

STUDENT	§	BEFORE A SPECIAL EDUCATION
b/n/f PARENT	§	
	§	
V.	§	HEARING OFFICER FOR THE
	§	
HUMBLE INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

DECISION OF HEARING OFFICER

Procedural History

Petitioner, Student (“Student”), by next friend, Parent, (“the Parent”) filed a complaint requesting an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”). The Respondent is Humble Independent School District, (“the District”). At all times during the proceedings, Mara Purcell and Dorene Philpot, attorneys, represented the Petitioner, and Janet Little Horton, attorney, represented the Respondent.

Petitioner’s request for due process hearing was filed August 25, 2009. On September 20, 2009, during a pre-hearing conference and at the request of Petitioner, the undersigned hearing officer granted leave to amend Petitioner’s request for due process hearing. Petitioner’s First Amended Request for Due Process Hearing was filed September 21, 2009, and the statutory timelines were adjusted accordingly. A second pre-hearing conference was held and, for good cause, the decision due date was extended. The parties waived in writing the resolution session and participated in mediation.

The hearing occurred on December 8, 9, and 18, 2009, which was open to the public at Petitioner’s request. At the conclusion of the testimony phase of the hearing, the record was left open to allow the parties the opportunity to submit written closing arguments, and the decision due date was extended. Due to technical difficulties with preparation of the transcript, the parties were allowed an extension of the deadline for submission of closing arguments and the decision due date was extended.

Issues

Petitioner alleged a denial of a Free Appropriate Public Education (“FAPE”) and specifically claimed the following failures by the District:

1. Failure to provide an appropriate educational placement for the Student for the past year;
2. Failure to devise appropriate, measurable goals and/or objectives in every area addressed in student’s Individual Education Program (“IEP”) based on present levels of performance in all areas of need for the past one year;
3. Failure to give prior written notice at all required times, specifically, when Petitioner requested a change of placement or services and/or when there was a disagreement between the District and Petitioner; and
4. Failure to devise and implement an appropriate functional behavioral assessment (“FBA”) and behavior intervention plan (“BIP”) from late December, 2008 to present.

Request for Relief

As relief, Petitioner requested an order directing the District to provide an appropriate IEP to include the following:

1. Reimbursement for expenses associated with the Student’s placement at *** from June 8, 2009 to the present;
2. Placement at *** for the 2009-2010 school year at District expense;
3. An order directing the District to contract with ***, Ph.D. to conduct a Functional Behavioral Assessment;
4. An order directing the District to contract with Dr. *** for ongoing weekly supervision of the Student’s Behavior Intervention Plan upon student’s return to the District for a period of one year;
5. An order directing the District to contract with Dr. *** to provide training in behavioral interventions to all District staff involved in the Student’s programming prior to transitioning him back to the District; and
6. All other relief deemed appropriate by the Hearing Officer.

Findings of Fact

1. At the time of hearing, Student was *** years old and attended *** where student was enrolled by the Parent on June 8, 2009. Transcript Volume I, pg. 54 (hereafter referred to as “T. Vol. __, pg. __”); Petitioner’s Exhibit GG, Tab 29 (hereafter referred to as “P. Ex. __, pg. __ ,or Tab __” when applicable)
2. Humble Independent School District is responsible for providing FAPE to Student
3. When Student transferred to the District in ***, student was in *** grade at *** and eligible for special education services as a student with emotional disturbance (“ED”). Respondent’s Exhibit 14 (hereafter referred to as “R. Ex. __, pg. __”)
4. In the spring, 2008, the District conducted a Full Individual Evaluation (“FIE”) of the Student. The FIE included a psychological evaluation, Attention Deficit Hyperactivity Disorder (“ADHD”) evaluation, and a FBA. Student was determined to be a student with other health impairment (“OHI”) and a learning disability (“LD”) in the areas of math reasoning and basic reading skills. Student’s general intellectual ability fell within the *** range. R. Ex. 21
5. The District’s FBA included data collected from the Parent, teacher interviews, and observations of Student in the classroom. The Student’s behaviors that interfered with student’s classroom

performance included inappropriate social interactions, noncompliance, and aggression. Changes in student's routine caused problems for Student. Student was also inattentive, impulsive and hyperactive. R. Ex. 21

6. On March 24, 2008, the admission, review, and dismissal committee ("ARDC") met to review the Student's FIE results. The committee determined that Student was eligible for special education under the classifications of specific LD, ED and OHI. The committee agreed that the Student would receive counseling services for 45 minutes per week in the form of both direct and consult service time. A BIP that addressed positive behavioral supports and interventions was discussed and accepted. Student was to receive in-class support for 30 minutes each in ***. Modifications and accommodations were put in place. The ARDC agreed that student should be retained in *** grade for the 2008-2009 school year. The Parent agreed to the ARDC decisions. R. Ex. 12
7. At the end of the 2007-2008 school year, Student was in the *** stage in reading and writing. Student was reading at a DRA reading level of *** with *** accuracy and *** words per minute. R. Ex. 12; R. Ex. 53
8. During the 2008-2009 school year, Student repeated *** grade. Student was in a regular education classroom and followed the general education curriculum with accommodations according to student's IEP and BIP. Student received counseling services according to student's IEP. Tr. Vol. II, pgs. 461-2
9. During the fall, 2008, the Student's behaviors were disruptive at times. Student was able to talk through those behaviors and complete student's school day. Student received *** office referrals during that semester. Student had more good days than bad days. Tr. Vol. II, pgs 461-468; R. Ex. 34
10. The Student's 2008-2009 *** grade teacher utilized a color behavior card system with her students. Each student started the day with a *** card, then pulled a different color card if student's behavior was inappropriate. The colors descended from ***, to ***, then ***, ***, and finally, ***. Student received mostly *** and *** days during the fall, 2008. The teacher also used weekly rewards system and the campus used a positive behavior system. Student was able to earn rewards during the fall, 2008 and into February or March, 2009. Tr. Vol. II, pgs. 463-466
11. At the District, when a student meets standards and expectations, ***. R. Ex. 33
12. During the fall, 2008, Student received ***. Student was in the *** stage of reading and writing. R. Ex. 33
13. The District expects an *** grader to begin *** grade at a DRA level *** and progress to level *** by the end of the school year. In October, 2008, Student was reading on level ***. In January, 2009, student was on level ***. R. Ex. 32
14. In January, 2009, Student was progressing toward meeting standards in math. R. Ex. 32
15. By the third progress report in December, 2008, Student had made some progress on student's behavior goals. Student was on a DRA reading level ***. R. Ex. 11 and 33
16. The ARDC met December 12, 2008, discussed student's academic and behavioral progress, noted student's improvement in behavior, and made no changes to student's IEP or BIP. The Student's parent requested an occupational therapy ("OT") evaluation for fine motor skills and writing, and the committee agreed. The committee also required a speech and language evaluation. Modifications were added. The Student's medications were reviewed. Student was taking ***. per day, ***, and ***. The Parent agreed to the ARDC decisions. R. Ex. 11
17. In January, 2009, Student ***, began to have difficulties at home about homework, used profanity, and had problems at his *** program. The Parent changed student's *** program, and during the month, made medication adjustments. R. Ex. 54
18. In February, 2009, Student told student's Parent ***, and that he felt very alone. Student also told the Parent student would *** rather than ***. R. Ex. 54; P. Ex. P, pg. 911
19. The District's school counselor evaluated Student and assessed student's *** as low. P. Ex. O; Tr. Vol. III, pgs. 738-739
20. The Parent continued to adjust the Student's medications in February. R. Ex. W; R. Ex. 54
21. ***. Tr. Vol. I, pgs. 140-141; P. Ex. P, pgs. 905-908

22. In February, the Parent asked for *** and the District complied. R. Ex. 54; P. Ex. P, pg. 904
23. On February 27, 2009, the Parent wrote the District and requested that her child be placed in the adaptive behavior program, citing a need for a smaller group setting. R. Ex. 55
24. The ARDC met March 4, 2009 to review the Student's BIP and add additional in class support. The Parent participated and agreed by telephone. An impulse control system was added to student's BIP along with a procedure for handling *** behavior. The ARDC added 25 more minutes of in-class support. It was noted that the Student's *** behaviors increased since December and student had an increased inability to focus. The *** incident was discussed. Social skills intervention with the counselor and a peer group was added. R. Ex. 9
25. By early to mid-March, 2009, the Student's behavior became more non-compliant and defiant. The Parent felt she could not control Student. On ***, student was physically aggressive, ***. R. Ex. 54, pgs. 62; R. Ex. 34 pg. 9; P. Ex. Q, pgs. 915, 917
26. The Student's medications were changed several times during the early part of the spring, 2009. In mid-March, the Parent took Student to a different doctor who changed student's medications. T. Vol. I, pg. 147; P. Ex. W
27. Before spring break, Student was more was more aggressive with the Parent, and he would not ***. During spring break at home, student had a meltdown, threw things ***. Tr. Vol. I, pgs. 70-72
28. On ***, the Parent placed Student *** where student remained until ***. Student returned to school *** and was taking several medications. The District assigned ***, and began to arrange for an ARDC meeting. Student's classroom teacher continued to use the behavior systems, reinforcements and rewards that were in place prior to student's ***. R. Ex. 111, pgs. 9-15; 19; T. Vol. II, pgs. 471-472
29. On ***, an ARDC meeting was held during which the Parent reviewed Student's medications. It was reported that student was sleepy in the morning of ***, and that the doctors indicated that it could take 4-6 weeks for the medications to have an impact on student's behavior and to affect student's defiant behavior. Student's BIP was reviewed, and the committee continued with the one minute warning system. Discussion was had regarding the support provided by the *** and behavior team. The speech and language evaluation was reviewed and the ARDC accepted Student's eligibility for speech impairment ("SI"). The committee approved 60 minutes a week for speech therapy. The Parent participated and agreed to the ARDC decisions by telephone. R. Ex. 8
30. At the April ARDC meeting, Student was reading on a DRA level ***. Student needed more structure, and the ARDC developed a reading IEP and placed him in resource reading for *** minutes per day. R. Ex. 8
31. Student could ***, understood ***, and identified ***. R. Ex. 8
32. On ***, after several behavioral incidents including ***, the Parent picked Student up from school. R. Ex. 34; T. Vol. I, pg. 148
33. On ***, the Parent *** the Student a second time. Student's medications were changed. Student returned to student's classroom at *** on ***. P. Ex. W; T. Vol. I, pg. 151; T. Vol. III, pg 709
34. An ARDC met on *** to review the Student's current behaviors and program. The members were unable to see a clear pattern or a particular antecedent with student's behavior outbursts. Student's long time doctor recommended a structured, small group environment with low stimulus and positive reinforcement behavior management for classroom instruction. The Student's medications which included *** were discussed. The committee also recommended extended school year ("ESY") for social skills and behavior in order for Student to have consistency of program and to aid in preventing an increase in inappropriate behaviors. IEPs were written for ***. The Parent agreed with the ARDC decisions. R. Ex. 7
35. The *** ARDC amended the Student's BIP to include the level system for an applied behavior ("AB") class and placed him in the District's *** program at *** with transportation ***. While on levels *** in the system, the Student would not go anywhere on campus without ***.

Interventions were put in place to help the Student learn positive replacement behaviors specifically delineated in the BIP. R. Ex. 7

36. On ***, the Student's doctor increased student's medication which was given to affect student's behavior. Tr. Vol. I, pgs. 152-153
37. The Student attended the AB program *** and a portion of ***. Tr. Vol. III, pg. 710
38. On ***, an ARDC meeting was held to review the Student's placement. Rather than continue him at ***, because of student's crisis behavior, the committee placed him in ***. Student was *** at the time of the meeting and the Parent indicated that he would remain there for about *** days. The District asked the Parent to contact the *** administration when the Student was ***. R. Ex. 6; T. Vol. III, pg. 868
39. The day after the ARDC meeting, ***, the Student returned to school and began at ***. Tr. Vol. III, pg. 709
40. The *** where a student is placed until such time that behaviors are stabilized sufficiently to perform in an adaptive behavior class. At that time, a student is returned to student's regular campus. *** is the most *** placement available at the District. Tr. Vol. III, pgs. 630-632, 721-722
41. The behavior management system in place at *** is the ***. *** is a positive reinforcement system designed to be a teaching component when the District works with students to decrease negative behaviors, teach positive pro-social behaviors, and help transition them to a less restrictive environment. The level system is stair-stepped intervention. Students enter at the bottom step or level which has the most structure and most frequency of positive fixed intervals of reinforcement. At each interval, an adult uses a point sheet of targeted positive behaviors that are in line with replacement behaviors on a student's BIP. The behavior point sheet is taped to the student's desk and at 10-15 minute intervals, the adult provides the student with positive comments regarding positive behaviors. If a student does not earn a point for a behavior, the adult instructs the student about the behavior that is expected during the next work period so a point can be earned. Reinforcement time is given to the student on a periodic basis. The goal is for the student to achieve a percent of appropriate behavior over a ten day period for a student who is on level 1. T. Vol. III, pgs. 633-645
42. The *** level system is displayed so that students can see what is expected and what is not allowed. Data is collected daily and analyzed by District staff, and the system is adjusted to address a student's behaviors. *** has interventions that can be implemented in the system, including student specific interventions. The system uses an impulse control sequence to help the student identify and control student's behavior. Techniques are taught to help a student with self-control. As a student works student's way up the steps, the level system includes work on self-monitoring. T. Vol. III, pgs 670-674; T. Vol. IV, pgs. 1166-1167
43. During May, 2009, the *** principal made telephone calls on behalf of Student's parent regarding after school *** care and assistance for the Parent in the home. Tr. Vol. III, pgs. 867-886
44. While Student was at ***, student was in class with *** other students and *** teachers. Student worked on five positive behaviors which were addressed in student's behavioral and counseling IEPs. Student's behavior IEP goals were:
 - a. Verbalize and/or signal to teacher when upset and problem solve for resolution
 - b. Demonstrate on task behavior and complete assignments consistently
 - c. Stay within assigned areas and demonstrate appropriate personal space

Mastery criteria of student's objectives were from an 80-100% level with visual or verbal prompts. The positive behaviors that Student worked on while at *** were to keep hands, feet, and object to himself, follow directions within one minutes, remain in student's seat, keep trying, and use school appropriate language. Daily point sheets were kept at 10 minute intervals, and positive praise for good behaviors was given at the end of each interval. Student was given reinforcement time as a social skills tool. Because student was a *** student, the District used a

- *** of impulse control to enable Student to see if student was at a warning or at a second warning, or time-out. A timer was used during time-outs. A behavioral contract was implemented with the Student as another form of positive reinforcement. Redirection, sticky-tack, stress balls, and demonstrations of what was expected were used as de-escalation techniques. R. Ex. 7; Tr. Vol. III, pgs. 812-813; 835-837
45. The *** team reviewed the data that was collected on a daily basis to discuss what triggered the Student's behaviors and what strategies were successful or unsuccessful. Tr. Vol. III, pgs.832-833
 46. When a student tries to fulfill a function of student's behavior and the school structure prevents him from exhibiting the negative behaviors that have worked for him in the past, student will increase the negative behaviors' intensity, frequency and duration in student's efforts at success. This is called an extinction burst. Once a student learns that student's negative behaviors are not going to succeed in getting what student wants, student then decreases those behaviors. Tr. Vol. III, pgs. 659-660
 47. The Student was in *** for *** days. In student's first week at ***, through calculations from student's daily point sheets, it was determined that student displayed about 70% of positive behaviors. In the following two weeks, those behaviors decreased to mid 60%. Toward the last days at ***, student was displaying about 80% positive behaviors. R. Ex. 63; Tr. Vol. III, pgs. 912-913
 48. While at ***, the Student's grades in spelling, math, science, social studies, social skills, and P.E. were in the *** range. Student's DRA level was ***. Tr. Vol. III, pgs. 892-894
 49. Student received counseling services while at ***. Tr. Vol. III, pg. 894
 50. On June 1, 2009, at the Parent's request, an ARDC meeting was held. The Parent was in disagreement with the *** program and provided a statement from the Student's psychiatrist that recommended residential placement. A 10 day recess was agreed upon and the committee reconvened on June 9. At that meeting, the Parent informed the District that she had placed Student in residential placement at ***, and submitted a request for reimbursement for the cost of that placement. The Parent asked for in residential placement for the summer, and requested an Independent Educational Evaluation, a FIE with emphasis on IQ and reading, and a neuro-psychological and FBA evaluation at District expense. The District agreed. The Parent stated that Student would be at *** until ***. The Parent stated that the Student was a liability. The District offered parent training and in home training and the Parent agreed. The Parent disagreed with the District's increased offer for ESY. Prior written notice was provided to the Parent. R. Ex. 4 and 5
 51. The District's Full and Individual Re-Evaluation ("FIE") of September, 2009 was conducted to determine the Student' most appropriate disability condition, to identify student's current levels of functioning, strengths, weaknesses, and needs within the educational environment, and to provide information to the ARDC to enable the development of an educational program for Student. The multidisciplinary team concluded that student continued to be eligible under ED and OHI. The team ruled out eligibility as a student with autism, mental retardation, and speech impaired. Petitioner's private evaluation by Dr. *** made the same eligibility conclusions as the District. R. Ex. 15; P. Ex. CC; Tr. Vol. IV, pg. 1104
 52. On September 30, 2009, an ARDC meeting was held. The Parent did not attend. The committee agreed that the Student's qualifying disabilities are ED, OHI (ADD/ADHD), and SLD in reading fluency. New goals and objectives were accepted. A BIP and an in-home training IEP were accepted, and the committee agreed that the *** was the least restrictive environment ("LRE") for the Student. R. Ex. 1
 53. Assuming that the Parent disagreed with the September 30 decisions, prior written notice was provided. R. Ex. 3
 54. During ESY, 2009 at ***, the Student worked on *** grade level TEKS. Beginning in the fall, 2009, student worked on *** grade level TEKS. When *** enrolls a student that is privately

- placed, no one monitors student's education. Student has no goals and objectives at ***. P. Ex. FF, pgs. 44-49 and 169
55. *** uses a token economy as its behavior management system. When a student's behavior is good, student is rewarded with a token that can be used to buy things. Different teachers set up the token economy in different ways. Nothing is posted in the Student's classroom that tells him what behaviors student should exhibit to be able to earn student's token at the end of the day. *** uses no formal impulse control sequence. No data is taken that tracks when a student is exhibiting replacement behavior. *** tracks data as negative frequency counts. The same system is used in the *** where students lives while attending ***. The closest thing to posted rules by which the students are expected to live would be the students' rights and responsibilities. The token economy system is somewhat subjective. P. Ex. FF, pgs. 58-63; Tr. Vol. I, pgs 208-213
 56. If Student refuses to go to supervised separation, *** staff guides him by the elbows. *** does compliance training with Student which can last as long as 30 minutes or more. Compliance training requires the Student to do simple tasks over and over again until student is ready to comply with a demand. If a student refuses to do compliance training, *** staff will initiate hand over hand compliance training. Unlike Respondent, *** does not use a reinforcement component of compliance training. T. Vol. IV, pgs 1170-1182
 57. When a student enters ***, it develops a treatment plan that focuses on behavior and modification of behavior along with how *** will monitor medications and track physical, emotional, and social needs. The treatment plan is reviewed every 90 days to review the behaviors that are being tracked and list the needs of the student and how those needs will be met. P. Ex. FF, pgs. 130-133
 58. The case manager and counselor at *** stated that Student struggles in less structured environments, and needs concrete behavioral expectations, a routine, behavior therapy, positive reinforcement, social praise, teaching replacement behaviors, teaching appropriate social interactions both in vocal tone, physical space, and boundary, a self-contained classroom, minimal distractions, and close supervision or small group ratios. P. Ex. FF, pgs. 136-140
 59. *** has a *** student ratio. Approximately 99% of its students are disabled. In Student's classroom at ***, there were *** grade to *** grade students. Student lives with approximately 12 students. P. Ex. FF, pgs.26, 56 and 139; Tr. Vol. III, pg.766
 60. At ***, Student receives no individualized special education services. Student has no accommodations or modifications. Student receives some counseling, and there is no set schedule for such service. Student's teachers at *** indicated that an interruption in Student's routine would not affect him. After *** received a copy of the Student's most recent FIE, it made no changes to the services it provides to Student Tr. Vol. IV, pgs. 1168-1171; P. Ex. FF, pgs. 54;153-154
 61. At ***, parent training is done as needed, as requested by a parent. P. Ex. FF, pg. 165
 62. The District uses office referral forms on which it collects antecedent, behavior and consequence data when a student is referred to the office for behavioral reasons. Tr. Vol. IV, pg. 1065
 63. The District has a campus-wide positive behavioral support program (“{PBIS}”) that is used at the ***. The system is used to look at behaviors, locations and types of behaviors, possible motivations in order to determine if behaviors are a student problem or a system problem. Data is collected by use of discipline referral forms and restraint report forms. At ***, class-by-class points that are earned by the students is another type of systematic collection of data. Tr. Vol. III, pgs. 645-647; Tr. Vol. IV, pgs 1094-1097
 64. *** does not record restraints for anything that is under a minute. Tr. Vol. IV, pg. 1094
 65. As part of the September, 2009 FIE, the District conducted a FBA to determine Student's behaviors and their antecedents. The functions of student's behaviors were obtain something and to escape or avoid doing something. Student displayed the same behaviors at *** such as ***. These functions were the same as those identified in Student's 2008 FIE. Tr. Vol. IV, pgs 1128-1132

Discussion

Did the District fail to provide an appropriate educational placement for the Student for the past year?

At the heart of this dispute is the question of whether Student needs residential treatment on an around the clock basis. Petitioner relied heavily upon the testimony of student's psychiatrist who recommended residential placement in June, 2009 and again in November, 2009. At the time he made the recommendations, he had not seen Student since April, and he had no information about the Student's educational program or progress in the ***. Essentially, he made the recommendation based on input from the Parent who had been struggling with the Student's behaviors at home.

During the spring, Student took numerous medications, and the dosages were adjusted. At times, the dosages were higher levels than what is recommended for children. By June, after *** and numerous behavioral incidents at home and in the car, the Parent, who felt endangered by the Student, unilaterally placed him at ***, a residential treatment center where student remained at the time of hearing.

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that--

(a) The placement decision--

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including Sec. 300.114 through 300.118;

(b) The child's placement--

(1) Is determined at least annually;

(2) Is based on the child's IEP; and

(3) Is as close as possible to the child's home;

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. 34 C.F.R. § 300.116

During the fall, 2008, Student was in a regular education *** grade classroom and making progress. As student's behaviors began to escalate, the ARDC adjusted student's BIP. On February 27, the Parent, citing a need for a smaller classroom setting, requested that Student be placed in the AB classroom. In keeping with LRE requirements, the ARDC added more in class support for Student. At the *** ARDC meeting, student was placed in resource reading class. Student was placed in AB classroom at the *** ARDC meeting, and ultimately, at the May 6 ARDC, the committee placed him in the District's ***. The ARDC also required ESY for him during the summer, 2009. Student's parent

took part in the ARDC discussions and agreed to the decisions made at those ARDC meetings. After receiving results of the September, 2009 FIE and FBA, the ARDC committee determined that, upon student's return to the District, Student should continue at the ***. At each stage of the Student's behavioral escalation, the District acted quickly to develop an educational program that was individualized to Student's unique needs and in the LRE. At the end of the 2008-2009 school year, Student was beginning to make progress at the ***, and the District offered ESY in order to deter regression in behaviors.

The credible evidence reflects that Student was placed at *** because of behavioral problems in the home setting. The District's *** placement decision is less restrictive than a residential treatment center, and the evidence supports a finding that Student made progress during student's *** days in the program. Placement at *** is not necessary for Student to make educational progress and receive FAPE. *B.G. v. School Board Of Palm Beach County*, 255 F. App'x 360 (11th Cir. 2007). The District's placement of Student at *** is appropriate.

Did the District fail to devise appropriate, measurable goals and/or objectives in every area addressed in student's Individual Education Program ("IEP") based on present levels of performance in all areas of need for the past one year?

A special education student must have an IEP that includes a statement of measurable annual goals, including academic and functional goals, designed to meet the child's individual needs to enable him/her to be involved in and make progress in the general education curriculum. For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives are required. The IEP must include how the child's progress toward meeting the annual goals will be measured, and when periodic reports on the progress the child is making toward meeting the annual goals will be provided. 34 C.F.R. § 300.320.

A review of all of Student's goals and objectives for the applicable time period reveal that Respondent carefully designed both academic and functional goals to meet Student's needs. Student's IEPs included how student's progress toward meeting the goals was to be measured, and reflected periodic reports on that progress. Each IEP, on its face, contained student's present levels of performance.

Did the District fail to give prior written notice at all required times, specifically, when Petitioner requested a change of placement or services and/or when there was a disagreement between the District and Petitioner?

Prior written notice must be given to the parents of a child with a disability a reasonable time before the public agency proposes to initiate or change the identification, evaluation, or educational

placement of the child or the provision of FAPE to the child; or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 C.F.R. § 300.503.

On February 27, 2009, the Parent made a written request for the District to place her son in AB classroom. At the time of the request, Student was in a regular education classroom. Between February 27 and April 21, the ARDC met several times, and each time added additional support for the Student as the progression from less restrictive to more restrictive settings occurred. The IDEA mandates that the school proceed through a continuum of services, taking intermediate steps where appropriate. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1050 (5th Cir. 1989). Had the District jumped from a regular education classroom to AB classroom without first attempting less restrictive avenues, it would have been in violation of the LRE requirement of IDEA. Although the Parent made a specific educational placement request, it is unclear whether she presented that request to the ARDC. Regardless, I do not find that the delay in placing the Student in AB class was a refusal that required prior written notice. Further, the Parent agreed with each interim change that led to the AB classroom. Petitioner failed to present evidence of any other allegations of the District's failures to provide prior written notice.

During the pendency of this due process matter, the Parent did not agree to the June, 2009 ARDC decisions and failed to attend the September, 2009 ARDC meeting. Out of precaution, the District provided prior written notice upon each occurrence.

Did the District fail to devise and implement an appropriate functional behavioral assessment ("FBA") and behavior intervention plan ("BIP") from late December, 2008 to present?

In the spring, 2008, the District conducted a FBA which included data collected from the Parent, teacher interviews, and observations of Student in the classroom. The Student's behaviors that interfered with student's classroom performance included inappropriate social interactions, noncompliance, and aggression. Student had problems with changes in student's routine. Student was also inattentive, impulsive and hyperactive.

Following the FBA, the March, 2008 ARDC designed a BIP for the Student that included positive behavioral supports and interventions. At the December, 2008 ARDC meeting, noting that student's behaviors had improved, the committee made no changes to student's BIP.

In February, 2009, Student ***. The ARDC committee met March 4, 2009 and made changes and additions to student's BIP. In March, 2009, the Parent *** the Student. The ARDC met April 8, 2009 and reviewed student's medications, BIP, the *** and additional supports for Student

The Parent *** the Student for a second time on ***. The ARDC met April 21, 2009 and discussed student's behaviors and patterns or antecedents with student's behavior outbursts. The Student's medications which included *** were discussed. In order for Student to have consistency of

program and to aid in preventing an increase in inappropriate behaviors, the committee recommended ESY. Student's BIP was reviewed and amended. Interventions were put in place to help the Student learn positive replacement behaviors specifically delineated in the BIP. It was at this time that the ARDC placed him in the AB class at ***.

After approximately three days at ***, the Parent *** the Student a third time. The ARDC met on May 6, 2009 to review student's placement. The committee determined that student should be placed in the ***. Student attended the *** during which time the staff reviewed daily the behavioral data that was collected and discussed what was working with the Student.

Much testimony was elicited regarding whether the District conducted a FBA when Student began a downhill spiral in the early spring semester, 2009. Petitioner contended that a formal assessment should have been done. The IDEIA requires a District to conduct a FBA and prepare a BIP only when there is a change of placement for disciplinary reasons. 34 C.F.R. § 300.530. No change of placement for disciplinary reasons occurred in this Student's case.

The District's expert defined functional assessment as "collecting information in order to generate a hypothesis." An ongoing collection of behavioral data can be conducted to look at trends in an individual's behavior. When a behavior problem occurs, a "snapshot" of the behavior can be documented, and over time, through the collection of momentary time samples of behavior, one could develop an idea of the function of a person's behavior. An ARDC discussion of a child's behaviors, why the behaviors may have occurred, and subsequent changes to a BIP is a type of FBA.

The *** staff daily reviewed behavioral data collected on Student's behavior, discussed effective strategies used with him, and adjusted student's program based on the review. Throughout the spring semester, 2009, the ARDC reviewed and adjusted student's BIP. Although the District did not conduct a formal FBA from the spring, 2008 until September, 2009, it regularly assessed the functions of student's behaviors, and adjusted student's BIP as a result of those assessments.

Did the District deny Student a free appropriate public education?

Public school districts must comply with the IDEA procedures for identifying children with disabilities who need special education, and delivering appropriate services as necessary to provide FAPE. 20 U.S.C. § 1412(a)(1); *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 189 (1982).

The Fifth Circuit has further defined a free appropriate public education by delineating four factors to consider as indicators of whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational program individualized on the basis of the child'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 positive

academic and non-academic benefits demonstrated? *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). A placement is appropriate if it is designed to meet a special education child's individual needs such that the child can benefit from instruction. *Adam J. ex rel. Robert J. v. Keller ISD*, 328 F.3d 804, 808, 810 (5th Cir. 2003). The IDEA does not entitle a disabled child to a program that maximizes student's potential. Rather, it guarantees a basic floor of opportunity, specifically designed to meet the child's unique needs, supported by services that will permit the child to benefit from the instruction. It must be likely to produce progress and cannot be a mere modicum or *de minimis*. *Michael F.*, 118 F.3d at 247-48.

Factor Number 1: Is the educational program individualized on the basis of the child's assessment and performance?

During the applicable time frame, prior to the development of the IEPs, the District had a current FIE from which to develop the Student's educational program. Student's social, emotional and behavioral needs were address through a BIP that the ARDC regularly reviewed and amended as student's needs required. Counseling services were provided to help him develop social skills so that student could better identify student's emotions and appropriately deal with student's aggressive tendencies tendencies. In-class support was provided.

In an effort to show that the District's program was inappropriate for the Student, Petitioner spent a great deal of time eliciting testimony regarding the number of restraints used at *** as compared to the number used at ***. However, reporting requirements are more stringent for public schools than for private entities. Thus, comparing reported numbers of each school is akin to comparing apples to oranges, and Petitioner failed to show that the District's program was inappropriate on that basis.

Petitioner's witness testified that the *** program was not consistently implemented. The overwhelming evidence discounted that opinion.

The Student's 2009 ESY program continued the reading, math, social skills and counseling IEPs that were in place at the end of the 2008-2009 school year. The District increased student's ESY time to a total of five days per week for six hours each day at the ***. The Student did not attend the District, but was enrolled in *** during the summer.

Following a September, 2009 FIE, the District designed the Student's IEPs based on the results of that assessment. In-home and parent training were included in Student's program, along with counseling, extended day, and family counseling. Based on the new FBA, a BIP was developed, and a counseling IEP was designed to teach student social skills. Although invited to the September ARDC meeting, the Parent declined.

Petitioner argues that the Student's program was not individualized based upon current assessments because a FBA was not done after Student's behavior changed during the early part of 2009. Although the District did not conduct a formal FBA, the evidence reflected that the ARDC made regular

assessments of the Student's behaviors, discussed strategies to use, and made changes to student's program. In other words, a functional behavior assessment was an on-going process for Student. Petitioner also argues that the Student's psychiatrist wrote that community educational programs had been unable to adequately deal with Student's behavioral difficulties. However, at the time the doctor wrote his statement, he did not know what Student's placement was or how he was performing in school. He had not seen the Student in several weeks.

Petitioner argues that in-home and parent training should have been implemented in late fall, 2008. The evidence supports that, at least by the beginning of the spring semester, 2009, Student's behaviors began to escalate. The District did not offer in-home or parent training until after Student enrolled at ***. However, Petitioner failed to prove that the absence of such training rendered Student's IEP insufficient.

Factor Number 2: Is the program administered in the least restrictive environment?

Petitioner did not argue that the District Student was not educated in the least restrictive environment. A review of the evidence revealed that, in keeping with IDEA requirements, the ARDC gradually made Student's placement more restrictive as student's behaviors required. Student was able to progress in a regular education classroom during the fall, 2008 with accommodations and modifications. As student's behaviors escalated, the ARDC provided more support, then placed him in resource class before it made the decision to place him in the AB class, followed by the ***.

Factor Number 3: Are the services provided in a coordinated and collaborative manner by the key stakeholders?

Until September, 2009, the Parent participated in all of Student's ARDC meetings. She requested an OT evaluation in December, 2008 and the ARDC agreed. Regular e-mails between the Parent and District staff, reflected an open line of communication between the two in regard to the Student's education program. District staff communicated with each other about Student and the implementation of student's program.

The educational program that the District designed for Student for the 2009-2010 school year includes services from a licensed specialist in school psychology, special education staff, as well as in home training staff. The testimony from the *** staff reflects that they regularly communicated with each other regarding Student and that the center receives support from *** and a positive behavior specialist.

Factor Number 4: Are positive academic and non-academic benefits demonstrated?

At the end of the 2007-2008 school year, Student was at a DRA reading level of ***. During the 2008-2009 school year, Student progressed in keeping with a *** grader in student's reading, raising student's DRA level to ***. In the spring, 2009, student was tested on a DRA level ***. In May, 2009, while at ***, student's DRA level fell to level ***. Student's grades in student's other subjects were from

***. After *** days at the ***, student's behavior began to improve such that student was making up to 80% of student's points in positive replacement behaviors. Student was progressing toward many of student's social skills objectives and was making headway toward controlling student's impulses and handling student's emotions in an appropriate manner. Despite student's absences due to *** during the spring, 2009, overall, Student made progress during the 2008-2009 school year.

A petitioner who challenges the school district's eligibility determination or offer of services under the IDEIA bears the burden to prove that the child has been denied a FAPE. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005). Petitioner did not carry petitioner's burden of proof that the Student was denied FAPE.

Reimbursement for Private Placement

When a parent unilaterally places a child in a private school, the IDEA allows a hearing officer to order a public school district to reimburse the parent for costs of enrollment if the hearing officer finds that the district had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. 34 C.F.R. § 300.148. Having determined that FAPE was made available to the Student, a discussion of the appropriateness of the private placement is not necessary. Reimbursement for costs of enrollment is not ordered.

Conclusions of Law

1. The Student is eligible to receive special education and related services under the IDEIA, 20 U.S.C. § 1400 *et. seq.* and its implementing regulations.
2. The District's educational program is entitled to a legal presumption of appropriateness. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). Petitioner bears the burden of proving that the educational program is not appropriate or that the District has not complied with the procedural requirements under the IDEIA. *Schaffer v. Weast*, 126 S.Ct. 528 (2005); *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 189 (1982); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). Petitioner failed to meet petitioner's burden.

Order

Based upon a preponderance of the evidence and the forgoing findings of fact and conclusions of law, it is **ORDERED** that Petitioner's requests for relief are **DENIED**.

SIGNED on the 22nd day of February, 2010.

Brenda Rudd
Special Education Hearing Officer
For the State of Texas

NOTICE TO PARTIES

This decision is final, except that any party aggrieved by the findings and decision made by the hearing officer, or the performance thereof by any other party, may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States, as provided in 20 U.S.C., §1415(i)(2), and 34 C.F.R., §300.516.

STUDENT § BEFORE A SPECIAL EDUCATION
b/n/f PARENT §
§
V. § HEARING OFFICER FOR THE
§
HUMBLE INDEPENDENT §
SCHOOL DISTRICT § STATE OF TEXAS

SYNOPSIS

Issue: Did the District fail to provide an appropriate educational placement for the Student for the past year?

Held: For the District

Citation: 34 C.F.R. § 300.116; Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983)

Issue: Did the District fail to devise appropriate, measurable goals and/or objectives in every area addressed in Petitioner’s Individual Education Program (“IEP”) based on present levels of performance in all areas of need for the past one year?

Held: For the District

Citation: 34 C.F.R. § 300.320; Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983)

Issue: Did the District fail to give prior written notice at all required times, specifically, when Petitioner requested a change of placement or services and/or when there was a disagreement between the District and Petitioner?

Held: For the District

Citation: 34 C.F.R. § 300.503; Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983)

Issue: Did the District fail to devise and implement an appropriate functional behavioral assessment (“FBA”) and behavior intervention plan (“BIP”) from late December, 2008 to present?

Held: For the District

Citation: 34 C.F.R. § 300.530; Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983)

Issue: Did the District fail to provide the Student with a free appropriate public education?

Held: For the District

Citation: 34 C.F.R. § 300.101; Schaffer v. Weast, 126 S.Ct. 528 (2005); Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 189 (1982); Cypress Fairbanks Independent School District v. Michael F., 118 F.3d 245 (5th Cir. 1997); Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983)