

No. 168-SE-0307

STUDENT B/N/F	§	BEFORE A SPECIAL EDUCATION
PARENT	§	
PETITIONERS	§	
	§	
VS.	§	HEARING OFFICER
	§	
McMULLEN COUNTY INDEPENDENT	§	
SCHOOL DISTRICT	§	
RESPONDENT	§	FOR THE STATE OF TEXAS

**FINAL DECISION OF THE HEARING OFFICER**

STATEMENT OF THE CASE

Petitioner, \*\*, by his next of friend, \*\* (hereinafter Petitioner or Student) brings this proceeding against Respondent McMullen County Independent School District (hereinafter McMullen County ISD, Respondent or District) under the Individuals with Disabilities Education Improvement Act (hereinafter IDEA or IDEIA), 20 U.S.C. § 1400 *et. seq.*

Petitioners allege that Respondent denied Student a free appropriate public education during the 2006-2007 school years based on the following claims:

1. McMullen County ISD failed to timely identify Student as eligible for special education services under the Autism classification.
2. McMullen County ISD failed to provide Student appropriate speech services.

As relief, Petitioners seek reimbursement for an Independent Education Evaluation (IEE); reimbursement for private services; a finding that Student is eligible for special education services under the Autism classification which qualifies for additional supplemental services and for services as a student with Autism; an appropriate Behavior Intervention Plan (BIP); counseling services; individual tutoring; appropriate speech services; and two years of compensatory services.

## PROCEDURAL HISTORY

Petitioners, represented by Christopher Jonas of Corpus Christi, Texas, filed their request for a due process proceeding on March 2, 2007. Denise Pierce with the Austin firm of Bickerstaff, Heath, Delgado & Acosta, L.L.P., represented the District.

The Hearing Officer scheduled a prehearing conference for March 23, 2007, and the due process hearing for April 24, 2007. Since the District was closed for Spring break, there was no IDEA Resolution Session. On March 23, a prehearing conference was held; both Parties requested a continuance of the April 24 due process hearing which was then rescheduled for May 21-22, 2007

On April 19, Petitioners filed a Motion for Continuance of the May 21-22 hearing because their attorney had another due process hearing scheduled on the same days. The motion was granted and the hearing was rescheduled for June 13, 2007.

On June 5, 2007, Respondent filed a Motion for Summary Judgment based on the one-year statute of limitations. On the same day, Petitioners filed a First Amended Request for a Due Process Hearing. The First Amended Request constituted a new hearing request, thereby triggering the IDEA time lines to begin anew. Accordingly, the June 13, 2007 hearing was cancelled as a matter of law. On June 21, 2007, a Resolution Session for the Amended Request was held and was unsuccessful. The hearing was rescheduled for August 23-24, 2007

On August 10, 2007, Petitioners moved to continue the August 23-24 hearing to allow completion of a private psychological evaluation which was not expected to be completed until after the scheduled August 23-24 hearing. Petitioner's request for a continuance was granted and the hearing was rescheduled for September 10-11, 2007

The hearing began on September 10 and continued on September 11, 2007. The Parties requested a third day of hearing which was scheduled for September 18, 2007. On September 17, the District requested a continuance because its expert witness was unavailable. The District's motion was granted, and the hearing was rescheduled and held on September 28, 2007.

At the conclusion of the hearing, the Hearing Officer asked the Parties to brief certain legal issues by October 29, 2007. Both Parties timely filed their legal briefs. Petitioners filed their Response Brief to Respondent's Proposed Findings of Fact on November 4, 2007. On November 26, this Hearing Officer requested a one-day extension of the 45-day deadline due to an inadvertent error in calendaring the deadline. Both Parties agreed to the one-day extension.

Taking continuances into account, the deadline for the Final Decision is November 28, 2007. The Hearing Officer issued her decision on November 28, 2007.

#### FINDINGS OF FACT

1. Student is a resident of McMullen County ISD and as such receives IDEA services under the classifications of Speech Impairment and Emotionally Disturbed.

2. Student began attending \*\* when he was \*\* years old. Student was referred for special education testing due to an articulation impediment, but the District's speech therapist found he did not qualify for services. Nevertheless, Student was placed in the District's Section 504 program. (Transcript [Tr.], Volume [V.] 1, p. 23; Petitioner's Exhibit [PX]-27).
3. Student started \*\* in August 2004 and was referred for a special education evaluation by November 2004. The speech evaluation determined that Student qualified for services due to a speech impairment in the area of articulation. Student received two thirty minute sessions of speech therapy per week. During the 2004-2005 school year speech was the only service provided to student. In January 2005, Student took the Texas Primary Reading Inventory (TPRI) which showed that he was on a pre-\*\* reading level. (Tr. V. 3, p. 515; PX 14-B, 24-27).
4. During his \*\* year, Student exhibited significant frustration due to his poor academic skills. He excluded himself from the rest of the class, refused to do his work, played alone, was never easily soothed, was not a good sport, and did not communicate well. Additionally, Student was often absent or tardy because he did not want to go to school. All of these behaviors are consistent and common with an autism spectrum disorder.
5. In March 2005, three months after the first referral, Student was again referred for a special education evaluation. The referral packet stated that Student was making poor progress in acquiring basic reading and math skills, had difficulty with oral expression and in producing written work, and had problems retaining skills from day-to-day. (PX 14-B).
6. Student completed the Full Individual Evaluation (FIE) on March 1, 2005. The evaluation found Student functioned in the low average range of intelligence and that he was functioning on a pre-\*\* academic level, needed remediation in basic number identification, and could only identify 2 out of 14 letters of the alphabet. In spite of these low skills, Student did not meet the eligibility criteria as a student with a learning disability because no severe discrepancy existed between his educational performance and intellectual functioning. (PX 13-23).
7. At end of the 2004-2005 school year Student was having difficulties identifying the letters of the alphabet and their sounds. In the spring 2005, Student took the Iowa Test of Basic Skills for all academic areas. All his grade-equivalent scores were in the \*\* level and his percentile scores were all well below the \*\* % range. (PX 12).
8. After trying individual tutoring, alternative materials, peer tutoring, and various classroom interventions, Student continued to show poor progress on acquiring and retaining basic skills, and the decision was made to retain him in \*\* for another year. (Tr. V.1, p. 24; PX 23).

9. Over that summer, Student attended the Sylvan Learning Center and was referred by the Center for a psychological evaluation. The evaluation found that Student appeared to be experiencing depression and anxiety that stemmed from his learning problems. Student scored in the average range in math, the below average range in written language, and the mentally deficit range in reading. During the testing Student got angry, shut down, refused to attempt tasks, and was easily frustrated. Student was often too angry to proceed, gave up easily, and refused to answer questions he actually knew. His speech was difficult for the evaluator to understand. The evaluator recommended that Student be retained in \*\*. Student did improve his reading skills while attending the Sylvan Learning Center. (RX 1).
10. Student began his second year of \*\* in the fall of 2005. Shortly into the school year, the teacher and Student's parents began noticing that Student's behaviors interfered with his academic performance. He continued to have difficulties with articulation, letter-sound recognition, and control of his frustration. His reading skills remained on a \*\* level. He received small group speech therapy twice a week for 30 minutes per session. In addition, Student received help in class and 30 minutes daily of one-on-one reading instruction from a special education reading teacher. (Tr. V.1 p. 24, 70; PX14-B; .Respondent Exhibit [RX] 2, 15).
11. The ARD met in December 2005 for Student's annual ARD meeting. The Committee continued his speech program but did not provide any other behavioral or academic support. The decision was made to refer Student for another evaluation to determine if he met the eligibility classification of Emotional Disturbed. As noted above, Student had been previously referred by a Sylvan Learning Center teacher for a psychological evaluation due to his anxiety and depression. (PX4 A-C; RX1-2).
12. On December 14, 2005, Student was evaluated by a District psychologist to determine if he met the criteria as a student with an emotion disturbance. The report, completed in January 2006, showed that Student was functioning at a \*\* level academically but showed strengths in the area of math reasoning. The evaluation showed that Student needed remediation in all areas.
13. The report noted that behaviorally, Student still shut down and got anxious. When introduced to new material, Student became frustrated and "acted out" when embarrassed. The teacher rating scale showed that Student was in the clinically significant range for aggression, depression, withdrawal, and adaptability; he was in the at-risk range for social skills and functional communication. (PX4 A-C; RX1-2).
14. The evaluation results reveal that Student displayed a high number of aggressive behaviors, often arguing when denied his way, demonstrating negativity, pessimism and sometimes refusal to join group activities. He withdrew from classroom or group activity when he didn't understand the lesson being taught. He had difficulty adjusting to new situations when compared to others his age, did not cope well with minor setbacks, had

trouble being soothed after becoming angry, and displayed rigid body movement. Moreover, Student had difficulty articulating his thoughts and ideas to others. (PX4 A-C; RX1-2).

15. The January 2006 evaluation found that Student met the eligibility classification of Emotionally Disturbed. On January 25, 2006, the ARD Committee met and accepted this new eligibility. As a result, the District provided additional services to Student including more resource reading time, counseling, a functional behavioral assessment, and developed a Behavior Intervention Plan (BIP). At the end of May 2006, Student passed to \*\* grade. (PX4 A-C; RX1-2).
16. On November 16, 2006, Student's annual ARD meeting was held. The Committee noted that Student continued to experience academic problems in reading and refused to do classroom work. The Committee found that he was still functioning at or below the \*\* level. Student's resource classroom time was increased from 30 minutes daily to an hour daily, but counseling was reduced from nine sessions to six sessions. (RX 13; PX 3).
17. The BIP was developed to address Student's excluding himself from group or classroom activities, his refusal to work, and his inability to manage his frustration. An IEP focusing on social skills was developed to help Student control his body language and facial expressions related to anger and frustration. (Tr. V. 2, pp. 451-452; PX 3; RX 9).
18. In the fall of 2006, Student's mother observed him playing alone on the playground, isolated from the other children and "living in his own world". Student continued to have academic and speech problems and had more difficulty attending school. Although consistent attendance was a problem in previous school years, in the 2006-2007 school year, Student simply did not want to attend school resulting in a higher number of absences.
19. Such behavior was a manifestation of the significant stressors he was experiencing at school. Additionally, Student's reading skills were not improving, and his reading level remained at the \*\* level. (TR. V.1, p. 181-182; RX 10).
20. In the fall 2006 semester, Student's \*\* school counselor approached his mother with a pamphlet on autism. Although his mother was not prepared to consider that her son may have had autism, she nevertheless researched the topic. After reading a book about autism, Student's mother told his Resource teacher about the book and shared her suspicion that her son may be autistic. A few weeks later, Student's mother provided his teacher a copy of the book to read. Nevertheless, neither the counselor nor the teacher requested an evaluation to rule out autism. Neither called an ARD meeting to discuss the mother's suspicions. (Tr. V. 1, pp. 166-167).
21. Both the elementary school counselor and the resource classroom teacher were responsible for fulfilling the "child-find" obligation under IDEA. Accordingly both had

an obligation to either refer Student for a special education assessment or call an ARD committee to discuss the mother's concerns.

22. An autism spectrum disorder affects three major areas of development: social interaction, communication, and stereotypic behaviors. As a child grows, develops and learns, these characteristics become very idiosyncratic to that particular person. Autism spectrum disorders are a syndrome and display a collection of symptoms which develop at different pace in each individual. The development of some of the more common symptoms associated with an autism spectrum disorder will influence when the disorder is recognized in a particular individual. (Tr. V. 1, p. 107).
23. Student exhibits behaviors in all three areas affected by an autism spectrum disorder. He engages in stereotypic behavior such as arm flapping, spinning, or other purposeless physical actions. When he stressed, he has no ability to communicate with people other than those he knows well. Student has trouble understanding language, particularly new language or symbols and does not understand most tasks. In many situations, his only response is anger or withdrawal. (Tr. V. 1, pp. 107-112; PX 4C).
24. The District's expert witness testified that Student exhibited none of the characteristics associated with an autism spectrum disorder. Her testimony was based strictly on a review of the records and interviews with school personnel. The expert testified that her opinions were based on Student's four evaluations: two psychological evaluations, an FIE to rule out Learning Disabled, and a speech evaluation. The tests used in these evaluations measured Student's academic, cognitive and achievement skills. There was no test to measure his pragmatic skills or adaptive behavior skills. The District's expert did not see or meet Student or his parents. In such a vacuum, her testimony was not persuasive. (Tr. V. 1, pp. 109-110, 124).
25. During the fall 2006, Student exhibited behaviors which could be attributed to an autism spectrum disorder, including refusal to work, hand-spinning, turning his body away from teachers and other adults, avoiding eye contact, his dislike of being touched, avoiding school attendance, and retreating into his "own world." Student also exhibited poor communication and social skills. (Tr. V. 1, p. 125-126, 131, 142-148, 167-181).
26. On November 27, 2006, Student was given an independent speech evaluation by a private clinic in San Antonio. The articulation evaluation showed that he was in the bottom one percentile as compared to children his age. This translated into an articulation age equivalent of 3.3 years. The evaluation recommended he begin speech therapy immediately. (PX 2).
27. In January 2007, Student's pediatrician's office referred him to the \*\* Pediatric Center in San Antonio, for an evaluation and, if necessary, a treatment plan. The parent took Student for this evaluation in June 2007. The \*\* performed a speech evaluation and an

Applied Verbal Behavior Evaluation. The behavior evaluation recommended targeting many of the problems seen in the school setting such as ignoring teaching instructions, non-compliant behaviors, articulation, anger, shutting down, responding to questions inappropriately, and controlling stress levels while being taught new material. (PX29).

28. The \*\* Center conducted a speech and language assessment using two instruments, the Clinical Evaluation of Language Fundamentals (CELF) and the Goldman-Fristoe Test of Articulation. The speech assessment found a severe expressive language delay. Expressive language skills are the ability to: express emotion, recognize emotions in others, interpret eye contact and body language, and express clearly and fluently. Student demonstrated significantly decreased pragmatic language skills. During the evaluation, Student had few facial expressions or gestures and poor body orientation. He never initiated conversation was unable to adjust or repair conversation flow. (Tr. V. 1, p. 215, 221-228; PX 30).
29. The Goldman-Fristoe Test of Articulation confirmed the November 2006 evaluation using the same instrument: Student continues to fall within the one percentile as compared to typically developing aged peers indicating significantly articulation and phonological problems. Based on this low percentile, Student is considered to be, and is, severely unintelligible. (Tr. V. 1, pp. 215-220; PX 30).
30. The \*\* speech assessment recommended therapy objectives to increase overall communication skills by targeting phonological awareness, articulation skills, and speech intelligibility. The evaluation also recommended pragmatic language objectives designed to increase his communication initiation, reciprocity, non-verbal communication skills, and conversation maintenance and repair. (Tr. V. 1, pp. 219-220; PX 2, 30).
31. Prior to November 2006, Student received eight thirty-minute sessions of speech therapy every six-weeks in a group setting. In October 2006, Student's \*\* grade teacher asked the speech therapist to provide Student individual therapy. The therapist agreed and provided an additional 15 minutes of individual therapy after group therapy. Student needs speech therapy for articulation on a one-on-one basis.
32. In November 2006, Student's ARD Committee decreased his speech therapy to seven (7) thirty-minute sessions of speech therapy every six-weeks. The ARD documents note that the speech therapy would be delivered "part individual-part group." Though both the \*\* grade teacher and the therapist testified that the November 2006 ARD increased Student's speech services, the documents show that in fact his speech services was decreased from eight sessions to seven sessions every six weeks. (PX 3; RX14-15).
33. The speech therapist testified that Student had mastered the /k/ and /g/ phonemes by being able to auditory discriminate between the two phonemes and that he mastered the use of such phonemes on the syllable level, phrase level, and sentence level. However, under cross examination, it was clear that Student had not mastered these phonemes at

the all of the hierarchy levels. The 2007 \*\* evaluation confirmed that Student has not mastered these levels. (Tr. V. 3, pp.526-527; PX 30).

34. The speech therapist reported Student had mastered an objective relating to fronting of particular phonemes. However, this objective, without revision, was continued for an additional year for different purposes. The first year, the objective was to discriminate between particular phonemes. The second year, it was used to measure Student's ability to actually produce the sound of the phonemes. Since this objective was not written to reflect the criteria used to measure progress, it is difficult to determine if the Student mastered it. To report master of an objective while continuing to work on that objective reflects negatively on the credibility of the therapist. Goals should be written to allow parents and other school personnel to measure the stated objective, particularly if the objective has a hierarchy system. (Tr. V. 3, pp. 530-534, 617; RX 9).
35. Student's speech therapy did not address pragmatic skills. Student did have an IEP for Adaptive Social Skills that supported his BIP relating to frustration and anger. However, the Student needs pragmatic goals and objectives to develop reciprocity, eye contact, conversation initiation and repair, and other related social skills communication needs. Since the speech IEP did not provide goals relating to pragmatic skills, I find the IEP inappropriate.
36. The May 2007 STAR Reading Diagnostic report showed that Student's grade equivalent score was \*\* meaning his reading skills were comparable to those of an average \*\* after the fifth month of school. Student's national percentile rank was \*\*. After \*\* years of school, Student is still considered an emergent reader only beginning to identify the parts of a book; i.e., the title, the front, and the back. (RX10).
37. In summer 2007, Student received services from the \*\* Pediatric Clinic in San Antonio, Texas. These services were necessary because of McMullen County ISD failure to evaluate Student for an autism spectrum disorder.

## DISCUSSION

### I. STANDARD OF REVIEW

In general, IDEA entitles every student with a disability to receive a free appropriate public education (FAPE). Thus, every student is entitled to an individualized education plan (IEP) that is developed according to specified procedures, designed specifically for the student's unique needs, individualized according to assessments and performance, and supported by services that will permit the student to benefit meaningfully from instruction. The United States Supreme Court established a two-prong test for determining whether a school district has provided a child with a free appropriate public education. The first inquiry is whether the district complied with

IDEA procedural requirements. The second inquiry is whether the student's education program is reasonably calculated to confer an educational benefit. *Board of Education of Hendricks Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S.Ct. 3034 (1982).

Petitioners allege that McMullen County ISD violated the procedural guarantees of IDEA, specifically, by violating the "child find" provision of the IDEA. Under the second prong, Petitioners allege that McMullen County ISD did not provide their child an appropriate education because the District failed to provide appropriate speech services.

Because IDEA does not provide a substantive standard specifying the precise level of education required to provide a free appropriate public education, the courts have defined the required education as "personalized instruction with sufficient services to permit the child to benefit educationally from that instruction." An IEP must be designed to achieve a meaningful educational benefit that is 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).

The Fifth Circuit delineated 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 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 positive academic and non-academic benefits demonstrated. *Id.* at 253. An IEP will be strictly scrutinized for procedural defects that result in a lost educational opportunity for the student or that infringe on the parents' opportunity to participate in the IEP process.

## II. CHILD FIND

Both federal and state laws require a school district to identify, locate, and evaluate all children with disabilities residing within its jurisdictional boundaries. This rule is known as the "child find" provision. 20 U.S.C. Sec. 1414 (a) (1) (A).

The "child find" provision requires a school district to have procedures in place to ensure that "All children with disabilities ..., and who are in need of special education and related services, are identified, located, and evaluated." This provision imposes an affirmative duty on the school district to seek out and identify students with disabilities. Although parents may request a referral for such services, they are not required or obligated to do so. The parents' failure to seek a referral does not relieve the District of its obligation to look for children who may qualify for special education services. 34 C.F. R. §300.125 (a) (1) and (2).

The IDEA requires a two-step analysis for determining if a child should be identified and referred for special education services. First, the district must have some reason to suspect that

the child has a disability. Second, the district must have some reason to suspect that the child is in need of special education and related services. *B.C., B.N.F., L.C. v. Seguin ISD*, Docket No. 232-SE-0305(SEA Tex. 2005). In this proceeding, McMullen County ISD disputes that the District had reason to suspect a disability. McMullen County agrees that Student is a child in need of special education and related services and argues that the current services provide a free appropriate public education.

Petitioners assert that the District should have referred Student for a special education evaluation to rule out an autism spectrum disorder based on the facts and circumstances known to the District before Petitioners filed for a due process hearing. The District counters that it complied with the “child find” provision by providing Student services through Section 504 and special education services. I am asked to determine whether the District was required under the “child-find” provision of IDEA to refer Student for a special-education evaluation in the 2006-2007 school year to determine if he met the eligibility criteria for autism. Whether Student should have qualified for special-education services at an earlier date, or whether he ever qualifies for special-education services under the autism classification, is not relevant to this “child find” determination.

McMullen County ISD contends that there was no reason to suspect that Student was autistic because he achieved or was close to mastering his educational goals and his behavior improved after the District implemented a behavior plan. The District further argues that Student did not exhibit any recognized signs of autism such as repetitive motion or lack of personal relationships. I find the District’s arguments unpersuasive.

Two categories of evidence support the conclusion that McMullen County ISD was required to refer Student for an evaluation to rule out autism. The first category is the interaction between Student’s mother and District personnel. The credible evidence established that it was the school counselor who initially provided Student’s mother with information concerning autism. Thereafter, Student’s mother gave the teacher a book and said that she believed her son met most of the described autism characteristics. The teacher testified that the book exchange occurred.

The teacher testified that because *she* did not see any of these characteristics in the Student, she didn’t refer him for an evaluation. She further admitted that she had no training about autism and had never taught a student with autism. Since she knew she lacked any knowledge about autism, she had a duty to refer Student to personnel who had the necessary training to evaluate the possibility.

The same is true for the school counselor. I believe the school counselor was the first person to provide Student’s parent with information on autism. It is highly unlikely that in fall 2006, without this precipitating event, the parent would have unilaterally decided that her son was autistic and begun researching this emotionally-laced topic. The counselor testified that she provided only a telephone number to an agency that evaluates and provides services to students with autism. However, assuming for the sake of argument that this was the case, the counselor should have inquired further and reviewed the matter with teachers and diagnostician or other

special education administrators. Under the “child find” obligation, the District is responsible for evaluating *all suspected disabilities*, without regard to whether that suspicion comes from school personnel or a parent. In any event, whether the issue of autism was initiated by the District personnel or the parent, it was at least sufficient to raise a reasonable suspicion of disability and thus triggering the necessity of an appropriate evaluation.

The second category of persuasive evidence is the Student’s educational progress or the lack thereof, in reading and speech. In the spring of 2005, the Iowa Test of Basic Skills showed Student’s the overall level of a \*\* having three months of school. That summer, he attended the Sylvan Learning Center and received academic tutoring. Later that summer, Student had a private evaluation that showed his academic scores were low. Given his minimal progress over the summer, both the counselor and the special education teacher should have taken more seriously the mother’s concerns about autism as expressed in the fall of 2006 and convened an ARD to discuss the matter. Student’s lack of meaningful progress was further evident in the May 2007 STAR reading scores that again showed him to be on a \*\* level. By the May 2007 STAR test, Student had attended school for \*\* years.

The Hearing Officer concludes that Student is entitled to a reimbursement of any costs associated with an Independent Educational Evaluation based on the McMullen County ISD’s failure to identify him in the fall 2006.

### III. SPEECH SERVICES

Two private speech evaluations showed that Student was not making progress in acquiring and appropriately using speech. Only one of Student’s speech objectives addressed his articulation problems and the other two objectives addressed the correct target patterns in syllables and words. The speech program failed to address pragmatic language, i.e., maintenance and repair of a structured conversation and the identification of appropriate non-verbal communication such as eye contact, body posturing, eye contact, and body orientation. All school personnel testified that Student was socially appropriate with them and students. However, this may reflect Student’s comfort in being at a small school in a small classroom with the same support personnel year after year.

The persuasive evidence concerning Student’s pragmatic skills was the testimony of Petitioner’s autism expert, the \*\* therapist, and the parent’s description of Student’s reaction to crowds and strangers. Both the autism expert and the \*\* therapist had the same experience -- Student was socially inappropriate and lacked basic pragmatic skills.

When this proceeding was filed, Student’s speech program was twice a week for 30 minutes in a group setting. In October 2006, Student’s teacher asked the speech therapist to provide an additional 15 minutes of individual therapy which was provided. Currently, his speech program consists of two 45 minutes sessions per week, 30 minutes of which is a group session and 15 minutes in individual sessions. However, the May 2007 IEP does not state that speech therapy

will be delivered on an individual basis for 30 minutes a week nor does it show an increase from 30 minutes to 45 minutes.

I find that the speech services provided in the IEP are inadequate to address all Student's speech and communication needs. Additionally, I find that the method of delivery, i.e., group sessions, was inappropriate because of Student's severe articulation and communication needs.

## V. FREE APPROPRIATE PUBLIC EDUCATION

IDEA requires that a student receive a meaningful educational benefit, that is more than merely trivial benefit, but not necessarily a maximization of a student's potential. *Bd. Of Edu. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 175 (1982). McMullen County ISD argues that Student received a free appropriate public education because he is receiving all the necessary services to address his speech articulation problem and his emotional disturbance. Respondent further argues that Student made progress on his reading and social skills IEPs.

The question of "meaningful educational benefit" is the second of two-prong test the Supreme Court set out as a measure of a free appropriate public education. The first prong, the adherence to the IDEA procedural safeguard, must be met before examining the question of meaningful benefit. In this case, I find that McMullen County ISD failed to satisfy the first prong by its failure to refer Student for an autism assessment. Such failure violated Student's right to a free appropriate public education.

In addition to this procedural violation, I find that McMullen County ISD failed to provide Student appropriate speech services because they did not address a critical area, mainly pragmatic skills. Although the District attempted to address certain social skills related to Student's anger and frustration, he obviously needs more than these pragmatic skills. Furthermore, his May 2007 reading scores showed he has made minimal progress over a four-year period.

## V. CONCLUSION

In conclusion, I find that Student was deprived of a free appropriate public education because he was not referred for a special education evaluation for an autism spectrum disorder. Furthermore, I find that Student was deprived of appropriate speech therapy because the objectives did not address his unique communication and pragmatic needs. The delivery of services was also inappropriate because his services should have been provided on a one-on-one basis to ensure he received more than a trivial educational benefit.

## CONCLUSIONS OF LAW

1. McMullen County Independent School District is an independent school district duly constituted in and by the State of Texas, and is subject to the requirements of IDEA, 20 U.S.C. §1401, and its implementing federal and state regulations.

2. Residing within McMullen County ISD, \*\* is currently eligible for special education services under the Speech Impairment and Emotional Disturbance classifications. 20 U.S.C. §1401; 34 C.F.R. §300.7(c).

3. Petitioners met their burden to show that McMullen County ISD failed to timely evaluate \*\* for additional special education and related services as a student with an autism spectrum disorder.

4. Petitioners met their burden to show that McMullen County ISD failed to comply with the IDEA's requirements governing "child find" by failing to timely refer, evaluate and determine \*\*'s eligibility for special education and related services. This procedural violation caused \*\* to suffer a loss of access to the special education referral process and ultimately timely special education services. *Adam J. v. Keller ISD*, 328 F.3d 804 (5<sup>th</sup> Cir. 2003).

5. Petitioners met their burden to show that \*\*'s speech therapy program was not appropriate.

6. There was insufficient evidence to find that \*\* met the IDEA's eligibility criteria for special education and related services as child with an autism spectrum disorder.

## ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, this Hearing Officer hereby **ORDERS** that the relief sought by Petitioner is hereby **GRANTED IN PART AND DENIED IN PART**.

**IT IS HEREBY ORDERED** that McMullen County ISD shall convene an ARDC meeting as soon as practical, but no later than ten school days from the date of this decision, to review the Independent Educational Evaluation conducted by Dr. \*\* of Corpus Christi. If the evaluation finds that \*\* is a child with an autism spectrum disorder, then the review shall include a review of current speech, behavioral, and academic goals and objectives, and if necessary, the addition, removal, or change of goals and objectives in order to be in compliance with Dr. \*\*'s recommendations.

IT IS HEREBY **ORDERED** that McMullen County ISD shall request and pay for the attendance of Dr. \*\* at the ARD meeting convened for the purpose of reviewing the \*\* Independent Educational Evaluation.

IT IS HEREBY **ORDERED** that McMullen County ISD shall pay Petitioners the amount of Four Hundred Forty Dollars (\$440.00) for reimbursement for the \*\* Pediatric Clinic services. Petitioners shall present documentary evidence of such expenditures.

IT IS HEREBY **ORDERED** that McMullen County ISD shall provide \*\* speech services on an individual basis.

IT IS HEREBY **ORDERED** that McMullen County ISD shall reimburse Petitioners any out of pocket expenses related to the Independent Educational Evaluation conducted by Dr. \*\*. Petitioners shall present documentary evidence of such expenditures.

IT IS HEREBY **ORDERED** that McMullen County ISD shall provide \*\* compensatory tutoring in the areas of social and pragmatic skills. Such tutoring shall begin in January 2008 and shall be in the amount determined appropriate by Dr. \*\* and the ARD Committee. These compensatory services shall not exceed an hour a week.

All other and further relief not expressly granted herein is hereby **DENIED**.

Finding that the public welfare requires the immediate effect of this Final Decision and Order, the Hearing Officer makes it effectively immediately, pursuant to 19 Tex. Admin. Code §157.5(n).

**SIGNED** and **ENTERED** this 28<sup>th</sup> of November 2007.

Olivia B. Ruiz  
Special Education Hearing Officer

#### NOTICE TO THE PARTIES

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision made by the Hearing Officer, or the performance thereof by any other party, 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, as provided in 20 United States Code (USC), §1415(i)(2). A civil action brought in state or federal court under 20 USC, §1415(i)(2) must be initiated not more than 90 days after the date the Hearing Officer issues his or her written decision in the due process hearing. 19 Tex. Admin. Code §89.1185(p).

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RESPONDENT	§	FOR THE STATE OF TEXAS

SYNOPSIS

ISSUE: Whether the District failed to timely evaluate Petitioner for special education services.

HELD: For the Student. The evidence established that the District had reason to suspect that Student was in need of special education services in the fall 2006 and should have referred Student for a special education evaluation.

34. C.F.R. §300.111(a)

ISSUE: Whether McMullen County ISD failed to provide appropriate speech therapy services.

HELD: For the Student

20 U.S.C. §1415(B)(3); 34 C.F.R. §300.503(a)(1)