
DOCKET NO. 183-SE-0406

B/N/F***&***

PETITIONER AND COUNTER

RESPONDENT

BEFORE A SPECIAL
EDUCATION
HEARING OFFICER
FOR THE STATE OF TEXAS

vs.

HOUSTON INDEPENDENT

SCHOOL DISTRICT

RESPONDENT AND COUNTER PETITIONER

AMENDED DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner, acting through his maternal grandparent as 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 issues for hearing were as follows:

1. Denial of a free appropriate public education (“FAPE”) by failing to place the student in the least restrictive environment (“LRE”);
2. Suspension of the student in excess of 10 school days;
3. Failure to conduct a Functional Behavior Assessment (“FBA”);
4. Failure to properly identify all areas of suspected disability;
5. Failure to follow proper evaluation procedures;
6. Failure to provide an independent educational evaluation (“IEE”) in a timely manner;
7. Failure to properly assess the student for related services;
8. Failure to develop an appropriate Individualized Educational Plan (“IEP”) for the student that allows him access to the general curriculum;
9. Failure to develop an appropriate Behavior Intervention Plan (“BIP”);
10. Failure to provide appropriate positive behavioral supports;

11. Violation of state regulations by proposing and using restraint as a behavioral intervention;
12. Failure to address and consider Extended School Year (“ESY”) services;
13. Failure to provide proper notice of Admission, Review, and Dismissal Committee (“ARDC”) meetings to afford the grandparent an opportunity to participate;
14. Failure to provide prior written notice of a proposed change of placement for the student;
15. Failure to provide access or copies of educational records;
16. Failure to conduct ARDC meetings in a collaborative manner;
17. Failure to train, monitor, and supervise Respondent’s staff in the evaluation, assessment, and development of IEP and BIP protocols and subsequent implementation;
18. Failure to appropriately place the student on the student’s home campus for the 2006-2007 school year;
19. Failure to provide the student with an educational program that conferred a meaningful educational benefit to the student, to enable the student to progress rather than regress; and,
20. Failure to design and implement appropriate instructional modifications and supports to allow the student to receive educational services to the maximum extent appropriate in the LRE.

As relief, Petitioner seeks the following:

1. An order stating that HISD denied a FAPE;
2. Compensatory services in the areas of tutoring, counseling, outreach and support services, or other services;
3. Reimbursement for private evaluations, private services, and related expenses;
4. 100 hours of compensatory services for failing to provide ESY;
5. An order for HISD to complete an IEE in a timely manner;
6. An order for HISD to implement the IEP;
7. An order for HISD to complete any further evaluations, as recommended by the IEE, in a timely manner;
8. An order for HISD to develop an appropriate BIP;
9. An order for HISD to provide an IEE for an FBA at public expense;
10. An order for HISD to determine the need for any related services and provide them;
11. An order for HISD to provide a FAPE to the student;
12. An order for HISD to contract with outside professionals to assist with the implementation of the student’s IEP;
13. An order for HISD to comply with the grandparent’s request for records in a timely manner; and,
14. An order for further relief as the Hearing Officer may deem just and proper.

HELD, for Respondent in part, for Petitioner in part.

Based on Respondent and Counter-Petitioner's Request to Add Counterclaim, Respondent seeks a ruling of the Hearing Officer on the following issues:

1. Whether an FBA is an assessment as defined by IDEA, and as amended by the Individuals with Disabilities Education Improvement Act ("IDEA 2004"), or whether it is an instructional strategy developed by the ARDC, resulting in no entitlement for Petitioner/Counter-Respondent to an IEE for an FBA;
2. In the alternative, should the Hearing Officer determine that an FBA is an assessment under IDEA, as amended by IDEA 2004, HISD denies the proposed assessment and proposes to prove the appropriateness of the FBA conducted by HISD.

HELD, for Respondent.

Procedural History

Petitioner ("Petitioner" or "Student") filed the above-captioned request for due process with the Texas Education Agency on April 13, 2006, and invoked the "stay-put" provisions of IDEA for the student to remain in his current placement. The Hearing Officer issued an order on April 17, 2006, setting April 27, 2006, as the apparent statutory resolution-meeting deadline and setting the hearing on May 22, 2006, following the required 30-day resolution period. Respondent did not file an objection to the sufficiency of Petitioner's Request for Due Process. The Decision Due Date was set for June 27, 2006.

Petitioner retained legal counsel prior to the first telephonic pre-hearing conference, convened on May 9, 2006¹. As a result, Petitioner sought leave to amend Petitioner's complaint over the objection of Respondent, granted for good cause shown, and Petitioner requested an unopposed motion for a five-week continuance. Petitioner filed his First Amended Complaint and Request for Due Process on May 13, 2006. Respondent filed its Response to Petitioner's Complaint on May 18, 2006, requesting leave to add a counterclaim to the proceeding regarding the classification of an FBA under IDEA, as amended by IDEA 2004. 20 U.S.C. §1400 et. seq. The Hearing Officer granted Petitioner's unopposed continuance request, amendment of issues and relief, and added

Respondent's counterclaim by written Order No. 2, dated June 5, 2006. This order reflected the agreed revised hearing date of June 26, 2006, and extended the Decision Due Date to July 31, 2006.

¹All telephonic pre-hearing conferences were transcribed by a court reporter and copies of the transcript were provided to both parties.

Petitioner filed a Motion to Compel and a Motion for Continuance on June 13, 2006. On June 21, 2006, during the second telephonic pre-hearing conference, Respondent agreed to produce additional documents and agreed to an eight-week continuance. By written order dated July 5, 2006, the hearing was reset and subsequently held on August 23-25, 2006, with a revised Decision Due Date set for September 20, 2006. A third telephonic pre-hearing conference occurred on August 10, 2006, to take up remaining discovery and witness issues.

The due process hearing occurred on September 23-25, 2006, in the administrative offices of HISD. At the conclusion of the hearing, the parties requested leave to submit their closing argument in writing by October 3, 2006, which was granted for good cause shown, and the Decision Due Date was extended by agreement to October 30, 2006. The record was closed upon the timely submission of the parties' Written Closing Statements on October 3, 2006. The Decision of the Hearing Officer was issued on October 30, 2006.

On November 3, 2006, Respondent filed its Motion for Reconsideration ("MFR") within the time period for a Motion for Rehearing. The Hearing Officer set a response deadline for Petitioner's Response to Respondent's Motion for Rehearing ("MFR Response") for November 13, 2006. Petitioner timely filed his MFR Response by November 13, 2006. After consideration of the arguments of Counsel and the record evidence, the Hearing Officer finds that good cause exists enter this Amended Decision of the Hearing Officer on December 6, 2006. Based upon the evidence and argument admitted into the record of this proceeding, the Hearing Officer makes the following findings of fact and conclusions of law:

Findings of Fact

Background

1. Petitioner is a *** year-old student who resides in the custody of his maternal grandparent within the jurisdictional boundaries of HISD. [Petitioner's Exhibit ("P.Ex.") 27, Respondent's Exhibit ("R.Ex.") 11, Transcript ("Tr.") Volume ("Vol.") I at 27-28].
2. Petitioner had not attended school before entering a general education *** class in HISD at his home campus in mid-August 2005. He was referred for special education testing in October 2005 and placed into special education as a student with Other Health Impairment ("OHI") on November 30, 2005. [P.Ex.22, 27, and 33; R.Ex. 2, 11, 21, and 22; Tr.Vol.I at 23].

Student Behavior and Medication

3. During the first nine-week period of the 2005-2006 school year, Petitioner exhibited disruptive behavior incidents in the classroom that included hitting, kicking, and screaming at his teacher, not keeping his hands to himself, hitting, kicking, and pinching other students, and running off into the parking lot. The grandparent participated in a teacher conference with school administrators to discuss these behaviors on or about September 15, 2005. The grandparent asked that the student be changed to a different *** classroom, but due to the cap on the number of students in place at the time, Respondent did not accommodate the request. [P.Ex. 7 and 8; R.Ex. 33; Tr. Vol.I 39-42].
4. From September 15, 2005, through October 19, 2005, the student manifested disruptive behaviors in and outside his classroom, such as: a) defiant behavior with teacher instructions and refusals to work; b) disturbing other students in the classroom; c) slapping another student; d) hitting his teacher in the face; e) grabbing, pinching, and screaming at his teacher; f) grabbing his teacher's arm and refusing to let the teacher leave the classroom; and, g) throwing objects in the classroom. [P.Ex. 33 and 35; R.Ex.23, 24, and 25].
5. In October 2005, the student's physician prescribed Clonidine once a day to control his aggressive behavior. [P.Ex. 26; R.Ex. 1; Tr.Vol.I at 55].
6. HISD moved the student to another *** classroom beginning October 23, 2005. This decision was made in lieu of a formalized teacher removal of the student under Chapter 37 of the Texas Education Code, since the cap of 22 students per class had been lifted state-wide due to students relocating to Texas after Hurricane Katrina. [Tr.Vol.I at 52-55 and 159].
7. Between late October 2005 through mid-January 2006, the student's disruptive behaviors continued both in and outside of the classroom and during transition periods, including: a) defiance of teacher directives; b) hitting, pushing, slapping, spitting, and yelling at other students; c) *** d) hitting a student's arm with a rock; e) hitting, kicking, spitting, and yelling at his teacher; and, f) throwing objects inside and outside the classroom. [P.Ex. 8, 9, 10, 34, and 35; R.Ex. 25, 26, 27, and 28].

8. Prior to the student's placement into special education at the end of November, he received approximately *** days of out-of-school suspension, with letter notice sent and received by the grandparent. The student received *** day of in-school suspension on November 16, 2005. [P.Ex. 7, 8, 9, and 35; R.Ex. 23, 24, 25, and 26].
9. From the student's initial placement into special education on November 30, 2005, through January 14, 2006, the student received *** days of in-school suspension on January 12-13, 2006. School district records reflect that a letter was mailed to the grandparent concerning this incident. [P.Ex. 10; R.Ex. 28].
10. The student began taking time-release Adderall for his Attention-Deficit Hyperactivity Disorder ("ADHD") symptoms in mid-January 2006. His dosage level has not been increased, as he has difficulty sleeping with a higher dosage. Between mid-January and early February 2006, the student exhibited fewer behavioral outbursts; however, the student's disruptive behaviors resumed around February 13, 2006. [P.Ex. 26, 33, and 35; R.Ex. 1, 28, and 29; Tr.Vol.I at 57 and 206].
11. Between mid-February and March 2006, the student's disciplinary and behavior anecdotal records show continued aggressive, disruptive, and defiant actions, including the use of inappropriate language, hitting, pinching, and assaulting fellow students, teachers, and staff members. He continued to throw objects in and out of the classroom and kicked furniture. During this period, he received *** days of in-school suspension and *** days of out-of-school suspension. [P.Ex. 33, 34, and 35; R.Ex. 23, 29, and 30].
12. On March 30, 2006, the student kicked and hit a teacher and attempted to run from an area after damaging a ***. Due to the threat of imminent physical harm to self and others, two staff members restrained him, at which time he *** one of the administrators. The grandparent received written notification of the restraint. [P.20; Tr.Vol.I at 138-141].
13. A team of HISD staff on the student's campus completed training on the use of therapeutic hold for restraining students. [Tr.Vol.II at 352-353 and 399-400].
14. On April 27, 2006, the student threw a book across the classroom, argued with the teacher, hit a folder out of the teacher's hand, and kicked a chair. [P.Ex. 33; R.Ex.31 at HISD608].
15. On May 3, 2006, the student received *** day of in-school suspension and *** day of out-of-school suspension for hitting and kicking his teacher. [P.Ex. 14; R.Ex. 33].
16. The student's behavioral issues persisted throughout the 2005-2006 school year. He repeatedly engaged in defiant, disruptive, and non-compliant, off-task behavior. He assaulted HISD staff members and fellow students across settings and with different teachers by spitting, punching, kicking, slapping, and grabbing. He frequently threw objects,***. [P.Ex. 33-36; R.Ex. 23-32].

Counseling Referral

17. Respondent made a referral for the student to West Houston Family Services Center (“WHFSC”) in October 2005, operating as an intake center with staff psychologists available for observation and making referrals through Texas Children’s Hospital or Mental Health and Mental Retardation Authority. One of the WHFSC psychologists observed the student at school and met with the grandparent with a referral for further intervention. After the grandparent learned that she did not have insurance coverage for services, she requested her records from the WHFSC and terminated further contact with the center. [P.Ex. 8; and 9; Tr.Vol.I at 40-42 and Tr.Vol.II at 419-422].
18. The student saw the campus counselor informally on a regular periodic basis during the first semester of the 2005-2006 school year through January 2006 to work on self-esteem issues and behavioral issues as part of his general curriculum. In February 2006, the counselor learned that the grandparent did not want further counseling sessions for the student. [P.Ex. 16; R.Ex 25 and 28; Tr.Vol.III at 707-712].
19. The grandparent did not give written consent for a counseling assessment, in spite of Respondent’s efforts to provide copies of consent forms and to give the grandparent information about a counseling assessment. [R.Ex. 10; Tr. Vol.I. at 208-209; Tr. Vol. II at 402-409 and 485; Tr.Vol.III at 707-715 and 724-725].

Evaluations

20. On September 15, 2005, the student’s teacher completed a Disruptive Behavior Disorder (“DBD”) Rating Scale, provided at the request of the grandparent, to give to the student’s physician. [P.Ex. 4; Tr.Vol.I at 233].
21. The student’s general education teacher referred the student for special education on October 17, 2005, due to the student’s inattention to tasks and frequent behavioral outbursts with hitting and kicking. The Campus Referral Report, signed by the campus administrator, teacher, and

evaluator, states, “[t]he committee suspects the presence of an impairment and refers the student for assessment to determine eligibility for special education services: OHI/ED.” [P.Ex. 22 at HISD133-HISD134].²

²Respondent/Counter-Petitioner used Bates’ stamped pages for their production of documents to Petitioner. To simplify reference to these page numbers in this Decision, the seven lead zeros have been omitted. For example, “HISD 368” is the simplified version of “HISD0000000368.”

22. On October 19, 2005, the grandparent provided consent for an FIE. She clarified her consent by an electronic communication to school administrators on October 21, 2005, stating that she agreed for “all special education testing for the student except for psychological evaluation in relation to E[motional] D[isturbance].” [P.Ex. 21; R.Ex. 33 at HISD368].

23. Respondent completed its Comprehensive Individual Assessment (“CIA”) of the student with a written FIE report dated October 26, 2005. Respondent used a variety of assessment data including a home language survey, language and behavior rating scales prepared by his teacher, a vision and hearing screening, and a related services screening. No related service needs were identified in the CIA. The student’s intellectual functioning was assessed using the Kaufman Assessment Battery for Children, Version Two. He scored a mental processing index of *** in the *** range. As part of this evaluation, HISD administered the Woodcock-Johnson Test of Achievement – Revised. The student tested at the following grade equivalents:

Subject	Grade Equivalents
Basic Reading	***
Reading Comprehension	***
Broad Written Language	***
Math Reasoning	***
Basic Math Skills	***

24. [P.Ex. 22; R.Ex. 2].

25. On November 7, 2005, the grandparent sent Respondent a copy of a diagnosis by the student's primary care physician of ADHD and Oppositional Defiant Disorder ("ODD"). Respondent received an "Other Health Impairment Eligibility Form" signed by the student's physician on November 30, 2005. [P.Ex.4; R.Ex. 5].
26. On November 28, 2005, Respondent completed the student's speech evaluation. The evaluation included a language severity rating scale, an articulation severity rating scale, administration of the Goldman Fristoe Test of Articulation, and the Comprehensive Assessment of Spoken Language. The student did not qualify for speech services as he had age-appropriate scores in all tested areas. [P.Ex. 23; R.Ex. 4].
27. In January 2006, Respondent administered the Stanford Achievement Test Series, Tenth Edition, to the student. On this test, the student grade equivalent score was at the *** level for the Basic Battery and the *** level for the Complete Battery with the following scores: Total Reading – ***; Sounds and Letters – ***; Word Reading – ***; Sentence Reading – ***; Math – ***; Environment – ***. [P.Ex. 5; R.Ex.20].
28. Respondent did not pursue plans for a psychological consult of the student after the initial ARDC meeting until the grandparent inquired about the progress of evaluations and requested a second ARDC meeting around February 14, 2006. [P.Ex.11 at HISD267-HISD269; Tr.Vol.II at 346].
29. On February 20, 2006, the ARDC discussed an IEE for the student, due to concerns of the grandparent of phonological issues, and assessment in the areas of Math, Reading, and Written Language. The ARDC completed an IEE supplement for an independent psycho-educational evaluation of Petitioner on or about February 21, 2006. [Tr.Vol.II at 590].
30. On April 24, 2006, an HISD psychologist completed the FBA report regarding the student's violent outbursts and compulsive behaviors. The FBA included review of the student's special education records, a teacher

survey, two interviews with the student's teachers, and four classroom observations of the student between March and April 2006. [P.Ex. 25; R.Ex. 8].

31. The April 2006 FBA teacher survey, completed by the teacher who taught the student between October 2005 and March 2006, reported that the student "might strike out and hit or kick any teacher or any student in his area. He has lunged at teachers and administrators to strike out. He often throws things at others." The teacher described the intensity of his violent outburst behavior as***, occurring daily and could happen anywhere, and noted that the student had *** to the students." The teacher reported that all efforts to calm him were unsuccessful and no strategy had worked to *** the student's behavior. [R.Ex. 27 at HISD894-HISD898].
32. The April 2006 FBA report data collection results of the student's behavior revealed *** outbursts occurring approximately once a day for approximately 20 to 30 minutes with a *** level, possibly functioning as an expression of frustration/anger. Settings for the *** outbursts included "[a]nything that agitates him (an activity, a child, leaving home, coming to school)." Additionally, the student exhibited compulsive behavior of moderate intensity while engaged in seat work activities involving writing tasks, also occurring daily with for approximately five minutes or lasting the duration of an activity. The compulsive behavior functions include expression of the student's frustration with self-performance and signals the student's need for assistance by whining. [P.Ex. 25; R.Ex. 8].
33. Recommendations the April 2006 FBA to address Petitioner's *** outbursts include simplified and increased communication with Petitioner before behavior escalation and provision of choices for the student to "cool down." To address Petitioner's compulsive behavior, expectations should be explained to the student with reinforcement for improvement. The evaluator recommended social skills training to increase flexibility and frustration of the student, to be provided either through the school

counselor or a private provider, and also suggested keeping close communications between home and school for managing the student's problems across settings. The evaluator recommended the student be referred for further evaluation on identified problem behaviors. [P.Ex. 25; R.Ex. 8].

34. On May 17, 2006, a clinical neuropsychologist and Assistant Professor of Pediatrics at The University of Texas Health Science Center in Houston, Texas, conducted the independent psycho-educational evaluation of Petitioner. Respondent's documentation of the contract with this provider are signed by the grandparent and dated May 17, 2006. [P.Ex. 26; R.Ex. 1].

35. The neuropsychologist found the student to be in the *** range of intellectual function based on the Wechsler Intelligence Scale for Children – IV. The student scored a full scale Intelligence Quotient of *** placing him at the *** percentile. Assessment of the student's reading, math, and written language skills by the Woodcock-Johnson Test of Achievement, Third Edition, established the following grade equivalent levels:

Subject	Grade Equivalents
Word Attack	***
Letter Word Identification	***
Passage Comprehension	***
Basic Reading Skills Cluster	***
Broad Reading Cluster	***
Calculation	***
Math Fluency	***
Applied Problems	***
Broad Math Cluster	***
Spelling	***
Writing Sample	***

36. Based on the testing results, the neuropsychologist concluded that the student exhibited *** verbal skills, with academic skill levels developing nicely, and his academic achievement level to be exactly where the

- evaluator would expect the student's achievement. [P.Ex. 21 and 26; R.Ex. 1].
37. In the written psycho-educational report, dated May 17, 2006, the neuropsychologist recommended additional testing, "[The student] should be evaluated by a child psychiatrist to ensure that his medication regimen is appropriate," noting that his grandparent and teachers observed a "significant improvement" in behavior following the initiation of medication. The neuropsychologist found the student's verbal skills to be *** than non-verbal, and recommended a speech evaluation for the student, although the neuropsychologist was unaware that Respondent had performed a speech evaluation of the student. [P.Ex. 26; R.Ex. 1; Tr.Vol.III at 629-630].
38. The neuropsychologist addressed the student's behavior during the evaluation in the IEE report, concluding that the student's degree of aggression given the minor nature of the stimulus was more *** than expected of a student with ADHD. The neuropsychologist expressed an opinion, but did not make a firm diagnosis, that the student's aggressive behaviors characteristics better resembled an Intermittent Explosive Disorder ("IED") rather than ADHD. Even with medication, the student had significant problems with his attention. Over time, the student's behavior would have an impact on his academic functioning and a decrease in his educational experience. [P.Ex. 26; R.Ex. 1; Tr.Vol.III at 635-636, 639-640, and 645-646].
39. The neuropsychologist recommended an FBA "which documents frequencies of maladaptive behaviors" to determine the effectiveness of the student's intervention program. In the written report, the neuropsychologist offered 16 classroom modifications as suggestions for improving the student's behavior, such as: a) breaking down large assignments into smaller intervals, giving the assignment one sheet at a time, or assign every third problem; b) make sure the student establishes eye contact when receiving direction/instruction to improve understanding

and follow-through on his task; c) seat work is often extremely difficult for the student, can be compounded when a teacher is working with another small group, and the student should be frequently checked or should check in with the teacher. [P.Ex. 26; R.Ex.1].

Behavioral Interventions

40. At hearing, Respondent presented an educational psychologist currently serving on the faculty of the Department of Educational Psychology at the University of Houston, whose professional focus is on the etiology of behavioral issues, the assessment of children and adolescents with ADHD and behavioral issues, and the effective treatment with behavioral interventions. The educational psychologist believes that endlessly searching for the cause of a behavior results in multiple assessments and a delay in treatment. Based on the experience and research, the educational psychologist believes that behavior is not the result of just one cause of behavior; by delaying treatment while searching for causes of behavior, behaviors tend to become more problematic. [Tr.Vol.III at 653-655].
41. The educational psychologist has familiarity with the behavioral intervention approaches used by Respondent in the Behavior Services Class ("BSC"), a level system that uses a two-fold system of helping teachers implement intervention and helping administrators monitor what is occurring in these classrooms. The BSC, in his opinion, is supported by a great deal of research. Specific behaviors must be targeted for behavioral interventions to be effective. The ARDC process usually identifies the behaviors. Once targeted, a specific behavioral goal must be identified for the student to achieve. In order to determine and monitor student progress, the student's behavior must be tracked and charted to determine whether behavioral goals are met. [Tr.Vol.III at 655-662].

42. In the opinion of the educational psychologist, students exhibiting the disorders of ODD or IED receive benefit from the BSC interventions used by Respondent. Rather than an internalizing disorder that internalizes a student's symptoms such as depression or anxiety, students with disorders such as ODD or IED externalize the symptoms, so that the disruption is external to the student. In most cases, externalizing disorders are responsive to behavioral interventions. [Tr.Vol.III at 666].
43. A licensed specialist in school psychology ("LSSP"), formerly employed by Respondent, testified at hearing regarding the appropriateness of Respondent's behavioral intervention method used in the BSC. Familiarity with the FBA process is part of the LSSP's professional background and public school experience. Frequently described as a functional analysis in clinical settings, the FBA process originated in behavioral psychology. Typically, inappropriate behaviors are targeted through behavior observation. Once targeted, different strategies are attempted to gauge what the student is gaining by the behavior. According to the LSSP, the ongoing process of an FBA is dissimilar to an assessment under IDEA used to determine the eligibility for special education services, since the FBA changes over time as the student's behavior changes. [Tr.Vol.III at 733-736].
44. The LSSP reviewed the student's ARDC records and all evaluations in the school record, the anecdotal records, and communication between the grandparent and teachers in preparation for the hearing. Based on this information, the LSSP attempted to establish a frequency for the student's aggressive behaviors that is, in the LSSP's professional opinion, consistent with the student's FBA report conducted by Respondent. [Tr.Vol.III at 726-731].
45. The LSSP also reviewed the student's behavioral records, noting that the behavior was ***, and occurred at very high frequency on close to a daily basis. Aggressive behaviors were directed against students, teachers, and

had a highly disruptive impact on the classroom instruction. The aggressive behaviors continued even with the assistance of outside staff, administrators, and the presence of a paraprofessional. In the LSSP's professional opinion, it is appropriate for the student to be placed in a self-contained behavioral classroom to allow continued monitoring of his behavior and determine the function of the student's behaviors. [Tr.Vol.III at 731-733].

ARDC Meetings and IEP Development

46. The initial ARDC meeting for the student was held on November 30, 2005. At this meeting, the ARDC reviewed the completed assessment information and concluded that the student qualifies for special education as a student with OHI due to his diagnoses of ADHD and ODD. [P.Ex. 4 and 27; R.Ex. 3 and 11].
47. The grandparent agreed with the ARDC decision on November 30, 2005, for the student's placement into special education within the general education classroom with Resource Classroom placement for Math and Reading. [P.Ex. 27; R.Ex. 11].
48. The November 30, 2005, ARDC concluded that the student is able to follow the Student Code of Conduct. As part of the ARDC deliberations, the ARDC conducted an FBA as well as reviewed and developed a Behavior Plan and a Behavior IEP to address two behavior goals to increase on task and non-aggression through positive supports, reinforcers, and rewards. [P.Ex. 27; R.Ex. 11].
49. The minutes of the initial placement ARDC from November 30, 2005, reflect the ARDC's plans to conduct a psychological consult to address ODD, as well as the grandparent's request for an explanation of what this entailed. The minutes state that the grandparent "agreed to the consult." [P.Ex. 27; R.Ex. 11 at HISD101].

50. On February 20, 2006, at the request of the grandparent, Respondent convened a second ARDC meeting to address whether the student's placement in the Resource Classroom should continue for Math and Reading. The grandparent attended this meeting with the assistance of a special education advocate and presented her written request for an FBA. The ARDC discussed an in-home assessment, a psychological consult, an FBA, and a counseling assessment. As part of this meeting, the ARDC completed an "Independent Educational Evaluation Supplement" due to the grandparent's disagreement with previous testing, requesting "a more robust test" to address issues impacting the student's cognitive functioning, math and reading academic achievement, and phonological awareness/processing in written language. The grandparent gave written consent for an FBA of the student but did not consent to a counseling assessment at this meeting, specifically asking that the campus counselor not see the student. The ARDC meeting reached consensus to return the student to the regular education setting for all subjects. [P.Ex. 21 and 28; R.Ex. 7 and 12; Tr.Vol.II at 590-591; Tr.Vol.III at 712-713].
51. Respondent attempted to schedule a third ARDC meeting for March 24, 2006, at 11:00 a.m., but reset the meeting after the grandparent signed the notification, indicating that she would like to attend the meeting at a date "that works with my work schedule." On Respondent's second attempt to reschedule the meeting to March 27, 2006, at 8:30 a.m., the grandparent signed the notification, indicating that she could not attend an ARDC before 3:00 p.m. When Respondent made a third attempt to notify the grandparent of a new date and time for the meeting on March 29, 2006, at 2:00 p.m., the grandparent responded that she had not been contacted by telephone to set up a mutually agreed date and time, and that no indication had been given that "the assessments have been done as there is no need to meet until there is new information to bring to the table." [P.Ex. 31; R.Ex. 13, 14, and 15].

52. Respondent convened the third ARDC meeting for the student on March 29, 2006, with the presence of the grandparent's advocate. The grandparent participated in the discussion by telephone. The ARDC discussed an *** in the student's behavioral outbursts, including an episode when the student *** in the classroom. The ARDC recommended placement of the student into a resource classroom setting for Reading and Math, with academic work on grade level and the student's previous Behavior IEP in place, to determine whether a smaller setting would benefit the student. The grandparent believed that there was not sufficient data to support the student's removal from the general education classroom and requested copies of Respondent's documentation. The ARDC recessed and reconvened on April 5, 2006. [P.Ex. 29; R.Ex. 17 at HISD058; Tr.Vol.I at 120-121].
53. The grandparent and her advocate participated in person when the ARDC reconvened on April 5, 2006. On this date, Respondent proposed additional evaluation of the student and provided a "Consent for Consult/Related Service Evaluation" form to the grandparent, indicating referral for the following consultation/evaluation: a) Central Auditory Processing; and, b) Psychologist/Social Worker. The grandparent believed that she gave consent for a psychological evaluation of the student when she signed this form, giving permission for the testing to begin immediately by waiving the required waiting period between notice of evaluation and initiation of the evaluation of five school days. [P.Ex. 21 and 29; R.Ex. 17; Tr.Vol.1 at 266-269].
54. As part of the ARDC deliberations on April 5, 2006, the grandparent presented and the ARDC considered a letter from a clinical psychiatrist who recently evaluated the student. The clinical psychiatrist stated concern that in addition to ADHD, the student may have a neurological auditory processing problem, and recommended no change be made for the student's placement until completion of additional testing by a full

neuropsychological evaluation with auditory processing and projective testing. The grandparent agreed with the psychiatrist's recommendation and requested a neuropsychological evaluation of the student with an auditory processing evaluation. The ARDC discussed possible placements for the student, including a BSC within the Behavioral Services Center. The ARDC recommended placement of the student in a BSC class of four students with assistance of a classroom assistant; however, the grandparent and her advocate disagreed with the recommendation. At this time, the grandparent also rejected HISD's offer for the school counselor to check on the student during lunch. The ARDC tabled this meeting. [P.Ex. 29; R.Ex. 6 and 17 at HISD059].

55. Respondent planned to offer the use of an FM Training Unit for the student when the ARDC meeting reconvened after April 5, 2006. On April 18, 2006, an HISD audiologist confirmed that a unit would be available to the student for trial usage for the remainder of the school year. [R.Ex.33 at HISD749].
56. Respondent made diligent attempts to communicate with the grandparent by telephone, written, and electronic communication concerning the student's progress, issues that arose with the student, his program, and ARDC meetings through April 5, 2006. At times, the grandparent was difficult to reach by telephone and did not respond promptly to communications from Respondent. [Tr.Vol.I at 168, Tr.Vol.II at 420-427 and 603-604].
57. Respondent notified the grandparent of plans to reconvene the ARDC meeting of April 5, 2006, by means of multiple E-mails and written notices that specified three different dates for the reconvened meeting. The grandparent found the multiple notices confusing and made direct effort to respond that she would be unable to attend any ARDC meeting until 3:00 p.m. On April 25, 2006, the grandparent responded to the most recent proposed meeting date, April 27, 2006, asking that the meeting be

rescheduled because the grandparent had a previous commitment. In reply on April 25, 2006, Respondent informed the grandparent that the reconvened meeting would be held with or without the grandparent's presence, and that the psychologist responsible for producing the FBA would attend the ARDC meeting, but did not state that the ARDC would consider the completed FBA report at the meeting. The ARDC ultimately reconvened at 2:50 p.m. on April 27, 2006. Due to her prior commitment, the grandparent did not attend the meeting and could not be reached by telephone during the ARDC meeting. [P.Ex.13, 16, 30, and 31; R.Ex. 18, and 33; Tr.Vol.I at 296-298 and Tr.Vol.II at 406, 413, and 498-500].

58. The HISD psychologist completed the student's written FBA report on April 24, 2006, and participated in the reconvened ARDC meeting on April 27, 2006. The HISD psychologist recommended a referral for a counseling assessment and a psychological evaluation of the student. During the meeting, participating ARDC members revised the student's behavior plan, agreeing that the student was unable to follow the Student Code of Conduct. A comparison of the student's revisions to the Behavior IEP reveals the following changes (in italics):

Goals	11/30/05 Behavior IEP	4/27/06 Behavior IEP
Target 1 (behavior to be increased :)	"Student is will (error in original)be on task, stay in seat, and stop making noise when not appropriate"	"Student is out of seat and does not complete tasks as directed by his teacher."
Mastery Criteria/ Evaluation Codes	*** (none listed)	*** 1, 3
Antecedent Interventions/ Positive Supports	Student has and will have a second personal space he can go to when he needs	Student has and will have a second personal space he can go to when he needs time alone to

	time alone to refocus. He can go to another class, office, or counselor to cool down.	refocus. He can go to another class, office, or counselor to cool down. Clarify expectations prior to and during transitions. Check for understanding of instructions. Teach him to be satisfied with his own efforts rather than perfection.
Positive Reinforcement	Reward Stickers, Happy faces on his chart, Visit to the Class Treasure Chest	Stickers, Happy faces on his chart, Visit to the Class Treasure Chest, Line leader, Teacher helper
Consequences (teacher/classroom based)	1. Time out 2. Loss of rewards 3. Go to the office	1. Time out 2. Loss of rewards 3. Go to the office 4. In-school suspension 5. Out-of-school suspension
Target 2 (behavior to be increased)	“Student will not hit teachers or students.”	“Student will express his unhappiness and frustration when upset in an appropriate manner.”
Mastery Criteria/ Evaluation Codes	*** 1,3	*** 1, 3
Antecedent Interventions/Positive Supports	“Student has and will have a second personal space he can go to when he needs time alone to	“Student has and will have a second personal space he

	<p>refocus. He can go to another class, office, or counselor to cool down."</p>	<p>can go to when he needs time alone to refocus. He can go to another class, office, or counselor to cool down".</p> <p>Provide choices to cool down (i.e. – count to 10, drawing, tearing up paper).</p> <p>Daily review of behavior at end of day.</p>
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59. [P.Ex. 30; R.Ex. 18].

60. The revisions to the student's Behavior IEP, accepted by ARDC on April 27, 2006, do not include all suggestions from the April 2006 FBA to address the student's violent outbursts, including: a) private communication of concern to the student when agitation increases; b) short periods of allowing the student to engage in a desired activity to regain focus; c) if behavior escalation continues, give calm verbal warnings to the student of pre-determined consequences; d) give the student a few seconds to decide whether to continue the behavior; and, e) if the behavior persists, implementation of the pre-determined consequences in a calm manner. Likewise, the Behavior IEP omitted some FBA recommendations for decreasing compulsive behavior, such as: a) simplified verbal explanations of expectations to the student; b) privately checking the student's understanding of the explanation; c)

- reinforcement for improvement rather than excellence; and, d) teaching the student to praise himself internally. [P.Ex. 25; R.Ex. 8].
61. On April 27, 2006, participating committee members discussed a resource placement for the student, but rejected this setting because his previous resource placement had not been helpful even with the daily assistance of the resource teacher in the general education classroom instructing the student for 60 minutes. In the previous resource placement, his negative behavior outbursts continued and he had difficulty transitioning between classes. Instead, all ARDC members present agreed to a BSC placement, noting that the goal of this class is to get behaviors under control by teaching self-control skills. The ARDC referred the student for psychological and counseling evaluations. [P.Ex. 30; R.Ex. 18].
62. On April 27, 2006, the ARDC rejected the grandparent's request for an auditory processing evaluation, initially made on April 5, 2006, because Respondent's guidelines for auditory processing evaluation require a student to be at least eight years old to get a valid test. The ARDC minutes stated that an FM Training Unit would be made available to the student upon the request of the grandparent. [P.Ex. 30; R.Ex. 10 and 33; Tr.Vol.I at 271-272].
63. By letter dated April 27, 2006, Respondent transmitted ARDC documents from the meeting held on that day, along with a copy of the FBA, a referral guide for auditory processing disorders, and two consent forms for a psychological and a counseling evaluation. Neither consent form was returned to Respondent. [P.Ex. 13; Tr.Vol.II at 485].
64. The student passed his *** and at no time during the 2005-2006 school year had *** grades. [P.Ex.6; Tr,Vol.II at 484].

Discussion

Background

The crux of this case concerns on-going disruptive behaviors of the student. It is undisputed that the student had behavioral outbursts during the 2005-2006 school year. Instead, the parties hold divergent views of how Respondent managed those misbehaviors and whether, when taken as a whole, the actions of Respondent deprived the student of an appropriate educational plan that allowed the student to make educational progress in Respondent's program. It is further undisputed that the student is within the *** range of intelligence and capable of making academic progress. However, the parties disagree that the student will be able to continue appropriate academic process in a more restrictive setting.

Petitioner asserts a deprivation of an appropriate education for the student throughout the 2005-2006 school year by Respondent's delayed special education placement, delayed response to the grandparent's requests for evaluation, and once the evaluation process had begun, failure to assess all areas of the student's disability in order to address the student's misbehaviors. As a result, Petitioner contends the inadequacy of the educational plan and behavioral intervention developed by Respondent. Petitioner's requested relief includes compensatory services in the areas of tutoring, counseling, outreach, and support services, an independent functional assessment of the student's behavior, and development of an appropriate Behavior IEP. Petitioner is strongly opposed to the ARDC's proposed placement of the student into the more restrictive setting of a class for behavioral control, asserting that the student is capable of remaining in the general education setting with additional supports, such as a one-on-one aide.

Legal Standard

Under IDEA, every disabled student is entitled to access education with individualized instruction, with sufficient supportive and related services to enable the student to benefit from instruction. 20 U.S.C. §1412(a)(1); *Hendrick-Hudson District Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

Federal and state law mandate a “child find” duty upon school districts to identify children who manifest learning problems but are not yet eligible for special education services. School districts have an affirmative duty to locate and evaluate all children with disabilities within the school district’s jurisdictional boundaries who are in need special education services, regardless of whether the student and parents have requested evaluation or services. 20 U.S.C. §1414(a)(1)(A); 34 C.F.R. §§300.125 & 300.128. The school district’s duty is triggered when the school district has reason to believe that a student has a disability and suspects that the student may need special education services to address the disability. See *Davonne B. v. Houston I.S.D.*, No. 327-SE-596 (SEA TX 1997). Once a referral is made, IDEA implementing regulations require school districts to fully evaluate the student in all areas of suspected disability. 34 C.F.R. §300.532(g).

A placement is appropriate under IDEA if it enables a student to receive “some benefit” from his education, but does not require schools to “maximize” a student’s educational potential. *Rowley, supra*. Schools are not required to provide all the services that may benefit a student. Instead, the educational benefit received by a student must be meaningful and 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); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). To monitor compliance with IDEA, the Fifth Circuit used a four-factor test in *Cypress-Fairbanks*: a) whether the eligible student’s IEP is individualized and developed based on the assessment and performance of the student; b) whether the IEP is delivered in the LRE; c) whether the IEP is delivered in a collaborative and coordinated manner by key stakeholders; and, d) whether the school’s program for the student results in positive academic and non-academic benefits. *Id.*, at 247-248.

The educational program proposed by the school district is presumed appropriate. *Tatro v. Texas*, 703 F.2d 823 (5th Cir.1983) aff'd on other grounds sub nom., *Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984). The party attacking the appropriateness of a student's IEP bears the legal burden of proving why the IEP and resulting placements were inappropriate under IDEA. *Schaffer v. Weast*, 156 S.Ct. 528, 44 IDELR 150 (2005); *Cypress-Fairbanks, supra*. Here, Petitioner has the burden of proving that the IEP was inappropriate in its design or implementation, or was based on inappropriate evaluation. However, when a parent specifically requests that the school district provide an independent evaluation, and the school district elects pursuant to 34 C.F.R. §300.502(b)(3) to defend its own evaluation rather than cede to the parent's request, the school district has the burden of proving that its evaluation was appropriate.

IDEA stresses procedural compliance on the theory that if parties follow statutory procedures as Congress intended, the eligible child is likely to receive an appropriate IEP. See *Rowley, supra*; *Hall v. Vance County Board of Educ.*, 774 F.2d 629 (4th Cir.1985); *Bobby R., supra*. Educational harm does not necessarily result from a procedural error where the school district substantially implemented the student's IEP, the student's academic progress was more than trivial, and a meaningful benefit in other academic areas accrued to the student. *Bobby R.* at 349-350. Likewise in *Bobby R.*, a student's educational potential does not have to be maximized or improved in every area for a student to receive an educational benefit. *Id.* at 350. Neither is a student's right to receive a FAPE violated by a procedural defect alone unless there is an accompanying loss of educational opportunity as a result, or if the parent, as a result, is deprived of the opportunity for meaningful participation in the student's IEP, or both. *Adam J. v. Keller I.S.D.*, 328 F.3d 804 (5th Cir. 2003). Similarly, procedural defects that infringed upon the parents' ability to participate in the IEP process are strictly scrutinized by hearing officers. *Roland M. v. Concord School Comm.*, 910 F.2d 983 (1st Cir. 1990).

Initial Evaluation

Petitioner complains of Respondent's failure to assess the student rapidly. But the record evidence established that HISD staff responded to the grandparent's request to fill out a DBD behavior rating scale form for the student's physician by early September 2005, within the first month of the school year, yet the school district did not receive a diagnosis from the physician until November 7, 2005, or three weeks after the student's general education teacher made a referral to special education on October 17, 2005. Petitioner further complains that the evaluation did not address all suspected areas of the student's disability, noting that referral documentation indicated suspicion of an OHI and an Emotional Disturbance ("ED"). However, I find no other notation in the written record or persuasive testimony at hearing of further indication after initial testing of a continuing suspicion that the student qualified as ED. Even if the school district had continuing suspicion of ED as an additional area of disability, the grandparent failed to give written consent for a psychological evaluation at the time of her original consent and did not believe that she had fulfilled Respondent's written consent requirements until April 5, 2006. Within two days of her initial consent for the CIA, she specifically clarified that her consent for assessment specifically excluded evaluation for ED.

Applicable state and federal regulations require schools to conduct evaluation of a student suspected of IDEA eligibility within 60 days from the date of the original referral, further clarified in federal law as beginning on the receipt of consent from the parent or guardian. 20 U.S.C. §1414; Tex. Educ. Code §29.004. In this case, only two days elapsed after the referral until Respondent obtained consent to conduct an initial evaluation of the student, October 19, 2005. This date marks the beginning of the 60-day period that Respondent had to complete an evaluation of the student, ending with December 18, 2005. Again the record evidence establishes that Respondent rapidly completed the CIA report by October 26, 2005, one week from the receipt of consent for the assessment and 53 days before expiration of the 60-day period.

Initial Placement

After completion of the CIA report, state law requires that an ARDC meeting be held within 30 calendar days from the completion of the written evaluation report, in this case on or before November 24, 2005. Thus, the ARDC meeting was convened six days beyond the 30-day period. 19 T.A.C. §89.1050(d). Yet, I find this six-day delay did not unfairly impact the student, as his placement into special education occurred 18 days before the initial 60-day period for completion of the written CIA report.

Behavior Assessment

Petitioner contends that Respondent's initial evaluation of the student failed to determine what the student could do in terms of behavior, and did not present sufficient data to determine his present levels of performance in behavior and social skills. I disagree. Respondent's CIA delineated his present levels of performance with a behavioral rating scale and identified specific behaviors of concern to the teacher. [P.Ex.21 at HISD133 and HISD136]. This information was augmented prior to the initial ARDC meeting with an FBA/Behavior Support Plan that addressed antecedents, reinforcers, and consequences. With this information supplemented by behavioral records and disciplinary occurrences, the student's initial IEP addressed behavior through means of a BIP in the form of a "Behavioral Support Plan" and a "Behavior IEP" to address the student's specific aggressive and compulsive behaviors. The later evolution of the behavioral plan is discussed further below.

Psychological Consult and Psychological Evaluation Requests

Respondent admits that it did not follow through with a psychological consult of the student after the initial ARDC meeting, acknowledging the oversight at the second ARDC meeting on February 20, 2006. The record testimony and exhibits establish that Respondent discussed various types of evaluations available with the grandparent during the second ARDC meeting, including the differences between a psychological consult and a psychological evaluation. Further, the

record evidence establishes that on February 20, 2006, the grandparent neither requested nor gave consent for a full psychological evaluation of the student. Instead, the grandparent gave written consent for a second FBA and a psycho-educational IEE, discussed separately below.

Functional Behavior Assessment Request

Through its counterclaim, Respondent seeks a determination that an FBA is not an assessment under the IDEA, as amended by the IDEA 2004. In the alternative, should this Hearing Officer find that an FBA is an assessment, Respondent seeks affirmation of the appropriateness of its FBA and subsequent denial of Petitioner's request for an independent FBA at public expense.

Respondent asserts that whether or not particular review of the student's behavior constitutes assessment subject to IDEA's mandatory independent review procedures depends, in substance, on the nature and purpose of the review, citing *L.B. v. Houston ISD*, Texas Education Docket No. 006-SE-0905 (August 28, 2005). In *L.B.*, the Hearing Officer found that "nursing evaluation" was not an evaluation under IDEA, as the nursing activities constituted merely staff monitoring the student regarding when and how to implement the student's IEP for the student's medical service plan; the purpose of the review activity was not to consider potential modification per se of the IEP. In *L.B.*, the review activities of that student's medical service plan, as part of the IEP, were not done by staff having the appropriate qualifications to propose relevant IEP changes as all determinations concerning which medical procedures belonged in the medical service plan remained within the physician's domain. Instead, the staff nurses exercised discretion for implementation of IEP provisions.

In the instant case, the FBA constituted more than a review of data to decide among existing IEP options which strategy to implement, and instead resulted in a fairly elaborate set of procedures conducted by professionals routinely qualified to recommend changes to behavior-related IEP provisions. Here, the FBA was more like a separate assessment for the purpose of recommending actual IEP modifications. Under IDEA, evaluation is activity undertaken for the purpose of determining the existence of a disability and determining the appropriateness of the content of services. 20 U.S.C. §1414(a); 34 C.F.R. §300.500(b)(2). Finding the FBA as conducted did constitute an evaluation within the meaning of IDEA, it is unnecessary to address Petitioner's argument that the Commissioner's Rules necessarily require defining an FBA as an IDEA

evaluation subject to procedural safeguards, particularly given that there is no generally-accepted definition of what constitutes an FBA.

Although the preponderance of the evidence in this case tended to establish that Respondent's April 2006 FBA was in fact an IDEA evaluation, the evidence also amply established that Respondent's evaluation procedures were appropriate. Petitioner, therefore, is not entitled to an independent FBA by way of the IEE safeguard. First, Respondent established by a preponderance of the evidence, which Petitioner failed to rebut, that the essential requirements for evaluations as set out in 20 U.S.C. §1414 were met. Second, there is no statutory requirement for the content of a FBA, other than the implication that it be designed "to address the behavior violation so that it does not recur." But it is well-established law that IDEA interventions are not legally required to contain a guarantee of success, and I find that there is no justification for finding an FBA inadequate simply because it was ineffective or was unable to identify a pattern underlying the student's violent episodes.

Nonetheless, a school district is not relieved of the responsibility to identify the basis of behaviors that interfere with instruction merely because an FBA does not result in the identification of a behavior pattern, or definite antecedents and consequences that may explain the behavior and serve as a basis for behavior intervention. But insofar as the FBA itself is concerned, the record evidence in this case establishes that it was designed to address the specific behavior violations and included a variety of appropriate procedures to address the suspected disability. Therefore, it was appropriate within the meaning of IDEA.

Independent Educational Evaluation Requests

The IDEA implementing regulations at §300.502(a) impart an automatic right to the student's parent or guardian to obtain an IEE at any time during their child's education if the parent disagrees with the evaluation obtained by the school.

Once a parent or guardian disagrees with the school's evaluation and requests an IEE at public expense, the school must *without unnecessary delay* either initiate a hearing under §300.507 to show that its evaluation is appropriate, or provide the IEE at public expense unless the school demonstrates that an IEE

obtained by the parent fails to meet agency criteria. 34 C.F.R. §300.502(b) [Emphasis added]. While a school may ask a parent the reason why the parent objects to the school's evaluation, "the explanation by the parent *may not be required* and the public agency *may not unreasonably delay* either providing the evaluation at public expense, or initiating a due process hearing to defend the public evaluation. 34 C.F.R. §300.502(b)(4) [Emphasis added].

In this case, the record evidence established that Petitioner made a specific written and verbal request for an IEE for a psycho-educational evaluation of the student on February 20, 2006, at the same time she requested an FBA. Although Respondent began efforts to obtain the independent psycho-educational evaluation the following day, the undisputed record evidence shows that this IEE was not completed on May 17, 2006, or a total of 87 days after written consent. As a result, Petitioner believes the lateness of this IEE deprived the ARDC from valuable information that could have been used to make better determinations of the student's additional needs, and better insight into which services might be indicated. I agree. I find no convincing explanation for this specific delay in the record of this proceeding and, accordingly, find for the Petitioner on this issue. I turn to the impact of the three-week delay below.

Pending FBA and Psycho-Educational IEE

As the student's behaviors appeared to escalate in March and April 2006, the ARDC attempted and failed to reach agreement on March 29, 2006, choosing instead to recess the ARDC meeting and reconvene on April 5, 2006. At this time, both the second FBA and the psycho-educational IEE were pending. It does not escape my notice that the ARDC meeting on March 29, 2006, called at the request of the school, was for review the student's behavior and progress. Although the discussion centered on moving the student to a resource setting for instruction in Math and Reading, the BSC placement was mentioned prior to recessing the meeting.

When the ARDC reconvened on April 5, 2006, neither the FBA nor the psycho-educational assessment had been completed. The hearing testimony of the

grandparent established her belief that she gave written consent for a psychological evaluation of the student when she signed Respondent's form for the student to be evaluated by a psychologist/social worker and for an auditory processing evaluation on April 5, 2006. The ARDC documents from this meeting detail a discussion about "all placements," including the BSC. By the conclusion of this reconvened meeting, the ARDC now recommended a change of placement of the student to the BSC, a much more restrictive setting than the resource placement. I find it troubling that the ARDC recommended placement of the student to the restrictive setting in the BSC prior to completion, receipt, and review of both pending assessments. As this meeting ended in disagreement, the ARDC made plans to reconvene.

ARDC Meeting – April 27, 2006

After many communications back and forth between the school district and the grandparent, the ARDC ultimately reconvened without the presence of the grandparent on April 27, 2006, as a "continuation" of the meeting held on April 5, 2006. Yet at this time, only one of two pending assessments had been completed – the second FBA – with the written report issued just three days before the scheduled meeting. The record evidence establishes that the psycho-educational IEE results were not available for consideration at the ARDC meeting of April 27, 2006, as the evaluation would not take place until May 17, 2006. It was within this context of partial information that the ARDC made the decision to place the student into the BSC and to refer the student for "Psychological Evaluation/Counseling," one of the recommendations in the second FBA. [P.Ex. 30; R.Ex. 18]. At this meeting, the ARDC denied the grandparent's request of April 5, 2006, for evaluation of auditory processing abilities but determined that a psychological evaluation of the student was appropriate. The transmittal of these ARDC documents to the grandparent included another form entitled "Consent for Psychological Evaluation," and arguably the grandparent failed to understand that she needed to sign the new consent form. In any event, no psychological evaluation of the student has occurred as of the close of the record evidence

after the ARDC determined that a psychological evaluation of the student was appropriate on April 27, 2006. In its counterclaim, Respondent did not request that Petitioner be required to submit to a psychological evaluation,

The “child find” duty of the school district to evaluate the student with a psychological evaluation was triggered no later than April 27, 2006, at which time the ARDC proposed a psychological evaluation of the student in response to FBA recommendations of the HISD psychologist. The completed IEE report of May 17, 2006, further identified a new possible area of disability for the student, an IED designation, but this report was not available when the ARDC made the decision to move the student to the BSC on April 27, 2006.

Respondent in its MFR argues that the sole purpose of the psycho-educational evaluation is to determine the absence or the presence of a student’s learning disability and does not address behavior, but instead addressed the student’s reading skills. Petitioner in his R-MFR points that Respondent has focused on the eligibility function of evaluations under 20 U.S.C. §1414(b)(4) rather than the second purpose of evaluations – the determination of the needs of the student.

After reconsideration of Counsel’s arguments and the record evidence, I conclude that the psycho-educational IEE did address the needs of the student in the form of specific recommendations, behavioral observations, and numerous evaluations and screenings that provided much more information than merely the student’s reading skills. Yet, the ARDC did not have this information available for consideration on April 27, 2006.

The delay of 87 days from grandparent’s consent to completion of this IEE is not fully explained in the record and, after careful reconsideration of the record evidence, I do not find that the preponderance of the evidence points to any fault of the grandparent to follow through with selection and scheduling of this evaluation, nor are there any records of attempts of Respondent to follow-up with the grandparent to proceed with the IEE during this 87-day period. Instead, the record evidence shows that on or about May 17, 2006, Respondent communicated and contracted with the provider for the evaluation. Within 30 days from finalization of the contract with Respondent, the evaluator completed both the evaluation and report.

While Respondent is correct that the IDEA and its implementing regulations do not specify a timeframe for completion of an IEE at parental request, the school district must provide the IEE without unnecessary delay and within a time frame that does not deprive the student of FAPE because of the delay. 34 C.F.R. §300.502(b)(2). The record evidence established that the grandparent did not receive a copy of the completed IEE until mid-June through her attorney. [Tr.Vol. 1 at 150-156]. This was the first time the grandparent learned of the IED designation within the report, a full 115 days after she had given written consent for the evaluation. As of the close of the record evidence, the ARDC had yet to consider the results of the psycho-educational IEE. After reconsideration of the record evidence, I infer that the delay of completion of the psycho-educational IEE was indeed an unreasonable delay. As a result, the ARDC did not have significant information available with which to change the student's placement to a more restrictive setting on April 27, 2006.

Behavior Support Plan and Behavior IEP Development

The initial ARDC developed a "Behavior Support Plan" and "Behavior IEP" to target the increase of two behaviors through specification of mastery criteria, lists of reinforcers, and specification of interventions to change behavior and consequences for behaviors. Yet, the two behavior goals are not broken down into sub-goals to help a teacher implement steps towards goal achievement. For example, I note that several different behaviors are grouped into one goal: "Target 1: [Student] is/will be on task, stay in seat, and stop making noise when not appropriate." Under antecedent interventions/positive strategies, no criteria are included to clarify when or in what circumstances the student may leave the room to refocus in a quiet place, or how to distinguish which place he will be allowed to go to "refocus." There is no explanation about whether the student will be unaccompanied or accompanied for these trips out of the classroom to "refocus" or is there an explanation on implementation of how to use the positive consequences. For example, there is no guidance for rewarding the student stickers for positive behavior, so should the student earn a sticker for two

minutes of compliance or 20 minutes of compliance? Must the student comply with all three behaviors mentioned in the first target (on task, stay in seat, stop making noise), or will compliance with one of the three behaviors over a period of time be sufficient to earn a reward? I find the language somewhat confusing.

While greater specificity, more precise descriptions, and measurable steps would assist a general education teacher in implementing a student's behavior plan, the initial BIP was a beginning of the process to improve the student's behavior. The IDEA implementing regulations require any deficiencies in the student's IEP to be revised. 34 C.F.R.

§300.346. Once written, however, the school district's duty to revise the IEP continued. In February 2006, participants in the student's second ARDC meeting chose not to revise the student's BIP and no additional changes to the BIP were made until completion of a second FBA in April 2006. I do not fault the ARDC for the wisdom to wait for the completion of pending evaluations before undertaking revisions to the behavior plan for this student. But once armed with this data, the task to revise the behavior plan is implicit.

At the meeting on April 27, 2006, the ARDC undertook the important task of revising the Behavior Support Plan and Behavior IEP with one of two evaluations completed, the April 2006 FBA. Although the ARDC did include many suggestions of the April 2006 FBA for the two targeted behaviors, not all suggestions to address compulsive behavior and aggressive behavior were included as sub-goals. The results of these efforts failed to add sub-goals to the two behavioral targeted goals. For example, the change to the first target, to be written as the behavior to be improved, is confusing on its face, "Student is out of seat and does not complete tasks as directed by his teacher." While it is certainly apparent that the educators' true intent is to avoid this behavior, the goal not only fails to state the behavior to be improved, but states two behaviors combined into one goal. In reading this target as a behavior-increase target, there are two behaviors to be addressed, remaining in his seat and completing tasks directed by the teacher. A general education teacher could find it difficult, if not impossible, to implement this target as written without additional specificity and clarity. The end result becomes a BIP that is difficult to implement, with any data recorded by the implementing teacher vague as to which of the two behaviors were tracked – staying in his seat or completing tasks, or both – ultimately preventing a future ARDC from tracking the student's progress on the goal. The

revisions to the Behavior IEP also failed to clarify when and how the student would use the “personal space” options, leaving the teacher implementing the plan with continuing confusion about how to implement the student’s travel to three separate “personal space” zones. Presumably, “[c]larify expectations prior to and during transitions” was added to address the student’s travel outside his classroom, but fails to specify how to implement the positive support. The evidence tended to show that the student’s behaviors were extremely severe and posed a definite risk of resulting in a more restrictive placement. The evidence, therefore, supports the inference that the student needed a highly structured and carefully managed behavior plan.

In summary, the Behavior IEP as revised did not have the clarity to allow a teacher to implement the plan without using a great deal of discretion. The revised Behavior IEP on its face is confusing, lacks specificity, and fails to have measurable indicators of progress to achieve the goals. The end result is data collected by the implementing teacher that fails to accurately track the student’s mastery of targeted goals and is difficult if not impossible to accurately implement. Besides the difficulty of implementation, tracking the student’s compliance and performance towards the targeted behavior mastery goal of *** compliance makes for inaccurate data keeping. Ultimately, future ARDC meetings will have vague data with which to make decisions on the student’s behavioral progress. Such data becomes important when making a decision to change the student’s setting to a more restrictive setting.

Supplementary Aids and Services

The assistive technology and other supplementary aids and service needs of the student were not properly assessed, according to Petitioner, beginning with the student’s initial assessment. As proof, Petitioner points to the fact that no assistive technology needs or services were recommended at that time.

Under IDEA, a school district has a duty not only to provide special education, but also related services, supplementary aids and services, and assistive

technology. 34 C.F.R. §§ 300.300 and 300.308. The IDEA implementing regulations define supplementary aids and services as aids, services, and other supports that are provided in the regular education classroom to enable disabled students to be educated with non-disabled students to the maximum extent possible. 34 C.F.R. §300.28. Assistive technology services are described as any item, piece of equipment, or product system that is used to increase, maintain, or improve the functional capabilities of a child with a disability. 34 C.F.R. §300.5. While I agree that Respondent did not identify a need for assistive technology services during initial assessment, I note that there has been no allegation that the student required assistive technology at any time during the 2005-2006 school year in order to benefit from his education. Neither did Respondent neglect to look at the changing needs of the student during his *** year. When Petitioner informed Respondent for the first time on April 5, 2006, that a medical provider suspected that the student had an auditory processing issue, the grandparent chose to file for due process. The record evidence established that Respondent stood ready to offer an FM device for the student's use, should the grandparent want to access that service.

Other supplementary services and aids were not, according to Petitioner, properly addressed during his *** year. Apparently, Petitioner's argument is that more supplementary services would have allowed Petitioner to remain in the general education setting, with the addition of supports for his general education teachers of an itinerant teacher with behavioral management experience. Petitioner argues that an itinerant teacher would have been able to model behavior management techniques for the general education teacher, or teach mini-lessons in social skills to the student, or co-teach with the general education teacher. I note, however, that the ARDC process in which the grandparent participated through early April 2006, neither suggested nor refused these support services. Instead, the ARDC agreed to place the student in a Resource Room placement as a smaller setting, yet the behaviors of the student did not improve in that setting. Also, the general education *** room had

paraprofessional support of an aide. The credible testimony of district witnesses and the grandparent indicate that the student was accompanied during transition periods with the assistance of the classroom aide, yet still the student's problem behaviors persisted. Despite the presence of the resource teacher in the general education class daily, the student continued to have negative behavior outbursts.

Related Services

Related services, according to Petitioner, were not properly assessed and provided to the student by Respondent. Petitioner alleges that the ARDC summarily determined at the initial ARDC meeting that related services were "not applicable." [P.27 at HISD092]. I disagree.

Under the IDEA implementing regulations, related services include counseling services, social skills training, therapeutic recreation, and psychological services as well as other services such as parent training and social work services. 34 C.F.R. §300.24(a). For a special education student to be eligible to receive these services as part of the school's program, there must be an identified educational need exhibited by the student. I note that the initial ARDC identified the need to refer the grandparent and student to resources within the community for counseling services of a psycho-therapy nature. Ultimately, the grandparent chose not to use the services when her insurance did not cover the services. The counseling recommendation contained in the April 2006 FBA, reviewed by the ARDC committee on April 27, 2006, led to the school's offer of a consent form to the grandparent for a counseling assessment. I do not fault the school district for not pursuing counseling as a related service prior to the ARDC review of the April 2006 FBA on April 27, 2006. As of the close of the record, the grandparent has not accepted the offer of a counseling evaluation.

IEP Formulation: Annual Goals and Short-Term Objectives

Under the IDEA, each eligible student's IEP must include a statement of measurable annual goals, including benchmarks or short-term objectives that have a twofold relationship to the student's needs: a) meeting the student's needs resulting from the disability to enable the student to be involved in and

progress in the general curriculum; and, b) meeting the student's other educational needs that result from the student's disability. 20 U.S.C. §1414(d)(1)(A); 34 C.F.R. §300.347(a)(2). The IDEA's implementing regulations at §300.347(a)(1) require the IEP to include a statement of the student's present levels of performance, including how the student's disability affects his or her involvement in and progress in the general curriculum. The student's assessed present educational levels should be the basis for development annual goals for the student. 34 C.F.R. §300.346(a)(1).

Procedurally, the formulation of written annual goals is a basic part of IEP development. Yet, in the absence of guidance from the IDEA and its implementing regulations as to the parameters of "measurable annual goals," it is generally considered that some objective criteria must exist to make a determination that the student has mastered each goal. See *Windsor C-1 School Dist.*, 29 IDELR 170 (SEA MO 1998). At least one Texas Hearing Officer followed this analysis for evaluating annual IEP goals by concluding that "the annual goal must be written in positive terms that include sufficient specificity so that there will be no confusion in determining if the goal will be met." *Rene H. v. Ysleta ISD*, 103 L.R.P. 50295 (SEA TX 2003), citing Gerry Klor, *Say the Right Thing: A Guide for Responding to Parents' IEP Requests* (LRP Publications 2003). As discussed previously above, I find that the Behavior IEP revised on April 27, 2006, failed to include validly measurable annual goals and failed to specify how to measure the student's progress in obtaining these goals.

Least Restrictive Environment (LRE)

Petitioner believes that only a general education setting is appropriate for the student and that he will be harmed within a BSC placement. The testimony of the grandparent underscored her conviction that the student will regress in such a placement both academically and in social skills. By contrast, Respondent's expert witnesses gave convincing testimony about the effectiveness of a BSC placement that uses a level system. Careful documentation is required for a level system – beyond what a general education teacher can be expected to provide.

The expert stated that the student's behaviors are of such an unpredictable nature and degree of persistency, that the BSC placement is appropriate. Nonetheless, I find that the ARDC decision on April 27, 2006, to remove the student from his general education placement was made at a time when the ARDC did not have the completed psycho-educational IEE. As the ARDC lacked important data with which to make a definitive decision on moving the student to a more restrictive placement, the BSC placement decision should be revisited. While the ARDC may ultimately conclude, based on ARDC review of the completed psycho-educational IEE of May 17, 2006, together with additional psychological and counseling assessments, that the restrictive setting of the BSC is appropriate for the student, the decision to move him at the current time is premature.

Educational Benefit

Despite the lack of specificity of the student's behavior goal revisions in April 2006, a view of the student's entire program for the 2005-2006 school year and the credible hearing testimony of his regular education teachers show that the student made academic progress and made some improvement in his behavior. I find that he received an educational benefit from his education after April 27, 2006, and consequently, that Respondent provided FAPE to the student during the 2005-2006 school year.

Procedural Violations

The student's grandparent requested an IEE at school district expense for a psycho-educational evaluation of the student and a second FBA on February 20, 2006. While Respondent timely obtained the FBA, the ARDC first considered the written FBA when the grandparent was not in attendance on April 27, 2006. I find that the school district unreasonably delayed in completion of the psycho-educational IEE for approximately three weeks, making it impossible for the ARDC to consider the IEE evaluator's recommendations student before changing the student to a more restrictive placement.

It is undisputed that the FBA evaluator recommended psychological evaluation of the student in the written report of April 24, 2006, yet I find no record evidence that the grandparent had access to a copy of the FBA report to review prior to this meeting.

Neither do I find any evidence in the record that Respondent specifically informed the grandparent that the completed FBA report would be reviewed by the HISD psychologist at the reconvened ARDC. Instead, the grandparent received communication from Respondent that an ARDC would be held on April 27, 2006 – with or without her attendance. Had Respondent given the completed FBA report to the grandparent before reconvening the ARDC, and had the grandparent been able to attend the reconvened ARDC, all participants could have discussed Respondent's consent form requirements for the psychological evaluation.

Petitioner asserts that Respondent retained complete control over the type of consent form it uses as well as control over scheduling and completing evaluations. I agree and find that the communication break-down during the ARDC process after April 5, 2006, halted all progress on additional evaluation of the student. After careful reconsideration of the record, I find that the student's grandparent and legal guardian believed that she consented to a psychological evaluation and an auditory processing evaluation of the student on April 5, 2006, after she had previously consulted to both the FBA and a psycho-educational IEE on February 2006. While Respondent subsequently denied the central auditory processing evaluation, Respondent did not at any time provide prior written notice that it would not perform a psychological evaluation of the student.

I find that the procedural violations of Respondent unduly delayed completion and timely provision of a psychological assessment. In compensation for this delay, I find that Petitioner is entitled to receive compensatory services of an IEE for the student's psychological evaluation at school district expense.

Further, I find that the grandparent was effectively prohibited from participation in reconvening the ARDC meeting of April 5, 2006. The grandparent specifically informed Respondent that she had a scheduling conflict and would like the ARDC rescheduled on a different date at 3:00 p.m. As a result, the grandparent was denied an opportunity to meaningfully participate in the development of the student's IEP or in determining his placement at the ARDC meeting of April 27, 2006. Yet, after careful reconsideration of the record, I do not find that Petitioner suffered more than a de minimis harm from a lack of opportunity to participate in the ARDC meeting on April 27, 2006. Bobby R., supra. Instead, the preponderance of the record evidence establishes that the grandparent was an active participant in the student's ARDC process beginning in August 2005.

While communication between the grandparent and Respondent deteriorated at the time Petitioner filed his Request for Due Process, the grandparent actively participated and gave input into the student's ARDC process through April 5,

2006. Instead, for reasons previously stated, the decision to move the student to a more restrictive setting should be revisited in another ARDC meeting after completion of additional assessment data, thus affording the grandparent the opportunity to participate in review of new assessment data as part of the student's ARDC.

Summary

After completion of the psychological IEE, the ARDC should reconvene to review the psychological IEE, the psycho-educational report from May 2006, and any other completed assessment data of the student not previously reviewed by the ARDC. Based on this new data, the ARDC should revise the student's Behavior IEP to include specific and measurable goals and objectives. After consideration of the additional assessment data, the ARDC should make a decision as to the least restrictive placement for the student without further delay. Ultimately, the ARDC may conclude that the BSC is the appropriate setting for the student, but that decision should be based on a complete assessment picture of the student rather than a partial view.

Conclusions of Law

1. The student is entitled to special education and related services under the provisions of the IDEA, 20 U.S.C.A. §1400, et. seq., and its implementing regulations.
2. The student and his custodial grandparent reside within the jurisdictional boundaries of Respondent, a legally constituted independent school district operating as a political subdivision of the State of Texas. Respondent is responsible for providing the student with a free appropriate public education. 20 U.S.C. §1412(a)(1); *Hendrick-Hudson District Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C.A. §1412; 34 C.F.R. §300.300; 19 T.A.C. §89.1001.
3. The educational program proposed by the school district is presumed to be appropriate. Petitioner, as the party challenging the educational program offered by Respondent, bears the burden of proof. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), aff'd on other grounds sub nom., *Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Alamo Heights ISD v. State Board of Education*, 709 F.2d 1153 (5th Cir. 1986).
4. Petitioner did not meet his burden to prove that Respondent's educational program for the student's 2005-2006 school year was inappropriate.

5. The plans for reconvening the April 5, 2006, ARDC meeting changed repeatedly, resulting in confusing E-mail notifications to the grandparent that effectively prohibited the grandparent's participation in the reconvened ARDC meeting held on April 27, 2006.
6. The ARDC decision to move the student on April 27, 2006, to a behavioral classroom placement as the least restrictive environment was not based on complete assessment information and should be rescinded.
7. Respondent met its burden of proof to show its April 2006 FBA was appropriate under IDEA and its implementing regulations, and as such, Petitioner is not entitled to an independent FBA evaluation. 34 C.F.R. §300.502(a)-(b).
8. Respondent provided the special education services specified in the student's IEP beginning November 30, 2006, through April 27, 2006, that were reasonably calculated to provide him with a free appropriate public education with sufficient individualized instruction and support services to allow him to benefit from his education. *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000); *Cypress Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); 34 C.F.R. §§300.346-300.347; 19 T.A.C. §89.1055.
9. As of the close of the record, Respondent has not timely evaluated the student in all areas of suspected disability by completion of a psychological evaluation. As a result, Petitioner is entitled to an independent psychological evaluation of the student at school district expense as compensation for the delay. *Burlington School Comm. v. Department of Educ.*, 471 U.S. 359 (1985); *Alamo Heights ISD v. State Board of Education*, 709 F.2d 1153 (5th Cir. 1986); 34 C.F.R. §300.532(g).
10. Respondent did not perform the independent psycho-educational evaluation requested by the grandparent until 87 days after receipt of the grandparent's written consent, constituting an unreasonable delay in completion of the assessment that made it impossible for the ARDC to review this data prior to changing the student's placement to the behavioral classroom. As a result, the ARDC decision to move the student to a more restrictive placement on April 27, 2006, should be rescinded. *Burlington School Comm. v. Department of Educ.*, 471 U.S. 359 (1985); *Alamo Heights ISD v. State Board of Education*, 709 F.2d 1153 (5th Cir. 1986); 34 C.F.R. §300.502(b)(2).
11. The student's behavioral goals from the Behavior IEP revised on April 27, 2006, lacked sufficient clarity to be measurable. 34 C.F.R. §§300.346-347.
12. Despite the absence of measurable goals and objectives in the Behavior IEP revised on April 27, 2006, the student made some behavioral progress after April 27, 2006, to the end of the 2005-2006 school year and received meaningful educational benefit from HISD. *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

ORDERS

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

IT IS HEREBY ORDERED that Respondent provide a psychological evaluation, at public expense, to be performed by a psychologist who meets the qualifications of Respondent and who has specific training and experience in child behavior problems. Within 5 school days of this Amended Decision, Respondent shall deliver information to Petitioner on the selection of an evaluator for the psychological evaluation and shall provide an appropriate consent form for the evaluation.

IT IS FURTHER ORDERED that, within 15 school days from the completion of the psychological evaluation, Respondent shall convene the student's ARDC to consider the recommendations of the report and any other completed assessment data not previously reviewed by the ARDC committee, to consider the proper placement of the student, and to revise the student's behavioral IEP to include specific and measurable goals.

IT IS FURTHER ORDERED that Respondent shall timely implement this Amended 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 Special Education Programs and Complaints at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Amended Decision: 1) documentation demonstrating that the Amended Decision has been implemented; or 2) if the timeline set by the Hearing Officer for implementing certain aspects of the Amended Decision is longer than 10 school days, the district's plan for implementing the Amended Decision within the prescribed timeline, and a signed assurance from the superintendent that the Amended Decision will be implemented.

IT IS FURTHER ORDERED that any findings of fact that are more properly characterized as conclusions of law, and any conclusions of law that are more properly characterized as findings of fact, shall be considered and shall have the same effect as if properly characterized.

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

Signed this 6th day of December 2006.

Mary Carolyn Carmichael

Special Education Hearing Officer

Finding that the public welfare requires the immediate effect of this Amended Decision, the Special Education Hearing Officer makes it effective immediately.

DOCKET NO. 183-SE-0406

B/N/F***&***

PETITIONER AND COUNTER

RESPONDENT

BEFORE A SPECIAL
EDUCATION
HEARING OFFICER
FOR THE STATE OF TEXAS

vs.

HOUSTON INDEPENDENT

SCHOOL DISTRICT

RESPONDENT AND COUNTER PETITIONER

SYNOPSIS OF DECISION

ISSUE: A. Whether the school district followed proper evaluation procedures, including requests for independent educational evaluations, according to timelines?

CITATION: 20 U.S.C. §1414(a)-(c); 34 C.F.R. §§300.502 and 300.532.

For the District, in part; For the Student, in part.

HELD: Initially, the school district conducted proper evaluation of the student's known disabilities for the student's assessment into special education within specified timelines. However, the school district completed an additional assessment, an independent psycho-educational evaluation, with unreasonable delay. As a result, the Admission, Review, and Dismissal Committee ("ARDC") lacked all appropriate assessment data to revise the student's program and to propose a change of placement on April 27, 2006.

ISSUE: B. Whether the school district's Functional Behavior Assessment qualified as an assessment, and if so, did the school district's denial of an independent Functional Behavior Assessment constitute a denial of the student's right to an independent educational evaluation?

CITATION: 20 U.S.C. §1414(a); 34 C.F.R. §300.500(b)(2).

For the District.

HELD: The school district performed two Functional Behavior Assessments for the student, with the second at the request of the student. The school district's second Functional Behavior Assessment met the standards of an assessment. As school district met its burden of proof to prove that its assessment was appropriate, the student was not entitled to an independent Functional Behavior Assessment at school district expense.

ISSUE: C. Whether the school district failed to develop specific and measurable goals and objectives for revisions to the student's behavior individualized education program?

CITATION: 34 C.F.R. §§300.346-300.347; 19 T.A.C. §89.1055.

For the Student.

HELD: At the student's initial placement into special education, the school district developed an Individualized Education Program for the student's behavior. Subsequent revisions accepted by the ARDC on April 27, 2006, did not produce measurable goals and objectives with sufficient specificity to adequately track the student's progress toward mastery of these goals.

ISSUE: D. Whether the Admission, Review, and Dismissal Committee decision to place the student in a more restrictive setting of a behavior class, was based on review of available assessment data, so that the committee could determine the student's least restrictive placement?

CITATION: 34 C.F.R §§300.532 and 300.550.

For the Student.

HELD: The ARDC decided to change the student's placement to a more restrictive setting on April 27, 2006, prior to the completion and review of pending assessment data. The pending independent

psycho-evaluation assessment related to the student's educational needs and ultimately, was completed three weeks after the decision to move the student to a more restrictive setting. Thus, the change of placement decision was premature and should be rescinded.

ISSUE: E. Whether the school district properly considered, and addressed the student's need for related services as well as supplemental aids and services for the student's Individualized Education Program?

CITATION: 34 C.F.R. §§300.5, 300.24(a), 300.28, and 300.346-300.347; 19 T.A.C. §89.1055.

For the District.

HELD: The school district considered the student's needs for related services and for supplementary aids and services in the development of the student's Individualized Education Program, offering additional services and/or evaluation for services as needs were identified.

ISSUE: F. Whether the student is entitled to an award of compensatory services of an independent psychological evaluation at school district expense to address the untimely assessment and completion of a psychological evaluation?

CITATION: *Burlington School Comm. v. Department of Educ.*, 471 U.S. 359 (1985); *Alamo Heights ISD v. State Board of Education*, 709 F.2d 1153 (5th Cir. 1986); 34 C.F.R. §300.502.

For the Student.

HELD: At the close of the record, the school district had not performed a psychological evaluation of the student after receiving written consent for the evaluation from the student's guardian on April 5, 2006. Respondent did not at any time provide prior written notice that it would not perform a psychological evaluation, and as of the close of the record evidence, As a result, Petitioner is entitled to an award of a psychological assessment of the student by an independent provider as compensation.

ISSUE: G. Whether the school district denied the student a meaningful program that conferred educational benefit to the student, to allow the student to progress rather than regress during the 2005-2006 school year?

CITATION: *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); 34 C.F.R. §§300.346-300.347; 19 T.A.C. §89.1055.

For the District.

HELD: The school district provided a meaningful program for the student for the 2005-2006 school year and, as a result of that program, the

student made academic progress and received some behavioral benefit, so that the school district's failure to adequately revise the student's behavior Individualized Education Program on April 27, 2006, did not negate the student's progress during the 2005-2006 school year.

ISSUE: H. Whether the school district provided the special education services specified in the student's Individualized Education Program beginning November 30, 2005, through April 27, 2006, that were reasonably calculated to provide the student with a free appropriate public education with sufficient individualized instruction and support services to allow him to benefit from his education?

CITATION: *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); *Hall v. Vance County Board of Educ.*, 774 F.2d 629 (4th Cir.1985)

For the District.

HELD: The school district's program between November 30, 2005, and April 27, 2006, contained sufficient individualized instruction and support services for the student to receive an educational benefit.