

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

DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Petitioner, ██████████ (hereinafter Petitioner or ██████████), brings this action against Respondent Houston Independent School District (hereinafter Respondent or HISD) under the Individuals With Disabilities Education Act (hereinafter IDEA), 20 U.S.C. § 1400 *et. seq.*

Petitioner alleges that Respondent denied him a free appropriate public education in violation of the provisions of the IDEA in the following particulars:

1. Failure to comply with the procedural requirements of IDEA by failing to notify Petitioner of its failure to protect ██████████ from assault and/or harassment in the BAC placement at ██████████ School, and its failure to notify Petitioner of objective mastery information under his IEPs;
2. Denial of access to the ARD process by failing/refusing to schedule an ARDC for ██████████ following a request for one in September 2003;
3. Failure to provide ██████████ with IEPs that are reasonably calculated to meet his academic and behavioral needs, particularly in the area of his learning disabilities;
4. Failure to provide ██████████ with appropriate transition planning at ██████████ and ██████████ years of age;
5. Failure to provide placement for ██████████ in the least restrictive environment in that the Behavior Adjustment Class (hereinafter BAC) is not necessary or appropriate for ██████████;
6. Failure to provide qualified and appropriate staff to work with ██████████ in the BAC; and
7. Failure to provide progress statements as required by IDEA.

For relief, Petitioner seeks declaratory relief that [REDACTED]'s program and placement has been inappropriate and that Respondent committed the alleged procedural violations; the development of appropriate IEPs for [REDACTED] academic and non-academic needs to be implemented in a less restrictive environment than the self-contained BAC; and compensatory education for the period in which [REDACTED] has been without an appropriate education in the form of additional years of education at the appropriate level for [REDACTED] as well as compensatory tutoring, counseling and academic services.

Daniel McCall of Katy, Texas represents Petitioner in this proceeding. Hans Graff of Houston, Texas represents Respondent.

PROCEDURAL HISTORY

Petitioner filed his request for hearing on February 3, 2004. Following several continuances, the matter came on for hearing on April 21 and 22, and June 10, 2004. The parties submitted post-hearing arguments on June 25, 2004 and this decision of the Hearing Officer is due on or before July 19, 2004.

FINDINGS OF FACT

1. [REDACTED] is [REDACTED] student who is eligible for special education and related services under IDEA as a student with an emotional disturbance. [REDACTED] has received special education services pursuant to that eligibility classification since the [REDACTED] grade.
2. [REDACTED] lives within the jurisdictional boundaries of HISD, a political subdivision of the State of Texas and a duly incorporated school district. [REDACTED] attends [REDACTED] School within HISD and completed his [REDACTED] year during the 2003-2004 school year.
3. Beginning in [REDACTED] grade and continuing through [REDACTED] grade year, [REDACTED] received the majority of his instruction in a self-contained behavior class. [REDACTED] placement in the behavior class during these years resulted from behavioral problems in the classroom that required his removal from the general education environment.
4. [REDACTED] began attending [REDACTED] during the 2001-2002 school year as a [REDACTED]. An Admission, Review, and Dismissal Committee (hereinafter ARDC) convened on November 14, 2001 to develop an [REDACTED] (hereinafter [REDACTED]) for [REDACTED] and to conduct his annual review and develop IEPs for his [REDACTED] grade year. The ARDC continued [REDACTED] placement in the self-contained behavior class (called the Behavior Services Class or the BSC) with a behavior IEP and a Behavior Intervention Plan that targeted his relationships with peers, compliance with teachers' directives, and timely completion of assignments. In addition, the ARDC continued to provide counseling on a weekly basis to address issues of non-compliance.
5. [REDACTED] placement in the BSC during his [REDACTED] grade year constituted the least restrictive environment for [REDACTED] success as he transitioned into [REDACTED] school.

6. At the conclusion of [REDACTED] grade year, his counselor recommended his dismissal from counseling based on his mastery of the goals and issues worked on during the counseling sessions. She further recommended placement for the [REDACTED] grade year in a co-teach or resource environment.
7. [REDACTED] began his [REDACTED] grade year in the BSC for fundamental academics and three classes in the general education environment: [REDACTED].
8. On August 27, 2002, shortly after the beginning of the 2002-2003 school year, Respondent completed documentation to assess [REDACTED] continued eligibility for special education as a student with an emotional disturbance. This review indicated that [REDACTED] continued to experience behavioral difficulties of a significant nature, particularly in his classes outside the BSC environment.
9. The ARDC convened on October 17, 2002 to conduct an ITP meeting, as well as to conduct [REDACTED] annual review. Based on the eligibility documentation, [REDACTED] grades, and other relevant data, the ARDC continued [REDACTED] eligibility for special education services as a student with an emotional disturbance, continued [REDACTED] program and placement in the BSC with three general education classes, and developed a new behavior intervention plan and new behavior IEPs.
10. [REDACTED] had great difficulty in his BCIS class and did not receive passing grades in either the fall or spring semester. The BCIS teacher reported that [REDACTED] had numerous absences, did not complete assignments, could not focus in class, distracted other students, and was in need of continual redirection.
11. [REDACTED] also had behavioral difficulties in his [REDACTED] class and did not receive a passing grade in either the fall or spring semester.
12. In [REDACTED] [REDACTED] class, he passed the fall semester with a [REDACTED] and the spring semester with an [REDACTED].
13. In the BSC, [REDACTED] also experienced difficulty with absences and completing assignments, however he ultimately received passing grades in all subjects. At the conclusion of the 2002-2003 school year, [REDACTED] had failing grades in three courses due to his failure to take the final exams; however, he made up the exams at the beginning of the 2003-2004 school year and achieved passing grades in each of those subjects as a result.
14. [REDACTED] placement in the BSC during the 2002-2003 school year for his fundamental academics, with three general education classes, constituted the least restrictive environment for [REDACTED].

15. [REDACTED] behavior in the BSC improved over the course of the year such that the behavior point sheets kept in the BSC reflect very good behavioral ratings when [REDACTED] was present.
16. At the beginning of the 2003-2004 school year, the ARDC convened on September 2, 2003 for [REDACTED] annual review. As a result of behavioral improvement, the ARDC recommended removal from the BSC to a resource environment. The ARDC developed IEPs for the [REDACTED] program, resource math, English, and reading and completed a [REDACTED]. [REDACTED] continued to have a Behavior Intervention Plan and a Behavior IEP.
17. During the 2003-2004 school year, up to the point of the information available for this due process hearing, [REDACTED] received passing grades and either satisfactory or excellent conduct ratings in all classes during the fall semester. During the spring semester, [REDACTED] continued to receive satisfactory or excellent conduct ratings and passing grades, with the exception of the second grading period in Reading where he received a [REDACTED] and had [REDACTED] unexcused absences.
18. [REDACTED] records reflect that he took the [REDACTED] exams on his instructional level at the end of his [REDACTED] and [REDACTED] grade years; however, the results of those exams were not part of the evidentiary record in this hearing.
19. [REDACTED] completed the Stanford Test of Academic Skills in February 2002 and March 2003. Scores reflect minimal to no progress in all areas except social science and spelling, with the total battery score reflecting an increase of one month's performance over the year. The scores do, however, reflect meaningful gains from [REDACTED] school scores received in February 2001.
20. [REDACTED] requested an ARDC sometime during the fall semester of 2003; however an ARDC meeting was not held. The record is not clear about all of the reasons for failure of the ARDC to convene; however, Respondent attempted to schedule ARDC meetings in spring 2004. There is no evidence explaining the delay between the initial request and the spring attempts.
21. [REDACTED] teacher in the BSC, Mr. [REDACTED], met the certification standards of Texas through his participation in the state's alternative certification program.
22. [REDACTED] and his mother received regular report cards marking [REDACTED] progress in his classes.
23. Mr. [REDACTED] provided some updates of [REDACTED] progress toward his annual goals; however, the reporting information on [REDACTED] IEPs was not accurate, as Mr. [REDACTED] did not understand the mastery percentage criteria and how to measure [REDACTED] progress on the IEP objectives. [REDACTED] progress during the 2002-2003 school year as documented on

his IEPs reflects a failure to make any progress or reach the designated mastery level on any of the benchmarks in any subject area.

24. [REDACTED] report cards accurately reflect his progress in the curriculum at Westbury.
25. The atmosphere in the BSC during the 2002-2003 school year included ongoing conversation and banter [REDACTED]
[REDACTED]
Although the banter was inappropriate for the classroom environment and, at times, negatively impacted [REDACTED] it was not the cause of [REDACTED] failure to attend school or complete his assignments.
26. [REDACTED] mother, [REDACTED], participated in all of [REDACTED]'s annual ARDC meetings during his enrollment at [REDACTED] School. [REDACTED] received notice of procedural safeguards at the ARDC meetings.

DISCUSSION

Petitioner raises numerous issues alleging violations of the IDEA during the 2001-2002, 2002-2003, and 2003-2004 school years. Each of these will be addressed below, in addition to claims raised pertaining to the statute of limitations and spoliation of evidence.

Statute of Limitations

Petitioner filed the instant request for due process on February 3, 2004. Although the statute of limitations for requests for due process requires that a complainant request a hearing within one year of the date the complainant knew or should have known about the alleged action (See, 19 T.A.C. Sec. 89.1150(c) and *Texas Advocates Supporting Kids With Disabilities v. Texas Education Agency*, 112 S.W. 3d 234 (Tex. Ct. App.-Austin 2003), Petitioner urges the Hearing Officer to toll the application of the statute to his claims based on both statutory and equitable tolling grounds.

With regard to Petitioner's argument that the statutory tolling provision of Tex. Civ. Prac. & Rem. Code, Section 16.001 requires tolling the statute until Petitioner reaches the age of majority, the Hearing Officer would simply note that IDEA explicitly grants the right to initiate a due process hearing to a **parent** as defined within IDEA. 34 C.F.R. Section 300.507. The right to request a due process hearing does not transfer to a student until the student reaches the age of majority as defined by state law. 34 C.F.R. Section 300.517. Thus, the entitlement to bring a due process request belongs directly to a parent when the student is under the age of majority and not to the student him/herself.

Contrary to Petitioner's argument, this is not analogous to the court's decision in *Hickey v. Irving Independent School District*, 976 F. 2d 980 (5th Cir. 1992) where the fifth circuit applied statutory tolling to the statute of limitations for claims brought pursuant to the Rehabilitation Act. The court explained in *Hickey* that tolling applied because the statute of limitations itself

had been borrowed from state law: "where a state statute of limitations is borrowed, the state's rules for tolling the statute are borrowed as well." *Id* at 984. In contrast, the statute of limitations governing due process hearing requests is not borrowed from state law by determining the most closely analogous claim, but rather, is explicitly set forth in the administrative rules adopted by the Texas Education Agency and upheld by the courts.

Petitioner's argument that **any** claim arising under IDEA is tolled until the student reaches the age of majority clearly contradicts the legislative intent of resolving special education disputes in an expeditious manner. [REDACTED] bnf [REDACTED] and [REDACTED] v. *Houston ISD*, Docket No. 332-SE-0603 (SEA TX 2004). Further, it is patently unreasonable for a claim arising during a child's first grade year, for example, to be preserved until the child graduates from high school. Clearly, the statutory tolling provision found in Section 16.001 of the Texas Civil Practices and Remedies Code does not apply to requests for due process brought under the IDEA.

Petitioner further argues that the one-year statute of limitations should be tolled on equitable grounds based on Respondent's failure to inform Petitioner of the change to the one-year statute of limitations and on Petitioner's lack of knowledge of the basis for his claims prior to the date he obtained counsel and filed for due process. Petitioner's claims are unsubstantiated by the evidence in this cause. The record shows that [REDACTED] mother participated in annual ARDCs and received notice of her procedural safeguards. Further, all of the facts that form the basis for Petitioner's claims in this cause, i.e. [REDACTED] performance and progress in the BSC, were known to Petitioner as they occurred; this is not a case where newly discovered information gave rise to a claim after the fact. See, for example, [REDACTED] *El Paso ISD*, 39 IDELR 113 (SEA TX 2003) (parent learning that a teacher was not certified triggered the beginning of the limitations period as parent could reasonably presume that a teacher hired by the district was certified).

While Petitioner's equitable tolling theory may have some applicability to a special education due process request under the right set of facts, the evidence in this case simply does not support the conclusion that Respondent failed to meet its duty to notify Petitioner of his procedural rights or that Petitioner did not know of the facts that form the basis of his complaint. Accordingly, the Hearing Officer declines to toll the one-year statute of limitations applicable to due process hearing requests in this cause. All claims arising before February 3, 2004 are thus barred by the statute of limitations. This limits the Hearing Officer's review of [REDACTED] educational program to spring semester 2003 and the 2003-2004 school year.

Petitioner's Claim of Spoliation of Evidence

Petitioner requests that the Hearing Officer find that the evidence contained in the behavior point sheets of [REDACTED] teachers' aide and [REDACTED] make-up final exams is presumed to favor Petitioner based on the fact that these documents were lost during an office move and thus unavailable as documentary evidence in this cause.

Spoliation of evidence consists of an intentional or negligent interference with a prospective civil action by destruction of evidence. Once placed on notice of potential litigation, a duty to preserve evidence exists. *Trevino v. Ortega*, 969 S.W.2d 950 (TX 1998). In Texas, courts have held that a failure to produce evidence within a party's control raises the presumption that if produced, it would operate against him. *Brewer v. Dowling*, 862 S.W.2d 156 (Tex. App.-fort Worth 1993, writ denied). The presumption arises when the party not in possession of the evidence has introduced evidence harmful to the party who had control of the evidence. *Id.* Petitioner relies on this to argue that Respondent's failure to produce the behavior reports and make-up exams supports Petitioner's contention that ██████ was not progressing academically or behaviorally during spring 2003.

Under the facts in this case, the Hearing Officer declines to grant Petitioner the presumption that the missing records would support his contention of class failures or behavior problems. First, Petitioner did not present evidence to suggest that ██████ was not successful in the BSC class, either behaviorally or academically. The evidence certainly indicates that ██████ had numerous unexcused absences and incomplete assignments that lowered both his grades and behavior point ratings; however, Petitioner did not introduce any evidence to establish a general decline in ██████ performance during the relevant time frame. In fact, the evidence demonstrates a steady improvement in ██████ behavior and academic difficulties due to absences and incomplete assignments, rather than an inability to do the work. Because Petitioner did not introduce evidence harmful to Respondent on this point, the spoliation presumption does not arise.

Second, Respondent produced other documentary evidence of the type that precludes the spoliation presumption. *Watson v. Brazos Electric Power Co-op*, 918 S.W.2d 639 (Tex. App.-Waco 1996, writ denied 1996). Specifically, Respondent produced transcript notations reflecting ██████ grades on his make-up finals that were made contemporaneously with the exams and prior to the instant litigation, as well as behavior point sheets completed during the spring 2003 semester that tracked Brandon's behavior on a day-by-day basis.

Whether Respondent Failed To Provide ██████ With A Free Appropriate Public Education During The 2002-2003 and 2003-2004 School Years

IDEA requires HISD to provide ██████ 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.

In examining the appropriateness of HISD's program, a presumption exists in favor of the school district's plan for educating Brandon. As such, Petitioner bears the

burden of proving that Brandon's program and placement were not appropriate. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd* 468 U.S. 883 (1984).

Procedural Violations Of IDEA

Petitioner alleges three procedural violations of IDEA: 1) failure to comply with IDEA's notice provisions by not informing Petitioner of its failure to protect ██████ from assault and/or harassment in the BSC at ██████, 2) failure to provide Brandon with regular reports of his progress toward mastering his IEP annual goals, and 3) failure to convene an ARDC in a timely manner following Brandon's request for such in September 2003.

Under IDEA, procedural violations warrant a finding that a school has failed to provide a free appropriate public education only when they result in the loss of educational opportunity, i.e. result in substantive harm, or seriously infringe on a parent's opportunity to participate in the ARDC process. *Adam J. v. Keller ISD*, 328 F.3d 804 (5th Cir. 2003). Thus, Petitioner must establish not only the existence of a procedural violation, but some substantive harm flowing from that violation.

Petitioner failed to produce evidence sufficient to meet his burden of proof with regard to the procedural violations alleged. Petitioner did prove that Respondent failed to provide regular and accurate reports of ██████ progress toward his annual IEP goals in the BSC during spring 2003. ██████ teacher's testimony demonstrated that he did not understand the mastery percentage criteria established by the ARDC, either in terms of what those criteria meant or how to use them to measure ██████ progress. The teacher's reporting of ██████ progress on his IEPs consistently indicated a failure to master any benchmark on the IEP despite report card grades showing satisfactory progress toward mastering the curriculum. The Hearing Officer finds the discrepant information and lack of professional understanding on the part of ██████ teacher troubling; however, the weight of the evidence establishes that ██████ did, in fact, make progress and earn passing grades in the BSC despite the teacher's confusion about how to report progress on the IEP goals and objectives.² For this reason, the teacher's failure to comply with IDEA's procedural requirements concerning progress reporting does not itself result in a denial of a free appropriate public education.

With regard to Petitioner's claim that Respondent refused to convene an ARDC meeting following ██████ request for one, Petitioner simply did not offer evidence to support this contention. ██████ did not testify at all about the ARDC request, when it was made, or

¹ Petitioner's claim of a procedural violation based on a failure to notify him of an intention to engage in illegal conduct of harassment or assault is misplaced. The procedural safeguard provision of IDEA pertaining to prior written notice does not apply in such a circumstance as, by definition, it governs proposals or refusals to change a student's program or placement in relation to the provision of a free appropriate public education. See, 34 C.F.R. Section 300.503.

² Petitioner attempted to argue that ██████ grades did not accurately reflect his performance in the BSC; however, Petitioner did not offer any proof to establish this fact. The Hearing Officer finds, based on the teacher's testimony, which revealed substantial confusion about reporting progress on the IEPs, that ██████ grades are a more accurate reflection of his performance than the progress codes on his IEPs.

Respondent's response to it. The only evidence in the record pertains to difficulties Respondent encountered in scheduling the meeting during spring 2004 that resulted in not convening the ARDC meeting prior to the due process hearing in this cause. Petitioner failed to meet his burden of proof concerning this procedural violation.

Substantive Violations Of IDEA

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

Although courts have not adopted a specific substantive standard to determine when a free appropriate public education has been provided, the Fifth Circuit in *Michael F.* identified four factors to consider in analyzing a school's program:

1. Is the program individualized and based on the student's assessment and performance;
2. Is the program administered in the least restrictive environment;
3. Are the services provided in a coordinated and collaborative manner by the key stakeholders; and
4. Are there demonstrated positive benefits both academically and non-academically to the student.

Applying these legal standards and indicia of a free appropriate public education to the evidence in this case, the Hearing Officer concludes that [REDACTED] program and placement during the 2002-2003 and 2003-2004 school years provided him with a free appropriate public education as defined by IDEA.

Program Individualized and Based on Assessment and Performance

[REDACTED] program in the BSC and general education environment was developed on an annual basis utilizing current evaluation and performance data, including counseling information, grades, conduct and behavioral records, and test results.

Least Restrictive Environment

Petitioner suggests that [REDACTED] placement in the BSC during spring 2003 was not the least restrictive environment for [REDACTED], though simultaneously argues that [REDACTED] was not successful in the BSC and did not achieve the requisite academic or behavioral progress. Based

on the evidence of record, the Hearing Officer concludes that [REDACTED] placement in the BSC with three general education classes was appropriate for [REDACTED] and enabled him to progress behaviorally and academically. [REDACTED] continued to have difficulty in his general education classes throughout the 2002-2003 school year, indicating the continued need and importance of the BSC structure and support. During the 2003-2004 school year, when [REDACTED] transitioned entirely out of the BSC environment, the evidence shows better success and progress-both academically and behaviorally.

Coordinated and Collaborative Services

Petitioner presented no evidence to suggest that services were not provided to [REDACTED] in a coordinated or collaborative manner. [REDACTED] counselors and teachers, as well as the special education coordinator for [REDACTED] were familiar with his program and available to support his needs at school.

Academic and Non-Academic Benefits

The evidence of [REDACTED] behavioral progress and non-academic benefit is clear and uncontroverted. [REDACTED] behavioral progress is documented by in class performance records, teacher and counselor testimony, and by [REDACTED] self-assessment. Although [REDACTED] continued to have excessive absences and incomplete assignments, he made great strides in issues relating to compliance with directions, relationships with peers, and discipline related problems.

As discussed previously, the evidence concerning [REDACTED] academic progress is more discrepant. [REDACTED] report cards however reflect passing grades and steady attainment of [REDACTED] achievement testing shows modest gains in grade level equivalencies from [REDACTED] school levels, though the evidence in the record of academic testing and [REDACTED] results was scant and incomplete. In short, though [REDACTED] academic progress was not as substantial or conclusively documented as would be desirable, the Hearing Officer cannot conclude, based on the record evidence, that [REDACTED] failed to progress or attained merely trivial progress during his [REDACTED] and [REDACTED] grade years at [REDACTED]. Rather, [REDACTED] is moving through the curriculum at the expected rate and appears to be successful in a general education and resource environment for the first time since his [REDACTED] grade year. This alone is an important indicator of his progress under the IEPs and placement offered at [REDACTED].

[REDACTED] Harassment

Petitioner argued vigorously that [REDACTED] right to a free appropriate public education was denied by repeated [REDACTED] harassment from both students and teachers in the BSC. Petitioner testified that the climate was much improved during the 2003-2004 school year, so his claim pertains essentially to the spring 2003 semester in light of the Hearing Officer's ruling concerning the statute of limitations.

Based on a preponderance of the evidence, the Hearing Officer concludes that ██████ did experience an inappropriate atmosphere of learning in the BSC occasioned in large part by ██████ harassment; however, the Hearing Officer does not find that this environment impacted ██████ academic performance in the classroom. Again, the evidence demonstrates that ██████ made academic progress, and even greater behavioral and emotional progress, during the spring semester of 2003 despite this inappropriate atmosphere in the BSC. Whatever claims ██████ may have regarding the atmosphere in the BSC, they do not raise issues under IDEA that this Hearing Officer can address in light of the overall evidence of ██████ educational success while at ██████

Transition Planning

Petitioner presented no evidence to establish a failure to comply with the transition planning requirements of IDEA. Rather, the record reflects that transition planning, graduation requirement review, and vocational planning occurred on a regular basis beginning in ██████ grade year.

In conclusion, when applying the indicia of a free appropriate public education delineated by the Fifth Circuit in *Michael F.* to the evidence concerning ██████ program, the Hearing Officer concludes that Respondent provided ██████ with a free appropriate public education during the 2002-2003 and 2003-2004 school years.

CONCLUSIONS OF LAW

1. ██████ is an adult student in the HISD who is eligible for special education services under the provisions of IDEA and its implementing regulations as a student with an emotional disturbance.
2. Respondent HISD 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 regulations. HISD is ██████ resident district and has the responsibility to provide him with a free appropriate public education under the IDEA. 20 U.S.C. § 1401 (a)(18).
3. Petitioner failed to meet his burden of proof to establish procedural or substantive violations of IDEA. *Tatro v. State of Texas*, 703 F.2nd 823 (5th Cir. 1983), *aff'd* 468 U.S. 883 (1984).
4. Respondent provided ██████ with a free appropriate public education during the 2002-2003 and 2003-2004 school years. *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997); 34 CFR 300.552; 19 T.A.C. §89.1055.

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, this Hearing Officer hereby **ORDERS** that all relief sought by Petitioner is 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 19th day of July 2004.

/s/ Lynn E. Rubinett

Lynn E. Rubinett

Special Education Hearing Officer

<p>██████████. bnf ██████████ Petitioner</p>	<p>§ § § § § § § §</p>	<p>BEFORE A SPECIAL EDUCATION</p> <p>HEARING OFFICER FOR THE</p> <p>STATE OF TEXAS</p>
<p>v.</p> <p>HOUSTON INDEPENDENT SCHOOL DISTRICT Respondent</p>		

SYNOPSIS

Issue: Whether Respondent failed to comply with the procedural requirements of IDEA by failing to notify Petitioner of its failure to protect ██████████ from assault and/or harassment in the BAC placement at ██████████ School, and its failure to notify Petitioner of objective mastery information under his IEPs;

Held: For Respondent. The prior written notice provision of IDEA does not apply to this situation where Respondent did not propose to change, or refuse to change, Petitioner’s program or placement. Respondent’s failure to provide accurate progress reporting information did not cause a substantive harm to ██████████ and, as such, did not deny him a free appropriate public education.

Cite: 20 U.S.C. § 1415(b) & (c); 34 C.F.R. Section 300.347; *Adam J. v. Keller ISD*, 328 F.3d 804 (5th Cir. 2003).

Issue: Whether Respondent denied Brandon access to the ARD process by failing/refusing to schedule an ARDC for ██████████ following a request for one in September 2003

Held: For Respondent. Petitioner failed to prove that Respondent did not timely schedule an ARDC following a request for one.

Cite: 34 C.F.R. §§ 300.345.

Issue: Whether Respondent failed to provide a program in the BSC that was reasonably calculated to provide ██████████ with an educational benefit in the least restrictive environment due to inappropriate IEPs, lack of qualified teaching personnel, and an inappropriate atmosphere of anti-gay harassment?

Held: For Respondent. When applying the indicia of a free appropriate public education delineated by the Fifth Circuit in *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997) to the evidence concerning ██████████ program,

the Hearing Officer concludes that Respondent provided [REDACTED] with a free appropriate public education during the 2002-2003 and 2003-2004 school years. [REDACTED] obtained the requisite academic and non-academic benefits and required the structure of the BSC for a portion of the day in the spring 2003 semester. The atmosphere of [REDACTED] harassment in the BSC did not cause a denial of free appropriate public education to [REDACTED] and does not raise claims under IDEA.

Cite: 34 C.F.R. §§ 300.121 & 300.300; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

Issue: Whether Respondent failed to provide [REDACTED] with appropriate transition planning under IDEA?

Held: For Respondent. Respondent met the requirements of IDEA for transition planning for [REDACTED]

Cite: 34 C.F.R. §§ 300.347.