

DOCKET NO. 157-SE-0310

STUDENT bnf PARENT	§	SPECIAL EDUCATION
	§	
VS.	§	HEARING OFFICER FOR
	§	
ENNIS ISD	§	THE STATE OF TEXAS

**ORDER CLARIFYING
DECISION OF THE HEARING OFFICER**

Student (hereinafter “the student”) through student’s next friend, Parent (Petitioner), 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 Ennis Independent School District.

1. In the Request for Hearing, Petitioner alleged that EISD denied the student a Free Appropriate Public Education (FAPE) in the following particulars:

- a. Failing to develop measurable IEP goals and objectives;
- b. Failing to provide appropriate goals and objectives;
- c. Failing to provide appropriate special education counseling;
- d. Failing to provide appropriate speech services;
- e. Failing to provide full instructional days for the student;
- f. Failing to provide appropriate Occupational Therapy services;
- g. Failing to provide appropriate Assistive Technology;
- h. Failing to provide and develop an appropriate BIP;
- i. Failing to appropriately implement the student’s BIP.

2. The student’s placement was inappropriate and not in the least restrictive environment.
3. Petitioner unilaterally placed the student in a private school after providing notice to the district that Petitioner would be seeking reimbursement and placement at public expense.
4. Petitioner alleges that the private placement is appropriate.

The relevant time period pursuant to the one year statute of limitations is March 5, 2009 through the date of hearing.¹

Petitioner requested reimbursement for her unilateral private placement of the student at the *** School and an order requiring prospective placement of the student at the *** School.

¹ Many of Petitioner’s complaints regarding repeated IEP goals and objectives and the failure to develop and implement an appropriate BIP and provide appropriate related services of counseling, occupational therapy and assistive technology arise from acts or omissions that occurred prior to March 5, 2009 and are outside the limitations period. Therefore, the findings of fact, discussion and relief will be limited to the appropriateness or implementation of any IEP or services developed or provided on or after March 5, 2009.

PROCEDURAL HISTORY

Petitioner filed this request for hearing on March 5, 2010. The parties waived the resolution session and mediation. A hearing was held on May 18, 19 and 20, 2010. Petitioner was represented by attorney Myrna Silver. The Ennis Independent School District was represented by attorney Rhonda Crass. At the conclusion of the hearing, both parties requested an opportunity to submit written argument and proposed findings of fact and conclusions of law. The decision due date was extended for good cause to allow an opportunity to submit written argument. The decision due date was extended to July 26, 2010. The Decision was timely rendered and forwarded to the parties.

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusions of law. Citations to the transcript will be designated "T" with a notation of the volume number and page number. Citations to the Exhibits will be designated "P" for Petitioner and "R" for Respondent, followed by the exhibit and page number.

FINDINGS OF FACT

1. The Ennis ISD is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing Student a free appropriate public education in accordance with the Individuals with Disabilities Education Improvement Act, 20 U.S.C.A. § 1400, et seq., and the rules and regulations promulgated pursuant to IDEIA.

2. The student resides within the geographical boundaries of the Ennis ISD. Ennis ISD is responsible for providing the student with a FAPE. The student is eligible to receive special education and related services under the eligibility categories of ***, *** and Speech Impaired. The student was in the *** grade during the 2008-2009 school year and in the *** grade during the 2009-2010 school year.

3. During the Fall of 2008, the student's IEP required placement for *** and *** in the Resource Classroom and *** and *** in the general education classroom. The student also participated with non-disabled peers in *** and ***. (P-8)

4. The student had *** at all times. (T3-46)

5. During the Fall of 2008, the student had the following behavioral difficulties: aggressive behavior directed at certain teachers, off-task behavior, obsessive or ritualistic behavior where student would ***. R35. The student's behaviors became worse during transitions and in the general education classroom. The student targeted the life skills teacher and an aide. (T3-61-62, 127) Some school staff characterized student's behavior as more severe and compulsive. Some characterized it as ritualistic and not that disruptive.

6. The student has a history of behavioral problems at home, including aggression ***. (T2-52, 77-78, 86-88, 92) The parent at times during the hearing minimized the student's behavior and was not completely forthcoming with Dr. *** regarding student's behaviors. (R16) The mother also refused to provide consent for school personnel to talk with the student's physicians. (T2-42)

7. There were many staff changes with regard to the student's *** during the Fall of 2008 and the school and parent attributed many of student's behavioral difficulties to the staff changes. Additionally, the student experienced medication changes during the early part of the semester which caused student to become agitated. (R1-38) The student's progress report as of March 5, 2009 indicated the student's behavior improved.

8. The student's cognitive functioning is in the *** range. During the most recent FIE, student's IQ on the Kaufman Brief Intelligence Test-2nd Edition was ***, and *** on the Wechsler Nonverbal Scale of Ability. These scores are consistent with the student's 2007 IQ testing. An independent evaluation reflected higher IQ scores in the ***. However, both the FIE and the IEE support a finding that the student meets the eligibility criteria for ***. Student also meets the criteria for *** and speech impairment. Student is affected by ***.²

9. There was conflicting testimony regarding the severity and frequency of the student's behaviors during the 2008-2009 school year. Neither the school witnesses nor the parent were credible in this regard. Both parties provided conflicting testimony regarding the nature and frequency of the student's behaviors. Data sheets were allegedly kept regarding the student's behaviors but not made available by the District during the hearing. (T2-76, 141-142, 167-168)

10. A Behavior Intervention Plan was developed for the student on November 6, 2008, following the completion of a Functional Behavior Assessment. The BIP targeted the following behaviors: off-task behaviors, appropriate requests for help, engaging with peers, and aggression. (P8). The BIP was not properly implemented. This is evidenced by the testimony of the student's *** regarding her own inappropriate interventions. For example, the student's BIP provided that the student would communicate student's needs by indicating a need for a break in stressful situations. (R1-21) The *** testified that if the student became disruptive in class, or got up from student's chair (task avoidant behaviors), she would take student to the quiet room where student would write "I will not get out of my chair" sentences in order to return to the room. (T3-51) Additionally, the student had a behavioral goal for completing work in the general education classroom, but the *** completed the work for student. (T3-60) The Independent Evaluator found that the BIP was not appropriately implemented. (R16) I find, based on a preponderance of the credible testimony and evidence, that prior to the student's withdrawal from EISD, the BIP was not properly implemented and that the staff working with the student did not have a working understanding of the manner in which to implement it.

11. On March 5, 2009, the ARD Committee convened for an Annual ARD and to discuss the student's IEP and student's placement for the remainder of the 2008-09 school year and the 2009-2010 school year. The ARD Committee, including the mother, agreed to change the student's placement from a general education setting to a special education setting for *** and ***, and general education for *** and an unspecified elective, with the changes taking place following spring break on March 23, 2009. (R1)

12. On March 5, 2009, the ARD Committee adopted the BIP that had been previously accepted during the November 2008 ARD Committee meeting. Social skills training was also added.

² There was conflicting testimony as to whether the student actually has ***, or is affected by ***. The distinction in this case makes no difference with regard to the student's educational programming based on the evidence presented at hearing.

13. There was much dispute over whether the March 5, 2009 proposed placement for *** and *** was in the resource class or in a life skills class with the life skills teacher. According to the school's diagnostician, the student's placement was changed to *** and ***, which was delivered in a resource setting. (T3-163-165) According to the parent, the district's *** consultant, and the student's report card, the instruction was delivered in a Community Based Instruction, or CBI (or life skills) setting. The diagnostician testified that the student's report card reflected a computer or coding error to the extent it reflected instruction in the life skills setting. The District's *** specialist testified that he observed the student receiving *** instruction in the life skills classroom but acknowledged that the life skills teacher also taught *** and ***. (See testimony of ***) The *** testified that the student's placement for science and social studies was in a resource class room. (T3-49). The District did not call the Life Skills teacher, who also taught *** and ***, as a witness. According to the independent evaluation, a life skills placement is too restrictive for the student, but resource classes for core academics are appropriate. Both are special education placements, and the student's educational needs require a modified curriculum in these subject areas. Having found the March 5, 2009 IEP inappropriate, it is not necessary to resolve the conflict in testimony; however, it is more likely than not that the *** and *** curriculum was delivered to the student in a resource setting with the life skills teacher.

13. The IEP's developed at the March 5, 2009 ARD Committee meeting for the most part are unintelligible and not measurable. Some of the discrepancies in the IEP are typographical in nature. For example, the IEP for math has a start date of 3/5/2009 and an end date of 3/4/2010. (R1-75). However, the same IEP, in the objective section has a start date for the objective of 3/11/2008. (R1-75). These errors are explainable as typographical errors occurring as a result of the software program utilized carrying forward dates from prior IEPs. However, there are other issues with the IEP that are not explainable. For example, the mastery criterion for the student's math goals is only 40%, an indicator that either the goal is not appropriate or that the expectation that student achieve only 40% mastery is too low. (R-1-75). Additionally, many of the math goals have a beginning date of October 2008, and are scheduled to continue through March 2010, almost an 18 month period of time. (R1-86-88; R1-75).

14. The student' March 5, 2009 social studies goals for the remainder of the 2008-2009 school year are not measurable. For example, one of the social studies goals in effect through the end of the school year was for the student to understand traditional historical points of reference in Texas history, to be assessed by performance on the activities associated with the essence of the TEKS. The goal is wholly unmeasurable. (R1-91) The only other goal was to demonstrate measurable progress in social studies, and required the student to answer 4 out of 5 questions regarding material 70% of the time (or 70% of 80%). The IEP goals in no way convey to the parent the measure by which the student's progress will be evaluated.

15. The student's science goals require the student to answer review questions, know that there is a relationship between force and motion, and know that substances have physical and chemical properties, without any explanation that conveys to the parent or instructional staff the criteria by the student will be measured. (R1-95)

16. The student's language arts goal required composition of original texts, applying the conventions of written language, such as capitalization, punctuation and penmanship to communicate

clearly and spell proficiently. (R1-57) The goal contains no mastery criteria and does not specifically provide the grade level at which the student will be assessed, other than to provide the student will be assessed by Student's performance on activities associated with the essence of the *** grade TEKS. The student's goals in the area of written expression appear have begun on October 3, 2008 and carried over through March 2010. Numerous goals appear to have repeated from the 2007-2008 school year. (R1-58-59)

17. The student's reading goals require that the student recognize 5 out of 10 grade level words by the end of the school year (presumably *** grade). The objectives for this goal involve applying letter sound correspondence, language structure and context to identify words in 2 out of 3 trials, read a short grade level passage for information and to be entertained 2 out of 3 trials, and to fill out forms with personal information 2 out of 3 trials. R1-73. These goals are measurable.

18. The BIP adopted at the March 5, 2009 ARD Committee meeting contains many appropriate and measurable goals, with the exception of one goal which merely states that the student will demonstrate self-control. (R1-26) Although this goal is vague and not measurable, the remainder of the BIP is specific and measurable. However, the March 5, 2009 ARD Committee did not make any revisions to the student's October 2008 goals and specified that they would continue through March 4, 2010, a period which exceeds one year. (R1-21)

19. The Speech goals adopted on March 5, 2009 involve the student demonstrating progress toward the acquisition of developmentally appropriate pragmatic skills, with specific objectives. Two of the objectives are not measurable and are vague in that they require the student to express emotions through verbalization and appropriately request permission. There are no mastery criteria for either objective. (R1-40) The semantic language goal appears to be a goal carried over from 2007, with objectives for defining and describing items from categories and actions, without any mastery criteria. (R1-41). The IEP also has the goal of demonstrating progress toward the acquisition toward developmentally appropriate academic skills by increasing curriculum based vocabulary and sequencing pictures to relate a story, with no mastery criteria. The goal of improving intelligibility of speech is vague and non measurable. (R1-42). Many of the goals are continued from the previous year. (R1-45-46) Despite significant articulation deficits, the student's articulations goals were discontinued at the March 5, 2009 ARD Meeting, although not mastered. (R1-44-48)

20. There was conflicting testimony as to whether or not speech therapy was provided to the student after April 9, 2009. I find that the testimony of the speech therapist that she provided speech therapy after this date is credible and that speech therapy services were provided, although the dates and times would vary. However, the goals were vague and not measurable.

21. At the parent's request, another ARD committee meeting was held on April 8, 2009. (R-2). At this ARD, the parent was accompanied by an advocate and requested additional evaluations. She also objected to the previously agreed upon placement of *** and ***. The ARD Committee agreed to conduct an FIE, including Occupational and Assistive Technology evaluations. The school district members of the ARD Committee did not agree with the parent to return the student to a general education placement for *** and ***.

22. At the ARD meeting, the mother also complained that the counselor was not a special

education counselor. Following the April 8 ARD, an LSSP began to attend the ARD meetings to provide input into the student's counseling goals. (R3, 4, 5 and 6). The March 5, 2009 IEP included 60 minutes, one time per month direct counseling services. (R3) There was no evidence that these counseling service were not provided at all. It is reasonable to conclude from the evidence that the counselor was not a special education counselor. Additionally, the Independent Evaluator found the counseling services proposed to be inadequate and recommended that counseling be provided with increased frequency. (R16)

23. The ARD Committee agreed that the student would participate in ESY during the summer of 2009. (R1) However, the ARD Committee failed to develop an IEP for ESY and according to the mother, the services were provided sporadically. (R-1)

24. On June 23, 2009, the ARD Committee reconvened to review the student's FIE. The Petitioner attended the ARD meeting with counsel and notified the District of her intent to place the student at the *** School at public expense. (R3)

25. The parent disagreed with the FIE and requested an IEE at public expense as well as an independent FBA. The District agreed to both IEE's, which were conducted over the summer by Dr. *** and a behavioral specialist who conducted an independent FBA. (R3)

26. Dr. *** completed her evaluation on October 5, 2009. Dr. *** was denied access to the student in the private placement. (R16-00310).

27. Dr. *** reviewed historical as well as recent testing, and conducted additional testing. She concluded that the student met the eligibility criteria for *** as well as ***, and found further that student has a severe communication disorder affecting language comprehension and expression, as well as pragmatics. She also found that student has severe deficits in speech intelligibility and in processing connected speech and formulating and organizing verbal responses and recommended speech therapy to address student's deficits in these areas. (R16-00322). I find, based on a preponderance of the credible evidence, that speech therapy is an essential component of the student's IEP.

28. Teacher reports to Dr. *** regarding the student's behavior were inconsistent and variable, as was the testimony at the hearing. They reported that student did not do well academically in the general education setting, was frequently out of the general education classroom due to aggressive behavior, and some reported expectations that were unrealistic, such as noting that student could not take notes or interact with others in class. (R16-00313). The *** teacher also admitted to the evaluator that the student's *** did student's work for student because the student could understand the basic concepts in student's class. (3-121) Teachers reported that when the student engaged in aggressive and/or ritualistic behaviors, student was removed to the hallway for 5 minutes, and if that was not successful, student was removed to the Life Skills class where student would engage in self-stimulatory behaviors. Dr. *** also found based on her interviews that the teachers did not understand how to help the student initiate interactions with other students. (R16-00315). The staff reported to Dr. *** that the most appropriate placement for the student would be a life skills class to focus on vocational skills and community based instruction. (R16-00315).

29. The student's *** teacher reported that while her resource class worked on a *** grade

level, the student was not able to do work above a *** grade level and needed assistance with all tasks. (R16-00316)

30. The *** teacher reported that his major concern about the student was that student could not stay in one place and pay attention and was disruptive. The student was removed from the class when student did not meet expectations that were demanded of student. (R16-00317).

31. Dr. *** noted that the school staff had not implemented preventative strategies with the student, such as social stories, visuals and adapted (rather than shortened) work tasks. She also noted the lack of interventions in place to teach the student appropriate behaviors to gain peer attention rather than reaction to negative attempts to gain attention.³ (RR16-00323)

32. Dr. *** recommended that the student's academic needs for core subjects would best be met within a resource class setting, with the material being further individualized for student's needs. She further recommended an alternative elective class in a general education setting. She recommended that the student be able to dictate response to written activities and that the recommendations from the Assistive Technology assessment be implemented. (R16-00324)

33. Dr. *** found the student's BIP had not been implemented properly and that staff primarily reacted to the student's behaviors rather than engaging in preventative measures. (RR16-00324)

34. Dr. *** recommended speech therapy as an integral component of the student's educational program.

35. The independent behavior specialist that conducted an independent FBA concurred with the FBA and BIP. (RR15-00304; T3-105, 112)

36. On October 30, 2009, the ARD Committee, including the parent and parent's attorney met to review the independent evaluations and the assistive technology assessment. Dr. *** and the independent behavior specialist participated in the ARD meeting. The ARD recessed for the revision of the IEP goals and objectives, however the parent and attorney did not attend the reconvened ARD meeting on November 11, 2009, and requested mediation instead. The District provided notice to the parent that the ARD Committee would proceed as scheduled. R5-6) Dr. *** participated by phone and the minutes reflect that Dr. *** approved the speech goals and the independent behavior specialist approved the social skills goals. (R5-205-207) The evidence shows that speech services were increased to 45 minutes per week and counseling services to 30 minutes per week. (R5-177-178). The remaining academic goals and objectives were developed in a collaborative manner with the consensus of all ARD Committee members and with the input of Dr. ***. The *** was completed, with an agreement that an in-home needs assessment would be completed when the parent re-enrolled the student in the school. (R5-208). IEP goals for speech, social skills, reading, math, science and social studies were approved by the ARD Committee, are measurable, and in language that is more easily understood than the March 2009 IEP. (In fact, the minutes reflect that the District was requested by its attorney to use "normal

³ The majority of the acts and omissions of the school personnel occurred outside the limitations period as the IEP in questions was developed toward the end of the school year. Any denial of FAPE resulting from this acts is not remediable.

language” in the development of the IEP, without reliance solely on numerical code descriptors.) (RR5-203) Additionally, the ARD Committee appears to have followed Dr. ***’s input with regard to measurability. The ARD Committee also adopted a plan for assistive technology trials.

37. The District notified the parent of its proposed IEP on November 30, 2009. (R5-210)

38. I find based on a preponderance of the credible evidence that the November 11, 2010 IEP developed for the student is appropriate.

39. The parent failed to meet her burden with regard to proof that the District denied the student a full instructional day and appropriate Occupational Therapy Services.

40. The Director of student’s private placement testified that the student functions in the *** range, consistent with a student with an IQ between *** and ***. The director’s assessment of the student’s cognitive abilities is consistent with prior testing conducted by the District as well as the independent evaluator selected by the parent. (R16, R12, R31)

41. The Director testified that the student currently functions on a *** to *** level. (R31-00523) This is consistent with the testing and conclusions of the private evaluator selected by the parent as well as the District’s testing. (R16, R12)

42. The student has significant speech deficits and requires speech therapy to access student’s education. (R-16) The student uses sentences of 3-4 words, has poor articulation, and frequently unintelligible speech. (R-16; T1-146; T3-79)

43. The student has received no speech therapy or counseling while at the *** School. (R31-00525) The school offers no related services.

43. The Director of the *** School testified that the student would not benefit from participating in regular education classes for electives, such as *** and ***. R31-82-83. The Director testified that the student cannot receive an educational benefit from a general education placement for core academics. (R-31-82). This is consistent with Dr. ***’s report that the student should receive instruction in core academic areas in a resource class setting (R16), but inconsistent with her recommendation that student receive access to non-disabled peers through elective classes. I find based on the credible evidence that the student’s placement in the general education setting for core academic subjects was not appropriate for the student. I further find that the District’s proposal to move the student to the special education setting for all core academic subjects is appropriate, with electives in the general education setting also being appropriate, and providing the student an opportunity to participate with non-disabled peers.

38. The Director of the *** school recommends a more restrictive setting for the student such as a therapeutic day school or residential facility. (R31-86; T1-124)

39. The student’s behavior deteriorated during the year student was at the *** School. The student ***, was physically aggressive with students and staff, would leave student’s assigned area, ***, and was off-task. (R31-33-34, 53-55) However, by the end of the school year the *** had reduced.

(R31-56) The student continues to be aggressive and student's behavioral goals have not been mastered. The school has been hesitant to allow the student to return to their campus for the 2010-2011 school year. However, the Director has agreed to do so provided that the parent provides for an additional ***. (T1-122)

40. There are *** students who attend *** School, and *** of these students are non-disabled. (R31-13) The school is arranged such that the student is in an area in which 5 students are separated by a partition from upper school students. A teacher's desk is placed between the student and the remaining 4 students in student's area to isolate student from the others. (R31-46; R31A) The *** School's proposal for the 2010-2011 school year would further isolate the student. I find that the student's program at the *** School is a more restrictive environment than EISD and further find that it is not the least restrictive environment for student.

DISCUSSION

Did the District Fail to Develop and Provide an Appropriate BIP and IEP

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 (5th 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" but that it enables to 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 (5th Cir. 2000).

1. Procedural Sufficiency

IDEIA establishes certain procedural requirements in formulating and implementing a child's IEP. Procedural flaws do not automatically require a finding of a denial of a free appropriate public education. However, procedural inadequacies that impede the child's right to a FAPE, result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the development of the IEP result in the denial of a free appropriate public education." 20 USC 1415 (f)(3)(E); *Adam J. v. Keller ISD*, 328 F. 3d 804 (5th Cir. 2003). In this case, the District committed several procedural errors that resulted in a loss of educational benefit to the child and seriously infringed upon the parent's opportunity to participate in the development of the IEP.

A. IEP Goals

March 5, 2009 IEP

IDEIA requires an IEP to contain a statement of measurable annual goals, including academic and functional goals designed to (a) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (b) meet each of the child's other educational needs that result from the child's disability. 34 CFR § 300.320. In this case, the IEP developed on March 5, 2009, is not measurable, and many of IEP goals were scheduled to extend more than one school year.

For example the Speech goals adopted on March 5, 2009 involve the student demonstrating progress toward the acquisition of developmentally appropriate pragmatic skills, with specific objectives. Two of the objectives are not measurable and are vague in that they require the student to generally express emotions through verbalization and appropriately request permission. There is no mastery criterion for either objective and the objectives are vague with regard to which emotions the student is to verbalize, under what circumstances student is to verbalize the emotions and the circumstances in which student should ask for permission and the manner in which student is to do so. (R1-40) The semantic language goal appears to be a goal carried over from 2007, with objectives for defining and describing items from categories and actions, without any mastery criteria. (R1-41) The IEP also has the goal of demonstrating progress toward the acquisition of developmentally appropriate academic skills by increasing curriculum based vocabulary and sequencing pictures to relate a story, with no mastery criteria and no statement of what is developmentally appropriate for the student. The goal of improving intelligibility of speech is vague and non measurable. (R1-42). Many of the goals are continued from the previous year. (R1-45-46)

Similar issues exist with the reading, language arts, math, science, behavior and social studies goals. The reading goals are not measurable, are vague, and extend only through the end of the 2008-2009 school year, even though they were prepared as part of an annual ARD. However, many other goals, in addition to not being measurable, have a beginning date of October 2008, and are scheduled to continue through March 2010, almost an 18 month period of time in violation of IDEIA's requirement that the IEP contain *annual goals*. (See R1-86-88; R1-75).

Additionally, the IEP as a whole is unintelligible. Although some errors are excusable as typographical in nature (e.g., a start date of 2007 which should in fact be 2009), it is apparent that many of the problems with the development and drafting of the IEP, and with the parent's understanding of it, have to do with the school's use of a software program that is tied to numerical codes based on the Texas Essential Knowledge Skills (TEKS), with goals and services designated by numerical codes for which even the hearing officer required explanation, and for which there is no plain English translation. (T3162-169, 205-215) The District was so tied to the use of its software program that it pre-checked "agree" for all participants in advance of the ARD meeting so the forms would be substantially complete before the ARD Committee began to collaborate. (R3-171) Not only is this process non-collaborative, it is confusing to the reader, including this hearing officer and the parent. Additionally, in many instances, it is impossible to distinguish between the progress reports for previously implemented goals and objectives and the proposed goals and objectives. A procedurally sufficient IEP should be drafted in such a manner that it is understandable to the parent and the educators who will be working with the child. When a school is so tied to the use of a software program, including the use of numerical code-driven descriptors, then the individualization of the student's educational program is questionable, and

the parent's ability to be a meaningful participant in the development of the IEP is infringed. This results in a denial of a FAPE. 34 C.F.R. § 300.513(a)(2)(ii).

November 11, 2010 IEP

The parent has failed to meet her burden with regard to the November 11, 2010 IEP. The parent has neither alleged nor proven procedural violations in connection with the November 11, 2010 IEP that rise to the level of a denial of a FAPE. Petitioner does not prevail on this issue.

2. Substantive Sufficiency

March 5, 2009 IEP – 4 Factor Test

In evaluating whether an educational program is reasonably calculated to confer an educational benefit, the Fifth Circuit Court of Appeals has identified four factors to consider:

1. Is the program individualized on the basis of the student's assessment and performance?
2. Is the program administered in the least restrictive environment?
3. Are the services provided in a coordinated and collaborative manner by the key stakeholders?
4. Are positive academic and nonacademic benefits demonstrated?

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3rd 245 (5th Cir 1997); cert. denied, 522 U.S. 1047 (1998).

In applying the relevant factors to the facts of this case, I find that the student's educational program developed on March 5, 2009 was not calculated to and did not provide a meaningful educational benefit. The district's educational program is entitled to a legal presumption of appropriateness. Petitioner bears the burden of proving that it is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). Petitioner has met this burden. The IEP goals developed at the March 5, 2009 ARD meeting were not measurable and did not reflect the student's individualized need for instruction based on student's assessment and performance at a *** grade to *** grade level.

The March 5, 2009 IEP and the services provided the student were not coordinated in a collaborative manner by the key stakeholders. Dr. ***'s interviews with school personnel reflected a basic lack of understanding of the student's disability. For example, the aide believed an appropriate intervention to the student's behavior was to have student write "I will not get out of my seat" sentences. The *** teacher commented that the student was not able to take notes, and therefore could not be successful in his classroom, indicating a lack of understanding of student's disability. None of the staff expressed an understanding of the need to be proactive in preventing the student's problem behaviors, but rather reacted to them. Additionally, all staff reported that the student was not able to interact with non-disabled peers, and therefore should not be in the mainstream setting, but did not seem to understand the need to be proactive in promoting the interaction and assisting the student in engaging with other students. (R16) A valid FBA was completed by the school's behavior specialist, and an appropriate BIP was developed, but the staff did not appear to understand how to implement it. The student's services were not provided in a coordinated and collaborative manner.

Additionally, as discussed above, the manner in which the development of the IEP and the school's reliance on its software program resulted in an unintelligible IEP infringed upon the parent's ability to meaningfully participate in its development is evidence of the lack of a collaborative and coordinated effort to develop an meaningful IEP for the student.

Is the program administered in the least restrictive environment?

Both the proposed March 5, 2009 and November 11, 2009 IEPs provided for services being delivered in the least restrictive environment for the student. The student is entitled to be educated with nondisabled peers to the maximum extent appropriate. *Daniel R.R. v. State Board of Educ.*, 874 F.2d 1036 (5th Cir. 1989). In evaluating whether Respondent proposed to educate the student with nondisabled peers to the maximum extent appropriate, there are two inquiries which must be made. The first question is whether education in the regular education classroom, with supplementary aids and services, can be achieved satisfactorily. If not, then we must evaluate whether Respondent has mainstreamed (or proposes to mainstream) the student to the maximum extent appropriate, taking into consideration student's particular disability and its manifestations.

The testimony from all sources is very clear that the student's core academic needs cannot be met in the general education classroom. The parent's experts agreed with this premise. The District made more than a mere token effort, and attempted to mainstream the student for *** and ***, unsuccessfully, resulting in the aide actually doing the student's work for student and intervening inappropriately to behaviors. The proposal to provide instruction in all core academic areas in the resource class was appropriate. There was also testimony that the student's aggressive and disruptive behaviors were such that they could present detrimental effects on the student as well as others in the classroom. The student will have access to non-disabled peers through electives, such as *** or *** and other school activities in a general education setting. The student will also be able to attend school in student's home community, a factor weighing in favor of the district's proposed IEP. By contrast, at the *** School, the campus is comprised of *** students, *** of whom are disabled, and is located in ***, Texas, outside the boundaries of Ennis ISD. Within the partitioned area in which student receives instruction, the student is further isolated from the other five students by the teacher placing a desk between the student and remaining students. Moreover, the school will only allow the student to return next year if *** within this environment. The *** School is not the least restrictive environment for the student.

November 11, 2010 IEP

The parent has failed to meet her burden with regard to the November 11, 2010 IEP. The parent specifically failed to prove that the student's November 11, 2010 IEP was substantively insufficient or inappropriate.

3. *Private Placement Reimbursement*

The parent has requested reimbursement for private placement at *** School. In order to receive reimbursement for the unilateral private placement of a child with a disability, the parent must prove (1) the public school's IEP is not appropriate under IDEA; and (ii) the private placement was appropriate.

Sch. Comm. Of Burlington v. Dept. of Educ. Of Mass, 471 U.S. 359, 370 (1985); *Richardson Ind. Sch. Dist. V. Michael Z.*, 580 F.3d 286, 293 (5th Cir. 2009). Although the private placement need not meet all state education standards for public schools, it must nonetheless be appropriate in light of the student's needs. *Florence County School District Four v. Shannon Carter bnf Emory Carter*, 510 U.S. 7, 13 (1993).

As the only period in which reimbursement is an option is from the date of enrollment (August 31, 2009 (R27)) through the date of the November 11, 2009 ARD, when the appropriate IEP was developed, the student's academic progress when measured over the entirety of the year is not as persuasive of a factor in determining whether the placement was appropriate. The student's behavior deteriorated very soon upon enrollment at the *** School, for reasons that are not necessarily the fault of the school. However, the student failed to master student's behavioral goals and aggression continued to be a problem behavior at the time of the hearing. The student was isolated within the disabled student body to control student's behaviors (although some appropriate interventions such as social stories were utilized). The student has a significant language and articulation disorder and received no speech therapy. Additionally, although the parent complains that the district failed to provide appropriate related services, the *** School provided no related services. Finally, the Director of the school testified that he believe the student required a more restrictive environment, such as residential placement, a placement not contemplated by Dr. *** and the other ARD Committee members in developing the student's IEP. The District will only allow the student to return for the 2010-2011 school year if ***. This is evidence that the placement as it existed was not appropriate and was not considered appropriate by *** personnel. The student is not entitled to reimbursement for the private placement.

4. Relief

Although Petitioner requested reimbursement and prospective private placement, I am not bound by the nature of the relief requested by the parent. Rather, I am bound by guidance from the record regarding what the student needs now to obtain a FAPE. See *J.K. v. Clear Creek Indep. School District*, Docket No. 085-SE-1104 (February 2005); *Alamo Heights Indep. School Dist. Vs.. State Board of Education*, 709 F.2d 1153 (5th Cir. 1986) Relief under IDEIA is equitable in nature and prospective relief is an appropriate device to remedy substantive violations. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). IDEA requires that relief be designed to ensure that the student is appropriately educated within the meaning of IDEA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9th Cir. 1994).

In this case, the appropriate relief should center around services for the student to enable the student to transition back to the Ennis ISD, should the parent so choose. The violations of IDEIA in this case centered on a lack of understanding of the nature of the student's disability and the manner in which to appropriately intervene with the student. Therefore, I am ordering the following relief:

A. The District shall engage the services of *** to assist the ARD Committee in the development of an appropriate IEP for the student's return to Ennis ISD. As it has been more than a year since the District or Dr. *** have seen the student, the ARD Committee should review existing evaluation data to determine if further assessment is needed, document that need, and conduct the assessments as appropriate. Additionally, the ARD Committee should review the student's current levels of performance at *** School and make any appropriate modifications to the IEP. The ARD

Committee should also collaborate with staff from the *** School to develop the student's IEP.

B. The District shall engage the services of *** to train all staff who will work with the student, with the training to be completed no later than 30 days following the student's re-enrollment in EISD. In the event, *** is not available to conduct the training during that time frame, the District shall provide documentation to the parent of this fact, provide training through its *** specialist, and then provide additional training with Dr. *** at her earliest availability.

C. Any Order herein that the District shall work with the *** School to transition the student back to EISD shall not be deemed to be a finding that the *** School is appropriate.

D. Upon completion of the IEP and training of District staff, the District's *** specialist shall provide consulting services deemed appropriate by the ARD Committee in consultation with Dr. *** and the ARD Committee.

E. The District, in consult with *** and its *** specialist shall provide notice of its intent to conduct a parent-training and in-home training assessment within 10 days of the student's return to EISD, and thereafter, provide services as recommended by the assessment.

F. Upon completion of the development of the IEP, the ARD Committee meeting implementing same, the staff training and in-home and parent-training assessments, all future consulting services with regard to the student's disability and behavior may be completed by the District's autism consultant.

CONCLUSIONS OF LAW

1. The student currently resides within the geographical boundaries of Ennis ISD, a legally constituted independent school district within the State of Texas, and is entitled to special education services pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. §1400, et seq., as amended.

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 (5th 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 (5th Cir. 2000). *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). Petitioner has met that burden with regard to the March 5, 2009 IEP and the provision of a FAPE for the remainder of the 2008-2009 school year. However, Petitioner has failed to meet that burden with regard to the IEP developed at the November 11, 2009 ARD Committee meeting.

3. Petitioner is not entitled to reimbursement for student's placement at the *** School. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985); nor is student entitled to prospective private placement at the *** School. The placement at *** School is not appropriate.

4. Petitioner is entitled to prospective relief. Although, the parent has requested prospective relief in the form of placement at *** School, IDEIA requires that relief be designed to

ensure that the student is appropriately educated within the meaning of IDEIA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9th Cir. 1994).

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, I hereby **ORDER** that the request for private placement reimbursement and prospective private placement is **DENIED**. However, I grant the relief set forth above and order as follows:

1. The District shall engage the services of *** to assist the ARD Committee in the development of an appropriate IEP for the student's return to Ennis ISD. As it has been more than a year since the District or Dr. *** have seen the student, the ARD Committee should review existing evaluation data to determine if further assessment is needed, document that need, and conduct the assessments as appropriate. Additionally, the ARD Committee should review the student's current levels of performance at *** School and make any appropriate modifications to the IEP. The ARD Committee should also collaborate with staff from the *** School to develop the student's IEP.

2. The District shall engage the services of *** to train all staff who will work with the student, with the training to be completed no later than 30 days following the student's re-enrollment in EISD. In the event, *** is not available to conduct the training during that time frame, the District shall provide documentation to the parent of this fact, provide training through its *** specialist, and then provide additional training with Dr. *** at her earliest availability.

3. Any Order herein that the District shall work with the *** School to transition the student back to EISD shall not be deemed to be a finding that the *** School is appropriate.

4. Upon completion of the IEP and training of District staff, the District's *** specialist shall provide consulting services deemed appropriate by the ARD Committee in consultation with Dr. *** and the ARD Committee.

5. The District, in consult with *** and its *** specialist shall provide notice of its intent to conduct a parent-training and in-home training assessment within 10 days of the student's return to EISD, and thereafter, provide services as recommended by the assessment.

6. Upon completion of the development of the IEP, the ARD Committee meeting implementing same, the staff training and in-home and parent-training assessments, all future consulting services with regard to the student's disability and behavior may be completed by the District's autism consultant.

7. The terms regarding the relief granted herein are contingent upon the parent re-enrolling the student in EISD.

8. The ARDC shall meet within ten (10) days of receipt of this decision to begin implementation of the relief ordered herein.

All other relief not specifically granted herein is hereby **DENIED**.

NOTICE TO THE PARTIES

This Decision is final and is appealable to state or federal district court.

The District shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(p). The following must be provided to the Division of IDEA Coordination at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating that the Decision has been implemented; or 2.) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

SIGNED this 28th day of July, 2010.

Sharon M. Ramage
Special Education Hearing Officer

SYNOPSIS

Issue: Whether the District's March 5, 2009 IEP and program were inappropriate and denied the student a FAPE?

Held: For the Parent. The IEP did not contain measurable annual goals or goals for ESY and was developed in a manner that impeded the parent's right to meaningful participation. Additionally, the District failed to implement the student's BIP.

Citation: 34 CFR § 300.320(a)(2); 34 CFR § 300.322; §300.324(a)(2)(i)

Issue: Whether the District's proposed November 2009 IEP and proposed program were inappropriate?

Held: For the District. The IEP contained measurable annual goals, was appropriate to meet the student's unique needs and was developed collaboratively following the assessment of the student.

Citation: 34 CFR § 300.320(a)(2); 34 CFR § 300.322; §300.324(a)(2)(i)

Issue: Whether the student's placement in a special education setting for *** and *** was the least restrictive environment for the student?

Held: For the District. The student's academic needs could not be met in the general education setting. The placement was the least restrictive environment appropriate for the student.

Citation: 34 CFR § 300.114(2)(i)

Issue: Whether the parent is entitled to reimbursement for the unilateral private placement of the student at the *** School and prospective private placement.

Held: For the District. The private placement was not appropriate.

Citation: 34 CFR §300.148 (c).