

**DOCKET NO. 286-SE-0809**

<b>STUDENT bnf PARENTS</b>	<b>§</b>	<b>BEFORE A SPECIAL</b>
	<b>§</b>	<b>EDUCATION</b>
<b>VS.</b>	<b>§</b>	<b>HEARING OFFICER FOR</b>
	<b>§</b>	
<b>VICTORIA ISD</b>	<b>§</b>	<b>THE STATE OF TEXAS</b>

**DECISION OF THE HEARING OFFICER**

**Procedural History and Issues**

STUDENT (hereinafter “the student”) through student’s next friends, Parents (Petitioner), requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. § 1400 et. seq. The Respondent is the Victoria Independent School District (VISD).

In the Request for Hearing, Petitioner alleged that VISD denied the student a Free Appropriate Public Education (FAPE) in the following particulars:

1. Respondent denied the student’s parents a meaningful opportunity to participate in the decision making process by failing to work with them.
2. Respondent failed to properly supervise and educate the student.
3. Respondent improperly suspended the student and improperly \*\*\*, denying the student access to a FAPE.
4. Respondent failed to maintain the student in the classroom.
5. Respondent failed to implement appropriate behavior interventions.
6. Respondent failed to provide a FAPE in that the student did not meet IEP goals and objectives, regressed significantly and failed to meet standards on the statewide assessment.
7. Respondent improperly denied the parent’s request for a private placement for the student.

Prior to filing a Request for Due Process Hearing, Petitioner unilaterally placed the student in a private, residential placement, where the parent alleged the student made progress.

Petitioner requested the following relief:

1. Reimbursement for costs associated with private placement at \*\*\*.
2. Placement of the student in the \*\*\*, prospectively as the least restrictive environment for the student.
3. An order for the District to provide appropriate evaluations.
4. Private placement at \*\*\* as compensatory education for one year or an amount deemed appropriate by the Hearing Officer.

5. An order for the District to convene an ARD Committee meeting to implement the Decision.

### **Procedural History**

The parties waived the resolution session in writing dated August 12, 2009, and agreed to participate in mediation. The parties reported that they had not resolved the issues for hearing at the mediation. This matter was initially set for hearing on September 22, 2009. However, due to scheduling conflicts of the attorneys, I found good cause to continue the matter and re-set the hearing to October 20-22, 2009. At the request of the parties, the hearing commenced on October 21-22, 2009. The Hearing recessed on October 21, 2009 due to the illness of the hearing officer. Due to scheduling conflicts of the parties, the hearing was continued until December 14-15, 2009, and the Decision Due Date was continued to February 6, 2010. The parties convened for the continuation of the hearing on December 14-15, and 17, 2009. Both parties requested an opportunity to file a written brief in light of the complex issue in this case and agreed to an extension of the Decision due date until February 15, 2010. The parties submitted briefs on January 19, 2010. The Decision was timely rendered and forwarded to the parties.<sup>1</sup>

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusions of law. Citations to the transcript will be designated “RR” with a notation of the volume number and page number. Citations to Exhibits will be designated with a notation of the exhibit number.

### **Findings of Fact**

1. The student, a \*\*\* year old \*\*\*, is eligible to receive services as a student with a disability under the classification of Mental Retardation. The student’s residence is within the geographical boundaries of the Victoria ISD.
2. The student has been diagnosed with Fetal Alcohol Syndrome and Psychosis NOS. (RR1-59-60). Student’s mental retardation is in the \*\*\* range, with an IQ of \*\*\*. (RR1-160; P-7)
3. The student began the 2008-2009 school year with most of student’s instructional day occurring in the resource classroom in Victoria ISD. By October of 2008, the ARD Committee convened to change the student’s placement to an Academics for Life (AFL) classroom because the resource placement was not appropriate for the student. (RR3-183; P-44)
4. The student’s teacher from October 2008-May 2009 testified that student’s behavior deteriorated over the course of the 2008-2009 school year. (RR3-212-213) She also testified that the previous resource placement had not been appropriate for the student. (RR3-183) She also testified that the District’s Behavior program (ABLE) was not appropriate for the student. (RR3-184, 185)

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<sup>1</sup>February 15, 2010 is a federal and state and postal holiday, so the Decision was forwarded to the parties via U.S. Mail on the next postal day, February 16, 2010.

5. During December 2008, the parent objected to the placement of another disabled student in the student's classroom. (R33; 34) According to the student's teacher, the student copied the behavior of other students. (RR3-156)
6. According to the student's teacher, the student regressed during the 2008-2009 school year, with the most significant behaviors beginning in February 2009. (RR3-189; R41) The student was extremely impulsive and would \*\*\* and was difficult if not impossible to deter. (RR3-155-156)
7. The student received the following disciplinary referrals: fighting, horseplay, \*\*\*, walking out of class, aggravating and instigating behavior, \*\*\*, arguing with another student, arriving to class late, \*\*\*, leaving class, \*\*\*. (R-41, 42, 44, 45, 47, 53, 54, 57, 60, 62) There were a total of \*\*\* referrals between February and May 2009. (R-62) The final referral of the year occurred on \*\*\* and \*\*\*. The referral indicated that the student \*\*\*. (R-62) The student was \*\*\* on that date.
8. On April 9, 2009, the ARD Committee convened to discuss the student's annual IEP, plan a full individual evaluation and to discuss behaviors. (R48, 50) A previous ARD had been scheduled in March to discuss behaviors but was cancelled by the parent. During the April 2009 ARD Committee meeting, the parent requested a \*\*\* aide for the student to address bullying and \*\*\*. The District declined the parent's request because it felt the use of an aide would be too restrictive. (R-50, p. 41) The teacher testified that an aide would have been of no help "because once [the student] made up student's mind that student was going to do something, [the student] did it." (RR3-135) The parent also informed the ARD Committee that she was exploring placement at the \*\*\* at the recommendation of the student's psychiatrist. (R50, p. 39)
9. On April 10, 2009, the parent notified a district employee that the student had \*\*\*. (R-51) She also notified the employee that the student had been having \*\*\*. (R-51) She reported prior incidents of the student \*\*\* as well as from home and talked about prior \*\*\* referrals. The parent stated that because of student's behaviors they were desperate for help and said they needed help getting student's behaviors under control at home *and at school*. (R-51) She said this is why she was bringing up the subject of residential placement at \*\*\*.
10. On April 15, 2009, the parent wrote the special education director and requested an aide. She reported the student's leaving class and campus on multiple occasions. (R-52)
11. On May 3, 2009, the student's teacher wrote an email to the parent which states as follows:

"Please promise that IF [student] DOESN'T get into a home somewhere that YOU will still insist that student goes to the \*\*\* campus. [Student] is very hateful to [aide] and myself... Things have not improved at all. Student picks at those student can intimidate and I will have still have [sic] my other students next year and the personalities are clashing big time. I am so sorry I have to tell you but I can Not deal w/[student] much longer. I am trying to hang in until the end of May but I may have to take a medical leave if I don't get some relief. \*\*\* will not help you, do not be fooled, she is pussy footing around. \*\*\* cannot help you, the District WILL NOT help you

financially. You are wasting your time by contacting \*\*\* or \*\*\*. \*\*\* is a sweetheart but they have NO intention of putting money out for [student]. They are stalling, trying to pacify you. YOU know that I can bet my life on it. They are NOT going to fork out money...they have already put a hold on any new special ed teachers being hired... they have got to pay for those two new high schools. If you don't believe it call some school board members ... which by the way we need to vote them off!!!

"I havn't called you but DAILY [student] is \*\*\* 2 or more times and constantly late from lunch and \*\*\*. Student \*\*\*. Student told me that student would \*\*\*...student said it to me in class...I should have written student up BUT they won't do anything about it so what is the use? I am sick and tired and I am sorry that [student] is on my last nerve. Student starts \*\*\* and they get angry. If I had no sense at all...I'd let student \*\*\* and not even bother reporting student \*\*\*... BUT I do have sense, at least a little. One day someone is going to knock student's socks off for student's \*\*\* and student's \*\*\*. A regular ed kid will do student in, if not some thug if student acts that way with them.

"Please, please send student to the \*\*\*campus next year if you can't afford a home for student. Maybe they can help student, I can't help student behaviourly [sic]. [Student] needs to be in a behavior unit with a strong personality Male teacher. [Student's] ways are beyond me. I am sorry." (P-17)

12. The teacher testified that she was extremely frustrated when she wrote the email and attempted to minimize its impact at the hearing. However, in light of her testimony as a whole, I find that the P-17 email is a credible assessment of the teacher's impressions of the student's behavioral problems during the spring of 2009 and the District's failure to respond adequately to them. I also find that the credible evidence supports a finding that school personnel were well aware that the parent was seeking residential placement for the student during the Spring of 2009. In fact, the school counselor's calendar has a notation that as early as March 2, 2009, school personnel were aware that the parents were seeking residential treatment at district expense. (R-106).
13. The student's teacher testified that she believed the student functioned at a \*\*\* or \*\*\* grade level during the 2008-2009 school year, when student was a \*\*\* grader. (RR3-198) However, she acknowledged that student did not meet expectations on standardized assessments administered at the \*\*\* and \*\*\* grade level. (RR3-194-196). According to the teacher's description of her teaching, she did not individualize her instruction for the student; rather she made it "flexible" for the student or anyone having trouble staying on task. (RR3-155-156) When asked to give an example of individualized instruction, the paraprofessional's response was that the teacher would help the student if student asked. (RR3-94).
14. The teacher also testified that the student required someone to prompt student to do student's work. (RR3-197, 198) This prompting did not occur when student \*\*\* nor did it occur when student was \*\*\*. (RR3-198) In fact, the teacher acknowledged that work that was sent with the student to ISS was not completed
15. The teacher said she would not characterize the student's school year as a failure because student did not fail student's academic subjects even though student may have received a "\*\*\*" in discipline or behavior. (RR3-160).

16. The teacher told a \*\*\* during March of 2009 that the student was a “constant problem” in class and at home and spends several days a week \*\*\* due to misbehavior. She acknowledged that she was aware of the \*\*\* and had concerns about the parent’s safety. She further told the caseworker that the student acted on \*\*\* instincts, and that student could \*\*\* and just not know any better. (R-104, p. 20) The teacher explained during the hearing that by acting on \*\*\* instincts, she meant that the student \*\*\*. (RR3-211-212)
17. During the Spring of 2009, the student developed an obsession with \*\*\*. (RR3-204-205). While the credible evidence is that \*\*\* did not engage in inappropriate behavior with the student, the student displayed inappropriate behaviors and boundaries with \*\*\*. (RR1-41, 42, 52, 53, RR3-204, 205)
18. The District’s response to the student’s inappropriate behavior was to prohibit student from seeing \*\*\*. (RR3-204-205)
19. According to the student’s teacher, the student \*\*\* her and the paraprofessional. (RR3-205). The paraprofessional testified that the student had not \*\*\* her or the teacher. I find that the paraprofessional’s testimony is not credible in light of the credible testimony of the teacher.
20. The student’s behavior was poor everyday and deteriorated throughout the spring of 2009. (RR3-212-213)
21. The student’s teacher testified that the student’s behaviors were not her responsibility and it was clear from her testimony that she viewed academics to be her only responsibility. (RR3-216)
22. It is a reasonable deduction from the testimony of the teacher that she saw herself as helpless in addressing the student’s behaviors. In fact, she testified that she asked for help from the Administration to no avail. (RR3- 207-208)
23. On May 25, 2009, the student attempted \*\*\*. (R 104 p. 37). The student was \*\*\* on May 28 2009, and the teacher making the referral characterized the student as a \*\*\*. (R-62). The last day of school according to the District was June 3, 2009. The parents enrolled the student in \*\*\* on June 1, 2009 on the recommendation of the psychiatrist. (P-4-D)
24. The student is currently placed at \*\*\* and attending \*\*\* school within the \*\*\* ISD, which provides educational services to the \*\*\*. (P57B)
25. There was no summer academic program at \*\*\* during the summer of 2009 other than summer enrichment activities. (RR2-37-39). However, the \*\*\* developed a treatment plan for the student to address behaviors. (P-4C)
26. Beginning in the Fall of 2009, Student attended school during the day at \*\*\* school in \*\*\* ISD, with student’s classroom placement being comparable to the AFL class at Victoria ISD. The IEPs from \*\*\* and Victoria are substantially similar. After the school day, the student returns to the \*\*\* campus, where student has a highly structured and predictable schedule. The student’s progress is monitored by charting student’s behaviors. (R2-83) The student’s academic progress is measured by measuring progress on student’s IEP goals and objectives at \*\*\* ISD. There is a liaison between

- the \*\*\* and the \*\*\* that attends ARD meetings, coordinates services and monitors progress. (R79)
27. The student's psychiatrist has treated the student since 2006. (RR1-59)
  28. According to the student's psychiatrist, the student's history of fetal alcohol syndrome has resulted in the student's mental retardation, developmental delays, poor impulse control, and psychosis. (RR1-60)
  29. The psychiatrist testified that because of student's disability, the student does not process information in a logical way. While some students with mental retardation may respond well to medication or behavior management, the student does not. The student's emotional and behavioral status is complicated by student's psychosis in that student is unpredictable in student's responses, engages in irrational behaviors, such as \*\*\*, is aggressive, and \*\*\*. (RR1-61-62)
  30. The student's psychiatrist testified that in his opinion, the student needs the wrap-around services of a residential placement to provide structure for the student, address behavior, respond to crises at school, and coordinate between school and the residential program. (RR1-62) According to the psychiatrist, the student's educational program within the \*\*\* ISD would not be sufficient to meet student's needs because student requires the coordination of services between the residential treatment center and the classroom. (RR1-80) The student's psychologist, Dr. \*\*\*, provided the same opinion. (See testimony of Dr. \*\*\*, RR1)
  31. When the student first entered \*\*\* during June 2009, student exhibited the following behaviors: hurtful to others, disruptive, unusual or repetitive behaviors, socially offensive behaviors, withdrawn, and uncooperative. (P6) These behaviors are consistent with the behaviors the doctor observed in the student prior to placement. (RR1-65)
  32. According to the psychiatrist, the student is the most \*\*\* child he has treated in his 20 years of experience. (RR1-75, 88) The student is minimally responsive to medication and engages in extremely impulsive and irrational behaviors. (RR1-76) The student will \*\*\* and will also engage in \*\*\* behaviors while at \*\*\*. (RR1-105-106) This is consistent with the behaviors reported by the student's teacher at VISD and consistent with the student's psychosis. (RR1-107).
  33. According to the psychiatrist, the student is experiencing some success at \*\*\* because of the structure and the coordination between the residential treatment center and \*\*\* ISD. (RR1-76) The student would not be successful in student's classroom setting at \*\*\* ISD without the support of the \*\*\* program, in the opinion of the psychiatrist. (RR1-109)
  34. According to the psychiatrist, a therapeutic foster home would not be able to adequately respond to the student's emotional and behavioral needs. (RR1-76)
  35. Student needs the structure of a residential treatment center to learn control over student's behavior. (RR1-90)
  36. At \*\*\*, the student receives medication management, individual psychotherapy, and intensive behavior management, with constant supervision and a high staff to student

- ratio. (RR1-100, 2-81-83) The student has made progress while at \*\*\*. (RR1-100; RR2-90) There is ongoing communication between the staff and the \*\*\*ISD, and the student's behaviors have calmed down. (RR2-98)
37. During the first 30 days of the student's enrollment at \*\*\*, staff documented \*\*\* behavioral incidents. (R83) During the second 90 days, the student's behavior began to improve, with \*\*\* incidents reported by staff over a 90 day period. (P4-D)
  38. During the Fall of 2009, the student had a setback after a campus visit and observation by VISD staff. (R3-38-41; RR1-65-67) The student was \*\*\* following VISD staff appearance in student's classroom.
  39. According to the Special Education Director at \*\*\*ISD, the student is making academic and behavioral progress. (RR3-40) Although the student has tested limits as though student would \*\*\*, the teacher is able to redirect student. (RR3-46-48) \*\*\*ISD staff report no aggressive or threatening behaviors on campus, nor do they report that student \*\*\*. (RR1-71)
  40. While in the classroom at \*\*\*ISD, the student works on a third grade level. (RR3-49)
  41. The student's classroom arrangement at \*\*\*ISD is a Functional Academics Class much like the classroom at VISD. (See testimony of Dr. \*\*\*) The IEP and placement at \*\*\*ISD are substantially similar to the IEP and placement at VISD. However, the student's placement is not within the \*\*\*ISD; rather \*\*\*ISD provides a component of the student's educational program on campus within the \*\*\*ISD, with the student's behavioral objectives being addressed within the \*\*\*.
  42. The student's parents unilaterally placed the student at \*\*\* in June 2009 and notified the school after it had made the placement. The ARD Committee convened on June 3, 2009, at which time the District refused the parent's request for residential placement. (R-65)
  43. The special education director for VISD concurred in the District's decision to refuse residential placement and testified that the District could meet the student's emotional and behavioral needs. She testified that ABLE classroom was not appropriate for the student, but that the AFL placement was appropriate.
  44. The Special Education Director testified as the school's expert that the student's behavior and emotional needs could be addressed within VISD. However, she acknowledged that she never observed the student in the classroom, never spoke with the student's teacher or paraprofessional, never reviewed the student's behavioral incidents or spoke with the student's treatment providers prior to making such recommendation. (RR5-38-40) The Special Education Director based her opinion solely on the testimony she heard during the hearing.
  45. The District never attempted to utilize a behavioral specialist to work with the student and/or student's classroom teacher prior to the time the parents enrolled student in \*\*\*. Additionally, the District never requested a psychological evaluation or functional behavior assessment. The IEP proposed for the 2009-2010 school year is similar to student's IEP for the 2008-2009 school year, with the same placement, does not adequately address targeted behavior goals, and does not contain a Behavior

Intervention Plan. Although the ARD Committee minutes state that the District hired a behavior specialist, no behavioral goals were addressed in the IEP.

46. The student's parents disagreed with the ARD Committee's decision and filed this request for hearing, seeking reimbursement for residential placement as well as prospective residential placement.
47. \*\*\* has billed the parents directly for the student's placement at \*\*\*. The balance is approximately \$\*\*\* per month. (P-4A;4B)

### **Discussion**

#### Did the District provide an appropriate education?

The initial inquiry in this case is a determination of whether the District provided an appropriate education to the student, generally defined as one that enables a student to obtain "some benefit" from student's education. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 189 (1982). According to the test established by the Fifth Circuit in *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 253, (5th Cir. 1997) "some benefit" is demonstrated where:

- (1) the program is individualized on the basis of the student's assessment and performance;
- (2) the program is administered in the least restrictive environment;
- (3) the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and
- (4) positive academic and non-academic benefits are demonstrated.

The student in this case had mental retardation and behavioral problems as a result of Fetal Alcohol Syndrome. Behavioral issues which occurred at school included an inability to \*\*\* during the school day, \*\*\*, making physical threats to \*\*\*, not understanding appropriate boundaries with \*\*\*, \*\*\* at other students, and according to the teacher, \*\*\*, as though student were \*\*\*. The student's IEP during the 2008-2009 school year is completely devoid of behavioral goals, as is the 2009-2010 IEP, although the credible evidence demonstrates that the student's behavior impeded student's ability to access an education.

With regard to the second factor, the student was in a self-contained Academics for Life Class. Even though the placement was a restrictive setting, the teacher had no confidence in her ability to keep the student \*\*\*, and in fact, said no one could \*\*\*. The teacher testified that she was unable to bring other behaviors, such as \*\*\*, \*\*\*, \*\*, inappropriate gestures, fighting and \*\*\* under control in the classroom, and none of the staff was able to do so. In fact, the teacher appeared resigned to the fact that the student would \*\*\* when student wanted and testified that no one could stop student and no more restrictive placement in the school could stop student.

Perhaps one of the most significant factors in this case is the lack of collaboration between key stakeholders. The student has fetal alcohol syndrome, mental retardation, and a psychotic disorder. School officials were aware of the other \*\*\* interventions with the student's family as evidenced by the fact that they had communicated with those \*\*\*. A lot of the student's behaviors were described by the student's psychiatrist as being among the most severe he had seen in any other child. The school was aware that the student was under the care of a psychiatrist and took medications as early as 2006, as discussed in the ARD meetings and the student's evaluation in 2007 (R-50; R-22; R-15). The school was aware that the parents were seeking residential placement options for the student as early as the Spring of 2009. However, no one from the school ever contacted the student's psychiatrist. Additionally, the ARD Committee never addressed the student's behaviors, never proposed conducting a functional behavior assessment or psychological evaluation and never developed a Behavior Intervention Plan. The school never attempted to engage the assistance of a behavior specialist during the 2008-2009 school year, even though the teacher asked for assistance. Behavioral goals should have been a critical part of the student's education. However, it is clear from a preponderance of the credible evidence that the student's teacher viewed the student's behavior as being beyond the District's responsibilities. The school waited until after the student had enrolled in \*\*\* to attempt to hire a behavior specialist, but the behavior specialist did not participate in the development of the student's IEP for the 2009-2010 school year, which is substantially the same as the 2008-2009 IEP and involves the same placement. (R-50; R-65) The District's expert (the special education director) acknowledged that in making the recommendation to reject the parent's request for residential placement that she never communicated with the student's treatment providers, never observed the student in the classroom, and never talked with the student's teacher or paraprofessional. It is clear from the evidence that services were not provided in a coordinated or collaborative manner by key stakeholders.

Finally, Petitioner has proven that the student did not attain any positive educational benefits with regard to behavior, and in fact, student's teacher testified that student deteriorated behaviorally during the school year. The student also made little academic progress as reflected in student's performance on statewide assessment instruments. (R-21; 27). However, I find that it is more compelling that the student deteriorated behaviorally during the school year. The school's emphasis on academic progress to the exclusion of behavioral progress ignores IDEA's broad definition of education. Educational needs include all aspects of a student's education, including social skills, developmental skills and functional skills. *Venus Ind. Sch. Dist. v. Daniel S.*, 36 IDELR 870 (N.D. Tex. 2002); *Student v. Seguin ISD*, Docket No. 232-SE-0305 (Tex. Hearing Officer James Holtz, 2005). The school wholly failed in its obligation to address the student's behavioral needs.

#### Requirements for private placement

Generally speaking, parents may recover the costs expended for a unilateral private placement upon showing the District did not provide an appropriate placement, and the private placement did provide an appropriate education. 20 U.S.C. § 1412 (a) (10) (c); 34 C.F.R. § 300.403 (a), (c).

One of the most difficult areas to apply the requirements of the IDEA lies in the realm of residential placement. State regulations limit the responsibility of a school district's duty to provide

residential placement to situations where the placement is necessary in order for the student to receive FAPE. 19 TEX. ADMIN. CODE §89.61. However, if the residential placement is “primarily due to medical reasons or primarily due to problems in the student’s home,” then residential placement is not the school district’s responsibility. 19 TEX. ADMIN. CODE §89.61(b)(1). The Fifth Circuit Court of Appeals, in *Richardson ISD v. Leah Z*, 580 F.3d 286 (5<sup>th</sup> Cir. 2009) (hereinafter *Leah Z.*), recently addressed the question of when a school district is responsible for providing a residential placement for a student. According to the Fifth Circuit, the placement must (1) be essential for the student to receive an educational benefit and (2) be primarily oriented toward education.

### Was the placement essential?

The first issue to be addressed in analyzing a residential placement is whether the placement was appropriate in general by determining if it was essential in order for the child to obtain a meaningful educational benefit. *Id.* If the child is able to receive a meaningful educational benefit without the residential placement, then it is not essential. *Id.* Answering this question requires an evaluation of the student’s progress, or lack thereof, in the public school as well as in the residential placement. While in VISD during the 2008-2009 school year, the student regressed behaviorally beginning soon after the beginning of the winter semester. Student had numerous discipline referrals, threatened \*\*\*, had inappropriate boundaries with \*\*\*, \*\*\* and bullied other students, acted like an \*\*\* according to the teacher, and by the end of the school year was \*\*\* 3-4 times per day and, according to the teacher, no one was capable of \*\*\*. While at \*\*\*, the student’s behavior appears to have improved to the point that student \*\*\*, and behavioral incidents have decreased at \*\*\* (with the exception of the \*\*\* after VISD visited student’s classroom). Additionally, \*\*\* ISD personnel testified that student is making progress.

One differentiating factor in this case is the fact that although the student resides in the \*\*\*, a public school provides educational services to the residents at \*\*\* through a contract. This is a hybrid placement as in the *Leah Z.* case. However, where the public school provided educational services on the campus of the residential center in *Leah Z.*, the student in this case attended school at \*\*\* ISD in a self-contained classroom similar to the classroom at VISD. The District argues that since the student’s IEP and placement are comparable between VISD and \*\*\*ISD, that these factors negate the essential need for the residential placement. However, it is important to note that the student’s placement is not a self-contained classroom at \*\*\*ISD. Rather, it is the residential placement where the behavioral component of the student’s educational program is addressed along with student’s academic needs. The difference between the placement at \*\*\* and VISD is the presence of coordinated services between the \*\*\*ISD campus and the \*\*\* staff. Therefore, the student’s success in \*\*\*ISD is attributable to this collaborative effort or “wrap-around” services. There were no reports of the student \*\*\* while at \*\*\*, acting aggressively in the classroom, or threatening \*\*\*. The student’s school behavior has improved while at \*\*\* as has student’s behavior within the residential placement. Given the student’s progress while at \*\*\*, the placement is essential.

### Was the placement primarily oriented towards education?

The Court in *Leah Z.* announced a new standard by which private, residential placements are evaluated - whether the residential placement is primarily oriented toward education.

Prior to *Leah Z.*, the standard inquiry in many cases was whether the student's social, emotional, medical and educational problems are so intertwined that "realistically it is not possible for the court to perform the Solomon-like task of separating them." *Kruelle v. New Castle County School District*, 642 F.2d 687, 694 (3rd Cir. 1981), quoting *North v. Dist. of Columbia Board of Education*, 471 F.Supp. 136 at 141 (D.D.C. 1979). However, the Fifth Circuit rejected this test in *Leah Z.*, instead holding that residential placement at public school expense is not warranted unless the placement is "primarily oriented toward education." However, the Fifth Circuit failed to explain this standard any further, and there are no reported decisions explaining this standard since *Leah Z.* However, it would appear that this question is very similar to the questions posed under the state regulations, i.e., is the placement for medical reasons or primarily for reasons relating to the student's home. In other words, the task is to look at the *placement* itself to determine its purpose. Although parent motivation for the placement may include a motive to eliminate problems in the home, parent motivation for the placement is not the standard under *Leah Z.* Rather, the key factor is the nature of the placement itself.

There is no dispute that \*\*\* is not a medical facility. Although the student receives ongoing medication management, medication management is not the purpose of student's placement or a central component of this placement. I find, based on a preponderance of the credible evidence, that the placement at \*\*\* was not for medical purposes.

There is no doubt that the student's emotional and behavioral issues are central to the need for placement. Respondent attempted to minimize the student's behavioral issues at school, claiming that the problematic behaviors primarily occurred away from school, and therefore any need for residential placement is a result of the student's away from school behaviors. This premise is neither credible nor supported by the evidence. It is undisputed that the student has mental retardation, resulting from fetal alcohol syndrome, and psychosis. According to the student's psychiatrist, student is the most \*\*\* youth he has worked with and needs \*\*\* supervision in order to be able to access an education. The student does not act logically and is impulsive. This is consistent with the behaviors observed by the teacher in that the student's behaviors were impulsive and difficult to re-direct. According to the teacher, no one could reason with or re-direct the student from \*\*\* when student wanted to do so. Student has been physically aggressive and threatening at home and at school. Student has engaged in \*\*\* behaviors at school, fantasized about another disabled student in student's classroom, and \*\*\* away from school. Student has displayed inappropriate boundaries toward the \*\*\*. Student has \*\*\* students and according to the teacher, acted like \*\*\* while at school. Behaviors related to disabilities such as mental retardation and psychosis do not occur in a vacuum. The fact that the student had significant behavioral issues at home does not negate the need for behavioral intervention in the school setting. In fact, an aspect of this student's education should have addressed the student's need to generalize appropriate behaviors across all settings.

The student's teacher testified that although she was aware the student's parents were seeking residential placement in the Spring of 2009, she did not feel it was necessary. She even sent an email to the parent that she hoped she found a placement for student. Her reasoning for the

student's lack of need for residential placement was that it was not the school's responsibility for the student's disability. In other words, the premise is that if the school did not contribute to or cause the student's emotional and behavioral problems, it should not be required to respond to those problems with a residential placement, even if it is otherwise needed. This is consistent with Respondent's contentions throughout the hearing.

The relief sought under IDEA is equitable in nature, and not in the form of damages. Causation is not a factor in determining whether residential placement is warranted nor is it a factor in determining the nature of the placement. Parental motivation is also not a dispositive factor in evaluating the nature of the placement.

Ultimately, the cause of the student's decline over the 2008-2009 school year is not so much an issue as Respondent's lack of responsiveness to student's needs.

Was the placement primarily for problems in the home or oriented toward education?

The District contends that the student's residential placement at \*\*\* was primarily due to problems in the student's home, pointing to the concerns about the \*\*\*, and physically aggressive behavior toward student's mother. Those concerns, although legitimate, were not the exclusive reasons for the student's placement at \*\*\*, although it is unrealistic to conclude that the student's behavior at home was not a motivator for placement. It is important to note that every home behavior exhibited by the student has a corresponding behavior within the school setting. For example, at home the student \*\*\*; at school during the same period of time student developed an obsession about the \*\*\*and fantasized about another student. Student exhibited \*\* behaviors at home; student \*\*\* on more than one occasion, \*\*\*. The student was \*\*\* at home; the school characterized student as \*\*\* at the end of the school year. In sum, although parents were certainly motivated to end certain behaviors at home that motivation does not equate with proof that the student's placement is primarily due to non-educational reasons.

Was \*\*\* an appropriate placement?

As previously noted, the student's cognitive functioning, psychosis and behavior necessitated student's admission to a residential facility. The District could not handle the student's emotional and behavioral needs. The \*\*\* provided a program that integrated the student's medication management, psychological services, and behavior management. The \*\*\* provided related services to the student. IDEA defines **related services**" as transportation, and such other developmental, corrective, and other supportive services that may be required to assist a child with a disability to benefit from special education. These services include speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, therapeutic recreation, social work services, certain school nursing services, orientation and mobility services, and medical services that are for diagnostic and evaluation purposes. 20 U.S.C. 1401 (26); 34 C.F.R. §300.34 The psychological, behavior management and casework services provided by \*\*\* are related services. Additionally, the wraparound services provided by \*\*\*, coordinating the services at \*\*\* with the classroom program at \*\*\*ISD were appropriate. These services were necessary for the student's behavior to change so student could benefit from an education. In fact, behavior management is and should be a significant component of the student's education and was

neglected by VISD. I find, based on a preponderance of the credible evidence, that the placement at \*\*\* is primarily oriented to education and appropriate.

### Reimbursement

The District was on notice as of the June 3 2009 ARD meeting of the parent's intent to place the student. The evidence shows that the parents received no other funds or programs to defray the cost of the student's placement at \*\*\*. The District failed to provide a FAPE to the student during the 2008-2009 school year and the placement at \*\*\* is appropriate. Additionally, the 2009-2010 IEP is not reasonably calculated to confer a meaningful educational benefit in that it is substantially the same as the previous IEP and fails to address the student's behavioral deficits. The District is ORDERED to continue the student's placement at \*\*\*.

### **Conclusions of Law**

After due consideration of matters of record, matters of official notice, and the foregoing findings of fact, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following conclusions of law:

1. The student is eligible for special education services under the IDEA as a child who is mentally retarded. 34 C.F.R. §300.8; (c)(6); 19 TEX. ADMIN. CODE § 89.1040 (c) (5).
2. Victoria ISD failed to provide an appropriate education for the student during the 2008-2009 school year because the student did not make meaningful educational progress and in fact, deteriorated behaviorally. *See Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997). Additionally, the District's proposed IEP for the 2009-2010 year is not appropriate. *Board of Educ. v. Rowley*, 458 U.S.176 (1982).
3. Petitioner bears the burden of proof with respect to the claims that the student was denied a free appropriate public education. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Petitioner met student's burden of proof in this case.
4. \*\*\* was an appropriate placement for the student from June 3, 2009 through the date of hearing.
5. The student's parents are entitled to reimbursement for student's placement at \*\*\* as of June 3, 2009.
6. The \*\*\* continues to be an appropriate placement for the student.

## ORDER

Based upon a preponderance of the evidence and the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the relief requested by Petitioner is **GRANTED**.

1. IT IS ORDERED that Petitioner shall be entitled to reimbursement for out-of-pocket expenses associated with the student's placement \*\*\* from June 3, 2009 to present.

2. IT IS FURTHER ORDERED that the District shall convene an ARD meeting within 10 school days of the date of this ORDER to implement placement at the \*\*\* as ordered herein

3. IT IS FURTHER ORDERED that at this ARD meeting, the parent shall present receipts for out-of pocket expenses for the student's placement at \*\*\*, and the District shall reimburse said expenses within 15 days of receipt.

IT IS ORDERED that all other relief not specifically awarded herein is DENIED.

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

### NOTICE TO THE PARTIES

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

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

**SIGNED** this 15<sup>th</sup> day of February, 2010.

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

## SYNOPSIS

Issue: Whether the parent is entitled to reimbursement for placement at \*\*\*?

Held: For the parent. The District failed to provide a FAPE for the student and the private residential placement was appropriate for the student.

Citation: 20 U.S.C. § 1412(a)(10)(C); 34 CFR 300.148 (c).

Issue: Whether residential placement was primarily oriented toward education and therefore the responsibility of the District.

Held: For the parent. The placement addressed emotional and behavioral objectives for the student which enable student to become successful and remain in the classroom. The District wholly failed to address the student's behavioral needs. The placement was primarily oriented toward education and was not required primarily due to medical reasons or problems in the student's home.

Citation: *Richardson ISD v. Leah Z.*, 580 F.3d 286 (5<sup>th</sup> Cir. 2009); 19 Tex. Admin. Code. 89.61(b)(1).