

**DOCKET NO. 161-SE-0215**  
**DOCKET NO. 243-SE-0415**

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

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**BEFORE A SPECIAL EDUCATION**

**v.**

**KILLEEN INDEPENDENT SCHOOL  
DISTRICT,  
Respondent**

**HEARING OFFICER FOR**

**THE STATE OF TEXAS**

**DECISION OF HEARING OFFICER**

Petitioner \*\*\* (the Student), by next friend \*\*\* (Father) and \*\*\* (Mother) (collectively, Petitioner)

- (7) filed in bad faith; and
- (8) Did the District obstruct an observation and evaluation by a provider?

As far as relief requested, at the hearing and in closing arguments, Petitioner asserted that, in the event that the District is found to have denied the Student FAPE, the District should be ordered to pay for private services and placement; pay for related services of weekly occupational therapy, speech therapy, and Applied Behavior Analysis (ABA); pay for the IEE provided by \*\*\*, Ph.D.; and pay for miscellaneous expenses such as mileage. The District denies that it failed to provide the Student FAPE.

## II. PROCEDURAL HISTORY AND JURISDICTION

Petitioner filed a Request for a Due Process Hearing (Complaint) on February 6, 2015, with a subsequent Complaint containing two additional allegations filed on April 24, 2015. An Order of Consolidation was entered by the Hearing Officer on April 27, 2015. The parties requested a continuance of the hearing and extension of the decision date to accommodate scheduling conflicts and to allow sufficient time for the parties to conduct discovery. This request was granted for good cause. The parties attended a resolution session, which was unsuccessful. The parties also participated in mediation in June 2015. The mediation was unsuccessful.

The hearing was held July 8-10, 2015, in Killeen, Texas. The hearing was held in the presence of the public. Petitioner was represented by attorneys Dorene Philpot and Yvonnilda Muñiz. The District was represented by attorney Holly B. Wardell. At the conclusion of the hearing, the parties requested an extension of the decision deadline to allow time for the preparation of a transcript and written closing arguments. This request was granted for good cause. Accordingly, the decision deadline was extended to September 14, 2015.





regard to issues related to a parental request for an IEE. In this case, Petitioner requested an IEE. Under 34 C.F.R. § 300.502(b)(2), the District must either cover the cost of the IEE or file a due process complaint to show that its evaluation was appropriate.

#### IV. FINDINGS OF FACT

Based upon the evidence and argument of the parties, the Hearing Officer issues the following findings of fact.

1. The Student, date of birth of \*\*\*,

problems were observed, but speaking fluency, articulation and vocal quality could not be evaluated. *Id.* at 9. cognitive functioning scores were delayed for adaptive behavior, social-emotional, and communication but average for the physical domain scores. *Id.* at 12.

10. The Student was also considered nonverbal, used \*\*\* interact with others, did not \*\*\* with others, and \*\*\*. Student used \*\*\*. Student did not \*\*\*. Student did not \*\*\*.
11. Student presented with a delay in all areas of receptive and expressive language. strength was the ability to express different \*\*\*.
12. The FIE recommended behavioral interventions and strategies consisting of structured supportive setting with a high emphasis on communication skills, a small class size with increased staff-to-student ratio, and frequent one-on-one instruction or \*\*\* on certain tasks in order to stay on task. Resp. Ex. 10 at 21.

**\*\*\* ARD**

13. An initial ARDC meeting was held in \*\*\* to review the FIE and implement educational program. Pet. Ex. 8. The ARDC \*\*\* communication was \*\*\* and Student \*\*\* what Student wanted. *Id.* at 8. The IEP goal was to increase receptive and expressive language skills. *Id.* at 3. The IEP, however, did not contain a goal to teach the Student \*\*\*. Tr. at 107, 109.
14. The \*\*\* IEP noted that the Student had difficulty expressing needs, interacting with others, responding to oral instructions, and did not appear to be interested in games or other children. Pet. Ex. 8 at 4. The ARDC recommended sensory breaks, physical prompting, use of incentives, adaptive materials, and non-verbal prompts. Pet. Ex. 8 at 17.
15. The \*\*\* IEP established that speech and occupational therapy was necessary. Pet. 8 at 23. The Student was scheduled to receive speech therapy (ST) for three 30-minute sessions every 4.5 weeks, and occupational therapy (OT) for four 15-minute sessions every 9 weeks.
16. \*\*\*, considered it appropriate that the \*\*\* IEP did not contain goals for \*\*\*, a recommendation for Extended School Year Services (ESY), a recommendation for a sensory evaluation, or more extensive OT or ST services because the Student was \*\*\* and 005200517sEgo

**\*\*\* ARD**

19. In \*\*\*, an annual ARD meeting was held. Pet. Ex. 10. Speech continued to be an issue. The committee noted that the Student was using at least \*\*\* in the classroom, including \*\*\*; Student was learning \*\*\*; and Student was \*\*\*. Student was also using the \*\*\* (\*\*\*) \*\*\* Student needed or wanted. verbalization skills continued to lag, however, and Student was only able to articulate \*\*\* in the classroom. *Id.* at 5.
20. The goals and objectives indicated that the Student would be encouraged to communicate using \*\*\*. Pet. Ex. 10 at 12. The Student would also use \*\*\*, would use \*\*\*, and would stay in assigned area with a minimum of staff support. *Id.* at 12-14.
21. The ARDC recommended an Assistive Technology Evaluation. Pet. Ex. 10 at 16.
22. \*\*\*. Pet. Ex. 10 at 20. \*\*\*. *Id.* at 22.
23. A formal \*\*\* was not necessary in \*\*\* because the Student was receiving \*\*\* instruction from teacher, \*\*\*, as well as other \*\*\* such as \*\*\*

**\*\*\* ARD**

31. The \*\*\*





54. Dr. \*\*\* found that the Student had strong short-term nonverbal memory as measured through recognition of objects; nonverbal reasoning skills were well above average; and overall visual perceptual matching, spatial orientation and fine motor coordination were average. capacity to learn depends on modality of presentation and the nature of the material but ranges from low average to above average. Tr. at 182.

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The ARDC also recommended that the ST and OT services be reduced. Although she was not present at this meeting, Ms. \*\*\* speculated that the services were reduced because the Student was showing progress.<sup>40</sup> She verified that the services \*\*\*.<sup>41</sup>

As to behavior, the IEP states \*\*\* exhibits oppositional behavior and has trouble working  
<sup>42</sup> No FBA or BIP was recommended by the ARDC at that point, although it was becoming apparent that the Student was \*\*\* on a regular basis. ESY was approved by the ARDC to prevent regression on significant skills after breaks. Specifically, the ARDC determined that Student required continued instruction in language/ communication, social skills, and behavioral skills.<sup>43</sup>

An \*\*\* ARDC meeting was convened to follow-up on an Assistive Technology Team Evaluation Report (AT Report). The AT Report





Ms. \*\*\* agreed, however, that there had never been an evaluation to determine whether Student fits the criteria for apraxia of speech, a physiological disorder that can be diagnosed and evaluated.<sup>56</sup> She had asked for an evaluation to be completed in \*\*\* to determine if apraxia was present, but the parents had not consented. The last ARDC had not recommended any further evaluations.<sup>57</sup> Lastly, Ms. \*\*\*

motor and gross motor and compares the scores by age equivalent. The Brigance was given to the Student in \*\*\* and in \*\*\*.<sup>64</sup>

Ms. \*\*\* testified that the Brigance shows how much progress the Student has made in total development. In \*\*\*, when Student was \*\*\* years \*\*\*old, Student had a raw score of \*\*\* with five areas in the \*\*\*-year-old age equivalency, eight areas in the \*\*\*-year-old age equivalency, and with one area in the \*\*\*-year-old age equivalency (literacy).<sup>65</sup> Then, in \*\*\*, when Student was \*\*\* years \*\*\* old, Student had a raw score of \*\*\*, with six areas in the \*\*\*-year-old age equivalency, four areas in the \*\*\*-year-old age equivalency, and three areas in the \*\*\*-year-old age equivalency (academic/cognitive, literacy, and gross motor). The last Brigance test, in \*\*\*, when Student was \*\*\*



On \*\*\*, Principal \*\*\* responded by letter that he had interviewed the teacher and aides and determined \*\*\*, in fact, both aides and the teacher stated that Student used \*\*\* and motions to indicate to them that Student would like \*\*\*.<sup>85</sup> Dr. \*\*\* denied the grievance and concluded that the teacher had the discretion to use behavioral strategies as needed.<sup>86</sup>

After the CPS and grievance were filed, Ms. \*\*\* \*\*\*. She testified that she felt like the working relationship that she had with the parents had been damaged.<sup>87</sup> She \*\*\*, because she realized the conflict was with the parents and not her relationship with the Student.<sup>88</sup>

In her \*\*\* FIE, Dr. \*\*\* discussed maladaptive behavior; she \*\*\* during school as maladaptive behavior.<sup>89</sup> Student was also \*\*\*<sup>90</sup> She pointed out that the solution by the school was \*\*\*. Dr. \*\*\* explained that it is typical symptomatic behavior of a child on the autism spectrum to engage in self-stimulatory behavior for various reasons.<sup>91</sup> So rather than make it inconvenient for the Student to engage in stimulatory behavior, there needed to be an evaluation of why Student was doing the behavior so the cause can be addressed directly, according to Dr. \*\*\*.<sup>92</sup> She explained that if the behavior is not addressed and just avoided (\*\*\*), then the replacement behavior may be more difficult to deal with than the original behavior.<sup>93</sup> The FBA would identify the function of behavior and then identify an alternative way for child to meet the need.<sup>94</sup>



There was controversy addressed by numerous witnesses concerning the District's placement for the Student for the \*\*\* school year. Ms. \*\*\* testified that she put the Student on a list of students who were recommended for \*\*\*. <sup>105</sup> She explained that skills class is a program for students with lower cognitive function. <sup>106</sup> There were \*\*\* children who were on the list. <sup>107</sup> The most recent ARD, dated \*\*\*, reflects that a skills placement is recommended for the \*\*\* small class setting with a low staff-to-student ratio to progress toward mastery of goals and objectives. <sup>108</sup>

Dr. \*\*\* testified that she disagreed with the appropriateness of the District's skills class, as proposed in the \*\*\* ARD for the \*\*\* school year. She explained that skills class refers to programs that are designed to emphasize functional skills, and not academic skills. It is a lower level with regards to academic rigors. For instance, skills class works on toileting, eating, and other functional life skills but has limited academics, such as reading signs rather than phonological processing required for reading. <sup>109</sup> Based on the review of the documents, observations, and testing, Dr. \*\*\* concluded that placement in a life skills setting would not be appropriate. <sup>110</sup> Student is not indicated as a student with an intellectual disability, according to Dr. \*\*\*. <sup>111</sup>

On \*\*\*, Mother notified \*\*\*, Ph.D., the Executive Director for xel21 0.06 Tc[(109)] TJETE4T EMC /P AMCI

uses \*\*\* with Student as





administered in the least restrictive environment. There was very little controversy on this factor raised by the parties in regards to the communication or behavioral issues. The evidence showed that the initial evaluation performed in \*\*\* when the Student was \*\*\*

should include a supportive setting with a high emphasis on communication skills; a small class size with increased staff-to-student ratio; and frequent one-on-one instruction on certain tasks in order to stay on task. Bo



Regarding the first factor, the District did not develop an appropriate individualized program on the basis of the Student performance. On this factor, the evidence demonstrated that the District failed to address the behavior. It was demonstrated persuasively that there were numerous opportunities presented to assess whether the Student had behavioral issues. When the Student first began \*\*\*, the parents had submitted an application to the District documenting that an OT and ABA assessment were requested, and that progress would be established when these evaluations were completed. No ABA assessment was ever undertaken by the District.

The Student underwent an FIE, psychological evaluation, and speech/language evaluation. Based on the evaluations, an ARDC was convened in \*\*\* to consider the IEP. The ARDC noted that the Student had difficulty expressing needs





The testimony from these witnesses is persuasive that the friction between the parents and the District staff affected the objectivity of the educational program administered to the Student, including the plan for future services through the skills program, which resulted in educational harm and abrogated the positive academic benefits achieved in the communication arena.

ndation for placement in the skills class  
Student from her class based  
on her perception that the behavior was interfering with her ability to teach, and the friction and lack of communication with the school staff, were all shown to have affected the delivery of meaningful educational benefits, which ultimately motivated the parents to remove the Student from the District and enroll the Student in a private placement.

Therefore, after considering all the factors, the Hearing Officer concludes that the Petitioner established that the District failed to provide a FAPE to the Student as to the behavioral issues.

### **C. Payment for the IEE**

The burden of proof is shifted in regard to issues related to a parental request for an IEE. In this case, Petitioner requested an IEE. Under 34 C.F.R. § 300.502(b)(2), the District must either cover the cost of the IEE or file a due process complaint to show that its evaluation was appropriate. The District granted the request for this request, the District bears the burden of proof.

The Hearing Officer concludes that the District has not met the burden of proof to show that it should not cover the cost of the IEE by Dr. \*\*\*. The evidence showed that a letter granting the IEE was sent to the parents. The District became aware thorough an e-mail that Dr. \*\*\* was going to conduct the IEE and worked with Dr. \*\*\* to arrange a schedule for her to observe the Student. Dr. \*\*\* had done work for the District in the past so there is no question that she met the qualifications.

The District should have arranged for payment once it became apparent that Dr. \*\*\* had been chosen to conduct the IEE. The District must pay the cost of \*\*\* to Dr. \*\*\* for the IEE. However, the evaluation was designed to have an achievement and IQ component and the scores must be furnished by Dr. \*\*\* to the District.

To summarize, as to the communication issues, the Hearing Officer finds that FAPE was provided to Petitioner. Moreover, Petitioner failed to meet the burden of proof, as alleged in the Complaint, that the District:

Failed to properly devise and implement an IEP to provide \*\*\*;

Changed an IEP without written parental input;

Failed to properly evaluate the Student so that a strategy could be developed to foster



school, if the hearing officer finds that the agency had not made FAPE available to the child in a timely manner and that the private placement is appropriate.<sup>124</sup> The evidence showed that

3. Petitioner did not meet the burden to prove that the District committed any other alleged denials of FAPE, including procedural errors under the IDEA that resulted in the deprivation of an educational benefit. 34 C.F.R. §§ 300.101, .513; *Schaffer v. Weast*, 546 U.S. 49 (2005).
4. Petitioner is entitled to appropriate relief, including compensatory education, for the educational deficit e to provide FAPE from February 6, 2014, to the date of issuance of this decision. *School Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985).
5. The Student is entitled to compensatory services in the areas of behavioral intervention.
6. The District is capable of providing the compensatory services and of providing FAPE.
7. The private provider of educational services, \*\*\*, was not proven to be reasonable or appropriate for Student.

### ORDER

1. -enrollment in the District, the District shall convene an ARD committee meeting to address the issues and decisions contained in this decision.
2. The District shall provide or contract with a specialist trained in ABA

6. The District shall pay Dr. \*\*\* within thirty days of this Decision. Dr. \*\*\* must either complete or provide the IQ and achievement test results that were authorized as part of the IEE
7. All other relief is denied.

**NOTICE TO PARTIES**

This Decision of Hearing Officer is a final and appealable order. Any party aggrieved by the findings and decision made by the Hearing Officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 19 Tex. Admin. Code § 89.1185(n).

**SIGNED on**

## **SYNOPSIS**

**Issue No. 1:** Did the District fail to properly identify and assess Student in all areas of suspected