

STUDENT	§	BEFORE A SPECIAL EDUCATION
v.	§	
	§	HEARING OFFICER FOR THE
Coolidge	§	
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 February 2, 2011. Petitioner was represented by next friend Parent of Coolidge, Texas. Respondent was represented by Attorney Susan Morrison of Fowler Law Firm in Austin, Texas who appeared *pro se*. A due process hearing was held on Tuesday, March 22, 2010 in Coolidge, Texas. The parties agreed to file post-hearing briefs on or before April 15, 2011.

Petitioner alleges that Student is a ***-year old in the *** Grade. Petitioner has been receiving special education as a student who is challenged by ***, an Emotional Disturbance, and ***.

1. Petitioner states that Student was sent home for two days *** to get Student's ***, as Student was suffering from ***. Petitioner further states that the Superintendent informed her that Student was *not* being punished.

2. Petitioner states that Respondent placed Student in a behavior class without notifying the parent, and Respondent notified Petitioner that if Student showed up at school, Student would ***.

3. Petitioner states that Respondent is denying Student socialization. Petitioner further states that Student has always been in the general education classroom, and suddenly Student is separated from peers. In this regard, Petitioner alleges that the Student's placement and Individual Education Plan ("IEP") is inappropriate.

4. Petitioner states that during the January 3, 2011 Admission, Review, Dismissal ("ARD") meeting, Petitioner was informed that Student would be educated ***. Petitioner alleges that Respondent provided the Student's parents with insufficient notice of the subject matter of this ARD meeting.

5. Petitioner states that Student is not receiving a Free Appropriate Public Education ("FAPE"), in that Student is not receiving a full education by a teacher. Petitioner further states, that on the days that Student's teacher is unable to work, Student is sent home.

6. Petitioner states that Respondent failed to notify Petitioner of Student's Change of Placement. Petitioner further states that Student was not allowed to ***.

7. Petitioner spoke to the Superintendent in the second week of January, 2011 because Student was upset about not being able to ***. Petitioner states that Respondent does not want Student *** because of Student's disability and the fact that Student needs *** for student's disability.

8. Petitioner alleges that Respondent is not educating Student in the Least Restrictive Environment ("LRE").

9. Petitioner states that at the February 1, 2011 ARD meeting, Respondent only discussed Student's grades. Petitioner asserts that Respondent is denying the Student's parents equal partnership in the ARD process.

10. Petitioner states that a Behavioral Intervention Plan ("BIP") was requested and Respondent has failed to develop and implement an appropriate BIP for the Student.

As relief in this due process hearing, Petitioner requests that Respondent be ordered to do the following:

1. Change the Student's placement where Student can learn in the general education setting.
2. Provide compensatory education to the Student to compensate the Student for Respondent's blatant disregard for Student's disability.
3. Develop and implement an appropriate BIP for the Student.
4. Train the Student's teachers and school administration in the appropriate handling of a student with the Student's disabilities.

II. Findings of Fact

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

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 suffers from ***, Emotional Disturbance, and ***.

4. An ARD meeting was convened on the Student's behalf on **July 28, 2010**. The purpose of the ARD was to discuss a change of the Student's placement from *** back to a regular general education setting.
5. The ARD Committee ("ARDC") determined the following:
 - a. *** was changed to allow Student to have a more productive day.
 - b. Student's school day was ***.
 - c. Student will participate in the A+ Program, a self-paced accelerated study course.
 - d. Student's schedule for the year 2010-2011 will be revised.
 - e. A School Licensed Specialist in School Psychologist ("LSSP") will observe and interview Student to start and complete an evaluation (psychological, vocational, educational assessment).
 - f. Student will start taking TAKS in October 2010.
 - g. Student will take TAKS-A in a small group setting; the test will be oral.
6. At the July 28, 2010 ARD meeting two alternative *** plans were discussed with Student's next friend, *** and ***. The *** was chosen to allow the Student to ***. This was signed by Student's next friend.
7. All members of the July 28, 2010 ARDC agreed and the ARD Report was executed by all participating members.
8. On October 1, 2010, LSSP selected by the Student's next friend released an Independent Educational Evaluation ("IEE") that she completed regarding the Student. The evaluation was performed at the Student's next friend's request, for a current assessment of the Student's emotional and behavioral status and for recommendations regarding the Student's educational program.
9. The LSSP performed an assessment on the following areas: Academic Skills, Reading, Math, Writing, Cognitive Abilities, Sensory Motor Functions, Input/Output Channels, Verbal, Reasoning, Memory. She also performed a *** and observed the Student during class. The LSSP's October 1, 2010 report reflects that the LSSP took an oral history of the Student's next friend that included descriptions of chronic impulsivity and behavioral problems; over reactions to problems; ***; and habitual noncompliance with adult directives.
10. The LSSP's October 1, 2010 report proposed six specific instructional strategies to address cognitive strengths and weaknesses that range from *** to *** levels that are adversely affected by the Student's emotional disability and general feelings of academic inadequacy. Moreover, the LSSP concluded

that: “Functionally, it appears that [Student’s] inappropriate classroom behaviors serve primarily to avoid engaging in academic activities that will highlight [Student’s] inadequacies in front of both teachers and fellow students.”

11. The LSSP’s October 1, 2010 report concludes that the Student’s IEP and BIP needs to be structured to ensure that they provide for a consistent strategy of positive behavior support. She also concludes that “behavioral interventions that rely on frequent and focused positive reinforcement of targeted new and replacement behaviors will be much more effective for student than those that rely on consequences for inappropriate behaviors.”

12. An ARD was convened on the Student’s behalf on **October 7, 2010**. The purpose of the ARD was to review Student’s program, initial evaluation/re-evaluation completed and to discuss the October 1, 2010 report of the LSSP.

13. The October 7, 2010 ARDC concluded that the Student continued to qualify for special education services as a student with an emotional disturbance. However, the ARDC also concluded that the Student’s behavior did *not* impede the Student’s learning or the learning of the others. The ARDC determined that the Student works on grade level in all educational subject areas. The ARDC determined that the Student did not require an IEP to address deficits in subject matter, only a behavioral IEP to address school misbehavior.

14. In the area of Site and Service Considerations, the October 7, 2010 ARDC determined that general education only; general education with support services; and alternative school had been “tried”. The ARDC also noted that placement in *** had been “provided”.

15. The October 7, 2010 ARDC determined that previously provided supplementary aides and services included Title I Compensatory education; school health services; tutorials; counseling; and accommodations in general education.

16. The October 7, 2010 ARDC determined the following:
- a. Student is to ***.
 - b. A BIP is needed and other strategies should be executed.
 - c. An LSSP will help draft the IEP to address Student’s inappropriate behaviors at school. Student will be allowed a cool down time and ability to talk with the school counselor, to talk about incidents that have happened and student’s ability to make better choices.
 - d. Student will work with the school counselor during advisory.

- e. IEP goal to teach Student strategies to deal with stressful situations in ways that are consistent with school rules. Strategies include:
 - 1. Cool down will be done in the counselor's office.
 - 2. Student needs to learn how to catch student's self and recommend to the teacher that student needs a cool down.
 - 3. Teachers need to observe and recommend cool off time before escalations of behavior.
- f. Objective is for Student to be able to cool off and handle situations without presenting student's self as defiant.

17. The October 7, 2010 ARDC did not reach a unanimous agreement. The ARD Report was executed by all participating members, showing the Student's next friend in disagreement with the determination of the ARDC.

18. On October 25, 2010 the Student's next friend was notified by the County Sheriff's Office that a Criminal Trespass Notice had been issued prohibiting her from entering the school grounds at the risk of being charged with the offense of criminal trespass (P.C. Sec.30.05).

19. An ARD meeting was convened on the Student's behalf on **October 27, 2010**. The purpose of the ARD was to discuss to discuss Other Health Impairment ("OHI") eligibility and review the Student's behavioral IEP adopted in the 10/7/10 ARDC meeting.

20. The October 27, 2010 ARDC concluded that the Student suffers from ***. It acknowledged that the Student had been ***. ***. It was also determined that the Student was to be allowed to cool down when feeling upset; and be able to leave class and go see the School Counselor to allow the Student to cool down.

21. The October 27, 2010 ARDC determined that the Student would be placed in and accelerated participation program, A+, where Student will ***. The A+ program is self paced and students in such programs often complete lessons alone or in classes that contain a small number of students.

22. All members of the October 27, 2010 ARDC agreed with the changes except Student's next friend. Student's next friend signed "Disagreed" to the findings of the ARDC.

23. On or about ***, 2010, the Student overheard the School Principal and *** Teacher having a conversation that the Student found to be inappropriate. The Student believed that *** Teacher had violated the

Student's and another classmate's confidentiality about ***. The Student also believed that *** Teacher had said disparaging things about the Student's educational disability and personal habits. The Student's belief that *** Teacher had made disparaging remarks upset the Student and caused the Student to confront *** Teacher and the Principal about the alleged remarks.

24. During the Student's meeting with *** Teacher and the Principal, the Student became angry, confrontational, and disrespectful of the Principal and the *** Teacher.

25. On December 14, 2010 the Student was alone in a hallway during class time on the way back from an authorized bathroom break. The Student was walking and was either kicking or randomly tossing a spherical, 2 inch diameter rock, down the empty hallway until it hit a metal locker, making a loud noise. The School's Pullout Teacher went into the hallway with the Student and saw the rock in the Student's hand. When the Student saw the Pullout Teacher, the Student said: "I wish it had been [The Principal]." The Student did not threaten the Pullout Teacher with the rock or say that the Principal was going to be targeted. However, the Student refused to hand over the rock to the Pullout Teacher when requested to do so. The Student was sent to the School's office for refusing to obey a direct instruction.

26. On ***, 2010 the Student, still angry about what the Student considered an unsatisfactory resolution of a perceived slight and invasion of privacy by *** Teacher and Principal; left a handwritten note with the District's Superintendent's office, ***. The note contained the following:

“*** wont talk *** wants No Drama So I'm left to Fight this on my own cuz I know you cant do anything its my word against theres I might not be here when you get back going to talk to [Principal] again But one Way or another I Will win cuz ***
[Student] AND ITS IMPORTANT”

27. Because of the Student's ***, 2010 note to the Superintendent, the incident with the rock, and the angry confrontation with *** Teacher and the Principal, the School's administration determined that the Student was a danger to the Staff and Students and, possibly, the Student. Student's next friend was offered the option of the Student *** or ***. The District's Superintendent did not want the Student ***, the Superintendent was concerned. The Student's next friend took the Student home ***.

28. During the events of ***, 2010 through ***, 2010, the Student told School officials that the Student had stopped *** because the Student was upset about the alleged oral slight by *** teacher.

29. On ***, 2010, an invitation to participate in an ARD meeting was mailed to *** Student's next friend to discuss possible changes in program or schedule and proposed changes of IEP and/or placement at an ARD meeting to convene on ***, 2011. Because of ***, there was *one* school day between the date of the notice and the date of the proposed ARD meeting. The Notice of Procedural Safeguards required the School to provide *ten* school days notice of any decision to change the placement of the Student because of a violation of the Student code of conduct.

30. An ARD was convened on the Student's behalf on *** 2011. The purpose of the ARD was to discuss possible changes in program or schedule and proposed changes of IEP and/or placement.

31. The ***, 2011 ARDC determined the following:

- a. Student's placement will be ***.
- b. This will be a behavior support class and Student will be on a self paced program to complete schoolwork.
- c. Student will be allowed to attend all *** and any extracurricular activities.
- d. Student will take the TAKS-A for *** in the areas Student ***.

32. On ***, 2011, the School Principal notified the Student and the Student's next friend by letter, explaining that because of the Student's ***, 2010 and ***, 2010 behaviors, the Student was assigned to a Behavior Support Classroom ("BSC") until ***. The School Principal characterized the Student's behaviors on those days as "very disruptive and threatening to the instructional environment causing an unsafe environment for the Student himself, staff, and other students in the building." The letter also contained the following sentences: "[Student] is required to follow all Student Code of Conduct rules while in the BSC environment; ... Any verbal or physical threats, any profanity, any disruptive behaviors that totally disrupt the educational environment may be *** and ***." The letter notice was read to the Student's next friend during the ***, 2011 ARD meeting.

33. Student's next friend signed agreed with the decision of the ***, 2011 ARDC and executed the ARD Report, but felt that there was no other choice but to agree with the ARDC determination.

34. After ***, 2011 the Student was permitted to participate in *** activities but declined to do so because of the events on the last school week in *** and the Student's subsequent placement in the BSC.

35. The Student was upset by the ***, 2011 placement in the *** with a teacher. The Student felt that it was punishment and that the Student was no longer welcome at the School.
36. An ARD meeting was convened on the Student's behalf on ***, 2011. Student's next friend requested that student be returned to the mainstreamed, general education classroom.
37. The ***, 2011 ARDC determined that Student's current placement should not be changed. All members agreed except Student's next friend. The ***, 2011 ARDC agreed to leave the Student in the BSC.
38. On ***, 2011, an ARD meeting was reconvened after a 10 school day break from the ***, 2011 ARD meeting. All members were present and the ***, 2001 ARD was reviewed.
39. The ***, 2011 ARDC determined the following:
- a. Student's placement should not be changed because Student is successful with the academic work in the current setting.
 - b. Student's placement will remain in the Behavioral Services Class ("BSC").
 - c. Student has completed all coursework for *** except four lessons in *** and 10 in ***.
 - d. Student will take the *** TAKS for ELA and Math.
 - e. ARDC will accept Student's score as passing and allow Student to ***.
40. All members of the ***, 2011 ARDC agreed except Student's next friend. Student's next friend refused to sign the ARD Report.
41. The Student worked more efficiently on assigned school work after ***, 2011 while in the BSC placement. The Student completed all assignments and was ***.
42. The Student and the Student's next friend affirmatively stated during the March 22, 2011 hearing that no form of compensatory education was sought in this due process hearing.
43. The Student and the Student's next friend were notified on March 2, 2011 that the Student has ***.

II. Discussion

In any due process hearing, the ultimate question before a special education hearing officer is whether the student in question received a FAPE. Due process hearings typically involve many disputed fact issues and allegations of procedural violations of IDEIA, or its many implementing regulations. However, the question of whether the student received a FAPE is always the central issue in the case. The alleged procedural violations are evaluated to determine if they, individually or collectively, amounted to a denial of FAPE. IDEIA, itself, requires a procedural violation to rise to the level of a substantive violation of a FAPE. [20 U.S.C. §1415(f)(3)(E)(ii).]

The limits of a special education and a FAPE have been defined by the courts. The United States Supreme Court and the Fifth Circuit Court of Appeals decisions in *Board of Education of the Hendricks Hudson Central School District v. Rowley*, 458 U.S. 176 (1982) and *Cypress Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997) read together, define a FAPE as an individualized educational intervention that provides an impaired student with a basic educational floor on which the student can make meaningful educational progress. The Fifth Circuit decision of *Houston ISD v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) followed the holdings announced in *Michael F.* and, as particularly relevant to this case, held that a failure to receive FAPE is not shown by a *de minimis* failure to implement *all* aspects of a student's IEP. The court concluded:

Therefore, we conclude that to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failure and for providing the disable child a meaningful educational benefit.

(See, *Bobby R.*, *supra*, at. P. 349)

In this case the facts show more than a *de minimis* failure to implement all aspects of the Student's IEP occurred with the Student's educational program. The removal of the Student from the general education setting and placement in the restrictive, functionally self-contained setting of the *** "Behavior Services Class", was done through improper procedure. The Student was clearly removed because of the disruptive, *** behaviors associated with the *** outbursts the week of ***, 2010. The Respondent's contention that the Student's BSC was *not* a disciplinary placement is undermined by the testimony that *** were also considered as alternatives. It is further undermined by a warning that further misbehavior in the BSC would ***. The ARDC should have

made an exception for misbehavior that was related to or a manifestation of the Student's disability. Moreover, the parties generally concede that the Student's behaviors were a manifestation of the Student's disability. They were the same as the predicted misbehaviors described in the LSSP's October 1, 2010 IEE report. A Manifestation Determination Review ("MDR") should have been held and the determination should have been that the Student's failure to ***, combined with perceived slights from authority figures, caused inappropriate, aggressive outbursts that ***. Applicable rules could have supported a placement in BSC *anyway* under 34 CFR §300.530(g). The Hearing Officer makes no determination that the Respondent was not justifiably concerned about School's Student's safety. That call is best left to professionals on site. However, the facts mandated a different procedural approach than what was used, with ARDC and documented consideration for the possibility of the Student's subsequent disability-related misbehavior while in the BSC setting.

Nevertheless, however the Student arrived in the BSC placement and, however unhappy the placement caused the Student to be, the facts show that the Student flourished *educationally* in the BSC placement. The environment allowed the Student to complete all remaining assignments ***, as was the Student's and the Student's next friend's education goal. Without the possibility of compensatory education being awarded in this case, all remaining issues are functionally moot. The above-referenced definition of FAPE in *Bobby R.*, *supra* is satisfied. Moreover, the Student's current *** renders any other contemplated relief, gratuitous.

III. Conclusions of Law

1. Petitioner is a student with the School District who is eligible for special education services based on a classification as a student who has an emotional disturbance by virtue of ***. [20 U.S.C.A. §1400(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. The Student's removal from general education classes by the ***, 2011 ARDC was done so because of the Student's discipline violations the week beginning ***, 2010. The Student's removal violated applicable procedural rules because there was not a manifestation determination review prior to a change in placement and the Student's negative behavioral outbursts were a manifestation of the Student's known disabilities. [34 C.F.R. §§300.536(a)(1); 300.530(e),(f).]

4. The Student's restrictive educational setting after ***, 2011 allowed the Student to receive significant educational benefit so that the Student accomplished the agreed upon ***. Therefore, the Student received a Free Appropriate Public Education. [*Hendrick Hudson Central School District v. Rowlet*, 458 US 176 (1982); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).]

5. Although the Student ***, the Student's achievement of all educational goals *** functionally moots all remaining issues in this due process hearing. [34 C.F.R. §300.102(a)(3)(i).]

IV. 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 be DENIED.

SIGNED in Austin, Texas this 28th day of April, 2011.

/S/Stephen P. Webb
Stephen P. Webb
Special Education Hearing Officer

STUDENT	§	BEFORE A SPECIAL EDUCATION
v.	§	
	§	HEARING OFFICER FOR THE
Coolidge	§	
Independent School District	§	STATE OF TEXAS

SYNOPSIS

Issue: Whether the School District’s summary removal of a *** student from a general education setting and placement in a restrictive, self-contained setting because of potentially dangerous, *** outbursts, denied the Student’s right to be educated in the Least Restrictive Environment and resulted in a denial of FAPE.

Federal Citation: 20 U.S.C.A. §1414; *Hendrick Hudson Central School District v. Rowlet*, 458 US 176 (1982); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); *Daniel R.R. v. State Bd. Of Educ.*, 874.F.2d 1036 (5th Cir. 1989); 34 C.F.R. §300.324; §300.305; §300.530; §300.536; §300.102.

Texas Citation: 19 T.A.C. §§89.1050; §§89.1055; *Tatro v. State of Texas*, 625 F.2d 557 (5th Cir. 1980).

Held: For the Respondent: The Student’s removal from general education and placement in a restrictive class with only a teacher because of a violation of the school’s code of conduct was done without a MDR being conducted to determine if the conduct was a manifestation of the Students disability. However, the environment of the restrictive setting was appropriate, given the Student’s disabilities and the potential danger to the Student and the school; and it allowed the Student to complete all requirements necessary for ***.