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

DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

I.
PROCEDURAL HISTORY

On March 15, 2010, the Texas Education Agency ("TEA") received the Request for Due Process Hearing ("the complaint") filed by Student *b/n/f* Parent ("Petitioner") appearing *pro se*. TEA assigned the case Docket No. 174-SE-0310 and assigned the matter to the undersigned Hearing Officer. On March 15, 2010, the Hearing Officer sent the Initial Scheduling Order of the Hearing Officer to the parties, Petitioner and Houston Independent School District ("Respondent" or "HISD"), stating that the prehearing conference would convene April 5, 2010, the Due Process Hearing would take place on April 29, 2010, and the Decision would issue by May 29, 2010.

Respondent's counsel submitted Respondent's Original Answer, Motion and Counterclaim on March 26, 2010. In the Original Answer Respondent generally denied all the allegations in Petitioner's request for Due Process Hearing. Additionally, Respondent asserted that most of the allegations state claims upon which no relief can be granted for want of jurisdiction. Respondent's counterclaim presented its position about the history the District has experienced with Petitioner.

The Hearing Officer received Respondent's request to reschedule the prehearing conference due to Respondent's counsel's being out of the country on military duty during the time the prehearing conference was originally scheduled by the Hearing Officer. Finding the reason stated to be good cause, the Hearing Officer granted the request and rescheduled the prehearing conference to April 14, 2010, at 10:00 a.m. Before the prehearing conference could be convened the Hearing Officer received numerous faxes from Petitioner regarding a variety of matters between March 26, 2010, and April 12, 2010. [1]

Petitioner objected to the Hearing Officer's rescheduling the prehearing conference, the counterclaim that Respondent had included in its Answer, and Respondent's alleged failure to schedule a Resolution Session. Petitioner sought sanctions related to the Resolution Session and Respondent's alleged failure to obey the Initial Scheduling Order. [2]

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[1] Petitioner never provided a return fax number. The only means of communication Petitioner made available to the Hearing Officer were via U.S. mail and, as of April 5, 2010, telephone. No method was provided to leave messages for Petitioner. The telephone communication proved to be sporadic, at best. Frequently, the Hearing Officer's administrative staff received a message that the telephone user was not receiving calls or got no answer at all.

[2] Petitioner requested that the Hearing Offer order Respondent to answer the allegations set forth in the Request for Due Process Hearing. Petitioner sent a "Notification the Petitioner Mother will be Filing An Order for Production of Documents, and Motion for an [sic] Production Hearing." Petitioner sent a letter on April 2, 2010, complaining of many of the issues already noted, but also stating, "The Petitioner Mother will be waiting on the phone call in reference on the phone to the Pre-Hearing Conference on April 5, 2010, as scheduled according to the Hearing Officer [sic]

The Hearing Officer's letter to Petitioner dated April 1, 2010, specified that any rulings that needed to be made concerning Petitioner's submissions would occur during the prehearing conference. The Hearing Officer also reiterated her position that the prehearing conference had already been moved to April 14, 2010.

On April 14, 2010, the Hearing Officer convened the prehearing conference by telephone as scheduled. In attendance were the following: 1) Parent of Student, appearing *pro se* for Petitioner; 2) Mr. Hans Graff, counsel for Respondent; 3) Respondent's Director for Special Education, South Region; 4) the Hearing Officer; and 5) the court reporter, who made a record of the prehearing conference.

The prehearing conference lasted approximately one hour and fifteen minutes. The parties discussed many matters, including the items Petitioner raised in her faxes, the issues presented in the Request for Due Process Hearing, the relief requested by Petitioner, Respondent's issues, and the relief requested by Respondent.

One of Petitioner's concerns related to the subpoenas she had directed toward documents in Respondent's possession. The Hearing Officer explained to Petitioner that under the Texas Rules of Civil Procedure her Requests for Production of Documents from a party do not require subpoenas. Consequently, the Hearing Officer would not be signing Petitioner's subpoenas directed to Respondent that had been sent so far.[3] After an extended discussion, Respondent's counsel committed to producing the thousands of pages of documents that Petitioner was requesting by April 22, 2010.

Because the parties agreed that the Due Process Hearing would require more than one (1) day, the hearing was rescheduled for May 3-4, 2010. During the conference call, Petitioner stated she believed she was available to do the two (2) hearings the parties were discussing on the three (3) consecutive days of May 3, 4, and 5, and that she would check her calendar to let the Hearing Officer know. [4] After the prehearing conference was over, Petitioner informed the Hearing Officer by letter that she would not be available on May 3 or 6, 2010.

In the Prehearing Order issued by the Hearing Officer on April 19, 2010, the Hearing Officer scheduled the Due Process Hearing for May 4-5, 2010, as those were days that Petitioner indicated she was available for the hearing. The Prehearing Order also set forth the issues and relief the Hearing Officer found relevant to this proceeding.[5]

Initial Scheduling Order." Petitioner sent a second letter on April 2, 2010, to the Hearing Officer, to "PLEASE CHECK YOUR VOICE-MAIL OVER THE WEEKEND FOR THE CONTACT NUMBER-IN [sic] REFERENCE TO THE PRE-HEARING CONFERENCE'S [sic]." Petitioner sent a letter dated April 5, 2010, to the Hearing Officer complaining again of the rescheduling of the prehearing conference. Petitioner sent a "MOTION TO ORDER THIS HEARING OFFICER TO ORDER THE RESPONDENT TO PRODUCE EVIDENCE OF AN [sic] NAVY ASSIGNMENT FROM APRIL 5, 2010 THROUGH APRIL 9, 2010." Petitioner sent a subpoena duces tecum to be served on ***, Assistant Superintendent of Special Education Services for Respondent, to produce a specified set of documents within forty-eight (48) hours to Petitioner.

[3] Petitioner erroneously interpreted the Hearing Officer's ruling to mean that the Hearing Officer "did not like to" sign subpoenas, as indicated in the letter Petitioner sent the day after the prehearing conference. The Hearing Officer referred the parties to Tex. R. Civ. P. 176 and explained the use of subpoenas for trial testimony.

[4] Petitioner had also filed a separate Request for Due Process Hearing against Respondent regarding one of her other children.

On April 26, 2010, Petitioner filed a "motion of recusal." On that same date, the Hearing Officer denied Petitioner's recusal request, entered an order abating the proceeding, and sent the recusal documents to TEA for review by a Senior Hearing Officer. On April 30, 2010, Senior Hearing Officer Lucius Bunton denied the Motion for Recusal.

On that same date, Petitioner attempted to appeal the second denial of the recusal motion by sending a letter to TEA. The case remained abated until TEA made its determination and returned the matter to the Hearing Officer on June 7, 2010.

On June 17, 2010, the Hearing Officer lifted the abatement and rescheduled the Due Process Hearing for July 6-7, 2010. The Hearing Officer also informed the parties that she would grant a continuance if the parties were not available on those dates. On June 24, 2010, Respondent's counsel sent a letter to the Hearing Officer informing her that the July 6-7, 2010, hearing dates were not available to the District. On June 25, 2010, the Hearing Officer found good cause and granted Respondent's request for continuance and rescheduled the hearing to August 3 and 4, 2010.

On July 27, 2010, Respondent's counsel submitted another request for continuance based on the parties' desire to participate in mediation, set for August 30, 2010. Respondent requested a continuance until the week of September 27, 2010. The Hearing Officer granted the continuance and rescheduled the hearing to September 27 and 28, 2010. The mediation was not successful.

On September 9, 2010, Petitioner filed another case with TEA involving these same parties. TEA assigned the new filing Docket Number 004-SE-0910. On September 20, 2010, the Hearing Officer issued an Order Consolidating Cases, and notified the parties by letter that Docket Numbers 174-SE-0310 and 004-SE-0910 would be consolidated and would proceed under Docket Number 174-SE-0310.

On September 17, 2010, Petitioner requested a continuance of the hearing set for September 27 and 28, 2010, because she was unable to take off work. In a letter dated September 20, 2010, the Hearing Officer informed Petitioner the continuance was granted, and included the Order Consolidating Cases, which adopted for the consolidated cases those deadlines set out in the Initial Scheduling Order dated September 10, 2010, for the newer case that had been filed by Petitioner. Thus, a new prehearing conference was set for October 1, 2010, and a new hearing date was set for October 25, 2010. On September 29, 2010, Petitioner faxed a letter to the Hearing Officer stating she was not available for a prehearing conference due to her job schedule. The October 25, 2010, hearing date was continued also, and the Hearing Officer requested by letter dated November 16, 2010, that the parties provide dates they were available for a prehearing conference to reschedule the hearing.

The Hearing Officer wrote the parties on January 12, 2011, and gave three (3) dates and times for the parties to provide their preferences for a prehearing conference. Additionally, the Hearing Officer informed the parties the case was being set for hearing on February 3 and 4, 2011, and if there were any objections to that setting, they could be taken up at the prehearing conference on one of the offered dates. Respondent's office notified the Hearing Officer that its counsel was available on any of the offered dates for the prehearing conference and that Respondent had no objection to the hearing dates. None of the three (3) dates was selected, and thus, no prehearing conference was conducted.

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[5] The Hearing Officer received the electronic copy of the transcript of the prehearing conference from the court reporter on April 19, 2010.

On January 21, 2011, the Hearing Officer sent a reminder letter to the parties, confirming the hearing date of February 3 and 4, 2011. On January 24, 2011, Petitioner filed her second "motion of recusal" in this matter. The Hearing Officer denied the motion on January 25, 2011, and abated the matter pending review by TEA. On January 28, 2011, Senior Hearing Officer Lucius Bunton denied Petitioner's motion to recuse, and on January 31, 2011, the undersigned Hearing Officer ordered the abatement of this matter lifted and rescheduled the Due Process Hearing for February 3 and 4, 2011.

On January 31, 2011, Petitioner filed a "motion to disqualify judge," received by the Hearing Officer after the close of business. On February 1, 2011, the Hearing Officer denied Petitioner's motion to disqualify. Additionally, on February 1, 2011, the Hearing Officer sent a letter to Petitioner's home via hand-delivery addressing the many documents received that morning concerning a variety of matters, including a request for continuance. The Hearing Officer informed Petitioner that if she were to consider a continuance, she would need to hear the concerns of the parties during a prehearing conference. She requested that Petitioner contact her office immediately to advise when she would be available for a prehearing conference. Failure to do so would result in a denial of the continuance.

After close of business on February 2, and again before the opening of regular business hours on February 3, 2011, the Hearing Officer's voice mail contained several messages from Petitioner stating she had just received the Hearing Officer's letter and was contacting the office as instructed. She further indicated she could not attend the hearing because of her work. The Hearing Officer relayed messages to Petitioner conveying the fact that if Petitioner was not going to attend the hearing, she needed to at least be prepared to participate in a conference call to explain why she was not there so that her comments could be part of the official record.

At 9:00 a.m. on February 3, 2011, the scheduled date and time for the Due Process Hearing, the Hearing Officer convened the case for hearing. Respondent appeared through its counsel and its representative. The court reporter made a record of the proceeding. As indicated by her telephone messages, Petitioner was not at the hearing. The conference call was made to the number Petitioner had provided, and Petitioner was joined to the proceeding.

Petitioner requested a continuance of the hearing, and stated it was because she was not able to arrange time off from work. She said she had just begun a new job that was for "PRN" work and that she did not know very far ahead of time what her schedule would be. The Hearing Officer asked her what dates she would be available, and Petitioner directed attention to the letter she had written February 1, 2011. Respondent's counsel already had a hearing scheduled on several of those days, and other days fell during spring break.

After inquiring about the seriousness of Petitioner's intention to actually participate in a hearing, the Hearing Officer granted Petitioner's request for continuance and rescheduled the Due Process Hearing for one (1) day, March 9, 2011. [6] However, the Hearing Officer also admonished Petitioner, there would be no more continuances granted to Petitioner for any reason, and if she failed to appear on March 9, 2011, her case would be dismissed with prejudice. The Order Granting Continuance and Rescheduling Due Process Hearing was dated February 14, 2011.

[6] Only one (1) day could be provided for a hearing on such short notice. As an accommodation, the hearing was set to start early and go late. The parties were informed to be ready at 8:00 a.m. There were slight delays that were experienced on March 9, 2011, but the parties were pushed to accomplish as much as possible with the amount of time given. Breaks and lunch were kept short. The hearing ended shortly before 6:00 p.m.

Petitioner submitted a letter dated February 15, 2011, to the Hearing Officer complaining of a failure to rule on four (4) motions that had been faxed to the Hearing Officer on February 1, 2011:

1. "Motion to Disqualify Attorney Hans Graff"
2. "Motion to Sanction the Respondent for failure to comply with Discovery"
3. "Motion to ORDER the Respondent to produce discovery"
4. "Motion to sign and submit the Subpoena in reference to Attorney Hans Graff"

In an Order dated February 18, 2011, the Hearing Officer denied all four (4) motions.

On February 25, 2011, the Hearing Officer denied Petitioner's "Motion to Dismiss the Respondent [sic] Counterclaim," in which Petitioner argued that dismissal was appropriate "due to it been [sic] groundless, fictitious, false, and bought [sic] in bad faith and harassment." Petitioner argued that "these type [sic] of claims may be dismissed, and the attorney signing them may be guilty of contempt." Petitioner cited Tex. R. Civ. P. 13 and various other rules concerning the professional responsibilies of attorneys as the reasons for her request.

On March 2, 2011, the Hearing Officer received Petitioner's Disclosures of witnesses and documents. Petitioner's sending document indicated a time-stamp of 4:14 p.m. but the receipt occurred at the Hearing Officer's office actually at 5:12 p.m. [7]

On March 3, 2011, the Hearing Officer signed subpoenas requested by Petitioner, to require the presence at the Due Process Hearing for four (4) witnesses. [8]

The Due Process Hearing convened in a conference room at the Hattie Mae White Educational Center in Houston, Texas, on March 9, 2011. Petitioner's Parent appeared *pro se*; Mr. Graff appeared as counsel for Respondent; and ***, Senior Manager of High School Special Education, appeared as the institutional representative for Respondent. Also present for Petitioner was Muszetta Foreman, Advocate.

Petitioner called four (4) witnesses; Respondent did not call any witnesses, but cross-examined the witnesses called by Petitioner. The Hearing Officer admitted all thirty-one (31) of Petitioner's exhibits, and all thirty-five (35) of Respondent's exhibits into evidence. The transcript of the one-day hearing prepared by the court reporter was three hundred fourteen (314) pages in length.

Petitioner sent a letter to Mr. Graff the day after the Due Process Hearing, averring to other lawsuits and appeals and expressing an overall dissatisfaction with the Due Process Hearing system, including prior cases and the instant case. The letter was not directed to the Hearing Officer, but a copy was provided by Petitioner. Thus, a copy will be included among the other papers that constitute the record in this proceeding.

It later came to the Hearing Officer's attention on March 29, 2011, that the parties apparently had agreed between themselves to submit closing arguments by March 28, 2011, at 5:00 p.m. The Hearing Officer did not ask for closing arguments or briefs, and did not require such from the parties. Notwithstanding that fact, Petitioner requested a continuance of that deadline, asserting that she could not file the closing argument with the Hearing Officer due to the Hearing

[7] Respondent's counsel did not object to any of Petitioner's exhibits at the Due Process Hearing, and none of the persons identified on Petitioner's witness list was excluded.

[8] One of the four (4) witnesses was no longer employed by HISD when the Due Process Hearing occurred. That witness did not appear.

Officer's job change. The Hearing Officer granted the continuance request and informed both parties that if they wished to submit closing arguments, they should file them by 8:00 a.m., Monday, April 4, 2011.[9] Thus, no one was prejudiced by any failure to submit a document prior to March 29, 2011.

Based upon the Hearing Officer's Order Granting Continuance and Rescheduling Due Process Hearing dated February 14, 2011, the Decision deadline in this case is April 4, 2011.

II.
DUE PROCESS HEARING ISSUES AND REQUESTED RELIEF

Based upon discussions and clarifications during the prehearing telephone conference, the Hearing Officer finds the following issues are relevant to this proceeding:

Petitioner's Issues

Petitioner bears the burden of proof with respect to the following issues:

1. whether Respondent failed to conduct a transfer Admission, Review and Dismissal Committee ("ARDC") meeting for Student;

2. whether Respondent failed to conduct an ARDC meeting at a time and place that was mutually agreeable to the Parent [*see 34 C.F.R. 300.322]*;

3. whether Respondent failed to provide the statutorily required notice to the Parent prior to conducting an ARDC meeting [*see 34 C.F.R. 300.322]*;

4. whether Respondent conducted an ARDC meeting despite the Parent's request not to discuss Student without her presence [*see 34 C.F.R. 300.303]*;

5. whether Respondent failed to conduct a full and individual evaluation ("FIE") for Student [*see 34 C.F.R. 300.532(g){sic}]*;

6. whether Respondent failed to submit the evaluation results to the Parent in advance, as required, that were presented at the ARDC meeting on 3/11/2010;

7. whether the Individual Educational Plan ("IEP") for Student is appropriate;

8. whether Respondent failed to re-evaluate Student;

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[9] The Hearing Officer's telephone number, mailing address, and fax number remained the same, and in working order throughout the entire life of this case. It seems that Petitioner became confused after the Due Process Hearing when she assumed that, because the Hearing Officer planned to take a new job after completing this case, she needed to obtain a forwarding address. No one told Petitioner that any address change was needed for this case. She did call the Hearing Officer's office to ask for an address "to have a constable give [the Hearing Officer] some papers." The staff interpreted the statement to mean that Petitioner was attempting to serve the Hearing Officer, and not merely seeking information to provide the Hearing Officer with a closing argument or brief on this case. While the administrative staff declined to provide Petitioner with an alternative address for the Hearing Officer, the staff clearly informed Petitioner via telephone, certified mail, regular mail, and email that she could send any closing argument or brief to the same address or fax number and the Hearing Officer would receive it. Additionally, Petitioner was provided an email address by which she could submit any document.

9. whether Respondent has properly identified Student as a child who has an Emotional Disturbance ("ED") and/or a Learning Disability ("LD");

10. whether Respondent changed any identification labels of Student inappropriately, such as ED; and

11. as to the March 11, 2010, ARDC meeting and May 12, 2010, ARDC meeting, whether the functional behavioral assessments ("FBA") were properly prepared.

Petitioner's Relief

Petitioner seeks an Order from the Hearing Officer requiring:

1. an independent educational evaluation ("IEE");

2. Respondent to immediately start providing compensatory services [previously agreed upon] for the time Student was not allowed to attend school;

3. placement at a private school, such as River Oaks Academy, or Shiloh Treatment Center;

4. a speech evaluation;

5. an aide or tutor;

6. staff training relating to procedural safeguards for students with disabilities;

7. a person not affiliated with HISD to conduct an FBA; and

8. an order directing HISD to properly identify Student with the correct eligibility labels under IDEA.

Respondent's Issues

Respondent bears the burden of proof with respect to the following issues:

1. whether the Parent failed to give consent for an FIE and psychological evaluation;

2. whether the need exists to conduct an FIE and psychological evaluation to determine further eligibility and determine how to serve Student;

3. whether, in the absence of the Parent's cooperation in conducting evaluations, an order to override refusal should be issued.

Respondent's Relief

Respondent seeks an Order from the Hearing Officer to:

1. override the refusal of the Parent to give consent for an FIE psycho-educational and psychological evaluation;

2. require cooperation by the Parent; and

3. provide that, in the event cooperation does not occur, the override shall be deemed sufficient for the psycho-educational and psychological evaluations.

III.
FINDINGS OF FACT

Based upon the matters of record and matters of official notice, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following findings of fact based on a preponderance of the credible evidence:

1. Student's Parent resides within the jurisdictional limits of HISD. HISD is a political subdivision of the State of Texas and a duly incorporated independent school district. Student resides with her Parents.

2. Student currently receives special education services from HISD under the classification of ED.

3. During the 2008-2009 school year Student's Parent withdrew her from school and home-schooled her. By at least September 2009 it is apparent from the evidence the Parent decided that she wanted Student back in school, however, and began writing letters to various officials expressing her displeasure about the manner in which HISD had handled Student's education. Parent began sending letters to elected and non-elected persons at HISD, TEA, and the U.S. Congress. (Pet. Ex. 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18).

4. Student was re-enrolled in HISD in *** 2010. At that point her most recent formal evaluation was dated December 14, 2006. Student was placed in the ***, the same placement where she had been when Parent withdrew her from school. (Pet. Ex. 6, p. 2).

5. Parent has not signed a consent form for Student to be evaluated for a complete psychological evaluation. The psychologists prefer to meet with parents in person to discuss the tests that will be performed and answer any questions that the parents may have. The consent forms are not sent via students' backpacks or through the mail. (Trans. pp. 146-148.) Moreover, information was given to Parent as to how to contact the psychologist at her daughter's school in response to Parent's inquiry about the type of testing that would be done for Student. (Resp. Ex. 34). Parent did not contact the psychologist with any questions. (Trans. pp. 148-149).

6. On March 11, 2010, HISD conducted an ARDC meeting to review or discuss placement, program, extended school year services ("ESY"), evaluation, annual review, and compensatory services for Student. The Parent did not participate in this ARDC meeting. Persons present on behalf of HISD included representatives from the administration, general education, special education (two (2) persons), evaluation (the licensed specialist in school psychology ["LSSP"]), counseling, and nursing.

7. During the March 11, 2010, ARDC meeting the group reviewed Student's present levels of academic achievement and functional performance. Student had been attending classes for approximately *** at that point, and her classroom teacher was able to provide meaningful input to the group. The Committee also had Student's scores from the Stanford 10 Achievement Test given to all students in the 2008-2009

school year. Thus, both formal and informal sources of data informed the ARDC in the March 11, 2010, meeting. The ARDC prepared an IEP and placed Student in a setting that the Committee believed would provide the education and related services in the least restrictive environment.

8. The persons present and the actions taken by the ARDC on March 11, 2010, concerning Student constitute a viable transfer ARDC in order to have a program in place for Student's returning to school on, or about, ***, 2010.

9. HISD's LSSP conducted a Review of Existing Evaluation Data ("REED") on March 10, 2010. When performing a review of existing evaluation data the LSSP reviews previous testing and whatever current information the school may have on the child. Information concerning current academic functioning would usually be taken from prior evaluations, which may not necessarily mean that a student is performing precisely at that same point on the day of the review. Most of the best information comes from the schools and the teachers because they are dealing with the students every day. (Trans. pp. 149-150). HISD is unusual because it gives the Stanford Achievement Test to all students each year. Thus, that formal achievement test is normed on whatever grade level may be needed and available each year. (Trans. 150).

10. The March 11, 2010, ARDC's report also contained an "FBA/Behavior Support Plan." The plan identified problematic behaviors that were exhibited by Student during the past year and rated the various interventions, reinforcers, and consequences for the behaviors. The plan also listed what seemed to be the antecedents of the behaviors, as well as the functions of the behaviors. (Resp. Ex. 17).

11. Student obtained the following grades during the 2009-2010 school year:

- Math ***
- English ***
- Science ***
- *** ***
- Reading ***
- U.S. History ***
- Art ***
- Enrichment ***
- *** *** [10]
- Conduct Grades ***

12. Student, at all times during her time in special education at HISD, has consistently been classified under the category ED. None of the testing data indicates Student would have ever qualified for the classification of LD. Although paperwork from one ARDC meeting may have shown "specific learning disability," it appears to be little more than a clerical mistake. (Pet. Ex. 24, p.2; Trans. pp. 151-156). [11]

[10] ***

[11] Student qualified first for special education in *** under speech impaired ("SI") and was placed in a *** program. In an ARDC on May 22, 2002, Student was dismissed from special education, because the ARDC determined Student no longer met eligibility criteria. In 2003 Student was assessed due to behavioral difficulties at home and school and met criteria as a Student with ED. (Resp. Ex. 5, p. 3).

13. Parent complained about the dates being offered by HISD for the ARDC meeting to address Student's program upon her return from being home-schooled. HISD went forward with the March 11, 2010, ARDC meeting, believing that it needed to get a program in place for Student without further delay. (Trans. p. 66). There are numerous documents expressing the Parent's outcry over the failure to include her in the meeting. However, HISD offered to conduct another ARDC meeting on the exact date that Parent said she was available, March 31, 2010. Parent failed to appear for the March 31, 2010, ARDC meeting. (Resp. Ex. 18).

14. Various persons from HISD expressed frustrations trying to communicate with Parent. Invitations to ARDC meetings would be sent by certified mail and regular mail. If someone telephoned Parent and asked if she was coming to an ARDC meeting, she would be talking and suddenly the line would go dead. Then Parent would give another telephone number that would be disconnected or was no longer receiving calls. Additionally, Parent did not want any communications sent home through Student. (Trans. pp. 64-65).

15. The IEP developed by HISD in the March 11, 2010, ARDC meeting is appropriate for Student. The ARDC used the most recent data it had available. [12] The Committee collaborated – or at least attempted to – with all of the stakeholders appropriate to Student's education. The program was personalized with Student specifically in mind. The particular IEP that was prepared was not just a cookie-cutter approach.

16. Student's most recent FIE that is not a REED was performed in late 2006. The interviews, assessments, and evaluations occurred between October and December 2006, and the report is dated December 14, 2006. (Resp. Ex. 5).

17. Student attended the Due Process Hearing on March 9, 2011. Student's behavior was excellent throughout the entire day.

18. Student was promoted from *** grade (2009-2010 school year) to *** grade (2010-2011 school year).

19. Behaviors that are referenced in reports from teachers are the types that can be managed through a Behavior Support Plan. There are indications from earlier psychological reports, however, that reasons for such behaviors should be explored in the present timeframe. For example, in the 2006 psychological report Student indicated that ***. (Resp. Ex. 5, p. 5).

IV.
DISCUSSION

A. Introduction

This discussion begins with a review of what standard applies in this case. HISD is required to provide an appropriate education to Student. In this regard the standard is described as one that enables a Student to obtain "some benefit" from her education. *Board of Education of the*

[12] Petitioner disagreed with the notation in the REED "[Student] is able to read *** grade level." (Pet. Ex. 6, p. 2). Petitioner contends this is contradictory to the Stanford 10 Achievement Test data from 2008-2009, in which Student's reading comprehension level was ***. However, the Hearing Officer does not find this necessarily to be contradictory. A teacher could observe Student reading *** grade level material in March the following year, and yet normed, standardized testing against peers may not indicate reading comprehension levels of that same grade.

Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 189 (1982). Whether the education is designed to maximize a Student's potential is not the test. Rather, the IDEA guarantees a "basic floor of opportunity," requiring a school to provide "access to specialized instruction and related services which are individually designed to provide educational benefit." *Rowley*, 458 U.S. at 201.

B. Parental Participation

The issue of whether the Parent was denied participation in the educational planning for the Student is a question of procedural rights. The U.S. Court of Appeals for the Fifth Circuit has held that a claim based on a violation of IDEIA's procedural requirements is viable only if those procedural violations affected the Student's substantive rights. *Adam J. v. Keller ISD*, 328 F.3d 804, 811-812 (5th Cir. 2003). This holding was codified in 20 U.S.C. §1415 and 34 C.F.R. §300.513.

Several of Parent's complaints fall into the procedural category. The procedural deficiencies complained of here did not result in any lost educational opportunity, and therefore, did not equate to a denial of a free appropriate education ("FAPE"). 20 U.S.C. §1415(f)(3)(E)(ii); 34 C.F.R. §300.513(a)(2)(ii).

C. Whether the IEP Is Appropriate

The four-factor test approved by the Fifth Circuit in *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253, (5th Cir. 1997) is used to determine whether an IEP is appropriate. The Court said that an IEP must be geared to provide some benefit, and that is demonstrated where: 1) the program is individualized on the basis of the Student's assessment and performance; 2) the program is administered in the least restrictive environment; 3) the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and 4) positive academic and non-academic benefits are demonstrated. The Hearing Officer finds from the evidence presented that HISD has met all four (4) of these factors.

D. Student's Classification

Labels under the IDEA are not controlling; rather, the eligibility criteria govern access to special education. It is then the school's responsibility to develop an appropriate program to educate the child. The errant inclusion of "specific learning disability" on one (1) piece of paper over an entire school career fails to convince the Hearing Officer that Student should be reclassified as LD. Moreover, the data in the documents do not support any reason to believe that Student might qualify for services as someone with a specific LD. [13] The evidence also does not indicate any malfeasance on the part of anyone associated with HISD to change the identification label of Student.

E. Need for Re-Evaluation

Student's last FIE that included a psychological evaluation occurred in 2006. Parent's testimony at the Due Process Hearing seemed to indicate that she would agree to a complete a psycho-educational assessment and a psychological evaluation for Student at the present time.

[13] The Hearing Officer has heard many cases over the years in which the existence of a learning disability was an issue. The evidence in this case bears little resemblance to such other cases.

However, as HISD's LSSP testified, the ethics requirements for psychologists mandate that certain explanations be given before tests may be administered.

There has been no meeting of the minds between Parent and HISD regarding the necessary consent. HISD contends that "informed consent" is necessary. Parent believes that her notated sheet should be sufficient. For this reason, the issue has been put to the Hearing Officer. Understanding that there may never be a true meeting of the minds on this point, it is necessary for someone to make the decision.

The Hearing Officer finds that it is appropriate for HISD to conduct the FIE psycho-educational and psychological evaluations. Accordingly, the Hearing Officer orders an override of the Parent's refusal to consent to these evaluations. Such an order shall be deemed sufficient for the psycho-educational and psychological evaluations.

F. Compensatory Services

Parent filed a complaint pursuant to the State Complaint Procedures set out in 34 CFR §151 *et seq.;* TEX. ADM. CODE §89.1150. The Hearing Officer has no jurisdiction concerning the implementation of compensatory services offered pursuant to a complaint with TEA, not a Due Process Complaint. Accordingly, the Hearing Officer offers no opinion on this issue.

V.
CONCLUSIONS OF LAW

After due consideration of matters of record, matters of official notice, and the foregoing findings of fact, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following conclusions of law:

1. Student is eligible for special education services as a child who is emotionally disturbed. 20 U.S.C. §1401 (3) (A); 34 C.F.R. §300.8 (c) (1), (4); 19 TEX. ADMIN. CODE § 89.1040 (c) (4).
2. This case was filed on March 15, 2010. Therefore, under the applicable statute of limitations, only claims occurring within one (1) year before March 15, 2010, may be heard in this case.
3. HISD is required to provide Student a FAPE.
4. HISD did not fail to provide FAPE to Student during the period relevant to this case. *See Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
5. Petitioner bears the burden of proof with respect Petitioner's claims that Student was denied a FAPE. *Tatro v. Texas,* 703 F.2d 823 (5th Cir. 1983), *aff'd,* 468 U.S. 883 (1984). Petitioner did not meet Petitioner's burden of proof in this case.
6. HISD bears the burden of proof with respect to the issue of consent for a psycho-educational evaluation and a psychological evaluation for Student. HISD met its burden of proof with respect to this issue.
7. If Parent refuses to consent to a psycho-educational evaluation and a psychological evaluation for Student, the refusal is hereby overridden as a matter of law.

VI.
ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the relief sought by Petitioner is DENIED. IT IS FURTHER ORDERED that the relief requested by Respondent is GRANTED.

It is further ORDERED that it is appropriate for HISD to conduct the FIE psycho-educational and psychological evaluations. If the Parent refuses to consent to the FIE psycho-educational and psychological evaluations, this Order shall override the Parent's refusal to consent to the evaluations. This ORDER shall be deemed sufficient in all respects for consent to the psycho-educational and psychological evaluations.

SIGNED this 4th day of April 2011.

/s/ Luecretia Dillard
Luecretia Dillard
Special Education Hearing Officer

COPIES SENT TO:

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