

**DOCKET NO. 167-SE-0215**

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

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**BEFORE A SPECIAL EDUCATION**

**v.**

**HEARING OFFICER FOR**

**SAN ANTONIO INDEPENDENT  
SCHOOL DISTRICT,  
Respondent**

**THE STATE OF TEXAS**

**DECISION OF HEARING OFFICER**

Petitioner \*\*\* (Student), by next friend PARENT, (collectively, Petitioner) requested an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 *et seq.* The respondent to the complaint is the San Antonio Independent School District (the District). Petitioner alleges the District failed to provide Student with a free appropriate public education (FAPE). The District denies Petitioner’s allegations and contends that FAPE was provided. The Hearing Officer finds that the District failed to provide FAPE but that Petitioner’s request for a private placement is unsupported. Rather, Student’s placement is at \*\*\* (\*\*\*) and compensatory education for the lost opportunities since one year before the complaint was filed should be provided. Moreover, a rigorous ABA program should be implemented.

**I. DUE PROCESS HEARING**

Petitioner filed a Request for a Due Process Hearing (Complaint) on February 12, 2015. The hearing was held on July 28-31, 2015, in San Antonio, Texas with both parties represented by counsel and fully participating in the hearing. At Petitioner’s request, the decision due date was moved up from August 28, 2015, to August 17, 2015, so that Student can begin the school year at the placement resulting from this due process hearing.<sup>1</sup> This decision was written without the aid of a transcript and without the filing of briefs by the parties. It was timely issued. Petitioner did file a short list of considerations.

Student meets eligibility criteria for autism and other health impairment. At the hearing, Petitioner alleged that the District failed to provide FAPE at both of its campuses attended by Student, \*\*\* and \*\*\* (\*\*\*). Moreover,

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<sup>1</sup> It should be noted that one of the District’s primary witnesses, a teacher at \*\*\* and unable to appear at the hearing. Showing that it had Student’s best interest in mind, the District understood the need to place Student and agreed to proceed without its witness.

due to the particularities of Student's impairments and the uniqueness of Student's educational and behavioral needs, Petitioner maintained that the District has proven to be incapable of providing FAPE. Remedies requested and proposed by Petitioner included:

1. Private placement of Student in an appropriate school that can provide FAPE;
2. The provision of compensatory special education;
3. An order directing that an Admission, Review and Dismissal (ARD) Committee meeting be convened and that appropriate goals, objectives, modifications, and accommodations be developed to address all of Student's educational needs;
4. An order directing the District to obtain the services of a behavior specialist to guide and train District personnel and to prepare a functional behavior assessment (FBA) and assist with the development of a behavior intervention plan (BIP);
5. An order directing the District to draft a BIP that is reviewed periodically, that is measurable, that employs the use of positive reinforcements, and that is based on data collected over a reasonable period of time,
6. An order directing the District to train its staff on behavior management techniques that address Student's special education needs;
7. An order directing the District to provide highly qualified and certified teachers for Student; and
8. The District employ applied behavioral analysis (ABA) techniques as requested by the Student's Mother (Mother).

IDEA creates a presumption that a school district's decisions made pursuant to IDEA are appropriate and that the party challenging the decisions bears the burden of proof at all times.<sup>2</sup> To prevail, Petitioner must establish its allegations by a preponderance of the evidence.

## II. OVERVIEW OF EVIDENCE PROVIDED

The following persons testified during the hearing as fact witnesses:

1. \*\*\*: Mother

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<sup>2</sup> *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 U.S. 528, 537, 163 L.Ed.2d 387 (2005); see also *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d. 373, 377 (5th Cir. 2003); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993).

2. Luis Echieverria: Former advocate or attorney for Petitioner
3. \*\*\*: \*\*\*
4. \*\*\*: Master's degree-special education emphasis
5. \*\*\*: Licensed specialist in school psychology
6. \*\*\*: Behavioral specialist for the District
7. \*\*\*: Principal at \*\*\*
8. \*\*\*: ABA certified behavioral specialist for the District
9. \*\*\*: District's Senior Executive Director for Special Education

It should be noted that only one witness, \*\*\*, was qualified or designated in this hearing as an expert witness. She testified on behalf of Petitioner. Ms. \*\*\* is an educational diagnostician with a professional supervision certificate. She has certifications in ED, MR, at all level and diagnostics. She developed the autism program at an independent school district and then worked for the District to train staff in the ARD process and about the autism spectrum, in particular.

The District objected to the appearance of several witnesses for Petitioner who were on the witness list but not designated as experts. The District urged that had it known some would be called as experts, it might have subpoenaed them or otherwise prepared its case. The objection was granted and all of Petitioner's witnesses, except Ms. \*\*\* who had been identified as an expert, were considered as fact witnesses only. Petitioner then objected to the presentation of the District's witnesses as experts as they too had not been designated as experts. The District agreed and stated that none of its witnesses were offered as experts.

Given these witness designations, it was difficult for the hearing officer to determine the weight to afford the testimony of the District's witnesses, separating out the facts from opinions. Expert opinions may only be offered by experts. The hearing officer did apply a presumption that Student's Individual Education Plan (IEP) provided FAPE but that presumption was overcome by the evidence. The facts did not weigh in the District's favor, and the District offered no expert testimony to rebut the opinions provided by Ms. \*\*\*.

ARD Committee meetings over the time relevant to this proceeding include the following. Many dates are reconvened meetings after disagreements.

\*\*\*

(June 2015 ARD)

\*\*\* (May 2015 ARD)  
\*\*\* (March 2015 ARD reconvened)  
\*\*\* (March 2015 ARD)  
\*\*\* (January 2015 ARD reconvened)  
\*\*\* (December 2015 ARD)  
\*\*\* (October 2014 ARD)  
\*\*\* (September 2014 ARD reconvened)  
\*\*\* (August 2014 ARD)  
\*\*\* (June 2014 ARD)  
\*\*\* (April 2014 ARD reconvened)  
\*\*\* (April 2014 ARD)  
\*\*\* (February 2014 ARD)

### III. FINDINGS OF FACT

Based upon the evidence and argument of the parties, the Hearing Officer makes the following findings of fact:

1. Student resides within the geographical boundaries of the District.
2. Student meets eligibility criteria for special education services with the primary disability of autism and a secondary disability of other health impairment.<sup>3</sup>
3. A full and individual evaluation (FIE) was performed on \*\*\*; this is the most recent FIE. Student's levels of academic achievement were tested in reading at \*\*\* and in math at \*\*\*, depending on the testing used.
4. The most recent ARD committee meeting was on June 8, 2015.
5. It was noted at the June 2015 ARD committee meeting that Student needed writing related services of spelling, penmanship, and correct language.<sup>4</sup>
6. At the time of the June 2015 ARD, Student was in the \*\*\* grade.

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<sup>3</sup> Ex. R-1 at 2.

<sup>4</sup> Ex. R-1 at 2.

7. At the June 2015 ARD, Student's needs included: interacting with peers, working in large and unstructured settings, reading and writing skills, and working independently.<sup>5</sup>
8. The ARD committee determined that Student did not need community experiences because Student receives help from Student's family and friends.<sup>6</sup>
9. Student needs community experiences to increase Student's interpersonal relationship and reasoning skills.
10. Modifications and accommodations were included for Student by the ARD committee.
11. Numerous ARD meetings were convened during the 2014-2015 school year.
12. Student's intellectual ability was assessed in 2009 and found to be low-average to average, with high average findings for auditory processing. Student's lowest score was in fluid reasoning.
13. In the 2014-2015 school year, Student was in \*\*\* grade but was reading at a \*\*\* grade level and performing math at \*\*\* grade level.
14. Student is intellectually capable of performing at an educational level commensurate with Student's age.
15. Student's abilities, confirmed by testing significantly below grade level for math and reading, is due to poor behavior related to Student's disability, which prevents educational progress.
16. The only witness testifying as an expert in this proceeding was \*\*\*, who was the past supervisor for the District's department of special education.
17. Ms. \*\*\* is an educational specialist, diagnostician, and former teacher.
18. The District has not provided the Student with an appropriate education, given Student's particular needs, as demonstrated by Ms. \*\*\*.
19. Ms. \*\*\* validated that an additional objective is needed in Student's IEP addressing social skills, including how to start a conversation; how to greet people; the necessity of personal space; and how to socialize and fit in.
20. The social skills objective may be worked on with a speech therapist.
21. During the time in question, student attended \*\*\*.
22. One difficulty in providing an appropriate education for Student is that Student is a person with high-functioning autism and desires to be in general education, but emotionally Student has difficulty in a large and noisy environment with many students.

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<sup>5</sup> Ex. R-1 at 9.

<sup>6</sup> Ex. R-1 at 10.

23. At the February 2014 ARD committee meeting, the District was aware of Mother's concerns with placement at both \*\*\* and \*\*\*, and she told District staff that Student was not progressing.
24. At the time of the February 2014 ARD, Student's home school was \*\*\*.
25. At the February 2014 ARD committee meeting, Mother's concerns included: modifications were not being followed; the teachers at \*\*\* were not properly trained; and Student was not receiving any counseling. Additionally, Student \*\*\*. At \*\*\*, Mother noted that Student felt that Student must be perfect and Student was threatened by being told that Student's conduct will be documented and will count as an incident. These approaches or strategies caused Student to be anxious.<sup>7</sup>
26. Student had numerous behavior problems when at \*\*\*.
27. Student was transitioned to \*\*\*.
28. Student's behavior problems escalated when at \*\*\*. On \*\*\*, Student was \*\*\*. Ultimately, Student \*\*\*.
29. Principal \*\*\* should be fully involved in Student's education. Mother's request to work with someone other than Principal \*\*\* has undermined Student's education at \*\*\*.
30. At the August 2014 ARD committee meeting, Mother requested Student be returned to \*\*\*. The ARD committee disagreed with Mother.
31. Student's behavior intervention plan focused on inappropriate language, aggressive touching, leaving class without permission, and refusing to perform class assignments. Student needs constant supervision for transition throughout the school day.<sup>8</sup>
32. Student had two significant behavioral incidents while at \*\*\* in September and October, 2014, but Student was reported to be meeting all of Student's objectives.
33. An ARD committee meeting was held in October 2014 to discuss transition of student to \*\*\* and this was agreed to by all at the ARD. The transition started on \*\*\*.
34. At the October 2014 ARD, Mother stated that Student needed a specialist to address Student's \*\*\*. No specialist was provided.
35. The District failed to implement an appropriate strategy for Student's \*\*\* but instead exacerbated the problem by allowing it to continue.
36. From \*\*\*, Student had \*\*\* behavioral incidents \*\*\*, including \*\*\* serious events \*\*\*.
37. The October 2014 ARD committee discussions about Student by District personnel did not accurately portray Student's behavioral actions. The failure by \*\*\* staff to record data in the \*\*\* was one factor resulting in the inaccurate perception that Student was doing well behaviorally.

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<sup>7</sup> Ex. R-4 at 1.

<sup>8</sup> Ex. R-7 at 38.

38. On \*\*\*, Student was scored as meeting all Student's objectives. On that same day, student was \*\*\*. \*\*\*.
39. \*\*\* staff failed to accurately record Student's behavioral performance in \*\*\* on almost a daily basis.
40. District personnel should have identified Student as having an issue with \*\*\*, even by \*\*\*, and as noted by Mother at the October ARD committee meeting only \*\*\* days later.
41. The documentation by \*\*\* Staff is inadequate to allow the determination of a base level of behavioral needs, the antecedents to poor behavior, and the strategies that work.
42. The \*\*\* as implemented at \*\*\* failed to include systematic marks for strategies used, for frequencies of targeted behaviors, and for participation in class.
43. The inadequate documentation performed by \*\*\* staff is due to training needs, as discussed by \*\*\*, a District ABA specialist.
44. \*\*\* staff's inadequate documentation led to incorrect information discussed at the October 2014 ARD committee meeting and ultimately led to a failed transition and partial placement at \*\*\*.
45. While at \*\*\*, District staff appropriately recorded information in \*\*\*.
46. In November 2014, the daily reports show a pattern of \*\*\* behavior issue and a student who is struggling with other behavioral issues.
47. Student's behavioral issues and grades continued to deteriorate in December, 2014.
48. At the December 2014 ARD committee meeting, the District appropriately recommended Student \*\*\*. Mother disagreed and wanted Student to \*\*\*, despite Student's falling grades and worsening behavior. Student \*\*\*.
49. At the December 2014 ARD committee meeting, the District inexplicably reported that Student was meeting all Student's objectives.<sup>9</sup> This provided an incorrect evaluation of Student's educational progress. Additional objectives were needed concerning \*\*\*. Even though Student was \*\*\*, \*\*\* incorrectly indicated that Student was meeting Student's objectives. At this time, District was not providing Student with a FAPE. Student was \*\*\*, receiving no educational benefit.
50. At the \*\*\* Annual ARD committee meeting, the Student's \*\*\* were identified but again not appropriately addressed.
51. The January 2015 ARD committee meeting \*\*\* Student to \*\*\*, over Mother's objections.
52. Mother requested a private placement for Student at the January 2015 ARD.
53. It was unclear, and remains unclear, what antecedents led to Student's behavioral issues.

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<sup>9</sup> Ex. R-5 at 3.

54. Mother requested ABA for Student. Student needs a strictly-followed and closely-monitored ABA program, implemented by someone with appropriate training.
55. The excellent ratios at \*\*\* and the ability of the staff to confer with each other every morning are insufficient to collect the data necessary to provide Student with a meaningful education, particularly over the long term. The \*\*\* data is relied on by the ARD committee and it is necessary to properly collect that data for Student to receive a FAPE.
56. Finally, in May 2015, the District tasked Ms. \*\*\*, who is trained in ABA, to review Student's records and to implement an appropriate Behavior Support Plan (BSP). Ms. \*\*\* included ABA components in her plan. These included recording the antecedent and the behavior, and then imposing and noting a consequence whenever Student engaged in \*\*\*.<sup>10</sup>
57. Ms. \*\*\* provided a form for recording the frequency of Student's being on task with assignments completed.<sup>11</sup>
58. \*\*\* may be used in place of Ms. \*\*\*'s forms but additional training is necessary.
59. The record does not indicate whether Ms. \*\*\*'s recommendations were implemented.
60. Student was returned to \*\*\* in the 2014-2015 school year, after Ms. \*\*\* prepared her BSP.
61. Documentation of whether or how the BSP was implemented is not in the record.

#### IV. DISCUSSION

##### A. Applicable Law

The primary purpose of IDEA is to ensure that all children with disabilities have available to them a 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>12</sup> IDEA guarantees a student with a disability a “basic floor of opportunity” consisting of specialized instruction and related services that are individually designed to provide the student with an educational benefit.<sup>13</sup> The educational benefit must be more than a “mere modicum” and not *de minimis*.<sup>14</sup>

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<sup>10</sup> Resp. Ex. 21 at 7.

<sup>11</sup> Resp. Ex. 21 at 8.

<sup>12</sup> 20 U.S.C.S. § 1400(d)(1)(A).

<sup>13</sup> *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189 (1982).

<sup>14</sup> *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 246-248 (5<sup>th</sup> Cir. 1997).

The Fifth Circuit established a four-factor test to determine whether a school district's educational program meets this standard in providing the student with a FAPE under the IDEA.<sup>15</sup> The four factors are: (1) whether the program was individualized on the basis of the student's assessment and performance; (2) whether the program was administered in the least restrictive environment; (3) whether the services were provided in a coordinated and collaborative manner by key stakeholders; and (4) whether positive academic and non-academic benefits demonstrated by the program.<sup>16</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>17</sup>

After an IEP is adopted, the school district must put it into effect.<sup>18</sup> The failure to implement a material or significant portion of the IEP can amount to a denial of FAPE. However, 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>19</sup>

Under IDEA, in Texas, a parent must request a due process hearing within 1 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>20</sup> As noted above, Petitioner filed the request for a due process hearing in February 2015. The time frame applicable in this case goes back one year from that date.

IDEA provides that the district 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

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<sup>15</sup> 118 F. 3d at 247-248.

<sup>16</sup> 118 F. 3d at 247-248.

<sup>17</sup> *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

<sup>18</sup> 20 U.S.C.S. § 1414(d)(2)(A); *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012).

<sup>19</sup> *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th 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>20</sup> 19 Tex. Admin. Code. § 89.1151(c).

reevaluation, the child's anticipated needs, or other matters.<sup>21</sup> It is therefore the district's duty to revise the IEP in response to information and events. It is also the district that sends notifications of ARD committee meetings.<sup>22</sup>

A student denied FAPE is entitled to appropriate relief.<sup>23</sup> Private placement may be found appropriate for a child with a disability, who previously received special education and related services in public school, if the hearing officer finds that the agency had not made a FAPE available to the child in a timely manner and that the private placement is appropriate.<sup>24</sup>

## **B. Evidence and Decision**

A review of the evidence presented in this due process hearing establishes that Student is capable of educational achievement at grade level, but Student has not achieved Student's potential. Student's intellectual abilities are generally at an average, low average level, yet Student's tested level of reading and math lag woefully behind. The District attempted two placements and accommodations while working with Mother, who has advocated diligently for her \*\*\*. Nevertheless, the efforts have not produced positive results, although Student has been promoted from grade to grade. Much of this hearing was focused on discovering why there is a discrepancy between Student's grade-level advancement and Student's low reading and math testing results.

The evidence reveals Student has a complicated disability, aggravated by wellintentioned but misdirected efforts by Mother and the District. The frustrations and occasional major setbacks have led to distrust, misunderstandings, and a lack of cooperation between the District and Mother. For Student to reach Student's potential for educational achievement, the two must work together. The District demonstrated first steps at this, with its welcome circle to Student for Student's \*\*\* return to \*\*\*. Mother must join in with Ms. \*\*\* and the other educators at \*\*\* to work towards the shared goal of Student's success. This is most important at this critical time for Student's education.

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<sup>21</sup> 20 U.S.C. § 1414(d)(4).

<sup>22</sup> 34 C.F.R. § 300.322.

<sup>23</sup> *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985).

<sup>24</sup> 34 C.F.R. § 300.148.

Turning more specifically to the IDEA and Student's failure to progress, the evidence establishes that, despite the District's efforts and resources provided to Student, it has not provided a FAPE. Student's IEP is both facially inadequate and inadequate as implemented. It fails to provide Student with more than a *de minimis* educational benefit. In fact, it is apparent that during the time at issue in this hearing, Student regressed in behavior and made no progress educationally.

Evaluating Student's IEP in light of the four factors set out by the Fifth Circuit, the hearing officer finds the program was not individualized on the basis of Student's assessment and performance; the services were not provided in a coordinated and collaborative manner by key stakeholders; and there are no positive academic or non-academic benefits demonstrated by the program. On the other hand, the program was administered in the least restrictive environment, the ARD committee having tried several levels of restrictions, including general education at \*\*\*.

In short, and as discussed further below, the District has not established a baseline for Student's educational or behavioral needs. The program established to record Student's behavior and participation, \*\*\*, is inadequate. However, in practice the personnel at \*\*\* failed to record most of the data needed to establish a baseline and necessary to evaluate Student's changing behavioral needs. This failure led to delays in adjustments, to incorrect assumptions, and to Student's regression behaviorally, including Student's failure to obtain any educational benefit over the time period addressed in this hearing.

**1. Facial Inadequacy: the program was not individualized on the basis of Student's assessment and performance.**

In order to be adequate, the IEP must be designed so as to provide Student with a reasonable educational benefit.<sup>25</sup> Courts have defined a reasonable educational benefit as including many factors. One factor is that the IEP must include a student's present level of performance, often referred to as establishing a baseline performance.<sup>26</sup> Courts have noted that a failure to establish a baseline goes to the very heart of the IEP. Without establishing a student's initial level of academic, functional, and behavioral performance, an IEP cannot set measurable goals, evaluate progress, and then be used to determine what services are needed.

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<sup>25</sup> *Bd. of Educ. of the Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1982).

<sup>26</sup> *Kirby v. Cabell County Bd. of Educ.*, 46 IDELR 156 (S.D. W.Va. 2006).

Student's last FIE was performed at the time of the \*\*\* Re-evaluation (REED). Student's grades show no real pattern: from failing to high B's at various times and in a variety of subjects. When Student was enrolled in \*\*\*, and at the REED, Student's most recent report card showed grades in core subjects of:<sup>27</sup>

Reading (special education):	***
Math:	***
Social Studies:	***
English:	***
Science	***

Even while passing \*\*\* and reading, Student was assessed using the STAR diagnostic test<sup>28</sup> to provide grade equivalent estimates. Student's grade equivalent in math was \*\*\*, indicating Student knows only basic addition and subtraction. Student's grade equivalent in reading was \*\*\*.<sup>29</sup> It went unexplained how a student with \*\*\* grade proficiency can pass classes in \*\*\* grade.

Mother asserts that Student could not perform the \*\*\* grade work but was instead given the answer sheets along with the assignments and Student simply copied the answers. She testified that some of the work credited to Student and entered into the record was not in Student's handwriting. On the other hand, Student did pass the \*\*\* grade STAAR modified, in all areas tested. The areas tested are not noted. What is undisputed is that Student has average to low-average intellectual ability, but Student is hindered by Student's limitations of expression and reasoning, leading to behavioral issues that impact Student's educational performance.

Inexplicably, there is a fundamental discrepancy in Student's educational progress that the District failed to address in this hearing. Providing Student with FAPE must begin with an evaluation of Student's current academic level; but here, even after the 3-day hearing, Student's academic level is unknown. Ms. \*\*\* testified that in her expert opinion, the District needed to perform an assessment to determine Student's baseline academic and behavioral skills. She indicated that at this point, the District does not know what the Student is learning. What is known is that Student's present academic level is somewhere between the \*\*\* and \*\*\* grade level

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<sup>27</sup> Ex. R-13 at 6.

<sup>28</sup> The hearing officer is unaware whether the Star diagnostic test is related to the STAAR achievement tests.

<sup>29</sup> Student was also assessed in math with PIAT and Student's score was a \*\*\*. The difference between the STAR score of \*\*\* and PIAT score of \*\*\* is noted in the IEP as perhaps resulting from testing discrepancies.

(Student was promoted to \*\*\* grade for the 2014-2015 school year). Of course, this is wholly unacceptable as a baseline.

The evidence shows that a month after the complaint was filed, the District referred Student's situation to an ABA certified behavioral specialist, Ms. \*\*\*. She testified at the hearing and was very knowledgeable and credible. The District however, did not offer her as an expert witness. Instead, she was offered only as a fact witness, as were all of the District's witnesses.<sup>30</sup>

In March 2015, Ms. \*\*\* began creating a BSP to implement with Student's return to \*\*\*.<sup>31</sup> Ms. \*\*\* first met Student on \*\*\*. She developed a BSP intended to address the behaviors that kept Student from participating in the educational setting. It included antecedent strategies to be implemented in order to avoid negative behavior, and outlined positive reinforcement systems to encourage good behavior. Finally, specific behavioral strategies were established to address task refusal and \*\*\*. This BIP is a major step in the correct direction, however, the questions remaining are:

1. Whether it will be completed with a baseline established;
2. Whether the examples of data collections provided by Ms. \*\*\* will be implemented at \*\*\*; and
3. Whether adjustments will be made to address the behavioral strategies as observed from collected data?

Ms. \*\*\*'s involvement was painfully late and, thus far, too limited to establish the provision of a FAPE.<sup>32</sup> In fact, whether Student made any educational progress after Ms. \*\*\*'s intervention was not proven. The evidence does establish, however, that through Ms. \*\*\*'s involvement the District took steps to improve Student's BIP. The District at least had the skeleton of an ABA plan, albeit without specifics such as baseline data or evaluation scores. Without a baseline for educational and behavioral needs, the District's IEP remained insufficient to provide Student with a FAPE.

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<sup>30</sup> This is important, as fact witnesses are generally not allowed to offer opinions nor have the great weight of evidence based on their opinions.

<sup>31</sup> Student was held out of school by Mother for weeks.

<sup>32</sup> Ms. \*\*\* noted that she was unable to observe Student in the classroom, and she did not know the exact function of the behaviors, so she added various techniques to try and address a wide range of behaviors.

The evidence establishes that FAPE was not provided for the year up to the filing of the complaint, and a month before Ms. \*\*\* began her work. Moreover, even after Ms. \*\*\*'s involvement \*\*\* of the 2014-2015 school year, it was not proven that her BSP was implemented nor that \*\*\* staff was appropriately trained to implement it. The evidence is insufficient to find that Student was provided even a basic educational floor, given Student's behavioral needs.

This leads to the other major issue that remains, the District's continued failure to establish a baseline for Student's behavioral needs. Baselines are needed in Student's educational proficiencies and in Student's behavioral needs. Ms. \*\*\* observed that, at \*\*\*, the District's \*\*\* reports did not include the frequency of behaviors, the strategies used, nor the minutes of participation; all three necessary in her opinion to establish a baseline. This is highlighted by the ARD committee minutes from December 2014, indicating that Student's behavior was manageable when a review of the record establishes it was not.<sup>33</sup> The minutes indicate that Student achieved all of Student's objectives, including: avoiding touching others, participating in class, staying in class until permitted to leave, and using appropriate language. What the District missed was that Student's behavior was actually declining. The evidence at hearing suggests this was missed because \*\*\* was not appropriately tracking Student's behavior with the \*\*\*. Looking back over the same period addressed by the December 2014 ARD committee, Ms. \*\*\* observed:

... at the beginning [Student] had a lot better scores than when the whole semester went on. But there weren't any changes made as [Student] started to diminish in [Student's] behavior. And there were more notes [indicating poor behavior] and more \*\*\*, [and] more avoidant behavior. As those increased, that should have been a sign to change things.

Without tracking Student's daily behavioral performance, the District inadequately implemented the IEP, which itself was inadequate because no baseline for performance was determined through observation or through a behavioral assessment. This leads to another point relied upon by the Fifth Circuit to determine whether FAPE was provided and is discussed in more detail below.

**2. Implementation inadequacy: the services were not provided in a coordinated and collaborative manner by key stakeholders.**

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<sup>33</sup> Ex. R-5 at 3.

Even if the IEP were facially adequate, which it was not, the District still failed to provide Student with a FAPE. Allowing Student to \*\*\* provided Student with no educational benefit. Each time Student \*\*\* without a consequence, this behavior was positively reinforced. Ms. \*\*\* testified that when \*\*\* occurred, Student's IEP should have been amended to include a goal addressing this behavior and recommending redirected behavior. She further explained that rather than Student being allowed to \*\*\*, Student should have been directed to go to \*\*\* to participate in something Student enjoyed. Ms. \*\*\* opined that student was using \*\*\* as a refuge and as a comfort zone so as to escape whatever Student was feeling.

In response, the District noted that this issue was raised as a concern at an ARD meeting. The District also blamed Mother, saying she had advised \*\*\*. However, Mother testified that she advised \*\*\* on only one occasion, \*\*\*.

The hearing officer is unconvinced by the District's evidence and notes that a FAPE is owed to Student, not Mother. For this reason, a parent cannot singularly block the decisions of an ARD committee. One of the District's shortcomings was failing to designate this issue in Student's IEP, where appropriate strategies could have been developed and implemented. Mere mention of a behavior at an ARD committee meeting is not the same as addressing the need in Student's BIP. Whether due to miscommunications or other reasons, during this time, the District failed to provide Student with a FAPE.

The District sent the work Student missed, due to elopement \*\*\*, to make up as homework. To Mother's disappointment, when she picked up the work for Student on one occasion, it contained the questions and the answers to the questions, raising a concern as to whether Student was simply copying answers in order to progress. Throughout this time, Mother and the District had misunderstandings and a lack of trust.<sup>34</sup> This, and similar situations, exacerbated the situation, further degrading Student's educational opportunities.

To make matters worse, when Student was \*\*\*, Student's behavior was often recorded as "meeting" Student's IEP goals in the \*\*\*. It is true that \*\*\*, Student was not touching anyone or cursing, but this is misleading. Moreover, the amount of time Student actually spent in the classroom was also not recorded and the anecdotal notes suggested Student sometimes \*\*\* for the better part of a school day. Yet on these same days,

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<sup>34</sup> For instance, the District argued that when called about Student's \*\*\*, Mother advised \*\*\*. Mother insisted that she gave this instruction only one time \*\*\*. She did not intend for this one instance to become common practice.

when calculating Student's achievement of Student's goals, the District would note Student achieved Student's goals, finding Student at above 80% in compliance. The District mistakenly factored in Student's \*\*\* as an achievement of goals, skewing the results calculated for Student's IEP. True, Student was not touching nor cursing, but the District missed the main behavioral concern. Student's \*\*\* and elopement was degrading Student's educational opportunity and it needed to be addressed. The District's actions did not provide the Student with a FAPE.

The District provided resources to Student as a person with autism combined with an average or low average intellect. For instance, the District provided one-on-one support; however, the record contains very little information about what that support accomplished. And, the IEP fails to discuss why it was not more successful. Addressing Student's individual needs will take much more evaluation and observation, with adjustments made for interventions that work.

It should also be noted that District personnel performed better in observing, documenting, and addressing Student's individual needs and performance when it came to Student's general education setting at \*\*\*. At the insistence of Mother, and her special advocate who was instructed by his employer to seek a general educational setting, Student was allowed to transition into \*\*\* for part of the day. It was soon obvious that when Student attended \*\*\* for even part of a school day, that Student's learning decreased and Student's poor behavior increased. As noted by Ms. \*\*\*, the size and noise of \*\*\* overwhelmed Student's senses and led to Student's acting out in unacceptable ways. It is one thing to have general education as a goal, quite another to immediately demand it without understanding Student's needs and abilities. The special advocate failed Student and sidetracked the District's efforts to provide FAPE.

Ultimately, the District's IEP for Student has not proven to be effective for any educational or behavioral progress, whether implemented at \*\*\* where the observation and monitoring of Student's behaviors was much better. Over 30 years of study have established applied ABA as a reliable method for teaching students with autism. According to Mother, she repeatedly requested these services at ARD committee meetings, but to no avail. Finally, with the filing of the Complaint, the District brought in a certified behavioral analyst to address Student's behavioral needs. This is a first positive step.

- 3. Outcome inadequacy: there are no positive academic nor non-academic benefits demonstrated by the program.**

Student's performance on objective tests shows very little progress, if any, with Student's reading and math way behind grade levels. Student's grades were failing or just passing, leaving the hearing officer with the opinion that Student was simply allowed to pass, given Student's special accommodations. There is no baseline educational ability or behavioral conduct from which to gauge academic or non-academic progress. In short, the hearing record is absent evidence of positive academic or behavioral benefits demonstrated by the District's IEP, except for anecdotal testimony about the last six weeks of the 2014-2015 school year. Petitioner overcame the presumptions in favor of the District, and the District did not effectively rebut Petitioner's evidence.

#### 4. Remedies sought.

Petitioner sought private placement; however, during the hearing no private placements were presented as appropriate for Student.<sup>35</sup> Student's unique needs and abilities, including Student's high function and intellect, eliminate many private placement facilities that focus on lesser skills that are far below Student's capabilities. Moreover, the evidence establishes that the District, initially at \*\*\*, can provide FAPE. An FIE and better accounting on a daily basis for effective interventions are needed. \*\*\* is the placement where Student can immediately be provided with a FAPE. Below, the hearing officer orders Student's return to \*\*\* to begin the 2015-2016 school year and orders the District and Mother to request and allow an FIE to determine Student's present levels of academic and functional performance. Moreover, compensatory education is ordered to compensate student for the loss of educational benefit during the 2014-2015 school year.

### V. CONCLUSIONS OF LAW

1. Petitioner met its burden to prove that the District failed to provide Student with a FAPE, 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 to meet Student's behavioral and educational 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 (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); *Schaffer v. Weast*, 126 U. S. 528 (2005).
2. Petitioner did not meet the burden to prove that the District committed any other alleged denials of FAPE, including 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).

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<sup>35</sup> 34 C.F.R. § 300.148.

3. Petitioner is entitled to appropriate relief, including compensatory education, for the educational deficit created by the District's failure to provide FAPE from February 12, 2014, to the date of issuance of this decision. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985).
4. Student is entitled to compensatory services in the areas of math, reading, and behavioral intervention.
5. The District is capable of providing the compensatory services and of providing FAPE.
6. No private provider of educational and behavioral skills training was proven to be reasonable for Student.

### ORDER

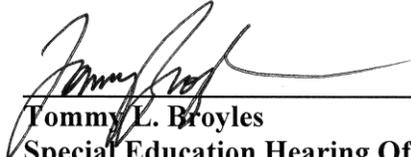
1. The District shall convene an ARD committee meeting to address the issues and decisions contained in this decision.
2. The District shall provide or contract with a specialist trained in ABA to: (1) ensure assessment of Student using assessment methods the specialist deems appropriate including a new FIE to include at least academics, autism, \*\*\*, social skills, psychological functioning, emotional functioning, and adaptive behavior; (2) develop a comprehensive BIP for student with an ABA program, including 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 the services; (4) include in the plan specific requirements for the amount and nature of the training to be provided to anyone, including any District 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 daily data collection and for weekly 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. The program shall be fully implemented as soon as possible. The specialist overseeing the program shall confirm in writing to Mother when the necessary assessments, planning, and training are complete.
3. The District shall, within 10 school days following the date of this Decision, convene an ARD committee meeting to devise a plan for the provision of compensatory education to address Student's lack of FAPE that began \*\*\*, to date. Student is due any appropriate habilitative, developmental, or enriching services and activities that further Student's education and training. *In re Educational Assignment of Joseph J.*, Spec. Ed. Op. No. 1027 (2000).
4. The compensatory services shall include: 425 hours of ABA therapy (25 hours per month for 17 months lost), 240 hours of math (20 hours per month for 12 school months lost), 240 hours of reading/logic comprehension (20 hours per month for 12 school months lost), and 340 hours of social skills/communication/adaptive behavior and functional skills training (20 hours per month for 17 months lost). The compensatory services may be delivered over a period of time extending beyond the 2015-16 academic year, if necessary. The ABA therapy hours may be provided concurrently with the other compensatory service hours so long as ABA strategies are applied and results are recorded.

5. The District must include in either Student's compensatory adaptive behavior or in Student's present IEP (depending on the availability of other students), a daily social skills small group of behaviorally appropriate peers to model and role play appropriate behavior for Student. Similar services provided at other districts have been called buddy systems.
6. Mother shall provide authorization for the District to perform the assessments necessary, as noted above.
7. 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 17, 2015.**

  
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Tommy L. Broyles  
Special Education Hearing Officer  
For the State of Texas

DOCKET NO. 167-SE-0215

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

SYNOPSIS

**Issue 1:** Whether the District provide a free appropriate public education (FAPE) to Student.

**Held: For the Petitioner.** The evidence establishes that, despite the District’s efforts and resources provided to Student, it has not provided a FAPE. Student’s IEP is both facially inadequate and inadequate as implemented. It fails to provide Student with more than a *de minimis* educational benefit. In fact, it is apparent that during the time at issue in this hearing, Student regressed in behavior and made no progress educationally.

**Citation:** 34 C.F.R. §§ 300.101, 300.106-107

**Issue 2:** Whether the District’s individual education plan (IEP) was facially adequate.

**Held: For the Petitioner.** The preponderance of credible evidence demonstrated that program was not individualized on the basis of Student’s assessment and performance needs.

**Citation:** 34 C.F.R. §§ 300.112, 300.320-324

**Issue 3:** Whether the District’s IEP was implemented adequately.

**Held: For the Petitioner.** The evidence establishes that the IEP was not implemented in such a manner as to provide Student with at minimum a floor of opportunity for educational success.

**Citation:** 34 C.F.R. §§ 300.112, 300.320-324

**Issue 4:** Whether the IEP provided academic benefit to Student.

**Held: For the Petitioner.** The preponderance of credible evidence demonstrated that Student's academic performance is woefully behind Student's intellectual capabilities. The District's failure to appropriately address issues arising from Student being a child with autism led to *di minimis* academic or behavioral progress.

**Citation:** 34 C.F.R. §§ 300.109, 300.320-324.

**Issue 5:** Whether Student's IEP was commensurate with Student's unique and individualized needs.

**Held: For the Petitioner.** The preponderance of credible evidence demonstrated that Student's IED was not individualized on the basis of Student's assessment and performance. There was no baseline performance determined by recent evaluations or by recording Student's daily actions.

**Citation:** 34 C.F.R. §§ 300.301-305

**Issue 6:** Whether Student must be placed in a private placement for a FAPE to be provided.

**Held: For the District.** The preponderance of credible evidence demonstrated that the District can provide a FAPE for Student. No private placement school was proven to be a reasonable alternative.

**Citation:** 34 C.F.R. §§ 300.101, 300.104, 300.154