

STUDENT	§	BEFORE A SPECIAL EDUCATION
	§	
v.	§	HEARING OFFICER FOR THE
	§	
PLANO ISD	§	STATE OF TEXAS
	§	

AMENDED 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 "School District"). Petitioner (hereinafter referred to as "Petitioner" or "Student") filed a written request for a due process hearing which was received by the Texas Education Agency on July 27, 2007. Petitioner was represented by Attorney Myrna Silver of Dallas, Texas. Respondent was represented by Attorney Nona Matthews of the law firm Walsh, Anderson, Brown, Schulze & Aldridge, P.C. in Irving, Texas. A telephone prehearing conference was held on Thursday, August 16, 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)] A due process hearing was held on Monday and Wednesday, September 24 and 26, 2007 and October 25, 2007 in Plano, Texas. The parties agreed to file post-hearing briefs on or before November 16, 2007. On November 27, 2007, the Hearing officer issued a Decision of the Hearing Officer and allowed the parties to file requests for amended findings of fact and conclusions of law. On December 5, 2007, the Hearing Officer granted Petitioner's request that the parties be allowed to file requests for amended findings of fact and conclusions of law by December 21, 2007. On December 21, 2007, the parties filed said requests. Based on the arguments continued within those pleadings, the Hearing Officer hereby withdraws the Decision issued on November 27, 2007, and substitutes the following Amended Decision in the referenced due process hearing.

Petitioner's Allegations:

Petitioner alleges that Student is a ** year-old who receives special education placement, programs and services on the basis of meeting eligibility criteria as a student in the School District. Petitioner asserts the following:

1. That Student had a total lack of educational progress during the 2006-2007 school year;
2. That Student regressed with respect to objectives mastered at the Wayman Learning Center (“WLC”) and then “unmastered” those objectives due to confusing or contradictory training methodologies used at School District despite School District personnel having access to the WLC for observation;
3. That School District failed to provide In-Home Training during the 2006-2007 school year;
4. That School District failed to provide any services to Student from Student’s third (3rd) birthday in May, 2006 until school began in August, 2006;
5. That School District failed to provide Student with Extended School Year (“ESY”) services for the summer of 2007;
6. That School District failed to have a teacher certified in Applied Behavior Analysis (“ABA”) as required by the Petitioner; and
7. That School District committed procedural violations in connection with Admission, Review and Dismissal (“ARD”) meetings held on May 14, 2007 and June 13, 2007.

As relief in this due process hearing, Petitioner requests that Respondent be ordered to do the following:

1. Implement “stay-put” for the 2007-2008 school year so that Petitioner attends school for approximately two and a half (2 ½) hours per day, three (3) days a week;
2. Provide Student with twenty (20) hours per week of private ABA instruction for the 2007-2008 and 2008-2009 school years; and
3. Reimburse Petitioner for the cost of private educational services.

Respondent’s Response:

Respondent generally denies Petitioner’s allegations. Respondent states that all necessary accommodations were made for Student, and that it was Student’s parents who failed to fully utilize the services provided for Student. The School District convened several ARD meetings on Student’s behalf, and recommended special education instruction for two and a half hours (2 ½) each day, for five (5) days a week. Student’s parents elected to have Student attend classes for three (3) days per week, and enrolled Student in private education classes for the remaining two (2) days each week.

Based upon the evidence submitted during the hearing 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 resides within the School District.

2. The School District is a political subdivision of the State of Texas and a duly incorporated Independent School District 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. On October 12, 2004, Dr. **, M.D., conducted a developmental evaluation of the Student. A Receptive-Expressive Emergent Language Scale-2 was administered by parent interview, and the Student appeared to have language skills about ** to ** months of age. The Childhood Autism Rating Scale was administered by parent interview and observation. The Student scored **, which falls into the severely autistic range. Significant scores were achieved in all areas, including imitation, object use, adaptation to change, visual response, verbal and non-verbal communication, and listening response.

5. The following impressions were identified in Dr. ** October 12, 2004 report: the Student has significant delays in communication, social relatedness and repetitive behavior. He fulfills the diagnostic criteria for autism. The Student also appears to exhibit characteristics of a sensory integration dysfunction, and would benefit from an occupational therapy evaluation for treatment of this disorder. It was recommended that the Student receive individual speech and occupational therapy twice weekly. Dr. ** concluded that the Student was at the “severe” end of the autism spectrum.

6. On April 7, 2006, the Respondent held an initial meeting to develop an Evaluation Review and Plan (“ERP”) for the Student. The ERP Committee was aware of Dr. ** evaluation of the Student and her diagnosis of Autism. The ERP committee determined that additional data would be needed to determine the following: Whether the student had a possible delay in any

developmental area, including the suspected areas of autism spectrum disorder and speech impairment; present levels of performance and educational needs of the student, including Functional Behavioral Assessment (“FBA”), speech/language/communication evaluation, developmental evaluation, parent information, standardized evaluation.

7. On May 12, 2006, the Respondent completed a Full Individual Evaluation (“FIE”) of the Student. The evaluators noted that the Student had been evaluated by Dr. **, who diagnosed Student with Autism; that the Student attended the WLC Monday through Thursday; and that the Student was receiving ABA training, privately.

8. The May 12, 2006 FIE used the following methods of assessment: Transdisciplinary Play-Based Assessment, which is research-based; The Childhood Autism Rating Scale (“CARS”); and the Psycho-Educational Profile 3rd Edition Developmental Scale (“PEP-3”).

9. The CARS used in the May 12, 2006 FIE identified the Student’s total score as **. A score of 30 or higher is indicative of an autism spectrum disorder, and the Student’s score fell within the range of Severely Autistic.

10. The PEP-3 identified in the May 12, 2006 FIE provided the following information about the Student: receptive language was identified as below the developmental age of ** months with a percent rank of 33 percent, indicating that the Student’s receptive language was functioning at the moderate level. It was determined that the Student did not demonstrate the following competencies: cognitive verbal, fine motor and visual-motor imitation. It was determined that the Student demonstrated the following emerging skills: fine motor skills, including using pincer grasp to pick up M&M and putting a block in a container; visual-motor imitation, including inconsistently imitating 3 gross motor movements.

11. The May 12, 2006 FIE contained the following recommendations: that the ARD/ Individualized Education Plan (“IEP”) committee determine if the Student is eligible for special education services as a student with Autism and Speech Impairment. It was recommended that if eligibility were met, the committee should develop a program to meet the Student’s educational needs. It was also recommended that the Student attend the pre-kindergarten classroom five (5) days per week with sixty (60) minutes of speech therapy to be provided within the classroom time due to the Student’s developmental delays and disruptions.

12. At the time of the School District’s evaluation, Petitioner attended the WLC, where he received 1:1 private ABA services with limited opportunity for socialization with other students. The WLC currently has twelve instructors and 25 students. The WLC uses an old version of the Assessment of Basic Language and Learning Skills (“ABLLS”) to guide Petitioner’s programming. **, the owner and director of the WLC, provided information to the School District as part of Petitioner’s initial evaluation by the School District.

13. On May 18, 2006, an ARD meeting was convened to consider the Student for admission for Special Education and review Placement/Program. The following information was reviewed: information from parents, student and teachers; Vision/Hearing/Medical; FIE; FBA; Speech/Language Evaluation. The Student met specific TEA and federal eligibility criteria to receive special education services as a student with autism and speech impairment.

14. The May 18, 2006 ARDC consisted of the following individuals: **, who is normally employed as a Special Language Evaluator, who served in the role of an individual who could interpret the instructional implications of evaluation results and as a representative of the School District; **, who is normally employed as a diagnostician, but who served the role of the ARDC as the Student’s special education teacher, even though she had not been nor was it planned that she would be the Student’s special education teacher. Ms. ** was not, in fact, employed by the Respondent as a special education teacher at the time of the May 18, 2006 ARD; **, who is normally employed as a school psychologist for the Respondent, but who

served in the role of an individual who could interpret the instructional implications of evaluation results; and finally, the Student's parents. The Student's were not experienced in, or knowledgeable of, the requirements or parameters of special education programs and services.

15. The May 18, 2006 ARDC did not include an individual who was a regular education teacher, whether or not the Student was considered for placement in a regular education classroom. Also, no one was present from the WLC, which was the private instructional setting known to the Respondent. The Respondent did not invite any of the Student's instructors or administrators from WLC.

16. On May 18, 2006, the ARDC accepted an IEP that included goals and objectives that would be measured by observations by Special Education staff. The Student's measurable annual goal was identified as improving the Student's cognitive skills by mastering the following objectives to the indicated level, which contained a percentage for each short term objective. Short term goals were identified as: imitate demonstrating the function of ten (10) common toys; search for a preferred object once it has been removed from sight; make a choice between two preferred toys or foods; consistently follow single-step directions with a gesture and without a gesture; imitate simple vocalizations; learn five (5) new signs and use them in appropriate situations.

17. The IEP accepted on May 18, 2006 made a determination of education instruction, and did not include related services.

18. The IEP accepted on May 18, 2006 determined that Extended School Year Services ("ESYS") were not recommended because based on data reviewed, the Student was expected to recoup previously mastered skills within a reasonable time after school resumes. ARDC members from the Respondent concluded that the Student was not eligible for ESYS because as a new prospective student, the ARDC had no specific data or potential regression or

recoupment of learned skills. The ARDC minutes, that included deliberations made during the May 18, 2006 ARD meeting, do not indicate that ESYs was discussed.

19. The May 18, 2006 ARDC reviewed an Autism Supplement that determined that In-Home and parent training were considered and the parents would be informed of the School District's training and resources.

20. The Committee Minutes that includes deliberations made during the May 18, 2006 ARD meeting do not indicate that ESYs or In-Home training was discussed.

21. ** testified that the May 18, 2006 ARDC did not consider In-Home training because there were no reports of home difficulties.

22. Within the first three weeks of school, the District convened another ARD committee meeting on August 25, 2006, to discuss Petitioner's placement and attendance. Petitioner's teacher and speech pathologist were concerned that Petitioner required a smaller, more restrictive educational environment, with a lower student/teacher ratio. The ARD committee changed Petitioner's placement to a self-contained classroom made up of five(5) to six (6) children with disabilities, a full time special education teacher, two (2) to three (3) teaching assistants, and a speech pathologist two and one half (2 ½) days per week.

23. The May 18, 2006 ARDC developed and accepted an Autism Supplement, which specified how speech services would be delivered to the Student, and showed that the IEP goals would be provided mostly in a group setting. The ARDC also developed and accepted a behavior plan, goals and objectives, and accommodations.

24. The committee that completed the Autism Supplement determined that Petitioner's parents would be informed of District trainings and resources. The committee did not recommend additional In-Home training because there was no indication that Petitioner was not

generalizing skills to the home setting, and the parents did not indicate any difficulties at home that needed to be addressed. The committee agreed on the appropriate staff to student ratio, which included small group instruction for learning new information.

25. The parents were provided a copy of May 18, 2006 ARD to review on the date of the meeting, and returned the signed agreement the next day.

26. The committee recommended that Petitioner receive special education instruction five (5) days per week for two and a half (2 ½) hours each day in pre-K integrated classroom, in addition to speech therapy, at ** Early Childhood School in Plano ISD. An integrated class is made up of approximately fifty (50) percent students with disabilities and fifty (50) percent students without disabilities.

27. On August 25, 2006, an ARD meeting was convened on behalf of the Student. The purpose of the ARD meeting was to review and modify the special education program developed for the Student by the May 18, 2006 ARDC.

28. The following individuals attended the August 25, 2006 ARD meeting: **, a counselor at the Student's school, who attended the ARD as an "administrator;" **, who was the Student's special education teacher for a portion of the 2006-2007 school year; and **, who was normally employed as a speech pathologist appeared as an individual who can interpret the instructional implications of evaluations (limited to speech - language evaluations.) The Student's mother was present. The ARDC did not include another evaluator with broader qualifications or the Student's regular education teacher. The ARDC did not include the Student's actual special education teacher in whose class the Student was placed by the August 25, 2006 ARDC.

29. Upon enrollment for the 2006-2007 school year Petitioner's parents decided not to access all of the services that were determined necessary by the ARD committee. Petitioner's

parents elected to utilize the dual enrollment provision to only access services from the District for three (3) days per week instead of the five (5) days per week recommended by the August 25, 2006 ARDC.

30. On May 14, 2007, an ARD meeting was convened to evaluate the Student's progress, and ** signed as a General Education teacher.

31. The August 25, 2006 ARD was called because the Student's integrated classroom teacher felt that her classroom was not appropriate for the Student to make progress, and needed a more structured day in a smaller setting with a smaller teacher-student ratio.

32. The August 25, 2006 ARDC determined that the Annual Goals and Short-Term Instructional Objectives for the IEP reviewed at the May 18, 2006 ARD contained asterisks to identify goals and objectives that could be worked on in the three (3) days that the Student attended school in the district.

33. The integrated classroom was more of a general education placement than a special education placement. ** testified that there were five (5) students at the beginning of the time that she taught the Student in her general education classroom; the class consisted of more typical peers than special education peers. She testified that the other students had minimal impairments that were not severe, and that all of the other children were verbal.

34. The Student's special education teacher testified that she taught the Student from the end of August of 2006 until May of 2007, and contained about five (5) or six (6) students at the time that the Student entered her class. She testified that the students in that class were all equal in their ability levels; five (5) were non-verbal, including the Student; and the Student had a functioning level equivalent to three (3) other students.

35. ** stated that she engaged in one-on-one instruction every day in her class between 2:00 and 2:30 and between 12:45 and 12:50. She also stated that Student would exhibit tantrumming, fighting and crying around 2:00, and would be placed in a more structured classroom.

36. ** testified that she did not know at the time that the Student was placed in her class that the Student attended the WLC, and that she had no communication with ** during the time she taught the Student.

37. Within the first three (3) weeks of school, the District convened another ARD committee meeting on August 25, 2006, to discuss Petitioner's placement and attendance. Petitioner's teacher and speech pathologist were concerned that Petitioner required a smaller, more restrictive educational environment, with a lower student/teacher ratio. The ARD committee changed Petitioner's placement to a Self-contained Classroom made up of five (5) to six (6) children with disabilities, a full time special education teacher, two (2) to three (3) teaching assistants, and a speech pathologist two and one half (2 ½) days per week.

38. Members of the August 25, 2006 ARDC voiced their concern that Petitioner was not accessing all of the educational services previously determined necessary. Due to the parents' election to access dual enrollment, the committee reduced the goals and objectives to be targeted during the three (3) days per week that Petitioner attended school in the District. The committee did not request an In-Home Training assessment because Petitioner's mother indicated that Petitioner demonstrated similar skills at school and at home. Petitioner's mother was present, did not voice any concerns regarding the prioritized objectives, and was in agreement with the decisions of the committee.

39. On October 12, 2006, Petitioner's mother confirmed the District's belief that Petitioner's skills were generalizing between settings by writing a note to the speech pathologist that states "I'm encouraged that [Student] seems to be carrying over his skills well between

WLC, home, and **.” Based on frequent informal conversations with Petitioner’s mother, the District’s speech pathologist determined that Student’s behaviors were similar in the home and school setting.

40. The Student exhibited minimal progress in the following objectives according to Respondent’s IEP Reporting Period Updates provided after the first reporting period in the 2006 to 2007 school year:

- “Independently sit at circle for 3 or more minutes without tangible reinforcements”
 - “Demonstrate interest in cause and effect toys”
 - “Transition throughout the school day using objects/pictures without protest”
 - “Comply with 5 or more routine classroom directives with only one reminder (Stand up. Sit down. Line up. Stop. Come here.)”
 - “Engage in reciprocal activity with an adult for 3 turns”
 - “Remain in designated area for 3 or more minutes”
 - “Participate in hand motions and finger plays with 5 familiar songs”
 - “Pull pants up and down in preparation for diapering”
 - “Take care of personal belongings (putting backpack away, putting snack in appropriate location, etc.”

41. The Student exhibited satisfactory progress, after the first reporting period of the 2006-2007 school year, in the following objectives included within the extremely important area of communication, according to Respondent’s IEP Reporting Period Updates:

- “Consistently respond to environmental sounds by turning toward the source”
- “Make a choice between two preferred toys or foods”

- “Consistently follow single-step directions with a gesture”
- “Follow single-step directions without a gesture (Give me a __. Show me __. Touch the __.)”
- “Consistently use known signs in appropriate situations.”

42. The Student exhibited satisfactory progress in or mastered the following objectives

in the areas of Cognitive, Communication, and Social/Emotional/Behavioral according to Respondent’s IEP Reporting Period Updates provided after the second reporting period in the 2006 to 2007 school year:

- “Independently sit at circle for 3 or more minutes without tangible reinforcements”
 - “Consistently respond to environmental sounds by turning toward the source”
 - “Make a choice between two preferred toys or foods”
 - “Consistently follow single-step directions with a gesture”
 - “Follow single-step directions without a gesture (Give me a __. Show me __. Touch the __.)”
 - “Comply with 5 or more routine classroom directives with only one reminder (Stand up. Sit down. Line up. Stop. Come here.).”

43. ** testified that she taught in a centralized structured classroom, and began teaching the Student in March of 2007 beginning at 2:00 p.m. after his teachers said that his behavior deteriorated at 2:00 p.m.

44. ** said that she focused on communication and behavioral goals. The following communication goals were targeted: make a choice between two (2) preferred toys or foods;

consistently follow single-step directions with a gesture; consistently use known signs in appropriate situations.

45. ** reported that the Student would tantrum in the beginning of the year and not do well, but made progress toward the end of the year. The Annual Goals and Short-Term Instructional Objectives contained in the IEP accepted by the ARDC on May 18, 2006 specifies evaluation codes for the subject area, Cognitive, that indicate that no progress was made.

46. The March 20, 2007 ARDC determined that Student would be provided seven and a half (7 ½) hours of Special Education per school week. The Student would attend the self-contained class from 12:45 p.m. to 2:00 p.m., and attend the structured class from approximately 2:00 p.m. to 3:15 p.m., on school days.

47. Petitioner received one-on-one instruction for one hour per day in the Structured Classroom from **, a certified special education teacher who has extensive specialized training and experience in ABA and teaching children with autism. ** was previously offered a job by Ms. ** to teach at her center. ** further testified that as a special education teacher at Plano ISD, she had access to a Board Certified Behavior Analyst. ** focused on Petitioner's communication and behavioral goals. ** uses the verbal behavior approach, which uses applied behavior techniques in order to control the environment in order to elicit a change in observable behavior. The verbal behavior approach was introduced by B.F. Skinner and is supported by peer reviewed research. ** reported that petitioner responded well to her instruction. ** has visited the WLC, where she observed many of the same techniques that were used at the ** Early Childhood Center in Plano ISD.

48. ** is a speech pathologist in private practice who has been instructing the Student using ABA since January, 2006. She reported that the Student was currently non-verbal, but could form several sounds. She works with the Student at the WLC and works with reinforcer signs. According to **, the Student has severe apraxia, a motor speech disorder. She also states

that she models behavior that she wants the Student to do, and does not feel he can use other children's behavior as a model.

49. ** reported that the original IEP goals: 1) Consistently respond to environmental sounds by turning toward the source was not a high priority; she was not sure if she had observed the Student in May of 2006 to 2) Make a choice between two preferred toys or foods; 3) Respond to simple where questions by pointing to the object was appropriate; 4) Consistently follow single-step directions with a gesture was appropriate but not measurable; 5) Follow single-step directions without a gesture was appropriate; 6) Consistently use known signs in appropriate situations was appropriate; 7) Imitate simple vocalizations was appropriate; 8) Learn 5 new signs and use them in appropriate situations was "very important."

50. ** focused her speech therapy with the student on the motoric form of speech rather than language; the language component comes from the IEP through the WLC.

51. ** reported that she has observed a decrease in the Student's negative behaviors since he has learned to communicate, and noticed a decrease in misbehavior over the past six (6) months.

52. The District conducted Petitioner's annual ARD committee meeting on May 14, June 13, and June 20, 2007. The committee requested additional evaluations to include an occupational therapy evaluation and an in-home training assessment. The committee conducted an FBA and revised Petitioner's BIP. Petitioner's compliance had improved to the point that the District recommended targeting biting. The committee developed goals and objectives in the areas of communication, cognitive, social skills/behavior, and self-help. The committee determined necessary classroom accommodations. Petitioner's parents and private service provider participated actively in the ARD committee meeting. The committee revised the goals and objectives in direct response to the parents' and Ms. **'s concerns.

53. The May 14, June 13, and June 20, 2007 ARDC recommended that Petitioner receive special instruction five (5) days per week for an extended school day of five (5) hours each day, in addition to speech therapy. The committee also recommended ESY services for five (5) hours per day, four (4) days per week, for six (6) weeks, with sixty (60) minutes per week of speech therapy.

54. The May 14, June 13, and June 20, 2007 ARDC completed the autism supplement. In response to concerns voiced by the parents, the committee further decreased the student/teacher ratio so that all of Petitioner's instruction would be provided 1:1.

55. Petitioner's parents were in disagreement with the decisions of the May 14, June 13, and June 20, 2007 ARDC .

56. Petitioner did not attend the ESY services recommended by the District at the May 14, June 13 and June 20, 2007 ARD meetings.

57. Another ARD committee meeting was conducted on August 24 and September 5 of 2007, to review the new evaluation reports. The committee developed goals and objectives and recommended the related services of In-Home training for three (3) hours per week for two (2) weeks to be followed by one (1) hour sessions weekly through May 13, 2008; Parent Training for three (3) hours, and occupational Therapy for 840 minutes per year of direct services and 840 minutes per year of staff consultation (e.g approximately thirty (30) minutes each per week).

58. Petitioner's parents were not in agreement with the recommendations and did not access any of the services offered by the August 24 and September 5, 2007 ARDC.

59. The Student receives one-on-one educational services at WLC, five (5) days a week. The WLC is operated by **, a Board-Certified behavior analyst who has operated the Center for

three (3) years. Ms. ** has thirteen (13) years experience working with students with disabilities in an educational setting.

60. The Student is instructed using the Applied Behavior Analysis (“ABA”) methodology at WLC. The ABA methodology is based on well-researched and reported studies conducted by multiple recognized researchers in the education and psychology fields and is well regarded as a behavioral intervention approach for children with communication and behavioral disabilities. This methodology has been useful in improving the Student’s negative behaviors that are associated with his disability, including outbursts, tantrums and self stimulation activity.

61. The Student is taught in a furnished 6,000 square foot permanent facility that is composed of one largest area called a “motor room” where the Student is allowed to engage in therapeutic gross motor activities; two other larger areas where the Student is taught generalization of skills, new skills and play activities in a natural learning environment; and smaller classrooms furnished with tables, teaching stations and dividers.

62. There are twenty-five (25) students at the WLC, all of whom have disabilities that are disguised as autism or where the children display behaviors similar to autism.

63. The Student’s progress in his educational program at the WLC is measured and developed using the Assessment of Basic Skills and Learning Skills, Skills Tracking System.

64. The Student’s educational program at the WLC includes instruction of the Student in the use of sign language to communicate his needs and wants.

65. The Student’s educational program at the WLC is designed to provide him with educational benefit at the Student’s Early Childhood Intervention level.

66. The Student attends the WLC fifteen (15) hours per week at a rate of \$65.00 per hour for a total cost of \$975.00 per week.

III. Discussion

The parties have presented an administrative hearing record that represents the extreme positions regarding the issue of dual enrollment: when a student is educated in both a public and private setting. Both parties argue valid points that are considered and incorporated into this decision.

Petitioner's Arguments

Petitioner argues that Respondent committed significant substantive and procedural errors that deprived the Student of educational opportunity. Specifically, the fatally flawed composition of key ARD Committees, particularly the May 18, 2006 and August 25, 2006 Committees, resulted in placement and programs that provided minimal educational benefit to the Student. Petitioner presented convincing argument that, with respect to the provision of ESYS for the Summer of 2006 and the Student's placement and programs for a portion of the 2006-2007 school year, the Student's IEP was not sufficiently individualized on the basis of the Student's assessment and performance, and the program was not administered in the least restrictive environment - two important prongs of the Fifth Circuit decision of *Cypress-Fairbanks ISD v. Michael F.*, 118F. 3d 245, 253 (5th Cir. 1997).

The most convincing evidence argued by the Petitioner related to how the initial May 18, 2006 ARD meeting was conducted. At this meeting, the Respondent developed a flawed IEP for the Student that adversely affected the Student's educational opportunities. Moreover, the crucial members of the May 18, 2006 ARDC were missing, and the absence of such statutorily mandated individuals resulted in an inappropriate initial placement for the Student. Petitioner correctly cites the decision of *W.G. v. Bd of Trustees*, 960 F. 2d 1479 (9th Cir. 1992) and *Shapiro*

v. Paradise Valley Unified School District No. 69, 317 F. 3d 1072 (9th Cir. 2003) as controlling authority on these issues. In *W.G. v. Board* (*supra*) the Local Education Agency (“LEA”) inappropriately convened an IEP team meeting without the input of the Student’s regular classroom teacher or any representative of that Student’s private school in which he was dually enrolled. Moreover, the LEA’s IEP team erroneously placed that Student in a pre-existing, predetermined program that was not sufficiently individualized. The Court concluded:

“When a district fails to meet the procedural requirements of the Act by failing to develop an IEP in the manner specified, the purposes of the Act are not served, and the district may have failed to provide a FAPE. The significance of the procedures provided by the IDEA goes beyond any measure of a child’s academic progress during the period at issue” (*supra* at 1485)

The *W.G. v. Board* Court’s ruling on the importance of that district’s failure actually discounted the necessity to review of that district’s IEP, even in the context of a dual enrollment. The Court held:

“Because we hold that [the LEA] failed to develop the IEP according to the procedures required by [IDEA] and by Montana law, we need not address the question of whether the proposed partial IEP was reasonably calculated to enable W.G. to receive educational benefits. See *Rowley*, 458 US at 201, 204-05; 20 U.S.C. §1401 (19) (*supra* at 1485)”

In this case, at the time of the May 18, 2006 ARD meeting Plano ISD was well aware that the Student was severely autistic and was being taught in a private instructional environment with which it was also familiar. IDEA and its implementing regulations [34 CFR §300.321 (a)(2)(3)(4)] mandated that appropriate IEP team members be present at the May 18, 206 ARD and give input on appropriate placement and programs for the Student. The *W.G. v. Board* Court required that one or more of the Student’s teachers at the WLC, including **, be invited to the initial May 18, 2006 ARD. It is highly unlikely that if a WLC representative had been present on May 18, 206, that the Student’s ARDC would have recommended a functionally general

education placement for the Fall, as it ultimately did, and provide no ESYS for the entire summer for a severely autistic three year old.

The decision in *Shapiro v. Paradise Valley*, cited herein, contradicts Respondent's arguments that its May 18, 2006 and August 25, 2006 ARDC's were compliant with the Act and its regulations. In *Shapiro*, the LEA convened an IEP team meeting without a representative of the private school from which that Student was receiving services as a hearing impaired student; and substituted a hearing impaired instructor who was employed by that district. The *Shapiro* Court addressed, with specificity, the same dichotomy that is repeated in this case of having a teacher in an ARD/IEP team meeting in place of *the Student's* teacher. The Court construed §1401(a) (20) of the old Act, but it might well have written on the requirements of 34 CFR §300.321(a) when it held:

“According to §1401(a)(20), ‘*the* teacher,’ not ‘a teacher,’ must be included in the development of the IEP. The [LEA’s] interpretation of this statutory provision conveys too broad a meaning to the word ‘teacher,’ a meaning inconsistent with the statute.” (*supra* at 1078)

As in the *Shapiro* facts, Plano ISD convened at least two ARD meetings using individuals who evidently lacked any specific connection to the Student's individualized program and omitted key individuals who could have provided valuable, if dissenting opinions. The result was a placement that the Student's original teacher, a District employee, concluded was highly inappropriate and resulted in a loss of needed instruction time opportunity.

With regard to the ESYS issue and its relationship to the one year statute of limitations period, Petitioner has the more persuasive argument. The District was aware on May 18, 2006, that the Student's parents were novices in the world of special education services. (This conclusion stands even though the Student's father is an established attorney who practices in an area other than special education law.) By failing to invite or include key personnel at the May 18, 2006 ARD, the District effectively withheld from the parents the availability of important

input regarding the Student's need for careful placement and ESYS. As such, I hereby conclude that regulation 34 CFR §300.511 (f)(2), proffered by the Petitioner, applies to this case. The fact that the Student was entitled to EYS for the *entire* summer, including the brief period on and after July 27, 2006 within the one year limitation period, only supports the equitable application of this exception.

The record shows that the Student was entitled to ESYS for the summer of 2006. The May 18, 2006 ARDC was provided with ample information that the Student was diagnosed severely autistic in 2004, and determined to have severe autism by a District diagnostician. Moreover, the May 18, 2006 ARDC had access to information that the Student was being instructed by ABA at the WLC. As discussed herein, additional data about the Student was available to the ARDC and even more data would have been available to the ARDC had WLC personnel been invited to the ARD meeting. On these facts, the May 18, 2006 ARDC determined that ESYS was not recommended for the Student for the summer of 2006 - on the grounds that there was insufficient data regarding the prospective public school Student to indicate that the Student would exhibit severe or substantial regression of skills that could not be recouped within a reasonable period of time [presumably, relying on 19 TAC §89.1065 (3)]. Petitioner correctly argues that 34 CFR §300.106 does not require a district to consider *only* regression/recoupment as a basis for determining if a child needs ESY services. Also, Petitioner directs the Hearing Officer to 19 TAC §89.1065 (7), which authorizes the School District to use information collected during the current year (perhaps from WLC) to support ESYS for a newly enrolling student. However, Petitioner may well have cited, as additional authority, 19 TAC §89.1055 (e)(1), which requires an ARDC to consider extended educational programming for students with autism/pervasive developmental disorders.

The record, as a whole, supports a conclusion that the May 18, 2006 ARDC had predetermined that ESYS was not necessary for the Student to receive a FAPE. In addition to ignoring the regulations noted herein, the May 18, 2006 ARDC apparently engaged in very little discussion and no *documented* discussion of offering ESYS for the Student for 2006. The

insistence that only documented regression data, presumably from the District, supported ESYS for a severely autistic three year old known to be receiving continuous instruction is similar, in kind, to the LEA's disinclination to consider ABA for an autistic student in *Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004). That Court found that the Hamilton County LEA had an unofficial policy of refusing to consider one-on-one ABA programs (*supra* p. 857). The fact that the May 14, 2007 ARDC ordered *five (5) hours per day, four days per week* of ESYS for the summer of 2007, only supports the conclusion that Respondent had a narrow view of what data supported ESYS.

Respondent's Arguments

Respondent correctly directed the Hearing Officer to Commissioner Rule 19 TAC §89.1096(c)(e) regarding issues challenging the implementation of the Student's IEP. That reference provides, in part:

“Parents of an eligible student ages three (3) or four (4) shall have the right to ‘dual enroll’ their student in both the public school and the private school beginning on the student’s third birthday and continuing until the end of the school year in which the student turns five (5) or until the student is eligible to attend a district’s public school kindergarten program, whichever comes first, subject to paragraphs (1)-(3) of this subsection. The public school district where a student resides is responsible for providing special education and related services to a student whose parents choose dual enrollment.

(1) The student’s ARD committee shall develop an Individualized Education Program (“IEP”) designed to provide the student with a FAPE in the least restrictive environment appropriate for the student.

(2) From the IEP, the parent and the district shall determine which special education and/or related services will be provided to the student and the location where those services will be provided, based on the requirements concerning placement in the least restrictive environment set forth in 34 CFR §§300.114-300.120, and the policies and procedures of the district.

(3) For students served under the provisions of this subsection, the school district shall be responsible for the employment and supervision of the personnel providing the service, providing the needed instructional materials, and maintaining pupil accounting records. Materials and services provided shall be consistent with those provided for students enrolled only in the public school and shall remain the property of the public school.

(e) Complaints regarding the implementation of the components of the student's IEP that have been selected by the parent and the district under subsection (c) of this section may be filed with the Texas Education Agency under the procedures in 34 CFR §§300.151-300.153. Additionally, parents may request mediation as outlined in 34 CFR §300.506. The procedures in 34 CFR §§300.300, 300.504, 300.507, 300.508 and 300.510 - 300.518 **(relating to due process hearings) do not apply to complaints regarding the implementation of the components of the student's IEP that have been selected by the parent and the district under subsection (c).**"

(emphasis supplied)

Because the Student's parents chose to dual enroll the Student into a *portion* of the program developed by the ARD Committees of May 18, 2006 and August 25, 2006, the implementation of the IEPs from each meeting is not subject to challenge. The wisdom of this rule is plain since it is impossible to attribute the undeniable progress that the Student made during a portion of the 2006 - 2007 school year to either his attendance in the School District's program or the WLC. The corollary to this conclusion is that it is also impossible to blame either his failure to totally access the School District's program or some failure in the School District's implementation of an otherwise appropriate program.

Extant case law makes such determinations unnecessary, anyway, when a student has made more than minimal educational progress. Respondent has appropriately cited *Patricia P. v. Bd. of Edu.*, 203 F.3d 462, 469 (7th Cir. 2000) and *M.M. v. Sch. Dist. of Greenville County*, 303 F. 3d 523, 533-35 (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 less than desirable educational progress. However, *Cypress-Fairbanks ISD v. Michael F.*, cited herein, and of course, *Board of Educ. v. Rowley*, 458.US.176, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982),

stand for the proposition that where a student has made more than minimal educational progress in any individualized program designed to confer educational benefit, the LEA has discharged its burden to the student, under IDEA. Moreover, it is important to remember where the student has a disability that presents substantial educational challenges, that even educational progress is not necessarily the yard stick in measuring the value of the LEA's educational program. See *CJN v. Minneapolis Pub. Sch.*, 323 F. 3d 630, 642 (8th Cir. 2003), cert. denied, 540 US. 984, 124 S. Ct. 478 (2003).

The essence of this decision is that the Respondent failed to provide the Student with appropriate educational opportunity during the summer of 2006 and the first nine weeks of the 2006 - 2007 school year. As discussed herein, ESYS was indicated for this Student as of the May 18, 206 ARD meeting. To the extent that the Student's parents had to provide private instruction for the Student for that summer, their costs should be reimbursed. Similarly, the inappropriate initial placement for the Student for the first three weeks of school did not afford such an educational opportunity. Fortunately for the Student, his teacher recognized the placement mistake made by the May 18, 2006 ARDC. The first tangible, documented evidence of some educational progress was not confirmed until the Student report update completed on October 10, 2006. I disagree with Respondent's assertion in its Motion for Amended Findings of Fact, that any award of compensatory relief for the Petitioner for any portion of the 2006-2007 school year is inconsistent with the proscription against IEP implementation claims, discussed herein. The August 25, 2006 ARD corrected the errors made in the *development* of an appropriate IEP, committed by the May 18, 2006 ARDC. However, satisfactory evidence of the Student receiving educational benefit was not confirmed for a period of the 2006-2007 school year *prior* to October 12, 2006. Student's parents should be reimbursed their private educational costs for the entire initial nine week period until the results made possible by the August 25, 2006 ARD were confirmed. The measure of the value of the WLC's placement and its fundamental approach is that after the March 20, 2007 ARD meeting when the Student was provided one-on-one instruction in the Structured Classroom of **, did the Student's progress increase significantly.

Therefore, reimbursement of the parents' WLC costs as described herein, is an appropriate compensatory award for the Student's lost educational opportunity.

To the extent that the Student's parents failed to access the Respondent's appropriately offered programs and services for the Student, their requests for relief should be denied. The May and June 2007 ARDC belatedly recognized the Student's need for ESYS for the summer of 2007. The parents' failure to use the services should not be rewarded. See *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F. 3d 1309 (11th Cir., 2003) and *Doe v. Defendant I*, 898 F. 2d 1186 (6th Cir., 1990). In the same vein, the persistent procedural problems evident in the School District's broad reading of required ARDC members, discussed herein, did not result in a loss of educational opportunity for the Student after the first nine week period. For this reason, Petitioner's requested relief after that period should be denied.

Issue No. 1: That Student had a total lack of educational progress during the 2006-2007 school year.

Ruling: **GRANTED IN PART AND DENIED IN PART.** Petitioner showed that Respondent failed to develop an appropriate placement and program that conferred benefit to the Student and denied the Student a FAPE the first nine (9) weeks of the 2006-2007 school year. Thereafter, the Student made educational progress for the remainder of the school year and was provided with a FAPE.

Issue No. 2: That Student regressed with respect to objectives mastered at the WLC and then "unmastered" those objectives due to confusing or contradictory training methodologies used at School District despite School District personnel having access to the WLC for observation.

Ruling: This claim is **DISMISSED**, as it is based on the assertion that Respondent failed to implement the Student's IEP. Such a claim is barred by 19 TAC §89.10966 (e).

Issue No. 3: That School District failed to provide In-Home Training during the 2006-2007 school year.

Ruling: This claim is **DENIED**. The evidence of record shows that Respondent had no reason to know that the Student's skills were being generalized at home. In fact, the Student's parents reported to the Respondent that the Student was doing well at home. When the Respondent was informed otherwise, it developed an in-home training IEP for the Student's family on a timely basis.

Issue No. 4: That School District failed to provide any services to Student from Student's third (3rd) birthday in May, 2006 until school began in August, 2006.

Ruling: This claim is **GRANTED IN PART AND DENIED IN PART**. Respondent was obligated to provide the Student with ESYS for the summer of 2006. To the extent that it did not, the Student's parents are entitled to the private educational services that they obtained for the Student during the summer. However, the Student's parents failed to access the Respondent's offer of services for the last two days of the 2005-2006 school year.

Issue No. 5: That School District failed to provide Student with Extended School Year ("ESY") services for the summer of 2007.

Ruling: This claim is **DENIED**. Respondent developed an ESYS plan for the Student for the summer of 2007. The plan was designed to confer educational benefit upon the Student. The Student's parents failed to access the services offered by the Respondent.

Issue No. 6: That School District failed to have teacher certified in Applied Behavior Analysis ("ABA") as required by the Petitioner.

Ruling: This claim is **DENIED**. Respondent is not obligated to employ any specific educational methodology to provide the Student with a FAPE.

Issue No. 7: That School District committed procedural violations in connection with Admission, Review and Dismissal (“ARD”) meetings held on May 14, 2007 and June 13, 2007.

Ruling: This claim is **DENIED**. Respondent developed an appropriate plan to provide ESYS to the Student for the summer of 2007 that was designed to confer educational benefit. The Student’s parents failed to access such services.

IV. Conclusions of Law

1. Petitioner is a student in the School District who is eligible for special education services based on his/her classification as a student with Autism and Speech Impairment. 20 U.S.C.A. § 1401(3); 34 C.F.R. § 300.7; 19 T.A.C. § 89.1040.
2. Respondent has a responsibility to provide Student with a free appropriate public education. 20 U.S.C.A. § 1412; 34 C.F.R. §300.300; 19 T.A.C.§ 89.1001.
3. Respondent failed to convene duly constituted ARD committees on the Student’s behalf on May 18, 2006 and August 25, 2006. As A direct consequence of this procedural error, the Student was denied a FAPE to the extent that he did not receive ESYS for the Summer of 2006, or appropriate placement and programs for the first nine weeks of the 2006 - 2007 school year. 34 CFR §§300.321 (a)(2)(3)(4), 300.321. *W.G. v. Bd of Trustees*, 960 F. 2d 1479 (9th Cir. 1992); *Shapiro v. Paradise Valley Unified School District No. 69*, 317 F. 3d 1072 (9th Cir. 2003).
4. Respondent, through its actions in failing to convene a duly constituted ARDC on May 18, 2006, withheld information from the Student’s parents that prevented the development of an

appropriate IEP for the Student. 34 CFR §§300.321 (a)(2)(3)(4), 300.321. *W.G. v. Bd of Trustees*, 960 F. 2d 1479 (9th Cir. 1992); *Shapiro v. Paradise Valley Unified School District No. 69*, 317 F. 3d 1072 (9th Cir. 2003).

5. Respondent, through the actions of its May 18, 2006 ARDC, deprived the Student's parents equal participation in the ARD process and arrived at a pre-determined decision regarding the provision of ESYS to the Student for the Summer of 2006. This action deprived the Student of a FAPE for the Summer of 2006. 34 CFR §§300.511 (f)(2), 300.106; 19 TAC §§89.1065 (7), 89.105 (e)(1).

6. Respondent developed an IEP for the Student that was designed to provide educational benefit for the Student for all except the first nine week period of the 2006 - 2007 school year. *Cypress-Fairbanks ISD v. Michael F.*, 118F. 3d 245, 253 (5th Cir. 1997).

7. The Student made educational progress and received a FAPE for all periods relevant to this case, except the Summer of 2006 and the first nine week period of the 2006 - 2007 school year. *Cypress-Fairbanks ISD v. Michael F.*, 118F. 3d 245, 253 (5th Cir. 1997).

8. The Student's parents failed to access an appropriate ESYS program developed for the Student for the Summer of 2007. *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F. 3d 1309 (11th Cir., 2003) and *Doe v. Defendant I*, 898 F. 2d 1186 (6th Cir., 1990).

9. The Student's parents are entitled to reimbursement of their educational expenses incurred in educating the Student at the WLC for the Summer of 2006 and the first nine weeks of the 2006 - 2007 school year as compensation for the School District's failure to provide the Student with a FAPE for that period. *Burlington Sch. Comm. v. Department of Educ.*, 471 U.S. 359, 369-71 (1985); *Seattle Sch. Dist., No. 1 v. B.S.*, 82 F.3d 1493, 1502 (9th Cir. 1996)

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 IN PART AND DENIED IN PART**.

Respondent is ordered to reimburse the Student's parents for a total of 315 hours at \$65.00/hour as compensatory relief for its failures to provide a FAPE to the Student as discussed herein. All other relief requested is hereby **DENIED**.

The district shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of **Special Education Programs and Complaints** at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating that the Decision has been implemented; or 2.) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

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

SIGNED in Austin, Texas this 7th day of January, 2008

Stephen P. Webb
Special Education Hearing Officer

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

SYNOPSIS

Issue: Whether the School District failed to provide a FAPE to a dually enrolled three year old autistic Student because it violated the Student’s right to an IEP that was developed by a duly constituted ARD Committee what included representatives from his private school.

Federal Citation: 34 CFR §§300.321 (a)(2)(3)(4), 300.321

Texas Citation: *W.G. v. Bd of Trustees*, 960 F. 2d 1479 (9th Cir. 1992); *Shapiro v. Paradise Valley Unified School District No. 69*, 317 F. 3d 1072 (9th Cir. 2003)

Held: For the Petitioner. Respondent convened an ARD meeting that failed to include actual teachers of the Student or administrators of the Student’s school, or any representative of the private school where the Student was known to be receiving instruction through Applied Behavior Analysis. The resulting IEP developed by this ARDC was inappropriate and denied the Student a FAPE.

Issue: Whether the School District inappropriately denied ESYS to a three year old ECI autistic student who was new to the School District, because the School District had no regression or recoupment data of its own.

Federal Citation: 34 CFR §§300.511 (f)(2), 300.106

Texas Citation: 19 TAC §§89.1065 (7), 89.105 (e)(1)

Held: For the Petitioner. Commissioner rules and federal regulations permit an ARDC to provide ESYS to a new autistic student if it is necessary for the Student to receive a FAPE. Commissioner Rules require the ADC to

gather necessary data from any source, including the Student's private school.

Issue: Whether the School District's actions regarding the development of the Student's IEP trigger an exception to the one year statute of limitations period for due process hearings.

Federal Citation: 34 CFR §300.511 (f)(2)

Texas Citation: *Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004)

Held: For the Petitioner. The School District's ARDC member withheld necessary information about appropriate special education services, including ESYs, from parents new to special education, by failing to invite key providers of educational services to the initial ARD and engaging in a predetermined course of action during the initial ARD meeting.

Issue: Whether the parents of a duly enrolled three year old autistic student are entitled to challenge the implementation of the Student IEP.

Texas Citation: 19 TAC §89.1096(c)(e)

Held: For the School District. Commission rules expressly prohibit, via due process hearing, a challenge to the School District's implementation of a student's IEP when the student is three or four years old and dually enrolled in the District and a private school.

