

DOCKET NO. 167-SE-0104

STUDENT § **BEFORE A SPECIAL EDUCATION**
B/N/F PARENT §
§
VS. § **HEARING OFFICER FOR THE**
§
NORTHSIDE INDEPENDENT §
SCHOOL DISTRICT § **STATE OF TEXAS**

DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

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

Petitioner alleged that Respondent denied Student a Free Appropriate Public Education (“FAPE”) during the 2002-2003 school year in the following particulars:

1. Respondent failed to provide a FAPE to Student during the 2002-2003 school year.
2. Respondent failed to implement substantial portions of Students’ IEP as he slept throughout a substantial part of the 2002-03 school year and failed to appropriately respond to Student’s sleeping, thereby denying him access to a FAPE.
3. Petitioner’s teacher during the 2002-03 school year was abusive to him and there was a direct link between her conduct and Petitioner’s ability to receive an educational benefit in her classroom.
4. Respondent denied Petitioner access to off-campus, community based instruction as activities in which the other students participated and required his mother to keep him at home during those activities.
5. Respondent failed to provide a FAPE for Petitioner by denying Extended School Year services during the summer of 2003.
6. Respondent failed to develop a transition plan for Student prior to May 2003.

Petitioner limited his complaint to the 2002-2003 school year.

As relief, Petitioner requested:

1. Compensatory services in the form of summer programming and in-home services;
2. Transition planning;
3. An Order directing the District to develop a Behavior Intervention Plan;
4. Therapy in response to the alleged abuse by the teacher;
5. A comprehensive evaluation;
6. Implementation of Students' current IEP with modifications to provide FAPE.

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

PROCEDURAL HISTORY

Petitioner's request for hearing was received by Texas Education Agency on January 16, 2004, and assigned to Special Education Hearing Officer Sharon M. Ramage. Petitioner was represented by Karen Seal, of San Antonio. Paula Maddox Roalson, of San Antonio, represented the Northside Independent School District.

The hearing was initially scheduled for February 9, 2004, with a decision due date of March 1, 2004. A telephone prehearing conference was held on January 29, 2004 and was transcribed by a court reporter. Both parties requested a continuance due to scheduling conflicts. I found that good cause existed to continue this matter to March 25, 2004. Respondent filed a Motion for Partial Summary Judgment, which was denied in all respects except as to the one-year statute of limitations. 19 Texas Administrative Code (TAC) §89.1151(c). Petitioner amended his pleadings, a second prehearing conference was held, the parties agreed to go forward with the hearing on March 25, and an additional day was provided. The hearing was held on March 25-26, 2004. The parties requested an extension of the decision due date in order to submit proposed findings of fact and written arguments. The Decision Due date was extended to May 10, 2004, and the Decision was timely rendered and forwarded to the parties.

Based upon the evidence and argument of the parties, I find that Petitioner prevails in part and Respondent prevails in part, and make the following findings of fact and conclusions of law. (All references to the transcript will be designated as "Tr." followed by the page number; all references to Petitioner's and Respondent's exhibits will be designated as "R" or "P", followed by the exhibit number.)

FINDINGS OF FACT

1. Student is a ***-year old *** grade student who resides within the boundaries of the Northside Independent School District. He is eligible for special education as a student with multiple handicapping conditions, including Mental Retardation, Other Health Impairment;

Auditory Impairment and Speech Impairment. R- 8, 9. He has diagnoses of ***, hypotonia, seizures, and global developmental delays, along with significant associated orthopedic involvement. R17; Tr. II-239-240. This is a profound disability which affects a number of bodily systems, including the central nervous system. Student is nonverbal, non-ambulatory, and has a profound bilateral sensorineural hearing loss.¹ R8.

2. Student's current placement is in the ALE (Adaptive Learning Environment) classroom, on his home campus, a self-contained classroom for severely disabled students. Student's current placement is on his home campus. P-3B. His teacher in the ALE classroom for the 2003-2004 school year will be referred to as Ms. ***.
3. Student placement during the 2002-2003 school year was in another ALE classroom on his home campus. R-9. His teacher for the 2002-2003 school year will be referred to as Ms. ***.
4. Prior to the 2002-2003 school year, Student experienced periods of sleepiness. These periods were not frequent and did not appear to prevent him from making progress in his educational placement. R-3, R-5A.11, 18, Tr. II-305. In fact, the record as a whole reflects that Student made progress during the school years prior to the 2002-2003 school year.
5. Beginning in October of 2002, Student's sleeping difficulties significantly increased to the point that he was sleeping for significant portions of each school day. During the month of November, there were 12 school days and Student slept for half, if not all, of 8 of those days, and for hours on the remaining four school days. By January, 2003, Student was sleeping at least 80% of the class time. By April of 2003, Student was sleeping for all of virtually every day he attended school. R21; R-20; Tr. II-78-83.
6. During the 2002-2003 school year, Student would be placed on a mat which was isolated from the other students. The mat was located behind the teacher's desk, away from the ambulatory students. This is where Student spent much of his school day sleeping. (Tr. II-31, 190, Ms. ***) He was moved to the mat from his wheelchair for safety reasons. According to the instructional assistants, Ms. *** did not actively work with Student during this time period.
7. Student's IEP for the 2002-2003 school year included an ARD/IEP Supplement for Transition Planning which identified Community Based Instruction as a transition service to be provided for Student and incorporated into his IEP. R-9.

¹ Petitioner raised for the first time during the hearing the issue of whether Respondent had provided the AI consult services provided in the IEP for the 2002-2003 school year. That issue will not be addressed in this opinion because Petitioner failed to identify that claim in her pleadings or in the pre-hearing conference. Additionally, the District still has the capability of completing that provision of services prior to the end of the school year or Student's annual ARD.

8. Parent testified that Ms. *** called her frequently to pick Student up from school because the other students were participating in community based instruction activities which would not be available to him. (Tr.I-35). This testimony was consistent with the testimony of the classroom aides who acknowledged that Student was not included in these activities and was either left behind or Parent would pick him up from school. (Tr. II-188, Tr. I-189). I find this testimony to be credible in light of the record as a whole. Therefore, I find, based on a preponderance of the credible evidence that Student was denied an opportunity to participate in community based instruction with his classmates.
9. Ms. *** first discussed Student's sleeping problem with his mother and suggested that her classroom was no longer appropriate for him in November 2003. Neither Ms. *** nor any District personnel requested an ARDC meeting to address Student's needs. Instead, Ms. *** told the mother and other personnel that the matter would be addressed at Student's annual ARD. R-20.
10. As early as December of 2002, Ms. *** reported that she was no longer able to work on Student's IEP goals and objectives due to his change in status and described him as "nonsresponsive." R-20.
11. In December of 2002, in an email to all related service personnel, Ms. *** noted that *** (***) appeared to be the appropriate placement for Student and indicated that all related service personnel were in agreement. R-20.
12. Respondent did not attempt to communicate with any of Student's physicians until April 29, and May 16, 2003, when the Physical Therapist forwarded releases to Drs. ***, and *** and requested a prescription for a new wheelchair. R-12, R-17.
13. Ms.*** testified that she collaborated with outside personnel during the 2002-2003 school year to address Student's change in status. The physical therapist also testified that school personnel attempted to communicate with Student's neurologist regarding his change in status. However, the record clearly shows that District personnel did not attempt to communicate with Student's neurologist, Dr. ***, during the 2002-2003 school year. In fact, the only release of information pertaining to Dr. *** is dated August 27, 2003 (the beginning of the 2003-2004 school year. R-23.
14. The Annual ARD for Student should have been held prior to March 18, 2003, but was not held until May 15, 2003. The prior annual ARDC meeting for Student was held on March 18, 2002. R-6; R-16.
15. Student's mother withdrew him from school on March 5, 2003 until March 26, 2003. R20; TR. II-83, R-21. There were 34 school days from March 26, 2003, until the May 15, 2003, ARDC meeting. R-21. During that time period, Student slept 15 full days and for one-half

to three-fourths of the day on 16 of those days. He was absent one day, withdrew on another day, and slept for a very short period of time on one day. R-21. No data was collected regarding Student's sleeping patterns after May 13, 2004. R-21.

16. The May 2003 ARDC agreed to move Student to the *** Program at the *** Center during the Fall of 2003 for diagnostic purposes. The purpose of the change in placement was to address Students' sleeping issues. The *** is a placement within the District with a high nurse-to-student ratio, access to physicians, and which provides more specialized services for medically fragile students. The purpose of the placement was to gather data with regard to Student's increased sleeping, including the cause as well as develop strategies for working with Student. The placement was to be re-evaluated after 6 weeks. R-16.
17. At the beginning of the 2002-2003 school year, Petitioner's mother reported that Student was having seizures on a daily basis, but District personnel reported seeing only one seizure. Beginning in August 2002, Dr. *** adjusted Student's seizure medication. Student was taking Carbitrol, Keppra, and Topamax. Dr. *** began weaning Student from Topamax in January 2003, and Student was completely off Topamax by May 15, 2003. (RII 385) The Topamax had been added to address Student's seizures. Between October and January of 2002, the seizures were under control and the medication was reduced. Tr. II-377, 384.
18. Dr. *** saw Student in his office on numerous occasions during the 2002-2003 school year and he never appeared to be drowsy or lethargic. (Tr. II-382) Dr. *** testified that Student's medication levels were never in the toxic range over the course of the year. According to Dr. ***, the amount of medication Student was taking was not sufficient to cause the amount of sleeping Student experienced at school. The seizure activity would not have caused the amount of somnolence Student experienced. Rather, the type of seizures he experienced would have caused brief postictal periods from which he would recover in a matter of a few minutes. Tr. II-367-368.
19. Student did not enter the *** placement at the beginning of the 2003-2004 school year. At the conclusion of the 2002-2003 school year, after recessing for the summer break, Student's level of alertness and activity increased.
20. Student was placed in Ms. ***'s ALE classroom for the 2003-2004 school year. Personnel who worked with Student in Ms. ***'s classroom as well as Ms. ***'s classroom observed a significant change. Although there have been occasions when Student has slept in the classroom, the events appear to be infrequent in occurrence and short in duration. Student has not slept for days and weeks at a time during the 2003-2004 school year. P-9; testimony of Ms. *** testimony of Parent. Student has generally made progress during the 2003-2004 school year.
21. The District received several complaints regarding Ms. ***'s classroom conduct toward her students. An instructional assistant assisting on one occasion during the 2002-2003 school

year observed Ms. *** to strike Student on the leg with what she described as a “motivational pat” which caused her to be uncomfortable. She contacted CPS and eventually reported it to her supervisor. Tr. I-69-80. Although the incident occurred during November 2002, the aide did not document her concern in writing until the end of the school year. Tr. I-68, 85, P 7.13. She reported the incident to the other ALE classroom teacher, Ms. ***, in December 2002. R-7.3.

22. Ms. *** has been an ALE classroom teacher at *** School since August 2001 and is Student’s current classroom teacher. Ms. *** testified that she has observed Ms. *** to be rough in the way she handled the disabled children in her classroom and characterized her as impatient, inappropriate and abusive. Tr. I-97-100; II-414. I found Ms. ***’s testimony to be credible and compelling.
23. An instructional assistant assigned to Student’s classroom during the Fall of the 2002-2003 school year reported to District administration that she had observed Ms. *** to be abusive towards the students in the ALE classroom. She described Ms. *** as being overly aggressive towards Student in the way she handled him. Tr. I-184. According to this witness, Ms. *** yelled at the students, and pushed and shoved them. Tr. I-184, 191. I found this witness’s testimony to be credible.
24. An instructional assistant in Ms. ***’s ALE classroom reported her observations of Ms. ***’s classroom conduct to District administration during the 2002-2003 school year. This witness testified that she observed Ms. *** to use excessive force with students other than Student. I found this testimony to be credible.
25. *** and ***, parents of ALE students in Ms. ***’s classroom, testified that they had observed Ms. *** to be aggressive towards the students in her classroom, yelling at them, and pushing and shoving them. Tr. II-212-215; 220-231. Both parents complained to District administration during the 2002-2003 school year when they learned that their children could possibly be moved to Ms. ***’s classroom due to construction on the campus. Ms. *** first complained about Ms. ***’s conduct as early as 1998. Tr. II-224. I found the testimony of these witnesses to be credible.
26. Child Protective Services investigated allegations that Ms. *** had emotionally abused another student during the 2002-2003 school year, which Ms. *** suggested was generated by a cafeteria worker. Tr. II-109. The results of the CPS investigation were that emotional abuse, as that term is defined in the Texas Family Code, did not occur. R-26. This investigation did not pertain to Student.
27. The United States Department of Education, Office of Civil Rights, investigated allegations that Ms. *** had physically and emotionally abused several students in her classroom, including Student, during the 2002-2003 school year. The results of that investigation were inconclusive. R-29.

28. The Texas Education Agency declined further investigation into the abuse allegations surrounding Ms. *** due to the ongoing investigations by other agencies. R-28.
29. Ms. *** denied allegations that she had acted inappropriately with any of the students in her classroom, including Student, and provided explanations for each allegation. In order to conclude that Ms. *** acted appropriately with her students, I would have to completely discount the testimony of two parents, four instructional assistants, a student, and another teacher, all of whom were credible. Accordingly, I find from a preponderance of the credible evidence that the environment in Ms. ***'s classroom was one in which she handled her students in an aggressive and rough manner which was inappropriate.

DISCUSSION

Did Respondent Provide Student a Free Appropriate Education During the 2002-2003 School-Year?

The United States Supreme Court established a two-prong test for determining whether a school district has provided a free appropriate public education. The first inquiry is whether the school district complied with IDEA procedural requirements. The second inquiry is whether the student's IEP is reasonably calculated to confer an educational benefit. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S. Ct. 3034 (1982). An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Rowley, id.*; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

Procedural Sufficiency

IDEA establishes certain procedural requirements in formulating and implementing a child's IEP. Procedural flaws do not automatically require a finding of a denial of a free appropriate public education. However, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the development of the IEP result in the denial of a free appropriate public education." *Adam J. v. Keller ISD*, 328 F. 3d 804 (5th Cir. 2003).

With regard to procedural deficiencies, Ms. *** unilaterally discontinued implementation of certain IEP goals and objectives without first convening an ARDC meeting to discuss Student's change in status, seek further evaluation, or develop new goals and objectives which were appropriate for Students' individual needs. The Individuals with Disabilities Education Act contemplates that such a change in a child's educational program must be approved by the child's ARD Committee. 34 CFR §300.346. Respondent failed in this regard.

Additionally, the law requires that an IEP be reviewed at least *annually*. In this case, the IEP for Student's 2002-2003 school year was developed on March 18, 2002. Consequently, at a

minimum, Student's IEP should have been reviewed no later than March 18, 2003. Respondent waited until May 15, 2003, to convene the annual ARD to review Students' IEP. During the two month delay, Student lost approximately 31 instructional days due to increased sleeping.

Respondent appears to contend that by providing an opportunity for Student's mother to visit the *** campus in December 2002, it fulfilled its obligations to Student under IDEA. Respondent also appears to contend that it is dispositive that Student's mother did not request an ARDC meeting to address Student's regression. However, a sufficient number of key District personnel had knowledge of Student's deterioration and his lack of progress in Ms. ***'s classroom. Apparently, a sufficient number of District personnel agreed that a move to a diagnostic placement was warranted. The ARDC could have met during the Fall of 2002 to develop a more appropriate IEP, seek additional assessment, or recommend a change in placement. The school district is required by law to develop and offer an appropriate program even when the parent (or adult student) disagrees with the program or fails to request an ARDC meeting. A school district risks legal liability if its failure to convene an ARDC meeting to provide needed services results in substantive educational harm to the student, as happened in this case. See *Adam J. v. Keller ISD*, 328 F. 3d 804 (5th Cir. 2003). The procedural errors in this case did not result in a trivial denial of FAPE. The delay resulted in a deprivation of educational benefits.

Substantive Sufficiency

In evaluating whether an educational program is reasonably calculated to confer an educational benefit, the Fifth Circuit Court of Appeals has identified four factors to consider:

1. Is the program individualized on the basis of 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?
4. Are positive academic and nonacademic benefits demonstrated?

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3rd 245 (5th Cir 1997); *cert. denied*, 522 U.S. 1047 (1998).

In applying these factors to the facts of this case, I find that Student's educational program for the 2002-2003 school year was not calculated to and did not provide a meaningful educational benefit, and in fact Student experienced regression during the school year.

The district's educational program is entitled to a legal presumption of appropriateness. Petitioner bears the burden of proving that it is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). Petitioner has met his burden with regard to the 2002-2003 school year.

Is the Program Individualized on the Basis of the Student's Assessment and Performance?

Student's IEP for the 2002-2003 school year was developed in March of 2002, at a time when Student was making meaningful progress. Although prior to the 2002-2003 school year, Student had experienced periods of time when he would sleep (either due to a lack of rest or a seizure), he did not sleep for substantial portions of the school day, and this condition did not significantly impact on his ability to make progress on his IEP goals. However, all parties agreed that things substantially changed in the Fall of 2002.

A fundamental principle of IDEA is that disabled students have access to a free appropriate public education. During the 2002-2003 school year, the preponderance of the credible evidence establishes that Student accessed no educational services at all due to his increased sleeping and Respondent's failure to respond to his change in status. Although the District's documentation establishes overwhelming evidence that Student was receiving no educational benefit as early as October 2002, no significant changes were proposed to his IEP until May 2003. Essentially, Student had an IEP which was not being implemented and which was not appropriate for him based on his then current performance.

Are the services provided in a coordinated and collaborative manner by the key stakeholders?

Respondent contends that it did not request an ARD because Student's increased sleeping was due solely to seizures and medication dosage and could not be addressed educationally. However, District personnel made no efforts to obtain information from medical personnel until April 29, 2004 (just two weeks before the "annual" ARDC meeting). The District did not even obtain a release to confer with Student's treating neurologist, Dr. ***, until the beginning of the 2003-2004 school year. Respondent assumed that Student's change in status was solely a result of his medical condition and sought no further assessment. This is inexcusable, especially in light of the fact that the District had the resources of the *** Program. A diagnostic placement would have been appropriate in the Fall of 2002 when Student began to deteriorate. The communication between Ms. *** and related service personnel indicated that as early as December of 2002, a determination was made by each person individually that the ALE classroom was not appropriate for Student and that changes needed to be made to his IEP and placement. However, none of the key stakeholders in Student's education responded to those concerns by requesting an ARDC meeting to respond to Student's significant needs.

Are positive academic and nonacademic benefits demonstrated?

Respondent contends that during the October 2002-May 2003 time frame, Student made some progress on his IEP goals and objectives during his alert periods. However, documentation of this alleged progress was kept in a portfolio which was purportedly lost. Tr. II-179, 138. According to Dr. ***, Student's portfolio was the only one which was lost during construction. Ms. *** testified that Ms. *** told her she did not maintain the data because Student slept the entire year. Tr. II-411. I find Ms. ***'s testimony to be credible. Therefore, I accord no weight to

Ms. ***'s testimony that Student made progress during the 2002-2003 school year. Additionally, the IEP report card for the 2002-2003 school year states that Student did not make meaningful progress on his IEP goals due to sleeping. In fact, the evidence in the record is clear that Student regressed significantly during the course of the 2002-2003 school year.

Is the program administered in the least restrictive environment?

Respondent contends that it should be excused for not convening an ARDC meeting prior to May 15 because a change in placement to the *** would have resulted in a placement which was too restrictive for Student. The documentation clearly shows that Student was not being successful in Ms. ***'s classroom as early as October, 2002. As stated above, an ARDC could have requested additional assessment and modified IEP goals and objectives in light of Student's status without recommending a move to ***. However, the District also contends that the May 15, 2003 ARD recommended an appropriate diagnostic placement at the ***. Respondent's argument is without merit.

Environmental vs. Medical Factors

This case presents a series of events and circumstances which render it difficult to pinpoint the "cause" for Student's regression during the 2002-2003 school year. Petitioner contends that his classroom environment was the sole cause of his deterioration. Respondent contends that Student's complex medical condition and medication dosage were the sole cause. It is very clear that Student suffers from a seizure disorder, and as a result, has experienced periods of time where he has slept and has been difficult to arouse while at school. The record is also clear, however, that there was a qualitative and quantitative difference in the impact of these symptoms when comparing school years which preceded and followed the 2002-2003 school year. Prior to October 2002, Student was able to progress educationally and the degree of sleeping and lack of alertness was not a significant daily occurrence. Likewise, during the 2003-2004 school year, while in another classroom, Student has experienced some periods where he has slept for a very short period of time during the school day, but these instances have been rare and have not interfered with his overall ability to make progress. Nothing compares to the 2002-2003 school year. Student's disability has not changed from year to year, so we must look to other factors to determine what contributed to his decline.

Respondent contends that Student decline is solely a result of seizure activity and/or the side-effects of his medication. However, from October, 2002 to January 2003, Student's seizures began to extinguish. Although Student had been placed on an additional anti-seizure medication (Topamax) in the Fall of 2002, his doctor began to eliminate this medication by January 2003 because his seizures were extinguishing. The medication was eliminated gradually over a period of months. By May, 2003, Student was no longer taking Topamax and his blood levels were negative for the medication. At the time when Student's seizures were extinguishing and his medication was reduced, the amount of time Student spent sleeping during the school day dramatically increased. Dr. *** treated Student on multiple occasions during the 2002-2003 school year and never observed him to be lethargic or exhibit the symptoms he experienced at school. Dr. *** testified that periodic

screening revealed that Student's medications were at therapeutic levels during the 2002-2003 school year, and that the amount of medication he was taking was not sufficient to cause the symptoms he exhibited at school. He further testified that the type of seizures Student experienced would not have caused the degree and amount of impaired consciousness evident during the 2002-2003 school year. According to Dr. ***, a seizure would be followed by a postictal stage which would last a matter of minutes. By the end of the school year, Student appeared to experience consecutive days and weeks during which he would sleep for all or a substantial portion of his school day. These facts do not appear to be consistent with a conclusion that Student's deterioration was caused solely by seizures and/or medication.

We must next look to Student's environment. Petitioner offered the explanation that Student's teacher during the 2002-2003 school year was abusive, and that this abuse caused Student to "shut down". Two witnesses observed direct conduct by Ms. *** towards Student which concerned them at the time, but standing alone would not lead to the conclusion that he experienced child abuse. Taken as a whole, the testimony of the witnesses suggests that Ms. *** may have been aggressive or rough in the way that she handled the students in her classroom, including Student. I have found that the credible evidence in this case leads me to conclude that the environment in Ms. ***'s classroom was one in which she was inappropriately aggressive or rough in her dealings with the students. I am not convinced, however, that her conduct rose to the level of child abuse.² I am also not convinced that the aggressive conduct of the teacher, and the environment in the classroom as a result thereof, was the sole cause of his regression.

Several witnesses testified that Student was left to sleep on a mat in the classroom and that Ms. *** did not adequately involve him or attempt to stimulate him. I found the testimony of these witnesses to be credible. Student's Triennial Review specifically states that he requires "much stimulation and adult attention." R-8.3. This factor would certainly appear to have had an impact on Student's ability to be successful in the classroom.

Once Student's environment changed, Student's alertness increased and he began to be successful in the classroom again. Student's mother testified soon after Student was home during the summer break, he stopped sleeping for significant amounts of time. Additionally, the classroom aide who worked with Student in Ms. ***'s class as well as in Ms. ***'s class noted a significant difference in Student during the 2003-2004 school year. Ms. *** testified that although Student would occasionally sleep for a short period of time during the school day, this was a rare occurrence. These events appear to be infrequent in occurrence and short in duration. Ms. *** and her classroom aides testified that they make concerted efforts to engage Student in classroom activity. Student has made steady educational progress during the 2003-2004 school year.

² CPS investigated allegations pertaining to another child in Ms. ***'s classroom and found that emotional abuse, as defined by the Texas Family Code, did not occur. The Texas Family Code defines emotional abuse as mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning. Physical abuse is defined as physical injury that results in substantial harm to the child or the genuine threat of substantial harm from physical injury to the child.... Tex. Fam. Code § 261.001(1)(A)(C)

Student is a complex young man with a complex disability which renders it extremely difficult to determine a single cause for the symptoms he exhibited during the 2002-2003 school year. However, I am convinced that environmental factors in Ms. ***'s classroom did impact Student and contribute to his regression. I am also convinced that medical factors also impacted Student.

Ultimately, the cause of Student's decline over the 2002-2003 school year is not so much an issue as Respondent's lack of responsiveness to his needs. Respondent missed multiple opportunities during the school year to intervene, seek further assessment, modify his IEP and change his placement. Rather, Student was left to sleep on a mat in the corner of the classroom for the better part of the school year. This is unacceptable. Respondent's failure in this regard resulted in a denial of a Free Appropriate Public Education.

Extended School Year

Petitioner contends that Respondent denied Student a FAPE by not providing him extended school year services during the 2002-2003 school year. The necessity for ESY services must be determined on an individual basis and documented from formal or informal means which demonstrate that in one or more critical areas addressed in the student's IEP objectives, the student *has exhibited, or reasonably may be expected to exhibit*, severe or substantial regression that cannot be recouped within a reasonable period of time. 19 Tex. Admin. Code §89.1065. Contrary to Respondent's assertion, I do find that Petitioner has demonstrated that the regression Student experienced during the 2002-2003 school year was related to the absence of instruction. At the beginning of the 2002-2003 school year, Student was close to mastering his IEP goals. R-10. Once Student began to deteriorate, his progress declined to the point that he had lost these gains and was making no progress by the end of the year. R-9. A goal which Student had almost mastered during the Fall of 2002, was eliminated from his IEP for the 2003-2004 school year. R-10, 16. Student's current teacher testified that she expected Student would need Extended School Year Services in order to avoid loss of skills acquired over the current school year. Tr. I-138.

Based on the totality of the circumstances, it is clear from the record that Student regressed significantly during the 2002-2003 school year. Although he was alert at the beginning of the 2003-2004 school year, he had not recouped the gains he had made during previous school year within the first eight weeks of 2002-2003 school year. 19 TAC §89.1065(3). Analyzing whether Student qualified for ESY by only weighing his level of progress at the end of the 2002-2003 school year (which was no progress) against his progress at the end of the first eight weeks of the 2003-2004 school year would reward the District for violating IDEA. Student made progress during the early part of the 2002-2003 school year which was lost, in large part, due to the absence of instruction. Therefore, in weighing the gains Student made during the early part of the 2002 school year against the gains made during the first 8 weeks of the 2003-2004 school year, it is clear from the record that Student had exhibited substantial regression which was not recouped within a reasonable period of

time. Consequently, I find that Student should have received Extended School Year Services during the Summer of 2003. However, there is no evidence in the record as to the amount of services necessary. Therefore, for this reason and due to the amount of compensatory services ordered below, I will not order compensatory relief in this area.

Transition Plan

Petitioner contends that Respondent failed to develop a Transition Plan for Student during the 2002-2003 school year. This is not consistent with the record. Respondent prevails on this issue.

RELIEF

Compensatory Services

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

The amount of compensatory services in this case should be measured by the number of days in which Student was unable to access his educational program as a result of Respondent's failure to respond to his deteriorating ability to function in the classroom. According to the data collected by the teacher (R-21), Student slept for 50% or more of the school day for 52 days during the time period of January 16 through May 13, 2003.³ I find that Student was denied access to FAPE on each of these days. Student was entitled to receive 6 hours of educational programming per day according to his 2002-2003 IEP. Therefore, an appropriate compensatory award for that time period is 312 hours. The teacher failed to maintain data after May 13, 2003 (the ARDC meeting occurred on May 15). The record as a whole supports a conclusion that Student was unable to access his educational program for the remainder of the school year. However, there is no evidence in the record with regard to the last instructional day of the 2002-2003 school year. Therefore, Respondent is ordered to provide Petitioner an additional amount of compensatory educational time equal to the number of educational hours from May 14, 2003 until the end of the school year, excluding absences.

The second element of compensatory relief turns on a consideration of what services are needed to provide a free appropriate public education in light of the denial of FAPE. A logical

³ The calculation of compensatory educational hours in this case does not include any days prior to January 16, 2003, as all claims arising prior to that date were barred pursuant to the one-year statute of limitations and will not be compensated. The calculation also does not include the dates Student was absent or withdrawn from school at his mother's request.

approach would be to require Respondent to structure the compensatory educational services such that they are proportionately consistent with the schedule of services in place during the 2002-2003 school year. However, such a rigid approach would not necessarily be consistent with Student's current educational needs. Therefore, the District is Ordered to conduct an assessment, utilizing the personnel and the methodology as recommended by the ARD Committee, to determine Student's current educational needs and the type of services appropriate to respond to those needs, including summer programming, in-home services, and any related services the ARD Committee deems appropriate. Respondent shall complete the provision of compensatory services no later than September 1, 2006, or at a time mutually agreed upon by the parties.

Petitioner's request for counseling for Student is not supported by the record and therefore denied.

CONCLUSIONS OF LAW

1. Student currently resides in Northside ISD, a legally constituted independent school district within the State of Texas, and is entitled to special education services pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, et seq., as amended.
2. The District's educational program is presumed to be appropriate. As the party challenging the educational program proposed by the district, Petitioner bears the burden of proof. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), aff'd 468 U.S. 883 (1984); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). Petitioner has met that burden.
3. The relevant time period for relief in this case begins on January 16, 2003 and extends through the end of the 2002-2003 school year. During the relevant time period, Student was denied a FAPE in the least restrictive environment appropriate. His IEP goals were not reasonably calculated to provide an educational benefit, and they were not fully implemented. He made no academic or non-academic progress from January 16, 2003 through the end of the school year. *Hendrick Hudson District Board of Educ. v. Rowley*, 458 U.S. 176 (1982); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).
4. During the 2002-2003 school year, Respondent's failure to convene an ARDC meeting to modify Student's IEP and failure to timely convene an annual ARD resulted in a denial of FAPE. *Adam J. v. Keller ISD*, 328 F. 3d 804 (5th Cir. 2003).
5. Petitioner is entitled to compensatory education services to remedy the denial of FAPE. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985).

ORDER

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

1. Respondent shall provide Student with 312 hours of compensatory educational services, consisting of summer programming, in-home services, and any further related services deemed appropriate by the ARD Committee to meet Student's individual needs. Additionally, Respondent is ordered to calculate the number of educational hours from the time period of May 14, 2004 through the end of the school year, exclusive of absences, and to provide compensatory educational services to Student in an amount equal to that sum. All compensatory educational services shall be completed by September 1, 2006, or at a time mutually agreed upon by the parties.
2. Respondent shall conduct an assessment, utilizing the personnel and the methodology as recommended by the ARD Committee, to determine Student's current educational needs and the type of services appropriate to respond to those needs, including summer programming, in-home services, and any related services the ARD Committee deems appropriate.
3. The ARDC shall meet within ten (10) days of receipt of this decision to begin implementation of the relief ordered herein.

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

NOTICE TO THE PARTIES

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

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

SIGNED this 10th day May, 2004.

/S/Sharon M. Ramage
Sharon M. Ramage
Special Education Hearing Officer

DOCKET NO. 167-SE-0104

STUDENT § **BEFORE A SPECIAL EDUCATION**
B/N/F PARENT §
§
VS. § **HEARING OFFICER FOR THE**
§
NORTHSIDE INDEPENDENT §
SCHOOL DISTRICT § **STATE OF TEXAS**

SYNOPSIS

Issue No. 1: Whether or not Respondent denied Student a Free Appropriate Public Education during the 2002-2003 school year by failing to implement substantial portions of his IEP.

Held: For Petitioner. During the relevant time period, Student was denied a FAPE in the least restrictive environment appropriate. His IEP goals were not reasonably calculated to provide an educational benefit, and they were not implemented. Student's ability to function in the classroom deteriorated significantly over 2002-2003 school year, to the point that he began sleeping for all or substantial portions of each school day. Student regressed significantly over the school year and Respondent did not implement his IEP or appropriately respond to his deterioration.

Citation: 34 C.F.R. 300.13; *Hendrick Hudson District Board of Educ. v. Rowley*, 458 U.S. 176 (1982); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

Issue No. 2: Whether or not Respondent failed to develop a Transition Plan for Student prior to the 2003 school year.

Held: For Respondent. An Individual Transition Plan was developed for Student.

Citation: 20 U.S.C. 1414(d)(1)(a); 34 C.F.R. §300.347(b)

Issue No. 3: Whether or not Petitioner was eligible to receive Extended School Year Services during the Summer of 2003.

Held: For Petitioner.

Citation: 34 C.F.R. §300.309; 19 TAC §89.1065