

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

DECISION OF THE HEARING OFFICER

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

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§
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v.

DOCKET NO. 108-SE-1206

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**LEWISVILLE
INDEPENDENT SCHOOL
DISTRICT,
Respondent**

REPRESENTING PETITIONER:

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PARENT,	§	BEFORE A SPECIAL EDUCATION
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v.	§	HEARING OFFICER
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LEWISVILLE INDEPENDENT	§	
SCHOOL DISTRICT,	§	
Respondent	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner, acting through his parent 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. Whether Respondent provided a free appropriate public education (“FAPE”) for Petitioner under the IDEA;
2. Whether Respondent provided and implemented an appropriate Behavioral Intervention Plan (“BIP”) for Petitioner;
3. Whether Petitioner’s placement is appropriate and constitutes the least restrictive environment (“LRE”) for Petitioner;
4. Whether Respondent’s refusal to provide Petitioner with Math instruction in a special education classroom was appropriate;
5. Whether Petitioner requires individualized tutoring in order to receive a FAPE;
6. Whether Respondent provided and implemented appropriate classroom modifications for Petitioner; and,
7. Whether Petitioner requires modified Texas Essential Knowledge and Skills (“TEKS”) in Math, through the development of goals and objectives for Math.

As relief, Petitioner seeks the following:

1. An appropriate BIP and use of appropriate behavioral intervention;
2. Appropriate modifications in Petitioner’s individualized educational program (“IEP”);
3. An appropriate IEP for special education and support services for Math; and,

4. One year of compensatory educational services, or an amount of compensatory services deemed appropriate by the Hearing Officer;

HELD, for Respondent.

Procedural History

Petitioner (“Student”) filed the above-captioned due process complaint with the Texas Education Agency on December 27, 2006, and the Hearing Officer received the case assignment on December 28, 2006. The Hearing Officer issued an order on December 29, 2006, identifying January 13, 2007, as the apparent statutory resolution-meeting deadline and setting the hearing on February 9, 2007, following the required 30-day resolution period. Lewisville ISD (“Respondent” or “LISD”) did not file an objection to the sufficiency of Petitioner’s Request. The Decision Due Date was set for March 12, 2007.

The parties timely attempted a resolution session, but were unable to resolve their dispute. During the telephonic pre-hearing conference on January 17, 2007, the parties agreed to attempt mediation prior to the scheduled hearing date. Prior to the scheduled disclosure date, the parties jointly requested a continuance to accommodate the scheduled mediation on February 9, 2007, which was granted for good cause shown and the hearing postponed to March 16, 2007, with the extended Decision Due Date of April 16, 2007. On March 1, 2007, Petitioner sought a continuance of the hearing date due to the unavailability of the student’s father to attend the hearing. Respondent did not oppose a continuance, which was granted for good cause shown. The revised schedule set the hearing for April 16, 2007, with an extension of the Decision Due Date to May 17, 2007. The parties jointly sought a third continuance due to scheduling conflicts for Petitioner’s Counsel. The hearing was reset for May 15, 2007, with the extended Decision Due Date set for June 15, 2007.

The matter proceeded to an evidentiary due process hearing on May 15, 2007. Before the conclusion of the one-day hearing, the parties jointly sought leave to file written closing argument, which leave was granted for good cause shown, and the Decision Due Date extended by agreement to July 2, 2007. The record closed upon the timely filing of the parties’ written closing argument on June 11, 2007. The Decision of the Hearing Officer was issued on July 2, 2007.

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 an ** student who resides with his parents within the jurisdictional boundaries of LISD and receives special education services under the eligibility classification of Emotional Disturbance (“ED”). [Respondent’s Exhibit (“R.Ex.”) 3; Transcript (“Tr.”) at 11].

2. From the age of ** year, the student exhibited significant emotional and behavioral difficulties, including violent outbursts with head banging and screaming, and the student began taking medication to address his outbursts. He was diagnosed with Bi-Polar Disorder and with Attention Deficit Hyperactivity Disorder (“ADHD”) around the ages of ** and ** years old. The student’s behavioral difficulties continued after the student started school and were manifested in the classroom setting. Consequently, the student began receiving special education services from Austin ISD. [Tr. at 11-13].

3. The student’s medication history includes prescriptions for Ritalin, Depakote, Risperdal, Adderall, Prozac, and Strattera. [Tr. at 16].

4. Prior to transferring to LISD, the student received special education services from Garland ISD, also under the ED eligibility classification. While at Garland ISD, the student progressed in a self-contained special education placement to address his behavioral issues by means of a level system that allowed the student to return to the regular education setting as behavioral expectations were met. At the time of withdrawal from Garland ISD in May 2006, the student had made progress sufficient to receive all instruction in the regular education setting with the exception of a special education placement for Social Studies. [Petitioner’s Exhibit (“P.Ex.”) 16; R.Ex. 2; Tr. at 116-119].

5. The student received a Full Individual Evaluation (“FIE”) from Garland ISD on September 9, 2005. The FIE noted a previous diagnosis of the student as ADHD. As part of this FIE, the student’s intellectual ability as well as his achievement in the areas of Reading, Writing, and, Math measured within the average range in comparison to his peers. The FIE nevertheless recommended continued eligibility under the ED classification. Based on the formal behavioral assessment data in the report, the student did not qualify for special education eligibility due to the presence of ADHD. [P.Exs. 17 and 18; R.Ex. 1; Tr. at 113-116 and 266-267].

Beginning of the 2006-2007 School Year

6. The student entered LISD in August 2006 and was enrolled in the ** grade for the 2006-2007 school year. [R.Ex. 3; Tr. at 11, 18, and 264].

7. In Fall 2006, the student was taken off Strattera because he had been doing so well. His parents did not see much difference in his behavior when the student took Strattera. LISD knew that the student was not taking any medication in the first semester of the 2006-2007 school year. [Tr. at 18-19].

Temporary Placement

8. On August 14, 2006, LISD convened a meeting of the Admission, Review, and Dismissal Committee (“ARDC”) to determine the student’s temporary placement and schedule of services by reviewing the student’s last annual ARDC documents and the 2005 FIE from Garland ISD. The student’s parents participated in the meeting. The ARDC reached consensus on an ED eligibility determination and did not request further evaluation nor did the parents request consideration of another area of eligibility. The ARDC placed the student in a special education setting for Geography with Content Mastery support and an aide for behavioral support, if

necessary, to be consistent with his Garland IEP. The ARDC did not find that the student required related services. [R.Exs. 2 and 3; Tr. at 110, 119-121, 129, 200, and 207].

9. The ARDC developed a BIP at the temporary ARDC meeting that identified a broad behavioral goal of behaving “in a manner that follows the student code of conduct and promotes academic success. The student to make progress in or toward the general curriculum.” The two behavioral objectives developed in the temporary ARDC meeting in August 2006 were later revised to three behavioral objectives at a subsequent ARDC meeting held on September 19, 2006, as follows:

Behavioral Objectives	8/14/06 Temporary Behavior IEP	9/19/06 Behavior IEP
<u>Objective 1:</u>	<ul style="list-style-type: none"> • “[Student] will maintain self-control (i.e. remaining calm, apologizing when necessary)” 	<ul style="list-style-type: none"> • “[Student] will maintain self-control (i.e. remaining calm, apologizing when necessary)”
Targeted Mastery Level/ Evaluation Methods	70% 2,4	70% 2,4
Positive Intervention Strategies	<ul style="list-style-type: none"> • Increased teacher support; • Frequent reminders of rules; • Frequent positive feedback. 	<ul style="list-style-type: none"> • Increased teacher support; • Frequent reminders of rules; • Frequent positive feedback.
Consequences	<ul style="list-style-type: none"> • Natural consequences; • Removal of student to TU room.¹ 	<ul style="list-style-type: none"> • Natural consequences; • Removal of student to TC room.
<u>Objective 2:</u>	<ul style="list-style-type: none"> • “[Student] will comply with teacher directives.” 	<ul style="list-style-type: none"> • “[Student] will comply with teacher directives.”
Targeted Mastery Level/ Evaluation Methods	70% 2,4	70% 2,4
Positive Intervention Strategies	<ul style="list-style-type: none"> • Clear and concise directives (restated if necessary); • Peer “buddy;” • Point sheet. 	<ul style="list-style-type: none"> • Clear and concise directives (restated if necessary); • Peer “buddy;” • Point sheet.
Consequences	<ul style="list-style-type: none"> • Natural consequences; • Removal of student to TU room. 	<ul style="list-style-type: none"> • Natural consequences; • Removal of student to TC room.
<u>Objective 3:</u>		<ul style="list-style-type: none"> • “[Student] will complete homework assignments by due date.”
Targeted Mastery Level/ Evaluation Methods		70% 2,4,5,6
Positive Intervention Strategies		<ul style="list-style-type: none"> • <i>Educate [student] to use his planner;</i> • <i>Point sheet;</i> • <i>Positive Feedback.</i>

¹ “TU” is defined as the Transition Unit, used interchangeably with the term “Transition Center,” the behavioral classroom at the student’s campus. [Tr. at 33].

Consequences		<ul style="list-style-type: none"> • <i>Reduced credit for assignment.</i>
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[R.Exs. 3 and 4; Tr. at 33].

10. On the student’s campus, the Transition Classroom (also known as the “Transition Unit” and abbreviated as “TC” or “TU”) is a classroom that focuses on a student’s behavioral needs and the development of social skills, in order to help students develop necessary behavioral and social skills for success in the general education setting. The 2006-2007 aide assigned to the TC room had training in student behavioral support and held a Master’s degree in Social Work. [Tr. at 143 and 199].

11. According to LISD staff, “natural consequences” means that if the student misbehaves in class, he will receive the same consequences as a regular education student. [Tr. at 229].

12. At hearing, the student’s mother explained that she does not understand, and has never been told, what is meant by “natural consequences” in the student’s BIP. [Tr. at 31].

13. Following the August 2006 ARDC meeting, the student’s special education teacher reviewed the student’s BIP and accommodations with each of the student’s teachers for discussion on how to effectively implement the BIP, accommodations, and modifications within the classroom. [Tr. at 201-206].

Annual ARDC Meeting and Functional Behavioral Assessment Review

14. During the first weeks of the 2006-2007 school year the student’s Math teacher observed increasing frustration when he did not complete his homework or when he had not adequately prepared for class. In response, Respondent made plans to convene an ARDC to discuss organizational issues. [Tr. at 141].

15. On September 18, 2006, Respondent completed a Functional Behavioral Assessment (“FBA”) with information from the student’s teachers and parents in preparation for the student’s annual ARDC meeting on September 19, 2006. The results of the FBA revealed that the student exhibited the following behaviors once or twice a day: a) maintaining self-control – high intensity for 15 minute duration; b) complying with teacher – high intensity for 10 minute duration; and, c) completion of homework – high intensity, occurring daily. [R.Ex. 4].

16. After reviewing the FBA on September 19, 2006, the ARDC added a third behavioral objective to the student’s BIP to address his difficulty with homework completion. The ARDC reviewed current teacher input forms regarding the student’s behavioral and academic progress, accepted the 2005 FIE from Garland ISD, and reviewed the student’s previous performance during Spring 2006 in his ** grade year on the Texas Assessment of Knowledge and Skills (“TAKS”), revealing that the student reached grade ** achievement level ** in Math and Reading on the State Developed Alternative Assessment-II (“SDAA-II”). Based on the SDAA-II score report, the student would have met the passing standard on TAKS if he had been administered the TAKS test in Math and Reading. The student received a passing score on the TAKS test in Science in Spring 2006. After reviewing the assessment results, the ARDC specified that the

student would take the TAKS test in Math and Reading on his enrolled grade level. [R.Exs. 4 and 9; Tr. at 135].

17. The September 2006 ARDC continued the student's schedule of services with all classes in the general education classroom, with Geography in the TC setting. The ARDC continued the availability of an aide for behavioral support as needed and with Content Mastery support for 15 minutes per week or 90 minutes per six-week grading period. To address homework completion issues, the ARDC added "shorten assignments" to the student's accommodations. [R.Ex.4; Tr. at 133].

Student Intervention Team Plan Meeting

18. The student's father participated in the ARDC on September 19, 2006, requesting placement of his son into a special education setting for Math. In response, the school district members of the ARDC referred the student to the Student Intervention Team Plan ("SITP") to consider appropriate services to enable the student to remain in the general education setting for Math. The ARDC meeting ended in consensus. [R.Ex.4; Tr. at 137-138].

19. On September 29, 2006, the SITP convened and noted that the student performed successfully on grade level TEKS in Math. The SITP deliberations state that the student was disorganized and was defiant with school staff. Based on the student's difficulty completing homework in Math and Science, the SITP recommended adding a Study Skills class in the TC setting as well as a special education counseling consultation to determine if the student needed a special education counseling referral. [R.Ex.5].

20. At the time of the SITP meeting and the counseling consultation, the student had not received any disciplinary referrals. Results of the counseling consultation did not show a need for special education counseling by the student. [R.Ex. 10; Tr. at 42 and 211-212].

21. The student received support from the general education counselor approximately once a month. [Tr. at 143 and 212].

22. The student's special education teacher noticed that the student's Math grade suffered due in part to zeros earned by the student for failure to complete homework assignments. He also exhibited poor test performance. [Tr. at 232].

23. The student's mother did not object to the student being required to complete homework, yet she remained concerned about the student's missing assignments and his lack of organization in his school daily folder. [Tr. at 42-43].

October 2006 Schedule Revision

24. The ARDC convened for a third ARDC meeting to discuss recommendations of the SITP on October 4, 2006. The ARDC revised the student's schedule, adding a Study Skills class in the TC special education setting as recommended by the SITP. The student's mother attended the meeting, did not object to any aspect of the student's IEP or to the addition of the Study Skills class, and the meeting ended in consensus. [R.Ex. 6; Tr. at 144].

25. Following the third ARDC meeting on October 19, 2006, the student's parents did not request an additional ARDC meeting nor express concerns or disagreements with the student's IEP until they filed Petitioner's Request for Due Process in late December 2006. [Pleading file; Tr. at 146].

Disciplinary Office Referrals

26. The student received his first office referral on October 25, 2006, after implementation of the student's BIP. Over the course of the 2006-2007 school year, the student received a total of eight office referrals as follows: a) two referrals in October 2006; b) one referral in December 2006; and, c) five referrals in April 2007. As a result, the student received a total of eight in-school suspension days in the 2006-2007 school year. [P.Ex. 20; R.Ex. 10; Tr. at 161].

27. One day in February or March 2007, LISD notified the student's father about a concern that the student wanted to hurt himself. At the request of the student's father, the student's grandfather picked up the student and took care of him for the rest of the day. The student's family did not seek medical intervention or counseling for the student, deciding instead to discuss the incident with him and deferring additional care and treatment. [Tr. at 67-69 and 72-73].

28. Respondent offered a special education counseling evaluation to Petitioner in March 2007, but the student's parents refused consent for the evaluation. [Tr. at 298].

29. At hearing, the parents clarified that they do not want counseling services to be provided by Respondent and would not consent to special education counseling as a related service by school district staff, even if the student exhibited a need for the service based on a counseling evaluation. [Tr. at 304-305].

30. The student's parents do not believe that the student should participate in tutoring outside of school hours. [Tr. at 39-40].

LISD Psychologist Input and ARDC Review

31. In August 2006, the LISD clinical psychologist and licensed specialist in school psychology ("L.S.S.P.") initially reviewed the student's records to ensure that the student's evaluation data was valid and current. In April 2007, after the student began to exhibit some behavioral problems, school personnel requested that the clinical psychologist obtain updated information regarding the student's FBA and BIP. The psychologist met with the student's teachers regarding areas of concern. [Tr. at 264-268].

32. The student's special education teacher saw the student make behavioral progress during the Fall 2006 semester, but noted an increase in behavioral problems in the second semester with worsening behavior in April and May 2007. [R.Ex. 8; Tr. at 214].

33. After the student's receipt of five office referrals in April 2007, the ARDC made plans to convene a fourth ARDC meeting, gave written notice to the parents on April 17, 2007,

subsequently communicated with the parents by electronic communication to find a time convenient for the parents' participation, and completed a second FBA. On the advice of Petitioner's attorney, the parents chose not to attend the fourth ARDC meeting during the pendency of this docket and gave written notice to the school district of the decision not to participate in the fourth ARDC meeting on April 19, 2007. [R.Ex. 7; Tr. at 60 and 152-154].

34. At the fourth ARDC meeting on May 1, 2007, the LISD clinical psychologist collaborated with the ARDC members for review and revision of the student's BIP. ARDC members reviewed the second FBA, which included new behavioral areas of concern regarding the use of profane language with teachers and others, and disrespectful comments to teachers and others. The Study Skills class elective had proven effective in helping the student complete work as well as getting weekly feedback from teachers on homework completion. The ARDC continued the first broad behavioral goal of the student's BIP – to behave in a manner that follows the code of conduct and that promotes academic success – and continued three behavioral objectives. The ARDC reviewed the student's progress toward 70% mastery of the three behavioral objectives by reviewing the student's six-week grading period progress:

<u>5/1/2007 – Review of Progress on BIP Mastery Levels</u>					
Broad Goal 1: <i>“[Student] to behave in a manner that follows the code of conduct and promotes academic success.”</i>					
Progress during five of six grading periods (six-week grading periods) as of 5/1/07:	1	2	3	4	5
Objective 1: Targeted Mastery Level at 70% • “[Student] will maintain self-control (i.e. remaining calm, apologizing when necessary)”	**	**	**	**	**
Objective 2: Targeted Mastery Level at 70% • “[Student] will comply with student directives.”	**	**	**	**	**
Objective 3: Targeted Mastery Level at 70% • “[Student] will complete homework assignments by due date.”	**	**	**	**	**

[R.Ex. 7].

Proposed Revisions to the BIP

35. As part of the fourth ARDC meeting, participating ARDC members noted that the student's recent behavioral difficulties occurred within his Language Arts class despite the behavioral support of an aide. The ARDC decided that instruction on grade level TEKS for Language Arts within a TC classroom setting would be appropriate for the student to address the student's behavior as the student's behavior interfered in the learning of other students in the his present Language Arts general education classroom. The ARDC agreed to add a second broad behavioral goal and two behavioral objectives to the student's BIP as follows:

5/1/07 Broad Behavioral Goal 2:	[Student] will have positive interactions with teachers and others in the school environment. (The student to make progress toward the general curriculum)
Objective 1:	• “[Student] will express frustration when asked to complete an assignment or task in an appropriate way (for example, not using profane language).”

Targeted Mastery Level/ Evaluation Methods	100% 2,4,6,7
Positive Intervention Strategies	<ul style="list-style-type: none"> • Re-direction to task; • Opportunity to privately process behavior one-on-one with teacher (within class period) – to include replacement behaviors.
Consequences	<ul style="list-style-type: none"> • Removal from General Ed classes to the TC room; • Officer referral; • Lunch detention.

Objective 2:	<ul style="list-style-type: none"> • “[Student] will respond to students’ and teachers’ comments using acceptable language (Such as will not say, ‘This is crap.’ ‘Forget this.’ ‘You’re stupid.’).”
Targeted Mastery Level/ Evaluation Methods	100% 2,4,6,7
Positive Intervention Strategies	<ul style="list-style-type: none"> • Opportunity to privately process behavior one-on-one with teacher (within class period) – to include replacement behaviors.
Consequences	<ul style="list-style-type: none"> • Removal from General Ed classes to the TC room; • Officer referral; • Lunch detention.

[R.Ex. 7; Tr. at 156-157 and 248-249].

36. The changes made at the fourth ARDC meeting to the student’s BIP and schedule of classes have not been implemented during the pendency of this Request for Due Process due to the “stay put” status of the student. [Tr. at 159].

37. The student made passing grades on enrolled grade level TEKS in all his classes. As of the fifth grading period, the student had a ** average in Math grade level TEKS instruction. [R.Ex. 8].

Daily Point System

38. LISD tracked the student’s behavior on a daily basis with “Daily Point System” sheets. The student received positive reinforcement under his BIP through a Motivation System to earn points redeemable for rewards and privileges as tracked on a daily point sheet. The student carried his point sheet throughout his school day, presenting it in each class for his teacher’s signature. As additional incentives, LISD used a “Mystery Motivator” for earning extra points and a Reward Bank for redeeming his earned points. By means of the daily point sheet, the student’s parents also had the opportunity to review their student’s behavior and sign the daily point sheet when the student brought the sheet home. [P.Ex. 21; R.Ex. 11].

Petitioner’s Independent Psychological Evaluation

39. On May 3, 2007, Petitioner obtained an independent psychological evaluation of the student. The evaluating psychologist found the student to fall within the ** range of intelligence based on the Wechsler Abbreviated Scale of Intelligence with a score of ** or the upper ** percentile. The psychologist administered the Wechsler Individual Achievement Test, Second Edition, as a brief screener of educational achievement, revealing the following standard scores and percentile ranks: Word Reading – ** or ** percentile; Numerical Operations – ** or ** percentile; and, Spelling – ** or ** percentile. [P.Ex. 1].

40. Petitioner’s evaluating psychologist used information obtained from the student’s parents regarding the student’s behavior and school experience. The psychologist spoke with the LISD educational diagnostician on May 2, 2007. The independent psychological evaluation did not include any behavioral observation of the student in the school setting and did not include formal assessment data from the school district. Although LISD staff promptly returned behavioral rating

scales to the Petitioner's evaluating psychologist, the results were not included in the formal evaluation report. At hearing, the psychologist clarified that neither the student's FBA or BIP were a part of the evaluator's review. Based on the information received from the LISD educational diagnostician, Petitioner's psychologist believes that the student's behaviors are manifestations of the student's disability. [P.Ex. 1; Tr. at 87, 94, 99, and 165-166].

41. As part of the independent psychological evaluation, Petitioner's psychologist measured the student's sustained attention and freedom from distractibility with the Conner's Continuous Performance Test ("CPT-II"). This test measures performance on a specific task, in contrast to information from parents or school staff. The results of the CPT-II showed that it is unlikely that Petitioner is a student with ADHD. [P.Ex.1; Tr. at 275-276].

42. Petitioner's psychologist obtained information from the student's mother. On the Conner's Parent Rating Scale - Short version, a measure of behavior symptoms more specific to ADHD, the mother's ratings indicated significant elevations in the areas of opposition, cognitive problems/inattention, hyperactivity, and on the ADHD index as interpreted by Petitioner's psychologist. On the Achenbach Parent Behavior Problem Checklist filled out by the student's mother, Petitioner's psychologist noted clinical elevations above the ** percentile in the areas of sadness, anxiety, social and attention problems, rule-breaking behaviors, and aggression. The independent psychological report states that the student's responses to the Children's Depression Inventory Self-Report were within normal limits "although he did express some complaints, including thoughts of self-harm, without intent, having to push himself to do schoolwork, wishing for more friends, and seeing himself as not doing what he is told most times." On the Behavior Assessment for Children, Second Edition, an objective measure of attitudes and clinical complaints as reported by the student, responses indicated significant elevations in attitude, often negative or guarded, toward school and teachers as well as moderate deficits in areas of social stress or interpersonal relations. [P.Ex. 1; Tr. at 266].

43. In the written independent psychological report, Petitioner's psychologist diagnosed the student with ADHD, combined type and Bi-polar Disorder, Not Otherwise Specified. As part of the recommendations in the final independent psychological evaluation report, Petitioner's psychologist recommended counseling as a related service for the student as well as a behavior plan tailored with goals and objectives to address impulsivity, inattention, poor work production, poor response to discipline, and social deficits. The psychologist recommended eligibility for special education as a student with Other Health Impaired ("OHI") as well as ED. [P.Ex. 1; Tr. at 277-278].

44. The student's parents did not inform LISD of the independent psychological evaluation or request an additional ARDC meeting to review the completed report; LISD did not receive a copy of Petitioner's independent psychological evaluation until the Disclosure Due Date in this matter. [Tr. at 167-168].

45. Communication between LISD and the student's parents included numerous electronic communications via the Internet over the course of the 2006-2007 school year concerning the student's daily progress, including his assignments, homework, daily grades, medication, and discipline issues. [P.Exs. 4, 6, 8, and 9].

Discussion

Background

This proceeding concerns the appropriateness of the program developed by Respondent for a ** grade student with ongoing behavioral issues as a student with an ED. Respondent believes that the student has made academic and behavioral progress during his only year within the school district by means of a carefully designed program complete with an individualized plan for management of his behavior. Further, upon escalation of the student's misbehaviors in late Spring 2007, Respondent believes the school district timely responded to the change by convening an ARDC meeting, recommending placement of the student into an additional special education class for Language Arts, reviewing the student's behavioral progress, and suggesting appropriate revisions to the behavioral plan but was unable to implement the changes during the pendency of this proceeding. By contrast, Petitioner believes that the student did not progress under Respondent's program, but instead received disciplinary consequences for behaviors related directly to his disabling condition. Petitioner believes that Respondent improperly rejected the parents' request for a special education Math class for the student. Petitioner seeks compensatory services from the school district to address the behavioral needs of the student, including development of an appropriate IEP for Math.

The school district's educational program 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). Petitioner, as the party attacking the appropriateness of a school district's educational program, 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). School districts are not required to maximize the student's potential or supply every conceivable program that may benefit a student in order for the student's program to be found appropriate, so long as the student receives "some benefit" from the educational program. *Bd. of Educ. v. Rowley*, 102 S.Ct. 3034 (1982). Under *Rowley*, two factors must be considered to determine whether a school district has provided a student with a FAPE: 1) the school district must comply with the procedural requirements of IDEA; and, 2) the school district must design and implement a program that is reasonably calculated to enable the child to receive educational benefits. *Id.* at 206-207.

In *Cypress-Fairbanks Indep. School District v. Michael F.*, the Fifth Circuit used a four-factor test to assess whether an IEP is reasonably calculated to confer educational benefit to a student, including: 1) whether the eligible student's IEP was developed in accordance with proscribed procedures, including an individualized program based on the student's assessment and performance; 2) whether the program is administered in the LRE; 3) whether the program was delivered in a collaborative and coordinated manner by key stakeholders; and, 4) whether positive benefits are demonstrated both academically and non-academically. *Cypress Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-248 (5th Cir. 1997).

Individualized Program

Under the first factor of *Michael F.*, Petitioner has the burden to show by a preponderance of the evidence that the school district's educational program developed for the student is not individualized on the basis of the student's assessment and performance. Petitioner has not carried his burden as the

record evidence conclusively established that Respondent's educational program, including the BIP are based on assessment data as well as ongoing performance data.

A. Development of the IEP and BIP. When developing the IEP of a student whose behavior impedes the student's learning or the learning of others, IDEA implementing regulations require an ARDC to "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 34 C.F.R. §300.324(a)(2)(ii). Upon the student's entry into LISD, the ARDC considered the FIE from his previous school district for development of his temporary IEP. With the input of the student's parents and teachers, the ARDC reconvened on September 16, 2006, to finalize the student's IEP and BIP. Committee members reviewed a newly-completed FBA that identified and described problem behaviors with frequency of occurrence, antecedents, and consequences of the problem behaviors. The FBA detailed reinforcers and interventions attempted by the school over the first weeks of school. Based on this information, the ARDC revised the student's BIP to include one behavioral goal with three objectives. When the student's father expressed concern over the student remaining in the general education setting for Math, the ARDC referred the student to the SITP for consideration of services to help the student remain in the general setting for Math, ultimately reconvening for a third ARDC meeting after completion of the SITP recommendations on October 4, 2006. The evidence established that the SITP process included specific review of the student's grade-level performance on TEKS instruction in Math, with a resulting recommendation that the student remain in the general education setting with the addition of a Study Skills class to address the student's academic and organizational struggles.

B. Behavior Escalation. The uncontroverted record evidence established that the student's behaviors escalated in April 2007, at which time Respondent made plans to convene an additional ARDC meeting, eventually held without the parents on May 1, 2007. Members of the ARDC participated in the drafting and review of a second FBA at this meeting, with the identification of two additional behavioral concerns of use of profane language and disrespectful behavior, deciding to continue the first behavioral goal with the addition of a second behavioral goal with two objectives to the student's BIP. Although the changes to the student's IEP and BIP were not implemented during the pendency of this proceeding, the ARDC specifically included positive intervention strategies and positive feedback in the suggested BIP, including a point sheet for earning privileges and rewards and a Mystery Motivator system.

C. Disciplinary Consequences. Petitioner believes that the student received inappropriate disciplinary consequences for manifestations of his disability. The record evidence established that at each stage of revision during the school year, the student's BIP contained both positive reinforcers as well as specified consequences to address the student's inappropriate behaviors. The disciplinary consequences included natural consequences, removal to the TC room, and reduced credit for assignments. The May 2007 ARDC added disciplinary consequences of office referral and lunch detention. Guidance from the United States Department of Education notes to the final IDEA regulations clarifies that implementation of behavioral strategies in a student's IEP is appropriate, including "strategies designed to correct behavior by imposing disciplinary consequences ... even if the behavior is a manifestation of the child's disability." 71 Fed. Reg. 4672. I conclude that the fact the student's BIP contained disciplinary consequences to address the student's specific inappropriate behaviors is not evidence that the student's BIP is inappropriate. The ARDC followed appropriate procedures in designing the student's IEP and BIP. Further, I find that Petitioner did not meet his burden to prove that the disciplinary consequences were, in fact, inappropriate for this student.

The record evidence established that the student received a total of eight days of removals during the 2006-2007 school year. Under IDEA's implementing regulations, a disciplinary change in placement is triggered by a removal for more than 10 consecutive school days, or if the student has been subject to a series of removals that constitute a pattern. 34 C.F.R. §300.536(a)(1-2). The student's removal was not a disciplinary change of placement for which the ARDC was *required* to develop a BIP for a change of placement. Instead, LISD performed two FBAs and made revisions to the student's BIP over the course of the 2006-2007 school year that included consideration of positive behavioral interventions that were incorporated into the student's BIP. The evidence as a whole does not preponderate to support a finding that the BIP was inappropriate under *Michael F.*

At hearing, Petitioner asserted that the first annual behavioral goal for the student, "to behave in a manner that follows the code of conduct and that promotes academic success," was immeasurable and inappropriate. Respondent argues that in fact, successful completion of this goal is measured by not receiving office referrals for a violation of the code of conduct for a given school year. As evidence of this mastery, Respondent notes that Petitioner's limited number of office referrals for the entire school year, or eight referrals, the behavioral goal is individualized and obtainable. Further, Respondent asserts that even if the annual goal were immeasurable, the behavioral goals were measurable. I agree with Respondent and find that although the goal of compliance with the code of conduct for a given school year is broad, the objectives were measurable and in retrospect the student's compliance was indeed measured by referrals for violations of the code of conduct.

D. Procedural Issues. School districts must comply with the procedural requirements of IDEA. *Rowley, supra.* A school district is deemed to have substantially complied with such requirements where short-term objectives are written with sufficient specificity to allow a student to receive an educational benefit and allows for parental participation in the ARDC process. *Leticia H. v. Ysleta Indep. Sch. Dist.*, 47 IDELR 13 (W.D. Tex. 2006). In *Leticia H.*, the court found that the student made behavioral progress and received an educational benefit despite the lack of measurable annual goals. Notably, both the court and the hearing officer found that the student's short-term objectives were measurable. Even if, as in *Leticia H.*, the student's first annual goal is deemed immeasurable, the preponderance of the record evidence conclusively established that the student's parents fully participated in the development of the student's BIP goals and objectives up to the fourth ARDC meeting on May 1, 2007, scheduled by the ARDC after repeated attempts to include the parents. The student's behavior escalated late in the school year in April 2007 when the student received five of his eight officer referrals of the school year. The ARDC reviewed the student's progress with additional information in the form of an FBA for review at the fourth ARDC meeting on May 1, 2007, including a review of the student's progress on the three behavioral objectives, as summarized above in Finding of Fact No. 34. While the student's rate of progress decreased slightly in the third six-week grading period on all three objectives to the ** level, the student's progress on self-control and compliance with student directives continued a decrease in the fourth six-week period to **, followed by gains in the 5th grading period to reach a ** and ** mastery, respectively. Although the student did not achieve the targeted progress of ** compliance on all three objectives, the student nonetheless progressed on the third behavioral objective toward mastery of the overall behavior goal, achieving ** mastery on his completion of homework assignments, or one percentage point below mastery. I find that LISD substantially complied with the procedural requirements of IDEA in the development of the student's IEP and BIP.

E. Accommodations and Modifications. Under Respondent's educational program, the student received accommodations based on his performance and assessment data, such as shortened assignments, Content Mastery support, and an aide for behavioral support, if needed. Petitioner did not

present evidence that these accommodations were inappropriate and not based on the individual needs of the student.

Although Petitioner asserts that the student requires modified TEKS for Math instruction, the uncontroverted hearing testimony and record evidence establish that grade-level TEKS instruction in Math is appropriate for this student. In his previous school district, the student received Math instruction at grade-level TEKS. Over the course of the 2006-2007 school year, the student obtained a ** average at grade-level TEKS. Petitioner did not present evidence to the contrary. The ARDC's decision to schedule grade-level TEKS instruction in the area of Math did not deny the student a FAPE.

F. Tutoring. Petitioner alleges that the student requires individualized tutoring in order to receive a FAPE. To the contrary, Respondent believes that the student's passing grades in all subjects, without the support of individualized tutoring, establishes that the student had no need for individualized tutoring, and negates the necessity of such tutoring. Respondent points to the availability of the general education tutoring for the student, although the student's parents do not want the student to attend tutoring sessions outside of the school day. I agree with Respondent. The evidence preponderates to show that the student progressed under his program with the support of his Content Mastery class, remaining on grade-level TEKS and maintaining passing grades. I find Petitioner has not met his burden to prove a need for individualized tutoring.

G. Eligibility due to ADHD. At hearing, Petitioner appeared to suggest a denial of FAPE for the student due to a failure to identify the student as OHI due to ADHD. This issue was not identified as a contested issue, yet the record testimony and exhibits in this matter do not show that Petitioner is a student with OHI due to ADHD. First, there is no diagnosis by a physician in the record that the student qualifies as OHI due to ADHD. The Texas Administrative Code requires that an eligibility determination for special education and related services, made by an ARDC for eligibility as OHI, must include a licensed physician. 19 T.A.C. §89.1040 (b) and (c)(8). Petitioner failed to meet this burden. Instead, Petitioner's diagnosis of the student as ADHD and recommendation for OHI eligibility was made by a licensed psychologist rather than the requisite physician. Second, there is no showing in the record that the student demonstrates an educational need for special education and related services due to an OHI in order to meet eligibility as a student with OHI. 34 C.F.R. §300.8(a)(1). Neither the ARDC nor Petitioner's parents expressed concern over OHI eligibility. Likewise, there are no requests for additional evaluation for OHI eligibility prior to the due process hearing. Further, I note that LISD did not receive Petitioner's independent psychological evaluation with the psychologist's conclusions prior to the Disclosure Deadline in this matter, nor have the student's parents asked that the psychologist's recommendations be considered. I agree with Respondent that the record evidence in this proceeding does not demonstrate that the student has difficulty in attention and impulsivity in the school environment.

Least Restrictive Setting

The second factor in the four-factor *Michael F.* test mandates that the student's program must be administered in the LRE. *Michael F.*, *supra*. Petitioner challenges Respondent's program on the basis that it is not administered in the LRE. By contrast, Respondent believes that the school district consistently identified the LRE for the student's success. I agree with Respondent.

The record evidence shows that the student began his ** grade year in the least restrictive setting with one special education class per day within the TC for Geography, resembling the

student's schedule in his previous school district. Respondent's program addressed the behavioral needs of the student through a BIP for his targeted behavioral issues, an aide for behavior support in the general education setting, time in the Content Mastery class, and accommodations. Respondent's TC setting is a behavioral support designed specifically to address behavioral needs and social skills.

As the school year progressed and upon identification of the student's homework completion issues and increase of behavioral difficulties as a result, the September 2006 ARDC determined that potential benefit outweighed harm to add a second special education class of Study Skills within the TC setting to assist the student's assignment and homework completion issues.

A. Counseling Consult. The September 2006 ARDC also considered whether the student needed a special education counseling evaluation, determining that one was not recommended at that time. The preponderance of the record evidence established that around the time the student expressed a desire to harm himself in March 2007, Respondent offered a special education counseling consultation but the parents refused to sign consent for the same. Again the issue of a counseling evaluation was discussed by the ARDC at the May 2007 ARDC meeting, including the parents' unwillingness to consent for the evaluation. At hearing, the student's mother confirmed the parents' refusal to consent for special education counseling as a related service by LISD staff. I find that the credible evidence shows that LISD has offered and continues to offer a special education counseling evaluation to the student upon consent of the parents.

B. April 2007 Behavioral Escalation. As the student's behavioral difficulties resulted in five office referrals in April 2007, Respondent's L.S.S.P. met with the student's teachers to gather new behavioral information on the student. The L.S.S.P. met and collaborated with the May 2007 ARDC to address additional behavioral concerns, exhibited by the student in his general education Language Arts classroom. Prior to this time, the student received instruction in the general education setting for Language Arts with accommodations and the assistance of a behavioral aide. At this fourth ARDC meeting, participating ARDC members recommended an additional class period in the TC for Language Arts instruction to address the student's behaviors that occurred during his general education Language Arts class period. As with all ARDC revisions to the student's program by the May 2007 ARDC, Respondent has not implemented the more restrictive placement during the pendency of this docket.

After review of the exhibits and testimony admitted into the record of this proceeding, I specifically note that the more restrictive placement of the student into additional classes in the TC room, made during the first three ARDC meetings of the 2006-2007 school year, were made after review of the student's performance and with the specific input of the parents. Consequently, I find that Petitioner has not proved by a preponderance of the evidence that Respondent's educational program for the student was implemented in too restrictive an environment.

Provision of Services

Under the third factor of the four-factor *Michael F.* test, a school district must provide the student's special education services in a coordinated and collaborative manner by key stakeholders. The record in this proceeding shows that the parents received ongoing information about their son's progress under his educational program in the form of daily behavior sheets, grade reports, access to grade reports online, and electronic communications between his teachers and the parents via the Internet. Likewise, the record shows that the parents participated fully in three of four ARDC

meetings until May 2007. The preponderance of the record evidence shows that Petitioner has not sustained his burden to show that the parents were not fully included in the development and ongoing progress of the student under Respondent's educational program.

Likewise, the record evidence establishes that LISD staff coordinated the delivery of special education services to the student, including direct input from the student's special education teacher to each of his general education teachers. The ARDC documentation of all ARDC meetings for the 2006-2007 school year show participation of the teaching staff responsible for delivery of the student's program. Although the ARDC considered and ultimately rejected the father's request for placement of the student into a special education Math class, the record likewise supports that the ARDC considered and discussed the parental recommendation, including referring the student to the SITP process prior to making a determination that the general education setting was more appropriate for Math. During this process, I find that the parents' input was considered and discussed, although not adopted by the ARDC. *White v. Ascension Parish*, 343 F.3d 373, 377 (5th Cir. 2003).

Academic and Non-academic Benefits

The final factor of the *Michael F.* test requires that both academic and non-academic benefits be demonstrated under the school district's individualized program for the student. Review of the records and testimony admitted into the record of this proceeding shows that the student made passing grades and remained on grade-level instruction for the 2006-2007 school year. Although not determinative, passing grades are indicators of the receipt of an educational benefit. *Rowley, supra*, at 3034. Despite the presence of a disability, the student's receipt of passing grades suggests that the student's IEP "is not only calculated to allow [the student] to make progress, but that it is achieving that objective as well." *Leighty v. Laurel Sch. Dist.*, 46 IDELR 214 (W.D. Pa. 2006). In the instant case, the student remained on grade-level TEKS instruction, even with the presence of his ED.

The student's progress on behavioral issues is ongoing. The record before me shows that the student continues his struggles with his first behavioral objective and the second objective identified by the May 2007 ARDC. Even if the decrease in progress on two of three behavioral objectives on the first behavioral goal is viewed as regression, the student nonetheless made significant and specific progress on the third behavioral objective – the completion of homework assignments. In *Clear Creek Indep. Sch. Dist. v. J.K.*, the Court found that regression on an objective does not alone constitute a denial of FAPE. *Clear Creek Indep. Sch. Dist. v. J.K.*, 400 F.Supp.2d 991 (S.D. Tex. 2005) (regression on toileting skills did not negate a FAPE as the student received some educational benefit on almost all of the objectives of his IEPs). In determining that the student received a FAPE, the Court reasoned:

An IEP and its implementation cannot be judged based on a student's progress or regression on a single objective, even an important one. Absent a showing that [the student] regressed overall or in several significant areas, the Court cannot find that the deficiency...denied him [a] FAPE. An IEP is not guaranteed to succeed, even if it is implemented fully, so the Court cannot rely on the child's failure to master a single specific task as a measure of the propriety of an IEP and its implementation. *Id.* (citation omitted).

As in *Clear Creek Indep. Sch. Dist.*, the student did not progress on all his objectives. Yet the record evidence shows that he made academic progress and remained on grade-level instruction in all

subject areas. At the beginning of the 2006-2007 school year, the student made progress in all three behavioral objectives. By the end of the school year, the student had made significant progress in one of the three objectives. Even with apparent regression on two of the three objectives, the student's progress over the school year exhibits both academic and behavioral benefit from his IEP and I decline to find a denial of FAPE.

Conclusions of Law

1. The student is entitled to special education and related services at no cost to the parents under the provisions of the IDEA, 20 U.S.C.A. §1400, *et. seq.*, and its implementing regulations.
2. The student and his parents 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*, 790 F.2d 1153 (5th Cir. 1986). Petitioner did not meet his burden of proof in this case.
4. Petitioner did not meet his burden to show that the IEP developed by Respondent was not reasonably calculated to enable Petitioner to receive an educational benefit. *Hendrick-Hudson District Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *Cypress Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-248 (5th Cir. 1997); *Polk v. Central Susquehanna Inter. Unit 16*, 853 F.2d 171, 181 (3rd Cir. 1988); *Hall v. Vance County Board of Education*, 774 F.2d 629, 636 (4th Cir. 1985).
5. Petitioner did not meet his burden to show a violation of substantive or procedural violations of IDEA. Petitioner is not entitled to an award of compensatory services. *Burlington Sch. Comm. V. Department of Educ.*, 471 U.S.359, 369-371 (1985); *Alamo Heights Indep. School Dist. v. State Bd. of Educ.*, 790 F.2d 1153 (5th Cir. 1986); *Parents of Student W. v. Puyallup School District, No. 3*, 21 IDELR 723 (9th Cir. 1994).

ORDERS

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

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

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 2nd day of July 2007.

/s/ Mary Carolyn Carmichael

Mary Carolyn Carmichael
Special Education Hearing Officer

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

DOCKET NO. 108-SE-1206

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

SYNOPSIS OF DECISION

ISSUE: A. *Whether the school provided a free appropriate public education (“FAPE”) for the student under the Individuals with Disabilities Education Act (“IDEA”)?*

CITATION: 34 C.F.R. §§300.17, 300.101, 300.320, and 300.324.

HELD: For the District.

ISSUE: B. *Whether the school district provided and implemented an appropriate Behavioral Intervention Plan (“BIP”) for the student?*

CITATION: 20 U.S.C. §1414(d)(3); 34 C.F.R. §300.346(a)(2).

HELD: For the District.

ISSUE: C. *Whether the student’s placement is appropriate and constitutes the least restrictive environment (“LRE”)?*

CITATION: 34 C.F.R §§300.114 and 300.116.

HELD: For the District.

ISSUE: D. *Whether the school district’s refusal to provide the student with Math instruction in the special education classroom was appropriate?*

CITATION: 34 C.F.R §§300.116, 300.322, and 300.324.

HELD: For the District.

ISSUE: E. *Whether the student requires individualized tutoring in order to receive a FAPE?*

CITATION: 34 C.F.R. §§300.320 and 300.323.

HELD: For the District.

ISSUE: F. *Whether the school district provided and implemented appropriate classroom modifications for the student?*

CITATION: 34 C.F.R. §§300.320 and 300.324.

HELD: For the District.

ISSUE: G. *Whether the student requires modified Texas Essential Knowledge and Skills (“TEKS”) in Math, through the development of goals and objectives in Math?*

CITATION: 34 C.F.R. §300.320(6)(i)-(ii).

HELD: For the District.