

**BEFORE A SPECIAL EDUCATION
HEARING OFFICER FOR THE STATE OF TEXAS**

DECISION OF THE HEARING OFFICER

Student, b/n/f	§	
Parents.,	§	
Petitioner	§	
	§	
v.	§	DOCKET NO. 126-SE-0208
	§	
KARNES CITY	§	
INDEPENDENT SCHOOL	§	
DISTRICT,	§	
Respondent	§	

REPRESENTING PETITIONER:

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SCHOOL DISTRICT,	§	
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DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner, acting through his parents as next friends, filed a complaint for a due process hearing pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §1400, *et seq.*, as amended. The parties produced evidence on the following contested issues:

1. Failure to provide appropriate counseling services;
2. Failure to provide social skills training;
3. Failure to provide appropriate parent training;
4. Failure to provide Extended School Year (“ESY”) services in the area of Math;
5. Failure to provide an Individualized Education Program (“IEP”) in the area of Math;
6. Failure to provide an appropriate Behavior Intervention Plan (“BIP”); and,
7. Failure to provide a Free Appropriate Public Education (“FAPE”) designed to meet the student’s individual needs.

Petitioner sought the following relief within the jurisdiction of this Hearing Officer:

1. Reimbursement of out-of-pocket counseling and educational expenses since January 8, 2007; and,
2. Two years of compensatory educational services or an amount of compensatory educational services deemed appropriate by the Hearing Officer.

HELD, for Respondent.

Procedural History

This is the second due process complaint with the Parties before this Hearing Officer. The first, Docket No. 324-SE-0807 (“KC-I”), proceeded to hearing on February 7, 2008. Prior to presentation of Petitioner’s case, Petitioner moved for dismissal without prejudice, granted for good

cause shown. Petitioner filed the above-captioned due process complaint (“KC-II”) with the Texas Education Agency on February 8, 2008. This Hearing Officer received the case assignment and issued the initial scheduling order on February 11, 2008, setting the hearing on March 31, 2008. The initial Decision Due Date was April 23, 2008. The Parties participated in the initial telephonic pre-hearing conference on February 22, 2008.

Petitioner filed an amended witness list on February 19, 2008, adding an additional school employee witness to Petitioner’s witness list in KC-I. By written request dated March 18, 2008, Respondent requested that the previous disclosure date and witness designation set in KC-I would remain in effect in KC-II, since Petitioner’s dismissal request in KC-I occurred after the disclosure date on January 30, 2008. On March 24, 2008, the Parties presented argument on the motion during a second telephonic pre-hearing conference. This Hearing Officer denied Petitioner’s amended witness list by written order on March 24, 2008, finding that Petitioner failed to establish good cause for witness list amendment in KC-II. The due process hearing took place on March 31, 2008. Prior to the conclusion of the hearing, the parties sought leave to submit their closing argument in writing after receipt of the hearing transcript. Finding that this request stated good cause for an extension of the Decision Due Date, the undersigned Hearing Officer granted the parties’ request and set a submission date for the written argument of May 5, 2008, with an extension of the Decision Due Date to May 28, 2008. Due to a scheduling conflict of the Hearing Officer, the Parties subsequently agreed to extend the Decision Due Date to June 2, 2008.

The record closed upon the timely submission of the parties’ written closing argument on May 5, 2008. On June 2, 2008, the Hearing Officer issued this Decision.

Based upon the evidence and argument admitted into the record of this proceeding, the Hearing Officer makes the following findings of fact and conclusions of law.

Findings of Fact

1. Petitioner is a ** year-old student who resides with his parents within the jurisdictional boundaries of Karnes City ISD (“Respondent” or “KCISD”). He qualifies as a student with Autism. [Transcript (“Tr.”) at 32].

2. Petitioner was diagnosed with Asperger Syndrome in March 2006 during his ** grade year. [Tr. at 32-34].

3. As part of Respondent’s psychological evaluation of the student, Respondent’s Licensed Specialist in School Psychology (“LSSP”) administered the Beck Youth Inventories to Petitioner, a self-report measure to assess the student’s experience of anxiety, anger, disruptive behavior, and concept of self. Petitioner scored in the average range. Petitioner reported that he likes himself, feels others often want to be with him, feels he is a good person, and feels as though he is smart. Petitioner denied worrying about getting hurt, being teased by others, or worrying when at school. Based in part on these responses, the LSSP’s evaluation report concluded that related services of counseling were not indicated at that time, recommending instead that the student access the regular education counselor to address social skills. As evidenced by the LSSP’s hearing testimony, the general education setting was the least restrictive intervention for counseling

services that allowed the student daily access to the general education counselor. [Respondent's Exhibit ("R.Ex.") 2 at 12-14; Tr. at 283].

4. On May 2, 2006, the Admission, Review, and Dismissal Committee ("ARDC") convened to review Petitioner's completed Full Individual Evaluation results with Petitioner's mother in attendance. The ARDC participants reached consensus on a general education placement for Petitioner. Petitioner's IEP, effective through May 2007, included a daily special education Study Skills class period and 30 minutes of occupational therapy each week. [Petitioner's Exhibits ("P.Exs.") 30 and 31; R.Exs. 2 and 5].

5. As part of Petitioner's program, the ARDC developed a BIP for him on May 2, 2006. The plan included recommendations from the March 2006 evaluation report by the LSSP and was based on a Functional Behavioral Assessment ("FBA"). The initial BIP specified positive interventions and replacement behaviors for helping Petitioner remain awake in class and to assist him in organization of his assignments. [R.Ex. 5].

6. At the time he qualified for special education services during his ** grade year, Petitioner participated in the second year of the "Life Skills" program, a research-based program. Instruction techniques for the program included small group instruction, role playing, class interaction, and classroom work. These program components complied with the March 2006 recommendations of the LSSP. The program included scripted components that allow repetitive practice with language combined with adult support – techniques effective for an autistic student. Respondent's staff trained on the state and national level for proficiency in this program. [P.Ex. 2; Tr. at 159-165, 171-172, and 289-290].

7. The ** grade social skills component of the "Life Skills" program included instruction in the following skills: a) positive decision-making; b) coping with anxiety; c) coping with and controlling anger; d) self-advocacy and communication; e) assertiveness; f) social skills; and, g) conflict resolution. [R.Ex. 22; Tr. at 168-185].

8. Petitioner's initial IEP developed at the ARDC meeting of May 2, 2006, continued a social skills program for Petitioner within the general education program. [P.Ex. 5 at 21].

9. On May 2, 2006, the ARDC offered parent training as a special education related service to Petitioner's parents. Petitioner's parents chose not to participate. [R.Ex. 5; Tr. at 292-293].

10. On May 31, 2006, Respondent's LSSP offered Petitioner's parents the opportunity to attend, at school district expense, the Annual State Conference on Autism in Dallas, Texas. Petitioner's parents chose not to attend the conference. [R.Ex. 6; Tr. at 292-293].

11. Petitioner participated in a summer remediation program in the area of Math at the conclusion of his ** grade year. He came to summer school sessions fatigued and had difficulty staying awake in class. His mother had trouble getting Petitioner to go to bed. After discussion between the grant director and his mother, Petitioner's sleep habits improved. [R.Ex. 7; Tr. at 187-191].

12. Respondent offered a parenting course to Petitioner's parents in Summer 2006. The program, "Parenting Adolescents Wisely," was offered in connection with the "Life Skills" program. Petitioner's parents did not choose to participate in the program. [Tr. at 188].

13. In Petitioner's ** grade year in 2006-2007, Petitioner received general education social skills instruction through the "Positive Action" program taught during his homeroom period. This program focuses on the development of a positive school-wide environment in a program of 32 units. Topics covered include the establishment of a "thoughts-actions-feelings circle," introduction of "emotional positive actions for a happy, healthy lifestyle," people skills and positive cooperation action, "positive action of compromise," and specific positive actions towards others. As part of the program, students learned how to develop a "General Code of Conduct" to describe how they want to be treated. Students also practiced how to treat "each other as they would like to be treated." Petitioner participated in this program, affording him practice in social interaction with non-disabled peers. [Tr. at 200-204].

14. During Petitioner's ** grade year in 2006-2007, the general education counselor supported Petitioner's program by the following: a) informal meetings between Petitioner and the counselor in the hallway, classroom, and during lunch; b) participation of the counselor in conversations with Petitioner and his friends; c) participation in behavior incentive programs with positive reinforcers for Petitioner and his friends; d) individual counseling with Petitioner; e) telephone conference support for Petitioner's parents; f) collaboration with Petitioner's general and special education teachers regarding appropriate classroom accommodations; g) interaction with Petitioner's friend for service as a peer role model for Petitioner; and, h) preparation of counseling notes. [Tr. at 32, 39, and 216-232].

15. Petitioner received Math instruction in two general education classes during Fall 2006 of his ** grade year and one Math class in Spring 2007. He received the following Math grades by semester during the 2006-2007 school year: Math ** and final average, **; and, Math Tactics – ** (Fall 2006). [P.Ex. 19; R.Exs. 18 and 25].

16. Petitioner continued to have problems staying awake in school throughout his ** grade year. Petitioner's general education counselor for the 2006-2007 school year contacted Petitioner's mother by telephone on October 23, 2006. The counselor invited Petitioner's mother to attend a meeting with his teachers and the counselors on October 24, 2006. Although Petitioner's mother replied that she could not attend the meeting, she reported that Petitioner stayed up late often spending time and playing games on the computer. As a result, Petitioner's mother thought this affected Petitioner's ability to stay awake in class. During the meeting on October 24, 2006, Petitioner's teachers and general education counselor developed a plan to increase positive action and decrease negative action for Petitioner's sleep issues. The counselor followed up with Petitioner's teachers to ensure uniformity in addressing staying awake in class. Petitioner's alertness in class improved after this meeting. [R.Exs. 7 and 9; Tr. at 221-222 and 242-244].

17. Petitioner admitted at hearing that he fell asleep in class. He recalled discussing falling asleep in class with the general education counselor during the 2006-2007 school year. At hearing, Petitioner claimed that falling asleep in class was not intentional and did not happen when he was in a good mood. Petitioner described falling asleep in class on occasions when "something happened earlier in the day and I'm not very happy, then I'll probably – then I'll probably fall

asleep.” He recalled going to the principal’s office “at least three times” for falling asleep in class during his ** grade year. [Tr. at 88-89].

18. At hearing, Petitioner’s mother recalled receiving telephone calls “from time to time” during the 2006-2007 school year from Respondent concerning Petitioner falling asleep in class. [Tr. at 100].

19. On April 12, 2007, the ARDC convened with Petitioner’s mother in attendance. The ARDC reviewed Petitioner’s IEP for the upcoming school year. The ARDC continued Petitioner’s social skills delivery in the general education setting. During this meeting, Petitioner’s mother described ongoing difficulty getting Petitioner to go to bed. According to his mother, Petitioner slept through the family’s dinner, stayed up late on his computer, and his mother did not know what time Petitioner actually went to bed. Participants discussed what the student might be accessing on his computer. Petitioner’s mother believed he was likely in chat rooms and having discussions with his friends, but she was not certain. The ARDC requested further assessment for in-home training and parent training at this time to get more information on Petitioner’s sleep patterns. Petitioner’s mother gave written consent for the evaluation. [P.Exs. 10 and 11; Tr. at 315-317].

20. At the ARDC meeting on April 12, 2007, Petitioner’s mother discussed Petitioner’s computer “chat” room activities. The LSSP discussed the possible dangers for Petitioner in the Internet with Petitioner’s mother at that time. According to the LSSP, Petitioner’s mother did not seem aware of the dangers posed on unsupervised Internet usage. [Tr. at 316-317].

21. Participants in the ARDC meeting of April 12, 2007, agreed to a BIP for Petitioner to increase three behaviors: a) remaining awake in class; b) organization for assignment completion; and, c) compliance with requirement to complete work. Targeted behaviors to decrease included lack of assignment completion and sleeping in class. The functions of these behaviors included escape from required tasks and physical fatigue due to erratic sleep habits. The ARDC moved Petitioner’s Study Skills period to the end of the day. Thus, if Petitioner completed assigned work, Petitioner would be allowed computer time for enjoyment during Study Skills. As further reinforcement, the BIP added Art as an enjoyable elective for Petitioner, with a proviso that lack of work completion or sleeping in class might result in the loss of the elective for the day. [R.Ex. 10 at 21].

22. The BIP developed by the ARDC on April 12, 2007, included responses to negative behaviors. To address disorganization, the BIP specified adult assistance for Petitioner to manage work requirements, to assist Petitioner in using a visual organizer, and to give frequent teacher input to his special education teacher regarding missing or incomplete assignments. To address lack of work completion, the BIP placed Petitioner’s Study Skills class period as the last class each day. As a result, Respondent would be able to keep Petitioner after school until he completed his work before going home. To support continuity between home and school, the BIP specified frequent parent contact to support privilege loss across the home and school settings in response to Petitioner’s classroom sleeping. [R.Ex. 10 at 21].

23. Positive behavioral supports included in the BIP of April 12, 2007, included the following: a) counseling assistance available through the general education counselor; b) assignment of computer-related tasks in class to encourage participation and work completion;

and, c) placement of Petitioner next to the teacher's desk to help keep Petitioner awake and to allow Petitioner brief breaks out of class to refresh Petitioner. [R.Ex. 10 at 21].

24. The ARDC of April 12, 2007, planned to monitor Petitioner's progress on the BIP goals through observation and grades. The ARDC planned to review his progress every six-week grading period and annually. [R.Ex. 10 at 21].

25. During evening hours on April 26, 2007, several of Petitioner's school peers made allegations to law enforcement that Petitioner threatened them via electronic communication in a "chat" room on the Internet. The alleged electronic communication made by Petitioner referenced being bullied and picked on by other students. Petitioner mentioned "getting even" with his peers for this alleged conduct. Law enforcement and juvenile authorities investigated these allegations, arresting Petitioner on April 27, 2007. Petitioner was sentenced to juvenile detention for a Class B misdemeanor of making a terroristic threat. [P.Exs. 7, 9, 10, and 11; Tr. at 41 and 93-95].

26. Following Petitioner's arrest, Petitioner made allegations that he had been bullied at school during ** grade. According to his parents and Petitioner's psychologist, Petitioner began to disclose this information over a two-month period during Summer 2007. Petitioner first established a trust relationship in counseling before gradually offering additional information about alleged bullying behavior at school by his peers. By August 2007, Petitioner expressed his fear about entering the school bathroom because the bathroom area was not supervised by Respondent's personnel. As a result, Petitioner also divulged that he had, at times, avoided using the bathroom at school for fear of bullying or harassment in the school bathroom by his peers. [P.Ex. 6; Tr. at 86-87 and 110-114].

27. Petitioner's parents recall that their son was "constantly harassed, picked on" in the ** grade. At that time, Petitioner's mother contacted the campus principal about the alleged conduct. As a result, the campus principal questioned two students about the alleged conduct. [Tr. at 38].

28. Petitioner did not tell his parents about being bullied. [Tr. at 96].

29. Petitioner recalled two incidents of peer misbehavior directed at him during his ** grade year. First, a student allegedly pulled a chair out from under Petitioner. Second, on another occasion, a student pulled the back of Petitioner's hair while he tried to do his work. [Tr. at 87].

30. Petitioner's psychologist described Petitioner's anger toward peers who bullied him at school. As a result of alleged bullying, Petitioner told the psychologist during counseling sessions that the alleged peer mistreatment hurt his feelings, made him want to avoid socialization such as sitting by specific peers, and, frequently, he fell asleep in class. Petitioner's psychologist viewed the function of his classroom sleeping as an avoidance technique. According to Petitioner's psychologist, Petitioner is very compliant and would not report peer bullying behavior unless a plan were in place to make him feel safe. [Tr. at 111-112 and 119-121].

31. After Petitioner's release from juvenile detention, Respondent placed Petitioner in the Disciplinary Alternative Educational Placement ("DAEP"), in near the end of May. He attended the DAEP for four days. During his time in the DAEP, the general education counselor visited Petitioner in order to assist in his transition back into the general education setting. On

May 17, 2007, Petitioner had a detention hearing. By judicial order, he remained on house arrest until September 2007. Petitioner's parents believed that the court order prohibited his attendance at school during this period. [P.Exs. 6 and 25; R.Ex. 9; Tr. at 47-51 and 230].

32. On May 22, 2007, the ARDC convened with Petitioner's mother in attendance. Petitioner's placement remained at his home under the constant supervision of his parents. The ARDC added counseling as a related service for Petitioner through six counseling sessions of 30-minute duration during the summer. In anticipation of his return to school in August 2007, the ARDC planned weekly counseling sessions of 20-minute duration for Petitioner for the 2007-2008 school year. [P.Ex. 19; R.Exs. 9 and 15; Tr. at 230].

33. On May 22, 2007, ARDC participants added an IEP for social skills to Petitioner's program. Social skills would be delivered through general and special education services. The social skills IEP targeted coping skills and self-advocacy. The ARDC designed the social skills IEP to address Petitioner's perception of peer bullying brought out by his alleged threat to peers in April 2007. [P.Ex. 19 at 9; R.Ex. 15 at 9].

34. As part of the May 2007 ARDC meeting, participants reviewed the completed evaluation results for home and parent training. Based on these results, the ARDC agreed that Petitioner should receive two home and parent training sessions of 45-minute duration. Petitioner's parents chose not to participate in parent training. [R.Exs. 15 and 19; Tr. at 81].

35. Petitioner passed all his classes at the conclusion of the 2006-2007 school year. He passed all sections of Texas Assessment of Knowledge and Skills ("TAKS") exam, receiving commended performance in Reading, and Social Studies, and met standards for Science. Petitioner took the State-Developed Alternative Assessment ("SDAA") in Math, passing with TAKS equivalency standards. [P.Ex. 17; R.Ex. 25; Tr. at 282-283].

36. On September 14, 2007, the ARDC convened at parental request. At this time, Petitioner was awaiting a court proceeding the following week and was not attending school within KCISD. [P.Ex. 17; R.Ex. 25].

37. As part of the ARDC on September 14, 2007, the ARDC developed a specific transition plan to facilitate Petitioner's safe return to school. This plan included the following: a) implementation of the transition plan discussed in Spring 2007 of establishing a Circle of Friends; b) unannounced presence of an aide or administrator within Petitioner's vicinity during unstructured times; c) teacher training on Asperger Syndrome on the ** campus; d) instruction for teachers on safe monitoring of all students during class and classroom passing periods; e) continued counseling and social skills specified in Petitioner's IEP; and, f) provision of a paraprofessional shadow for Petitioner during classroom passing periods. [P.Ex. 17; R.Ex. 25 at 18-19; Tr. at 346, and 353].

38. The campus principal participated in the September 2007 ARDC meeting. The principal discussed Petitioner's possible placement into pre-Advanced Placement ("pre-AP") classes, suggesting that the pre-AP class environment offered "a group of students that he would easier move into due to his intellectual level and academic capabilities." [P.Ex. 17; R.Ex. 25 at 18-19; Tr. at 346, 353, and 398-399].

39. At the ARDC meeting on September 14, 2007, Petitioner requested private placement in the ** Center in San Antonio, Texas. Respondent wanted to recess the ARDC meeting to gather more information about Petitioner's proposed placement, and after gathering the new data, reconvene the meeting to discuss the least restrictive placement for Petitioner. [R.Ex. 26].

40. Petitioner refused to participate in a reconvened meeting of the ARDC held on September 14, 2007. [R.Exs. 25 and 26].

41. On September 20, 2007, the special education director of Respondent's special education cooperative contacted ** Center in San Antonio, Texas, to gather information about the facility. The special education director confirmed that the program only offers programs for young children with Autism; there are no secondary student programs available at the facility. [R.Ex. 28].

42. Petitioner did not give notice to Respondent, either at the last ARDC meeting before Petitioner was withdrawn, or in writing ten business days before removing the student from public school, of Petitioner's intent to enroll him into a private homeschool program at public expense. [R.Ex. 26; Tr. at 57-58 and 349-350].

43. At the time of the due process hearing, Petitioner was an enrolled student in the ** Academy, a homeschool program with Internet support. Petitioner enrolled in this program on July 31, 2007. [P.Ex. 1; Tr. at 65-66].

44. Petitioner believes he is learning in his current homeschool program. He is taking coursework at the ** grade level. He finds homeschooling less stressful than public school. His homeschool grades reflect a ** grade point average on a 4.0 scale. [P.Ex. 1; Tr. at 89-90].

45. Petitioner's parents believe their son cannot return to school at KCISD because he is frightened of peer harassment and retaliation by peers. Petitioner's father believes that if Petitioner returned to public school, he would not threaten other students, harm other students, or act in a socially inappropriate way. [Tr. at 52-54, 75, and 97-98].

46. Petitioner is afraid to return to public school, even with Respondent's proposed safety plans for his reintegration. He is concerned that his peers "will always find a way around to pick you somehow." [Tr. at 85-86].

47. Petitioner filed his first hearing request, KC-I, on August 20, 2007, approximately one month prior to Petitioner and his parents signing a deferred prosecution agreement regarding the April 2007 incident. [Pleading File; P.Ex. 2].

48. Petitioner's mother was not aware that her son received any counseling or social skills training during his ** grade year. [Tr. at 99].

49. Respondent had no information from Petitioner or his parents that Petitioner experienced any bullying or harassment by peers during his ** and ** grade school years prior to Petitioner's arrest for terroristic threat in April 2007. [Tr. at 346].

50. Respondent's LSSP served as Petitioner's case manager. At hearing, the LSSP found no reason to change the opinion formed in March 2006 that general education counseling had been appropriate for Petitioner up to his April 2007 arrest. [Tr. at 312].

51. Petitioner met ARDC expectations and demonstrated the same level of performance as a student who met the passing standard on the grade-level TAKS test. [R.Ex. 12 at 2].

52. Petitioner met mastery criteria in his grade-level Math class during his ** grade year. [R.Ex. 18].

Discussion

Background

The crux of Petitioner's complaint is that Respondent's educational program for Petitioner lacked appropriate instruction and intervention that, in effect, failed to prevent Petitioner's alleged threat to his peers. Specifically, Petitioner alleges that Petitioner suffered harassment and bullying by peers over a three-year period prior to Petitioner's alleged threat. By contrast, Respondent believes that the educational program provided to Petitioner was appropriate in all respects. As a result, Respondent believes that Petitioner failed to identify and prove, by a preponderance of the evidence, that Petitioner was denied a FAPE under Respondent's program. Instead, Respondent believes that Petitioner made educational progress under his program up to his withdrawal from public education.

Petitioner, as the party attacking the appropriateness of the school district's program, must prove by a preponderance of the evidence, that the student's IEP and placement are inappropriate under IDEA. *Schaffer v. Weast*, 156 S.Ct. 528, 44 IDELR 150 (2005). The school district's educational program is presumed appropriate for a student who is eligible for IDEA services. *Tatro v. Texas*, 703 F.2d 823 (5th Cir.1983) *aff'd on other grounds sub nom.*, *Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984). Two factors must be considered to determine whether a school district has provided a student with a FAPE: 1) the school district must comply with the procedural requirements of IDEA; and, 2) the school district must design and implement a program that is reasonably calculated to enable the child to receive educational benefits. *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175, 206-207 (1982). School districts are not required to maximize the student's potential or to supply every conceivable program that may benefit a student. *Id.*

The Fifth Circuit used a four-factor test in *Cypress-Fairbanks Indep. School District v. Michael F.* to determine whether an IEP is reasonably calculated to confer educational benefit to a student, including: 1) whether the school district used proscribed procedures to develop the student's IEP, including an individualized program based on the student's assessment and performance; 2) whether delivery of the program occurs in the least restrictive environment ("LRE"); 3) whether the program was delivered in a collaborative and coordinated manner by key stakeholders; and, 4) whether the program produced academic and non-academic benefits for the student. *Cypress Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-248 (5th Cir. 1997).

Counseling

At the time Petitioner qualified for special education services at the end of his sixth grade year, the ARDC accepted the recommendation of Respondent's LSSP for general education counseling services. Specifically, the ARDC agreed that Petitioner would be able to access general education counseling services, based on the assessment results in Petitioner's initial evaluation. The LSSP's evaluation of Petitioner, including Petitioner's self-report, did not show a need for a more restrictive environment at that time.

The evidence shows that Petitioner accessed the general education counselor during the 2006-2007 school year. Petitioner interacted with friends, and at no time before April 2007, made any report to his parents or teachers that he needed assistance for peer interactions due to bullying behaviors. In fact, Petitioner's self-report on the Beck Inventories, part of the LSSP's evaluation, specifically *denied* any problems with teasing or peers at school. Likewise, Petitioner did not report to his parents any harassment or teasing episodes in the 2006-2007 school year before April 2007. At Petitioner's annual ARDC meeting in early April 2007, the ARDC reviewed his program. The ARDC did not see a need to add counseling as a related service, nor did his parents make a request for the same which was denied. Simply put, Petitioner did not present evidence of the need for more intensive counseling services until the end of April 2007.

Respondent first learned of alleged bullying or harassment by peers at school subsequent to Petitioner's alleged threat against peers at the end of April 2007. The evidence shows that Respondent promptly responded to this unexpected and unforeseen event. Respondent's counselor visited Petitioner during his four-day placement in the DAEP, made plans to convene an ARDC meeting, and, with the input of Petitioner's parent, the ARDC added counseling services as a related service. The ARDC offered specific counseling services to Petitioner over the summer period while Petitioner remained under house arrest. The ARDC, in anticipation of his return to public school, added weekly counseling to his Fall 2007 program.

Petitioner failed to meet his burden to show Respondent's counseling services were not sufficiently individualized for Petitioner prior to April 2007. Petitioner failed to show that Respondent should have provided special education related services of counseling rather than servicing Petitioner by the general education campus counselor. Respondent had no knowledge of bullying behavior during the 2006-2007 school year nor during the preceding 2005-2006 school year, to indicate a need for intervention with related counseling services upon Petitioner's qualification for special education in May 2006. Respondent acted rapidly to address Petitioner's needs in the area of counseling after Petitioner's arrest. The ARDC promptly convened, offering counseling services to Petitioner until his withdrawal from public school.

Social Skills Training

Petitioner received social skills training during his ** school years in the general education curriculum, prior to his qualification for special education services in May 2006, through the "Life Skills" program. His initial ARDC continued the general education social skills program for his ** grade year in the "Positive Action" program. Respondent's social skills program is a proven research-based program that is appropriate for delivery to a varied student population, including students with disabilities. The evidence established that Respondent's staff received training specific to both programs.

Petitioner presented no evidence that Petitioner or his parents sought and were denied more intensive social skills training through the special education program prior to April 2007. Instead, the evidence preponderates to show parental agreement with Petitioner's placement in the LRE for social skills. As a student with Autism, both the "Life Skills" and the "Positive Action" programs afforded Petitioner invaluable practice in social skills interaction with his peers.

Upon Petitioner's arrest and detention for alleged threats against his peers in April 2007, Respondent responded with a review of the social skills component in Petitioner's IEP. At the ARDC on May 22, 2007, with parental participation and agreement, the ARDC added a social-skills IEP as a related service to target coping skills to improve socialization efforts and self-advocacy skills. There is no evidence in the record to establish that Petitioner's parents sought special education related services for Petitioner's social skills training, nor was there any indication that Petitioner needed more intensive intervention in establishing positive social skills with his peers, prior to April 2007.

I find that Petitioner did not carry his burden to show inadequate delivery of a social skills program in a more restrictive environment prior to April 2007. Further, upon receipt of new information that Petitioner needed more intensive assistance for development of appropriate social skills, Respondent promptly reviewed Petitioner's changed needs and designed a program specifically tailored to meet his needs after April 2007.

Parent Training and Parental Participation

Petitioner did not overcome the presumption that Respondent's offer of parent training was appropriate. There is no evidence offered by Petitioner that the services offered to Petitioner's parents were inadequate in quantity or quality.

Federal regulations require a school district to help parents acquire the necessary skills that will help them support their child's IEP. 34 C.F.R. 300/34(c)(8). Under Texas Commissioner's rules, parents of a student with Autism are entitled to have parent and family training and support by qualified personnel with experience in Autism Spectrum Disorders included as part of their child's IEP. 19 T.A.C. §89.1055(e)(6). The evidence in this proceeding overwhelmingly established repeated attempts by Respondent to offer parent training to Petitioner's parents in the form of going to an out-of-town Autism conference, parenting classes, and in-home training. Unfortunately, Petitioner's parents chose not to avail themselves of these opportunities. Further, there is no evidence in the record that Petitioner sought specific parent training or resources and Respondent refused any request for additional parent training services.

Respondent made collaborative effort to include Petitioner's parents as full participants in all aspects of the development and review of Petitioner's program. Petitioner's parents received proper notification of ARDC meetings, received telephone calls from Respondent's staff when problems or concerns arose, and Respondent scheduled meetings designed to include the parents in the process, including the offer of specific services designed to help Petitioner's parents address the needs of their autistic son.

Math Program

Petitioner has not demonstrated a need for special education services in Math. Instead, the evidence shows that Petitioner reached grade-level mastery on the SDAA assessment in Math at the

same level of performance as a student passing the corresponding grade-level TAKS test. Further, Petitioner passed his ** grade Math class.

By contrast, Petitioner did not offer evidence to show that Respondent delivered inadequate Math instruction. Likewise, Petitioner failed to show a need for ESY services in Math and a subsequent denial of such services by Respondent. Instead, the evidence established that Petitioner received specialized remediation instruction in Math during Summer 2006 preceding his ** grade year. However, as his ** grade school year came to a close, Petitioner's performance did not indicate a need for ESY services in Summer 2007. At this point, Petitioner had reached grade equivalency standards in Math as a result of his general education Math instruction.

Appropriate BIP

Petitioner's initial ARDC designed and approved a BIP for Petitioner upon his qualification as a student with Autism in May 2006. This initial BIP used information from Petitioner's psychological assessment, gathered by Respondent's LSSP, along with information from an FBA. Petitioner's initial BIP included positive interventions and identified replacement behaviors to address behavioral concerns.

On April 12, 2007 – two weeks before Petitioner allegedly made a threat against several peers – the ARDC reviewed Petitioner's BIP, added an additional goal, and revised positive reinforcers and consequences for targeted behaviors, based on new FBA data presented to the ARDC. After Petitioner's arrest and detention, Respondent promptly convened an ARDC meeting to review his IEP to review his program and new FBA results on May 22, 2007. The ARDC added a fourth goal to his BIP of self-advocacy and specified additional positive behavioral supports. At hearing, Petitioner's psychologist expressed an opinion that Petitioner required a specific BIP in order for Petitioner to feel safe, yet the psychologist did not identify specific concerns about Petitioner's existing BIP.

Neither IDEA nor its implementing regulations specify the components required for a proper BIP. In 2004, the Seventh Circuit Court of Appeals declined to "create out of whole cloth" any substantive standards for a BIP. *See, Alex R. v. Forrestville Valley Community Sch. Dist. #221*, 41 IDELR 146, 375 F.3d 603 (7th Cir. 2004). Although Petitioner's BIP in place in April 2007 did not anticipate Petitioner's alleged threatening conduct to his peers, there is no indication in the record of this proceeding that Respondent had any suspicion that such an event would occur. I therefore conclude that Petitioner did not meet his burden to overcome the presumption of Respondent's BIP for Petitioner. The evidence preponderates to show ARDC development, review, and revision of Petitioner's BIP to address changes in Petitioner's behavioral needs. As those needs changed, Respondent properly convened the ARDC to revise Petitioner's program, including his BIP, based on new data.

Receipt of FAPE

As discussed above, the Fifth Circuit developed a four-factor test to determine whether or not a school district complied with IDEA's requirements. *Michael F., supra.*

A. Individualized Program and Development of the IEP

Applying the first factor of *Michael F.*, Petitioner must prove by a preponderance of the evidence that Respondent's educational program is *not* individualized on the basis of the student's assessment and performance. *Id.* The evidence established Respondent's consistent use of current

assessment and performance data for the initial IEP formulation in May 2006, followed by subsequent review of new data in April 2007, May 2007, and September 2007. Based on updated information, Respondent met the first factor by providing an individualized program for Petitioner, revised periodically as Petitioner's needs changed.

B. LRE

Under the second factor in the four-factor *Michael F.* test, Respondent must deliver the student's program in the LRE. *Id.* From Petitioner's first ARDC meeting in May 2006, Respondent delivered Petitioner's program in the general education setting, with only one special education class augmented by weekly occupational therapy sessions. Respondent maintained the LRE general education setting for Petitioner during his enrollment in KCISD, affording Petitioner as a high-functioning student with Autism the opportunity to interact with non-disabled peers. When Petitioner's needs changed near the end of his ** grade year, Respondent added additional special education services of counseling, parent training, and social skills while maintaining Petitioner's general education setting. Respondent's program met the LRE standard under the second factor.

C. Delivery of the Student's Program

The third factor under the four-part *Michael F.* test mandates delivery of the student's educational program in a collaborative and coordinated manner by key stakeholders. *Id.* At all times pertinent to this dispute, Petitioner's parents were full partners in the educational process together with the Petitioner's educators responsible for delivering his program. Respondent kept Petitioner's parents informed and consulted the parents for input on their son's program. Respondent properly obtained parental consent for additional services or assessment when necessary. I conclude that Respondent's program was both collaborative and coordinated under the third factor.

D. Academic and Non-academic Benefits

The fourth and final factor of the *Michael F.* test mandates receipt of academic and non-academic benefits by the student as a result of the school district's individualized program. *Id.* Petitioner's allegations challenge both components.

a. **Academic Benefit in the Area of Math Instruction.** Petitioner challenged the academic benefit of Respondent's program in the area of Math instruction. Specifically, Petitioner challenged the efficacy of Respondent's Math program to address Petitioner's specific needs in Math. By contrast, Respondent's initial special education evaluation of the student in May 2006 did not establish a need for special education services by Petitioner in Math, nor did Petitioner and his parents challenge the assessment results or seek additional evaluation from Respondent.

Petitioner presented no evidence to show that, in fact, Petitioner required special education services in Math, such as outside evaluation data obtained by his parents. By contrast, the preponderance of evidence revealed a Math program for Petitioner that was tailored to address his need for remedial instruction in Summer 2006. Additionally, the first semester of his ** grade year included two Math courses, including instruction in Math Tactics. Although Petitioner did not make passing grades in his first semester Math courses, his grades improved during his second semester and he passed ** grade Math. Likewise, Petitioner's achievement of state passing standards on the SDAA in Math further demonstrates his academic progress in Math. Petitioner, in fact, met grade-level standards for Math by the conclusion of his ** grade

school year. I conclude that Petitioner received an academic benefit from his Math instruction under Respondent's program.

b. **Non-academic Benefit.** Petitioner challenged the non-academic benefit of Respondent's program in several areas relating to Petitioner's behavior and social functioning, including counseling services, social skills training, and the appropriateness of his BIP. As previously discussed above, I conclude that Petitioner did not carry his burden to show the inappropriateness of Respondent's program in these areas. Respondent's program delivered instruction to address Petitioner's needs in behavioral and social skills acquisition with a program designed to augment Petitioner's non-academic benefit in these areas. This program included practice in social skills with his peers delivered in the LRE general education setting. At no time prior to the Petitioner's isolated alleged misbehavior directed toward his peers did Respondent have any information that Petitioner's needs had changed, and as a result, required more intensive intervention in these areas.

Even after Petitioner's single alleged misbehavior, Respondent addressed the potential seriousness of the behavior by reviewing his educational program, adding related services of special education counseling, offering more social skills training opportunities to his parents, and developing a social skills IEP. The evidence firmly established that Respondent had no indication from Petitioner, his parents, Respondent's educators, or even Petitioner's peers, that Petitioner expressed any problems with his peer interaction or that he was the recipient of unwanted bullying behavior during his ** and ** grade years. Other than Petitioner's statements after April 2007 to his parents, and his psychologist, Petitioner was not able to establish independent corroboration that bullying incidents actually occurred or that Petitioner, in fact, had suffered mistreatment by his peers at school. Nonetheless, even if these incidents of alleged bullying or other peer harassment occurred to Petitioner, Respondent did not have any information to alert the school district for intervention before April 26, 2007.

Finally, when Petitioner's alleged conduct towards his peers indicated the need for review and revision of Petitioner's IEP, Respondent promptly responded – with the input of his parents. Petitioner's parents chose not to avail themselves of parenting resources offered by Respondent prior to Petitioner's arrest in April 2007. Without notice to Respondent, Petitioner's parents chose to exit the public school system and proceed with homeschooling services in the more restrictive setting of their home rather than the public school setting.

Based on the foregoing, I conclude that Respondent's program meets the standards enunciated under the four-part test of *Michael F.*, resulting in progress under his program. *Michael F., supra.* Under this program, Petitioner made progress toward his IEP goals and made academic progress through the 2006-2007 school year. When Petitioner's needs changed, without previous indicators to his parents and educators, Respondent promptly acted to revise Petitioner's program to address new concerns.

Conclusions of Law

1. Petitioner is entitled to special education and related services at no cost to the parents under the provisions of IDEA, 20 U.S.C.A. §1400, *et. seq.*, and its implementing regulations.
2. Petitioner and his parents reside within the jurisdictional boundaries of Respondent, a legally constituted independent school district operating as a political subdivision of the State of Texas. Respondent is responsible for providing the student with a FAPE. 20 U.S.C. §1412(a)(1); *Hendrick-Hudson District Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C.A. §1412; 34 C.F.R. §300.300; 19 T.A.C. §89.1001.
3. The educational program proposed by the school district is presumed to be appropriate. Petitioner, as the party challenging the educational program offered by Respondent, bears the burden of proof. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Alamo Heights ISD v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986). Petitioner did not meet his burden of proof in this case.
4. Petitioner did not meet his burden to show that the IEP developed by Respondent was not reasonably calculated to enable Petitioner to receive an educational benefit. *Hendrick-Hudson District Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *Cypress Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-248 (5th Cir. 1997); *Polk v. Central Susquehanna Inter. Unit 16*, 853 F.2d 171, 181 (3rd Cir. 1988); *Hall v. Vance County Board of Education*, 774 F.2d 629, 636 (4th Cir. 1985).
5. Petitioner did not meet his burden to show a violation of substantive or procedural rights under IDEA, or that the actions of Respondent deprived Petitioner of meaningful participation in the development of the student's educational program. *Burlington Sch. Comm. v. Department of Educ.*, 471 U.S.359, 369-371 (1985); *Alamo Heights Indep. School Dist. v. State Bd. of Educ.*, 790 F.2d 1153 (5th Cir. 1986); *Parents of Student W. v. Puyallup School District, No. 3*, 21 IDELR 723 (9th Cir. 1994).
6. Petitioner is not entitled to an award of compensatory services. *Burlington Sch. Comm. v. Department of Educ.*, 471 U.S.359, 369-371 (1985); *Alamo Heights Indep. School Dist. v. State Bd. of Educ.*, 790 F.2d 1153 (5th Cir. 1986); *Parents of Student W. v. Puyallup School District, No. 3*, 21 IDELR 723 (9th Cir. 1994).
7. Petitioner has neither demonstrated an educational need for specially designed Math instruction, nor a need for ESY services in this academic area.
8. Petitioner did not offer evidence of the appropriateness of Petitioner's homeschool program.
9. Petitioner is not entitled to reimbursement for his unilateral private placement into a homeschool program.

ORDERS

Based upon the record of this proceeding, the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that all relief requested by Petitioner is **DENIED**.

IT IS FURTHER ORDERED that any findings of fact that are more properly characterized as conclusions of law, and any conclusions of law that are more properly characterized as findings of fact, shall be considered and shall have the same effect as if properly characterized.

IT IS FURTHER ORDERED that any and all additional or different relief not specifically ordered herein is **DENIED**.

Signed this 2nd day of June 2008.

/s/ Mary Carolyn Carmichael

Mary Carolyn Carmichael
Special Education Hearing Officer

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