

CONSOLIDATED DOCKET NOS.

004-SE-0906  
039-SE-1006  
154-SE-0207  
256-SE-0507

STUDENT BNF PARENT, Petitioner	§	BEFORE A DUE PROCESS
	§	
VS.	§	HEARING OFFICER FOR
	§	
KATY INDEPENDENT SCHOOL DISTRICT, Respondent	§	THE STATE OF TEXAS

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**DECISION OF THE HEARING OFFICER**

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**Statement of the Case**

Petitioner (hereafter “parent”), as next friend and on behalf of her son (hereafter “student”), brought four separate due process complaints against Katy Independent School District (hereafter “Katy ISD”) pursuant to the Individuals with Disabilities Education Improvement Act (hereafter “IDEA”), 20 U.S.C. §1400 *et seq.* The parent initially complained that Katy ISD failed to design and implement an appropriate behavior intervention plan for the student for the 2006-2007 school year. Subsequently, the parent withdrew the student from Katy ISD and seeks, through these consolidated proceedings, reimbursement from Katy ISD of the private educational costs she incurred in educating the student.

**Procedural History**

The parent filed this request for a due process hearing with the Texas Education Agency (hereafter “TEA”) on September 11, 2006. The hearing in this matter was initially set for October 25, 2006.

A telephone prehearing conference was held on October 2, 2007 wherein the following fourteen issues were identified. The time period applicable to these issues was from July 15, 2006 through the date of filing of the complaint:

1. Whether the social skills training provided to the student was appropriate?
2. Whether Katy ISD was responsible for the student’s failure to receive social skills training?

3. Whether Katy ISD excluded the student's parent as an equal participant at ARD Committee meetings?
4. Whether Katy ISD refused to provide the student with an appropriate behavior intervention plan?
5. Whether the student was wrongfully disciplined for misconduct that occurred while he did not have a behavior intervention plan in place?
6. Whether the student was wrongfully excluded from becoming a member of the National Junior Honor Society due to his behaviors?
7. Whether the student's behavior intervention plan was appropriate?
8. Whether the student was punished for behaviors related to his disability and whether student was set up for failure?
9. Whether student was provided with a safe learning environment?
10. Whether student was taught new methods?
11. Whether there are specific strategies in the student's individualized education plan and behavior intervention plan to promote positive behaviors?
12. Whether there are only punishment interventions in student's behavior intervention plan?
13. Whether Katy ISD designated a "mentor" or "safe place" as tools to assist the student with behavior?
14. Whether there were any instructions or directions in student's behavior intervention plan to allow professionals working with the student to use as a reference or guide so that appropriate redirection of his behavior could occur?

During the telephone prehearing conference the parties requested a continuance of the hearing date for purposes of attempting mediation. The continuance was granted and this matter was rescheduled for hearing on December 13 and 14, 2006.

During the pendency of this proceeding, the student was involved in an incident in the locker room at school. Based on this incident, his parent filed another request for a due process hearing on October 18, 2007, which was assigned TEA Docket No. 039-SE-1006. Two issues were raised in this due process complaint - whether Katy ISD failed to provide the student with adequate supports during his physical education class and

whether Katy ISD provided the student with a safe environment. The hearing date in this new matter was also set for December 13 and 14, 2006.

Due to illness of counsel, the hearing dates in these matters were again rescheduled by agreement of the parties to February 6 and 7, 2007.

On January 12, 2007, Petitioner's counsel filed an Amended Request for a due process hearing in TEA Docket No. 039-SE-1007. This request was granted. Pursuant to the IDEA, an amendment of a due process complaint recommences the timelines set forth in the Act. This resulted in the hearing in TEA Docket No. 039-SE-1007 being rescheduled for February 27, 2007.

On January 22, 2007, a continuance of TEA Docket No. 004-SE-0906 was granted to Katy ISD for purposes of combining its hearing date with TEA Docket No. 039-SE-1007.

On February 12, 2007, the parent filed her third request for a due process hearing with the Texas Education Agency. It was assigned TEA Docket No. 154-SE-0207 and the matter was initially set for hearing on March 22, 2007. The issue raised in this proceeding was whether Katy ISD failed to provide the student with appropriate speech therapy services.

On February 20, 2007, at the request of counsel, these hearings were again continued due to a personal matter involving counsel and to allow the parties additional time to prepare for hearing. The hearings were rescheduled for March 20 – 22, 2007.

On March 19, 2007, the three pending hearings were continued due to illness of Petitioner's counsel. The new hearing dates assigned to these cases were June 4 and 5, 2007.

On May 21, 2007, the parent filed a fourth due process complaint with the Texas Education Agency. It was assigned TEA Docket No. 254-SE-0507. The issues raised in this proceeding involved a continuation of an alleged inappropriate behavior intervention plan since September, 2006. In the complaint, the parent claimed that as a result of an inappropriate educational program, the student had been removed from school and sought as relief, reimbursement of private educational costs. This matter was initially set for hearing on June 28, 2007.

Katy ISD filed a motion contesting the viability of the fourth due process complaint claiming it did not contain any new issues from those previously alleged and therefore did not constitute a "separate" complaint as required by the IDEA.<sup>1</sup> This Motion was subsequently denied.

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<sup>1</sup> The IDEA gives parents the right to file a separate due process complaint on an issue separate from a due process complaint already filed. *See*, 20 U.S.C. Section 1415 (o).

The parties proceeded to hearing in TEA Docket Nos. 004-SE-0906, 039-SE-1006 and 154-SE-0207 on June 4 and 5, 2007. At the request of the parties, these matters were consolidated for all purposes. The hearing in these consolidated matters was not completed on these dates and, at the request of the parties, additional days of hearing were set for August 14 and 15, 2007.

On June 21, 2007, at the request of the parties, TEA Docket No. 254-SE-0507 was also consolidated with the other pending cases. The consolidated cases proceeded to hearing on August 14 and 15, 2007 and October 10 and 11, 2007. At the request of the parties, the record remained open in these consolidated matters for purposes of receiving written closing statements by December 10, 2007. The decision due date was extended by the parties to December 15, 2007.

Based on the evidence presented and admitted into the record of this proceeding, I make the following findings of fact and conclusions of law. Certain findings of fact and conclusions of law may also be contained in the discussion section of this decision:

### **Findings of Fact**

1. The student is \*\* years old, in the \*\* grade (2006-2007 school year) and resides with his parents within the jurisdictional boundaries of Katy ISD. [Hearing Transcript, 06/05/07, page 10, hereafter, T. (hearing date) page \_\_].

2. Katy ISD is a duly incorporated school district under the laws of the State of Texas and is the local educational agency responsible for providing the student with a free appropriate public education.

3. The student has been diagnosed with Asperger's disorder, an autism spectrum disorder commonly known as high functioning autism. Typically, these children have good language and cognitive abilities, but deficits in social interaction skills, emotional regulation and pragmatic speech. The student is highly intelligent and fully capable of being educated in general education with appropriate behavioral supports and accommodations. [T. 06/04/07 page 31; P. Exh. #6].

4. The student was initially diagnosed with a pervasive developmental disorder at age \*\*. He attended a school for children with autism in the \*\* and \*\* grades, was home schooled from \*\* through \*\* grade and entered public school in the \*\* grade. [T. 33, Petitioner's Exhibit. #6, hereafter P. Exh. #\_\_].

5. The student is currently eligible for special education services as a student with Autism and speech impairments [P. Exh. #12].

6. The student has "perfectionist" tendencies and engages in emotional outbursts when he does not meet his standards. In the educational environment, poor grades on a test or assignment have the propensity to cause the student to act out in class.

7. Behaviors displayed by the student that interfered with his education during the 2006-2007 school year included verbal aggression in stressful situations, physical aggression in stressful situations, and a failure to organize, locate, complete and turn in his work. The student's verbal aggression included use of profanity in class, the making of threats toward students, teachers and threats to destroy school property. Physical aggression included punching school property, slamming doors, tossing desks/chairs, throwing objects, slamming down books and materials, and pushing and shoving other students.

8. These behavioral difficulties were identified as areas of need in a functional behavioral assessment completed on or about February 22, 2006, and were the areas targeted by the May 18, 2006 ARD Committee when developing the student's individualized education program (IEP), and behavior intervention plan for the 2006-2007 school year. [P. Exh. #24].

9. The student's IEP for the 2006-2007 school year provided for his placement in all general education classes. It provided for speech therapy services to address the student's deficits in pragmatic speech as it related to his social interactions and behaviors. It also provided a behavior IEP with a goal of improving his organizational skills and to eliminate verbal and physical aggression toward staff and peers when stressed. This IEP contained four benchmarks or short-term objectives for the student to master during the school year. These included (1) writing assignments in tracker during each class period; (2) locating and turning in completed assignments on time; (3) refraining from using profanity or verbal threats toward school property, students and staff in classrooms and hallways; and (4) refraining from physical aggression when stressed. His IEP also included program modifications such as use by the student of an assignment notebook, and access to cooling off locations for behaviors which could be implemented by either the student or teachers. Additionally, teachers were to encourage his classroom participation by providing feedback and prompts and by providing clearly defined and consistent limits, although teachers were to teach through low level behaviors and then have a private conference with the student after class. Teachers were also to provide positive reinforcements and use proximity control during instruction. The IEP further provided his teachers with supports including consultation with special education staff, and assistance with implementing the behavior intervention plan. [R. Exh. #15].

10. The student's behavior plan (set forth in Discussion Section of Decision) was designed to address those problem areas involving the student's lack of organizational skills, verbal profanity and aggression, and physical aggression. It included as one of the strategies the use of visual cues by the teachers in the form of a "yellow card" which was a warning and reminder to the student to try and deescalate his behavior and a "red card" which meant the student was to leave the class and proceed to his cool-off destination. Examples of the types of behaviors justifying use of a particular color were provided to the teachers. [R. Exh. #20, 27; T. 08/14/07, page 196].

11. Under the student's IEP, he was held to the same Student Code of Conduct as non-disabled students. [T. 06/04/07, page 141]. Disciplinary offenses in the Student Code of Conduct are categorized into five levels which identify sample offenses and possible disciplinary options available to the teacher or administrators. Level one offenses are minor offenses addressed by the classroom teacher. Examples include being tardy to class, running or making excessive noise, neglecting to bring required materials to class, failing to follow classroom rules, throwing objects or passing unauthorized notes, horseplay or scuffling (not fighting), etc. The disciplinary options for these minor infractions involve detentions, temporary removal from class, special assignment or duties, telephone call or note to parent, verbal reprimand, etc. Level two offenses are more serious and are handled by school administrators. Examples include using inappropriate language, failing to comply with directives of staff, being disrespectful, physically contacting another student creating a disruptive environment, creating or participating in a disturbance, cheating, etc. The disciplinary options for level two offenses are more severe and may include in-school and out-of school suspensions, exclusion from extracurricular activities, parent call or conference, etc. Level three offenses are even more serious and include disruptions of the school environment or educational process, using profane, vulgar, obscene or threatening language or gestures, using ethnic or racial slurs, fighting or encouraging or promoting a fight, hazing, harassing, stalking, bullying, etc. Disciplinary options for level three offenses include an off-campus disciplinary alternative educational placement (DAEP). The Student Code of Conduct also provides that school officials shall notify local law enforcement if they suspect that criminal acts have occurred on school property or at a school-sponsored event. [R. Exh. #15].

12. The parent disagreed with the decisions of the May 18, 2006 ARD Committee meeting, particularly with those involving the student's behavior intervention plan. The parent did not believe that the student could comply with the Student Code of Conduct, particularly when upset. Additionally, the parent objected to the plan's flexibility and lack of specific consequences for misbehavior and to the plan not including more positive reinforcers and strategies for good behavior.

13. The student's case manager is a special education teacher who also taught the student in two classes. She has been his case manager since \*\* grade. [T. 08/14/07, page 174]. She copied and disseminated information regarding the student to his teachers, including his IEPs, behavior intervention plan, and his list of accommodations and modifications. She also met individually with his teachers to explain the behavior intervention plan and help them get to know the student prior to him coming to their classrooms. She met with the teachers individually and sometimes in small groups. She also provided in-service materials to the teachers on working with students with Asperger's. [T. 08/14/07, page 187].

14. The student began his \*\* grade school year on August 10, 2006.

15. The student received four class periods of speech therapy services every six weeks. These services were provided in what was called a "CHAT" group. The

purpose of the CHAT group was to work on the student's pragmatics with other students, to teach the student ways to control his emotions and accept disappointments, and to work on social skills by learning to interact appropriately with peers and adults. These areas were also addressed by the school psychologist in conjunction with the speech therapist during these CHAT group meetings. [T. 08/14/07 page 193]. The student missed the first CHAT group session, not wanting to attend. He attended subsequent CHAT group sessions. Katy ISD offered to make up the missed CHAT group session but the parent declined this offer.

16. On August 18, 2006, the student received a grade of \*\* on a quiz. He became upset, wadded up a piece of paper and threw it and hit the teacher. The teacher, in utilizing the behavior intervention plan, placed a "yellow" card on the board constituting a warning to the student. The student calmed down and after the class was over the teacher discussed the incident with student and reported it to his case manager. The student, in lieu of receiving a disciplinary referral, was allowed to apologize to the teacher. [R. Exh. #48].

17. On August 25, 2006, the student was removed from class for throwing a calculator case after his calculator was confiscated by the teacher for not putting it away as instructed. The student was sent to his case manager but stopped at the main office and called his mother to come pick him up. [R. Exh. #1].

18. On August 28, 2006, the student threw pencil lead at another student. The teacher utilized a "red" card per the student's behavior intervention plan which was ignored by the student. The "red" card was a cue to the student to proceed to his "cooling off" place where he was to counsel with his case manager. When the assistant principal arrived, the student threw a paper wad at another student. For this incident, the student received two days of lunch detention. [R. Exh. #48].

19. On August 30, 2006, the student yelled at and elbowed another student in the hallway. For this incident, the student received one day of in-school suspension. [R. Exh. # 48].

20. On August 31, 2006, the student was sent to his cool-off room for using inappropriate language in class and for refusing to follow the teacher's directives. Instead of proceeding to the cool off room, he went to the main office, called his mother who then came and signed him out as ill. School staff became concerned about his mother intervening and removing the student from school when they were attempting to implement his behavior intervention plan and decided not to allow calls home until after he counseled with his case manager. [R. Exh. #1]. His mother was made aware of this concern.

21. The student was a member of the National Junior Honor Society. In September, 2006, after learning that the student had received two Level 2 discipline referrals, the National Junior Honor Society board placed the student on probation. The student thereafter decided not to participate in the National Junior Honor Society. The

student was not excluded from participating in the National Junior Honor Society by Katy ISD.

22. On September 11, 2006, the parent filed her initial request for a due process hearing with the Texas Education Agency. In the request, the parent complained about the inappropriateness of the student's behavior intervention plan and the lack of social skills training, her lack of opportunity to be an equal participant at ARD Committee meetings, the lack of a safe educational environment for the student, and his exclusion from the National Junior Honor Society.

23. Katy ISD retained Dr. \*\*, an expert in special education and in the inclusion of students with disabilities in general education, to conduct an inclusion and social skills IEP evaluation report regarding the student. The purpose of the evaluation was to determine how the student's success in his general education classes could be enhanced and how to improve the student's social interactions with peers and adults. After observing the student at school, interviewing the campus principal and staff, reviewing the student's current IEP and assessment and progress reports and interviewing the student's mother, Dr. \*\* completed his report on October 11, 2007. He found the following:

The staff working with the student appeared very sensitive and responsive to his needs and genuinely seemed to want to do what was best for him;

His general education teachers seemed to accept him as a full member of their classes and were accepting of his unique behavioral patterns and were observed to be responsive to his needs;

His teachers held him in high regard academically;

The student's non-disabled peers appear to fully accept him and support him as needed;

The instruction in the classrooms was active, engaging and of high quality;

For a student with an Asperger's diagnosis, he seemed to get along reasonably well with his classmates and appeared to socially interact with other students; and

His teachers do a good job of not giving the student attention for minor inappropriate behaviors by ignoring such behavior.

24. Dr. \*\* also made sixteen recommendations for improving the student's educational program. These included developing "first person" social stories; expanding the use of peer buddy/tutoring; continuing to focus on teaching the student appropriate social skills, which included eight recommendations for improving the CHAT group for purposes of helping the student develop closer friendships with his peers; improving

student's organizational skills by creating an assignment checklist; using desensitization procedures to help the student accept performances that are less than perfect on tests and assignments; developing cooperative learning "base groups" in one of the student's classes as a strategy to improve the student's organizational skills; developing a contingency management system that focuses on positive consequences to complement the yellow/red card system; using evidence-based positive approaches in managing the student's classroom behavior; with regard to the card system, coming up with a more private signal for the red card that will not draw as much classmate attention to the student; developing clear and specific criteria for use of the yellow card and red card and using social stories and role playing to make this criteria clear to the student; creating a team approach with the student's out-of-school mental health providers and family; teaching the student to subvocalize his criticisms of teachers; conducting further psychological assessments; determining the driving forces behind the student's behavior; having his mother record a message that the student could listen to when he is stressed to assist in calming him down; and expanding the student's social skills IEP to include goals to develop closer friendships at school with one or more students, to accept negative feedback and follow directions of authority figures. [R. Exh. #54].

25. On September 21, 2006, the parent complained that the student was being bullied at school in the hallway. He had reported another student had called him names and threw paper at him. In response, the assistant principal spoke to the student allegedly engaged in the bullying and asked staff to watch the hall area where the incident happened. Additionally, the student was told to immediately contact the assistant principal if another incident occurred. [R. Exh. #1].

26. On September 26, 2006, the student became upset at a less than perfect grade and knocked the books off his desk and wrote "screw this" on a white board. This prompted his teachers and the school psychologist to pursue additional teaching strategies to get the student to better understand and deal with his frustrations, including the use of a social script. Additionally, school administrators decided to provide the student with additional staff support in his math class in lieu of any discipline referral. [R. Exh. #1].

27. On September 27, 2006, the parent indicated her concern about the student's reaction to the additional staff member in the class. He had made comments about hurting himself and other people as he was embarrassed by having a staff member assigned to him.

28. On October 5, 2006, the student, while unsupervised in his physical education class, was hit in the mouth by the forearm of another student \*\*. [T. 06/05/07, page 14; P. Exh. #14].

29. The parent complained to school administrators that the October 5, 2006 incident involving bullying by another student. The student told school administrators that he had been punched in the face by the other student. [T. 06/04/07, page 133]

30. Katy ISD investigated the October 5, 2006 incident and determined it was not intentionally caused but was the result of an accidental collision while the students engaged in horseplay. [T. 06/04/07, pages 132-136; P. Exh. #17, 18].

31. On October 13, 2006, the student called his teacher a “stupid teacher.” He received one day of in-school suspension for being non-compliant and insubordinate. [R. Exh. #48; P. Exh. #13].

32. On October 17, 2006, the student was disrupting his class and the teacher gave him a “red card.” He proceeded to see his case manager. The next day, she conducted a social autopsy with the student, where she reviewed the incident with the student and discussed strategies and techniques he should use to diffuse such situations in the future. [R. Exh. #6].

33. On October 18, 2006, the parent filed her second due process hearing complaint. This complaint involved the alleged “bullying” incident in the locker room on October 5, 2006 and another possible incident on October 11, 2006 regarding the same student. This second incident was investigated by Katy ISD but there were no other witnesses to this alleged bullying. [P. Exh. #19].

34. On October 19, 2006, the student became upset at a failing grade on a quiz. He crumpled his scantron and threw it to the front of the room. He received a “yellow card” cue. He then could not find his homework and told the teacher, “You can mark me off the class roll because my mom will kill me when she finds out my grade.” Later, while checking homework, the student threw a mechanical pencil across the room and hit a female student in the leg. He was given a “red card” cue and he left the room saying “good riddance.” He went to his cool-off room where a social autopsy was completed and he was required to apologize to those involved.

35. On October 26, 2006, the student threw a pencil at his teacher, \*\*, called the principal a “freak,” and threw two pencils at him. For these infractions, the student received in-school suspension. [R. Exh. #48].

36. The parent withdrew the student from school on November 1, 2006, due to concerns regarding his increased anxiety, anger and stress levels at school and over concerns regarding his behavior. [P. Exh. #12]. The student returned to school on November 9, 2007.

37. An ARD meeting was held on November 8, 2006. The Committee addressed concerns about the level and difficulty of the \*\* credit classes that the student was taking and felt there might be a direct relationship between those \*\* credit classes and the stress and anxiety he was experiencing. The student was taking some pre-AP classes where he was experiencing lower grades and some problematic behaviors. Consequently, the ARD Committee moved the student from pre-AP English to Academic English. Additionally, Spanish was dropped and an additional advisory period was reinstated. Dr. \*\*'s report was also reviewed and considered by the ARD Committee.

The ARD Committee also recommended increasing the student's speech therapy services from 45 minutes four times per six weeks to 75 minutes four times per six weeks. The ARD Committee also recommended a psychological evaluation of the student. [R. Exh. #16]. The parent disagreed with the decisions of the ARD Committee. She disagreed with the district conducting a psychological evaluation of the student and felt that the student was not being provided with sufficient support services to enable him to be successful in the general education environment. Additionally, the parent disagreed with the ARD Committee decision not to fully implement all of the recommendations of Dr. \*\*. [P. Exh. #1]. The ARD Committee reconvened on December 12, 2006, at which time the parent learned that the additional speech therapy services recommended by the ARD Committee had not been provided because she had not agreed with the decisions made at the November 8<sup>th</sup> meeting. The parent verbal agreed to the provision of the additional speech therapy services, but never provided a written agreement as requested by the school district. [R. Exh. #16; P. Exh. #3].

38. The additional speech therapy services authorized by the November 8, 2006 ARD Committee were not provided to the student because of the "stay-put" provision of the IDEA. [P. Exh. #3].

39. For the fall semester, 2006, the student received passing grades in all his academic classes.

40. On February 1, 2007, the student was given a "yellow card" cue after he crumpled his test and stomped on it repeatedly in front of the class. He then yelled, "What the hell do I care" for which he was given a "red card" and he left the room and went to his locker. While there, he told a teacher he had hit a student in the face and he was going to the office to call his father so he could go home. For this incident, he was counseled and completed his "hassle" log on how to deal with disappointments and appropriately accept comfort and concern from others. The hassle log was a strategy utilized when the student was given a red card. It was a means for the student to document and process what occurred, to identify the antecedent for his behavior so as to understand and learn from the experience. [R. Exh. #6; T. 08/15/07, pages 93-94].

41. On February 6, 2007, the student misplaced some note cards he had prepared and had an outburst. He called his case manager "a piece of crap," called the assistant principal "a freak" and made inappropriate remarks to another student. For this misconduct, the student was required to write letters of apology to those involved. [R. Exh. #1].

42. On February 12, 2007, the parent filed her third request for a due process hearing claiming that Katy ISD was failing to provide the increased level of speech therapy services recommended by the November 8, 2006 ARD Committee.

43. On February 14, 2007, the student got into an argument with another student in class and the student became intensely angry and both students were removed from the class and taken to the office. While there, the student pushed the other student and called him "a piece of crap." Because of this act of physical aggression, the incident

was processed as a Level 2 office referral and the student was assigned one and one half days of in-school suspension. [P. Exh. #2].

44. On February 26, 2007, the student received an \*\* on an English paper. He became agitated, began shouting and tore up his paper in front of the class. He was sent to a cool-off room where he conferenced with his case manager on dealing with disappointment and strategies to deal with perfectionism.

45. On March 1, 2007, a substitute teacher observed the student making physical contact with another student. The student claimed the other student had insulted him \*\*. The student went to his cool-off room with his case manager and called his mother and asked repeatedly that she come and get him. The case manager requested that the parent not intervene but to let her process the incident with the student. After applying some relaxation techniques, she processed the incident with the student. The student received two days of in-school suspension for this incident. [R. Exh. #6; P. Exh. #41, 43].

46. \*\*, the school had a \*\* program whereby students could purchase a ticket to go see a faculty/student volleyball game and if they had not had any issues with discipline that week, they would be allowed to attend. On that day the student \*\*. However, earlier in the day he had physical contact with another student, knocking him down in the hallway, which had resulted in his mother coming to school to calm him down. School administration was in the process of investigating the incident in the hallway and therefore the principal did not allow the student \*\*. Instead, he was to attend his advisory class. His response was to state that he believed he was being punished because his mother was suing the district. However, removal of reinforcers was consistent with the student's behavior intervention. The student also stated his intent to leave the campus at which time a school administrator responded that the police would be called if he left the campus. [T. 08/15/07, page 112].

47. The student did not return to school after spring break. Instead, the student was withdrawn from Katy ISD by his parent on March 19, 2007, because she believed the student was having behavioral incidents that were not being properly addressed by school staff and because of concern regarding the student's safety. Additionally, the parent withdrew the student over concerns that the school would ultimately bring criminal charges against the student for conduct related to his disability. This concern was reinforced by the fact that the parent is in law enforcement.

48. Prior to his withdrawal, the parent did not notify the school district of their plans to place the student in home schooling, a private setting under Texas law, nor did they indicate that they wished the District to pay for his private home schooling. [T. 08/14/07 page 138; P. Exh. #50].

49. At the time the student was withdrawn from Katy ISD, he had passing grades in all of his classes. [R. Exh. #52].

50. After withdrawing the student from Katy ISD, the parent incurred \$924.13 in private educational costs for his computer on-line courses and books and for the costs of one field trip to the State Capital. [P. Exh. #56].

51. On May 21, 2007, the parent filed her fourth due process complaint alleging the continued implementation by Katy ISD of an inappropriate behavior intervention plan for the student since September, 2006. In the complaint, the parent claimed that as a result of an inappropriate educational program, the student had been removed from school and the parent sought as relief, reimbursement of the student's private educational costs.

52. The student's behavior intervention plan in effect from August 10, 2006 through March 19, 2007 was appropriate. It was individualized on the basis of current assessment and performance; and it was to be carried out in a coordinated and collaborative manner by key stakeholders. It was being implemented in the least restrictive environment and despite some difficulties and set-backs, it was successful in diminishing and/or controlling the student's behaviors so as to allow him to make positive academic and nonacademic gains in the general education setting.

53. The student was held to the same Student Code of Conduct as other non-disabled students. [T. 06/04/07, page 141]. Disciplinary offenses in the Student Code of Conduct are categorized into five levels which identify sample offenses and possible disciplinary options available to the teacher or administrators. Level one offenses are addressed by the classroom teacher and examples are being tardy to class, running or making excessive noise, neglecting to bring required materials to class, failing to follow classroom rules, throwing objects or passing unauthorized notes, horseplay or scuffling (not fighting), etc. The disciplinary options for these minor infractions involve detentions, temporary removal from class, special assignment or duties, telephone call or note to parent, verbal reprimand, etc. Level two offenses are more serious and are handled by school administrators. Examples include using inappropriate language; failing to comply with directives of staff; being disrespectful; physically contacting another student creating a disruptive environment; creating or participating in a disturbance; cheating, etc. The disciplinary options for level two offenses are more severe and may include in-school and out-of school suspensions, exclusion from extracurricular activities, parent call or conference, etc. Level three offenses are even more serious and include disruptions of the school environment or educational process, using profane, vulgar, obscene or threatening language or gestures, using ethnic or racial slurs, fighting or encouraging or promoting a fight, hazing, harassing, stalking, bullying, etc. Disciplinary options for level three offenses include an off-campus disciplinary alternative educational placement (DAEP). The Student Code of Conduct also provides that school officials shall notify local law enforcement if they suspect that criminal acts have occurred on school property or at a school-sponsored event. [R. Exh. #51].

54. The student has the intellectual capacity and is capable of understanding and complying with the Student Code of Conduct.

55. Although the student was expected to adhere to the Student Code of Conduct, school administrators properly used discretion in determining what consequences would be assigned to the student for misconduct related to his disabilities, in conjunction with his behavior intervention plan. Consequently, behaviors of the student that could have resulted in the student being suspended or placed in a discipline alternative educational placement were appropriately handled by school administrators utilizing in-school suspensions.

56. The parent attended and was an equal participant in all ARD Committee meetings conducted involving the student's 2006-2007 IEPs.

57. The disciplinary consequences given the student during the 2006-2007 school year were appropriate in relationship to the infraction and were in accordance with the student's behavior intervention plan and the Student Code of Conduct. At no time did the disciplinary consequences constitute a change in the student's educational placement. The student had been assigned and served 7 days of in-school suspension during the 2006-2007 school year, through March 5, 2007.

58. The IDEA does not specifically exclude children with disabilities from receiving disciplinary consequences for misbehavior related to their disabilities.

59. The student was not subjected to bullying and was provided with a safe learning environment during the 2006-2007 school year. Katy ISD properly investigated all allegations of bullying and determined that bullying of the student had not taken place. Additionally, Katy ISD took appropriate steps to better supervise and protect the student in his physical education class and in the hallways to promote a safe learning environment for the student.

60. The student's IEPs, including his behavior intervention plan, as developed and implement during the 2006-2007 school year was appropriate and reasonably calculated to confer an educational benefit on the student.

61. Although the student's IEPs and behavior intervention plan may have possibly been improved by the inclusion of additional positive supports and strategies as suggested by Dr. \*\*, the overall plan as developed and implemented by Katy ISD staff was successful in controlling the student's behaviors to the extent that he was able to be maintained and educated in the general education environment and receive educational benefit from his instruction.

### **Discussion**

Four separate due process complaints brought by the parent against Katy ISD were consolidated for administrative expediency. The Petitioner bears the burden of proof on each issue raised in this consolidated proceeding. *Schaeffer v. Weast*, 126 S. Ct. 528 (U.S. 2005); *Adam J. ex rel. Robert J. v. Keller ISD*, 328 F.3d 804, 806 (5<sup>th</sup> Cir. 2003); *Cypress Fairbanks ISD v. Michael F.*, 118 F.3d 245, 252 (5<sup>th</sup> Cir. 1997).

In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court established a two-part test for determining whether a school district has provided a free appropriate public education (FAPE) to a student under the IDEA: 1) has the district complied with the procedures set forth in the IDEA; and 2) is the individual education plan (IEP) developed reasonably calculated to confer educational benefit on the student.

The Fifth Circuit has established criteria for determining when an IEP is reasonably calculated to confer educational benefit. In *Cypress Fairbanks ISD v. Michael F.*, the Fifth Circuit set forth four factors "that can serve as indicators of whether an IEP is reasonably calculated to provide meaningful educational benefit." *Michael F.*, 118 F.3d 245, 249 (5<sup>th</sup> Cir. 1997):

- The IEP is individualized on the basis of current assessment and performance;
- The IEP is to be carried out in a coordinated and collaborative manner by key stakeholders;
- The IEP is to be implemented in the least restrictive environment; and
- The IEP results in positive academic and/or non-academic benefit.

The free appropriate public education proffered in an IEP need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from instruction. The IDEA guarantees only a basic floor of opportunity, consisting of specialized instruction and related services which are individually designed to provide educational benefit. *Adam J.*, 328 F.3d at 808.

To prevail on a claim under the IDEA, a party challenging the implementation of an IEP "must show more than a *de minimus* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant" provisions of the IEP. This approach afford the school district some flexibility in implementing IEPs, but it still holds them accountable for material failures and for providing the disabled child a meaningful educational benefit. *Houston ISD v. Bobby R.*, 200 F.3d 341, 349 (5<sup>th</sup> Cir. 2000).

If a procedural violation is alleged, a hearing officer may find a student did not receive FAPE only if the procedural violation impeded the student's right to FAPE, significantly impeded the parent's opportunity to participate in the educational decision-making process or caused a deprivation of educational benefit. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). The hearing officer's determination of whether a student received FAPE must be based on substantive grounds. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(1).

## **Behavior Intervention Plan**

The primary complaint in these proceedings involves the appropriateness of the student's behavior intervention plan. Petitioner contends that the student was denied a free appropriate public education due, in part, from the lack of an appropriately developed and implemented behavior intervention plan. Petitioner argues that the student's behavior intervention plan was inappropriate because it did not specify the contingencies and reinforcers to apply to particular behaviors, because it did not include sufficient positive intervention strategies and support and because it did not supersede the Student Code of Conduct. Petitioner argues that the student was not capable of complying with the Student Code of Conduct, especially when upset.

Specifically, the issues identified in the various complaints as they relate to the appropriateness of the student's behavior intervention plan are as follows:

Whether Katy ISD refused to provide the student with an appropriate behavior intervention plan?

Whether the student was wrongfully disciplined for misconduct that occurred while he did not have a behavior intervention plan in place?

Whether the student was wrongfully excluded from becoming a member of the National Junior Honor Society due to his behaviors?

Whether the student's behavior intervention plan was appropriate?

Whether the student was punished for behaviors related to his disability and whether student was set up for failure?

Whether there are specific strategies in the student's individualized education plan and behavior intervention plan to promote positive behaviors?

Whether student was taught new methods?

Whether there are only punishment interventions in student's behavior intervention plan?

Whether Katy ISD designated a "mentor" or "safe place" as tools to assist the student with behavior?

Whether there were any instructions or directions in student's behavior intervention plan to allow professionals working with the student to use as a reference or guide so that appropriate redirection of his behavior could occur?

I find that Petitioner failed to establish by a preponderance of the evidence that the student’s behavior intervention plan was inappropriate.

A functional behavioral assessment of the student was completed by Katy ISD on February 22, 2006 and was included as part of the ARD Committee documentation at the May 18, 2006 ARD Committee meeting. The functional behavioral assessment identified three areas of concern regarding the student’s behavior – verbal aggression in stressful situations, physical aggression in stressful situations and failure to organize, complete or turn in completed assignments. Based on this functional behavioral assessment, the ARD Committee developed the following behavior intervention plan for implementation from August 10, 2006 to May 23, 2007:

<b>Inappropriate Behavior</b>	<b>Prevention Techniques</b>	<b>Replacement Behavior</b>	<b>Teaching Strategies</b>	<b>Reinforcement Strategies</b>	<b>Consequences</b>
What is the behavior that needs to be changed?	What strategies will be implemented to prevent the inappropriate behavior from occurring?	What appropriate behavior will be targeted to replace the inappropriate behavior? (indicate mastery criteria)	What methods will be used to teach the student the appropriate replacement behavior?	What techniques will be used to reinforce the occurrence of the replacement behavior?	What will be the consequences to the student for engaging in this inappropriate behavior?
Verbal aggression-profanity, threats toward students, teachers and school property	Visual cues, self-calming strategies, journaling negative feelings when they arise, organization strategies, location for cooling off	Respond to visual cues, move to cool-off area when stressed, journal negative feelings when stressed, list alternative vocabulary to express negative feelings	Social autopsies, hassle logs, role play, opportunity to self-initiate working in an alternative setting when stressed	Verbal praise, activity reinforcers, tangible rewards, special privileges, positive parent contacts	Non-verbal cue, removal to alternate setting, loss of reinforcer, written apology, after school detention, office referral  Ignore low level behaviors (sic), comments private
Physical aggression – punching school property, slamming doors, tossing desks/chairs, throwing objects, crumpling paper and throwing paper, slamming down books/materials	Visual cues, self-calming strategies, remove self to calming area	Take frustrations out on a bean bag pillow, journal, respond to visual cues, remove self from situation to calming area	Social autopsies, hassle logs, role play, opportunity to self-initiate, working in alternative setting when stressed	Verbal praise, activity reinforcers, tangible rewards, special privileges, positive parent contacts	Non-verbal cue, removal to alternate setting, loss of reinforcer, written apology, restitution, after school detention, office referral
Failure to organize, locate, complete and turn in work	Daily use of tracker by student, teacher check accuracy, visual cues, weekly grade checks, student/teacher review tracker, daily in advisory	Student write in tracker each period, student pack necessary materials to complete work, student locate in (sic) turn in work	Use visual cues reminders, fade verbal/physical prompt, homework folder, use of tracker/planner	Verbal praise, activity reinforcers, tangible rewards, special privileges, positive parent contacts	Re-do assignment and turn it in, loss of reinforcer

Petitioner failed to present sufficient evidence to establish that the student’s behavior intervention plan was in some manner inappropriate. The purpose of the student’s behavior intervention plan was to sufficiently control those behaviors that interfered with his ability to be appropriately educated in his general education classes. The only expert testimony presented by Petitioner related to the inappropriateness of the

behavior intervention plan was that of Dr. \*\*. He opined that it should have included more positive reinforcers, particularly in the area involving use of the colored cards. [T. 06/04/07, pages 85-86.]. It was Dr. \*\*’s opinion that positive consequences change behaviors, not negative consequences, and at best, negative consequences in combination with positive consequences would help. However, I find his testimony of suggestions for improving the behavior intervention plan did not establish that the plan was inappropriate, either in design or as implemented. The plan, as designed, included use of positive supports, including verbal praise, and positive reinforcers.<sup>2</sup> The plan, as implemented, was sufficient to maintain the student in the general educational environment to the extent that he received high achieving passing grades in all of his academic classes. As with an IEP, a perfectly designed behavior intervention plan or one designed to maximize the student’s potential is not the IDEA standard. Instead, the IDEA only requires an “appropriately” designed plan, that is, one that, when necessary, will assist a student in managing his or her behavior so they can be successfully educated in the least restrictive environment.

In response to the specific issues alleged, I find no evidence in the record that Katy ISD refused to provide the student with an appropriate behavior intervention plan. As indicated, the plan could possibly have been modified and improved by including more positive reinforcers and supports as suggested by Dr. \*\*, but the plan, as designed and implemented was generally successful in maintaining the student in his regular classrooms. Although the student served seven days of in-school suspension for more serious forms of misconduct, these temporary removals were reasonably expected due to the severity of the student’s disabilities and these temporary removals were handled professionally and appropriately by school district staff. In fact, the evidence presented established a high degree of competency by the student’s teachers and staff, and the overall educational program provided to the student was quite laudable. Moreover, contrary to Petitioner’s allegations, the behavior intervention plan did not contain only punishment interventions. As indicated, it included positive verbal praise and other strategies. The plan also included a safe place, a cooling off place for the student to go where staff could counsel with the student and process the events resulting in his removal from class.

I find no evidence in the record, as alleged, that Katy ISD wrongfully disciplined the student for misconduct related to his disability when there was no behavior intervention plan in effect. First, there is no evidence that at any during the 2006-2007 school year the student did not have in effect a behavior intervention plan. Second, there is no evidence that the student was wrongfully disciplined. Third, there is no prohibition in the IDEA that prevents Katy ISD from disciplining the student for misconduct related to his disability. The only limitation placed on school districts related to the discipline of a child with disabilities involves decisions to change the student’s educational placement for violations of the student code of conduct. See 20 U.S.C. §1415 (k). In the instant action, there was no evidence of any attempt by Katy ISD to change the student’s educational placement.

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<sup>2</sup> 34 C.F.R. §300.324 requires ARD Committees to consider use of positive behavior interventions and supports and other strategies, to address behavior that impedes the child’s learning or that of others.

With regard to the Petitioner's arguments that somehow the behavior intervention plan was deficient because every contingency or reinforcer possible was not set forth under the plan, neither the IDEA nor its implementing regulations specify what the content of a proper behavior intervention plan should be. In 2004, the Seventh Circuit Court of Appeals refused to "create out of whole cloth" any substantive standards for the structure of such plans. See *Alex R. v. Forrestville Valley Comm. Sch. Dist. #221*, 41 IDELR 146, 375 F.3d 603 (7<sup>th</sup> Cir. 2004). As the Court said in that case, "the District's behavioral intervention plan could not have fallen short of substantive criteria that do not exist . . . ." See also *T.W. v. Unified Sch. Dist. No. 259, Wichita, Kansas*, 43 IDELR 187, 136 Fed. App. 122 (10<sup>th</sup> Cir. 2005) (same); *Board of Educ. of Fayette County, Kentucky v. L.M.*, 45 IDELR 95 (E.D. Ky. 2006) (same); *Oxford Area Sch. Dist.*, 46 IDELR 113 n. 80 (SEA PA 2006) (same); *Maine School Admin. Dist. No. 6*, 46 IDELR 239 (SEA ME 2006) (same).

Petitioner further alleges that the student was improperly excluded from becoming a member of the National Junior Honor Society due to behaviors related to his disabilities. The IDEA provides that school districts provide to children with disabilities nonacademic and extracurricular services and activities in the manner necessary to afford such children an equal opportunity for participation in those services and activities. 34 C.F.R. §300.107(a) and (b). I find no evidence the student was denied participation in the National Junior Honor Society. On the contrary, the evidence established that the student was a member of the National Junior Honor Society at the beginning of the 2006-2007 school year. The evidence further confirmed that the National Junior Honor Society local board placed the student on probation in September, 2006, when the student received two office referrals. Thereafter, it was the student who declined to further participate in the National Junior Honor Society. Accordingly, there is no evidence that the student was ever improperly excluded from becoming a member of the National Junior Honor Society due to behaviors related to his disabilities. I decline to make any ruling on whether behaviors related to his disabilities resulted in a constructive termination of his membership as such an issue was not raised in this proceeding. See 20 U.S.C. §1415 (f)(3)(B) which limits the issues raised in a due process hearing to those contained in the due process notice.

It is also noted that the parent was quite concerned over the frequency and continued existence of certain aggressive behaviors exhibited by the student at school. The parent, being in the field of law enforcement, is aware of the potential for criminal charges to be filed against her child for some of the more serious acts of physical aggression he displayed at school. Petitioner acknowledges that school officials had not previously contacted law enforcement authorities, but she became concerned when, on March 9, 2007, a school administrator mentioned to the student that the police would be called if the student left the campus. This potential threat of police involvement was a factor in Petitioner's removal of the student from Katy ISD in March, 2007. The IDEA does not prohibit a school district from reporting an alleged crime committed by a child with a disability to appropriate authorities nor does it prevent State law enforcement or judicial authorities from exercising their responsibilities with regard to the application of Federal or State law to crimes committed by a child with a disability. See 20 U.S.C.

§1415 (k)(6). Accordingly, the plight of the parent is certainly understandable. No parent wants to place their child in an environment where potentially they could be subjected to criminal prosecution for acts related to their disabilities. But that is the current status of the law, even for minor criminal offenses. Therefore, a school district's right and ability to report alleged crimes by children with disabilities to appropriate authorities is neither a component of nor a factor in determining whether a student's IEP or behavior intervention plan is appropriate and the removal of a child from school solely for this reason is not actionable under the IDEA.

### **Social Skills Training**

Petitioner also contends that the student's IEP lacked appropriate social skills training. In particular, Petitioner raised the following issues in this proceeding:

Whether the social skills training provided to the student was appropriate?

Whether Katy ISD was responsible for the student's failure to receive social skills training?

The evidence established that the social skills training provided to the student during the 2006-2007 school year was appropriate.

Petitioner failed to present sufficient evidence to establish that the social skills portion of the student's IEP was inappropriate or that the student was deprived of social skill training by Katy ISD. The only competent evidence presented by Petitioner contesting the appropriateness of the student's social skills training program was the testimony and report of Dr. \*\*. Again, however, Dr. \*\*'s opinions regarding the social skill training indicated only that it could be improved through implementation of his recommendations, not that the program was inappropriate. The evidence established that as part of the student's social skills program, he was to attend CHAT group four times per six weeks of school. The purpose of CHAT group was to work on the student's pragmatics in a group environment, to work on learning to control the student's emotions and to work on interacting appropriately with peers and adults. These areas of need were appropriately addressed by the speech therapist and school psychologist in the CHAT group. The evidence elicited from the student's teachers, case manager, speech therapist and the school psychologist all indicated that the student was making good progress and gains in the areas of social skills. In fact, Dr. \*\* mentioned in his report how well the teachers and students had accept the student. Accordingly, I find that Petitioner failed to carry its burden of establishing by a preponderance of the evidence that the social skills portion of the student's IEP for the 2006-2007 school year was in some manner inappropriate. On the contrary, I find the student's IEPs, including his social skills program, as developed and implement during the 2006-2007 school year, was reasonably calculated and did confer an educational benefit on the student and thereby provided the student with a free appropriate public education.

## Safe Learning Environment

The parent contends that the student was bullied by other students and that Katy ISD failed to take appropriate action to adequately protect the student.

The parent does not cite any statutory authority or case law recognizing a cause of action against a school district for allowing an unsafe or hostile educational environment under the IDEA, but it is presumed that such a claim could be cognizable if a student was subjected to such an oppressive educational environment that it hindered the student's access to an appropriate instruction to such a degree that it denied him a free appropriate public education.<sup>3</sup> However, to the extent that such a claim is a general allegation that a student was bullied or otherwise subjected to hostility from others on a school campus, such a claim would not fall within the IDEA. Other jurisdictions have recognized potential causes of actions under other federal statutes against school districts for not maintaining a safe learning environment and/or for allowing bullying to take place without appropriate intervention. See *K.R. v. School District of Philadelphia*, 48 IDELR 216 (E.D. Pa Sept. 17, 2007); *Walden v. Moffett*, 46 IDELR 159 (E.D. Ca. August 28, 2006). However, as indicated, to state any potential cognizable cause of action for an unsafe educational environment under the IDEA, to the extent one exists, the parent would have to, at minimum, present facts that showed the student was in some manner denied access to a FAPE because of the existence of an unsafe educational environment. See *Gagliardo v. Arlington Central School District*, 418 F. Supp. 559, 45 IDELR 119 (S.D. NY March 3, 2006). The parent failed to present any such evidence. The only evidence presented regarding "bullying" of the student was an incident in October 2006, wherein the student was hit in the month. The school district immediately and appropriately investigated the incident and determined that "bullying" had not occurred but that the student had been injured during horseplay with another student. Other alleged incidents of bullying were not proven to have occurred. Accordingly, factually, Petitioner failed to establish that the student was a victim of bullying or otherwise subjected to an unsafe or hostile educational environment during the 2006-2007 school year.

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<sup>3</sup> An unsafe or hostile educational environment claim has been recognized in situations involving peer-to-peer sexual harassment in violation of Title IX. *Davis v. Monroe*, 526 U.S. 629, 650 (1999). The *Davis* Court held that a school district can be held liable if it is "deliberately indifferent" to peer sexual harassment and its response is "clearly unreasonable in light of the known circumstances." 526 U.S. at 648-49; see also *Gebser v. Lago Vista Independent Sch. Dist.*, [524 U.S. 274](#) (1998) (finding school district could be liable in damages under Title IX when it is deliberately indifferent to the known acts of sexual harassment by a teacher). However, school district liability for a general claim of unsafe or hostile educational environment under the IDEA has not been recognized or addressed by the U.S. Supreme Court or the Fifth Circuit. Hearing Officers in Texas and other jurisdictions have previously addressed issues involving bullying in IDEA proceedings under the context of a denial of FAPE. See for example, *Northside Independent School District*, 107 LRP 32247 (TEA Docket No. 245-SE-0606, January 5, 2007); *Peninsula School District*, 106 LRP 2245 (WA Docket Nos. 2003-SE-0161, 2003-SE-0163, March 3, 2004).

## **Physical Education Class Supports**

The parent brought a due process complaint against Katy ISD when the student was injured in his physical education class while unsupervised. The parent claims the student should have been supervised because of the extent of his disabilities. I find no evidence that the student required constant direct supervision by school staff throughout the school day. No such requirement was contained in his IEP. In fact, the student was allowed to move about the campus unsupervised. He wanted to be treated like other students; he was able to get to his classes in a timely manner and usually without difficulties. [T. 10/10/07, page 28]. The school district conducted an investigation into the incident and determined that the injury was due to horseplay. The school district thereafter undertook steps to insure that the student was better supervised during physical education class by limiting the amount of down time that the student would spend in the locker room, and relocating the student's locker to an area where it could be observed by the coaches. [R. Exh. #46; T. 10/10/07, page 172-182]. These were appropriate actions taken by the school district to address the problem. Accordingly, I find no violation of the IDEA or any denial of a FAPE to the student as a result of this alleged incident in the locker room.

## **Speech Therapy Services**

The parent filed a due process complaint in February, 2007, claiming that Katy ISD failed to provide the student with the additional speech therapy services approved by the November 8, 2006, ARD Committee.

When the November 8, 2006, ARD Committee determined that additional speech therapy services were warranted, a due process hearing was pending between the parties which invoked the "stay-put" provision of the IDEA.<sup>4</sup> Additionally, the parent had disagreed with the decisions of the ARD Committee. Consequently, the school district did not implement the additional speech therapy services. The parent testified that she gave verbal consent for the provision of these services at both the November 8, 2006, and the December 12, 2006, ARD Committee meetings, but that the school district refused to implement the additional services. The school district contended it had requested written consent from the parent to begin such services, but that the parent either refused or failed to provide such consent. [T. 10/11/07, pages 18-19].

The stay-put provision is clear and unequivocal. Unless both sides agree, the child is to remain in the then current educational placement. The stay-put provision not only extends to placement, but additionally, covers all programs and activities that are included in the student's IEP. Accordingly, without mutual consent of the parties to change the amount of the student's speech therapy services during the pendency of the hearing, the stay-put provision of the IDEA precluded Katy ISD from altering the amount of speech therapy services. There is no evidence that there was mutual agreement from

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<sup>4</sup> 20 U.S.C. §1415 (j) provides that except for discipline placements during an appeal, during the pendency of any proceeding conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child.

the parties to override the “stay-put” provision of the IDEA during the pendency of this hearing. Accordingly, stay-put applies and there is no denial of FAPE to the student as a result of the failure to provide the additional speech therapy services during the pendency of this hearing.

### **Lack of Equal ARD Participation**

The parent claims that although she attended and participated at ARD Committee meetings, she was not treated as an equal participant. There is a lack of evidence in the record supporting this claim. On the contrary, the parent attended and was an active and equal participant at all ARD Committee meetings held during the relevant time period from May 18, 2006 through March 19, 2007. Accordingly, I find no procedural violation of the IDEA or its implementing federal or state regulations relating to the parent’s right of participation at ARD Committee meetings.

### **Tuition Reimbursement**

The parent seeks reimbursement of the tuition and costs she incurred for the student’s home schooling after he was withdrawn from school on March 19, 2007.

The IDEA allows for reimbursement of private school placements by parents in limited circumstances. Specifically, the statute provides:

“(ii) Reimbursement for Private School Placement: If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.” *See* 20 U.S.C. §1412(a)(10)(C)(ii).

The IDEA also places limitation on reimbursement as follows:

“The cost of reimbursement described in clause (ii) may be reduced or denied –  
(I) if –

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense;  
or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

...

(III) upon a judicial finding of unreasonableness with respect to the action taken by the parents.” See 20 U.S.C. §1412(a)(10)(C)(iii).

Accordingly, to be entitled to reimbursement for educational costs of the student’s home school placement, the parent must prove by a preponderance of the evidence that Katy ISD failed to make available to the student a free appropriate public education in a timely manner.

As previously stated, the parent failed to establish by a preponderance of the evidence that Katy ISD had not made a free appropriate public education available to the child in a timely manner prior to his removal and home schooling. On the contrary, I have determined that the student’s IEP, including his behavior intervention plan for the 2006-2007 school year, was appropriate. It was individualized on the basis of the student’s assessment and performance, and it could be anticipated to provide positive academic and nonacademic benefits to the student and did, in fact, provide such academic and nonacademic benefits. *Cypress Fairbanks ISD v. Michael F.*, 118 F.3d 245, 252 (5<sup>th</sup> Cir. 1997).

Moreover, to be entitled to private school placement reimbursement, the parent must show that she timely provided the necessary prior notification to the school district or she must fall within one of the statutory exceptions. As for the prior notice requirement, I find that the parent failed to meet her evidentiary burden. The parent failed to establish that she provided Katy ISD with proper and timely notice of her intent to home school the student as required by the IDEA. The parent did not request an ARD Committee meeting prior to withdrawing the student from school and did not raise the issue of home schooling the student at school district expense at any previous ARD Committee meeting. Additionally, the parent did not furnish Katy ISD with 10 business day’s prior written notice that she was rejecting the placement proposed by the school district to provide a free appropriate public education to the student, including stating her concerns and her intent to home school the child at public expense. The evidence confirms that the parent gave school officials notice of her concerns about the student’s safety and of her withdrawal of the student from school on the day he was withdrawn, but she did not indicate she would be seeking payment for the costs of the home schooling from the school district.

Accordingly, the parent is not entitled to reimbursement for the expenses she incurred in home schooling the student since Katy ISD was providing FAPE to the student at the time he was withdrawn from school and because the parent failed to comply with the IDEA’s notice requirements for obtaining public reimbursement for the student’s home schooling costs.

## Conclusions of Law

1. The parent, being the party attacking the appropriateness of the IEP and behavior intervention plan developed by Katy ISD, bears the burden of showing why they are inappropriate under the IDEA. *Cypress-Fairbanks Indep, Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-48 (5th Cir. 1997).
2. Petitioner failed to meet her burden of establishing by a preponderance of the evidence that Katy ISD did not make a free appropriate education available to the student during the 2006-2007 school year.
3. The 2006-2007 IEPs developed by Katy ISD for the student, including the student's behavior intervention plan, was appropriate and provided the Petitioner meaningful educational benefit.
4. The 2006-2007 IEPs developed by Katy ISD for the student, including the student's behavior intervention plan, was reasonably calculated to, and through March 19, 2007, did confer educational benefit on the student.
5. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment." *See* 20 U.S.C. §1412(a)(10)(C)(ii).
6. When the parent withdrew the student from Katy ISD on March 19, 2007, the student's IEP in effect at that time was appropriate. It was reasonably calculated to provide the student with a meaningful educational benefit. *Cypress-Fairbanks Indep, Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-48 (5th Cir. 1997).
7. The cost of reimbursement may be reduced or denied if: (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa). 20 U.S.C. §1412(a)(10)(C)(iii).
8. The parent failed to establish that she provided Katy ISD with proper and timely notice of her intent to remove the student from Katy ISD and home school the student at school district expense as required by the IDEA. 20 U.S.C. §1412(a)(10)(C)(iii).
9. School district liability for a claim of an "unsafe or hostile educational environment" under the IDEA has not been recognized or addressed by the U.S. Supreme

Court or the Fifth Circuit. Presumably, such a claim could be cognizable if a student was subjected to an oppressive educational environment that hindered the student's access to an appropriate instruction to such a degree that it denied him a free appropriate public education. *See, e.g. Davis v. Monroe*, 526 U.S. 629, 650 (1999); *Gagliardo v. Arlington Central School District*, 418 F. Supp. 559, 45 IDELR 119 (S.D. NY March 3, 2006).

10. The facts of this case do not indicate that the student was subjected to such an oppressive, unsafe or hostile educational environment that it denied him a free appropriate public education. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S. Ct. 3034 (1982). 20 U.S.C. §1402 (9).

11. To prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000). Significant provisions of the student's 2006-2007 IEP had been followed by Katy ISD and the student did receive an educational benefit from his instruction. Katy ISD either provided the student with a free appropriate public education during the 2006-2007 school year or had in effect an IEP that was reasonably calculated to provide the student with a free appropriate public education.

12. The IDEA does not prohibit local educational agencies from reporting a crime committed by a child with a disability to appropriate authorities nor does it prevent State law enforcement or judicial authorities from exercising their responsibilities with regard to the application of Federal or State law to crimes committed by a child with a disability. See 20 U.S.C. §1415 (k)(6).

13. The ability of school officials to report alleged crimes by children with disabilities to appropriate authorities, even of those behaviors resulting in crimes are related to their disabilities, is not a component or factor when determining FAPE. See 20 U.S.C. §1415 (k)(6).

14. The additional speech therapy services authorized for the student at the November 8, 2006 ARD Committee meeting was not provided due to the "stay-put" provision of the IDEA. Katy ISD was not obligated to provide the student such services during the pendency of this due process hearing. 34 C.F.R. §§300.34, 300.518.

15. The parent had prior notice of and the right to participate in ARD Committee meetings regarding the student during the 2006-2007 school year and actively participated in each meeting. Katy ISD did not exclude the student's parent as an equal participant at ARD Committee meetings. 34 C.F.R. §§300.322(a) and (b).

**ORDER**

After due consideration of the record, the foregoing findings of fact and conclusions of law, I hereby ORDER that the all relief requested by Petitioner is DENIED.

SIGNED this 15th day of December 2007.

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James W. Holtz  
Special Education Hearing Officer

**NOTICE TO PARTIES**

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

CONSOLIDATED DOCKET NOS.

004-SE-0906  
039-SE-1006  
154-SE-1006  
246-SE- 0507

STUDENT BNF PARENT, Petitioner	§	BEFORE A DUE PROCESS
	§	
VS.	§	HEARING OFFICER FOR
	§	
KATY INDEPENDENT SCHOOL DISTRICT, Respondent	§	THE STATE OF TEXAS

**SYNOPSIS**

**Issue: Whether the social skills training provided to the student was appropriate?**

Held: For School District. Petitioner failed to present sufficient evidence to establish that the social skills portion of the student’s IEP was inappropriate or that the student was deprived of social skill training by Katy ISD

Cite: 34 C.F.R. §§300.101(a) and (c), 300.320(a)

**Issue: Whether Katy ISD was responsible for the student’s failure to receive social skills training?**

Held: For School District. Petitioner failed to present sufficient evidence to establish that the social skills portion of the student’s IEP was inappropriate or that the student was deprived of social skill training by Katy ISD. On the contrary, evidence showed that the student received appropriate social skills training pursuant to his IEP.

Cite: 34 C.F.R. §§300.101(a) and (c), 300.320(a)

**Issue: Whether Katy ISD excluded the student’s parent as an equal participant at ARD Committee meetings?**

Held: For School District. There was no evidence that the school district excluded the student’s parent as an equal participant at ARD Committee meetings. The parent attended and participated in all ARD Committee meetings related to the student’s 2006-2007 IEP

Cite: 34 C.F.R. §§300.322(a) and (b).

**Issue: Whether Katy ISD refused to provide the student with an appropriate behavior intervention plan?**

Held: For School District. There was no evidence of any “refusal” on the part of Katy ISD to provide the student with a behavior intervention plan. One was in effect during the 2006-2007 school year when the student was enrolled in Katy ISD. Katy ISD provided the student with a free appropriate public education during the 2006-2007 school year.

Cite: *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000); 20 U.S.C. §1415 (a)(1); 34 C.F.R. §§300.101(a) and (c), 300.320(a), 300.322(a) and (c).

**Issue: Whether the student was wrongfully disciplined for misconduct that occurred while he did not have a Behavior Intervention Plan in place?**

Held: For School District. There was no evidence presented of either the student being wrongfully disciplined or that there was a time when he did not have a behavior intervention plan in place. The behavior intervention plan was developed in May, 2006 and was effectively and appropriately implemented throughout the 2006-2007 year while the student attended public school. Katy ISD provided the student with a free appropriate public education during the 2006-2007 school year.

Cite: *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000); 20 U.S.C. §1415 (a)(1); 34 C.F.R. §§300.101(a) and (c), 300.320(a), 300.322(a) and (c), 300.535.

**Issue: Whether the student was wrongfully excluded from becoming a member of the National Junior Honor Society due to his behaviors?**

Held: For School District. There was no evidence that Katy ISD excluded the student from becoming a member of the National Junior Honor Society due to his behaviors. On the contrary, the evidence indicated the student withdrew or otherwise decided not to participate when he was put on probation for his behaviors. There was no finding of a denial of a free appropriate public education related to this issue.

Cite: *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000); 20 U.S.C. §1415 (a)(1); 34 C.F.R. §300.107(a) and (b).

**Issue: Whether the student’s behavior intervention plan was appropriate?**

Held: For School District. The behavior intervention plan designed and implemented by Katy ISD was appropriate. The plan was sufficient to maintain the student in the general educational environment to the extent that he received passing grades in all of his academic classes.

Cite: *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000); 20 U.S.C. §1415 (a)(1); 34 C.F.R. §§300.101(a) and (c), 300.320(a), 300.322(a) and (c), 300.535.

**Issue: Whether the student was punished for behaviors related to his disability and whether student was set up for failure?**

Held: For School District. There is no provision in the IDEA that prohibits a school district from taking disciplinary action against a student with disabilities even for behaviors related to his disability. Any “punishment” or disciplinary consequences given to the student for behaviors related to his disability were in accordance with the student’s behavior intervention plan and were appropriate responses to the behaviors. Katy ISD provided the student with a free appropriate public education during the 2006-2007 school year.

Cite: *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000); 20 U.S.C. §1415 (a)(1); 34 C.F.R. §300.535

**Issue: Whether student was provided with a safe learning environment?**

Held: For School District. The facts of this case do not indicate that the student was subjected to such an oppressive, unsafe or hostile educational environment that it denied him a free appropriate public education.

Cite: *See, e.g. Davis v. Monroe*, 526 U.S. 629, 650 (1999); *Board of Education of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S. Ct. 3034 (1982); *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000); 20 U.S.C. §1415 (a)(1); 34 C.F.R. §§300.101(a) and (c), 300.320(a).

**Issue: Whether student is taught new methods?**

Held: For School District. The behavior intervention plan was designed based on then current assessment data, including a functional behavioral assessment. The plan was properly implement and was successful in that the student was maintained in the general education setting and was achieving passing grades in all his grade level academic classes. The student’s behavior intervention plan was appropriately designed and implemented by Katy ISD.

Cite: *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000); 20 U.S.C. §1415 (a)(1); 34 C.F.R. §§300.101(a) and (c), 300.320(a), 300.322(a) and (c).

**Issue: Whether there are specific strategies in the student’s individualized education plan and behavior intervention plan to promote positive behaviors?**

Held: For School District. The student's IEPs and behavior intervention plan were properly designed based on then current assessment data and contained specific strategies to promote positive behaviors.

Cite: 34 C.F.R. §§300.101(a) and (c), 300.320(a), 300.322(a) and (c).

**Issue: Whether there are only punishment interventions in student's behavior intervention plan?**

Held: For School District. The student's behavior intervention plan was properly designed based on then current assessment data and contained specific strategies to promote positive behaviors, including verbal praise by teachers and the use of positive reinforcers. It did not only include punishment interventions.

Cite: *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000); 20 U.S.C. §1415 (a)(1); 34 C.F.R. §300.535

**Issue: Whether Katy ISD designated a "mentor" or "safe place" as tools to assist the student with behavior?**

Held: For School District. The student had a safe place, a cooling off location that he could access whenever he felt the need. Additionally, the student had a case manager to oversee his program and provide assistance to teachers and administrators. The educational program as designed and implemented by Katy ISD for the student was appropriate and provided the student with a free appropriate public education.

Cite: *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000); 20 U.S.C. §1415 (a)(1); 34 C.F.R. §§300.101(a) and (c), 300.320(a), 300.322(a) and (c).

**Issue: Whether there were any instructions or directions in student's behavior intervention plan to allow professionals working with the student to use as a reference or guide so that appropriate redirection of his behavior could occur?**

Held: For School District. The student's teachers and staff were provided with training in implementing the student's behavior intervention plan. The plan itself included guidance for its implementation. Although the plan may have been less specific than the parent desired, the plan appropriately allowed school some flexibility in selecting the consequences for various types of behaviors. The plan was appropriately designed and implemented by Katy ISD.

Cite: *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000); 20 U.S.C. §1415 (a)(1); 34 C.F.R. §§300.101(a) and (c), 300.320(a), 300.322(a) and (c).

**Issue: Whether Katy ISD failed to provide the student with appropriate speech therapy services?**

Held: For School District: The additional speech therapy services authorized for the student at the November, 2006 ARD Committee meeting was not implemented due to the “stay-put” provision of the IDEA. Katy ISD was not obligated to provide the student such services during the pendency of this due process hearing.

Cite: 34 C.F.R. §§300.34, 300.518

**Issue: Whether Parent is entitled to tuition reimbursement from school district for a unilateral home school placement?**

Held: For School District. The school district had in effect during the 2006-2007 school year an IEP and behavior intervention plan reasonably calculated to confer upon the student an educational benefit. Additionally, the parent failed to provide timely notice to the school district of intent to home school the student at public expense.

Cite: 20 U.S.C. §1412(a)(10)(C)(ii) and (iii); 34 C.F.R. §300.148

**Issue: Whether School District denied student a free appropriate public education during the 2006-2007 school year?**

Held: For School District: To prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. Significant provisions of the student’s 2006-2007 IEP, including the behavior intervention plan had been followed by Katy ISD and the student did receive an educational benefit from his instruction. Katy ISD provided the student with a free appropriate public education during the 2006-2007 school year.

Cite: *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000). 20 U.S.C. §1415 (a)(1). 34 C.F.R. §§ 300.17, 34 C.F.R. §§300.101(a) and (c), 300.320(a), 300.322(a) and (c).