

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

FINAL DECISION OF THE HEARING OFFICER

Appearances for Petitioner:

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FINAL DECISION OF THE HEARING OFFICER

Statement of the Case

The Petitioner (Student or Child)¹ initiated this action against the Respondent (District or School) under the Individuals with Disabilities Education Act (IDEA), as amended (20 U.S.C. § 1400). The Petitioner complains that the Respondent denied a free appropriate public education (FAPE) because of:

1. A failure to implement an appropriate behavioral intervention plan (BIP).
2. A failure to provide an appropriate BIP.
3. A failure to timely conduct a psychological evaluation.
4. A failure to provide appropriate personnel support during special education transportation.
5. A failure to provide special education counseling services.²

As relief, the Petitioner asks that the Respondent be directed to provide: (1) appropriate evaluations; (2) an admission, review and dismissal (ARD) committee meeting; (3) appropriate modifications, interventions and services to enable the Petitioner to receive a FAPE; (4) placement in the least restrictive environment (LRE); (5) compensatory educational services; and (6) reimbursement for parental expenditures and costs.

Procedural History

The Texas Education Agency (TEA) received the Petitioner’s Due Process Complaint requesting a due process hearing on May 17, 2011. The parties participated in the mandatory resolution meeting on May 31, 2011 but were unable to resolve the Petitioner’s complaints.³ This Hearing Officer held a prehearing teleconference with the parties on June 7, 2011. Among other things, the scope of the Petitioner’s complaints was reviewed and plans made for a hearing. Subsequently, this Hearing Officer reviewed and denied the Respondent’s challenge to the sufficiency of the Petitioner’s Due Process Complaint.⁴

The due process hearing was conducted on August 1, 2011. Altogether, seven witnesses were called and testified. Altogether, 63 exhibits were admitted into evidence. During the hearing, the Petitioner was afforded a fair opportunity to offer and solicit evidence and testimony to satisfy its burden of persuasion as assigned under *Schaffer v. Weast*, 546 U.S. 49, 57 – 58 (2005). Subsequent to the hearing, the parties were permitted to submit written closing arguments.⁵

¹ To protect the privacy of the Petitioner, the Petitioner is also referred to as “Student” or “Child” in this Decision.

² This list closely tracks but is not a verbatim reiteration of the Petitioner’s claims in the Due Process Complaint. The Petitioner’s complaints have been edited here, in part, to more succinctly state them. See Pet’r’s Due Process Complaint at 1 – 3 (May 17, 2011).

³ 34 C.F.R. § 300.510(a).

⁴ 34 C.F.R. § 300.508(d).

⁵ Following the hearing, the decision due date was extended to accommodate a delay in the submission of closing briefs.

Findings of Fact

Based upon the testimony and evidence taken on the record in this proceeding, this Hearing Officer makes the following findings of fact:

1. The Child qualifies under the IDEA as a child with a serious emotional disturbance (SED) or emotional disturbance (ED). The School also determined that the Child also qualifies under the IDEA as a child with an “other health impairment” (OHI). (Hr’g Tr. at 25, 131; Pet’r Ex. 5, p. 20; Resp’t Ex. 1, p. 2; Resp’t Ex. 13, p. 20)
2. The Child has a diagnosis of, among other things, attention deficit hyperactivity disorder (ADHD) and bipolar disorder with mood swings. (Hr’g Tr. at 26, 28 – 29, 131)
3. The Child has moderate to severe behavioral development issues, including serious emotional delays and very poor affective or emotional control. (Hr’g Tr. at 85 – 86, 106 – 07; Pet’r Ex. 1, p. 9)
4. The Child’s disability impedes the Child’s academic achievement to the extent that the Child is not able to cope with emotional stress and frustration, is sensitive, and can become nervous and may quit tasks. (Hr’g Tr. at 87 – 88, 103, 105, 107)
5. When the Child gets “confounded,” the Child may decompensate into tantrums, screaming, and perhaps turning over furniture. (Hr’g Tr. at 88)
6. When the child is decompensating or in an infantile emotional state the Child is not open to learning. (Hr’g Tr. at 99)
7. The Child was in the *** grade during the 2010-2011 school year. The Child spent most of the 2010-2011 school year at ***, a *** school in the school district that was not the child’s neighborhood school. During the fall of 2010, the Child temporarily transferred and attended another *** school within the school district for less than one month. (Hr’g Tr. at 20, 32, 160, 161, 179 – 80, 202 – 04, 206)
8. During the 2010-2011 school year, the Child’s placement was in a “successful academic inclusive learning” (SAIL) program – a campus behavior management program that primarily utilized a resource room along with partial inclusion in general education classes. (Hr’g Tr. at 48, 173, 181, 210 – 11, 212, 217)
9. During the 2010-2011 school year, the Child was generally mainstreamed or included in general education in the mornings until lunch. (Hr’g Tr. at 181, 212, 217 – 18)
10. On September 8, 2010, the Child’s ARD committee met. The Child’s grandparent attended and participated. Among other things, the committee identified, regarding “present levels of academic achievement and functional performance,” that the following behaviors and characteristics affected the Child’s education: (1) “talks back to adults;” (2) “aggressive;” and (3) “defiant, easily frustrated.” (Hr’g Tr. at 45 – 46, 65; Pet’r Ex. 19, pp. 2, 47; Resp’t Ex. 3, pp. 2, 14 – 15)
11. On September 8, 2010, the Child’s ARD committee stated, regarding “present levels of academic achievement and functional performance,” the following on the Child’s academics: “[The Child’s] word recognition skills are at about the *** grade level. Reading Star results indicate a *** grade level. [The Child’s] Reading DRA level of *** places [the Child’s] skills within the

end of *** grade level. Regarding Comprehension, [the Child] performed at the *** grade level. Regarding Math, [the Child] can add and subtract whole numbers with three digits but struggles with four or more digits. [The Child] has mastered *** grade computation but is still working on *** grade material. This includes naming fractions, comparing fractions, ordering fractions, multiplication facts, division, and naming geometric shapes.” (Pet’r Ex. 19, p. 28; Resp’t Ex. 3, p. 3)

12. On September 8, 2010, the Child’s ARD committee included a functional behavioral assessment (FBA) of the Child prepared by the Child’s SAIL teacher. Among other things, the FBA identified three “prioritized targeted behaviors” and the functions of each of the behaviors: (1) “not completing work independently” – “frustration, task avoidance;” (2) “arguing with adults/staff/teacher” – “gain attention, task avoidance, frustration;” and (3) “physical aggression” – “gain attention, teased, frustrated, provocation from peer.” Antecedents to the behaviors were identified. Among the antecedents were: “request/directive from teacher/staff;” “redirect from inappropriate activity;” “non-compliance;” “engage in academic activity;” and “off task.” “Consequences/Reinforcers” for the behaviors were identified along with their degree of effectiveness. Among those identified as “effective” were: “conference (parent or student);” “loss of privileges;” “special privileges;” and “tangible items.” Among the “not effective” was: “suspension.” (Hr’g Tr. at 127, 200; Pet’r Ex. 19, pp. 29 – 30; Pet’r Ex. 20, pp. 1 – 2; Resp’t Ex. 3, pp. 17 – 18)
13. On September 8, 2010, the Child’s ARD committee included a BIP in the Child’s individualized education program (IEP). The BIP was drafted by the Child’s SAIL teacher. The BIP was comprised of one continued annual goal and two new short-term objectives. The BIP annual goal was: “The learner will increase positive behaviors and/or decrease negative behaviors.” The short-term objectives were: (1) “[The Child] will increase performance in areas of educational need by completing assigned classroom tasks measured by 70% accuracy for each six weeks;” and (2) “[The Child] will increase appropriate types of behaviors or feelings by respectfully expressing thoughts, feelings, and beliefs in a non-aggressive/non-destructive way while interacting with peers, and adults measured by 80% accuracy for each six weeks.” For the first short-term objective (completing assigned classroom tasks), 12 “strategies” were listed: (1) “provide a structured environment;” (2) “set well defined limits and rules;” (3) “Speak to [the Child] privately;” (4) “Offer choices;” (5) “Premack principal;” (6) “Special privileges;” (7) “Complete work in another setting/allow extra time;” (8) “Cooling off time;” (9) “Call grandfather;” (10) “Office referral;” (11) “Suspension;” and (12) “Emergency removal.” For the first short-term objective, the following special education consequences and reinforcers were listed: (1) “[The Child] will receive behavioral support from the SAIL teacher;” and (2) “social skills (Boy’s Town Press) will be implemented to reinforce [the Child] in completing [the Child’s] assignments (ex: organizationetc.) [sic].” For the second short-term objective (respectfully expressing thoughts), 14 “strategies” were listed: (1) “The use of a punch card or classroom system;” (2) “social and problem solving skills curriculum to address repeated incidences;” (3) “set reinforcement and consequences for each six weeks;” (4) “private discussion regarding behavior;” (5) “non verbal signal [sic];” (6) “premack principal If you do this then you do that [sic];” (7) “offer choices;” (8) “earn privileges;” (9) “cooling off time;” (10) “removal to another area;” (11) “contact grandfather;” (12) “office referral;” (13) “suspension;” and (14) “emergency removal.” For the second short-term objective, the following special education consequences and reinforcers were listed: (1) “[The Child] will receive behavioral support from the SAIL teacher;” (2) “a punch card will be used to establish positive reinforcement;” (3) “social skills will be used to provide support;” and (4) “negative behaviors will result in loss of mainstream time.” (Hr’g Tr. at 65 – 66, 127, 128 – 29, 176 – 77, 182, 190, 199, 204 – 05; Resp’t Ex. 3, pp. 25 – 27; Resp’t Ex. 6, pp. 6 – 8)

14. The Child's BIP incorporated consequences. (Hr'g Tr. at 147, 178)
15. The Child's BIP, through the SAIL program, included social skills training for the Child. (Hr'g Tr. at 174 – 75)
16. The implementation of the Child's BIP included a point card system that tracked behaviors. It was used by teachers to measure behaviors and shown to the Child as feedback on behaviors. (Hr'g Tr. at 183 – 84, 190 – 91, 196 – 98)
17. On September 8, 2010, the Child's ARD committee included in the IEP the provision of the related service of transportation through bus service between home and school as well as between school and after-school care. The school bus had a driver and one transportation aide. The Child shared the bus with approximately seven other students. (Hr'g Tr. at 32, 202, 241; Pet'r Ex. 19, pp. 34, 37, 48 – 49; Resp't Ex. 3, pp. 5, 32 – 34)
18. The Child's transportation aide received some general training in behavior management. (Hr'g Tr. at 205 – 06)
19. On September 8, 2010, the Child's ARD committee also conducted a review of existing evaluation data on the Child. The committee decided that additional data were needed to determine continued eligibility and educational needs. A psychological evaluation was a part of the reevaluation that the School would administer. The Child's grandparent signed a "consent for assessment/evaluation" form for the District. The reevaluation began in November, 2010. (Hr'g Tr. at 122, 127, 156 – 57, 158, 168; Pet'r Ex. 19, pp. 46, 54; Pet'r Ex. 21, pp. 3 – 4; Resp't Ex. 3, p. 16; Resp't Ex. 10, pp. 3 – 4; Resp't Ex. 11, p. 4)
20. During the 2010-2011 school year, the Child demonstrated and engaged in inappropriate behaviors on the school bus during transit between home and school and school and home. Misbehaviors included inappropriate language, not remaining seated with seatbelt on, and ***. (Hr'g Tr. at 89, 150 – 52, 185, 188, 234, 239)
21. During the 2010-2011 school year, the Child's School suspended the Child from the school bus and denied transportation service because of the Child's behavior on the bus. (Hr'g Tr. at 32, 43 – 44, 77)
22. The School implemented various interventions on the school bus over the course of Fall, 2010. Informal interventions began with seating arrangements and attempting to distract the Child from surroundings on the bus by directing attention to writing in a spiral notebook. These informal interventions were not effective; misbehavior on the bus increased. (Hr'g Tr. at 185 – 89, 242 – 43)
23. During the 2010-2011 school year, the Child's School's principal or vice principal called the Child's grandparent to come to school to pick up the Child and take the Child home for the remainder of the school day. These occasions were attributed to the Child being "upset" or having had "a rough time on the bus." (Hr'g Tr. at 29 – 31, 33 – 34, 47, 67 – 68)
24. During the 2010-2011 school year, the School's principal reported that the Child had "multiple" office referrals. (Hr'g Tr. at 229)
25. Office referrals that the Child received came from the resource room, general education, and the bus. (Hr'g Tr. at 225)

26. The Child's resource room teacher reported that the Child had a couple of violent outbursts but that they were "very few." However, when they did occur, resource teacher was not able to manage and had to call the School's office. The office would manage Child and determine whether sent home or returned to resource room. (Hr'g Tr. at 218 – 19, 222 – 23)
27. On September 21, 2010, the Child demonstrated inappropriate behaviors at School. The Child was referred to the School's office. (Pet'r Ex. 17, p. 19)
28. On September 22, 2010, the Child demonstrated inappropriate behaviors during transportation on the school bus. The Child was suspended from transportation for a day on September 23, 2010. (Hr'g Tr. at 43 – 44; Pet'r Ex. 15, p. 1; Pet'r Ex. 17, p. 30; Pet'r Ex. 18, p. 1; Resp't Ex. 28, p. 1)
29. On or about September 24, 2010, the grandparent withdrew the Child from *** School and temporarily transferred the Child to another *** school in the school district for less than one month. After the transfer of a few weeks, the Child returned to *** for the remainder of the school year. (Hr'g Tr. at 179 – 80, 202 – 04, 206, 261 – 62)
30. In October, 2010, upon the Child's return to the *** school (***) where the Child started the 2010-2011 school year, the School noted that the Child had regressed and the Child's behaviors were worse than those experienced prior to the temporary transfer. Among other things, the Child yelled, screamed, used profanities, and ran out of classes. (Hr'g Tr. at 180 – 81)
31. On or about October 20, 2010, the Child demonstrated inappropriate behaviors at School. The Child was referred to the School's office. (Pet'r Ex. 17, p. 20)
32. On or about October 26, 2010, the Child demonstrated inappropriate behaviors at School. The Child was referred to the School's office. (Pet'r Ex. 17, p. 21)
33. On October 28, 2010, the Child demonstrated inappropriate behaviors during transportation on the school bus. The Child was suspended for a day. (Pet'r Ex. 11, p. 1; Pet'r Ex. 15, p. 1; Pet'r Ex. 17, pp. 1 – 2, 22)
34. On November 5, 2010, the Child demonstrated inappropriate behaviors during transportation on the school bus. The Child was suspended for two days on November 8 and 9, 2010. (Pet'r Ex. 11, p. 1; Pet'r Ex. 15, p. 1; Pet'r Ex. 17, pp. 3 – 5, 23; Resp't Ex. 2, p. 32)
35. On November 11, 2010, the Child demonstrated inappropriate behaviors at School. The School's principal called the Child's grandparent to pick up the Child and take the Child home. (Pet'r Ex. 11, p. 1; Pet'r Ex. 15, p. 1)
36. On or about November 16, 2010, the Child demonstrated inappropriate behavior during transportation on the school bus. The Child's School's campus counselor met with the Child. The Child was suspended for two days on November 17 and 18, 2010. (Hr'g Tr. at 55 – 56; Pet'r Ex. 15, p. 1; Pet'r Ex. 17, p. 7; Pet'r Ex. 18, p. 2; Resp't Ex. 28, p. 2; Resp't Ex. 33, p. 4)
37. On November 18, 2010, the Child demonstrated inappropriate behaviors at School. The Child was suspended for a day on November 19, 2010. (Pet'r Ex. 15, p. 1; Pet'r Ex. 17, p. 5)
38. On December 1, 2010, the Child's ARD committee met. The Child's step-grandparent attended and participated. Representatives of transportation services attended and participated in the ARD committee meeting. The committee discussed the Child's behaviors on the school bus. In summary, the Child's behaviors were reported as: "[The Child] has exhibited profanity, and

physical aggression towards attendant on the bus (kick, attempted to bit [sic]). [The Child] has removed . . . seatbelt without permission on the bus. [The Child] has left seat without driver permission. [The Child] has displayed disobedience to the driver.” Among other things, the committee discussed the utilization of a restraint harness on the Child while in transport. The committee also considered options proposed by the Child’s family including separating the Child from the other children while on the bus and solo transportation. A plan was developed to provide the Child with a written schedule of which bus seat to sit in and a follow-up meeting to review bus safety rules with the Child. (Hr’g Tr. at 79, 114 – 15; Resp’t Ex. 2, pp. 15 – 17)

39. On December 10, 2010, the Child demonstrated inappropriate behaviors at school. The Child was suspended for a day on or about December 14, 2010. (Pet’r Ex. 11, p. 1; Pet’r Ex. 15, p. 1; Pet’r Ex. 17, p. 6, 24)
40. On or about January 6, 2011, the Child’s School’s principal or vice principal called a meeting with the Child’s step-grandparent and transportation personnel and unilaterally determined that transportation service for the Child was suspended as discipline for misbehavior on the bus. This bus suspension was for approximately nine school days. (Hr’g Tr. at 33 – 34, 114, 115 – 16, 118, 246 – 48, 250 – 54, 256 – 58; Pet’r Ex. 15, p. 1; Pet’r Ex. 17, p. 8 – 9, 25; Pet’r Ex. 18, p. 3 – 4; Resp’t Ex. 28, p. 3 – 4)
41. On January 11, 2011, the Child demonstrated inappropriate behavior at school. The Child was suspended for a day on or about January 12, 2011. (Pet’r Ex. 11, p. 1; Pet’r Ex. 15, p. 1; Pet’r Ex. 17, p. 6)
42. On January 18, 2011, the Child’s ARD committee met. The Child’s grandparents attended and participated. Representatives of transportation services attended and participated in the ARD committee meeting. The committee discussed the Child’s behaviors on the school bus. In summary, the Child’s behaviors were reported as: “unbuckling seat belt, not remaining seated, inappropriate language.” The Child had been on a bus suspension. Among other things, the District proposed that the grandparents provide transportation for the Child with the District providing mileage reimbursement to the grandparents. The grandparents rejected the District’s proposal. The committee determined that the District’s transportation of the Child would resume under a new plan that included an assigned bus seat and a behavior chart. (Hr’g Tr. at 34, 57 – 58, 76 – 77, 117, 242; Resp’t Ex. 1, pp. 13 – 16)
43. On January 18, 2011, the Child’s ARD committee also included a revised FBA of the Child. Among other things, the FBA added a new “prioritized targeted behavior” and the function of the behavior: “misbehavior on bus” – “gain attention.” The revised FBA otherwise resembled the September, 2010 FBA. (Resp’t Ex. 1, pp. 17 – 18)
44. On January 18, 2011, the Child’s ARD committee retained the Child’s BIP without any change. (Resp’t Ex. 1, pp. 25 – 27)
45. On January 18, 2011, the Child’s ARD committee also discussed and agreed to refer the Child for special education counseling. (Hr’g Tr. at 53 – 55, 75 – 76; Resp’t Ex. 1, p. 15 – 16; Resp’t Ex. 33, pp. 1 – 3)
46. On January 18, 2011, the Child’s grandparent resigned consent forms for the reevaluation approved at the September, 2010 ARD committee meeting. (Hr’g Tr. at 260; Resp’t Ex. 11, p. 2)
47. Following the January 18, 2011 ARD committee meeting, the School prepared a written transportation behavior plan for the Child. The plan included a designated seating assignment,

behavior chart and a positive reinforcement punch card. (Hr'g Tr. at 60 – 61, 149 – 54, 194 – 95; Resp't Ex. 30, pp. 3, 6)

48. The Child demonstrated inappropriate behaviors multiple times during transportation on the school bus on January 19, 20, and 21, 2011. (Pet'r Ex. 13, pp. 6 – 7)
49. The Child demonstrated inappropriate behaviors multiple times during transportation on the school bus on January 24, 25, 26, and 27, 2011. (Pet'r Ex. 13, p. 8)
50. On January 26, 2011, the Child demonstrated inappropriate behaviors during transportation on the school bus. (Pet'r Ex. 18, p. 5; Resp't Ex. 28, p. 5)
51. On January 27, 2011, the Child demonstrated inappropriate behaviors during transportation on the school bus. The School assigned the Child to in-school suspension (ISS) for a day. (Pet'r Ex. 18, p. 6; Pet'r Ex. 23, p. 22; Resp't Ex. 28, p. 6)
52. The Child demonstrated inappropriate behaviors multiple times during transportation on the school bus on February 1, 2011. (Pet'r Ex. 13, p. 9)
53. The Child demonstrated inappropriate behaviors multiple times during transportation on the school bus on February 7, 9, and 11, 2011. (Pet'r Ex. 13, p. 10)
54. The Child demonstrated inappropriate behaviors multiple times during transportation on the school bus on February 14, 16, 17, and 18, 2011. (Pet'r Ex. 13, p. 11)
55. On February 17, 2011, the Child demonstrated inappropriate behaviors during transportation on the school bus. (Pet'r Ex. 18, p. 7 – 8; Resp't Ex. 28, p. 7 – 8)
56. On March 1, 2011, the Child demonstrated inappropriate behaviors during transportation on the school bus. (Pet'r Ex. 17, p. 10)
57. On March 3, 2011, the Child demonstrated inappropriate behaviors during transportation on the school bus. (Pet'r Ex. 17, p. 11; Pet'r Ex. 18, p. 9; Resp't Ex. 28, p. 9)
58. On March 8, 2011, the Child demonstrated inappropriate behaviors at School. (Pet'r Ex. 17, p. 31; Pet'r Ex. 23, p. 47)
59. On March 24, 2011, the Child demonstrated inappropriate behaviors at School. The Child was referred to the School's office. (Pet'r Ex. 17, p. 26; Pet'r Ex. 23, p. 58)
60. On April 7, 2011, the Child demonstrated inappropriate behaviors during transportation on the school bus. The School assigned the Child to ISS for a day. (Pet'r Ex. 17, p. 12; Resp't Ex. 29, p. 1)
61. On April 11, 2011, the Child demonstrated inappropriate behaviors during transportation on the school bus. The School assigned the Child to ISS for a day. (Pet'r Ex. 17, p. 13; Pet'r Ex. 23, p. 68)
62. On April 12, 2011, the Child demonstrated inappropriate behaviors during transportation on the school bus. The School assigned the Child to ISS for a day. (Pet'r Ex. 17, p. 14; Resp't Ex. 29, p. 2 – 3)

63. On April 14, 2011, the Child demonstrated inappropriate behaviors during transportation on the school bus. The Child was suspended from transportation for three days on April 18, 19, and 20, 2011. (Pet'r Ex. 17, p. 15)
64. On or about April 20, 2011, the Child demonstrated inappropriate behaviors during transportation on the school bus. (Pet'r Ex. 17, p. 16)
65. On April 29, 2011, the Child demonstrated inappropriate behaviors at School. The Child was referred to the School's office. (Pet'r Ex. 17, p. 27; Pet'r Ex. 23, p. 79)
66. On May 5, 2011, the Child demonstrated inappropriate behaviors at School and during transportation on the school bus. Among other things, the Child *** and hit another student during the school day. The Child engaged in a scuffle with another student on the bus and struggled with School staff during removal from the bus upon its return to campus. A police officer for the District issued a citation to the Child for physical aggression against the other student. The Child was suspended for a day on May 6, 2011. (Hr'g Tr. at 234; Pet'r Ex. 17, pp. 6, 17, 28, 32 – 33; Pet'r Ex. 23, pp. 83 – 84)
67. On May 12, 2011, the Child demonstrated inappropriate behaviors at School. The Child was referred to the School's office. (Pet'r Ex. 17, p. 29; Pet'r Ex. 23, p. 88)
68. On May 19, 2011, the Child demonstrated inappropriate behaviors during transportation on the school bus. (Pet'r Ex. 17, p. 18)
69. In Spring, 2011, the School's LSSP requested that the Child's SAIL teacher complete behavior rating scales on the Child. (Hr'g Tr. at 208)
70. On May 2, 2011, the School completed a reevaluation, including a psychological evaluation, of the Child. The reevaluation, including the psychological evaluation, was completed almost eight months after its approval at the September, 2010 ARD committee meeting. (Hr'g Tr. at 131, 157, 163, 170; Pet'r Ex. 5; Resp't Ex. 13)
71. The District's psychological evaluation determined, among other things, that the Child remained eligible as a child with ED. The reevaluation report recommended no significant changes in the Child's education. (Hr'g Tr. at 131, 162; Pet'r Ex. 5, pp. 4 – 5; Resp't Ex. 13, pp. 4 – 5)
72. The District's licensed specialist in school psychology compiled STAR grade-level equivalent scores for the Child from September, 2010 and April, 2011 in three areas: (1) word recognition – *** (2010) and *** (2011); (2) reading comprehension – *** (2010) and *** (2011); and (3) math computation – *** (2010) and *** (2011). (Hr'g Tr. at 136 – 40; Pet'r Ex. 5, p. 18; Resp't Ex. 13, p. 18)

Discussion

The Petitioner's claims regarding provision and implementation of an appropriate BIP are sufficiently connected that the Hearing Officer will address them together in the analysis below. These BIP claims also relate to the transportation of the Petitioner, the subject of another claim.

BIP and FAPE

The Petitioner claims that the Respondent failed to provide and implement an appropriate BIP for the Petitioner. Here, the Respondent incorporated the BIP into the Student's IEP. According to the standard set by the U.S. Supreme Court in *Board of Education v. Rowley*, a school district fails to provide FAPE to a child with

a disability under the IDEA if the child's IEP is (1) not compliant with the IDEA procedures, and (2) not reasonably calculated to enable the child to receive educational benefits.⁶ Regarding the second prong of the *Rowley* standard, the U.S. Court of Appeals for the Fifth Circuit, in *Cypress-Fairbanks Independent School District v. Michael F.*, announced four factors to consider in deciding whether a child's IEP is reasonably calculated to confer educational benefits: (1) individualized services; (2) placement in the LRE; (3) coordination of key stakeholders; and (4) provision of positive academic and nonacademic benefits.⁷

The analysis here will focus on each of the *Michael F.* factors as determinative of whether the Student's BIP, as a significant portion of the IEP, was appropriate.

Individualized Services

Factor 1 under *Michael F.* is whether the child's IEP has been individualized. An IEP is individualized if it includes the goals and programming that respond to the identified special needs of the child. For a child with behavioral issues, the obvious focus must be on the behavioral challenges.⁸ Here, the Respondent failed to tailor at all the BIP at the January, 2011 ARD committee meeting to address the behavioral issues that were the subject of the meeting. The Respondent's write up of a bus plan – even if a substitute in form – was not substantively responsive to the Student's problems on the school bus as demonstrated by the lack of behavioral progress. As discussed below, the Student's behavior may even be characterized as regressing as the Student received a citation from the police for inappropriate behavior during a bus trip late in the Spring, 2011 semester.

In the circumstances in this case, a review and revision of the Student's BIP was required by the IDEA but did not happen. The Respondent, therefore, did not individualize a program for the Student in the area of need. When a child with a disability is provided transportation as a related service in the IEP, any suspension from the school bus counts as a disciplinary removal under the IDEA's discipline rules.⁹ Here, the child was either suspended from the bus or suspended from school because of misbehavior on the bus for more than 10 school days in the 2010-2011 school year. These bus-related suspensions cumulatively constituted a "change of placement" under 34 C.F.R. § 300.536(a)(2)(i) for the purpose of triggering the FBA and BIP provision in 34 C.F.R. § 300.530(d)(1)(ii). Under 34 C.F.R. § 300.530(d)(1)(ii), a school that causes a change in placement (such as removal from transportation provided under an IEP) must do an appropriate FBA and BIP to address the behavior that prompted the change in placement. While the January, 2011 ARD committee revised the Student's FBA on account of the trouble on the school bus, the committee did not alter the Student's BIP then or at any later ARD committee meeting. A review and revision of the Student's BIP was particularly necessary here because the Student began to exhibit inappropriate conduct *** that was not mentioned in the BIP or bus plan.

The existing BIP for the 2010-2011 school year was also not individualized for the Student because it included suspensions as part of the plan's strategies even though the District's own FBA identified suspensions as "not effective." Suspensions were not rare; indeed, as noted above, they occurred frequently enough to constitute a "change of placement" in regard to the school bus.

Least Restrictive Environment

Factor 2 under *Michael F.* is whether the child has been served in the LRE. Compliance with the LRE mandate is evaluated through the two-part test announced by the Fifth Circuit in *Daniel R.R. v. State Board of Education*.¹⁰

⁶ *Board of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982).

⁷ 118 F.3d 245, 253 (5th Cir. 1997), *cert. denied* 522 U.S. 1047 (1998).

⁸ See, e.g., *Gellert v. District of Columbia Pub. Sch.*, 435 F.Supp.2d 18, 23 – 24 (D.D.C. 2006).

⁹ See the nonregulatory guidance of the U.S. Department of Education on a bus suspension counting as a day of suspension under 34 C.F.R. §§ 300.530, 300.536. 71 Fed. Reg. 46715 (2006).

¹⁰ 874 F.2d 1036, 1048 (5th Cir. 1989)

The first prong of the *Daniel R.R.* test asks whether full-time education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily. The second prong of the *Daniel R.R.* test asks which setting permits the child to be mainstreamed to the maximum extent appropriate if removed from the regular education setting. Here, the Respondent practiced inclusion with the Student during the school day to the maximum extent appropriate through the SAIL program. The Student had fellow students as passengers on the bus.

Key Stakeholder Coordination

Factor 3 under *Michael F.* is whether key stakeholders acted in a coordinated manner. Here, while there were the ultimate disagreements, the grandparents and the school district met and maintained communication throughout the school year. Further Respondent's transportation department staff attended ARD committee meetings on transportation.

Educational Benefit

Factor 4 under *Michael F.* is whether the child received positive academic and nonacademic benefits. Regarding academic benefits, while the Petitioner's expert testified that the Student was "functionally illiterate,"¹¹ this Hearing Officer credits the testimony of the Respondent's licensed specialist in school psychology that testing results showed academic gains over the course of the 2010-2011 school year. Academic achievement, however, is not enough to demonstrate the provision of educational benefit in satisfaction of the IDEA. As the U.S. District Court for the Southern District of Texas in *Klein Indep. Sch. Dist. v. Hovem* pointed out, the measurement of any advancement must be centered on the area affected by the child's disability.¹² As a Student with ED, behavior is the primary area affected by this disability. Regarding nonacademic benefits, the Hearing Officer's review of the records submitted reveals that during the 2010-2011 school year, the Student continued to demonstrate inappropriate behaviors on the school bus despite the bus plan. Indeed, there was no progress as the Student was suspended from the bus more often in the Spring semester than in the Fall semester. As evidence that the Student's behavior actually deteriorated over the course of the school year, in May, 2011 law enforcement had to be involved in an incident on the bus and a police officer issued a citation to the Student. This Hearing Officer finds that the Student did not make nonacademic gains in the 2010-2011 school year in the area most affected by the Student's impairments.

In conclusion, this Hearing Officer finds that after weighing the *Michael F.* factors, the Respondent did not satisfy the *Rowley* standard calling for an IEP reasonably calculated to confer educational benefits. Therefore, the Petitioner prevails on the questions regarding the Student's BIP.

Reevaluation

One of the Petitioner's claims is that the Respondent failed to timely conduct a psychological evaluation of the Student. Under the IDEA, reevaluations must be conducted in accordance with a specified process.¹³ In general, there are three phases of any IDEA reevaluation: (1) an initial review of existing assessment data; (2) an administration of any needed assessments; and (3) an interpretation of results and determinations of eligibility and educational needs.¹⁴ The administration of any new assessments must occur in compliance with IDEA protocols.¹⁵ Upon the completion of the new data collection step, school districts must assemble a group that includes the child's parents and qualified professionals to interpret all of the information and determine the

¹¹ Hr'g Tr. at 87.

¹² 745 F.Supp.2d 700, 749 (S.D. Tex. 2010).

¹³ 34 C.F.R. §§ 300.15, 300.122.

¹⁴ 34 C.F.R. §§ 300.305(a) – (c), 300.306.

¹⁵ 34 C.F.R. § 300.304.

child's eligibility under the IDEA's definition of a child with a disability.¹⁶ In addition to these federal requirements, there are state evaluation requirements, including in regard to children with ED.¹⁷

Here, the Respondent held the review of existing data in September, 2010. The ARD committee identified new assessments that were needed and obtained consent from the grandparent. This included a new psychological evaluation. The issue here is that although authorized in September, 2010, the reevaluation report, including the psychological evaluation, was not completed until May, 2011. Thus, almost the whole school year past before the Respondent produced the psychological evaluation.

The IDEA generally requires, with limited exception, that the written report of a full and individual initial evaluation (FIIE) be completed within 60 days of the school district receiving written consent for the evaluation.¹⁸ The Texas Education Code requires that the written report of a FIE be completed within 60 days of the school district receiving written consent for the evaluation without exception.¹⁹ These provisions, however, do not specifically refer to the timeliness of reevaluations.

This Hearing Officer finds that even if the Respondent was not subject to a 60-day deadline – which it missed even if the timeline began to run once the grandparent resigned the consent form at the January, 2011 ARD committee meeting – it was nonetheless unreasonable for the Respondent to take almost eight months to produce the psychological evaluation report as part of the reevaluation of the Student. The behavioral problems upon the Student's return from the temporary transfer alone would have warranted the conduct of the psychological evaluation along with the crisis that prompted the School to suspend bus service near the start of the Spring, 2011 semester.

In conclusion, this Hearing Officer finds that the Petitioner prevails on the claim regarding a timely psychological evaluation.

Personnel Support During Special Education Transportation

One of the Petitioner's claims is that the Respondent failed to provide appropriate personnel support during special education transportation. Under the IDEA, transportation is a related service. Under the IDEA, supplementary aids and services are those aids, services and supports that are provided in a variety of settings to enable a child with a disability to be integrated to the maximum extent appropriate.²⁰

Here, the bus monitor who supervised the children on the Student's school bus only had general training on behavior management. The Hearing Officer finds that in this situation with significant and regular behaviors by the Student that disrupt the bus ride, the Student required a monitor with more specific training and skills to ensure that the Student can coexist with fellow student passengers on the bus.

In conclusion, this Hearing Officer finds that the Petitioner prevails on the claim regarding personnel support during transportation.

Special Education Counseling

One of the Petitioner's claims is that the Respondent failed to provide special education counseling services. Under the IDEA, counseling service is a related service.²¹ It may be provided by a variety of qualified professionals.

¹⁶ 34 C.F.R. § 300.306.

¹⁷ 19 Tex. Admin. Code § 89.1040(c)(4).

¹⁸ 20 U.S.C. § 1414(a)(1)(C).

¹⁹ Tex. Educ. Code § 29.004(a).

²⁰ 34 C.F.R. § 300.42.

²¹ 34 C.F.R. § 300.34(c)(2).

Here, the Respondent recognized the potential need for special education counseling and referred the Student during the January, 2011 ARD committee meeting.

In conclusion, this Hearing Officer finds that the Respondent prevails on the Petitioner's claim regarding special education counseling.

Requested Relief – Reimbursement of Private Expenses

The Petitioner's Due Process Complaint includes as part of the relief sought a request for reimbursement of certain private expenditures and costs: "out of pocket expenses and mileage reimbursement related to providing [the Child] with transportation when [the Child] was denied special education transportation services" and "out of pocket expenses for any private testing conducted."²² Here, the Petitioner did not place into the record any evidence of expenditures or costs incurred by the Child's family. Therefore, the Petitioner's request for reimbursement cannot be granted and is denied.

Conclusions of Law

After due consideration of the foregoing findings of fact, this Hearing Officer makes the following conclusions of law:

1. The Respondent, Corpus Christi Independent School District, inappropriately devised and implemented a BIP for the Petitioner, Student, under 34 C.F.R. §§ 300.324(a)(2)(i), 300.324(b)(2), 300.530(d)(1)(ii) and denied FAPE because of a lack of nonacademic benefit under 34 C.F.R. § 300.101(a); *Board of Educ. v. Rowley*, 458 U.S. 176 (1982); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997), *cert. denied* 522 U.S. 1047 (1998); and *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir.), *cert. denied* 531 U.S. 817 (2000).
2. The Respondent, Corpus Christi Independent School District, inappropriately evaluated the Petitioner, Student, because of an untimely reevaluation under 34 C.F.R. §§ 300.303 – 300.306; 19 Tex. Admin. Code §§ 89.1040(b), (c)(4).
3. The Respondent, Corpus Christi Independent School District, inappropriately provided personnel support during special education transportation to the Petitioner, Student, because of an untrained aide under 34 C.F.R. §§ 300.34(c)(16), 300.42, 300.320(a)(4).
4. The Respondent, Corpus Christi Independent School District, appropriately referred the Petitioner, Student, for special education counseling services under 34 C.F.R. §§ 300.34(c)(2), 300.320(a)(4).
5. The Respondent, Corpus Christi Independent School District, has not incurred an obligation to reimburse the Petitioner, Student, for private transportation and private testing under 19 Tex. Admin. Code § 89.1170(b).

Order

Based upon the foregoing findings of fact and conclusions of law,

IT IS HEREBY ORDERED THAT:

²² Pet'r's Due Process Complaint at 4 (May 17, 2011).

1. The Respondent shall conduct an FBA and develop a BIP that appropriately addresses all behaviors of the Petitioner during bus transportation. The Respondent shall conduct an ARD committee meeting to initiate the FBA and development of the BIP within 10 school days of this Final Decision, unless the Petitioner and the Respondent mutually agree in writing to a date outside of 10 school days.
2. The Respondent shall offer the Petitioner an independent educational evaluation at public expense for obtaining an independent psychological evaluation. The Respondent shall make such an offer in writing within 10 school days of this Final Decision. The Petitioner shall timely indicate in writing whether accepting the offer.
3. The Respondent shall provide supplementary aids and services, including bus monitors with appropriate training specific to the Petitioner's behaviors, for the Petitioner during bus transportation. The Respondent shall conduct an ARD committee meeting to arrange and provide trained bus monitors within 10 school days of this Final Decision, unless the Petitioner and the Respondent mutually agree in writing to a date outside of 10 school days
4. The Respondent shall timely implement this Final Decision within 10 school days in accordance with 19 Tex. Admin. Code § 89.1185(p) and 34 C.F.R. § 300.518. The Respondent must provide the following to the Division of Complaints Management at the Texas Education Agency and the Petitioner within 15 school days from the date of this Final Decision: (1) documentation demonstrating that the Final Decision has been implemented, or (2) if the timeline set by the Hearing Officer for implementing certain aspects of the Final Decision is longer than 10 school days, the Respondent's plan for implementing the Final Decision within the prescribed timeline and a signed assurance from the superintendent that the Decision will be implemented.
5. All other relief sought by the Petitioner shall be and is **DENIED**.

SIGNED this 6th day of September, 2011.

/s/ Steve R Aleman
Steven R. Aleman
Special Education Hearing Officer

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

SYNOPSIS

CLAIM 1: Whether the Respondent failed to implement an appropriate BIP.

CITE: 34 C.F.R. § 300.323(c)(2)

HELD: For the Petitioner. The Respondent's BIP incorporated into the IEP did not appropriately address behaviors of the Student that resulted in bus suspensions that constituted a change in placement.

CLAIM 2: Whether the Respondent failed to provide an appropriate BIP.

CITE: 34 C.F.R. §§ 300.101(a), 300.324(a)(2)(i), 300.324(b)(2), 300.530(d)(1)(ii)

HELD: For the Petitioner. The Respondent's BIP incorporated in the IEP did not appropriately address behaviors of the Student that resulted in bus suspensions that constituted a change in placement.

CLAIM 3: Whether the Respondent failed to timely conduct a psychological evaluation.

CITE: 34 C.F.R. §§ 300.303 – 300.306; 19 Tex. Admin. Code §§ 89.1040(b), (c)(4)

HELD: For the Petitioner. The Respondent did not reasonably complete its reevaluation, including psychological evaluation, in a timely manner when it was not completed for almost the entire school year.

CLAIM 4: Whether the Respondent failed to provide appropriate personnel support during special education transportation.

CITE: 34 C.F.R. §§ 300.34(c)(16), 300.42, 300.320(a)(4)

HELD: For the Petitioner. The Student's bus aide had no specific training to address the Student's behavior on the bus that deteriorated over the school year.

CLAIM 5: Whether the Respondent failed to provide special education counseling services.

CITE: 34 C.F.R. §§ 300.34(c)(2), 300.320(a)(4)

HELD: For the Respondent. The ARD committee made a referral for a special education counseling evaluation for the Student to obtain special education counseling.