to the start of the new school year.<sup>97</sup>

The next ARD committee meeting convened on October 24, 2013, at the request of Mother, who believed that there was no full-time ABA program in place. At this same time, Ms. \*\*\* told the District that it must choose who would provide the behavioral services: \*\*\*, based in \*\*\*, or Ms. \*\*\*’s organization, based in \*\*\*. Mother chose Ms. \*\*\*, who began providing the ABA services.<sup>98</sup> As a result of the meeting, the committee agreed on the following:

- Ms. \*\*\*’s organization would provide increased ABA therapy—150 minutes of one-to-one therapy four times per week (a total of ten hours) in the school setting;
- Ms. \*\*\*’s organization would provide sixty minutes of one-to-one ABA therapy three times per week in the home; and
- Ms. \*\*\*’s organization would provide trainers to assist in the implementation of the ABA therapy program for Student and would oversee training of the classroom teachers and/or paraprofessionals to specifically and individually provide ABA therapy for Student. ABA

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<sup>93</sup> Pet. Ex. 10 at 11, 31.

<sup>94</sup> Pet. Ex. 38 at 42.

<sup>95</sup> Tr. at 918.

<sup>96</sup> Pet. Ex. 31 at 64A.

<sup>97</sup> Tr. at 325-327.

<sup>98</sup> Tr. at 812-13. Given Mother’s active participation in this decision, the Hearing Officer determines there was no violation of the Settlement Agreement relating to the fact that a BCBA was not involved in the ABA program following October 2013.

trainers would be available on campus in the classroom for direct therapy with a teacher or paraprofessional present at all times during direct student training.<sup>99</sup>

Ms. \*\*\*'s organization began providing ten hours of therapy per week at school for Student beginning on November 4, 2013. Ms. \*\*\*'s behavior trainer also worked with Student's aide for training purposes.<sup>100</sup>

An ARD committee meeting was held on January 17, 2014. The committee agreed to a continuation of the ABA therapy (both at school and in the home).<sup>101</sup>

It is evident from this chronology that the District failed to comply with the Settlement Agreement in fundamental ways. These deviations from the Settlement Agreement cannot be accounted for by intentional modifications made by the ARD committee after determining that Student did not need the services agreed to in the Settlement Agreement. The Settlement Agreement provided for the implementation of an ABA program consistent with the assessment of a BCBA. \*\*\*'s BCBA, in turn, explicitly recommended the use of particular assessment tools—VBMAPP or ABLLS—and the development of a comprehensive ABA program based on the results of those assessments. The District implemented a stop-gap program of limited ABA therapy pending completion of the assessments and development of the plan based on them. The language of the April 2013 ARD documents strongly implies that another ARD would occur before the next school year to plan out the ABA services for the coming year based on the assessments. However, the assessments were not performed, and no plan was or could have been developed on their basis. The follow-up assessments were not performed at the end of the summer. No ARD committee meeting was convened following the April 2013 ARD meeting and before the start of the new school year. The stop-gap program was simply picked up in the fall and continued until the late October 2013 ARD committee meeting, which was called by the parent, not the District. And then, even though the ABA program was intensified in October 2013 to call for more time by the third-party contractor, there still was no plan or program based on the recommended assessments.

In addition to the District's failure to ensure that the needed assessments and related planning were done, there is the further question whether the ABA program provided was "full-time" as required by the Settlement Agreement.<sup>102</sup> The District asserts that it provided a full-time ABA program.<sup>103</sup> This is the closest

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<sup>99</sup> Pet. Ex. 11.

<sup>100</sup> Pet. Ex. 40 at 20.

<sup>101</sup> Pet. Ex. 12.

<sup>102</sup> \*\*\*'s initial evaluation was silent as to an ABA program for the spring of 2013 (perhaps because the necessary assessments had to be done), but the Settlement Agreement's language strongly suggests that the District agreed to provide a full-time ABA program throughout 2013 and into 2014.

issue of this case. On balance, the Hearing Officer concludes that the record does not support a finding that the ABA program was “full-time” in any meaningful sense of the word. The District did offer persuasive evidence that a “full-time” ABA therapy program does not necessarily mean that a behavioral specialist is working with the student for the entire school day; rather, a “full-time” program can be provided by a behavioral specialist or trainer for some period of the time and at other times by special education classroom teachers and paraprofessionals properly trained in ABA techniques and administering them in a structured learning classroom like the one Student attended at \*\*\*.<sup>104</sup> This seems to have been what was contemplated (although not well spelled-out, due to the absence of a comprehensive plan, as discussed above). The April 12, 2013 IEP refers to ABA strategies being employed in the classroom in addition to the therapy provided by behavioral specialists.<sup>105</sup> The heart of the problem, however, relates back to the lack of a plan spelling out exactly how the therapy would proceed and setting out how adequate training of classroom personnel would be assured. Student’s teacher in the spring of 2013 was not trained in ABA.<sup>106</sup> As to Classroom Teacher, who taught Student in the summer of 2013 and then in the 2013-14 school year, the state of her ABA training is unclear from the record.<sup>107</sup> Ms. \*\*\* said that Student’s aide in the fall 2013 semester was not compliant with administering the child’s behavioral program,<sup>108</sup> and there is evidence that Ms. \*\*\* did not train a new aide who came on board and was assigned to Student near the end of calendar year 2013 and the beginning of 2014.<sup>109</sup> Based on these facts, the Hearing Officer determines that the District did not deliver a full-time, one-on-one ABA program to Student (at least for part of the period from April 2013 through spring 2014).

Therefore, the ABA program failed to comply with the Settlement Agreement and Student’s IEP because it was not based on the necessary planning developed in light of the recommended assessments and was not always delivered full-time.

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<sup>103</sup> Respondent’s Closing Argument at 3-4.

<sup>104</sup> Tr. at 987-989, 1020.

<sup>105</sup> Pet. Ex. 9 at 28. Petitioner seems to invite the Hearing Officer to adopt findings by other hearing officers in other cases concerning the importance of the terms “therapy” versus “strategies.” See Petitioner’s Closing Brief at 6-10. However, this case must be decided on the basis of this evidentiary record. In the instant case, there was some confusing testimony about “strategies” and “therapy.” See, e.g., Tr. at 931-932, 1059-60. “Strategies” seem to be individual components of therapy.

<sup>106</sup> Tr. at 954.

<sup>107</sup> Classroom Teacher had received some ABA training in the past. Tr. at 919-920. However, she testified that she did not receive ABA training related to Student’s therapy until late August 2013, at the end of the summer program. It is unclear how much in-class coaching with Student she received prior to that time or in the fall. Tr. at 622-25, 644.

<sup>108</sup> Pet. Ex. 40 at 20; Tr. at 457-58, 565.

<sup>109</sup> Tr. at 565.

These provisions of Student's IEP were significant or material. For Student, behavioral issues are intertwined with academic progress. The ABA program is central to Student's overall instructional program, and is a critical part of Student's IEP. The mandates that the program be based on assessment and delivered full-time were so important that they were explicitly spelled out in the Settlement Agreement resolving previous disputes between the parties. The District acknowledges that it was required to comply with the terms of the Settlement Agreement.<sup>110</sup> Without the needed assessment, Student's ABA program could not possibly be appropriately individualized as required by IDEA. As discussed above, while Student made some progress during the 2013-14 school year, there is also evidence of behavioral regression, particularly in early 2014. The District's failure to deliver the ABA program in the manner specified in Student's IEP denied student FAPE.

### **3. Other Issues Related to Behavioral Therapy**

Petitioner points out that, in its March 2013 assessment, \*\*\* evaluator said that an FBA and behavioral intervention plan should be prepared if the aggressive behaviors continued.<sup>111</sup> The Hearing Officer determines that no violation of the IDEA has been shown with respect to this issue. It is true that Student's aggressive behaviors were a large problem and did continue. However, Ms. \*\*\* prepared an "Individual Behavior Plan" in June 2013 and was recording data in connection with it from mid-summer 2013 forward.<sup>112</sup> While it is unclear from the record whether this plan covered both school and home, there nevertheless was a plan, it included aggression, and there is therefore insufficient basis for the Hearing Officer to conclude that there was a violation of FAPE in connection with this issue.

Petitioner also asserts that \*\*\* recommended a preference assessment. As this was not expressed as part of the ABA program, it was not part of the Settlement Agreement and the IEP. There is no evidence of its degree of importance. A denial of FAPE has not been proven in connection with this issue.

### **D. Communication Issues: Failure to Follow Settlement Agreement/IEP**

On January 17, 2013, Petitioner and the District entered into the Settlement Agreement, providing, "The district will agree to incorporate all the educational interventions recommended by Dr. \*\*\* in his evaluation."<sup>113</sup> The Settlement Agreement was incorporated into Student's IEP.<sup>114</sup> Dr. \*\*\*'s evaluation stated:

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<sup>110</sup> Respondent's Closing Argument at 2.

<sup>111</sup> Pet. Ex. 24.

<sup>112</sup> Pet. Ex. 40 at 24-27.

<sup>113</sup> Pet. Ex. 32 at 1.

[Student's] communication needs are a priority. [Student] needs to be evaluated for the use of a specific communication system (e.g., picture exchange system, voice generating device). . . . Student's current repertoire of gestures should be reviewed to see if these gestures can be modified to express a greater range of meanings more clearly and effectively.<sup>115</sup>

However, there is no such evaluation in evidence. Student's 2013 IEP includes a District-performed language evaluation that only reported on levels of function.<sup>116</sup> It merely served to confirm that Student's communication abilities were well below average, that student used gestures and some vocalizations, and that student could understand more than student could express. The evaluation included no assessment for the use of a specific communication system and no discussion of how student's gestures might be modified to express a greater range of meaning. In fact, it included no recommendations or discussion of particular communication systems at all. Dr. \*\*\* noted that, based on his review of the records, no formal speech or communication assessment had been done.<sup>117</sup> The District's evaluation did not satisfy Dr. \*\*\*'s recommendation that Student undergo evaluation for use of a specific communication system and greater use of gestural communication.

As noted above, Student is completely nonverbal. The development of functional communication for such a student is important. Ms. \*\*\* stated, based on her review of the records:

[P]art of this child's frustration and some of student's behaviors that are observed are because student has no way of communicating so that is student's way to communicate whether it's avoidance, whether it's throwing objects, whether it's making a sound. That's student's way to communicate what student's feeling inside. . . . [Y]ou have to address these behaviors and communication in order for this child to make any educational progress.<sup>118</sup>

The District's failure to provide the recommended communication assessment for Student appears to be related to a lack of coherence in the communication services provided to student. A formal assessment for a particular system of communication would have provided guidance for the development of a plan to address Student's communication needs. Dr. \*\*\*'s evaluation, made part of the Settlement Agreement and part of the IEP, not only recommended that Student be evaluated for the use of a communication system, but also that student be trained in that system, and that the system be used with school staff and caretakers at both school and

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<sup>114</sup> Pet. Ex. 7 at 58; Dist. Ex. 7.

<sup>115</sup> Pet. Ex. 16 at 15.

<sup>116</sup> Dist. Ex. 1 at 8-11.

<sup>117</sup> Tr. at 154.

<sup>118</sup> Tr. at 374-75.

home.<sup>119</sup> Dr. \*\*\* testified that development of a communication plan—with specific goals, training for staff, and training for the parents— should have been a priority for Student.<sup>120</sup> He stated that some use of sign language, possibly with some modified signs to accommodate Student’s fine motor limitations, coupled with a picture-based communication system would probably allow student the most potential to communicate effectively and with a degree of independence.<sup>121</sup> There is considerable evidence in the record that Student employs several basic signs from American Sign Language (ASL); this is obviously a promising area for student.<sup>122</sup> According to Dr. \*\*\*, an evaluation and consistent use of a communication system are not “pie in the sky” services for Student, but are basic, “bread and butter” necessities.<sup>123</sup> He stressed the importance of continuity between school and home in communication methods:

[I]t’s critical for student to be able to have a consistency to be able to learn as well as generalize student’s communication. . . . And hopefully this will all increase student’s ability to function and minimize . . . some of the problem behaviors.<sup>124</sup>

The preponderance of the evidence indicates that there was no plan and no consistency between school and home. Although, Dr. \*\*\* said, there are mentions in the school records of picture exchange programs and signing, there appear to have been no plan, no data collection, and no training for the family.<sup>125</sup> Ms. \*\*\* also remarked on the absence of an articulated communication plan for Student and any indication that communication was being addressed in the home.<sup>126</sup> Nor is there evidence that that the family was trained in the communication methods employed in school. Mother testified that, in October 2013, she considered private placement in part because there was no communication system in place.<sup>127</sup>

In March 2013, the BCBA whose recommendations were incorporated into Student’s IEP by the terms of the Settlement Agreement,<sup>128</sup> had recommended that Total Communication “should be considered.”<sup>129</sup> Total

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<sup>119</sup> Pet. Ex. 16 at 15.

<sup>120</sup> Tr. at 145-46.

<sup>121</sup> Tr. at 147.

<sup>122</sup> Pet. Ex. 23 at 11, 22; Pet. Ex. 26 at 4. Student came to \*\*\* already using signs student had employed at student’s previous school; nonetheless, the evidence suggests that student has not learned many new signs at \*\*\*. Tr. at 330, 632.

<sup>123</sup> Tr. at 157-58.

<sup>124</sup> Tr. at 160.

<sup>125</sup> Tr. at 153-158, 183.

<sup>126</sup> Tr. at 369, 374.

<sup>127</sup> Tr. at 696.

<sup>128</sup> Pet. Exs. 7, 32; Dist. Ex. 7.

<sup>129</sup> Pet. Ex. 24 at 4.



Communication is the simultaneous use of various means of communication—eye contact, gestures, sounds, signs, visuals.<sup>130</sup> Despite that non-mandatory language, the BCBA went on to employ language that actually did mandate the use of a Total Communication approach:

The student needs a clear and consistent communication system, all staff that have interaction with the student should be fully trained in anticipating, prompting, modeling, shaping, and reinforcing communication attempts (sign, sound, gestures, vi[s]uals) followed by contingent reinforcement across the day and throughout all activities in a functional context.<sup>131</sup>

In October 2013, Student’s IEP mandated the use of “Total Communication,” and this mandate was repeated in the January 2014 IEP.<sup>132</sup> It is difficult to imagine how such a program could be effectively implemented without a plan. Indeed, Ms. \*\*\* testified that, to be carried out, the modes of communication to be employed would have to be specifically documented in the IEP, and this was not done; there was no plan documented.<sup>133</sup> Ms. \*\*\* agreed that there was no plan for Total Communication in Student’s IEP, and further stated that Total Communication was not employed in the classroom.<sup>134</sup> Although Ms. \*\*\* testified that, in her professional opinion, Total Communication was being used with Student,<sup>135</sup> neither Classroom Teacher nor Ms. \*\*\* was even aware that Total Communication was mandated in Student’s IEPs.<sup>136</sup> The preponderant evidence indicates that Total Communication was not, in fact, employed in any deliberate, meaningful manner.

Despite the lack of an overall communication plan for Student, Student’s October 24, 2013 IEP and student’s January 17, 2014 IEP both mandated the use of “PECS” (“Picture Exchange Communication System.”)<sup>137</sup> Petitioner asserts that the District failed to use the PECS program with Student and that this failure violated student’s IEP and constituted a denial of FAPE. A picture exchange system, as that term is generally used, is the systematized use of pictures to facilitate communication, while “PECS” is a particular picture

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<sup>130</sup> Pet. Ex. 24 at 5; Tr. at 389-90.

<sup>131</sup> Pet. Ex. 24 at 5.

<sup>132</sup> Pet. Ex. 11 at 6; Pet. Ex. 12 at 6.

<sup>133</sup> Tr. at 390-91.

<sup>134</sup> Tr. at 473.

<sup>135</sup> Tr. at 854.

<sup>136</sup> Tr. at 329, 473-74.

<sup>137</sup> Pet. Ex. 11 at 6; Pet. Ex. 12 at 6. Dr. \*\*\*’s evaluation recommended that Student be assessed for use of a communication system such as a picture exchange system, and he gave PECS as an example, but he did not specifically mandate or recommend any particular system. Pet. Ex. 16 at 15.

exchange system (with a series of phases that progress in technological sophistication to iPad use) that must be purchased and requires intensive training to administer.<sup>138</sup>

Student used pictures generated through a software program by Classroom Teacher to facilitate communication and create a “picture schedule”—a daily schedule with activities indicated by pictures.<sup>139</sup> It was, according to Classroom Teacher, a PECS-like program, but not the actual PECS program.<sup>140</sup> Student was given larger, 2” by 2” pictures for use in the classroom, and smaller 1” by 1” pictures to carry in a little bag for trips to the school cafeteria.<sup>141</sup> According to Mother, the bag of pictures was difficult for Student to manipulate, in that the pictures tended to spill as Student tried to extract one from the bag, and the pictures were of no practical application in communicating with people in the real world.<sup>142</sup> In October or November 2013, Ms. \*\*\* began the initial phases of PECS with Student, but Student has not been taught with PECS by others in the classroom setting.<sup>143</sup> Ms. \*\*\* testified that she used the iPad (which was provided by the District to Student in October 2013) at home with Student but never witnessed it used at school.<sup>144</sup> There is no evidence that anyone at school ever taught Student using a picture program on an iPad. Mother and Grandmother were involved in the use of the iPad at home with Student and Ms. \*\*\*, but, as discussed above, there is no evidence they were trained in any communication system being used in the classroom. Ms. \*\*\* testified that the District had both PECS and another, similar program called Board Maker that, she said, was the same as PECS; however, she was unsure whether Board Maker involved use of an iPad.<sup>145</sup>

The evidence establishes a violation of Student’s IEPs in effect since October 2013, which unambiguously require the use of PECS in the classroom. (The same IEPs mandate the use of an iPad as

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<sup>138</sup> Tr. at 92-93, 474, 849-53. Ms. \*\*\* distinguished PECS from other picture exchange systems: “If you have just a picture for a communication process, you can exchange a picture for an item and that’s not really considered PECS because you haven’t followed the phases.” Tr. at 475.

<sup>139</sup> Tr. at 677-78.

<sup>140</sup> Tr. at 669-70, 671-73.

<sup>141</sup> Tr. at 677-78, 857.

<sup>142</sup> Tr. at 691-92, 702-03 (“Are we expecting student to put student’s vocabulary and student’s thoughts into a paper bag to disperse to people to explain what student wants?”).

<sup>143</sup> Tr. at 474, 670; Pet. Ex. 38 at 61. Classroom Teacher stated, “I did not use the name brand PECS in my classroom.” Tr. at 670.

<sup>144</sup> Tr. at 476-77, 690. Classroom Teacher testified that Ms. \*\*\*, Ms. \*\*\*, and the speech teacher used the iPad with Student, but Ms. \*\*\* denied ever seeing it used at school for communication. *Id.* at 660. There is an email in evidence indicating that, in early 2014, the speech pathologist used PECS with Student. Student received speech therapy for thirty minutes, twice per week. Pet. Ex. 11 at 12; Pet. Ex. 38 at 66.

<sup>145</sup> Tr. at 849-53.

well.)<sup>146</sup> Ms. \*\*\*'s testimony failed to establish that Board Maker and PECS are the same. And while Ms. \*\*\* did, as part of Student's educational program, begin to use PECS during her work with Student at home, there is no evidence that PECS has ever been employed in Student's regular work in student's home classroom. Dr. \*\*\*'s recommendations, incorporated into the IEP, made clear that any communication system chosen must be used uniformly at home and at school.<sup>147</sup> Student's apparent difficulty in manipulating a bag of pictures suggests that a communication system progressing to iPad use might facilitate student's ability to communicate.<sup>148</sup>

The District's failure to provide the recommended communication assessment for Student violated Dr. \*\*\*'s recommendation, and therefore the Settlement Agreement and Student's IEP, from spring 2013 forward. The failure to establish an overall communication plan violated the IEP starting in spring 2013 because such a plan was necessary to implement the BCBA's March 2013 requirement that Total Communication be implemented, and subsequent IEPs memorialized the Total Communication requirement. Total Communication was never implemented. The non-PECS picture exchange system used in school with Student violated student's IEP from the January 2013 IEP forward because it was not used uniformly across student's school and home environments, as Dr. \*\*\* said was "critical" to do. The District's failure to implement the use of PECS in Student's regular classroom violated Student's IEPs from October 2013 forward and also failed to ensure the critical consistency in student's communication methods.

The District asserts that there was no denial of FAPE because both Ms. \*\*\* and the District's speech pathologist reported that Student had progressed in speech.<sup>149</sup> That Student made some progress in communication did not alleviate the District's responsibility to fulfill its obligations under the Settlement Agreement and Student's IEPs in the very critical area of communication. These provisions of Student's IEP were significant or material. They were "bread and butter" necessities for a nonverbal child, like Student. Communication issues are so vital to Student's success that these matters were spelled out in the Settlement Agreement resolving previous disputes between the parties. The District acknowledges that it was required to

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<sup>146</sup> Pet. Ex. 11 at 6; Pet. Ex. 12 at 6. This Decision does not find a violation of the IEPs before October 2013 because previous IEPs alluded only to "picture exchange systems," *see, e.g.*, Pet. Ex. 10 at 13 (1-24-13 IEP), and there is evidence that some picture exchange system was in use in the classroom.

<sup>147</sup> Pet. Ex. 16 at 15.

<sup>148</sup> Student is able to manipulate an iPad for some purposes. Tr. at 476, 692.

<sup>149</sup> Pet. Ex. 12 at 16 and 59. Ms. \*\*\* reported "great" progress in communication in the fall of 2013, Dist. Ex. 11 at 568, but also suggested at the same time that there was a need for greater consistency in communication methods between the school and home environments. *Id.* at 567. There is little actual data charting Student's progress in communication. In fact, the lack of data collection was one of Dr. \*\*\*'s criticisms of Student's communication-related services. Tr. at 155.

comply with the terms of the Settlement Agreement.<sup>150</sup> The failure to properly assess Student prevented the District from appropriately individualizing Student's communication services. The District's failure to implement these requirements violated IDEA and denied Student FAPE.

## **E. Other Claims**

### **1. Violations of IDEA Proven**

#### **a. Sensory Diet: Failure to Comply with Settlement Agreement/IEP**

Dr. \*\*\*, whose recommendations were incorporated into the Settlement Agreement and Student's IEP, stated in his report that Student should be assessed for a sensory diet.<sup>151</sup> Student's OT assessment in March 2013 likewise recommended a scheduled sensory diet, and the ARD documentation from April 12, 2013, incorporates this recommendation.<sup>152</sup> Nonetheless, Student was never provided with a sensory diet.<sup>153</sup> This requirement was a material element of Student's IEP, in that it was part of the Settlement Agreement, which the District agrees must be followed. Therefore, a failure to provide FAPE has been shown.

#### **b. Failure to Convene ARD after \*\*\***

Petitioner contends that Student was denied FAPE by the failure to receive, after \*\*\*, the many educational services to which student was entitled under student's IEP. The Hearing Officer agrees.

The IDEA provides that the local education agency shall ensure that the IEP Team revises the IEP as appropriate to address any lack of expected progress toward the annual goals and in the general education curriculum, the results of any reevaluation, the child's anticipated needs, or other matters.<sup>154</sup> The duty to revise the IEP in response to information and events is therefore on the district. It is also the district that sends

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<sup>150</sup> Respondent's Closing Argument at 2.

<sup>151</sup> Pet. Ex. 16 at 13.

<sup>152</sup> Pet. Ex. 9 at 27; Pet. Ex. 20 at 3.

<sup>153</sup> Tr. at 139, 247, 468.

<sup>154</sup> 20 U.S.C. § 1414(d)(4).

notifications of ARD meetings.<sup>155</sup> A district can conduct an ARD meeting without a parent in attendance if the parent is unwilling to attend.<sup>156</sup>

Following the events of \*\*\*, when Student was no longer attending school but was not formally withdrawn from the BISD, it was clear to everyone that: (1) student's family was keeping student home due to alleged mistreatment at school and other concerns, and (2) student's educational needs were not being fully met at home. Mother inquired about whether the District would provide related services to Student (*e.g.*, speech therapy, OT, and PT, all of which were specified in student's IEP) while the family was considering private placement, and the District's response did not directly address the question.<sup>157</sup> Ms. \*\*\* testified that she offered several times to convene an ARD committee meeting, but that each time Mother refused.<sup>158</sup> The emails in evidence do not mention needing to convene an ARD. Mother testified that, between \*\*\*, she asked for an ARD meeting. Mother also stated that no one at the District told her that there should be an ARD or sent an ARD notice to her.<sup>159</sup>

There seems to have been something of a stand-off between Mother and the District after \*\*\*. Under these circumstances, following the events of \*\*\* and with Student not receiving the educational services student needed, it was incumbent on the District to meet and consider revising the IEP. If the District had noticed an ARD meeting, perhaps Mother would have attended. In any event, the District could have gone forward and convened a meeting to discuss the events leading up to Student's absence from school and consider IEP amendments to address problems and transition Student back. The District's failure to do so was an important missed opportunity to try to regain the family's trust and bring Student back to school for needed services, and therefore caused substantive educational harm and constituted a denial of FAPE.

## **2. Violations of IDEA Not Proven**

### **a. Alleged IEP Inadequacies**

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<sup>155</sup> 34 C.F.R. § 300.322.

<sup>156</sup> 34 C.F.R. § 300.322(d).

<sup>157</sup> Pet. Ex. 38 at 91.

<sup>158</sup> Tr. at 935-37.

<sup>159</sup> Tr. at 718-19.

Petitioner also asserts that Student was denied FAPE because student's IEP goals and objectives were generally inappropriate. Petitioner has not met its burden of proof on this issue. Although Petitioner presented expert testimony that some goals and objectives could have been better crafted,<sup>160</sup> the evidence is insufficient to support a finding of a denial of FAPE. Further, while Student's October 24, 2013 and January 17, 2014 IEPs included obviously unattainable and inappropriate objectives—identifying the anthems and mottoes of the United States and Texas and participating in recitation of the Pledge of Allegiance and singing state and national anthems<sup>161</sup>—the inclusion of these inappropriate objectives (and other deficiencies, such as typographical errors) did not rise to the level of a denial of FAPE.

**b. Other**

As to the Petitioner's remaining allegations, including those related to the subjects below, Petitioner has failed to meet Petitioner's burden of proof, and no violation of IDEA has been shown:

- lack of report cards;
- physical education;
- \*\*\* during school;
- 2013 ESY curriculum (apart from any ABA deficiencies noted above);
- staff training (apart from ABA deficiencies already addressed);
- “bullying, harassment, and retaliation”;<sup>162</sup> and
- various procedural irregularities.

**V. APPROPRIATE RELIEF**

Petitioner has proven that, up to now, the District has failed to provide an appropriate education for Student, having violated—not just student's IEP—but the terms of a settlement agreement in significant respects. The District must provide the necessary services to Student that it has failed, up to now, to deliver. The District must also provide compensatory services for the related services it failed to provide after \*\*\*.

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<sup>160</sup> See, e.g., Tr. at 350, 361-63.

<sup>161</sup> Pet. Ex. 11 at 30; Pet. Ex. 12 at 34.

<sup>162</sup> Petitioner claims that, by calling an expert witness who was not personally involved in Student's educational program, the District engaged in “bullying, harassment, and retaliation.” Petitioner's Closing Brief at 42. This baseless claim was inflammatory and inappropriate.

A major item of relief requested by Petitioner is reimbursement for all of Ms. \*\*\*'s organization's services provided to Student up the date of this Decision. To the degree that Ms. \*\*\* was providing in-home training services (for the regular school year, ESY, or both) pursuant to Student's IEP and a contract with the District, the District must of course pay her as it ordinarily does. The issue here relates to monies expended by Mother for Ms. \*\*\* to provide private ABA therapy following Student's departure from the \*\*\* classroom. A parent may enroll a child in a private school without the consent of the school district, and a hearing officer may require the district to reimburse the parent for the cost of that enrollment, if the hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.<sup>163</sup> Here, although Student has not been "enrolled" in a private school, student has been receiving educational services through a private provider. Mother's decision—not to send Student back to \*\*\* following student's mistreatment, regression, and denial of FAPE—was reasonable. The services provided by Ms. \*\*\* were "appropriate," in that they constituted behavioral intervention and academic instruction that Student should have been receiving pursuant to student's IEP. As discussed above, Student progressed in the private environment. That the services did not fully meet all of Student's educational needs does not mean that they were not appropriate measures to try to stem regression pending the completion of the due process hearing.<sup>164</sup> Therefore, given that Student was denied FAPE in student's public education setting and that the private educational services were appropriate, Student is entitled to reimbursement for the cost of those services, starting from the earliest date of service in March 2014 until the date of this Decision.<sup>165</sup>

Student's current situation—receiving ABA services from Ms. \*\*\* in a daycare setting—does not allow for the provision of the many educational and related services Student requires and is therefore not adequate for long-term placement.<sup>166</sup> The appropriate relief in this case involves ending Student's absence from the classroom but doing so in a manner that attempts to ensure that the District finally provides FAPE. The District must hire an independent specialist, approved by Mother, to oversee the planning and delivery of an ABA program to Student. The program may include delivery of services by District personnel, but the District personnel must be properly trained pursuant to the plan devised by the chosen specialist. The specialist must

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<sup>163</sup> 34 C.F.R. § 300.148; *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985). Notice requirements apply to parents who choose to take advantage of this unilateral placement option. 34 C.F.R. § 300.148(d). In Petitioner's request for a due process hearing, filed February 24, 2014, Petitioner provided written notice to the District of Petitioner's intent to seek private educational services at the District's expense. Special Education Due Process Hearing Request at 2.

<sup>164</sup> The applicable federal rule provides: "A parental placement may be found to be appropriate by a hearing officer . . . even if it does not meet the State standards that apply to [public] education . . ." 34 C.F.R. § 300.148(c).

<sup>165</sup> *See* Pet. Ex. 40 at 4. The Hearing Officer declines to order the District to pay for private educational services provided to Student prior to the filing of Petitioner's due process complaint, which contains Petitioner's written notice to the District concerning the private services. 34 C.F.R. § 300.148(d). Further, Petitioner has not asked for, and this Decision does not include, reimbursement for any leasing of space for the delivery of the educational services.

<sup>166</sup> It is not even clear that Petitioner is asking for long-term placement in that setting.

confirm in writing that the program is fully in place, with the necessary assessments, planning, and training complete. And, given the District's failure to deliver an appropriate educational program to Student and, more significantly, the District's failure to comply even with the terms of a Settlement Agreement resolving a prior dispute between the parties, Mother shall have the option of continuing Student's current educational services, provided off-campus by Ms. \*\*\*, at the District's expense until such written confirmation by the specialist is provided.

## VI. CONCLUSIONS OF LAW

1. Petitioner met Petitioner's burden to prove that the District failed to provide Student with a free, appropriate public education because the District failed to implement significant or material elements of Student's IEP, failed to devise and deliver a program individualized on the basis of the student's assessment and performance, and failed meet Student's behavioral and communication needs. 20 U.S.C.S. § 1414(d)(2)(A); 34 C.F.R. § 300.101; *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 246-248 (5<sup>th</sup> Cir. 1997); *Schaffer v. Weast*, 126 U. S. 528 (2005).
2. Petitioner met Petitioner's burden to prove that the District violated IDEA by failing to notice and convene an ARD to discuss the events leading up to Student's absence from school and consider IEP amendments to address problems and transition Student back, and that this failure resulted in educational harm. 20 U.S.C. § 1414(d)(4); 34 C.F.R. § 300.101, .322, .513; *Schaffer v. Weast*, 126 U. S. 528 (2005).
3. Petitioner did not meet Petitioner's burden to prove that the District committed various other denials of FAPE and procedural errors under the IDEA that resulted in the deprivation of an educational benefit. 34 C.F.R. §§ 300.101, .513; *Schaffer v. Weast*, 126 U. S. 528 (2005).
4. Petitioner is entitled to appropriate relief. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985).
5. Petitioner is entitled to reimbursement for private educational services. 34 C.F.R. § 300.148; *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985).



**ORDER**

1. The District shall, within ten school days following the date of this Decision, convene an ARD committee meeting to address the questions of which campus and which classroom Student will attend.
2. The District shall reimburse Mother for the cost of services provided by \*\*\*'s organization to Student from the earliest date of service in March 2014 until the date of this Decision. The District shall further pay for additional such expenses incurred after the date of this Decision should Mother exercise the option at the end of paragraph three, below.
3. The District shall contract with an independent specialist trained in ABA (such as a BCBA) to:  
(1) ensure assessment of Student using ABLLS or VBMAPP (and any other assessment methods the specialist deems appropriate); (2) develop a comprehensive plan for a full-time (thirty-to-forty-hour per week) ABA program for Student, including a specific curriculum, based on the results of the assessments; (3) include in the plan a description of the services to be delivered and an explicit identification of who will deliver them; (4) include in the plan specific requirements for the amount and nature of the training to be provided to anyone, including any BISD staff, who will be involved in delivering any of the ABA therapy to Student, to ensure that all ABA therapy providers are competent to deliver the services; (5) include in the plan specific provisions for data collection and analysis, and modification of goals and objectives based on the data; (6) include in the program standards for oversight by the specialist; and (7) oversee and implement the program. Mother must agree to the identity of the specialist overseeing the program. Primary areas of development for curriculum shall include self-regulation, self-help skills, communication, social skills, and academic development. The program shall be fully implemented as soon as possible. The specialist overseeing the program shall confirm in writing that the necessary assessments, planning, and training are complete. Until such time as the chosen behavioral specialist confirms in writing that the necessary assessments, planning, and training are complete, Mother shall have the option of continuing Student's current educational services, provided by Ms. \*\*\* off-campus, at the District's expense.
4. The District shall have a person trained in American Sign Language (ASL) assess Student for the use of ASL and devise a specific plan to integrate ASL (or modifications of it) into student's communication system. Student's teachers, aides, and family shall be trained in ASL to a degree necessary to communicate with student at the appropriate level as specified in the plan.
5. The District shall immediately provide Student with an iPad (or other tablet device, along with all necessary accessories, such as chargers) with the PECS system, train all classroom personnel who interact with Student, and Student's family, on the use of PECS, and ensure that the system is used throughout Student's school environment and student's in-home training.
6. The District shall develop and implement a plan for Total Communication to be employed with Student.
7. The District shall, within ten school days following the date of this Decision, convene an ARD meeting to devise a plan for the provision of compensatory OT, PT, speech, and adaptive P.E. services to address student's lack of services since \*\*\*. Based on the weekly amounts of services Student was to receive in those areas (Pet. Ex. 12 at 11-12), and student's being denied FAPE following \*\*\*, for the approximately twelve-week remainder of the 2013-14 year, Student is due the following: 360 minutes of OT, 360 minutes of PT, 720 minutes of speech therapy, and 720 minutes of adaptive P.E.. The compensatory services may be delivered over a period of time extending beyond the 2014-15 academic year, if necessary.

8. The District shall develop and implement a plan for a sensory diet for Student.
9. The District shall pay for Dr. \*\*\*'s May/June 2014 evaluation.<sup>167</sup>
10. All other relief is denied.

### NOTICE TO PARTIES

This Decision of Hearing Officer is a final and appealable order. Any party aggrieved by the findings and decision 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 § 89.1185(n).

**SIGNED on August 28, 2014.**



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**Shannon Kilgore**  
**Special Education Hearing Officer**  
**For the State of Texas**

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<sup>167</sup> The District has already granted this IEE. Pet. Ex. 38 at 80.

**DOCKET NO. 162-SE-0214**

<b>STUDENT,</b>	§	
<b>b/n/f PARENT,</b>	§	<b>BEFORE A SPECIAL EDUCATION</b>
<b>Petitioner</b>	§	
	§	
<b>v.</b>	§	<b>HEARING OFFICER FOR</b>
	§	
<b>BEAUMONT INDEPENDENT SCHOOL</b>	§	
<b>DISTRICT,</b>	§	<b>THE STATE OF TEXAS</b>
<b>Respondent</b>	§	

**SYNOPSIS**

**ISSUE:**

Did the school district fail to meet Student’s behavioral needs by responding to behavioral regression with inappropriate interventions, outside the Student’s IEP, that furthered the regression?

**HELD: FOR THE STUDENT**

Being repeatedly forced \*\*\* against student’s will, being allowed to remain \*\*\* for hours on multiple occasions, having a yardstick hit on a desk and then hit on student’s hand, and being called “ugly” were inappropriate and ineffective responses to behavioral regression and furthered Student’s behavioral regression. These actions were behavioral interventions outside Student’s IEP, and so were not part of a program individualized on the basis of assessment and performance. 30 C.F.R. § 300.101; *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 246-248 (5<sup>th</sup> Cir. 1997).

**ISSUE:**

Did the school district fail to provide Student with FAPE by failing to implement significant or material portions of student’s IEP with respect to ABA therapy?

**HELD: FOR THE STUDENT**

The ABA program failed to comply with the Settlement Agreement between the parties and Student’s IEP because it was not based on the necessary comprehensive planning developed in light of the needed assessments and it was not delivered full-time. Without the needed assessment, Student’s ABA program could not possibly be appropriately individualized. The requirements in the Settlement Agreement and Student’s IEP that student be assessed for the development of an ABA program and that the program be full-time were significant or material elements of Student’s IEP. 20 U.S.C.S. § 1414(d)(2)(A); 34 C.F.R. §§ 300.101; *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5<sup>th</sup> Cir. 2012); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5<sup>th</sup> Cir. 2000); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 246-248 (5<sup>th</sup> Cir. 1997).

**ISSUE:**

Did the school district fail to provide Student with FAPE by failing to implement significant or material portions of student's IEP with respect to communication?

**HELD: FOR THE STUDENT**

Student has not undergone an assessment for the use of a specific communication system (e.g., picture exchange system, voice generating device), nor has student's repertoire of gestures been reviewed to see if the gestures could be modified to express a greater range of meanings more clearly and effectively. The District never developed an overall plan for Student's communication or implemented Total Communication. The non-PECS picture exchange system used in school with Student was not used uniformly across student's school and home environments. The District failed to implement the use of PECS in Student's classroom environment.

The requirements that: Student be assessed for the use of a specific communication system, student's repertoire of gestures be reviewed to see if the gestures could be modified to express a greater range of meanings more clearly and effectively, a plan for use of Total Communication be developed and implemented, Student's communication system be used consistently across student's environments, and student use PECS with a iPad were significant or material elements of student's IEP. The failure to properly assess Student prevented the District from appropriately individualizing Student's communication services. 20 U.S.C.S. § 1414(d)(2)(A); 34 C.F.R. §§ 300.101; *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 246-248 (5<sup>th</sup> Cir. 1997).

**ISSUE:**

Did the District deny Student FAPE by failing to prepare a behavioral intervention plan and administer a preference assessment?

**HELD: FOR THE DISTRICT**

Petitioner failed to meet Petitioner's burden of proof as to these matters. 34 C.F.R. § 300.101; *Schaffer v. Weast*, 126 U. S. 528 (2005).

**ISSUE:**

Did the District's failure to notice and convene an ARD meeting following Student's absence from school beginning \*\*\*, violate IDEA and deny Student FAPE?

**HELD: FOR THE STUDENT**

The District violated IDEA by failing to notice and convene an ARD to discuss the events leading up to Student's absence from school and consider IEP amendments to address problems and transition Student back. The District's failure to do so was an important missed opportunity to try to bring Student back to school for needed services, and therefore caused substantive educational harm and constituted a denial of FAPE. 20 U.S.C. § 1414(d)(4); 34 C.F.R. §§ 300.101, .322; .513.

**ISSUE:**

Did the District deny Student FAPE by failing to provide Student with a sensory diet, as required by Student's IEP?

**HELD: FOR THE STUDENT**

The District failed to provide Student with a sensory diet, as required by the Settlement Agreement and Student's IEP. The requirement was significant or material. A failure to provide FAPE has been shown. 20 U.S.C.S. § 1414(d)(2)(A); 34 C.F.R. § 300.101; *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000).

**ISSUE:**

Did the District deny Student FAPE because student's IEP goals and objectives were generally inappropriate?

**HELD: FOR THE DISTRICT**

Petitioner failed to meet Petitioner's burden of proof as to this allegation. 34 C.F.R. § 300.101; *Schaffer v. Weast*, 126 U. S. 528 (2005).

**ISSUE:**

Did the District deny Student FAPE in connection with:

- lack of report cards;
- physical education;
- \*\*\* during school;
- 2013 ESY curriculum (apart from any ABA deficiencies noted above);
- staff training (apart from ABA deficiencies already addressed);
- "bullying, harassment, and retaliation"; and
- various procedural irregularities?

**HELD: FOR THE DISTRICT**

Petitioner failed to meet Petitioner's burden of proof as to these allegations. 34 C.F.R. §§ 300.101, .513; *Schaffer v. Weast*, 126 U. S. 528 (2005).

**ISSUE:**

Must the District reimburse Petitioner for private educational services?

**HELD: FOR THE STUDENT**

The District denied FAPE, and the services were appropriate; Petitioner is entitled to reimbursement. 34 C.F.R. § 300.148; *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985).