

**DOCKET NO. 130-SE-0213**

**STUDENT** § **BEFORE A SPECIAL EDUCATION**  
§  
**VS.** § **HEARING OFFICER FOR**  
§  
**MANOR ISD** § **THE STATE OF TEXAS**

**DECISION OF HEARING OFFICER**

\*\*\* (hereinafter “the student”) through student’s next friend \*\*\*, requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. § 1400 *et. seq.*. The Respondent is the Manor Independent School District.

**PROCEDURAL HISTORY**

Petitioner filed a request for due process hearing on February 15, 2013. This matter was initially assigned to Special Education Hearing Officer Gwendolyn Webb and reassigned to the undersigned Hearing Officer on August 9, 2013. Petitioner alleged that the District denied the student a FAPE during the 2010-2011 and 2011-2012 school years when student was enrolled in MISD. At the time of the hearing, the student was no longer enrolled in MISD, but enrolled in another public school district.

Petitioner alleged that MISD’s acts and omissions outside the one year statute of limitations denied the student a FAPE. Hearing Officer Webb decided the statute of limitations issue on submission and ruled that the one-year statute of limitations applies to the facts of this case. The undersigned Hearing Officer did not reconsider Hearing Officer Webb’s prior rulings.

The parties appeared for the due process hearing on October 23-25, 2013. Attorney Yvonnilda Muniz represented Petitioner. Attorney Charlotte Salter represented MISD. Due the parents’ limited English proficiency, a certified interpreter assisted at all times during the proceedings.

At the conclusion of the hearing, the parties requested that certain exhibits be translated from \*\*\* to English and that they have an opportunity to submit written arguments upon completion of the translation and requested an extension of the Decision due date. The Decision was timely rendered on February 19, 2014 and forwarded to both parties. The Decision was also submitted to the interpreter for translation from English to \*\*\*.

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusions of law. References to the court reporter’s record will be designated “RR” followed by the page number. References to the exhibits will be designated “P” for Petitioner or “R” for Respondent, followed by the exhibit number and page number if applicable.<sup>1</sup>

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<sup>1</sup> Many exhibits were produced by both Petitioner and Respondent. For ease of reference, only one party’s exhibit will be referenced.

## ISSUES PRESENTED BY PETITIONER

Petitioner's allegations as identified in the Pre-Hearing Conference Order dated March 28, 2013, are as follows:

1. Whether Respondent failed to keep the student safe from injuries at all times and physically abused the Student while student was at school.
2. Whether Respondent restrained the student excessively, to the detriment of student's health, well-being and education.
3. Whether Respondent failed to provide appropriate educational services to meet the student's individualized needs.
4. Whether Respondent failed to provide the student with an appropriate individualized education program (IEP), an appropriate Functional Behavioral Assessment (FBA) and an appropriate Behavior Intervention Plan (BIP).
5. Whether Respondent failed to provide the student with a full day of school and the opportunity to interact with non-disabled peers.
6. Whether Respondent failed to train teachers and staff appropriately for the student's educational services.
7. Whether Respondent failed to make progress on the student's IEP goals and objectives and whether Respondent failed to provide IEP progress reports to the parent in her native language.
8. Whether Respondent failed to implement the student's BIP by restraining the student.
9. Whether Respondent failed to allow the student's next friend to participate in ARD Committee meetings by failing to provide an interpreter.
10. Whether Respondent failed to include the student in ARD Committee meetings when \*\*\*; and whether Respondent violated IDEIA by not including the student in ARD Committee meetings based solely on student's level of cognitive functioning.
11. Whether Respondent failed to advise \*\*\*.
12. Whether Respondent failed to provide the student and student's parents copies of educational records in student's native language despite the parent's request and the district's agreement.
13. Whether Respondent failed to provide a copy of the investigation into the parent's claim that the student was abused at school. (The parent waived this issue.)

## Statute of Limitations

This matter was previously assigned to Hearing Officer Gwendolyn Webb. Petitioner requested a ruling from the hearing officer tolling the statute of limitations based on Tex. Civ. Prac. & Rem. Code § 16.001. Additionally, Petitioner alleged that because the District allegedly withheld information from \*\*\*, an exception to the statute of limitations must be granted pursuant to 34 CFR § 300.511(f). The Hearing Officer ruled that the one-year statute of limitations is applicable to this case and Petitioner failed to file a timely motion to reconsider. Upon transfer of the case to the undersigned Hearing Officer, the case was scheduled and proceeded to hearing with all prior rulings remaining in full force and effect. Therefore, the applicable time period within the limitations period is February 15, 2012, through May 30, 2012, when the student moved to another school district. *See Ruling on Time Period of Review*. Much of the evidence presented by Petitioner arises out of acts or omissions that occurred prior to February 15, 2012, including allegations that the student was subjected to excessive restraint and denied a full school day.<sup>2</sup> In fact, Petitioner argues that numerous acts occurring within the limitations period are evidence that the student's program was not appropriate prior to that time. This is significant for two reasons. First, assuming the allegations are meritorious, they are barred by the statute of limitations and not actionable. Second, Petitioner impliedly agrees that changes made during the limitations period were positive. Although prior history has limited probative value regarding the history of the student, alleged acts or omissions of the District occurring before February 15, 2012, cannot support a finding of a denial of FAPE. All claims arising prior to February 15, 2012, are barred and will not be addressed in this Decision. *See* 19 T.A.C. § 89.1151(c); *Texas Advocates Supporting Kids with Disabilities v. Texas Education Agency*, 112 S.W.3d 234 (Tex. App.—Austin 2003, no pet.). Any reference to acts prior to February 15, 2012, is provided for background purposes only.

## Findings of Fact

1. The student entered MISD at the beginning of the 2010-2011 school year after transferring from another school District. The initial transfer ARD was held on August 10, 2010, and \*\*\*.
2. The student was eligible to receive special education and related services as a student with intellectual disabilities and autism.
3. The student lived in \*\*\* until student moved to \*\*\* in 2009. The student enrolled in student's first school district in August, 2009. That district provided services to the student based on student's intellectual disability. P1-007. By Spring of 2010, the student enrolled in a second school district, which requested psychiatric and autism assessments and determined the student meets the eligibility criteria for Autism. P2.
4. The student exhibited self-injurious and aggressive behaviors in both the first and second school districts. For example, while in the second school district in the Spring of 2010, the student would \*\*\* and \*\*\*. Staff attempted to \*\*\*, but the student would \*\*\*. P1-010; P2-024. Student would charge at and push adults, throw objects at them, and attempt to \*\*\*. P1-

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<sup>2</sup>The student experienced a significant number of restraints and the mother was called frequently to the school to pick up the student. However, the evidence regarding these issues primarily occurred outside the limitations period.

010. When agitated, student would pursue someone for up to 1-2 hours. At the time, the student had no functional system of communication. P1-011. An evaluator reported that student's compliance rate was less than 25%. P1-010.

5. Staff at the student's first district also reported similar self-injurious behaviors. P1-003.

6. Assessments in both the first and second districts reflected that the student's developmental age is in the range of \*\*\* months. P2-003-005. The psychiatrist that conducted the psychiatric evaluation concluded that the student is not capable of academic work at any level and recommended focusing on life skills and self-management, rudimentary socialization, daily living skills, along with appropriate related services. Additionally, he recommended use of a defined cooling off area and intervention when the student showed pre-agitation signs. He discouraged physical engagement or intervention to avoid escalating behavior. P2-47.

7. At the student's second school district, student was placed in a segregated classroom with two adults on an alternative campus, with no access to age appropriate peers, due to physical aggression. P2-36 An assessment completed by the second school district recommended that the student spend a portion of the day in a physically defined space away from peers and stimulation. P1-12-13.

8. The student enrolled in MISD at the beginning of the 2010-2011 school year. On August 13, 2010, MISD convened a transfer ARD Committee meeting for the student at which the Committee reviewed the evaluations and IEP's from the first and second districts. P3-7. The student was \*\*\* at the time of the ARD Committee meeting and did not participate due to student's level of functioning. P3-6.

9. The ARD Committee convened on September 28, 2010, to develop the student's IEP. The ARD Committee accepted the September 2, 2009 FIE from the first district as well as an autism evaluation from the second district. P5. Additionally, the District considered and accepted the second district's FBA, and noted that the prior BIP addressed self-injurious behaviors, leaving the assigned area, physical aggression towards adults and non-compliance that was also observed in MISD. Consequently, MISD continued the BIP. P5-3 5-20.

10. The ARD Committee developed the student's IEP goals and objectives, focusing on maintaining compliant behaviors, extinguishing self-injurious behaviors, hygiene, communication through use of symbols, gestures, pictures or directions, classifying and sorting items and objects, using a daily picture schedule, participating in group activities, and decreasing aggression. P5-5-9.

11. The ARD Committee convened in December, 2010, to address the student's behaviors and parent concerns. P6. At the time, the District frequently contacted the parent to pick up the student from school. P6-12. The student's teacher reported that the student was physically aggressive toward all staff members, roamed during class, would not participate in any type of instruction, displayed short attention span, and would hit, pinch, grab and twist the arms of adults without provocation. P6-12. Additionally, the student had acted aggressively toward another student, and several staff members had been injured, \*\*\*. P6-12.

12. The District consulted with a Board Certified Behavior Specialist (BCBA) from \*\*\* to complete a functional behavioral assessment (FBA) on January 27, 2011. P7. The BCBA also made classroom recommendations, including use of schedules, clearly defined boundaries and spaces, life skills instruction, vocational skills, and communication strategies. She specifically recommended that the student not be allowed to nap during the day, use of augmentive communication, such as a picture exchange system, and use of the STAR curriculum. P-20

13. The BCBA worked with staff to implement a plan to de-escalate the student's behaviors and implement alternative strategies. P7-4.

14. The BCBA also recommended strategies to prevent maladaptive behavior and self-injurious behavior. She recommended that restraint only be used in limited circumstances to protect the safety of others and property. P7-06-08.

15. Over the course of the 2010-2011 and the 2011-2012 school year through February 14, 2012, the student continued to exhibit significant aggression towards \*\*\*self, staff and other students, injuring staff \*\*\*. The student would engage in as many as 20 aggressive acts in one day but would also have calm days. P8-018. During this time period, staff implemented a significant number of restraints, as many as 17 hug restraints and 6 ground restraints in one day. P7-03. Staff reported that there was no predictable pattern to the student's behavior.

16. The District changed the student's teacher during the 2010-2011 school year. The student had a full-time aide during the Spring of 2011 through the end of the 2011-2012 school year.

17. The student \*\*\* at school in \*\*\*, 2012, apparently by \*\*\*. The parent's advocate recommended that the mother keep the student out of school for a two week period ending \*\*\*, 2012, and the District agreed after having concerns for the student's safety. R6-09; RR657. The student received no instruction during this two-week time period.

18. District personnel collaborated with \*\*\* for an increased presence in the student's classroom beginning in February, 2012. They made changes to the student's classroom where student \*\*\*. According to the evidence, I find this change was necessary because the student's behaviors impeded student's learning as well as that of others.

19. Between February \*\*\*, 2012 and May \*\*\*, 2012, a BCBA and two aides remained with the student at all times, with additional staff from MISD and \*\*\* having access to the classroom. RR534, 540.

20. Between February \*\*\*, 2012, and May \*\*\*, 2012, the evidence is inconsistent with regard to the teacher's direct instruction of the student. According to the BCBA and the teacher, the teacher was present and working with the student during the classroom at various times of the day. RR417, 534, 540. The aide testified that it was possible that the teacher worked directly with the student but he could not recall. RR488. An independent evaluator reported that the teacher had not worked directly with the student during the time period. P16-20. The teacher and the BCBA denied this allegation. I find based on a preponderance of the evidence that between February \*\*\*, 2012 and May \*\*\*, 2012, the teacher's direct involvement

diminished, while the BCBA and aides primarily worked in the classroom with the student on IEP and behavioral goals.

21. During the time period between February \*\*\*, 2012 and May \*\*\*, 2012, the BCBA and District personnel maintained data pertaining to the student's behaviors in 5 to 15 minute increments. The BCBA and District staff also maintained data regarding the student's progress on tasks specific to student's IEP as well as discrete trials. RR545-546; R9. Although the student made some progress during this time frame, the totality of the evidence would suggest the progress was not yet consistent in that the student still required hand over hand prompting for many tasks, and communication required facilitation from staff. P16-019.

22. There were two ARD Committee meetings during the limitations period: April 25, 2012 and May 30, 2012. P15 The District offered audiotapes of the meetings which reflect that the parent fully participated in the ARD Committee meeting with the assistance of an interpreter and an advocate. The interpreter not only translated from English to \*\*\*, but he translated the parent's comments from \*\*\* to English. R17.

23. The overall tone of both ARD Committee meetings is collaborative, even though school district personnel and the parent at one point appeared frustrated when discussing concerns regarding the student's resistance to \*\*\*. When frustrations interfered with the meeting, the moderator appropriately suggested a break. When the parties returned to the meeting, the remainder of the meeting was productive. *See* R-16.

24. I find, based on a preponderance of the evidence, the parent meaningfully participated in each ARD Committee during the limitations period with the assistance of an interpreter and advocate. To the extent the District did not provide a copy of the ARD Committee documents to the parent in her native language, such a failure did not interfere with her participation.

25. The District agreed to fund and considered IEE's at the parent request during this time frame. The ARD Committee developed an IEP for the student on May 30, 2012, to which the parent agreed. However, the parent then notified the District that she had moved to a neighboring District. R6-10. District staff cooperated with the new District in the student's transfer.

26. The student is currently enrolled in a specialized campus for severely impaired students in a fourth school district. The student has continued to exhibit aggressive and self-injurious behaviors at the new district. According to the student's current teacher, the frequency of the student's behaviors has remained constant, but the intensity has decreased. RR637.

27. MISD did not provide notice to the student of \*\*\* until May, 2011. R1-188.

28. The District did not include the student in the ARD Committee meetings due to student's level of cognitive functioning after considering whether student could tolerate or participate in the ARD Committee meetings. The student was not able to sit through a meeting without being disruptive, distracting to student's mother, or trying to leave. RR 89. The student did not have the capacity to understand the nature of the meetings. The student was eventually \*\*\*. RR172-173. I find that MISD's decision not to invite the student to the ARD Committee meeting was not arbitrary.

## Discussion

Ultimately, the issue in this case is whether the MISD denied the student a FAPE during a relatively short period of time from February 15, 2012 through May 30, 2012. The educational program offered by the school district is presumed to be appropriate. Petitioner, as the party challenging the educational program, bears the burden of proof in showing why the IEP is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983). *Schaffer v. Weast*, 126 S.Ct. 528 (2005). This includes the burden of proof with regard to harm or a deprivation of educational benefit. The law does not require that the student's educational potential be optimal or "maximized." Rather, it must enable the student to receive some educational benefit from student's program.

The United States Supreme Court established a two-prong test for determining whether a school district has provided a free appropriate public education. The first inquiry is whether the school district complied with IDEIA's procedural requirements. The second inquiry is whether the student's IEP is reasonably calculated to confer an educational benefit. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S.Ct. 3034 (1982). An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Id.*; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000).

### Procedural Sufficiency

Petitioner alleges the following procedural errors:

1. *Whether Respondent failed to allow the student's next friend to participate in ARD Committee meetings by failing to provide an interpreter.*
2. *Whether Respondent failed to include the student in ARD Committee meetings \*\*\*; and whether Respondent violated IDEIA by not including the student in ARD Committee meetings based solely on student's level of cognitive functioning.*
3. *Whether Respondent failed to \*\*\*.<sup>3</sup>*
4. *Whether Respondent failed to \*\*\* and student's parents copies of educational records and IEP progress reports in student's native language despite the parent's request and the district's agreement.*

Petitioner presented no evidence that the District failed to allow the parent to participate in ARD Committee meetings by failing to provide an interpreter. There were two ARD Committee meetings during the limitations period, April 25, 2012, and the continuation of the annual ARD Committee meeting on May 30, 2012. The parent no longer resided in the District after that date. RR660; R6-10. The District offered audiotapes of the meetings which reflect that the parent fully participated in the ARD Committee meeting with the assistance of an interpreter and an advocate. R16. The interpreter not only translated from English to \*\*\*, but he translated

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<sup>3</sup>This claim is outside the statute of limitations as the District provided the notice in May, 2011.

the parent's comments from \*\*\* to English. Additionally, the parent's advocate actively participated in the ARD Committee meetings. The parent was not denied meaningful participation in the development of the student's educational program.

Petitioner also complains that the District failed to provide copies of the student's educational records, as well as restraint and progress reports in her native language. First, Petitioner complains that IEE's were to be provided to the parent in \*\*\*. P12-28. Although the IEE's were not translated when the ARD Committee commenced on April 25, 2012, the Petitioner concedes that the meeting recessed until May 30, 2012, in order that the IEE's could be translated. The parent's advocate attended both ARD Committee meetings and the evaluations were discussed with the assistance of an interpreter. No decisions were made prior to the completion of the ARD Committee meeting on May 30, 2012. Although the better practice would have been to provide the \*\*\* translation to the parent at the April 25, 2012 meeting, the District recessed the ARD in order to accommodate the parent.

The District's documentation, i.e. Notice of Assessment, ARD notices, Health Care Plan progress reports and restraint forms are not wholly in the parent's native language. Some of the forms are in \*\*\*, but the individualized information is in English. In fact, the forms were translated for the hearing officer. *See* P17, P18, P15-50-52. However, the minutes of the ARD Committee reflect that dates for meetings would be coordinated with the parent's advocate and the invitation states that the parent's advocate has been invited. P15-27, 46, 50; R1-00478, 480, 482, 484(T) (translation). The parent and her advocate participated in the ARD meetings as noticed. The restraints, the health care plan, behavior and the student's progress were discussed in \*\*\* and English during the ARD committee meetings on April 25 and May 30, 2012. The parent's advocate fully participated in discussing them as well. R17. The District complied with 34 CFR §300.322(e) by providing for an interpreter to ensure that the parent understood the proceedings. In fact, a review of the audio of the ARD Committee meetings supports a finding that the parent did in fact understand the proceedings through the use of the interpreter. Additionally, the parent was accompanied and assisted by an advocate consistent with 34 CFR §300.321(a)(6).

Texas law requires the District to provide the parent a written or audio-taped translation of the student's IEP. *Tex. Educ. Code* §29.005(d)(1); 19 *Tex. Admin. Code*. §89.1050(e). Additionally, the District must provide prior written notice of its intent to conduct an evaluation of the student in the parent's native language. 34 CFR §500.503(c). On May 30, 2012, the District completed the student's annual ARD Committee meeting and developed the student's IEP for the 2012-2013 school year. A translation of the IEP was not provided to the parent as of that date. The District also provided the parent with notice of its intent to evaluate the student but failed to provide the notice in \*\*\*. P15-46. However, the parent moved from the District on the same date, so the evaluation was never administered. Procedural violations support a finding of a denial of FAPE only when the error impedes the student's right to a FAPE, significantly impairs the parent's opportunity to participate in the decision making process regarding the provision of FAPE, or causes a deprivation of an educational benefit. 34 CFR §300.513(a)(2); *See Adam J. v. Keller ISD*, 328 F.3d 804 (5<sup>th</sup> Cir. 2003); 34 CFR §300.513(a)(2). Although the District did not comply with the procedural requirements under IDEIA and applicable Texas law, the procedural violations during the limitations period did not result in a denial of FAPE.<sup>4</sup>

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<sup>4</sup> Petitioner alleges that these same procedural errors occurred prior to February 15, 2012. However, these



It is undisputed the student did not participate in the ARD Committee meetings, \*\*\*. It is also undisputed that the student did not have the capacity to meaningfully participate in the ARD Committee meetings. \*\*\*, student's absence from the meeting did not result in harm under IDEIA.

The remaining issues are best characterized collectively as substantive IDEIA issues. In other words, the central issue is whether the District's educational program was substantively appropriate.

### Substantive Sufficiency

In determining whether an IEP is appropriate for a student, the issue is whether it is reasonably calculated to confer an educational benefit. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S. Ct. 3034 (1982). An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Rowley, supra.*; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000). An IEP is reasonably calculated to provide meaningful educational benefit when it is individualized based on the student's assessment and performance; administered in the least restrictive environment; provided in a coordinated and collaborative manner by the key stakeholders; and demonstrates positive academic and nonacademic benefits. *Cypress-Fairbanks Ind. Sch. Dist. V. Michael F.*, 118 F.3d 245, 253 (5<sup>th</sup> Cir. 1997).

The above factors need not be applied in any particular way as they are merely indicators of the appropriateness of educational programming and are intended to provide guidance in a fact-sensitive, case by case inquiry to determine whether an IEP has provided an educational benefit. *Richardson ISD v. Michael Z.*, 580 F.3d 294 (5<sup>th</sup> Cir. 2009). In this case, the educational program in question is the program in existence and implemented between the dates of February 15, 2012 and May 30, 2012.<sup>5</sup>

The student in this case, according to the evidence, is extremely challenging. Student moved to \*\*\* with student's parents in 2009, was enrolled in two different school districts prior to enrolling in MISD in August 2010, is currently enrolled in a fourth district, and presented substantially similar challenges in each district.

The student has engaged in aggressive and self-injurious behavior in each school district, including MISD. In student's first two districts, the student was reported to \*\*\*. P1-10; P2-24-25; P2-45. Additionally, student was frequently physically aggressive to staff and non-compliant. P1-011; P2-25. Previous evaluators recommended that the student spend a portion of student's day spent away from others to facilitate self-regulation. P1-012; P2-047. According to evaluations completed prior to the time the student entered the District, student functioned as a 2-3 year old, had limited receptive language skills in both English and \*\*\*, and no functional system of communication, and was unable to use pictures to communicate even basic needs and wants. P1. A psychiatric evaluation completed by another district stated that the student was not capable of academic work at any level and characterized student's impairment as extreme. P2-47.

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complaints are no longer actionable.

<sup>5</sup> Petitioner's argument that the student has not received an educational benefit is primarily based on events which occurred outside the limitations period. I make no findings regarding the provision of a FAPE prior to February 15, 2012.

The student entered MISD in the Fall of 2010. By the end of the first semester, the student's behaviors interfered with student's learning as well as that of others in the classroom. Student would \*\*\*, had a short attention span, could not sit for even brief periods of time, could not participate in instruction, engaged in self-injurious behaviors, would \*\*\*, and was aggressive to students as well as staff, resulting in \*\*\*. P6. The District engaged the services of \*\*\*, behavior specialists. \*\*\* conducted an FBA in January of 2011. The evaluator reviewed prior evaluations from previous districts and \*\*\* and concluded that some previously reported information was inaccurate or incomplete. The evaluator also concluded that multiple transitions and significant changes in language, lifestyle and education after relocating from \*\*\* must be taken in to account in working with the student. She concluded that the student had failed to generalize skills to student's new setting (MISD) and that those skills would need to be retaught. P7-001-002. For example, the student was reported to be able to classify objects by color and form, communicate through simple images in \*\*\*, but was not demonstrating these abilities in the classroom when student first entered MISD. P7-010. Self-injurious behaviors were identified as being prevalent throughout the student's life, primarily in response to frustration, inability to communicate, over-stimulation by student's environment (i.e., noise, bright lights), confusion, adults physically interfering to block the student from hitting or \*\*\*. P7-004. The evaluator observed the student on one occasion engage in physical aggression towards adults a minimum of 3 times per hour, but the frequency decreased after she provided hands-on-support and training for the staff. P7-004. \*\*\* recommended increased structure for the student and specific steps for staff to take in response to the student's aggressive behaviors. For example, she recommended that the staff not attempt to physically intervene in self-injurious behaviors, but that they redirect student, using \*\*\* commands as much as possible. Regarding physical aggression to others, she recommended limited use of restraint as a last resort when staff could not move away or the student was destroying valuable property. P7-008. The outside consultant continued to work with staff in an effort to track and manage the student's behaviors.

At the beginning of the 2011-2012 school year, the \*\*\* consultant continued to observe the student and assist staff in tracking data to analyze the student's behaviors. The student began the school year following another transition - \*\*\* of in-patient treatment at the \*\*\* arising out of physical aggression directed toward a family member. R12-11-14. Initially upon return from the hospital, the student's behaviors improved significantly but later deteriorated. RR381. The parent would not permit school staff to administer medication for the student while at school, although student was prescribed medication while in the hospital. R2-118. Staff reported that new behaviors emerged that had not been seen in the previous year, such as \*\*\*, increased aggression toward students, attempting to escape the classroom, \*\*\*, and dropping to the ground when being led by an adult. P11-002. The consultant reported that staff took preventative measures to help decrease aggressive behaviors and increase compliance. However, the data reflected 116 incidents of aggression over a three-week period in spite of their efforts. P11-005.

Multiple ARD Committee meetings were held between September, 2011 and February 15, 2012, to discuss the student's behavioral needs, as well as independent evaluations. The \*\*\* consultant reported that interventions that previously worked with the student were no longer effective and that the functions of student's behavior appeared to have changed. P-12-027. According to the consultant, the most significant challenge presented by the student was the unpredictability of student's behaviors, what preceded the behaviors and what happened following the behaviors. Because of the unpredictability, it was difficult to develop strategies to decrease maladaptive behavior and increase safe and appropriate behaviors. RR-502.

The student's aggressive behaviors frequently resulted in injuries to staff \*\*\*. The aide assigned to work with the student testified that he wore loose clothing that could be discarded because they became ripped or torn due to the student's aggression and that the student had \*\*\* on more than one occasion. RR461. According to the testimony of all staff who worked with the student, and the documentation from student's previous school district, as well as student's current school district, it is clear that the student engages in significant self-injurious behaviors that are difficult to manage, even in a specialized environment. In fact, the student is currently in a fourth school district on a specialized campus for students with severe disabilities and continues to exhibit aggressive and self-injurious behavior. In fact, the student's current teacher testified that the frequency of the student's aggressive behaviors has not decreased since August of 2012, although the intensity has. RR637.

In late \*\*\*, 2012, the student \*\*\* following an incident at school and sought medical attention. The mother reported to medical personnel that the student is aggressive at school. P23-008. Although no one was able to initially explain the injury to the parent, it was ultimately determined that the student \*\*\*. R2-98-99. There is no incident report for the incident. On \*\*\*, 2012, the school and the parent decided to maintain the student at home to keep student from being injured, following the suggestion of the parent's advocate. RR657. The student returned to school on \*\*\*, 2012. P23-016; R26. MISD did not provide instructional services to the student during this time. Therefore, the student missed two weeks of instruction during the limitations period in which the District provided no educational services.

In January and early February, 2012, the District and \*\*\* discussed increasing training of staff and assistance with the student. The \*\*\* consultant acknowledged that school staff were consistent in their interventions, but determined it would be more appropriate to increase the amount of time that \*\*\* personnel could work with the student and staff to enforce acceptable behaviors as they occurred and ultimately train 2 staff members who would be full-time with the student in the classroom. R6-207. The change in approach was determined to be necessary due to the change in the function and the variability of the student's behaviors, or the student's current functioning. P202-204.

The IEP in effect beginning February 15, 2012, was the IEP developed at the May 2011 ARD Committee meeting. P9-005. The IEP provides for behavioral goals that address the student's need to maintain compliant behaviors and extinguish self-injurious and aggressive behaviors. P9. The IEP also provided for goals pertaining to hygiene, hand-washing, identifying body parts, following one step directions, using pictures/symbols/sign languages to communicate, sorting items by color and shape, and following a pre-set schedule (such as a picture schedule), and self-help skills in the classroom. Although some of the goals had been carried over from the previous year, some modifications were made to reflect the student's current performance. For example, mastery criteria was increased on the compliance goal, the hygiene objective was modified to encourage the student to wash student's hands with only a verbal prompt rather than using a picture chart, mastery criteria was modified on the objectives for sorting objects and peer interactions that were more consistent with student's current performance, and the objective for decreasing the student's need to \*\*\* while walking was modified to encourage greater independence from adults. P9-5-12. The IEP contained behavioral goals, and the ARD Committee considered positive behavioral supports and other strategies to address behavior consistent with 34 CFR §300.324(a). The ARD Committee

carefully considered the student's present levels of performance prior to modifying or continuing the student's goals. The IEP in effect at the beginning of the limitations period was appropriate. However, the student's maladaptive behaviors impeded student's learning and required a collaborative and coordinated provision of services.

The \*\*\* consultant and District staff made changes to the classroom set up for the student. The student had exclusive use of a \*\*\*. RR528-530; R27. \*\*\*. R27. \*\*\* was necessary because student's behaviors impeded student's learning and that of others. The student remained in the \*\*\* setting, but was moved to \*\*\* in order for staff to intensively work with student to get behaviors under control. This was the least restrictive environment for the student.

During the months of March, April and May, 2012, \*\*\* consultants, two aides and the teacher worked with the student in the classroom. According to the \*\*\* consultant, the teacher worked with the student and was in the classroom several times per day. RR534, 540. The \*\*\* consultant trained all staff in the collection of behavioral data for the student. Data was collected on a daily basis, initially in 15 minute increments, and then in 5 minute increments due to the frequency of the maladaptive and aggressive behaviors. RR538; R9-85-121. Staff also maintained daily documentation specific to the student's aggression. R9-129-335. Additionally, staff maintained daily and weekly documentation to track progress on tasks specific to the student's IEP, as well as discrete trials based on the IEP. RR545-546; R9-369-470.

Prior to and during the limitations period, the District conducted daily body checks to document injuries resulting from the student's self-injurious and aggressive behavior. P29; R9. The injuries included \*\*\*. Some of the documented marks were of injuries occurring outside of school. P29. The mother also took photographs and provided them to the school, alleging that someone from school inflicted the injuries. During this same time frame, the student would frequently \*\*\*, either in the classroom or the restroom. *See testimony of aide and teacher.* The aide, using poor judgment, took photographs on an iPad in an effort to document the behavior, which the mother discovered after a mixup in iPads. Although the aide's decision to take the photographs (with the knowledge of the teacher) shows extremely poor judgment, the District appropriately addressed the incident. There is no evidence that the aide was abusive to the student or took the photos for \*\*\* purpose. \*\*\* investigated the incident and determined the physical neglect, \*\*\* and emotional abuse allegations against unknown MISD staff to be invalid. Previous physical abuse allegations were likewise not validated. R6.

The \*\*\* consultant reported that during the relevant time period from February 15, 2012 to May 30, 2012, the student made progress in student's communication and student was able to use limited sign language, however there were other reports that the student was no longer able to signal a request to walk with someone by \*\*\*. P16-019; RR551. Student began to be consistent with student's hygiene routine and showed some improvement in tolerating \*\*\*. They focused on vocational tasks, such as sorting colors and silverware, and matching primary colors. RR551-554. The student also began to functionally use the iPad to express yes or no with facilitation, although inconsistently. RR551, 602. Although the student was not observed to engage in the same task in student's subsequent school district, this is attributed to lack of generalization. RR603. The student's teacher in student's current school reported that the student was able to use the iPad to communicate simple requests with pictures. RR634. It is important to note, however, that the student began to exhibit new maladaptive behaviors during this same time period, such as \*\*\*. P16-023.

The ARD Committee convened on April 25, 2012, and May 30, 2012, to review the data and the student's progress and develop the student's annual IEP. P15; R17 (audiotapes). The parent had previously requested IEE's for occupational therapy, speech therapy and a functional behavior assessment. The District agreed to fund the IEE's and they were presented during the second meeting. P16. The parent and the District acknowledged that the student had begun to show some progress during the time \*\*\* had been assisting in the classroom. However, the parent expressed frustration over the inconsistencies prior to February 2012. Videos of the student in the classroom offered by the District are consistent with the District's representations of the student's functioning, but also show the student napping. (The videos are date-stamped prior to February 15, 2012.) R16. The videos reflect staff communicating in \*\*\*, and the student using pictures to pair objects, guide the aide through the room as they are walking, and complete the song, "Old McDonald." R16. The number of restraints used during the same time period also decreased, with 14 restraints in March, 1 restraint in April and 1 restraint in May. R1-498-513. The participation of the outside consultants and collaboration with the staff from February 15, 2012 until May 30, 2012, in analyzing the student's behavior and training the staff appears to have created positive change in the student's environment. Although the transportation goal was not mastered, staff created a goal to work with the student on becoming comfortable \*\*\* as a prerequisite to being able to tolerate the bus. The District also remedied its error by reimbursing the parent for transporting the student to and from school. P15-026. The ARD Committee, after reviewing the student's assessment and performance, adopted goals for the 2012-2013 school year that addressed hygiene, allowing the nurse to bandage wounds, caring for personal possessions at school, following verbal directions, sorting and classifying objects, reducing aggression, extinguishing self-injurious behaviors, and compliance. P15-4-10. The goals are appropriate and the parent agreed to the goals. P15-20. However, immediately following the ARD Committee, she notified the District that she had moved to another public school district. R6-10.

There are factors, however, that suggest a lack of educational benefit during the limitations period. The District provided no educational services for the student for a period of two weeks after concerns of being unable to maintain student's safety, however it was the parent's advocate who suggested that the parent keep student at home and the District acquiesced. RR657. Additionally, it appears that the teacher engaged in less direct instruction with the student while the BCBA and the aides worked with student on student's IEP goals and in tracking student's behavior. These events under some circumstances may indicate a denial of educational benefit. However, whether or not the student's program is appropriate under IDEIA requires a review of the totality of the circumstances and the time period and not just a snapshot of a particular day or event. In this case, during the relevant time period, the District made significant efforts to analyze the student's behavior and functioning as well as its own program. The program was not perfect. However, the student presented unique and complex behaviors that challenged multiple school districts. An analysis of whether the student received a FAPE does not require that equal weight be given to all of the *Michael F.* factors. *Richardson ISD v. Michael Z.*, 580 F.3d 294 (5<sup>th</sup> Cir. 2009). In this case, key stakeholders provided services, i.e., ongoing evaluation and assessment of the student's program and training of staff, in a collaborative and coordinated manner that was critical to the student's future progress. The student began to make progress during toward the end of the limitations period, as acknowledged by the parent in an ARD Committee meeting and in her own argument. The parent may believe the progress was too little, too late, and perhaps that is understandable given the history. The

program was not perfect and District personnel still made errors in the delivery of a complicated program to a complicated young \*\*\*. However, to the extent there was a denial of a FAPE during this time frame, it was *de minimis* under the circumstances.

### Claim for Compensatory Relief

However, assuming a denial of FAPE was not *de minimis*, the parent's relocation to another District complicates matters further. The parent's sole requested relief is compensatory education. The student is currently enrolled in a neighboring district in a specialized program that serves students with severe medical and behavioral needs. RR225. However, even in that program the student was initially \*\*\*, with a 2:1 staff to student ratio because student posed a risk to staff and other students. Student also continued to engage in self-injurious behaviors. RR 273. The parent authorized staff to administer PRN medications for the student's anxiety at the first sign of deteriorating behavior, something she would not permit MISD to do. RR644-645; R2-118. Although the student's aggressive behavior has decreased in intensity, it has not decreased in frequency. RR637. However, it is evident that the student, after approximately 1-1/2 years in that school, is making some progress in student's current placement. The student has a history of regressing behaviorally and functionally after transitioning from one program to the next. Any award and implementation of compensatory services could potentially interfere with services being provided in student's current program. Compensatory services are equitable in nature; not damages. It is proper for a hearing officer to take into consideration the complexity of the student's difficulties as well as parent behavior and current circumstances in deciding whether to exercise her discretion and award compensatory relief. *Reid v. District of Columbia*, 2005 WL 678385 (D.C. Cir. 2005). Given the minimal deprivation within the limitations period, and the student's current status in student's fourth school district, an award of compensatory services would not serve the purpose of providing the student educational benefits which should have accrued but for the denial of FAPE. Unfortunately, the introduction of additional services outside student's current educational program could be counterproductive. As the student is no longer enrolled in MISD, and is being served by another school district, there is no longer a live controversy between the parties and no further effective relief that the Hearing Officer can award under the circumstances. *See Student v. HISD*, Dkt. No. 009-SE-0108 (A. Lockwood, 2008), *citing Crown Point Cent. Sch. Dist.*, 46 IDELR 269 (SEA N.Y. 2006); *Bd. Of Educ. Montgomery Cnty v. Khan*, 44 IDELR 132 (D.C. Md. 2005).

### Additional Claim

Petitioner claims that Respondent failed to keep the student safe from injuries at all times and physically abused the student. There is no evidence that anyone in the District abused the student. To the extent Petitioner's complaint encompasses the photographs taken of the student by the aide, that complaint is not actionable under IDEIA.

## CONCLUSIONS OF LAW

1. The student was eligible for special education services as a student with a disability under IDEIA, 20 U.S.C. §1400 *et. seq.* and its implementing regulations until student's withdrawal from the district on May \*\*\*, 2013. MISD identified the student as a student eligible to receive special education and related services while student was enrolled in MISD.

2. The District's educational program is presumed to be appropriate. As the party challenging the educational program proposed by the district, Petitioner bears the burden of proof. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). *Tatro v. State of Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983), *aff'd* 468 U.S. 883 (1984) and must show more than a de minimis deprivation of educational benefit. *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000). *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000). Petitioner has failed to meet petitioner's burden.

3. To the extent there is a denial of FAPE, the award of compensatory services is not appropriate under the circumstances. *Reid v. District of Columbia*, 2005 WL 678385 (D.C. Cir. 2005).

## ORDER

Based upon a preponderance of the evidence and the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the relief requested by Petitioner is **DENIED**.

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

**SIGNED** this 19<sup>th</sup> day of February, 2014.

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Sharon M. Ramage  
Special Education Hearing Officer

## SYNOPSIS

Issue No. 1: Whether the District provided an appropriate educational program for the student?

Ruling: For the District. The student's program, during the limitations period, was based on the student's assessment and performance, provided in a collaborative and coordinated manner that included training of staff and addressed behavior that impeded the student's learning. The student began to show progress. If the program resulted in a denial of an educational benefit, such denial was *de minimis*.

Citation: 34 CFR §300.324

Issue No. 2: Whether the student's educational program was administered in the least restrictive environment?

Ruling: For the District. The student's aggressive and self-injurious behaviors required a restrictive setting because the student's behaviors impeded student's learning and that of others.

Citation: 34 CFR §300.114

Issue No. 3: Whether the District utilized excessive restraint?

Ruling: For the District. During the limitations period, the use of restraints decreased as additional supports and strategies were used in the classroom. Any restraints that were implemented were necessary to address behaviors that posed an imminent threat of physical harm to the student or others.

Citation: 19 TAC §89.1053

Issue No. 4: Whether the District denied the parent an opportunity to participate in ARD Committee meetings by failing to provide an interpreter.

Ruling: For the District. The District provided an interpreter. Additionally, the parent participated with an advocate.

Citation: 34 CFR § 300.322

Issue No. 5: Whether failure to include the student in ARD Committee meetings, failure to provide ARD and assessment notices and copies of the student's educational records in student's native language denied the student a FAPE?

Ruling: For the District. The student lacked capacity to participate in the ARD Committee meetings and Petitioner \*\*\*. Petitioner has failed to establish that such failure to participate deprived the student a FAPE. ARD notices were provided to the parent and copied to the parent's advocate, and the parent and advocate participated in each ARD Committee meeting. Additionally, the parent was assisted by an interpreter during the ARD Committee meetings and she meaningfully participated in the discussion of the student's IEP. The parent has failed to establish that the procedural errors resulted in a denial of FAPE or significantly impeded her ability to participate in the decision making process. Finally, the parent requested a translation of the IEP and then withdrew from the District on the same date.

Citation: 34 CFR § 300.513(a)(2)(ii)