

DOCKET NO. 279-SE-0405

Student B/N/F ***, Petitioner

VS.

BEFORE A SPECIAL EDUCATION
HEARING OFFICER
FOR THE STATE OF TEXAS

VICTORIA INDEPENDENT SCHOOL
DISTRICT, Respondent

DECISION OF THE HEARING OFFICER

Student (Petitioner) through his next friend, *** requested a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et. seq.*, as amended. The Respondent is the Victoria Independent School District.

Petitioner alleged that Respondent denied student a Free Appropriate Public Education (“FAPE”) during the Spring of 2004 and during the 2004-2005 school year in the following particulars:

1. Failure to provide FAPE arising out of an incident wherein Petitioner was allegedly *** at the school in the Spring of 2004.
2. Failure to provide FAPE by failing to properly clean *** from Petitioner.
3. Failure to provide counseling and an appropriate evaluation.

For relief, Petitioner requested:

1. Compensatory education services in the area of counseling for one year.
2. An evaluation, including a psychological evaluation.

Held, for Petitioner.

PROCEDURAL HISTORY

Petitioner’s request for hearing was received by Texas Education Agency on April 27, 2005, and assigned to Special Education Hearing Officer Sharon M. Ramage. Petitioner was represented by Christopher Jonas, of Corpus Christi. Merri Schneider-Vogel, of Houston, represented the Victoria Independent School District.

The hearing was initially scheduled for May 24, 2005, with a decision due date of June 11, 2005. A telephone prehearing conference was held on May 4, 2005 and was transcribed by a court reporter. Both parties requested a continuance due to scheduling conflicts. I found that good cause existed to continue this matter to June 21, 2005.

Respondent filed a Motion to Dismiss which was granted in part and denied in part.¹ Respondent also raised the one-year statute of limitations, requesting that Petitioner’s complaint be dismissed to the extent it encompassed allegations of acts or omissions on the part of Respondent which occurred more than one year prior to the date of the filing of this Request for Hearing. The applicable limitations period in this case is one year. 19 T.A.C. §89.1151(c).

¹ The basis of Respondent’s Motion to Dismiss was that Petitioner failed to state a claim for which relief could be granted with regard to *** allegations. I granted the Motion to Dismiss in part. However, to the extent Petitioner’s complaint encompassed Respondent’s responsiveness to the student’s educational needs, including a failure to provide counseling or other related services, the Motion was denied.

Therefore, any relief granted herein is limited to that necessary to compensate or remedy any acts and omissions on the part of Respondent which occurred after April 27, 2004.

The hearing was held on June 21-22, 2005. The parties requested an extension of the decision due date in order to submit proposed findings of fact and written arguments, and I found good cause to do so. The Decision Due date was extended to August 8, 2005 and the Decision was timely rendered and forwarded to the parties.

Based upon the evidence and argument of the parties, I find that Petitioner prevails and make the following findings of fact and conclusions of law. (All references to the transcript will be designated as "Tr." followed by the volume and page number; all references to Petitioner's and Respondent's exhibits will be designated as "R" or "P", followed by the exhibit number.)

FINDINGS OF FACT

1. Student is student in the Victoria ISD. During the 2004-2005 school year, he completed the *** grade.
2. Student receives special education services as a student with Other Health Impairment and Speech Impairment. (R-3; P-10)
3. Student has been diagnosed with a heart condition, attention deficit hyperactivity disorder, speech impairment, **** syndrome. (Tr. I-12-13, 15, 90,91) Student's *** did not form properly and his **** is enlarged. ***. (Tr. I-90-91, 141-142). This condition can only be corrected with surgery and student's parents have elected not to have the surgery on medical advice because of his heart condition. (Tr. I-15). He wears "****" and will do so all of his life. (Tr. I-13) Additionally, he has *** syndrome. ***. (Tr. II-63) Student is also lactose intolerant, a factor which negatively impacts on his *** syndrome. (Tr.I-94-95)***. (Tr. I-91). However, even when student is not having seizures, he continues to ***, no control over them, and requires assistance with ***. (Tr. I-91, 94, 142-143, Tr. II-52)
4. ***. (Vol.I-15, 91, 94: Tr. II- 63-65, 146, 155). As student has matured, he has become more self-conscious about his physical condition and has some emotional problems as a result. (Tr. I-93-98)
5. Based upon student's Full and Individual Evaluation, the ARD Committee determined that student met the eligibility criteria for a student with Other Health Impairment and Speech Impairment. Student's physician completed the OHI eligibility report and stated that student's health condition adversely affected his educational performance in the area of difficulty with adaptive behavior or self-help skills, specifically ***, in addition to difficulties with alertness and his need for medication and rest periods. (R-3)
6. During the 2003-2004 and 2004-2005 school years, student's IEP's specifically provided that his disability significantly interferes with his educational progress in the area of adaptive behavior. (R-4; R-5; R-9) Student's *** teacher acknowledged that student had deficits in this area and required the assistance of a nurse when he ***. (Tr. II-52, 59, 64). He has no other adaptive behavior deficits.
7. Although student's IEP's during the 2003-2004 and 2004-2005 school years indicate that school health services had been previously provided to student, no School Health Services Plans were incorporated into any of student's IEP's. (R-4; R-5; R-9). The IEP's for these time periods contained no documentation that a school health services plan had been terminated, and there was no indication in the FIE that student no longer needed these related services. (R-3; R-4; R-5; R-9) The District hired a new *** for the 2004-2005 school year. The new *** testified that she reviewed student's *** file when she became employed and that it contained no documentation regarding his health conditions or the assistance he required other than a notation on a "stickum" regarding medications. (Tr. II-111, 112, 124). Mrs. *** testified that she provided the District with documentation from student's therapist (P-3; P-7) and the ARD Committee minutes indicate that she informed school personnel that student was in counseling. (P-6). Mrs. *** also testified that she provided documentation to the District during the 2003-2004 school year with regard to student's

lactose intolerance and a prescription that student have no dairy products or juices at school. (P-9) District personnel denied seeing this documentation. However, student allegedly (at some point in time) had a school health services plan and frequented the *** office during the 2003-2004 school year for *** assistance as well as medications and assistance following seizures. It is inconceivable that this student's *** file would contain no pertinent information regarding his health conditions and only a "stickum" regarding his medication. Based on a preponderance of the credible evidence, it is reasonable to infer that Mrs. *** provided the documentation to the District and the school *** for the 2003-2004 school year failed to maintain it.

8. During the 2003-2004 school year, the ***, ***, was instructed to call student's parents when student needed ***, but she never did. (Tr. I-16, II-10-22). Allegedly, Ms. *** was charged with *** student's *** and ***. The parent reported that he would frequently come home *** and that this was an ongoing issue during the 2003-2004 school year. (Tr. I-108).
9. According to Mrs. ***, student's 2003-2004 teacher, student required assistance with *** 3-5 times per week, and sometimes he needed daily assistance. (Tr. II-52-53). This is consistent with the testimony of Mrs. ***, an a *** who was assigned to assist student in his *** needs at the end of the 2003-2004 school year and for the first week of the 2004-2005 school year.
10. *** was inconsistent with regard to the consistency with which she saw student during the 2003-2004 school year. ***, (Tr. II-11-20) ***, (Tr. II-16-17) She testified that when called upon to do so, she *** student properly and never harmed him in any way. I do not find her testimony to be credible.
11. On one occasion during March of 2004, Mrs. *** went to the school to see student and was not in the classroom, but was in the *** office allegedly being ***. Mrs. *** went to the nurse's office and discovered Mrs. *** at her desk and student in the restroom unattended, ***. Mrs. *** was not *** him. There were no wipes and Mrs. *** was unable to locate any. Ms. *** told her to use brown paper towels from the dispenser. (Tr. II-104-106)
12. During March of 2004, Mrs. *** noticed cuts around student's ***and on his ***. (Tr. I-101). Student told his psychologist, Dr. ***, that the***. (Tr. I-28, 62, 83). Dr. *** made a report to Child Protective Services in response to student's statements. Child Protective Services did not find sufficient evidence to conclude that student had been *** abused. (P-8) Dr. *** testified that he did not necessarily believe student was *** abused, but that student. was traumatized by the events that happened in the *** office and that it had had a serious emotional impact on him. (Tr. I-63)
13. Student testified that *** . (Tr. I-189). He referred to these actions as "bad things" and calls *** the monster. (Tr. I-192) *** denied using gel to clean student, but acknowledged using liquid soap. It is very easy to see that student would confuse liquid soap with gel.
14. Mrs. *** acknowledged that she had used brown paper towels to clean student. along with soap from the soap dispenser. She stated that she used water to wet the towels before using them. I do not find her testimony that she wet the paper towels to be credible. Mrs. *** appeared to minimize the number of times she used brown paper towels to clean student. Mrs. *** described the manner in which she cleaned student by stating that she would have a wipe in each hand and simultaneously wipe the front and the back in one movement. (Tr. II-17-18) ***, (Tr. II-28) I do not find her testimony to be credible.
15. Following the incident with Ms. ***, the District took steps during the remainder of the Spring of 2004 to have an aide assist student with his *** needs. (Tr. II-66, 87, 130) Ms. *** testified that she saw student 3-5 times per week in order to *** him and assist him in ***, but by the end of the school year she was only *** him 1-3 times per week. (Tr. II-136) Although Ms. *** says she had no *** responsibilities after the 2003-2004 school year, student's *** grade teacher reported that she believed Ms. *** was *** student during the first week of school. (Tr. II-170, 193). Ms. *** testified that student was incapable of ***. (Tr. II-146, 155).

16. Student's physical condition did not change during the 2004-2005 school year in that he continued to have ***. He continues to this day to require assistance following a ***. ***. (Tr. I-141)
17. Student's *** grade teacher did not understand the nature and extent of student's health conditions, including his *** condition. She testified that she did not know that he had a history of being incapable of ***. (Tr. II-210-211) It was apparent from the testimony of the teacher that she believed student could take care of his ***. She testified that he would excuse himself from her classroom daily to go to the bathroom and then return to class. She testified that she only saw him take *** to the bathroom on one occasion during the school year. (Tr. II-198, 206, 208). She acknowledged that Mrs. *** complained on one occasion that student was coming home ***. Her response to Mrs. *** was "I don't know what he does when he goes." (Tr. II-212)
18. Dr. *** testified that student experiences anxiety with regard to his *** needs and that he has felt *** by other students. He testified that the cumulative effect of the events that occurred in the Spring of 2004, ongoing teasing by peers and his health condition have had a significant emotional impact on student (Tr. I-62, 63, 67) According to Dr. ***, counseling would be an appropriate intervention. (Tr. I-63) Dr. *** began seeing student prior to the 2003-2004 school year due to aggressive behavior, and ongoing psychological concerns following a referral from student's physician. Dr. *** is only able to see student once per month due to distance and he has been unsuccessful in referring student to a counselor in Victoria. (Tr. I-53, 57, 65). Dr. *** believes student could benefit from more intense counseling than he is able to provide in one session per month. He has attempted to refer student to an outside counselor rather than recommend school counseling because he assumed the school would have a limited ability to work with student (Tr. I-66). He does maintain, however, that counseling is an appropriate intervention to address student's needs.
19. Mrs. *** testified that student reports to her that the other children call him *** and ridicule him and that this causes student a lot of emotional distress.
20. The *** teacher denied that student smelled *** at any time during the 2004-2005 school year. This testimony, in light of the credible evidence as whole, is not credible.
21. The *** teacher testified that some students made fun of student "no more than six times", that she addressed it in the classroom and it ceased being a problem. (Tr. II-174) She also testified that student did not show any signs that he was embarrassed or in any way emotionally affected by his health condition. Based on a preponderance of the credible testimony and the demeanor and credibility of student when he testified, I do not find this testimony to be credible.
22. It was apparent in assessing the demeanor and credibility of student that he experiences significant embarrassment with regard to his health condition and his inability to ***. Additionally, it was apparent that he was traumatized by the events that occurred in *** office.
23. Based on the totality of the testimony of student, his mother and his *** teacher, I find that for all but one week of the 2004-2005 school year, student attempted to *** on his own without assistance from ***. (Tr. I-185, 191) Student testified that by the time he went to the ***, ***. (Tr. I-184) He testified that ***. Student testified that he needed his mother's help in *** when he got home. (Tr. I-184) Student testified that other students make fun of him because *** and it makes him sad.² (Tr. I-176)

² Respondent asserts that the evidence only shows that the students make fun of student because ***, not because ***. This is a distinction without a difference.

24. Mrs. *** testified that student would frequently arrive home from school with *** and on his body. This occurred as frequently as 3-4 times per week. *** She stated that he would *** when he arrived home. Mr. *** also testified that student would come home from school *** and in need of ***. (Tr. I-130, 143, 145, 166)
25. I find, based on a preponderance of the credible evidence and testimony, that Respondent failed to make reasonable efforts to assist student in his *** needs during the 2004-2005 school year.
26. I find, based on a preponderance of the credible evidence and testimony, that student has significant deficits in adaptive behavior, specifically self-help and ***, and requires assistance in *** and ***, and that Respondent failed to provide this assistance during the 2004-2005 school year.
27. I find that Respondent wholly failed to address student's adaptive behavior deficits in the area of self-help and *** skills during the 2004-2005 school year.

DISCUSSION

There are two basic threshold issues in this case. First, did student, as a result of a disability, require assistance in the area of self-help skills, specifically ***, and second, did Respondent appropriately respond to student's needs? The evidence in this case is very clear that student had a physical condition which prevented him from independently taking care of his *** needs. The evidence in this case is also clear that this deficit in adaptive behavior was deemed by the ARD Committee to significantly interfere with student's ability to be successful in the classroom (R- 4, R-5, R-9). The answer to the second question, i.e., did Respondent adequately respond to student's need for *** assistance, is ultimately decided on an evaluation of the credibility of the witnesses. In sum, I find that the testimony presented by Petitioner that Respondent did not properly *** student to be credible. I find the Respondent's proffered testimony that either student had no need for assistance, or that the District adequately responded to any needs if they existed, to be less than credible.

Given a finding that student requires *** assistance, and that Respondent failed to provide appropriate *** assistance for student during the 2004-2005 school year, the next inquiry is whether the District's failure to properly *** student and respond to his need for *** assistance during the 2004-2005 school year equates with a denial of a Free Appropriate Public Education. For the reasons set forth below, I find that it does.

The United States Supreme Court established a two-prong test for determining whether a school district has provided a free appropriate public education. The first inquiry is whether the school district complied with IDEA's procedural requirements. The second inquiry is whether the student's IEP is reasonably calculated to confer an educational benefit. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S. Ct. 3034 (1982). An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Rowley, supra.*; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

Procedural Sufficiency

IDEA establishes certain procedural requirements in formulating and implementing a child's IEP. Procedural flaws do not automatically require a finding of a denial of a free appropriate public education. However, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the development of the IEP, result in the denial of a free appropriate public education." *Adam J. v. Keller ISD*, 328 F. 3d 804 (5th Cir. 2003).

With regard to procedural deficiencies, student's OHI eligibility report specifically provides that he has difficulty with self-help skills, specifically ***, as a result of his disability. Additionally, each of student's IEP's during the 2003-2004 and 2004-2005 school years specifically provide that his disability significantly interferes with his ability to meet regular mastery levels in the area of adaptive behavior. His IEP's also reflect that School Health Services

have previously been provided. However, none of the IEPs incorporated a school health services plan or specified the manner in which the school health services would be provided. In fact, it is doubtful that one existed at all given that the *** for the 2004-2005 school year testified that she inherited a *** file that contained absolutely no health information about student other than a “stickum” note pertaining to medication.

The lack of specificity with regard to the related school health services that student requires or the manner in which his *** needs would be addressed significantly impacted student’s meaningful access to a Free Appropriate Public Education. Neither student’s teacher nor the school *** for the 2004-2005 school year had specific knowledge with regard to student’s health condition and its impact on his ability to care for his *** needs. Student’s teacher and aide during the 2003-2004 school year were certainly aware of the full extent of his *** problems and testified that he was incapable of independently *** himself. However, this information was obviously not provided to the 2004-2005 personnel who worked with student. It is extremely alarming that the school *** as of the date of the hearing had no knowledge of the nature of student’s disability, *** condition. She only knew she was to help him with *** if he “needed it” and that he never asked for help. The teacher testified that student excused himself to the bathroom daily, but acknowledged that he never took *** with him. She acknowledged some teasing incidents and acknowledged that Mrs. *** at one time talked with her about student coming home ***. Yet, there was never any follow-up on her part to determine the nature and extent of student’s physical condition and its impact on his self-help skills.

An IEP must be written so that it contains sufficient detail that the school personnel required to implement it are apprised of the child’s needs and goals as well as the appropriate means and methods necessary to address and achieve them. If a student requires school health services as a related service, these services must be specified in the student’s IEP. See *Letter to Anonymous*, 25 IDELR 531 (OSEP 1996). In *Marshall County Board of Educ.*, 25 IDELR 794 (Ala. State Educ. Agency 1997), A special education hearing officer held that a school district’s failure to provide specific detail about school health services for a child in need of clean intermittent catheterization resulted in a denial of FAPE when the end result was a lack of knowledge on the part of school personnel of her need for related services and when none were provided. *Id.* This case presents much the same scenario. Student had an obvious need for assistance in the development of self-help skills and assistance in taking care of his *** needs. The deficient IEP’s did not provide sufficient detail with regard to the scope of his disability and his need for *** assistance to arm his *** teacher with the knowledge that would have enabled her to recognize that something was amiss when student was not going to the *** for assistance. Respondent’s failure to detail appropriate related and supportive services and to adequately address his adaptive behavior deficit and need for *** assistance in the IEP resulted in a loss of educational opportunity. See *Adam J. v. Keller ISD*, 328 F. 3d 804 (5th Cir. 2003). The procedural errors in this case did not result in a trivial denial of FAPE in that the IEP wholly failed to address student’s specific adaptive behavior deficit, an area in which the ARD Committee determined his disability would significantly impair his ability to be successful.

Substantive Sufficiency

In evaluating whether an educational program is reasonably calculated to confer an educational benefit, the Fifth Circuit Court of Appeals has identified four factors to consider:

1. Is the program individualized on the basis of the student’s assessment and performance?
2. Is the program administered in the least restrictive environment?³
3. Are the services provided in a coordinated and collaborative manner by the key stakeholders?
4. Are positive academic and nonacademic benefits demonstrated?

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245 (5th Cir 1997); *cert. denied*, 522 U.S. 1047 (1998).

³ Student’s placement was in the general education setting. There is no question that he was educated in the least restrictive environment and this factor is not an issue.

In applying these factors to the facts of this case, I find that student's educational program for the 2004-2005 school year was not calculated to and did not provide a meaningful educational benefit, and in fact student demonstrated regression in the area of accessing *** assistance that was completely ignored by the District. The analysis of the deprivation of FAPE as a result of procedural deficiencies is similar to the analysis of the substantive denial of FAPE because of the District's failure to specifically address related services and to provide the same.

Did the District's failure to provide related services to assist student in * result in a denial of FAPE?**

A fundamental principle of IDEA is that disabled students have meaningful access to a free appropriate public education, including the provision of related services designed to meet the unique needs of the student. 20 U.S.C. § 1400(d); 34 C.F.R. 300.13.; 34 C.F.R. 300.24; 34 C.F.R. 300.347. The preponderance of the credible evidence establishes that during the 2004-2005 school year, student accessed no related services which would have assisted him in the area of self-help or *** skills. In fact, the District offered none.

As stated herein, student is unable to physically *** as it occurs as a result of his physical conditions. His Full Individual Evaluation provides that student's health condition adversely affects his educational performance in the area of self-help skills, specifically ***. His IEP specifically provides that his disability significantly interferes with his educational progress in the area of adaptive behavior. However, student's IEP does not provide any guidance with regard to the manner in which these adaptive behavior deficits or the development of self-help skills will be addressed. Student's IEP is not individualized with regard to his specific disability and his need for necessary related services. Consequently, it is not surprising that none were provided.

Related services are defined as "... developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education ... The term also includes school health services ..." 34 C.F.R. § 300.24(a) and counseling. School health services are defined as services provided by a qualified school nurse or other qualified person. 34 C.F.R. § 300.24(b)(2), (12). While, student's IEP for the 2004-2005 school year referenced a previously implemented health services plan and a need for assistance in the area of adaptive behavior, no specific related services were provided with regard to student's specific needs in the area of ***.

Respondent cites the case of *Brandywine Public Schools*, 35 IDELR 81 (Mich. State Educ. Agcy. 2001) as an example of the only circumstance in which a failure to address *** needs may result in a denial of FAPE. In *Brandywine*, a student with multiple disabilities required an adaptive toilet, the school district failed to provide one in a timely manner, and she suffered a fall during the time period that one was not provided. The hearing officer concluded that the student suffered more than a *de minimis* denial of FAPE, reasoning that addressing the student's *** needs was an obligation of the district, and that the student missed educational days as a result of the fall. The relief ordered in that case was compensatory educational hours to work on goals and objectives in her daily living skills in an amount commensurate with her absences. *Id.* In the instant case, the District was obligated to address student's deficits in his self-help skills and wholly failed to do so. The harm student suffered was not a physical injury, but an emotional one. The cumulative effect of the events in the Spring of 2004, ongoing teasing by other students, student's own apparent emotional conflict with regard to his condition, and the District's failure to *** student during the 2004-2005 school year have all contributed to a situation where student now does not seek out the assistance that he needs. The failure on the part of school personnel to be aware of his physical limitations resulted in student unsuccessfully attempting to *** himself and frequently ***. The District's failure to provide appropriate related services for student may not have left him with physical injuries like the student in *Brandywine*, but it has certainly affected him emotionally and interfered with his ability to develop self-help skills and access *** assistance.

A Texas hearing officer considered a complaint regarding a student's right to privacy with regard to *** in *C. M., bnf S.M. vs. Sinton ISD*, Docket No. 043-SE-1097 (TEA March 1997). In that case, a disabled student required a therapeutic ***. The District attempted several methods to respond to the student's need for assistance with ***, none of which provided privacy to the student. *Id.* The parent testified that other students teased her son and that it caused him to be embarrassed. The Hearing Officer concluded that District's actions in addressing the student's *** needs posed unacceptable risks of additional teasing and additional embarrassment, thereby denying him the degree of privacy commensurate with an appropriate education. *Id.* I have found that student experienced teasing

and ridicule from other students as a result of his health condition and that it had a significant impact on him emotionally. As student's *** needs were not addressed, and he *** was denied the degree of privacy *and dignity* commensurate with an appropriate education.

Services were not provided to student in a coordinated and collaborative manner by key stakeholders. The lack of documentation on the part of the District with regard to appropriate responses to student's self-help skills was critical in this case. Although not documented, it is apparent that for a portion of the 2003-2004 school year,⁴ the District attempted to respond to student's *** needs by *** and assisting him in ***. It was apparent that student's teacher and the *** aide had full knowledge of student's health condition and its implications in the area of his adaptive behavior.

However, during the 2004-2005 school year, student had a new teacher and the school hired a new ***. Neither of these professionals had any knowledge of the extent and nature of student's health condition and its impact on his self-help skills. Had the District properly documented the nature and extent of student's health condition and its implications for his education, the *** grade teacher and the newly hired *** would have been armed with the knowledge necessary to recognize that student was not accessing the appropriate assistance. The phrase "the right hand not knowing what the left hand was doing" characterizes the manner in which the services for student were implemented. The lack of communication among student's teachers and related service providers from one school year to the next resulted in a complete failure to address student's ability to access related services which would enable him to receive academic and nonacademic benefits.

Respondent contends that student received positive academic benefits during the 2004-2005 school year, as evidenced by his passing grades. Perhaps it can be said that student made passing grades and received academic benefits in spite of the District's failures. The fact that student made passing grades does not relieve the District of its responsibility to provide the necessary related services which would have addressed student's adaptive behavior deficit and his obvious need for assistance in ***.

The evidence is clear that student did not access assistance with his *** needs and that his emotional state had a negative impact on his ability to do so. This case presents a series of event and circumstances which render it difficult to pinpoint the "cause" for student's reluctance to access services in the area of his self-help skills. While I do not believe the evidence supports a finding that student was *** abused by the ***, it is abundantly clear that something traumatic from the perspective of student occurred in the *** office associated with ***. I am convinced that *** handled student in a manner that was hurtful and that this conduct impacted student emotionally. I have also found that student experienced teasing and ridicule from his peers. Student is also at a developmental stage where he is more aware of his limitations as compared to other children, in light of the tendency of *** graders to gain more independence. It is clear from the preponderance of the credible evidence that student experiences a significant amount of embarrassment as a result of his condition, whether it is from his own internal conflict or from being subjected to teasing and ridicule by peers. All of these factors - the actions of the ***, the teasing by other students, student's maturity level, and the Respondent's failure to adequately respond to his needs - appear to have impacted student emotionally. This emotional impact significantly interfered with student's ability to access assistance with his *** needs.

The record is clear that there was a qualitative and quantitative difference in the manner in which Respondent addressed student's *** needs when comparing the 2003-2004 and 2004-2005 school years. Student's health condition did not disappear after the first week of the 2004-2005 school year. In fact, it will never disappear. While student was able to seek the assistance he needed in the 2003-2004 school year, he was clearly not able to do so during the 2004-2005 school year. Even sadder is the fact that none of the personnel working with student knew enough to know better.

Ultimately, the cause of student's failure to access assistance to address his *** needs during the 2004-2005 school

⁴ Although I find that *** did not adequately *** student during the 2003-2004 school year, the only portion of that year within the Statute of Limitations would encompass the time during which Ms. *** was adequately *** student

year is not so much an issue as Respondent's lack of responsiveness to his needs. Had Respondent adequately addressed student's needs in his IEP, or informed his new teacher and the new nurse of the nature and extent of his health condition, it may not have missed the opportunity during the school year to respond to his inability to seek assistance in caring for his *** needs. Student was not independently addressing his own *** needs during the 2004-2005 school year. Rather, he was ignored and allowed to sit in a classroom in his own *** throughout the school year. This is unacceptable. Respondent's failure in this regard resulted in a denial of a Free Appropriate Public Education in that it denied student meaningful access to his education. The denial was not *de minimis* because the Respondent's shortcomings were not in failing to implement some portions of his IEP with no impact on his education. Rather, the Respondent wholly failed to address student's self-help skills, when it had already determined that his disability would significantly interfere with his educational success in the area of adaptive behavior.

RELIEF

For relief, Petitioner requests compensatory services in the form of a psychological evaluation, counseling assessment and counseling services. I am not bound by Petitioner's request, but by the guidance from the record regarding what student needs now to obtain a FAPE, taking into consideration equitable concerns. See *J.K. v. Clear Creek Indep. School District*, Docket No. 085-SE-1104 (TEA, February 2005); *Alamo Heights Indep. School Dist. V. State Board of Education*, 709 F.2d 1153 (5th Cir. 1986) Compensatory relief is available under IDEA as an equitable device to remedy substantive violations. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). IDEA requires that relief be designed to ensure that the student is appropriately educated within the meaning of IDEA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9th Cir. 1994). Thus, determining what compensatory relief is appropriate turns on a consideration of the extent of the denial as well as what services would be needed to provide a free appropriate public education in light of that denial.

The extent of the denial of FAPE in this case is the District's failure to address and respond to student's need to develop self-help skills and access assistance with ***. Based on the evidence, it is apparent that at this point in student's life, development of appropriate self-help skills would involve at a minimum communicating the need for and seeking appropriate assistance in ***. If student is *** himself, he must be able to seek out and access assistance.

The second element of compensatory relief turns on a consideration of what services are needed to provide a free appropriate public education in light of the denial of FAPE. It is clear from the evidence that counseling would be an appropriate related service to respond to student's emotional state and its impact on his ability to access assistance in addressing his *** needs. It is not possible from the record to determine the amount and duration of counseling services needed. Therefore, the District is ORDERED to conduct a counseling assessment for student including consideration of information from student's private psychologist, to determine the duration and frequency of counseling. The counseling shall be provided to assist student in developing self-help skills, more specifically, his ability to access assistance with ***.

Respondent's failures in this case ultimately resulted from a lack of communication about student's disability and health conditions, and a failure to specifically address his adaptive behavior deficits and need for related services, including school health services, in his I.E.P. Therefore, IT IS FURTHER ORDERED that the District shall provide training to all personnel who work with student with regard to the nature and extent of his health condition and to provide documentation to the parent that it has done so no later than ten (10) school days from the date of this Order.

IT IS FURTHER ORDERED that the ARD Committee shall convene and specifically address the manner in which student's *** needs and assistance will be addressed for the 2005-2006 school year.

CONCLUSIONS OF LAW

1. Student meets the eligibility criteria and presents an educational need for special education services as a student with disability classifications of Other Health Impairment and Speech

Impairment under IDEA, 20 U.S.C. §1400 *et. seq.* and its implementing regulations.

2. Student's parents reside within Victoria ISD, a legally constituted independent school district within the state of Texas that is responsible for providing student with a Free Appropriate Public Education.
3. Student is a student with limited strength or alertness, including a heightened awareness to environmental stimuli that results in limited awareness with respect to the educational environment, that (i) is due to chronic or acute health problems that (ii) adversely affects his educational performance. 34 CFR 300.7(c).
4. Although student has advanced from grade to grade, he still exhibits an educational need for special education services and is still entitled to a Free Appropriate Public Education. 34 C.F.R. 300.121(e)
5. The district's educational program is entitled to a legal presumption of appropriateness. Petitioner bears the burden of proving that it is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). Petitioner has met his burden with regard to the 2004-2005 school year.
6. Respondent denied student a FAPE by wholly failing to respond to his educational need for related and supportive services to address his deficits in adaptive behavior, i.e., his self-help skills in ***, during the 2004-2005 school year.
7. Student is entitled to compensatory and prospective relief as an equitable remedy for Respondent's IDEA violations. *Burlington Sch. Comm. V. Department of Educ.*, 471 U.S. 359, 369-71 (1985); *Alamo Heights Indep. School Dist. V. State Bd. of Educ.*, 790 F.2d 1153 (5th Cir. 1986); *Parents of Student W. v. Puyallup School Dist. No. 3*, 21 IDELR 723 (9th Cir. 1994).

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, I hereby **ORDER** that the relief sought by the Petitioner is hereby **GRANTED** as follows:

1. Respondent shall provide a counseling assessment and counseling services to student to address student's need to communicate his need for and access to *** assistance. The amount and frequency of counseling will be determined by the ARD Committee based on student's current individual needs.
2. Respondent shall provide training to all personnel who work with student with regard to the nature and extent of his health condition, including its impact on his *** needs, no later than ten (10) school days from the date of this Order and provide documentation to the parent that it has done so.
3. The ARD Committee shall convene to specifically address the manner in which student's *** needs and assistance will be addressed for the 2005-2006 school year.
4. The ARD Committee shall meet within ten (10) school days of the date of this decision to begin implementation of the relief ordered herein.

All other relief not specifically granted herein is hereby **DENIED**.

NOTICE TO THE PARTIES

This Decision is final and is appealable to state or federal district court.

The district shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of Complaints Management at the Texas Education Agency, and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating that the Decision has been implemented; or 2.) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

SIGNED this 8th day of August, 2005.

Sharon M. Ramage
Special Education Hearing Officer

DOCKET NO. 279-SE-0405

Student B/N/F ***, Petitioner

VS.

VICTORIA INDEPENDENT SCHOOL
DISTRICT, Respondent

BEFORE A SPECIAL EDUCATION
HEARING OFFICER
FOR THE STATE OF TEXAS

SYNOPSIS

Issue No. 1: Whether or not Respondent denied Petitioner a Free Appropriate Public Education during the 2004-2005 school year by failing to address his needs for *** assistance.

Held: For Petitioner. Respondent wholly failed to address student's self-help skills, when it had previously determined that his disability would significantly interfere with his educational success in the area of adaptive behavior.

Citation: 34 C.F.R. 300.13; 34 C.F.R. 300.121(e); 34 C.F.R. 300.300; 34 C.F.R. 300.347

DOCKET NO. 279-SE-0405

Student B/N/F ***, Petitioner

VS.

VICTORIA INDEPENDENT SCHOOL
DISTRICT, Respondent

BEFORE A SPECIAL EDUCATION
HEARING OFFICER
FOR THE STATE OF TEXAS

SUMMARY

An IEP must be written so that it contains sufficient detail that the school personnel required to implement it are apprised of the child's needs and goals as well as the appropriate means and methods necessary to address and achieve them. If a student requires school health services as a related service, these services must be specified in the student's IEP. In this case the student's *** needs were not addressed, which resulted in emotional harm. The student was therefore denied the degree of privacy and dignity commensurate with an appropriate education. Respondent failed to address the student's self-help skills when it had already determined that his disability would significantly interfere with his educational success in the area of adaptive behavior. Respondent's failure in this regard resulted in a denial of a Free Appropriate Public Education in that it denied the student meaningful access to his education.