

STUDENT <i>b/n/f</i>	§	BEFORE A SPECIAL EDUCATION
PARENTS,	§	
Petitioner,	§	
	§	
V.	§	HEARING OFFICER
	§	
BIRDVILLE INDEPENDENT	§	
SCHOOL DISTRICT,	§	
Respondent.	§	FOR THE STATE OF TEXAS

DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

**I.
STATEMENT OF THE CASE**

Petitioner, Student *b/n/f* Parents (“Petitioner” or “Student”), filed a Request for Due Process Hearing (“Complaint”) with the Texas Education Agency (“TEA”), requesting a Due Process Hearing pursuant to the Individuals With Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. §1400 *et. seq.*, contending that Respondent, Birdville Independent School District (“Respondent” or “BISD” or “the District”), denied Student a free, appropriate, public education (“FAPE”) as follows:

A. Petitioner’s Issues:

1. Respondent failed to devise an appropriate Individual Education Plan (“IEP”) for Petitioner at the July 18, 2011, Admission, Review, and Dismissal Committee meeting (“ARDC”);
2. Respondent failed to devise appropriate and measurable goals and objectives, based on present levels of performance and in all the Petitioner’s areas of need;
3. Respondent’s proposed Behavior Intervention Plan (“BIP”) was not appropriate;
4. Respondent’s proposed counseling services were not appropriate;
5. Respondent should pay for private school placement services, including mileage, at the *** during school year 2011-12 and summer 2012;
6. Respondent should pay for the Independent Educational Evaluation (“IEE”) performed by Dr. *** in January 2011; and
7. Respondent failed to give Petitioner’s parents prior written notice when denying parental requests.

B. Petitioner’s Requested Relief:

1. compensatory special education services;

2. compensatory related services;
3. staff training;
4. reimbursement for private school services, evaluations, and mileage incurred in fall 2011 at ***; and
5. continued private school expenses at *** School, related costs, including mileage, for the remainder of the during school year 2011-12 and summer 2012.

C. Respondent's Claims:

Respondent asserted that several issues pled by Petitioner are either a) not within the jurisdiction of a Texas Special Education Hearing Officer¹ or b) not ripe for consideration as of the date of the filing the Complaint.² Respondent requested in its Response that these issues be dismissed.

II PROCEDURAL HISTORY

This is the second Due Process Hearing involving these parties during 2011.

A. DOCKET No. 139-SE-0211

Student filed student's Complaint in Docket No. 139-SE-0211 on February 25, 2011. On that same date, TEA assigned the case to the undersigned Hearing Officer. Based upon the agreement of the parties and Hearing Officer, Docket No. 139-SE-0211 was tried on April 27-29, 2011. The undersigned rendered the Decision on June 22, 2011, which confirmed some of Petitioner's issues and denied the remainder. Specifically, the undersigned held that 1) Respondent's FIE was inappropriate; 2) Petitioner qualified for special education and related services under the eligibility criteria of emotional disturbance ("ED"); 3) Respondent failed to develop an appropriate educational program and placement for Student during the second semester of summer 2010, fall 2010, and spring 2011; and 4) Petitioner's private placement at *** School provided Student with an appropriate education during the second semester of summer 2010, fall 2010, and spring 2011. The undersigned ordered Respondent 1) to reimburse the Parents for educational expenses at *** School from the second semester of summer school 2010 through the summer of 2011, and 2) to convene an ARDC to ascertain whether Respondent could develop an appropriate IEP for Petitioner, and if so, then to develop an appropriate program and placement at BISD.

The parties convened the ARDC on July 18, 2011, but were unable to agree upon Petitioner's

1 Petitioner raised issues and requested relief under numerous statutes over which the Hearing Officer has no jurisdiction: Section 504 of the Rehabilitation Act; the Americans with Disabilities Act (ADA); the Family Educational Rights Privacy Act (FERPA); the No Child Left Behind Act (NCLBA); Section 1983 of the Civil Rights Act of 1964; Title VI of the Civil Rights Act of 1964; the Technology Related Assistance For Individuals With Disabilities Act; and multiple statutes that provide for attorneys' fees, including IDEIA.

2 Petitioner made several requests for accommodations and rulings, particularly related to discovery disputes, as well as requests for exemptions from several state and federal rules and statutes, most of which were not ripe for adjudication at the point of filing the Complaint.

program and placement for school year 2011-12. Respondent proposed academic and behavioral IEPs for implementation in a self-contained classroom with children who are younger, non-verbal, and more disabled than Petitioner. Student's Parents declined this proposed program and placement.

B. DOCKET No. 258-SE-0711

Student filed student's Complaint in Docket No. 258-SE-0711 on July 19, 2011. On that same date, TEA assigned the case to the undersigned Hearing Officer. On July 20, 2011, the undersigned Hearing Officer sent the Initial Scheduling Order to the parties, stating that the pre-hearing telephone conference would convene on August 9, 2011, that the Due Process Hearing would take place on September 2, 2011, and that the Decision would issue by October 2, 2011. By agreement, the undersigned continued the pre-hearing telephone conference to August 17, 2011.

Respondent filed its Response to Complaint on July 29, 2011, asserting several defenses and requesting dismissal of all of Petitioner's issues related to 1) claims deriving from statutes over which a Texas Special Education Hearing Officer has no jurisdiction, and 2) all matters preemptively alleged.

The parties held a Resolution Session on August 3, 2011, but were unable to resolve the matter.

On August 17, 2011, the parties convened the pre-hearing telephone conference. In attendance were the following: 1) Ms. Dorene J. Philpot, Petitioner's counsel; 2) Mr. and Mrs. ***, Petitioner's Parents; 3) Mr. J. Erik Nichols, Respondent's counsel; 4) Ms. Amy Tucker, Respondent's co-counsel; 5) Dr. ***, Respondent's Special Education Director; 6) the undersigned Hearing Officer; and 7) the court reporter, who made a record of the telephone conference. The parties discussed the issues and re-scheduled the Due Process Hearing for September 27-29, 2011.

On August 19, 2011, the undersigned issued the Second Order Scheduling Due Process Hearing, which set out the agreed hearing deadlines, additional procedural matters, and dismissed all of Petitioner's claims that were outside the Hearing Officer's jurisdiction.

The Due Process Hearing convened on September 27, 2011, and concluded on September 29, 2011. Both parties introduced documentary evidence; Petitioner called eight (8) witnesses; Respondent called four (4) witnesses. Both parties conducted cross-examination of the witnesses.

During the hearing, Petitioner was represented by counsel, Ms. Philpot. Also in attendance throughout the hearing were 1) Mr. and Mrs. ***, Petitioner's Parents; and 2) Ms. Melanie Watson, Ms. Philpot's paralegal. Respondent was represented by counsel, Mr. Nichols. Also in attendance throughout the hearing was Dr. ***, Respondent's Special Education Director. Petitioner opened the hearing and observers were in attendance at various times.

At the conclusion of the hearing on September 29, 2011, the parties and Hearing Officer agreed to a post-hearing schedule: closing arguments would be due by November 18, 2011, and the Decision would be rendered by December 2, 2011.³

3 References to the Due Process Hearing Record are identified as follows: "T.I.#" or "T.II.#" or "T.III.#" refers to the Certified Court Reporter's Transcription of testimony made on September 27, 28, and 29, 2011, and the numbers following the volume designation refer to the pages within the particular volume of testimony. "P.#.#" refers to Petitioner's Exhibits by number and page; "R.#.#" refers to Respondent's Exhibits by number and page.

**III.
FINDINGS OF FACT**

1. BISD is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing FAPE under IDEIA and its implementing rules and regulations.
2. Student is a ***-year-old child who qualifies for special education and related services under the eligibility category of ED. Student resides within BISD's jurisdictional boundaries with student's Parents and sibling. BISD is responsible for providing Student with an appropriate education under IDEIA and its federal and state implementing statutes.

Docket No. 139-SE-0211:

3. Student was diagnosed with a nonspecific mood disorder in June 2010 while receiving psychiatric day treatment at ***. Prior to this treatment, Student had demonstrated extremely explosive, aggressive behaviors towards other students, adults, and property, such as disrupting class, screaming, refusing to follow directions, throwing things, and kicking, which resulted in Student's being dismissed from ***. All of this occurred by the time Student was *** years old.
4. *** discharged Student on June 11, 2010, and encouraged the Parents to contact BISD for assistance. Student's Parents contacted Respondent to obtain an evaluation for special education and to obtain educational services. The Parents provided Respondent with Student's behavioral history, including information related to student's dismissal from ***, as well as the psychiatric admission, evaluations, and medications.
5. On June 14, 2010, the Parents enrolled Student in the *** School in ***, a therapeutic summer program for children who are challenged with learning, social, emotional and/or behavioral difficulties.
6. Respondent conducted Student's FIE in June 2010. Based upon the results of the FIE, Student's ARDC determined that Student did not qualify for special education and related services under the ED eligibility. BISD suggested that the Parents place Student in a private Montessori *** facility.
7. Student attended two four-week sessions of *** School during summer 2010. The Parents were pleased with Student's behavioral progress and enrolled student in the *** class for school year 2010-11. Student has attended *** School since student's enrollment. Student currently is in the *** class at *** School.
8. In February 2011, Student filed a Complaint with TEA, Docket No. 139-SE-0211, challenging BISD's failure to determine Student's ED eligibility and to develop an appropriate program and placement in special education. This case went to Due Process Hearing on April 27-29, 2011. The undersigned Hearing Officer determined that 1) BISD failed to appropriately assess Student; 2) Student qualifies for special education and related services under the ED eligibility criteria; 3) BISD failed to develop an appropriate educational program and placement for Student during the second semester of summer 2010, fall 2010, and spring 2010; and 4) *** School provided Student with an appropriate education during the second semester of summer 2010, fall 2010, and spring 2011. Based upon these findings, the undersigned ordered BISD 1) to reimburse

Student's Parents for some of the costs of the private school placement, and 2) to convene an ARDC to determine whether BISD can provide Student with an appropriate education and if so, to develop an appropriate program and placement.

9. Student's ARDC convened on July 18, 2011, in compliance with the Hearing Officer's orders. The ARDC failed to reach consensus on the IEP goals and objectives and Student's proposed placement in the self-contained *** class.⁴
10. On July 19, 2011, Student filed the current Complaint related to Student's proposed program and placement for school year 2011-12.

Docket No. 278-SE-0711:

A. Student's July 18, 2011, IEP:

11. On July 18, 2011, Student's ARDC convened to develop Student's IEPs and determine student's placement at BISD for school year 2011-12. During this meeting, the ARDC 1) adopted Dr. *** January 15, 2011, evaluation as Student's FIE (R.1.1); 2) developed IEPs with goals and objectives in a) adaptive social studies, b) math, c) reading, d) science, e) social studies, and f) written language (R.1.6-16); 3) developed a BIP (R.1.19-20); and 4) specified instructional accommodations for use in Student's core subjects (R.1.21-22). The ARDC used Dr. *** IEE, Student's goals and objectives from *** School, and observation notes in developing Student's IEPs.
12. The ARDC recommended that Student receive the majority of student's educational services in a special education setting with eighty (80) minutes per day in general education. Accordingly, Student would receive instruction in the special education setting for reading, math (thirty (30) minutes only), language, science, social studies, fine arts, and physical education. Student would participate in general education in the areas of math (thirty (30) minutes), recess (twenty (20) minutes), and *** (thirty (30) minutes) (R.1.26).
13. The ARDC recommended placing Student in a self-contained *** classroom, which was taught by a highly qualified special education teacher. The class was described as a behavior classroom with the teacher serving a variety of disabilities and ages, typically ages *** – ***. During the ARDC meeting, Parents requested specific information about the disabilities of the other students and their ages. The ARDC declined to provide the disability information on the grounds of confidentiality (T.3.764-65) (R.1.36). The ARDC confirmed that three (3) of the students would be returning for school year 2011-12 and that they were *** (***) years old (R.1.36).
14. At the time of the ARDC meeting, the Parents believed that the proposed program and placement in the *** self-contained class would encompass a full day of activity with the majority of the time in the self-contained setting, with at least three (3) students returning, who would be Student's classmates for almost the entire day. The ARDC report supports the Parents' belief. The Parents rejected the proposed program and placement in the self-contained *** classroom and requested the Student remain at the *** School through at school year 2011-12.

4 BISD argued that Student was not being placed in a self-contained classroom; the reference throughout the record to the "self-contained" classroom applied to the instructional arrangement required to be identified by TEA for PEIMS coding. BISD proffers that Student was being placed in a special education classroom.

15. Following the July 18, 2011, ARDC meeting, Student's Parents hired Dr. *** to observe the proposed self-contained classroom. Dr. *** observed the classroom on September 15, 2011, for a short period of time, and wrote a report of her observations (T.3.633-34) (P.8). Dr. *** spent an hour at the school observing the class and speaking with the teacher. Based upon her observation, Dr. *** found the proposed placement in the self-contained classroom inappropriate (T.3.633). The class consisted of four (4) students, all of whom are on the autism spectrum, nonverbal, and cognitively low functioning (T.1.204).
16. Dr. *** report confirms that she and the Parents believed that Student would be placed in the self-contained classroom, with children who are nonverbal and cognitively very low, for the majority of the school day (P.8).
17. Dr. ***, Student's psychiatrist, concurred that Student's proposed placement in the self-contained classroom would not be appropriate and that it might be detrimental (T.1.393).
18. Dr. ***, BISD's expert, performed the Functional Behavior Assessment ("FBA"), which was authorized at the July 18, 2011, ARDC meeting. Dr. *** had concerns about Student's placement in the self-contained classroom with students who were very low functioning and much lower than Student (T.3.711). Dr. *** met with Dr. ***, who clarified that Student would be with student's classmates only a short time each day and would not be involved with the other students' activities (T.3.712). With that clarification, Dr. *** opined that the proposed program and placement were appropriate. At that time, Dr. *** was not informed that Student's academics would be provided in a one-on-one setting because the *** was a half-day program only.
19. Dr. *** testified that placing Student in the proposed self-contained class would be dangerous for the nonverbal children who could not report if Student hurt them (T.3.640).
20. During the hearing, BISD presented evidence that was unknown to the Parents at the time of the ARDC meeting and not reported on the ARDC Report. BISD confirmed that the proposed self-contained class was not a full-day class but a half-day class. Accordingly, Student would be working one-on-one with student's teacher in the afternoon on student's IEPs (T.1.190). BISD clarified that the teacher could work one-on-one with Student in an area called ***, which is an area outside the classroom that has centers for students to use during tutoring. BISD concluded that Student would have some interaction with general education students while working ***.
21. Dr. ***, Dr. ***, and Dr. *** all testified that providing Student with one-on-one instruction is inappropriate because student needs to learn to function in a larger body of student's peers (T.2.394) (T.3.642) (T.3.715-16).

B. Student's Current Education at * School:**

22. Student's Parents continued student's enrollment at *** School. Student is in a classroom with four (4) other students, two (2) of whom are *** (***) years old. Two (2) students are very high functioning and read on a *** grade level; two (2), including Student, are performing above grade level; and one (1) is developmentally delayed (T.1.45-46).

23. Student is in the ***-grade group performing academically above average. The focus on Student's education is the development of behavioral and social skills (T.1.173). Student receives group counseling twice a week with students in student's age group (T.1.174).
24. *** School uses an individualized daily point sheet system and positive reward incentives (T.3.757). This behavior program is used at home to provide consistency (T.3.759).
25. Student has made progress at *** School. Student's explosive and aggressive behaviors have tapered off and have been replaced with personal awareness of escalating behaviors that can be diffused with words (T.1.140) (T.3.766). Student rarely needs physical restraints (T.1.140).
26. The evidence established that the July 18, 2011, ARDC recommendation, that Student be placed in the self-contained class for school year 2011-12, was inappropriate because the placement would not be in the LRE.
27. The evidence established that the July 18, 2011, ARDC recommendation, that Student be placed in the self-contained class for school year 2011-12, was inappropriate because such placement would likely deprive Student of educational benefits.
28. The evidence established that *** School continues to provide Student with an appropriate program and placement.
29. The evidence failed to establish that the July 18, 2011, ARDC did not devise appropriate and measurable goals and objectives for implementation at BISD.
30. The evidence failed to establish that the July 18, 2011, ARDC did not develop an appropriate BIP. The ARDC authorized an FBA during the July 18, 2011, ARDC meeting. The BIP developed in July 2011 was intended to be in place for Student until the completion of the FBA.
31. The evidence failed to establish that the July 18, 2011, ARDC's recommendation for counseling services is inappropriate. The ARDC agreed to provide thirty (30) minutes per week of counseling in compliance with Student's counseling services at *** School (R.1.26; 35-36).
32. The evidence established Student's right to reimbursement for private school placement, and attendant necessary expenses, during fall 2011.
33. The evidence failed to establish Student's right to reimbursement for Dr. *** January 2011 IEE.
34. The evidence failed to establish that BISD committed procedural violations sufficient to deny Student FAPE.

IV. DISCUSSION

All state school districts receiving federal funding must provide all handicapped children FAPE. The United States Supreme Court, in *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175 (1982), established a two-part test for determining whether a school district has provided a student FAPE: 1) the school district must comply with the procedural requirements of IDEIA, and 2) the school district must design and implement a program "... reasonably calculated to enable the child to receive educational benefits."

An educational benefit must be meaningful and provide the “basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational benefit to the handicapped child.” *Rowley*, 458 U.S. at 200-01. In determining whether a child is receiving FAPE, the *Rowley* Court insisted that the reviewing court must not substitute its concept of sound educational policy for that of the school authorities. *Id.*, 458 U.S. at 206. Although the school district need only provide “some educational benefit,” the educational program must be meaningful. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). The educational benefit cannot be a mere modicum or *de minimis*. It must be likely to produce progress, not regression or trivial educational advancement. *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000).

In *Cypress-Fairbanks Independent School District v. Michael F.*, the Court set forth four (4) factors that aid in evaluating whether a student is receiving the “basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational benefit” to that student: 1) whether there is an individualized program based on the student's assessment and performance; 2) whether the individualized program is administered in the LRE; 3) whether the services are provided in a coordinated and collaborative manner by the key stakeholders; and 4) whether positive benefits are demonstrated both academically and non-academically.

In the instant case, the deficiency in BISD's proposed program and placement is the actual recommended *placement* in the *** self-contained classroom. The ARDC's proposed goals and objectives, including those directed to behavior, are appropriate and likely to provide Student with educational benefit *in the appropriate setting*. In developing these goals and objectives, the ARDC reviewed Student's assessments, performance, current observations, and the instructions contained in the prior Decision. Likewise, the proposed BIP was appropriate at the time it was developed, which was prior to the FBA. The ARDC Report clearly set forth the plan to revise Student's BIP when the FBA was completed.

Notwithstanding these facts, the proposed IEP fails because 1) it would be implemented in a more restrictive environment than evidenced on the ARDC Report or recommended by Student's assessors; and 2) it would impede Student's acquisition of academic and non-academic benefits.

A. Student's Placement In BISD's * Classroom Is Inappropriate.**

There is no debate that Student is highly intelligent and capable of delivering work on academic assignments that are above student's grade level. Student, who just turned *** (***), has a verbal IQ of *** and a performance IQ of *** (T.3.636). Student retains information and loves to learn (T.1.58). Student is highly motivated by challenging academics and should be educated at a high academic level (T.3.641).

The challenge to Student, however, is student's negative behavior attendant to student's ED disability. Student has a history of such explosive behaviors that student was actually kicked out of *** before student's Parents found *** School in June 2010. Student has manifested serious issues with reality testing, lashing out for things that student clearly misinterprets, and aggressive behaviors that injure ***self and others. Given Student's academic superiority, concomitant with student's behavioral impairment, Student presents a challenge to the developers of student's educational program.

In the June 22, 2011, Decision, the undersigned instructed the parties to convene an ARDC meeting to develop an appropriate program and placement for Student by referring to the

recommendations of Dr. ***, as well as other information available to the ARDC. Dr. *** determined that Student needs high levels of structure and predictability to function at student's optimum (P.9.7). Student needs a small-group setting, consistent behavior management, and reinforcement for positive behaviors (P.9.8). Student must have the opportunity to interact with a social body of student's peers who are on, or above, student's academic level.

Contrary to Dr. *** recommendations, as well as the experts who dealt with Student, the July 18, 2011, ARDC proposed placing Student in the *** self-contained classroom, which consisted of four (4) students, all of whom are on the autism spectrum, nonverbal, cognitively impaired, and younger than Student.⁵ The ARDC Report indicates that Student would receive academic instruction for the full school day in the self-contained classroom with eighty (80) minutes of interaction with general education students.

After the July 18, 2011, ARDC meeting, Student's Parents learned the disabilities of the four (4) classmates in the *** classroom. At the hearing, Student's Parents learned that the *** class was a half-day class and that Student would be alone throughout the afternoon every day, receiving instruction one-on-one from student's teacher. During the hearing, BISD proposed that Student receive student's one-on-one instruction in, or near, the *** area where the chance of Student's interaction with general education peers was possible.

Not one of the experts testified that Student would benefit from one-on-one instruction. To the contrary, one-on-one instruction is absolutely inappropriate for this student. Student requires social interaction, albeit in a small-group setting, so that student's primary disability, social deficits, can be addressed and student's behavior modified to the point that Student can one day enjoy classes with student's peers in the regular education setting. Anything less than a small-group setting with student's peers, at this juncture, could derail all of the accomplishments Student has achieved at *** School.

There was no explanation as to why critical details of BISD's proposed program and placement were clarified at the hearing by BISD and not during the July 18, 2011, ARDC meeting. No matter the reason, neither the details of the July 18, 2011, proposed placement or the hearing clarifications renders Student's proposed placement in the self-contained *** classroom, with one-on-one instruction, appropriate.

B. Student's Current Placement At * School Is Appropriate.**

Student continues to make progress at *** School because it provides the kind of environment that student needs: structure, behavior reinforcement, communication with the Parents, clear expectations, and academic stimulation. Student is more aware of student's negative behaviors, their escalation, and strategies for handling the situation. Student is a happier child. The use of restraints has decreased significantly. Student's program comports with the recommendations of the experts.

All of Student's experts recommend continued placement at *** School until Student's behaviors are under such control that student can successfully experience the regular education setting with student's peers. Accordingly, because BISD did not make FAPE available to Student in fall 2011, and Student's placement at *** School during fall 2011 is appropriate, Student is entitled to reimbursement for the private placement expenses incurred. 34 C.F.R. §300.148(c).

⁵ At the time of the ARDC meeting, the members declined to inform the Parents that Student's classmates would be on the autism spectrum, nonverbal, and cognitively impaired.

As to Student's education in spring 2012, the evidence did not establish that BISD cannot craft an IEP for delivery in an appropriate setting. Indeed, the lion's share of the proposed IEP was appropriate. It was the actual setting for Student's receipt of these services that proved inappropriate for this Student and student's individual needs. BISD has the right to convene an ARDC to review all requisite information and to then determine whether it can educate Student in the LRE. If it can, the ARDC shall craft an appropriate program and placement. If it cannot, then the ARDC can refer Student to *** School, where Student has clearly made progress, or any other setting the ARDC deems appropriate, and pay for those private educational services.

C. Student Failed To Prove Remaining Issues.

Student additionally alleged 1) that Student's Parents are entitled to reimbursement for the IEE that was prepared by Dr. *** in January 2011 and adopted by Student's ARDC as the Student's current FIE; and 2) that BISD committed procedural violations of IDEIA.

1. Dr. * IEE:**

Dr. *** January 2011 IEE was evidence in the prior Due Process Hearing, Docket No. 139-SE-0211. Student requested reimbursement for the IEE; however, the undersigned declined to award such reimbursement.

At the July 18, 2011, ARDC meeting, the ARDC agreed to adopt Dr. *** IEE as BISD's FIE, an act that Student admits resulted from trickery. Student argues that 1) by adopting the evaluation as the Student's FIE, 2) by using it as the basis for the development of the proposed program and placement, and 3) by failing to conduct its own FIE, BISD has now obligated itself to pay for Dr. *** evaluation. BISD counters that 1) the doctrine of *res judicata* and 2) the fact that the prior Decision required use of the IEE preclude Student's recovery of the IEE fees from BISD.

The doctrine of *res judicata*, claim preclusion, establishes that once a case has reached a final judgment, re-litigation of the claims and issues is barred. In other words, claims between the same parties that result in a final judgment cannot be re-litigated in a new proceeding, whether before the same or any other tribunal. *Texas Water Rights Commission v. Crow Iron Works*, 582 S.W.2d 768, 771-72 (Tex. 1979). The scope of *res judicata* is not limited to matters actually litigated; the judgment in the first case precludes a second action by the parties not only on matters actually litigated, but also on causes of action that arise out of the same subject matter and that might have been litigated in the first case. *Id.* The Texas Supreme Court has ruled that this doctrine applies to administrative hearings. *Coalition of Cities for Affordable Utility Rates v. Public Utility Com'n of Texas*, 798 S.W.2d 560 (Tex. 1990).

In this case, Student requested reimbursement for Dr. *** IEE, which the undersigned denied in the June 22, 2011, Decision. Under the doctrine of *res judicata*, this issue has already been tried and therefore, is not viable in the current case.

As to Student's argument that by trickery it was able to garner BISD's adoption of the IEE as its FIE, and that as such, Student is entitled to reimbursement, BISD's counter argument prevails. The June 22, 2011, Decision instructed the parties to convene an ARDC meeting to develop Student's 2011-12 program and placement by using, *inter alia*, the recommendations contained in Dr. *** IEE. In other words, the undersigned Hearing Officer required that the IEE be used in developing the IEPs. There is no authority to support a finding that BISD's compliance with the Decision somehow "morphed" the IEE into an evaluation that required BISD to fund. Further, BISD's adoption

of the IEE as an FIE arguably barred it from conducting another FIE within one (1) year. Student's reimbursement request for the January 2011 IEE is denied.

2. Student's Alleged Procedural Violations:

Under IDEIA, a procedural violation only rises to the level of a denial of FAPE if it either 1) impeded the Student's right to FAPE; 2) significantly impeded the Parent's opportunity to participate in the decision-making process regarding FAPE; or 3) caused a deprivation of educational benefits. 34 C.F.R. §300.513(a)(2).

In this matter, Student alleged multiple procedural violations during the hearing.⁶ Specifically, Student alleged 1) BISD failed to invite a representative from *** School and Student's assessors to attend the July 18, 2011, ARDC meeting; 2) BISD declined to provide Student's Parents with information related to the disabilities of Student's classmates in the *** self-contained setting, thereby depriving them of equal participation; 3) BISD failed to provide Student's Parents with prior written notice of the ARDC's denial of the requested private placement; 4) BISD failed to provide a complete ARDC Report; 5) BISD made multiple decisions, without parental input, prior to the ARDC meeting; 6) the procedural safeguards sent to the Parents did not contain all required information; and 7) BISD never contacted the Parents to schedule another ARDC meeting.

Of all the above-listed violations, the only one that arguably comes close to a procedural violation is number 2: BISD declined to provide Student's Parents with information related to the disabilities of Student's classmates in the *** self-contained setting, thereby depriving them of equal participation. Notwithstanding the fact that BISD failed to provide this information, which would be important information in assessing the placement, the Parents were determined to object to the proposed program and placement on numerous other grounds. This is evidenced in their waiving the ten-day recess and immediately filing their Complaint in this case. Their Complaint was not based primarily on the fact that there was unknown information; it was based upon the actual program and placement proffered by the ARDC. As such, the omission of the requested information does not equate to a procedural violation.

V. CONCLUSIONS OF LAW

1. Student's July 18, 2011, proposed program and placement are not appropriate; they fail to place Student in the LRE; and they are not reasonably calculated to provide Student FAPE. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
2. Student's fall 2011 program and placement at *** School is appropriate and is providing Student with FAPE.
3. BISD shall reimburse Student's Parents for educational expenses at *** School for fall 2011. 34 C.F.R. §300.148(d).
4. BISD did not commit procedural violations of IDEIA that equate to a denial of FAPE. 34 C.F.R. §300.513(a)(2).

⁶ Although Student's Complaint alleges only one procedural violation related to prior written notice, Student argued during the hearing and in the closing brief other alleged procedural violations. BISD did not object to these additional procedural violations.

5. The doctrine of *res judicata* bars Student's recovery of fees associated with Dr. *** January 2011 IEE. *Coalition of Cities for Affordable Utility Rates v. Public Utility Com'n of Texas*, 798 S.W.2d 560 (Tex. 1990).
6. Student failed to establish that BISD cannot provide Student with FAPE during spring 2012 and EYS 2012.

VI. ORDER

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the relief requested by Petitioner is GRANTED, IN PART, AND DENIED, IN PART. It is, therefore,

ORDERED that within thirty (30) days of Student's last day of the fall 2011 semester at *** School, Student's Parents shall provide BISD with proof of payment to *** School for tuition and enrollment fees for fall 2011, as well as mileage attributable to daily travel to *** School during the fall 2011 semester. It is further

ORDERED that within thirty (30) days of BISD's receipt of such information, BISD shall pay Student's Parents the following:

1. reimbursement for tuition and enrollment fees at *** School incurred in fall 2011, beginning in August 2011; and
2. reimbursement for mileage calculated at the current state rate.

All other requests for reimbursement are **DENIED**. It is further ORDERED that within thirty (30) days from the date of this Decision:

1. Student's ARDC shall meet to review all current data and determine whether BISD can provide Student FAPE for spring 2012 and ESY for summer 2012;
2. if the determination is that BISD can provide Student FAPE, the ARDC shall consider all current evaluations that are necessary to develop an appropriate IEP for Student for spring 2012 and ESY 2012;
3. if the determination is that BISD can provide Student FAPE, the ARDC shall develop an appropriate IEP for Student for spring 2012 and ESY 2012;
4. if the determination is that BISD can provide Student FAPE, BISD shall invite all necessary personnel, including representatives of *** School, to attend the ARDC meeting.

All other requests for relief not specifically stated in this Order are **DENIED**.

VII.
NOTICE TO PARENTS

The Decision of the Hearing Officer is final and appealable to state or federal district court.

The District shall timely implement this Decision within ten (10) school days in accordance with 19 Tex. Admin. Code §89.1185(p). The following must be provided to the Division of IDEIA Coordination at the Texas Education Agency and copied to the Petitioner within fifteen (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 ten (10) school days, documentation demonstrating 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 2nd day of December 2011.

Deborah Heaton McElvaney
Special Education Hearing Officer

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