

**BEFORE A SPECIAL EDUCATION
HEARING OFFICER FOR THE STATE OF TEXAS**

DECISION OF THE HEARING OFFICER

**STUDENT, b/n/f/ PARENTS,
Petitioner**

v.

**AUSTIN INDEPENDENT
SCHOOL DISTRICT,
Respondent**

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DOCKET NO. 087-SE-1212

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v.	§	HEARING OFFICER
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INDEPENDENT SCHOOL DISTRICT,	§	
Respondent	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner *** (“the Student”), by next friends, *** and *** (“the Parents”), requested a due process hearing pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §1400, *et seq.*, against Respondent Austin Independent School District (“Austin ISD” or “the District”).

Chris Schulz, an attorney with the firm Cirkiel & Associates in Round Rock, Texas, represented Petitioner. Holly B. Wardell, an attorney with the firm Eichelbaum Wardell Hansen Powell and Mehl, P.C., in Austin, Texas, represented Respondent. The Texas Education Agency (“TEA”) received this due process complaint and issued the notice of filing on December 10, 2012. The initial procedural schedule set the hearing for January 21, 2013, and the Decision Due Date for February 23, 2013. The parties participated in a resolution session on December 20, 2012, but were unable to resolve the dispute.

Due to a holiday school closure and the need for more than one hearing day, the parties requested a 24-day continuance, granted for good cause shown. The due process hearing was reset to February 14-15, 2013, and the Decision Due Date to March 19, 2013. The parties participated in a telephonic pre-hearing conference on December 28, 2012. In January 2013, Petitioner requested a third hearing date to ensure sufficient time for presentation of Petitioner’s case and made a Request for Interim Placement and Motion for Emergency Hearing. Respondent objected to these requests by written filing. For good cause shown, the undersigned Hearing Officer added a third hearing day of February 13, 2013, but denied Petitioner’s request for an emergency hearing. Instead, the parties were ordered to schedule a meeting of the Admission, Review, and Dismissal Committee (“ARDC”) to discuss remaining parental concerns pending the due process hearing.

The due process hearing took place on February 13-15, 2013, at *** School within the District, transcribed by a certified court reporter. As requested by the Parents, the hearing was open to the public. Prior to the conclusion of the hearing, the parties sought leave to file written closing statements in lieu of oral closing argument. For good cause shown and by agreement of the parties, revisions to the procedural schedule set the deadline for submission of the written closings to March 25, 2013, and extended the Decision of the Hearing Officer to April 8, 2013. The parties timely submitted their written closings and the record closed on March 25, 2013. The Decision of the Hearing Officer was timely issued on April 8, 2013.

Petitioner complains of the following actions or inactions of Austin ISD during the pertinent period:

1. Whether Respondent provided the Student with an appropriate individualized education program (“IEP”) in an appropriate educational environment, including: a) academic services; and, b) non-academic and supplementary services;
2. Whether the Student requires placement at a residential treatment facility at school district expense;
3. Whether Petitioner is the prevailing party in this proceeding and, as such, is entitled to reimbursement of all costs of this proceeding;¹ and,
4. Whether Respondent failed to properly train and supervise staff working with the Student regarding disability accommodations and interventions specific to behavior.

As relief, Petitioner seeks the following:

1. A finding that Respondent did not comply with the IDEA during the pertinent period to provide: a) academic services; b) non-academic and supplementary services; and, c) an appropriate educational environment;
2. A finding that Petitioner is the prevailing party in this proceeding;
3. An order that Respondent pay for the Student’s placement in a residential treatment facility;
4. An order directing Respondent to train and supervise staff working with the Student regarding disability accommodations and interventions specific to behavior;
5. An order directing Respondent to develop an appropriate IEP for the Student;
6. An order directing Respondent to take any and all other specific actions required by the IDEA; and,
7. Any other relief deemed by the Hearing Officer as just and proper.

Based upon the evidence and argument admitted into the record of this proceeding, the Hearing Officer makes the following findings of fact and conclusions of law:

Findings of Fact

Background

1. The Student resides within the jurisdictional boundaries of the District with student’s parents and siblings. At the time of the hearing, the Student was *** years old and attended *** School within the District. [Pleading file; J.Exs. 12, 13, and 19; Tr. at 180].²

2. In August 2011, the Student was admitted to special education as Other Health Impairment (“OHI”) due to conditions of Attention Deficit Hyperactivity Disorder (“ADHD”) and Obsessive Compulsive Disorder (“OCD”). The District’s initial Full and Individual Evaluation (“FIE”) did not determine that student met eligibility requirements for an Emotional Disturbance (“ED”). Prior to this time, student received Section 504 services under the Rehabilitation Act of 1973 to address these conditions. [P.Ex. 5; J.Exs. 9 and 19; Tr. at 192 and 200].

¹ Petitioner’s complaint references recoupment of attorneys’ fees and recoupment of expert witness’ fees under a variety of other laws including the Americans with Disability Act and Section 504 of the Rehabilitation Act. Petitioner also addresses reimbursement of costs up through appeal. As the undersigned Hearing Officer’s jurisdiction is limited to claims arising under the IDEA and does not address further appeal issues, these requests were dismissed from this proceeding for lack of jurisdiction of the Hearing Officer.

² Exhibits are abbreviated by the following designations: Petitioner’s Exhibits (“P.Ex.” or “P.Exs.”), Respondent’s Exhibits (“R.Ex.” or “R.Exs.”), and Transcript (“Tr.”), followed by exhibit number and page number following if applicable.

3. The District's November 2012 psycho-educational reevaluation of the Student determined that student met eligibility requirements as a student with ED. Currently, the Student qualifies for special education and related services under the eligibility categories OHI and ED. [J.Exs. 1, 3, and 13; Tr. at 206].

4. The Parents reported difficulty with the Student's behavior at school for focus and respecting other's work time in *** grade. At the hearing, the Student's mother described the Student's development of OCD behaviors after ***. At age ***, the Parents took the Student to an infectious disease specialist and other physicians, ultimately taking the Student to *** for an in-patient stay in June 2008. The Parents were concerned that the Student exhibited odd behaviors. [P.Exs. 1 at 1-3 and 38 at 6-20; Tr. at 415-416].

5. The Parents report that the Student is a "triangle child" having three major disabilities of OCD, ADHD, and a mood disorder, and also exhibits ***. Because of the interaction of the disabilities, adjustment in one medication affects other medications for the various conditions. As a result, the Student had difficulty in sleep adjustment near the end of seventh grade in 2011. [Tr. at 418].

Absences and Truancy Proceedings

6. The Student has a history of excessive absences from school. In student's *** grade year in 2009-2010, the Student missed 20 school days. In student's *** grade year in 2010-2011, student missed 49 school days, 18 of which were unexcused absences. When the Student *** in February 2011, student's Parents took student to *** for an approximate one-week stay. [P.Exs. 1 at 7 and 38 at 2-5; Tr. at 214 and 419-420].

7. In 2011-2012, the Student had 54 days of absences, 38 of which were unexcused. When the Student failed to complete student's missed work after these absences, student failed student's first ***-grade year. [P.Ex. 1 at 8-9; R.Ex. 13 at 367; Tr. at 213-214 and 381].

8. The 2012-2013 school year is the Student's second ***-grade year. As of the due process hearing, the Student had been absent 57 days during the 2012-2013 school year with only one absence excused for a doctor's visit ***. [P.Exs. 1 at 11-12 and 32 at 2-4; R.Ex. 18 at 560-561; Tr. at 381, 396, and 404].

9. There are 180 instructional days in the 2012-2013 school year. [Tr. at 405].

10. The Student and student's Parents have been referred to truancy court three times. In the first case in 2010-2011, the Student had to do tutoring to make up for the absences. This case was later dismissed when the Student went to *** in 2011. A second truancy case, filed in *** 2012, was deferred until ***, 2012. The Student was ordered to attend classes, be on time, have no out-of-school suspensions, pass all classes, and submit attendance records. In *** 2012, when the presiding judge was not convinced that there was a legally-defensible reason for the continued truancy, the Parents were ***.³ At the due process hearing, the Student's mother could not recall the disposition of the third truancy case but described it as "just hanging there." Petitioner's exhibits include notice of a court setting for the Student's attendance issues set for ***, 2013. [P.Exs. 9 at 12-13, 24 at 1, and 32 at 1-9; R.Ex. 19; Tr. at 402-403 and 422-423].

2010-2011 – * Grade Year**

11. The Student consistently passed student's Texas Assessment of Knowledge and Skills ("TAKS") reading testing from *** through *** grades and the TAKS math testing from *** through *** grades. The Student did not pass student's *** grade TAKS math test, achieving a scaled score of ***, but

³ Ordered by ***, Travis County, Texas (P.Ex. 32).

was close to the passing scaled score of 670. The Student was absent for the *** grade TAKS writing testing. [P.Ex. 2 at 8; J.Ex. 13 at 266; Tr. at 193 and 199].

Summer 2011

12. In June 2011, the District completed two evaluations of the Student – an FIE and an evaluation of counseling as a related service. [J.Exs. 18 and 19].

13. On August 17, 2011, the Student’s ARDC convened with the Student’s mother and her advocate, Bonnie Garza, in attendance. The ARDC incorporated items agreed to by the parties in a previous mediation agreement on ***, including performance of a Functional Behavioral Assessment (“FBA”) to consider the Student’s need for a Behavioral Intervention Plan (“BIP”), to be completed by the end of November 2011. The ARDC also developed a point sheet/reward system for the Student to use pending completion of the FBA and BIP. Participants agreed to implement the parties’ mediated agreement to delay the Student’s Fall 2011 *** – because student’s medications impacted student’s ability to ***. All participants agreed to an IEP with 15 minutes of inclusion support in general education Reading/Language Arts, Science, Math, and Social Studies classes. [R.Ex. 4 at 307-308; J.Exs. 9 at 234 and 19 at 301; Tr. at 237].

14. The August 2011 ARDC reviewed the Student’s in-home training needs and assessment, agreeing to three hours of in-home training to be completed by November 2011. The ARDC discussed the recent counseling evaluation agreed to as part of the mediation, but due to the Student’s express desire not to participate in counseling, the ARDC agreed to defer discussion of a counseling evaluation to a future ARDC meeting if the Student’s needs changed. At this meeting, the Student’s mother expressed concern about the Student’s anxiety level. [J.Exs. 9 at 234 and 18 at 296-298; Tr. at 269].

15. The August 2011 ARDC incorporated tutoring for the Student as previously agreed in the *** mediation. The IEP specified tutoring by the Student’s case manager twice a week for 30-minute sessions after school on ***. If the Student missed six tutoring sessions under the agreement, the District would no longer provide the tutoring. [R.Ex. 4 at 308; J.Ex. 9 at 234].

16. To ensure prompt exchange of information between the parties, the August 2011 ARDC agreed that the Parents would notify the school nurse within three days of any medication change for the Student, send a written note within two school days of an absence, and send a doctor’s note if an absence exceeded three days. The Parents agreed to either bring the Student to the school office or contact the office by phone in the event the Student ***. [R.Ex. 4 at 308; J.Ex. 9 at 234].

17. The Student’s August 2011 IEP included one goal – to attend all classes and meet educational expectations for *** grade. Student’s objectives for this goal included passing all classes with a minimum grade of 70% as reported in three-week intervals and to complete homework in all classes with a 70% passing rate seven out of ten times. [J.Ex. 9 at 235].

18. The District completed a third evaluation of the Student – the In-Home and Parent Training Needs Assessment – on August 18, 2011. [J.Ex. 17].

2011-2012 School Year – First Year in * Grade**

19. During the Student’s first ***-grade year, the Parents experienced difficulty with the Student being “mouthy” at home, not wanting to do things, and being aggressive and “pushy.” [Tr. at 418-419].

20. The Student's after-school tutoring took place between August *** and October *** in the Fall 2011 semester on ***. ***, ***, School special education department chair, used various tactics to remind and track down the Student during this period, including ***, written reminders, verbal reminders during the day, and *** to remind student to go to tutoring. On one occasion, the campus assistant principal tracked down and escorted the Student to after-school tutoring. The tutoring sessions ended when, in spite of these efforts, the Student missed six tutoring sessions. [P.Ex. 3 at 1-2; Tr. at 242 and 244-245].

21. The District completed the Student's fourth evaluation – the FBA – on September 28, 2011. A second ARDC meeting convened on October 25, 2011, to discuss completed FBA results and for transition planning. The Student's mother and her advocate attended the meeting. The Parents did not want counseling for the Student from the District at this time. [J.Exs. 8 and 16].

22. In the October 2011 ARDC meeting, District staff collaborated with the Parent and her advocate to develop and use behavioral interventions of point sheets in Fall 2011. [R.Exs. 9 and 10].

23. By the October 2011 ARDC meeting, the Student had *** disciplinary incidents since the initial ARDC meeting, *** of which resulted in suspension. Participants agreed to discontinue use of point sheets and instead use the *** to monitor work and homework completion by teacher signature. An independent educational evaluation (“IEE”) for neuropsychological evaluation of the Student, previously requested by the Parents, had not been received by the District by this meeting. Participants reviewed a draft FBA, gathered ARDC input, and agreed with a final version of the FBA. The meeting ended in agreement. [P.Ex. 9 at 1-8; J.Exs. 8 and 15].

24. The Student's fifth evaluation was completed by Dr. ***, a neuropsychologist in ***, Texas, based on observations on October 19, 2011, and October 26, 2011. Dr. *** administered a variety of assessment instruments. On the Wechsler Intelligence Test for Children – Fourth Edition, the Student scored in the Low Average range of intelligence with a Full Scale Intelligence Quotient of ***, exhibiting a seven-point decline from previous testing by Dr. *** office in 2006. On the Woodcock-Johnson - Third Edition, the Student scored lower in fluency scores than associated basic skills but still scored within the same basic range as previous 2006 testing. Dr. *** noted decreased executive function performance by the Student between the 2006 and 2011 evaluations, indicating problems with working memory and encoding effectiveness. [J.Ex. 15].

25. Dr. *** 2011 IEE assessed the Student's behavior by self-report with the Behavior Assessment Scale for Children, Second Edition (“BASC-2”). On the BASC-2, the Student had “at risk” elevations on “scales sensitive to sensation seeking behavior, attention problems, and hyperactive/impulsive behavior.” On BASC-2 content scales, the Student had a slightly elevated level of behavioral activation, with low “at risk” elevations on scales sensitive to test anxiety. There were no significant critical item endorsements. On the Conners-Third Edition questionnaires filled out by the Parents, two teachers and the Student, Dr. *** noted significant elevations on scores sensitive to defiant and aggressive behavior. [J.Ex. 15].

26. Dr. *** 2011 IEE recommended the use of *** for the Student for class and written assignments. [J.Ex. 15 at 290].

27. The Student failed *** classes at the end of the Fall 2011 semester, including ***. [P.Ex. 1 at 8].

28. The Student received discipline referrals during the 2011-2012 first ***-grade year for multiple tardies and failure to attend school. Student also received referrals for other actions such as failure to comply with the teacher, ***, being sent outside for disruptive behavior, saying inappropriate comments, ***, and flicking items at other students. On one occasion, student took ***, but when told student should not do so by another student, student put the it back. [P.Ex. 9; Tr. at 250-256, 324-325, and 394].

29. On February 16, 2012, a third ARDC meeting convened to review the completed neuropsychological IEE by Dr. *** and to discuss parental concerns about grades and accommodation access for the Student. Both the Student's mother and her advocate attended the meeting. The District's Licensed Specialist in School Psychology ("LSSP"), ***, also attended this meeting to discuss Dr. *** IEE results. Participants agreed to increase both the Student's math and social studies inclusion time from 15 minutes to 3.5 hours per week (or an increase of 3.25 in each subject), adding total additional inclusion support of 6.5 hours to the Student's IEP. The ARDC did not change the Student's goal, objectives, or student's BIP but agreed to testing accommodations on the State of Texas Assessments of Academic Readiness ("STAAR") testing for *** for the Student's math and science testing. The advocate requested an assistive technology ("AT") consult, agreed to by all participants, and the Student's mother gave written consent for the AT consult. The meeting ended in agreement. [J.Ex. 7].

30. The sixth evaluation for the Student, the District's AT Evaluation, took place on May 8, 2012. This evaluation recommended a trial of *** for the Student to help student with writing and organization. [J.Ex. 14].

31. The District convened a fourth ARDC meeting on May 10, 2012, with the Student's mother in attendance for annual review of the Student's IEP. Participants discussed goals, objectives, accommodations, the BIP, feedback from the Parents and teachers, considered Extended Year Services for Summer 2012, and discussed the restrictiveness of the Student's environment for the current and upcoming school years. This ARDC served as the Student's placement/retention committee as the Student was failing *** classes at the time of this meeting. The ARDC determined that the Student would have to attend summer school in order to pass into *** grade. On a trial basis, the ARDC agreed to provide a *** for six weeks in the 2012-2013 school year to help with writing assignments and other academic needs. All participants signed the ARDC documentation in agreement with the decisions of this meeting. [P.Ex. 1 at 8-9; J.Ex. 6].

32. The Student made good benchmark scores in 2012. Student made a *** on student's middle-of-the-year reading benchmark, scoring above average. [Tr. at 221].

2012-2013 School Year – Second Year in * Grade**

33. On ***, 2012, the Student was asked to leave *** because student had failing grades because the campus policy prohibits students with failing grades from attending extra-curricular activities. The Student, however, returned to ***. When the Student's father took student home, a District administrator discussed the policy with the Student's father. [P.Ex. 10 at 6; Tr. at 382-383].

34. On ***, 2012, the Student remained on campus after school – without an academic activity or tutoring need. Dr. ***, campus principal, confronted the Student. When the Student responded with some profanity, Dr. *** asked the security monitor to go outside to talk to the Student. The Student specifically asked to be ticketed for trespassing. When the Student's mother came to drive student home, Dr. *** spoke to the Parent about the episode. Later the same afternoon, the Student returned to the campus and ***. Once again, the security monitor confronted the Student. In response, the Student yelled, *** and made threats ***. The Student was *** while waiting for the police to arrive, according to the written discipline report. When

*** arrived, the Student stated *** as student pointed to the security monitor. [P.Ex. 10 at 6-7; R.Ex. 1 at 2; Tr. at 262-263 and 382-386].

35. The District made an emergency placement of the Student in ***, after the Student's behavior incident on ***, 2012. As a result, a fifth ARDC meeting convened for the Student on ***, 2012, audio-recorded by the District, to conduct a manifestation disciplinary review ("MDR") of the Student's misbehavior. The Student's father attended this meeting with the advocate. The ARDC offered additional testing of a new FBA to address the new behavioral concerns. The ARDC prepared an alternate schedule in the event the Student remained in *** for the remainder of student's emergency removal days, specifying two hours of inclusion support for each of the core classes if student remained at ***. This meeting ended in disagreement with all participants – except the Student's father – agreeing that the behavior was not a manifestation of the Student's disability. The ARDC made plans to reconvene on October 4, 2012. [P.Ex. 10 at 7; R.Ex. 1; J.Ex. 5].

36. On ***, the sixth ARDC meeting took place as previously planned at the *** ARDC meeting that ended in disagreement. The Student's mother and her advocate participated in the meeting. Participants discussed the Student's behavioral concerns and the current in-school suspension ("ISS") placement of the Student. The ARDC offered another IEE for the Student and the Parents made a request for an independent FBA by an evaluator in ***, Texas, granted by the ARDC. The ARDC agreed to the Parents' request for completion of a reevaluation by the District's LSSP for possible ED eligibility and offered a counseling reevaluation. The Student's mother signed consent for the reevaluation at the conclusion of this meeting. [J.Ex. 4; R.Ex. 3 at 111].

37. At the *** 2012 ARDC meeting, the Student's mother reported that the Student refused to take student's medication, get out of bed, and come to school. The ARDC offered to have a learning support specialist from *** who had previously worked with the Student call and encourage the Student to come back to school. [J.Ex. 4 at 100].

38. The *** 2012 ARDC meeting discussed AT, noting that the Student did not want to use the *** AT device. The ARDC agreed to expedite the pending reevaluations, meet before the winter semester break, and reconsider AT needs after completion of the reevaluations. [J.Ex. 4 at 100].

39. Before the conclusion of the *** 2012 ARDC meeting, the ARDC asked if the Parents had any new evaluations or medical information for ARDC consideration, but the Parents' response was "No." [J.Ex. 4 at 100].

40. The Student did not pass one of student's core curriculum classes during the first six-week grading period of the Fall 2012 semester. By the progress report period of the second six-week grading period, the Student was passing ***, but was failing student's other classes with the following grade averages: *** – ***; Science – ***; Math – ***; and, English Language Arts – ***. The Student's teachers observed that the Student was not attempting or completing assignments. [J.Ex. 13 at 227].

41. On November 20, 2012, a seventh ARDC meeting convened for the Student. The purpose of this meeting was to review four new evaluations of the Student, bringing the total to ten evaluations performed of the Student since June 2011. Participants reviewed the following: a) the District's psychological reevaluation; b) the District's FBA; c) the District's counseling reevaluation; and d) an independent FBA performed by Dr. ***, a behaviorist in private practice in ***, Texas. Both the Student's mother and her

advocate attended the meeting and Dr. *** participated by telephone. The District audio-recorded the meeting. [R.Ex. 2; J.Exs. 3, 10, 11, 12, and 13].

42. At the November 2012 ARDC meeting, Dr. *** reported on her FBA evaluation that included one four-hour observation of the Student on November 5, 2012, behavioral data collection and analysis, review of the Student's discipline and academic records, results of surveys completed by the Student's teachers and the campus assistant principal, results of a parent interview, and Dr. *** conclusions and suggestions for a proposed behavior plan. Dr. *** clarified during the ARDC meeting that her proposed behavior plan was designed for a self-contained setting and not a general education setting. [R.Ex. 2; J.Exs. 3 at 72 and 12 at 264].

43. Dr. *** attended *** for graduate work and received a master's degree in special education and Applied Behavioral Analysis ("ABA"), subsequently obtaining a doctorate in educational psychology from the same institution. Although she is not a licensed psychologist and is not licensed to diagnose or treat individuals for mental illness in the State of Texas, she did her undergraduate work in psychology. Dr. *** never received a teaching certificate and is not an LSSP. At the hearing, Dr. *** referred to herself as a "behaviorist" and confirmed that she holds no certifications. [J.Ex. 12; Tr. at 37-38, 40-41, and 96-97].

44. Dr. *** has consulted with school districts for more than 10 years. She served as a behaviorist for one Texas district for about 10 years in ***, Texas, where she served over the ED adaptive behavior self-contained unit. In that capacity, she performed training and wrote all the BIPs for the students in the self-contained unit. She is not a member of a psychology group, but currently has a private practice where she does IEEs, serves as an expert witness, and does consulting. In the past five years, she has transitioned to more work with private clients. [Tr. at 38-39 and 96-97].

45. Dr. *** did not produce the raw data underlying her report prior to the due process hearing although Respondent requested this information by subpoena including the "tally" sheets used in her observation. Dr. *** initially stated that she did not have anything else in front of her as she testified. Later, she identified an "Excel" spreadsheet that had not been produced in response to Respondent's subpoena prior to the start of the due process hearing. [Tr. at 27-29].

46. It is the practice of Dr. *** office to shred her observation notes after she finishes a written report. At hearing, she explained, "But then once they're put into the report, it's gone. I mean, we shred it and it's gone." Dr. *** confirmed that the notes about the parent interview were shredded, but explained that she puts everything that she writes down from an observation into her written reports. [Tr. at 27-33].

47. Dr. *** observed the Student in four of student's classes for four hours on a single day, November ***, 2012. She uses a 70% baseline for on-task behaviors on every report she prepares, regardless of what the true baseline for the actual students in the class would be. [J.Ex. 12; Tr. at 102-104].

48. Based on Dr. *** observations taken at 30-second intervals, she found the Student was on-task 75% of the time, or 5% more than a typical student as her selected baseline for the Student. Her report lists 33 behaviors, 26 observed during her four-hour observation, such as walking into class late, pencil tapping, talking to peers, staring in space, and ***. Dr. *** identified two functions of the behaviors: a) attention-seeking for peers – primary function, behaviors 1-23; and, b) avoidance for non-desired tasks, consequences – secondary function, behaviors 24-33. Dr. *** concluded that the attention-seeking behaviors occur at a high frequency and medium-to-high intensity during the day while the "avoidant behaviors, physical/verbal

aggression to staff” occur “every time and at a high intensity when staff redirect or give a consequence.” [J.Ex. 12 at 257-258 and 262-265].

49. After her four-hour observation of the Student on ***, 2012, Dr. *** concluded that the Student’s overall on-task percentage in the school setting was 62%, noting that student’s compliance decreased as the day progressed with student’s highest compliance during lunch and student’s art class. During the observation, Dr. *** asked each teacher if it was a typical day. [J.Ex. 12 at 257].

50. Campus principal *** noted at hearing that only two of the behaviors noted by Dr. *** during her four-hour observation of the Student violate the District’s Student Code of Conduct: a) use of profanity; and, b) taunting peers. The majority of the observed behaviors are attention-seeking or work-avoidance behaviors. [Tr. at 337 and 394-395].

51. Dr. *** primary recommendation was to place the Student for immediate psychiatric care in order to stabilize medication and behaviors. Her preferred option was placement of the Student at *** (“****”) in ***. As a second option, Dr. *** recommended placing the Student in a self-contained behavioral unit at the District until student’s behavior is stabilized. [R.Ex. 2; J.Exs. 3 at 72 and 12 at 264].

52. Dr. *** report defines stabilization of the Student’s behavior as the following: a) no physical/verbal aggression; b) 80% compliant; c) passing grades; d) regular attendance; and, e) consistent medication for two months. [J.Ex. 12 at 264].

53. Dr. *** report expressed safety concerns for the Student’s physical/aggressive behaviors towards peers and staff, possible cycling, refusal to take medications, and concern over lack of a consistent management system. Due to this concern, Dr. *** recommended that the Student’s behavior be stabilized for two months after student’s return from ***, or hospitalization, or, in the event of no hospital stay, in the *** (“****”) self-contained behavioral unit at the District prior to considering placing the Student back into general education classes. [R.Ex. 2 at 31; J.Ex. 12 at 264; Tr. at 62-63].

54. Dr. *** report incorrectly identifies the Student as having Bipolar Disorder. At hearing, she admitted that this information was based “on Mom’s report,” and admitted that neither the Parents nor the District gave any doctor’s reports with the Bipolar Disorder diagnosis. Based on Dr. *** observations of the Student on ***, 2012, she clarified at hearing that she gathered data that showed student’s behaviors were cycling. [J.Ex. 12 at 256; Tr. at 57 and 117-118].

55. Prior to, or at the time of, her observation, Dr. *** did not give any instructions to District staff. At hearing, the Student’s English Teacher, ***, explained that she withheld implementing the Student’s regular behavior strategies in her English class during Dr. *** observation because “I thought she [Dr. ***] was there to see student in the full swing of things.” [Tr. at 459-460].

56. Dr. *** observed 134 inappropriate behaviors by the Student across all settings and tasks, with teachers administering 42 redirections and prompts in comparison to four concrete consequences. [R.Ex. 2 at 29; J.Ex. 12 at 259-260].

57. Dr. *** cautioned the November 2012 ARDC that the Student would experience an “extinction burst” in student’s behaviors once student is placed in a self-contained unit, so that the school would not be able to get student to come back to school. Because the Student likes to get attention from peers, as soon as peer attention is taken away from student, student’s behavior will go “through the roof” while the Student

attempts to intimidate the situation and “get you to go back to the dance you were doing. So I knew that was going to happen.” [R.Ex. 2 at 42; Tr. at 68-69].

58. Dr. *** recommended that the Student reach an 80% compliance level, or 10% more than what is expected of other students based on her selection of a 70% baseline. [J.Ex. 12 at 257 and 264].

59. At hearing, Dr. *** was asked why she made a secondary recommendation of a self-contained placement after making her primary recommendation for ***. Dr. *** responded, “School districts care more about money than they do about the child. So I knew that was going to happen. People, they’ve done this so many times in school districts So my recommendation was ***. But I knew full well that you-all weren’t going to do that.” When asked how Dr. *** knew prior to attending the Student’s ARDC that the District would not agree to residential placement, Dr. *** replied, “Because, once again, I’m a behaviorist, and I deal with school districts and school district attorneys a lot. And what you-all will do over and over and over again is try to do anything other than do what should be done if it costs a lot of money.” [Tr. at 122-123].

60. Dr. *** recommended a behavior plan for a self-contained setting for all behaviors, except physical/verbal aggression, with the following consequences at one-minute intervals: a) Warning; b) (Second) Warning; c) Isolated area in class (for 10 minutes); d) Assign an additional undesired task; and, e) Office referral for afterschool detention for amount of time wasted. [J.Ex. 12 at 264].

61. Dr. *** recommended that the Student not be suspended or placed in ISS for inappropriate behaviors. Instead, she recommended use of “Pay Back Time” as a consequence, so that whatever time the Student wastes with verbal/physical aggression – or with refusals to comply – will be “paid back” after school. She recommended student stay after school for one hour for physical aggression and 30 minutes for verbal aggression. [J.Ex. 12 at 265].

62. ***, the District’s LSSP, did not believe that the idea of “Pay Back Time” would be effective with the Student due to student’s absences and missed work as it would become “insurmountable to overcome.” [Tr. at 219-220].

63. The “Pay Back Time” concept suggested by Dr. *** in her evaluation was not part of the community supervision time ordered in the truancy proceedings involving the Parents and Student. [Tr. at 407].

64. The District’s updated FBA, dated November 10, 2012, considered information from Dr. *** as well as the information already gathered by the ARDC, adding another behavior of concern – verbal and physical aggression. The list of behaviors included the following:

Behaviors of Concern:	Which Could Look Like:
Escape-Motivated Behaviors	Off-Task Behaviors, Writing on Furniture, Fidgeting, Yelling Inappropriate Comments, Playing with Objects, Making Fun of Peers/Staff, Putting Hands/Feet/Objects on Others or Items
Attention-Seeking Behaviors	Tardiness, Fidgeting with Objects, Walking Around Room, Making Fun of Peers/Staff, Putting Hands/Feet/Objects on Others or Items
Verbal & Physical Aggression	Yelling Profanity towards Staff/Students, Being Physically Aggressive Towards Students, Putting Hands/Feet/Objects on Other People
***	(*Refers to *** incident – see FOF 28 above and Tr. at 282-283)

[J.Exs. 3 and 11; Tr. at 282-283].

65. The Student achieved good benchmark scores in the 2012-2013 school year. On the beginning-of-the-year science benchmark, the Student scored at ***, or above average. On the middle-of-the-year social studies benchmark, the Student scored in the *** range, or above average. [Tr. at 221].

66. In Fall 2011, the Student received about five and a half hours of in-home/parent training during five visits to the family's home. *** a behavior specialist and trainer of in-home trainers for the District in Fall 2011, noted that the Parents' greatest areas of concern expressed during her visits involved the communication process between the Parents and the Student and homework completion. The Parents did not mention concern about the Student getting out of bed in the morning. The Student's father participated in only two of the five visits and on one of the visits, played soccer outside with the Student's sibling. [Tr. at 449-451].

67. *** recommended that the Parents attend the District's parent training on the Parent Satori Alternatives to Managing Aggression ("Parent SAMA") training that is designed for parents who want to learn how to help their child de-escalate so the child won't hurt ***self or others. Although *** gave information to the Student's mother about times and dates for the training, the Parents did not attend. At hearing, the Student's mother did not recall being offered this opportunity for Parent SAMA training. [P.Ex. 12; Tr. at 429-430, 451-452 and 540].

68. *** also recommended "Love & Logic" training for the Parents to assist them with communication and in creating healthy boundaries with the Student. *** made this recommendation after hearing the Student's mother make a comment regarding "checking with the Student" to see if one of *** recommendations was something student wanted to attempt. Because *** realized that the Parents lacked boundaries with the Student, she recommended the program to the Parents. The Parents did not participate in the "Love & Logic" training. [Tr. at 429 and 452-453].

69. The District's Assistant Director of Special Education has 42 years of experience in education. At hearing, she explained her experience included placement of students into residential placement. She believes, based on this experience, that unless the systems and structures within the home and community setting drastically change before a student returns from a residential placement, a student quickly moves back into old patterns so that there is not a long-term benefit seen from the residential placement. [Tr. at 531].

70. Dr. ***, based on her experience with residential placements and reintegration, cautioned that help must be given to the community, the family, and the school to figure out what is getting in the way of a student's success. As this work needs to be done when a student returns from residential placement, the reintegration process should begin at the time of the placement. [Tr. at 485-486].

71. Dr. *** cautioned that research has shown that a residential placement is "almost always traumatic for students." Such placements are not always helpful. There is research indicating that residential placement is ineffective with anxiety disorders. Although very severe behaviors can be contained in residential placement, for students with milder conditions, there are drawbacks to residential placement. Students are exposed to peers with more severe problems and, as a result, have the potential to pick up bad habits, attitudes, behaviors, responses, and ideas from that peer group. Although progress may be made containing behaviors or changing behaviors with residential treatment, it is not easy to generalize and continue them once out of residential placement because the setting has an important effect on behavior. [Tr. at 485-487].

72. At hearing, Dr. *** expressed her main concern over Dr. *** report was “what appears to be a reckless leap from what data she had and what information she had to her recommendations.” Dr. *** further noted with concern the heavy emphasis on punishment by Dr. ***, given the high intensity and number of punishment recommendations in Dr. *** report. By contrast, Dr. *** cited recent research by Kazden on the effects of punishment in a behavior management plan. If punishments are added to punishments, then, “[N]umber one, soon there’s nothing else to take away; and number two, what they have seen is that students essentially give up.” [Tr. at 491-492].

73. ***, the District’s LSSP, tested the Student as part of the reevaluation on October 23, 2012, with completion of the report by November 1, 2012. The LSSP noted that while the Student’s behavior had only recently begun to deteriorate at school during the 2012-2013 school year, it had done so at a marked degree. In past school years at the *** campus, the Student had not demonstrated at school the behaviors reported at home of verbal aggression, non-compliance, and emotional lability with previous behaviors noted at school appearing to be related to student’s diagnosis of ADHD. By contrast, current behaviors such as the Student’s escalation when angry appear to be related to an emotional condition and may be more evident at school recently because the Student currently refuses to take student’s current medications of ***. The report concluded that the Student met eligibility as ED. [J.Exs. 10 at 252 and 13 at 277].

74. The District’s LSSP, ***, described the Student’s exhibited verbal aggression at the beginning of the 2012-2013 year as not unusual for *** school student, “[T]here’s a lot of F you’s and that type of stuff.” [Tr. at 239-240].

75. The counseling reevaluation report by ***, a special education counselor in the District, noted that the Student’s behavior had continued to decline since the September 2012 disciplinary event, with a total of 13 office referrals. Of these, the Student received 10 disciplinary consequences of ISS and ***. [J.Ex. 10 at 252].

76. In the November 2012 counseling reevaluation, *** administered the Piers-Harris 2 Children’s Self- Concept Scale to the Student. The Piers-Harris 2 is a 60-item self-report to elicit information on how the Student feels about ***self. Overall, the Student’s responses fell within normal limits at the Low Average range with a total score of ***. This score reflecting self-esteem similar to most students within the standardization sample. However, the Student admitted to negative characteristics that impact student’s overall sense of worth, such as not being well-behaved enough in school, causing trouble for student’s family, not being good at school work, behaving badly at home, often getting into trouble, doing many bad things, and feeling like a disappointment to student’s family. On the KidsCope checklist, a non-normed set of questions designed to assess types of coping strategies of children in daily life, the Student indicated handling bad things that happen by distraction, blaming others, and attempts to deal with it by seeking social support. When asked if student could have three wishes, the Student stated: a) “less criticism from my family;” b) “no ***” (referring to the campus principal; when further probed, the Student expressed desire to be successful in *** school); and, c) “get along better with ***.” [J.Ex. 10 at 252-253].

77. The November 2012 counseling reevaluation concluded that the Student met eligibility for counseling as a related service because the Student was willing to participate in counseling as well as assist in measurable goal setting. The Student’s current emotional functioning appeared related to student’s decline in educational success. [J.Ex. 10 at 253].

78. Based on the reevaluation results, the November 2012 ARDC added ED to the Student's eligibility classifications at the November 2012 meeting. The ARDC also added 38 minutes per week of special education counseling to the Student's IEP. [J.Exs. 3 and 13].

79. The November 2012 ARDC meeting included discussion of the Student's placement. The Parents asked for hospitalization of the Student at District expense, but participants agreed to try a self-contained classroom setting in the *** classroom on the Student's *** school campus until the Fall 2012 holiday break. [R.Ex. 2 at 36; J.Ex. 3 at 72-73; Tr. at 213].

80. The Parents want the Student placed at *** as recommended in Dr. *** independent FBA. *** focuses primarily on treating behavior and is located in *** miles from Austin, Texas. The administrator and director of treatment, ***, clarified at the hearing that all students at *** have some type of impairment, with the following approximate student body composition: a) 60% - autism spectrum disorders; b) 30-40% - intellectual disabilities; c) 30% - ED; and, d) 50-60% - life skills classroom placement students. *** staff expects a referring agency to make a determination that placement at *** is appropriate for a particular student. [Tr. at 361-363 and 373-374].

81. The average length of stay at *** is about 34 months. *** provides a structured behavior management program using Applied Behavior Analysis. Students live in residential homes with developmentally and age-appropriate peers, usually sharing a room with two other peers. The homes are located about *** from the instructional campus. All classrooms are self-contained and are arranged with developmentally appropriate peers, so that the students experience a normal environment as much as possible. Students get to engage in activities with peers as appropriate, including all students participating in *** at the residential campus with oversight by *** specialist. [Tr. at 358-359].

82. *** is approved by the TEA as a nonpublic school. Students may receive professional services such as individual, family, and group counseling, speech, and occupational therapy as well as positive behavioral supports, depending on individual needs. *** staff try to deliver 80% positive and 20% negative behavioral redirections under its program. *** uses a consensus approach to determine when a student is ready to transition back into the home district. [Tr. at 356-359 and 368].

83. *** staff do not force students to take their medications without a court order. When a *** student refuses to take student's medication, facility staff discuss the benefits of taking the prescribed medications with the student as well as continue to apply behavior consequences for that student. [Tr. at 365-366].

84. *** staff are not involved in the transition process of getting a new student to the residential facility. If, however, transporting the student was a need, three to four *** staff would come and encourage the student to get into the van, ultimately using physical force to transport the Student to *** facility in ***. [Tr. at 374-375].

85. The *** teacher, ***, joined the November 2012 ARDC discussion and explained *** classroom rewards, academic time, social behavioral skills, lunchtime, and consequences work. The ARDC addressed a crisis plan in case a safety issue arose, noting the presence on campus of a school resource officer who is a mental health officer. [J.Ex. 3 at 73].

86. Based on *** placement, the November 2012 ARDC reviewed a revised BIP, and determined that a specific individualized behavior contract would be developed with input from the behavior specialist,

the Parents, and the *** teacher. The ARDC meeting ended in agreement with plans to hold another ARDC meeting before the holiday break. [R.Ex. 2; J.Ex. 3 at 72-73 and 80].

87. As planned, the ARDC convened for an eighth meeting on December 20, 2012. The Student's mother and her advocate attended the meeting. Participants reviewed the Student's progress in the *** classroom through daily progress notes and reports by the *** teacher. The Student did not exhibit any aggressive or disruptive behaviors in the *** setting. On one occasion, student took *** but returned it when confronted by a classroom aide. On another occasion, student ***. [J.Ex. 2 at 46; Tr. at 184-185].

88. The Parents requested residential placement at the end of the December 2012 ARDC meeting. District members of the ARDC declined the request for residential placement and the meeting ended in disagreement. The Parents declined the offer of a 10-day recess. [J.Ex. 2 at 46].

89. The Parents' efforts to get the Student out of bed and to school include setting an alarm clock, spraying the Student with a water bottle, and on one occasion, blowing a little foghorn obtained at a dollar store, techniques approved by the Student prior to the Parents' implementation. The Student's father was, on most occasions, off at work in the morning and did not assist the Student's mother in rousing the Student and getting student to school. [Tr. at 424 and 439].

90. The Parents chose to call the police to assist with getting the Student up in the morning and getting student to school a couple of times. As a result of these calls, the Parents report that the police will not come to their house now unless ***. [Tr. at 424-425].

91. Officer ***, a police officer with the Austin Police Department, confirmed at the hearing that he went to the Parents' house at their request on *** occasions during the past two years. Officer *** recalled that the Student was *** on one occasion. None of the visits involved taking the Student to a psychiatric facility and did not include dragging the Student out of bed. Instead, Officer *** "basically just told student that student had to go to school," the Student got up and dressed, and Officer Shipman ***. Officer *** gave the Parents information with *** and counseling information, but did not know if the Parents used the materials. [Tr. at 549-551].

92. At the hearing, the Student's mother admitted that the Student gets up to watch television when the Parents go to bed. [Tr. at 434].

93. Between November ***, 2012, and January ***, 2013, the Student attended 10 days of school, two to three of which were consecutive. During this period, the Student completed more work in the *** classroom than student had before. [Tr. at 165-166 and 228].

94. The *** teacher, ***, used point sheets with the Student to track the Student's behavior in the classroom and to allow self-evaluation of student's behavior. [P.Ex. 15; Tr. at 151-160 and 164].

95. The Student's *** classroom placement contained an aide who was new to his assignment in December 2012. On December ***, 2012, the Student's mother sent electronic communication to *** concerning the Student's report that the aide was "always looking over student's shoulder." *** electronically replied within three hours to the Student's mother that he would monitor the situation as the aide was new to the position and just getting to know the Student. [P.Ex. 13 at 3].

96. The *** classroom uses more positive than negative behavior consequences. [Tr. at 164-165].

97. On ***, 2013, the Student asked to go to the restroom ***. The *** teacher, ***, followed at a distance. When the Student turned away to an outside door, *** asked student what student was thinking. The Student said student was thinking about leaving campus. *** next used strategies with which he had been trained to try to persuade the Student to return, but the Student thanked the *** teacher and said student was going to leave and then calmly left the campus. [Tr. at 178-179].

98. The Student was not in crisis or out of control when student chose to leave the *** school campus early on ***, 2013. [Tr. at 178-179].

99. On the evening of ***, 2013, Petitioner requested an emergency hearing, seeking immediate placement of the Student into a residential facility at school district expense.⁴ [Pleading File].

100. The Student has not returned to school since ***, 2013. [Tr. at 177 and 401].

101. On ***, 2013, when two school counselors went to the Student's home to check on student, the Student was at home alone. When asked if student would be returning to school the next day, student responded that student would have to check with student's Parents. [Tr. at 401-402].

102. The Student's *** teacher went to the Student's home between five or six times since ***, 2013, but spoke to the Student only once. Other District staff as well as the *** teacher have called the Student by telephone to see how student is doing. [Tr. at 177].

103. A ninth ARDC meeting took place on January 31, 2013.⁵ The Student's mother attended with her attorney and her advocate. Participants discussed intervention options for the Student and developed a plan of supports and services with the input of Dr. ***, a consulting psychologist for the District. Discussion included the Student's strengths and underlying values identified in previous evaluations, with Dr. *** suggesting a plan that worked from the position of strengths. [R.Ex. 25; J.Ex. 1 at 12-13].

104. Dr. *** is a licensed psychologist and an LSSP in private practice in ***, Texas, providing psychotherapy, consultation, evaluation, and supervision of patients since 1997. Her educational degrees include a master's degree in education from *** and a doctorate in psychology from the ***. Her previous educational experience includes teaching special education. Dr. *** also served as a school psychologist for ***, a psychologist for both *** ISD and *** ISD, and as a behavior specialist for *** ISD. Dr. *** has specific experience with residential treatment centers while serving as a residential treatment reintegration specialist for *** ISD and *** ISD, including: a) visiting residential treatment centers; b) working with the students, school districts, and families impacted in making residential placement decisions; and, c) reintegrating students back to their homes, communities, and schools after residential placement. [R.Ex. 20; Tr. at 474-480].

105. Dr. *** reviewed all the Student's psychological evaluations including two evaluations by neuropsychologist Dr. ***, the District's most recent evaluation, Dr. *** behavioral observation report, a transcript of the November 2012 ARDC meeting, and other school documents. Dr. *** identified three main areas of concern: a) the Student's confirmed diagnosis of ADHD and student's documented discrepancy

⁴ The request for an emergency hearing is discussed above in "Statement of the Case."

⁵ This ARDC meeting was held by order of the undersigned Hearing Officer to address Petitioner's concerns about an emergency placement of the Student pending the due process hearing.

between the Student's higher level thinking skills and underlying processing speed skills; b) the impact of ***; and, c) the impact of retention upon the Student such as frustration and disappointment. [Tr. at 482-484].

106. The January 2013 ARDC proposed program included the following: a) home-based counseling/planning the first week; b) visual transition plan; c) a daily progress review for the Student; d) transition Student to *** School for an abbreviated day with 1:1 instruction and weekly counseling; e) access to normal school passing periods and lunch for socialization opportunities; f) provide shadow/visit opportunities to *** program and pleasant event planning; g) explore getting *** credits prior to start of the *** grade program; h) plan to extend the Student's day at end of six-week period or sooner; i) special transportation; j) summer school for accessing *** credit; k) psycho-educational sessions for the Student to learn about the neurological basis of student's disabilities; l) 10 sessions of family counseling with a licensed mental health professional knowledgeable about ADHD, other mental conditions, family systems, and school systems; m) a presentation to the *** (known as ***); and, n) application for non-educational funds through the regional education service center. [R.Ex. 25 at 683-709; J.Ex. 1 at 12-13].

107. Participants in the January 2013 ARDC meeting discussed proposed new goals. The Student's mother asked how the District planned to get the Student out of bed. In response, Dr. ** explained a strategy for this that initially sends student's counselor and special education teacher into the home. The ARDC offered home-based counseling by *** on a daily basis, but agreed to the request of the Student's mother to limit counseling to three times a week. The ARDC agreed to extend the home-based program if necessary, as requested by the advocate. At the conclusion of the meeting, the advocate, Petitioner's attorney, and the Student's mother did not sign the ARDC paperwork. The Student's mother wanted to discuss the proposal with the Student's father and the Student before agreeing to the proposed program. The ARDC offered to reconvene in 10 days, but Petitioner did not indicate a desire or need to reconvene. [R.Ex. 25 at 765-770; J.Ex. 1 at 11-12].

108. During the Student's first ***-grade year in 2011-2012, STAAR testing took place in March and April 2012, with math and reading testing the first week, and science and social studies testing the following week. Testing reports came out in January 2013 showing that the Student met satisfactory performance expectations in math and science testing in spite of student's absences. Student did not meet expectations for reading, scoring at a *** with a satisfactory level beginning at 1550. In the social studies testing, student scored a *** with satisfactory performance beginning at 3500. [J.Ex. 20; Tr. at 397-399].

109. The Student's 2012 STAAR results show the Student performed satisfactorily on the first test but not the second test in the two successive testing weeks. [Tr. at 397-399].

110. The Student's OCD diagnosis is by report of the Parents and the Student's physician. The District's LSSP who performed the Student's initial June 2011 FIE and a November 2012 psycho-educational reevaluation report, ***, never observed any OCD tendencies exhibited by the Student. [J.Exs. 13 and 19; Tr. at 228].

111. In Spring 2013, the Student's *** to help the family with the Student, ***. [Tr. at 441].

112. The most recent medical information provided by the Parents to the District has been information from 2011: a) records from the Student's *** hospitalization in *** 2011; and, b) a letter completing the OHI information from Dr. ***, a psychiatrist in ***, Texas. Only Dr. *** responded to the inquiries by the District's LSSP, ***, at the time of the 2011 evaluation to confirm the Student's diagnoses of ADHD, OCD, and a mood disorder, not otherwise specified. [R.Ex. 38 at 22-23; Tr. at 208-209 and 220].

113. The Parents presented no updated medical information to show that the Student is unable to come to school. [Tr. at 209].

114. Placement at *** would require the Student to live approximately *** hours away from student's family and would limit student's interaction with student's home and community. [Tr. at 373 and 485-486].

115. The Student's campus principal, ***, believes it would hurt the Student immensely to be placed into a residential setting. [Tr. at 404].

116. The Student's behavior problems are mild compared to other students on student's *** school campus with ED eligibility. The Student's *** teacher, ***, observed that the Student was not rude to other students, never laid student's hands on anyone, never exhibited any unsafe behaviors within the *** classroom, and described student as "low key." [Tr. at 166 and 222].

117. Dr. *** review of the Student's records noted statements by the Student at times such as "I feel like ***." Such statements would, according to Dr. ***, need further investigation and in further depth as it is not infrequent for adolescents to express ***. [Tr. at 496-497].

118. District staff, including the evaluating LSSP *** and the District's behavioral consultant, Dr. ***, were unable to locate any documentation from any provider that the Student, in fact, ***. [Tr. at 214 and 496].

119. There is no evidence in the record that the Student physically harmed anyone.

120. The record contains no medical diagnosis of the Student as having Bipolar Disorder.

121. There is no evidence that the District failed to train or supervise staff working with the Student.

Discussion

This case concerns a Student who has a history of failing to attend school since student's *** years who began receiving special education services in August 2011 to address student's OHI eligibility of ADHD and OCD. In Fall 2012, after the Student exhibited changed behavior, additional assessment by the District added ED eligibility as student's primary disability. Petitioner sought a residential placement for the Student at District expense, arguing that the Student's needs require such a placement to access an appropriate education and because of insufficiencies in the District's program. By contrast, Respondent denies that the Student requires a residential placement in order to access an appropriate education, arguing that the Student's primary behavior interfering with student's educational progress is precisely student's failure to attend school. Respondent further argues that this situation became worse because the Parents have not sent the Student to school subsequent to the denial of the emergency residential placement request in January 2013.

Issue One: Appropriateness of the District's Educational Program

Under the IDEA and its implementing regulations, school districts must provide a disabled student with an appropriate IEP that meets the student's needs and must also provide a FAPE. 34 C.F.R. §§300.17 and 300.320(a). Eligible students must receive needed supplementary aids and services, and other supports to allow students with disabilities to be educated with nondisabled students to the maximum extent appropriate. 34 C.F.R. §300.42. A student with a disability must have nonacademic and extracurricular services and

activities, such as meals and recess periods, with nondisabled students to the maximum extent possible according to the needs of the eligible student. 34 C.F.R. §300.117.

The first inquiry in this dispute concerns whether or not the District provided an appropriate education to the Student, generally defined as an education that enables a student to obtain “some benefit” from the educational program. *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 189 (1982). The Fifth Circuit established a test in *Cypress Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997) to examine whether “some benefit” is demonstrated by consideration of the following:

- (1) the program is individualized on the basis of the student’s assessment and performance;
- (2) the program is administered in the least restrictive environment (“LRE”);
- (3) the services are provided in a coordinated and collaborative manner by the key stakeholders; and,
- (4) positive academic and non-academic benefits are demonstrated.

Individualized Program. The record of this dispute reveals abundant assessment of the Student’s disabling conditions and progress. Since June 2011, there have been a total of 10 assessments, eight performed by the District and two independent assessments – an IEE by Dr. *** and the independent FBA by Dr. **. The documentation of the Student’s nine ARDC meetings during this period shows these evaluations were considered along with other information about the Student’s progress. This information included student’s grades, discipline records, and other information together with input of the Parents, teachers, and evaluators to develop and adjust student’s educational program. The hearing testimony underscored the efforts of the ARDC to review and revise the Student’s program based on new assessment and performance data of the Student as it became available.

Restrictiveness of the Program (LRE). School districts must educate qualified special education students with other students who are nondisabled to the maximum extent appropriate. *Id.* The record before me shows that the Student’s program evolved during the course of student’s special education services with added inclusion support, yet the Student remained in the general education classroom until November 2012. For example, the ARDC increased inclusion support during successive ARDC meetings first in February 2012, and again in May 2012. [J.Exs. 6 and 7]. By the beginning of the Student’s 2012-2013 school year, as requested by the Student’s mother, the Student had 3.5 hours of inclusion support in all four core classes at the time of the September 2012 ARDC review. It was at this point that the Student’s behavior required an MDR review with the subsequent emergency placement of the Student at the *** for events from ***, 2012. [J.Ex. 5]. At this meeting, the ARDC prepared two alternate schedules in the event student remained at the ***, with provision for 2.0 hours of inclusion support in each of the four core classes. Only after the Parents disagreed with the disciplinary decision did the November 2012 ARDC agree to the more restrictive self-contained special education setting in the *** classroom on a trial basis. [J.Ex. 2].

The Parents’ request for residential placement of the Student at *** would place the Student in a more restrictive setting with only disabled peers, approximately *** miles away from student’s family and community. This setting is not the least restrictive setting in which the Student can be educated, and I conclude that *** placement is more restrictive than the placement proposed by the District.

Coordination and Collaboration. Review of the testimony and documentary evidence in this dispute shows that at all junctures the Student’s Parents as well as their advocate have been involved in development of the Student’s IEPs, as discussed above. The District included parental input in the development of behavioral interventions such as the use of behavioral point sheets. The documentary evidence and testimony in the record

– including three transcribed ARDC meeting minutes, established that the ARDC worked with the Parents and independent evaluators to develop a program for the Student in a collaborative manner.

Positive Academic and Non-academic Benefits. Consideration of the Student’s academic progress reveals that the Student received academic benefit from the District’s educational program – even with student’s refusal to attend school. At the due process hearing, the newly-released 2012 STAAR results show student met passing standards for ***-grade math and science testing. Additionally, the District’s LSSP testified that the Student had good 2012 benchmark scores, with an above average score on student’s middle-of-the-year reading benchmark testing. In the 2012-2013 school year, the Student made an above-average score on student’s beginning-of-the-year science benchmark testing and on the middle-of-the-year social studies benchmark testing. Even though the Student attended only 10 non-consecutive days in student’s *** placement, the record evidence shows student was completing more work than student had previously completed. I conclude, based on the preponderance of the record evidence before me, that the Student was making some academic gains under the District’s program until student quit coming to school in *** 2013.

Turning to the non-academic benefits of the District’s program for the Student, it is abundantly clear that the Student would have received additional non-academic benefits under student’s program if student had come to school consistently. The evidence established that the Student did not regularly attend the after-school tutoring sessions agreed to by the Parties in the *** mediation agreement and put in place in the Student’s August 2011 ARDC, having missed sufficient sessions to end the opportunity by October ***, 2011.

The evidence further showed that the District provided the in-home/parent training in Fall 2011, also referenced in the parties’ *** mediation agreement. I found the testimony of the provider of the 5.5 hours of training, ***, shed additional light on the Student’s home environment and was credible. The Parents expressed concern over communication with the Student but did not mention difficulty getting student out of bed and to school during *** visits. *** offered additional supports to the family such as Parent SAMA and the Love & Logic training to help develop boundaries and foster communication, but there is no evidence in the record that the family took advantage of these opportunities through the in-home/parent training period.

Based on the evidence before me, I conclude that the Student received some academic benefit from student’s educational program during the pertinent period even with student’s absences. The same absences hindered student from full receipt of the non-academic benefits that the District provided through tutoring and input into the Student’s and student’s Parents’ needs for parent/in-home training and other opportunities to build better communication with the Student.

Issue Two: Residential Placement at District Expense

Under the IDEA and its implementing regulations, if public or private residential placement is necessary to provide special education and related services to an eligible student, then the program, including non-medical care and room and board, must be at no cost to the parents. 34 C.F.R. §300.104. In Texas, a school district’s responsibility is to provide a residential placement in situations where the placement is necessary in order for the student to receive a FAPE. 19 TEX. ADMIN. CODE §89.61(a). If a residential placement is primarily due to medical reasons or problems in a student’s home, then residential placement is not the responsibility of a school district. 19 TEX. ADMIN. CODE §89.61(b)(1).

The Fifth Circuit established a two-prong analysis for the determination of whether a residential placement is appropriate under the IDEA. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286 (5th Cir. 2009). Under this analysis, the placement must be: (1) essential in order for the student to receive a meaningful educational benefit; and, (2) primarily oriented toward enabling the student to obtain an education.

Id. at 299. The court explained that to be “essential,” the residential placement must be necessary in order for the IDEA-eligible student to receive benefit:

In other words, if a child is able to receive an educational benefit without the residential placement, even if the residential placement is helpful to a child’s education, the school is not required to pay for it under IDEA.

Id. at 300.

Under the Fifth Circuit’s second prong, residential placement must be “primarily oriented” to educational purposes as the IDEA does not require school districts to bear the costs of private residential services that are primarily aimed at treating medical difficulties or enabling participation in non-educational activities. *Id.*

In the case before me, the evidence failed to show that residential placement of the Student is required for the Student to access an education, and thus failed to meet the first prong of the Fifth Circuit’s inquiry. Petitioner presented no additional professional report beyond that of Dr. *** to show that the Student needed, much less “required,” residential placement to access student’s education. The observations of Dr. *** were limited to four hours on a single school day. Dr. *** inaccurately reported a diagnosis of Bipolar Disorder when in fact, Dr. *** received this information through the report of the Student’s Parents only. More concerning, however, was Dr. *** hearing testimony and her assumptions of what the ARDC would do before she had a chance to meet and discuss her report and recommendations. I do not find Dr. *** independent FBA report convincing that residential placement is *essential* for the Student to access educational benefit although it is clear this is Dr. *** preference for the Student’s placement. To the contrary, there is evidence in the record that residential placement might cause harm to the Student from the District’s consulting psychologist, Dr. ***, and the campus principal, ***.

There was a dearth of supporting documentation in the record to support the Parents’ report that the Student ***. *Contrast, e.g., Crowley Indep. Sch. Dist.*, 193-SE-0312 (SEA TX 2012) (where *** placement found appropriate and necessary for an ED student with documented ***, ***, and repeated ***); *Victoria Indep. Sch. Dist.*, 286-SE-080 (SEA TX 2010) (where residential placement found appropriate for severely psychotic and aggressive student). In the instant case, there is no evidence that the Student was assaulting others, was or had been incarcerated for assaultive behaviors. The behaviors noted in Dr. *** report and by student’s educators remain largely inattentive behaviors.

As the Student failed to show that residential placement was *required* for the Student to access student’s education, inquiry further into the primary orientation of the *** residential placement itself under Fifth Circuit’s second prong is not necessary in this dispute.

Issue Three: Reimbursement of Costs and Prevailing Party Status

Section 89.1185(m) of the Texas Commissioner’s Rules provides that a hearing officer, at the request of either party, shall include in the final decision specific findings of fact regarding:

- (1) whether the parent or public education agency unreasonably protracted the final resolution of the issues in controversy in the hearing; and
- (2) if the parent was represented by an attorney, whether the parent’s attorney provided the public education agency the appropriate information in the due process complaint in accordance with 34 C.F.R. §300.508(b).

19 TEX. ADMIN. CODE §89.1085(m).

Section 300.508(b) of the IDEA's implementing regulations set out the requirements of a due process complaint. 34 C.F.R. §300.508(b). The IDEA's implementing regulations specifically address attorneys' fees and prevailing party status under §300.517 regarding a determination in a subsequent court proceeding; attorneys' fees are, and remain, outside the jurisdiction of this Hearing Officer. 34 C.F.R. §300.517. As neither Petitioner nor Respondent ultimately asked for findings under 19 TEX. ADMIN. CODE §89.1085(m), I decline to make further findings or conclusions in this regard.⁶

Issue Four: Failure to Train and Supervise Staff

Under the IDEA and its implementing regulations, school districts must ensure that staff working with eligible students are properly trained, including related service personnel, paraprofessionals, and teachers. 34 C.F.R. §300.156 (a)-(c). In Texas, special education and related service personnel must be certified, endorsed, or licensed in the areas of assignment. 19 TEX. ADMIN. CODE §89.1131(a). Paraprofessional personnel must be certified and may be assigned to work with eligible students, general and special education teachers, and related service personnel. 19 TEX. ADMIN. CODE §89.1131(c).

Petitioner presented an electronic communication between the Student's mother and the *** teacher, dated December ***, 2012, concerning the classroom aide in the *** classroom. Within three hours of the communication, the *** teacher responded to the Student's mother. I find that the record before me does not show the District failed to train and supervise staff who worked with the Student. Petitioner failed to meet Petitioner's burden on this issue.

Conclusion

The presumption of the appropriateness of the District's IEP for this Student withstands Petitioner's challenge in this dispute. I conclude Petitioner did not meet Petitioner's burden to show the inappropriateness of the District's educational program, a program that delivered a FAPE to the Student. Likewise, Petitioner did not meet Petitioner's burden to prove that student required residential placement to further access educational benefit. Accordingly, I decline to award any relief to Petitioner.

⁶ See footnote 1 above.

Conclusions of Law

1. Respondent is the local educational agency responsible for determining the Student's eligibility for special education and related services under the IDEA. 20 U.S.C. §1400, *et. seq.*, and its implementing regulations.
2. Petitioner, as the party who challenged the school district's eligibility determination or offer of services under the IDEA, bears the burden to prove that the Student has been denied a FAPE. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom., Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 S.Ct. 528 (2005).
3. Petitioner did not meet Petitioner's burden to prove denial of a FAPE in this dispute under Respondent's program. 34 C.F.R. §§300.17, 300.42, 300.117, and 300.320(a); *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Cypress Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
4. Respondent has a responsibility to provide the Student with public or private residential placement, if it is necessary to provide special education and related services to the Student, at no cost to the Parents. 34 C.F.R. §300.104; 19 TEX. ADMIN. CODE §89.61(a), (b)(1).
5. Petitioner did not meet Petitioner's burden to show that residential placement of the Student was essential in order for the Student to receive a meaningful educational benefit in this dispute. As a result, Respondent is not responsible to provide a public or private residential placement in this dispute at no cost to the Parents. 34 C.F.R. §300.104; 19 TEX. ADMIN. CODE §89.61(a), (b)(1); *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286 (5th Cir. 2009).
6. Petitioner did not meet Petitioner's burden to show that the District improperly trained and supervised District staff working with the Student regarding disability accommodations and interventions specific to behavior. 34 C.F.R. §300.156 (a)-(c); TEX. ADMIN. CODE §89.1131(a), (c).
7. Respondent provided a FAPE to Petitioner at all times pertinent to this dispute. 34 C.F.R. §§300.17, 300.101, and 300.513(a)(1); *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Cypress Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

ORDERS

Based upon the record of this proceeding, the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that the relief requested by Petitioner is **DENIED**.

IT IS FURTHER ORDERED that any and all additional or different relief not specifically ordered herein is **DENIED**.

Signed this 8th day of April 2013.

/s/ Mary Carolyn Carmichael

Mary Carolyn Carmichael
Special Education Hearing Officer

NOTICE TO THE PARTIES

This decision is final and immediately enforceable, except that any party aggrieved by the findings and decision may bring a civil action in any state court of competent jurisdiction or in a district court of the United States as provided in 20 U.S.C. §1415(i)(2); 34 C.F.R. §300.516; and 19 TEX. ADMIN. CODE §89.1185(o).

DOCKET NO. 087-SE-1212

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

SYNOPSIS OF DECISION

- A. **ISSUE:** *Whether the District provided the Student with an appropriate individualized program in an appropriate educational environment, including: a) academic services; and, b) non-academic and supplementary services?*
HELD: For the District
CITATION: 34 C.F.R. §§300.17, 300.42, 300.117, and 300.320(a)
- B. **ISSUE:** *Whether the Student requires placement at a residential treatment facility at school district expense?*
HELD: For the District
CITATION: 34 C.F.R. §300.104;
19 TEX. ADMIN. CODE §89.61(a), (b)(1)
- C. **ISSUE:** *Whether Respondent failed to properly train and supervise staff working with the Student regarding disability accommodations and interventions specific to behavior?*
HELD: For the District
CITATION: 34 C.F.R. §300.156(a)-(c);
19 TEX. ADMIN. CODE §89.1131(a), (c)