

STUDENT bnf Parents	§	BEFORE A SPECIAL EDUCATION
	§	
v.	§	HEARING OFFICER FOR THE
	§	
YORKTOWN INDEPENDENT SCHOOL DISTRICT	§	STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioner brings this appeal, pursuant to the Individuals with Disabilities Education Improvement Act 20 U.S.C. § 1400 et seq., (hereinafter referred to as "IDEIA"), against Respondent (hereinafter referred to as "Respondent" or "School District"). Petitioner (hereinafter referred to as "Petitioner" or "Student") filed a written request for a due process hearing which was received by the Texas Education Agency on April 3, 2008. Petitioner was represented by Attorneys Yvonnilda Muniz of Austin, Texas, Dorene Philpot of Galveston, Texas; and Parent Advocate David Beinke. Respondent was represented by Attorneys Susan Graham and Denise Anderson of Walsh, Anderson, Brown, Shultze & Aldridge, P.C. in Austin, Texas. A telephone prehearing conference was held on Wednesday, April 23, 2008. A due process hearing was held on Monday and Tuesday, June 16 and 17, 2008, in Yorktown, Texas. The parties agreed to file post-hearing briefs on or before July 11, 2008.

Petitioner alleges that Student is a **-year-old who was in the ** grade at the time that the Request for Due Process Hearing and Required Notice ("Complaint") was filed, who receives special education placement, programs and services on the basis of meeting eligibility criteria as a student with a learning disability. Petitioner asserts that Respondent has failed to develop an appropriate Individualized Educational Plan ("IEP") in that the Student's curriculum is not age or grade appropriate. Petitioner alleges that Respondent has failed to develop or implement an appropriate Behavior Intervention Plan ("BIP") to address the Student's recurring classroom behavior problems. Petitioner alleges that Respondent has failed to complete an appropriate assessment of the Student's educational disabilities and to make such assessment available to the Student's Admission Review Dismissal ("ARD") Committee in a timely manner. Petitioner alleges that the Student's existing IEP has not been implemented appropriately because instructional modifications have not been provided consistently. Respondent has failed to adequately inform the Student's parents of the Student's existing assessment so that Student's parents could make an informed decision about the Student's educational placement. Petitioner alleges that the Student's existing placement is inappropriate. Petitioner alleges that the Student has been denied a free appropriate public education ("FAPE") for the reasons stated herein.

Respondent generally denies Petitioner's allegations and demands strict proof thereof. Respondent asserts that it has timely and appropriately assessed the Student and timely made

such assessments available to the Student’s parents and the ARD Committee. Respondent asserts that it has attempted to develop a BIP for the Student, but that the Student’s parents have refused to cooperate with the process and have withheld necessary parental consent for an additional Functional Behavior Assessment (“FBA”). Respondent asserts that it has imposed disciplinary consequences upon the Student appropriately in responding to the Student’s classroom misbehavior, and that such consequences have not resulted in a change of the Student’s placement. Respondent asserts that it has provided the Student with a FAPE.

Based upon the evidence and the argument of counsel, the Hearing Officer makes the following findings of fact and conclusions of law.

II. Findings of Fact

1. Student is a *-year-old student who resides within the School District.
2. The School District is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing Student a free appropriate public education in accordance with the Individuals with Disabilities Education Improvement Act, 20 U.S.C.A. § 1400, *et seq.*, and the rules and regulations promulgated pursuant to IDEIA.
3. Student is eligible for special education placement, programs and services as a student who has a learning disability.
4. Student’s behavior/discipline reports for 2007-2008 school year are shown below:

No.	Date	Behavior Shown	Action Taken
1.	September 05, 2007	Refused to participate in class.	Telephone conference with Father.
2.	September 06, 2007	Slapped another student in the face.	Warning; teacher conference.
3.	September 11, 2007	Passing notes in class; off task.	Phone conference with parents.
4.	September 14, 2007	Tardy; refused to do assignment in English.	Personal conference with Father
5.	September 26, 2007	Talking in class, did not return original detention slip.	30 minute detention.
6.	October 2, 2007	Forged Father’s signature on two previous detention slips, refused to do work.	45 minutes Detention on 10/02/07, and 45 minutes Detention on 10/03/07.
7.	October 8, 2007	Used profanity in classroom.	1 day of detention.

8.	October 10, 2007	Used profanity with teacher, threw books and notebook the floor.	Referral to principal.
9.	October 12, 2007	Threw reading book at wall, slammed binder on his desk.	5 days lunch detention, phone conference with Father.
10.	October 17, 2007	Made an obscene gesture in class.	Telephone conference with Father.
11.	October 19, 2007	Held another student in a head-lock; punched and slapped other student; used profanity against student and teachers.	Three days of In School Suspension ("ISS").
12.	December 7, 2007	Not prepared and talking without permission.	Detention.
13.	December 10, 2007	Talking after teacher repeatedly asked Student to stop.	Detention; Second detention added during Detention - 15 minutes added. (Detention was not served)
14.	December 10, 2007	Did not return Detention slip.	Detention. (Detention was not served)
15.	December 11, 2007	Did not return Detention slip.	Detention. (Detention was not served)
16.	December 12, 2007	Did not return Detention slip.	Detention. (Detention was not served)
17.	December 13, 2007	Refusal to serve Detention on 12/10, 12/11, and 12/12.	Phone conference with both parents regarding consequences; Discipline notice sent home.
18.	January 23, 2008	Refused to work in class; disrespectful and insubordinate to teachers; yelled at students, teachers, and principal.	One day of ISS ordered (not served due to absence); ISS ordered due to absence, parent checked Student out of ISS early. Later served the day of ISS.
19.	February 13, 2008	Used profanity towards teacher.	Discussion with Student; Phone conference with Father; 3 referrals; ISS on 2/20/08 for 6 hours; ISS on 2/21/08.
20.	February 19, 2008	Playing in class; use of profanity.	Discussion with Student; Phone conference with Father; 3 referrals; ISS on 2/20/08 for 6 hours; ISS on 2/21/08.
21.	February 19, 2008	Used profanity in class and then left class without permission.	Discussion with Student; Phone conference with Father; 3 referrals; ISS on 2/20/08 for 6 hours; ISS on 2/21/08.

22.	February 28, 2008	Refused to work; insubordinate and disrespectful.	ISS on 2/28/08 and 2/29/08 (Parent picked Student up early on 2/28/08. Student was absent 2/29/08. Served 2/29/08 ISS on 3/3/08.)
23.	March 6, 2008	Yelling outbursts; Physically threatening towards teacher.	ISS on 3/7, 3/10, and 3/11; Saturday School on March 8 from 8 a.m. -12 p.m. (Served on later dates)
24.	March 6, 2008	Not prepared; talking back to teacher; refuses to follow classroom rules.	<i>No disciplinary action.</i>
25.	April 22, 2008	Not prepared; laid head down on desk.	Phone conference with Mother.
26.	April 22, 2008	Had a laser pointer in class.	Teacher confiscated laser; Phone conference with Mother.
27.	April 23, 2008	Refused to do work; used profanity with teacher.	Phone conference with Mother; ISS for the rest of the day.
28.	April 23, 2008	(In ISS) Sleeping in class; refused to work.	Phone conference with Mother - told Mother about one-on-one aide available, but Student refused to work with aide.
29.	April 24, 2008	Walked out of class and used profanity.	Phone conference with Mother; ISS on 4/25/08.
30.	April 25, 2008	(In ISS) Spoke about a teacher negatively; refused to do assignments.	ISS on 4/28/08.
31.	April 28, 2008	Came to ISS without books; used profanity.	<i>No disciplinary action.</i>
32.	April 28, 2008	Used profanity; walked out of office; Mother called, but could not calm Student down. Mother took Student home early.	Three more days of ISS; Phone conference with Mother.
33.	May 5, 2008	Walked out of ISS.	Phone conference with Mother.
34.	May 12, 2008	Refused to follow directions.	Student sat in office for the rest of the day; Phone conference with Mother.
35.	May 14, 2008	Used the "finger" at the teacher and class; used profanity in class.	Phone conference with Mother; Three days of ISS.
36.	May 15, 2008	(In ISS) Did not complete assigned work.	1 day added to ISS; Phone conference with Mother.
37.	May 15, 2008	Disrespectful, refused to answer teacher.	1 day added to ISS; Phone conference with Mother
38.	May 16, 2008	Disrespectful, refused to complete assigned work.	Phone conference with Mother.

39.	May 16, 2008	Threw a book on the floor and refused to do his work, threw a pencil at cubicle, yelling in class.	Phone conference with Mother; Student was checked out early.
40.	May 17, 2008	Tardy to Saturday School; teacher confiscated cell phone from Student while Student was talking to Father. Left School without permission.	Phone conference with Father (Father threatened the teacher).
41.	May 20, 2008	Used profanity in response to question from teacher.	Teacher/Principal had a phone conference with Mother, 1 day added to ISS.
42.	May 23, 2008	(ISS) Passed a vulgar note to another student in class; walked out of class without permission; refused to work the rest of the day.	Phone conference with Mother.
43.	May 23, 2008	Walked out of ISS a second time; yelled at principal.	Phone conference with Mother.

5. A Full Individual Evaluation (“FIE”) was conducted on March 20, 2007. This was Student’s required three-year evaluation. Student’s vision and hearing were within normal limits, without glasses and unaided. Student also had no significant health history and no physical conditions which directly prevented Student’s ability to profit from the education process. The FIE team determined that Student has a learning disability that significantly interferes with Student’s ability to meet regular mastery level standards. The FIE team stated that Student demonstrates significant educational/developmental deficits in the area of Math Calculation.

6. On April 11, 2007, the ARD Committee met to review the FIE data and to develop the IEP for the 2007-2008 school year. Student’s parents participated in the ARD meeting and agreed with the IEP and placement developed at the meeting for 2007-2008. Student was moved into a general education English class for the remainder of the school year and the start of the next school year.

7. Annual Assessments of Spring, 2007 were as follows: Reading 6-I met ARD expectations (10/36 items correct); and Math 6-I met ARD expectations (12/44 items correct). Student passed all classes in the ** grade (2006-2007 School Year). Student passed all classes for the first six weeks. Student is working on ** and ** grade IEPs for Math and Reading, and ** and ** grade IEPs in Language Arts. Student is in general education for Science, Social Studies, English, Art and Athletics; and in resource for Math and Reading.

8. An ARD was held on October 16, 2007 at Student’s parents’ request to discuss schedules and modifications for Student. Student will have tutoring on Tuesdays and Thursdays for Math. Student’s teachers stated that Student will be expected to behave in the same manner as the other students, and that Student needs to focus more on classwork and listen to teacher instructions. It was also discussed that Student would like to be in the mainstream setting. There were no changes made to the Student’s BIP. A trial period of ten days was put into place for Math class. The ARD ended in agreement.

9. The October 16, 2007 ARD proposed to conduct the Woodcock-Johnson Achievement Test, a formal FBA, a neuropsychological evaluation, and an assistive technology evaluation. Student's parents refused consent for any evaluation except the Achievement Testing and the assistive technology evaluation. Student's parents requested an independent psychological evaluation.

10. An ARD meeting was held on October 20, 2007 at Student's parents' request to discuss Student's schedule. Student's Father stated that Student was upset with a recent ISS placement which prevented Student from attending a football game, and that Student does not want to continue to go to school in Yorktown anymore, due to that ISS placement. Student's Father felt that the behavior that placed Student in ISS should have been overlooked. Student's Father also stated that he had asked Student's teachers to ignore Student's minor infractions for at least a couple of weeks. Student's Father asked that Student's minor infractions be ignored for at least three weeks. Student's teachers stated that some minor write-ups had been ignored, but that Student will have to follow the Student Code of Conduct. This decision was based, in part, on the parties disagreement as to what constituted a "minor infraction."

11. On October 25, 2007, Student brought a cell phone to Saturday School. Student's Father was informed that having a cell phone at school violated policy and that pursuant to the policy Student's Father would have to pay a \$15.00 fee to have the phone returned. Student's Father stated that he "was not going to pay for the phone because it was his personal property and that [Student] was not going to Saturday School." Student's Father said he would take it up with his legal help at the next scheduled ARD, and removed Student from Saturday School. Student's Father was informed that Student would have to make up the time missed.

12. On October 30, 2007, a follow-up ARD was held to review and discuss Student's placement. Student's parents asked that Student's placement in general education Math be extended another ten days, and the ARD agreed to this. The importance of Student's participation in after school tutorials for skill reinforcement was emphasized. There was extensive discussion of Student's behavior, and School District personnel proposed that the behavior consultant observe Student and prepare an FBA. Student's Father did not think that Student had behavior problems.

13. An Annual ARD meeting was held on November 12, 2007 to discuss possible schedule changes for Student. Each of Student's teachers stated that Student was an excellent student, but that Student's behavior and attitude problems were continuing to escalate. Parents' advocate stated that he wanted Yorktown ISD "to build some kind of things into place so we are all on the same page" and that he was "looking for a pattern with [Student's] behaviors." Parents' advocate also requested that Student's behaviors be recorded so that the ARD could narrow down what was occurring with Student. An FBA was discussed by the ARD, however, Student's Father stated that he "wanted to think about that." One of Student's teachers stated that she kept a daily log of Student's behaviors, and pressed the need for an FBA to be conducted on Student. Student's Father again stated that he would have "to think about it."

14. At the November 12, 2007 ARD, Student's Father stated that Student would not be attending Thursday tutorials. Student's teacher stated that Student needs to attend tutorials for the extra help, and that if Student fails classes it is based on Student not attending the tutorials. Student's Father disagreed. At the end of the ARD, Student's parents would sign neither agree nor disagree, stating that there were additional items that needed to be discussed at another ARD.

15. On December 18, 2007, a group of Student's teachers met with a behavior consultant with the Special Education Cooperative ("Co-op") to conduct an informal behavior assessment. Specifically, Student's Reading teacher, Math teacher, English teacher and the Principal met with the consultant and an LSSP also from the Co-op to discuss Student's problematic behaviors at school.

16. The December 18, 2007 group identified two problematic behaviors Student was exhibiting in the classroom. The two behaviors identified were resistiveness/refusal (non-compliance) to work on class assignments and disrespectfulness when asked to work on assignments. Student's Math and Reading teachers noted that they saw the resistiveness/refusal to work on assignments in their classes throughout the class period on a daily basis. Student's English teacher noted that she saw the resistiveness/refusal two to three days a week. As to the disrespectfulness, it occurred two to three times daily in Math class, according to Student's teacher and, in English class, it occurred on the days Student was resistive. The group also completed the Functional Analysis Screening Tool which indicated that the function or purpose of Student's resistiveness/refusal to work on assignments and disrespectfulness was the variable of escape from task demands.

17. On December 19, 2007, the ARD committee met again. Student's parents participated with their advocate and attorney. A staffing of Student's teachers and the special education behavior consultant had been held the day before the ARD to discuss Student's conduct. A BIP was proposed and discussed in the ARD meeting. Student's parents did not agree to the BIP, and the ARD was rescheduled to continue on January 4, 2008.

18. At the January 4, 2008 ARD, parental concerns about the amount of homework were discussed and reduced assignments were agreed upon. Student's parents would not agree to the BIP unless it included a specific provision that "minor infractions" would be ignored. Once again, Student's parents refused consent for a formal FBA, and refused to permit the school counselor to work with Student on social skills issues.

19. Student received the following final grades for the 2007-2008 school year and was promoted to the ** grade:

Science 6	-	**
Reading 6 - RES	-	**
Physical Education	-	**
Band 6	-	**
English 6	-	**

Math 6 - RES	-	<i>No grade provided.</i>
Social Studies	-	**
English 6 - RES	-	**

20. The District has requested parental consent to conduct an FBA on Student at least five times during the 2007-2008 school year during the following ARD meetings: October 30, 2007; November 12, 2007; December 19, 2007; January 4, 2008; and May 7, 2008.

21. The District has provided Student with an educational program that has conferred significant educational benefit on Student. However, the District has not taken all actions necessary to maximize the educational benefit that Student could derive from an increased educational program.

22. Student's Father does not believe that Student has a behavioral problem. He believes that Student has developed "bad habits" from older special education students placed in the classroom with Student. Also, Student's Father believes that the school discipline consequences including assignment to ISS has demoralized Student and made Student into an angry and hateful young person at school.

23. Student's parents are unwilling to commit to any additional assessment or testing of Student to determine, with accuracy, the level of Student's educational functioning or the root cause of Student's behavioral problems. Student's parents are concerned about Student's inability to consistently focus in class; Student's distractibility; Student's inconsistent effort and Student's classroom misbehavior. However, Student's parents are unwilling to have doctors "meddling in [Student's] internal affairs" or even providing the School District with Student's medical records. Moreover, Student's parents object to the District performing a neuropsychological evaluation of Student because they perceive that such an evaluation would "get into our [Student's family's] business a lot more and thinking that [Student] had something wrong with [Student]."

24. Student's parents want the School District to educate Student through a combination of mainstreamed and modified curriculum in one or more subjects; on-on-one assistance in one or more subjects; and a BIP that disregards Student's misbehavior. However, Student's parents have prevented the School District from developing or implementing an IEP or BIP with some of these features by their actions in response to attempts to discipline Student and their opposition to the necessary additional assessment of Student.

25. Student has a severe behavioral problem that significantly impedes Student's learning and the learning of other students. The root cause of Student's behavioral problem is unclear. It may be based on a lack of motivation; an emotional disturbance; or even Attention Deficit Hyperactivity Disorder ("ADHD"). A complete FIE with a neuropsychological evaluation is necessary to determine if Student has an additional educational disability that has not been identified, at this time.

26. Student's behavior needs to be addressed by a BIP that is based on a formal FBA, after a complete FIE is performed on the Student, including a neuropsychological evaluation.

III. Discussion

In this case, the evidence shows that Student has a severe, all encompassing behavioral problem that significantly impedes Student's ability to maximize educational progress, but does not prevent Student from making educational progress, at this time. Student's persistent classroom misbehavior has required the District to remove Student from class and minimize Student's disruptive impact so frequently that it has obscured an accurate judgment of Student's academic strengths and weaknesses. For too much of the 2007-2008 school year Student was instructed in the School's ISS because of persistent, perhaps uncontrollable misbehavior. The School managed to fashion, throughout multiple ARD meetings, adjustments in educational supports, a year of educational instruction from which Student derived more than minimal educational progress, resulting in Student's promotion to the next grade level. However, the circumstances of the school year were far from optimal. It is doubtful that Student will have the same good fortune in the upcoming school year, if Student's misbehavior continues to escalate and is unabated by a detailed, well-informed behavioral intervention plan.

Student's parents have been obstacles rather than effective partners to Student's educational progress. Rather than acting on what is manifestly obvious from this record, Student's parents have chosen to oppose any of the School's efforts to cobble together and implement a reasonable BIP or develop a more effective BIP based on a formal FBA. Student's parents' testimony was a mixture of denial of Student's suspected disabilities related to Student's misbehavior; and a misguided sense of Student's right to medical/personal privacy. A comprehensive neuropsychological assessment on Student is long overdue. Student's parents' consistent refusal to consent to such evaluation and a formal FBA only threatens to continue to limit Student's future educational success.

Two cases provide controlling authority for this decision: *Cypress-Fairbanks ISD vs. Michael F.*, 118 F. 3d 245 (5th Cir. 1997); and *M.M. vs. Sch. Dist. of Greenville County*, 303 F. 3d 523 (4th Cir. 2002). The *Michael F.* decision, which cites the landmark decision of *Board of Educ. vs. Rowley*, 458 US 176, 73 L. Ed. 2d 690, 102 S. Ct. 3034(1982), stands for the proposition that where a student has made more than minimal educational progress in any individualized program designed to confer educational benefit, the LEA has discharged its burden to the student, under IDEIA. Student's grades and promotion alone shows that Student received more than minimal educational benefit from the modified, general education program [See also *Adam J. v. Keller ISD*, 328 F. 3d 804, 810 (5th Cir. 2003)]. Therefore, Petitioner's claims of procedural violations regarding reports to parents of grade level achievement scores; or alleged violations of 34 CFR §300.311(a)(5) pale in ultimate significance. Petitioner's allegations of a failure to develop and implement an appropriate IEP or BIP or make instructional modifications contradict the *M.M.* holding. That decision holds that a parent's failure to completely access services offered by a school district cannot be ignored in an evaluation of a student's less than desirable educational progress. Services such as counseling

and free educational evaluations are crucial educational services. Refusing to consent to either and then complaining about the results is illogical. Likewise, undermining any effort of the District to implement any type of disciplinary consequences for misbehavior such as refusing to allow Student to serve ISS or detention, hurts only the Student. The Petitioner's advocates in this hearing and in some of the ARD meetings take the curious position of advocating a position that is actually eschewed by Student's *parents*, but is appropriate for Student. Their extraordinary argument that the District should have overridden Student's parents' lack of consent seems to tacitly acknowledge that Student's *parents* have acted inappropriately. (It therefore begs the question of why energy was not spent changing Student's parents' minds rather than litigating a due process hearing.) Nevertheless, a parent's failure to use the services offered by a District should not be rewarded. See *Loren F. vs. Atlanta ISD*, 349 F. 3d 1309 (11th Cir. 2003) and *Doe vs. Defendant I.*, 898 F. 2d. 1186 (6th Cir. 1990).

Petitioner's argument that the District failed to timely seek to override the parents' lack of consent is contradicted by applicable regulations and the educational progress achieved by Student. Rule 34 CFR §300.300 pertain to the obligation of an LEA to seek to override a lack of consent for a necessary evaluation. After all, a school district has an independent obligation to provide FAPE to a student even if that student's parents' actions are inappropriate. However, a subsection of the rule provides:

“ii. If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures described in paragraph (a)(3) of this section.

iii. The public agency does not violate its obligation under §300.111 and §§300.301 through 300.311 if it declines to pursue the evaluation or reevaluation.”

34 CFR §300.300(c)(i)(ii),(iii)

The District is placed on notice of the need to be more proactive in obtaining information crucial to ensure that Student continues to receive a FAPE. This District is not required to seek to override, then, even if the record shows it should have. This is particularly the case if Student has not been denied a FAPE.

IV. Conclusions of Law

1. Petitioner is a student in the School District who is eligible for special education services based on Student's classification as a student with a learning disability. 20 U.S.C.A. § 1401(3); 34 C.F.R. § 300.7; 19 T.A.C. § 89.1040.

2. Respondent has a responsibility to provide Student with a free appropriate public education. 20 U.S.C.A. § 1412; 34 C.F.R. §300.300; 19 T.A.C. § 89.1001.

3. Respondent showed that it developed and implemented an IEP and BIP for Student that was designed to convey an educational benefit to Student for the 2007-2008 school year. *Cypress-Fairbanks ISD vs. Michael F.* 118 F. 3d 245, 253 (5th Cir. 1997)

4. Student received a FAPE for the 2007-2008 school year. *Cypress-Fairbanks ISD vs. Michael F.* 118 F. 3d 245, 253 (5th Cir. 1997)

V. Order

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer ORDERS that the relief sought by Petitioner is DENIED.

SIGNED in Austin, Texas this 21st day of July, 2008.

Stephen P. Webb
Special Education Hearing Officer

STUDENT	§	BEFORE A SPECIAL EDUCATION
	§	
v.	§	HEARING OFFICER FOR THE
	§	
YORKTOWN INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

SYNOPSIS

Issue: Did the School provide the Student with an educational program designed to confer educational benefit and a FAPE?

Federal Citation: 20 USCA §1412; 34 CFR §§300.300, 300.341, *Cypress-Fairbanks ISD v. Michael F.* 118 F. 3d. 245 (5th Cir. 1997); *Board of Educ. v. Rowley*, 458 U.S. 176, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982)

Held: For the School District. The School District implemented the Student's IEP and BIP without cooperation from the Student's parents or their consent for necessary additional assessment. The resulting educational progress did meet the standard of a FAPE contained in applicable case-law and statutes.