

STUDENT	§	BEFORE A SPECIAL
BNF PARENT	§	EDUCATION
Petitioner	§	
v.	§	HEARING OFFICER FOR THE
	§	
HOUSTON INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	STATE OF TEXAS

FINAL DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Petitioner, Student *** and student's next friend and parent, *** (hereinafter referred to collectively as Petitioner and individually as Student or Parent), brings this action against Respondent Houston Independent School District (hereinafter Respondent, the District, or HISD) under the Individuals With Disabilities Education Improvement Act, as amended, 20 U.S.C. §1401 et. seq. (IDEA) and its implementing state and federal regulations.

The issues raised by Petitioner in this proceeding are:

1. Whether HISD's removal of Student from the *** School (***) to *** constitutes a violation of student's procedural right to stay put under IDEA and/or a denial of student's right to a free appropriate public education?
2. Whether the number and pattern of suspensions of Student by HISD constitutes a change of placement under IDEA?
3. Whether the lack of an appropriate BIP and the lack of appropriate response to Student's behaviors resulted in a denial of a free appropriate public education under IDEA?
4. Whether the delay in setting up Student's special education program at *** School at the start of the 2012-2013 school year resulted in a denial of a free appropriate public education under IDEA?
5. Whether HISD violated its child find duty under IDEA by its failure to timely evaluate and identify Student as eligible for special education and related services under IDEA?

The relief sought by Petitioner includes the following: continued placement at the *** School, development of a new BIP based on the recommendations made in the independent FBA, implementation of recommendations

from the independent educational evaluations in Student's IEP, training for staff working with Student, compensatory educational services, and reimbursement for the costs of private placement incurred as a result of Respondent's alleged violation of stay-put.

PROCEDURAL HISTORY

Petitioner filed the instant request for due process on November 26, 2012. Michael O'Dell, Attorney at Law, represents Petitioner in this proceeding. Hans Graff, Attorney at Law, represents Respondent.

The parties met in a resolution session on December 7, 2012, but did not reach resolution of the issues in dispute. A pre-hearing conference was held on December 13, 2012. An Order Following Pre-Hearing Conference was entered on December 17, 2012 outlining the issues in dispute and extending the decision due date to April 4, 2013 for good cause at the request of both parties.

On February 11, 2013, Petitioner requested a continuance of the due process hearing and an extension of the decision due date on the grounds that the two pending independent educational evaluations would not be complete by the hearing date, discovery had not been completed, and Petitioner's expert witness was not available to testify during the current hearing dates. Respondent had no objection to the requested continuance and extension. I found good cause to grant Petitioner's request and entered an Order Granting Petitioner's First Request For Extension on February 22, 2013, resetting the due process hearing to April 2-4, 2013 and the decision due date to May 2, 2013.

On March 21, 2013, Petitioner again requested a continuance of the due process hearing and an extension of the decision due date on the grounds that one of the independent educational evaluations would not be complete for the April hearing dates. Respondent again did not object to the continuance. Finding that the evaluation was important evidence needed to consider the issues in dispute, I granted Petitioner's request and entered an Order Granting Petitioner's Second Request For Extension, resetting the due process hearing to May 13-15, 2013 and the decision due date to June 17, 2013.

The hearing took place on May 13-15, 2013 at the administrative offices of HISD. At the conclusion of the due process hearing, by joint request of the parties, I granted leave to file closing briefs and entered an Order Granting Joint Request To Extend Decision Due Date For Filing Post-Hearing Briefs, setting the due date for briefs as June 20, 2013 and the decision due date as July 25, 2013.

FINDINGS OF FACT

Based on a review of the testimonial and documentary evidence submitted in this cause, I find the following facts to be established based on the weight of the credible evidence:

1. Student lives with student's siblings and student's mother and next friend within the geographical boundaries of HISD, a political subdivision of the State of Texas and a duly incorporated school district. Student is currently *** years old and has been deemed eligible for special education and related services as a student with an Other Health Impairment (OHI) based on Attention Deficit Hyperactivity Disorder (ADHD). (Respondent Exhibit, 5, p. 38; Respondent Exhibit 10, p. 78) (hereinafter cited as R. 5, p. 38 and R. 10, p. 78).

***** Year 1: 2010-2011 School Year @ *****

2. Student was ***. *** when first enrolled *** School within HISD for the 2010-2011 school year. (Testimony of *** Principal, pp. 455, 457) (hereinafter cited as *** Principal or *** Teacher, p. ____).

3. During the 2010-2011 school year, Student demonstrated significant behavioral challenges at school, including frequent office visits, violent outbursts during class, and one disciplinary suspension. (***) Principal, p. 456). Both Parent and school agreed that Student should repeat *** during the 2011-2012 school year as a result of student's *** and level of advancement. (***) Principal, p. 456; Mother, p. 396; P. 1, p. 1).
4. During May 2011, Mother requested "an ARD/IEP referral" under IDEA and a Functional Behavioral Assessment (FBA) for Student due to the problems student was experiencing. (Mother, pp. 396-397; P. 1, p.2). In response, HISD convened a referral meeting on June 1, 2011. At the referral meeting, HISD declined to initiate a special education evaluation and instead decided to provide Intervention Assistance Team/Response To Intervention (IAT/RTI) for Student at the beginning of the next school year, with input from HISD psychological services. The committee recommended to Mother that she consult with a physician in response to her question about ADHD. (P. 1, pp. 5-6).

***** Year 2: 2011-2012 School Year @ *****

5. Before the 2011-2012 school year began, the *** principal selected a teacher for Student who was highly experienced in working with behavioral challenges to help ensure Student's success during student's second year in ***. (***) Principal, pp. 458, 498). In addition, student's teacher met with the HISD psychologist and other team members before school started to design Student's behavior plan and allow Student to start the year with a strong foundation in learning and behaviors. (P. 2, p. 7; *** Teacher #2, pp. 492-493.)
6. During the 2011-2012 school year, Student received the following interventions, supports, and accommodations through RTI: 1) implementation of student's behavior plan targeting these areas of concern: following directions, completing tasks, behaviors such as impulsivity, poor anger control, disrespect toward adults and peers, defiance of authority, and inappropriate reactions to correction/direction from adults; 2) accommodations such as: explain the expected behavior and demonstrate where possible, have peer model expected behavior, reward effort through positive reinforcement, preferential seating, break tasks into smaller increments and steps, small group or one on one instruction as needed, frequent checks for understanding, behavior management plan, daily behavior chart to be sent home, one on one explanation from teacher concerning inappropriate behavior, calm down spot in classroom, one to one or group time with counselor as needed, and use of restraint as a last resort; 3) counseling one time per week and as needed with the goals of adjusting to the school setting, improving peer relationships, identifying emotions, expressing anger appropriately, and becoming aware of how student's behavior affects others. (R.1, pp. 2-3). Further, when appropriate, Student was excused from activities student would otherwise be required to complete because of student's disability. (***) Counselor, T. p. 532).
7. HISD LSSP *** performed an FBA of Student during May 2012 and described student's day as "infused with behavioral interventions, modifications, and supports" that are "extensive" in nature. (R.2, pp. 13-14).
8. *** teacher #2 testified that she provided Student with a great deal of support in the form of consistent explanations, expectations, routine, and structure; daily individualized incentives and sticker charts; processing of behavioral incidents as they occurred; and close collaboration with Mother and the school counselor. The teacher worked well with Student and built student's trust by listening closely to student talk about student's feelings, preparing student carefully for transitions with warnings and tasks to engage student during the transition. (***) Teacher #2, pp. 494-497).

9. The *** counselor testified that he met with Student weekly and provided ongoing counseling on an “as needed” basis. When Student had a behavioral issue in class, the teacher would email the counselor, whose office was adjacent to Student’s classroom, and he would provide immediate support to Student. The counselor collaborated with Student’s teacher to ensure they used the same language to discuss behavior and with HISD psychological services to obtain recommendations on how to best work with Student. The counselor worked with Student on anger management and learning appropriate substitute behaviors. According to the counselor, what Student needs most is predictability, a very close rapport with student’s teacher; and access to counseling. (*** Counselor, pp. 519-522, 524).
10. Student continued to have some serious behavioral episodes when student’s routine was disrupted or student’s teacher was unavailable (R. 29, pp. 162-166, 191); but on the whole, student made meaningful progress in the areas of both academics and behavior during the 2011-2012 school year. Student’s progress resulted from the effective implementation of the extensive behavioral supports and interventions student received. (*** Principal, p. 467, 477; Stipulation of Petitioner, p. 475; *** Teacher #2, pp. 496-497; 510-512; Mother, pp. 402-405).
11. Both the *** teacher and the *** Counselor testified that the interventions Student received during the 2011-2012 school year were necessary for Student to access student’s education and make academic progress. Both agreed that the services, interventions, and accommodations needed to continue for the 2012-2013 school year in order for Student to maintain the gains student made and continue to make progress. As the counselor put it, he would never suggest that Student go to *** without a plan. (*** Teacher #2, pp. 502, 513-515; *** Counselor, pp. 524, 537-538).
12. In February 2012, Mother again requested a special education evaluation because she believed that Student’s behaviors were serious and could not be managed by persons who were not highly skilled or when student’s routine was disrupted. She requested a full IDEA evaluation and informed HISD that Student’s “problems are more serious than just behavior” and she did not believe student “will be successful in *** without further assistance.” (P.1, p. 8; Mother, pp. 405-406).
13. HISD informed Mother that a Full and Individual Evaluation (FIE) would be done, but that Student had done so well with the IAT interventions, accommodations could be provided under Section 504. (P.1, p. 8).
14. The FIE was completed by a multidisciplinary team consisting of an LSSP, school nurse, and Student’s teacher on April 9, 2012. The FIE consisted of IQ and achievement testing and classroom observation, but no psychological testing. Mother provided documentation of a medical diagnosis of moderate to severe ADHD. The FIE did not support the existence of a learning disability as cognitive testing indicated that all processing areas were intact and all academic areas fell within the average range. However, the FIE team concluded that Student should receive special education services under the eligibility category of OHI because Student’s difficulty with attention and impulsivity impacted student’s academic performance and behavior in the classroom. The team made recommendations for the content of Student’s IEP. (R.1, pp. 2-12).
15. LSSP ***, who was part of the FIE team, testified that “educational need” for special education eligibility under the category of OHI includes both academics and behaviors. (LSSP *** Testimony, p. 685).
16. An FBA was completed on May 8, 2012 by LSSP ***, which documented the success of Student’s behavioral interventions. The FBA showed that Student continued to struggle with transitions and

schedule changes, but demonstrated that Student's behavior had improved notably from the previous school year. (R. 2).

17. An Admission, Review, and Dismissal Committee (ARDC) convened on May 17, 2012 to review the FIE and FBA and make a determination regarding eligibility for special education. Despite the eligibility recommendation made in the FIE and LSSP *** report to the ARDC that Student's day is infused with behavioral supports that student needs to continue to receive, the ARDC decided that Student was not eligible. The ARDC decided that Student had no need for special education services because student was performing on grade level and making progress with what the ARDC viewed as general education interventions. (R. 28, p. 3; *** Special Education Department Chair, pp. 689-690; HISD Senior Manager for *** Special Education Services, p. 697).
18. *** staff intended to continue Student's behavior plan and counseling to *** and meet before school started to develop a Section 504 plan for Student. (*** Special Education Department Chair, pp. 693-694).

*****: 2012-2103 School Year @ *****

19. During the summer of 2012, Mother decided to enroll all of her children for the 2012-2013 school year *** School (***). Mother was drawn to *** because of her interest in her family learning ***, the smaller class sizes at ***, and tensions her family had experienced at *** despite Student's positive experience there. (Mother, T. pp. 409-410).
20. Admission to *** is by application only and for the *** (2012-2013), ***. No prior *** was required. The need for special education services was not a factor in decision-making, though no students receiving special education or Section 504 services were a part of the 2012-2013 *** class. (*** Principal, T. pp. 120-121; 138).
21. *** is a *** school for grades ***, such that students spend ***. (*** Principal, T. pp. 119-120).
22. Instruction during the *** is *** and students are expected to *** as well, though students were allowed to ***. (*** Teacher, pp. 549-550).
23. Before the start of the 2012-2013 school year, the *** assistant principal (AP) contacted Mother about whether she wanted *** placed in *** classes. During that conversation, Mother mentioned Student's behavior issues and Section 504 status and asked to meet with student's teachers to convey effective behavior strategies for working with student. The AP declined the meeting. (AP, pp. 647; 671-618; Mother, p. 409).
24. Before the start of the 2012-2013 school year, *** principal and AP had no contact with ***, obtained no records concerning Student, and did not inform Student's *** teachers about student's behavioral issues. A Section 504 meeting did not take place. No specific behavior plan was in place for Student when student began at *** and student's teachers had no knowledge of student's behavioral history or prior educational services. Teachers did not receive any behavior management training prior to the start of school. (AP, pp. 504, 618, 647-648; *** Teacher, p. 564; **** Teacher, p. 594).
25. No one within HISD considered whether *** was an appropriate program for Student in light of student's identified needs for consistency, structure, routine, support with transitions, an experienced teacher with strong behavior management, and access to ongoing counseling.

26. Student's *** teacher at *** had five years experience and student's *** teacher was a first-year teacher with no prior experience. The routine in the *** classroom varied from day-to-day during the fall semester. (*** Teacher, pp. 564, 553-554; *** Teacher, p. 591).
27. Student began to exhibit severe behavioral problems at *** from the first day of school, with the *** teacher regularly contacting the Principal and AP for support and suggestions. Student's behaviors included speaking out in class, defiance, refusal to do work, and aggressive actions toward others. Student demonstrated these behaviors in both the *** and *** portion of student's day, but the behaviors were more severe in both frequency and intensity during the *** portion of student's day, or the end of the *** as transition to *** approached. (R. 19; *** Teacher, pp. 594-595, 599, 601, 604; *** Teacher, pp. 549-550, 561; AP, p. 620, 627).
28. *** contacted Mother on a regular basis during the first weeks of school and requested that she come to school to calm Student from a behavior meltdown and/or pick up Student because of student's behavior. (Mother, p. 416; AP, pp. 622-623).
29. Mother met with *** administrators on the second day of school, August 28, 2012, because of Student's behaviors and informed them of all the information she had about Student. (Mother, pp. 414-415).
30. On September 10, 2012, HISD conducted a new FIE based on a Review of Existing Evaluation Data (REED) and confirmed Student's disability of OHI based on ADHD. The reason for the new FIE was that Student's behaviors were interfering with student's ability to access grade level curriculum. The behaviors identified at that time included: impulsivity, inappropriate reaction to correction/direction from adults, defiance of authority, and poor anger control. (R.3; R. 19, pp. 223-224; R. 20, pp. 367-369).

Section 504 Meeting and Services

31. *** convened a Section 504 meeting on September 12, 2012. The committee reviewed the FIE and FBA from the prior school year and noted that Student had not qualified for special education services. *** teachers reported that Student exhibited escalating behaviors in the classroom and had broken *** and attempted to damage classroom materials. Mother had already taken Student home on several occasions due to student's behavior and the AP stated that if student had further episodes, student would be suspended. (R.7, p. 95).
32. The 504 Committee put a behavior plan into place based on information from the FIE, FBA done in May 2012, student's current teachers, and Mother. The plan provided for clear and defined limits, frequent reminders of rules, time out/cooling off time, clearly defined guidelines for making transitions, a consistent routine, rewards for verbalizing anger and not acting out, and a behavior tracking log. (R. 7).
33. Implementation of the Section 504 plan was not effective and Student's behaviors continued to escalate. (R. 19, pp. 225-227; R. 20, pp. 370-374). On September 19, 2012, Student received a disciplinary referral resulting in a three-day suspension when student threatened ***; knocked over chairs, teacher materials and keyboards; threw supply boxes; and ***. The referral indicates that staff attempted to use strategies from student's behavior plan for a full hour before Student's final outburst. (R.21, pp. 394, 409-412).

Special Education Eligibility and Services

34. An ARDC convened on September 28, 2012 to revisit special education eligibility and found Student eligible for special education under the disability category of OHI based on emotional/behavioral needs.

The ARDC requested, and Mother consented to, an updated FBA to be completed by LSSP *** within thirty days. No other testing was requested, such as a psychological evaluation, despite the severity of Student's behavior. The ARDC also implemented the following accommodations and interventions for Student: extended time to complete work; daily communication folder with home; counseling with LSSP *** at the rate of two times per week for 30 minutes for two weeks, and then one time per week for 30 minutes thereafter; visual schedule and choices to help with transitions; cue cards; expectation check list; and contacting *** in a crisis situation. A 1:1 aide was refused as being too restrictive. (R. 8).

35. Student's IEP addressed behavioral/emotional factors described as talking out, difficulty with transitions, and defiant behavior. (R.8, p. 100). The IEP identified two annual behavioral goals, but no short-term objectives, in the areas of compliance and using words to express emotions when frustrated. Progress on the goals was to be determined based on percent of time, with a starting baseline score of 20% noted for October 1, 2012 and a goal of 80% by September 27, 2013. (R. 8, p. 102). The baseline score of 20% appears to have been randomly selected. The ARDC did not develop an IEP for Counseling.
36. The ARDC developed a Behavior Support Plan (BSP) based on the FBA from May 2012 and current teacher input and set up a data collection system. The targeted behaviors were the same as those in the Behavior IEP.
37. Although a 1:1 aide was refused by the ARDC, *** administrators decided shortly after the ARDC meeting, at the beginning of October, to assign the *** teaching assistant (hereinafter TA) who was supporting all of *** classes to work exclusively in the afternoon with Student's teacher so he could assist with Student. The TA was ***, but had no training in, or knowledge of, behavior management. (***) Principal, pp. 159-160; TA, p. 674).
38. LSSP *** provided counseling services to Student, but they were not provided at a consistent time as she came to the school at different points each week. *** did not have a counselor on site.
39. The TA accompanied Student during lunch, recess, and throughout the afternoon during student's ***. Each day, the TA presented Student with a choice of whether to work on student's *** assignments in the *** classroom or other designated locations within the building based on student's behavior plan; however, Student's behavior plan provided for a choice of locations within the classroom for cooling off, not for roaming the building as Student was allowed to do. (R. 8, p. 143).
40. Detailed anecdotal records of Student's behavior during October 2012, taken as a whole, document continued escalation of severe and extreme behavior by Student. The records reflect the following behaviors on a regular basis: Student rarely participated in *** class or completed work; Student frequently refused to attend *** class or come in after recess; student frequently delayed the decision of where student would chose to work in the afternoon and wandered the building, *** in the cafeteria, destroying school materials, and ***; "messed with" and/or destroyed school materials; refused to follow instructions of adults; and often ***. The records reflect a lack of effective behavior management strategies and a lack of follow through on behavioral expectations and demands, with the result that Student frequently spent the afternoons engaging in serious misbehavior that went largely unchecked until escalation required intervention by school administrators. Student did not attend class or complete work during the *** with any regularity. (R. 19; pp. 231-277; R. 20, pp. 375-383).
41. The behavior log of the afternoon of October 19, 2012 is representative of many days in October. It indicates that Student was allowed to engage in seriously inappropriate behaviors without effective intervention from trained staff (R.19, p. 255). The log states:

Time	October 19, 2012	Observer: *** (TA)
12:55	Student delays decision for the afternoon.	
1:15	Student decides to proceed to ***	
1:20	Student throws chairs and desks in ***. After reminding Student of acceptable activities, student continued to mishandle classroom materials. Student also ***.	
1:36	*** was in the room repairing items. Student said, “***, you better be careful or I’ll ***.”	
1:45	Student tries to ***	
1:47	Student tries to ***. Student sits at the *** for approximately ten minutes.	
2:00	Student continues to play with items in the classroom. Student is reminded that work can be done.	
2:43	Student spits at ***. Student stomps ***.	

42. Discipline records reflect a referral on October 9, 2012 that resulted in a one-day suspension for: failure to comply with the requests of school personnel; refusal to enter class; hitting TA more than once; kicking classroom doors, tearing papers, breaking students’ supplies. (R. 21, pp. 396, 413).
43. A disciplinary referral also occurred on October 16, 2012 that resulted in a one-day suspension for: failure to comply with requests of school personnel; tore items ***; and *** other students (R. 21, p. 397).
44. Again, on October 25, 2012, Student received a two-day suspension for: destroying classroom materials, hitting and kicking teacher, and running away. The AP describes the incident as follows: “*At dismissal, Student refused to leave Ms. *** class. Student kicked me in the leg. Then student began to tear up things on the teacher’s desk. Mr. *** (Principal) and Mr. *** (TA) removed Student from the class. Student tried *** and then ***. In the cafeteria, Student tried ***.*” (R. 21, p. 398, 419).
45. AP’s notes reflect detailed descriptions of similar behavioral incidents on other dates, for which disciplinary referrals did not occur. (R. 21, pp. 413-423). Also during October, issues arose related to alleged bullying by Student, as well as verbal threats, hitting, kicking, and damaging other students’ property. (R. 9, p. 147).
46. In response to the continued escalation of Student’s behavior, student’s teachers changed and individualized student’s reward system and modified student’s behavior contract. (*** Teacher, p. 573-574; R. 19, p. 278-279). The TA worked with the special education teacher and LSSP *** to design behavior-tracking forms and collect behavior data. (TA, pp. 669-670, 672, 677-679).

Updated FBA Done By LSSP ***

47. LSSP *** completed the FBA of Student on October 22, 2012 based on observations on October 2 and 3, interviews with parent and teachers, review of records, and the administration of the Behavior Assessment System for Children- Second Edition (Parent and Teacher versions) (BASC-P and BASC-T) and the Brief Inventory of Executive Function (Parent and Teacher Versions) (BRIEF-P and BRIEF-T).
48. Mother reported the following to LSSP *** during the FBA: Task completion is an issue; if Student is having any trouble with a task, “student is gone;” student will create a situation to get out of work that is too hard; student will control and run things if student is allowed; Student may perceive *** as too hard, but student will adjust if the school does not allow student to get out of it. (R. 4, p. 25).
49. The *** teacher reported the following to LSSP *** during the FBA: Her afternoon *** class, that includes Student, is behind because of student’s frequent interruptions; she has had to reduce the work load and change the method of instruction in the afternoon class to deal with Student’s frustration at the academic demands; she has had to evacuate the class due to Student’s behaviors; and Student is “never on task.” (R. 4, pp. 25-26).
50. The *** teacher reported concerns with interruptions, loud noises, and leaving student’s area without permission. The teacher implemented strategies with Student, but none were successful. The teacher reported that Student does not complete enough work to gauge student’s academic strengths and weaknesses. (R. 4, p. 26).
51. During her observation of Student in student’s ***, LSSP *** observed 23 off-task verbal behaviors and 14 off-task motor behaviors, for a total of 37, during a period of 105 minutes. During the ***, she observed 18 off-task verbal behaviors and 25 off-task motor behaviors, for a total of 43, during a period of 90 minutes. (R. 4, pp. 28-29). These results support slightly more incidents of off-task behavior in ***.
52. LSSP *** did not observe an emotional tantrum; however, she addressed Student’s emotional meltdowns in the FBA. *** found that the tantrums occurred on an almost near daily basis in *** class and reported that Student had revealed to *** during student’s counseling sessions that the tantrums result from student feeling that *** class moves too fast and student cannot keep up, causing student to feel frustrated and angry, and to behave in an aggressive and defiant manner. (R. 4, p. 30).
53. LSSP *** also reported that Student refused to attend *** class entirely as of the week of October 15, 2012, so the campus contacted HISD Psychological Services to provide assistance and consult. Extreme behavioral episodes appear to be triggered by Student’s required attendance at *** class. (R. 4, p. 30).
54. Assessment data from *** administration of the BRIEF were mostly consistent between all three raters (Mother and two teachers). All responders rated Student as having significant difficulty in one or more areas of executive functioning. Overall, the responders identified concerns with Student’s ability to adjust to changes in routine or task demands, inhibit impulsive responses, modulate emotions, and plan and organize problem solving approaches. Student’s profile combines rigidity with emotional dysregulation; children with that profile have a tendency to lose emotional control when their routines or perspectives are challenged and/or when flexibility is required. (R. 4, p. 31).
55. The BASC provides information about behavioral and emotional problem areas. Scores in the “clinically significant” range indicate high levels of maladjustment; while scores in the “at-risk” range identify a significant problem that may not require formal treatment, but should be monitored. (R. 4, p. 33).

56. The BASC composite scores indicated the following: all raters placed Student's score on the *Externalizing Problems* composite in the "clinically significant" range, with "clinically significant" ratings in hyperactivity, conduct problems, and aggression. The "clinically significant" score indicates that Student engages in an unusually high number of disruptive, impulsive, and uncontrolled behaviors; is often restless and engages in a high number of behaviors that adversely affect other children in the classroom; and displays a high number of aggressive behaviors and is often argumentative, defiant, and/or threatening to others. These ratings are consistent with the anecdotal behavior data collected by school staff. (R. 4, pp. 34-35).
57. Recommendations from the FBA included: manage and limit stimuli or antecedents that produce emotional changes and outbursts until Student gains more success in managing student's emotional expression; provide additional structure in student's environment at the outset to help control behavior, achieved by more explicit, extensive, clear rules and expectations, that are reviewed with student regularly; limit distractions; preferential seating with careful thought to placement within the classroom; lower student-to-teacher ratio; implement accommodations to assist with task completion and transitions; and adjust academic demands. (R. 4, p. 37).
58. Based on all the information analyzed in the FBA, LSSP *** concluded that the *** of Student's day appeared to be an antecedent to student's tantrums and that the tantrums served to allow student to escape or avoid the instruction. (R. 4, pp. 23, 26, 30). Indeed, Student's behavior did allow student to avoid the instruction, as evidenced by the behavior documentation of student's wandering in the afternoon.
59. *** Principal, AP, *** Teacher, *** Teacher, LSSP ***, and TA all testified that Student told them that student disliked ***, felt the pace was too fast for student to keep up, and that student wished to return to a *** setting with *** instruction.

November 2012 ARDC Meetings

60. The ARDC convened on November 9, 2012 to review the FBA. As of that date, Student had failing grades due to not completing tests and other work. School personnel expressed the view that Student disliked *** class and the *** teacher reported that none of the interventions developed for Student were effective in her classroom. The ARDC revised behavior goals to reflect parent input and changed the intervals for rewards to attempt to better shape Student's behavior, but the ARDC also recommended that Student return to student's home campus and receive instruction in a general education setting with instruction *** throughout the school day. School personnel believed that Student could be more successful in that setting and that it would constitute a less restrictive environment. The ARDC did not address many of the FBA's recommendations and did not initiate a psychological evaluation though Student's behavior indicated the need for one. (R. 9, pp. 155-157).
61. Mother disagreed with the recommendation to return Student to ***. Mother requested a psychological evaluation, which the ARDC agreed to provide. The ARDC scheduled a reconvene ARDC on November 20, 2012. (R. 9, pp. 155-157).
62. In early November, Student experienced improved behavior and greater success at school for a brief period of time. The evidence does not conclusively demonstrate the reason for this brief respite. (R. 19, pp. 308-347; R. 20, pp. 384-389).
63. On ***, 2012, prior to the ARDC meeting, Student became involved in the most serious behavioral incident student experienced at ***, triggered by student *** in student's *** class. The record is clear

that Student lost complete control in the classroom, threw objects, kicked furniture, and ***. After Student *** in the classroom, campus staff restrained Student and removed student from the classroom to student's cooling off room. AP was extremely concerned and called both HISD psychological services and LSSP *** for assistance. Meanwhile, staff thought Student had calmed down, but, in fact, student had not. Student ultimately ***. ***. Staff walked Student to the office for medical care as Mother was arriving. She declined medical treatment from the nurse and left the school ***. (AP, T. pp. 641-642; *** Principal, pp. 249-254; R. 20, pp. 359-360; R. 21, pp. 422-423; R. 10 p. 182).

64. The ARDC reconvened later on the day of the ***, 2012 incident and determined that the proposed transfer to *** should become effective immediately. The basis for the ARDC's decision was Student's safety, student's lack of success at *** despite the involvement of several psychologists and the interventions that had been attempted, and the fact that Student had expressed such dislike of *** and *** instruction. The ARDC believed that Student needed to be in a *** school environment with one classroom teacher to provide fewer transitions and greater consistency. Mother disagreed and the school signaled its intent to go forward with implementing the move to ***. (R. 10, p. 182). Mother filed the instant action on November 26, 2012.
65. By letter dated November 29, 2012, *** Principal informed Mother that she must withdraw Student from *** by November 30, 2012 or student would be administratively withdrawn. (P. 9, p. 2).
66. At ***, Student's *** teacher lacked experience and training in behavior management techniques, received no training prior to school and did not read the Student's file or the FBA completed by LSSP *** in October 2012. Instead, she contacted the *** Principal and AP to deal with Student when student's behaviors escalated and she needed assistance. (***) Teacher, T. pp. 564, 566-567, 571, 578).
67. It is undisputed that Student's behaviors worsened in frequency, intensity, and severity over the course of student's semester at ***. The cause of Student's behavioral regression includes, but is not limited to, the *** program at ***.
68. While Student's inappropriate behaviors were more frequent and severe in *** class, student's *** teacher also struggled to manage student's behavior. She reported incidents where she was unable to calm Student and had to contact administrators for assistance. Frequently, Student could not calm down or re-enter her class. (***) Teacher, pp. 594-595).

After Student Left *: Private Placement and IEEs**

69. Mother disagreed that HISD could unilaterally implement Student's transfer to *** and declined to enroll Student at ***. After searching for an appropriate educational setting for Student, Mother enrolled student at ***, where student received 1:1 instruction for four hours per day, three days per week. Student had no peers, but worked effectively with the teacher and, according to Mother, made incredible progress while there. (Mother, p. 433). Mother reports that Student's *** instructors commented that student was "a different kid" after leaving *** and that student was doing much better behaviorally. (Mother, p. 433).
70. Mother disagrees that Student does not like learning *** and would like student to return to *** with the proper supports and interventions. She states that student's *** is comparable to student's siblings who attend ***. (Mother, T. pp. 433-434).
71. HISD provided Mother with two independent educational evaluations (IEEs), an FIE and an FBA. Dr. ***, a PH.D psychologist and LSSP performed the FIE for Student. (R. 5). In his FIE, Dr. ***

confirmed Student's diagnosis of ADHD, but found that something more significant was in play. Dr. *** conducted extensive and thorough testing and spent 8-9 hours with Student. Ultimately, Dr. *** concluded that Student has a Mood Disorder NOS, with a probability of an emerging bipolar disorder. Based on his findings, Student meets criteria for IDEA eligibility under the disability categories of ED and LD. Dr. *** made extensive educational programming recommendations to address Student's academic, behavioral, social skills, and communication needs. (R. 5, pp. 51-57). An ARDC has not yet considered Dr. *** FIE; however LSSP *** testified that she had no issues with the FIE. (HISD Counsel Opening Statement, T. p. 16-18; LSSP ***, T. p. 368).

72. ***, LSSP, provided Student's independent FBA on April 13, 2013 based on review of records, parent interview, and behavioral observation. She was not able to observe at *** or contact *** staff, but she had substantial information upon which to base her FBA. (***, T. pp. 167-169). *** concludes that Student has significant behavioral problems related to mood instability. She strongly concurs with Dr. *** that Student's behaviors are indicative of an emotional disturbance and not simply ADHD. (***, T. p. 173).
73. *** identified the following concerns with Student's program at ***: the severity of Student's behaviors require staff who are highly trained in behavior management so that Student's behaviors are not exacerbated, some of the actions of *** staff indicate they did not have the necessary expertise; Student's behavior plan failed to provide sufficient support during transitions; the behavior plan failed to outline or describe the specific interventions that should be implemented and to identify when and by whom the strategies and replacement behaviors would be taught to Student; and Student's IEP goals contained within them interventions or tools that were said to be ineffective in the behavior plan data, i.e. the use of a written or visual schedule. (***, T. pp. 176-215).
74. The weight of the evidence supports the accuracy of *** concerns with Student's program at ***.
75. *** believes that a general education environment with supports may not be sufficient to provide Student with success and that student may require a structured behavior class. (***, T. p. 217-218). An ARDC has not considered *** FBA. (HISD Counsel Opening Statement, T. p. 16-18).

DISCUSSION

The instant case raises several issues pertaining to HISD's education of Student in the 2011-2012 and 2012-2103 school years: 1) eligibility and child find, 2) denial of a free appropriate public education (FAPE), and 3) violation of the stay-put provision of IDEA during the 2012-2013 school year.

I. ELIGIBILITY AND CHILD FIND

Petitioner alleges that HISD violated its child find duty by its failure to timely evaluate and identify Student as eligible for special education and related services under IDEA. Petitioner challenges both HISD's failure to evaluate Student prior to Mother's February 2012 request and the failure to find Student eligible until September 2012.

It is well settled that IDEA does not penalize school districts for not timely evaluating students who do not actually need special education. *D.G. v. Flour Bluff ISD*, 59 IDELR 2 (5th Cir. 2012). In other words, a failure to timely evaluate for special education is not actionable unless the student is ultimately determined to be eligible for special education services. In this case, HISD determined that Student was eligible for special education services in September 2012. The question raised is whether Student should have been tested and found eligible for such services prior to September 2012?

Eligibility- Timely Identification As IDEA Eligible

Eligibility for special education services is determined by a two part test: 1) Does the student meet the criteria for one or more of the disability classifications in the statute as determined by the evaluation procedures set forth in the Act; **and** 2) Does the student, by reason of the disability, need special education and related services? 34 C.F.R. § 300.8(a)(1); 19 T.A.C. § 89.1040. Both parts of this test must be satisfied in order to meet the eligibility requirements of IDEA.

HISD found Student eligible for special education in September 2012, but Student argues that student should have been tested and identified as eligible during the 2011-2012 school year based on HISD's knowledge of student's disability of ADHD and the resulting behavioral and emotional issues Student demonstrated at school. Student further argues that Respondent's failure to timely identify student caused student educational harm when student began *** at *** without an IEP and needed services.

HISD completed an FIE of Student in spring 2012 in response to Mother's request to evaluate in February 2012, but found Student not eligible for services at the ARDC held in May 2012 to review the FIE and determine eligibility. The ARDC found that Student satisfied part one of the eligibility test as meeting the criteria for the disability classification of OHI due to student's ADHD, but did not qualify for special education based on part two of the test: student did not *need* special education and related services by reason of student's disability because student demonstrated academic and behavioral progress with general education interventions. Student challenges the ARDC's decision, asserting that student's need for services was clear as of May 2012 based on the extensive interventions, accommodations and supports student received in student's general education classroom.

Whether Student Was In Need Of Special Education Services

Prior To September 2012?

IDEA eligibility requires that Student be in need of special education services by reason of student's disability. Special education means "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability." 34 C.F.R. § 300.39(a). Specially designed instruction means "adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction – (i) to address the unique needs of the child that result from the child's disability; and (ii) to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children." 34 C.F.R. § 300.39(b)(3).

The District argues that if a student can adequately progress and obtain educational benefit in the general education environment with interventions, then by definition, the student has no need for special education services. *Hood v. Encinitas Union School District*, 482 F. 3d 1175 (9th Cir. 2007). However, the proper standard for determining educational need for special education services is not *solely* whether a student obtains benefit in a general education setting with interventions; that determination also requires consideration of a variety of sources, including assessment data, parent input, and teacher recommendations, to determine if the student's disability gives rise to a need for services. *Alvin ISD v. AD*, 503 F. 3d 378 (5th Cir. 2007); 34 U.S.C. § 300.306 (c).

Considering this variety of sources, the analysis must go one step further than simply looking at the benefit obtained by a student in the general education setting: do the interventions provided to the Student in the general education setting themselves constitute specially designed instruction and are they required by the student in order to make progress? *Alvin, supra*; *Mr. I. v. Maine School Administrative District No. 55*, 480 F. 3d 1(1st Cir. 2007); *State of Hawaii, Department of Education v. Zachary B.*, 52 IDELR 213 (U.S.D.C. HI 2009); *W.H. bnf B.H. and K.H. v. Clovis Unified School District*, 52 IDELR 258 (E.D. CA 2009); *A.P. v.*

Woodstock Board of Education, 572 F. Supp. 2d 221 (U.S.D.C. CT 2008). In other words, a student's ability to progress and obtain benefit in the general education environment must be analyzed in relationship to the interventions and supports being provided to the student. Without analyzing the supports provided when considering a student's need for specially designed instruction, a student could be provided the equivalent of special education services without naming them as such, but not identified as eligible under IDEA, thus depriving the student of the substantive and procedural guarantees of IDEA.

Applying these standards to the facts and circumstances of this case, I find that the assessment data, educational program data, and parent and staff recommendations, taken as a whole, demonstrate that Student had a need for special education services by reason of student's OHI in May 2012 at the time of the ARDC review of eligibility. As such, student should have been found eligible for special education at that time.

Assessment Data

The ARDC reviewed Student's FIE dated April 9, 2012 in considering eligibility. The FIE reported present levels of academic achievement and functional performance to determine whether the student had a disability and need for special education and related services. As required by IDEA, a multi-disciplinary team consisting of an LSSP, the school nurse, and Student's teacher completed the FIE. The FIE included IQ and achievement testing, documentation of disability for OHI, a review of Student's current educational programming including classroom observation, and information from Mother and Student's teacher.

The FIE team concluded that Student both had a disability and a need for special education services by reason of that disability because student's ADHD impacted student's academic performance and behavior in the classroom. The FIE team made recommendations for the content of an IEP for Student that included adaptations in methodology and delivery of instruction substantially similar to those student received in ***.

Despite the findings and recommendations made by the FIE team, the ARDC declined to find Student eligible for services.

Educational Program Data

In finding that Student did not need special education services in May 2012, the ARDC focused only on the academic and behavioral progress Student made during the 2011-2012 school year and failed to take into account Student's educational program and the extensive supports student required in order to obtain that progress. For example, in relying on the FBA completed in May 2012 to point out Student's behavioral progress, the ARDC failed to recognize that the FBA documented the *success* of Student's interventions rather than the *need* for them. LSSP ***, in completing the FBA, specifically noted throughout the assessment, that Student's behavior was assessed with the support of extensive interventions, modifications, and supports. As LSSP *** described it, "Student's day ... is infused with behavioral interventions, modifications, and supports, e.g. verbal praise, redirection, warning, behavioral feedback, and rehearsal." (R. 2, pp. 13-14). In addition to those noted by ***, Student also received the following interventions: a detailed and individualized behavior support plan, an individualized behavior reward system, a daily communication log between home and school, counseling on a weekly basis and access to the counselor on an immediate as-needed basis, accommodations from student's teacher to support student's success in the classroom, and willingness to modify required activities and excuse Student from participation if possible (the musical). Student's teacher and the counselor worked together closely to effectively teach Student how to manage student's anger and express student's emotions and consulted with HISD psychological services for input on strategies to work effectively with Student.

In short, I find that the evidence demonstrates that the individualized services provided to Student during the 2012-2013 school year constituted adaptations of the delivery of instruction to Student to ensure student's access to the general education curriculum of student's *** class. As such, Student received specially designed instruction even though it was not labeled as such.

Teacher and Parent Recommendations

The weight of the evidence also demonstrates that Student required and depended upon the individualized services that student received in order to be successful. Both student's teacher and the counselor testified that Student required the services to be successful, and that student would continue to need them to successfully transition to ***. Mother also recognized that Student required the extensive level of support student received. In requesting student's IDEA evaluation in February 2012, Mother pointed to the need Student continued to exhibit when student's regular classroom teacher was unavailable or any change occurred in student's routine. In fact, Mother accurately forecast the future in expressing to HISD that Student's problems were more serious than just misbehavior and that student was going to need services to be successful in ***. The evidence clearly established that both school staff and Mother recognized that Student required substantial individualized intervention in order to access the general education curriculum.

In considering the variety of sources of information available in May 2012, I find that Student demonstrated a need for special education services as of the ARDC review at that time. Although Student obtained academic and behavioral benefit during the 2011-2012 school year, the evidence is clear that student would not have obtained that benefit without the effective implementation of the specially designed instruction student received. As such, Student should have been designated IDEA-eligible in May 2012, so that student would be guaranteed an IEP and services as student transitioned into *** in the following school year.

As discussed more fully below, I further find that this failure to identify Student as IDEA-eligible resulted in substantive educational harm to Student in fall semester 2012.

Child Find- Timely Evaluation For IDEA Eligibility

IDEA requires that all children with disabilities ... "who are in need of special education services be identified, located, and evaluated." 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a). This obligation is known as the "child find" requirement.

Student claims that the District violated this requirement by failing to evaluate (and identify) student earlier in the 2011-2012 school year by virtue of student's demonstrated behavioral and emotional difficulties during both the 2010-2011 and 2011-2012 school years.¹ The District, of course, argues that Student was not eligible for services under IDEA during the 2011-2012 school year at all because of student's educational progress.

Having found that Student was eligible for special education at the time of the May 2012 ARDC, I must also consider Petitioner's contention that IDEA's child find requirement mandated that Student be evaluated at some earlier point in time within the statutory limitations period. *Venus ISD v. Daniel S.*, 2002. LEXIS, 6247 (N.D. TX 2002).

However, the facts of this case do not require me to determine if HISD's child find duty necessitated earlier evaluation and identification of Student in the 2011-2012 school year. The record is clear, and both parties

¹ The statute of limitations in this case extends back to November 26, 2011, one year prior to the date of filing; as such, Petitioner's child find claim is evaluated as of that date.

agree, that Student made meaningful progress in both academics and behavior during the 2011-2012 school year as a result of excellent implementation of the extensive interventions student received. Thus, even if I were to find that Student should have been evaluated and identified as IDEA-eligible earlier during the year, the evidence is clear that Student suffered no harm as a result of any delay in evaluation or identification during the 2011-2012 school year. Accordingly, I do not reach the issue of whether Student should have been evaluated earlier in the 2011-2012 school year.

Conclusion on Eligibility and Child Find Claims

In summary, I find that Student should have been deemed eligible for special education at the conclusion of the 2011-2012 school year as student transitioned into ***. As will be discussed subsequently, HISD's failure to identify student in May 2012 directly impacted student's educational experience in *** and caused a deprivation of educational benefit to Student during fall 2012.

II. DENIAL OF FAPE DURING FALL SEMESTER 2012

The purpose of IDEA is to ensure that all children with disabilities have available to them a free, appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. *20 U.S.C. § 1400 (d)*. Under IDEA, HISD has a duty to provide a free appropriate public education to all children with disabilities residing within its jurisdictional boundaries between the ages of 3 and 21. *34 C.F.R. § 300.101 (a)*. As previously discussed, I find that Student was a child with a disability whom HISD had the duty to serve under IDEA from May 2012 forward.

Petitioner alleges that Student was denied a FAPE during the 2012-2013 school year on the following grounds: 1) the delay in setting up Student's special education program at the start of the school year resulted in a denial of FAPE; 2) the services provided at *** during Student's enrollment there (lack of an appropriate BIP and appropriate response to student's behaviors) were inappropriate and resulted in a denial of FAPE; and 3) the decision to remove Student from *** and return student to *** in November 2012 denied student a FAPE.

Legal Standards Governing FAPE

IDEA requires Respondent to provide Student with a free appropriate public education that consists of "personalized instruction with sufficient services to permit the child to benefit educationally from that instruction." *Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982)*. In *Rowley*, the court developed a two prong analysis to determine if a school district has met its obligation to provide a free appropriate public education: 1) whether the district complied with the procedural requirements of IDEA, and 2) whether the district offered a program to the student that was reasonably calculated to provide educational benefit. *Id. at 206-207.*²

² Petitioner alleged procedural violations of IDEA pertaining to the content of student's IEP, i.e. lack of objectives for student's annual goals and unsupported present level of performance for student's goals, and the failure to provide progress data on student's IEP to Mother. It is well settled that procedural Petitioner violations constitute a denial of a FAPE only if the procedural inadequacies impeded the child's right to a free appropriate public education, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education, or caused a deprivation of educational benefit. *34 C.F.R. 300.513(a)*. Because I find that Respondent has denied Student a free appropriate public education on substantive grounds, I will not address each of the procedural violations individually.

The essence of determining whether a substantive violation of IDEA has occurred is whether the school's program has provided the student with the requisite educational benefit. IDEA does not require an education that maximizes a student's potential; rather, the school must provide an education that is reasonably calculated to enable the child to achieve *some* benefit. *Some* benefit means an educational program that is meaningful and offers more than a *de minimus* educational benefit; it must be "likely to produce progress, not regression or trivial educational advancement." *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997).

Although courts have not adopted a specific substantive standard to determine when a free appropriate public education has been provided, the Fifth Circuit in *Michael F.* identified four factors to consider in analyzing a school's program: 1) is the program individualized and based on 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; and 4) are there demonstrated positive benefits both academically and non-academically to the student.

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program for reimbursement purposes. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

Finally, in examining the appropriateness of Respondent's program, a presumption exists in favor of the school district's plan for educating Student. As such, Petitioner bears the burden of proving that Student's program and placement were not appropriate. *Tatro v. State of Texas*, 703 F.2nd 823 (5th Cir. 1983), *aff'd* 468 U.S. 883 (1984); *Schaffer v. Weast*, 546 U.S. 49 (2005).

Applying these legal standards to the evidence in this case, I find that Respondent did not provide Student with a free appropriate public education under IDEA during Fall 2012.

Student's Transition to * and Program at *****

Was Student's Program Individualized and Based On Assessment & Performance? Did Key Stakeholders provide Services in a Coordinated and Collaborative Manner?

At the start of the 2012-2103 school year, HISD provided Student with no individualized program at all due to the District's prior failure to identify Student as IDEA-eligible and to a complete lack of coordination within HISD about Student's needs for services. The credible evidence indicates that *** administrators did not contact *** to learn more about Student despite Mother's attempt to inform them about student's needs. The AP did not communicate with Student's teachers before school started about any of student's particular needs or services. Student's assigned teacher for the *** was a first year teacher with no teaching experience and no training in behavior management or working with students like Student. In short, Student received none of the accommodations and interventions that student's former school knew student required in order to access student's education. This lack of collaboration and coordination within the District resulted in an initial program at *** that was not individualized to Student at all and did not take into account student's prior performance or assessment. These actions directly impacted the provision of FAPE to Student in at least two important ways.

First, had Student been deemed eligible for special education services in ***, student's ARDC would have been charged with making an individualized determination regarding the appropriateness of *** for Student. The ARDC would have considered Student's prior performance, assessment data, and the input of the *** principal, Student's *** teacher, and the *** Counselor, who knew Student's needs and testified to them at hearing: Student required predictability, structure, support with transitions, a teacher highly experienced in behavior management, close rapport with student's teacher, ready access to counseling to assist with emotional regulation and expression, an individualized behavior plan and reward system, and other accommodations and supports that student relied on to be successful. Upon consideration of that input, the ARDC could have decided that *** was not an appropriate setting for Student *or* developed an appropriate IEP for implementation at *** so that Student could be successful. Significantly, had HISD staff collaborated and coordinated to address Student's needs, the process later performed by the ARDC in November 2012 of evaluating whether *** was an appropriate setting for Student would have taken place *before* Student enrolled, rather than after a disastrous three-month experience.³

Second, had communication and collaboration occurred to address Student's individualized needs, HISD would have timely provided Student with an IEP for implementation on the first day of school, rather than at the end of September as happened in Student's case. As the *** teacher testified, this type of advance planning for a child like Student helps to start the year with a strong foundation. Importantly, planning could have taken place to address the aspects of the *** program that could reasonably be expected to be challenging for a student with Student's profile, e.g. increased transitions, working with multiple teachers, and increased academic demands.

Respondent counters that while Student may not have begun the year with an individualized plan in place, *** staff reacted quickly when Student began to demonstrate behavior problems by convening a 504 Committee during the third week of school and designating Student as eligible for special education by the end of September. From that time forward, Respondent points to the individualization of Student's program, including updating student's IEP as new information became available, and collaborative efforts to implement student's IEP in the weeks following student's admission to special education.

While the evidence does show that HISD took these steps following Student's admission into special education, it also shows that Respondent updated Student's FIE on September 10, 2012 showing student's need for special education, but still placed Student into Section 504 for two weeks before convening an ARDC. No explanation for this delay was provided to this Hearing Officer. Further, Respondent never initiated a psychological evaluation despite the clear need for additional assessment data to explain Student's emotional condition. Finally, Respondent's argument fails to account for the District's responsibility to collaborate between campuses within its boundaries. The failure to coordinate and collaborate at the outset resulted in Student spending the first month of fall 2012 at a new school, ***, without behavioral supports and interventions, trained teachers who could provide effective behavioral intervention, and staff who were familiar with student's needs. Given the particular facts proven in this case, I find the one month delay in addressing Student's special education needs to be significant in impacting student's adjustment to *** and student's ability to access the general education curriculum.

³ The sequence of events here illustrates why special education eligibility cannot be based solely on a student's ability to progress in a general education setting with interventions. Without the designation and protections of IDEA, the student is not guaranteed to continue receiving those interventions. Where, as here, a student's interventions are so substantial as to constitute special education services and it is proven that the student requires those interventions to be successful, IDEA eligibility ensures continuity of service so that a student can receive a FAPE.

In summary, I find that HISD failed to provide Student with an individualized program based on assessment and performance, and failed to collaborate and communicate with key stakeholders in providing services to Student for at least the first month of school. Given Student's ***, the severity of student's behaviors, the nature of student's disability, and the ***, I find this delay significant to the provision of FAPE to Student.

Was Student's Program At *** Reasonably Calculated To Provide Academic and Non-Academic Benefits and Did It Provide These Benefits?

The weight of the evidence demonstrates that Respondent's program was not reasonably calculated to provide Student with academic and non-academic benefits and that it did not, in fact, provide these benefits.

First, Student's program at *** lacked many of the key features identified by Student's former educators at *** that Student needed in order to be successful. Student's *** teacher was a first year teacher with no experience or training with behavior management; student's 1:1 aide also lacked any experience or training in behavior management; and student did not have ongoing access to counseling to process situations as they arose. Behavioral records reflect the staff's inability to effectively intervene or manage Student's behavior so that student could remain in class and learn. *** personnel all testified to the importance of selecting an appropriate, experienced teacher for Student, providing structure and routine, access to counseling, and other interventions.

Second, Student's IEP and program failed to provide any pro-active positive behavioral interventions such as a social skills class or explicit training in appropriate replacement behaviors and social skills. The only services provided in this area were counseling sessions with LSSP ***. The ARDC did not develop counseling goals and objectives, and no progress information was provided to Mother, but LSSP *** testified that Student did not make progress in this important area. The evidence is clear that Student required additional and effective behavioral interventions on the front end, rather than reactive responses to misbehaviors after they occurred, in order to make progress.

Third, *** staff viewed Student's meltdowns, defiance, and aggression as resulting exclusively from student's frustration with the *** program. *** staff made this clear in their testimony at hearing, in the ARDC's decision in November 2012 to return Student to *** with the exact same special education program student received while at ***, and in the ARDC's failure to request a psychological evaluation for Student, when the need for one was clearly implicated by the severity of student's behavior. While the evidence supports the fact that the *** program at *** was not appropriate to meet Student's needs, it is equally clear that Student's frustration with *** was not the sole trigger for the severe behavioral incidents student experienced. As Mother expressed in Spring 2012, and as both independent evaluators pointed out in their evaluations and testimony, something more serious underlies Student's behavior than ADHD or the *** at ***.

The *** staff's singular focus on Student's difficulty with *** blinded them to the severity of Student's disability, the need for experienced and trained staff who could effectively implement student's program, and the need for additional assessment and tools to address it.

As a result of the totality of these deficits in Student's program, student failed to obtain academic and behavioral benefits while at ***. It is undisputed that Student's behaviors deteriorated, intensifying in both frequency and severity, over the course of student's tenure at ***. Student regularly engaged in aggressive, destructive behavior that resulted in 7 days of suspension over a 3 month period, numerous absences when student would leave school early due to behavior issues, evacuations of other students from student's classroom due to student's behavior or refusal to leave the room, at least two restraints, and one ***. In addition, Student routinely refused to attend the *** portion of student's day or to do student's work, missing critical instruction in ***, Math, and Science, despite the presence of a 1:1 aide during this portion of student's day. Though student's grades reflect passing marks, anecdotal records make clear that Student regularly wandered the

building during student's afternoons, failed to complete work, and missed substantial portions of instruction. Student's English teacher testified that student did not complete enough work in her class for her to even gauge student's academic strengths and weaknesses. Student's teachers' testimony is a more reliable indicator of student's academic progress or lack thereof during Fall 2012 than student's report card. The *** AP and LSSP *** both acknowledged that they simply could not identify behavioral strategies that were effective with Student.

The record is quite clear that Student's program not only failed to produce progress; rather, Student regressed substantially, with the resulting impact that student completed little to no academic work during student's time at ***.

In arguing that HISD provided Student with a FAPE while at ***, Respondent does not contest Student's lack of progress, but instead emphasizes that its efforts to educate Student were not successful because the trigger for Student's behavioral disintegration was *** itself, or more specifically, receiving instruction for ***. Respondent argues it had no control over Mother's choice to place Student at *** and it acted appropriately to provide services to Student while student was there, and to then propose student's transfer back to *** in November 2012 when student's lack of success at *** became apparent.

Respondent's duty to provide FAPE to Student under IDEA did not change simply because student attended *** rather than *** in Fall 2012. Having accepted Student into ***, Respondent continued to have a legal responsibility to provide Student with "personalized instruction with sufficient services to permit the child to benefit educationally from that instruction." *Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982)*. Respondent failed to meet that duty during Student's tenure at ***.

For all the reasons discussed herein, I find that Respondent did not provide Student with a FAPE during student's enrollment at *** in Fall 2012.

Removal From * to *****

On November 9, 2012, the ARDC met to review the recently updated FBA and discuss Student's program. The ARDC reviewed Student's progress at *** and determined that student's needs would be better served at student's *** home *** campus, ***, where the *** could be removed. Mother disagreed and wanted Student to remain at ***. The ARDC was scheduled to reconvene on November 20, 2012 to continue the discussion.

On ***, Student was involved in a very serious behavioral incident that culminated in Student's physical removal from the classroom and subsequent injury when student ***. The ARDC discussed Student's attendance at *** again, noting that Student disliked ***, wanted to attend ***, had not been successful at *** even with a 1:1 ***, and was failing Math, Science, and Reading at that time. Based on these factors and the severity of the incident ***, the ARDC recommended that Student return to *** with the same instructional arrangement and services, effectively immediately. Mother disagreed. Effective November 30, 2012, Student was withdrawn from ***.

Petitioner argues that Student's removal from *** constitutes a denial of FAPE. Petitioner argues that Student should have the opportunity to attend *** with a well developed and appropriate program, trained teacher, and trained aide so that student can be successful there. Respondent counters that *** was not appropriate for Student, as the *** program was a trigger for student's behavioral issues.

I find that Respondent's proposed removal of Student from *** in November 2012 to return student to *** did not violate Student's rights under IDEA. IDEA provides, in relevant part, that placement decisions be made by a group of persons knowledgeable about the child, the evaluation data, and the placement options; are made in

accordance with the least restrictive environment (LRE) provisions of IDEA; are based on the child's IEP; and are as close as possible to the child's home. 34 C.F.R. § 300.116. Nothing in IDEA's provisions governing placement of eligible students addresses their entitlement to placement at ***. Clearly, if a local educational agency accepts a student with a disability into a ***, as HISD did here, the provision of a FAPE to that student during his/her enrollment at the school is a question arising under IDEA. That question, however, is distinct from the legal entitlement of a student with disabilities to attend a *** program in the first place. Questions related to a child's admission and access to a *** program in light of student's disabilities arise under Section 504, not IDEA, and are beyond the jurisdiction of this hearing officer.

Furthermore, proper placement of Student requires consideration of whether a particular setting meets Student's individualized needs. The evidence demonstrates that Student's individualized needs were not met at ***, in part due to the *** and the structure of Student's day that it demanded. The ARDC made the determination that Student's IEP could best be implemented at student's home campus where student would receive instruction in *** classroom in *** throughout student's school day. Based on Student's documented difficulties with student's *** class, transitions, lack of consistency, and increased academic demands, I find the ARDC's decision to remove Student from *** to be supported by the data and consistent with Student's special education needs.

Because Student has no legal entitlement *under IDEA* to attend *** and because the evidence supports the ARDC's decision that Student's special education needs are best met at student's *** home campus, I find that the ARDC's decision to remove Student from *** in November 2012 did not violate student's rights under IDEA.

Conclusion on FAPE Issues

In summary, I find that the delay in implementing Student's special education program at ***, combined with the inappropriate services student received while at ***, resulted in a deprivation of academic and non-academic benefits to Student and a denial of FAPE. I further find that the ARDC's decision to remove Student from *** in November 2012 and return student to student's home campus of *** did not violate Student's rights under IDEA.

Remedies For Violation of FAPE

In relevant part, Petitioner requested the following remedies related to the FAPE claims asserted in this cause: continued placement at ***; ARDC review of the IEEs and development of a revised Behavior Intervention Plan with the assistance of the independent behaviorist; training for all staff working with Student in the implementation of the Behavior Intervention Plan and in working with students with moderate to severe ADHD; and compensatory education in connection with Student's failure to regularly attend and benefit from *** classes while at ***.

In light of the foregoing discussion, I find that continued placement of Student at *** and compensatory education to address deficits in *** are not appropriate relief for the FAPE violations proven. The remaining relief requested is appropriate based on the evidence presented in this cause.

In addition to the relief requested by Petitioner, the evidence supports an order requiring the ARDC to convene not only to review the IEEs and revise Student's Behavior Intervention Plan, but also to revise Student's IEP to provide social skills training and address any other identified areas of need. Further, the ARDC must consider, based on the IEE completed by Dr. ***, whether additional psychological testing is needed and whether Student's eligibility classification for services under IDEA as OHI includes all areas of disability.

III. VIOLATION OF STAY PUT

At the ARDC on November 20, 2012, the ARDC decided to move Student from *** to *** for the reasons discussed herein. Student's special education needs were the primary consideration for the proposed move. Mother disagreed and, as such, filed the instant action on November 26, 2012. Subsequently, on November 20, 2012, HISD unilaterally implemented the proposed move to ***, causing Mother to place Student in a private school, ***, as a result of HISD's alleged violation of the stay-put provisions of IDEA.

HISD argues that the stay-put provisions of IDEA did not preclude Student's unilateral transfer from *** to *** because the move did not trigger a change of placement under IDEA. Petitioner counters that a change of placement occurred because the removal was essentially a disciplinary change of placement, or, in the alternative, because the transfer was a placement decision made by the ARDC for special education reasons.

Stay-Put Provision of IDEA

The stay-put provision of IDEA provides that, "during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complain must remain in his or her current educational placement." 34 C.F.R. § 300.518(a). Case law under IDEA makes clear that a violation of stay-put occurs only if there is a change in a child's current educational placement. The question then, is what constitutes a change in placement under IDEA.

The Fifth Circuit addressed the issue of what constitutes a change of placement most recently in *Veazey v. Ascension Parish School Board*, 42 IDELR 140 (5th Cir. 2005), holding that educational placement means the educational program and not the location where the program is implemented. In finding that the transfer of a student from student's neighborhood school to a cluster cite several miles away where student would receive the same services did not constitute a change of placement triggering the procedural safeguards of IDEA, the court emphasized that an educational placement has not changed unless a fundamental change in or elimination of a basic element of the educational program has occurred. Defined further, the Court has held that educational placement refers to the setting described in the continuum of services rather than the particular school. *White v. Ascension Parish School Board*, 343 F. 3d 373 (5th Cir. 2003). *Accord*, *A.W. by D.W. & C.W.v. Vairfax County School Board*, 372 F. 3d 674 (4th Circ. 2004). As such, a change of placement does not occur when a student has the same special education services, the same LRE-compliant placement, and the same access to the general education curriculum.

Whether Move From * To *** Constitutes A Change Of Placement**

Disciplinary Change of Placement

Student first argues that student's transfer to *** is for disciplinary purposes pursuant to 34 C.F.R. 300.536. Student points to student's 7 days of suspension, coupled with additional days when *** staff told student's Mother she had to pick student up, to argue that student was removed from school for more ten (10) days, student's behavior was substantially similar in the incidents that resulted in removal, and additional factors such as the length of the removals, the total amount of time Student was removed, and the proximity of the removals from each other.

The evidence does not support Petitioner's theory of a disciplinary change in placement. First, as a factual matter, the evidence does not demonstrate that Student was removed from school for more than 10 days. Second, while Student's behavior was substantially similar in each of the instances of suspension, the evidence shows

that there were numerous instances of such behavior for which Student was not suspended and that other responses to Student's behavior occurred.

Change in Educational Placement Under IDEA

In the instant case, while Student's educational program would undoubtedly be different at *** than at ***, student's special education services and student's access to the general education setting and curriculum would remain unchanged. This focus on a change in Student's special education program, and student's related access to general education, is consistent with the purpose of IDEA's stay-put provision: to ensure that a student's special education placement is not unilaterally changed during the pendency of a due process proceeding designed to resolve disputes concerning matters related exclusively to a student's services under IDEA.

Based on the applicable law and the facts in this case, I find that the transfer of Student from *** to *** did not constitute a change in educational placement that triggered the stay-put provisions of IDEA. As such, HISD's unilateral implementation of that move did not violate Student's procedural right to stay-put.

CONCLUSIONS OF LAW

1. Respondent Houston ISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA and its implementing federal and state regulations. Houston ISD is Student's resident district under IDEA for all time periods relevant to this action.
2. Student bears the burden of proof on all issues raised in this proceeding. *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49 (2005).
3. Respondent failed to timely identify Student as eligible for special education services under IDEA as a student with an Other Health Impairment based on ADHD as of May 2012. Respondent's failure to timely identify Student in May 2012 resulted in a deprivation of educational benefit to Student. 34 C.F.R. § 300.8(c)(9); 19 T.A.C. § 89.1040(c)(8); 34 C.F.R. § 300.513(a)(2).
4. Respondent failed to provide Student with a free appropriate public education during student's enrollment at ***, as Student demonstrated that student's program did not satisfy the indicia of a free appropriate public education and did not provide student with meaningful academic and non-academic benefits. 34 C.F.R. § 300.101 (a).
5. Respondent's removal of Student from *** to *** does not violate IDEA. 34 C.F.R. § 300.116.
6. Respondent's unilateral implementation of Student's transfer from *** to *** during the pendency of this proceeding does not violate the stay-put provisions of IDEA, as it does not constitute a change of placement under IDEA. 34 C.F.R. § 300.518.

ORDERS

After due consideration of the record, and the foregoing Findings of Fact and Conclusions of Law, this Hearing Officer hereby **ORDERS** that the relief sought by Petitioner is **GRANTED IN PART and DENIED IN PART**. The following relief is specifically awarded:

It is **ORDERED** that an ARDC meeting shall be convened at a mutually agreeable time within twelve (12) business days of the date of this decision, or at a later date if both parties mutually agree. It is further **ORDERED** that Dr. *** and *** shall be invited to attend the ARDC at District expense to fully participate in the ARDC.

It is further **ORDERED** that the ARDC shall:

- 1) Review the IEEs completed by Dr. *** and ***;
- 2) Consider whether additional psychological testing of Student is warranted;
- 3) Consider Student's eligibility classifications for services under IDEA;
- 4) Develop a transition plan for Student's return to HISD for the 2013-2014 school year;
- 5) Design an Individual Education Plan for Student in accordance with the provisions of IDEA that addresses all areas of Student's documented academic, social, and emotional needs, including Student's need for social skills; and
- 6) Design a Behavior Intervention Plan for Student in consideration of the recommendations contained within the IEEs.

It is further **ORDERED** that HISD shall provide training for all staff members who will work with Student during the 2013-2014 school year on the implementation of Student's IEP, Behavior Intervention Plan, and on effective strategies for working with students with ADHD and emotional dysregulation. It is further **ORDERED** that such training be completed prior to the start of the 2013-2014 school year. It is further **ORDERED** that the training shall also be provided for any staff members assigned to work with Student after the start of the 2013-2014 school as soon as is practical after such assignment is made.

It is further **ORDERED** that all other items of relief not specifically awarded herein are **DENIED**.

SIGNED and **ENTERED** this 25th day of July 2013.

/s/ Lynn E. Rubinett

Lynn E. Rubinett

Attorney at Law

Special Education Hearing Officer for the State of Texas

STUDENT	§	BEFORE A SPECIAL
BNF PARENT	§	EDUCATION
Petitioner	§	
v.	§	HEARING OFFICER FOR THE
	§	
HOUSTON INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	STATE OF TEXAS

SYNOPSIS

Issue: Whether Respondent failed to timely identify Student as eligible for special education services under IDEA as a student with an Other Health Impairment based on ADHD

Held: For the Student. Student met student's burden of establishing that Respondent failed to timely identify Student as eligible for special education services under IDEA as a student with an Other Health Impairment based on ADHD as of May 2012. Respondent's failure to timely identify Student in May 2012 resulted in a deprivation of educational benefit to Student.

Cite: 34 C.F.R. § 300.8(c)(9); 19 T.A.C. § 89.1040(c)(8); 34 C.F.R. § 300.513(a)(2).

Issue: Whether Respondent failed to provide Student with a free appropriate public education during student's enrollment at *** in Fall 2012?

Held: For the Student. Student met student's burden of establishing that Respondent failed to provide student with a free appropriate public education during student's enrollment at ***, as Student demonstrated that student's program did not satisfy the indicia of a free appropriate public education and did not provide student with meaningful academic and non-academic benefits.

Cite: 34 C.F.R. § 300.101 (a).

Issue: Whether Respondent's transfer of Student from *** to *** violates IDEA?

Held: For Respondent. Respondent's transfer of Student from *** to *** does not violate IDEA.

Cite: 34 C.F.R. § 300.116.

Issue: Whether Respondent's unilateral implementation of Student's transfer from *** to *** during the pendency of this proceeding violates the stay-put provisions of IDEA

Held: For Respondent. Respondent's unilateral implementation of Student's transfer from *** to *** during the pendency of this proceeding does not violate the stay-put provisions of IDEA, as it does not constitute a change of placement under IDEA.

Cite: 34 C.F.R. § 300.518.