

DOCKET NO. 036-SE-1010

STUDENT bnf PARENT § **BEFORE A SPECIAL EDUCATION**
§
VS. § **HEARING OFFICER FOR**
§
CORPUS CHRISTI ISD § **THE STATE OF TEXAS**

DECISION OF HEARING OFFICER

Student (hereinafter “the student”) through his next friend, Parent (Petitioner), requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. § 1400 et. seq. The Respondent is the Corpus Christi Independent School District.

In the Request for Hearing, Petitioner alleged that CCISD denied the student a Free Appropriate Public Education (FAPE) during the student’s enrollment during portions of the 2009-2010 school year, ESY during the Summer of 2010 and during the 2010-2011 school year through the date of hearing.

The issues are as follows with regard to services during August 2009-December 2010, April 2010 – June 2, 2010, and Summer of 2010 time periods.

1. Whether the District failed to conduct an FBA.
2. Whether the District failed to implement appropriate behavior strategies.
3. Whether the failure to conduct the FBA and implement appropriate behavior strategies restricted the student’s participation in school life activities.
4. Whether the District failed to conduct a counseling evaluation.
5. Whether the District failed to conduct a timely re-evaluation.
6. Whether the student’s IEP goals and objectives are appropriate and based on the student’s current needs.
7. Whether the District refused to provide in-home training.
8. Whether the district failed to conduct a timely ARD Committee meeting when the child re-entered the District in April 2010.
9. Whether the District denied the student the opportunity to participate in the implementation of the *** when it required the parent to attend with her.
10. Whether the District failed to implement the *** goals.
11. Whether the District inappropriately *** for behaviors related to her disability.
12. Whether during the summer of 2010 the District failed to implement adaptive behavior goals for ESY.
13. Whether during the summer of 2010, the District developed a BIP or conducted a counseling evaluation.
14. Whether the District provided appropriate services during ESY 2010 in the areas of writing and math.

Petitioner complains of the following for the 2010-2011 school year.

1. Whether the District developed an appropriate BIP.
2. Whether the District failed to implement the IEP.
3. Whether the District allows the student to *** and fails to address those behaviors in a BIP.
4. Whether the September 2010 IEP is based on an appropriate evaluation.
5. Whether the IEP goals are appropriate.
6. Whether the District has appropriately implemented the IEP.
7. Whether the District has failed to conduct a counseling evaluation.
8. Whether the District timely re-evaluated the student.
9. Whether the IEP is inappropriate because it is based on data that is not current.
10. Whether the District has failed to provide appropriate supportive services, such as an aide.
11. Whether the District has failed to appropriately address life skill needs in the student's IEP.
12. Whether the student has been educated in the least restrictive environment.

As relief, Petitioner requested:

1. An order requiring the District to develop and implement an appropriate IEP.
2. An order that the District conduct appropriate evaluations.
3. One year of compensatory education in all academic areas, or an amount deemed appropriate by the Hearing Officer.

PROCEDURAL HISTORY

Petitioner filed this request for hearing on October 12, 2010. A hearing was held on January 10, 2011. Petitioner was represented by attorney Christopher Jonas. The Corpus Christi Independent School District was represented by attorney John Janssen. At the conclusion of the hearing, both parties requested an opportunity to submit written argument and proposed findings of fact and conclusions of law. The decision due date was extended for good cause to allow an opportunity to submit written argument. The decision due date was extended to February 22, 2011. The Decision was timely rendered and forwarded to the parties.

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusions of law. Citations to the transcript will be designated "RR" with a notation of the volume number and page number. Citations to Petitioner's and Respondent's Exhibits will be designated with a notation of the "P" or "R" followed by the exhibit number.

FINDINGS OF FACT

1. The Corpus Christi Independent ISD is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing Student a free appropriate public education (FAPE) 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 IDEIA.
2. The student resides within the geographical boundaries of the Corpus Christi Independent School District. CCISD is responsible for providing the student with a FAPE.
3. The Petitioner meets eligibility criteria and presents educational needs for special education services as a student with disability classifications of Mental Retardation and Speech Impairment. At the time of hearing, the student was in the *** grade. (P-27).

4. The student receives instruction in the *** classroom, a self-contained classroom, for all of her school day except physical education and music. (P27-19; RR16). She also receives weekly speech therapy services.

5. During the Fall of 2009, the student was enrolled in Corpus Christi ISD, attending ***. (R3). The student's annual IEP was developed in September of 2009.

6. The student withdrew from CCISD and attended *** ISD from *** 2010 and then returned to the District. (RR37). After her return, the student attended ***. (RR97-101). Although the District did not convene a transfer ARD, the student received special education services and the District convened an *annual* ARD meeting on May 25, 2010. (P2).

7. The student was enrolled in CCISD for multiple school years but not continuously. She was enrolled in *** ISD at the time of her 2004 and 2007 evaluations (R14; R15), but was enrolled in CCISD for a portion of the 2004-2005 school year and for the 2005-2006 school year. (R9; R10). In *** of 2008, she was once again in *** ISD, but returned to CCISD by *** 2008. (R7; R8). The student was *** from *** of 2007 until *** of 2008, and returned to the CCISD by the beginning of the 2008-2009 school year. (RR63-64; R6; R7). She attended CCISD continuously from *** 2008 through the date of hearing, except for a brief period of time during the 2009-2010 school year (*** through approximately ***) when she was enrolled in *** ISD and when the student was previously enrolled in the District. (P31; RR31-37).

8. The student exhibits inappropriate behaviors in the school setting that impede her education. According to the teacher's conduct log, she is at times ***, refuses to work, refuses to stay in her assigned area, ***, runs from staff, ***, and disrupts class. She also *** in class. These behaviors are documented in a conduct log beginning in April 2010 (P8). Similar behaviors were documented while the student attended *** School. (P14).

9. The student exhibits similar behaviors at home. (RR52, 57). The student's *** observed the inappropriate behaviors in both the school and home settings. (RR72). The *** testified that the only intervention she had observed by school personnel was when an aide attempted to gain the student's attention by hitting a ruler on a desk. (RR74). According the ***, the student's behaviors can occur sporadically or unexpectedly, and are severe. (RR72-74).

10. The *** has worked with the student for approximately 22 months as ***. (RR70-72). *** testified that she spent a minimum of one hour a month with the student, and sometimes more. Additionally, she monitors the student's educational services as a part of her duties with ***. (RR73-76). I find *** testimony regarding her observations of the student and the interventions to be credible.

11. The student's 2010-2011 IEP contains numerous goals and objectives that were being implemented in 2005, many of which were reported as mastered in 2005, but as "in progress" in 2010. (R6; P27;P28; P32). These same goals and objectives were also in the student's 2008 IEP.

12. The ARD Committee conducted a Review of Existing Evaluation Data in September 2009 and determined that further assessment was not warranted. (R3)

13. The District did not conduct a functional behavior assessment at any time during the 2009-2010 school year.

14. The District failed to convene a timely transfer ARD meeting when the student reenrolled in the District in April 2010. Rather, the District waited until late May 2010 and conducted an annual ARD. (R2).

15. The District failed to develop an appropriate BIP. Although the District adopted behavioral goals during a September 2010 ARD meeting, the goals failed to specifically address the student's problematic behaviors and are vague. (R1-14) The goals and objectives generally address the need to increase positive behaviors and decrease negative behaviors without identifying the target behaviors. The goals and objectives do not specifically address her ***.

16. The IEP fails to identify positive reinforcements and consequences to decrease negative behavior and/or increase positive behavior. (R1-14).

17. The student's teacher maintained a log of the student's behavior which appears to merely contain data regarding the behavior rather than the interventions, supports and consequences utilized to address the behavior. (P8).

18. The District administered an in-home training assessment on October 19, 2010. However, as of the date of the hearing, the ARD Committee had not convened to consider or act upon the assessment. (RR172).

19. The student participated in ESY during the summer of 2010. However, the ARD Committee did not approve goals and objectives for the summer, but identified that the student needed services in language arts and adaptive behavior or socialization. (R2-19). The program was available to all students with moderate to severe disabilities and was not necessarily individualized for the student. (RR173). No specific goals and objectives were identified by the ARD Committee to be implemented during ESY. The teacher testified that he created separate goals and objectives for the ESY program based on the student's then current IEP but did not present them to either the parent or the ARD Committee. (RR174-176).

DISCUSSION

Petitioner complains separately about two distinct periods of enrollment in CCISD that occurred within one year of the date of filing of this request for hearing. She complains that during the Fall Semester of 2009, as well as a portion of the Spring Semester of 2010, the summer of 2010 and the 2010-2011 school year, the District denied a her FAPE. Her complaints can be separated into the following general areas: (1) timely and appropriate evaluation; (2) behavioral intervention; (3) related services of in-home training and counseling; (4) appropriateness of the student's IEP; (5) implementation of the student's IEP; (6) ***; (7) least restrictive environment; and (8) ESY services.¹

The educational program offered by the school district is presumed to be appropriate. Petitioner, as the party challenging the educational program bears the burden of proof in showing why the IEP is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). *Schaffer v. West*, 126 S.Ct. 528 (2005). This includes the burden of proof with regard to harm or a deprivation of educational benefit. The law does not require that the student's educational potential be optimal or "maximized" but that the program enable the student to receive some educational benefit from his program. The Petitioner has met her burden with regard to the appropriateness of the student's IEP and the behavior assessment and intervention provided by the District. She has failed to meet her burden with regard to the remainder of her claims.

¹Petitioner failed to present competent evidence with regard to the necessity or need for a counseling assessment or counseling services, ***, failure to implement ***, or that the student's placement was too restrictive. Therefore, Petitioner has failed to meet her burden and does not prevail on these issues and they will not be addressed herein.

Did the District Fail to Develop and Provide an Appropriate BIP and IEP?

The United States Supreme Court established a two-prong test for determining whether a school district has provided a free appropriate public education. The first inquiry is whether the school district complied with IDEIA's procedural requirements. The second inquiry is whether the student's IEP is reasonably calculated to confer an educational benefit. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S.Ct. 3034 (1982). An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Id.*; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

1. *Procedural Sufficiency*

IDEIA establishes certain procedural requirements in formulating and implementing a child's IEP. Procedural flaws do not automatically require a finding of a denial of a free appropriate public education. However, procedural inadequacies that impede the child's right to a FAPE, result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the development of the IEP result in the denial of a free appropriate public education." 20 USC 1415 (f)(3)(E); *Adam J. v. Keller ISD*, 328 F. 3d 804 (5th Cir. 2003). In this case, the District and the ARD Committee committed several procedural errors that impeded the child's right to a FAPE and resulted in a loss of educational benefit to the child.

A. *Evaluation*

The student was enrolled in CCISD for multiple school years but not continuously. She was enrolled in *** ISD at the time of her 2004 and 2007 evaluations (R14; R15) but was enrolled in CCISD for a portion of the 2004-2005 school year and for the 2005-2006 school year. (R9; R10). In *** of 2008, she was once again in *** ISD, but returned to CCISD by *** 2008. (R7; R8). She attended CCISD continuously from *** 2008 through the date of hearing, except for a brief period of time during the 2009-2010 school year (*** through approximately ***) when she was enrolled in *** ISD. (P31; RR31-37).

With regard to the evaluation, the parent complains that the student's three year reevaluation was not timely. The student's initial evaluation for special education occurred on February 4, 2004 when she was *** years of age and enrolled in another school district). (R14). That same district administered additional testing at the time it conducted its three-year reevaluation when the student was in ***. (R15). The student's next three-year reevaluation was due on or before February 9, 2010. *See* 34 C.F.R. § 300.303(b)(2). In September of 2009, the school conducted a Review of Existing Evaluation Data (REED) and determined that further evaluation was not necessary. (R3-2). This is an acceptable practice under the federal regulations, so the parent's complaint that the reevaluation was *not timely* is without merit. 34 CFR §300.305(a)(2); 300.305(d).

B. *Failure to Develop IEP based on Appropriate Evaluation*

The Petitioner also complains that the IEP for the 2010-2011 school year is inappropriate because it was based on an *inappropriate* evaluation. Although the REED occurred within the three years required by IDEIA, and was therefore timely, the District's decision not to conduct further evaluation is a procedural error that impacts not only the appropriateness of the evaluation, but the substantive sufficiency of subsequent IEP's based on that evaluation. The September 2009 Assessment/Evaluation Planning Supplement reflected that the student has severe cognitive delays consistent with her diagnosis of mental retardation. However, a reevaluation is necessary when there are questions about the student's present levels of academic achievement and related developmental needs,

and whether any additions or modifications to the student's program are needed to enable her to meet measurable annual IEP goals and to participate, as appropriate, in the general curriculum. See 34 C.F.R. §300.305(a)(2)(ii); 300.305(a)(2)(iv). The data before the District at the time was suggestive of a need for further assessment. The student's records during the Fall of 2009 reflect that the school continued to work on the same goals and objectives with the student over a period of years, even when the goals had been previously mastered. For example, in 2005 (the student's *** year), the student's IEP contained a goal for social skill development, with an objective for stating her first and last name with 50% mastery. This goal was mastered by the end of the 2005-2006 school year. (P32) However, this goal and objective was repeated in her IEP for the 2008-2009 and 2010-2011 school years, with a notation that it was still in progress. (P27; P28) Additionally, objectives for engaging in a simple game with an adult or peer and taking turns were reported as mastered or "almost mastered" in 2005 but repeated in her 2008 and 2010 IEP (R6; P27; P28; P32). Her 2008 and 2010 IEP contained a goal for motor skill development, with objectives that she be able to bounce a ball from the floor 3 consecutive jumps, throw a ball 48 inches, and catch a large ball by clasping it to her body. These objectives were also purportedly mastered during the 2005-2006 school year. (R6; P27; P28; P32) Similarly the manual dexterity goal mastered in 2005 was carried over to the 2008 and 2010 IEP. (R6; P27; P28; P32). Her 2005 IEP progress reports indicated she mastered the cognitive objectives of indicating her age on her fingers, identifying pictures on picture cards, and identifying and counting objects, but these same objectives were carried over to her 2008 and 2010 IEP. (R6; P27; P28; P32).

Although the IDEIA contemplates that the child's parents and the ARD Committee may determine that further evaluation is not necessary, such a failure to conduct further assessment may result in a denial of FAPE if it results in the maintenance of an inappropriate IEP or placement. That is what occurred in this case. Given the continuation of goals and objectives from previous years, and a reported lack of mastery, the District should have recognized that the IEP was inappropriate and sought further assessment in order to determine the student's current levels of functioning to develop an appropriate IEP. In any event, whether the goals had been previously mastered or not, the continuation of them year after year is evidence that the student's program was not based on an assessment of the student's current needs.

C. Failure to conduct Functional Behavior Assessment.

The September 2009 Assessment/Evaluation Planning Supplement also provides that the student's behaviors interfered with her learning environment in a general education setting, and her special education teacher reported that she was defiant and used *** on a daily basis. (R3). However, the student continued to participate in the general education curriculum for physical education and music with no identified supports or interventions. (R3-13) Although there are internal inconsistencies in the report, such as that she respects authority, is cooperative, and interacts appropriately with adults, these statements are inconsistent with the reports of *** and defiance. (RR3-1; 13). Further, it is not reasonable to conclude that the student's behaviors developed suddenly in 2010 and did not exist at the beginning of the 2009-2010 school year, especially in light of the student's *** testimony. If the student was exhibiting behavioral difficulties that impeded her participation in the general education setting, being *** in the classroom, a functional behavior assessment would have been warranted at that time. No additional assessment was conducted to assess the student's behavioral needs until September 2010. When a student's behavior impedes her learning, then the ARD Committee must consider the use of positive behavioral interventions and supports and other strategies to address that behavior. 34 C.F.R. § 300.324(a)(2). The District failed to do so in a timely manner.

D. Failure to timely convene transfer ARD in April 2010.

The evidence is undisputed that the student was not enrolled in the District from *** 2010 until ***, 2010, when she reenrolled in the District from *** ISD. However, no ARD Committee meeting was held until May 25, 2010. (P28; RR39-40). Although there was only an absence of *** from the District, the District was obligated under the applicable regulations to convene an ARD Committee meeting to adopt the student's IEP from the prior

school or develop, adopt and implement a new IEP. See 34 C.F.R. §300.323(e); 19 Tex. Admin. Code 89.1050(f).

Data from *** ISD reflected that the student had mastered goals and objectives such as knowing her name, showing her age on her fingers, naming colors (P29), yet these goals and objectives were adopted by the CCISD ARD Committee on May 25, 2010. (P28). The teacher acknowledged that he continued to work on these repeated goals and objectives prior to the May 2010 ARD Meeting, even though they had been noted as previously mastered. The *** ISD IEP included a proposed Behavior Intervention Plan that addressed the student's inappropriate behaviors, and identified positive reinforcements and consequences. (P30-5) CCISD, however, did not adopt a BIP when it convened in May 2010, and a BIP was not included in the September 2009 IEP it had previously provided the student. (R3). The ARD Committee did not review or discuss the student's educational program from the transferring district. (P28-22) It is apparent from the record that the District treated the student as though she had never left the District and did not timely convene an ARD Committee meeting upon the student's return to the District and review the data from *** ISD. Consequently, the District continued to work on objectives that were not appropriate for her then current educational needs.

2. *Substantive Sufficiency*

Petitioner complains that the student's IEPs for the relevant time periods were not appropriate. The school's program is appropriate if it is reasonably calculated to confer a meaningful educational benefit. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S.Ct. 3034 (1982). An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Id.*; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

In evaluating whether an educational program is reasonably calculated to confer an educational benefit, the Fifth Circuit Court of Appeals has identified four factors to consider:

1. Is the program individualized on the basis of the student's assessment and performance?
2. Is the program administered in the least restrictive environment?
3. Are the services provided in a coordinated and collaborative manner by the key stakeholders?
4. Are positive academic and nonacademic benefits demonstrated?

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245 (5th Cir 1997); cert. denied, 522 U.S. 1047 (1998).

In applying these factors to the facts of this case, I find that the student's educational program for *** through *** 2010, the summer of 2010, and the 2010-2011 school year through the date of hearing was not calculated to and did not provide a meaningful educational benefit. The district's educational program is entitled to a legal presumption of appropriateness. Petitioner bears the burden of proving that it is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). Petitioner has met her burden.

Is the Program Individualized on the Basis of the Student's Assessment and Performance? Are the Services Provided in a Collaborative Manner by Key Stakeholders?

A fundamental principle of IDEIA is that disabled students have access to a free appropriate public education. During the relevant time frame, the preponderance of the credible evidence establishes that the student accessed no meaningful benefit from her educational program in CCISD in part because the program was not individualized for the student based on her assessment and performance and in part due to the lack of collaboration among key stakeholders.

As stated above, the District failed to conduct further assessment of the student in 2009 when IEP goals and

objectives had been repeated since 2005. Neither party offered the Goals and Objectives from the September 24 2009 IEP into evidence. Therefore, I will make no finding as to the appropriateness of the September 24, 2009 IEP. However, the IEP developed in May and September 2010 on its face reflects that 12 of the objectives adopted by the ARD Committee had a start date of May 2005 and are identical to goals and objectives from the student's September 24 2008 IEP and September 2005 IEP. (R1; R2-7-13; R6; P27; P28; P32). According to the IEP progress report from May 2006, many of these goals and objectives had been mastered. (P32). The continuation of the same IEP goals indicates that the goals and objectives were not mastered or the IEP was not individualized based on current assessment and performance. It cannot be said that the student made meaningful progress given the almost wholesale repetition of prior years' IEP goals and objectives.

Additionally, although the special education teacher reported in 2009 that the student's behavior impeded her access to education in the general education curriculum, and reported aggressive and defiant behavior in the special education classroom, the District failed to conduct a functional behavior assessment or develop a Behavior Intervention Plan to address those behaviors, and waited until September 2010 to do so. (R1-26) Although the student's teacher created conduct logs detailing the student's *** and defiant behaviors in the Spring of 2010, the District did not conduct an FBA until the following semester, and, in fact, indicated on the May 2010 IEP that the student's behavior did not impede her learning or that of others. (P28) This was inconsistent with the conduct logs as well as other statements in the IEP regarding the student's behaviors.

The District contends that it developed a BIP by including behavioral goals in the student's IEP. The IEP contains general goals and objectives for increasing positive behaviors, decreasing negative behaviors and maintaining compliant behaviors. (R1-14). These objectives are vague and immeasurable. Additionally, the goals do not specifically address the problematic behaviors identified in the FBA: ***, and do not include specific strategies, interventions or positive reinforcements to address the behavior.

IDEIA and its implementing regulations require an ARD Committee to "consider" the use of positive behavioral supports, interventions and strategies in the development of an IEP for a student whose behavior impedes his learning or that of others. *See* 34 C.F.R. §300.324(2). Although the federal regulations do not require a written BIP in all cases, failure to reduce the BIP to writing may result in a denial of FAPE if the District is in fact not implementing a systematic behavior program. *See, e.g., School Bd. Of Indep. Scho. Dist. No. 11 v. Renollett by Renollett*, 45 IDELR 117 (8th Cir. 2006). In this case, the student did not progress academically as evidenced by the continued repetition of IEP goals and objectives, but the teacher testified that by the time of the hearing her behavior was improving. (RR165). However, the parent and *** both testified that the student continued to exhibit the same behavior, and the teacher acknowledged that the behavior was sporadic. The teacher testified that he implemented consequences and positive interventions to address the student's behavior as contained in the Functional Behavior Assessment by utilizing a behavior chart (RR169). However, the teacher could not identify any specific strategies, consequences, or positive reinforcements used to address the student's behavior, other than the development of a chart that appeared to be nothing more than a method of collecting behavioral data. It would be impossible for other instructional staff or the parent to review the IEP and the behavior chart and obtain guidance on how to manage the student's behavior. The District failed to develop a specific, coordinated, collaborative plan that identified problem behaviors and and specific consequences for those behaviors.

Are positive academic and nonacademic benefits demonstrated?

Respondent does not contend that the student made academic progress during the relevant time periods. In fact, the student's IEP reflects repetition of identical goals and objectives over a period of years, which is inconsistent with meaningful academic benefit. Although the teacher testified that he believed the student made some progress during this school year, meaningful behavioral benefit is not consistent with the evidence as a whole. *** and the parent both testified that the student continues to exhibit *** and defiant behaviors. The

student's conduct log continues to reflect behavioral difficulties in the classroom and during transition times. (P8). The student's performance does not reflect meaningful academic and nonacademic benefits.

Is the program administered in the least restrictive environment?

The student's placement was not an issue. The evidence supports a finding that the self-contained classroom is appropriate, and Petitioner did not present any evidence that it was not.

3. Related Services/ESY

When the ARD Committee convened at the beginning of the 2010-2011 school year, the teacher recommended an in-home training assessment. The survey was completed on October 9, 2010, but had still not been reviewed by the ARD Committee as of the date of the hearing but was scheduled for review on January 25, 2011. (RR172). Although there is a delay between the initiation of the in-home services survey and the review and approval of services by the ARD Committee, this same issue was the subject of another due process hearing involving the same parties in Docket No. 102-SE-0111, which has been resolved as of the date of this Decision. Petitioner failed to produce any evidence at the time of this hearing that the delay in convening an ARD Committee to discuss the in-home training assessment resulted in a deprivation of educational benefit. Petitioner has wholly failed to meet her burden on this issue.

With regard to Extended School Year Services, the ARD Committee determined in May 2010 that ESY services were necessary for the student to receive a FAPE. (P28). By definition, ESY services are services that are provided to a disabled student that extend beyond the normal school year and are provided in accordance with the student's IEP and are *individualized*. 34 C.F.R. § 106(b); 89 Tex. Admin. Code § 89.1065. Tex. Admin. Code § 89.1055(c) provides that when the ARD Committee determines the need for ESY services, the IEP must include goals and objectives for ESY services from the student's current IEP. In this case, the IEP provided that the student may be expected to regress if she did not receive ongoing services in the areas of language arts and adaptive behavior/socialization. (P28-19). However, the teacher testified that he created ESY goals and objectives outside the ARD Committee and never provided them to the parent. (RR174-175). The ESY program for 2010 is inappropriate for three reasons. First, the IEP does not identify which goals and objectives were to be addressed in the ESY program. Second, the process in developing the ESY goals failed to include collaboration among key stakeholders as required by *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F, supra*. Finally, assuming there is no requirement that additional goals and objectives for ESY be included in the IEP because the services are in actuality a continuation of the student's then current program, the student's May 25, 2010 IEP was inappropriate because it was not based on an appropriate assessment or current data, and further, was the mere repetition of goals and objectives from previous years. If the May 25, 2010 IEP was inappropriate during the regular school year, the implementation of the goals and objectives during summer was also inappropriate.

RELIEF

For relief, Petitioner requests prospective relief and compensatory services that can be categorized in the areas of assessment, IEP development, implementation and compensatory education.

Compensatory relief is available under IDEA as an equitable device to remedy substantive violations. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). IDEA requires that relief be designed to ensure that the student is appropriately educated within the meaning of IDEA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9th Cir. 1994). Thus, determining what compensatory relief is appropriate turns on a consideration of the extent of the denial as well as what services would be needed to provide a

free appropriate public education in light of that denial.

In this case, the amount of compensatory services should be measured by the length of time the student was unable to access educational benefit from his program due to the District's failure to develop and implement an appropriate IEP and BIP. However, Petitioner failed to offer any evidence as to the contents of the student's IEP that was in effect from October 12, 2009 through her withdrawal from the District ***. Although one could speculate that the IEP goals and objectives were consistent with the 2005, 2008 and 2010 IEP's, Petitioner failed to meet her burden with regard to the IEP goals and objectives during *** of 2009. Therefore, any deficiencies in the student's program for that time period will not be compensated.

The student's program provided no meaningful educational benefit for the time periods *** 2010, Summer 2010 and the 2010-2011 school year to the date of hearing for the reasons set forth herein. While there is no specific formula which must be applied in determining an appropriate award, the student's progress or lack of progress must be taken into consideration. In this case, the District failed to develop appropriate, measurable annual goals for the student, but instead repeated goals and objectives from previous school years, and failed to develop an appropriate behavior intervention plan. When the ARD Committee did adopt behavioral goals in the Fall of 2010, they were vague and not measurable. According to the student's IEP progress reports, she did not master the repeated goals even though the District previously reported they had been mastered in 2005. The continuation of the same IEP goals indicates that the goals and objectives were not mastered or the IEP was not individualized as to the student's needs. This is the functional equivalent of no IEP at all. It cannot be said that the student made meaningful progress given the repetition of prior years' IEP goals and objectives. Therefore, based on the facts in this case, I find that it is appropriate to award the student compensatory educational services in all core academic areas, with the total amount of the award to be equal to the amount of instructional time available to the student from the date she reenrolled in CCISD in ***2010 through the end of the 2009-2010 school year, the time period in which she was enrolled in ESY during the summer of 2010, and from the first day of school during the 2010-2011 school year through the date of hearing on January 10, 2011.

The second element of compensatory relief turns on a consideration of what services are needed to provide a free appropriate public education in light of the denial of FAPE. A logical approach would be to require Respondent to structure the compensatory educational services such that they are proportionately consistent with the schedule of services in place during the school year in question. However, such a rigid approach would not necessarily be consistent with the student's current educational needs. And, because of the District's failure to conduct an appropriate evaluation, a full individual evaluation is needed not just to determine the student's current needs for ongoing educational services, but to determine the areas in which compensatory services should be provided. Therefore, the District is Ordered to conduct a reevaluation, consistent with the requirements of 34 C.F.R. §300.304-300.311, utilizing the personnel and the methodology as recommended by the ARD Committee, to determine the student's current educational needs and the type of services appropriate to respond to those needs. The evaluator shall make recommendations for current programming and compensatory services, including, but not limited to summer programming, in-home services, parent training, tutoring or any related services the evaluator recommends as appropriate. The evaluation should include testing in the areas of cognitive functioning and adaptive behavior, academic functioning and developmental skills, and an emotional/behavioral assessment, as well as any other areas deemed appropriate by the evaluator.

The District is further ordered to convene an ARD Committee meeting within 30 days of completion of the evaluation to develop an IEP, implementing the recommendations of the evaluator. The District shall also develop a schedule for the provision of compensatory services recommended by the evaluator and complete the services no later than September 1, 2013, or at a later time if mutually agreed upon by the parent and the District. In the event the District provides compensatory educational services over the summer months, these services shall be in addition to and not in lieu of Extended School Year services absent an agreement of the parent.

Additionally, as prospective relief, Respondent shall provide training to all campus personnel who work with the student designed to educate them regarding the student's disability and the implementation of her IEP and management of her behaviors. The District shall provide documentation of this training to the parent and TEA no later than September 1, 2011.

CONCLUSIONS OF LAW

1. The student currently resides within the geographical boundaries of Corpus Christi ISD, a legally constituted independent school district within the State of Texas, and is entitled to special education services pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. §1400, et seq., as amended.

2. The District's educational program is presumed to be appropriate. As the party challenging the educational program proposed by the district, Petitioner bears the burden of proof. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), aff'd 468 U.S. 883 (1984) and must show more than a de minimis deprivation of educational benefit. *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). Petitioner has met that burden with regard to the educational program in place for the student during the time frames April –June 2010, ESY 2010, and the IEP for the 2010-2011 school year.

3. The relevant time period for relief in this case begins on the date the student reenrolled in the District in *** 2010 and extends through the end of the 2009-2010 school year, the time period in which the student was enrolled in ESY during the summer of 2010, and the 2010-2011 school year through the date of hearing. During the relevant time period, CCISD denied the student a FAPE. Her IEP goals were not reasonably calculated to provide an educational benefit, and were not based on current assessment data. Additionally, the student made no meaningful academic progress during the relevant time period as evidenced by the repetition of IEP goals and objectives from 2005. The denial of FAPE in this case was more than de minimis. *Hendrick Hudson District Board of Educ. v. Rowley*, 458 U.S. 176 (1982); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

4. During the relevant time period, the District relied on an inappropriate evaluation to develop and implement the student's IEP's because it determined that no further assessment was needed in *** of 2009. This procedural error resulted in a denial of FAPE. 20 USC 1415 (f)(3)(E); *Adam J. v. Keller ISD*, 328 F. 3d 804 (5th Cir. 2003).

5. Petitioner is entitled to compensatory education services and prospective relief to remedy the denial of FAPE. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). IDEIA requires that relief be designed to ensure that the student is appropriately educated within the meaning of IDEIA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9th Cir. 1994).

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, I hereby **ORDER** that the relief sought by the Petitioner is hereby **GRANTED, in part**, as follows:

1. Respondent shall provide the student with compensatory education services, which may consist of instruction in all core subject areas and social skills instruction, and which may consist of summer programming, in-home services, parent training, tutoring, and any further related services recommended as appropriate by the evaluator to meet the student's current individual needs. Respondent is ordered to calculate the number of instructional hours available to the student from the date the student reenrolled in the District in *** 2010 through the end of the 2010-2011 school year, the time during which she was enrolled in ESY during the Summer of 2010, and the 2010-2011 school year through the date of hearing, exclusive of absences, and to provide compensatory educational services in an amount equal to that sum. All compensatory educational services shall be completed by September 1, 2013, or at a time mutually agreed upon by the parties consistent with terms hereinabove.
2. Respondent shall conduct a reevaluation, complying with the requirements of 34 C.F.R. 300.304-300.311, utilizing the personnel as recommended by the ARD Committee, to determine student's current educational needs and the type of compensatory services appropriate to respond to those needs. The evaluation should include testing in the areas of cognitive functioning and adaptive behavior, academic functioning and developmental skills, and an emotional/behavioral assessment, as well as any other areas deemed appropriate by the evaluator.
3. It is ordered that the assessment ordered in paragraph 2 above shall also address the student's needs for current educational programming, and the District shall convene an ARD Committee meeting within 30 days of the completion of the evaluation to review the evaluation, develop and IEP, and implement the recommendations of the evaluator.
5. The District shall provide training to all campus personnel who work with the student designed to educate them regarding the student's disability and the implementation of her IEP. The District shall provide documentation of this training to the parent and TEA no later than September 1, 2011.
6. The ARDC shall meet within ten (10) school days of receipt of this decision to begin implementation of the relief ordered herein.

All other relief not specifically granted herein is hereby **DENIED**.

NOTICE TO THE PARTIES

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

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

SIGNED this 22nd day of February, 2011.

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

SYNOPSIS

Issue No. 1: Whether the District timely evaluated the student?

Held: For the District. The District conducted a Review of Existing Evaluation Data prior to the 3rd anniversary of the student's previous evaluation and determined that further assessment was not necessary. The REED was conducted timely.

Citation: 34 CFR §300.305(a)(2); 34 CFR 300.305(d)

Issue No. 2: Whether the 2009-2010 and 2010-2011 IEPs were inappropriate because they were not based on an assessment of the student's current needs?

Held: For the Petitioner. Given the continued repetition of the student's IEP goals and objectives, the District should not have determined that further evaluation was not needed and conducted further assessment. Additionally, the student's behavior impeded her learning and the District should have conducted a Functional Behavior Assessment prior to the beginning of the 2010-2011 school year.

Citation: 34 CFR §§300.305(a)(2)(ii) and 300.305(a)(2)(iv); 34 CFR 300.324(a)(2)

Issue No. 4: Whether the District failed to timely convene a transfer ARD Committee meeting when the student re-enrolled in the District?

Held: For the Petitioner. The student re-enrolled in the District on *** and the District failed to convene an ARD Committee meeting until May 25, 2010, rather than within 30 days of enrollment. 34 CFR §300.323(e); 19 Tex. Admin. Code §89.1050(f)

Issue No 5: Whether the student's IEP was inappropriate?

Held: For the Parent. The IEP repeated goals and objectives from 2005 and 2008 school years when the student was previously enrolled in the District, some of which had been previously mastered. The IEP was not individualized for the student based on her then current educational needs.

Citation: *Cypress-Fairbanks Sch. Dist. V. Michael F.*, 118 F.3rd 245 (5th Cir. 1997); cert. denied, 522 U.S. 1047 (1998)

Issue No. 6: Whether the District developed and implemented an appropriate BIP?

Held: For the Parent. The behavior goals were not specific and did not address the student's problematic behaviors. Additionally, the BIP did not contain positive behavioral supports, consequences and strategies for addressing the student's behavior.

Citation: 34 C.F.R. §300.324(2)

Issue No. 7: Whether the student's Summer 2001 ESY program was appropriate?

Held: For the Parent. The IEP did not address goals and objectives to be addressed during the Summer of 2010, and the teacher testified that he created goals and objectives that were not presented to the ARD Committee. Additionally, the student's current IEP at the time was inappropriate, so continuation of those goals and objectives during the summer was also inappropriate.

Citation: 34 C.F.R. §106(b); 89 Tex. Admin. Code §89.1065.