

STUDENT	§	BEFORE A SPECIAL EDUCATION
BNF Parent	§	
Petitioner	§	
v.	§	HEARING OFFICER FOR THE
EAGLE MOUNTAIN-SAGINAW	§	
INDEPENDENT SCHOOL DISTRICT	§	
Respondent	§	STATE OF TEXAS

**DECISION OF THE HEARING OFFICER**

**STATEMENT OF THE CASE**

Petitioner, Student (hereinafter Petitioner or Student), by his next friend, Parent (hereinafter Parent) brings this action against Respondent Eagle Mountain-Saginaw Independent School District (hereinafter Respondent or EMS) 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 (hereinafter FAPE) in the following particulars:

1. Failure to identify Petitioner’s disability of Attention Deficit Hyperactivity Disorder (ADHD) and to classify Petitioner as eligible for special education services based on the eligibility classification of Other Health Impaired (OHI);
2. Failure to provide Petitioner with appropriate special education services and programming to address his ADHD, and to a lesser extent, Petitioner’s learning disabilities in reading and written expression; and
3. Failure to propose an appropriate program for Petitioner at \*\*\* School that addressed all of Petitioner’s disabilities and provided appropriate programming and services.

As a result of Respondent’s alleged failure to provide FAPE, Petitioner enrolled in a private school, the \*\*\* School, as of the beginning of the 2002-2003 school year.

For relief, Petitioner seeks reimbursement for tuition expenses incurred in attending \*\*\* School during the 2002-2003 and 2003-2004 school years, as well as continued placement at Respondent’s expense at the \*\*\* School for the remainder of Petitioner’s \*\*\* school years.

Myrna Silver of Dallas, Texas represents Petitioner in this proceeding. Rhonda Barfield of Fort Worth, Texas represents Respondent.

### PROCEDURAL HISTORY

Petitioner filed his request for hearing on May 21, 2003. The Hearing Officer granted several joint requests to continue the due process hearing to allow for ongoing settlement negotiations, mediation, the filing of a motion for summary judgment, and to accommodate the availability of expert witnesses.

The matter came on for hearing on January 14-15 and February 9, 2004. The parties filed post-hearing briefs on February 26, 2004. The decision of the Hearing Officer is due on or before March 25, 2004.

### FINDINGS OF FACT

1. Student is \*\*\* grade student currently attending the \*\*\* School of Fort Worth, a private educational facility. Student lives within the jurisdictional boundaries of EMS, a political subdivision of the State of Texas and a duly incorporated school district. EMS, as Student's resident district, is responsible for providing a free appropriate public education to Student under the provisions of the IDEA.
2. Student is currently eligible for special education services as a student with a learning disability. Student was initially identified as a student eligible for services in the \*\*\* grade based on a learning disability and a speech impairment.
3. A private psychologist first diagnosed Student with Attention Deficit Hyperactivity Disorder (hereinafter ADHD) during his \*\*\* grade year.
4. A Comprehensive Individual Assessment (hereinafter CIA) was completed for Student in November 1995 during his \*\*\* grade year. The testing showed intellectual functioning in the superior range with discrepancies in performance significant enough to constitute a learning disability in reading, spelling, and math calculation/reasoning.
5. EMS recognized the diagnosis of ADHD in the psychological evaluation portion of Student's CIA and concluded that Student's disruptive and noncompliant behaviors resulted primarily from his ADHD. The CIA made these recommendations to address Student's ADHD: modified tasks such as shorten, highlight, use markers and windows for tracking, and break work into manageable tasks; provide energy breaks and opportunities for focused movement, develop a behavior management plan with weekly psychological consultations, and provide counseling services.

6. Following the completion of the CIA, an Admission, Review, and Dismissal Committee (hereinafter ARDC) convened in November 1995 to consider the results. The ARDC discussed Student's high level of activity and inconsistent attention and, as a result, Parent agreed to consult a physician concerning these attentional issues.
7. An ARDC reconvened in May 1996 to plan for Student's \*\*\* grade year. The ARDC noted significant academic and behavioral gains, while also noting the need for increased one-on-one support in the areas of reading and language arts. To provide this support, the ARDC recommended a pull out class for reading and language arts, and content mastery.
8. During the fall of Student's \*\*\* grade year, the ARDC conducted Student's annual review and noted that Student's behaviors of distractibility, impulsivity, over activity, and non-compliance presented the most significant challenges to his learning. Parent reported that Student's physician did not find Student to have ADHD. To address Student's behavioral challenges, the ARDC developed Individual Education Plans (hereinafter IEPs) in the areas of classroom behaviors and behavior management, and provided for additional modifications and adaptations.
9. Student's annual review in \*\*\* grade reflected that he was making "good progress" and the ARDC adopted similar IEPs and modifications as had been utilized in his \*\*\* grade year.
10. EMS conducted a three-year reevaluation of Student in October 1998, Student's \*\*\* grade year, and found continued deficits in the areas of reading, spelling, writing, and attention. Despite ongoing deficits, Student's score on the Wechsler Individual Achievement Test (hereinafter WIAT) subtest in the area of reading comprehension, when compared to his 1995 score, showed an increase in standard score from \*\*\* to \*\*\*.
11. In addition to the WIAT, EMS administered various tests in completing Student's CIA, including the Attention Deficit Disorders Evaluation Scale, school and home version. On the school version, Student obtained a standard score of \*\*\* on both the Inattentive and Impulsive/Hyperactive subscales (mean of \*\*\* and standard deviation of \*\*\*), placing him in the average range relative to the normative sample.
12. Based on Student's discrepant basic reading score on the WIAT when compared to his IQ and math scores, the EMS diagnostician referred Student for dyslexia screening. As a result, Student was placed in the regular education dyslexia instruction program for 45 minutes per day, in addition to his special education support in reading and language arts. Student remained in the dyslexia program for the remainder of \*\*\* grade and all of his \*\*\* grade year.
13. At \*\*\* grade, Student moved to \*\*\* School where he attended all regular education classes with content mastery support. Student continued to receive instructional modifications and supports to address his disabilities that included reduced assignments,

extra time for assignments, reduced distractions, highlighted materials, frequent breaks, proximity control, and clearly defined limits. Student's grades during his \*\*\* grade year were all "\*\*\*\*'s" and "\*\*\*\*'s."

14. During Student's \*\*\* through \*\*\* grade years, he was exempt from taking the TAAS Reading exam. Student successfully passed the Math TAAS exam with oral administration, mastering every objective during \*\*\*, \*\*\*, and \*\*\* grades and every objective but one in \*\*\* grade. In \*\*\* grade, Student obtained "Academic Recognition" on his Math TAAS test because of his high score.
15. Student was dismissed from the dyslexia reading program in August 2000, at the beginning of his \*\*\* grade year based on successful completion of the program. Although Student's assessment in the program showed a reading comprehension level of \*\*\* grade, Parent observed that Student's comprehension was not at that level and that he was able to give correct answers without a true understanding of written material.
16. Student's annual ARDC convened in October 2000, his \*\*\* grade year. As of this time, Student was beginning to evidence more difficulty in the educational environment as he was not completing work regularly and was constantly talking in class. The system of carrying a "drag sheet" to track assignments was not working. In addition, Student began to refuse his medication for ADHD.
17. Student's \*\*\* grade program and placement continued to provide for regular education classes with content mastery support. Student's final grades in \*\*\* grade declined to "\*\*\*\*'s" in the areas of English/Language Arts and Literature, while his other grades remained "\*\*\*\*'s" and "\*\*\*\*'s."
18. In \*\*\* grade, Student took the Reading TAAS test for the first time and mastered 5 of 6 objectives with a Texas Learning Index (hereinafter TLI) of \*\*\*. Student's passing score was high enough to meet the higher TEKS based standards. Student also passed the Math TAAS test with oral administration, scoring a TLI of \*\*\*.
19. Student's three-year reevaluation, a Full and Individual Evaluation (hereinafter FIE) conducted in September 2001, reflected continued deficits in basic reading, numeric operations, listening comprehension, and oral expression. Student continued to meet eligibility requirements for special education as a student with a learning disability. The FIE recommended continued adaptations and modifications for Student that included: alternate materials, highlighted texts, assignment/review sheets, organizers, modified or shortened assignments, extra time for completion of work, and one-to-one teaching.
20. Student's standard score on the reading comprehension subtest on the WIAT was \*\*\* as compared to \*\*\* in 1998, while his standard score on the basic reading subtest (assessing decoding and word-reading abilities) remained relatively constant with a \*\*\* as compared to a \*\*\* in 1998.

21. An ARDC convened in October 2001, Student's \*\*\* grade year, to review the results of the FIE and conduct Student's annual review. In developing Student's IEP, the ARDC recognized Student's ADHD and, pursuant to Student's reevaluation plan, conducted a Functional Behavioral Assessment (hereinafter FBA) to address the relationship between Student's challenging behaviors and his performance at school. The most commonly identified behaviors that interfered with learning were class disruption, being unprepared for class, and inability to focus; however, the ARDC determined that a behavior intervention plan was not needed as the behaviors did not significantly interfere with Student's learning.
22. The primary barrier to Student's success was his failure to turn in classroom assignments. Parent worked with Student's teachers to obtain assignments he did not turn in and ensure that he completed them.
23. The ARDC developed a study skills IEP to be implemented in both Student's regular and special education classes with objectives aimed at encouraging Student to remain on task, arrive in class on time with required materials, and to plan, prepare for, and perform assigned tasks on time. Otherwise, Student's schedule of services and instructional modifications remained the same from previous years.
24. During the spring semester of Student's \*\*\* grade year, he became increasingly frustrated, withdrawn, and depressed. Due to not turning in work and not attending class, Student began to receive failing grades. Student's difficulties with concentration again presented the greatest challenge to his academic performance. Parent requested a conference to address her concerns in April 2002 at which time the following changes in Student's program were made to assist him for the remainder of the \*\*\* grade year: provide Student with a copy of class notes, require attendance at Content Mastery on a daily basis, allow for dictating the results of homework, and send copies of all assignments to Parent by email for tracking purposes.
25. Student continued to struggle during the spring semester and had 16 absences due to truancy. The changes proposed at the April conference allowed Student to pass \*\*\* grade, but did not successfully address the challenges he was experiencing.
26. Student failed English/Language Arts and Writing at the end of \*\*\* grade and received "\*\*\*\*'s" and "\*\*\*\*'s" in the remainder of his courses. Student's grades reflect his need for increased support in order to be successful, particularly in the area of Language Arts and Writing.
27. In \*\*\* grade, Student took all portions of the TAAS test for the first time without the modification of oral administration. Student's \*\*\* grade TAAS scores were: **Reading**-mastered all objectives with a passing TLI score of \*\*\* and met the higher based TEKS standard; **Math**-mastered 10 of 13 objectives with a passing TLI score of \*\*\* and met the higher based TEKS standard; **Science**-mastered all objectives and achieved "Academic Recognition" for a high score; **Social Studies**-mastered 6 of 8 objectives and met the

- higher TEKS based standards; and **Writing**-mastered 2 of 3 objectives on the objective portion and failed the written composition portion with a score of “\*\*\*.”
28. Following the April 2002 conference, Parent decided to obtain an independent evaluation of Student in order to better understand the difficulties he was having at school. Scottish Rite Hospital for Children tested Student on May 10, 2002 and reported the results to Parent on June 20, 2002.
  29. The Scottish Rite evaluation diagnosed Student with Developmental Dyslexia, post remediation, a Written Expression problem, ADHD based on the previous diagnosis, and an Adjustment Disorder with Conduct Disturbance.
  30. The Adjustment Disorder diagnosis made by Scottish Rite was based on Student’s truancy at school and falling grades during \*\*\* grade, as well as his general lack of motivation concerning his academic performance. Dr. \*\*\* of Scottish Rite understood these behaviors to stem from the increased demands on Student due to maturing, coupled with a lack of effective coping techniques and an insufficient degree of intervention and support.
  31. The areas of concern noted by the Scottish Rite evaluation mirror those identified by EMS: dyslexia, learning disability in reading and written expression, ADHD, and behavioral issues related to motivation and declining grades.
  32. Scottish Rite made recommendations for Student’s program to address each identified area of concern. Some, but not all, of the recommended strategies and modifications had previously been employed by EMS. The recommendations that most distinctly differed from the program provided to Student by EMS concerned direct structured instruction to remediate Student’s weak skills in written expression, and greater use of classroom modifications and assistive technology to address the written expression deficits.
  33. In the area of Student’s dyslexia, the Scottish Rite report recommended classroom modifications and accommodations that had largely been utilized by EMS such as extended time for assignments, frequent breaks, modified administration of standardized tests, and the use of a computer.
  34. In the area of ADHD, the Scottish Rite report suggested accommodations for attentional weaknesses that had been, or were proposed to be, part of Student’s IEPs at EMS. Despite the recommended accommodations, Dr. \*\*\* of Scottish Rite emphasized that management of ADHD requires a multi-faceted approach that goes beyond classroom interventions. As such, Dr. \*\*\* strongly encouraged Parent to pursue medication for Student’s ADHD as well as self-management strategies.
  35. Based on Student’s declining grades and behaviors at the end of \*\*\* grade, and the results and recommendations of the Scottish Rite report, Parent pursued admission for Student to \*\*\* School, a private educational facility serving students with learning

disabilities. Parent learned in August 2002, on the day of Student's \*\*\* orientation at \*\*\* School in EMS, that Student had been accepted at \*\*\* School and she decided to enroll him there. As such, Student never attended classes at \*\*\*.

36. Student entered \*\*\* School working on grade level. Student's \*\*\* grade class at \*\*\* consisted of 26 students, with an average class size of 10-13 students.
37. On August 29 and October 15, 2002, EMS convened an ARDC to discuss Student's placement for his \*\*\* grade year. Parent first provided EMS with a copy of the Scottish Rite report for review at the ARDC meeting in August.
38. The ARDC members discussed Student's difficulties during his \*\*\* grade year, Parent's belief that placement in regular education classes with content mastery support did not offer enough support to Student, and the Scottish Rite report recommendations in attempting to devise a program for Student.
39. At the ARDC meeting, Student's family emphasized that EMS had not, and could not, adequately address Student's avoidant behaviors (truancy, not completing work, and poor motivation) that were central to his lack of success at EMS. Student's family believed that the program offered by EMS for Student at \*\*\* did not vary enough from the previously unsuccessful program at \*\*\* School to provide Student with an appropriate education.
40. The program proposed by EMS for Student's \*\*\* grade year included: general education classes with content mastery support, placement in a resource class for English, development of a Behavior Management Plan to support Student's use of content mastery and to utilize consequences for inappropriate behaviors, conducting a counseling assessment and FBA, providing counseling, providing after school tutorials, and developing IEPs for Student in writing and counseling. In addition, the ARDC requested consent from Parent to obtain an "Other Health Impaired" (hereinafter OHI) form from Student's doctor to designate Student as eligible for special education based on his ADHD.
41. Based on the Scottish Rite report, EMS proposed the following additional accommodations and modifications for Student in addition to those previously used in \*\*\* grade: providing a set of textbooks for use at home; utilizing a tape recorder and key board for assignments; allowing oral responses to assignments and allowing Student to dictate his thoughts before placing them on paper; providing short instructions, preferential seating for distraction control, and one on one task redirection; minimizing distractions, including the use of a study carrel if needed; utilizing positive reinforcement and frequent breaks.
42. The ARDC meetings ended in disagreement and Student continued to attend \*\*\* School during his \*\*\* year.

43. The program proposed for Student's \*\*\* grade year at \*\*\*, when considered in its entirety, offered Student sufficient additional support, interventions, and modifications to be reasonably calculated to provide Student with a meaningful educational benefit. The proposed program incorporated many of the recommendations from the Scottish Rite report and addressed the difficulties experienced by Student in his \*\*\* grade year.
44. An ARDC reconvened in October 2003 to consider Student's present competencies and performance at \*\*\* School and to develop a placement for Student at \*\*\* for his \*\*\* grade year, the 2003-2004 school year. Student's family expressed the belief that Student did not make progress while attending EMS schools and that no proposed plan would be acceptable.
45. The ARDC reviewed Student's \*\*\* grade instructional plan from \*\*\* School which described these goals and progress for Student: 1) Work on turning in assignments regularly and on time-Student made gradual progress toward goal, but did not master; 2) Work on time management, organizational skills, and classroom discipline-Student made gradual progress toward goal, but did not master. Student's grades during his \*\*\* grade year at \*\*\* consisted of "\*\*\*\*'s" and "\*\*\*\*'s." Teacher comments and discipline grades reflect some behavioral improvements, but continued challenges with staying on task and impulsive behaviors.
46. After consideration of various options, the ARDC proposed the following program and placement for Student's \*\*\* grade year: English, Math, Science, and Social Studies in a resource setting working on grade level TEKS, with the remainder of Student's classes in the regular education setting. EMS proposed the resource setting to minimize distractions, provide a smaller classroom environment and facilitate Student's transition back to the public school environment.
47. The October 2003 ARDC continued to recommend a counseling evaluation and again sought a release to obtain an OHI eligibility form from Student's doctor. The ARDC proposed an Independent Study Skills IEP addressing the areas of organizational skills, proofreading and editing, and attention span and an Adaptive Social Skills IEP addressing the area of self-discipline and off-task behavior.
48. Student's proposed modifications for \*\*\* grade continued to include: reduced assignments when mastery demonstrated (math), extra time to complete assignments, emphasis on major points, opportunity to dictate thoughts into tape recorder, content mastery, assignment notebook to be checked daily in each class, extra time for written responses, preferential seating to minimize distractions, 1:1 task redirection, minimize auditory and visual distractions and provide a study carrel if needed, monitored note taking, opportunity to use a word processor, clearly defined limits, positive reinforcement, and frequent eye contact and proximity control.

49. The program proposed for Student's \*\*\* grade year at \*\*\*, when considered in its entirety, was reasonably calculated to provide Student with a meaningful educational benefit.
50. The instant action for reimbursement and continued placement at \*\*\* was filed on May 21, 2003.
51. The actions that form the basis for this request for due process occurred in August 2002 when Parent unilaterally withdrew Student from EMS schools and enrolled him in \*\*\* School.
52. The instant action was filed within one year of the date on which Parent knew or should have know of the circumstances giving rise to this action.

### DISCUSSION

This is an action requesting reimbursement for Student's private education at \*\*\* School following Parent's decision to unilaterally withdraw Student from EMS based on her belief that EMS's program and placement for Student would not provide him with a free appropriate public education.

In order to obtain reimbursement for Student's unilateral placement at \*\*\* School, Parent must show that the individual education plan proposed for Student by EMS was inappropriate under IDEA and that the private placement was proper. If the Hearing Officer determines that EMS's program was appropriate, it is not necessary to reach the issue of the propriety of the private placement. *School Committee of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985). A presumption exists in favor of the school district's plan for educating Student, thus placing the burden on the party attacking the proposed IEP and placement. *Christopher M. v. Corpus Christi ISD*, 933 F.2d 1285 (5<sup>th</sup> Cir. 1991).

When a parent challenges the appropriateness of a student's educational program under IDEA, the Hearing Officer must conduct a two fold inquiry: 1) Has the school complied with the procedures set forth in IDEA and 2) Is the educational program developed reasonably calculated to enable the child to receive educational benefits? *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). This inquiry is set forth below.

### **Procedural Compliance With IDEA**

Petitioner argues that Respondent's failure to identify Student as a student eligible for services based on his ADHD was a procedural violation of IDEA. Respondent counters that Student's ADHD was recognized and addressed throughout his educational career at EMS regardless of his eligibility classification.

The record is abundantly clear, from a procedural standpoint, that EMS recognized, considered, and addressed Student's ADHD and attentional issues throughout his tenure at

EMS.<sup>1</sup> Beginning in \*\*\* grade, with Student’s initial identification as a special education student, both ARDC and assessment documents routinely reflect discussion of Student’s attentional challenges and the modifications necessary to assist him. In \*\*\* grade, Parent was asked to consult Student’s doctor about his attentional issues. At Student’s \*\*\* grade annual ARDC, Parent reported that the doctor declined to diagnose Student with ADHD. Despite the lack of a medical diagnosis of ADHD, when Student’s re-evaluation was completed in \*\*\* grade, EMS administered the Attention Deficit Disorders Evaluation Scale to assess Student in this known area of concern. At every annual ARDC meeting, the ARDC continued to discuss Student’s ADHD and its impact on his learning.

Although EMS could not designate Student as OHI based on his ADHD without a medical diagnosis of the condition, the weight of the evidence clearly supports the conclusion that EMS understood and identified Student’s ADHD as an integral part of his special education needs. The Hearing Officer finds that EMS met its procedural obligations under IDEA by consistently recognizing, assessing, and programming for Student’s ADHD and related behaviors.

### **Substantive Compliance With IDEA**

Because IDEA itself does not prescribe a substantive standard defining the precise level of education required to provide a free appropriate public education, courts have defined the required education as “personalized instruction with sufficient services to permit the child to benefit educationally from that instruction.” *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). The educational benefit that an IEP is designed to achieve must be meaningful and likely to produce progress, rather than regression or trivial educational advancement. *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997). Although the educational benefit must be meaningful, schools are not required to maximize a child’s potential or provide the best possible program. *Houston Independent School District v. Bobby R.*, 200 F.3d 347 (5<sup>th</sup> Cir. 2000).

The Fifth Circuit has further defined a free appropriate public education by delineating four factors to consider as indicators of whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational program individualized on the basis of 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 positive academic and non-academic benefits demonstrated? *Cypress-Fairbanks ISD v. Michael F.*, 118 F. 3d at 253.

Applying these standards and indicia of a free appropriate public education to the educational program proposed for Student by EMS, the Hearing Officer concludes that Student’s proposed program for \*\*\* and \*\*\* grades at \*\*\* School was reasonably calculated to provide Student with a meaningful educational benefit. Although Student experienced difficulties at

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<sup>1</sup> Whether EMS’s programming was substantively adequate to address Student’s ADHD will be discussed in the substantive compliance section.

EMS in his \*\*\* grade year that suggested his need for increased interventions and supports<sup>2</sup>, the Hearing Officer finds that EMS's proposed program for Student at \*\*\* addressed those difficulties and incorporated recommendations from independent assessment data provided by Parent such that the program would reasonably be expected to meet Student's needs and provide a meaningful benefit to him.

### Student's \*\*\* School Program

Student's \*\*\* grade program at \*\*\* School essentially duplicated his program from \*\*\* and \*\*\* grades: regular education classes with content mastery support and modifications to address his areas of disability. Following the CIA and FBA completed in his \*\*\* grade year, Student also had an Independent Study Skills IEP.

The evidence presented establishes that Student's educational program had proven successful in \*\*\* and \*\*\* grades, making it reasonable to continue it in his \*\*\* grade year. Specifically, Student's grades and TAAS scores in \*\*\* and \*\*\* grades reflected clear progress and mastery of the regular education curriculum. Following Student's completion of EMS's dyslexia program in \*\*\* grade, Student took the Reading portion of the TAAS exam for the first time in \*\*\* grade and mastered 5 of 6 objectives with a TLI score of \*\*\*, high enough to meet the higher TEKS based standards. Further, Student's achievement scores on the WIAT, taken at the end of \*\*\* grade and again at the beginning of \*\*\* grade, demonstrated notable improvement, particularly in the area of reading comprehension. Although Student's \*\*\* and \*\*\* grade program provided for modifications to address his attentional issues, the evidence indicates that those challenges were ongoing and continued to present difficulties for Student. Nevertheless, Student was able to participate successfully in the regular education environment, achieving academic success and managing his behavior effectively enough to attain meaningful educational benefits.

In \*\*\* grade, Student's grades began to decline, particularly in English and Writing, primarily due to a failure to turn in work and complete assignments. Student also exhibited a corresponding decline in his emotional state and attitude toward school. As a result, when Student's re-evaluation FIE was completed in the fall semester of his \*\*\* grade year, EMS conducted a FBA in addition to academic assessment to evaluate the impact of Student's behavior and distractibility on his learning.

The results of Student's FIE indicated an ongoing deficit in basic reading skills (decoding and word-reading ability), but improvement in the area of reading comprehension, with a standard score of \*\*\* in the average range. Student also scored in the average range on the written expression subtest, an improvement from earlier testing. The FBA identified Student's

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<sup>2</sup> In discussing Student's difficulties in \*\*\* grade, the Hearing Officer is not concluding that EMS failed to provide Student with a free appropriate public education during his \*\*\* grade year. The evidence establishes that despite Student's declining grades, attitudes, and attendance during the spring semester of \*\*\* grade, he completed the year with evidence of an educational benefit. Even so, the evidence also reveals a distinct decline in Student's performance and attitude that necessitated some response by EMS in order to continue to provide him with a free appropriate public education.

most frequent problem behaviors as being unprepared for class and unable to focus. Based on the information reviewed in conducting the FBA, the ARDC concluded that these problem behaviors did not rise to the level of interfering with Student's learning. Although Parent testified that she disagrees with that conclusion, the evidence presented did not demonstrate, as of October \*\*\* when the FBA was conducted, that Student's behaviors were precluding his ability to benefit from his education.

Certainly, as the \*\*\* grade year progressed, Student continued to decline and evidence more problematic behaviors. Parent was understandably concerned by this and initiated a meeting in April to devise a plan to support Student for the remainder of his \*\*\* grade year. Ultimately, Student did not pass English and Writing at the conclusion of the year, though his \*\*\* grade TAAS scores reflect a mastery of the grade level curriculum and a high level of achievement. In Reading, Student mastered all objectives and increased his TLI score from \*\*\* to \*\*\*. In Math, Science, and Social Studies, Student took the TAAS without the modification of oral administration for the first time and passed all subjects at the higher based TEKS standard, achieving the highest rating of "Academic Recognition" in Science. In Writing, Student passed the objective portion of the exam, but did not pass the written composition portion, which he took for the first time in \*\*\* grade. Thus, despite clear evidence of Student's difficulties in the spring semester of \*\*\* grade, the objective indicia of Student's performance over time establish that he was able to attain a meaningful educational benefit and true mastery of the grade level material. *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000).

Petitioner argues that Student's \*\*\* grade program did not provide him with a free appropriate public education given his decline over the year and EMS's failure to respond with increased intervention and support, particularly in the area of Student's attentional and behavioral issues. The Hearing Officer agrees that Student's declining grades, lowered self-esteem, and increased truancy were important red flags that signaled the need for additional interventions to support Student; however, the actions taken by EMS in August 2002 when planning for Student's \*\*\* grade year demonstrate that important revisions to Student's program were made to address these warning signs and support Student's ability to get back on track.

*Student's Proposed \*\*\* School Program For\*\*\*<sup>h</sup> and \*\*\* Grades*

In August 2002, the ARDC convened to plan for Student's \*\*\* grade year, with the benefit of the Scottish Rite report completed in June 2002 and the data concerning Student's declining performance in \*\*\* grade, both of which both confirmed the need for some alterations in Student's program to reasonably ensure continued educational benefit. The evidence shows that EMS recognized this necessity and proposed additional supports and interventions for Student such as Resource English, a Behavior Management Plan to support Student's use of Content Mastery and provide structured consequences for inappropriate behaviors, an IEP with goals and objectives in Writing, a counseling assessment and counseling services, and revised modifications based on the Scottish Rite recommendations.

These proposed changes in Student's educational program addressed the exact areas of concern identified by Student's \*\*\* grade experience and the Scottish Rite report by offering

Student additional support in English and Writing, a more structured behavioral tracking system to help control classroom behavior and ensure the use of Content Mastery, counseling to assist with the emotional and motivational issues Student faced in \*\*\* grade, and additional modifications to address both attentional and reading challenges. Indeed, the proposed program incorporates much of what was recommended by Scottish Rite, particularly in the areas of ADHD management, the family's primary concern.

In October 2003, the ARDC reconvened to plan for Student's \*\*\* grade year, relying primarily on Parent's report of Student's experiences at \*\*\* School during the \*\*\* grade. After considering this data, the ARDC proposed placing Student in resource classes working on grade level TEKS in English, Math, Science, and Social Studies with the remaining classes in the general education environment. This placement was designed to duplicate the smaller class size and learning environment that Student had experienced at \*\*\* School and ease his transition back to \*\*\*. Other services and modifications remained as proposed for Student's \*\*\* grade year.

When comparing EMS's proposed program to that provided at \*\*\* School, the Hearing Officer finds that the goals and objectives identified for Student were the same as those designated by EMS in Student's Independent Study Skills IEPs (turn in assignments regularly and on time, time management, organizational skills, and classroom discipline), the progress enjoyed by Student toward those goals was similar (progress uneven, goals continued), Student's grades were similar to those at EMS (\*\*\*'s and \*\*\*'s during his \*\*\* grade year), and the comments of his teachers reflected ongoing challenges with the same types of attentional and behavioral issues he experienced at EMS. The Hearing Officer understands that the smaller school and class size at \*\*\* School allowed Student more personalized attention and was highly beneficial to him; however, the evidence demonstrates that Student's program and performance at \*\*\* were not substantially different from that at EMS, with the exception of the end of Student's \*\*\* grade year when he began to experience greater difficulties. The changes in program proposed by EMS were intended to provide Student with some of the same benefits as the smaller environment of \*\*\* and were reasonably calculated to provide Student with the additional support he needed to regain his success at EMS.

The Hearing Officer finds that the changes in Student's proposed program for \*\*\* and \*\*\* grade at \*\*\* reflect EMS's efforts to individualize instruction for Student based on his identified needs, while attempting to maintain instruction in the least restrictive environment that would allow Student to achieve a meaningful educational benefit. Parent's removal of Student from EMS before the implementation of this revised program did not allow EMS the opportunity to establish that its program could effectively address the difficulties encountered in Student's \*\*\* grade year and incorporate the recommendations made by Scottish Rite. As such, Parent is not entitled to reimbursement from public funds for the cost of sending Student to \*\*\* School. *Todd v. Duneland School Corporation*, 299 F.3d 899 (7<sup>th</sup> Cir. 2002) (school provided free appropriate public education making reimbursement for private education improper where school improved on already successful efforts by using previously successful methods and adding additional services and supports); *Fort Zumwalt School District v. Clynes*, 119 F.3d 607 (8<sup>th</sup> Cir.

1997) (school provided a free appropriate public education making reimbursement for private education improper where school improved on student's prior program, but parent withdrew student before allowing program to be implemented).

IDEA requires schools to provide educational programs that allow students to attain meaningful progress; however, it does not require the best possible education or results. Although Student may benefit more from his education at \*\*\* School, academically, emotionally, and socially, this is not the legal standard that determines whether EMS must pay for this private placement. Many students benefit from and do better in private placements that offer the very small ratios afforded by \*\*\* School, but under IDEA, public schools are required to pay only for those students who cannot receive a free appropriate public education in the public school setting. In Student's case, the Hearing Officer concludes that despite the difficulties he encountered in his \*\*\* grade year, the weight of the evidence establishes that he did achieve the requisite benefits at EMS and that his proposed program included sufficient changes to address the emerging problems Student faced.

#### CONCLUSIONS OF LAW

1. Student is a student in the Eagle Mountain-Saginaw ISD who is eligible for special education services under the provisions of IDEA and its implementing regulations with the disability classification of Learning Disabled.
2. Respondent Eagle Mountain-Saginaw ISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA and its implementing federal and state regulations. EMS ISD is Student's resident district and has the responsibility to provide him with a free appropriate public education. 20 U.S.C. § 1401 (a)(18).
3. Petitioner's action for due process is timely pursuant to 19 T.A.C. § 89.1151(c).
4. Respondent's proposed IEPs and placement for Student for his \*\*\* and \*\*\* grade years were reasonably calculated to enable Student to receive educational benefits under the standards enunciated in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982) and *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997).
5. Petitioner is not entitled to reimbursement for tuition at \*\*\* School for Student's \*\*\* and \*\*\* grade years. *School Committee of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985).

#### 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 25<sup>th</sup> day of March 2004.

*/s/ Lynn E. Rubinett*

Lynn E. Rubinett

Special Education Hearing Officer

Student		§	BEFORE A SPECIAL EDUCATION
BNF Parent	§		
	Petitioner	§	
		§	
v.		§	HEARING OFFICER FOR THE
		§	
EAGLE MOUNTAIN-SAGINAW		§	
INDEPENDENT SCHOOL DISTRICT		§	
	Respondent	§	STATE OF TEXAS

SYNOPSIS

**Issue:** Whether Respondent failed to provide Petitioner with a free appropriate public education such that he is entitled to reimbursement for a unilateral private placement at \*\*\* School.

**Held:** For Respondent. Respondent’s proposed educational program for Petitioner was reasonably calculated to provide Petitioner with educational benefit in the least restrictive environment under the standards of *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982) and *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997).

**Cite:** 34 C.F.R. §§300.300; 300.552.