

SEASHORE LEARNING CENTER	§	BEFORE A SPECIAL EDUCATION
	§	
V.	§	HEARING OFFICER FOR THE
	§	
STUDENT	§	STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioner brings this appeal, pursuant to the Individuals with Disabilities Education Improvement Act 20 U.S.C. § 1400 *et seq.*, (hereinafter referred to as "IDEIA"), against Respondent (hereinafter referred to as "Respondent" or "Student"). Petitioner (hereinafter referred to as "Petitioner" or "School") filed a written request for a due process hearing which was received by the Texas Education Agency on October 3, 2007. Petitioner was represented by Attorney Evelyn Howard-Hand of the law firm Walsh, Anderson, Brown, Schulze & Aldridge, P.C. in Austin, Texas and Attorney Lisa Norman of the law firm Cokinos, Bosien & Young in San Antonio, Texas. Respondent was represented by Attorney Christopher Jonas of the Center for Special Education Law in Corpus Christi, Texas. Respondent filed a Counterclaim on October 19, 2007. A telephone prehearing conference was held on October 29, 2007, at which time both parties waived their right to a final decision within forty-five (45) days of the date the written request for due process hearing was filed [34 C.F.R. §300.511(c)]. Petitioner filed a Motion for Leave to Amend Request for Due Process Hearing on November 1, 2007. This request was granted by the Hearing Officer through the Prehearing Order dated November 8, 2007. Respondent filed a First Amended Counterclaim on November 15, 2007 and a Second Amended Counterclaim on December 12, 2007. Both were timely responded to by Petitioner. A due process hearing was held on Monday, Tuesday and Wednesday, February 18, 19 and 20, 2008, in Corpus Christi, Texas. The parties agreed to file post-hearing briefs on or before Tuesday, March 25, 2008.

The parties stipulate that Student is a ** year-old who receives special education placement, programs and services on the basis of meeting eligibility criteria as a student with Autism and a Speech Impairment.

Petitioner filed their request for a due process hearing to override lack of parental consent for a Full Individual Evaluation ("FIE"). Petitioner later amended their request for a due process hearing to include a request to override lack of parental consent for Parent and In-Home Training.

Respondent contended in his Counterclaim that School has failed to provide Student with a Free Appropriate Public Education ("FAPE") to meet Student's unique and Individual needs because School has failed to implement as appropriate behavior intervention plan ("BIP") for Student, and School has failed to provide highly qualified personnel, a certified special education teacher, trained to teach students with Autism for Student.

After filing their request for due process hearing, School, on October 10, 2007, requested that Student's parent consent to Parent and In-Home Training. Student's parent refused consent for this training, and School amended their earlier request for due process hearing to include a request to override the lack of parental consent for Parent and In-Home Training.

Based upon the evidence and the argument of counsel, the Hearing Officer makes the following findings of fact and conclusions of law.

II. Findings of Fact

1. Student is a ** year-old who transferred to School from Local School District. School is located within the geographical boundaries of an LEA, referred to herein as Local School District and Local School District Elementary School is Respondent's home campus.

2. The School is an open enrollment charter school authorized by Texas Education Code §12.101. School is within the geographical boundaries of Local School District. Accordingly, School is required to accept students who apply for enrollment in such school on the basis of availability and is responsible for providing Student a free appropriate public education in accordance with the Individuals with Disabilities Education Improvement Act, 20 U.S.C.A. § 1400, *et seq.*, and the rules and regulations promulgated pursuant to IDEIA.

3. Student is eligible for special education placement, programs and services as a student who has Autism and a Speech Impairment.

4. Student transferred to School at the beginning of the 2007-2008 school year from Local School District.

5. Prior to enrollment at School, the following assessments/evaluations were conducted on Student:

- Musical Therapy Assessment on May 18 and 20, 2005, by School;
- Occupational Therapy ("OT") Evaluation on October 13, 2006;
- Functional Behavior Assessment ("FBA") on October 16, 2006;
- Report of AAC Assessment (Adaptive Therapy ["AT"] evaluation) on October 20, 2006;
- Behavior Intervention Plan ("BIP") (containing partial FBA) on January 21, 2007, by Hannah's Hope;
- Evaluation Report (learning and behavior competencies) on April 28, 2007;

- Recommendation for Social Skills Reinforcement within School Setting (social skills assessment) on May 14, 2007;
- Report of Psychological Evaluation (autism evaluation) on May 15 and 18, 2007;
- Full Individual Evaluation on May 22, 2007, by Local School District;
- Eligibility Report: Autism or PPD on May 25, 2007, by Local School District;
- Language Barriers Assessment Report on June 19, 2007;
- FIE for Adaptive PE on July 10, 2007, by Local School District: and
- FIE for Speech Impairment on July 13, 2007, by Local School District.

6. Student had an AAC Assessment on October 20, 2006. The evaluation was conducted by an MA, CCC-SLP, Board Certified Behavior Analysts (“BCBA”) in Austin, Texas. The reason for the evaluation was that Student’s parents and teachers were concerned that Student’s speech output capabilities were significantly impacting the development of expressive language. Despite intensive intervention, Student’s speech remains significantly unintelligible when Student speaks in more than one word utterances. Student’s parents felt that Student has the potential to learn much more complex language forms given an alternative form of communication.

7. The AAC Assessment recommended that Student was a strong candidate for a voice output device. It was stated that Student’s potential to use speech as a form of communication beyond one to two word phrases was questionable. It was noted however, that given Student’s success with academic skills such as reading and strength in visual perception, Student has great potential to be able to combine words into sentences using a voice output device. It was recommended that Student’s teachers and care-givers should attend the appropriate training seminars in order to learn how to use and teach Student to use the device.

8. A BIP was created on February 21, 2007 by the Central Texas Autism Center in Austin Texas. The evaluator was an M. Ed., BCBA. The BIP focused on the following target behaviors:

A. Target Behaviors -

1. Self-injurious Behaviors (“SIB”);
 - Presses hand to nose or nose into objects, presses knee to mouth, bites hand/finger/knee, presses head into objects, pinches self.

2. Aggression towards others:
 - Grabs, bites, pinches, hits, pushes, scratches, butts head, squeezes.
 - Crying often accompanies these behaviors.

3. Other behaviors observed:
 - Flapping hands in front of body.
 - Jumping up and down.
 - Closing eyes.
 - Spinning in circle with head slightly tilted.
 - Placing hands over eyes or ears.
 - Vocalizing “ee” or “mm” sound repetitively.

9. The FBA portion of the BIP stated that the current behavior plan from Private School includes antecedent manipulations of a sensory diet, pairing and DRO every 25 minutes for non-occurrence of target behaviors. Consequences included explaining to Student why Student will not get a reinforcer when the timer goes off or a time out. The previous intervention plan from June, 2006 includes the DRO schedule, but implemented a contingent effort punishment procedure of 5 stand up/sit downs.

10. Under the Recommended procedures section of the BIP, the Behavior/Reduction Plan stated: *Contingent Effort*. When any of the above mentioned topographies of Aggression or SIB occur, say “No _____” and tell Student to “Stand up/Sit down” repetitively until Student complies with no occurrence of the target behaviors for at least ten seconds. You may be prompting physically and keeping the demand. If any target behaviors occur during the procedure, say “No _____” and keep saying “Stand up/Sit down.” If Student aggresses towards you, block and back away, but do not stop saying the command. It may be necessary to hold a binder between you and Student, as placing the demands to deflect the aggression and prompt Student back towards the chair.

11. On April 28, 2007, an Evaluation was performed on Student by the same MA, CCC-SLP, BCBA who performed Student’s AAC Assessment. In the Background Information section, the evaluation stated the following: That Student was diagnosed with a Pervasive Developmental Disorder at age **. Student had been receiving intensive 1:1 behavioral intervention in the home for the past five years. Student’s parents coordinated and implemented this program with guidance and consultation from BCBA’s. In addition to Applied Behavioral Analysis (“ABA”), previous intervention has included: Occupational Therapy (“OT”), Speech Therapy, Relationship Development Intervention, and the Miller Method (Cognitive Designs, Inc.). Student has previously attended a local private preschool, a public charter school, and a local private school for children with autism. Student had failed to make measurable progress in academic areas during all previous attempts at teaching in a group setting. At the time of the evaluation, Student was being home-schooled and receiving 1:1 intervention for four hours a day.

12. In the summary of results for the April 28, 2007 Evaluation, under Expressive Language, the following was noted: Student primarily uses single spoken words for expression. Student attempts to

combine words into short sentences to answer questions and make requests, but Student's intelligibility decreases significantly when he does so. He is able to make simple requests, label objects/actions/adjectives/prepositions, and answer simple "wh" questions with one word responses. Student's expressive language skills are representative of the 30-36 month developmental level.

13. On May 14, 2007, Student's parents sought an assessment for Student from Family Enrichment & Play Therapy in Corpus Christi, Texas. Student's parents sought the assessment to assist in determining the psychological, behavioral, emotional and social factors important to the treatment of Student's Pervasive Developmental Disorder.

14. The results of the May 14, 2007 assessment showed that Student would benefit from social and interpersonal training and reinforcement to strengthen Student's social maturation and maximize classroom potential. It was stated that without intervention across all domains (school, home, etc.) that Student's progress would be impeded dramatically. The assessment also stated that teaching staff should also become familiar with ABA and Tango Communication devices.

15. On May 15, 2007, Local School District conducted an FIE for Determination of Disability and Educational Need on Student. The FIE was conducted by an Educational Diagnostician. Information from Student's parents and teachers was used, as well as a previous Speech and Language Evaluation. Student scored below average on "Receptive" and "Expressive English. The report stated that in the "Receptive" category, Student was able to understand and follow simple directions and had no listed weaknesses. In the "Expressive" category, Student was able to express oneself primarily using single spoken words, but Student's intelligibility decreases when attempting to combine words into short sentences o answer questions and make requests.

16. Local School District conducted a Psychological Evaluation on Student on May 25, 2007. The evaluator was an Licensed Specialist in School Psychology ("LSSP").The evaluation found that Student's auditory comprehension, expressive communication and receptive language skills were all at least several years behind the normal level for Student's physical age. This showed that Student continued to exhibit a severe speech and language disorder, secondary to neurological regression.

17. The May 25, 2007 Psychological Evaluation recommended that Student's school review all previous assessments/evaluations performed on Student and see if additional assessments/evaluations are needed. It also recommended that Student's school should discuss the need for Parent In-Home Training with Student's parents. The final recommendation was to maintain a high degree of structure for instructional purposes, as Student's behavior may deteriorate when there is a corresponding decrease of structure in the environment.

18. A Language Barriers Assessment Report was conducted on Student on June 19, 2007 to determine if there were any language barriers impeding Student's progress acquiring language and learning skills. The assessment was conducted by an M.A., BCBA at Autism Consulting Services, LLC.

19. The Language Barriers Assessment Report stated that a further analysis of Student's RD, LRFFC, tact and current intra-verbal repertoires to select targets for formal intra-verbal training was necessary. It stated that a focus on generalizing any targets that were taught at the table (structured teaching) to the natural environment and that Parent training on how to select functional targets and implement teaching strategies on the natural environment throughout the course of Student's day.

20. Local School District conducted an FIE on Student on July 10, 2007, specifically for Adapted Physical Education. The FIE recommended that Student continue to receive physical education instruction in the inclusion PE class. Participation in the inclusion PE class was deemed the least restrictive environment for Student. To maximize Student's participation time, it was decided that Student would engage in gross motor activity with peers for 10 minutes then be rewarded with 5 minutes of the gross motor activity of Student's choice. The FIE stated that an Adapted PE IEP would be developed and implemented for Student.

21. Local School District conducted an Admission, Review and Dismissal ("ARD") Committee meeting for Student on August 14, 2007. The ARD was the annual review, and the May 15, 2007 FIE, the May 15, 2007 Psychological Evaluation, the October 13, 2006 OT Evaluation, the May 17, 2007 Speech/Language Evaluation and the July 10, 2007 Adaptive PE evaluation were all reviewed. Student's parent expressed concern over ABA strategies/staff experience, and Local School District's ability to implement the behavior plan.

22. At the August 14, 2007 Local School District ARD, it was determined that additional data was needed. An evaluation that was to include a counseling-play therapy assessment was to be completed by October 12, 2007. The ARD also felt that Student was capable of receiving instruction in the classroom without special modifications or arrangements, and was able to follow the state attendance policy. The IEP completed by the August 14, 2007 ARDC did not provide for social skills training or in-home training prior to the completion of the evaluation. It provided for parent training but contained no goals for parent training.

23. The August 14, 2007 Local School District ARD drafted and accepted an IEP with the following goals:

- Student will increase general math skills including place value, addition, subtraction, time, money, measure, fractions and graphing;
- Student will increase phonemic awareness skills using pictures with text;
- Student will increase spelling and written language skills;
- Student will increase skills in receptive language, expressive language, and intra-verbal vocabulary;
- Student will increase science-related vocabulary and knowledge;

- Student will increase geography-related vocabulary and knowledge;
- Student will increase age appropriate gross motor skills by participating in the Adapted Physical Education Program; and
- Student will demonstrate measurable progress toward the acquisition of functional communication needed for the educational environment using a voice output device.

24. The first day of school for students enrolled in School for the 2007 - 2008 school year was August 23, 2007.

25. School requested that Student's mother participate in a meeting to discuss services comparable to those set forth in the Local School District IEP on the first day of school. Since Student's mother could not meet on August 23rd, School implemented comparable services and had a meeting on August 30th to discuss these services with the Student's mother. A follow-up meeting to discuss comparable services further was scheduled on September 1 and 4, 2007, but instead of meeting to discuss these services with the School, the Student's mother indicated that she was too busy to meet, and that she would prefer to discuss the issue in writing.

26. Pending Student's mother's agreement to a date to convene an ARDC meeting, School scheduled a meeting to determine services comparable to those listed in the Local School District IEP and a meeting to review existing evaluation data.

27. A Review of Existing Evaluation Data ("REED") meeting was held on August 30, 2007. All previous evaluations and assessments performed on Student were reviewed for the REED meeting.

28. During the REED, School employees requested that Student receive an FIE so that School would have more complete information on Student's disabilities. School attempted to provide Student's next friend with the consent form. Student's next friend refused, stating that she would not accept the consent form until she received a transcribed copy of the tape of the REED meeting and a written request of why School needed additional evaluation, as well as stating each area of the requested evaluation.

29. The following individuals attended the REED meeting on August 30, 2007, to review all evaluation data provided to School by Student's mother: Director of School; two special education certified teachers of Student, a regular education certified teacher of Student, serving Student in the self-contained special education class; a diagnostician; and Student's mother. One teacher also teaches in regular education inclusion classes of Student, and another teacher co-taught Student in the regular education P.E. class at School.

30. During the August 30, 2007 REED meeting, the Student's mother did not participate in the meeting in a cooperative or collaborative manner. Student's mother refused to consent to School's request

to perform additional assessment of Student, even though additional assessment was recommended by the August 14, 2007 ARDC conducted by the Local School District. Student's mother's preconditions for giving her consent for additional testing were unreasonable and inconsistent with the orderly development of Student's IEP.

31. School officials questioned the completeness and currentness of several of Student's previous evaluations, specifically Student's BIP; spelling lists in the Psychological Evaluation; and Language Evaluation. School requested that these assessments and evaluations needed to be reassessed. Student's next friend again stated that she felt Student's evaluations and assessments were adequate.

32. On September 10, 2007, School sent a Notice of FIE to Student's parents, stating that School wanted to perform an FIE of Student, including a neuropsychological evaluation) to determine Student's need for related services and speech/language therapy, to develop an appropriate sensory diet, and to develop appropriate Individualized Education Plans ("IEP") (goals and objectives) and a BIP.

33. The Notice of FIE also stated that the existing data did not contain sufficient detail in several areas, and that School needed to obtain current information so that the ARD could determine the appropriateness of Local School District's IEP goals. It was noted that several skills listed on the Local School District IEP and prior assessments had not been demonstrated by Student at School.

34. The Notice of FIE stated that School would test Student in the areas of Language (Communicative Status), Physical (Motor Abilities, Emotional/Behavioral, Cognitive/Adaptive Behavior, Educational Learning Competencies (Academic Performance) and a Neuropsychological Evaluation.

35. Respondent's Notice of FIE stated that Student had been in two different public schools and one private school over the previous two years, as well as being home-schooled. There was some concern that some learned skills had been lost and that other learned skills had not been generalized.

36. Student's parent refused to consent to any additional assessment for Student.

37. On September 12, 2007, Student's next friend sent a letter to School's Director regarding the Notice of FIE. Student's next friend stated that she did not agree with School's determination that Student needed additional assessments and evaluations. She also did not agree with School's view that Student's current assessments and evaluations were not "current." Student's next friend disputed every assertion and requested that School made in its Notice of FIE, and requested further information as to why an additional FIE needed to be performed on Student.

38. School attempted to schedule an ARDC meeting to adopt an IEP for the Student as early as August 23, 2007 and offered the Student's mother several different dates for an ARDC meeting between August 27, 2007 and September 27, 2007, but the Student's mother repeatedly indicated that she was not available, and that she would need "several days" notice of an ARDC meeting if the School's counsel would be present.

39. Student's mother did not withdraw Student from the Local School District until August 27, 2007, and she told the School she would request an IEE from the Local School District on September 11, 2007.

40. An ARD was held on September 27, 2007. Student's mother had previously notified the School that she was available for an ARDC meeting on September 27, 2007, and Student's mother received more than five school days notice of the ARDC meeting. Student's next friend was initially in attendance, but left the ARD soon after it was convened. Student's next friend walked out of the ARD, walked back in, handed a piece of paper to Respondent's attorney, and left again. The piece of paper was a notice that Student's next friend would not be able to participate in the meeting, but would like to participate via telephone. The note also stated that Student's next friend reserved the right to participate and agree or disagree with the ARD on any matters. Student's next friend did not verbally tell the ARD that she wanted to participate via telephone.

41. Approximately one-half hour after the September 27, 2007 ARDC convened, Student's mother provided School's counsel with written notice that she wanted to participate in the ARDC meeting via telephone, but School's counsel did not see the portion of the written notice indicating Student's mother's request to be called, and School did not notice it until the next day.

42. All of Student's previous evaluations were reviewed. Student met the eligibility requirement for Speech Impairment/Language and Autism. Service Alternatives that had been previously tried were discussed, and included: General education classroom; Modifications in general education and/or curriculum, including testing procedures and/or currently PE and Music; Social education supplementary aids and services; and self-contained classroom. Assistive Technology was available for Student, but was rejected as an option by Student's next friend.

43. The results of these service alternatives were: Student requires 1:1 adult to student ratio for academic instruction for new concepts; and extreme physical aggression limits Student's ability for interaction with peers.

44. Because Student's next friend has refused consent for School to do an FIE, an IEP was developed based on existing information. IEP goals were discussed, revised and accepted by the ARD.

45. It was decided that Student should be removed from the general education classroom, and receive all education in a special education classroom setting, because: Placement in the general education classroom prohibited the Student from achieving the goals and objectives contained in the IEP even though supplementary aids and services are used; The modifications required for the Student to achieve the goals and objectives in the IEP cannot be implemented in the general education classroom without eliminating essential components of the regular curriculum/activity; and Implementing the Student's behavior management plan means that other students would not benefit satisfactorily from academic instruction or non-academic activities.

46. It was also noted that Student would not have the opportunity to participate with students without disabilities in all non-academic and extracurricular activities.

47. The Instructional Modifications/Accommodations/Support offered by the September 27, 2008 included the following: Instruction in the self contained class should have a staff:student ratio of 1:5 except for the following: Student requires 1:1 adult student instruction 30 minutes/day for new concepts in math, 30 minutes/day new concepts in language arts, 75 minutes/day for behavioral intervention instruction (including sensory/vestibular breaks).

48. The ARD Committee discussed instructional methodologies and decided to use a combination of ABA/VB and other instructional strategies.

49. The September 27, 2007 ARD reached a consensus to implement the services reflected, even though Student's parent was not in attendance for the entirety of the proceedings.

50. On September 28, 2007, the Student's mother notified the School via email that she was disappointed that she had not been contacted via telephone to participate in the ARDC meeting the prior day. Immediately after seeing this email, the School reviewed the note that Student's mother left with the ARDC on September 27, 2007, and notified the Student's mother that the School had been unaware of her desire to participate via telephone on the prior day and offered to convene another ARDC meeting as soon as possible.

51. Through correspondence to the Student's mother and Respondent's counsel, School offered to schedule another ARDC meeting on several occasions; Student's mother refused to schedule another ARDC meeting subsequent to September 27, 2007, but Student's mother refused to attend an ARDC meeting.

52. On October 4, 2007, the School sent the Student's mother prior written notice of its intent to implement the IEP developed at the September 27 ARDC meeting. The Student's mother received such notice on October 5, 2007.

53. On or about September 18, 2007, the Student's mother requested reimbursement for parent training, and School notified Student's mother that the Local School District did not contain any goals for parent training, and that an ARDC would need to be convened to determine appropriate goals for parent training and in-home training and a parent training and in-home training questionnaire were sent to Student's mother on October 10, 2007. Student's mother refused to provide consent for such evaluation or to complete the questionnaires.

54. After the September 27, 2007 ARD meeting, the School began implementing the IEP and BIP adopted by the ARDC. The School used ABA teaching methodologies and the Student was probed as to each of the IEP goals.

55. The Student's educational progress was recorded by his teaching staff on "probe sheets." Review of such educational records shows that the Student was making educational progress in meeting his IEP goals and objectives.

56. The Comparable Services and School IEP were individualized on the basis of Respondent's available assessment and performance. The School used all available information to develop an appropriate IEP, but additional assessment would assist the School in more clearly defining Respondent's needs and appropriate behavior intervention strategies.

57. To the extent appropriate, School implemented the BIP adopted by the Local School District pending the completion of an ARDC meeting to develop its own IEP.

58. School provided educational services to Respondent in a coordinated and collaborative manner.

59. The Comparable Services and the School IEP were reasonably calculated to confer an educational benefit to Respondent.

60. The School attempted to implement the Student's BIP to address his disruptive negative behaviors. The School's ability to specifically tailor a more effective BIP was impaired by its inability to develop a Functional Behavioral Assessment ("FBA") and the inability to set appropriate goals. Student's FBA and specific goals required new assessment data that was not possible to obtain because of the Student's parents' refusal to give consent to a new assessment.

61. Student's progress in expressive language development has been hampered by School's inability to assess the Student to identify barriers which may be impeding the Student from developing language skills beyond those of a 30-36 month old child.

62. School did not refuse to initiate or change the identification, evaluation or educational placement of Respondent or the provision of the FAPE to the Respondent.

63. School was not provided with an opportunity to consider any request by Respondent to initiate or change the identification, evaluation or educational placement of Respondent or the provision of FAPE to Respondent because Respondent's mother refused to attend an ARDC meeting on multiple occasions since the original September 27, 2007 ARDC.

64. The refusal by Respondent's mother to participate in an ARDC meeting since Student's enrollment and attendance for the 2007-2008 school year deprived School of its right to the parent's participation, input and collaboration.

65. Respondent failed to give School the opportunity to cure and resolve disputes prior to filing its Counterclaim against School.

66. School consulted with Autism Consulting Services, LLC on October 18, 2007. Autism Consulting Services, LLC recommended the following: (1) that an FBA be conducted by a Board Certified Associate Behavior Analyst (“BCABA”) supervised by a BCBA at School to determine what the functions of Student’s maladaptive behaviors are in that specific environment and with School staff; (2) that a behavioral language assessment be conducted to determine Student’s skills and deficits to assist School staff in developing appropriate teaching goals; (3) that School staff identify and utilize reinforcers during structured teaching sessions and that Student have frequent opportunities to request these items throughout the session/day; (4) that School staff read and follow the “session management” recommendations in an attempt to prevent maladaptive behaviors; and (5) that School staff receive ongoing training on the principles of ABA/behavior management as needed by a BCBA or BCABA.

67. School took reasonable measures to obtain necessary and qualified staff to implement Student’s IEP and provide Student with a FAPE. Student had a prior history of enrollment at School, but had been attending classes elsewhere. Moreover, Student attended the Local School District immediately before and for a few days after Student attended classes at School. School had a reasonable expectation that Student would be attending a school within the Local School District.

68. As a charter school, School does not receive funding for students who are not actually attending classes at School. School had, and currently has, no other autistic children in attendance, except for Student. It was reasonable for School to begin its search for a permanent certified special education teacher with experience in instructing students with autism after Student began attending classes at School. Once Student began attending classes, School made a reasonable effort to obtain a permanent, qualified special education teacher to instruct Student.

69. Student was instructed by teachers who were qualified to provide Student with a FAPE up until after October 10, 2007 and November 28, 2007 it hired BCBA trained instructors to provide Student with ABA strategies.

70. Student’s parents did not cooperate with the training of Student’s instructors at School during the 2007-2008 school year. Student’s parents’ refusal to consent to School allowing a qualified training professional to observe Student interfered with the training of Student’s instructors.

71. Student’s parents’ refusal to give consent for needed assessments to participate in an ARDC meeting impaired the degree to which Student received an education tailored to his needs.

72. School developed and implemented an IEP designed to provide Student with educational benefit. Student’s parents’ failure to cooperate with School in the development and implementation of such IEP did not prevent Student from receiving a FAPE.

73. The facts contained in TEA Docket No. 062-SE-1106, *School vs. Student* (which involved these parties) and the analysis found in the order of January 31, 2007, that resolved that case, are relevant to the facts and law applicable to this case.

III. Discussion

The previous due process hearing docket between these parties involved facts substantially similar to those in this case. In prior TEA Docket No. 062-SE-1106, the School sought a declaratory judgment regarding its obligation to provide Student with a FAPE and, alternatively, an order to override a lack of consent to perform an FIE on Student. Student counterclaimed for reimbursement of private and home school expenses on the grounds that School *could not* provide Student with a FAPE, even though Student was enrolled, but never attended, School. In ruling for School and denying the counterclaim in TEA Docket No. 062-SE-1106, the key fact cited was the failure of Student to give School the opportunity to provide a FAPE to Student.

Slightly more than eight months after the issuance of the dispositive order in TEA Docket No. 062-SE-1106, the parties are involved in a dispute that is substantially the same in all material aspects. The School is, again, seeking an order to override a lack of parental consent to an FIE, and this time, a lack of parental consent for in-home parent training. Student is counterclaiming for compensatory education for a denial of FAPE based on a failure to implement a BIP and a failure to provide qualified personnel. In this case, Student is enrolled and attending School, but Student's parents are refusing to attend ARDC meetings or give consent to any evaluations or even observation of Student by professionals hired by School to train the very staff that Student complains about. Not surprisingly, the same basic legal analysis should follow in evaluating these facts.

School has a right to, and should, based on this evidence, perform additional evaluations on the Student. The evidence shows that Student has a substantial educational impairment; is extremely delayed in key areas, such as speech; has significant behavioral problems; and has experienced instability in educational settings over the last few years, even though Student's disability is best addressed in an instructional setting that is stable. Every expert in this case testified that Student should have some form of continued assessment in order to complete his IEP and/or BIP. Finally, the law applicable to this case gives School an absolute right to perform an evaluation on Student. [See: *Andress v. Cleveland ISD*, 64 F. 3d 16 (5th Cir. 1995); *Shelby S. v. Conroe ISD*, 454 F. 3d 450 (5th Cir. 2006), *cert denied*, 127 S. Ct. 936 (2007)]

For reasons best known to them, however, Student's parents have continued to withhold their consent from school to evaluate or assess Student. Apparently, Student's parents do not object to evaluations of Student by *other* entities. They have allowed and even sought evaluations by Central Texas Autism Center, Family Enrichment & Play Therapy, a Private School and the *Local School District*. However, even when School sought to complete the assessments of Student that the Local School District *said was necessary*, Student's parents refused consent. The Student is an autistic child with significant delays who has been taught by several different settings. Updating Student's assessments to address language delays and severe behavior problems in this new setting is a logical for the School to follow to teach the severely educationally impaired student new to the school. However, Student's mother's participation in the August 30, 2007 REED raised questions about any legitimate concerns, on her part. She placed unreasonable preconditions on her consent that were no more than a transparent mask of an

intention to obstruct, rather than assist, the School's development of an appropriate educational program for the Student. The most indicative of Student mother's lack of cooperation, however, was her refusal to have Student even *observed* in class by an autism expert who was at the School to gather information specific to the training of *Student's* teachers. In this regard, such a refusal, combined with record evidence of School's efforts to hire and train a permanent staff to teach the School's *only* autistic student, makes it difficult to consider Student's counterclaim of School having an untrained staff as sincere.

Student's parents' refusal to attend ARDC meetings convened by School is an even more serious impediment to Student receiving the most optimized education. The Respondent has made much of the events of the September 27, 2007 ARD meeting. Surely, the circumstances of the abortive attempted mediation scheduled for the same date as the ARDC meeting contributed to overall confusion and upset Student's mother. One can even accept, on its face, Student's mother's testimony that she was too upset to remain at School for the ARDC meeting on September 27, 2007 to simply *tell someone* that she wanted to participate in the meeting by telephone. It was a clear error for School's counsel not to read the note that Student's mother gave to School's counsel at the ARDC meeting of September 27, 2007. However, any confusion or error in the September 27, 2007 ARD meeting pales in the face of Student's parents' refusal to agree to attend any subsequently scheduled ARDC meeting to that meeting. That ARD meeting, or the program developed by the remainder of the ARDC, did not result in a denial of a FAPE to Student. However, there is simply no excuse or justification for the Student's parents' subsequent refusal to attend any other ARD meetings at the School or refuse the School's multiple invitations to discuss Student's ongoing educational needs in an ARD. The ARD process is designed to be collaborative and the parents' role in the collaboration is essential in a successful collaboration. *Loren F. v. Atlanta Indep. Sch. Sys.* 349 F. 3d 1309 (11th Cir. 2003). Student's parents failed to perform their part of the ARD process. [See *Loren F.*, *supra*; *Doe v. Defendant I.* 898 F. 2d 1186, 1189 (6th Cir. 1990) (on issue of parent reimbursement when parent refuses to cooperate or hinder development of student's IEP.)] Allowing a disabled child to attend a school, but refusing to attend ARD meetings or consent to necessary evaluations is only slightly better than enrolling a child in the school but withholding his attendance and then complaining about the school's inability to teach the child.

Regarding the adequacy of Student's educational program at School, the record shows that Student did receive a FAPE. Even without the cooperation of Student's parents, School made diligent efforts to hire and train a staff and implement Student's IEP and BIP to the extent it could without the necessary additional evaluations. The School's IEP and BIP for the Student, even which the limitations under which it was developed, was reasonably calculated to confer an educational benefit. *Samuel Tyler v. Northwest Indep. Sch. Dist.* 202 F. Supp. 2d 557, 563 (N.D. Tex. 2002). The financing limitations imposed on a charter school, under state law, kept School from "staffing up" to meet the needs of its single autistic student until the day Student actually attended classes. The various teachers and consultants used by School until it permanently hired a certified special education teacher with actual experience with Student, reasonably implemented the Local School District's IEP for Student. School's evidence of Student's educational progress, thus far in the 2007 - 2008 school year was not disproven by the Respondent, as is his burden. Finally, Student's parents' lack of cooperation in the completion of an in-home training program must be considered in the evaluation of Student's limited educational progress. [See, *Patricia P. v. Bd. of Edu.*, 203 F. 3d 462 (7th Cir. 2000) and *M. M. v. Sch. Dist. of Greenville Co.*, 303 F. 3d 523 (4th

Cir. 2002) for the propositions that parent failure to completely access services offered by school districts cannot be ignored in an evaluation of a student's limited educational progress.]

In summary, it is apparent that School and Student's parents have developed over the years, an adversarial relationship that has been actively prosecuted, but has not benefitted the parties, most particularly, the Student. Student's parents seem to have decided to provide the School with the barest level of cooperation in the development and implementation of the Student's IEP, and have missed that low mark. School does not help matters in insisting that it has its counsel in attendance at ARDC meetings, which seems to only fuel Student's parents' suspicions about the School's motives. In spite of this less than optimal setting, Student is receiving a FAPE at levels compliant with *Cypress-Fairbanks ISD v. Michael F.* 118 F. 3d. 245 (5th Cir. 1997) and *Board of Educ. v. Rowley*, 458 U.S. 176, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982). School is entitled to its requested access to Student to increase the level of Student's educational progress, and the counterclaims should be denied in their entirety.

IV. Conclusions of Law

1. Respondent is a student in the School District who is eligible for special education services based on their classification as a student with Autism and a speech impairment. 20 USCA § 1401(3); 34 CFR § 300.7; 19 TAC § 89.1040.
2. Petitioner has a responsibility to provide Student with a free appropriate public education. 20 USCA § 1412; 34 CFR §300.300; 19 TAC § 89.1001.
3. Petitioner is entitled and obligated to develop an appropriate educational program for the student that is based on the best and most current assessment data available and that is tailored to the specific student on his current educational setting. 20 USCA §1412; 34 CFR §§300.300 and 300.300(a)(3), 300.341, 300.505(e).
4. Respondent's refusal to consent to the Petitioner's requests to obtain further assessments of the Student impedes the ability of the Petitioner to provide the Student with a FAPE.
5. Petitioner should be given authority, over the objection of Respondent's parents, to conduct an FIE on the Student and an in-home parent training assessment. 34 CFR §300.505(b) *Andress v. Cleveland ISD*; 64 F. 3d 174 (5th Cir. 1995); *Conroe v. Shelby S.*; 454 F. 3d 450 (5th Cir. 2006)
6. Respondent has failed to show that the Student has been denied a FAPE for the 2007 - 2008 school year. *Cypress-Fairbanks ISD v. Michael F.* 118 F. 3d. 245 (5th Cir. 1997)
7. The Student made educational progress and received a FAPE for the 2007-2008 school year. *Cypress-Fairbanks ISD v. Michael F.* 118 F. 3d. 245 (5th Cir. 1997)

8. The Petitioner made reasonable efforts to implement the Student's educational program and provide the Student with qualified teachers and instructional staff for the 2007 - 2008 school year.

V. Order

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer ORDERS that the relief sought by Petitioner is GRANTED, and the counterclaims by Respondent and Counter-Petitioner are DENIED in their entirety.

Petitioner is authorized to perform an FIE and an in-home parent training assessment on the Student.

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.

SIGNED in Austin, Texas this 31st day of March, 2008.

Stephen P. Webb
Special Education Hearing Officer

DOCKET NO. 020-SE-1007

SCHOOL § BEFORE A SPECIAL EDUCATION
V. § HEARING OFFICER FOR THE
STUDENT § STATE OF TEXAS

SYNOPSIS

Issue: Is the Charter School entitled to test and evaluate a ** year old autistic student with an eligible disability even when the student’s parent refuses to consent to such evaluation and wishes the District to rely on independent educational evaluations?

Federal Citation: 20 USCA §1414(a)(1)(C)(ii) and 34 CFR §300.505(b); *Andress v. Cleveland ISD*, 64 F. 3d 176 (5th Cir. 1995), *Conroe v. Shelby*, 454 F. 3d 450 (5th Cir. 2006), cert. denied, 127 S. Ct. 936 (2007)

Texas Citation: 19 TAC §§ 89.1011; 19 TAC 89.1045; 19 TAC 89.1050(a)(5)

Held: For the Petitioner. Federal law clearly authorizes the educational testing of a student over the objection of a parent or guardian when such testing is justified. The record shows that educational testing is justified. Case-law states that a school district need not rely solely on privately obtained evaluations or evaluations not performed by the Local Education Agency.

Issue: Did the School provide the Student with an educational program designed to confer educational benefit and a FAPE?

Federal Citation: 20 USCA §1412; 34 CFR §§300.300, 300.341, *Cypress-Fairbanks ISD v. Michael F.* 118 F. 3d. 245 (5th Cir. 1997) ; *Board of Educ. v. Rowley*, 458 U.S. 176, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982)

Held:

For the Petitioner and Counter Respondent (School). The School implemented the Student's IEP and BIP without cooperation from the Student's parents or their consent for necessary additional assessment. The resulting educational progress did meet the standard of a FAPE contained in applicable case-law and statutes.