

STUDENT	§	BEFORE A SPECIAL
BNF PARENT	§	EDUCATION
Petitioner	§	
v.	§	HEARING OFFICER FOR THE
	§	
GREGORY PORTLAND ISD	§	
Respondent	§	
	§	STATE OF TEXAS

FINAL DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Petitioner, ***, Student, and Student's next friend and parent, *** (hereinafter referred to collectively as Petitioner and individually as Student or Parent), brings this action against Respondent Gregory Portland Independent School District (hereinafter referred to as Respondent, the District, or GPISD) 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 September 24, 2015.

At the pre-hearing conference held on October 19, 2015, Petitioner reviewed the issues set forth in the Request for Due Process and confirmed that the request accurately and completely set forth all of the issues asserted and relief requested by Petitioner in this cause. Accordingly, Petitioner's Request for Due Process is incorporated herein by reference as a complete statement of the issues raised.

By way of further elaboration, the sole issue raised by Petitioner, as set forth in the Order Following Pre-Hearing Conference issued on November 2, 2015, is as follows:

- Whether Respondent failed to provide Student with a free appropriate public education (hereinafter FAPE) based on inappropriate levels of ABA services, i.e. failure to provide any direct ABA services and insufficient amounts of ABA services.

The relief sought by Petitioner in this proceeding, as identified in the Order Following Pre-Hearing Conference issued on November 2, 2015 is:

- The provision of direct ABA services on a daily basis during the school day in the amount of one to three hours per day.

In Petitioner's Request for Due Process and Post-Hearing Brief, Petitioner also requested compensatory ABA instruction to be provided by the staff of *** (hereinafter ***) in Student's classroom at GPISD, independent educational evaluations as recommended by ***'s Board Certified Behavior Analyst (hereinafter BCBA), reimbursement to Petitioner for private evaluations for which Petitioner has paid, and documentation of training of BPISD staff.

PROCEDURAL HISTORY

Petitioner filed the instant request for due process on September 24, 2015. Christopher Jonas, Attorney at Law, with assistance from James Hollis, Attorney at Law, represents Petitioner in this proceeding. Cynthia Buechler, Attorney at Law, represents Respondent GPISD.

The parties met in a resolution session on October 9, 2015, but did not reach resolution of the issues in dispute.

A pre-hearing conference was held on October 19, 2015. An Order Following Pre-Hearing Conference was entered on November 2, 2015, outlining the issues in dispute and extending the decision due date to February 8, 2016 for good cause at the request of Petitioner.

The hearing took place on January 6-7, 2016 in Corpus Christi, Texas. 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 for Extension of Decision Due Date, extending the decision due date to March 25, 2016.

This decision is timely issued and forwarded to the parties by email and U.S. Mail on March 25, 2016.

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 was a resident of GPISD, a political subdivision of the State of Texas and a duly incorporated school district. (Transcript, p. 67; hereinafter T. 67).
2. Student attended school at GPISD in the *** (hereinafter ***) from *** years of age until ***, when Student *** for the *** school year. (T. 67). While in ***, Student was eligible for special education services with the primary disability of Other Health Impairment and the secondary disability of Speech Impairment. (Respondent Exhibit 5, p. 1; hereinafter R5-1).
3. Student was diagnosed with Autism in ***. (T. 68).
4. In ***, *** evaluated Student, and began providing Student with Applied Behavioral Analysis (hereinafter ABA) services in ***. (T. 68, 90). Student receives ABA services from ***, a private company, in part through ***. (T. 134, 195).
5. *** provides one to one intensive, repetitive, structured services in a clinical setting based on the techniques and strategies of ABA, one of the primary research based methods for working effectively with students with Autism. (T. 72, 109-111, 154-155). The direct services are provided by behavior technicians, individuals who

- are minimally required to have a high school degree and forty hours of behavior training, working under the supervision of a Board Certified Behavior Analyst (BCBA). (T. 135, 141). The BCBA does not attend the sessions. (T. 132).
6. The BCBA and behavior technicians from *** who work with Student are not certified teachers, do not have educational expertise, and are not familiar with the *** curriculum or the Texas Essential Knowledge and Skills (TEKS). (T. 135-136). The BCBA from *** has never worked in a public school providing ABA services. (T. 138). *** services do not address Student's academic needs. (T. 150, 175).
 7. Student received *** services for approximately *** hours per week from *** until *** and made some progress in the areas of *** (***) to get Student's wants and needs met with the use of Student's communication device (***), matching objects, *** ***, ***, imitating, and compliance with the directive of "come here." (T. 91-93, 107-108). In ***, Student's hours decreased to approximately *** per week due to ***. (T. 109, 134).
 8. The BCBA from *** and one of the *** behavior technicians credibly testified that the use of ABA with Student is both appropriate and effective. (T. 124, 168). They also testified that ABA therapy requires structure, consistency and 1:1 direct teaching to be effective. (T. 110-111, 177). *** data demonstrates that Student made some progress in the areas Student worked on with ***; however, Student's performance on the *** goals was inconsistent and variable. (P7E, P7I; T. 118-119, 148-150).
 9. At the beginning of the *** school year, Student received Student's ABA services from ***. (T. 185). Beginning ***, Parent changed Student's schedule and began to take Student for *** services during the school day because Student was too tired to make optimal use of ABA services ***. (P1; T. 185, 198).
 10. On ***, an ARDC convened to consider Parent's request that *** be allowed to provide Student with their ABA services during the school day, in order to work with Student in the school setting and train Student's teachers in the ABA techniques used by ***. (R5-5; T. 196).
 11. The school members of the ARDC disagreed with *** serving Student during the school day for several reasons: the entire school day was needed to address all of Student's Individual Education Plan (IEP), Student's teacher was highly qualified and trained to provide ABA strategies as needed by Student, the District had its own BCBA on contract that it would use to provide necessary ABA services to Student, and confidentiality concerns of other students made it challenging to bring in outside personnel.
 12. The District was willing to collaborate with *** about strategies, but did not want Student to receive one to one direct ABA services in the classroom from *** personnel. (R4-8, 9). The ARDC ended in disagreement, with a plan to reconvene on ***. (R4-9). *** and the District agreed to share treatment plans and exchange observations; however, Parent did not get back to Teacher about a time for Teacher

- to observe *** working with Student. (T. 232). Further, ***'s treatment plan was not made available to District staff prior to the due process hearing even though it was requested. (T. 225).
13. On ***, the BCBA from *** observed Student at school for two hours to make recommendations to the ARDC about Student's program and services. During the observation, the BCBA observed the teacher and paraprofessionals redirecting Student; Student responding to individual teacher instruction, but not to group direction; Student attending well in a group activity ***; Student *** and *** correctly; and Student *** and leaving the table where Student was working to wander the classroom multiple times during table time. (P4). The BCBA observed some 1:1 instruction of Student by Student's teacher (approximately 15 minutes), but did not observe data collection. (T. 124-125).
 14. The BCBA expressed to Parent that Student's teacher at GPISD was "really wonderful." (P3-10; T. 143). Parent concurred with the BCBA's opinion. (T. 190).
 15. Based on her observation, the *** BCBA recommended that a *** behavior technician accompany Student at school for at least two hours per day to help Student engage in the classroom without ***, generalize *** and *** skills to the classroom setting, and improve Student's ability to sustain attention rather than engage in escape behavior. (P4-5, 6). *** recommended their program for Student in the school setting because of Student's difficulties accessing group instruction. With the proper 1:1 support, *** staff believed that Student could make progress. (T. 177-179).
 16. The observation of ***'s BCBA demonstrates that Student was able to participate and receive instruction in the classroom despite periods of inattentiveness. The observation was based solely on Student's behavior during a two-hour period on one school day, a day with a different routine due to ***, and cannot be extrapolated to establish Student's behavior in the classroom over time.
 17. The ARDC reconvened on ***. Based on a recently completed Full and Individual Evaluation (FIE), the ARDC updated Student's eligibility to include the primary category of Autism and the secondary category of Speech Impairment. (R4-1, 10).
 18. After considering Parent's request that *** work with Student for two hours per day at school on ABA activities, the District members of the ARDC rejected the request, concluding that Student's educational needs were being adequately met by GPISD staff and the contract BCBA, and that Student was making progress at school. Parent agreed that Student was making progress, but sought ABA therapy in the school setting to increase that progress and address the ongoing issues identified by the *** BCBA. (R4-10; T. 188).
 19. For Student's *** year, Student's placement was in the *** classroom, with approximately *** students, 1 teacher, and *** paraprofessionals. (T. 204-205). Student's classroom teacher (hereinafter referred to as Teacher) was highly qualified and well-trained, with a BA Degree and teaching certifications in General

- Education, Special Education, and English as a Second Language, and *** years' experience working with children with Autism. Teacher was in process of obtaining *** and a BCBA certification. (T. 202-203). Teacher testified credibly, convincingly, and knowledgeably about Student and Student's substantial behavioral and academic progress during the school year.
20. Teacher demonstrated knowledge of ABA teaching strategies and her use of those strategies throughout the school day. (T. 205-206). Teacher works with Student on a 1:1 basis for approximately thirty (30) minutes per day; paraprofessionals also work 1:1 with Student. (T. 237, 247).
 21. Teacher credibly testified to Student's meaningful academic, social, and behavioral progress during the first semester ***. (T. 207-214, 250). She specifically noted progress in using Student's communication device proficiently, attending to task with the use of ***, an ABA learning strategy, attending to group instruction, ***, interacting with adults and peers, ability to *** independently without eloping, and identification of *** and where Student lives. (207, 217-219, 227, 248). In addition, Teacher described in detail the progress made by Student on Student's IEP goals, explaining that Student was very close to needing entirely new IEPs because Student had mastered the goals from the current IEPs. (R11-1; T. 209, 211, 212-214).
 22. Teacher reviewed the data collection sheets used to track data on IEP goal progress, as well as behavior. (R9, R12; T. 240, 244, 251).
 23. Teacher reviewed Student's benchmark testing data, which demonstrated a nine-point gain from beginning to middle year. (T. 232). Teacher characterized Student's progress as three times what she would have hoped Student to achieve by the end of the full school year. (T. 234).
 24. Teacher was assisted in working with Student, by the District's contract BCBA, who holds a Masters and graduate level ABA certificate, and has worked with individuals with Autism since 1999. (T. 311-312). The District BCBA observed Student's classroom on at least a monthly basis and made recommendations for working with Student, including *** strategy that assisted with sustained attention. (T. 222-223, 315). The District BCBA observed that Student's classroom was very structured, Student's teacher has a high level of competency, and Student was making excellent progress. (T. 315-316, 322).
 25. Teacher and District BCBA reviewed the then current *** treatment plan for Student (P2-11-14) and confirmed that Student was working at a higher level at school than the goals set forth in Student's *** plan, with the exception of ***. (T. 226, 323).
 26. During Student's first semester of *** at GPISD, Student made meaningful academic and nonacademic progress.

DISCUSSION

I.

Issues Newly Raised by Petitioner in Post-Hearing Brief: Procedural Violations and Failure to Implement IEP

The sole issue raised by Petitioner prior to the due process hearing was whether GPISD failed to provide Student with FAPE by providing only consultative ABA services through Student's Teacher, who is not a trained and certified BCBA, and by failing to provide an appropriate level of qualified ABA therapy at Student's campus. (*See, Petitioner's Post-Hearing Argument and Brief, p. 2*). Although this was the only issue raised by Petitioner in advance of the hearing, Petitioner raises new grounds to support an alleged denial of FAPE, for the first time, in Petitioner's Post-Hearing Brief: 1) procedural violations that denied Parent effective participation in the ARDC process and caused a deprivation of educational benefits to Student; and 2) failure to implement Student's IEP with respect to the provision of trained staff and appropriate ABA strategies.

IDEA's notice provision mandates that "a party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements of paragraph (b) of this section. *34 C.F.R. § 300.508 (c)*. Paragraph (b) specifies that a due process complaint must include a description of the nature of the problem, including facts related to the problem. *34 C.F.R. § 300.508 (b)*.

In this case, Petitioner's Request for Due Process alleges a denial of FAPE based on GPISD's failure to provide adequate ABA services, but makes no mention of procedural flaws with the ARDC process or failure to implement provisions of Student's IEP. Petitioner also did not identify these issues at the due process hearing so that Respondent had notice of Petitioner's intent to argue the issues in Petitioner's Post-Hearing Brief. Under these circumstances, I conclude that Respondent did not have the notice of these allegations as mandated by IDEA; as such, Petitioner is not entitled to be heard on these issues.

In the alternative, even if Petitioner were deemed to have properly raised these additional grounds for a denial of FAPE, I find that Petitioner failed to meet Petitioner's burden of proof on either ground. First, with regard to the procedural claims that the ARDC process denied Parent effective participation and caused a deprivation of educational benefit to Student, the evidence is clear that the ARDC considered Parent's request that *** be allowed to serve Student at school, allowed *** to observe Student at school so that recommendations could be made to the ARDC, and explained several reasons for denying Parent's request, all of which were based on rational educational and operational considerations. As will be discussed further herein, I find that the IEP generated by the ARDC and the FAPE provided by GPISD satisfied the requirements of IDEA, thus defeating Petitioner's argument that Student suffered a deprivation of educational benefit.

Second, with regard to the alleged failure to implement claim, the evidence demonstrates that GPISD staff, and in particular Student's Teacher and the District BCBA, were proficient in ABA methodology, trained and skilled to work with Student, and

implemented both the Texas *** curriculum and ABA teaching methodologies effectively enough to provide Student with the level of progress mandated by IDEA. I find that GPISD implemented Student's IEP and provided Student with instructional staff trained and proficient in educating Student.

II.

Failure to Provide FAPE Based On Inadequate ABA Services

Applicable Law on FAPE

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, GPISD 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)*. As a resident of GPISD, Student was entitled to receive FAPE from the District.

The definition of FAPE 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).

The vehicle for provision of FAPE is a Student's IEP; an appropriate IEP details an educational plan that addresses all of a student's identified needs in accordance with the requirements of IDEA and is reasonably calculated to provide a meaningful education benefit. *34 C.F.R. § 300.320*.

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, i.e. a substantive determination. *Id. at 206-207*.

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)*; *Adam J. v. Keller ISD*; *328 F.3d 804 (5th Circ. 2003)*.

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 minimis* 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 (5th 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 has 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. *Id.*; *Klein v. Hovem*, *supra*; *Wood v. Katy Independent School District*, 2015 U. S. Dist. LEXIS 134297 (S.D. TX 2015). These factors are intended to guide the inquiry of evaluating whether a student’s IEP provided a FAPE; they need not be considered or weighed in any particular way. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

Case law dictates that the educational program offered by Respondent is presumed to be appropriate. Petitioners bear the burden of proof to show that FAPE was not provided. *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).

Petitioner argues a denial of FAPE, focusing on the District’s failure to collaborate with the District’s BCBA and with ***, and on the lack of positive academic and non-academic benefits to Student. Concerns related to whether the program is individualized and based on assessment and performance and/or least restrictive environment do not apply.

Failure to Collaborate

The evidence does not support Petitioner’s contention that the District failed to collaborate with *** or that Student’s teacher and the District BCBA failed to collaborate. With regard to ***, the District allowed *** to observe Student so that its input could be considered at the ARDC meetings for Student. Teacher asked to observe *** working with Student in the home and to see ***’s treatment plan for Student, but was not provided the opportunity or information in response. With regard to collaboration between Teacher and the District BCBA, the evidence demonstrates that the BCBA visited Student’s classroom at least once per month for several hours to make recommendations to Teacher and that she did, in fact, make at least one recommendation specific to Student that was useful to Teacher.

Petitioner failed to prove that Student’s services were not provided in a coordinated and collaborative manner by the key stakeholders.

Positive Academic and Non-Academic Benefits

Petitioner alleges a denial of FAPE based on inadequate ABA services to Student at school. In support of Petitioner’s claim, Petitioner argues primarily that the evidence demonstrating positive academic and non-academic benefits to Student is unreliable and that, to the extent Student obtained any benefit from Student’s education at GPISD, it was minimal when compared with the progress Student made from receiving *** services.

Petitioner urges that the District's documentary evidence of data collection does not demonstrate progress and that Student's Teacher's testimony was too speculative to establish positive benefits or meaningful progress.

The weight of the evidence in this case supports the District's contention that Student made significant progress in Student's *** ***, both academically and non-academically. While the data collection sheets and IEP progress reports do not match the type of data kept in a clinical setting by ***, they do provide a reliable basis for assessing progress in an educational setting. More importantly, Teacher's testimony was highly persuasive as to Student's progress, because of Teacher's credibility, level of training and expertise, and the specificity with which she discussed Student's gains. Finally, Student's documented progress on the District's benchmark testing is a reliable indicator of academic progress.

Petitioner's focus on whether Student made more progress at *** than Student did at GPISD is misplaced. Legally, the question is whether GPISD provided Student with FAPE, not whether involvement by additional providers could increase the rate or level of progress obtained. Factually, the evidence demonstrates that *** services were not academic in nature and did not address any of Student's educational needs. Further, the progress made by Student as reflected on *** data is not consistent or meaningful in all areas.

I have no doubt that *** provides Student with important and effective services to address many of Student's needs as a Student with Autism; however, the determination as to whether GPISD has denied Student a FAPE by failing to provide ABA during the school day must focus on whether Student has made the requisite progress academically and non-academically under IDEA with the services provided Student. Petitioner failed to prove that the District's program, as currently constituted, did not provide Student with FAPE because of the lack of direct ABA therapy during the school day.

CONCLUSIONS OF LAW

1. Respondent Gregory Portland 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. GPISD is Student's resident district under IDEA for all time periods relevant to this action and is responsible for providing Student with a free appropriate public education under the IDEA. *20 U.S.C. §1400, et. seq.*
2. Student is eligible for special education and related services under IDEA. *20 U.S.C. Section 1400, et. seq.*
3. Petitioner bears the burden of proof on all issues raised in this proceeding. *Schaffer ex. rel. Schaffer v. Weast, 546 U.S. 49 (2005).*
4. Petitioner failed to meet Petitioner's burden to demonstrate a violation of IDEA, or to prove that GPISD failed to provide Student with a FAPE during the *** school year. *34 C.F.R. §§ 300.101, 300.116.*

5. Student's IEP is reasonably calculated to provide educational benefit, as the services are provided in a coordinated and collaborative manner by the key stakeholders and positive academic and non-academic benefits to Student were demonstrated. *Cypress Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); 34 C.F.R. §300.323.

ORDER

After due consideration of the record, and the foregoing Findings of Fact and Conclusions of Law, this Hearing Officer hereby **ORDERS** that all relief requested by Petitioner is **DENIED** and all claims are **DISMISSED WITH PREJUDICE**.

SIGNED and **ENTERED** this 25th day of March 2016.

/s/ Lynn E. Rubinett

Lynn E. Rubinett

Attorney at Law

Special Education Hearing Officer for the State of Texas

NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 20 U.S.C. §1415; 34 C.F.R. § 300.516; 19 Tex. Admin. Code Sec. 89.1185 (n).

TEA DOCKET NO. 024-SE-0915

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	§	
GREGORY PORTLAND ISD	§	
Respondent	§	
	§	STATE OF TEXAS

SYNOPSIS

Issue: Whether Respondent failed to provide Student with a free appropriate public education during the *** school year based on lack of adequate ABA services at school and in Student’s IEP?

Held: For the District. Petitioner failed to meet Petitioner’s burden to demonstrate a violation of IDEA, or to prove that GPISD failed to provide Student with a FAPE during the *** school year.

Cite: 34 C.F.R. §§ 300.101, 300.116