

TEA DOCKET NO. 094-SE-0108

Student	§	
b/n/f Parents	§	
	§	BEFORE A
Petitioner	§	SPECIAL EDUCATION
	§	
v.	§	HEARING OFFICER
	§	
EL CAMPO	§	FOR THE
INDEPENDENT SCHOOL DISTRICT	§	STATE OF TEXAS
Respondent	§	

FINAL DECISION OF THE HEARING OFFICER

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Statement of the Case

The Petitioner (child)<sup>1</sup> brings this action against the Respondent (district), under the Individuals with Disabilities Education Act (IDEA), as amended (20 U.S.C. §§ 1400 et seq.). The Petitioner complains that:

1. The Respondent denied the Petitioner a free appropriate public education (FAPE) by failing to place the Petitioner in the least restrictive environment (LRE) during the 2007 – 08 school year;<sup>2</sup>
2. The Respondent failed to conduct a proper functional behavioral assessment (FBA) once the Respondent determined the Petitioner was a child with an “other health impairment” (OHI), not autism;
3. The Respondent failed to develop an appropriate behavioral intervention plan (BIP) for the Petitioner;
4. The Respondent failed to develop an appropriate individualized education program (IEP) that allowed the Petitioner access to the general curriculum and the LRE;
5. The Respondent failed to reimburse the Petitioner’s next friends for home schooling, evaluation, therapy, and other costs after the Petitioner’s withdrawal from the Respondent;
6. The Respondent failed to provide the Petitioner with an educational program that provided meaningful educational benefit;
7. The Respondent failed to provide the Petitioner with an appropriate curriculum for the Petitioner’s grade level and sufficient special education;

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<sup>1</sup> To protect the privacy of the Petitioner, the Petitioner is referred to as “child” in this Decision.

<sup>2</sup> This list closely tracks but is not a verbatim reiteration of the Petitioner’s claims. The Petitioner’s statement of claims has been edited here, in part, to remove personally identifiable information. See Pet’r Second Amended Due Process Complaint at 2 – 4 (filed Feb. 15, 2008 and received by Respondent on Feb. 21, 2008). The Petitioner’s Closing Argument limits the denial of FAPE claim to the 2007-08 school year. This is consistent with the Petitioner’s counsel’s opening statement that the Petitioner is not critical of the Respondent during the period the child was qualified under the eligibility category of autism – the 2006-07 school year (Hr’g Tr. at 44 (vol. 1)).

8. The Respondent failed to follow the recommendations of the Petitioner's private psychologists and other experts who provided reports to the Respondent, instead relying on outdated assessments and unqualified experts who neither evaluated the Petitioner nor had the expertise or credentials to evaluate the Petitioner; and
9. The Respondent failed to reevaluate the Petitioner subsequent to the Petitioner's new diagnosis or change in medication and failed to amend the Petitioner's IEP and BIP in accordance the Petitioner's new diagnosis.<sup>3</sup>

As relief, the Petitioner requests that the Respondent provide (1) placement of the Petitioner in the regular classroom; (2) reimbursement of private educational expenses;<sup>4</sup> (3) an independent educational evaluation (IEE) at public expense and/or reimbursement for all IEEs and expert reports and evaluations;<sup>5</sup> (4) reimbursement of attorneys' fees and costs; (5) reimbursement of all medical costs and evaluations; (6) an appropriate IEP specifically targeted to the Petitioner's needs; (7) an appropriate FBA and BIP; and (8) appropriate instructional modifications.<sup>6</sup>

### Procedural History

The Texas Education Agency (TEA) received the Petitioner's Due Process Complaint on January 3, 2008. The parties participated in a resolution session on January 17, 2008, but were unable to resolve the issues in the case. On January 29, 2008, the Petitioner filed, with permission, its First Amended Due Process Complaint. On February 15, 2008, the Petitioner filed, with permission, its Second Amended Due Process Complaint.

After continuances to accommodate a change in counsel for the Petitioner, additional settlement talks and discovery, a Due Process Hearing was conducted on June 3, 4, and 5, 2008. During the Hearing, the Petitioner was afforded a fair opportunity to offer and solicit evidence and testimony to satisfy the Petitioner's burden of persuasion as assigned under *Schaffer v. Weast*, 546 U.S. 49, 57 – 58 (2005). Following the Due

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<sup>3</sup> This Hearing Officer is designating nine claims that the Petitioner is prosecuting against the Respondent based upon the "Statement of Claims" in the Petitioner's Closing Argument (Pet'r Closing Argument at 2 – 3 (filed July 11, 2008)). These nine claims were listed in the Petitioner's Second Amended Due Process Complaint (Pet'r Second Amended Due Process Complaint at 2 – 4 (filed Feb. 15, 2008 and received by Respondent on Feb. 21, 2008)).

<sup>4</sup> In the Petitioner's Closing Argument, the Petitioner requests reimbursement for this item in the amount of \$10,748.59. (Pet'r Closing Argument at 32 (filed July 11, 2008)).

<sup>5</sup> In the Petitioner's Closing Argument, the Petitioner requests reimbursement for this item in the amount of \$8,500. (Pet'r Closing Argument at 32 (filed July 11, 2008)).

<sup>6</sup> Pet'r Closing Argument at 32 (filed July 11, 2008).

Process Hearing, this Hearing Officer permitted the parties to submit written closing statements.

### Findings of Fact

Based upon the testimony and evidence taken on the record in this proceeding, this Hearing Officer makes the following findings of fact:

1. The child is a child with a disability under the IDEA. For the 2006 – 07 school year, the child was qualified under the autism eligibility category. For the 2007 – 08 school year the child was qualified under the OHI eligibility category. (Hr’g Tr. at 121 – 22; 177; 192 – 93 (vol. 1); Resp’t Ex. 10, pp. 2, 9; Resp’t Ex. 49, pp. 2, 12)
2. During the 2006 – 07 school year, the child was a student in the school district; the child’s grade level was \*\* grade. The child began the school year splitting time between regular education classes and a resource class. Among other things, the child was provided a classroom aide. (Hr’g Tr. at 73 (vol. 1); Resp’t Ex. 10, pp. 1, 9)
3. In October, 2006, the child’s classroom aide at school resigned and the child’s behavior began to deteriorate. (Hr’g Tr. at 73 – 75, 86 – 87 (vol. 1))
4. In October, 2006, school staff restrained the child a total of 3 times, with a total of 18 minutes spent on restraint. In November, 2006, school staff restrained the child a total of 3 times, with a total of 30 minutes spent on restraint. In December, 2006, school staff restrained the child a total of 5 times, with a total of 1 hour, 19 minutes spent on restraint. (Resp’t Ex. 14, pp. 3 – 13)
5. In December, 2006, the school district retained a behavior analyst who performed an FBA on the child with regard to the child’s demonstrated maladaptive or inappropriate behaviors. (Hr’g Tr. at 410 – 13 (vol. 2); Resp’t Ex. 16)
6. On January 18, 2007, the child’s admission, review and dismissal (ARD) committee met. The Petitioner’s next friends attended and participated in the meeting. Among other things, the committee reviewed the FBA prepared by the behavior analyst. The behavior analyst recommended implementation of an “applied behavioral analysis (ABA)/verbal behavior

program” for the child in a self-contained classroom – a classroom solely occupied by the child and the child’s teacher and aide. The committee considered and adopted the recommended plan and incorporated it into the child’s IEP and BIP. The committee considered and adopted the recommended placement and placed the child in a self-contained classroom; the child, however, would participate with children without disabilities for lunch and physical education. The committee also requested additional information that the behavior analyst would provide in an addendum to the FBA. (Hr’g Tr. at 95 (vol. 1); Hr’g Tr. at 462 – 64, 524 (vol. 2); Resp’t Ex. 18, pp. 10 – 11, 14 – 20)

7. The plan designed by the behavior analyst was intended to address maladaptive behaviors the behavior analyst determined were caused by the child avoiding or escaping demands or gaining access to items and activities preferred by the child. The plan’s approach was to no longer reinforce inappropriate behaviors – a technique known as “extinction” – and teach “replacement behaviors” – more appropriate behaviors that gain access to preferred items and activities. (Hr’g Tr. at 450 – 51, 464, 536, 629 (vol. 2))
8. On February 6, 2007, the child’s ARD committee met. The Petitioner’s next friends attended and participated in the meeting. Among other things, the committee reviewed the FBA addendum prepared by the behavior analyst. The addendum included inclusion criteria for the child. The addendum also included definitions of “level 1” and “level 2” maladaptive behaviors. Level 1 maladaptive behaviors are behaviors that are inappropriate but would not cause harm to the child or others. Level 2 maladaptive behaviors are behaviors that are inappropriate and could cause harm to the child or others. The mastery criteria in the addendum specified that if the child did not engage in any “level 2” maladaptive behaviors for 10 consecutive days and any “level 1” maladaptive behaviors for 10 consecutive days, then children without disabilities would enter the child’s self-contained classroom to interact with the child. This approach was referred to as a “reverse inclusion model.” The committee adopted the addendum and incorporated it into the child’s BIP. (Hr’g Tr. at 411, 464 – 69 (vol. 2); Resp’t Ex. 19; Resp’t Ex. 21, pp. 15 – 18, 22 – 27)
9. On May 24, 2007, the child’s ARD committee met. The Petitioner’s next friends attended and participated in the meeting. Among other things, the child’s special education teacher reported that the child “has made definite

improvements over the last year” and that “the behavioral program has been very successful in help [sic] to support [the child] and [the child’s] behaviors.” The behavior analyst retained by the school district concurred that the BIP was working. (Hr’g Tr. at 483 – 90, 494 – 96 (vol. 2); Resp’t Ex. 35, pp. 14 – 15)

10. Once the child’s IEP and BIP were finalized for the spring, 2007 semester, the semester ended with fewer instances of restraint and lower amounts of time school staff spent restraining the child than during the beginning and middle of the semester. In February, 2007, school staff restrained the child a total of 9 times, with a total of 2 hours, 58 minutes spent on restraint. In March, 2007, school staff restrained the child a total of 17 times, with a total of 1 hour, 21 minutes spent on restraint. In April, 2007, school staff restrained the child a total of 3 times, with a total of 36 minutes spent on restraint. In May, 2007, school staff restrained the child a total of 3 times, with a total of 25 minutes spent on restraint. (Hr’g Tr. at 501 – 02, 594 – 95, 617 – 20 (vol. 2); Resp’t Ex. 40, pp. 9 – 26; Resp’t Ex. 62, pp. 22, 24, 32, 34; Resp’t Ex. 63, pp. 1 – 7)
11. On the Texas state-developed alternative assessment – instructional level 4, expectation level II (SDAA-4-II), the child met the ARD committee expectation level in mathematics in spring, 2007. (Resp’t Ex. 39, p. 1)
12. On the Texas SDAA-4-II, the child did not meet the ARD committee expectation level in reading in spring, 2007. The child, however, did advance in reading from a grade equivalent level of 2.1 in October, 2006 to a grade equivalent level of 2.6 in May, 2007. (Hr’g Tr. at 339 – 40 (vol. 1); Resp’t Ex. 13, p. 35; Resp’t Ex. 39, p. 2; Resp’t Ex. 67, p. 1)
13. In July, 2007, the Petitioner’s next friends retained an independent evaluator for the child – a clinical psychologist. The independent evaluator examined the child, prepared a report and determined that the child has reactive attachment disorder (RAD). Hr’g Tr. at 231 – 34, 239 – 40, 243 (vol. 1); Pet’r Ex. 8, pp. 3 – 11)
14. On August 13, 2007, the child’s ARD committee met. The Petitioner’s next friends attended and participated in the meeting. The Petitioner’s next friends presented the independent evaluator’s report to the ARD committee and the ARD committee recessed to review and consider the independent evaluator’s report. Included in the ARD documentation was a consultation note from the district’s behavior analyst suggesting that the

child had met some criteria and was ready to be “moved into a small Special Education classroom.” (Resp’t Ex. 44, p. 15, 19)

15. On August 27, 2007, the 2007 – 08 school year began but the child did not attend school. During the 2007 – 08 school year, the child’s grade level was \*\* grade. (Resp’t Ex. 43, p. 8; Resp’t Ex. 44, p. 1)
16. On August 30, 2007, the child’s ARD committee met. The Petitioner’s next friends attended and participated in the meeting. Among other things, the committee changed the child’s eligibility under the IDEA from autism to OHI based upon the independent evaluator’s report. The child’s special education teacher noted that the child’s IEP listed four targeted behaviors for improvement: “accepting no,” “waiting,” “transitioning” and “complying with demands/requests.” The strategy utilized to improve these targeted behaviors was an “applied behavioral analysis (ABA)/verbal behavior program” using “discrete trials.” For each targeted behavior, the child must positively respond to 15 trials every day for 10 consecutive days to master the behavioral objective in the IEP. The child’s special education teacher explained that the child’s BIP specified that if the child did not engage in any “level 2” maladaptive behaviors for 10 consecutive days, then children without disabilities would enter the child’s self-contained classroom to interact with the child under a “reverse inclusion model.” This plan was identical to that adopted by the January/February, 2007 ARD committees. The Petitioner’s next friends expressed disapproval of this IEP and BIP, stating that the IEP and BIP were based on an outdated FBA that was conducted while the child was medicated and identified as a child with autism. The Petitioner’s next friends also expressed disapproval of the child’s placement in the self-contained classroom and requested placement in a regular classroom. The Petitioner’s next friends did not request a new FBA or reevaluation of the child. After consideration, the school district recommended continuation of the IEP, BIP and self-contained placement despite the change in eligibility category. The ARD committee granted the Petitioner’s next friends a 10-day recess. (Hr’g Tr. at 121 – 22 (vol. 1); Hr’g Tr. at 540 – 41, 561 – 62 (vol. 2); Hr’g Tr. at 701 – 04, 707 – 08 (vol. 3); Resp’t Ex. 19, p. 1; Resp’t Ex. 49, pp. 2, 10 – 20)
17. On September 14, 2007, the child’s ARD committee met. The Petitioner’s next friends attended and participated in the meeting. Among other things, the committee received input from an independent consultant on children with neurological impairments retained by the Petitioner’s next

friends; the independent consultant participated by telephone and spoke with the committee for one hour and 50 minutes. The independent consultant recommended that the demand during a discrete trial not be repeated or maintained if the child did not immediately respond; instead, the independent consultant recommended that the demand be withdrawn and the child be allowed to comply later. The independent consultant also recommended that the child be placed in a regular education setting at least half-time and be allowed to move to a “safe room” when the child self-recognized a “trigger” is oncoming. After engaging in a discussion with the independent consultant and the Petitioner’s next friends and considering the recommendations, the school district denied the Petitioner’s next friends’ request that demands not be repeated during discrete trials and denied the request that the child be placed in a regular education classroom with a safe room option. In particular, the school staff expressed concern about the feasibility of permitting the child to leave the regular education classroom for the safe room when the child deemed it necessary. School staff also stated that the child had made progress with the current BIP. The ARD documentation indicated that for the 2007 – 08 school year the child would take state assessments on grade level. The Petitioner’s next friends requested the ARD committee provide school work for them to do with the child at home until their requests were adopted. The Petitioner’s next friends requested that while the child was at home, the child be considered absent rather than classified as a homebound student. The Petitioner’s next friends did not request a new FBA or reevaluation of the child. (Hr’g Tr. at 121 – 24, 220 – 21 (vol. 1); Resp’t Ex. 51, pp. 5, 11 – 18)

18. The independent consultant on children with neurological impairments retained by the Petitioner’s next friends did not examine or observe the child prior to making recommendations to the child’s ARD committee, but did review the child’s earlier ARD committee documentation and assessments prior to making recommendations to the child’s ARD committee. (Hr’g Tr. at 195, 219 – 20 (vol. 1); Resp’t Ex. 51, p. 11)
19. On or about September 19, 2007, the Respondent provided a “prior written notice” to the Petitioner’s next friends. The prior written notice indicated that the school district was refusing the Petitioner’s next friends’ requests to place the child in general education, eliminate the current BIP, or in the alternative, modify the BIP. (Hr’g Tr. at 222 (vol. 1); Resp’t Ex. 53)

20. The Petitioner's next friends did not state their intent to home school the child at public expense prior to removing the child from public school. (Hr'g Tr. at 224 (vol. 1))
21. For the 2007 – 08 school year the Petitioner's next friends home schooled the child. (Hr'g Tr. at 127 – 28 (vol. 1); Hr'g Tr. at 352 (vol. 2))

### Discussion

#### Free Appropriate Public Education (FAPE)

The Petitioner's fundamental claim is that the Respondent failed to provide the Petitioner with FAPE. Under the IDEA, a school district's basic duty is to provide each child with a disability with FAPE.<sup>7</sup> The question of whether there is a denial of FAPE is examined under a two-part test enunciated by the U.S. Supreme Court in *Board of Education v. Rowley*.<sup>8</sup> According to *Rowley*, there is a deprivation of FAPE if a child's program and services are (1) not in compliance with the IDEA procedures, and (2) not reasonably calculated to enable the child to receive educational benefits. Here, analysis of all of the Petitioner's claims fits into the *Rowley* framework.

#### COMPLIANCE WITH IDEA PROCEDURES

The Petitioner's only procedural allegation is its eighth claim: that the Respondent failed to follow the recommendations of the private psychologists and other experts specifically retained by the Petitioner's next friends to evaluate the child and who provided reports to the school district as to the child's needs.<sup>9</sup> In Texas, case law establishes that ARD committees are not obligated to adhere to expert recommendations. In *Marc V. v. North East Indep. Sch. Dist.*,<sup>10</sup> the federal district court stated that an ARD committee may not delegate its duties to develop a program for a child with a disability to an outside expert who prescribes a particular placement. The ARD committee retains the responsibility to ensure an appropriate IEP and placement in the least restrictive environment. Therefore, this child's ARD committee did not commit a procedural error by not following the recommendations of the child's private psychologists and consultants.

In terms of consideration of any independent expert reports by the ARD committee, this Hearing Officer is guided by the standard announced for the

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<sup>7</sup> 20 U.S.C. § 1412(a)(1), as amended; 34 C.F.R. § 300.101.

<sup>8</sup> 458 U.S. 176, 206-07 (1982).

<sup>9</sup> Pet'r Closing Argument at 2 – 3 (filed July 11, 2008).

<sup>10</sup> 455 F.Supp.2d 577, 594 (W.D. Tex. 2006).

consideration of parental input generally in *White v. Ascension Parish Sch. Bd.*<sup>11</sup> In *White*, the Fifth Circuit Court of Appeals stated that absent any evidence of bad faith exclusion or refusal to listen to or consider the family's input, a school district meets the IDEA's requirement with respect to parental input. Here, there was no evidence that either the Petitioner's psychologists and consultants were excluded from the ARD process or that the ARD committee refused to listen to them or consider their input. The notes of the September, 2007 ARD committee meeting in particular demonstrate that the independent consultant on children with neurological impairments retained by the Petitioner's next friends was afforded almost two hours to address the committee and the committee engaged with the consultant in the consideration of his recommendations.

In conclusion, this Hearing Officer finds that the Respondent prevails on claim no. 8. Thus, the Petitioner has failed to demonstrate a violation of the first prong of the *Rowley* test.

#### REASONABLE CALCULATION TO PROVIDE EDUCATIONAL BENEFITS

The Fifth Circuit, in *Cypress-Fairbanks Independent School District v. Michael F.*,<sup>12</sup> announced four factors to consider in deciding whether a child's IEP is reasonably calculated to confer educational benefits: (1) individualized services; (2) placement in the LRE; (3) coordination of key stakeholders; and (4) provision of educational benefits. The Petitioner's seven substantive allegations fall under this prong of the *Rowley* test and are addressed below.

##### Individualized Services

Under the first *Michael F.* factor, the IEP for the child must be individualized. In this case, the Petitioner's basic complaint is that the school district's behavioral approach to this child was not individualized because it aggravated needs stemming from the child's disability – RAD. In particular, the Petitioner asserts that because of RAD this child needed to avoid situations that increased frustration because that triggered decompensation or meltdowns.<sup>13</sup> According to the Petitioner, the repeating or maintaining of demands during discrete trials as called for in the child's BIP created a situation of increasing frustration on the child's part yet the ARD committee failed to recognize that instead of meeting the child's needs, it was exacerbating them.<sup>14</sup>

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<sup>11</sup> 343 F.3d 373, 380 (5<sup>th</sup> Cir. 2003).

<sup>12</sup> 118 F.3d 245, 253 (5<sup>th</sup> Cir. 1997), *cert. denied* 522 U.S. 1047 (1998).

<sup>13</sup> Hr'g Tr. at 241 – 44 (vol. 1) (test. of Pet'r independent evaluator).

<sup>14</sup> Hr'g Tr. at 256 – 57 (vol. 1) (test. of Pet'r independent evaluator).

Here, the record reveals that serious instances of the child decompensating or melting down – as reflected by restraint of the child by school staff – were minimal by the end of the semester the school district employed the BIP that included repeating or maintaining demands during trials. With fewer restraints in April and May, 2007 than during February and March, 2007, the ARD committee could reasonably determine that the BIP was effective and addressed the child’s incontrovertible need for reduced maladaptive behaviors in school and was, therefore, individualized to the child. The district’s proposed continuation of this behavioral plan for the 2007 – 08 school year was thus not unreasonable.

Relating to whether the child’s ARD committee had the necessary information to individualize the child’s program are the Petitioner’s second and ninth allegations: that the Respondent failed to conduct a proper FBA and reevaluation.<sup>15</sup> Under the IDEA, an FBA is required in disciplinary situations when (1) a school removes a child from his or her current placement to an interim alternative educational setting because of special circumstances: weapons, illegal drugs, or infliction of serious bodily injury; (2) a school removes a child from his or her current placement for more than 10 school days and the child’s behavior is not a manifestation of his or her disability; and (3) a school conducts a manifestation review and determines the child’s behavior is a manifestation of his or her disability.<sup>16</sup> Also under the IDEA, a child’s IEP is required to include positive behavioral interventions and supports for those children whose behavior impedes learning.<sup>17</sup> According to non-regulatory guidance from the U.S. Department of Education, an FBA typically precedes the development of these positive behavioral interventions and supports, but is not required.<sup>18</sup> According to the U.S. Department of Education, it is a function of the ARD committee to determine whether an existing FBA is current and valid or a new FBA is needed.<sup>19</sup>

Here, the Petitioner’s next friends neither dispute that the child has maladaptive behaviors nor dispute the targeted behaviors in the child’s BIP. Their only concern is one element of the BIP: whether to repeat or maintain a demand during a trial if the child does not immediately comply. In light of the fact that maladaptive behaviors diminished in the spring, 2007 semester, there is no objective evidence suggesting a new FBA was warranted at the beginning of the fall, 2007 semester once the ARD committee switched the child’s eligibility category from autism to OHI.

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<sup>15</sup> Pet’r Closing Argument at 2 – 3 (filed July 11, 2008).

<sup>16</sup> 20 U.S.C. §§ 1415(k)(1)(D)(ii), (k)(1)(F)(i), as amended.

<sup>17</sup> 20 U.S.C. § 1414(d)(3)(B)(i), as amended.

<sup>18</sup> 71 Fed. Reg. 46575, 46683 (2006).

<sup>19</sup> 71 Fed. Reg. 46721 (2006).

Under the IDEA, a reevaluation is required under three circumstances: (1) if the school district determines that the needs of the child warrant a reevaluation; (2) a parent or teacher of the child requests a reevaluation, unless the district refuses and opts to defend its refusal; and (3) at least every three years, unless the parent and school district agree it is unnecessary.<sup>20</sup> Although the Petitioner's next friends argue that the Respondent should have reevaluated the child "when the child was no longer medicated nor diagnosed with autism,"<sup>21</sup> they did not request a reevaluation at that time. Moreover, the child's academic and non-academic progress the previous semester did not indicate the need for a reevaluation.

In sum, the Petitioner failed to establish by a preponderance of the evidence that the child's program, in the form of the IEP and BIP, was not individualized or that a new FBA and reevaluation were warranted.

#### Least Restrictive Environment (LRE)

The second *Michael F.* factor is whether the child's program is administered in the LRE. Compliance with the LRE mandate is evaluated through the two-part test announced by the Fifth Circuit in *Daniel R.R. v. State Board of Education*.<sup>22</sup>

#### First Prong of the *Daniel R.R.* Test

The first prong of the *Daniel R.R.* test asks whether full-time education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily. Several factors are considered under the first prong, such as the steps the school has taken to accommodate the student, the sufficiency of these efforts, the ability of the student to receive educational benefit in the regular classroom, the overall experience of the student, and the effect of the student on his or her classmates.<sup>23</sup>

#### Steps Taken to Accommodate the Child in General Education Setting

Here, the ARD committee first attempted to place the child in regular education classes part-time. The deterioration of the child's behaviors beginning in the fall, 2006 semester, however, necessitated moving the child to a more restrictive placement more appropriate to accommodate the child's meltdowns and need for restraints.

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<sup>20</sup> 34 C.F.R. § 300.303.

<sup>21</sup> Pet'r Closing Argument at 3 (filed July 11, 2008).

<sup>22</sup> 874 F.2d 1036, 1048 (5<sup>th</sup> Cir. 1989)

<sup>23</sup> 874 F.2d at 1048 – 49.

### Sufficiency of Efforts to Accommodate the Child

Here, the steps taken by the ARD committee to accommodate the child in the mainstream environment were sufficient. The committee deferred making a switch to the self-contained class until an FBA was performed and reviewed by the ARD committee in January, 2007.

### Educational Benefits

As discussed below, the child received educational benefit while in the self-contained classroom during the spring of 2007. Relying upon this experience, the school district reasonably projected that continued educational benefit could be obtained during the fall of 2007 in the same setting.

### Overall Experience in General Education Setting

Here, the ARD committee's judgment was that given the child's experience during the later part of fall, 2006, a change in spring, 2007 was appropriate. The Petitioner failed to establish by a preponderance of the evidence that this judgment was faulty at that time.

### Child's Effects on General Education Setting and Classmates

Here, the child's effect on others was an issue with the level 2 behaviors. The district may take this into account and remove the child to a more restrictive setting where behaviors do not interfere with the instruction of other students.

### Second Prong of the *Daniel R.R.* Test

Because full-time education in the regular classroom, even with the use of supplementary aids and services, could not be achieved satisfactorily, the analysis turns to the second prong of the *Daniel R.R.* test. The second prong asks which setting permits the child to be mainstreamed to the maximum extent appropriate. Here, the school district determined that setting to be a self-contained classroom. While the child did not have exposure to peers without disabilities in the self-contained classroom without 10 days of no level 2 behaviors, the child still had exposure to non-disabled peers during other parts of the school day, such at the lunch period and physical education. Further, at the August 13, 2007 ARD committee meeting, the committee was provided a consultation note from the district's behavior analyst suggesting that the child had met

some criteria and was ready to be “moved into a small Special Education classroom.”<sup>24</sup> Thus, the Respondent appeared open to mainstreaming the child as behavioral progress permitted.

After applying the two-part test announced in *Daniel R.R.*, this Hearing Officer finds that the school district’s proposed placement of the child in a self-contained classroom to begin the 2007-08 school year was appropriate and complied with the LRE mandate.

#### Key Stakeholders

Under the third *Michael F.* factor, the child’s key stakeholders must work in a coordinated and collaborative manner. In this case, the Petitioner presented no testimony or documentation on this factor.<sup>25</sup>

#### Educational Benefit

The fourth *Michael F.* factor is whether the child’s IEP is reasonably calculated to generate educational benefits. Regarding academic benefits in this case, the child advanced a grade level from the 2006 – 07 school year to the 2007 – 08 school year. During the spring, 2007 semester, the child met the ARD committee’s expectation level on the SDAA in math. While the child did not meet the committee’s expectation on the SDAA in reading, other testing revealed that the child’s reading level improved over the course of the year, including during the spring, 2007 semester when the controversial BIP was first implemented. Academically, the child made progress by the end of the 2006 – 07 school year and it was not unreasonable for the school district to project that the continuation of the same program – the IEP and BIP in the self-contained placement – would continue to yield academic benefits for the child, regardless of whether the child’s eligibility label was revised. At the September, 2007 ARD committee meeting, the documentation indicated that for the 2007 – 08 school year, the child would take state assessments on grade level thus indicating the school district anticipated that the child would access the appropriate general curriculum. The Petitioner did not link the RAD diagnosis with any new or different learning needs.

Regarding nonacademic benefits in this case, the child showed marked improvement as indicated by the number of restraints and the amount of time in restraints falling as the first semester when the controversial BIP was implemented was coming to an end. Behaviorally, the child made progress by the end of the 2006 – 07 school year and it was not unreasonable for the school district to project that the continuation of the

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<sup>24</sup> Resp’t Ex. 44, p. 19.

<sup>25</sup> The Petitioner does not address this factor in its Closing Argument.

same program – the IEP and BIP in the self-contained placement – would continue to yield nonacademic benefits for the child, regardless of whether the child’s eligibility label was revised. The underlying behavioral need was not changed with the child’s switch to the OHI category. The Petitioner never argued that the targeted behaviors themselves were inappropriate, just the approach in addressing them.<sup>26</sup>

In sum, the four *Michael F.* factors militate in favor of a finding that the child’s IEP and BIP were reasonably calculated to address the child’s behavioral issues and academic needs. Regarding the Petitioner’s first allegation<sup>27</sup> that the Respondent denied the Petitioner FAPE in the LRE during the 2007 – 08 school year this Hearing Officer finds that, based upon the above discussion, the child was not denied FAPE in the LRE.

Regarding the Petitioner’s second allegation<sup>28</sup> that the Respondent failed to conduct a proper FBA on the Petitioner, this Hearing Officer finds that, based upon the above discussion, the child was not denied a proper FBA.

Regarding the Petitioner’s third allegation<sup>29</sup> that the Respondent failed to develop an appropriate BIP for the Petitioner, this Hearing Officer finds that, based upon the above discussion, the child was not denied an appropriate BIP.

Regarding the Petitioner’s fourth allegation<sup>30</sup> that the Respondent failed to develop an appropriate IEP for the Petitioner, this Hearing Officer finds that, based upon the above discussion, the child was not denied an appropriate IEP.

Regarding the Petitioner’s sixth allegation<sup>31</sup> that the Respondent failed to provide the Petitioner with an educational program that provided meaningful educational benefit

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<sup>26</sup> To the extent that this case represents a dispute over behavioral methodologies, it is well established that reviewing administrative and judicial bodies leave to the discretion of educators the methods to apply to children in special education. See, e.g., *Bonnie Ann F. v. Calallen Indep. Sch. Dist.*, 835 F.Supp. 340, 347 (S.D. Tex. 1993), *aff’d* 40 F.3d 386 (5<sup>th</sup> Cir. 1994), *cert. denied* 514 U.S. 1084 (1995) (once a determination that the requirements of the IDEA have been met, questions of methodology are for resolution by the public agency). Further, under the IDEA there is not a comparative analysis between the school district’s proposed program and the child’s preferred program. Even if the child’s preferred program may be superior in terms of yielding results, that does not render the district’s proposed program inappropriate. See, e.g., *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991) (if there is an appropriate public school program available, the district need not consider private placement, even though the private placement might be better able to serve the child).

<sup>27</sup> Pet’r Closing Argument at 2 (filed July 11, 2008).

<sup>28</sup> Pet’r Closing Argument at 2 (filed July 11, 2008).

<sup>29</sup> Pet’r Closing Argument at 2 (filed July 11, 2008).

<sup>30</sup> Pet’r Closing Argument at 2 (filed July 11, 2008).

<sup>31</sup> Pet’r Closing Argument at 2 (filed July 11, 2008).

to the Petitioner, this Hearing Officer finds that, based upon the above discussion, the child was not denied meaningful educational benefit.

Regarding the Petitioner's seventh allegation<sup>32</sup> that the Respondent failed to provide the Petitioner with appropriate curriculum for the Petitioner's grade level and instead provided an insufficient special education program, this Hearing Officer finds that, based upon the above discussion, the child was provided a sufficient special education program.

In conclusion, this Hearing Officer finds that the Respondent prevails on claims no. 1, 2, 3, 4, 6, 7, and 9.

### Reimbursement Claim

The Petitioner's fifth claim is that the Respondent failed to reimburse the Petitioner's next friends for home schooling, evaluation, therapy and other costs due to withdrawing the child from the school district.<sup>33</sup> Under the IDEA, such reimbursement is allowed under specified conditions.<sup>34</sup> Procedurally, Petitioners generally must demonstrate that they provided advance notice to the school district before removing the child for private instruction.<sup>35</sup> Substantively, Petitioners must demonstrate that they have satisfied a two-part test: first, showing that the school district cannot offer an appropriate education to the child and, second, showing that the private instruction did so.<sup>36</sup>

Procedurally, the Petitioner here did not comply with the notice provisions for a reimbursement request. Under the IDEA, a party may provide notice in one of two ways. Notice provided through an ARD committee meeting must occur before the child is removed.<sup>37</sup> Notice provided through a notice letter must occur at least 10 business days before the child is removed.<sup>38</sup> Regardless of the manner of notice, the party desiring reimbursement must (1) inform the ARD committee that it is rejecting the placement proposed by the school district; (2) state its concerns; and (3) state its intent to enroll the child in private school at public expense.<sup>39</sup> Here, the Petitioner's next friends did not state their intent to home school the child at public expense before beginning home schooling.

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<sup>32</sup> Pet'r Closing Argument at 2 (filed July 11, 2008).

<sup>33</sup> Pet'r Closing Argument at 2 (filed July 11, 2008).

<sup>34</sup> 34 C.F.R. § 300.148.

<sup>35</sup> 34 C.F.R. § 300.148(d)(1).

<sup>36</sup> 34 C.F.R. § 300.148(c).

<sup>37</sup> 34 C.F.R. § 300.148(d)(1)(i).

<sup>38</sup> 34 C.F.R. § 300.148(d)(1)(ii).

<sup>39</sup> 34 C.F.R. § 300.148(d)(1)(i).

Substantively, the Petitioner here has not demonstrated that the Respondent cannot offer an appropriate education to the child. As discussed above, the Respondent did provide FAPE to the child.

In conclusion, this Hearing Officer finds that the Respondent prevails on claim no. 5.

#### Conclusions of Law

After due consideration of the foregoing findings of fact, this Hearing Officer makes the following conclusions of law:

1. The Respondent, El Campo Independent School District, proposed an IEP and BIP for the 2007 – 08 school year that were reasonably calculated to provide FAPE to the Petitioner under *Board of Educ. v. Rowley*, 458 U.S. 176 (1982) and *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997), *cert. denied* 522 U.S. 1047 (1998).
2. The Respondent, El Campo Independent School District, proposed a placement for the 2007 – 08 school year that was the LRE for the Petitioner under *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989).
3. The Respondent, El Campo Independent School District, did not fail to conduct an FBA or reevaluation of the child under 34 C.F.R. §§ 300.303, 300.530.
4. The Respondent, El Campo Independent School District, did not fail to follow the recommendations of the Petitioner’s private psychologists and other experts under *Marc V. v. North East Indep. Sch. Dist.*, 455 F.Supp.2d 577 (W.D. Tex. 2006).
5. The Respondent, El Campo Independent School District, is not required to pay for the cost of home schooling the Petitioner under 34 C.F.R. § 300.148.

Order

Based upon the foregoing findings of fact and conclusions of law,

**IT IS HEREBY ORDERED THAT:**

1. All relief sought by the Petitioner shall be and is **DENIED**.

**SIGNED** this 4<sup>th</sup> day of August, 2008.

/s/ Steven R Aleman  
Steven R. Aleman  
Special Education Hearing Officer

Notice

Any party aggrieved by the findings and decision of this Hearing Officer has the right to bring a civil action seeking review in a state or federal court of competent jurisdiction. The party bringing the civil action shall have no more than 90 days from the date of this Decision to file the civil action. 20 U.S.C. § 1415(i)(2), as amended.

TEA DOCKET NO. 094-SE-0108

Student	§	
b/n/f Parents.	§	BEFORE A
	§	SPECIAL EDUCATION
Petitioner	§	
	§	
v.	§	HEARING OFFICER
	§	
EL CAMPO	§	FOR THE
INDEPENDENT SCHOOL DISTRICT	§	STATE OF TEXAS
Respondent	§	

SYNOPSIS

ISSUE 1: Whether the Respondent denied the Petitioner FAPE in the LRE for the 2007 – 08 school year.

CITE: 34 C.F.R. §§ 300.101, 300.114

HELD: For the Respondent. The Respondent proposed an IEP and BIP reasonably calculated to provide FAPE to the child in the LRE.

ISSUE 2: Whether the Respondent failed to conduct a proper FBA.

CITE: 34 C.F.R. § 300.530

HELD: For the Respondent. The Respondent was not required to conduct an FBA.

ISSUE 3: Whether the Respondent failed to develop an appropriate BIP.

CITE: 34 C.F.R. § 300.530

HELD: For the Respondent. The Respondent proposed an appropriate BIP.

ISSUE 4: Whether the Respondent failed to develop an appropriate IEP.

CITE: 34 C.F.R. § 300.324

HELD: For the Respondent. The Respondent proposed an appropriate IEP.

ISSUE 5: Whether the Respondent failed to reimburse the Petitioner for home schooling, evaluations, therapy and other costs necessitated by the withdrawal of the child from the school district.

CITE: 34 C.F.R. § 300.148

HELD: For the Respondent. The Respondent proposed an IEP and BIP reasonably calculated to provide FAPE to the child in the LRE.

ISSUE 6: Whether the Respondent failed to provide the Petitioner with meaningful educational benefit.

CITE: 34 C.F.R. § 300.101

HELD: For the Respondent. The Respondent proposed an IEP and BIP reasonably calculated to provide FAPE to the child in the LRE.

ISSUE 7: Whether the Respondent failed to provide the Petitioner with appropriate curriculum.

CITE: 34 C.F.R. § 300.101

HELD: For the Respondent. The Respondent proposed an IEP and BIP reasonably calculated to provide FAPE to the child in the LRE.

ISSUE 8: Whether the Respondent failed to follow the recommendations of the Petitioner's private psychologists and other experts.

CITE: 34 C.F.R. § 300.324

HELD: For the Respondent. The Respondent considered all recommendations and adopted those determined appropriate. The Respondent was not obligated to follow any recommendation merely because it was made by a private psychologist or other expert.

ISSUE 9: Whether the Respondent failed to reevaluate the Petitioner.

CITE: 34 C.F.R. § 300.303

HELD: For the Respondent. The Respondent was not required to reevaluate the Petitioner.