

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

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioner brings this appeal, pursuant to the Individuals with Disabilities Education Improvement Act 20 U.S.C. § 1400 et seq., (hereinafter referred to as "IDEA"), against Respondent (hereinafter referred to as "Respondent" or "School District"). Petitioner (hereinafter referred to as "Petitioner" or "Student") filed a written request for a due process hearing which was received by the Texas Education Agency ("TEA") on February 15, 2012, which was styled and docketed as shown above. Petitioner was represented at the Due Process hearing by petitioner's ***. Respondent was represented by Attorney Hans P. Graff, Assistant General Counsel of School District Legal Services in Houston, Texas. A Due Process Hearing was originally scheduled for Thursday and Friday, April 26-27, 2012, however, Respondent was granted a continuance on Tuesday, April 17, 2012, due to Respondent's Schedule. The original disclosure date of April 18, 2012 changed to May 18, 2012. The Due Process Hearing in this matter was held on Tuesday, May 29, 2012, and reconvened on Wednesday, May 30, 2012 in Houston Independent School District's Administrative Building located at 4400 West 18th Street in Houston, Texas 77092. At the conclusion of the hearing, the parties agreed that the Decision of the Hearing Officer would be issued on or before Monday, July 2, 2012.

A Prehearing Conference was held on Wednesday, March 7, 2012, at which time the parties outlined the issues to be addressed in the due process hearing. Petitioner's Request for Special Education Due Process Hearing and Required Notice ("Complaint") raised the following issues regarding the special education identification, evaluation, placement, programs and services of Petitioner, and Respondent's alleged denials of a free appropriate public education ("FAPE"):

1. Petitioner was assigned to self-contained Behavior Support Class in February, 2011 in Middle School without an Admission, Review, and Dismissal ("ARD") meeting.
2. Respondent provided a Behavior Intervention Plan ("BIP") for Petitioner without the necessary raw data regarding interventions which worked. The BIP also was not sufficient for all Petitioner's classes.
3. Respondent does not implement Petitioner's Individualized Education Plan ("IEP") and BIP consistently or appropriately, including punishing Petitioner for behaviors which are manifestations of a disability. Although Petitioner does not dispute that problem behaviors occurred, Petitioner maintains that Student's BIP was not implemented and that punishments were improperly imposed.
4. Respondent does not respond appropriately to Petitioner's email correspondence, labeling it "harassive." Respondent emails Petitioner often complaining of Petitioner's manifestations of disability.
5. Respondent's special education teacher does not integrate the special education students with the other students in the general education classroom.

6. Respondent punishes Petitioner inappropriately for tardies.
7. Special Education teachers are not present as needed in the classroom to implement Petitioner's IEP and BIP.
8. Respondent "predetermined" the outcome of the October 24, 2011 Manifestation Determination Review ARD ("MDR ARD"), and parent requests for modification to Petitioner's BIP were ignored.
9. Respondent would not allow Petitioner to schedule medication so as not to interfere with ***.
10. Respondent "predetermined" the outcome of the January 27, 2012 MDR ARD and only considered placement at *** School ("***"). Respondent did not consider: Petitioner's requests to implement IEP and BIP appropriately; Additional accommodations provided by Petitioner; or Alternatives to placement at ***. Respondent failed to offer a ten (10) day recess of the January 27, 2010 MDR ARD to determine the items of disagreement.
11. Respondent has not met the requirements of 34 CFR, §300.114(A)(2)(ii) because school personnel have not documented the services provided, nor have they provided services requested by Petitioner in emails and MDR meetings because of lack of personnel and funding.
12. Respondent has not considered the effectiveness of Petitioner's new medication begun in February 2012 in continuing to insist on placement at Harper.

As relief in this Special Education Due Process Hearing, Petitioner requests that Respondent be ordered to do the following:

1. Allow Petitioner to "stay put" at the current High School, the last agreed upon placement until the decision of the Special Education Hearing Officer.
2. Follow Petitioner's BIP and assign teachers willing to do the needed interventions.
3. Provide an ADHD "coach" in addition to the team teachers, to help Petitioner in each class. A family friend, who Petitioner trusts, is available to be paid for this activity for much less than a highly trained, licensed teacher.
4. Provide the following new accommodations;
 - (a) Seat Petitioner front and center near the teacher and away from doors or windows where noise or passing students may distract;
 - (b) Place Petitioner next to a good role model;
 - (c) Increase the distance between desks if possible;
 - (d) Mark an area with tape around Petitioner's desk so that Petitioner can move freely;
 - (e) Allow extra time for Petitioner to complete assigned work.
5. Allow Petitioner to practice *** over the summer to *** at Petitioner's level of accomplishment.

6. Take specific actions required by IDEA.
7. Reimburse Petitioner for the cost of private educational services.
8. Provide compensatory special education or related services.

The Complaint also notes that Petitioner will request attorney's fees and expert witness fees.

In its response to the Complaint, Respondent denied that Petitioner was entitled to any of the requested relief and resolutions.

After considering the evidence of record, the Special Education Hearing Officer makes the following Findings of Fact and Conclusions of Law:

II. Findings of Fact

1. Petitioner is a *** grade student with a disability who resides within Houston Independent School District. Student attended *** School in the School District during the 2010-2011 School year and attended *** grade in School District during the 2011-2012 School Year.

2. School District is a political subdivision of the State of Texas and a duly incorporated Independent School District. Respondent would be responsible for providing Petitioner a free appropriate public education in accordance with the Individuals with Disabilities Education Improvement Act, 20 U.S.C.A. § 1400, *et seq.*, and the rules and regulations promulgated pursuant to IDEA if Petitioner had not withdrawn from School District.

3. Petitioner is eligible for special education as a child with a disability who meets eligibility criteria under the following handicapping conditions: Severe Emotional Disturbance. Student is also known to have Attention Deficit Hyperactivity Disorder ("ADHD").

4. Student has ***, and was *** by Petitioner, ***, and his wife. Petitioner has a complicated family history, involving *** when Student was ***, including *** and child custody litigation. There were ***. Both parents noted behavior problems in *** home settings. Parents were faulted for failing to work cooperatively in the shared parenting; the parents were advised to develop more structured home environments using cooperative methods of parenting and discipline, and to develop consistent behavior rules incorporating rewards and consequences which would apply in both households. Mother complains of ***, disrespect, and significant behavior problems. Petitioner complains of Mother's ***, and behavior problems at home, also. Student was *** in connection with ***. Petitioner, *** in the past, asserts that Student has behavior problems related to severe ADHD, and that recent medication changes have improved Student's behavior. Student resides with Petitioner ***.

5. Additionally, based on the March 2, 2011 Integrated Psychological Report provided by Respondent's Licensed Specialist in School Psychology ("LSSP") and Educational Diagnostician, and other Student records, Student has a history of hospitalizations in ***. In *** 2007, Student was admitted to *** after an incident at *** in which Student destroyed property. ***. During a period of suspension from *** School in *** 2009, Student's education was assigned to *** ("****"). In *** 2009, Student was assigned by court order to *** ("****"). While in ***, Student started with the *** ("****"), and was placed in *** because student *** during an

angry outburst at the *** campus. Student was released by court order on ***, 2010 and remained on probation until ***, 2010. In *** 2011, Student was admitted to the *** after an incident following ***. It was alleged that Student had expressed suicidal ideation; however, this was never confirmed.

6. Student received accommodations under Section 504, beginning in the *** grade related to ADHD. The Section 504 Accommodations addressed issues related to lack of focus and impulsivity. A Behavior Management Plan was put into place to address noncompliant and defiant behaviors. Student was admitted to Special Education in March, 2011, when Student was in *** grade.

7. Student's evaluations from age *** describe Student as of average intelligence with strengths in verbal intelligence, and with weaknesses in Working Memory and Listening Comprehension. More recent intelligence testing in March 2011 indicates that Student scores in the high average range, or better than *** of peers, for Verbal IQ, with a Nonverbal IQ better than only *** of peers. Academic weaknesses were in Math Calculation skills and Written Expression.

8. Student was known to have significant psychological and behavior problems at home and at school beginning at school age and documented in the *** 2008 Residential Treatment Summary. Issues in the home setting included: trouble sleeping, separation issues ***, refusal or difficulty following instructions and directions, rudeness, pouting and temper tantrums, defiance, conflict with parents, feelings easily hurt, dependent and immature, disobedient and noncompliant, *** issues, lack of organizational skills, interrupting and yelling out, lying, lack of respect, scab picking, and foul language. Issues in the school setting included: listening attentively, working quietly, inability to follow directions, ineffective use of time, incomplete assignments, disrespect for students and teachers, disrupting the learning environment, being uncooperative, work refusal, bullying and threatening, and name calling. The Residential Treatment Summary developed a treatment plan to target two (2) behaviors: *** Behaviors/Physical Aggression *** and Anger Management. The Residential Treatment Summary also stated that Student needed behavior modification to develop social awareness and coping skills.

9. Respondent conducted a Full and Individual Evaluation ("FIE") of Student most recently on with an Integrated Psychological Report dated March 2, 2011. Specifically, the multidisciplinary team determined that Student's behaviors impeded learning and the learning of others. Specific behaviors identified were physical and verbal aggression, hostility, cursing, noncompliance, significant mood swings, difficult interactions with peers and adults, and lack of motivation. Student was found to qualify for Special Education and Related Services under the disability category Emotional Disturbance ("ED"). It was noted that Student was experiencing a significant amount of distress; Student had deep feelings of anger and resentment which have manifested as mal-adaptive behaviors in the home and school environment. Student was found to have inappropriate types of behavior or feelings under normal circumstances, a general mood of unhappiness or depression and an inability to build or maintain satisfactory interpersonal relationships with peers and teachers. Student was not found to have an inability to learn; Student was performing at grade level in school work, met the "Commended" standard in the Reading and Math TAKS, and tested at grade level in Spelling. Student also did not develop physical symptoms or fears associated with personal or school problems.

10. Following the initial ARD meeting on March 7, 2011, Student was placed in the Self Contained Behavior Services Classroom in *** School with a Behavior Support Plan. Specific IEP goals and objectives were developed to address weaknesses in Math Calculation and Written Expression. TEKS grade level instruction would be provided. The Behavior Support Plan was developed to address cursing and Student's

use of physical aggression. All members of the ARD Committee ("ARDC"), including Petitioner, agreed with the eligibility, placement and IEP for Student.

11. On May 20, 2011, a *** ARD was held to address Student's ***. A main difference between *** Special Education program was that Student would receive TEKS instruction with accommodations and behavior support services in the general education classroom. The Behavior Support Classroom was abandoned in favor of including all the special education students in the general education class with the assistance of a special education teacher. A special education teacher would assist the special education students in the general education classroom setting both in content mastery and in behavior management. Disruptive special education students would be removed from the class and would receive a discipline referral.

12. *** provided numerous psychological diagnoses of Student, including AXIS I diagnoses in February 2012 of Mood Disorder, Not Otherwise Specified; Oppositional Defiant Disorder; ADHD, and Reactive Attachment Disorder. Student was reported to be taking psychotropic drugs in February 2012 which could interfere with ability to handle strenuous physical activity. In March 2012, *** provided revised AXIS I diagnoses of Bipolar Disorder, Not Otherwise Specified; Oppositional Defiant Disorder; ADHD Reactive Attachment Disorder and Mood Disorder, Not Otherwise Specified.

13. Student did not adjust well to the *** School setting. From the start of the 2011-2012 school year through December 31, 2011, Student received eighteen (18) written disciplinary referrals from School District staff members for the violating the Student Code of Conduct in many instances by using profane, foul or obscene language, and using of racial and gender slurs. It should be noted that Student uses the most profane language routinely, including: *** and was written up for an incident where Student disrupted the class by loudly threatening another student, saying student would "****." When the teacher paused to allow student to calm down, Student yelled out that student "****" According to School District teachers and coaches, the use of profane, vulgar and threatening language in class is not only disruptive, but it is intimidating to other students, and shocking and frightening, particularly for *** in the class. Other violations included: Refusing to follow instructions or participate in classroom activity; disrupting the class or bothering other students; skipping or cutting class; excessive tardiness; threatening students or staff with physical violence; and physical altercations or violent behavior. These referrals resulted in numerous removals from class, parent conferences, one-on-one student-teacher conferences, *** days of In School Suspension, and *** days of off campus Suspensions.

14. Previously, Petitioner was advised that Student would benefit from being involved in athletics, because such involvement would provide ***, and would also help channel aggressive tendencies more appropriately. Student wanted to participate in **. Student was allowed to ** and enjoyed the experience. Unfortunately, Student was not able to continue with ** after **, 2011, because of an incident of serious misbehavior, which was reported as follows:

*** were required to be on time *** or were required to *** before *** as punishment. Student was late to class because of finishing a test and was told to do a modified punishment of *** due to the limited *** time remaining. Student refused to do the punishment, cursed and **. It was reported at the time that student said, "****." In any case, Student received a discipline referral, asked that Student be *** due to student's defiance of the punishment and it was immediately done. Student was not allowed to participate in ** following that incident.

The *** staff states that refusal to comply with *** requirements, defiance of authority, and profanity are not only disruptive, but are impossible to contend with in a *** setting, where team work and discipline are stressed.

The *** staff all stated that noncompliance and defiance could not be tolerated in a situation where *** had to work together under supervision in ***. Student and Petitioner would like Student to *** next year, and would also like to participate in summer ***. Student would only be allowed to participate in summer *** if such participation were directed by Respondent's attorney.

15. A brief ARD was held on October 24, 2011 to conduct a Manifestation Determination Review ("MDR") based on Student's receiving twelve (12) disciplinary referrals for Level 2 and Level 3 offenses. It was agreed that Student's problem behaviors were a manifestation of the Emotional Disturbance disability, and Student need a Behavior Support Plan for Student. The ARDC reviewed Student's behaviors, developed a Functional Behavior Assessment ("FBA"), and identified strategies and consequences to address Student's continuing behavior problems. The ARDC identified twelve (12) challenging behaviors of Student:

- a. Off task;
- b. Unprepared for class;
- c. Defiance of authority;
- d. Negative physical;
- e. Incomplete assignments;
- f. Emotional outbursts/tantrums;
- g. Negative verbalization;
- h. Physical aggression;
- i. Classroom disruption;
- j. Noncompliance;
- k. Verbal aggression; and
- l. Social isolation/withdrawal.

The positive supports which were used by Teachers were:

- a. Verbal prompting and redirection (Sometimes effective);
- b. Corrective Feedback (Sometimes effective);
- c. Counseling or Conferencing/ Processing (Sometimes effective);
- d. Provide choices (Sometimes effective);
- e. Reduce length/number of objectives (Not effective);
- f. Visual prompt/ cue/ signal (Not effective);
- g. Provide manipulatives (Not effective);
- h. Cooling off period (Not effective);
- i. Preferential seating and proximity control (Not effective);
- j. Physical prompting/ redirection (Not effective);
- k. Teach/ establish clear rules (Not effective);
- l. Written or visual cues (Not effective); and
- m. Remove distracting materials (Not effective).

The two behaviors which were deemed the most challenging were: (1) Express frustrations and anger using inappropriate verbalizations with peers and adults throughout the school day; and (2) Expressing anger toward peers with verbal and physical aggression when the students do not comply with requests during the school day. The measurable annual goals adopted were: (1) Express anger and frustration using appropriate verbalizations for 90 minutes by March 7, 2012; and (2) Act in a nonviolent manner to ***self, students and teachers 90% of the time or for 90 minutes by March 6, 2012. Additionally, the ARDC considered accommodations to address Student's deficits in working Memory, and provided numerous strategies for

Giving and Following Directions, and Increasing Attention and Time on Task. All the ARDC members, including Petitioner, agreed with the behavior supports developed at the October 24, 2011 ARD.

16. Student's social worker got special dispensation to allow Student to try out for *** after try-outs officially ended. Student did not make the team for reasons related to skill level, including not being able to ***, and not being able to **. The *** coach was not aware of any email from the *** teacher regarding problems with Student's behavior and Petitioner's communications. Student stated that student enjoys ***, but does not wish to participate in ***.

17. Student's teachers experienced varying degrees of success in working with Student in the general education classroom. The *** teacher felt that with the instructional modifications in Student's IEP, she was able to work well with Student and Student did well in the class, scoring an *** on the semester final. Student also participated in the general education P.E. class after being removed from the **. The P.E. teacher indicated that after resolving issues of proper dress, Student was willing to participate. The P.E. teacher sent an email to the *** stating that Student and Petitioner were both difficult to work with and recommending that Student not be allowed to participate in *** because of behavior problems. The *** teacher stated that Student did grade level work but had frequent outbursts of profane and foul language, got out of student's seat constantly, got physical with other students, threatened the teacher, incited disruptions by other students, and took up too much of the teacher's time with disruptions and redirection. The *** teacher found the Student capable of working at grade level but very disruptive, in terms of lateness, interruptions, and inability to refrain from profanity.

18. Student's teachers reviewed the Behavior Support Plan and used the consequences and rewards with little long term success. Additionally, Petitioner was very active in Student's school life and communicated frequently by email with Student's teachers and service providers. Petitioner tried to assist with Student's organizational deficits, and teachers would provide extra copies of notices and assignments to Petitioner so that student would have both the materials and the assistance from Petitioner in completing assignments and preparing for tests. Student also received Counseling as a Related Service throughout *** grade. The social worker who worked with Student provided a sympathetic ear when Student needed someone to talk to, provided assistance when Student's behaviors escalated, and provided a place to calm down. The social worker also met with Student one-on-one, walked with Student to diffuse tensions and emotions, and talked and counseled with Student. As mentioned above, the social worker also assisted Student in getting a try out for *** after the period for try outs had ended. As a general rule, Student prefers not to receive one-on-one counseling in the social workers office, but will talk to the social worker at times when they encounter each other on campus.

19. From January 1, 2012 through the end of January 2012, Student received ten (10) written disciplinary referrals from School District staff members for the following violations of the Student Code of Conduct: cursing, profane, foul or obscene language; disrupting the class or bothering other students; skipping or cutting class; and threatening students or staff with physical violence. These referrals resulted in removals from class, one-on-one student-teacher conferences, *** day of In School Suspension and *** days of off campus Suspensions. Respondent was having little success in managing Student's behavior, and Student was not making progress in meeting the behavior goals of the Behavior Support Plan.

20. There were two MDR ARDs in 2012, one on January 26, 2012 at *** School ("***"), and one on February 16, 2012 at **. In both cases, the ARDC reviewed Student's behaviors, developed a Functional

Behavior Assessment (“FBA”), and identified strategies and consequences to address Student’s continuing behavior problems.

21. The ARD on January 16, 2012 was another MDR, based on five (5) written disciplinary referrals. The ARDC agreed that the behaviors which resulted in the referrals were manifestations of Student’s Emotional Disturbance disability. The ARDC reviewed Student’s behaviors, developed a FBA and identified strategies and consequences to address Student’s continuing behavior problems. Petitioner and School District personnel disagreed regarding whether the behaviors were the result of a failure to implement Student’s IEP. Petitioner was particularly concerned that behavior strategies and interventions were not being followed, even though Petitioner’s teachers stated that the Behavior Support Plan was being implemented in the general education classroom, but was simply not sufficient to control Petitioner’s identified problem behaviors. Respondent proposed placement at ***, and Petitioner objected. The ARDC agreed to hold a placement ARD at ***, and the meeting adjourned without agreement regarding the proposed change in placement. The *** ARD convened on February 16, 2012, and did not result in a change in placement, pending the outcome of this Due Process Hearing. There was no evidence of any predetermined outcome regarding the ARD deliberations; Petitioner and Respondent simply disagreed regarding the appropriate placement and Least Restrictive Environment (“LRE”) for Student.

22. Petitioner requested several behavior management strategies which would not be feasible for implementation in the general education classroom, where Student does not like being singled out or made to feel inadequate. Some of the strategies requested by Petitioner (such as providing a one-on-one coach, increasing the distance between desks, and marking an area with tape around Petitioner’s desk so that Petitioner can move freely) would be likely to exacerbate Petitioner’s feelings of inadequacy and cause further problems in Student’s peer interactions.

23. Student also receives private counseling from Dr. ***, a licensed Psychologist and LSSP, who has worked with Student and student’s family for 2.5 years. Dr. *** has diagnosed Student with Bipolar Disorder, Post Traumatic Stress Disorder, and Reactive Attachment Disorder. Dr. *** participated in some ARDs and reviewed ARD documents. Dr. *** believes Student needs individualized cool down times and opportunities for inclusion instruction with nondisabled peers. Dr. *** also believes that Student needs the contemporaneous structured formal peer feedback offered at ***, which will allow Student to hear specific information about how student’s behavior is affecting other people. Dr. *** also believes that the level system, which was effective in the ***, is an appropriate behavior intervention. Dr. *** does not think the one-on-one assistance and instruction offered by *** is appropriate all the time and in isolation, because there are no peers to provide feedback. Dr. *** believes that Student requires medication and also does require the assistance of a one-to-one aide in the general education classroom, and a special education teacher when Student is pulled out of the general education classroom. Dr. *** also thinks academics and *** are motivators for Student, and that keeping Student engaged academically and in athletics as much as possible will improve Student’s behavior. Dr. *** found Student’s IEP to be appropriate and the people working with Student to be respectful, and noted that *** Grade had been one of the most powerful experiences for Student, who believes that people at *** endorse student, support student, were not out to get student, and enabled student to make academic progress. Dr. *** thinks Student should be given a chance to take personal responsibility for making amends at ***, so that student does not have the feeling that student has been cast aside.

24. Petitioner filed a Request for Special Education Due Process Hearing on February 15, 2012 to appeal Respondent’s recommended change in placement from *** to ***. During the pendency of the Due Process Hearing, Student has received one-on-one instructional and behavior services from a certified Special

Education Teacher, who has supervised Student's participation in the general education inclusion classroom. General Education teachers report that classes have functioned much better in terms of grades and curriculum mastery without Student's presence during all regular class periods. At the same time, other students have not had the services of the special education teacher who is now devoted solely to Student.

25. Beginning in January 2012 through April 2012, Certified Special Education Teacher *** reported twelve (12) occurrences to School District and Student's parent that Student needed to either be redirected or moved from class for obscene language; refusing to follow instruction or participate in classroom activity; disrupting the class or bothering other students; refusing to complete any work assignments; skipping or cutting class; threatening students or staff with physical violence; and physical altercations or violent behavior. Each of these reported occurrences resulted in a one-on-one student-teacher conference or calming down period, which may consist of walking around the school or finishing out the period in the library.

26. *** believes that Student has not made much progress in improving behaviors so that student can remain in the general education classroom on a regular basis. According to ***, Student is academically capable, but is not able to have any consistent control over problem behaviors. Student's behaviors change from moment to moment, and student's relationships with peers have suffered as a result of impulsivity and unpredictability in Student's words and actions. Student does not generally have positive interactions with peers. Student does not know how to develop appropriate interpersonal or social relationships, is not respectful of the personal property of others, and is overly aggressive physically with other students; Student hurts other students when student hits, punches, smacks, pushes them, and knocks them down. Student does not take responsibility for the harm to the other students, and states that there was no problem because no one was hurt or no ambulance was called. Student also is over-stimulated by student population and the activities at ***. *** did not provide discipline referrals for Student's violations of the Student Code of Conduct, because he believed it was his responsibility to address Student's behaviors himself because he is the Behavior Support Teacher. *** believes it would help Student for him to continue to spend time with Student if Student is transferred to ***, so that Student does not feel discarded, and so that Student understands that *** values the relationship the two of them have developed.

27. *** is a special education placement in School District for students in grades *** with severe behavior problems. The school population (***) is mostly ***, and majority ***, whose needs are not being met in the regular *** campus. The evidence of a student's needs not being met is found in suspensions and expulsions from the regular *** campuses. *** was started in *** to address the needs of students suspended and/or expelled from other campuses. Students are given an opportunity to succeed academically with small classes staffed by certified special education teachers. *** has homeroom structure and seven (7) classes per day with approximately three to five students per class moving from classroom to classroom every 55 minutes. *** offers *** classes in *** and *** to enrich the student educational experience and to provide opportunity for success in *** situations. Counselors on staff work with students at least once a week. *** support is present on campus, and students will be cited for infractions but are expected to return to school upon ***. *** principal is trained in behavior intervention techniques and certified to teach Seriously Emotionally Disturbed and Autistic children; he believes that the educational environment at *** is superior for students with behavior problems, because they are not isolated by continual removal from class, but work with special education teachers certified in the academic subject areas. *** also provides field trips. *** uses a level system where students may earn their way back to their home campuses by meeting their behavior goals. The goal of *** is to return students to their home campuses.

28. *** has a high dropout rate (***) compared to *** (***), and neither *** nor *** has met the Adequate Yearly Progress standard for the last two years. Student would not be able to participate *** at *** while attending ***.

29. At the time of the Due Process Hearing, Student was passing all classes, and it was assumed Student would earn credits for all *** grade classes. Petitioner and Respondent both expressed concerns that Student be intellectually challenged, because Student is a capable student who can master grade level TEKS curriculum. All persons working with Student believe Student needs increased access to direct academic instruction. Student's future plans are ***. It is essential for Student's individualized special education to address the behaviors which interfere with accessing the curriculum, learning, and having appropriate interactions with peers in an educational setting.

30. During the Due Process Hearing, it was agreed by counsel for Respondent that Student could participate in summer *** program at ***, provided Student satisfied the requirements for participation and did not disrupt the program.

III. Discussion

Petitioner alleged numerous procedural violations under IDEA, in addition to allegations that Respondent failed to implement Student's IEP and punished Student for manifestations of student's disability. The evidence, however, did not establish that Respondent violated IDEA or failed to provide individualized special education and related services to address Student's needs as a child with Severe Emotional Disturbance. Petitioner has been through some very difficult times with Student and is interested in promoting Student's interests and maximizing Student's educational potential. At the same time, Petitioner appears not to understand that Student's educational needs are primarily in the area of behavior, and that Student's education needs to focus on preparing student to interact appropriately with peers and adults—not only in an educational setting, but in every social setting.

The main relief requested by Petitioner is to allow Student to remain at Westside High School with the assistance of certified Special Education Teacher, who would assist Student academically in the general education inclusion class, and a trained ADHD assistant who would act as a coach to address Student's behaviors. Petitioner's requested placement and supplementary aids and services acknowledge that Student has been shown incapable of regulating student's behavior in the general education classroom. Petitioner would like Student's psychological and behavioral deficits to be addressed by others who would take Student out of class as needed, but hopefully prevent Student from acting out and needing to be removed from the classroom in the first place. But, Petitioner's approach appears to ignore Student's inability to function in the inclusion classroom without consistently disrupting the teaching and learning processes for Student and others in that setting. In addition to mandating an individualized education program, IDEA includes Least Restrictive Environment ("LRE") requirements which are set forth in 34 C.F.R. §300.114:

- (a) *General.*
 - (1) Except as provided in §300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and §§300.115 through 300.120.

- (2) Each public agency must ensure that—
- (a) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
 - (b) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

The abandonment of the Behavior Services Classroom at *** in favor of the inclusion classes was an effort by *** to mainstream Students with disabilities in the general education classroom. But, in some cases such as this one, education with nondisabled peers, even with resource room or itinerate instruction, is not possible, and for that reason, school districts are required to have a continuum of educational placements, including regular classes, special classes, special schools, home instruction, and instruction in hospitals or institutions. See, 34 C.F.R. §300.115.

The general rule is that a student's IEP must be individualized, is not required to maximize the child with a disability's educational potential, and must be reasonably calculated to provide an educational benefit. The Fifth Circuit enunciated criteria for determining when an IEP is reasonably calculated to provide a meaningful educational benefit in *Cypress-Fairbanks ISD v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997):

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

In this case, the evidence established that the Student's IEP developed at *** before this Request for Due Process Hearing was filed, including the Functional Behavior Assessment and Behavior Support Plan, was individualized. Student's IEP took into account Student's assessments and performance, including recent assessments, social history, and input from the duly constituted ARDC. Student's IEP, developed in collaboration with Petitioner, requires services to be provided in a coordinated and collaborative manner among Student's general and special education teachers, coaches, social workers and counselors. The evidence showed that there were demonstrated positive academic benefits in that Student passed student's classes. The question as to the proposed IEP is whether there are demonstrated non-academic benefits, and whether *** would, in fact, be the least restrictive environment. It is recognized that *** students are generally special education students with behavior problems, and that while at ***, Student would not participate with the general education students for sports, lunch or assemblies, although Student would have exposure to the community through educational field trips.

After considering the evidence and arguments of Petitioner and Respondent, the Hearing Officer concludes that a change in placement to *** is indicated based on Student's inability to participate effectively in the general education inclusion classroom, even with supplementary aids, including adapted curriculum and instructional modifications, and itinerate teaching provided by the certified special education teacher. In *Daniel R.R. v. State Board of Education*, 874 F. 2d 1036 (5th Cir. 1989), the Fifth Circuit enunciated criteria for determining whether a child has been mainstreamed to the maximum extent appropriate. In finding that

removal of the child with a disability from the general education class did not violate the predecessor act to IDEA, the court reviewed the facts associated with the placement in the general education classroom compared to removing the student to a self contained special education placement, considering:

- (1) Whether the school district took steps to modify the general education program and to provide supplementary aids and services to the student;
- (2) Whether the student was receiving any educational benefit from the general education placement;
- (3) Whether the student's overall educational experience was beneficial; and
- (4) Whether the student's presence in the general education classroom was fair to the rest of the class.

As Respondent noted in the Closing Argument and Brief of Legal Issues filed in this case, the consideration of LRE is must be individualized and fact specific.

In looking at the facts of this case, it is clear that Respondent modified the general education program for the benefit of Student and other children with disabilities who participated in general education inclusion classes with itinerate special education teacher support. Student's assignments, testing, and attendance were all modified to allow student to attend general education classes when possible. Respondent made more than a *de minimus* effort and even bent over backwards to continue the *** mainstream placement as Student's consistent behavior problems escalated and disrupted the classes and required student's frequent removal. In general, the Student was not receiving an educational benefit from the general education class, but was receiving an educational benefit from the support and coaching of the special education teacher, ***. Student's overall educational experience at *** was not beneficial because, even according to Student, student's behaviors had isolated student and caused student to feel inadequate, unwanted and needing to make amends because student had burned bridges. Moreover, Student's presence in the general education classroom, even with the assistance of the special education teacher, was not fair to the other students who were exposed to verbal and physical threats, and obscene language and unseemly behavior, which reduced their access to curriculum and instruction, and also reduced their educational performance.

In considering LRE, courts have also looked at interactions between the child with a disability and the other students. In this case, those interactions were significantly reduced by the one-on-one teaching and coaching services provided by the ***, but when they occurred, they were frequently not positive. Therefore, the benefits of remaining in the general education inclusion setting are significantly reduced. The Hearing Officer finds that Student's placement at *** is reasonably calculated to provide a meaningful educational benefit, and the opportunity for Student to access the structure and services at *** outweigh the limited benefit Student is receiving from placement at ***.

Finally, the parties are reminded that this Decision of the Hearing Officer regarding placement at *** is not in any way similar to a prison sentence for Student. *** is a school which provides special assistance with behavior problems, which is could satisfy an important need for Student. As a child with a disability, Student is always entitled to a free appropriate public education. If Student's ARDC finds that the *** placement is not Student's least restrictive environment after it has been given a reasonable opportunity to prove appropriate, the placement is subject to review and change. But, considering Student's experience in *** Grade at ***, the Hearing Officer finds that the smaller, more structured and restrictive instructional setting of *** School is appropriate for Student.

IV. Conclusions of Law

1. Petitioner is a student who resides within the School District who is eligible for special education as a child with the disability: Severe Emotional Disturbance. Petitioner's disability is also known to be affected by Attention Deficit Hyperactivity Disorder. [20 U.S.C.A. §1401(3); 34 C.F.R. §300.8; 19 T.A.C §89.1040(c)(4).]

2. Respondent has a responsibility to provide Student with a free appropriate public education. [20 U.S.C. §1401(9); 34 C.F.R. §300.101; *Board of Education of the Hendrik Hudson Center School District v. Rowley*, 458 U.S. 176; 19 Tex. Admin. Code, §89.1001.]

3. Petitioner did not prove that Respondent violated the procedural requirements of IDEA. Respondent did not change Petitioner's placement without a meeting of the Admission, Review or Dismissal Committee, nor did Respondent change Petitioner's placement during the pendency of this Due Process Hearing. [20 U.S.C. §1415; 34 C.F.R. §§ 300.500 through §300.520; 19 Tex. Admin. Code, §89.1150 through §89.1185.]

4. Petitioner did not prove that Respondent failed to implement Petitioner's IEP at *** School, nor did Petitioner prove that Petitioner's IEP was not reasonably calculated to provide a meaningful educational benefit for Petitioner. [19 U.S.C. §1414; 34 C.F.R. §300.320 through §300.324, and §300.327; *Cypress-Fairbanks ISD v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997); 19 Tex. Admin. Code, §89.1055.]

5. Petitioner did not prove that Respondent punished Student for manifestations of Student's disability. Respondent is required to maintain a safe environment for all students, including nondisabled and general education students, and Petitioner is required to experience consequences in accordance with the IEP and Behavior Support Plan. [19 U.S.C. § 1415 (k); 34 C.F.R. §300.530 through §300.536]

6. Respondent proved that implementation of Petitioner's IEP developed by the ARDC, including a special education placement at *** School, would provide Petitioner with a free appropriate public education in Petitioner's least restrictive environment. [20 U.S.C. §1401(9), §1414, and §1412; 34 C.F.R. §300.114 through §300.120; *Board of Education of the Hendrik Hudson Center School District v. Rowley*, 458 U.S. 176; 19 Tex. Admin. Code, §89.1001, *et seq.*]

V. Order

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer ORDERS that the relief sought by Petitioner be DENIED.

ISSUED in Austin, Texas this 13th day of July, 2012.

/s/
Gwendolyn Hill Webb
Special Education Hearing Officer

STUDENT b/n/f PARENT

§
§
§
§
§
§
§

BEFORE A SPECIAL EDUCATION

V.

HEARING OFFICER FOR THE

HOUSTON INDEPENDENT
SCHOOL DISTRICT

STATE OF TEXAS

SYNOPSIS

Issue: Was Student’s removal from the general education classroom to *** school, Student’s least restrictive environment, such that the removal would constitute a violation of the mandate to educate children with disabilities to the maximum extent appropriate with their nondisabled peers.

Federal Citation: 20 U. S. C. §1412(a)(5); 34 C.F.R. §§300.114-300.120.
Board of Education of the Hendrik Hudson Center School District v. Rowley, 458 U.S. 176; *Cypress-Fairbanks ISD v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997); *Daniel R.R. v. State Board of Education*, 874 F. 2d 1036 (5th Cir. 1989).

Texas Citation: 19 Tex. Admin. Code, §89.63; 19 Tex. Admin. Code, §89.1001.

Held: When Respondent significantly modified the program in the general education inclusion classroom with supplementary aids and services; When Petitioner received limited educational benefit from the general education classroom; When Petitioner’s overall educational experience at the general education *** School was not beneficial; When Petitioner’s exposure to the general education classroom was very limited and restricted; and, When Petitioner’s presence in the general education classroom was not fair to the rest of the class, then Petitioner’s removal to *** school would be an appropriate placement where Respondent could implement Petitioner’s IEP and Petitioner could receive a free appropriate public education.