

**BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS**

**STUDENT, bnf
Parent,
Petitioner,**

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**v.
CHINA SPRING INDEPENDENT
SCHOOL DISTRICT,
Respondent.**

DOCKET NO. 059-SE-1109

DECISION OF THE HEARING OFFICER

Procedural History

Petitioner, Student (“Petitioner” or “Student”) brings this action against the Respondent China Spring Independent School District (“Respondent,” “the school district,” or, “CSISD”) under the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. § 1401 et. seq (IDEA) and its implementing state and federal regulations.

Party Representatives

Student has been represented throughout this litigation by student’s legal counsel, Myrna Silver, Attorney at Law. Respondent China Spring Independent School District has been represented throughout this litigation by its legal counsel, Gigi Maez with the law firm of Walsh, Anderson, Brown, Gallegos & Green.

Resolution Session and Mediation

The parties submitted written waivers of the opportunity to convene a Resolution Session on November 18, 2009. Respondent declined Petitioner’s offer to attempt the use of mediation in this case.

Procedural History

Petitioner filed petitioner’s initial request for hearing on November 6, 2009. An initial Scheduling Order was issued on December 9, 2009. The case was first set for hearing on January 4-5, 2010. The initial prehearing telephone conference was conducted on December 4, 2009. The legal issues and items of requested relief were confirmed and clarified. Petitioner requested a continuance of the January hearing dates in order to resolve a scheduling conflict for petitioner’s legal counsel. Respondent did not oppose the request. The hearing was reset, by agreement, for February 24-26, 2010.

The due process hearing was conducted on February 24-26, 2010. A fourth day of hearing was conducted, by agreement, on March 3, 2010 in order to provide Respondent with an adequate opportunity to complete the presentation of its case. Petitioner continued to be represented by petitioner’s legal counsel Myrna Silver. In addition, Student’s mother, Parent also attended the hearing. Respondent continued to be represented by its legal counsel Gigi Maez and her co-counsel Denise Anderson. Susan Crain, Special Education Coordinator, also attended the hearing as the party representative. The school district’s superintendent Dr. Jason McCullough also attended portions of the hearing. At the conclusion of the hearing the parties requested an opportunity to submit written closing arguments and legal briefs. The request was granted and the deadline for Decision of the Hearing Officer
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the Decision of the Hearing Officer extended accordingly to April 22, 2010.

On March 26, 2010 Petitioner filed an Unopposed Motion to Extend the Closing Argument deadline because a serious family health issue arose for Petitioner's counsel. The deadline was extended to April 9, 2010. Both parties submitted their written closing arguments in a timely manner. The deadline for the Decision of the Hearing Officer was extended to April 30, 2010.

Issues

The issues for decision in this case are:

1. Whether the school district failed to properly implement Student's Individual Educational Plan (IEP), including the Behavior Intervention Plan (BIP) component, during the 2008-2009 school year and, if so, whether that constitutes a failure to provide Student with a free, appropriate public education (FAPE) within the meaning of the Individuals with Disabilities Education Act (IDEA);
2. Whether Student's placement into the Disciplinary Alternative Educational Placement (DAEP) on ***, 2008 was appropriate within the meaning of the IDEA;
3. Whether the school district failed to provide Student with a free, appropriate public education in the DAEP; specifically whether the school district failed to provide Student with IEP accommodations and modifications including the alleged failure to provide student with ***, failure to provide student with appropriate assignment, and whether school district staff *** while placed in the DAEP and, if so, whether that constitutes a denial of a free, appropriate public education;
4. Whether school district staff were properly trained and/or qualified to implement the 2008-2009 IEP and BIP and, if not, whether that constitutes a denial of a free, appropriate public education;
5. Whether the school district's disciplinary decisions beginning in *** 2008 through *** 2009 to remove Student from class, including *** days of In-School Suspension and *** hours of detention, were appropriate under IDEA and, if not, whether that constitutes a denial of a free, appropriate public education;
6. Whether the educational program proposed at the annual Admission, Review & Dismissal Committee (ARD) meeting in March 2009 was reasonably calculated to provide Student with a free, appropriate public education, including the proposed placement in a ***, discontinuing unmet 2009-2009 IEP goals, and, the alleged failure to include effective transition planning;
7. Whether the school district failed to revise Student's 2008-2009 BIP when the BIP proved to be ineffective in meeting student's behavioral needs beginning in *** 2008 up through *** 2009 and, if so, whether that constitutes a denial of a free, appropriate public education;
8. Whether the school district failed to provide Student's mother with written progress reports in meeting IEP goals, the use of the *** reading program, and implementation of the *** system under Student's BIP and, if so, whether that constitutes a denial of a free, appropriate public education;
9. Whether Student is entitled to reimbursement for the costs of student's private placement at *** School in *** beginning in *** 2009 or whether Student's reimbursement claim is barred or should be reduced by Petitioner's alleged failure to provide the school district with the requisite notice of student's intent to enroll

in the private school;

10. Whether any relief related to Petitioner's claims that arose prior to *** 2008 is barred by the one year statute of limitations applied in Texas and, as an evidentiary matter, whether facts that arose prior to *** 2008 are relevant evidence for the due process hearing.

Relief Requested

Petitioner confirmed and clarified the following items of requested relief:

1. The school district reimburse Student's mother for the tuition and related expenses for Student's placement at *** School beginning in *** 2009 up through the end of the current school year; and,
2. As prospective relief, continued placement at *** School with tuition and related expenses to be paid by the school district for the 2010-2011 school year and/or until ***.

FINDINGS OF FACT

1. Student is eligible for special education as a student with an emotional disturbance (ED), specific learning disability (LD) and other health impairment (OHI). Student has undergone a number of evaluations in the past year or so including a functional behavioral assessment (FBA), a psychological, and a full individual evaluation (FIE) that included academic achievement and intelligence testing. Student was also evaluated independently. Student has been diagnosed with mood disorder, ***, oppositional defiant disorder (ODD), attention-deficit hyperactivity disorder (ADHD), depression, *** and ***. (Petitioner's Exhibits 5, 6, 8, 10)(referred to hereafter as "P. Ex. ____")(Respondent's Exhibits 1, 2, 7, 8)(referred to hereafter as "R. Ex. ____").
2. *** (P. Ex. 2, p. 52)(P. Ex. 21, pp. 409, 411-412, 414, 416).
3. Inattention, impulsivity and hyperactivity are aspects of ADHD. As a student with ADHD Student can be overtly inattentive (e.g., student looks around, stares off into space) or the inattention may be less obvious (e.g., student appears to be focused on the activity but there is very little engagement in terms of reading, writing or listening). (P. Ex. 2, p. 53).
4. *** (Transcript, Volume III., p. 649)(referred to hereafter as "Tr. Vol. ____, p. ____").
5. Variable school performance can be a manifestation of Student's *** disorder. Student is frequently ***. This aspect of student's emotional disturbance can result in defiant behavior. Even when Student's mood is stable student can still be oppositional. When student's mood is unstable student is more reactive and impulsive and less likely to be cooperative. Student is ***. Student can be ***g. Student has limited social skills and ***. Student is not *** and can be *** in student's interactions. (P. Ex. 6, p. 157) (R. Ex. 8, p. 16) (Tr. Vol. III., pp. 654-655).
6. Although Student is certainly oppositional it is student's mood disorder and associated thought-processing symptoms that have a greater effect on student's academics and student's life in general. (Tr. Vol. III., pp. 157-158). However, it is Student's oppositional behavior, exhibited by refusal or failure to complete work, failure to follow directions, and negative peer interactions, that are the problems noted most often at school. (P. Ex. 10, p. 306)(P. Ex. 14, pp. 346-352) (R. Ex. 8, pp. 4, 19).

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7. Student needs a *** classroom with staff well educated about special education, behavior management of children with a variety of *** disorders, and *** issues in children. Student also needs *** to play a role in the classroom to provide services and coordinate classroom activities. Student needs a classroom with a focus on student's emotional reactivity rather than on simply containing student's behavior. (Tr. Vol. III, pp. 157-158, 652-654). Student needs a small class with students who have similar needs and *** services as a component of student's educational program. (P. Ex. 10, pp. 304-305) (Tr. Vol. III, pp. 652-658, 664-665).
8. An IEP developed at a series of ARD meetings in April-May 2008 was in place for the 2008-2009 school year with the duration of services beginning August 25, 2008 through May 29, 2009. (P. Ex. 1) (R. Ex. 5). The 2008-2009 IEP included a statement of present levels of academic achievement and functional performance. The IEP included a behavior intervention plan that targeted a number of behaviors identified by teachers, a set of positive intervention and reinforcement strategies, and a detailed set of procedures for use of a "cool down" mechanism. Counseling services were also provided. A counseling IEP included an annual goal and set of objectives aimed at Student's need to develop appropriate means of communicating with peers and teachers and improving student's self esteem. (P. Ex. 1, pp. 1-21) (R. Ex. 5, p. 4).
9. Another aspect of Student's program for the 2008-2009 school year was student's participation in ***. They planned some social activities and participated in some community service projects. Student was *** each year of *** school and enjoyed the positive interaction with ***. (Tr. Vol. II, pp. 401-402, 403, 417, 421, 425, 432-434)
10. In 2008-2009 there were also a set of specific IEP's for language arts, study skills, and reading/writing. The IEP for language arts was based upon a curriculum known as *** with an annual goal focused on Student's reading comprehension, reading fluency and writing skills and related objectives. Study Skills was an additional class period with a specific IEP aimed at improving Student's organizational skills, keyboarding/word processing skills and effective use of technology (specifically the *** software program). The Reading/Writing IEP was aimed at increasing Student's proficiency in reading and writing in order to access the general curriculum with an extensive set of related measurable objectives. (R. Ex. 5, pp. 7-8).
11. The 2008-2009 IEP also included an extensive set of modifications and accommodations. This aspect of student's program addressed a number of Student's needs including student's writing and organizational deficits by allowing ***, providing copies of class notes or board work as appropriate, test review sheets, ***, individual instructions and directions, modified test formats, repeating directions orally to check for understanding, and reducing assignments at teacher discretion for math and general ed classes. (P. Ex. 1, pp. 22-23) (R. Ex. 5, pp. 12-13).
12. Student's educational program for August 2008 through May 2009 included a mix of general education classes and special education classes including the ***. Student was also placed in a TAKS reading remediation class. The school district's *** specialist was also available to consult with teaching staff and to monitor Student's program. (P. Ex. 1, p. 21) (R. Ex. 5, p. 11) (Tr. Vol. III, pp. 521-523, 578-579).
13. Prior to the beginning of the 2008-2009 school year the school district provided staff training to Student's teachers. The training was conducted by the school district's *** specialist and the Special Education Coordinator with a focus on Student's needs as a student with *** and ADHD and effective instructional strategies. Staff were able to ask questions about the implementation of Student's IEP, BIP, and the set of accommodations and modifications. (P. Ex. 2, pp. 51-53) (Tr. Vol. III, pp. 588, 623-626).

14. Student's teachers and the *** school administrators implemented the 2008-2009 BIP, including use of the cool-down mechanism, redirection, etc. Some teachers were more effective in implementing the BIP than others. Student seemed to respond and behave somewhat better with ***. Although initially effective, the BIP strategies were less successful as the fall semester progressed so that by the end of the *** six week grading period Student's academic and student's behavior became more problematic. (P. Ex. 12) (Tr. Vol. II, pp. 424, 461-463, 472-477) (Tr. Vol. III. pp. 524-527, 529, 560-562, 582-585, 592-593, 599).
15. A positive reinforcement mechanism known as *** was developed in *** 2008 by the counselor and Student. The *** system was implemented from *** 2008 through *** 2009. The *** consisted of a set of behavioral competencies for each class each day. It was virtually impossible for Student to meet the full range of behavioral competencies on a daily basis. Student rarely earned the reinforcements for the period of time the *** system was in place. (P. Ex. 3) (Tr. Vol. II, pp. 416, 420-421, 440-442).
16. On ***, 2008 Student ***. Earlier in the day Student became very upset when student was reprimanded for *** in violation of school rules. Student was eventually able to return to class but probably remained upset. ***. (R. Ex. 6) (Tr. Vol. I., pp. 79-82).
17. A manifestation determination ARD (MDR ARD) was conducted on ***, 2008. The MDR ARD concluded, with the exception of student's mother, that Student's behavior was not a manifestation of student's disabilities. A disciplinary placement for *** days was imposed. The disciplinary placement was fulfilled on campus in the ISS classroom rather than the off campus DAEP in Waco in order to implement Student's IEP – specifically access to the *** class, student's ***class, and to student's *** Class. The ISS classroom was staffed by a certified paraprofessional. Student received assignments from student's teachers while in ISS. For the first two days student did not have access to the *** required by student's IEP but the principal remedied this issue as soon as he was made aware of the problem. (P. Ex. 4, pp. 97-102) (P. Ex. 14, pp. 348, 354) (R. Ex. 6) (Tr. Vol. I., pp. 154, 157-158) (Tr. Vol. II, p. 464-465).
18. The MDR ARD agreed on the need for a Functional Behavioral Assessment (FBA). (P. Ex. 4, pp. 103-104). The FBA was conducted as a component of the FIE completed in January 2010. The FBA included a proposed behavior plan that included recommendations for positive intervention and reinforcement strategies that addressed Student's needs specifically arising from student's oppositionality, mood disorder, and ADHD. (P. Ex. 5, pp. 150-154)(R. Ex.8, pp. 28-37 (Tr. Vol. III., p. 632).
19. A series of ARD meetings were conducted on February 12, 23, and March 16, 2009 as an annual review and to develop and revise Student's IEP and BIP. The duration of services was for March 16, 2009 through March 16, 2010. Teachers reported that student's academic performance was inconsistent: completion of activities in the *** Program was sporadic, student had not made great progress in ***, resisted using ***, and lost focus in classes. The counselor reported that Student seems to believe that student lacks the ability to make changes which will affect how others react to student. (P. Ex. 10., pp. 288, 307).
20. Student's mother actively participated in all of the ARD meetings, expressed her thoughts, ideas, concerns and criticisms and articulated her disagreement with a number of issues. School staff attempted to respond to parental needs by revising some IEP objectives so they would be more understandable. School staff also responded to parental requests for information, clarification and explanations related to a wide variety of topics. Student's mother was provided with a draft set of proposed IEP's upon request prior to the ARD meetings. She received progress reports and report cards. (P. Ex. 2, pp. 87-91)(P. Ex. 10, p. 317) (P. Ex. 13)(P. Ex. 14, pp. 351-355) (Tr. Vol. I, pp. 43, 143) (Tr. Vol. III., pp., 532, 537, 554, 668-669).

21. The proposed BIP included an annual goal addressing student's "general pervasive mood of unhappiness" with a set of behavioral objectives. The proposed counseling IEP included an annual goal targeting Student's low self esteem and social skill deficits with objectives addressing the development of communication skills, problem solving skills, and appropriate attention. A minimum of 120 minutes of direct counseling per every six weeks and 180 minutes of consultative counseling services were also proposed. The revised BIP took into account a number of recommendations from the experts – two psychologists who conducted separate evaluations and Student's ***. (P. Ex. 6, pp. 164-167)(P. Ex. 10, pp. 288-294, p. 300) (R. Ex. 5, pp. 13-23, 28-37) (R. Ex. 7)(Tr. Vol III, pp. 614, 636, 669-670).
22. The proposed reading/writing IEP included an annual goal of increasing Student's proficiency in reading and writing to access the general curriculum in order to pass student's classes. It also included a set of objectives addressing student's writing needs and a host of language arts and reading comprehension skills. (P. Ex. 10, p. 295).
23. A supplemental English/language arts IEP was also proposed based upon needs identified by the Brigance Inventory of Basic Skills, a criterion-referenced assessment administered by the special education Content Mastery teacher. (P. Ex. 10, p. 296) (P. Ex. 22) (Tr. Vol. I., pp. 186-187) (Tr. Vol. II, p. 685).
24. A *** IEP was also proposed aimed at addressing Student's need to continue to develop proficiency in decoding, reading comprehension, and grammatical skills in order to access the general curriculum. A set of measureable objectives focused on specific language skills was also included. A study skills IEP was proposed to address Student's need to further develop organizational skills, keyboarding and/or word processing skills and effective use of assistive technology. The proposed IEP also included a set of annual academic goals related to the regular education curriculum which included classes in *** and other general education classes. (P. Ex. 10, pp. 297-299).
25. The proposed IEP also included an extensive set of modifications and accommodations continued from the 2008-2009 IEP. Many of the modifications and accommodations addressed the skills and needs identified by the updated school district and independent evaluations. (P. Ex. 4, p. 115)(P. Ex. 10, pp. 301-302) (P. Ex. 6) (R. Ex. 2).
26. The school district proposed changing Student's placement to a *** special education classroom. At the time the classroom was known as the *** but is now called the ***. A special education teacher and two paraprofessionals staff the *** classroom. The teacher is described as ***. The teacher was also trained in the *** program, is a certified *** teacher, and capable of continuing to provide Student with ***. One of the paraprofessionals has worked in the class for *** years. There would be *** students in the class including Student. A *** supervises the classroom and provides ongoing support to both the students and instructional staff. The physical design of the class accommodates the cool-down procedure recommended by one of the outside evaluators. The goal of the *** class is to prepare students to transition back into general education whenever reasonably possible. (P. Ex. 6, pp. 164-165)(P. Ex. 10, p. 310) (Tr. Vol. III., pp. 567-568, 604, 670-671) (Tr. Vol. IV. pp. 712-717).
27. The proposed *** class would provide Student with opportunities to interact with non-disabled peers; initially that would have included *** and continuation of the ***. The philosophy and goal of the *** class is to slowly transition Student back into the regular *** school environment beginning with a class student would likely be successful in such as ***. (Tr. Vol. II, p. 451)(Tr. Vol. III, pp. 671-673)(Tr. Vol. IV, pp. 716-717).

28. Social skills training provided twice a week is another aspect of the *** class. A *** provides *** every two weeks and individual counseling with students as needed during ***. The *** provides ongoing involvement in the program by dropping in to check on students and consulting with the teaching staff. (Tr. Vol. IV, pp. 698-699, 714-715).
29. Transition services were also discussed at the March 16, 2009 ARD. An ARD Supplement regarding transition services was prepared. A transition plan was developed based upon information provided by Student's mother; i.e., that Student ***. Student continues to maintain an interest in ***. The transition plan noted that Student is pursuing the *** plan and student will be able to take *** courses as electives. ***. (P. Ex. 10., p. 312) (R. Ex. 10, p. 27) (Tr. Vol. III, p. 675).
30. *** (Tr. Vol. III, p.674)(R. Ex. 10, p. 26).
31. Student's mother disagreed with the proposed program and provided the school district with notice of her intent to place Student in a residential treatment facility at school district expense at the February 23, 2009 ARD. (P. Ex. 11, p. 320) (R. Ex. 10, p. 23) (R. Ex. 11, pp 1-2). Student's mother provided a revised notice of intent to enroll Student at *** School in *** at school district expense at the March 16, 2009 ARD. (R. Ex. 10, p 26) (R. Ex. 11, p. 3).
32. Student was withdrawn from the school district on ***, 2009. (Tr. Vol. I., p. 75)(R. Ex. 11, p. 4). At the time of student's withdrawal Student's grades were as follows: ***. Although somewhat sporadic and inconsistent, Student made academic progress under the IEP implemented during the 2008-2009 school year. (P. Ex. 9)(P. Ex. 13)(R. Ex. 11, p. 4) (R. Ex. 15, p. 2) (Tr. Vol. III, pp. 534-536, 539, 541, 566, 581-582).
33. Student attended the *** School for the remainder of the 2008-2009 school year. Since then student has attended *** School - a *** private school in ***. Student is making academic and behavioral progress at *** School. (P. Ex. 20, p. 390-392, p. 394-400)(Tr. Vol. II, p. 265)(Tr. Vol. II., pp. 266-267)(Tr. Vol. II., p. 275, 282)(Tr. Vol. II, pp. 276-277, 282)(Tr. Vol. II., pp. 286-287, 289) (Tr. Vol. II, p. 264).

DISCUSSION

Statute of Limitations

Under federal law a parent must request a due process hearing within two years of the date the parent knew or should have known about the alleged action that forms the basis of the due process complaint. *34 C.F.R. § 300.511 (e)*. If the State has an explicit time limitation for requesting a due process hearing, the parent must submit the request within the State's timeframe. *Id.* In Texas a parent must request a due process hearing within one year of the date the parent knew or should have known about the alleged action that serves as the basis for the hearing request. *19 Tex. Admin. Code § 89.1151 (c)*.

There are two exceptions to the general rule. The one year statute of limitations does not apply to limit parental claims if the parent was prevented from filing a due process complaint due to either (i) specific misrepresentations by the school district that it resolved the problem forming the basis of the due process complaint; or (ii) the school district withheld information from the parent that was otherwise required under IDEA. *34 C.F.R. §300.511 (f) (1) (2)*.

There is no evidence to establish that either of the exceptions to the statute of limitations rule should apply to this case. Petitioner filed petitioner's request for a due process hearing on November 6, 2009. The one year statute of limitations allows claims that arose beginning on November 6, 2008 up through the present. The evidence shows that an IEP and BIP were in place and implemented during the 2008-2009 school year including the period of time beginning on November 6, 2008 until Student's withdrawal on ***, 2009.

Claims arising under the IDEA do not arise in a vacuum. Evidence as to the IEP and BIP in place and implemented prior to that date as well as Student's educational history were admitted as relevant to Petitioner's IDEA claims. However, the conclusions of law in this Decision are limited to those claims arising within the requisite one year statute of limitations period. *19 Tex. Admin. Code § 89.1151 (c)*.

Failure to Implement IEP

Petitioner contends that the school district failed to implement student's IEP during the 2008-2009 school year; specifically, the BIP component of the IEP. While there is some evidence that some teachers were more effective than others in addressing Student's behavior the credible evidence establishes that, for the most part, the BIP as written was implemented. The disciplinary records suggest that classes that placed the greatest demand on student in terms of *** were also classes with a greater number of behavioral issues. Student's anxiety and resistance to tasks that tested and challenged student to *** coupled with a baseline irritable mood disorder left student unable, at times, to comply with teacher directives or to engage in work – particularly in student's *** classes.

The evidence showed that teachers generally complied with the BIP strategies of speaking to Student privately, allowing student to use the cool-down mechanism, redirecting student when needed, and using positive verbal praise. Although the use of other strategies, such as the ***, were not particularly successful this does not mean the BIP was not implemented. Petitioner did not meet petitioner's burden of proof on this issue. *Shaffer v. Weast 546 U.S.49, 62(2005)*.

Disciplinary Placement and Failure to Provide FAPE in DAEP

Petitioner also complains that petitioner should not have been placed into the in-school suspension disciplinary placement following ***. Petitioner further complains that the school district failed to provide petitioner with schoolwork, IEP accommodations and modifications, or access to ***. Petitioner also contends school staff *** while petitioner was in the ISS disciplinary placement.

Although it is difficult to determine the source or etiology of Student's behavior in a given situation the evidence showed student needs to be held accountable for student's behavior and experience logical consequences. The MDR ARD determined that the conduct at issue was not a manifestation of disability. Therefore the imposition of the disciplinary placement was appropriate.

The evidence showed that while student did not have access to *** required by student's IEP for the first two days of the disciplinary placement the issue was readily resolved by the principal. The evidence also established that Student was allowed to go to ***, to continue to attend student's *** and *** classes, and to receive counseling services while in the disciplinary placement. While Student may have elected not to produce much work on student's own the credible evidence did not show the school district failed to provide student with anything to do.

It is also reasonable to infer from the credible evidence that Student's interpretation of directives or statements made by the ISS paraprofessional could have been somewhat *** – an aspect of student's mood disorder. Petitioner did not meet petitioner's burden of proof on these issues. *Shaffer v. Weast, supra*.

Trained, Qualified Staff

The evidence showed the teaching staff were all duly certified and qualified to fulfill the duties of their respective positions. The evidence showed that all staff were provided with specific training at the beginning of the 2008-2009 school year on the nature of Student's ***, ***, and ADHD, as well as on student's IEP and BIP. Teachers had an opportunity to ask questions and discuss aspects of the BIP during this training. The evidence also showed that teachers consulted special ed staff at times on how to implement Student's program. Petitioner did not meet petitioner's burden of proof on this issue. *Shaffer v. Weast, supra*.

Disciplinary Decisions

Petitioner contends petitioner was removed from class for *** days of in school suspension and given *** hours of detention. The evidence showed that petitioner was placed in ISS for *** days for *** in lieu of placement in an off campus DAEP. There is some evidence that *** was also assigned for several disciplinary referrals during the 2008-2009 school year. However, the disciplinary decisions were appropriate consequences for Student's behavior and addressed student's need to be accountable for student's actions. Petitioner did not meet petitioner's burden of proof on this issue. *Shaffer v. Weast, supra*.

Proposed Program and BIP

Petitioner contends that the program proposed for Student at the March 16, 2009 ARD meeting was not reasonably calculated to provide student with FAPE within the meaning of IDEA. Petitioner specifically complains of the proposed placement in a *** special education classroom, omission of unmet IEP goals from the 2008-2009 school year, and ineffective transition planning. Petitioner also contends that the school district failed to revise Student's BIP when it proved to be ineffective during the 2008-2009 school year. These issues will be addressed in reverse order.

Transition Plan

The evidence showed that a transition plan was indeed discussed and formulated by the March 16, 2009 ARD. The transition plan identified Student's *** goals of ***. The *** plan noted Student's ***, and that it would be appropriate to include *** in future transition plans for Student. A functional behavior assessment was not appropriate "at this time."

Because *** did not attend or participate in the transition planning portions of the ARD meetings the ARD committee was somewhat limited in its ability to make more specific transition plans for student. It is unfortunate that *** did not participate in the transition planning as it would have provided student with ***. This resulted, however, from a parental decision to conduct the ARD meetings without *** participation. Under the circumstances I conclude the transition plan was appropriate under IDEA. *34 C.F.R. § 300.320(b) (1) (2)*.

IEP Goals and Objectives

The evidence supported the set of proposed IEP goals and objectives developed to meet Student's needs. Continuing to work on increasing student's overall reading and writing skills in order to pass general education classes was certainly supported by the assessment data. The proposed set of specific objectives was aimed at continuing the development of language, reading and study skills. *34 C.F.R. §§ 300.320, 300.324*. The evidence was unclear as to which unmet IEP goals Petitioner contends were omitted from the proposed program. Petitioner failed to meet petitioner's burden of proof on this issue. *Shaffer v. Weast, supra*.

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2008-2009 BIP

The evidence demonstrated that the BIP implemented during the 2008-2009 school year was not entirely effective in meeting Student's emotional and behavioral needs. For example, the standards for receiving positive reinforcement under the *** system were too difficult and contained too many targeted behaviors – Student was rarely successful in earning the reinforcements. The system could and should have been revised to target a more limited set of behaviors and provide reinforcement at more frequent intervals.

Student's behavior improved slightly for a short period of time but then escalated again – consistent with the emotional lability of student's mood disorder. Due to the interaction and combination of Student's mood disorder, impulsivity, attentional deficits, and learning disabilities, it was often difficult for Student to self-regulate, overcome anxiety or frustration with assignments, or adjust misperceptions of interactions with educational staff and peers. The 2008-2009 BIP asked quite a bit of the teachers. Responding to Student's complex, interconnected academic, behavioral, and emotional needs was challenging.

I do not conclude, however, that any shortcomings in the BIP denied student an educational benefit. Instead, the evidence showed that student continued to be provided with counseling support and consistent efforts by teaching and administrative staff to address student's complex behavioral needs. It was not any deficiency in the BIP being implemented that was the problem – instead, it was the stress placed on Student in attempting to emotionally survive the demands of the overall *** school environment. The school district recognized this problem which led to the proposed placement in the *** program. Petitioner did not meet petitioner's burden of proof on this issue. *Shaffer v. Weast, supra*.

Proposed *** Placement

The proposed educational program for the remainder of the 2008-2009 school year and the 2009-2010 school year was to implement Student's IEP and BIP in a *** class. The evidence showed the proposed program was reasonably calculated to meet Student's needs as identified by the experts: a small class, peers with similar needs, staffed by a teacher trained in special education and ***, a nurturing, positive environment, and coordinated services provided by ***. The proposed program included provision of counseling services, social skills training, ***, and access to positive peer-related social interaction through continued participation in ***. Student would have the opportunity to gradually work student's way back into the larger, mainstream *** school by first transitioning back into a class where student could be expected to be successful – such as ***. The evidence showed that the proposed IEP and BIP goals and objectives were appropriate and met student's complex and inter-related academic and behavioral needs. *34 C.F.R. §§ 300.17, 300.324 (a)(1)(2)*.

Written Progress Reports

The credible evidence established that Student's mother was provided with written progress reports towards IEP goals and Student's progress was discussed at numerous ARD meetings. Even if she had not been provided with those reports the evidence showed that this did not impact parental participation in educational decision-making. The evidence showed that Student's mother was very involved and in frequent communication with school personnel. School personnel attempted to address and meet parental concerns and needs.

A procedural violation is a violation of IDEA only if it results in the loss of educational opportunity for the student, seriously deprives parents of their participation rights or causes a deprivation of educational benefit. The evidence in this case does not support such findings. *Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-526 (2007)*;

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D.S. v. Bayonne Bd. of Educ., 2010 U.S. App. LEXIS 8317(3rd Cir. 2010)(school district's failure to timely respond to parental request for meeting did not result in deprivation of educational benefit or denial of parental rights); 34 C.F.R. § 300.513(a)(2)(i)-(iii).

Reimbursement Request

In order to receive reimbursement for the unilateral private placement of a child with a disability the parent must prove that (i) the public school's IEP is not appropriate under IDEA; and (ii) the private placement was proper under IDEA. *Sch. Comm. of Burlington v. Dept. of Educ. of Mass.*, 471 U.S. 359, 370 (1985); *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 293 (5th Cir. 2009).

Therefore, I must first determine whether the school district's program implemented from *** 2008 until *** 2009 (the date of Student's withdrawal) was appropriate. If so, the inquiry ends there and Petitioner is not entitled to reimbursement for the unilateral private placement at *** or *** regardless of whether those placements were of benefit to petitioner. If not, then I need to consider whether the private school placement was "proper" under IDEA. *Id.*

The Four Factors Test

In Texas the Fifth Circuit has articulated a four factor test to determine whether a school district's program meets IDEA requirements. Those factors are:

- The program is individualized on the basis of the student's assessment and performance;
- The program is administered in the least restrictive environment;
- The services are provided in a coordinated, collaborative manner by the "key" stakeholders; and,
- Positive academic and non-academic benefits are demonstrated.

Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997).

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program for reimbursement purposes. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d at 294.

The credible evidence shows the program, although not perfect, met the requisite criteria under IDEA. It was individualized and based on assessment data and Student's academic performance. The program was administered in the least restrictive environment – giving Student opportunities to be educated with student's non-disabled peers. 34 C.F.R. § 300.114(a) (2) (i) (ii). The services were provided in a coordinated, collaborative manner by key stakeholders. For example, teachers were provided with training about the nature of Student's disabilities and effective instructional strategies as well as the provisions of student's IEP and BIP. The *** specialist and Special Education Coordinator were available to teachers for on-going support; the principal also monitored the implementation of Student's IEP and BIP. School staff attempted to meet parental needs and adopted many of the recommendations from a variety of evaluations.

Furthermore, the evidence showed Student derived some meaningful, positive academic and non-academic

benefits from student's educational program. Student passed student's classes and made some academic progress. Although student's behavior could be problematic teachers and administrators were able to cope with student's shifting ability to manage student's self in class and learn. The evidence showed the school district recognized Student's emotional and behavioral needs and proposed changes in student's program so student could be more successful. The school district conducted its own set of assessments and considered outside evaluations and the recommendations of Student's *** in order to do so. The school district proposed an educational placement reasonably calculated to provide Student with the opportunity to work on academic and behavioral skills stated in student's IEP and BIP in a therapeutic environment more conducive to meeting student's emotional needs. Therefore, I conclude the school district's program implemented during the relevant time period as well as the proposed program and educational placement were reasonably calculated to provide Student with a free, appropriate public education. *Cypress-Fairbanks Ind. Sch. Dist., v. Michael F., supra.* Petitioner is not entitled to reimbursement for unilateral private placements at *** or *** School. *Sch. Comm. of Burlington v. Dept. of Educ. of Mass., supra.*

CONCLUSIONS OF LAW

1. Petitioner's claims are limited to those arising on November 6, 2008 up through the date of the due process hearing; any claims arising prior to that date are barred by the applicable one year statute of limitations applied in Texas. *34 C.F.R. § 300.511(e); 19 Tex. Admin. Code § 89.1151 (c).*
2. Petitioner did not meet petitioner's burden of proof that Respondent failed to implement petitioner's IEP or BIP during the 2008-2009 school year. *Shaffer v. Weast, 546 U.S. 49, 61 (2005).*
3. Petitioner did not meet petitioner's burden of proof that the *** day in-school disciplinary placement or other disciplinary decisions made during the 2008-2009 school year were not appropriate. Petitioner did not meet petitioner's burden of proof that Respondent failed to provide petitioner with educational services during the in-school disciplinary placement. *Shaffer v. Weast, supra.; 34 C.F.R. §§ 300.530 (a)(b)(c) (d).*
4. Petitioner did not meet petitioner's burden of proof that school district staff were not properly trained or qualified to implement Petitioner's IEP or BIP during the 2008-2009 school year. *Shaffer v. Weast, supra.; 34 C.F.R. § 300.156; 19 Tex. Admin. Code § 89.1131.*
5. Respondent's proposed educational program and placement, including a revised IEP and BIP, were reasonably calculated to provide Petitioner with a free, appropriate public education within the least restrictive environment. *34 C.F.R. §§ 300.17, 300.114(a)(2), 300.116; 19 Tex. Admin. Code § 89.63 (a)(c)(6).*
6. Respondent's proposed educational program included an appropriate transition plan. *34 C.F.R. § 300.320(b)(1)(2).*
7. Petitioner did not meet petitioner's burden of proof that Respondent failed to revise petitioner's BIP during the 2008-2009 school year or that the 2008-2009 BIP was inappropriate under IDEA. *Shaffer v. Weast, supra.*
8. Petitioner did not meet petitioner's burden of proof that Respondent failed to provide petitioner's mother with written reports of Petitioner's progress in meeting IEP and BIP goals and objectives or other information related to petitioner's language arts class. Even if that information was not provided there was insufficient evidence to establish the loss of educational opportunity, a deprivation of parental participation or parental rights, or a deprivation of educational benefit. *Shaffer v. Weast, supra.; 34 C.F.R. § 300.513*

(a)(2)(i)-(iii).

9. Petitioner did not meet petitioner's burden of proof that the educational program implemented during the 2008-2009 school year or the proposed educational program finalized at the March 2009 ARD meeting were not appropriate under IDEA. Both programs were reasonably calculated to provide Petitioner with the requisite educational benefit. Therefore, Petitioner is not entitled to reimbursement for unilateral private placements or for prospective private placement at public expense. *Shaffer v. Weast, supra; Sch. Comm. of Burlington v. Dept. of Educ. of Mass., supra; Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., supra.*

ORDERS

Based upon the foregoing findings of fact and conclusions of law it is **ORDERED** that Petitioner's requests for relief are **DENIED**. All other relief not specifically stated herein is **DENIED**.

SIGNED the 30th day of April 2010

Ann Vevier Lockwood
Special Education Hearing Officer

NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer 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. *19 Tex. Admin. Code Sec. 89.1185 (p); Tex. Gov't Code, Sec. 2001.144(a) (b).*

**BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS**

STUDENT, bnf

**Parent,
Petitioner,**

§
§
§
§
§
§
§

v.

**CHINA SPRING INDEPENDENT
SCHOOL DISTRICT,
Respondent.**

DOCKET NO. 059-SE-1109

SYNOPSIS

Issue:

Whether Petitioner's claims that arose more than one year from the date Petitioner filed petitioner's request for a due process hearing were barred by Texas statute of limitations rule.

Held: FOR THE SCHOOL DISTRICT.

Petitioner filed petitioner's request for a due process hearing on November 6, 2009. Under the one year SOL rule applied in Texas claims that arose prior to that point were barred. However, evidence of Petitioner's educational history prior to November 6, 2009 was admitted as relevant evidence.

34 C.F.R. § 300.511 (3); 19 Tex. Admin. Code § 89.1151 (c)

Issue:

Whether the school district failed to IEP and BIP of *** grader with ***, ***, ADHD, mood disorder (***) and ODD during the 2008-2009 school year.

Held: FOR THE SCHOOL DISTRICT.

Petitioner did not meet petitioner's burden of proof that school district failed to implement petitioner's IEP and BIP during the relevant time period.

34 C.F.R. §§ 300.101, 300.323 (a); Shaffer v. Weast, 546 U.S. 49, 62 (2005).

Issue:

Whether *** day in-school disciplinary placement for *** was appropriate and whether other disciplinary decisions made during the 2008-2009 school year were appropriate.

Held:

FOR THE SCHOOL DISTRICT.

Petitioner did not meet petitioner's burden of proving the in-school disciplinary placement was not appropriate
Decision of the Hearing Officer
Dkt. No. 059-SE-1109

or that other disciplinary decisions during the relevant school year were not appropriate under the disciplinary provisions of IDEA.

34 C.F.R. § 300.530 (a)(b)(c)(d); Shaffer v. Weast, supra.

Issue:

Whether school district staff were properly trained or qualified to implement student's IEP and BIP during the 2008-2009 school year.

Held:

FOR THE SCHOOL DISTRICT.

Petitioner did not meet petitioner's burden of proving school staff were not qualified or properly trained. Evidence showed teachers were trained on language arts curriculum, use of ***, student's IEP and BIP and on the nature of student's disabilities.

34 C.F.R. § 300.156; 19 Tex. Admin. Code § 89.1131; Shaffer v. Weast, supra.

Issue:

Whether school district's proposed educational program and placement, including a revised IEP, BIP and placement in a *** classroom provided student with FAPE.

Held:

FOR THE SCHOOL DISTRICT.

Petitioner did not meet petitioner's burden of proving proposed program or placement was not appropriate under IDEA. Proposed IEP and BIP addressed student's complex and interconnected academic, social, emotional and behavioral needs with sufficient support and related services.

34 C.F.R. §§ 300.17, 300.114 (a)(2), 300.116; 19 Tex. Admin. Code § 89.63 (a)(c)(6).

Issue:

Whether school district's proposed program included appropriate transition plan.

Held:

FOR THE SCHOOL DISTRICT.

Petitioner did not meet petitioner's burden of proving transition plan developed at last ARD was not appropriate under IDEA. *** did not attend ARD or participate in transition planning.

34 C.F.R. § 300.320 (b)(1)(2).

Issue:

Whether school district failed to revise student's BIP, whether BIP implemented during 2008-2009 school year was appropriate and, if not, whether that violates IDEA.

Held:

FOR THE SCHOOL DISTRICT.

Petitioner did not meet petitioner's burden of proving BIP implemented during 2008-2009 school year was not appropriate or that school district failed to revise it.

34 C.F.R. § 300.324 (a)(1)(2)(i)(b)

Issue:

Whether school district failed to provide parent with written reports of student's progress in meeting IEP and BIP goals and objectives or other information related to student's progress in language arts program.

Held:

FOR THE SCHOOL DISTRICT.

Petitioner did not meet petitioner's burden of proving school district failed to provide parent with information about student's educational and behavioral progress. Even if school district did not provide such information Petitioner did not meet burden of proving a loss of educational opportunity, deprivation of parental participation or parental rights, or deprivation of an educational benefit.

34 C.F.R. § 300.513 (a)(2)(i)-(iii)

Issue:

Whether student entitled to reimbursement for unilateral private placements and to continued private placement as prospective relief.

Held:

FOR THE SCHOOL DISTRICT.

Student did not meet student's burden of proving educational program implemented during the 2008-2009 school or the proposed program and educational placement were not reasonably calculated to provide student with requisite educational benefit under IDEA. Because school district's programs were appropriate student was not entitled to reimbursement or private placement at public expense.

34 C.F.R. §§ 300.17, 300.148, 300.320