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# DOCKET NO. 108-SE-0106

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B/N/F\*\*\*&\*\*\*

PETITIONER

vs. BEFORE A SPECIAL EDUCATION  
HEARING OFFICER  
FOR THE STATE OF TEXAS

PLANO INDEPENDENT

SCHOOL DISTRICT

RESPONDENT

## AMENDED DECISION OF THE HEARING OFFICER

### Statement of Case

On January 25, 2006, \*\*\*, by next friends, \*\*\* and \*\*\* (“Petitioner”) filed this request for due process hearing under the Individuals with Disabilities Education Improvement Act (“IDEA 04”), 20 U.S.C. § 1400 et seq., against the Plano Independent School District (“Respondent” or “District”) and alleged that Respondent failed to provide Petitioner with a free appropriate public education (“FAPE”). Petitioner was represented by Myrna H. Silver, attorney at law. Nona C. Matthews, of the law firm, Walsh, Anderson, Brown, Schulze & Aldridge, P.C., appeared on behalf of Respondent.

After a pre-hearing conference on February 27, 2006, a Pre-Hearing Order was issued. At the request of Petitioner for certain specific changes to his claims and issues, an Amended Pre-Hearing Order was issued that incorporated those changes. The due process hearing convened on April 4, 2006, and continued on April 6 and 7, 2006. Following the presentation of each party’s case, the parties

filed written closing arguments, and by their agreement, the decision due date in this matter was set for May 31, 2006 in compliance with the forty-five day rule.

Petitioner made the following claims against the District:

1. The District acted in bad faith and failed to comply with an agreement reached by the parties at a resolution session in a prior due process complaint;
2. In January, 2005, the District offered and placed Petitioner in its PPCD program at \*\*\* and failed to consider the full spectrum of educational programs available to Petitioner during the spring semester, 2005;
3. Although prior to Petitioner's enrollment in the District, Petitioner received occupational therapy ("OT") from Early Childhood Intervention ("ECI"), and although Petitioner's private evaluations recommended OT, the District failed to consider the provision of occupational therapy ("OT") to Petitioner and failed to provide OT to Petitioner;
4. During the 2005-2006 school year, the District failed to provide an appropriate length of school day to Petitioner;
5. The District offered an inappropriate educational program to Petitioner in that a portion of the program included no peers of Petitioner, and the District did not offer a staff person with appropriate certification, namely an occupational therapist, to address Petitioner's feeding skills;
6. The District failed to offer or provide an appropriate speech therapy ("ST") program to Petitioner in that it offered an inadequate amount of one to one speech therapy;
7. In the spring semester, 2005, the District failed to address in-home training;
8. The District failed to consider Extended School Year ("ESY") services to Petitioner in the summer, 2005; and
9. The District failed to properly evaluate Petitioner's need for physical therapy ("PT"), failed to consider the provision of PT to Petitioner, and failed to consider or follow the recommendations of a private PT evaluation that recommended PT for Petitioner.

Based on the above claims, the following issues were adjudicated at hearing:

1. Whether or not a resolution session agreement between the parties was reached in the fall semester, 2005 and, if an agreement was made, whether or not the District failed to comply with such agreement;
2. For the spring semester, 2005, whether or not the District considered the full continuum of placement options, and whether or not the District's placement for Petitioner for the spring semester, 2005, was appropriate;
3. Whether or not the District's placement of Petitioner during the spring semester, 2005, and its proposed placement for the 2005-2006 school year was in the least restrictive environment ("LRE") and resulted in a denial of FAPE to Petitioner; and

4. Whether or not the District failed to consider or provide ESY to Petitioner during the summer, 2005.

Petitioner requested the following relief in this proceeding:

1. An order directing the District to reimburse Petitioner's parents for all tuition and fees incurred at Petitioner's current private school from the end of May, 2005 to the present, and an order directing the District to pay for tuition and fees incurred prospectively by Petitioner until Petitioner begins \*\*\* in the fall semester, 2008;
2. An order directing the District to reimburse Petitioner's parents for privately conducted ST, OT, and PT evaluations in the summer, 2005;
3. An order directing the District to reimburse Petitioner's parents for expenses incurred for ST provided by \*\*\* from September, 2005 to the present time, and an order directing the District to pay for such ST services conducted prospectively on a year round basis, such ST being on a one-to-one basis in an amount of two, 30 minutes sessions per week, until Petitioner begins \*\*\* at the District or until it is determined that Petitioner no longer needs such therapies; and
4. An order directing the District to reimburse Petitioner's parents for privately conducted ST, OT and PT by Advanced Therapy Services from May, 2005 to the present time, and an order directing the District to pay for such ST, OT, and PT services conducted prospectively on a year round basis until Petitioner begins kindergarten at the District or it is determined that Petitioner no longer needs such therapies.

## Findings of Fact

1. \*\*\* is a \*\*\* year-old child, and resides with his parents within the geographical boundaries of the District. [Petitioner Exhibit 1 and 2]
2. Petitioner is a student eligible for special education services under the classifications of Non-Categorical Early Childhood ("NCEC") with a suspicion of autism and speech impairment ("SI"). [Respondent's Exhibit 1]
3. Petitioner received services from the ECI Program beginning in March, 2004, having qualified for such services in the area of communication/cognition. [Petitioner's Exhibit 27]
4. Petitioner experienced separation anxiety at night and school, and awoke once or twice at night at least 50% of time before his \*\*\* birthday. [Petitioner's Exhibit 27; Respondent's Exhibit 1]
5. From June to December, 2004, on a full-day basis, Petitioner attended \*\*\* Child Development Center ("\*\*\*"), a private \*\*\* school for typically-developing children. He required extra attention in art and extra direction when it was time to wash his hands. He spoke single words and some two to three word phrases. His speech skills were emerging and were steadily progressing. His greatest difficulty was successful communication in a classroom setting. He had separation anxiety when he began at \*\*\*, but by December, 2004 he was not having difficulty with separation from his mother. Petitioner was in the process of being potty trained.

- The \*\*\* staff had no problems with Petitioner's behavior, but encouraged him to interact with his peers since he kept to himself. [Tr. Vol. I, Pages 1, 2, 28-30, 34; Tr. Vol. II, Pages 101-103]
6. Prior to enrollment in the District, Petitioner received ECI services on a 1:1 basis for 2 hours, 15 minutes per week. The weekly service consisted of 90 minutes speech therapy and 45 minutes occupational therapy for sensory regulation. [Tr. Vol. I, Page 25]
  7. Numerous assessments of \*\*\* have been performed over a one year period. Those assessments and results appear on Table I at the end of this decision.
  8. At approximately age \*\*\*, Petitioner could throw, catch and kick a ball, and work puzzles. [Petitioner's Exhibit 1; Respondent's Exhibit 1]
  9. At almost \*\*\* years, Petitioner could catch, throw and kick a ball, and jump up and down on both feet. [Petitioner's Exhibit 18]
  10. On December 10, 2004, an admission, review and dismissal ("ARD") meeting was held at which time Petitioner was identified as a student eligible for special education services under IDEA with disabilities of NCEC with a suspicion of autism spectrum disorder and SI. The committee determined that \*\*\* needs one-to-one instruction during transition period, small-group instruction in order to learn new information, to reinforce and practice new information, and for independent practice and generalization of skills. The committee, including Petitioner's parent, developed an individualized education program ("IEP") for Petitioner that included 60 minutes of group speech therapy. The ARD committee did not require a Behavioral Intervention Plan ("BIP"), PT or OT. Petitioner was placed in the District's early childhood program at \*\*\* School ("\*\*\*\*") which is the home campus for a child of Petitioner's age. The ARD committee discussed and considered in-home training and parent training but determined that Petitioner would be able to generalize skills across settings; thus, neither training was offered. Petitioner's parent agreed with the ARD decisions. [Petitioner's Exhibit 2; Respondent's Exhibit 2; Tr. Vol. II, Pages 143-146, 161]
  11. Numerous accommodations were determined necessary for Petitioner's educational success. A sampling of his short term objectives include the following:
    - o Answer yes/no questions
    - o Increase expressive vocabulary by 15 or more words per month
    - o Increase length of utterance to 3-5 words
    - o Engage in joint attention to non-preferred activities
    - o Develop tolerance to changes in environment by using visual/tangible cues
    - o Increase on-task behavior for non-preferred activities for 3-5 minutes
    - o Participate in classroom tactile activities for 1-2 minutes without protest
    - o Expand food varieties at snack to try 2 new foods per month [Petitioner's Exhibit 2; Respondent's Exhibit 2]
  12. \*\*\* is one of three early childhood schools in the District and has an enrollment of over 400 students; it has a state-funded \*\*\* program for at-risk students, \*\*\* programs for children with disabilities ("PPCD") where students with disabilities attend with typically-developing children who are tuition paid students; a communication program for students who only have IEP communication goals,

- Spanish special education classroom, self-contained classroom for students with more significant needs, a centralized structured classroom for students who need a high degree of structure and individual direct instruction among other \*\*\* childhood programs. The \*\*\* year-old, PPCD classes at \*\*\* have a maximum enrollment of 12 students with an opportunity for six students with IEPs and six tuition students per class; the \*\*\* year-old, PPCD classes have a maximum enrollment of 15 students, with an opportunity for six students with IEPs and nine tuition students per class. All teachers at \*\*\* are special education certified. Additionally, \*\*\* has Speech and Language Pathologists (“SLPs”), teaching assistants, OTs, and physical therapists (“PTs”) on campus, along with itinerant support staff persons. The PPCD classrooms have one classroom teacher, one teaching assistant, and a SLP that comes on alternating days. [Tr. Vol. II, Pages 128-135; Petitioner’s Exhibit 20]
13. The teacher to student ratio in Petitioner’s class at \*\*\* is approximately 2:26. Petitioner’s teacher at \*\*\* does not have a college degree and is not certified or licensed to teach in Texas public schools. There are no OTs or STs on staff at \*\*\* and there is no occupational therapist that assists Petitioner during lunch at \*\*\*. [Tr. Vol. II, Pages 100, 112-113, 120-123, 151]
  14. Upon enrollment in the District, since no data existed regarding Petitioner’s need for ESY, the ARD committee did not consider ESY. His teacher saw no indicators that Petitioner would regress during the summer months, and ESY was not offered to Petitioner for the summer, 2005. No ARD meeting was held to consider ESY for the summer, 2005. [Tr. Vol. II, Page 161]
  15. At \*\*\*, Petitioner, who was \*\*\* years old at the time, demonstrated some aggression toward his teachers. After the use of picture supports and behavioral supports, the behaviors went away after one or two weeks. [Tr. Vol. II, Pages 251-252]
  16. During Petitioner’s enrollment at \*\*\*, Petitioner’s parents observed that he cried often on the way to school and after his mother picked him up at the end of the school day. He had difficulty making decisions and regularly woke up several times a week and was inconsolable. At a March parent-teacher conference, Petitioner’s parent discussed what she believed were increasing negative behaviors, lack of progress in speech, a need for intensive summer therapy, and other areas of concern. After receiving no response after the conference, the parents proceeded with private evaluations by Advanced Therapy Services (“ATS”) to qualify Petitioner for services, and began private therapy in May, 2005 without giving notice to the District of their intent to privately place Petitioner. [Tr. Vol. I, Pages 44-48, 139]
  17. Petitioner re-enrolled in \*\*\* at the end of the spring semester, May, 2005. \*\*\* had stopped its curriculum for the summer. Upon Petitioner’s return, \*\*\* experienced behavior problems and potty training issues with Petitioner. [Tr. Vol. II, Pages 104-107]
  18. During the summer, 2005, \*\*\*’s parents provided him with private ST and OT. They discontinued the services in August while they worked with the District in the formulation of his IEPs. The parents noticed deterioration in Petitioner’s

- language skills and some basic fine motor skills during that month and resumed ST. [Tr. Vol. I, Page 40-41]
19. Petitioner's parents contacted the \*\*\* principal affirming their belief that Petitioner needs a volume of typically-developing peers and a longer school day, and requested an ARD meeting. The District wanted to observe Petitioner at \*\*\* before the ARD meeting. In response, the parents notified the District that they would not remove Petitioner from \*\*\* until an agreement could be made regarding his IEP, and offered to allow the District to observe Petitioner at \*\*\*. [Petitioner's Exhibits 4, 5; Tr. Vol. I, Pages 54-58]
  20. An ARD meeting was held August 15, 2005 and resumed August 23 during which the parents presented the private evaluation results. Their requested changes were discussed. The District wanted to do its own OT evaluation, an articulation evaluation, a functional behavioral assessment, and an in-home training assessment within one month. [Tr. Vol. I, Page 68; Petitioner's Exhibit 12]
  21. Petitioner has continued to attend \*\*\* since the summer, 2005. He arrives between 9:00-9:30 a.m., and typically leaves at 5:30 p.m. [Tr. Vol. I, Page 58]
  22. Petitioner has tactile defensiveness issues and it is difficult to get him to eat new foods independently in the school setting. Presently, Petitioner continues to refuse to eat at lunchtime at \*\*\*. At home, he refuses to try prepared foods unless heavy prompts are used with him. Even with prompts, he often refuses. Petitioner's IEP includes goals to address those issues. [Tr. Vol. I, Page 37; Petitioner's Exhibit 2, 12, 14, and 22]
  23. From August, 2005 to January, 2006, the District held several ARD meetings and many efforts were made to come to an agreement for Petitioner's IEP. [Petitioner's Exhibits 12, 14, 22, and 31]
  24. The District refused Petitioner's request to increase his educational program to a full day, refused to place him at \*\*\* at District expense, and refused to provide 90 minutes of individual ST and 30 minutes of group therapy. [Petitioner's Exhibit 32]
  25. The District agreed to increase Petitioner educational program from 2 hours 45 minutes per day to 3 hours 45 minutes, adding time for lunch with peers and IEP goals for his eating issues. It offered 75 minutes of group ST and 15 minutes of individual ST. [Petitioner's Exhibit 32]
  26. A 25 hour week of instruction for children with autism can be a combination of intensive classroom, intensive home, or intensive individual instruction. Individual instruction by a SLP is important because communication disorder is a hallmark characteristic of autism spectrum disorder; thus, the SLP should be in the classroom on a regular, daily basis for an extended period of time. [Tr. Vol. II, Pages 59-60]
  27. Apraxia is a speech disorder that is difficult to diagnose and needs to be done over time in order to account for a child's language skills or a possible language disorder. Its characteristics can be seen in many other speech disorders. [Tr. Vol. III, Page 78-81]
  28. Least restrictive environment at the \*\*\* school age is within the context of meaningful daily activities with their typically developing peers in meaningful

- tasks such as play and reading stories. Children with autism often fail to generalize skills that are taught in a one on one setting. [Tr. Vol. III, Pages 96-97]
29. Dual enrollment was offered to Petitioner, but was not accessed. [Tr. Vol. II, Pages 225, 236]
30. At the parents' request, the mastery level of some of \*\*\*'s proposed objectives are higher than originally proposed. Although the proposed short term objectives for the 2005-2006 school year are not agreed upon, the following is a summary of those objectives which incorporate Petitioner's parents requests:
- Correctly use pronouns at the sentence level
  - Initiate greetings and closures in a variety of school settings at least two times per day
  - Retell a familiar story in 5 consecutive session
  - Indicate understanding of concepts in unstructured classroom activities to include: first, middle, last, next to, before and after
  - Parent training to assist \*\*\* with developing a tolerance to changes in his environment, expand his food varieties to try and accept new food, and assist with learning to toilet independently
  - Expand food varieties to try one new food per week and learn to accept without protest two new foods per month
  - Attend to speaker by making visual regard before following instructions
  - Actively play with at least 3 toys as designed for 10 minutes with only verbal prompts for 3 consecutive days
  - Take preferred items from a peer, 2 per day without prompts for 3 consecutive days
  - Participate in classroom tactile activities for 1-2 minutes without protest [Petitioner's Exhibit 31; Respondent's Exhibit 5]

## **Discussion**

### **Was a resolution settlement agreement reached; if so, did the District breach the agreement?**

If parties to a due process proceeding reach a resolution to the dispute, the IDEA 04 requires the parties to execute a legally binding agreement that is signed by both the parent and a District representative with authority to bind the District. Such agreement can be voided by either party within three business days of the agreement's execution. 20 U.S.C. § 1415(f)(1)(B)(iii) and (iv). Although the parties in this matter participated in a resolution session, they did not sign a written settlement agreement. Petitioner failed to prove that a resolution settlement agreement was reached by the parties. *Tatro v. State of Texas*, 703

F.2d 832 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005).

For the spring semester, 2005, did the District consider the full continuum of placement options, and was the placement for Petitioner appropriate?

The principal of \*\*\* was present at the December, 2004 ARD meeting and is knowledgeable of the continuum of placement options at the District. Although every type of classroom at \*\*\* were not specifically discussed, the committee discussed an appropriate option for \*\*\* in light of his educational needs for small group and one-on-one instruction and determined that the integration classroom was appropriate. Petitioner does not prevail on the issue regarding the District's failure to consider a continuum of placement options. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005). The appropriateness of Petitioner's placement will be discussed in the FAPE discussion below.

**Was the District's placement of Petitioner in the spring semester, 2005, and its proposed placement for the 2005-2006 school year in the LRE; if not, did such placement result in a denial of FAPE to Petitioner?**

Public school districts must comply with the IDEA procedures for identifying children with disabilities who need special education, and delivering appropriate services as necessary to provide a free and appropriate public education (FAPE). 20 U.S.C. §1412(a)(1); Board of Education of the *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, (1982); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

The Fifth Circuit has further defined a free appropriate public education by delineating four factors to consider as indicators of whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational program individualized on the basis of the child'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 positive academic and non-academic benefits

demonstrated? *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d at 253.

**Is the educational program individualized on the basis of the child's assessment and performance?**

The District performed a FIE prior to Petitioner's \*\*\* birthday. The evaluation results were the basis for Petitioner's IEPs that were developed in December, 2004. Speech therapy was recommended while occupational therapy was not although Petitioner's issues regarding tactile defensiveness during eating were addressed in his IEPs. The assessment team concluded that Petitioner did not need OT or PT because he had the necessary skills to adequately perform in a classroom environment. During the only semester that Petitioner attended \*\*\*, although he had not mastered all of the IEP goals which were written for a year, he made overall progress on those goals by the end of the spring semester, 2005. Although Petitioner's parents contended that he suffered psychological side effects while at \*\*\*, Petitioner failed to prove that his problems were caused by his presence at \*\*\*.

In August, 2005, the ARD committee met at the parent's request to review Petitioner's IEP. A series of ARDs followed throughout the semester. The record reflects that the parents were active participants in the preparation of Petitioner's goals and objectives, and changes were incorporated as a result of such participation. Prior to a private physical therapy evaluation of Petitioner in the fall, 2005, there had been nothing to indicate a need for PT. The ARD committee reviewed the assessment and reports from \*\*\*'s \*\*\* teacher and determined that PT was not necessary for Petitioner to adequately perform in a classroom environment.

There are two overarching issues that prevented an agreement regarding Petitioner's IEP: length of school day and individual speech therapy. Petitioner's parents do not disagree with the benefits for group speech therapy, but believe \*\*\* should have more individual sessions. The parents want Petitioner to have individual ST in an amount of 30 minutes, three times per week. The District

proposed 15 minutes of one-to-one ST and group ST for 75 minutes per week, an increase from 60 minutes group therapy that was provided in the 2005 spring semester. The record reflects that \*\*\* mastered some speech skills and progressed on all skills with the 60 minute group therapy that he received in the 2005 spring semester.

Petitioner's parents want an extended school day to total 25 hours per week. While a 25 hour per week program may be the general recommendation, the District's obligation under the IDEA 04 is to create an education program based on Petitioner's individual and unique needs. The District offered to increase Petitioner's school day from 13.75 to 18.75 hours per week to include lunchtime during which he would be with peers and his eating issues could be addressed by district personnel with the guidance of an OT. While there was expert testimony in support of both positions, I find that Petitioner's spring semester, 2005 IEP and the proposed educational program for 2005-2006 are individualized on the basis of his assessment and performance.

Is the program administered in the LRE? The IDEA requires that to the maximum extent appropriate, children with disabilities are educated with children who are non-disabled and that removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S. C. § 1412 (a)(5). Although a school is not required to try every conceivable supplementary aid or service, it should make more than a token effort. If education in a regular classroom with supplementary aids and services cannot be achieved satisfactorily, the school must mainstream the child to the maximum extent appropriate. *Daniel R. R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989).

In this case, there are no "regular" classrooms for \*\*\* and \*\*\* year old students. Compulsory school age in the state of Texas is six years. Tex. Educ. Code § 28.085(b). However, the District offers a variety of classes for \*\*\* and \*\*\* year old students, some of which are entirely for typically developing students; these

classes are for students who are limited-English, Spanish speaking, or students whose only IEP goals and objectives are in the area of communication. The PPCD classrooms are made up of both children with disabilities and typically developing children, the ratio of which may be fluid and vary from approximately 1/3 students with IEPs, and 2/3 typically developing students to a more even ratio of ½ students with IEPs and ½ typically developing students.

Although Petitioner believes that a larger number of typically developing peers is more desirable such as the student make-up of \*\*\*, other factors should be considered. Petitioner's expert witness, Dr. \*\*\*, testified that the District's PPCD program strives to have an even mix of students and to provide an array of developmentally appropriate activities and keep the class size relatively small compared to many pre-school settings. She acknowledged that the teachers at \*\*\* are special educators knowledgeable of strategies for working with autistic students such as Petitioner. Her reservations with the program were the regression that was reported to her and the length of the school day. District personnel did not see regression in Petitioner; in fact, the progress notes in his IEPs and witness testimony at hearing support that he was making progress. Petitioner wants to continue at \*\*\* at District expense and argues that \*\*\* is the least restrictive environment. However, Petitioner's teacher at \*\*\* is not a certified special educator, the student to teacher ratio is high, and no SLP is on staff. ARD documents reflect that Petitioner's parents do not believe that the teachers at \*\*\* are trained to recognize sensory issues that affect his participation at lunch. In light of the fact that Petitioner requires an individualized education program to address his speech and communication needs and his tactile defensiveness issues, and his need for small group and one to one instruction, the \*\*\* PPCD program is the least restrictive environment for Petitioner.

**Are services provided in a coordinated and collaborative manner by the key stakeholders:**

At \*\*\*, there is a SLP in the classroom on alternating days. During the spring semester, 2005, Petitioner's classroom teacher and the SLP worked closely

together. An occupational therapist is on staff to assist with strategies for Petitioner's eating issues which can be addressed during lunchtime with his peers. In the lengthy ARD meetings that began in August, 2005, \*\*\*'s parents took an active part in the development and revision of his IEP. In contrast, the record reflects that there is no collaboration between the \*\*\* teacher and the key stakeholders. The teacher testified that she did not interact with the private service providers. Services are provided at \*\*\* in a coordinated and collaborative manner by the key stakeholders.

**Are positive academic and non-academic benefits demonstrated?**

The record reflects that Petitioner benefited from his one semester at \*\*\*. His parent admitted to improvement in March, 2005. During the August, 2005 ARD meeting, his parent agreed that he was making progress within the school day. At the January 11, 2006 ARD meeting his mother said she believed he made more progress in a one to one setting. She did not say he made no progress in a group setting such as the District recommends. Commendably, Petitioner's parents want him to make maximum progress and seem to feel a sense of urgency regarding his needs. However, maximum progress is not the test. The educational benefit that an IEP is designed to achieve must be meaningful and likely to produce progress, rather than regression or trivial educational advancement. Although the educational benefit must be meaningful, schools are not required to maximize a child's potential or provide the best program.

*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3rd 245 (5th Cir 1997); cert. denied, 522 U.S. 1047 (1998). Petitioner's overall progress at \*\*\* was meaningful.

**Did the District fail to consider or provide ESY to Petitioner during the summer, 2005?**

At the time Petitioner enrolled in the District in January, 2005, there was no data available to use to determine a need for ESY. The District relies on the teachers' observations of regression after breaks from school. In Petitioner's case, those breaks consisted of weekends and spring break. His teachers did not see any

regression following those breaks. However, on March 22, 2005, Petitioner's parent met with his teacher and gave her a list of her concerns which stated, "Due to the critical, limited window of opportunity for intervention benefits for autism spectrum disorders, intensive summer therapy is a must." A copy of the document was given to Petitioner's teacher to pass on to the building principal. Although the record reflects that Petitioner's teacher believed that she and the parent had resolved that concern, Petitioner's parent did not consider it resolved. No ARD meeting was held. When Petitioner's parent did not hear from the District, in April, 2005, she proceeded to obtain new evaluations of Petitioner and to seek a summer program for Petitioner. Petitioner enrolled at \*\*\* and his parents provided him with OT services and 20 individual ST sessions of 90 minutes per week from May, 2005 to August, 2005.

Having been made aware of the parent's concerns at the mid-point of Petitioner's first semester in the District, and in light of summer's approach, it is reasonable to expect the District to respond by scheduling an ARD meeting at which time the necessary decision makers could consider the need for ESY.

The IDEA 04 requires a district to provided ESY if a child's IEP team determines, on an individual basis, that the services are necessary for the provision of FAPE to the child. 20 U.S.C. 1412 (a)(1) [emphasis added]. The Texas Education Agency has specified criteria for determining when ESY must be provided. The ARD committee must make the determination regarding a need for ESY.

Documentation must demonstrate that in one or more critical areas addressed in the student's current IEP objectives, the student reasonably may be expected to exhibit severe or substantial regression that cannot be recouped within a reasonable period of time. 19 Tex. Admin. Code §89.1065[emphasis added]. The District failed to consider ESY to Petitioner during the summer, 2005 and, in so doing, denied FAPE to Petitioner.

Compensatory education is an equitable remedy available for substantive or procedural IDEA violation. *Burlington Sch. Comm. V. Department of Educ.*, 471 U.S. 359 (1985); *Alamo Heights Indep. School Dist. V. State Bd. Of Educ.*, 790

F.2d 1153 (5th Cir. 1986). In fashioning appropriate equitable relief, consideration is given to the conduct of the parties along with the nature of relief requested. *Parents of Student W. v. Puyallup School District, No. 3*, 21 IDELR 723 (9th Cir. 1994). Due to the parents' concern regarding a limited window of opportunity to develop speech and language skills and their conviction that \*\*\* needs occupational therapy, either speech therapy, occupational therapy, or both services would be appropriate compensatory services.

### **Petitioner's Request for Reimbursement**

Regarding Petitioner's request for reimbursement for the 2005 summer program, he cannot prevail since he did not comply with the IDEA 04 notice requirement prior to his unilateral enrollment at \*\*\*. 20 U.S.C. § 1412(a)(10)(C)(iii). Petitioner also requests reimbursement for costs incurred from the fall, 2005 through the present about which he provided notice to the District, along with his costs for privately obtained evaluations. To receive reimbursement, Petitioner must discharge two burdens of proof. First, he must show that Respondent's proposed 2005-2006 program was inappropriate. Second, he must show that the \*\*\* program is appropriate. If Petitioner fails to discharge either burden, he is not entitled to reimbursement. However, if the Hearing Officer finds that the District's proposed program is appropriate, it is not necessary to reach the issue of the appropriateness of the private school placement. *School Committee of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985); *Florence County Sch. Dist. Four v. Carter*, 114 S.Ct. 365 (1993); *Tatro v. State of Texas*, 703 F.2d 823, aff'd, 468 U.S. 883 (1984). Having previously determined that Respondent's program is appropriate, nothing further must be determined regarding reimbursement for costs.

### **Conclusions of Law**

1. \*\*\* is a child in the Plano Independent School District who is eligible for special education services under the provisions of the IDEA 04 as a child with autism and speech impairment.
2. Respondent, Plano Independent School District, is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of

- the IDEA 04. Plano Independent School District is \*\*\*'s resident district and has the responsibility to provide Petitioner with a free appropriate public education under the IDEA 04. 20 U.S.C. §1401(a)(18).
3. Petitioner and Respondent did not reach a resolution settlement agreement. 20 U.S.C. § 1415(f)(1)(B)(iii) and (iv); *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005).
  4. For the spring semester, 2005, the District considered the full continuum of placement options, and its placement for Petitioner for the spring semester, 2005, was appropriate. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005).
  5. The District's placement of Petitioner during the spring semester, 2005, and its proposed placement for the 2005-2006 school year is in the LRE. 20 U.S.C. §1412(a)(1) and (5); *Daniel R. R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245; *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005).
  6. The District failed to consider or provide ESY to Petitioner during the summer, 2005;  
such failure was denial of FAPE. 20 U.S.C. 1412 (a)(1); 19 Tex. Admin. Code §89.1065.

## Order

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, Respondent is ordered to take the following actions:

1. Convene an Admission, Review, and Dismissal Committee meeting at the earliest practicable time to consider Petitioner's needs for ESY during the 2006 summer session; and
2. Provide Petitioner with either individual or group speech therapy services, occupational therapy services, or both, as compensatory services, in the total amount of 15 hours to begin as soon as practicable. These compensatory services shall be in addition to the speech therapy services that the District has offered to Petitioner and shall occur outside Petitioner's proposed school day. The ARD committee shall make the determination of the schedule and individual session lengths based on Petitioner's age and individual needs.

All other relief not specifically granted is hereby DENIED.

The district shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of Special Education Programs and Complaints

at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating that the Decision has been implemented; or 2.) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

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

SIGNED on the 30th day of May, 2006.

Brenda Rudd

Special Education Hearing Officer

For the State of Texas

Evaluation Date	Age of Petitioner	Evaluation Performed	Results
11.15.04	***	Full Individual Evaluation (FIE) By District	a. Brief IQb. Behaviors that impede adequate development of interpersonal skills c. Difficulty with flexible thinking d. Transition difficulties e. CARS score *** w/I range of Autism Spectrum Disorders f. No difficulties that would prevent progress on goals; no need for OT g. Significant disruptions in ability to communicate and use language; uses jargon, word approximations a few single words and occasional 2-3 word phrase h. Does not interact with peers and has difficulty attending to large group instruction i. Can adequately bite,

			chew and swallow but has limited diet [Petitioner's Exhibit 1; Respondent's Exhibit 1]
4.12.05	***	Speech Assessment by Advanced Therapy Services (ATS) at request of parents	a. *** expressive language delay and *** receptive language delay; age equivalent *** b. Oral aversion [Petitioner's Exhibit 28]
4.28.05	***	Occupational Therapy (OT) Assessment by ATS at request of parents	a. Peabody Developmental Motor Scales to assess reflexes, gross motor and fine motor skills. Petitioner's result: grasping age equivalent ***; visual-motor integration age equivalent *** b. Definite differences with vestibular processing and oral processing; definite difference in sensory input affecting emotional response; probable difference with emotional/social responses and behavioral outcomes of sensory processing c. Problem areas: decreased fine motor skills, visual-motor integration, sensory processing and self-care skills. d. Currently being potty trained [Petitioner's Exhibit 28]
9.15.05	***	Physical Therapy Assessment by ATS at request of parents	a. Peabody Developmental Motor Scales to assess reflexes, gross motor, fine motor skills; Petitioner rated ***.-Stationary, ***.-Locomotion, and ***.-Object manipulation [Petitioner's Exhibit 28]
9.14.05	***	Addendum to	a. Goldman-Fristoe Test-

		FIE by District (articulation)	difference in percentage consonant correct in single words and connected speech ***; does not qualify for articulation therapy [Petitioner's Exhibit 13, Respondent's Exhibit 8]
9.16.05	***	FIE-OT by District	<p>a. *** difficulty with fine motor, gross motor, self-help, or sensory processing skills that impaired functioning in classroom</p> <p>b. Parents reported Petitioner is displaying tactile defensiveness to some grooming and health procedures in home setting, such difficulties do not appear to affect his ability to perform in the classroom. No occupational therapy needed to support goals and objectives in IEP. [Petitioner's Exhibit 13, Respondent's Exhibit 9]</p>
9.3.05	***	FIE-Related Service of In-Home and Parent Training by District	<p>. Parents concerned with Petitioner's lack of self-initiated use of toilet, fixation on his written name, limited diet, tactile defensiveness to things such as tags and long sleeves on clothing, and tantrums when told no</p> <p>b. Parents invited to participate in meetings on topic of social skills, behavior, and potty training for a total of 7.5 hours.</p> <p>c. Related service of parent training recommended as individualized session of 3 hours by a district home trainer to help parents implement strategies</p>

			learned in parent training and support meetings. [Petitioner's Exhibit 13]
9.16.05	***	Addendum to FIE-Behavioral assessment by District	<p>a. Private and District *** staff reported positive behaviors in school setting with some difficulty managing transitions from preferred to non-preferred tasks and playing appropriately with peers.</p> <p>b. Parents report more difficult behaviors in home setting regarding trying new foods, self-regulatory sensory and emotional needs, and adapting to routine changes.</p> <p>c. Petitioner's behavior consistently rated across setting within average range compared to his same age peers [Petitioner's Exhibit 13, Respondent's Exhibit 10]</p>
12.1.05	***	Individual Educational Evaluation by ***, Ph.D at request of parents	<p>a. Full scale IQ- ***; *** range of cognitive functioning compared to *** age mates</p> <p>b. PEP-R test for children with autism. Petitioner's performance was commensurate with his *** cognitive ability</p> <p>c. CELF-P test for language comprehension and expression tasks: *** average</p> <p>d. *** range for single word vocabulary, comprehension of single words; articulation was ***</p> <p>e. Phrases and sentences were intelligible, but when intelligibility decreased, it was sometimes due to</p>

		<p>jargon which appeared to be triggered by overwhelming language demands</p> <p>f. Vineland assessment of adaptive (day to day) functioning: within *** range with the exception of daily living skills</p> <p>g. Summary: Petitioner has language and social *** associated with autism disorder; nonverbal cognitive skills in *** range compared to same age peers; moderate communication disorder characterized by *** in processing and production of language and pragmatics, or interactive use of language; evidences mild-moderate developmental apraxia of speech [Respondent's Exhibit 19]</p>
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# DOCKET NO. 108-SE-0106

B/N/F\*\*\*&\*\*\*

PETITIONER

vs. BEFORE A SPECIAL EDUCATION  
HEARING OFFICER  
FOR THE STATE OF TEXAS

PLANO INDEPENDENT

SCHOOL DISTRICT

RESPONDENT

## SYNOPSIS OF DECISION

- ISSUE:** Whether or not a resolution session agreement between the parties was reached in the fall semester, 2005 and, if an agreement was made, whether or not the District failed to comply with such agreement.
- CITATION:** 20 U.S.C. § 1415(f)(1)(B)(iii) and (iv); *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005)
- HELD:** For Respondent
- ISSUE:** For the spring semester, 2005, whether or not the District considered the full continuum of placement options, and whether or not the District's placement for Petitioner for the spring semester, 2005, was appropriate.
- CITATION:** *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005)
- HELD:** For Respondent
- ISSUE:** Whether or not the District's placement of Petitioner during the spring semester, 2005, and its proposed placement for the 2005-2006 school year was in the least restrictive environment ("LRE") and resulted in a denial of FAPE to Petitioner.
- CITATION:** 20 U.S.C. §1412(a)(1) and (5); *Daniel R. R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245; *Board of Education of the Hendrick*

*Hudson Central School District v. Rowley*, 458 U.S. 176 (1982)

**HELD:** For Respondent

**ISSUE:** Whether or not the District failed to consider or provide ESY to Petitioner during the summer, 2005.

**CITATION:** 20 U.S.C. 1412 (a)(1); 19 Tex. Admin. Code §89.1065

**HELD:** For Petitioner