

STUDENT b/n/f/ PARENTS <i>Petitioner and Counter Respondent</i>	§ § § § § §	BEFORE A SPECIAL EDUCATION HEARING OFFICER FOR THE STATE OF TEXAS
BEAUMONT ISD <i>Respondent &amp; Counter Petitioner</i>	§ §	

**FINAL DECISION OF THE HEARING OFFICER**

**STATEMENT OF THE CASE**

Petitioner/Counter Respondent, Student \*\*\* and student's next friend and parents, \*\*\* and \*\*\* (hereinafter referred to collectively as Petitioner and individually as Student or Mother, Father, or Parents), bring this action against Respondent/Counter Petitioner Beaumont Independent School District (hereinafter referred to as Respondent, the District, or BISD) under the Individuals With Disabilities Education Improvement Act, as amended, 20 U.S.C. §1401 et. seq. (IDEA) and its implementing state and federal regulations. This action was filed on April 24, 2013. The statutory limitations period begins on April 24, 2012.

The issues raised by Petitioner in this proceeding are as follows:

1. Whether Respondent failed to devise and offer an appropriate and timely IEP to Student for the time period beginning in May 2013 forward;
2. Whether Petitioner is entitled to reimbursement for Dr. \*\*\* independent psychological evaluation of September 2013 and to a prospective independent Functional Behavior Analysis at public expense; and
3. Whether Respondent committed the following procedural errors in violation of IDEA:
  - a. Failure to provide Prior Written Notice in accordance with IDEA; and
  - b. Failure to provide Parents with accurate information regarding Respondent's obligations to serve Student during student's placement at \*\*\*.

For relief, Petitioner seeks continued placement of Student at \*\*\* for one year following the date of the decision rendered in this cause, reimbursement for Dr. \*\*\* independent psychological evaluation of September 2013, and a prospective independent Functional Behavior Analysis at public expense. Petitioner further seeks any other relief deemed appropriate by the Hearing Officer.

The issues raised by Respondent in this proceeding are as follows:

Respondent alleges that Petitioner is not entitled to a multi-disciplinary IEE at public expense on the following grounds: 1) Respondent's evaluations are appropriate in accordance with IDEA such that Petitioner is not entitled to an IEE; 2) Petitioner's request for IEE is time barred by the one-year statute of limitations applicable

to claims in Texas; and, in the alternative, 3) Petitioner's request for IEE is not ripe because the District has the right to reevaluate Student prior to providing Petitioner with an IEE.

For relief, Respondent seeks a denial of Petitioner's claim for a multi-disciplinary IEE at public expense.

### **PROCEDURAL HISTORY**

Petitioner filed the instant request for due process on April 24, 2013. Dorene Philpot, Attorney at Law, and Yvonnilda Muniz, Attorney at Law represent Petitioner in this proceeding. Heather Rutland, Attorney at Law, and Abraham Barker, Attorney at Law represent Respondent.

The parties met in a resolution session on May 9, 2013, but did not reach resolution of the issues in dispute.

Respondent filed its counter-request for due process on May 29, 2013, asserting the appropriateness of its educational evaluations in response to Petitioner's request for IEEs. Also, on May 29, 2013, Respondent filed a Motion To Override Lack Of Parental Consent.

A pre-hearing conference was held on May 31, 2013. An Order Following Pre-Hearing Conference was entered on May 31, 2013 outlining the issues in dispute and dismissing all claims arising outside of IDEA, including Petitioner's claims for attorney fees, costs, and expert witness fees for want of jurisdiction. The Order further extended the decision due date to October 25, 2013 for good cause at the request of both parties. The parties' request for a lengthy extension was granted, in part, to allow the parties to complete the requested assessments in advance of the due process hearing.

On June 19, 2013, I issued an Interim Order Granting Respondent's Motion To Override Lack Of Parental Consent and authorized Respondent to conduct the requested evaluations of Petitioner in advance of the due process hearing scheduled for September 2013. The Interim Order specifically informed the parties as follows: "In order for this Hearing Officer to consider the validity of any proposed new IEP for Student following the completion of the assessments ordered herein, the parties will need to return to ARD to consider the results of those assessments and any IEEs obtained by Petitioner. Should a disagreement arise at the ARDC on any aspect of the proposed placement or IEP for Student, the parties may amend the request for due process to include the issue(s) for consideration."

On August 22, 2013, Petitioner filed a Motion To Reconsider Order On Motion To Override Lack of Consent. After due consideration of Petitioner's motion and Respondent's response, I entered an Order Denying Petitioner's Motion To Reconsider on August 29, 2013 and again authorized Respondent to proceed with evaluation of Student in the requested areas.

I requested a status report from the parties on September 4, 2013 concerning Respondent's evaluations and whether any new issues had been identified as a result of the evaluations or a proposed placement. Petitioner replied "there is nothing new to report." Respondent did not file a status report.

The hearing took place on September 24-26, 2013 at the administrative offices of BISD. At the conclusion of the due process hearing, by joint request of the parties, I granted leave to file closing briefs and entered an Order Granting Joint Request To Extend Decision Due Date For Filing Post-Hearing Briefs, setting the due date for briefs as November 8, 2013 and the decision due date as December 12, 2013.

On November 5, 2013, Petitioner requested an extension of the decision due date to allow additional time to file post-hearing briefs due to counsel's unexpected call to jury duty. Respondent did not object. I found good

cause to grant Petitioner's request and extended the due date for briefs to November 15, 2013 and for the decision to December 16, 2013.

This decision is timely issued and forwarded to the parties on December 16, 2013.

### **FINDINGS OF FACT**

Based on a review of the testimonial and documentary evidence submitted in this cause, I find the following facts to be established based on the weight of the credible evidence.

1. At the time of this proceeding, and at all relevant times to this action, Student has been a resident of BISD, a political subdivision of the State of Texas and a duly incorporated school district.
2. Student is currently \*\*\* years old and in \*\*\* grade. Student is eligible for special education services under IDEA based on the eligibility categories of Autism, Intellectual Disability, and Speech Impairment. (Petitioner Exhibit 19; Respondent Exhibit 13; hereinafter cited at P19 or R13). (Many of the exhibits were submitted by both Petitioner and Respondent for consideration; only one version of the exhibit will be cited to in these Findings of Facts).
3. Respondent BISD is Student's resident district and is responsible for providing student with a free appropriate public education under the IDEA.

### **Background To The Current Dispute**

4. The parties have a long and contentious history of litigation concerning BISD's ability to serve Student, including four due process hearings.
5. Student has been attending \*\*\* continuously since June 2006 shortly after student turned \*\*\* years old. (T.739-740). \*\*\* is a private center-based Applied Behavior Analysis (ABA) program located in \*\*\*. (T. 739).
6. Student attended BISD in summer 2010 for Extended School Year (ESY) services to attempt education of Student at BISD. (T.740-741, 742). Student attended BISD for four days per week during ESY and attended \*\*\* on the one day per week when ESY was not available at BISD. Student remained in ESY at BISD for approximately \*\*\* weeks or \*\*\* days when Mother removed student and returned to \*\*\* full-time because Student began crying and exhibiting aggressive behavior, which student had not previously done. (T.741-742).
7. Student's family initiated due process in August 2010 against BISD, seeking placement at \*\*\* at District expense. The parties entered into a settlement agreement in October 2010, which provided that Student would remain at \*\*\* at District expense until \*\*\* 2011 when a transition period would begin on a one day per week basis until \*\*\* 2011, at which time Student would return full-time to BISD. (T.743-746, 769; P25).
8. Pursuant to the settlement agreement, Student began to attend BISD at the \*\*\* at \*\*\* for one day per week beginning in \*\*\* 2011 and attended \*\*\* for the remaining four days per week. After approximately eight weeks, Mother notified BISD on \*\*\*, 2011 that she was removing Student from student's one day per week program at BISD and returning student full-time to \*\*\*. (T.684, 743-44, 749; R20-445). Mother removed Student because student deteriorated over the course of student's

transition to BISD, such that student was not sleeping, began screaming and crying on a regular basis, and demonstrated behavioral problems at Shorkey after student's day at BISD. (T.746; P3-171-173).

9. Dr. \*\*\*, an independent evaluator who had previously evaluated Student in 2010, observed student during \*\*\* 2011 at both \*\*\* and BISD. Dr. \*\*\* concurred with Mother that Student's attendance at BISD during the 2011 transition period resulted in increased behavior problems that degraded Student's ability to function. Dr. \*\*\* concluded that the educational program at BISD was not sufficiently developed in terms of planning, staffing, resources, and training to provide Student with a meaningful educational benefit. (P3-173).
10. After returning Student to \*\*\*, the family again initiated due process in April 2011. The case settled in the middle of the hearing and a settlement agreement was executed on May \*\*\*, 2011, which provided that Student would attend \*\*\* at District expense from May \*\*\*, 2011 through May \*\*\*, 2013. (T. 684; P1).

### **The Current Dispute -- Prior To The Filing Of This Action**

11. The instant dispute, which was filed on April 24, 2013, arose as the parties anticipated and planned for the expiration of the May \*\*\*, 2011 settlement agreement on May \*\*\*, 2013.
12. In March 2013, Mother contacted BISD through \*\*\*, the District's Residential Facilities and Compliance Monitor, to schedule an Admission, Review, and Dismissal Committee meeting (hereinafter ARD) to discuss Student's placement after May \*\*\*, 2013. Mother indicated that she would like Student to remain at \*\*\* at District expense. (T.751).
13. In response to Mother's inquiry, \*\*\* asked Mother to re-enroll student in BISD and scheduled an ARD for April 9, 2013. (T.751; R13-187). Mother was surprised because she thought student had been continuously enrolled in BISD. (T.686-687).
14. In advance of the April 9, 2013 ARD, Mother asked \*\*\* to provide needed information to BISD (P24-234), which BISD received (T.273). In addition, Mother initiated a visit to the placements that BISD indicated were suitable for Student: \*\*\* at \*\*\* School where Student would be placed for the remainder for the 2012-2103 school year and three possible classrooms at \*\*\* School where Student would be placed for the 2013-2014 school year, two life-skills classrooms and one autism-oriented classroom. (T.803-805).
15. After visiting the proposed classrooms, Mother had concerns about their appropriateness for Student. She emailed \*\*\* on April 8, 2013 in advance of the ARD detailing her concerns so that they could be discussed at the upcoming meeting. She again expressed her desire for Student to continue at \*\*\* at District expense. (P17-23; T.689). BISD members of the ARD did not address these concerns or discuss the email at all at the ARD meeting. (T.689).
16. \*\*\*, the BISD diagnostician serving as Student's case manager, testified that she requested information from \*\*\* before the ARD so that BISD teachers could draft IEP goals and objectives for Student. BISD's intent was to mimic \*\*\* program until they could develop their own program.
17. In response to \*\*\* request, \*\*\* provided BISD with Student's IEP, detailed progress information from October 2012 forward, and progress notes from Speech and OT. (T.274).

18. According to \*\*\*, the data provided by \*\*\* was insufficient to draft an IEP for Student or allow BISD to mimic student's program. (T.219-222). BISD took no steps to obtain additional data from \*\*\* or visit \*\*\* in advance of the April 9, 2013 ARD. (T.309, 665, 690).

### **The April ARDs and BISD's Proposed Educational Program In April 2013**

19. Two ARD meetings convened in April 2013- April 9, 2013, which ended in disagreement, and a ten-day reconvene ARD on April 22, 2013. The ARD notice invited participants to an Annual ARD and indicated that the purpose of the meeting was to review Student's program and develop student's IEP. Staff from both BISD and \*\*\* attended, in addition to Student's Mother. (P19-2).

20. BISD had copies of Student's IEP from \*\*\*, with detailed progress information on student's goals and objectives. \*\*\* participants stated at the ARD that they had reams of additional data that BISD could review and copy. (T.753-754). BISD did not ask \*\*\* participants at the ARD to elaborate on their explanation of the available progress data or for other information concerning Student's program at \*\*\* or student's educational needs. (P28).

21. When the meeting convened, Mother requested that Student continue student's placement at \*\*\* rather than return to BISD. BISD participants expressed their need for updated assessment information to determine present levels of functioning, deficits, and needs, in order to develop an IEP for Student. BISD requested assessments in numerous areas and indicated they would complete the assessments within thirty school days and reconvene the ARD on or before May 21, 2013 to review the data and develop an IEP. (T.692-693; R13-187-203; P.19-6-7; P28).

22. Mother refused to provide consent for additional assessment, as she wanted to confer with her spouse. In addition, Mother expressed her confusion as to why additional assessments were needed given that the previous assessments were less than three years old and still valid. Finally, Mother objected to BISD waiting until mid-April to request assessments, having been aware since May 2011 that they needed to be prepared to serve Student at the end of May 2013. Mother was concerned by BISD's seeming lack of readiness to receive her child in light of the failed 2011 transition attempt. (P28; T.692-694).

23. During the ARD meeting, BISD repeatedly referred to the ARD as a Transfer ARD, stating that the District had thirty days to complete updated assessments and develop an IEP, including a transition plan from \*\*\* to BISD. (T.170, 651) BISD also stated that it could not have requested Student's updated assessments prior to the April ARD because Student was in a private placement and not enrolled in BISD. (P28; P19-6; T.666).

24. Regardless of Student's enrollment status at BISD, \*\*\* knew that Student resided in BISD, was placed at \*\*\* at District expense, and that the terms of the settlement expired in May 2013. \*\*\* took steps beginning in August 2012 to prepare for Student's transition back to BISD and knew that BISD was responsible for providing Student with a free appropriate public education as of May \*\*\*, 2013 whether at \*\*\*, BISD, or elsewhere. (T.614, 618, 621, 648-650).

25. During the time that BISD claims that Student was not enrolled, March \*\*\*, 2011 through March 2013, BISD staff accessed Student's special education file through the SuccessEd program twenty-three times. (T.252; P12-131-132).

26. Despite the ARD's stated need for updated information to develop an IEP for Student and the lack of a developed educational program for Student, BISD proposed that Student begin immediately

transitioning back from \*\*\* to the \*\*\* at \*\*\* School for three half-days per week. The ARD recommended a transition for three days per week because the prior transition in 2011 with one day per week was not successful. (T.279-280, 297).

27. The ARD did not discuss, develop, or propose an individualized plan to transition Student back to \*\*\* School. The ARD failed to address critical elements of Student's transition back to BISD, including how to collaborate with \*\*\* to best mimic their program, how to learn more about Student's present functioning and needs in order to serve student, what criteria to use to assess the success of Student's transition back to BISD, and how to prepare or plan for aspects of the transition that might be difficult for Student, such as greater noise levels, increased stimulation, and decreased structure.
28. BISD also proposed these additional components to Student's educational program: attendance at \*\*\* School in 2013-2104, but no instructional setting was described (P13-88; T.651), and a staff to student ratio of 3/5. BISD's daily schedule for Student reflected four periods of independent study. (P13-20). BISD did not make a specific proposal for ESY services, but stated that those services were to be determined based on the assessment results. (T.265-267).
29. The ARD paperwork notes that the ARD accepted the goals and objective from \*\*\* IEP until the new assessment data could be obtained; however, the goals and objectives were not discussed at the ARD and the committee as a whole did not make a decision to accept them. (P28; T691). Further, the goals and objectives were never adapted for use in BISD or incorporated into an IEP proposed by BISD. The \*\*\* IEP could not be implemented as written at the SLC because its implementation required 1:1 ABA therapy and ABA-based data collection practices which were not used at the \*\*\*.
30. Respondent's proposed offer of FAPE in April 2013 did not address the following necessary aspects of an educational program for Student: a daily schedule reflecting minimal unstructured time, \*\*\*, transition planning for the move from \*\*\* to \*\*\* School and from \*\*\* to \*\*\* School, Student's need for 1:1 instructional support and supervision, assistive technology, a behavioral token system and/or behavior intervention plan, related services, a plan for an ABA-based program based on data collection and analysis, and ESY services. (See, Findings of Fact Nos. 49-58).
31. The April 9, 2013 ARD ended in disagreement, as Mother refused to consent to updated assessments and disagreed that the proposed placement at \*\*\* School with a 3:5 staff to student ratio was appropriate.
32. On April 22, 2013, the ARD reconvened, but again ended in disagreement. Mother continued to object to the proposed placement and to deny consent for additional assessment, believing that adequate assessment data existed to develop a program, including reams of raw data from \*\*\* that were available to BISD. BISD continued to insist that additional assessment data was needed and to propose placement until that time at \*\*\* School with a ratio of 3:5.
33. Mother did not receive a complete copy of the ARD paperwork until approximately May 1, 2013. When she received the documentation from the ARD, it included items that had not been discussed at the ARDs, such as a completed autism supplement, a statement that the ARD had adopted \*\*\* IEP and daily schedule, and contradictory information about the start date for Student's proposed services, i.e. June 14, 2013 or August 26, 2013. (P12-118; T.320-322).
34. Following the April 22, 2013 ARD, BISD did not visit \*\*\* to review data concerning Student or contact \*\*\* to discuss Student's present levels of performance or educational needs.

35. The educational program proposed at the April 2013 ARDs is the last proposed program made by the District.
36. BISD had access to sufficient data from \*\*\*, Mother, and previous 2011 assessments in April 2013 to propose a more complete and appropriate educational program for Student. BISD had adequate data and information to address the following components of Student's educational plan even without updated assessment: a plan to transition Student back from \*\*\* to BISD, a plan to provide ABA therapy or methodologies to Student, a plan to collect and analyze data, designation of the frequency and extent of related services in the areas of OT and Speech, designation of the amount and type of ESY services for summer 2013, a daily schedule with minimal unstructured time, a behavior management plan or token system for use in Student's classroom at \*\*\*, and a plan for collaboration with \*\*\* to ensure consistency across settings as Student attended both programs during the transition period. While these components could be updated or revised based on subsequently obtained assessment data, BISD had adequate information or access to that information to address them in Student's proposed IEP in April 2013.

### **The Current Dispute – Subsequent To The Filing Of This Action**

37. On April 24, 2013, Petitioner filed the instant action, challenging the appropriateness of BISD's proposed educational program for Student and seeking independent evaluations at District expense. Petitioner continued to refuse consent for updated evaluations by BISD.
38. Mother testified that she requested independent evaluations in April 2013 because she had the right to do so, though Mother stated repeatedly at the April ARDs that she disputed the need for further evaluation of Student. (T.758; P28).
39. On May 29, 2013, Respondent filed a Motion to Override Lack of Parental Consent in this action to obtain its requested evaluations of Student. Petitioner objected, in part on the grounds that Respondent should not be allowed a "do over" of its proposed educational program offered at the April 2013 ARD meetings. (Respondent's Motion To Override Lack of Parental Consent, filed May 29, 2013; Petitioner's Response to Respondent's Motion To Override, filed June 7, 2013).
40. On June 10, 2013, I granted Respondent's Motion to Override Parental Consent, finding that Respondent's request for updated assessment data was essential to Respondent's legal obligation to provide Student with a free appropriate public education, and ordering Petitioner to make Student available for assessment as indicated in the order. (Interim Order Granting Respondent's Motion To Override Lack of Parental Consent To Evaluate issued June 19, 2013; hereinafter referred to as Interim Order).
41. The Interim Order directed the parties as follows: "In order for this Hearing Officer to consider the validity of any proposed new IEP for Student following the completion of the assessments ordered herein, the parties will need to return to ARD consider the results of those assessments and any IEEs obtained by Petitioner. Should a disagreement arise at the ARDC on any aspect of the proposed placement or IEP for Student, the parties may amend the request for due process to include the issue(s) for consideration." The Order further directed the parties to provide the Hearing Officer with a status report on the assessments and any additional issues for hearing by August 30, 2013. (Interim Order at p. 6).
42. On August 22, 2013, Petitioner filed a Motion to Reconsider Order On Motion To Override Lack of Parental Consent. Respondent filed a response on August 27, 2013 urging its right under the original

Interim Order to complete the assessments, but making no mention of any dispute or difficulty related to obtaining the assessments from Petitioner.

43. On August 29, 2013, I issued an Order Denying Petitioner's Motion To Reconsider and Modifying Interim Order To Clarify Relief Granted, hereinafter referred to as Modified Interim Order. In the Modified Interim Order, I clarified that Respondent was to provide Petitioner with Notice of Assessment consistent with 34 C.F.R. §§300.503 and 300.504 via service on Petitioner's counsel. I ordered the parties to provide a report on the status of the assessments and any additional issues for hearing by September 4, 2013.
44. I received a status report via email from Petitioner's counsel on September 4, 2013 indicating "there is nothing new to report." Respondent did not file a status report. (Correspondence file).
45. As of the date of the due process hearing in this matter, Respondent had not obtained the requested assessments of Student. Respondent contends that it provided legally sufficient notice to Petitioner, but that Petitioner continues to fail to cooperate and allow Student to be assessed. (T.575-576). Petitioner claims that Respondent has not provided proper notice because the District did not specify the particular assessment instruments it intended to use and how they would be used, provide a list of the evaluators and their qualifications, indicate whether and how the testing would impact Student's schedule at Shorkey, and a list of other concerns. (T.575-576, 709; P18-19).
46. The parties did not identify the dispute surrounding the updated assessment of Student – and whether Student has failed to provide the consent ordered by this Hearing Officer- as an issue for resolution in this proceeding in advance of the due process hearing. Further, the issue was not brought to the Hearing Officer's attention for action by way of an interim motion or request for relief prior to the hearing. The parties did, however, each submit evidence about the dispute over the Notice of Assessment and its legal sufficiency.

#### **Student's Claim For Independent Evaluations**

47. Petitioner seeks reimbursement for an independent psychological evaluation completed by Dr. \*\*\* in September 2013. (P26). Petitioner urges that this evaluation is requested in response to a psychological evaluation completed by BISD's \*\*\* in February 2011. (P12). According to Respondent, the ARD did not accept Dr. \*\*\* evaluation in 2011 and instead relied on Dr. \*\*\* 2010 assessment that was updated in 2011. (P3; P13-7-8; T.974-975).
48. Petitioner seeks an order for a prospective independent Functional Behavior Assessment (FBA). Petitioner urges that this evaluation is requested in response to an FBA completed by BISD and dated December 16, 2010. (T.789). Respondent disputes the authorship of the FBA or that it was completed by Respondent. (T.791-796)

#### **Student's Individualized Needs Based On Assessment And Performance**

49. Student demonstrates significant educational and developmental challenges in the areas of adaptive behavior skills, social-emotional skills, cognitive skills, sensorimotor skills, and speech and language skills that have been well-documented and described over time by both BISD and Student's private independent evaluation provider, Dr. \*\*\*. (R2; P3; P26).



50. Taken as a whole, Student's assessments indicate that student has marked impairment in the use of nonverbal communication; has failed to develop appropriate peer relationships; lacks spontaneous seeking to share enjoyment with others; and lacks social and emotional reciprocity. Student has a delay in the development of spoken language and a marked impairment in the ability to communicate. Student's adaptive behavior and IQ results indicate the presence of a moderate intellectual disability that impacts student's learning, educational performance, and level of independence. In the area of speech and communication, Student demonstrates difficulties in articulation and all areas of language, including critical thinking skills and the use of language for expressive purposes. (R2; P3; P26). Student's communication deficits are significant and pervasive. (T.507).
51. Dr. \*\*\*, an expert in autism, Applied Behavior Analysis (ABA), and assessment evaluated Student in 2010, 2011, and 2013. In the course of his evaluations, Dr. \*\*\* performed testing of Student, collected substantial information from both Student's parents and educators, and observed Student numerous times at both BISD and student's private placement at \*\*\*. (T.402, 405, 414-415; PP3, P26).
52. Dr. \*\*\* direct knowledge of and continuous involvement with Student, in addition to his subject matter expertise and credible testimony, render his opinions concerning Student's needs highly probative. Indeed, BISD relied on Dr. \*\*\* 2010 evaluation as its own psychological evaluation for purposes of eligibility and programming. (T. 312-313; R13-602; Respondent's Statement of Material Facts, #7).
53. Dr. \*\*\* has continuously indicated that Student's educational program must be individualized, data based, empirically supported, rely on 1:1 instruction for skill acquisition, have minimal unstructured time, minimize gaps of time in program breaks by providing extended year services, and be implemented by trained personnel. Dr. \*\*\* believes that Student's program must emphasize intensive behavioral intervention, with 20-40 hours of research based teaching strategies. He indicates that ABA is the most appropriate strategy for Student given student's particular level of functioning and needs. Dr. \*\*\* recommendations for Student's program have been consistent since 2010. (P3-18-19; P26-21-26; T.421-422, 441, 446, 448, 449, 468, 494, 524).
54. An effective ABA or behavior program for Student requires ongoing and systematic data collection and analysis, which requires a plan for collecting data, training and supervision of the implementation of the plan, and ongoing analysis of the data by a BCBA or person sufficiently trained in behavior analysis with subsequent modification of Student's program. (T.108, 421-422).
55. The research demonstrating the efficacy of behavioral learning theory is specifically about ABA therapy. An "eclectic approach" that combines different strategies is not the same as ABA therapy and is significantly less effective than ABA therapy that is provided by trained personnel in a systematic and analytical manner. (T.108, 420-422).
56. Student's current educational providers at \*\*\* substantially concur with Dr. \*\*\* recommendations. Student's current educators believe that Student requires 30-40 hours per week of ABA therapy year-round, on a 1:1 basis due to student's low level of functioning, student's inability to learn without 1:1 direct instruction, and student's need for 1:1 supervision to remain safe. (T.107-108, 340, 347-348, 350, 358).
57. Student's current educational providers at \*\*\*, Dr. \*\*\*, and Student's mother concur that a general education environment is not appropriate for Student at any time, as student cannot benefit from exposure to or inclusion with typically developing peers. (T.109, 350, 449, 716-717).

58. The only evidence presented at hearing concerning Student's current educational needs establishes conclusively that Student requires the following as necessary components of an educational plan that is reasonably calculated to provide student with educational benefit: intensive behavior intervention in the form of ABA therapy provided on a 1:1 basis for skill acquisition, detailed and systematic data collection throughout the day and across settings in accordance with a research-based instrument such as the ABLLS, ongoing supervision of the data collection and review of the data by a BCBA or appropriately trained behaviorist with consequent recommendations for program modifications, training for staff in ABA therapy, year round instruction, minimal unstructured time, appropriate related services, \*\*\*, and a detailed plan for transitioning from \*\*\* to BISD.

### **Appropriateness of BISD's Proposed Placements For Student**

59. BISD proposed that Student attend the \*\*\* at \*\*\* School (hereinafter \*\*\*) for the transition back to BISD in May 2013 until the end of the 2012-2013 school year. The \*\*\* is described as a class based on ABA interventions, data collection, and work on behavior skills. (P26-22). There is a staff to student ratio of 3:5 at the \*\*\*. (T.653). The teacher in Spring 2013 reported that she did not have access to a BCBA or use ABA therapy in the classroom, but had attended a lecture provided by BISD on ABA. (T.808, P26-22).

60. Dr. \*\*\* observed the \*\*\* for approximately one hour in September 2013. According to his observation, discrete trial training is not done in the \*\*\* classroom. He did not observe the use of ABA methodologies or a systematic behavior or token system. He observed the collection of some data, but no systematic plan to track the levels of independence or the numbers of prompts given, and no means of ongoing analysis of the data to revise a Student's program when needed. The data collected is thus limited in its usefulness to change behavior. (T.462-463, 523-527; P26-22-23). Dr. \*\*\* concluded that the \*\*\* program was less developed to meet Student's needs than it had been in February 2011 when student transitioned there before. (T.523-527, 541-542). Student's Mother concurs in Dr. \*\*\* conclusion. (T.772-773).

61. BISD's contract behavior analyst, \*\*\*, also observed the \*\*\* in Fall 2013. She observed "some components" of ABA such as picture schedules (T.889), but did not see behavior plans, data collection sheets, or observe ABA methodologies or discrete trial training. (T.895, 897-898).

62. \*\*\*, a consultant hired by BISD to provide classroom support and training in ABA to staff and students, testified that she provided training to \*\*\* staff in spring 2013, but her testimony did not comport with the teacher's remarks about her training from BISD. (T.911-912, 921-922, 924; P26-22). \*\*\* was not sure if ongoing data collection was a part of the program at \*\*\* (T.925) and she confirmed that discrete trial training or ABA therapy is not used at \*\*\*. (T.936).

63. Mother visited the \*\*\* in April 2013 and observed that students were not engaged in their class work and demonstrated maladaptive behavior without correction or redirection. (T.808).

64. Taken as a whole, the credible evidence establishes that the \*\*\* at \*\*\* School as presently constituted does not contain the elements needed to meet Student's identified individual needs. The staff to student ratio does not allow for the 1:1 instruction student needs to acquire new skills and remain safe. The lack of systematic data collection and analysis, coupled with a paucity of research-based teaching methodologies such as ABA, do not provide the type of setting needed for the implementation of Student's IEP and for Student to obtain meaningful educational benefit.

65. BISD proposed that Student attend \*\*\* School during the 2013/2014 school year, but did not identify an instructional setting. When Mother went to visit potential classrooms, BISD identified either the life skills or “autism unit” classrooms as possible appropriate placements for Student. \*\*\*, a freestanding educational arrangement affiliated with \*\*\*, was not identified as a possible placement to Mother before or during the ARD meetings. (T.464, 809).
66. Dr. \*\*\* observed the “autism class” or the ASD unit at \*\*\* and determined that it was clearly not appropriate for Student because of the high level of independent functioning required of the students within the class. (T.465; P26-22). BISD did not introduce evidence to counter Dr. \*\*\* opinion in this regard.
67. Dr. \*\*\* also testified that the life skills classroom at \*\*\* is not appropriate for Student because of the high level of noise and stimulation, relatively low level of structure, and because it requires self-management skills that Student does not possess. (P26-22; T.465-466; In addition, the teacher reported to Dr. \*\*\* that there were no behavior problems in the class and that she was not familiar with behavior intervention plans or ABA methodologies. (P26-22; T.465). BISD did not introduce evidence to counter Dr. \*\*\* opinion in this regard.
68. \*\*\*, though not proposed to Mother for consideration in spring 2013 prior to the expiration of Student’s placement at \*\*\*, has since been proposed by BISD as an appropriate placement for Student.
69. Dr. \*\*\* visited \*\*\* in September 2013 and described it as a setting oriented to students with significant intellectual and motor issues. (P26-22). The record reflects that students with autism are educated at \*\*\* and that the staff to student ratio is 1:1. (T.655; P26-22). Dr. \*\*\* did not observe the implementation of ABA methodologies to guide instruction or data collection. He did not observe visual systems or organizational systems in place to support increased self-management or independence. Dr. \*\*\* also noted a lack of familiarity by \*\*\* staff with ABA or autism spectrum disorders. (P26-22).
70. \*\*\* observed \*\*\* and the classrooms at \*\*\* School and talked with staff in those classrooms. She reviewed one student folder, but it was not set up with data. She concluded that the staff had “some basic knowledge” needed to serve students with autism and that they were “organized and motivated” to provide services. (T.895). \*\*\* testimony was not persuasive as to the current readiness of the staff at \*\*\* or \*\*\* to adequately serve Student.
71. Taken as a whole, the credible evidence establishes that the placements proposed at \*\*\* School for the 2013-2014 school year were not appropriate for Student and not designed to meet student’s individualized needs. \*\*\* was not timely proposed as a placement for Student and the evidence is not sufficient to evaluate its appropriateness.

### **Anticipated Educational Progress At BISD**

72. Student’s prior attempt to transition to BISD in 2011 to classrooms similar to those proposed by BISD in April 2013 was not successful in that student experienced documented regression in those settings.
73. BISD did not develop or propose a transition plan with sufficient detail or supports to reasonably anticipate that Student’s transition in May 2013 would be more successful than that attempted in 2011.

74. The classrooms proposed by BISD did not provide Student with the staff to student ratio, teaching methodologies, data collection and analysis practices, and trained staff student requires to obtain meaningful educational benefit.
75. The educational program proposed by BISD did not include 1:1 support for Student, a plan for ESY or related services, or a sufficiently developed ABA program. In light of the plan's failure to address these minimal areas of basic need, it is not reasonably calculated to enable Student to make meaningful educational progress at BISD.

### **Appropriateness of Student's Current Program At \*\*\***

76. Student has attended \*\*\* at BISD expense since May 2011. (P1). Student's program at \*\*\* consists of 1:1 ABA with discrete trial training in various settings and on various self-help, life, and academic skills throughout the school day. (T.117, 346, 499, 503-504). A token system is used for behavioral management. (T.333, 502). Progress is measured on Student's goals and objectives throughout the day via daily data collection. (T.334-336). Student's program is implemented by a special education teacher and a veteran aide under the supervision of a BCBA who provides 1-2 hours of supervision per 10 hours of therapy. This translates to approximately 6-8 hours of supervision per week. (T.97-98, 354).
77. Student's program at \*\*\* contains the essential elements described by Dr. \*\*\*needed to effectively educate Student. It is highly structured, provides 1:1 systematic instruction for 30-40 hours per week using ABA therapy with discrete trial training, detailed data collection and documentation of behavioral information including level of independence, and number of prompts provided in teaching a variety of skills across settings. (P26-11; T.98, 107, 346-348, 459, 460).
78. The evidence demonstrated a need for certain areas of improvement in the \*\*\* program (P26-21-21; T. 508 622-635); however, overall the great weight of the evidence establishes that the \*\*\* program is appropriate for Student and provides student with meaningful educational benefit as demonstrated by the progress student made between May 2011 and May 2013 in all areas of student's educational program. (T.98, 108, 114, 334-336, 350, 359, 712-713, 506-507).

### **Student's Progress At \*\*\***

79. Student's educators at \*\*\* report that Student has made progress across the board during student's placement at \*\*\* between May 2011 and May 2013. (T.98, 108, 114, 334-338, 350, 359).
80. \*\*\* progress data on Student's Individual Education Plan (IEP) provide detailed information as to Student's progress over time on each of the goals and objectives in student's IEP. The data contained in Student's IEP clearly demonstrate meaningful progress over time. (P8).
81. Progress is also indicated by Student's most recent assessment, completed in September 2013 by Dr. \*\*\*. The assessment documents that Student increased student's skill mastery on the Assessment of Basic Language and Learning Skills (ABLLS) between 2009 and 2012 in 17 of 25 areas tested and maintained student's skill levels in 4 areas. (P26, p. 19; hereinafter cited as P26-19; T.851). The ABLLS is considered the gold standard of assessment for measuring programmatic progress for students with autism. (Transcript, p. 101, 413-415, 900; hereinafter cited as T. 101, 413-415, 900).
82. Student's most recent assessment also documents progress in all objectives related to speech language except clarity of speech. (P26-19).

83. Student's mother reports anecdotal progress at \*\*\* that she sees at home and in the community: Student is more cooperative with routines, can accompany student's family in public venues with appropriate behaviors, is less aggressive, and has improved self-help skills. (T.712-713).
84. The evidence conclusively demonstrates that Student has made meaningful educational progress at \*\*\* between May 2011 and May 2013.

## **DISCUSSION**

The instant case presents two primary issues for resolution: 1) Did BISD fail to make a timely offer of a free appropriate public education (hereinafter FAPE) to Student upon the expiration of student's placement at \*\*\* at District expense? If so, is Student entitled to continue the placement at \*\*\* at District expense; and 2) Is Petitioner entitled to reimbursement for Dr. \*\*\* independent psychological evaluation of September 2013 and to an prospective independent Functional Behavior Analysis at public expense?

### **I. Petitioner's Claim For Continued Placement At \*\*\***

#### **The Legal Framework**

The purpose of IDEA is to ensure that all children with disabilities have available to them a free, appropriate public education that provides special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. *20 U.S.C. § 1400 (d)*. Under IDEA, BISD has a duty to provide a free appropriate public education to all children with disabilities residing within its jurisdictional boundaries between the ages of 3 and 21. *34 C.F.R. § 300.101 (a)*. BISD owes this duty to Student.

A free appropriate public education is special education, related services and specially designed personalized instruction with sufficient support services to meet the unique needs of the child in order to receive a meaningful educational benefit. *20 U.S.C. § 1401(9)*; *Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982)*.

Under IDEA, a parent is entitled to reimbursement for the unilateral placement of a child with a disability at a private school if the public school did not make a free appropriate public education available to the student in a timely manner and the private school's program is appropriate. *School Committee of Burlington v. Department of Education of Massachusetts, 471 U.S.359 (1985)*; *34 C.F.R. § 300.148(c)*.

In the instant case, Student attended \*\*\* Center, a private school, at District expense pursuant to a settlement agreement between the parties that expired by its terms on May \*\*\*, 2013. BISD, as Student's district of residence, had an affirmative legal obligation to develop and offer an appropriate IEP (FAPE) to Student for implementation when the agreement expired.<sup>1</sup>

An IEP is more than a written statement of annual goals and objectives and how they will be measured. An IEP also must include a description of a student's related services, supplementary supports and services, instructional arrangement, program modifications, supports for school personnel, designated staff to provide services, and the duration and frequency of the services, as well as the location where the services will be

---

<sup>1</sup> The evidence conclusively establishes Student's need for Extended School Year (ESY) services; therefore, Student required an offer of free appropriate public education to begin on \*\*\*, 2013, immediately following the expiration of student's placement at \*\*\* at District expense.

provided. 34 C.F.R. §§ 300.22, 300.323. An appropriate IEP that is reasonably calculated to provide FAPE must address all of these components of a student's educational plan.

Petitioner disagreed with the District's offer of FAPE and filed the instant due process request, seeking continued placement at \*\*\* at District expense. In order to prevail on that request for continued placement, Petitioner must establish: 1) the District's offer of FAPE was inappropriate; and 2) The \*\*\* placement is appropriate. *Florence County School District Four v. Carter*, 510 U.S. 7 (1993); *Letter to Chamberlain*, 111 LRP 74144 (OSEP 2011).

Case law dictates that Student has the burden of proof on this claim and that Respondent's program is deemed presumptively appropriate. *Tatro v. State of Texas*, 703 F.2nd 823 (5th Cir. 1983), *aff'd* 468 U.S. 883 (1984); *Schaffer v. Weast*, 546 U.S. 49 (2005).

#### The Parties Positions

Petitioner argues that Respondent failed to timely offer Student an appropriate educational program at BISD. At the ARD meetings in April 2013, Respondent failed to develop and propose an appropriate IEP, offered an inappropriate placement prior to drafting an IEP, and pre-determined that Student would return to BISD rather than considering continued placement at \*\*\*. Petitioner cites numerous procedural and substantive deficiencies with BISD's proposed program to support petitioner's position that the District's offer of FAPE to Student in April 2013 was not appropriate. Petitioner further argues that \*\*\* program for Student is appropriate and has produced meaningful benefit to Student during student's attendance there.

Respondent contends that it offered an appropriate program to Student in April 2013 based on the information it had available at that time, especially given that Student had been away from the District for two years. Respondent argues that to the extent its educational program was lacking, it was due to Parent's failure to consent to the additional assessment it needed to create a program for Student. The District emphasizes that Petitioner's refusal to allow updated assessment has been the primary obstacle in its effort to provide Student a free appropriate public education. Respondent further points to the history between the parties to argue that Petitioner has never given the District a real and legitimate opportunity to serve Student, always quickly withdrawing student and declaring a lack of success on BISD's part.

#### Was The District's Proposed Offer of FAPE Appropriate?

IDEA requires Respondent to provide Student with a free appropriate public education that consists of "personalized instruction with sufficient services to permit the child to benefit educationally from that instruction." *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the court developed a two prong analysis to determine if a school district has met its obligation to provide a free appropriate public education: 1) whether the district complied with the procedural requirements of IDEA, and 2) whether the district offered a program to the student that was reasonably calculated to provide educational benefit. *Id.* at 206-207.

#### *Procedural Sufficiency*

It is well settled that procedural violations constitute a denial of FAPE only if the procedural inadequacies impeded the child's right to a free appropriate public education, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education, or caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). In this case, the evidence demonstrates several procedural irregularities that ultimately impeded Student's right to a free appropriate public education.

First, the District repeatedly mischaracterized the April 2013 ARD meeting as a Transfer ARD, stating that BISD would adopt \*\*\* IEP for 30 days, during which time it would obtain updated assessment, develop a transition plan, and revise Student's educational program. However, the provisions governing transfer ARDs in IDEA specifically refer to students who transfer from one *public* school to another, where IEPs are subject to the same legal standards. *34 C.F.R. 300.323(a); 19 T.A.C. 89.1050(f)(2)*. In this case, the District proposed Student's return to BISD from a private school, not another public school. In proposing Student's return to the District in May 2013, BISD had an obligation to offer FAPE to Student at that time and not thirty days later. Further, if Respondent wished to implement the \*\*\* IEP, it needed to review the IEP and adapt it for implementation in a public school setting. Respondent failed to do this.

The District's failure to understand its obligation to Student ultimately led to a failure to offer an appropriate IEP at all prior to the expiration of Student's placement at \*\*\*. The evidence shows that at the April ARD, the District refused to discuss the necessary components of an educational program for Student such as how to transition student from \*\*\* to BISD, what ESY services student would receive, and other particulars of student's IEP because the District wanted additional assessment data and believed it could wait for that data to devise an appropriate educational plan. Even though the District sought, and ultimately was granted the right to obtain additional assessment data, it still had an obligation to offer a free appropriate public education to Student in a timely manner. Further, the District had adequate information to develop an appropriate IEP for Student in April 2013 despite its desire for more current data. Significantly, BISD recommended that Student return for three days per week beginning in May 2013 even while simultaneously refusing to develop an IEP. These actions deprived Student of a timely offer of FAPE.

Second, in a related procedural error, the District informed Mother that it could not have begun planning for Student's proposed return prior to the April ARD because Student was not enrolled in BISD. Again, the District failed to recognize its legal obligation to make a free appropriate public education available to Student upon expiration of the settlement agreement. The evidence also demonstrates that this argument is disingenuous at best. \*\*\* testified to her duty to prepare for Student's potential return to BISD, BISD staff continued to access Student's special education records 23 times after student's alleged withdrawal, and BISD continued to pay for Student's placement at \*\*\* on a monthly basis. Clearly, BISD staff were aware that Student as of \*\*\*, 2013, Student would require a proposed offer of FAPE. They simply failed to address student's need for a proposed program in a timely manner.

Finally, the District failed to make its proposed placement determination based on Student's IEP as dictated by *34 C.F.R. § 300.116*, and instead decided placement in advance of creating the IEP. This sequence of events runs contrary to IDEA, as it constitutes predetermination of placement based on the District's available resources rather than the student's individual needs. *Spielberg v. Henrico County Public School, 441 IDELR 17 (4<sup>th</sup> Cir. 1988), cert. denied, 489 U.S. 1016; Deal ex rel Deal v. Hamilton County Board of Education, 42 IDELR 109 (6<sup>th</sup> Cir. 2004)*. The evidence is clear that the District determined that Student would return to BISD into the \*\*\* at \*\*\* and then move to a special education classroom at \*\*\* even before the ARD convened on April 9 and even though an IEP to address Student's needs had not yet been developed. In Student's case, this led to the proposal of placements that were not equipped to meet Student's individual needs for 1:1 instruction, ABA therapy, and systematic data collection and analysis.

Taken as a whole, these procedural irregularities produced a situation whereby BISD decided that Student would return to a classroom in the District that was not equipped to meet student's needs without knowing exactly what student's needs were. Further, BISD failed to rely on the information it had available to it to devise and propose a complete IEP for Student in advance of the May \*\*\*, 2013 deadline. Instead, BISD declined to develop an educational program for Student at all until updated assessments were complete. BISD

has yet to propose a program for Student's return to the District that appropriately addresses student's individualized needs and is reasonably calculated to provide student an educational benefit.

### *Substantive Sufficiency*

The essence of determining whether a substantive violation of IDEA has occurred is whether the school's proposed program will provide the student with the requisite educational benefit. IDEA does not require an education that maximizes a student's potential; rather, the school must provide an education that is reasonably calculated to enable the child to achieve some benefit. Some benefit means an educational program that is meaningful and offers more than a *de minimus* educational benefit; it must be "likely to produce progress, not regression or trivial educational advancement." *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5<sup>th</sup> Cir. 1997).

Although courts have not adopted a specific substantive standard to determine when a free appropriate public education has been provided or offered, the Fifth Circuit in *Michael F.* identified four factors to consider in analyzing a school's program: 1) is the program individualized and based on 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; and 4) are there demonstrated positive benefits both academically and non-academically to the student.

Applying these considerations to Student's proposed program, I find that the program was not appropriate or reasonably calculated to provide Student with meaningful educational benefit.

### *Should The Inquiry Be Limited To The District's April 2013 Proposal?*

At the outset, I must determine whether to judge the appropriateness of Respondent's proposed educational plan based solely on what was offered at the April 2013 ARDs in light of Respondent's clear statement at the ARDs that the IEP was not final because Respondent wanted to obtain updated assessment information.

Petitioner argues that I must judge the IEP by its four corners - only on the basis of what was actually proposed to Student in April 2013 and not by any subsequent testimony of services that BISD *could* offer if the assessment data establishes that Student requires them. Respondent counters that I must consider evidence of an educational program it could have provided after obtaining updated assessment information because Petitioner interfered with the collaborative process by refusing consent for updated evaluations and filing for due process before the proposed IEP was made final.

In *Mt. Vernon School Corporation v. A.M.*, 2012 U.S. Dist. Lexis 122918 (S.D. IN 2012), the court addressed a situation where a parent initiates due process before the development of a final IEP is completed. The court reasoned that in such instances, a court should consider the way the IEP process unfolded and the relative responsibility of the participants for the breakdown of the process rather than looking only at the incomplete IEP proposed.

In considering the full context and evolution of the instant dispute, I find that the District's proposed offer of FAPE must be evaluated as it was constituted in April 2013 for the following reasons.

First, the District offered what it represented as a "locked" or final ARD to Petitioner and recommended that Student begin immediate transition to BISD as of that date. Clearly, the District believed its proposal to be sufficiently final to recommend that Student return to the District and receive educational services.



Second, as pointed out by the court in *R.E. ex rel. J.E. v. NY City Department of Education*, 694 F. 3d 167 (2<sup>nd</sup> Cir. 2012), cert. denied, 133 S. Ct. 2802 (U.S. 2013), parents are entitled to rely on a proposed IEP when making decisions about whether to accept the school's placement. At the time parents must choose whether to accept the school's proposed plan or to place their child elsewhere, they have only the IEP to rely on in making that decision. To allow a school district to rehabilitate a deficient IEP after the fact would unfairly deprive parents of their reliance interest in the IEP. In this instance, Petitioner had to determine whether to return Student to BISD as of May \*\*\*, 2013 or to continue petitioner's placement at \*\*\*. Petitioner could make that determination only on the basis of what the District had offered as of that date.

Third, the evidence does not persuade me that BISD was prevented from proposing an appropriate program at any time prior to the hearing in this matter, including April and May 2013, by Petitioner's actions. Respondent had access to a myriad of assessment and performance data in spring 2013 from \*\*\* and Student's prior assessments, and it took no steps to collect or review that data. While I concur that Respondent had the right to obtain updated assessment information, it does not follow that Respondent could "lay behind the log" and wait until such assessments were finalized to develop an offer of FAPE for this Student given the particulars of this situation.

In addition, I gave Respondent the opportunity to update its assessment information *and* revise its program by granting its Motion to Override Lack of Parental Consent. Respondent also did not avail itself of that opportunity. As a result, Respondent has taken no steps to date to discharge its affirmative duty to Student to offer an appropriate program for student's education at BISD. Under these circumstances, Respondent has no basis to request that this Hearing Officer evaluate whether it could present an appropriate program to Student rather than whether it did in fact present such a program. Respondent has had multiple opportunities to develop and propose a program for Student and the only program offered was the IEP developed in April 2013.

For these reasons, I will determine the appropriateness of Respondent's proposed educational program based on what was offered to Student in April 2013 and not on what could have been made available at some point in the future.

#### *Individualized Program Based On Performance And Assessment*

The evidence showed that the District failed to develop or propose an educational program for Student that addressed student's many documented individualized needs.

First, and most glaringly, BISD failed to develop or propose an individualized plan to transition Student back to BISD even though Student's 2011 transition was not successful. The ARD recommended that Student begin immediate transition to BISD for three days per week, but devised no plan at all for how this would be effectively accomplished. Without a systematic plan for transition and criteria to measure success, Student's expert reasonably predicted that the events of 2011 would repeat themselves. BISD's failure to consider how a well-planned transition would ultimately affect Student's success at BISD demonstrates a lack of understanding and/or willingness to address student's individual needs and work with Student's family to ensure student's success.

Second, the District failed to flesh out Student's educational program and address critical areas of need. The BISD ARD members refused to discuss or propose services to address Student's behavioral needs, related services needs, or clear need for ESY services. The ARD instead insisted on waiting to address all of these important areas of Student's program until updated assessment data could be obtained even though they had access to relatively recent assessment data, extensive progress data from \*\*\*, and \*\*\* participants at the ARD who could answer questions about Student's educational needs.

Third, with regard to IEP goals and objectives, the District purports to have adopted the \*\*\* IEP for Student; however, the ARD never discussed the IEP and its goals and objectives or its implementation. The \*\*\* IEP, though correlated with the TEKS, was developed based on the ABLLS and clearly designed for implementation with intensive ABA therapy and discrete trial training. The evidence is clear that none of the proposed placements at BISD were equipped to provide an environment for implementation of this IEP without adaptation to the BISD settings.

Fourth, the District proposed initial placement of Student at the \*\*\* at \*\*\*, but the evidence is clear that the 3:5 ratio at SLC classroom was not appropriate to Student's needs and that the teacher was not utilizing ABA methodologies, discrete trial training, or systematic data collection methods as required by Student in order to obtain educational benefit.

In short, the evidence is clear that the District's proposed educational program for Student was based on the placements and services that the District had available at that time and on generic services offered to students with autism rather than on Student's individualized needs.

#### *Least Restrictive Environment*

The only evidence offered concerning Student's unique needs makes it clear that Student's least restrictive environment does not require exposure to typically developing peers, as student cannot benefit from interaction. Further, even the special education self-contained settings proposed for Student at Westbrook required greater self-management skills and a higher level of functioning than Student currently has.

#### *Coordinated and Collaborative Manner By Key Stakeholders*

BISD's proposed plan did not reflect a coordinated and collaborative effort by key stakeholders, including Mother and \*\*\* staff. The District's proposed plan for Student to return to the \*\*\* at \*\*\* was developed and proposed to Mother without discussion with her. In fact, Mother emailed the District prior to the April ARD with concerns and reflections from her observations at the proposed placements, but no discussion took place concerning her email. \*\*\* representatives attended the ARD and provided data in advance to BISD, but no effort was made by BISD to collaborate outside the ARD meeting by visiting \*\*\* to observe or obtain additional data. Even in the critical task of transitioning Student back to BISD, Respondent did not collaborate with \*\*\* or Petitioner to develop a realistic plan for Student that had a reasonable chance of success.

#### *Reasonably Calculated To Provide Meaningful Benefit*

The evidence conclusively establishes that Student's educational program must contain certain components in order for student to obtain meaningful benefit: intensive behavior intervention provided on a 1:1 basis for skill acquisition, detailed and systematic data collection throughout the day and across settings in accordance with a research-based instrument such as the ABLLS, ongoing supervision of the data collection and review of the data by a BCBA or appropriately trained behaviorist with consequent recommendations for program modifications, training for staff in ABA methodologies, year round instruction, minimal unstructured time, 1:1 support for adequate supervision and safety, appropriate related services, \*\*\*, and a detailed plan for transitioning from \*\*\* to BISD. Without these components, Student is not reasonably expected to successfully transition to BISD or to continue to enjoy meaningful educational benefit.

The record reflects that when Student previously attended BISD and did not have these necessary elements as a part of student's educational program, student regressed behaviorally and academically. Even at \*\*\*, where

these components are provided in a small, highly structured, and intensive setting, Student's progress is slow and measured.

The record further reflects that Respondent's offer of FAPE to Student did not include these necessary elements for student's success. Rather, the evidence demonstrates that the proposed program at BISD is likely to produce either trivial advancement or regression. As such, it is not reasonably calculated to provide meaningful benefit for Student.

### *Did Petitioner's Actions Preclude BISD From Proposing An Appropriate Program?*

Although the evidence is resoundingly clear that BISD's proposed educational program for Student lacked key and necessary elements to meet student's educational needs, Respondent argues that the proposed placement was appropriate given what BISD knew at the time the placement was offered. Respondent urges the Hearing Officer to consider that BISD repeatedly sought Petitioner's consent to reassess Student, but Petitioner refused the District's efforts, in part because Mother does not desire that Student return to BISD.

I concur with Respondent that Mother clearly does not desire for student to return to BISD. She has made it clear to the District since March 2013 that she desires for student's placement at \*\*\* to continue. Even so, Mother did, on her own initiative, visit proposed placements at both \*\*\* School and \*\*\* School so that she could consider their appropriateness for Student. After her visits, Mother openly shared her concerns about the placements with the ARD. Mother also worked to ensure that BISD received the requested information from \*\*\* before the ARD and had ongoing access to \*\*\* data to help create a plan for Student.

While Mother refused to consent to the re-evaluation of Student and has allegedly continued to evade such assessment, the fact remains that BISD has not availed itself of the existing opportunities to develop an appropriate program for Student and instead merely points to the parent's actions as an excuse. BISD has not visited \*\*\*, reviewed \*\*\* data, requested additional or ongoing data from \*\*\*, or taken any steps to obtain information needed to devise a more appropriate program. Further, as previously discussed, I find that, as a factual matter, BISD had access to adequate information to develop and propose an educational program that contained the necessary elements to address Student's educational needs. BISD simply failed to do so.

In sum, I find that Respondent's proposed program to Student did not provide Student with a free appropriate public education that was reasonably calculated to provide student with meaningful educational benefit.

### Was The \*\*\* Program Appropriate?

The second prong of the reimbursement analysis asks whether the educational program provided by the private school was appropriate. *Burlington, 471 U.S. at 370*. The private school program need not necessarily meet every specific requirement of the IDEA, but it must be "otherwise proper." *Florence County School District Four v. Carter, 510 U.S. 7 (1993)*. The evidence showed that \*\*\* meets the requisite test.

Student's program at \*\*\* contains the essential elements described by Dr. \*\*\* in order to effectively educate Student. It is highly structured, provides 1:1 systematic instruction for 30-40 hours per week using ABA therapy with discrete trial training, and relies on detailed data collection and documentation of behavioral information including level of independence, and number of prompts provided in teaching a variety of skills across settings. The evidence demonstrates that the program is effectively implemented by trained personnel and supervised by a BCBA. The program is provided on a year- round basis and utilizes a well-researched, peer-reviewed, scientifically based approach shown to be effective in teaching children with autism generally and this Student specifically.

Significantly, the evidence reflects that Student has made progress in the \*\*\* program.

Respondent offered evidence to suggest that \*\*\* has not been successful in addressing all of Student's "problem" behaviors, pointing to a more recent escalation in \*\*\* behavior. The evidence did not conclusively demonstrate that \*\*\* is not effectively addressing this behavior. Moreover, even if the \*\*\* program is not 100% effective in every area, the evidence is clear that, on the whole, \*\*\* offers Student an appropriate program that meets student's educational needs and has afforded student meaningful educational benefit across the board.

In conclusion, Petitioner has met petitioner's burden of proving that Respondent failed to offer petitioner an appropriate educational program prior to the expiration of petitioner's placement at \*\*\* and that the program at \*\*\* was appropriate. As such, Petitioner is entitled to continued placement at \*\*\* at District expense.

### Do Petitioner's Actions Foreclose An Award Of Reimbursement?

Respondent argues that even if this Hearing Officer finds that Petitioner is entitled to continued placement at \*\*\* at District expense under the *Burlington* two-prong test, the actions of Petitioner foreclose an award of continued private placement at District expense. Citing 34 C.F.R. § 300.148(d) which states that an award of private placement at public expense may be reduced or denied if (1) the school district informed the parents of its intent to evaluate the student through the notice requirements of IDEA and the parents did not make the student available for testing; or (2) there is a finding of unreasonableness with respect to actions taken by the parents, Respondent argues that Petitioner's own actions have frustrated the school's efforts. I decline to reduce or deny Petitioner's award of continued private placement at \*\*\* on these grounds.

First, Petitioner contends the Respondent did not notify the parents of its intent to evaluate in accordance with the notice requirements of IDEA. Whether Respondent did, in fact, comply with the notice requirements is not before me; however, I note that a legitimate dispute exists between the parties on this point.

Second, I find that the parents' actions were not unreasonable when considered in the context of the relationship and history of the parties. Petitioner declined to provide consent initially because Respondent's evaluations of Student were still valid and Petitioner believed that Respondent should have requested the evaluations earlier in time to ensure a timely offer of a free appropriate public education to Student upon expiration of the settlement agreement on May 31, 2013. Petitioner rightly was concerned about Respondent's preparedness to receive Student after two years at a private school and two unsuccessful prior attempts to transition to BISD.

Third, and most significantly, I decline to reduce or deny continued placement at \*\*\* at District expense because the District has yet to offer an appropriate program for Student's transition back to BISD. The District repeatedly points to its lack of updated assessment data and to Petitioner's conduct as the cause for the lack of assessment as its defense in this case. Even if Petitioner has placed stumbling blocks in Respondent's path to offering Student an appropriate program, the record reflects that these have been merely stumbling blocks and not roadblocks that are insurmountable. Early on in this action, I provided Respondent with an opportunity, over Petitioner's objection, to update its assessment and revise its program for my consideration. Respondent failed to avail itself of that opportunity. Respondent now argues that it attempted to assess Student, but Petitioner would again not cooperate; however, Respondent took no steps to raise that issue in a timely manner so that it could be addressed and a more appropriate program developed and proposed. Based on this sequence of events, I have no option but to allow Student to remain at \*\*\*, as Petitioner has demonstrated that the only educational program proposed by Respondent to date simply will not meet Student's individual needs or allow student to make meaningful progress.

For these reasons, I decline to reduce or deny the award of Student's continued placement at \*\*\* based on actions taken by Student's parents. Student is entitled to continue student's placement at \*\*\* for the remainder of the 2013-2014 school year. Respondent is, however, entitled to obtain the updated evaluations it has yet to conduct in order to prepare for an appropriate offer of a free appropriate public education to Student at the conclusion of student's placement at \*\*\*.

## **II. Petitioner's Claim For Independent Evaluations At District Expense**

Petitioner seeks reimbursement for an independent psychological evaluation completed by Dr. \*\*\* in September 2013, in response to an alleged inappropriate psychological evaluation completed by BISD's \*\*\* in February 2011. According to Respondent, the ARD did not accept \*\*\* evaluation in 2011 and instead relied on Dr. \*\*\* 2010 assessment that was updated in 2011. Petitioner also seeks an order for a prospective independent FBA in response to an FBA completed by BISD and dated December 16, 2010. Respondent disputes the authorship of the FBA or Respondent completed that it.

Respondent argues, in part, that Petitioner's claims for independent evaluations are barred by the one-year statute of limitations applicable to IDEA claims in Texas. *34 C.F.R. 300.511(e); 19 T.A.C. § 89.1151(c)*.

The instant action was filed on April 24, 2013. Thus, the application of the one-year statute of limitations would require dismissal of all claims based on District acts or omissions arising prior to April 23, 2012 unless one of the exceptions to the statute of limitations was established.

The evidence demonstrates that the assessments and evaluations about which Student complains were conducted in late 2010 (the FBA) and early 2011 (the Farrell psychological), well over two-years prior to the date of filing. Petitioner has not alleged or proven an exception to the statute of limitations or a claim that petitioner became aware of the assessments' alleged deficiencies at some later date.

Accordingly, all claims asserted by Petitioner concerning the inadequacies of BISD's evaluations conducted in 2010 and 2011 are barred by the applicable statute of limitations. As such, Petitioner is not entitled to the requested independent evaluations.

## **CONCLUSIONS OF LAW**

1. Respondent Beaumont ISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA and its implementing federal and state regulations. Beaumont ISD is Student's resident district under IDEA for all time periods relevant to this action.
2. Respondent failed to timely provide a proposed educational program to Student that was reasonably calculated to provide student with a free appropriate public education for the 2013-2014 school year. *34 C.F.R. 300.323*.
3. Petitioner is entitled to placement at \*\*\* at District expense for the remainder of the 2013-2014 school year, including the ESY services offered in summer 2014 through the end of August 2014, because Respondent failed to make a timely offer of FAPE to Student and Student's placement at \*\*\* is appropriate. *34 C.F.R. § 300.148*.
4. Petitioner's award of continued placement at \*\*\* at District expense is not be reduced or denied based on the actions of Student's parents. *34 C.F.R. § 300.148*.

5. Student's claims for independent educational evaluations are barred by the one-year statute of limitations applicable to IDEA claims in Texas. 34 C.F.R. § 300.507; 19 T.A.C. § 89.1151.

### **ORDER**

After due consideration of the record, and the foregoing Findings of Fact and Conclusions of Law, this Hearing Officer hereby **ORDERS** that the relief sought by Petitioner is **GRANTED IN PART** as follows:

1. Petitioner's request for placement at \*\*\* at District expense is **GRANTED** as follows: BISD shall continue to pay the costs associated with Student's attendance at \*\*\* in a timely manner through the end of the 2013-2014 school year, including the period of ESY services ending in August 2014. Such costs shall include any costs associated with the Occupational Therapy and Speech services provided to Student at \*\*\*. The costs for related services shall be at the same amount previously provided to Student during the period of May 2011 to May 2013.
2. Petitioner's request for reimbursement for Dr. \*\*\* evaluation of September 2013 and request for prospective funding of an independent functional behavioral assessment are **DENIED**.

In addition to the above relief, the Hearing Officer hereby **ORDERS** the following equitable relief designed to ensure that the parties collaborate in a timely manner to plan for the provision of a free appropriate public education to Student upon the expiration of the placement ordered herein at the end of August 2014:

3. BISD shall provide Prior Written Notice of Assessment to Petitioner on or before February 1, 2014 of updated assessments it intends to perform for the purposes of planning Student's program for the 2014-2015 school year. BISD shall provide notice of any assessments it intends to conduct in any of the following areas: Speech/Language, Physical, Emotional/Behavioral, Educational Performance/Achievement, Assistive Technology, Adaptive P.E., and/or Vocational.
4. BISD's Notice of Assessment shall comply with the provisions of 34 C.F.R. §§ 300.300(a)(1), 300.503, 300.504, and 300.9, and 19 T.A.C. § 29.0041 if applicable. Specifically, the Notice shall inform Petitioner of the scope of the evaluations sought and include a description of each evaluation procedure that the District intends to conduct. Should Respondent intend to complete an Emotional/Behavioral or Psychological component of its evaluation, the Notice shall inform Petitioner of the name and type of the examination or test to be administered and an explanation of how the test will be used to develop an appropriate educational program. Respondent is not required to include in the notice the details as to when the evaluation will be conducted, whether and how it will impact Student's school day at \*\*\*, or other matters not specifically enumerated in 34 C.F.R. §§ 300.300(a)(1), 300.503, 300.504, and 300.9, and 19 T.A.C. § 29.0041.
5. BISD's Notice of Assessment shall be provided to Petitioner at least ten (10) calendar days in advance of the assessment. Upon provision of the Notice of Assessment to Petitioner, BISD may schedule the assessments in coordination with Petitioner and Student's current educational providers at \*\*\*.
6. Petitioner is ordered to collaborate and cooperate fully, both directly and by instructing \*\*\*, with BISD to schedule and complete the assessments. Petitioner is ordered to make Student available for the testing until all testing is complete.
7. This order shall override Petitioner's lack of consent to testing.

8. All assessments to be conducted by BISD shall be completed no later than April 15, 2014.
9. BISD shall convene an ARD to review the assessments and plan an educational program for the provision of a free appropriate public education to Student for the 2014-2015 school year no later than May 1, 2014 unless both parties agree to schedule the ARD outside of the time frame ordered herein.

It is further **ORDERED** that all other items of relief not specifically awarded herein are **HEREBY DENIED**.

**SIGNED** and **ENTERED** this 16<sup>th</sup> day of December 2013.

**Lynn E. Rubinett**

Lynn E. Rubinett

Attorney at Law

Special Education Hearing Officer for the State of Texas

TEA DOCKET NO. 205-SE-0413

STUDENT b/n/f/ PARENTS <i>Petitioner and Counter Respondent</i>	§ § § § § § §	BEFORE A SPECIAL EDUCATION  HEARING OFFICER FOR  THE STATE OF TEXAS
---	---------------------------------	--

**SYNOPSIS**

**Issue:** Whether Respondent failed to devise and offer an appropriate and timely IEP to Student for the time period beginning in May 2013 forward?

**Held:** For the Student. Student met student's burden of establishing that Respondent failed to devise and offer an appropriate and timely IEP for Student for the time period beginning in May 2013 forward. To the extent the Respondent required additional assessment data in order to devise an appropriate program that Petitioner refused consent to obtain, the Hearing Officer authorized Respondent to conduct that assessment as of June 19, 2013; however, Respondent failed to obtain the evaluations or to raise an issue before the Hearing Officer concerning its alleged inability to do so because of Petitioner's actions.

**Cite:** 34 C.F.R. 300.323

**Issue:** Whether Petitioner is entitled to private placement at District expense for the 2013-2014 school year?

**Held:** For the Student. Petitioner met petitioner's burden of establishing that Respondent failed to offer petitioner an appropriate educational program for the 2013-2014 school year in a timely manner and that Student's private placement is appropriate.

**Cite:** 34 C.F.R. § 300.148

**Issue:** Whether Petitioner is entitled to reimbursement for Dr. \*\*\* independent psychological evaluation of September 2013 and to a prospective independent Functional Behavior Analysis at public expense?

**Held:** For the District. Student's claims for independent educational evaluations are barred by the one-year statute of limitations applicable to IDEA claims in Texas. The evaluations conducted by the District for which Petitioner seeks independent evaluations were conducted in January and February 2011. Petitioner filed the instant action requesting independent evaluations on April 24, 2013, over two years from the date of Respondent's original evaluations.

**Cite:** 34 C.F.R. § 300.507; 19 T.A.C. § 89.1151.