

STUDENT	§	BEFORE A SPECIAL EDUCATION
B/N/F PARENT	§	
	§	
VS.	§	HEARING OFFICER FOR
	§	
LANCASTER ISD	§	THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Student (Petitioner) through student’s next friend Parent, requested a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et. seq.*, as amended. The Respondent is the Lancaster Independent School District (LISD).

This case arises out of a complaint surrounding Respondent’s placement of Petitioner in its Disciplinary Alternative Education Program (DAEP). Petitioner alleges that Respondent denied Student a Free Appropriate Public Education (“FAPE”) in the following particulars:

1. Petitioner alleges that student’s placement in the AEP on or about *** by the LISD is inappropriate.
2. Petitioner alleges the ARD committee incorrectly determined that the behavior leading to the disciplinary placement was not a manifestation of student’s disability.
3. Petitioner alleges that Respondent has failed to provide student a Behavior Intervention Plan and failed to adequately address student’s behaviors.
4. Petitioner alleges that Respondent has failed to provide an appropriate IEP.
5. Petitioner alleges that Respondent has failed to implement student’s IEP while in the AEP during the *** and currently.
6. Petitioner alleges that Respondent has failed to provide an appropriately certified teacher while in the AEP.
7. Petitioner alleges that student’s placement in the AEP in *** was inappropriate.
8. Petitioner alleges that multiple disciplinary removals have cumulatively exceeded 10 days and constitute an improper change in placement.

As relief, Petitioner seeks an Order requiring an Independent Education Evaluation at public expense, and an order directing Respondent to develop an appropriate IEP and BIP for Petitioner.

HELD, for Petitioner in Part; for Respondent in part.

PROCEDURAL HISTORY

Petitioner's request for hearing was received by Texas Education Agency on February 11, 2005, and assigned to Special Education Hearing Officer Sharon M. Ramage. Student's mother and next friend, Parent, represented student Pro Se, and was assisted by her parent advocate, Carolyn Morris. Nona Matthews and Kelly Kleist, of Irving, Texas, represented the Respondent.

A pre-hearing conference was conducted on February 18, 2005, and Petitioner identified the issues as stated above. During the pre-hearing conference, the case was set for hearing on March 2, 2005. A follow-up scheduling conference was conducted on February 21, 2005. Petitioner appeared with her advocate, Carolyn Morris. Respondent appeared through its attorney of record Nona Matthews. The parties mutually agreed to a hearing date of March 7, 2005, and the disclosure deadline was set for February 25, 2005. On February 27, 2005, the parties mutually agreed upon an extended disclosure deadline of February 27, 2005. The Decision Due date for this case was set for March 28, 2005.

On February 28, 2005, Respondent filed a Motion to Disqualify Advocate, alleging that Ms. Morris had a conflict of interest and that any representation by Ms. Morris would constitute the unauthorized practice of law. A follow-up prehearing conference was held on March 1, 2005, at which time the Motion to Disqualify was considered. During the pre-hearing conference, Respondent also notified the hearing officer and Petitioner of its intent to file a counterclaim to defend its evaluations of Petitioner. (The counterclaim was filed prior to the presentation of evidence at the hearing on the merits). Both parties submitted briefs and supporting documents with regard to their respective positions on the Motion to Disqualify.

On March 4, 2005, the Hearing Officer issued an Order on Respondent's Motion to Disqualify the Advocate. The Hearing Officer granted the Motion based on the Unauthorized Practice of Law complaint and ruled that Ms. Morris could accompany and assist Petitioner during the hearing, but that she could not present evidence, confront or cross examine witnesses, or in any manner manage the conduct of the litigation or proceedings on behalf of Petitioner, or engage in any actions requiring the use of legal skill or knowledge.

The Due Process Hearing was held on March 7, 2005. Carolyn Morris and Yolanda Potter, non-lawyers, assisted Petitioner during the hearing. Nona Matthews and Kelly Kleist, of Walsh, Anderson, Brown, Schulze & Aldridge, represented Respondent. ***, Director of Special Education for Lancaster ISD, served as the District Representative during the hearing.

The undersigned Hearing Officer received testimony and evidence. A transcript was made of the proceeding by a certified court reporter and provided to the parties. The Decision Due Date was March 28, 2005, and the Decision was timely issued and forwarded to the parties on that date.

I make the following findings of fact and conclusions of law. (All references to the transcript will be designated as "Tr." followed by the page number; all references to Petitioner's and Respondent's exhibits will be designated as "R" and "P", followed by the exhibit number.)

FINDINGS OF FACT

1. Student is a *** grade student who resides within the boundaries of the Lancaster Independent School District.
2. Lancaster ISD identified Student as a student with a disability which substantially limits a major life activity under Section 504 of the Rehabilitation Act in October 2003. (P68-71) Student was assigned to the DAEP in ***. (P96-97) The Section 504 committee conducted a manifestation determination on April 13, 2004. (P 150) At the time of Student's DAEP placement in ***, Student did not meet the eligibility criteria as a student with a disability for IDEA purposes, but received services under Section 504. At the conclusion of the school year, Student was referred for an evaluation for special education based on a suspicion of a possible learning disability and/or a possible emotional disturbance.
3. Lancaster ISD completed Student's initial Full and Individual Evaluation ("FIE") report for special education during August of 2004, as a result of a suspected learning disability and a suspected emotional disturbance. (R1, Tr. 42) A psychological evaluation was completed on September 8, 2004. (R2) Respondent obtained input from Student's mother and a classroom observation in completing the FIE. (R1) Student was assessed in all areas related to the suspected disability.
4. The standardized test instruments were administered by trained and knowledgeable personnel in accordance with the test instructions. (Tr. 46-47; R1) The test instruments were selected and administered so as not to be discriminatory on a racial or cultural basis. (Tr. 48; R1) The evaluation was conducted in Student's native language of English. (Tr.48- 49: R1)
5. Student's intellectual ability was measured using the Wechsler Intelligence Scale for Children, 4th Edition ("WISC-IV"). (Tr. 43; R2) The WISC-IV is a valid, reliable, and technically sound comprehensive test of intelligence for children. (Tr.44) Student's full scale IQ is an ***, which is in the *** range. (R1; R2; Tr.45)
6. Student's academic performance was evaluated using the Woodcock Johnson-III Test of Achievement ("WJ-III"). (Tr.45; R2) The WJ-III is a valid, reliable, and technically sound achievement test. (Tr.45 46) Student's achievement scores in broad math, basic reading skills, reading comprehension and math reasoning were in the *** range. Math calculation skills were in the *** range and written expression was in the *** range. (Tr.46; R2)
7. Student did not meet eligibility as a child with a specific learning disability. (Tr. 48; R1)
8. A psychological evaluation report was completed on September 8, 2004, as part of the FIE due to concerns about noncompliance and aggression. ***, Ph.D., LSSP, was the licensed psychologist that supervised the psychological evaluation. The psychological evaluation included the following: Achenbach Child Behavior Checklist - Parent Form, Achenbach Teacher's Report Form, Kinetic Family Drawing, Wolff's Children's Sentence Completion Form, Robert's Apperception Test for Children, student interview, teacher interview, parent interview, and review of referral information. The testing instruments used in the psychological evaluation are valid, reliable, and technically sound. The test instruments were administered by trained and knowledgeable personnel

in accordance with the test instructions. The test instruments were selected and administered so as not to be discriminatory on a racial or cultural basis. Student did not meet eligibility as a child with an emotional disturbance. (R2; Tr. 203, 207, 208, 212)

9. On October 1, 2004, Notice of an Admission, Review, and Dismissal ("ARD") committee meeting scheduled for October 11, 2004, was sent to Student's mother along with a copy of the Procedural Safeguards. The ARD Committee meeting was held on October 11, 2004, to review the results of the evaluations. Student's mother was not present at the ARD committee meeting, but gave consent for the meeting to proceed in her absence. The committee determined that Student did not meet eligibility for special education at that time. (R3)

10. Student's mother also received a copy of the Procedural Safeguards along with the notice of evaluation. (Tr. 51)

11. ***, M.D., at the Southwest Child and Family Medicine Clinic evaluated Student for suspicion of ADHD on October 13, 2003. Dr. *** initially diagnosed Student with Attention Deficit Disorder ("ADD") Combined Type. Dr. *** asked Student's mother and teachers to complete the Vanderbilt, an ADHD rating scale. Based on the results of the rating scale, on October 23, 2003, Dr. *** changed her initial diagnosis to ADD Inattentive Type. On August 19, 2004, Dr. *** continued to diagnose Student with ADD Inattentive Type. During the hearing, Dr. *** testified that her initial clinical impression was that Student's diagnosis was ADD Combined Type, but the data did not support an ADD Combined Type diagnosis, so she changed her diagnosis to ADD Inattentive Type. To date, Student's diagnosis is ADD Inattentive Type. (R4; testimony of Dr. ***)

12. On October 15, 2004, Parent provided the District with an Other Health Impairment eligibility form completed by ***, M.D.

13. The ARD committee met on November 15, 2004, to consider the Other Health Impairment eligibility form. (R5) Student's mother was present at this ARD committee meeting. She received another copy of the Procedural Safeguards along with her invitation to this meeting. The committee determined that Student met special education eligibility as a child with an Other Health Impairment due to Attention Deficit Hyperactivity Disorder. The ARD committee developed Student's Individual Education Program ("IEP") which included a Behavior Intervention Plan ("BIP") with positive intervention strategies, goals and objectives for study skills, classroom modifications, and special education support through Content Mastery for at least twenty minutes per week. (R5; Tr. 57)

14. Student received numerous disciplinary referrals and consequences during the 2004/2005 school year. The behaviors included making inappropriate comments, ***, using profane language, being disrespectful, *** and arguing, ***, refusing to comply with a teacher's instruction to ***. There were *** referrals during the 2004/2005 school year. Two of the referrals involved behavior that would appear to be related to Student's disability – forgetting to bring a book to class and not being focused and playing with paper spinners. The majority of the referrals, however, were neither impulsive nor inattentive behaviors. (R7; Tr. 216, 239)

15. The behaviors associated with ADD Inattentive Type include distractibility, failure to pay close attention, lack of focus and lack of organization. (Tr. 81, 216) The behaviors associated with ADD Combined Type include inattention, as well as impulsivity and hyperactivity. (Tr. 80)

16. On ***, 2005, Student received student's ***disciplinary referral for ***. Student was assigned to the DAEP for *** days for persistent misbehavior. A disciplinary hearing was held and the principal concluded that Student had engaged in persistent misbehavior. (Tr. 412-413)

17. Following the disciplinary hearing, on ***, 2005¹, the ARD Committee convened in order to conduct a manifestation determination. Student's mother attended the meeting and waived her right to five school days notice of the meeting. In fact, the ARD Committee meeting was held at a time to accommodate Student's mother. (R.6; Tr. 59, 413, 415)

18. The ARD committee discussed each of the required manifestation determination issues and determined that Student's behavior was not a manifestation of student's disability.

19. The ARD committee determined that, in relation to the behavior subject to the discipline, Student's IEP and placement were appropriate and were implemented.² The evidence produced at the hearing confirms this finding by the ARD Committee.

20. The ARD Committee determined that Student's disability did not impair student's ability to understand the impact and consequences of student's behavior. (Tr 61). The evidence produced at the hearing confirms this finding.

21. The ARD Committee determined that Student's disability did not impair student's ability to control the behavior subject to discipline. (Tr. 61). It is apparent from the testimony of the witnesses who attended the ARD Committee meeting that this inquiry received the most consideration. The Committee reviewed all of Student's behavioral referrals and determined that the behaviors were for the most part planned and that Student ***. Although the evidence would indicate that two of the referrals were related to inattention, the majority of the referrals were not. (R7) Although it is concerning that Student received two disciplinary referrals for inattentive behaviors, the majority of the behaviors were not related to inattention or impulsivity. (R7; Tr. 216) Neither of Petitioner's expert witnesses provided an opinion that the behaviors in question were in any way a manifestation of Student's disability. (See Testimony of Dr. *** and Dr. ***). Therefore, I find that the evidence supports the ARD Committee's finding that Student's disability did not impair student's ability to control the behavior subject to discipline.

22. Student's mother voiced concern at the ARD Committee meeting that Student had not been taking medication since Student had returned to school following the Christmas break. (Tr. 62; R6). During the

¹ There is a discrepancy with regard to whether the ARD Committee met on Monday, ***, 2005 or Tuesday, ***, 2005. It is undisputed that Student was not placed in the DAEP until after the ARD Committee meeting had occurred, so the date is not significant. There was some agreement that the meeting time was changed to accommodate Parent, and that Student arrived at the DAEP on a Monday, so for the purpose of this decision the ARDC meeting and the commencement of the DAEP placement will be deemed to have occurred on February 7, 2005.

² There was testimony that Student's Art teacher had not reviewed Student's IEP prior to the hearing. While it is concerning that one of Students's teachers had not reviewed student's IEP, any harm from this failure was *de minimus*. Student received instruction in the general curriculum and the Art teacher was able to provide specific examples of the manner in which the required modifications were provided to Student. Student's IEP called for minimal classroom modifications. Student did not exhibit a specified need for modified instruction in Art, made satisfactory progress in Art, and received no disciplinary referrals from student's Art class. Additionally, Student began attending Art in *** 2005, and had only attended Art for approximately 3 weeks on a three day a week rotation at the time of student's placement in the DAEP. (Tr. 136-142) In this particular instance, the Art teacher's failure to review the IEP did not result in a failure to implement significant portions of Student's IEP. *Houston ISD v. Bobby R.*, 200 F3d 341 (5th Cir. 2000).

Fall of 2004, Student's mother and student's teachers noted that Student had responded well to student's medication and appeared to be more focused. (R2) However, during this same period of time, Student engaged in behaviors such as ***, using profanity, *** – behaviors which those who observed Student reported to be deliberate, planned, and *** (Tr. 61, 425-426; R7 After the Christmas break, Student continued to engage in these same types of behaviors, as well as inattentive behaviors. (R7)

23. The ARD Committee determined that Student's IEP and BIP could be implemented at the DAEP and Student's placement was changed to the DAEP on ***.

24. Student's teacher at the DAEP was ***. Mr. *** and the DAEP principal testified that he has a probationary special education certification and is appropriately certified to teach Student. (Tr. 253; 395)

25. Student began attending the DAEP on *** (Monday) and was returned to the *** Campus during the afternoon of *** (Friday) following the issuance of a Stay-Put Order.

26. It was the responsibility of the DAEP instructor to follow a curriculum guide which correlates with the Texas Essential Knowledge Skills. (Tr. 267) None of Student's teachers forwarded work to Student while student was in the DAEP.

27. Mr. *** testified that he never received a copy of Student's IEP during the time that Student was at the DAEP. (Tr. 253-255). Student is in the *** grade. Mr. *** provided Student with *** to *** grade level work because that was what he provided the other students in his DAEP classroom, and admitted that the work he provided Student was not consistent with the level of work required of Student by student's teachers at the *** School. (Tr. 260). He also acknowledged that he is not always successful in obtaining assistance from the *** School teachers to maintain continuity with a student's curriculum. (Tr. 268). Mr. *** was not aware of Student's disability, of student's need for special education support, or of the grade level at which student received instruction during the entire time Student was in the DAEP. (Tr. 254-256). I therefore find that Mr. *** wholly failed to implement Student's IEP during the *** school days Student was in the DAEP, or one-third of Student's DAEP placement.

28. Petitioner failed to produce any evidence that Student's IEP and BIP were inappropriate. Rather, she produced evidence that it was not implemented while Student was in the DAEP.

29. Petitioner filed a request for due process hearing and notified the Hearing Officer that Carolyn Morris, a lay advocate, would represent her.

30. Carolyn Morris is the owner of Parent to Parent Connection Advocacy, Inc., and holds herself out as an "advocate" for disabled students. (Respondent's Motion to Dismiss Exhibit C). Ms. Morris identified her specialized training and knowledge to be as follows: Civil Rights training, and completion of mediation and negotiations skills training, Family Law and Divorce Mediation training, and participation in various organizations such as the United Way, the NAACP, and advisory committees related to education. However, Ms. Morris did not identify any specialized knowledge and training with respect to the problems of children with disabilities.³ (See Advocate's Motion to Deny Respondent's Motion to Disqualify Advocate).

³ Although Ms. Morris has apparently served as an advocate in other due process hearings, this fact is not dispositive of the issue of whether she has specialized knowledge and training.

31. Carolyn Morris is a member of the Board of Trustees for the Lancaster Independent School District.

32. Carolyn Morris is not a licensed attorney nor has she had any legal training.

33. Petitioner requested that Ms. Morris be allowed to “represent” her at the hearing by conducting the direct and cross examination of the witnesses and to make legal argument.

34. Respondent’s Motion to Disqualify Advocate was based on two arguments. First, Respondent alleged that Ms. Morris had a conflict of interest in that she was a member of the Lancaster ISD Board of Trustees and attempting to represent Petitioner in a matter adverse to the District. Second, Respondent asserted that Ms. Morris’s “representation” of Petitioner would constitute the unauthorized practice of law.

35. Ms. Morris’ participation in the due process hearing was limited in that she was permitted to accompany and advise the Petitioner, but was not permitted to manage the conduct of the litigation or engage in acts which required legal skill and knowledge. Ms. Morris did not examine or cross-examine witnesses on behalf of Petitioner.

36. During the hearing, Parent conducted direct and cross examination of witnesses with the assistance of Ms. Morris. Parent understood the proceedings, asked relevant questions of the witnesses, and conducted adequate cross examination of the witnesses. In fact, through her cross-examination of the witnesses she established that the LISD failed to implement Student’s IEP while in the DAEP, thereby entitling her to relief in this matter. She was permitted to take frequent breaks to consult with Ms. Morris, and appeared to have an adequate understanding of the proceedings.

DISCUSSION

1. IEP

Petitioner complained that student’s IEP is generally not appropriate. I disagree. In evaluating this case overall, the question is whether the District provided an individualized education plan reasonably calculated to enable Student to receive meaningful educational benefits. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 189 (1982). The court has adopted a four-factor test to determine whether an IEP has been reasonably calculated to enable the child to receive meaningful educational benefits. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997). Those four factors are:

- (1) the program is individualized on the basis of the student’s assessment and performance;
- (2) the program is administered in the least restrictive environment;
- (3) the services are provided in a coordinated and collaborative manner by the key “stakeholders”; and
- (4) positive academic and non-academic benefits are demonstrated.

The IEP developed by the ARD Committee for Student was individualized on the basis of Student’s

assessment and performance. Student received instruction in the general education curriculum which was consistent with the dictates of student's assessment. The ARD Committee adopted classroom modifications which were designed to address the impact that Student's ADD had on student's success in the classroom. The ARD Committee also recommended that Student be provided with special education support in the form of Content Mastery assistance, which Student was able to utilize. Student received student's instruction in the general education setting, the least restrictive environment for student. Student received passing grades in all classes during the Fall Semester of 2004. Student's behaviors with regard to student's inattention appeared to improve.

Petitioner also complained that Lancaster ISD failed to provide a Behavior Intervention Plan for Student. This contention is not supported by the evidence. The ARD Committee that developed Student's initial IEP reviewed a Functional Behavior Assessment and developed a specific BIP for Student which addressed targeted behaviors and contained positive intervention strategies. Each of Student's teachers at the *** School described the manner in which they implemented those strategies with regard to Student and the effectiveness of those strategies.

The IEP developed during the Fall of 2004 is reasonably calculated to confer a meaningful educational benefit under the standard of *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982) and *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); 34 CFR §§300.346-347 and 19 T.A.C. §89.1055.

The educational program and placement proposed by the school district are presumed to be appropriate. Petitioner bears the burden of proof. Petitioner has failed to demonstrate by a preponderance of the evidence that the Student's IEP is not appropriate. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd* 468 U.S. 883 (1984).

2. Manifestation Determination

The underlying reason for Student's disciplinary placement is not subject to my review. Rather, the determination as to whether Student's behavioral history as a whole rose to the level of persistent misbehavior is a determination which is made by the District personnel responsible for Student's discipline. The assistant principal in this case provided Student with a disciplinary hearing and informed Parent of her right to appeal that decision. (Tr. 412) It is not the role of the Hearing Officer to determine whether the child actually engaged in persistent misbehavior or whether the amount of time student was assigned to the DAEP was appropriate under the circumstances. *Joshua S. v. Shallowater ISD*, Dkt. No. 156-SE-0103 (February 23, 2003) (Texas SEHO Lucretia Dillard); *Brittany A. v. North East ISD*, Dkt. No. 141-SE-0102 (March 27, 2002) (Texas SEHO Stephen Webb).

The issue in this case is whether the ARD Committee, in determining whether to place Student in the DAEP as recommended in student's disciplinary hearing, complied with the legal requirements of 34 CFR § 300.523(c). The ARD Committee must determine that, in relation to the behavior subject to disciplinary action, (1) the student's IEP and placement were appropriate and properly implemented, (2) the student's disability did not impair student's ability to understand the impact and consequences of the behavior, and (3) the student's disability did not impair student's ability to control the behavior subject to disciplinary action. 34 C.F.R. §300.523(c)(2). If any one of these three standards is not met, the behavior must be considered a manifestation of the student's disability. 34 C.F.R. §300.523(d). Upon review of an ARD Committee's decision, the Hearing Officer must determine whether the school district has demonstrated that the student's behavior was not a manifestation of his/her disability consistent with the standards set forth above. 34

C.F.R. §300.525 (b).

As stated above, the evidence indicates that Student's IEP and BIP which were in place at the time of the disciplinary action were appropriate and met the standard set forth in *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982) and *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); 34 CFR §§300.346-347 and 19 T.A.C. §89.1055.

The evidence in this case also establishes that the ARD committee properly concluded that Student's disability did not impair student's ability to understand the impact and consequences of student's behavior, and that it did not impair student's ability to control the behavior that was subject to the disciplinary action. In particular, the ARD Committee took great care in evaluating Student's behavior and analyzing the impact that student's ADD had on student's ability to control that behavior. While two of the disciplinary referrals arguably involved behaviors which were the result of impulsivity and/or inattention (spinning paper; failure to bring work to class), the majority of the behaviors involved ***, disrespect and arguing with teachers, ***, and ***. Additionally, neither of Petitioner's experts testified that Student's disability impaired Student's ability to control the behaviors for which student was disciplined.

The testimony and the evidence as a whole supports the ARD Committee's finding that Student's behavior was not a manifestation of student's disability. Therefore, Student could be subjected to the disciplinary procedures in the same manner in which they would be applied to non-disabled students. 34 C.F.R. § 300.524(a). Therefore, the ARD Committee's decision to place Student in the DAEP was not improper and complied with the legal requirements set forth in 34 C.F.R. § 300.523.

3. Certification of DAEP Teacher

Petitioner contends that Respondent failed to provide Student with an appropriately certified teacher while student was in the DAEP. The evidence is undisputed that Student's DAEP teacher currently holds a probationary certification in Special Education. Under the IDEA, each state must have a comprehensive system of personnel development to "ensure that all personnel who work with children with disabilities . . . have the skill and knowledge necessary to meet the needs of children with disabilities . . ." 20 U.S.C. §1412(a)(14). "Qualified personnel" are defined as those persons who meet state educational agency (SEA) approved or SEA recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individuals are providing special education or related services. 34 C.F.R. §300.23 The IDEA regulations require that personnel providing special education and related services must meet appropriate State qualification standards, and allow States the discretion, under certain circumstances, to use personnel who do not meet the highest entry-level academic degree requirements applicable to their profession or discipline. 34 C.F.R. § 300.136. Under the TEA regulations, special education personnel must be certified, endorsed or licensed as appropriate for their area of assignment. 19 Tex. Admin. Code § 89.1131. A teacher who holds a special education certificate or an endorsement may be assigned to any level of a basic special education instructional program serving eligible students 3-21 years of age, in accordance with the limitation of their certification with certain exceptions. 19 Tex. Admin. Code §89.1131(b). The evidence is undisputed that Student's teacher held a valid probationary certification in Special Education. Petitioner does not prevail on this issue.

4. DAEP Placement

If an ARD Committee determines that a child's behavior is not a manifestation of child's disability and places the child in a disciplinary placement such as the DAEP, the school district must in any event

provide services to the extent necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP. In other words, the ARD Committee must provide a FAPE to the student placed in the disciplinary placement. 34 C.F.R. § 300.121(d).

Student was placed in the DAEP on ***, 2005 and remained there ***school days until ***, following the issuance of a stay-put order (one-third of placement period). Student's instructor at the DAEP testified that he did not receive Student's IEP until after Student had returned to the *** Campus and therefore did not implement it. Additionally, the instructor at the DAEP testified that he was unfamiliar with the level of work appropriate for Student, provided work for Student at the *** to *** grade level which was not appropriate for Student, and he was not aware that Student had a disability, an IEP or Behavior Intervention Plan. In other words, no portion of Student's IEP was implemented while Student was in the DAEP. Respondent's failure to implement substantial portions of Student's IEP while student was in the DAEP resulted in a denial of FAPE for that time period. *Houston ISD v. Bobby R.*, 200 F3d 341 (5th Cir. 2000).

5. Petitioner's Request for an Independent Education Evaluation at Public Expense

As relief, Petitioner requested an Independent Education Evaluation at Public Expense. When a parent requests an IEE at public expense, the District may initiate a hearing to show that is evaluation is appropriate. 34 C.F.R. § 300.502(b)(2). If the hearing officer's finding is that the District's evaluation was appropriate, the parent has the right to an IEE, but not at public expense. 34 C.F.R. §300.502(b)(3). Respondent filed a Counter-Claim to defend the appropriateness of its assessment of Student, and presented evidence that its assessment was appropriate and complied with the requirements set forth in 34 C.F.R. § 300.532-533. Petitioner does not prevail on this issue.

6. Lay Advocate

During the initial Pre-Hearing Conference, Petitioner was assisted by Carolyn Morris, a lay "advocate." Following the pre-hearing conference, Respondent filed a Motion to Disqualify Advocate, arguing that Ms. Morris should be disqualified for two reasons. First, Respondent argued that any representation of Petitioner by Ms. Morris would constitute the unauthorized practice of law in that she is not a licensed attorney. Respondent further argued that Ms. Morris has a conflict of interest in representing the Petitioner because she is a member of the Lancaster ISD Board of Trustees and cannot represent a third party in an action which is adverse to the school district. For the reasons set forth below, I granted the Motion based on the unauthorized practice of law, and ruled that Ms. Morris could accompany and assist Parent during the hearing, but that she could not present evidence, confront or cross examine witnesses, or in any manner manage the conduct of the litigation or proceedings on behalf of Petitioner, or engage in any actions requiring the use of legal skill or knowledge.

Petitioner argued at the hearing that *Ms. Morris* had the right under the Individuals with Disabilities Education Act and its implementing regulations to confront and cross-examine witnesses. The law provides that any party to an impartial due process hearing under IDEA shall be accorded the following rights:

- (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
- (2) the right to present evidence and confront, cross-examine and compel the attendance

of witnesses.

20 U.S.C. 1415(h); 34 C.F.R. § 300.509(a)(1); 300.509(a)(2).

The right to present evidence and confront, cross-examine and compel the attendance of witnesses in this case is particularized to Parent, not her lay advocate.

The issue in this case is whether the language in 34 C.F.R. § 300.509(a)(1) authorizes the legal representation of a parent by a non-lawyer in a due process hearing. This issue has been addressed by the 3rd Circuit in the case of *Arons v. New Jersey State Board of Education*, 842 F.2d 58(3rd Cir. 1988) (hereinafter *Arons*). In that case, a lay advocate sought an award of fees for her successful representation of a parent in a special education due process hearing. (Under New Jersey state law, a non-lawyer is specifically authorized to provide representation to parents in special education hearings, provided the non-lawyer seeking to represent the parent complies with certain application procedures, limitations, approval procedures and practice requirements. (See N.J. Admin. Code 1:6A-5.1)). Although New Jersey law allows non-lawyer representation of parents, it also specifically provides that non-lawyers may not receive a fee for representing a parent in a due process hearing. The advocate argued on appeal that under Federal Law (former EHA sec. 1415(d)(1)), she had a right to “represent” a parent in a due process hearing and therefore collect fees for that representation. The Third Circuit Court of Appeals held that the carefully drawn statutory language of the EHA did not authorize non-lawyers to render legal services and that the right of a party to present evidence and cross-examine and compel the attendance of witnesses is not designated to be performed by lay advocates. *Arons, supra*. The Court concluded that there was nothing in the legislative history of the EHA which indicated that Congress contemplated that individuals with specialized knowledge and training would act in a representative capacity. *Id.* The Court cited legislative history which described the role of such individuals to be one of consultation with an emphasis on the role of consultation, and the responsibility to identify educational problems, evaluate them, and determine proper educational placement. *Arons*, 842 F.2d at 62 citing S. Rep. No. 94-168 (1975).

The Delaware Supreme Court, relying on *Arons v. New Jersey State Board of Education* held that IDEA does not provide non-lawyer advocates the authorization to represent parents in special education due process hearings. In *In the Matter of: Marilyn Arons, et al*, a lay advocate (the same advocate who sought attorney’s fees in the *Arons* case cited above) appealed a decision by the Delaware Unauthorized Practice of Law Board that she had engaged in the unauthorized practice of law by representing parents in special education due process hearings. The Delaware Supreme Court, relying on *Arons*, held that the language of 20 U.S.C. 1415(h) does not authorize a non-lawyer to render legal services. In reaching its conclusion, the Court recognized the state’s compelling interest in regulating the practice of law within its borders. The Court also expressed concern that lay advocates are unregulated and, unlike members of the Bar, are not answerable to the disciplinary procedures applicable to attorneys. The Court further noted that Congress has explicitly included language in other federal statutes to permit lay representation where such a result was intended, citing as an example the Food Stamp Act provision allowing representation by a non-lawyer. The absence of such specific language in IDEA led the Court to conclude that the Act does not authorize the lay representation of parents in special education hearings. *In the Matter of: Marilyn Arons, Ruth Watson, and Parent Information Center of New Jersey, Inc.*, 32 IDELR 253 (Del. 2000).

I find the analysis by the Delaware Supreme Court and the holding of the 3rd Circuit to be persuasive. In other words, the language of IDEA and 34 C.F.R. § 300.509(a)(1) does not create an independent right under Federal law to legal *representation* by a non-lawyer in a special education due process hearing. The

issue of whether a party in a due process hearing may be represented by a lay advocate is, therefore, a matter of State law given the state's compelling interest in regulating the practice of law. *See Letter to Van Lieu*, 211 IDELR 129A (1979), (legal limitations as a non-lawyer advocate are a matter to be resolved at the state level).

In 1977, the Texas Attorney General issued an opinion that representation by non-lawyers during an administrative hearing does not constitute the unauthorized practice of law provided such representation is *permitted by the agency*. *Op. Tex. Att'y Gen. No. H-974* (1977) (emph. added). The issue before the Attorney General in that particular instance dealt with whether or not a non-lawyer could represent an individual before the Industrial Accident Board (which is no longer in existence) and the State Board of Insurance. At the time, both the Industrial Accident Board and the State Board of Insurance had adopted specific rules authorizing the representation of parties by non-lawyers. *Id.* Therefore, the Attorney General concluded that such representation does not constitute the unauthorized practice of law so long as the agency permits it and such representation is not otherwise prohibited by statute or the courts. *Id.* The Attorney General reasoned that the definition of the practice of law should be based upon an analysis of the dangers and benefits to the public, depending on the substance and nature of the particular administrative proceedings. *Id.*

The premise that representation of a parent by a non-lawyer in a special education hearing is subject to State law appears to be addressed in some jurisdictions. For example, New Jersey law specifically provides that a party may be *represented* by individuals with special knowledge or training with respect to handicapped pupils and their educational needs. *See N.J.A.C. 1:6A-5.1(b)*. However, the regulations pertaining to special education hearings in the State of Washington limit the act of representation to attorneys. Wash. Admin. Code 392-172-354(b).

The relevant Texas rules are silent on the issue of whether or not a lay person may provide representation to a parent in a due process hearing. *See 19 Tex. Admin. Code §1185*. The TEA, in the course of exercising its rule making authority, could certainly conclude that benefits to the public, given the substance of due process hearings, weighs in favor of allowing lay persons with specialized knowledge and training to represent parents and students. The substance of special education, i.e., the evaluation of students with disabilities, the nature and extent of those disabilities, and the implications those disabilities present for educational programming and placement are certainly areas of substantive knowledge that do not necessarily require the expertise of a lawyer. Rather, the expertise of individuals with specialized training and knowledge would certainly benefit any parent attempting to pursue legal remedies on behalf of his or her child, especially in light of the limited number of attorneys who represent parents in special education matters.

However, due process hearings are adversarial in nature. The Rules of Civil Procedure apply to the proceedings with some limitations. The Rules of Evidence govern all evidentiary issues. 19 Tex. Admin. Code § 89.1185(d). A party may prohibit the introduction of evidence not previously disclosed to that party at least 5 business days before the hearing. 34 C.F.R. § 300.509(a)(3). Limited discovery is available. 19 Tex. Admin. Code § 89.1180(f). There is an applicable Statute of Limitations. 19 Tex. Admin. Code § 89.1151(c). The decision of the Hearing Officer is final, except an aggrieved party may file an action in state or federal district court subject to the requirements of 20 U.S.C. 1415(i)(2); 34 C.F.R. § 300.512. 19 Tex. Admin. Code §89.1185(p). These factors may weigh against allowing non-lawyer representation in that the nature of the proceedings require legal knowledge and skill. The balance of these interests, and the risks and benefits to the public of non-attorney representation, concern matters of policy and should be made the TEA,

not by this Hearing Officer.

I therefore find that there is no right to non-attorney representation in special education hearings based on 20 U.S.C. 1415(h), 34 C.F.R. 300.509(a) and the relevant Texas statutes and Commissioner's rules. A party may be accompanied and advised by a person with specialized knowledge and training. However, a lay advocate may not present evidence, confront or cross examine witnesses, or in any manner manage the conduct of the litigation or proceedings on behalf of the party, or engage in actions which require the use of legal skill or knowledge. These actions would constitute the unauthorized practice of law. 34 CFR 300.509(a)(1); Tex. Gov't Code § 81.101(a).

RELIEF

Petitioner has established that Respondent wholly failed to implement student's IEP when student was placed in the Disciplinary Alternative Education Program. LISD was obligated to provide a FAPE to Student while student was in the disciplinary placement and failed to do so. The amount of time student was denied a FAPE is not insignificant in that it amounted to one-third of the overall time student would have been placed in the DAEP. A finding that this amounts to a *de minimus* denial of FAPE would frustrate the underlying purposes of IDEA. 34 C.F.R. 300.121(d).

Compensatory relief is available under IDEA as an equitable device to remedy substantive violations. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). IDEA requires that relief be designed to ensure that the student is appropriately educated within the meaning of IDEA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9th Cir. 1994). Thus, determining what compensatory relief is appropriate turns on a consideration of the extent of the denial as well as what services would be needed to provide a free appropriate public education in light of that denial.

The extent of denial in this case reflects that Respondent wholly failed to implement Student's IEP or provide a FAPE to Student during the time student was enrolled in the DAEP. Although the initial placement was *** days prior to the issuance of the Stay-Put order, this constituted one-third of student's overall placement in the DAEP. Therefore, compensatory services are appropriate in this case.

The second element of compensatory relief turns on a consideration of what services are needed to provide a free appropriate public education in light of the denial of FAPE. A logical approach would be to require LISD to structure the compensatory educational services such that they are proportionately consistent with the schedule of services in place during Student's tenure in the DAEP. However, this approach would not necessarily be consistent with Student's current educational needs. Therefore, the District is Ordered to convene an ARD Committee meeting, review Student's current progress and determine the type and amount of services necessary to respond to student's current needs in an amount not to exceed the number of instructional hours previously served in the DAEP prior to the Stay-Put Order. The compensatory services may be provided in the form of tutoring or any other related service the ARD Committee deems appropriate and may be provided to Student while student serves the remainder of student's placement in the DAEP, if the ARD Committee deems continued placement in the DAEP appropriate.

CONCLUSIONS OF LAW

1. Petitioner bears the burden of proof when challenging the educational program proposed by the LISD. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), aff'd 468 U.S. 883 (1984); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). Petitioner failed to meet this burden.
2. With respect to LISD's program developed for Student for the 2004-2005 school year, the IEP was reasonably calculated to enable student to receive educational benefits. *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982) and *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); 34 CFR §§300.346-347 and 19 T.A.C. §89.1055.
3. The ARD Committee properly developed the behavior intervention plan for Student as part of student's IEP. *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
4. The ARD Committee conducted a manifestation determination review in accordance with the applicable regulations. 34 C.F.R. § 300.523 (c).
5. The ARD Committee properly concluded that Student's behavior was not a manifestation of student's disability. 34 C.F.R. § 300.523 (c).
6. Student was not subjected to disciplinary change of placement until *** 2005. A change of placement occurs if the disciplinary removal is for more than 10 consecutive school days, or a child is subjected to a series of disciplinary removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of the removal, the total amount of time the child is removed, and the removals to one another. 34 C.F.R. § 300.519. Student received two referrals after student's initial placement in special education. The previous referrals during the Fall of 2004, although a part of the persistent pattern of misbehavior, did not occur at a time when Student was receiving special education services. The DAEP assignment constituted the disciplinary change of placement. Student was not subjected to an improper change of placement prior to that time.
7. Respondent did not fail to implement Student's IEP and BIP during April of 2004 in that Petitioner had not been identified as a special education student until November of 2004. Student received services under Section 504 of the Rehabilitation Act during the 2003/2004 school year.
8. Student's teacher in the DAEP was properly certified. 19 Tex. Admin. Code §89.1131(b).
9. Respondent's failure to implement Student's IEP during student's DAEP placement resulted in denial of FAPE and loss of educational opportunity. *Houston ISD v. Bobby R.*, 200 F3d 341 (5th Cir. 2000).
10. Petitioner is not entitled to an IEE at public expense as Respondent timely filed a counterclaim to defend its evaluation and proved that its evaluation was appropriate. 34 C.F.R. § 300.532-533.
11. Petitioner was entitled to be accompanied and assisted by a person with specialized knowledge and training during the due process hearing. 34 C.F.R. 509(a)(1). This right does not include the right to representation by the lay advocate in that the IDEA, its implementing regulations and the relevant state regulations do not give the lay advocate the right to conduct direct and cross-examination of witnesses, manage the conduct of the litigation on behalf of

the parent, or otherwise engage in activities requiring legal knowledge and skill. 34 CFR 300.509(a)(1); Tex. Gov't Code § 81.101(a).

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, I hereby **ORDER** that the relief sought by the Petitioner is hereby **GRANTED, in part**, as follows:

1. Respondent shall provide Student with compensatory educational services, the nature of which are to be determined by the ARD Committee to meet Student's individual needs in an amount not to exceed the number of instructional hours served in the DAEP from the date of student's placement until the date of the Stay Put Order in this case. The ARD Committee shall determine the type and nature of the services after reviewing Student's current progress and needs. Respondent is ordered to provide Student's compensatory education services by September 1, 2005, or at a time mutually agreed upon by the parties.
2. The ARD Committee shall meet within ten (10) school days of receipt of this decision to begin implementation of the relief ordered herein.

All other relief not specifically granted herein is hereby **DENIED**.

NOTICE TO THE PARTIES

This Decision is final and is appealable to state or federal district court.

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

SIGNED this 28th day of March, 2005.

/s/Sharon M. Ramage

Sharon M. Ramage
Special Education Hearing Officer

SYNOPSIS

Issue: Whether the District failed to develop and provide an IEP and BIP with appropriate individualized goals and objectives for Student for the 2004/2005 school year.

Held: For the District.

Citation: 34 CFR §§300.346-347; 19 T.A.C. §89.1055

Issue: Whether the District complied with the requirements of 34 C.F.R. §300.523 in conducting a manifestation determination review prior to placing Student in the District's DAEP.

Held: For the District.

Citation: 34 C.F.R. §300.523 (c)

Issue: Whether Petitioner is entitled to an IEE at public expense.

Held: For the District.

Citation 34 C.F.R. § 300.532-533.

Issue: Whether Student's teacher in the DAEP was properly certified.

Held: For the District.

Citation: 34 C.F.R. §300.23; 34 C.F.R. § 300.136; 19 Tex. Admin. Code §89.1131(b).

Issue: Whether multiple disciplinary removals cumulatively exceeded ten days and amounted to an improper change in placement.

Held: For the District.

Citation: 34 C.F.R. § 300.519.

Issue: Whether the District's failed to implement Student's IEP during student's placement in the DAEP.

Held: For the Parent

Citation: 34 C.F.R. 300.121(d)

Issue: Whether the parent's advocate's participation is limited to accompanying and advising the parent or whether she may represent the parent in the manner that an attorney would represent a client.

Held: For the District.

Citation: 34 CFR 300.509(a)(1)