

STUDENT. bnf	§	BEFORE A SPECIAL
PARENT	§	
Petitioner/Counter Respondent	§	EDUCATION
	§	
v.	§	HEARING OFFICER FOR THE
	§	
LITTLE CYPRESS	§	
MAURICEVILLE CISD	§	
Respondent/Counterclaimant	§	
	§	
	§	STATE OF TEXAS

**FINAL DECISION OF THE HEARING OFFICER**

**STATEMENT OF THE CASE**

\*\*\* (hereinafter Student), a minor, by and through student’s mother and next friend \*\*\* (hereinafter Petitioner) brings this action against Respondent Little Cypress Mauriceville Consolidated Independent School District (hereinafter Respondent, the District, or LCM) 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. Respondent has raised a counterclaim against Petitioner.

Petitioner raises two primary issues in this action: 1) Whether Respondent has denied student a free appropriate public education as of January 7, 2011; and 2) Whether Respondent has failed to timely and appropriately consider and place Student in a residential treatment facility (RTC), as Petitioner contends that RTC is the proper placement in the least restrictive environment for Student at this time.

Petitioner’s allegation of a denial of a free appropriate public education encompasses the following particular issues: 1) Student’s Individual Education Plan (IEP) did not address student’s areas of need (academic, social skills, behavior, counseling, study skills, life skills, and organizational skills) and were not based on present levels of performance; 2) Respondent failed to consider and implement necessary services from the Autism Supplement required by the state of Texas, including proper methods of instruction, ESY, in-home training, parent training, parent counseling, and staff training; 3) Respondent failed to implement an appropriate Behavior Intervention Plan (BIP) based on an appropriate Functional Behavioral Analysis (FBA); 4) Respondent failed to implement Student’s IEP; 5) Respondent failed to provide timely and accurate records to Petitioner concerning Student’s progress, grades, and restraints; 6) Respondent failed to timely and appropriately respond to Petitioner’s request for an Independent Educational Evaluation (IEE); and 7) Respondent failed to provide Petitioner with Prior Written Notice (PWN) of

refused services. Each of these sub-issues will be addressed to the extent necessary to resolve the primary issue of a denial of a free appropriate public education.

As requested relief, Petitioner seeks a finding that student's right to a free appropriate public education has been denied; placement at a TEA-approved RTC, preferably \*\*\*; reimbursement of a Program Review and Assessment completed by Dr. \*\*\*, as well as the provision of a complete multidisciplinary evaluation; and compensatory educational and counseling services.

Respondent raises one counterclaim in this action: Whether Respondent's 2012 Full and Individual Evaluation (FIE) is appropriate such that Petitioner's request for an IEE at public expense should be denied?<sup>1</sup> Respondent seeks a finding that its FIEs were appropriate under IDEA.

### **PROCEDURAL HISTORY**

Petitioner filed the instant request for due process on November 7, 2012. Dorene Philpot, Attorney at Law, represents Petitioner in this proceeding. Respondent is represented by Alan Sanders, Attorney at Law and Jose Martin, Attorney at Law.

The parties mutually agreed to waive the resolution session in this cause. A pre-hearing conference was held on November 26, 2012. An Order Following Pre-Hearing Conference was entered on November 30, 2012, dismissing all claims for relief asserted by Petitioner arising outside of my limited jurisdiction under IDEA, including claims for prevailing party attorney fees.

The due process hearing was continued for good cause to January 22-24, 2013, at which time the hearing was held.

At the conclusion of the due process hearing, by joint request of the parties, the Hearing Officer granted leave to file closing briefs. The decision of the Hearing Officer is due to the parties on or before March 25, 2013.

### **POST-HEARING MOTIONS FILED BY THE PARTIES**

Both Petitioner and Respondent filed post-hearing motions requesting relief regarding alleged violations of the process for producing documents in this case. On February 26, 2013, Petitioner filed a Motion For Order For IEE, Adverse Inferences, Other Remedies Due to District's Improper Withholding of Protocol Records. On February 27, 2013,

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<sup>1</sup> Respondent completed an FIE in July (hereinafter referred to as FIE #1). Respondent also completed an FIE in August 2012 (hereinafter referred to as FIE #2), but did not provide Petitioner with a copy of FIE #2 until January 2013, months after Petitioner requested an IEE and after the issues were identified for the instant due process hearing. Respondent's special education director testified that the District seeks to defend both FIE #1 and FIE #2 in this action. I will discuss the appropriateness of both FIEs in connection with Petitioner's entitlement to an IEE.

Respondent filed its Motion To Strike Testimony Of Petitioner's Expert Witness, Dr. \*\*\*, For Failure To Produce Requested Medical Records.

Both Petitioner and Respondent set forth detailed information in support of their respective motions, including evidence of repeated attempts to obtain the information not produced, i.e. the protocols and the file of Dr. \*\*\*. While I agree that the information at issue was properly requested and not timely provided, I find that both Petitioner and Respondent's motions for relief for the failure to produce are untimely filed.

Both Petitioner and Respondent had knowledge before and during the hearing in this matter that the requested documents had not been provided and yet they both waited until over a month after the completion of the hearing to raise their concerns and seek relief from this Hearing Officer. Had these motions been made during the hearing, I could have ordered meaningful relief in the form of production of the documents at a time when additional testimony could have been introduced regarding any issues raised by their contents. Instead, both parties waited until the time had passed when any meaningful relief could be provided and requested that I simply penalize the opposing party.

Under these circumstances, I find both Petitioner's Motion For Order For IEE, Adverse Inferences, Other Remedies Due to District's Improper Withholding of Protocol Records and Respondent's Motion To Strike Testimony Of Petitioner's Expert Witness, Dr. \*\*\*, For Failure To Produce Requested Medical Records untimely. As such, both motions are hereby **DENIED**.

### **FINDINGS OF FACT**

1. Student is a \*\*\*-year-old \*\*\* grader who lives with student's siblings and student's mother and next friend, Petitioner, within the geographical boundaries of LCM, a political subdivision of the State of Texas and a duly incorporated school district.
2. Student first enrolled at LCM on January \*\*\*, 2011, at the beginning of the spring semester of student's \*\*\* grade year.
3. Student is eligible for special education and related services based on the disability categories of Autism and Specific Learning Disability.
4. Student has a long history of violent and aggressive behavior to \*\*\*self and others, accompanied by an aggressive medication regimen and at least \*\*\* hospitalizations of varying lengths to address student's serious behaviors. Petitioner initiated each of student's hospitalizations and none resulted from placement by Student's Admission, Review, and Dismissal Committee (ARD) at a public school.
5. Student receives ongoing services from a private psychiatrist, Dr. \*\*\*, and from \*\*\*. (JE 7; T. 232)

6. Student's medical diagnoses include Bipolar Disorder, Attention Deficit Hyperactivity Disorder, Disruptive Behavior Disorder, \*\*\*, and Asperger's Disorder. (Respondent Exhibits 56-60; hereinafter cited as R 56-60; Joint Exhibits 28, 37, hereinafter cited as JE 28, 37).
7. At the time of the hearing in this matter, in January 2013, Student had attended LCM for four semesters and was beginning student's fifth semester. During Spring 2011, Student's \*\*\* grade year, student missed school \*\*\* due to three consecutive hospitalizations. During Fall 2012, Student's \*\*\* grade year, student missed school \*\*\* due to hospitalizations. In Spring 2012, Student missed school due to hospitalizations \*\*\*. In Fall 2012, Student was out due to hospitalizations from \*\*\*. Student returned to LCM on January \*\*\*, 2013 and was attending school at LCM at the time of the hearing. (R 52-60).
8. Student's significant absences both reflect and result from the severity of student's disability. Medical records indicate that each hospitalization was necessary to stabilize and treat Student's emotional and behavioral disability. (R 52-60). The frequency and duration of Student's multiple hospitalizations caused a significant disruption to Student's education and educational progress.

**\*\*\* Grade- Spring 2011**

9. Student began at LCM in a full time general education setting with accommodations and Content Mastery. Student was not designated "at risk" for academic success according to the District. (JE 26, p. 4). The initial transfer and placement ARDs held on February 7 and 17, 2011 requested updated evaluations, including an FIE, a psychological assessment, and a FBA for a new BIP. (JE 23). Until the assessments could be completed, the ARD adopted Student's prior BIP, which included three behaviors: comply with staff requests, keep hands and feet to self, and maintain self-control and appropriate non-aggressive behavior. The BIP provided for a tracking chart with short-term and long-term rewards and consequences for negative behaviors. (JE 23, p. 7).
10. Discipline records in January and February 2011 indicate at least eleven disciplinary referrals for severe behaviors such as running from class; throwing objects and \*\*\*; kicking, hitting, \*\*\* students and staff; \*\*\*. (JE 14, pp. 1-6).
11. By February 22, 2011, the ARD met to review Student's program due to a high level of concern for the safety of Student and others. The ARD agreed that Student could not be successful in the general education setting with supports. Effective, February \*\*\*, 2011, the ARD placed \*\*\* (\*\*\*) Program and directed the \*\*\* teacher to develop a Social Skills IEP for Student. (JE 24).
12. The \*\*\* program is a special education service offered to students only after other interventions have not been successful. \*\*\* is not a self-contained behavioral classroom; but rather, a service designed on a crisis intervention model to be

- provided when a behavioral issue occurs. (Transcript, p. 409, 615; hereinafter T. 409, 615).
13. During the orientation phase of the \*\*\* placement, students are self-contained in the \*\*\* classroom and receive 20 minutes of academic instruction, 20 minutes of instruction on the \*\*\* program, and 20 minutes of social skills instruction per hour. This schedule of \*\*\* services is not individualized by student. Students then transition out to their regular schedules one subject at a time according to the student's individual ability to successfully accomplish the transition. The \*\*\* teacher determines when and how the transition will occur; there are no written criteria to guide the transition. The transition can take two days, two weeks, two months, or more depending on the student. (T. 617-619, 761, 848).
  14. Once a student returns to his/her regular schedule, the \*\*\* staff tours the building regularly to see if the classroom teacher has indicated behavioral concerns with a \*\*\* student by \*\*\*. If \*\*\* or if the classroom teacher calls the \*\*\* staff, the student is removed from the classroom for support and remains with \*\*\* staff until the student can successfully return to the classroom. Such removals can last from ten minutes to several days. (T. 618-619).
  15. If a \*\*\* student is absent for an extended period of time, the orientation is provided again. (T. 630).
  16. During the same time frame of escalating aggression at school in January and February 2011, Student's behaviors in the home and community also became very aggressive and dangerous. (T. 218; JE 18)
  17. Shortly after Student's placement in \*\*\*, Petitioner admitted Student to \*\*\* hospital on \*\*\*, 2011. Medical records from \*\*\* reflect Student's severe depression and aggression. Student was discharged to home on \*\*\*, 2011. (JE 18; R 27).
  18. Within twenty-four hours of discharge and before Student returned to school, Petitioner contacted \*\*\* again because Student had \*\*\* toward another child, had \*\*\*, destroyed property in the home, and escaped the home. \*\*\* could not readmit Student and Petitioner ultimately admitted student to \*\*\* on \*\*\*, 2011. (T. 220; R 56, p. 39; JE 17).
  19. During March 2011, the District became aware that Petitioner intended to seek placement of Student at a RTC. District personnel held a staffing in advance of the upcoming ARD requested by Petitioner and conferred with District legal counsel who made suggestions for Student's program. At the meeting, LCM staff determined that Student was too new to LCM to assess the effectiveness of the \*\*\* program and make a determination about RTC. (JE 12, p. 6).
  20. At the ARD on March 21, 2011, Petitioner expressed her concern that Student was not receiving an education while in the hospital and that sequential

- hospitalizations would impact Student's academic progress. LCM staff informed Petitioner that Student should enroll in the District where student is hospitalized. (JE 26).
21. While at \*\*\*, records indicate that the hospital was not able to stabilize Student's behavior: \*\*. (R 56, pp. 79-90). \*\* discharge plan recommended residential treatment and Student was discharged to the \*\* (\*\*\*) on \*\*, 2011. (R 56).
  22. \*\* ISD served Student during student's tenure at \*\*. Upon discharge, the \*\* ISD ARD recommended that Student repeat \*\* grade due to student's limited progress in the curriculum and student's excessive absences. The ARD also noted that Student needed an FBA and revised BIP. (JE 27). \*\* discharged Student on \*\*, 2011 with behaviors that continued to be off task, provocative and aggressive, but not of an extreme nature. Though school "remained a significant issue," discharge was allowed as the school year was almost over. Placement recommendations included a smaller classroom, more attention from staff, and a full Autism Spectrum evaluation. (JE 37, pp. 12-13, 20).
  23. Student returned to LCM on \*\*, 2011 and a transfer ARD was held, with Student's schedule set to return to general education classes with content mastery support, and \*\* support for 15 minutes per day. (JE 42, pp. 4-5).
  24. A program review ARD convened on May 26, 2011. In relevant part, the ARD made the following decisions regarding Student's program: the timelines for the evaluations that had been requested were updated, with the FIE and In Home Training (IHT) evaluation to be completed in the summer and the psychological in the fall after school resumed; Student would not be retained as per \*\* ISD's recommendation because student's scores on end-of-year assessments indicated student could be successful in \*\* grade with the provision of ESY services; ESY services were discussed; and Student's BIP was amended to reflect \*\* involvement rather than administrative discipline should aggressive conduct occur. (JE 28).
  25. The ARD adopted Student's IEP for the 2011-2012 school year. The IEP did not contain any current present levels of performance and included four goals: demonstrate measurable progress in developmental/functional reading; demonstrate measurable progress in basic mathematics concepts; follow classroom/school rules by complying with adult requests, keeping hand and feet to self, and using self-control by displaying non aggressive behavior to self and others; and complete assigned tasks. No objectives were provided. (JE 28, pp. 8-9).
  26. The ARD did not obtain or review information from \*\* ISD or the medical facilities where Student had been hospitalized. The ARD did not request an updated FBA or discuss behavior strategies to support Student following student's sequential residential placements. (JE 28).

## **Assessment Data From Summer/Fall 2011- FIE #1**

27. The LCM diagnostician completed the psycho-educational portion of FIE #1 on July 27, 2011. This portion of FIE #1 included standardized testing measures in the areas of language, intellectual/cognitive, and achievement. No formal measures were used to assess emotional or behavioral functioning; rather, information was obtained from the ARD and observations of Student during the ESY period. (T. 490-494; JE 2).
28. Though Student's request for assessment included speech language testing, FIE #1 did not include a speech and language evaluation to measure Student's pragmatic language skills or the presence of a disability significantly affecting verbal and nonverbal communication, an essential component of an Autism Evaluation. The FIE did not contain multi-disciplinary testing or a developmental history, both necessary components of an evaluation for Autism. (JE 3, p. 11; T. 386-387; 523-525).
29. The diagnostician concluded that Student had significant deficits in the areas of Reading Fluency and Emotional and Behavioral. The evaluation recommended eligibility under the conditions of Autism and Specific Learning Disabilities, though only a Disability Report for Learning Disability was completed. (JE 2, p. 8, 11). The diagnostician noted a concern as to whether Student's medications could be impacting student's slow processing speed and recommended a medical opinion to rule out that possibility as it could affect the diagnosis of a learning disability. (JE 2, p. 11). LCM did not follow up to obtain a medical opinion on that issue.
30. Recommendations made by the diagnostician include a checklist of accommodations, but no instructional strategies in Student's areas of weakness or recommendations that were content area focused. (T. 398).
31. The District's LSSP completed the psychological evaluation portion of Student's FIE on October 22, 2011. The LSSP interviewed teachers and Petitioner and administered these standardized measures: the Behavior Assessment System for Children (BASC), Gilliam Asperger's Disorder Scale (GADS), the Gilliam Autism Rating Scale for Children (GARS), and the Children's Depression Inventory and Incomplete Sentence Blank to Student (CDI). (JE 4). The evaluator concluded that Student met a provisional diagnosis of Asperger's based on early history, but was unsure of the diagnosis and indicated it should be monitored. (JE 4, p. 3).
32. The psychological evaluation does not report the results of the BASC or the CDI, both directly relevant to the evaluator's conclusion that the Student does not have an emotional disturbance.
33. The majority of recommendations contained in the psychological evaluation are generic in nature and not specific to Student. (JE 4, p. 3). There are two

- recommendations specific to Student; one related to \*\*\* in class and one related to task completion. The recommendation related to \*\*\* in class is based on the evaluator's assumption as to the function of Student's behavior; however, no medical information is obtained and no FBA is recommended to assess if that assumption is accurate. (JE 4, p. 4; T. 391). The recommendations do not address Student's aggressive behavior or noncompliance, the areas of greatest concern. (T. 392).
34. Taken together, the educational and psychological portions of the FIE do not constitute a full Autism evaluation and do not contain sufficient testing and information to reach the conclusion that Student has an Autism Spectrum Disorder and not an Emotional Disturbance. (T. 389-390; JE 4, p. 5).
35. FIE #1, considering both the psycho-educational and psychological components, met the requirements for evaluations under IDEA set forth in 34 C.F.R. § 300.304(b)(1)(2)(3) and (c)(1)(2)(3)(5) and (7). FIE #1 did not meet the requirements of 34 C.F.R. § 300.304(c)(3)(4) and (7) in that the evaluation failed to rule out whether Student was sensory impaired by medication, failed to assess Student in areas related to student's suspected disability of Autism (speech/language), and it was not sufficiently comprehensive to identify all of Student's special education and related services needs (did not include medical information to rule out issues with processing speed; did not clearly identify whether Student has an Autism Spectrum Disorder or an Emotional).

**Fall 2011- \*\*\* Grade**

36. The ARD met on August 24, 2011 and reviewed the educational portion of the FIE from July 2011. The ARD confirmed Student's eligibility based on Autism and a Learning Disability in Reading Fluency. The ARD adopted the same BIP, IEP, and schedule from May 2011 and again indicated the need for a FBA and revised BIP, and for medical information about the impact of Student's medication on student's processing speed. The ARD did not develop any goals to address Student's identified disability in Reading Fluency and continued the general goal of demonstrating progress in reading. (JE 29).
37. The FBA was not completed following the ARD and no information was obtained from Student's doctor about the impact of student's medications.
38. The ARD met next on September 15, 2011 to review recently completed evaluations. Again, the same IEP and schedule was adopted; a FBA and BIP was requested; and In Home and Parent Training (IHT) was implemented on a weekly basis pursuant to the completed IHT evaluation to address yelling and aggressive behavior. (JE 30). Reports at the ARD indicated that Student was demonstrating behavioral improvements in the areas of compliance and task completion. (JE 30). Isolated incidents of behavioral aggression continued, as did \*\*\*. (JE 15, pp. 5-12).

39. In late September 2011, \*\*\*. Subsequently, Student's behavior began to deteriorate and become increasingly violent and aggressive in the home setting. School records do not indicate significant behavioral difficulties during this time frame. (JE 15, pp. 5-12).
40. An academic intervention meeting occurred for Student on October 11, 2011. Student was identified as requiring Tier 2 services in Reading, resulting in thirty minutes per day of additional support, four times per week. This was a general education service that was not driven by Student's IEP. (T. 729-730). In Math, Student required no additional help, but would be monitored. Behaviorally, Student would receive special education services through the \*\*\* program. (JE 16, p.2; T. 672-673).
41. On \*\*\*, 2011, Student was admitted to \*\*\* for increasingly violent, aggressive, and assaultive behaviors, primarily in the home and community. Student's discharge summary of \*\*\*, 2011 indicated that student was stable and did not require longer-term residential care at \*\*\*. Student's behaviors while at \*\*\* were not as severe as they had been during student's \*\*\* 2011 admission. (R 56, pp. 341, 395-297).
42. Upon student's return home, however, Student continued to display aggressive behaviors, including \*\*\* in the home. As a result, student was admitted to \*\*\* on \*\*\*, 2011 for the remainder of the fall semester. (JE 37, p. 20). During student's tenure at \*\*\*, student performed well in school as a result of the small class size, frequent attention from the teacher, and quiet environment.
43. Student was discharged at the end of \*\*\* 2011, with recommendations for a low student/student and student/teacher ratio, highly structured environment and routines, and a calm and quiet setting. (JE 37, p. 20).

#### **Spring 2012- \*\*\* Grade**

44. Student returned to LCM from \*\*\* ISD/\*\*\* on \*\*\*, 2012. The ARD met to develop a temporary placement and placed Student in the Life Skills setting for all of the day except for P.E./Music and 15 minutes in Content Mastery. Student continued to have \*\*\* support, with a plan to slowly transition student into the general education setting. (JE 44, p. 4). The ARD also provided for individual counseling, although Student did not have an IEP with counseling goals and objectives. (JE 44).
45. Student was placed into the Life Skills setting for approximately six to twelve weeks in Spring 2012 because it was the only option for a self-contained setting similar to \*\*\*. It is undisputed that the Life Skills setting was not appropriate for Student. (T. 582; 757-758).
46. The ARD met on January 24, 2012 to review Student's program and placement. Student's BIP was revised to add the behavior of \*\*\* in class. The ARD

- reviewed the psychological evaluation of 10/22/11 and accepted the provisional eligibility of Autism. The ARD increased Student's support by providing 1:1 assistance for transitions and small group instruction in the Applied setting. Petitioner objected to all portions of the 2011 FIE and indicated that \*\*\* ISD also had objections to the psychological evaluation. LCM agreed to contact \*\*\* ISD for input and to complete a FBA. (JE 33). There is no evidence that LCM contacted \*\*\* ISD concerning Student and LCM did not complete an updated FBA.
47. During Spring 2012, Student received instruction from six different teachers in at least four different settings, none of which provided an appropriate highly structured, quiet, small size environment for Student. It is unclear where Student received instruction for core subjects during the spring. (T. 79-80; JE 33, p. 12).
  48. As Student transitioned from the Life Skills setting into the general education and applied settings, student's behaviors began to deteriorate. During \*\*\* 2012, school records reflect isolated, but severe aggressive behaviors by Student: student \*\*\* attempted to contain student. (JE 13, pp. 3-5, 9-10).
  49. Petitioner took Student to \*\*\* emergency room on \*\*\*, 2012, stating that Student was creating safety issues in the home with aggressive and violent behavior. Petitioner indicated that she wanted Student placed at \*\*\*. Student presented as agitated, combative, and uncooperative. (R 59, p. 748). After evaluation, the hospital indicated no basis for admitting Student and discharged student to \*\*\* for evaluation. (R 59, pp. 751-753).
  50. Student remained at \*\*\*, during which time both Student and Petitioner indicated a desire for placement at \*\*\*. After brief stabilization, Student was discharged to home with a follow-up with student's psychiatrist, Dr. \*\*\*. (R 59, p. 686-690).
  51. During April and May 2012, Student was disciplined and restrained six times for incidents of severe behavior, including elopement; \*\*\*, slapping, kicking, \*\*\*. (JE 13, pp. 13, 15; JE 14, pp. 7, 8, 15, 17). Staff notes also reflect a decline in Student's behavior during April and May 2012, including an incident during which Student attempted to \*\*\* following an attempted restraint. (JE 12, pp. 9-13). Despite these severe behavioral incidents, daily tracking sheets reflect many days without incident. (JE 15, pp. 15-24).
  52. Student's behavior in the home and community also became increasingly aggressive and maladaptive during this time period.
  53. On May 3, 2012, Student's annual ARD met. The ARD revised Student's BIP to change the mastery level for student's \*\*\* goal, but did not request an updated FBA and adopted the same behavioral approach to working with Student. Student's IEP for 2012-2103 contained the same goals, with no present levels of performance and no objectives. (JE 34, pp. 6-9). The report from Student's counselor indicated that Student "has shown great difficulty in the ability to self-

regulate student's behavior" and recommended continued counseling and counseling goals. (JE 34, p. 19). Student's IEP did not contain any counseling goals or objectives. (JE 34, pp. 6-9).

### **\*\*\* Grade Year End Progress Data**

54. LCM did not provide IEP progress data consistently on Student's academic goals (see, JE 16) other than report cards, which demonstrate adequate academic progress during \*\*\* grade.
55. Student's teacher testified that student made one year's growth in Reading during \*\*\* grade and showed improvement. (T. 718). A review of year-end testing data indicates that Student made *de minimus* progress in Reading Fluency, adequate progress on student's guided reading level, but regression in student's ability to read passages correctly. Student began \*\*\* grade reading grade level passages at 31 words per minutes with 3 errors and ended the year reading 27 words per minute with 4 errors. The expected ending rate for \*\*\* graders is \*\*\* words per minutes with \*\*\* errors. Student's end of year benchmark score in Reading was \*\*\*. Overall, the data indicate slight progress in reading during \*\*\* grade. (JE 16, pp. 9, 15-16).
56. Student's teacher from Fall 2011 testified that student got good grades in Math and made progress; student's Spring 2012 Math teacher did not testify about student's math progress. (T. 675, 681, 683). However, year-end testing data in Math shows that Student began the year on pace with student's peers, with no identified learning disabilities in Math. Student maintained development on par with student's peers until \*\*\* when student was admitted to the hospital. Although student received additional services in the applied setting when student returned to LCM, student was able to make only minimal progress and ended the year substantially below student's \*\*\* grade peers. In Math Concepts and Applications, student ended the year with a score of 10 points, while the target point is \*\*\*. In Math Computation, Student ended the year with a score of 21 points, while the target year-end score is \*\*\*. Student's end of year benchmark score in Math was a \*\*\*.
57. Overall, the data indicate that Student did not make progress in Math during \*\*\* grade and that student did not receive necessary services for student's learning disabilities in Math that were not identified until Summer 2012.
58. Although Student's teachers testified that student made progress behaviorally during \*\*\* grade (T. 576-577; T. 677-680; T. 711-712; T. 772, 786; JE 20, p. 55, 59), and school records show that Student had fewer behavioral incidents in early Spring 2012 following student's return from \*\*\*, they also indicate that student's behavior began to deteriorate and escalate in \*\*\* 2012. (See Findings of Fact #s 47-48). Any behavioral gains realized by Student are fairly attributed to student's hospitalization at \*\*\* in \*\*\* 2011, as student's behavior became increasingly

severe and aggressive over the semester, as student was unable to maintain the gains achieved in the residential setting.

### **Summer 2012**

59. During May and June 2012, Petitioner continued to discuss her belief that Student required a residential placement in order to be educated and tension developed between Petitioner and LCM staff as a result. The evidence reflects that LCM staff increasingly documented incidents they believed reflected poor parenting on Petitioner's part and her inability to "control" Student's behavior in the home. The tone of emails and documents written by staff concerning Petitioner suggest that LCM staff sought to establish that any need for RTC resulted solely from Petitioner's inability to manage Student and not from an educational need. (R 35, 36, 37, 40, 41, 155).
60. The evidence also reflects that Petitioner was very focused on how to achieve the goal of residential placement for Student and at times made comments to Student about student's behaviors and impending residential placement that went against expert advice about how to relate to Student. Petitioner continued to desire a residential placement for Student, although Petitioner did agree to bypass her request for residential placement in June 2012 to allow LCM the opportunity to try additional actions to work with Student. (T. 246, 251).
61. Student's ARD met on May 29, 2012 to discuss Petitioner's request for residential placement. School members of the ARD believed that \*\*\* services and the additional supports provided had been very effective for Student with few behavior issues at school and educational improvement except for the most recent few weeks, while Petitioner indicated that Student's repeated hospitalizations have occurred because of behavior issues both at home and at school and that student's behavior was again beginning to decline. LCM staff stated that Student's FBA was current (done in 2010 at \*\*\* ISD) and Petitioner and her advocate requested that LCM complete an updated FBA. (JE 35, p. 21; R 55, pp. 243-244; T. 247). LCM agreed to complete an FBA with the behavioral specialist (the \*\*\* teacher) as the lead, even though the \*\*\* teacher testified that she is not a behavior specialist and does not know what an FBA is. JE 35, p. 21; T. 199). The ARD recessed in disagreement.
62. From \*\*\*, 2012, Petitioner again admitted Student to \*\*\* for aggression with children at student's \*\*\*. Upon admission, Student was defiant and tried to flip tables and fight. Staff's treatment plan indicated that Student was at high risk for injury to self and others. (R. 59, p. 808). \*\*\* records indicated that \*\*\* staff reported that Student's behaviors were much worse than during student's previous admission. (R 55, p. 245). Patient was subsequently discharged to the home with compliant and nonaggressive behavior. (R 59, p. 786).
63. The ARD reconvened on June 15, 2012 to review the updated FBA and discuss summer services and placement. (JE 35, p. 20).

64. The \*\*\* Specialist, Student's In Home Trainer/Special Education teacher, and Student's general education teacher completed the updated FBA on June 1, 2012 in a one-day period. (T. 248-250). Staff completed the FBA based on their recollection of Student's behavior over the prior weeks and a compilation of data from discipline records and parent reports. (T. 596-603). The data were not collected across home, school and community settings. The data report the frequency of a list of generic behaviors, but does not delineate when the behaviors occur, what the triggers are for particular behaviors, or what interventions are/are not effective for which behaviors. (JE 4, pp. 24-27). Staff completing the FBA did not recall why they rated behaviors as they did or how to interpret the ratings. (T. 602-602). As such, the FBA has a very low probability of supporting the creation of an effective BIP. (T. 380-382).
65. After reviewing the FBA, the ARD added a positive goal to Student's BIP of improving positive identity through the use of \*\*\*, and developed a sticker chart to connect with the BIP. This change did not correlate to the results of the BIP. IHT services were increased for the summer, ESY services developed, and all ARD members agreed that RTC would not be Student's placement at that time. (JE 35, p. 20).
66. Student received ESY services and records indicate two restraints and disciplinary incidents during summer school. (R 13, pp. 27, 30). Petitioner reported to \*\*\* staff during the summer that although Student continued to have many challenging behaviors, student's behavior was better since discharge from the hospital. (R 55, p. 248).

#### **FIE #2- August 2012**

67. LCM's diagnostician completed a second FIE on August 3, 2012 at Petitioner's request. She redid the educational testing, but carried forward the psychological evaluation from 10/22/12. The diagnostician found Student to have extremely slow processing speed and low levels of short-term memory, and was again concerned that these deficits might be related to Student's medication. She reported the need to address this with Student's physician, but as of the hearing date, this had not been done. (JE 50, p. 8, t. 542).
68. The diagnostician testified that she did not believe the FIE results to be accurate because of Student's resistance to testing. (T. 517-518). She has not re-evaluated Student to address this or suggested reevaluation to the ARD. (T. 543, 546).
69. FIE #2 reported substantially lower cognitive scores than FIE #1 (compare JE 50, pp. 13-14 with JE 2, pp. 4-5). As cognitive scores should be relatively stable, further assessment would be warranted to determine what would cause the decrease in cognitive scores. (T. 405).
70. Achievement scores on FIE #2 were also significantly lower in every area tested (19 total areas tested) except Reading Fluency and Academic Applications. In

Basic Reading Skills and Math Calculation Skills, Student scored 10 points lower on student's standard score; in Math Reasoning and Broad Math, Student's standard scores declined by over ten points. (Compare JE 50, p.16 with JE 2, p. 7).

71. Student's significant decline in achievement between FIE #1 and #2 indicates that either the testing results are inaccurate (see Fact Finding # 68) or that the totality of Student's experience has substantially impacted student's academic performance and precluded achievement. (T. 462).
72. Based on the testing results obtained, the diagnostician found learning disabilities in the areas of Reading Fluency, Mathematics Problem Solving, Mathematics Calculation, and Written Expression. (JE 50, p. 7; T. 547). Although not previously diagnosed in FIE #1, Student's math teacher testified that these learning disabilities were consistent with her math screening of Student in Fall 2012 and with her observation of Student in \*\*\* grade. (T. 695-697).
73. Although FIE #2 was completed in August 2012, a copy was not provided to Petitioner until January 2013 when Student's ARD reviewed the evaluation. (T. 258). As such, no programming or IEP goals were developed to address the newly identified learning disabilities in Math and Written Expression and Petitioner was denied the opportunity to participate in her Student's education or to request an IEE.
74. FIE #2 does not meet the criteria for evaluations set forth in 34 C.F.R. §300.304 (c)(3)(4)(6) and (7). The evaluation failed to rule out whether Student was sensory impaired by medication; failed to assess Student in all areas related to student's suspected disability of Autism (speech/language); failed to update the psychological evaluation with a complete Autism evaluation or psychological testing to rule out an Emotional Disturbance; the evaluation was not sufficiently comprehensive to identify all of Student's special education and related services needs; and did not timely provide relevant information to assist persons in determining Student's educational needs.

### **Fall 2012- \*\*\* Grade**

75. School records reflect frequent, ongoing, and severe behavioral incidents beginning on the first day of school and continuing throughout September 2012. Student's \*\*\* due to student's behaviors. (JE 12, p. 16-17; JE 25, pp. 25-31).
76. Student's teacher emailed the principal on 9/19/12 about Student, stating in part, "it's pretty much every day that I'm trying to keep student from exploding or destroying something," "...student usually refuses to do any written work or assignments, so I don't have any grades," "...I can't continue to come to work and be \*\*\*," and "I'm scared student's going to really hurt another student eventually before we can evacuate the room." (JE 12, p. 17). The teacher did not testify at the hearing and the principal attempted to downplay the email as a

- frustrated staff member, but I find the email. Along with the District's behavioral records, to be a credible assessment of Student's behavior during September 2012.
77. Student's behavior showed clear regression from the early portion of Spring 2012, following student's discharge from \*\*\*. (T. 107, 608-609).
  78. Student's behaviors at home and in the community also became very destructive and aggressive during September 2012. (R 55, p. 259; T. 228).
  79. On \*\*\*, 2012, Petitioner admitted Student to \*\*\* Hospital for worsening mood swings, agitation, and assaultive behaviors. Medical records reflect that Student demonstrated extremely assaultive behavior while in the hospital and required medication and restraints. Hospital staff noted that Student can display positive behaviors, but can easily switch to destructive and disruptive behaviors. (R 55, p. 260). This observation correlates to Student's behavior pattern at school. Student was discharged on \*\*\*, 2012 as stable, with the recommendation to participate in a structured social skills group. R 57, pp. 471, 545-548; 551-554; 730).
  80. Following discharge, Student continued to demonstrate severely aggressive behaviors at home (and at school \*\*\*), leading to a recommendation by \*\*\* for residential placement at \*\*\* on \*\*\*, 2012. (R 55, pp. 261-262; T. 229; JE 37, p. 24).
  81. The record reflects that Petitioner had been told that she could obtain a long-term residential placement for Student if she relinquished parental rights to the state of Texas, but she did not want to do that. (T. 253). As of October 19, 2012, Petitioner was beginning to consider this even though it was a very difficult decision. (R 55, p. 263).
  82. Student remained at \*\*\*. Medical records indicate student's admission to \*\*\* for the third time for aggressive behavior despite extensive services. While at \*\*\*, Student made progress behaviorally and successfully attended school. (JE 37, p. 22). Student was discharged to the home with recommendations for "structure, clear consistent limits, and quick positive reinforcement... student has done well in the hospital with structure and support." (JE 37, p. 26). Other recommendations included individual and family therapy, smaller classroom setting, a social skills group, and extracurricular activities. (JE 37, p. 26).
  83. \*\*\* ISD recommendations included a low student/student and student/teacher ratio, high structure and routines, and a calm and quiet classroom. (JE 46, p. 1).

### **Spring 2013- \*\*\* Grade**

84. Student returned to LCM on \*\*\*, 2013. An ARD convened on January 16 to consider placement and review evaluations. Upon student's return and continuing until the date of the hearing, Student was placed full-time in the \*\*\* classroom for reorientation on a 1:1 basis with a teacher and/or a paraprofessional aide. (T. 633).

- Transition to Student's regularly scheduled day was scheduled to begin and proceed at whatever pace Student could successfully transition. The ARD provided for IHT services and counseling services. (JE 50, pp. 3-6).
85. Math screening tests done in January 2013 indicates a lack of progress in math computation/application from \*\*\* to \*\*\* grade. (T. 685-686, 690; JE 16, p. 13).
  86. In the 9 school days between Student's return to LCM and the start of the hearing in this matter, Student had been restrained four times on one day, \*\*\*, 2013, for cussing, kicking, \*\*\*. (T. 262; JE 50, p. 1). Another disciplinary incident occurred on \*\*\*, 2013. (T. 262, 640).
  87. The \*\*\* teacher testified that no changes are planned for Student's program and that student will continue to receive services as before. (T. 637, 901). Student's proposed IEP and placement remain as they have been for the past year. Student continues to have no individualized social skills instruction, no counseling or social skills IEP goals, no IEP goals in student's identified areas of learning disability, and no BIP based on a properly completed FBA.
  88. The evidence reflects that, as of the date of the hearing, LCM has never consulted with Student's psychiatrist or with staff at \*\*\* or \*\*\* ISD about Student. LCM has never attempted to utilize a behavior specialist to conduct a proper FBA and develop a behavior plan and strategies that could be implemented in a small classroom with the high degree of structure and consistency recommended for Student. LCM has never requested a full Autism evaluation or a reevaluation to determine if the scores obtained in Summer 2012 are accurate.

**Dr. \*\*\* Program Review and Recommendation**

89. Dr. \*\*\*, Petitioner's expert witness, and a neuropsychologist and LSSP, both testified and provided a written program evaluation with recommendations for Student's educational programming. Dr. \*\*\* reviewed extensive and complete medical and educational records concerning Student, interviewed Petitioner and Student's case manager at \*\*\* during student's \*\*\* 2012 admittance there, interviewed the principal and \*\*\* teacher at LCM upon Student's return in \*\*\* 2013, interviewed Student briefly, and observed Student during a family visit at \*\*\* and in student's \*\*\* classroom at LCM. I find that Dr. \*\*\* relied on a broad base of reliable data in assessing Student's program and making her recommendations.
90. Dr. \*\*\* did not complete any testing or perform an IEE due to her lack of access to Student while student was hospitalized at \*\*\*. (P 1; T. 434).
91. Dr. \*\*\* reports that while at \*\*\*, Student's emotional instability and diminished ability to concentrate triggered aggression, that student required consistent close supervision to be successful, and behavioral support in an instructional setting with a small student/teacher ratio. Student's teacher at \*\*\* also reported

significant frustration resulting from student's low reading level, positive response to the class token economy system, and continuous progress over time with staying in class and attending. She indicated that behavior in less structured situations remained problematic. (P 1, p. 4).

92. Dr. \*\*\* found that Student has responded with variable levels of success to highly structured and consistent short-term residential programs, but has been unable to maintain an acceptable level of function after discharge from the hospital environment. (P 1 p. 5; T. 367). This is consistent with the parent's observation and the documentary evidence that the longer Student stays in an inpatient hospital, the longer things go well after student is discharged. (T. 221, 230).
93. \*\*\* testified that Respondent's model of \*\*\* services does not meet Student's needs because it is a crisis intervention approach whereby program staff monitor Student throughout the day and intervene as needed should behavioral incidences occur. Student continues to receive student's instruction in student's regular classroom environment. Instead, Student requires individualized social skills instruction throughout student's day with a priority given to data collection and progress monitoring so that student can learn and improve. (T. 371-373).
94. \*\*\* believes the appropriate placement for Student is a long-term residential program with consistent, intensive and coordinated services that can address student's significant emotional, cognitive, and academic needs. (T. 368, 372-373; P 1, p. 5).

#### **Dr. \*\*\* Recommendation For Placement**

95. Petitioner's long-term psychiatrist of 6-7 years, Dr. \*\*\*, testified that Student requires more 1:1 education that teaches student how to control \*\*\*self and student's moods. Dr. \*\*\* believes that Student requires a residential placement because student cannot learn to control \*\*\*self or be controlled in any other environment. Dr. \*\*\* testified unequivocally that Student requires a degree of structure and consistency in order to learn such that student cannot move back and forth successfully between any two environments. Based on this, Dr. \*\*\* believes that Student needs a RTC to make educational progress and receive an appropriate education. (T. 209, 211-212).

#### **The \*\*\***

96. Petitioner seeks placement of Student at the \*\*\* in \*\*\*, a TEA approved residential placement. Petitioner has made application to the \*\*\* for Student and the Director confirmed that Student is an appropriate candidate for the school. (T. 339-340).

97. The \*\*\* offers residential programming, educational programming and related services to students on an individualized basis. The \*\*\* has a staff of certified special education teachers, paraprofessionals, and related service providers. (T. 330).
98. If placed at \*\*\*, Student would attend school from approximately 8:00 a.m. until 3:30 p.m. to work on an individualized academic plan with certified teachers. Evening activities are related to goals and objectives outside of the daily routine of traditional educational academics. The focus is to surround the individual with a high level of structure and consistency and continuous work on social skills and behavior. (T. 331-332, 334-336, 341). Each student receives an individualized social skills program. (T. 342-343).
99. The goal of \*\*\* is to break the cycle and try and return to students to the point of being able to fit into more traditional settings such as the home, school, and community. (T. 333).
100. The \*\*\* coordinates between school, family, and \*\*\* with monthly reports to the school, parent training, and ongoing collaboration, while enrolled and at discharge for transition. (T. 344, 351).

### **LCM Behavior Data**

101. School records reflect daily behavior tracking forms and \*\*\* reporting forms to be sent home on a weekly basis. In general, neither the daily behavior forms nor the \*\*\* forms track detail sufficient to make firm conclusions about Student's behavior at school. For example, the forms note whether a behavior occurred, but do not delineate whether the behavior was \*\*\* or an aggressive act. The data reviewed showed some inconsistencies between the information reported on the two forms on given dates. (For example, see JE 19, p. 13/R 66, 504; JE 10-20/R 66, 523-526; JE 19, p. 21/R 66, 528-529; JE 19, p. 27/R 66, 547). I find the data to be overall a reasonably accurate reflection of Student's behavior at school, but I believe that it under represents Student's aggressive behavioral incidents.
102. Throughout Student's time at LCM, the record reflects a correlation between periods of increased behavioral aggression at home and in the community and at school. The record further reflects a pattern of periods of hospitalization followed by short-term improved behaviors. Following these periods of short-term behavioral improvement, the data reflect repeated increases of severe and frequent aggressive behaviors that ultimately lead to rehospitalization.

### **Student's IEPs**

103. Over time, Student's IEPs at LCM failed to contain goals in these documented areas of need that resulted from student's disability: Reading Fluency,

Mathematics Problem Solving, Mathematics Calculation, Written Expression, Counseling, and Social Skills.

104. Over time, Student's IEPs failed to report present levels of performance.
105. Over time, Student's IEPs repeated the same reading and math goals, "demonstrate measurable progress" in Reading, Math, etc.

### **District Witnesses**

106. District staff implied through their testimony that Petitioner's parenting and her comments to Student about student's placement in a residential treatment center impacted student's behavior for the worse and show that the need for residential placement stems from Petitioner's desire and not from educational need. (T. 826-829; T770-778; 781).
107. Student's aggressive and severe behaviors across settings are well documented in the medical and educational records and cannot fairly be attributed to Petitioner's parenting skills, lack of resources in the home environment, or her desire for Student to be residentially placed.
108. District witnesses uniformly testified that Student can, and has, received a free appropriate public education at LCM. Their testimony was that to the extent Student did not make progress while at LCM, it was because student was absent so much. Teachers also testified that Student's behaviors were not so serious as to impede student's educational performance. Testimony offered by District witnesses was impressionistic and conclusory in nature and was not based on a thorough review of all of the disciplinary reports, restraint records, staff notes, behavioral records, progress data, medical records, and expert opinions available in the record as a whole.

### **General Findings of Fact**

109. Student requires a residential placement in order to achieve meaningful educational progress at school. As such, residential placement is the least restrictive environment for Student.
110. Student's placement at a TEA approved residential facility is primarily for educational purposes so that Student can obtain educational programming that meets student's academic, behavioral, and emotional needs with the degree of structure and consistency that will enable student to make academic and nonacademic progress.

## **DISCUSSION**

### **Whether Respondent Failed to Provide Student With A Free Appropriate Public Education Beginning On November 7, 2011?**

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.<sup>2</sup>

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).

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 (5<sup>th</sup> 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

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<sup>2</sup> Petitioner alleged numerous procedural violations of IDEA pertaining to the content of student’s IEPs, failure to provide records and prior written notices, failure to comply with timelines for providing records, and failure to implement student’s IEPs, It is well settled that procedural violations constitute a denial of a free appropriate public education 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.

4. Are there demonstrated positive benefits both academically and non-academically to the student.

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.

1. Is the program individualized and based on the student's assessment and performance?

Student's program at LCM was initially based on assessment data from student's prior school district. The record reflects that when Student began to exhibit severe behavior problems in spring 2011, the ARD acted quickly to revise student's program based on this performance. The ARD also sought additional assessments, some of which were ultimately performed in summer and early fall 2011 due to Student's absences from school in spring 2011. An updated FBA, requested at each ARD repeatedly since February 2011 was not completed until June 2012.

After Student's placement into the \*\*\* program in February 2011, the evidence reflects that Respondent completely failed to continue to individualize and update Student's program based on assessment and performance. Between the time Student was placed in \*\*\* and the present, Student has been hospitalized for emotional and behavioral issues \*\*\* times. In addition, LCM has evaluated Student twice with cognitive and achievement testing, completed a psychological evaluation, and an FBA. Despite these significant educational events, Student's IEP goals, present levels of performance, BIP, and placement remain essentially unchanged.

With regard to assessment, the 2011 FIE identified a learning disability in the area of Reading Fluency, but the ARD did not revise Student's IEP to include a goal for Reading Fluency. In fact, the record reflects that Student received no special education services in Reading at all during \*\*\* grade. At the conclusion of student's \*\*\* grade year, school records reflect that Student made minimal to no progress in the area of Reading Fluency.

A psychological assessment was completed in October 22, 2011, but the evaluation failed to include any discussion or recommendations concerning Student's aggressive behaviors and noncompliance, the two most significant areas of behavior that impede student's education. No changes were made to Student's program following the psychological evaluation.

After the August 2012 FIE identified three new areas of learning disability and reflected a sharp decline in Student's achievement, Respondent failed to offer additional services to Student or devise a new IEP until January 2013.

Respondent has also failed to individualize Student's program based on student's performance. Student's performance at LCM has consisted of a pattern of cycling in and out of psychiatric hospitals and residential treatment at \*\*\*. Both doctors and educators have made recommendations for Student's program based on student's improved performance in those settings: small class size, structured and routine environment,

participation in a structured social skills group, counseling, and use of a token economy system to help improve behavior. LCM has failed to effectively incorporate these recommendations into Student's program. Instead, the record reflects that LCM has continued to rely on the \*\*\* crisis intervention model of behavior management, with no individualization for Student, with Student moving in and out of general education and applied classrooms to receive services. In fact, in spring 2012, following Student's second admission to \*\*\*, student worked with six different teachers in four different settings. This type of schedule clearly does not provide Student with an individualized program based on student's need for structure and routine.

LCM's only attempt to provide Student with an appropriate placement of a small self-contained classroom with structure and consistency was placement in a Life Skills classroom for a period of 6-12 weeks, a placement LCM readily acknowledges was completely inappropriate for Student. Throughout Student's tenure at LCM, student has never participated in a structured social skills group or had individualized social skills or counseling goals. As Dr. \*\*\* testified, without these important and necessary interventions, Student will be unable to learn to control \*\*\*self so that student can attend to important task of education.

Finally, Respondent's failure to individualize Student's program based on performance is underscored by student's \*\*\* teacher's testimony at the due process hearing in January 2013, after Student returned from over \*\*\* months of being residentially placed. The teacher, and other LCM witnesses, testified that *no* changes were being contemplated in Student's program and that student would continue to receive the same services to address student's behaviors.

In short, Respondent has repeatedly failed to individualize and update Student's program based on information obtained from both assessment and performance. As a result, Student has failed to receive the services student needs to make academic and nonacademic progress.

2. Is the program administered in the least restrictive environment?

As discussed herein in the context of Petitioner's request for residential placement, I find that Student's placement at LCM in general education with behavioral supports of \*\*\*, a BIP, and academic support of the applied setting, content mastery, and inclusion was not appropriate for Student, as student required significantly greater structure and consistency to attain an educational benefit.

3. Are the services provided in a coordinated and collaborative manner by the key stakeholders?

The record reflects a significant lack of coordination and collaboration between key players impacting Student's education. Most significantly, Respondent was aware that Petitioner struggled with Student in the home and community and that she was seeking a residential placement for Student as early as spring 2011, and Respondent failed to contact any of the private providers working with Student to consider and evaluate the

request. Respondent knew that Student received ongoing psychiatric services from Dr. \*\*\* and support from \*\*\*; however, Respondent never contacted these providers about residential placement or any other recommendations for Student, including the ARD's repeated question about the impact of Student's medications on student's \*\*\* on multiple occasions.

Following Student's many hospitalizations and student's enrollment at \*\*\* ISD while at \*\*\*, Respondent failed to timely collect relevant medical and educational records, or to contact the medical and educational providers, to obtain current information about Student's status or needs.

Finally, for this Student, collaboration between home and school is critically important. Though Respondent provided school-to-home daily behavior sheets to Petitioner, the information contained on the sheets lacked sufficient specificity for Petitioner to know what behaviors Student was demonstrating in the school environment. The record also does not reflect a behavior system that was implemented with any consistency in either environment- or across environments. Though the IHT worked on behavior strategies in the home that student used in student's classroom at school, the record does not reflect that any other LCM staff was made aware of, or trained, in the effective use of those strategies with Student. In short, the evidence demonstrates a complete lack of any systematic, coordinated, and consistently implemented behavior program based on information provided by the many persons involved in Student's educational and behavioral treatment. The evidence is clear that Student requires such a program to move forward educationally.

4. Are there demonstrated positive benefits both academically and non-academically to the student?

Although the Fifth Circuit states that all indicators are to be considered in evaluating whether a free appropriate public education has been provided to a student, with this factor not weighing more heavily than the others, the Court also states that this factor is the "most significant" and that positive academic benefit will generally militate against a finding that an IEP is inappropriate. *Klein ISD. v. Hovem*, 690 F.3d 390, (5th Cir. Tex., 2012, cert denied 2013 U.S. LEXIS 2325 (March 18, 2013)). Progress must include both academic and non-academic areas, including social skills, developmental skills, and functional skills. *Venus ISD v. Daniel S.*, 36 IDELR 870 (D.C.N.D. TX 2002).

Petitioner has proven that Student did not receive either academic or non-academic benefits at LCM. Academically, the evidence indicates that Student ended student's \*\*\* grade year with slight progress in Reading and no progress in Math. See, Fact Findings #s 55-57. In the summer following \*\*\* grade, Respondent retested Student's achievement and performance, and test results indicated a significant decline in academic performance in all areas from the previous year. Math screening performed in January 2013 when Student returned to LCM further confirmed student's lack of progress in mathematics.

Behaviorally, though the \*\*\* teacher claims Student mastered student's behavior goals in June 2012, Respondent's Special Education Director acknowledged that student had not (T. 107). Further, the evidence overwhelmingly demonstrates that Student's severe and aggressive behavior worsened in \*\*\* 2012 and again in \*\*\* 2012. To the extent that Student demonstrated periods of improved behavior in \*\*\* 2012, it is more credibly attributed to the services student received when residentially placed in \*\*\* 2012 and \*\*\* 2012 than from Respondent's program, which has remained constant through Student's significant behavioral progressions. The great weight of the credible evidence indicates that Student's behavior continues to be sufficiently severe that it results in cyclical out-of-school hospitalizations and placements that preclude sustained academic and behavioral progress. As such, Petitioner has demonstrated that Student failed to obtain nonacademic benefits from student's placement at LCM.

Taking the indicators of a free appropriate public education as a whole, I find that Respondent failed to provide Student with a free appropriate public education from November 2011 forward. Student is clearly capable of meaningful academic progress if student can make sufficient behavioral progress to obtain an education. The evidence convincingly demonstrates that during student's \*\*\* and \*\*\* grade years, Student has not progressed either behaviorally or academically. Student has cycled in and out of LCM and sequential hospital and residential placements, missing significant periods of academic instruction, lacking proper evaluation of student's academic and behavioral needs, lacking IEPs with goals individualized to student's identified areas of need, and lacking a coordinated and systematic behavioral plan that is implemented across settings.

#### Whether Placement In A Residential Treatment Facility Is The Appropriate Placement For Student At This Time

Petitioner is requesting placement at the \*\*\* or a comparable TEA-approved residential facility as the appropriate placement for Student under IDEA. Respondent argues first, that Petitioner does not require a residential placement to obtain an educational benefit and that Petitioner has, in fact, obtained such a benefit from student's placement at LCM. Respondent further argues that Petitioner's request for residential placement is not primarily for educational purposes; but rather to address student's behavioral issues. *See*, Respondent's Closing Brief, Part C, Paragraph C.

In *Richardson ISD v. Leah Z.*, 580 F. 3d 286 (5<sup>th</sup> Cir. 2009), the Fifth Circuit has enunciated a clear test for when reimbursement for residential placement by a parent is appropriate. Though this is not a reimbursement case, the test set forth in *Leah Z.* guides the determination in this case of when a highly restrictive residential placement is appropriate for a student: 1) the residential placement must be *essential* for the student to receive an educational benefit; and 2) the residential placement must be primarily oriented toward education. If both prongs of the *Leah Z.* test are met, then placement in a residential facility is appropriate as the least restrictive environment for the student.

1. Is Residential Placement Essential For Student To Receive An Educational Benefit?

The Fifth Circuit's test for residential placement is clear: the placement must be essential, i.e. it must be the only way for a child to receive a meaningful educational benefit under IDEA. *Leah Z, supra*; 34 C.F.R. § 300.104. Like a related service under IDEA, the placement must be required to assist a child to benefit from special education. 34 C.F.R. 300.34. Based on the evidence presented to me, I find that residential placement is essential for Student to receive the requisite educational benefit under IDEA.

First, as fully discussed *infra*, the evidence demonstrates conclusively that Student has not received educational benefit over the preceding two years at LCM without residential placement. That Student has failed to receive academic and nonacademic benefit while at LMC is not surprising, for during Student's two-year tenure at LCM, student has been placed in a hospital or residential treatment facility \*\*\* times and has missed a total of at least \*\*\* months of instructional time; *almost half* of the instructional time Student should have received from LCM since student enrolled. While Respondent characterizes these significant absences as Petitioner's choice due to her inability to manage Student in the home, and as the reason for Student's limited educational progress at school, I view them as critical evidence of why a residential placement is essential for Student at this time. A thorough review of the voluminous medical records submitted to me confirms that Petitioner's numerous admissions of Student for hospitalization and residential placement was necessitated by acute aggressive and violent behavior that presented a danger to student and others. With perhaps one exception (fall 2011), the escalation of Student's behavior at home and in the community correlated with increased aggression and severe behavioral episodes at school. I agree with Respondent that Student's frequent absences from school made it difficult to properly educate student; however, these absences result directly from Student's disability and reflect student's inability to sustain an emotional and behavioral state that would allow student to be educated at LCM. For this reason, I view Student's ongoing and frequent need for hospitalization and residential placement over the past two years as important evidence that long-term residential placement is essential for Student to benefit from special education services.

Second, the evidence demonstrates that the structure, consistency, and intensive intervention offered by residential placement allow Student to progress, both academically and behaviorally. The medical and educational records from Student's placement at \*\*\*/\*\*\* ISD conclusively demonstrate that Student showed notable progress in student's behavior and student's schooling while placed at \*\*\*.

Third, both Dr. \*\*\* and Dr. \*\*\*, the only two expert witnesses to provide testimony in this proceeding testified to Student's educational need for the structure, consistency, and intensity of services offered by a residential educational facility. Dr. \*\*\*, Student's long-term psychiatrist who has treated Student for over five years and throughout student's many admissions to various psychiatric hospitals, convincingly explained that Student's current condition is such that moving back and forth between *any* two environments, such as home and school, will not provide Student with the consistency and structure student requires to learn how to control student's behavior and attend to student's education.

Although LCM attempts to portray Student's home environment as the missing link to student's success, I find that both the home and school environment have failed to provide Student with the routine, structure, consistency and behavioral management needed for student to consistently remain at LCM and benefit from student's education. Student's severe and ongoing behavioral challenges at school, as graphically described by student's teacher in \*\*\* 2012, contradict Respondent's contention that the real problem lies only in the home environment.

Respondent argues that residential placement is not essential for Student because it *can* provide Student with an educational benefit. In support, Respondent offered the testimony of staff members who testified that they had provided Student with an effective educational environment with at least some success. As discussed at length herein, I do not find the evidence to support that Student's educational environment at LCM has been effective or has provided student with the legally required benefit. Significantly, staff members testified that they intended to make no significant changes in Student's program as of the date of the hearing even though Student missed \*\*\* due to being residentially placed. They believe that what they have been doing works despite the powerful evidence to the contrary.

In sum, for the reasons set forth above, I find that a residential placement is essential for Student to benefit from student's special education. I find that without such a placement, Student will be unable to achieve the meaningful educational benefit that student is entitled to obtain under IDEA.

## 2. Is Residential Placement For Student Primarily Oriented Toward Education?

In *Leah Z.*, the Fifth Circuit makes clear that the residential placement must not only be essential, but must also be primarily for an educational purpose. This means that like related services under IDEA, the services offered must be oriented toward enabling the child to obtain an education rather than toward engaging in non educational activities. The court explained that under this prong of the test for residential placement, the fact intensive inquiry must focus on whether the services provided by the residential facility fall within IDEA's definition of related services. In interpreting this requirement of *Leah Z.*, a Colorado federal court instructed that the issue is not the motivation behind the placement, but rather the services provided and whether they constitute special education and related services under IDEA. *Jefferson County School District v. Elizabeth E.*, 798 F. Supp. 2d 1177 (D.C. CO 2011). Based on the evidence presented, I find that Student's requested placement at the \*\*\* or an alternate TEA approved residential treatment facility is primarily oriented toward the education of Student.

Related services under IDEA are defined as "transportation, and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education..." 34 C.F.R. § 300.34. Examples of related services include, in relevant part, psychological services, recreational services, counseling services, and parent counseling and training. Medical services do not constitute related services unless they are for diagnostic or evaluation purposes. *Id.*

The services offered by the \*\*\* clearly fall within the definition of related services under IDEA and are clearly for educational purposes. The \*\*\* is not a medical facility and the services offered include educational services offered by certified teachers that include traditional academics, intensive social skills instruction, recreational therapeutic services, counseling services, and parent training and counseling as needed. The \*\*\* provides special education and related services to students on a full-time around the clock basis by working on their academic and behavioral IEP goals and objectives throughout the entire day rather than just the school day. In this way, \*\*\* is able to provide intensive services and a highly structured environment of the type that Student requires to make both academic and nonacademic progress. In short, \*\*\* is an educational facility that serves students with disabilities on a full-time basis, with the services and staff available to meet all of a student's education and related services needs.

The fact that Student's behavioral and emotional challenges drive student's need for residential placement does not mean that the placement is not primarily for educational purposes. As *Leah Z.* instructs, the issue is what services are offered by the placement, not the motivation for the placement. More importantly, as a student with Autism and Learning Disabilities, effectively addressing Student's emotional and behavioral needs is central to student's educational programming and success. As both Dr. \*\*\* and Dr. \*\*\* testified, Student will not be able to move forward academically without addressing both aspects of student's disabilities.

I find that the \*\*\* or a comparable TEA approved residential educational facility is primarily oriented toward the education of Student and an appropriate residential placement under IDEA.

#### Whether Petitioner Is Entitled To Compensatory Relief?

Petitioner failed to present evidence to support the type or amount of compensatory relief that would be appropriate for Student other than placement in a residential facility. I find that placement in a residential facility as ordered herein will remedy Respondent's failure to provide Student with a free appropriate public education by allowing Student to access intensive academic and emotional/behavioral interventions that will address the deficits of Respondent's program.

#### Whether Respondent's FIE Is Appropriate Such That Petitioner's Request For An IEE At Public Expense Should Be Denied?

Respondent did not meet its burden of proving that Respondent's FIE #1 and #2 were appropriate under IDEA. *See*, Findings of Fact, Numbers 35 and 74. In addition to the evaluations' failure to assess all areas of Student's suspected disabilities in a sufficiently comprehensive manner to identify all of Student's special education and related needs, the results of FIE #2 in particular are not reliable as per the evaluator's testimony. The evaluation, as such, fails to provide relevant information that can directly assist in determining the educational needs of Student.

Although I find that Respondent's FIEs of Student are not appropriate under IDEA, I also find that Dr. \*\*\* Educational Program Evaluation does not constitute a proper IEE for which reimbursement is required, as it did not contain any testing of Student or otherwise meet the criteria for evaluations under IDEA. 34 C.F.R. §300.502.

Because Respondent failed to establish the appropriateness of its FIE under IDEA, Petitioner is entitled to a full and complete independent educational evaluation in the areas of assessment that Respondent completed or should have completed.

### **CONCLUSIONS OF LAW**

1. Respondent LCM CISD 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. LCM CISD is Student's resident district under IDEA for all relevant time periods.
2. Respondent did not provide Student with a free appropriate public education from November 7, 2011 to the present. Respondent's current and proposed placement of Student is not reasonably calculated to provide student with educational benefit under IDEA and does not provide an appropriate placement in the least restrictive environment. *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5<sup>th</sup> Cir. 1997); 34 C.F.R. §§ 300.1, 300.17, 300.39, 300.101.
3. The appropriate and essential placement for Student is a residential treatment facility primarily oriented toward education. *Richardson ISD v. Leah Z.*, 580 F. 3d 286 (5<sup>th</sup> Cir. 2009); 34 C.F.R. 300.104.
4. Respondent's 2011 and 2012 Full and Individual Evaluations of Student were not appropriate under IDEA. 34 C.F.R. § 300.304.
5. The Program and Evaluation Review completed by Dr. \*\*\* does not constitute an Independent Educational Evaluation under IDEA. Petitioner is not entitled to reimbursement for Dr. \*\*\* evaluation. 34 C.F.R. §300.502.

### **ORDERS**

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

1. Respondent is ordered to convene an ARD within ten (10) school days of the date of this order to place Student at the \*\*\*. If the \*\*\* is unavailable, the ARD is to place Student at a TEA approved residential treatment facility.
2. The duration of the placement is for a maximum of one year from the date of

placement or less, if the residential treatment facility recommends Student's discharge earlier than one year from the date of placement.

3. The placement is to begin no later than thirty (30) school days from the date of this Order.
4. Upon Student's discharge from \*\*\* or other TEA approved residential facility to Respondent District, Respondent is ordered to collaborate with the facility to plan for Student's transition back to student's home, community, and school.
5. Respondent is ordered to provide Student with a multi-disciplinary independent educational evaluation at public expense, to include psycho-educational testing, psychological testing, an Autism evaluation, a Functional Behavioral Assessment, and Speech/Language and Communication. The IEE is to be provided by an independent evaluator(s) of Petitioner's selection in accordance with Respondent's policies governing the provision of IEEs.
6. Respondent is directed to enter into a contract for the provision of the IEE with Petitioner's chosen evaluator(s) no later than thirty (30) school days following Petitioner's notification to Respondent of its chosen evaluator(s).

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

Finding that the public welfare requires the immediate effect of this Final Decision and Order, the Hearing Officer makes it effectively immediately.

**SIGNED** and **ENTERED** this 25<sup>th</sup> day of March 2013.

/s/ Lynn E. Rubinett

Lynn E. Rubinett

Attorney at Law

Special Education Hearing Officer for the State of Texas

TEA DOCKET NO. 054-SE-1112

STUDENT bnf	§	BEFORE A SPECIAL
PARENT	§	
Petitioner/Counter Respondent	§	EDUCATION
	§	
v.	§	HEARING OFFICER FOR THE
	§	
LITTLE CYPRESS	§	
MAURICEVILLE CISD	§	
Respondent/Counterclaimant	§	
	§	
	§	STATE OF TEXAS

**SYNOPSIS**

**Issue:** Whether Respondent denied Student a free appropriate public education from November 7, 2011 forward?

**Held:** For the Student. Student met student’s burden of establishing that Respondent failed to provide student with a free appropriate public education.

**Cite:** 34 C.F.R. §§ 300.1, 300.17, 300.39, 300.101.

**Issue:** Whether Respondent’s proposed placement of Student is inappropriate because Student should be placed at a residential treatment facility?

**Held:** For the Student. Student met student’s burden of establishing that a residential treatment facility is essential for Student to obtain a free appropriate public education, and that residential placement is primarily oriented toward education.

**Cite:** *Richardson ISD v. Leah Z.*, 580 F. 3d 286 (5<sup>th</sup> Cir. 2009); 34 C.F.R. 300.104.

**Issue:** Whether Respondent’s evaluations of Student were appropriate such that Student is not entitled to an IEE at public expense?

**Held:** For the Student. Respondent failed to prove that its evaluations of Student were appropriate under IDEA.

**Cite:** 34 C.F.R. § 300.304.