

STUDENT b/n/f PARENT	§	BEFORE A SPECIAL EDUCATION
	§	
v.	§	HEARING OFFICER FOR THE
	§	
NEW CANEY ISD	§	STATE OF TEXAS

## **DECISION OF THE HEARING OFFICER**

### **I. Statement of the Case**

Petitioner Student by next friend Parent ("Petitioner" is referred to within this Decision as "Student," "Parent," or "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 New Caney Independent School District (hereinafter referred to as "Respondent," "School District," or "Crowley ISD"). Petitioner filed a written request for a due process hearing which was received by the Texas Education Agency ("TEA") on March 2, 2012 which was styled and docketed as shown above. Petitioner was represented by Attorneys Colleen Elbe of Disability Rights Texas in Lubbock, Texas; Constance Wannamaker of Disability Rights Texas in El Paso, Texas; and Ronald K. Lospennato of the Law Office of Ronald Lospennato in New Orleans, Louisiana. Respondent was represented by Attorney Justin R. Graham of the law firm Henslee Schwartz, LLP in Houston, Texas. The Due Process Hearing in this matter was held on Wednesday and Thursday, May 30 and 31, 2012, in New Caney Independent School District. Following the conclusion of the hearing, the parties agreed that written closing arguments would be filed by Monday, June 25, 2012, and that the Decision of the Hearing Officer would be issued on or before Thursday, July 5, 2012.

At a March 2, 2012 Prehearing Conference, 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 issues regarding the special education identification, evaluation, placement, programs and services of the Student, and Respondent's alleged denials of a free appropriate public education ("FAPE"):

1. Petitioner, placed in the \*\*\* by New Caney ISD ("NCISD"), is regularly subjected to ineffective and harmful behavioral management techniques.
2. The \*\*\* resembles many \*\*\*. The \*\*\* consists of \*\*\*. In order to enter any \*\*\* classroom, \*\*\*. Inside the \*\*\* are multiple classrooms and several isolation instruction rooms.
3. Petitioner, who was placed in the \*\*\*, makes little or no academic and behavioral progress, and has remained in the program for several years.
4. Petitioner is eligible to receive special education services under the IDEA on the basis of Petitioner's classification of Other Health Impaired ("OHI") and Learning Disabled.
5. Prior to \*\*\* of 2008, Respondent provided Petitioner with special education services in the general education setting with resource services in language arts, math, reading, science and social studies

6. In \*\*\* of 2008, Respondent's Admission Review and Dismissal ("ARD") Committee decided to temporarily place Petitioner in the self-contained \*\*\* and provide behavioral supports.

7. Respondent has continued Petitioner's "temporary placement" for almost \*\*\* calendar years and instead of providing behavioral supports, have implemented hundreds of physical restraints and numerous school days in isolation.

8. During the spring semester of the 2010-2011 school year and the fall semester of the 2011-2012 school year, Respondent also unreasonably and unlawfully restrained Petitioner over one hundred and fifty (150) times.

9. Respondent repeatedly punished Petitioner for behaviors identified on petitioner's behavior plan and related to petitioner's disabilities by requiring petitioner to spend most of petitioner's school days in either in an isolation instruction setting, a locked seclusion room, a physical restraint, or in detention.

10. Respondent failed to provide Petitioner with instruction reasonably calculated to teach petitioner skills to replace inappropriate behavior or provide petitioner with positive behavioral supports and interventions.

11. Respondent has a policy, practice and procedure of called "isolation instruction," whereby the Petitioner is placed in a bare carpeted room, with the only furniture being a desk that is brought into the room from another part of the \*\*\*.

12. Respondent utilized the same three goals for Petitioner on petitioner's Behavior Intervention Plan ("BIP") for the last two academic years in a row. Respondent also authorized the continued use of failing behavioral interventions on Petitioner's BIP, despite Petitioner's lack of progress.

13. Respondent failed to consider the alternatives mandated by the IDEA, such as increasing related services or supplemental aides and services.

14. Respondent failed to provide Petitioner with appropriate behavioral support including specialized instruction and appropriate related services such as social work, counseling, and school psychology services tailored to address identified behavioral issues that adversely affect Petitioner's education and that are based on petitioner's individual needs.

15. Respondent has failed to utilize behavioral evaluations or interventions reasonably calculated to assist Petitioner in exhibiting appropriate or acceptable behavior in a school setting.

16. Petitioner has failed to make adequate educational progress in the \*\*\*. Petitioner also failed \*\*\* core academic subjects and failed petitioner's \*\*\* TAKS test and received a \*\*\* TAKS test score of \*\*\*, which did not meet state standards.

17. Respondent's response to Petitioner's academic failure was to provide petitioner with a year's worth of generic pre-packaged lesson plans.

18. Respondent failed to provide Petitioner adequate opportunity for individualized additional instructions or assistance in the subjects Petitioner failed during the 2010- 2011 school year.

19. Respondent failed to implement an Individualized Education Plan ("IEP") that included a "statement of measurable annual goals, including academic and functional goals designed ID meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general curriculum" and failed to ensure that Petitioner "continue[d] to receive educational services, as provided in 300.101(8), so as .., to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP" during petitioner's placement at the Excel Program.

20. Respondent, in implementing policies, practices, and customs which have caused Petitioner to be subjected to repeated physical restraints and seclusion, without the support of peer-reviewed evidence that such restraints and seclusion are reasonably calculated to afford petitioner educational benefit, has violated and continues to violate petitioner's right under the IDEA to a free appropriate public education ("FAPE"). It is both practicable and reasonable to implement less intrusive, less harmful and more effective programs, such as positive behavioral interventions and supports that would provide Petitioner with meaningful educational benefit.

21. Respondent has failed to provide Petitioner with an education in the Least Restricted Environment.

22. Petitioner was excluded from participation in, denied the benefits of, and subject to discrimination by Respondents, solely because of petitioner's disability and in violation of Section 504.

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

1. Issue an order declaring that the \*\*\*, as currently operated, violates rights of Petitioner by:
  - a. Failing to provide petitioner with a free appropriate public education;
  - b. Failing to provide special education and related services in a manner that is based on and consistent with peer-reviewed research and data; and by
  - c. Subjecting petitioner to adverse behavioral techniques that are physically harmful without any peer-review research or data indicating that such techniques are reasonably calculated to provide education benefit.
2. Issue an order of requiring Respondent to take the following actions on behalf of Petitioner:
  - a. Cease and desist from requiring Petitioner to attend extended school days;
  - b. Cease and desist from physically restraining petitioner, except in an emergency situation to prevent Petitioner from engaging in behavior that is likely to inflict serious harm to \*\*\*self or to others and then only as long as necessary to prevent the infliction of serious harm;
  - c. Cease and desist from placing petitioner in seclusion, except in an emergency situation to prevent Petitioner from engaging in behavior that is likely to inflict serious harm to \*\*\*self or other and then only as long as necessary to prevent the infliction of serious harm; and
  - d. Cease and desist from referring to police officials for any behavior related to petitioner's disability.
3. Enter into a contract within thirty (30) days of the date of this order with a professional or professionals, who are not employees of the school district, who have the necessary qualifications, who are knowledgeable and experienced in implementing evidenced based programs such as Positive Behavioral interventions and supports, and who has been approved by the Petitioner, to perform the following functions:
  - a. Conduct a Functional Behavior Assessment and develop, at Respondent's expense, an appropriate Behavior Intervention Plan for Petitioner;
  - b. Conduct a thorough academic evaluation, at Respondent's expense, to assess any deficits in Petitioner's core subjects and to develop a remedial plan to address such deficits; and

- c. Conduct, at Respondent's expense, a thorough psychological evaluation and recommend any necessary counseling or other services to address any emotional harm Petitioner may have suffered.
4. Provide, at Respondent's expense, transportation any and all appointments occasioned by the order in this case or the provision of a free appropriate public education to Petitioner.
5. Within thirty (30) days of the date of this order develop a plan, approved by Petitioner to:
  - a. Provide any and all educational services needed to compensate Petitioner for Respondent's failure to provide a FAPE since Petitioner's initial placement at the \*\*\* in May of 2008; and
  - b. Place Petitioner in a regular classroom with all supplemental aides and services needed to provide Petitioner, with reasonable and adequate educational progress.
6. Issue an order requiring Respondent to take the following steps to address the systemic violations of the law:
  - a. Cease and desist from placing any additional students in the \*\*\*;
  - b. Cease and desist from using physical restraints and isolation instruction times for any student currently placed in the \*\*\*, except when an emergency exists as defined in the Texas Administrative Code; and
  - c. Enter into a contract within thirty (30) days of this order with a qualified professional approved by Petitioner, to conduct training on behavior management, positive behavior supports, de-escalation techniques, proper use of restraint, and proper completion of all state required restraint documentation for all New Caney ISD special education personnel and all New Caney ISD administrators.
7. Retain jurisdiction over this matter to ensure that Respondent is in full compliance with all orders issued in this matter and to address disputes between the parties regarding implementation; and
8. Order such other and further relief as the Hearing Officer may deem just and proper.

In its response to the Complaint, Respondent asserted that the Student received a FAPE in the least restrictive environment possible, because of the Student's behavioral problems; generally denied that Petitioner was entitled to any of the requested relief and resolutions; and requested that the Hearing Officer deny Petitioner's requests in its entirety.

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. Student is a \*\*\*-year old child with a disability who resides within the New Caney Independent School District. Student is a \*\*\* grade student who is eligible to receive special education services under the

IDEA on the basis of student's classification of Other Health Impairment ("OHI") and Learning Disabled ("LD").

2. Respondent is a political subdivision of the State of Texas and a duly incorporated Independent School District 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 Federal and Texas rules and regulations promulgated pursuant to IDEA.

### **Student's Admission, Review, Dismissal Meetings**

#### **May 13, 2011 ARD**

3. An Admission, Review, Dismissal ("ARD") meeting was held on the Student's behalf on May 13, 2011. The purpose of the meeting was to perform an annual review of the Student's educational placement and programs.

4. The Student's May 13, 2011 ARD Committee ("ARDC") reviewed a Full Individual Evaluation ("FIE") dated August 24, 2009; an OHI Report dated November 28, 2006; a Counseling Evaluation dated March 9, 2009 and a Functional Behavioral Assessment ("FBA") dated March 10, 2009. Based on all of the data reviewed, the Student's ARDC concluded that the Student met the eligibility classification as a student with an Other Health Impairment ("OHI") and a learning disability ("LD").

5. The Student's May 13, 2011 ARDC determined that the Student required shortened written assignments in Science and Social Studies; reading assistance on tests in Mathematics, reading questions and answers, Science, Social Studies and ELA-writing ("English Language Arts"); study aides/manipulative in Math, Reading, Social Studies, and ELA; and the implementation of student's BIP in ELA, Math, Reading, Science and student's electives. The ARDC concluded that these modifications to the general curriculum would allow the Student to make educational progress.

6. The Student's May 13, 2011 ARDC determined that the Student's behavior required the Student to be educated in the structured environment of \*\*\*, for all academic instruction and all nonacademic and extracurricular activities under a specialized curriculum. The Student's ARDC concluded that the Student's behavior intervention plan ("BIP") could not be implemented on a general education campus because the Student requires intense supervision in a closed environment.

7. The Student's parent signed in agreement along with the remainder of the Student's May 13, 2011 ARDC.

8. During the May 13, 2011 ARD, the ARDC discussed a psychological evaluation for the Student and said that parental consent for the evaluation would be sought in August, 2011. The Student's parent had no objections to the psychological evaluation on May 13, 2011, and shared with the ARDC that the Student had been diagnosed with Intermittent Explosive Disorder by a clinician working in \*\*\*. The Student's ARDC requested a copy of the diagnosis, but has not yet obtained it.

#### **September 9, 2011 ARD**

9. An ARD meeting was convened on the Student's behalf on September 9, 2011. The purpose of the meeting was to review the Student's special education program and placement.

10. The ARDC requested the Student's parent's consent to perform a new FIE and a psychological evaluation. The Student's mother gave consent. The Student's mother reported to the rest of the ARDC that the Student was receiving anger management assistance from a \*\*\*, but declined to provide the ARDC with a release of records/information from the Student's psychiatrist.

11. The Student's parent requested more challenging reading assignments/activities from the Student's September 9, 2011 ARDC; and reported the Student's interest in \*\*\*. The Student's \*\*\* teacher reported some improvement in the Student's behavior, but affirmed the need for the Student to follow the behavioral sequences of the BIP. The Student's behavior was discussed further in terms of its variability and dependence on whether student had a good or bad day at home, before the start of the school day. The ARDC affirmed the right of the Student to remain in the restrictive environment of the \*\*\* unless the Student is a danger to \*\*\*self or others. The Student's parent expressed frustration with the fact that the Student had been in \*\*\* since the \*\*\* grade and that she did not want the Student in the \*\*\* in \*\*\* school. While the mother requested that the Student attend a regular campus, the Director of the Excel Program explained that the Student had not averaged 93% behavioral compliance for three (3) weeks in a row- a necessity before transition to a regular campus was considered.

12. During the September 9, 2011 ARD meeting, the Student's mother suggested that the Student may not be successful in the \*\*\* and that residential placement may be necessary to avoid the same behaviors \*\*\*. The mother suggested that a residential facility could allow professionals to stabilize the Student's medications related to student's behavior.

13. During the September 9, 2011 ARD meeting, the Student's parent and grandparent reported incidents where the Student had \*\*\*.

14. The Student's September 9, 2011 ARDC agreed to implement a "No limit time stealing" strategy where the Student could be restrained in the isolation rooms for extended periods, even after school, because of potentially dangerous in school behavior. The purpose of the strategy was to increase the severity of the punitive isolation for misbehavior with the desired affect of encouraging the Student to make better behavioral choices.

15. The Student's September 9, 2011 ARDC discussed a strict rewards/consequences system that would be coordinated between home and school. The need for such a system was discussed as an alternative to residential placement and/or jail for the Student. The Student's mother agreed to the stricter punitive measures and took responsibility for previously requesting fewer restraints for the Student in the \*\*\*.

#### March 6, 2012 ARD

16. An ARD meeting was convened on the Student's behalf on March 6, 2012. The purpose of the meeting was to conduct an annual review of the Student's special education placement, programs and services.

17. The Student's ARDC concluded that based on all available data and assessments, the Student qualifies for special education as a student with OHI and LD educational disabilities.

18. The Student's March 6, 2012 ARDC considered an FIE completed on February 1, 2012, that included a psychological evaluation; an OHI Report that was completed on November 28, 2006; a counseling evaluation that was completed on February 1, 2012; a FBA that was completed on February 1, 2012; and a Speech and Language Evaluation that was completed on January 1, 2007. The ARDC also considered the Students' TAKS-M score of \*\*\* in \*\*\*, taken on April 1, 2011; and student's TAKM score of \*\*\* in \*\*\*, also taken on April 1, 2011.

19. The Student's March 6, 2012 ARDC identified the following traits about the Student's behavior:

"[Student] typically demonstrates poor attention and concentration, extreme mood swings, non-compliance with teacher directives, difficulty working with peers, and excessively high activity level, difficulty standing on task, difficulty following directions, is easily frustrated, and is physically and verbally aggressive with others. Student is noted to struggle with initiating activities independently,

assuming a leadership role in group activities asking for help when needed persisting with difficult tasks, and retaining instruction from week to week. When presented with reading and/or writing tasks, [Student] frequently complains of aches and pains and has more difficulty controlling student's behavior."

20. The Student's March 6, 2012 ARDC noted that fluency data collected over the year from fluency testing that was conducted three (3) times during the current academic year showed the following:

<u>Date</u>	<u>Fluency</u>	<u>Comprehension</u>	<u>Grade Level Est.</u>
September 14, 2011	*** wcpm	***	*** grade
November 2, 2011	*** wcpm	***	*** grade
January 21, 2011	*** wcpm	***	*** grade

21. The Student's March 6, 2012 ARDC noted the following academic levels of the Student in the area of Writing:

"A review of progress on IEP goals indicates [Student] is developing skills in using sound-letter patterns to spell CVC and CVCe words, planning a first draft by generating ideas for writing, developing a draft by sequencing ideas with assistance, revising drafts by adding or deleting words, phrases, or sentences, editing drafts for grammar, punctuation, and spelling using a rubric, writing brief stories that contain a beginning, middle, and end, distinguishing between declarative and interrogative sentences with assistance, and recognizing and using punctuation marks on the \*\*\* grade level. [Student] has mastered writing short letters that put ideas in chronological sequence using correct conventions on the \*\*\* grade level."

22. The Student's March 6, 2012 ARDC noted the following strengths in the subject of Math:

"Mathematics strengths include counting and writing numerals to 100, addition using concrete objects, identifying operation symbols, understanding place value, identifying fractional portions of concrete objects, telling time by the half hour, adding coins up to \$1.00, and adding coins and bills. Weaknesses in the area of math include mastery of renaming fractions, telling time by five minute intervals, reading a calendar, and making change from \$10.00. [Student] is able to use a calculator with prompting to complete basic math computations. [Student] is noted to have the ability to inductively reason with concepts involving mathematical relations and properties and is noted to perform best on materials presented at the \*\*\* grade level. Standardized assessment date obtained from WJ-III Ach indicated [Student] is functioning in the very low range (\*\*\* grade level) in calculations and in the low average range (\*\*\* grade level) in math reasoning."

23. The Student's March 6, 2012 ARDC concluded that the Student requires instructional modifications/accommodations in Reading, Math, Language, Science, Social Studies, and P.E.; and content modifications/accommodations in all of the same academic subjects except P.E. The ARDC concluded that the Student requires a specialized curriculum other than TEKS.

24. The Student's March 6, 2012 ARDC determined that the Student should be allowed to alter assignments by allowing extra time for completing assignments, a shortened written assignment in ELA, Reading, Math, Science, and Social Studies.

25. The Student's March 6, 2012 ARDC determined that instruction should be adapted by modified exams in length and/or format in ELA, Reading, Math, Science and Social Studies; a seat near the teacher for instructional purposes and the Student's attention in the same subjects; and that the teacher would check for the Student's understanding and re-teach when necessary in the same subjects.

26. The Student's March 6, 2012 ARDC determined that the Student should have a Behavior Intervention Plan ("BIP") where the BIP would be followed in all subjects; the Student would be allowed cooling down time in the classroom in all subjects; and the Student would be allowed frequent reminders of the rules in all subjects.

27. In the area of Least Restrictive Environment ("LRE"), the Student's March 6, 2012 ARDC determined that in the following placements were "tried" and the Student was "unsuccessful" because the Student required a high degree of structure and a low Staff-to-Student ratio with a high degree of repetition and modification to access and make progress in the educational curriculum due to behavioral difficulties:

General Education Classroom; Special Education Supplementary Aides and Services provided in a General Education Setting; and Modification in General Education Curriculum, instruction, test procedures and/or physical arrangements.

The ARDC noted that in the Resource Classroom the Student showed some success, but was ultimately unsuccessful overall.

The ARDC concluded that the Student was successful in the \*\*\* and has been able to make educational progress toward mastery of IEP goals because of the high structure, low Staff-to-Student ratio, a BIP, individualized level system, individualized reinforcement system and a high degree of academic modifications.

The ARDC noted that Residential Placement had been considered for the Student and rejected as too restrictive because of the progress that the Student is making the \*\*\*. Based on these conclusions, the ARDC placed the Student in \*\*\*.

28. The Student's March 6, 2012 ARDC concluded that the Student's BIP could not be implemented in a general education setting. Moreover, the ARDC concluded that the Student would not participate in the following non-academic activities with general education students: meals, field trips, fund raising activities, regular transportation, assemblies, recess periods, or general education routines such as homeroom assignments, lockers, study hall, class changes, or social activities. In making these conclusions, the ARDC acknowledged that the Student would have isolation from non-disabled peers, a lack of opportunity for appropriate role models, and diminished access to a full range of curriculum.

29. The Student's March 6, 2012 ARDC concluded that the Student's participation in a literate, motivating, risk-free, classroom environment may assist student in developing positive attitude toward writing as well as improving student's writing skills. A literate classroom features a student's written work prominently, is filled with reading and writing materials, and has work lists on the wall. The ARDC determined that a motivating and risk-free environment is created by the teacher setting an exciting mood that allows for student's input and flexibility on topics, and also reinforces and supports the student's accomplishments.

## **Student's February 1, 2012 Cognitive and Educational Evaluation**

30. A Cognitive and Educational Evaluation (“the Evaluation”) was completed on the Student on February 1, 2012. The Evaluation included two days of testing, using the WJIII Tests of Cognitive Abilities, administered on January 6, 2012; and the WJIII Tests of Achievement, administered on January 3, 2012. The tests were administered by an employee of the District. The Evaluation was designed to measure the Student’s overall intellectual ability, specific cognitive abilities, academic achievement, and oral abilities. The factual conclusions reached in the Evaluation about the Student were credible and persuasive. Based on the Evaluation, the Hearing Officer makes the following factual findings about the academic, cognitive and intellectual abilities of the Student:

- a. Student’s overall intellectual ability, as measured by the WJIIGIA (Ext.) score, is in the low range of other students student’s age. There is a 95% probability that Student’s true GIA would be included in the range of scores from \*\*\* to \*\*\*.
- b. Student’s fluid reasoning standard score is within the low average range when compared to other students student’s age. Student’s fluid reasoning ability is limited to average; Student will probably find age- level tasks requiring identifying categories and relations, drawing and generalizing inferences, recognizing and forming concepts and drawing conclusions difficult.
- c. Student’s short term memory standard score is within the low range for other students student’s age. Student’s short-term memory capacity is limited. The Student will likely find age-level tasks, such as remembering just imparted instructions or information or mentally manipulating information in immediate awareness, very difficult.
- d. Student’s comprehension knowledge standard score is within the low range for other students student’s age. The Student’s verbal knowledge and comprehension are limited, and Student will likely find age-level verbal communication, knowledge and comprehension tasks very difficult.
- e. Student’s processing speed standard score is within the low range for student’s age. Student’s processing speed is limited, and Student will probably find age-level tasks requiring cognitive speediness very difficult.
- f. The Student’s long-term retrieval standard score is within the low range for student’s age. Student’s long-term retrieval is limited to average, and it is likely that Student will find age-level tasks requiring strategies to solve, and fluency to retrieve, information difficult.
- g. The Student’s reading standard score is within the very low range for student’s age. Student’s performance is limited on tasks requiring the ability to use syntactic and semantic cues in comprehending written discourse as it is being read. Student’s performance is negligible on tasks requiring reading, decoding and the ability to identify words. Student will likely require intensive instructional support and targeted interventions in reading. Student’s very limited proficiency with general reading tasks may be related to student’s limited comprehension-knowledge, processing speed, and short-term memory.
- h. The Student’s overall mathematics ability is compare to that of the average individuate at age \*\*\*. The Student’s standard score is within the very low range for student’s age. Student’s overall mathematics ability is very limited. The age \*\*\* level mathematics tasks will be quite difficult for student.
- i. The Student’s written language standard score is within the very low range. Student’s performance is limited on tasks requiring the ability to convey ideas in writing. Student’s

- performance is negligible on tasks requiring the ability to spell orally presented words, correctly.
- j. The Student's oral expression standard score is within the low average range for student's age. Student's overall ability to express \*\*\*self orally is limited to average. Student will probably find age-level tasks requiring listening skills and English-language oral vocabulary development difficult.
  - k. The Student's listening comprehension retrieval standard score is within the low range for student's age. Student's listening and oral comprehension abilities are limited. Tasks measuring listening and oral comprehension abilities above the age \*\*\* will be quite difficult.
  - l. The Student's mathematics reasoning retrieval standard score is within the low range for student's age. It is compare to that of the average individual at the age of \*\*\*. Student's math reasoning ability is limited. Math reasoning tasks above the age \*\*\* level will be quite difficult.
  - m. The Student's overall ability to express \*\*\*self in writing is comparable to that of the average individual at age \*\*\*. Student's standard score is within the low range for student's age. Student's overall ability to express \*\*\*self in writing is limited and writing fluency tasks above the age \*\*\* level will be quite difficult.
  - n. The Student's math calculation skills are comparable to those of the average individual at age \*\*\*. Student's retrieval standard score is within the very low range for student's age. Student's math calculation skills are very limited and math calculation tasks above the age \*\*\* level will be quite difficult for student.
  - o. The Student's performance on Word Attack is comparable to that of the average individual at age \*\*\*. Student's standard score is within the low range for student's age. Student's ability to pronounce non-words is very limited and pronouncing non-words above the age \*\*\* level will be quite difficult.
  - p. The Student's overall academic skills are negligible. Specifically, Student's math calculation skill is very limited. Student's sight reading ability and spelling are negligible. The overall fluency with which Student performs academic tasks is limited. In particular, fluency with reading, writing and mathematics is limited. Also, Student's overall ability to apply academic skills is limited. Student's quantitative reasoning is very limited.
  - q. The Student will probably gain the most from reading instruction presented with the middle to late \*\*\* grade range.
  - r. The Student may benefit from a cross-age peer tutoring program either as a tutee or a tutor to improve Student's ability to efficiently decode passages, Student could be paired with an older student from another classroom and then engage in a weekly listening-while-reading intervention.

### **Dr. \*\*\* Review of the Excel Program**

31. \*\*\*, B.S., M.Ed, Ph.D is a Professor \*\*\*. Dr. \*\*\* holds a Bachelor of Science in Elementary Education from the \*\*\*; a Masters in Education from the \*\*\*; and a doctorate in Special education, specializing in EBD/Autism from the \*\*\*. Dr. \*\*\* professional experience included classroom teacher/lead teacher in \*\*\* Independent School District ("\*\*\*"); Special Education Staff Development, \*\*\*; and Director of \*\*\*. Dr. \*\*\* has written numerous academic papers and publications related to educating students with mental and

behavioral disabilities; chapters in books pertaining to educating such students and is co-author of \*\*\* books which include: \*\*\*. Dr. \*\*\* is an experienced, qualified expert on matters directly related to the issues in this hearing and is qualified to render a professional review of the District's \*\*\*.

32. Dr. \*\*\* reviewed documents related to the Student's placement in the \*\*\* covering the period from March 2008 to January 2012. On April 28, 2012, she issued a report of her review entitled *Educational Program Evaluation*. Her expert opinion regarding the \*\*\* in general and the educational program regarding the Student, specifically, is credible and persuasive. Her impressions and recommendations were provided for both the \*\*\* and for the Student's educational programming based on evidence- based educational, specifically special education practices. Based on Dr. \*\*\* April 28, 2012 report, the Hearing Officer makes the following factual findings about the District's \*\*\* value to the Student's special education program, placement, and services:

- a. While advertised as not a disciplinary placement, behavioral infractions are the primary indicator for the Student's placement in the \*\*\*. Placement requires FBA and a BIP rather than therapeutic goals. Monitoring a certain level of points for target social behaviors and the absence of behavior infractions are the main criteria for exiting \*\*\*.
- b. Placement in the \*\*\* seems to be based on the Student's demonstration of emotional/ behavioral disabilities; severe emotional/ behavioral disabilities; or emotional/behavioral impairment. The District has announced the following Goals for students placed in the \*\*\*:
  - A. Stabilization of students in crises- this so-called "stabilization" is not necessarily temporary and can last for years.
  - B. Intensive social skills training- \*\*\* social skills training *per se* is limited. No training in "Give Yourself Some Time" or "GYST".
  - C. Academic remediation- which is also available in less restrictive locations.
  - D. Development of an effective behavior management system- level system applied to all \*\*\* students equally, not based on individual behavioral assessments and needs.
- c. The \*\*\* level system is based on non-contingent reinforcement and cost response. Students are given points each day and lose them based on infractions. Everything about the level system is standardized.
- d. The \*\*\* applies a behavior management system uniformly that seems to contradict the IDEA mandate for individualized educational programs. Requiring the Student to "earn" less restrictive environment for lunch or recess seems to be problematic.
- e. The District's \*\*\* removes access to LRE by punishing challenging behavior rather than determining the appropriate placement. However, inclusion in less restrictive settings should not be used as reinforcers or removed as punishment for behavior management purposes.
- f. The \*\*\* requires the Student to achieve at a pre-determined accuracy level on assigned tasks. A student would have to achieve 80% accuracy or be subject to detention. Punishment reduces behavior but it does not build new behavior. It would discourage the Student from trying and failing at difficult assignments.

- g. The Level system requires the Student to self monitor student's own inappropriate behavior. Self monitoring infractions rather than correct responses do not motivate student to correctly self monitor or encourage appropriate behavior.
- h. Three components of the \*\*\* level system are missing for the Student's appropriate behavioral management:
  - A. Individual goals/expectations are not based on current or comprehensive FBA.
  - B. Failure to reduce problems behaviors often results in the increased use of ever more intense punishers and inadvertently reinforce inappropriate behaviors.
  - C. \*\*\* documentation did not include evidence of ongoing function-based assessment and planning.
- i. The Student's FBA should include:
  - A. Record reviews of all the Student's current assessment and performance information.
  - B. Structured interview with multiple respondents who know the Student.
  - C. Observational recording over time that the Student's behavior is captured relative to direct antecedents and consequences.
  - D. Summary statements that are developed specifying antecedents that seem to be address problem behaviors.
  - E. Replacement behaviors for the Student and other alternate behaviors that can be taught and reinforced.
- j. There is insufficient evidence that the level system of the \*\*\*includes a procedure for individually determining effective reinforcers.
  - A. Reinforcers normally vary among individuals, but are universally applied to the Student's behavior;
  - B. Reinforcer surveys or performance assessment should be individually determined for the Student to find what student deems rewarding.
  - C. \*\*\* staff seems to rely on punishment or fear of punishment rather than individualized rewards.
- k. There appears to be no direct reinforcement of targeted appropriate behaviors for the Student that is related to student's behavioral infractions.
  - A. The Student's mastery of the level point system is not clear.

- B. The mastery criteria for behavioral goals seem to be the same as it is for all \*\*\* students.
1. The \*\*\* level point system too complicated, too rigidly enforced with little or no adaptation or individualization. The Student's multiple challenges make it unlikely that student will ever exit the program.
  - m. There is no evidence to recommend an evidenced-based primarily punitive program for the Student. The \*\*\* more approximates a correctional facility with its \*\*\*, system of punishers, and level-system requirements for exist than a therapeutic and educational program for the Student.
  - n. For the Student, punishment is a consequence that results in the reduction of student's misbehavior. If administering these consequences does not result in reduction, in the Student's misbehavior the removals and "office referrals" are not acting as punishers for the Student, but rather as reinforcers. Harsh punishment should reduce targeted behavior quickly and should be monitored. If behavior is not reduced, more assessment is needed. Continuing to administer the consequence risks strengthening the behavior for the Student that the \*\*\* is meant to control.
  - o. Punishment should always be paired with differential reinforcement techniques for replacement behavior based on current FBA.
  - p. There is nothing in *CHAMPS* or the *Tough Kid Book/Toolbox*, New Caney ISD's evidence based strategies, to recommend an extensive number of punishment strategies in a lock-down facility in the absence of function-based planning, extensive reinforcement and positive strategies.
  - q. There is no evidence of systematic procedures for gathering meaningful data relative to appropriate and inappropriate behavior constructing visual representations of the data (graphs), and a systematic behavioral analysis principles, Positive Behavior Intervention and Supports (PBIS) principles, or evidence-based practices for the Student for the purposes of future programming.
  - r. \*\*\* staff has received regular training (e.g. TBSI, Differentiated Instruction, CPI, Suicide Prevention, Bullying) and document with logs and daily checkmark sheets. The data does not appear to drive programming purposes. In all the years Student has been in the program student's behavioral goals have not changed, the reinforcers have not changed and the punishers have not changed, even though the severity of student's inappropriate behavior has escalated.
  - s. The Student's levels of problem behaviors may have increased because of \*\*\* procedures and programming. Student has learned to resort to more aggressive and in adaptive behaviors to try to escape non-preferred situations or possibly to obtain adult attention.

- t. Once a new program is implemented, detailed frequency and duration data should be recorded to determine achievement in academic areas. These data should be graphed across time and reviewed weekly until the Student's behavior stabilizes and should guide future educational planning.
- u. The Student's \*\*\* placement affords limited opportunity to generalize any social skills that are learned in a practice environment.

## **Student's Experience in the \*\*\* Placement**

33. Student has attended School District on and off since the \*\*\* school year and has been placed at the \*\*\* within the District on and off since \*\*\* when Student was in \*\*\*.

34. Student has been in the \*\*\* full time since the end of the \*\*\* school year minus the couple of months at the beginning of the calendar year Student attended school on the main campus.

35. Prior to May \*\*\*, the District provided Student with special education services in the general education setting with resource services.

36. The Student's behavior in the \*\*\* is often extremely disruptive, sometime aggressive and violent, and is often characterized by irrational profane statements and aggressive actions that interfere with student's education and the education of student's classmates. Some of the Student's classroom outbursts and attempts to flee the campus can be appropriately found to be a danger to \*\*\*self and others, and require safe and appropriate \*\*\*.

37. \*\*\* is a self-contained special education program for \*\*\* through \*\*\* grade students with severe emotional/behavioral disabilities, and it located \*\*\*.

38. The \*\*\* has \*\*\* isolation rooms, and each room is approximately fifty (50) square feet. The isolation rooms are \*\*\*.

39. The \*\*\* isolation rooms were developed to address students who are acting out of control. The primary goal of the rooms is to de-escalate the rage or irrationality of a student in a manner that causes the least physical harm to the student, until the student is able to bring \*\*\*self and student's emotions under control. The isolation room is meant to be an alternative to physical restraint techniques, such as Crisis Prevention Institute's Non-Violent Crisis Physical Intervention ("CPI") techniques.

40. The District uses the isolation rooms of the \*\*\* with the assumption that there is no specific quantity of times that a student being placed in a locked isolation room that would indicate a problem with the use of the room as a useful tool in managing the student's uncontrolled behavior. The District's underlying assumption of the isolation room as a valid CPI methodology is unchanged even if, as was the case with the Student during the 2010-2011 school year, a Student \*\*\* isolation room.

41. The isolation rooms are a core feature of the \*\*\* and have been used since the program's inception. The rooms are used universally in the program's management of all students with disabilities who are placed in the \*\*\*. They are used with all students who exhibit uncontrolled behavior of a duration or degree that the program's general protocols require assignment to the room—a so-called "office referral." They are used even if a student has an identified anxiety disorder about being placed alone \*\*\*.

42. The isolation rooms were constructed to be in excess of fifty square feet so that they would not all within the legal definition of rooms used for "seclusion", as that term is defined by the Texas Education Code. Some of the original isolation rooms were constructed to be less than fifty square feet, but were re-built to comply with the minimum size requirements established by the Texas Education Agency.

43. The \*\*\* utilizes a series of punishers (time out, including isolation instruction, response-cost, over-correction, restraints) and has a complicated behavior management level system that requires long periods of primarily appropriate social behavior and compliance in order for the Student to move to a less restrictive setting. The \*\*\* level system is a standardized system that is applied to all \*\*\* students, equally.

44. The \*\*\* is neither research-based nor peer-reviewed. It is loosely modeled on aspects of a neighboring school district's program that is designed to address behaviorally challenged students. The current Special Education Director based the District's \*\*\* on what he had heard about the other district's program and has since made changes over the last 7-8 years to the program.

45. The punishment system in the \*\*\* consists of warnings (colored cards and redirects), response-cost procedures (removal of daily/weekly points and desired situations such as talking to peers at lunch, lunch with peers, talking to mother, and time on regular campus), time outs (GYST—removal to the hall, detentions, removal to the office, isolation instruction, door closed isolation, suspensions, removal to the police station), restitution over-correction (cleaning up any property damage), and the presentation of aversive stimuli (physical restraints).

46. The Student, while in the \*\*\*, must maintain a certain level of points in order to receive a short list of standard reinforcers at designated times and to ultimately be allowed to return to the regular campus.

47. The \*\*\* level system does not include a procedure for individually determining effective reinforcers and, as a result, the \*\*\* staff relies heavily on punishment and fear of punishment as the primary motivator for the Student to behave appropriately.

48. Since the \*\*\* level system is based on non-contingent reinforcement and cost-response, that is, all students are given points each day (they do not have to earn them) and points are removed as punishment for various infractions, there is no direct reinforcement of target appropriate behavior that is related to behavioral infractions.

49. The Student is to attain, or maintain, a certain percentage of points that is associated with appropriate behavior. However, the point system is difficult to decipher by the Student, in part, because target behaviors are not operationally defined for student.

50. While at the \*\*\*, Student is placed on a generic, multi-tiered and complex level system that requires strict conformity in order to move up in levels and "earn" student's way back to mainstream classes. \*\*\* level system involves both points and percentages and is uniform for every student in the program and is not individually tailored to the Student's needs and abilities.

51. Whether the Student will be placed in a less restrictive, more integrated setting depends on student's ability to progress through the \*\*\* level system.

52. Student was not provided a chance to be educated in a classroom on student's home campus until \*\*\* of 2011.

53. The Student's education on the main campus in \*\*\* was a limited success. The Student demonstrated an ability to act appropriately with non-disabled students in the hallways and in the classrooms of the main campus.

54. During the Student's limited transition to the main campus, student came to class prepared, followed classroom instruction, appropriately participated in classroom discussions, and completed the assigned work. Moreover, the Student interacted appropriately with student's peers while on the main \*\*\* school campus.

55. During the 2011-2012 school year for an approximated six weeks around \*\*\*, 2011, the Student began a limited transition to a general education campus. However, Student's placement on the main campus

was terminated as the result of one behavioral infraction on a school bus ride home from the \*\*\* campus. After student's placement on the main campus was terminated, the Student did not receive any of student's education on the main campus through the rest of the 2011-2012 school year.

56. The Student is scheduled to start full time in the fall semester, 2012, at the \*\*\* placement.

57. Due to student's low intellectual and academic functioning and ADHD, the Student may have difficulty with infrequent schedules of reinforcement, delayed gratification, enduring periods of isolation and restraint.

58. Regardless of the reason for an "office referral", before entering an isolation room all students must empty their pockets and remove their shoes. The Student's \*\*\* have all been taken before entering these isolation rooms.

59. Examples of the Student's behaviors that apparently warranted total social isolation in the opinion of the \*\*\* staff are: not processing through GYST; refusing to follow directions; slamming a binder down on a desk; and arguing and turning around while in GYST.

60. The Student has been sent to an isolation room in response to behavior that occurred the previous school day. Student has been kept in an isolation room after school, at least once until 7:00 p.m. Student has been locked in an isolation room for four (4) continuous hours.

61. Even if compliant and quietly working in an isolation room, the Student was exposed to the screams of other non-compliant students in adjacent isolation rooms.

62. While in an isolation room, the Student has been denied the use of the restroom and \*\*\*. Also, student has been subjected to ants crawling on student. At one point, while in isolation Student was \*\*\* for up to seven (7) hours.

63. Excel staff has locked the Student in an isolation room, for trying to leave the isolation room's immediate area.

64. The Student does not like to be locked in the isolation rooms and frequently requests to be let out. In some of the confinements in the locked isolation room, the Student has screamed hysterically, cried, attempted to choke \*\*\*self, pleaded with \*\*\* staff to let student out of the room, to go home, to see student's mother or to turn down music; and stated that student was injured.

65. While in an isolation room, the Student is denied any interaction with peers as well as any social skills training needed to make meaningful progress on student's BIP. While in an isolation room, the Student does not receive direct instruction from appropriately qualified teachers, nor is student able to participate in any classroom-like activities.

66. The Student never \*\*\* in a general education placement classroom.

67. Staff at \*\*\* has utilized different kinds of physical restraints with the Student including child's control, two person, and four point. \*\*\* staff also documents a closed and locked isolation room door as a restraint. The Student was restrained over 42 times in a seven (7) month period. \*\*\* staff has physically restrained the Student for trying to leave an isolation room.

68. \*\*\* staff has placed a spit shield over the Student's mouth and/or face at least twice. During times that \*\*\* has placed a spit shield over the Student's mouth and/or face, the Student has complained of being hot and of not being able to stand something placed on student's face.

69. There are no \*\*\* policies on the storage, authorized use, training, or cleaning of spit shields. Spit shields used on the Student have been made of cardboard and laminated paper. The \*\*\* does not directly notify parents of the use of spit shields, nor does the program have documented consent for use of such spit shields on non-compliant children.

70. While receiving education on the main campus during the 2011-2012 limited \*\*\* week transition, the Student was never physically restrained.

71. The set of behavioral goals for the Student have not significantly changed from January 2009 to the present and the Student's IEP does not include goals for any replacement behaviors. The Student's BIP mastery levels were lowered because student was not able to attain the previous year's criteria.

72. A primary function of the Student misbehavior seems to be escape from required academic tasks that student has not been able to master for years. The assigned tasks are difficult for student because of student's intellectual disability, that is characterized educationally by low academic achievement.

73. The \*\*\* has no systematic procedures for gathering meaningful data relative to the Student's appropriate and inappropriate behavior, constructing visual representations of the data, or a systematic procedure for reviewing such data by individuals who understand applied behavioral analysis principles, Positive Behavior Interventions and Supports (PBIS) principles, or evidence-based practices for students with EBD and/or ADHD.

74. The Student's academic mastery criteria were lowered because student was not making progress at the previously stated level. The Student's academic and behavioral progress has not been measured by objective mastery criteria data, but instead only personal, subjective observations and informal scans of documents by student's teachers and student's ARDC.

75. The Student's teachers and administrators have not quantified any progress by the Student, either in behavioral or academic goals.

### **III. Discussion**

In this case, the issue of the Student's educational progress in the District's \*\*\*, turns on the IDEA requirement that a Student with a disability be educated using services and supplementary aides that are based on peer-reviewed and research-based materials, to the extent practicable. The District's use of the \*\*\* as the Student's nearly exclusive educational setting for the last four school years has raised the question of the educational efficacy of the \*\*\* for this Student and whether the Student is capable of receiving a FAPE in that setting. After considering the record as a whole, the Hearing Officer concludes that the Student has not received a FAPE for the past school year and that student should be placed in a setting other than the \*\*\* for the coming school year. Moreover, the Hearing Officer concludes that the Student's IEP that has been implemented in the \*\*\* fails to provide the individualized education, particularly in the area of appropriate behavioral interventions, that this Student requires under IDEA's statutory guarantees.

Central to this decision lie the substantive requirements of IDEA and its implementing regulations. A special education student's IEP must be based on peer-reviewed research-based interventions, where possible. Both IDEA, itself [at 20 U.S.C. §1414(d)(1)(A)(i)(IV)] and federal regulation 34 CFR §300.320(a)(4) provide that special education students' IEP must contain:

[A] Statement of the special education and related services and supplementary aid and services, based on **peer-reviewed research to the extent practicable** to be

provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child:

- **To advance appropriately toward attaining the annual goals;**
- To be involved in and make progress in the general education curriculum in accordance... and **to participate in extracurricular and other non-academic activities;** and
- To be educated and participate **with other children with disabilities and nondisabled children** in the activities described in this section.

(emphasis supplied)

The Hearing Officer concludes that the District's use of the \*\*\* ultimately failed to provide the Student with a realistic opportunity to obtain a FAPE.

### **Statute of Limitations**

The Respondent asserts correctly that this due process hearing is subject to a one year statute of limitations. However, the Hearing Officer refers to aspects of the Student's educational program and placement in the \*\*\* beyond the one year statute not to expand the limits of relief, but to place facts found in this decision within a meaningful context. The Student was placed in the \*\*\* \*\*\* years ago; an FIE upon which the Student's May 13, 2011 ARDC developed an IEP was dated August 24, 2009; and at that same May 13, 2011 ARD student's ARDC considered an OHI report dated November 28, 2006, a Counseling Evaluation dated March 9, 2009, and (perhaps most important) an FBA dated March 10, 2009. The Student's educational progress, or lack thereof, within the limitations period did not happen in a one year vacuum. Neither did the deliberations of the Student's ARD committees that convened *within* the limitation period on this case and voted to maintain the Student's educational program, largely unchanged. The scope of the relief granted by this decision will not extend beyond the lawful limitation period for due process hearings held in Texas. This does not mean, however, that relevant facts beyond the limitation period did not assist in the review of facts that occurred one year prior to the filing of this request for due process hearing.

### **The testimony of \*\*\*, Ph.D**

The failure of Petitioner to provide the Respondent with a proper list of witnesses prior to the start of the hearing casts some doubt as to the admissibility of Dr. \*\*\* hearing testimony regarding her review of the District's \*\*\*. Dr. \*\*\* review is important because it amounts to the closest thing to a peer-review of the \*\*\* by someone who is well-qualified and experienced in the education of children with educational disabilities related to behavioral problems. For the purpose of this decision, all fact findings were made using Dr. \*\*\* April 28, 2012 *written report*, which was timely provided to the Respondent prior to the hearing and

independently reviewed by the District's Special Education Director. Dr. \*\*\* qualifications were taken from her curriculum vitae, which was provided to the Respondent in a timely manner, as well.

### **\*\*\* Deficiencies**

The primary problem with the \*\*\* and Student's special education program is lack of individualization on issues most important to the Student. The Student's disability causes student to express student's academic deficits in a disruptive and sometimes, \*\*\* way. The Student has relatively limited academic capabilities. The primary response to student's substantive class assignments is to engage in work avoidance and misbehavior. All too often, the Student's misbehavior takes a disruptive and violent tone; characterized by profanity, verbal and physical aggression toward student's peers and attempts to flee the class or the campus. The Student requires a BIP based on an FBA that is tailored to address student's positive and negative reinforcers and stressors. The \*\*\* complicated level system is more of a standardized "one size fits all" response to any student's negative behavior. All students who are placed into the \*\*\* must comply with the program's level system disciplinary protocols, at the risk of ending up in an "office referral". There is no evidence that the Student has been excused from complying with any of the core requirements of the program's level system: the arbitrary 93% compliance; three straight weeks of satisfactory compliance before transfer out of the program; or isolation in a locked, padded isolation room, without regard to a student's specific emotional/mental aversion to such isolation. The Student has been asked to fit the behavioral manifestations of student's particular disabilities into the rigidly applied rules of the \*\*\*. This is not functionally different from the Student being required to abide by the rules and consequences of a general education campus' Code of Student Conduct. That the Student has not successfully transitioned out of what was originally meant to be a "temporary" placement after \*\*\* years seems to be of no consequence to the \*\*\* administrators or the Student's ARDC. Such application of a school's rules to all students, regardless of the specific disabilities of the student, seems to fly in the face of the goal of individualized *special* education, under IDEA.

Another problem of the Student's IEP, particularly as it is implemented in the \*\*\*, is the vague nature of the Student's academic and behavioral goals. It is still not completely clear how the point system of the \*\*\* was developed and the 93% compliance target was derived. The program's current administrator candidly testified that the 93% target was determined for all \*\*\* students before her tenure. It is not clear why three straight weeks is required before transition out of the program is possible. The end result is that the Student seems no closer now to leaving the "temporary" placement than student has ever been, despite student's ARDC members' talk of student's "progress" on the goals and objectives of student's IEP and BIP. Such progress has not been *quantified* in a specific, individualized manner. There has been documentation of the Student's misbehavior, but no graphing or quantitative data was collected to show student's ARDC whether student is improving or regressing. Nor is "progress" the appropriate description for the Student's escalating, significantly

more violent behavior and sessions in the isolation rooms. The confused and contradictory statements and requests of the Student's mother and grandmother during the September 9, 2011 ARD meeting illustrate with great clarity the Student's family's frustration with a program in which the Student has exhibited no hope of leaving. The September 9, 2011 ARDC's apparent response to this frustration was to "double down" on the severity of the punishments for the Student's misbehavior. \*\*\* years in and the Student seems to be learning how to be more defiant and aggressive in response to longer office referrals and "no limit time stealing" disciplinary actions.

The Student seems to have made no more than *diminimus* educational progress on student's academic IEP goals and objectives, as that term is used by the Fifth Circuit in *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5<sup>th</sup> Cir. 1997). The last February 1, 2012 FIE reveals cognitive and intellectual deficits that explain such modest academic progress. The Student's ARDC actually lowered the Student's mastery criteria during the 2011-2012 school year. However, the Student's escalating misbehavior may be the main problem with achieving student's academic goals. It is difficult to try positive interventions, peer tutoring and small group teaching (initiatives recommended in student's 2012 FIE) when the Student is placed in a locked or even open isolation room, or hallway adjacent to the isolation room. Little or no instruction takes place in isolation rooms. It may well be that the "noise" of the Student's behavioral problems in the \*\*\* unit "drowns out" the Student's concentration on student's academic subjects, to say nothing of its impact on any social skills learning. Also, it seems to distract student's ARDC from trying newer or more individualized initiatives.

The \*\*\* further fails the Student in its lack of any realistic opportunity for the Student to have *any* interaction with student's non-disabled peers. The Student's ARDC saw fit to place the Student in the \*\*\* without any exposure to non-disabled students in a general education setting: no lunch, no recess, no extracurricular activities, no school trips. The Student's placement affords student with little or no education with non-disabled peers in direct contradiction of the stated requirements of IDEA and its regulations, cited herein, and the Fifth Circuit decision, *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1044 (5<sup>th</sup> Cir. 1989). The Student's one brief, limited transition to a general education campus was abandoned when the Student had a conflict with another \*\*\* student on a school bus. Otherwise, the Student's trial experience on a general education campus for \*\*\* weeks \*\*\*, 2011 seems to support a broader placement than the \*\*\* campus. Nevertheless, the Student's March 6, 2012 annual program review resulted in yet another \*\*\* placement for academic and *non academic* instruction. The record shows that the Respondent did not make a sufficient record to educate the Student in the least restrictive environment as required by 34 C.F.R. §300.114(a)(2). The Student is scheduled to start school at that placement for the 2012-2013 school year. It is no wonder that Student's mother was fearful that the Student could start \*\*\* *school* in the \*\*\* Program. (September 9, 2011 ARD meeting).

This is not to say that the District's approach to the Student is to be assailed, completely. The Student's behavior seems to warrant vigilant supervision and control. Whatever the isolation rooms have become for the Student, the logic of a more passive form of CPI for an out of control student seems sound. Moreover, the District's Special Education Director's testimony that the Student's experience in the \*\*\* placement is not *all* negative, is believable. The Student's program does seem to contain some of the positive reinforcers that Dr. \*\*\* recommends. The problem is that the punishments have become negative reinforcers that result in a denial of FAPE for the Student. The Hearing Officer is not so naïve as to be swayed by the *visuals* of the Student's misbehavior and the school's responses thereto. Handling students who are out of control is neither easy nor pleasant to observe. The Student's future placement *should* provide for student's safety and that of student's classmates. However, the negatives of the \*\*\* have exceeded the positives, for this Student.

Ultimately, the fact that the program is not research-based or peer-reviewed is reason for its rejection for this Student, based the Student's educational experience in the program. IDEA requires that teaching methods be *proven*. Congress could not have been more clear:

- “(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for all children with disabilities.
- (4) However, the implementation of this chapter has been impeded by low expectations, **and an insufficient focus on applying replicable research on proven methods of teaching** and learning for children with disabilities.
- (5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by –
  - ...(D) providing appropriate special education and related services, and aides and supports in the regular classroom,** to such children, whenever appropriate;
  - (E) supporting high-quality, intensive preservice preparation and professional development for all personnel who work with children with disabilities in order to ensure that such personnel have the skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities **including the use of scientifically based instructional practices, to the maximum extent possible...”**

20 U.S.C. §1400(c)(3),(5)(D),(E)  
(emphasis supplied)

The history of the \*\*\* does not support its designation as a peer-reviewed, research-based instructional practice. It appears to be the result of a laudible effort to incorporate an undetermined amount of another school

district's behavioral unit's program, adjusted over time in a manner that cannot be determined by the testimony of record. Based on Dr. \*\*\* expert review of the program for Student, the Hearing Officer concludes that it is possible for the District to use more research-based initiatives in the development of an IEP and a BIP than has occurred by the Student's placement in the \*\*\*.

The Hearing Officer will not attempt to dictate to the District or the Student's ARDC the exact nature of an appropriate placement for the Student or the precise contents of a new IEP or BIP. It may be that additional assessment is necessary, and another FBA and BIP is indicated. However, the specifics of the Student's educational program, going forward, is in the hands of key stakeholders and educational professionals – as IDEA intended. Even if the Hearing Officer had authority to maintain jurisdiction over this case – and this Hearing Officer concludes there is no such authority – such interference would be inappropriate. The District is encouraged to develop an IEP and BIP through which the Student can make academic, behavioral and social progress promised under IDEA.

#### **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 disabilities Attention Deficit Hyperactivity Disorder and a Learning Disability. [20 U.S.C. §1400(3); 34 C.F.R. §300.8(c)(4); 19 T.A.C §89.1040.]

2. The District's \*\*\* is not based on peer-reviewed research based instructional program as recommended by IDEA. 20 U.S.C. §1414(d)(1)(A)(i)(IV); 20 U.S.C. §1400(c)(3),(5)(D),(E), 34 C.F.R. §300.320(a)(4).

3. The District's \*\*\* is not the least restrictive appropriate educational placement for the Student. Moreover, the placement does not provide the Student with sufficient opportunity to be educated with student's non-disabled peers. 20 U.S.C. §1414(d)(1)(A)(i)(IV); 34 C.F.R. §300.114(a)(2); 34 C.F.R. §300.320(a)(4); *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989).

4. The District's \*\*\* placement and the District's implementation of the Student's IEP and BIP therein, did not result in the Student being provided for the entire 2011-2012 school year the "basic floor of opportunity consisting of specialized instruction and related services which are individually designed to provide educational benefit." *Board of Education of the Hendrik Hudson Center School District v. Rowley*, 458 U.S. 176, 201; *Adam J. v. Keller Independent School District*, 328 F. 3d 804, 808 (5<sup>th</sup> Cir. 2003).

5. The Student was denied a free appropriate public education for the entire 2011-2012 school year. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5<sup>th</sup> Cir. 1997).

## **V. Order**

The District is hereby ORDERED to do the following:

1. Provide the Student requires a function-based plan to effectively address the escape function of student's behaviors which should include the goal of reducing or eliminating isolation and restraint as punishers and should provide for the teaching of appropriate replacement behaviors to let student escape.
2. Provide the Student with increased social skills instruction; with multiple opportunities for student to practice the skills with peers (preferably peers who model positive social skills) and to interact with non-disabled peers during lunch and in other non-academic settings.
3. Provide the Student with sufficient counseling services to deal with the Student's anxiety and anger management.
4. Perform a thorough curriculum review to develop an engaging, meaningful, functional curriculum at Student's instructional level in an educational setting away from the \*\*\*.
5. Perform a thorough FBA and develop a BIP for the Student that relies upon a token of reinforcement system, not a level system; and one that is developed based on the findings with information addressing antecedent modifications, replacement behaviors and differential reinforcement strategies.
6. The District is further ORDERED to provide the Student with an educational placement away from the \*\*\* wherein social skills instruction can continue with multiple opportunities for Student to practice the skills with peers, including interaction with non-disabled peers during lunch and other non-academic settings.

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 is GRANTED IN PART as specifically set out in Section V of this decision. All relief not specifically granted herein is hereby DENIED.

ISSUED in Austin, Texas this 3<sup>rd</sup> day of July, 2012.

\_\_\_\_\_  
\_\_\_\_\_/s/\_\_\_\_\_  
Stephen P. Webb  
Special Education Hearing Officer

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

**SYNOPSIS**

**Issue:** Was the District's behavioral unit known as the \*\*\*, wherein a \*\*\* year old with ADHD and LD was placed, a peer-reviewed and research-based instructional practice?

**Federal Citation:** 20 U.S.C. §1414(d)(1)(A)(i)(IV); 20 U.S.C. §1400(c)(3),(5)(D),(E); 34 C.F.R. §300.320(a)(4)

**Texas Citation:** 19 TAC §89.1050(a)(1) .

**Held:** For the Petitioner. Despite IDEA's requirement that a school district use peer-reviewed and research-based instructional practices where possible, the Respondent's \*\*\* does not qualify as such a program.

**Issue:** Was the Student's placement the least restrictive appropriate placement for a student with behavioral problems?

**Federal Citation:** 34 C.F.R. §300.114(a)(2); 34 C.F.R. §300.320(a)(4)

**Texas Citation:** 19 TAC §89.1080

**Held:** For the Petitioner. The record shows that Respondent did not make a sufficient effort to educate the Student in a less restrictive environment or with non-disabled students in any of the possible academic or non-academic activities or educational settings.

**Issue:** Did the Student receive a FAPE in the \*\*\* placement?

**Federal Citation:** 20 U.S.C. §1414; 34 C.F.R. §300.320-§300.325; *Board of Education of the Hendrik Hudson Center School District v. Rowley*, 458 U.S. 176 (1982)

**Texas Citation:** 19 TAC §89.1050; *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5<sup>th</sup> Cir. 1997)

**Held:** For the Petitioner. The Student made no more than *diminimus* progress on student's vague academic and behavioral goals because of student's IEP and the \*\*\* placement.