

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

DECISION OF HEARING OFFICER

Introduction

Petitioner, *** (“Petitioner” or “Student”), b/n/f *** and *** (“Parent”), brought the instant action against the Respondent, North East Independent School District (“Respondent,” “District,” or “NEISD”) pursuant to the Individuals with Disabilities Education Improvement Act of 2004, as amended, 20 U.S.C. § 1401 et seq. (“IDEA”) and its implementing state and federal regulations. Petitioner filed petitioner’s request for due process hearing on May 20, 2011.

Party Representatives

Attorneys, Dorene Philpot and James Hollis, represented the Petitioner. Attorney, Ricardo Lopez, represented the Respondent.

Resolution Session and Mediation

The parties waived in writing the Resolution Session, and participated in an unsuccessful mediation session June 16, 2011.

Procedural History

The parties participated in several prehearing conferences that, following findings of good cause, resulted in continuances of the due process hearing. The hearing occurred December 8 and 9, 2011. Following the hearing, in order to allow sufficient time for the parties to submit closing arguments, the decision due date was extended to January 31, 2012.

Issues for Hearing

Petitioner alleged that the Respondent denied petitioner a free, appropriate public education (“FAPE”) and cited the following specific issues with a timeline since 2005:

1. Failure to educate the Student in the least restrictive environment (“LRE”);
2. Failure to appropriately consider the recommendations of the Student’s psychiatrist;

3. Failure to devise appropriate, objective and measurable goals and objectives based on present levels of performance in all of the Student's areas of need;
4. Failure to timely and appropriately assess the Student's needs, including learning disability;
5. Failure to conduct a timely and appropriate functional behavior assessment ("FBA") and develop an appropriate behavior intervention plan ("BIP");
6. Failure to consider and implement the appropriate provisions of the autism supplement in the Student's individualized education program ("IEP");
7. Changed the Student's placement to an alternative school without prior written notice and without a student-based rationale for doing so; NOTE: In its Closing Brief, Petitioner withdrew this issue.
8. Changed the Student's regular TAKS to TAKS-M without explanation of the ramification of the change and without discussion in the admission, review and dismissal ("ARD") committee deliberations;
9. Failure to offer extended school year ("ESY") services to the Student;
10. Failure to assess and address the Student's need for a one on one paraprofessional;
11. Failure to assist the Student with schoolwork while student was ***;
12. Failure to implement the Student's IEP as written;
13. Failure to incorporate plan for staff training into the Student's IEPs ;
14. Failure to provide prior written notice at all required junctures;
15. Failure to timely and appropriately respond to Petitioner's records requests; and
16. Violation of the Student's rights under federal statutes in addition to the IDEA.

As relief, Petitioner requests the following:

1. Provision of an appropriate IEP in the LRE;
2. Finding that Respondent denied the Student a FAPE;
3. Reimbursement for private services, evaluations and mileage, and an order of private placement and related services for a one year period;
4. Compensatory services; and
5. Anything else deemed appropriate by the hearing officer.

Jurisdiction of Hearing Officer

The authority of a hearing officer under the IDEA is limited to determinations relating to the identification, evaluation or educational placement of a child with a disability or the provision of FAPE to the

child. Petitioner’s allegations of violation of petitioner’s rights under federal statutes other than the IDEA are dismissed.

Findings of Fact

1. At the time of hearing, the Student was in the *** grade, and attended *** school in the District. The Student resides in the geographical boundaries of the Respondent school district. The District is responsible for providing student a FAPE.
2. During student’s several years in the District, the Student eligibilities included speech impairment (“SI”), learning disability in written expression (“SLD”), other health impairment (“OHI”) due to attention deficit hyperactivity disorder (“ADHD”), and autism (“AU”). Student is currently eligible under the classifications of SI, OHI, and AU. Petitioner’s Exhibits 2, page 36 (hereinafter “Pet. Ex.”); Pet. Ex. 5, pg. 253; Pet. Ex. 7, pg. 513; Pet. Ex. 11, pg. 837; Respondent’s Exhibit 4 (hereinafter “Resp. Ex.”).
3. Petitioner’s diagnoses have been several: bipolar disorder, oppositional defiant disorder, anxiety disorder not otherwise specified (“NOS”), intermittent explosive disorder, oppositional defiance disorder, pervasive developmental disorder, ***. Pet. Ex. 6, pg. 333; Pet. Ex. 8, pg. 590; Pet. Ex. 10, pg. 813; Pet. Ex. 7, pg. 400; Resp.’s Ex. 4.
4. The Student has deficits in pragmatic language and expressive and receptive language and has received speech therapy in the District during all the years of student’s enrollment. Pet. Ex. 5-8, 11; Resp. Ex. 4, 7, 8, 19.
5. The Student’s general intellectual ability is in the *** range. Pet. Ex. 4, pgs. 189, 193; Pet. Ex. 7, pg. 405.
6. Throughout student’s school years, the Student has struggled academically. Student’s difficulties have been in reading comprehension and decoding sounds and math number sense and memorization. Student has difficulty taking responsibility for student’s actions, will “shut down” and refuse to complete student’s work. Pet. Ex. 1, 2; Pet. Ex. 4, pgs. 87, 108, 146, 198, 214.
7. The Student’s performance on state tests is shown on the following table:

Grade	Reading	Science	Math
***	***		***
***	***		***
***	***	***	***
***	***		***
***	***		***

Pet. Ex. 5, pg. 269; Pet. Ex. 6, pg. 300; Pet. Ex. 8, pgs. 644, 730; Resp. Ex. 6; Tr. Vol. II, pgs. 681, 693 (hereinafter referred to as “Tr. Vol.”).

8. The TAKS-M is a grade level assessment with modifications. For example, the TAKS-M has a reduced vocabulary level. There are fewer answer choices from which a child may select. Tr.Vol. II, pgs. 680-681.
9. While the Student was in *** grade, the ARD committee conducted a FBA and developed a BIP to address behaviors that ranged from refusal to do classwork and participate in classroom activities, making inappropriate physical or verbal responses. Pet. Ex. 5, pgs. 277, 280.
10. As a *** grader, the Student's aggressive behaviors diminished and student had no BIP. Student had a behavior goal/objective in student's IEP. Student received services in general education, a 20-minute content mastery class, and direct speech therapy. At that time, the Student was eligible under SLD in listening comprehension, oral expression and written expression and SI. However, behavior issues existed in the spring, 2008. Pet. Ex. 6, pgs. 305, 312; Pet. Ex. 7, pgs. 392-397.
11. A 2008 Full and Individual Evaluation ("FIE") showed that the Student had an academic deficit in relation to student's same-aged peers, with achievement below normal limits in basic reading skills, reading comprehension, math calculation, math reasoning/problem solving, and written expression. Student's long-term retrieval and short-term memory were extremely low with student's auditory processing comprehension knowledge and processing speed below normal limits. Student no longer met the criteria for SLD, and continued to meet criteria for OHI and SI. Eligibility as a student with an emotional disturbance ("ED") could be revisited if student's behaviors increased in intensity in the school setting. Pet. Ex. 7, pgs. 422, 424-425, 516.
12. During student's *** grade year, the Student continued in general education classes with 20 minutes per week of content mastery and received consult/indirect speech therapy. Per a February, 2009 psychological assessment, student was below age appropriate level in social skills and academic skills. Pet. Ex. 7, pg. 539; Pet. Ex. 8, pg. 616.
13. As a *** grader, the Student was assessed determined eligible under the classifications of AU, OHI (ADD/ADHD) and SI. Student's AU supplement included strategies to proactively teach behaviors, parent/family training, social skills strategies and structured teaching with visual supports, social skills training and use of social stories/scripts. Student received services in a general education setting with accommodations and modifications that included content mastery for academic support. Student also received direct speech therapy. Pet. Ex. 11, pg. 838, 842, 851, 852.
14. In the *** grade, the Student functioned significantly below grade level in reading. Student's test scores and academic performance were low. The Student was in reading workshop, a class for special and general education student who did not pass the state assessment the previous year. Due to reading difficulties, the ARD committee moved the Student to a small reading lab with support from a

redirection program. Student's performance improved following the move to reading lab. Pet. Ex. 15, pg. 918; Tr. Vol. II, pgs. 686-688.

15. In the 2009-2010 school year, due to the Student's struggles with behavior, particularly during testing situations, the ARD committee added a redirection class period to reinforce behavioral and academic supports. Student's accommodations and modifications continued and included content mastery class for academic support, extended time assigned, reteach and retest, along with positive reinforcers, reminders of expectations and consequences, and a BIP. Due to the Student's anxiety level during testing, the committee agreed that student would take the *** grade TAKS-M for reading and math. Student was allowed to use a calculator and guide for math, and receive oral support for reading and math. During the *** grade, the Student was frequently sent to a redirection classroom to do student's work that student refused to do in student's classes. Pet. Ex. 17, pgs. 940, 949, 951; Pet. Ex. 18, pg. 1011; Resp. Ex. 19.
16. The Student's *** grade services were determined at the April 2010 ARD meeting. Student was in special education resource with support from the redirection class. Student had special education reading and student's remaining subjects were provided in general education, all with support from the redirection program. The Student was failing in core courses due to assignments not completed. An FBA was completed and goals and objectives were added to assist the Student with work avoidance behaviors. In addition, strategies such as role play, direct teach, social stories, and access to the redirection room were put in place. Pet. Ex. 19, pg. 1063; Resp. Ex. 19; Tr. Vol. II, pgs. 701-703.
17. The April, 2010 annual review ARD document reflected the Student's academic competencies relevant to developing the IEP as follows:
 - a. Science-***-participates in lab work
 - b. Social Studies-***
 - c. Math-*** current semester grade-has great calculator skills
 - d. PE/Health-***
 - e. Adpt. Res-***-participates in role playing/will work one on one with teacher on academic studies
 - f. English-*** running semester grade-can write a good paragraph
 - g. Reading-*** running semester grade-is a good oral reader.

The committee did not believe that ESY was needed. The Parent agreed with the decisions. Resp. Ex.

19. Goals were to be measured annually based on the accomplishment of objectives for the year unless otherwise noted in a goal's comments/mastery criteria. Resp. Ex. 19.

18. During the *** grade, the Student *** as a work avoidance behavior. When student was interested in the activity, student did not ***. When the bell rang, student *** and went to the next class. Student's other work avoidance behaviors included ***. Tr. Vol. II, pg. 701
19. In *** grade, work avoidance *** continued to be an issue with the Student. Between September and March, student's grades dropped due to the ***. Tr. Vol. I, pg. 44; Tr. Vol. II, pg. 721.
20. The Student was disciplined four times during student's *** grade year. Student was sent to in-school suspension ("ISS") due to flagrant defiance, inappropriate behavior, and failure to follow instructions. Pet. Ex. 20, pgs. 1100-1102, 1185, 1215, 1229-1232.
21. The Student's assistant principal placed the Student on a behavior contract that endured from December 10-December 17, 2010 when the Parent requested that it end. Pet. Ex. 22, pgs. 1229-1230.
22. The ARD committee met January 12, 2011, due to parental concerns regarding the Student's behaviors and programming. The assistant principal described two incidents of defiance and noncompliance during administration of benchmark tests. Student's teacher described aggressive posturing that was not a typical behavior for the Student. Student's teacher expressed concerns that student was *** in class, but when it was time to leave, student was ***. The review ARD was tabled. Pet. Ex. 20, pg. 1164; Resp. Ex. 13, 14, 19.
23. When the ARD reconvened on February 1, the Parent shared her concern regarding the Student's ***. The committee reviewed the supports in place for the Student. Due to the Student's non-compliant behaviors, the ARD committee requested the District's behavior interventionist to make recommendations. A behavior objective was rewritten to address the issue of insisting on direct eye contact as the only way to acknowledge a request from authority figures. The math goal/objective that was adopted in April, 2010 was not included in the February, 2011 ARD. Pet. Ex. 21, pgs. 1201, 1202; Tr. Vol. II, pgs. 710-711.
24. The Parent withdrew the Student from the District ***, 2011 and re-enrolled student on ***, 2011. Pet. Ex. 22, pg. 1268; Resp. Ex. 10.
25. The District's behavior interventionist completed a behavior plan for the Student. At a March 8, 2011 disciplinary ARD meeting, the behavioral recommendations were discussed. The committee agreed that the teachers would perform the recommendations and collect data regarding their effectiveness before adding them as modifications. Prior written notice was provided to the Parent. Pet. Ex. 24, pgs. 1292, 1333.
26. At the disciplinary ARD, the committee found no link between the Student's behavior and student's disabilities. After a Discipline Conference, student was to be placed in the *** beginning March ***,

2011 for ***. The Parent disagreed with the manifestation determination. Pet. Ex. 22, pgs. 1229-1232; Pet. Ex. 24, pgs. 1307, 1351, 1380.

27. At the March 8, 2011 ARD meeting, the Parent requested smaller group instruction. The behavior interventionist explained that he would assist staff with the Student's behavior for 6-9 weeks. If that intervention was unsuccessful, a more restrictive placement may be considered including I-Team support and placement off home campus. A new FBA and BIP were approved targeting the Student's recent aggressive posturing and ***. Pet. Ex. 24, pg. 1292.
28. Two days after the disciplinary ARD meeting, the Student's private psychiatrist recommended complete homebound schooling for the remainder of the school year. Pet. Ex. 26, pg. 1396.
29. The Parent withdrew the Student from the District again on ***, 2011. Pet. Ex. 22, pg. 1268, 1270; Resp. Ex. 10.
30. The Student was admitted to *** and remained there from ***, 2011. *** is not in the Respondent District. Pet. Ex. 24, pg. 1318, 1401; Pet. Ex. 26, pg. 1401; Resp. Ex. 10; Transcript Volume II, pg. 644.
31. The ARD committee discussed homebound services on April 13, 2011. The committee agreed to place the Student at the *** as an alternative disciplinary placement. The *** provides one to one individualized instruction access to a social worker, and social skills instruction. Transportation was added. The Parent agreed with the ARD decisions. Pet. Ex. 27, pg. 1416; Resp. Ex. 7; Tr. Vol. I, pgs. 100-102.
32. The District made two unsuccessful attempts to speak with the Student's psychiatrist before the May 19, 2011 annual ARD meeting. Resp. Ex. 4, pgs. 194-195.
33. On May 19, 2011, the District reported the results of its FIE. According to evaluation results, the Student did not meet the criteria for eligibility as a student with a disability of AU. Student met one of the five criteria for an emotional disturbance-an inability to build or maintain satisfactory interpersonal relationships with peers or teachers. The District proposed removal of the AU eligibility, addition of ED eligibility, and a continuation of OHI/ADHD and SI. Based on AT and OT assessment results, the Student did not qualify for OT or formal AT services. Pet. Ex. 30, pg. 1484; Resp. Ex. 4.
34. At the May 19 annual ARD, the committee prepared the Student's IEP for the coming year. The Student's academic competencies indicated that student could demonstrate a basic understanding of culturally diverse written texts in reading. A statement of student's math competency was included in the math goal/objective. Math competencies included that student could demonstrate an understanding of geometry and spatial reasoning and an understanding of the concepts and uses of measurement. The committee adopted academic, speech, and behavior goals and objectives. It approved ESY in math. Resp. Ex. 4, pgs. R-130-141.

35. The May 19 ARD committee determined the Student's services for student's *** grade year as follows: special education resource, reading, language arts, and math; speech adjustment; remaining classes in general education. Counseling and transportation as related services were included. Resp. Ex. 4, pgs. R-98-R-111.
36. As support in all subject areas, student had the Redirection Class during resource, and the Redirection Program in all other subjects for the 2011-2012 school year. Accommodations included a BIP, content mastery, extended time assigned, positive reinforcers, opportunity for reteach and retest, and reminder of expectations and consequences. In addition, the Student was to have visual schedule/visual cue cards and reading support for classroom assignments and tests. Resp. Ex. 4.
37. On May 19, 2011, the Parent gave written acknowledgment that she was aware of the implications of the TAKS-M regarding college. Pet. Ex. 30, pg. 1455.
38. The Parent agreed with the May 19 program and services. The Parent disagreed with the District's FIE, requested an Independent Educational Evaluation ("IEE"), and the District agreed to fund the evaluation. Resp. Ex. 4.
39. Petitioner's expert, Dr. ***, conducted an IEE. She observed the Student in student's current educational setting, noting the *** that student experiences and its potential relevance for academic function. The evaluation showed that the Student has language limitations that make it difficult for student to acquire skills in reading and writing. Dr. *** found it difficult to understand how the same evaluator could perceive a child so differently on two related forms of the same diagnostic instrument during administrations that were less than two years apart. Dr. *** assessment was more consistent with the District's 2009 FIE when the District determined eligibility to be AU. Based on her evaluation results, Dr. *** suggested the following strategies to support the Student's academic performance: repetition of information; preteach/teach/reteach strategy; introduction to new vocabulary and key concepts before beginning to learn new material; more active engagement to help student maintain attention and process the information such as checking off points as they are covered during lectures and discussions; use of a "smart pen" when student ***; reduced length of assignments when mastery has been demonstrated, choices regarding alternative activities that can demonstrate mastery apart from traditional tests; use of visualization strategies, special projects in lieu of some assignments, and as student ***, assistive technology options such as voice recognition software for written assignments. Pet. Ex. 38; Tr. Vol. II, pgs. 83-586.
40. Per Dr. ***, the Student has limited coping strategies that have become habitual. In complex or stressful situations, the Student resorts to those limited strategies. Tr. Vol. II, pgs. 592-593.
41. Dr. *** indicated that the Student is resistant to school in general, and needs to "buy back" into the idea

that student is capable of learning things that are going to be useful to student; she cited the District's use of allowing student to have *** at school and taking on clerical tasks as an example of one way to help the Student see a usefulness in school and believe in student's ability to learn. Tr. Vol. II, pgs. 597-598.

42. Prior to the current school year, it appeared that the Student *** in class as a means to avoid doing student's work. In the current school year, student's *** is different from previous years. When student is ***, student cannot be ***. Student *** at the computer and while eating breakfast. Student's *** may last as many as ***. At the time of hearing, there were 12 days when the Student did not *** at school during the current school year. Resp. Ex. 1-3; Tr. Vol. I, pg. 95; Tr.; 727-728; 734-736.
43. The District provided Procedural Safeguards to the Parent at each ARD meeting. They were provided when evaluations were to be conducted, when disciplinary decisions were made, and when the District determined that the child's eligibilities should be changed. Resp. Ex. 16.
44. The Parent requested the Student's special education and discipline records on April 25 and 27, 2011. Records were provided on May 24, 2011. Pet. Ex. 27; pgs. 1433-1435; Pet. Ex. 30, pg. 1551.

Statute of Limitations

Petitioner complains of a denial of FAPE since 2005. Petitioner filed this request for hearing on May 20, 2011. Unless a state has an explicit time limitation, a parent shall request a due process hearing within 2 years of the date the parent knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. §1415(f)(3)(C). Texas has established a one-year limitation within which a parent must request a due process hearing. 19 T.A.C. § 89.1151(c).

The one year statute of limitations would bar any recovery for the District's actions or omissions occurring prior to May 20, 2010 unless a finding is made that the District prevented the Parent from requesting the hearing by making specific misrepresentations that it had resolved the problem in this case or that the District withheld information from the Parent that was required under 20 U.S.C. §§ 1411-1419.

Petitioner's evidence and argument focused on whether the District withheld information that it was required to provide to the Parent. Petitioner's issue is limited to an allegation of failure to provide prior written notice at all required junctures.

Prior written notice shall be provided to a parent a reasonable time *before the public agency*:

(1) *Proposes* to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; *or*

(2) *Refuses* to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 C.F.R. § 300.503 *emphasis added*

The Parent testified that she asked for smaller group instruction for the Student, and argued that the District refused and did not provide prior written notice. The March 8, 2011 disciplinary ARD reflects her request. Documentary evidence reflects that prior written notice of the disciplinary meeting was provided, along with procedural safeguards. Upon the Student's return to the District, student received instruction in a one to one setting through the end of student's *** grade year.

When the District recommended changing the Student's eligibility, it provided a notice of the decision. When the ARD committee determined that the Student's behavior was not linked to student's disability in March, 2011, it provided a notice of the decision. The Parent attended both of those meetings.

The record is filled with documentation that reflects the Parent's attendance at the Student's ARD committee meetings. Because the Parent was present at the ARD meetings, there is an inference that she had knowledge that the meetings were to occur, whether or not prior written notice was provided. The documentation further supports that, if the Parent was not physically present, she participated by telephone and had knowledge of the meeting.

Procedural Safeguards were provided at every ARD meeting and such meetings were held at least annually. They were included in the District's invitation to the May 19, 2011 ARD meeting. The Parent filed for due process hearing on the next day. The safeguards were not provided at or after the time that Petitioner filed for a due process hearing. Considering that safeguards were given to the Parent the day before she filed her complaint, any failure to provide them on the next day was *de minimis*.

Based on a preponderance of the credible evidence, I find that the District did not withhold information from the Parent that was required by the IDEA. Petitioner's claims based on acts or omissions of the district arising prior to May 20, 2010 are time barred.

Burden of Proof

Petitioner has the burden of proving that student's educational program fails to meet legal standards. *Tatro v. State of Texas*, 703 F.2d 823, aff'd on other grounds sub nom., *Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).

Two factors must be considered to determine whether a school district has provided a student with a FAPE: 1) the school district must comply with the procedural requirements of IDEA; and, 2) the school district must design and implement a program that is reasonably calculated to enable the child to receive educational benefits. *Bd. of Educ. v. Rowley*, 102 S.Ct. 3034 (1982). In matters alleging procedural violations, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefit. 34 C.F.R. §300.513.

The Fifth Circuit has defined a free appropriate public education by delineating four factors to consider as indicators of whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational program individualized on the basis of the child's assessment and performance; 2) Is the program administered in the least restrictive environment; 3) Are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) Are positive academic and non-academic benefits demonstrated? *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). An IEP need not be the best possible one, nor one that will maximize the child's educational potential; it must only provide the child a basic floor of opportunity. See *Cypress-Fairbanks*, 118 F.3d at 247-48.

“The central role of the IEP...gives rise to the presumption in favor of the educational placement established by (the)...IEP. Moreover, because the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate.” *Id* at 830. In Texas, this burden extends to include programming issues, too. See, *Alamo Heights Ind. Sch. Dist. V. State Board of Education*, 790 F. 2d 1153, 1158 (5th Cir. 1986). FAPE does not demand that every element of the IEP be implemented. A child need not "improve in *every* area to obtain an educational benefit from student's IEP." *Bobby R. v. Houston Indep. Sch. Dist.*, 200 F.3d 341.

Discussion

Since May 20, 2010, four ARD meetings were held. For discussion purposes, the tabled January, 2011 meeting that reconvened in February shall be called the “February ARD.” The March, 2011 disciplinary ARD meeting is called the “MDR.” The April, 2011 meeting is called the “April ARD.” The May, 2011 annual ARD is the *** grade ARD.” Any reference to the Student's IEP that was in place on May 20, 2010 is referred to as the *** Grade ARD.” Discussion is limited to two of Petitioner's specific issues.

Failure to devise appropriate, objective and measurable goals and objectives based on present levels of performance in all of the Student's areas of need

At the beginning of each school year, a District must have an IEP in effect for a child who receives special education services. Each IEP must contain a statement of a child's present levels of academic achievement and functional performance relevant to the development of the IEP. An IEP must include how a child's disability affects student's involvement and progress in the general education curriculum. 34 C.F.R. §300.320. Grades alone, are insufficient. Present levels of academic achievement and functional performance should be all-encompassing and reflect the entire range of a child's needs, not singularly student's academic levels. 34 C.F.R. §300.324.

Although the Parent gave testimony of a failure of the District to send progress reports, Petitioner did not include the allegation in petitioner's pleadings. The Special Education Campus Coordinator confirmed that

progress reports were sent home with the Student. The Parent indicated that she had told the District to send things home “in an envelope.” The Student’s IEP does require that student’s progress reports be sent “in an envelope.”

The District’s Special Education Campus Coordinator confirmed that progress reports should be included in a student’s annual IEP. These were absent in the *** and *** grade ARD documents. Generally, a box that indicates “in progress” was checked. An IEP must include a description of when periodic reports on the progress a child is making toward meeting the annual goals concurrent with the issuance of report cards will be provided. 34 §300.320(a)(3)(ii). The statement is included in the Student’s IEPs.

The Parent participated in the *** grade and *** grade ARD meetings and the committee reviewed the Student’s progress. At the *** grade ARD meeting, by hand-written note, the Parent specifically agreed with the program and services. After a review of the *** grade and *** grade goals and objectives, I find that the District substantially complied with the requirements of the IDEA in their development. Present levels of performance in all areas of need were considered.

Implementation of the Student’s IEP

In February, 2011, the behavior interventionist developed a behavior plan for the Student. The MDR ARD committee agreed that the teachers were to perform the recommendations and collect data regarding their effectiveness before adding them as modifications. Subsequent ARD meetings failed to address the recommendations or data collection. In other words, the District failed to follow through with its earlier decision. This failure is a procedural violation of the District’s obligation to implement the Student’s IEP.

During the current school year, the Student’s *** issue has changed from previous years. Student now *** that student cannot be ***. Except for 12 days, student ***. Student’s reading lab teacher, not wanting to discourage student, and with her supervisor’s approval, gave grades only on the work that the Student completed. If student didn’t do an assignment, student received no grade. This modification was not part of the Student’s IEP. The behavior interventionist recommended that teachers should consider passing the Student if student is able to demonstrate mastery on comprehensive tests even if does not turn in daily assignments. In light of this recommendation, and taking the District’s failure to comply with the IEP regarding collection data in conjunction with the behavior interventionist’s recommendation, I find that the District failed to implement the IEP, a procedural failure. However, Petitioner failed to carry petitioner’s burden of proof that such failure denied student a FAPE.

Free Appropriate Public Education

For the reasons set out below, I find that, during the applicable time period, the Respondent provided the Student a free, appropriate public education. The four factors considered in making this determination of the provision of a FAPE are as follows:

(1) Is the Student's education program individualized on the basis of student's assessment and performance?

An IEP is a written statement for a child eligible for special education services that is developed, reviewed and revised in an ARD meeting. It must include (1) a statement of the child's present levels of academic achievement and functional performance including how the disability affect the child's involvement and progress in the general education curriculum; (2) a statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability and meet each of the child's other educational needs that result from student's disability; (3) how the child's progress toward meeting child's annual goals will be measured and when periodic reports on the child's progress toward meeting child's annual goals concurrent with the issuance of report cards will be provided; (4) a statement of the special education and related services and supplementary aids and services to be provided to the child, and a statement of the program modifications or supports for school personnel that will be provided; (5) An explanation of the extent to which the child will not participate with nondisabled children in the regular class; (6) a statement of individual appropriate accommodations that are necessary to measure the child's academic achievement and functional performance on State and district wide assessments; and (7) the projected date for the beginning of the services and modifications and the anticipated frequency, location, and duration of those services and modifications. 34 C.F.R. §300.320.

In developing a child's IEP, the IDEA requires an ARD committee to consider the child's strengths, the parents concerns for enhancing the education of their child, the results of the initial or most recent evaluation of the child and child's academic, developmental and functional needs. The committee must consider special factors such as behaviors that impede a child's learning or that of others, the child's need for the use of assistive technology, and communication needs. If a child's behaviors impede child's learning or that of others, the ARD committee must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior At least annually the ARD committee must review the IEP to determine whether the annual goals for the child are being achieved and to revise the IEP, as appropriate, to address any lack of expected progress toward the goals, the results of any reevaluation conducted, information provided by the parents and anticipated needs. 34 C.F.R. §300.324

The District conducted regular assessments of the Student, at least as regularly as every three years. The ARD committee reviewed the assessments at the meetings. Due to student's behavioral issues, the Student's ARD committee consistently conducted FBAs and developed BIPs with goals and objectives that targeted student's noncompliant behaviors. Goals were written to assist student to learn to comply with requests, to learn appropriate expression of personal opinions and needs, and to learn appropriate responses to feelings of anxiety.

The District implemented a “cooling off” pass that the Student could utilize. Supports were provided through the redirection program that allowed student to calm ***self and to teach coping strategies. Social skills were taught in student’s adaptive resource class. Student participated in a program called *** that focused on social skills and group interaction skills specifically designed for students with AU. Student used a visual schedule and sticky notes for communication when student was in “shut down” mode. When the Student began to have discipline problems in *** grade, the Assistant Principal developed a behavior contract with the Student. The ARD committee reviewed the Student’s IEP and BIP, and sought the assistance of the District’s behavior interventionist.

Academically, the Student has had reading and math goals and objectives that targeted student’s academic weaknesses. Student’s had the use of a calculator, received extended time to complete assignments, and reteach and rests opportunities. Student’s received reading support for classroom assignments and tests, along with content mastery class. When student struggled with reading, the ARD committee changed student’s reading class to a reading lab. The Student’s deficits in pragmatic language and expressive and receptive language have been addressed consistently through speech therapy services. Student’s speech goals targeted appropriate semantic language units and pragmatic skills.

After the Student was eligible as a student with autism, the District completed an AU Supplement and described the Student’s needs for strategies for appropriate interaction with peers. The committee included role playing, verbal reminders, prompting and situational teaching to reinforce expected social behaviors, among others.

The District conducted another FIE in the spring, 2011. Evaluation results indicated that eligibility may be ED, rather than AU. Since the FIE, Dr. *** performed an IEE. At the time of hearing, the ARD committee had not met to consider Dr. *** findings and recommendations.

During the current school year, the Student receives support through the I-Team and I-Teach and receives small group instruction. Student has *** in the redirection classroom specially designed for student. Student earns tickets for a token system for positive behaviors, including *** in class. In science class, the Student is ***.

The Student’s program is individualized on the basis of assessment and performance.

(2) Is the program administered in the least restrictive environment? After a disciplinary decision to place the Student at the *** and following ***, the Student’s psychiatrist recommended homebound for the remainder of the year. After consideration of the homebound request, the ARD committee placed student in the *** as an alternative discipline placement. *** is a very restrictive environment and is designed for transition of students, rather than what might be described as permanent placement. This placement was to continue until the end of the school year, then the Student was to start student’s *** grade year at student’s home school with I-Team

support. Although the Parent disagreed with the District's FIE and recommendation to remove the AU eligibility, she agreed with the decision regarding the *** class and subsequent return to the home campus. The day after the ARD meeting the Parent filed the instant action. Stay put was invoked, the Student finished student's *** grade year in the ***, and is currently attending student's home campus.

The transcript reveals that the Student did well while instructed in a 1:1 setting in the ***. Student's attitude toward school was positive. Student progressed, both academically and behaviorally. The Parent's testimony revealed that she was happy with the services that student received in the ***, to the point that she would like for student to be placed there now. The evidence supports a conclusion that, even if the homebound recommendation was not sufficiently considered, the Parent was quite satisfied with the *** program that was in lieu of homebound and an alternative disciplinary placement at the ***.

It is understandable that the Parent has concerns about the Student's emotional well-being that by all accounts was stable while at the ***. The Parent wants student's program to be administered either at the *** or in a "mirrored" educational environment. Nothing in the record supports a finding that, at this time, student's current placement is not the least restrictive environment. Student is educated with general education students while receiving special education services in student's areas of need. Although student has had one disciplinary incident, student's special education campus coordinator does not consider student a behavior problem.

Petitioner failed to carry petitioner's burden of proof regarding the LRE.

(3) Are the services provided in a coordinated and collaborative manner by the key stakeholders? The evidence shows that, during the *** grade, after a disciplinary incident, the assistant principal who dealt with the Student was unaware of student's AU eligibility. The Parent testified that he argued with her about the eligibility and called the Special Education Campus Coordinator to verify the primary eligibility of AU. Later in the year, another assistant principal who was part of the MDR ARD admitted that she did not know of the AU eligibility.

Failure to communicate and collaborate among school staff can contribute to a denial of FAPE. *Houston Independent School District v. Juan and Sylvia P.* 566 F.3rd 459 (5th Cir. 2009). While a better grasp of a child's IEP by administrators is desirable, I do not find that the two assistant principals' lack of knowledge of the Student's AU eligibility rises to the level of a failure to provide services in a coordinated and collaborative manner that resulted in a denial of a FAPE. The transcript shows that two of the Student's current teachers were uncertain of student's eligibilities. However, the evidence reflects that they are familiar with the Student's goals, accommodations and modifications and implement them satisfactorily. I do not find that the District failed to provide services in a coordinated and collaborative manner.

(4) Are positive academic and non-academic benefits demonstrated? The evidence shows that the Student passed from *** to *** to *** grades. The Student met expectations on the Texas assessment in *** and *** grades. Although modified, the assessments were at grade level. The Special Education Campus Coordinator

testified that the strategies that the District had in place for the Student helped student make educational progress. The Student's current science teacher testified that the Student is working on grade level and making educational progress.

While in the *** program, the Student made progress both academically and behaviorally. Student's teacher indicated that student had a positive attitude. The Parent testified that student was happy there and wanted to go to school.

During the current school year, the Student's benchmark scores have been in the 40s. Compared to this, the general population scores were in the 60s, while the special education population scores were in the upper 30s. Although benchmark tests are not given for grading purposes, they are some evidence of the Student's progress. Currently, student is making passing grades although it is noted that student's reading grade may not paint a complete picture.

The *Rowley* decision recognized that advancing from grade to grade, alone, does not indicate that student automatically received FAPE. 34 C.F.R. §101. In this matter, considering other evidence of progress, including state assessments, testimony of District staff, and benchmark tests, the Student received positive academic benefits. Student's behavior has improved and student has had one discipline incident in the *** grade as opposed to student's several incidents during student's *** grade year.

Conclusions of Law

1. Student is a student in the North East Independent School District eligible for special education and related services under the IDEA. The North East Independent School District is the local education agency responsible for providing those services to student. 20 U.S.C. § 1400 *et seq.* and its implementing regulations.
2. North East Independent School District's educational program is entitled to a legal presumption of appropriateness. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984). The Petitioner has the burden of proving that petitioner's special education program was not appropriate, or that the District did not comply with the procedural requirements of the IDEA and denied student a FAPE. *Schaffer v. Weast*, 126 U. S. 528 (2005). Petitioner failed to meet petitioner's burden of proof.
3. The Respondent failed to implement the IEP as written. Such procedural failure did not deny the Petitioner a FAPE. 34 C.F.R. §300.320; *Clear Creek Indep. Sch. Dist. v. J.K.*, 400 F.Supp.2d 991 (S.D. Tex. 2005)

Orders

Based upon the foregoing findings of fact and conclusions of law, Respondent is ordered to take the following actions:

1. The District shall convene an ARD meeting within 10 school days of the date of this order to review and consider the behavior interventionist's recommendations as discussed in the March 2011 ARD meeting. The committee shall consider the appropriateness of implementation of the recommendation, whether or not data collection has been or should be taken, and if data is to be collected, the time frame for such collection. If the committee agrees that data is to be collected, it shall set a date for a review of the data and determination of acceptance of any recommendation into the Student's IEP. The ARD meeting shall consider any other matters it considers to be important for the Student's IEP; and
2. No later than 5 days following the above ordered ARD meeting, the District shall review all of the Student's IEP with all District staff that is involved with the provision of services to the Student.

All other requested relief is DENIED.

SIGNED on January 30, 2012.

/s/
BRENDA RUDD
Special Education Hearing Officer

NOTICE TO THE PARTIES

The decision issued by the hearing officer is final, except that any party aggrieved by the findings and decision made by the hearing officer, or the performance thereof by any other party, may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. A civil action brought in state or federal court must be initiated not more than 90 days after the date the hearing officer issued his or her written decision in the due process hearing. 20 U.S.C. §1415(i)(2).

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

SYNOPSIS

- Main Issue:** Whether the District denied the Student a FAPE
Held: For the School District
Citation: 34 C.F.R. §300.101; *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005)
- Issue Number 1:** Whether the District failed to educate the Student in the LRE.
Held: For the School District
Citation: 34 C.F.R. §§ 300.114, 300.116
- Issue Number 2:** Whether the District failed to appropriately consider the recommendations of the Student’s psychiatrist.
Held: For the School District
Citation: 34 C.F.R. § 300.324
- Issue Number 3:** Whether the District failed to timely and appropriately devise objective and measurable goals and objectives based on present levels of performance in all of the Student’s areas of need
Held: For the School District
Citation: 34 C.F.R. § 300.320
- Issue Number 4:** Whether the District failed to timely and appropriately assess the Student’s needs, including learning disability.
Held: For the School District
Citation: 34 C.F.R. §§ 300.307, 300.324
- Issue Number 5:** Whether the District failed to timely and appropriately conduct Functional Behavior Assessment (“FBA”) and develop an appropriate Behavior Improvement Plan (“BIP”)
Held: For the School District
Citation: 34 C.F.R. § 300.324
- Issue Number 6:** Whether the District failed to consider and implement the appropriate provisions of the autism supplement in the Student’s IEP.
Held: For the School District
Citation: 34 C.F.R. § 300.324; Tex. Admin. Code §89.1055
- Issue Number 7:** Whether the District changed the Student’s regular TAKS to TAKS-M without explanation of the ramification of the change and without discussion in the admission, review and dismissal committee deliberations

Held: For the School District
Citation: 34 C.F.R. §300.324

Issue Number 8: Whether the District failed to offer extended school year services to the Student
Held: For the School District
Citation: 34 C.F.R. §300.106

Issue Number 9: Whether the District failed to assess and address the Student's need for a one on one paraprofessional
Held: For the School District
Citation: 34 C.F.R. § 300.324

Issue Number 10: Whether the District failed to assist the Student with school work while student was ***
Held: For the School District
Citation: 34 C.F.R. §300.101

Issue Number 11: Whether the District failed to implement the Student's IEP as written
Held: For the Student
Citation: 34 C.F.R. § 300.324

Issue Number 12: Whether the District failed to incorporate a plan for staff training into the Student's IEPs
Held: For the School District
Citation: 34 C.F.R. §§ 300.119, 300.324

Issue Number 13: Whether the District failed to provide prior written notice at all required junctures
Held: For the School District
Citation: 34 C.F.R. §300.503

Issue Number 14: Whether the District failed to timely and appropriately respond to Petitioner's records requests
Held: For the School District
Citation: 34 C.F.R. § 300.613

Issue Number 15: Whether the one year statute of limitations should apply
Held: For the School District
Citation: 34 C.F.R. § 300.511; 19 Tex. Admin. Code 89.1151