

TEA DOCKET NO. 177-SE-0307

STUDENT BNF Parent	§	BEFORE A SPECIAL
Petitioner	§	EDUCATION
	§	
v.	§	
	§	HEARING OFFICER FOR THE
AUSTIN	§	
INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	STATE OF TEXAS

DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Petitioner, STUDENT (hereinafter referred to as Petitioner or STUDENT), brings this action against Respondent Austin Independent School District (hereinafter Respondent or AISD) under the Individuals With Disabilities Education Act (hereinafter IDEA), 20 U.S.C. § 1400 *et. seq.*

Petitioner appeared *pro se* in this proceeding through his next friend, PARENT (hereinafter referred to as MOTHER). Leslie McCollom of Austin, Texas represents Respondent in this matter.

Petitioner raises the following issues for resolution at due process:

Whether Respondent failed to provide STUDENT with a free appropriate public education (hereinafter FAPE) in the following particulars: 1) by failing to provide a Full Individual Evaluation (hereinafter FIE) that identified all areas of disability; 2) by failing to properly and timely identify STUDENT'S disability; 3) by failing to properly and timely serve Petitioner as a student with a disability; 4) by failing to provide an appropriate Behavior Intervention Plan (hereinafter BIP) and failing to recognize STUDENT'S behaviors as manifestations of his disability; and 5) by STUDENT'S failure to make adequate progress, either academically or behaviorally.

For relief, Petitioner seeks reimbursement for private residential placement at **, Alabama (hereinafter **) from the date of STUDENT'S placement there (**) through his graduation from **, which is anticipated to be at the conclusion of the ** school year. Petitioner further seeks reimbursement for private testing obtained by the parents in March 2007 at the ** Treatment Center in San Marcos, Texas.

PROCEDURAL HISTORY

Petitioner filed his request for due process with the Texas Education Agency on March 12, 2007. On March 26, 2007, Respondent filed a Challenge to the Sufficiency of Petitioner's Request for Due Process, which was granted on the grounds that Petitioner failed to set forth facts that related to the problems described in his complaint. Petitioner was granted permission to amend his request for due process by April 9, 2007 and Petitioner timely amended his request. The Hearing Officer conducted a pre-hearing conference on May 10, 2007. The due process hearing was conducted on June 4, 5, 6, 12, and 13. By agreement, the parties filed post-hearing briefs on July 9, 2007. This decision of the Hearing Officer is due July 23, 2007

FINDINGS OF FACT

1. STUDENT is a **-year-old STUDENT who was enrolled in AISD at ** School from the beginning of his ** grade year in August 2004 until his withdrawal from school by his parents on March 19, 2007.
2. STUDENT lives primarily with his biological mother, but also lives part-time with his biological father. STUDENT'S father lives within the jurisdictional boundaries of AISD, a political subdivision of the State of Texas and a duly incorporated school district. AISD is the district responsible for providing STUDENT with a FAPE under the provisions of IDEA.
3. Petitioner filed the instant request for due process on March 12, 2007.
4. Prior to the 2004-2005 school year Petitioner attended private school except for one year- ** grade. He had never been evaluated or found eligible for services under the IDEA, though had been evaluated by private psychologists in connection with developmental delays and parental concerns with learning issues such as poor organization, motivation, and integration/understanding of learned material.
5. In May 1995, at age **, Dr. ** completed a psychological assessment of STUDENT and diagnosed him with Developmental Coordination Disorder and Attention Deficit Hyperactivity Disorder. Dr. ** also noted a significant discrepancy between STUDENT'S verbal and performance IQ scores, which was suggestive of a possible Non Verbal Learning Disability (NVLD), but which could not be conclusively diagnosed due to STUDENT'S young age.
6. In November 2000, Dr. ** completed a second psychological assessment of STUDENT at age **, ** grade. In the area of intellectual and cognitive functioning, Dr. ** found STUDENT to have a propensity for difficulties in sustained attention and certain areas, but also to have a level of intellectual efficiency and above average skills in Reading and Mathematics, such that he should do well in school if motivated. In the area of emotional functioning, Dr. ** found no specific indication of depression, anxiety, or impulsivity and no

deficits in receptive or expressive language functions, but did find a tendency for worry, uncertainty, and pessimism. Dr. **’s only diagnosis was Attention Deficit Disorder (Inattentive Type)—Controlled With Medication.

7. In addition to the issues identified in the psychological assessments, STUDENT experienced anxiety, obsessive-compulsive behaviors, depression, and social difficulties in the form of rejection and teasing. This constellation of issues impacted STUDENT’S success at school, particularly during ** and ** grades, with fluctuating grades, poor attitude and motivation at times, poor social relationships, and behavioral issues that caused him to be asked not to return to his private school for ** grade.
8. At the time of STUDENT’S enrollment at ** School, he was under the care of both a psychologist and a psychiatrist for therapy and medication management. Although mother was aware of the existence of §504 services, she agreed, at the urging of STUDENT and his therapist, to allow STUDENT a chance to “make it on his own” before initiating such supports.
9. Shortly after the beginning of the ** grade year, mother became concerned about poor peer influences on STUDENT, in particular with the use of marijuana. Mother believed that STUDENT was especially susceptible to peer pressure due to his history of social difficulties, which created in him a need for acceptance. She contacted one of STUDENT’S teachers and his counselor for assistance with the issue on or about September 1, 2004. No action was taken and on September 9, 2004, STUDENT was caught with a group of students using marijuana during lunch and suspended for 3 days to the Alternative Learning Center (hereinafter ALC).
10. In the context of discussing this disciplinary incident with the parent, ** SCHOOL personnel learned of STUDENT’S prior history and areas of concern. As a result, a §504 evaluation was initiated to explore additional supports to assist STUDENT in making more positive choices. A §504 meeting was scheduled for November 5, 2004 and teacher reports were solicited to provide input.
11. On October 25, 2004, STUDENT was suspended for 2 days due to his involvement with another STUDENT in a prank of calling “911” from a school pay phone. As a result of this disciplinary incident, STUDENT was placed on a behavior contract.
12. At the initial §504 meeting, teacher reports were reviewed, along with the assessments from Drs. ** and **. Teacher information indicated that STUDENT was doing fine, with the exception of one teacher who noted a lack of effort and another who indicated failing grade in pre-AP Algebra. Because the assessments were over three years old, Mother agreed to obtain a current evaluation and the committee recessed to allow time for that to occur.

13. Mother obtained a neuropsychological assessment from Dr. ** of the Austin Neurological Clinic in January 2005. The §504 committee reconvened on February 4, 2005 to consider the results of the assessment and STUDENT'S eligibility for § 504 services.
14. **'s assessment of STUDENT yielded the following diagnoses: Learning Disability, Not Otherwise Specified (NVLD); ADHD; Communication Disorder, Not Otherwise Specified (Auditory Processing Disorder); and Depression.
15. ** noted in the evaluation clinically significant levels of depression and anxiety, which were directly linked to STUDENT'S lack of motivation and academic interest.
16. She also discussed that some of the behaviors associated with STUDENT'S NVLD were also consistent with Asperger's Disorder. Although ** concluded that a diagnosis of NVLD was more appropriate, she indicated that an Asperger's diagnosis should be reconsidered in future evaluations. ** confirmed the findings of prior assessments that STUDENT'S overall cognitive abilities are in the average range, STUDENT demonstrates good performance on achievement tests, and that some skills are significantly above average.
17. ** recommended numerous modifications and supports to enable STUDENT to be more successful in school: note-taking assistance, additional time for exams, shell outlines of lectures, a planner or calendar, preferential seating, counseling, after school tutoring for homework support, study skills course, social skills intervention, written instructions in addition to oral ones, and the opportunity to take tests in a reduced distraction environment.
18. The §504 committee found STUDENT eligible for services based on Asperger's (primary eligibility), ADHD, and auditory processing. The committee recommended extended time for test and quizzes, access to the ** Learning Center (hereinafter TLC) for taking tests and for independent work, a schedule change to regular Algebra, and a classroom observation for further evaluation.
19. Despite the modifications in place for STUDENT, he rarely used the TLC, did not receive class notes or outlines, and did not access the additional time for testing.
20. STUDENT completed the remainder of his ** year without any disciplinary incidents and with passing grades in all classes and on all portions of the TAKS test. STUDENT'S GPA at the end of his freshman year was **.
21. STUDENT returned to ** SCHOOL for his ** grade year, the 2005-2006 school year. A § 504 re-evaluation meeting occurred on October 3, 2005. Teacher reports indicated that STUDENT was doing fine, but parents expressed concerns that STUDENT'S grades were beginning to drop and that teachers were not meeting STUDENT'S needs. In addition, parents expressed the need for STUDENT to work on social skills in light of his diagnoses of NVLD and possible Asperger's.

22. The § 504 committee recommended these supports for STUDENT in October 2005: use of a planner, with STUDENT obtaining teacher signatures; access to TLC for tests and independent work, written and repeated instructions in addition to oral, reinforcement of assignment time lines, increased time for testing, and provision of study guides when available. On the behavior and social skills side, the committee recommended that STUDENT have lunch in the TLC to allow for social skills intervention and agreed that school personnel would ignore minor behavior infractions by STUDENT and would initiate private discussions about behaviors to encourage more positive choices.
23. Beginning in January 2006, STUDENT began to decline precipitously, both academically and behaviorally.
24. During January and February 2006, STUDENT was involved in three disciplinary infractions. On January 12, 2006, STUDENT received three days suspension for a prank in which he threw into a classroom, a dead bird, a bottle, and some dog poop he had brought to school. On January 23, 2006, STUDENT received a warning for spitting from the 3rd floor on students below after being specifically told not to do it. On February 22, 2006, STUDENT received a one-day suspension for verbally harassing and being rude to a police officer at ** SCHOOL.
25. For the fourth six weeks grading period (concluded mid-February 2006), STUDENT failed 4 of his 7 classes, received **'s in two of his classes, and a ** in the remaining class. STUDENT repeated this trend in each of the remaining six weeks' grading periods for spring 2006- 4 failing grades and 3 marginal grades of barely passing (two **'s and one **). STUDENT'S low grades resulted from a failure to complete assignments, work in class, or prepare for tests.
26. STUDENT passed one of four portions of the TAKS in his ** grade year, failing Mathematics, Social Studies, and Science.
27. STUDENT'S teachers from this time period testified that they viewed his academic decline as a problem of attitude and motivation, rather than one of organization or lack of understanding.
28. STUDENT'S teachers almost uniformly reported that in class, STUDENT was lethargic, put his head on his desk throughout the class period, was extremely withdrawn and uncommunicative, never participated in class, was regularly tardy to some classes, had frequent absences, and was generally disengaged. One teacher reported concern over STUDENT'S physical health due to noticeable weight loss and sallow skin color.
29. In April 2006, STUDENT'S journalism teacher became concerned when STUDENT wrote a story in completion of an assignment that was very explicit and disturbing in its references to both sex and violence. The teacher testified that while students had turned in explicit and inappropriate pieces before, he had never

- seen one “quite that bad.” The journalism teacher reported his concern to STUDENT’S § 504 coordinator, his mother, and an assistant principal.
30. STUDENT wrote and turned in a disturbing writing to an English teacher during this same time period that made numerous explicit references to ** and to STUDENT’S interest and preoccupation with **.
 31. Due to the clear need for additional support for both academic and behavioral concerns, STUDENT’S counselor initiated a referral to special education in late April/early May 2006. The referral notes that STUDENT sleeps a lot, is withdrawn, will not engage in conversation, and is essentially “checked out.”
 32. A local support team (LST) convened on May 5, 2006 to obtain mother’s consent to evaluate and determine the focus and scope of the FIE. AISD LSSP, **, testified that she made a decision to focus the assessment on Asperger’s because of the comment in **’s assessment about Asperger’s, and ADHD because of its documented history. ** decided not to assess for depression or emotional issues because she understood STUDENT’S mother to say that his depression was “under control.” As such, a psychological assessment was not included as a component of the FIE. Speech and communication assessment was also not included as a component of the FIE.
 33. STUDENT’S disturbing writings were apparently not known to ** at the time she completed her FIE.
 34. ** testified that she generally considers testing valid within one year of the date of its completion.
 35. When assessing for autism and Asperger’s Disorder, ** typically relies on teacher and parent reports, student observation and interview, and other anecdotal information.
 36. ** completed an FIE of Special Education Eligibility for STUDENT on May 17, 2006. **’ FIE was based on **’s report of January 2005, a review of STUDENT’S records, parent and teacher ratings on the Attention Deficit Disorder Evaluation Scale (ADDES), and parent and teacher ratings on the Asperger Syndrome Diagnostic Scale (ASDS). ** did not meet or observe STUDENT and conducted no additional testing of STUDENT.
 37. Teacher reports on the ADDES from six different teachers indicate that STUDENT is in the statistically average range on both the inattentive and hyperactive-impulsive subscales, with the exception of one teacher who reported a statistically atypical score on the hyperactive-impulsive subscale. Mother reported statistically atypical scores on both subscales.
 38. On the ASDS, each of STUDENT’S six teachers who completed the scale reported scores that correlate with a *very unlikely* probability of Asperger’s. STUDENT’S mother’s score correlates with a *likely* probability of Asperger’s.

39. Upon completion of the FIE, ** concluded that STUDENT appears to meet eligibility criteria for special education for OHI based on his ADHD and for Autism based on his characteristics of Asperger's. ** further determined STUDENT'S behaviors appear to interfere with his learning, necessitating the development of a BIP.
40. An Admission, Review, and Dismissal Committee (hereinafter ARDC) convened on May 23, 2006 to review the FIE and consider STUDENT'S eligibility for special education. The ARDC found STUDENT to be eligible, with a primary eligibility category of Autism and a secondary category of OHI based on his ADHD.
41. The ARDC understood STUDENT as having difficulty making appropriate social decisions and interpreting social situations as a result of Asperger's and having difficulty with his academics as a result of ADHD. These understandings formed the basis for the IEP and program developed for STUDENT by the ARDC.
42. STUDENT'S IEP for the 2006-2007 school year included general education classes for all periods, except one Independent Study class in the SCORES program, a special education program for high functioning students with autism. The purpose of the Independent Study class was to offer increased support-academically by having SCORES staff track assignments with STUDENT and behaviorally by having STUDENT in the SCORES environment for one period per day to process and discuss any disciplinary issues that might arise.
43. The ARDC developed a BIP for STUDENT that identified one behavior of concern: develop awareness of behaviors and the consequences of inappropriate behaviors. A Functional Behavior Assessment (FBA) was to be completed by September 15, 2006 to support further revision of the BIP.
44. Modifications in STUDENT'S IEP included: clarify instructions, extend time, tests at the TLC, and alteration of completion time for assignments.
45. STUDENT received no related services to address his emotional issues and no services to address social skills or communication issues.
46. Mother took STUDENT to a private speech-language pathologist, Dr. **, for testing in June 2006 because of his ongoing difficulties with schoolwork. Dr. ** diagnosed STUDENT with a Language-Based Learning Disability, ADD, and Auditory Processing Disorder.
47. ** noted that STUDENT had certain deficient aspects of language that were impacting his academic work and daily interactions: inadequate ability to manipulate language, under developed ability to use language in social situations, difficulty using language to organize himself and his actions, and difficulty using language to integrate incoming information.

48. Mother provided **'s report to student's folder teacher in August 2006 when school resumed.
49. SCORES staff met with STUDENT in September 2006 to explain the program and have him complete a learning styles inventory and student information form. STUDENT appeared disinterested and disengaged in the program. His student interest survey indicated that STUDENT does not like school "because it is boring and a waste of time." SCORES staff member, **, viewed STUDENT'S negativity and lack of engagement as a function of Asperger's rather than as an emotionally based problem because STUDENT was in the SCORES program.
50. During the first six weeks of ** grade, STUDENT progressed appropriately. He earned passing grades in all classes: ** in English, ** in Psychology, ** in Independent Study, ** in U.S. History, ** in Algebra II, and ** in Spanish. Behaviorally, he received a one-day suspension for an incident on September 21, 2006 where he behaved inappropriately by dancing in the hall and bothering a custodian who was trying to work.
51. By the end of the second six weeks (early October 2006), STUDENT began to decline. He received 4 failing grades and two marginal grades in the low **'s. His only passing grade was in P.E. Again, this trend repeated in the third and fourth six weeks, with minor exceptions.
52. In November 2006, MOTHER contacted the folder teacher to express her concern about STUDENT'S failing grades and poor attitude. MOTHER communicated that STUDENT was saying he wanted to drop out of school and live on the streets. In response, the folder teacher began to research options for STUDENT to finish school as soon as possible, such as the DELTA computer program for U.S. History, a course STUDENT was failing.
53. By early December 2006, several of STUDENT'S teachers reported to his folder teacher that he was lethargic, placing his head on his desk, unmotivated and exerting no effort in class, non-responsive, and frequently absent and/or tardy. One teacher requested help from the folder teacher on December 4, 2006, "I would like to talk to someone regarding STUDENT. I have tried talking to him (he is unresponsive)... He just doesn't respond. He's failing miserably. Help me here..."
54. On December 7, 2006, STUDENT received a warning for insubordination when he refused a directive to go inside a classroom and leave the hallway.
55. Around early December 2006, SCORES staff began to provide additional support to STUDENT by collecting assignments each week from his teachers to provide to MOTHER to work on over the weekend, by tutoring STUDENT during his Independent Study class, and by generally increasing communication with his teachers.

56. On December 18, 2006, an ARDC convened at MOTHER'S request to discuss STUDENT'S lack of success, both academically and socially, and the school's lack of an effective plan for working with STUDENT.
57. STUDENT'S FBA had not been completed in September as originally promised, so the ARDC did an FBA looking at two behaviors of concern: shutting down academically and being easily coerced by peers. The BIP adopted by the ARDC at the December 2006 meeting is the same as the BIP put in place in May 2006.
58. AISD speech language pathologist, **, attended the ARDC and the committee reviewed the report from Dr. ** concerning STUDENT'S speech and language deficits. The recommendation was for STUDENT to attend one of **'s social skills groups to determine if STUDENT would benefit from the speech/communication support. When ** returned to school from winter break (late January 2007), she asked STUDENT if he wanted to participate in a social skills group. Because he declined, no further action was taken.
59. STUDENT did not receive any social skills or speech/communication support or assessment while enrolled at AISD.
60. Other changes made by the ARDC to student's program in December 2006 included: arriving early at school to meet with his English teacher for support, reporting after school to the SCORES room for additional organizational support, changing English classes to a period without certain friends who were distracting STUDENT, and beginning a self-paced computer-based U.S. History class. No changes were made in STUDENT'S IEPs or modifications.
61. Between January 2007 and STUDENT'S arrest for possession of marijuana on 2/15/07, his English teacher reported that he became more engaged and communicative, while his Math teacher reported that he hit a "completely do nothing period." STUDENT'S grades for the fourth six weeks reflect ongoing struggles, though the DELTA course in U.S. History and additional support in English resulted in improvement in those course grades.
62. STUDENT'S English teacher and the SCORES staff reported that STUDENT made the before and after school visits for a brief time (approximately one week) and that the visits were positive when they occurred.
63. On 2/27/07, the ARDC met and determined that STUDENT'S possession of marijuana was not a manifestation of his disability and removed him to the ALC. STUDENT'S parents did not object to his placement in the ALC because they believed a consequence was necessary for his actions, but they did not agree with the conclusion about manifestation. They believed that STUDENT'S use of marijuana at school resulted from his poor social decision-making, an aspect of his disability.
64. STUDENT'S parents became even more concerned about his behavior and attitude when he began the ALC placement. They consulted an educational

- consultant, **, for advice about how to educate STUDENT. When ** met with STUDENT, he revealed some risky behaviors that greatly concerned her and she recommended that he be admitted immediately to the ** Treatment Center for stabilization and evaluation prior to her recommending any long-term educational placement for STUDENT.
65. STUDENT was withdrawn from AISD effective March 9, 2007 and placed into ** Treatment Center on March 13, 2007, where he remained until his discharge on April 19, 2007 to **. MOTHER clearly stated that STUDENT was at the San Marcos facility for evaluation and not educational purposes.
 66. While at San Marcos, both a psychological and neuropsychological evaluation were completed for STUDENT. The neuropsychological evaluation, completed by Dr. **, found that STUDENT did not exhibit symptoms consistent with Asperger's Disorder and recommended psychological testing to address depressive symptoms and substance abuse. The assessment indicates that STUDENT appears to meet eligibility criteria for special education under the category of Emotionally Disturbed.
 67. The psychological evaluation of STUDENT, completed by Dr. **, found significant substance abuse as early as ** grade and strain in family relationships. PARENTS do not believe STUDENT'S reporting of substance abuse is accurate. Dr. ** suggested the following diagnoses for STUDENT: Major Depressive Disorder, Recurrent, Severe; Cannabis Abuse; Rule Out Other Substance Abuse; Oppositional Defiant Disorder; Obsessive-Compulsive Disorder, In Partial Remission; and Schizotypal Personality Traits. Dr. **'s placement recommendation for STUDENT was at a facility capable of managing his severe substance abuse and other dangerous impulses. Dr. ** also recommended evaluation for medication, individual, group, and family therapy, and substance abuse treatment.
 68. ** relied, in large part, on the assessments from San Marcos to recommend placement of STUDENT at a residential treatment center to provide the structure and therapeutic milieu needed to address both STUDENT'S emotional and behavioral needs. STUDENT'S parents unilaterally placed him at ** following these recommendations.
 69. ** is an accredited private residential program in Alabama that is on that state's list of approved state supported agencies. ** provides both academic and therapeutic/behavioral support in a residential treatment setting, with the ** Private School providing educational services to all students at the ** Therapeutic Program.
 70. Dr. ** of ** completed an initial psychological assessment of STUDENT on April 25, 2007, during which STUDENT again reported substantial substance abuse over a long period of time. Dr. ** gave the following diagnostic impressions: Oppositional Defiant Disorder; Antisocial Behavior of Adolescence:

- drug sales; Parent-Child Relational Problem, ADHD by history; Depressive Disorder NOS by history (rule out a substance-induced disorder).
71. ***' master treatment plan for STUDENT identifies the following problem areas for treatment: oppositional/defiant behavior; Substance Use; Family Relationship Issues; Underachievement/Learning Problems/ADHD; and Mood Disorder (Depression). The treatment plan contains specific long-term goals and short-term objectives for each area of concern identified.
 72. Academically, ** offers individualized instruction in a small group setting. STUDENT completed the end of the 2006-07 school year at ** and is attending summer school classes during summer 2007. As of June 2007, STUDENT'S IEP had not been finalized and eligibility classifications for special education had not been determined. STUDENT was at or above grade level in all academic areas and diagnostic testing and observation were underway.
 73. ** special education coordinator testified to an impression of STUDENT as having traits associated with ADD, auditory processing, and a NVLD, along with significant depression and anxiety.
 74. Parents selected ** for STUDENT in part because of their understanding that Alabama would allow them to obtain extended court jurisdiction of STUDENT past his 18th birthday and require him to remain in treatment and complete the program.
 75. As of March 13, 2007, when PARENTS effectively withdrew STUDENT from AISD, PARENTS had decided that ** SCHOOL was not the appropriate educational placement for their son. PARENTS made an attempt to inform AISD by letter dated March 11, 2007 of their intent to remove STUDENT from AISD and enroll him in private school at public expense, but AISD did not receive the letter.
 76. The due process hearing request, filed on March 12, 2007, informed the school that PARENTS had hired an educational consultant to advise them on the best school for STUDENT'S needs and that they expected the school to pay for the school recommended by the consultant. The amended hearing request, filed April 9, 2007, specifically seeks reimbursement for private education. On April 16, PARENTS again notified AISD by letter of their intent to enroll STUDENT in private school and seek reimbursement.
 77. At all times after March 13, 2007, MOTHER was not willing to consider options for educating STUDENT within AISD and made it clear to AISD that she was only seeking reimbursement for STUDENT'S private placement.
 78. In late March and April 2007, AISD attempted to convene an ARDC to discuss the new assessments completed at San Marcos and discuss changes to STUDENT'S program that might be appropriate. MOTHER declined to

participate in an ARDC, so the parties went to a resolution meeting instead, as required by IDEA.

79. At the resolution meeting, AISD again sought to discuss possible services that could be provided to address recently identified needs and issues in the area of depression and substance abuse. AISD specifically offered services such as counseling, additional support throughout the school day, and wrap around services beyond the school day for support at home and in the community. PARENTS were clear that a decision had been made to place STUDENT at **.

DISCUSSION

Under IDEA, parents are entitled to reimbursement for the cost of a unilaterally chosen private education upon a showing that Respondent failed to provide a free appropriate public education prior to enrollment in the private placement **and** that the private school placement is appropriate under the Act. *Florence County School District Four v. Carter*, 114 S. Ct. 361 (1993); 20 U.S.C. § 1412; 34 C.F.R. § 300.148. A presumption exists in favor of the school district's program, placing the burden on the party attacking the IEP and placement. *Schaffer v. Weast*, 156 S. Ct. 528 (2005).

I.

Did AISD Provide Petitioner With A Free Appropriate Public Education Prior To His Enrollment At **

The U.S. Supreme Court has defined a free appropriate public education as one that consists of “personalized instruction with sufficient services to permit the child to benefit educationally from that instruction.” *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the court developed a two prong analysis to determine if a school district has met its obligation to provide a free appropriate public education: 1) whether the district complied with the procedural requirements of IDEA, and 2) whether the district offered a program to the student that was reasonably calculated to provide educational benefit. *Id.* at 206-207. Only substantive violations are at issue in this cause.

The essence of determining whether a substantive violation of IDEA has occurred is whether the school's program has provided the student with the requisite educational benefit. IDEA does not require an education that maximizes a student's potential; rather, the school must provide an education that is reasonably calculated to enable the child to achieve *some* benefit. *Some* benefit means an educational program that is meaningful and offers more than a *de minimus* educational benefit; it must be “likely to produce progress, not regression or trivial educational advancement.” *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997).

Although courts have not adopted a specific substantive standard to determine when a free appropriate public education has been provided, the Fifth Circuit in *Michael F.* identified four factors to consider in analyzing a school's program: 1) is the program individualized and based on the student's assessment and performance; 2) is the program

administered in the least restrictive environment; 3) are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) are there demonstrated positive benefits both academically and non-academically to the student.

Petitioner alleges that Respondent has denied him a free appropriate public education by failing to timely¹ and properly identify, evaluate and serve all areas of his disability, by failing to provide him with an appropriate BIP and by failing to recognize his behaviors as manifestations of his disability. Petitioner further argues that STUDENT failed to make adequate progress under Respondent's educational program, either academically or behaviorally. Respondent counters that STUDENT'S educational plan was appropriate based on information available to Respondent, that as STUDENT'S performance declined, Respondent acted to increase supports, and that STUDENT was able to progress academically despite periods of decline and difficulty.

The Hearing Officer finds that the evidence of record supports Petitioner's claim that Respondent failed to properly evaluate or serve STUDENT and that STUDENT did not make meaningful progress in Respondent's program. Applying the applicable legal standards and indicia of a free appropriate public education to the evidence in this case, the Hearing Officer concludes that STUDENT'S program and placement from March 12, 2006 to his enrollment at ** failed to provide him with a free appropriate public education as defined by IDEA.

At the outset, STUDENT'S program, as designed by the ARDC in May 2006, was not based on complete and proper assessment. The many flaws in the initial assessment process reflect a lack of understanding of and attention to STUDENT'S specific needs and concerns. In particular, Respondent's failure to complete a psychological assessment of STUDENT as a component of the FIE was not reasonable based on available information at the time.

First, the evidence shows that the LSSP relied primarily on testing performed by ** in January 2005 that was over one year old, despite her testimony that she did not typically rely on testing that was over a year old.

Second, the LSSP decided to focus the assessment in the areas of ADHD and Autism based on the results of **'s assessment, even though **'s evaluation also noted clinically significant levels of anxiety and depression that were **directly** linked to lack of motivation and academic interest, the main symptoms STUDENT was exhibiting. Further, looking beyond **'s evaluation to STUDENT'S actual performance and

¹ Petitioner alleges that Respondent's failures to timely identify, assess, and serve STUDENT under IDEA date back to fall semester 2004 when STUDENT enrolled at ** SCHOOL. Petitioner's claims arising prior to March 12, 2006 are time barred by the one-year statute of limitations pertaining to special education cases in Texas. *Texas Advocates Supporting Kids With Disabilities v. Texas Education Agency*, 112 S.W. 3d 234 (TX. Ct. App.- Austin 2003); *Raymond V. v. Houston ISD*, Civil Action No. H-05-1799 (September 18, 2006). Thus, the Hearing Officer's analysis of Petitioner's claims pertains to the period of March 12, 2006 through his enrollment at **.

behavior in school, abundant evidence existed to suggest that STUDENT was severely depressed or, at a minimum, experiencing emotional distress that interfered with his education. In fact, his referral to special education was initiated because STUDENT was failing most of his classes, exhibiting extreme lethargy and disengagement, and had evidenced disturbing behaviors such as throwing a dead bird and dog poop into a classroom, spitting on students, verbally harassing a police officer, and turning in disturbing writings to teachers. Given this constellation of behaviors and the prior assessment, Respondent should have completed a psychological assessment of STUDENT to ensure a complete understanding of his disabilities. To the extent that all of this information was not known to the LSSP at the time of assessment, it reflects a lack of coordinated and collaborative communication concerning STUDENT.

Third, in completing her assessment of ADHD and Asperger's, the LSSP never met, talked to, or observed STUDENT despite testimony by the LSSP herself and the special education director that this is not the recommended or usual practice for assessment. Instead, the LSSP collected rating scales in both areas from MOTHER and STUDENT'S teachers. Notably, STUDENT'S teachers uniformly rated him in the statistically average range for ADHD and as "highly unlikely" to have Asperger's. MOTHER'S rating scales scored STUDENT as statistically atypical for ADHD and likely to have Asperger's. Rather than do additional testing or interview STUDENT to understand the important discrepancies in the data, the LSSP completed the FIE and concluded that STUDENT appeared to meet eligibility criteria for special education for Autism (Asperger's) and OHI (ADHD). This is particularly problematic given that autism, as a disability, does not apply "if a child's educational performance is adversely affected primarily because the child has an emotional disturbance as defined..." 34 C.F.R. §300.8.

In light of the discrepant data concerning Asperger's and the presence of indicators of a potential emotional disturbance, additional assessment was clearly necessary. Although it is impossible to predict how additional, more appropriate, assessment might have impacted the services STUDENT received, it seems certain, that it would have greatly helped Respondent understand STUDENT and his needs. As the Assistant Director of Special Education testified, "...additional assessment would have helped clarify things."

The ARDC subsequently found STUDENT eligible for services with a primary classification of Autism and a secondary of OHI. Although a failure to evaluate a student in all areas of suspected disability does not necessarily preclude a school from adequately serving the student if all needs created by the disability are addressed by the IEP, the evidence in this case establishes that the IEP and program developed for STUDENT did not adequately address either the academic or emotional/behavioral issues that interfered with his education.

The ARDC placed STUDENT into the SCORES program for academic and behavioral support, a program designed for high functioning students with autism. To meet his academic needs, SCORES provided the student with some supports, but the evidence shows that the few modifications in STUDENT'S IEP for his general education

classes were not consistently implemented. More significantly, most of the recommendations in **’s assessment and the FIE that would have provided meaningful academic support were not adopted by the ARDC for inclusion in STUDENT’S IEP. For example, supports related to note taking, outlines and study guides were necessary to provide STUDENT with a reasonable opportunity for success.

On the emotional/behavioral side, the ARDC did not consider social skills training or other services related to a social/communication based disorder and did not consider services to address STUDENT’S emotional challenges, such as counseling or a behavioral class. Further, although the ARDC developed a BIP for STUDENT, it was not based on an FBA and addressed only the concern of developing awareness of his behaviors and consequences; it did not address ongoing concerns of STUDENT shutting down or being easily swayed by poor peer influences. When the FBA was finally completed in December 2006, the BIP was not revised to reflect the results. In short, the program developed by the ARDC did not adequately address STUDENT’S social or emotional issues, whether they resulted from Asperger’s or an emotional disturbance. This is further evidenced by his continued decline in Fall 2006.

During Fall 2006, STUDENT again exhibited symptoms of depression, disengagement, and academic failure. Despite widespread knowledge that STUDENT’S academic failures were due primarily to a lack of motivation and negative attitude, the ARDC continued to recommend supports for STUDENT that depended on his initiative to work. To provide social skills and language support that STUDENT clearly needed, the ARDC agreed to include STUDENT in a social skills group if he wanted to attend, but took no steps to require it or ensure that he would participate. Not surprisingly, STUDENT declined the offer. To provide additional academic support, the ARDC recommended that STUDENT meet with his English teacher before school and the SCORES staff after school. STUDENT attended these meetings for only one week. Although the ARDC developed other supports for STUDENT that were not dependent on his initiative, such as collecting work for him to take home over the weekend and allowing him to take a self paced computer based U.S. History course, these supports were inadequate overall to allow him to make academic progress. Indeed, at by the end of the first semester, he was again failing 4 of his classes. Behaviorally, STUDENT also failed to make progress as evidenced by continued disengagement, lack of effort, insubordination, and finally, his arrest for possession of marijuana in February 2007.

In sum, Respondent failed to provide STUDENT with a free appropriate public education prior to his enrollment at **. Respondent failed to provide a complete or proper assessment of STUDENT’S disabilities and failed to develop a program and placement that was reasonably calculated to provide STUDENT with the requisite academic or non-academic benefits.

II. Was STUDENT'S Private Placement At ** Proper Under IDEA

Although a private parental placement need not meet the exact requirements of a public placement under IDEA, it is clear that IDEA's mandate and preference for students with disabilities to be educated in the least restrictive environment must be considered when analyzing the propriety of the private placement. *Id.*; *Rome School Committee v. Mrs. B.*, 247 F.3d 29 (1st Cir. 2001); *Corpus Christi ISD v. Christopher N.*, 45 IDELR 221 (S.D. TX 2006). Where, as in the instant case, the private placement unilaterally selected by the parents is a residential treatment center, the placement must be carefully reviewed to determine if it satisfies the Act's requirements for least restrictive environment and the guidelines for residential placements at public expense. *Id.*

Public funding for residential placement of a student with disabilities is proper only when such placements are **necessary** for a student to receive a free appropriate public education. 34 C.F.R. § 300.104. The residential placement must be necessary for educational purposes and not primarily for medical or other problems within the student's home or community that are segregable from the learning process. *Burke County Board of Education v. Denton*, 895 F. 2d 973 (4th Cir. 1990). The student must need the residential placement in order to receive the meaningful educational benefit required by the law.

Residential placements under IDEA are not appropriate when students exhibit problems at school, but those problems are not disability related. *Springfield School District*, 31 IDELR 68 (SEA OR 1999). Further, such placements at public expense are not appropriate under IDEA when lesser restrictive placements can adequately meet a student's needs. *Teague Independent School District v. Todd L.*, 20 IDELR 245 (5th Cir. 1993), *Corpus Christi ISD v. Christopher N.*, *supra*.

Petitioner argues, in reliance on the recommendations of the ** Treatment Center and **, that STUDENT requires a residential placement in order to stop the cycle of negative behaviors and address his emotional/behavioral issues seamlessly with his academic ones. Respondent counters that residential placement is not the least restrictive environment in which STUDENT can be educated and that its attempts to develop a program with greater support and structure for STUDENT in a less restrictive environment were rejected by STUDENT'S parents. Respondent further argues that STUDENT'S residential placement is primarily for non-educational reasons: substance abuse treatment and familial issues.

The Hearing Officer agrees with Respondent that residential treatment is not the least restrictive environment for STUDENT under IDEA. IDEA's mandate to educate students with disabilities alongside students who are not disabled to the maximum extent possible is central to the Act. *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989). In fact, Texas Education Agency regulations concerning residential placement at public expense provide that funding will not be approved for residential placement if the school district "did not attempt to implement lesser restrictive

placements prior to the residential placement.” 19 T.A.C. §89.61(b)(1)(D). This requirement is particularly applicable in this case where STUDENT was successful at school for six week periods at times, was in all general education classes except his Independent Study class, and had no special education supports such as individual, group, or family counseling, a one-to-one-aide, a social skills group, transportation, or wrap around services. Further, the evidence suggests that STUDENT would have been responsive to additional support and structure, as he was during the brief period of working more closely with his English and SCORES teachers in January and February 2007 and working in the DELTA program for U.S. History.

In offering to develop a program, based on recent assessment data, for STUDENT that included greater structure and additional supports, Respondent was doing what IDEA requires-- proposing changes that could allow STUDENT to be successful while still having exposure and interaction with nondisabled students. As the court held in *Corpus Christi ISD v. Christopher N., supra*, to change a student’s placement from mainstream education to the opposite end of the continuum in one fell swoop is not appropriate under the Act.

With regard to Respondent’s contention that STUDENT’S residential placement is not primarily for educational reasons, the Hearing Officer finds that the evidence is inconclusive as to the basis for STUDENT’S placement at **, Although the evidence shows that at the time of STUDENT’S withdrawal from AISD, he was suffering from severe depression that interfered with his ability to function both in and out of school; it is not clear whether STUDENT’S depression was induced by substance abuse or exists independently. **’s testimony, along with the psychological assessment and master treatment plan from **, support the finding that STUDENT’S substance abuse was a primary precipitating factor in his residential placement. Under IDEA, treatment for substance abuse is clearly excluded from the legal responsibilities of schools as a medical, rather than educational service. *Blickle v. St. Charles Community Unit School District No. 303*, 20 IDELR 167 (N.D. IL 1983); *Brian M. v Boston Public Schools*, 40 IDELR 341 (SEA MA 1989). As the proponent of residential placement at public expense, Petitioner has the burden of proof to establish that the placement is for educational purposes. Based on the evidence presented, Petitioner failed to meet his burden of proving that STUDENT’S placement at ** was primarily for educational purposes.²

² Petitioner also seeks reimbursement for the private evaluations obtained at ** Treatment Center. P also failed to prove that these evaluations were obtained for educational purposes. ** and MOTHER testified that STUDENT was placed at San Marcos for assessment due to an urgent concern for his health and safety resulting from self reported “risky behaviors.” Though inconclusive, the evidence strongly suggests these behaviors were substance abuse related. The diagnoses and placement recommendation that resulted from the evaluations support the conclusion that substance abuse was the condition that demanded urgent attention and treatment.

While the Hearing Officer understands MOTHER'S conviction that residential placement is both necessary and optimal for STUDENT at this time, the legal question before this Hearing Officer is whether the school district is obligated to pay for that placement. For the reasons discussed herein, the Hearing Officer cannot conclude, that residential treatment is an appropriate placement for STUDENT under IDEA as the least restrictive environment in which he can be educated.

Because Petitioner failed to prove that the private parental placement at ** is an appropriate placement under IDEA, reimbursement must be denied.³

CONCLUSIONS OF LAW

1. STUDENT is a student who is identified as eligible for special education services under the provisions of the IDEA as a student with Autism (Asperger's Disorder) and OHI (ADHD).
2. Respondent Austin ISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA and its implementing federal and state regulations. As STUDENT'S resident district, Austin ISD has the responsibility under IDEA to provide STUDENT with a free appropriate public education. 20 U.S.C. §1401; 34 C.F.R. § 300.101.
3. Respondent's program and placement for STUDENT from March 2006 to his enrollment at ** denied him a free appropriate public education as it was not sufficiently individualized based on assessment and performance and failed to provide meaningful academic and non-academic benefits. *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998).
4. STUDENT'S private placement at ** was not appropriate under IDEA as it was not the least restrictive environment in which STUDENT could be educated and was not primarily for educational purposes. *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989); *Corpus Christi ISD v. Christopher N.*, 45 IDELR 221 (S.D.TX 2006); *Burke County Board of Education v. Denton*, 895 F. 2d 973 (4th Cir. 1990).

In addition to the non-educational purpose of these assessments, before seeking the assessments, Petitioner did not request additional assessment from Respondent and, when they were complete, did not provide Respondent with copies of the assessments for educational planning.

Finally, Petitioner offered no evidence at all of the cost or appropriateness of the evaluations. For these reasons, the Hearing Officer declines to award reimbursement for the evaluations even though Respondent's assessment of STUDENT was inadequate.

³ The Hearing Officer need not reach questions related to the ten-day notice requirement for reimbursement for private school placement in light of the conclusion that reimbursement is denied on other grounds.

5. Petitioner is not entitled to reimbursement for tuition from **, as he did not meet his burden of establishing that Respondent's program was inappropriate **and** that the private school program was appropriate under IDEA. *Florence County School District Four v. Carter*, 510 U.S. 7 (1993).
6. Petitioner is not entitled to reimbursement for private testing from ** Treatment Center as he offered no proof related to the cost or appropriateness of the testing. *Schaffer v. Weast*, 156 S. Ct. 528 (2005).

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, this Hearing Officer hereby **ORDERS** that Petitioner's request for reimbursement for private school placement at ** of **, Alabama is hereby **DENIED**. It is further **ORDERED** that Petitioner's request for reimbursement for the costs of private testing obtained by the parents at ** Treatment Center is hereby **DENIED**.

It is further **ORDERED** that should STUDENT return to AISD, Respondent shall promptly complete a Full and Individual Evaluation of STUDENT, including all academic, psychological, and speech language testing. Upon completion of the evaluation, AISD is ordered to convene an ARDC in a timely manner to consider and develop an appropriate IEP and placement for STUDENT, including all necessary related services, to address all needs identified in the FIE.

All other requests for relief not specifically granted herein are hereby **DENIED**.

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

SIGNED and **ENTERED** this 23rd day of July 2007.

/s/ Lynn E. Rubinett

Lynn E. Rubinett

Special Education Hearing Officer for the State of Texas

TEA DOCKET NO. 177-SE-0307

STUDENT BNF Parent	§	BEFORE A SPECIAL
Petitioner	§	EDUCATION
	§	
v.	§	
	§	HEARING OFFICER FOR THE
AUSTIN	§	
INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	STATE OF TEXAS

SYNOPSIS

Issue: Whether Respondent provided Petitioner with a free appropriate public education prior to his enrollment in a unilateral private placement?

Held: For Petitioner. Respondent failed to provide Petitioner with a free appropriate public education from March 2006 to his enrollment at ** in that Respondent’s program and placement for STUDENT was not sufficiently individualized based on assessment and performance and failed to provide meaningful academic and non-academic benefits.

Cite: 34 C.F.R. § 300.17; 300.101. *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998).

Issue: Whether Petitioner’s private placement at ** residential treatment center was an appropriate placement under IDEA?

Held: STUDENT’S private placement at ** was not appropriate under IDEA as it was not the least restrictive environment in which STUDENT could be educated and was not primarily for educational purposes.

Cite: 34 C.F.R. § 300.104; 300.114; 300.115; 19 T.A.C. §89.61(b)(1)(D); *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989); *Corpus Christi ISD v. Christopher N.*, 45 IDELR 221 (S.D.TX 2006); *Burke County Board of Education v. Denton*, 895 F. 2d 973 (4th Cir. 1990).