

TEA DOCKET NO. 235-SE-0611

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

FINAL DECISION OF THE HEARING OFFICER

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Appearances for Petitioner:

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Houston, TX

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FINAL DECISION OF THE HEARING OFFICER

Statement of the Case

The Petitioner (Student or Child)<sup>1</sup> initiated this action against the Respondent (District or School) under the Individuals with Disabilities Education Act (IDEA), as amended (20 U.S.C. § 1400). The Petitioner complains that the Respondent violated the IDEA because it allegedly:

1. Failed to provide the Petitioner a “free appropriate public education” (FAPE) with respect to the Petitioner’s individualized education program (IEP) for the 2010-2011 school year.
2. Failed to provide adequate educational and behavioral progress under the established IEP and placement.
3. Inappropriately advanced the Petitioner to \*\*\* although the Petitioner had not satisfactorily completed IEP goals.<sup>2</sup>

As relief, the Petitioner asks that the Respondent provide the Petitioner a nonresidential placement at a local private school, including daily transportation between home and the private school.

Procedural History

The Texas Education Agency (TEA) received the Petitioner’s Due Process Complaint requesting a due process hearing under the IDEA on June 8, 2011. The parties participated in the mandatory resolution meeting on June 20, 2011 but were unable to resolve the Petitioner’s complaints.<sup>3</sup> This Hearing Officer held a prehearing teleconference with the parties on July 12, 2011. Among other things, the scope of the Petitioner’s complaints was reviewed and plans made for a hearing.

This Hearing Officer held a second prehearing teleconference with the parties on August 23, 2011. Subsequently, the Petitioner – with permission of this Hearing Officer – filed and served an “Amended Request for Due Process Hearing.”<sup>4</sup> In accordance with the IDEA, the hearing timetable began again and a new case schedule was set.<sup>5</sup>

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<sup>1</sup> To protect the privacy of the Petitioner, the Petitioner is also referred to as “Student” or “Child” in this Decision.  
<sup>2</sup> This list closely tracks but is not a verbatim reiteration of the Petitioner’s claims in the Amended Request for Due Process Hearing. The Petitioner’s complaints have been edited here, in part, to more succinctly state them for the purpose of this introduction. See the discussion below for a full statement of the Petitioner’s amended claims. See also Pet’r’s Amended Request for Due Process Hr’g at 1 – 2 (Aug. 25, 2011).  
<sup>3</sup> 34 C.F.R. § 300.510(a).  
<sup>4</sup> 34 C.F.R. § 300.508(d)(3)(ii).  
<sup>5</sup> 34 C.F.R. § 300.508(d)(4).

The due process hearing was conducted on October 12, 13, and 14, 2011. Altogether, 14 witnesses – including experts – were called and testified. Altogether, 58 exhibits were admitted into evidence. During the hearing, the Petitioner was afforded a fair opportunity to offer and solicit evidence and testimony to satisfy its burden of persuasion as assigned under *Schaffer v. Weast*, 546 U.S. 49, 57 – 58 (2005). Subsequent to the hearing, the parties were permitted to submit written closing arguments.<sup>6</sup>

### Findings of Fact

Based upon the testimony and evidence taken on the record in this proceeding, this Hearing Officer makes the following findings of fact:

1. The Child qualifies under the IDEA as a child with autism, speech impairment, mental retardation, and “other health impairment” (OHI). The Child’s health impairment is a heart condition. (Hr’g Tr. vol. 1, 167; Hr’g Tr. vol. 2, 444-45; Hr’g Tr. vol. 3, 827-28; Resp’t Ex. 4 at 105, 112)
2. In April, 2010, the Child transferred from another school district in Texas (\*\*Independent School District) to the Spring Independent School District. The Child was enrolled and began attending \*\*\* school (\*\*\*) in Spring Independent School District. (Hr’g Tr. vol. 1, 29-30, 31-32, 147, 166; Hr’g Tr. vol. 2, 592; Pet’r Ex. 7; Resp’t Ex. 1 at 289)
3. On May 20, 2010, the District held an “admission, review and dismissal” (ARD) committee meeting for the Child. The Child’s parent attended and participated in the meeting. (Hr’g Tr. vol. 1, 68, 166; Hr’g Tr. vol. 3, 824-25; Resp’t Ex. 1 at 289, 320-21)
4. Among other things, the May 20, 2010 ARD committee developed “individualized education programs” (IEPs) for the Child for the 2010-2011 school year. The committee developed seven IEPs in the areas of language arts, health, social skills, science, social studies, math, and vocational. The language arts IEP had one goal with four short-term objectives. The health IEP had one goal with four short-term objectives. The social skills IEP had two goals: one concerned “attending skills” and the other concerned “compliance behaviors.” Each social skills goal had two short-term objectives. The science IEP had one goal with three short-term objectives. The social studies IEP had two goals: one concerned \*\*\* and the other concerned U.S. history. The \*\*\* goal had two short-term objectives while the U.S. history goal had one short-term objective. The math IEP had one goal with four short-term objectives. The vocational IEP had one goal with four short-term objectives. The parent agreed with these IEPs for the 2010-2011 school year. (Hr’g Tr. vol. 1, 158, 166; Hr’g Tr. vol. 2, 592, 601-12; Hr’g Tr. vol. 3, 743-44; Resp’t Ex. 1 at 302-09, 320)
5. The 2010-2011 IEP for social skills had two goals. The first goal concerned improving “attending skills.” The attending skills goal had two short-term objectives: “retrieve and return materials to put away on completion of task time, with visual prompts (following a picture schedule) and reinforce with five direct verbal prompts” and “remain seated during task time while using token economy (penny board) and reinforcers.” The second goal concerned improving “compliance behaviors.” The compliance behaviors goal had two short-term objectives: “respond to one-word compliance commands, with three direct verbal prompts; e.g., stand up, sit down, stop, put in/take out, do this” and “engage in cooperative play or work with 1-

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<sup>6</sup> Following the hearing, the decision due date was extended to accommodate the submission of closing briefs. In addition to addressing claims, the Petitioner also requests that this Decision address discovery sanctions the Petitioner previously requested against the Respondent.

2 others (supervised) with three direct verbal prompts.” (Hr’g Tr. vol. 1, 261-62; Hr’g Tr. vol. 3, 679-81, 697; Resp’t Ex. 1 at 304-05; Resp’t Ex. 41)

6. Among other things, the May 20, 2010 ARD committee considered the items in the Texas “autism supplement” for the Child for the 2010-2011 school year. The committee addressed extended educational programming; in-home and community-based training; positive behavior support strategies, including replacement behaviors and reinforcement strategies; futures planning; staff-to-student ratio; communication interventions; social skills supports and strategies; professional educator/staff support; and teaching strategies. (Hr’g Tr. vol. 2, 616-19; Resp’t Ex. 1 at 295, 297-301)
7. On the 2010-2011 autism supplement, under positive behavior support strategies, the committee noted: “See Adaptive Social Skills, which addresses replacement behaviors and reinforcement strategies. Interventions are in place in addition to IEP.” Under replacement behaviors, the following were noted: “problem solving (set up all instructional settings for success); coping strategies (help with waiting); and parent communication.” Under reinforcement, the following were noted: “primary/book; secondary/token economy (penny board)/food items; [Child] is redirected, offered choices, and uses ‘wait time’ along with verbal comforting.” (Resp’t Ex. 1 at 299)
8. Among other things, the May 20, 2010 ARD committee determined that a “functional behavioral assessment” (FBA) of the Child was not needed. (Hr’g Tr. vol. 2, 644; Resp’t Ex. 1 at 295)
9. Among other things, the May 20, 2010 ARD committee identified various “positive strategies” for the classroom, instruction, transitions, and cafeteria. Among other things, the use of positive reinforcers was identified as a strategy to increase “pro-social behavior.” (Resp’t Ex. 1 at 296)
10. Among other things, the May 20, 2010 ARD committee determined that the Child would receive the following related services in the 2010-2011 school year: speech therapy, occupational therapy (OT), and transportation. Regarding speech therapy, the Child was scheduled for “direct” services 30 minutes, five times every six-week grading period, and for “integrated” services 15 minutes, five times every six-week grading period. Regarding OT, the Child was scheduled for “direct” services 30 minutes, twice every six-week grading period, and for “integrated” services 15 minutes, twice every six-week grading period. The committee also determined that the Child would receive the assistance of a paraprofessional. (Resp’t Ex. 1 at 291, 313, 318, 320, 326)
11. Among other things, the May 20, 2010 ARD committee determined that the Child has a significant cognitive disability that permits the Child to take the “Texas Assessment of Knowledge and Skills Alternative” (TAKS-Alt) state assessment test. (Resp’t Ex. 1 at 314)
12. Among other things, the May 20, 2010 ARD committee considered the Child’s placement for the 2010-2011 school year. The committee determined that the Child would be served in a self-contained “structured learning” class at \*\*\* school (\*\*\*). The structured learning class had one special education teacher and two aides for five students with disabilities, including the Child. The Child’s special education teacher received the Child’s IEPs. The Child’s IEPs were available to the teacher and aides through a copy on file in the class as well as electronically. (Hr’g Tr. vol. 2, 433, 436-37, 439, 480-81, 508-09; Resp’t Ex. 1 at 315-17, 319-20)
13. On June 1, 2010, the District held an ARD committee meeting for the Child. The Child’s parent attended and participated in the meeting. Among other things, the committee resolved the Child’s participation in “extended school year” (ESY) for summer, 2010. The parent approved

and the Child attended the ESY program. (Hr'g Tr. vol. 1, 81-82, 167; Hr'g Tr. vol. 2, 634-35; Hr'g Tr. vol. 3, 825-27; Pet'r Ex. 6 at 9, 13-14, 27-28; Resp't Ex. 2 at 332, 336-37, 350-51)

14. On September 14, 2010, the District held an ARD committee meeting for the Child. The Child's parent requested the meeting and attended and participated. Among other things, the committee revised the Child's class schedule to accommodate the child's health impairment. The parent agreed with the determinations made at the meeting. (Hr'g Tr. vol. 1, 52, 167-68; Hr'g Tr. vol. 3, 827; Resp't Ex. 3 at 127, 135, 137-38)
15. On January 24, 2011, the District held an ARD committee meeting for the Child. The Child's parent attended and participated in the meeting. Among other things, the committee officially added OHI to the list of impairments that qualified the Child for special education. Also, the parent declined in-home training. The parent agreed with the determinations made at the meeting. (Hr'g Tr. vol. 1, 168; Hr'g Tr. vol. 3, 828; Resp't Ex. 4 at 104, 112-15)
16. On or about March 30, 2011, the Child participated in the TAKS-Alt. assessment. (Resp't Ex. 21 at 272)
17. On April 14, 2011, the District held an ARD committee meeting for the Child. The Child's parent requested the meeting and attended and participated. Among other things, the committee discussed and approved the parent's request for an "assistive technology" (AT) evaluation for the Child. The parent agreed with the determinations made at the meeting. (Hr'g Tr. vol. 1, 168; Hr'g Tr. vol. 3, 828-29; Pet'r Ex. 5 at 2, 11, 13-14; Resp't Ex. 5 at 82, 91, 93-94)
18. On May 16, 2011, the District completed the AT evaluation of the Child. Among other things, the AT evaluation report included "teacher observations." Among other things, the Child's special education teacher is recorded as reporting that the Child "has a picture schedule but is not independent in using it." The teacher is also recorded as reporting that the Child "does not sort matching colors or match magnetic letters to the letters in [the Child's] name." (Hr'g Tr. vol. 1, 99-100; Hr'g Tr. vol. 2, 511-12; Hr'g Tr. vol. 3, 830; Pet'r Ex. 4 at 1; Resp't Ex. 24 at 72)
19. On May 19, 2011, the District held an ARD committee meeting for the Child. The Child's parent attended and participated in the meeting. Among other things, the committee reviewed the Child's levels of educational performance. The District presented the Child's progress toward the objectives in the IEPs in the areas of language arts, health, social skills, science, social studies, math, and vocational. The District reported that the Child had mastered IEP objectives. The parent disagreed. The committee recessed to further consider the Child's progress toward the goals and objectives in the 2010-2011 IEPs. (Hr'g Tr. vol. 1, 82, 85-91, 168; Hr'g Tr. vol. 2, 486-87, 502; Hr'g Tr. vol. 3, 829-31; Pet'r Ex. 3 at 1-12, 19-22; Resp't Ex. 6 at 39, 46-49; Resp't Ex. 13 at 62; Resp't Ex. 14 at 58-59; Resp't Ex. 15 at 53-54; Resp't Ex. 16 at 55-56; Resp't Ex. 17 at 60-61; Resp't Ex. 18 at 57; Resp't Ex. 19 at 52)
20. On May 19, 2011, the District provided the parent with a "prior written notice" that, among other things, acknowledged that the parent disagreed with the District's report that the Child had mastered IEP objectives. (Pet'r Ex. 3 at 24; Resp't Ex. 7)
21. On May 22, 2011, the Child's parent submitted a letter to the District outlining the parent's disagreements with the School concerning the Child's education. Among other things, the parent disputed that the Child had mastered IEP objectives. (Hr'g Tr. vol. 1, 91-92, 93-94, 97; Hr'g Tr. vol. 3, 832; Pet'r Ex. 2)

22. On June 1, 2011, the District held an ARD committee meeting for the Child. The Child's parent attended and participated in the meeting. Among other things, the committee resumed its review of the Child's levels of educational performance. District staff reviewed the Child's progress toward IEP goals and objectives for the 2010-2011 school year. The parent continued to disagree that the Child had mastered IEP objectives. (Hr'g Tr. vol. 1, 93, 168; Hr'g Tr. vol. 2, 499-501, 502-03, 628; Hr'g Tr. vol. 3, 833-35; 837-38; Resp't Ex. 8 at 5, 8-18, 30-31)
23. Among other things, the June 1, 2011 ARD committee reviewed the Child's performance on the TAKS-Alt. from the Spring, 2011 assessment. The Child passed the alternative tests in the areas of math, reading, science, and social studies. Page "5AA" in the ARD report from June 1, 2011 stated erroneously that the Child did not pass the TAKS-Alt. The correct results were discussed at the meeting with the parent. (Hr'g Tr. vol. 1, 116-17, 119-20; Hr'g Tr. vol. 2, 507-08, 629-31; Pet'r Ex. 14 at 1; Resp't Ex. 8 at 22, 31; Resp't Ex. 23)
24. Among other things, the June 1, 2011 ARD committee developed IEPs for the 2011-2012 school year. The Child's parent approved the 2011-2012 IEPs. (Hr'g Tr. vol. 1, 141-42; Hr'g Tr. vol. 2, 628-29; Resp't Ex. 8 at 8-18, 31)
25. Among other things, the June 1, 2011 ARD committee considered the Child's placement for the 2011-2012 school year. The District proposed that the Child be placed in a structured learning class at \*\*\* school (\*\*\*). The parent objected to advancing the Child to the \*\*\* school campus. (Hr'g Tr. vol. 1, 141-42; Hr'g Tr. vol. 2, 632-33; Hr'g Tr. vol. 3, 839-40; Resp't Ex. 8 at 23, 26, 31)
26. On June 13, 2011, the District provided the parent with a "prior written notice" that, among other things, reviewed the District's recommendation for placement of the Child in a structured learning class at \*\*\* school campus for the 2011-2012 school year. (Resp't Ex. 10)
27. During the 2010-2011 school year, the Child made progress toward the IEP goals and objectives. (Hr'g Tr. vol. 2, 486-87, 489-95, 500-01, 577-78, 628; Hr'g Tr. vol. 3, 683-707, 710-26, 902-05; Resp't Ex. 8 at 8-17; Resp't Ex. 13 at 202, 204, 206, 208; Resp't Ex. 14 at 194, 196, 198, 200; Resp't Ex. 15 at 186, 188, 190, 192, 513; Resp't Ex. 16 at 172, 174, 176, 178; Resp't Ex. 17 at 180, 182, 184; Resp't Ex. 18 at 166, 168, 170; Resp't Ex. 19 at 517, 519, 521, 523)
28. During the 2010-2011 school year, the Child communicated at school usually using one to two words in requesting something or in responding to a question. The Child did not regress in communication. (Hr'g Tr. vol. 2, 369-71, 620-21; Hr'g Tr. vol. 3, 736-37)
29. During the 2010-2011 school year, the Child utilized a carrel desk – with partition sides and a front – to separate and isolate the Child from other students and activities occurring in the structured learning classroom. The Child sat at the carrel desk with an aide or teacher to receive instruction and perform tasks. The use of the carrel desk allowed staff to minimize distractions and prevent the Child from moving or rooming around the classroom without permission. (Hr'g Tr. vol. 1, 243, 267; Hr'g Tr. vol. 2, 448, 472-73, 475-76, 477-78, 639, 641-43; Hr'g Tr. vol. 3, 738-39, 742-43; Resp't Ex. 20 at 217-18)
30. The Child's need for the carrel desk decreased during the 2010-2011 school year as the Child's behaviors improved. The Child moved into the classroom to work as the tendency of the Child to get up and leave a task diminished. (Hr'g Tr. vol. 1, 269; Hr'g Tr. vol. 2, 502, 578-80, 622-23; Hr'g Tr. vol. 3, 740, 765; Resp't Ex. 21 at 263, 269, 272-73)

31. During the 2010-2011 school year, the Child had a \*\*\* schedule at school. The schedule was posted and implemented. The schedule included a final break before boarding the school bus home. (Hr'g Tr. vol. 1, 64, 248-50; Hr'g Tr. vol. 3, 673-74; Resp't Ex. 20 at 223-24; Resp't Ex. 42)
32. The Child's \*\*\* skills at school improved during the 2010-2011 school year. (Hr'g Tr. vol. 1, 73, 250; Hr'g Tr. vol. 2, 624; Hr'g Tr. vol. 3, 674-77; Resp't Ex. 21 at 246, 255, 267, 276)
33. During the 2010-2011 school year, there were personality conflicts among the staff serving the Child in the structured learning class. These personality conflicts, however, did not adversely affect the delivery of services or instruction to the Child. For instance, the aide that primarily served the Child – \*\*\* – was informed of relevant portions of the Child's IEP and followed instructions regarding his responsibility for implementation. (Hr'g Tr. vol. 1, 258, 274; Hr'g Tr. vol. 2, 509-10, 587-89; Hr'g Tr. vol. 3, 750-53)
34. During the 2010-2011 school year, the Child's parent actively engaged with the School on the Child's education. Among other things, the parent received daily progress reports and visited the structured learning classroom on multiple occasions. Also, the parent provided advice on meeting the needs of the Child that was adopted and implemented by staff. (Hr'g Tr. vol. 1, 49, 50-51, 73-74, 144; Hr'g Tr. vol. 2, 481-82; Resp't Ex. 21)
35. On August 9, 2011, the parent obtained an "independent educational evaluation" (IEE) of the Child. The IEE examiner acknowledged in testimony, among other things, that the Child is not able to generalize what the Child learns in one environment, such as school, to another. Also, the IEE examiner acknowledged in testimony that the inability of the Child to perform requested tasks during the IEE did not establish that the Child is unable to perform tasks on the IEPs in the school environment. (Hr'g Tr. vol. 2, 521-23, 525, 542, 546, 553, 554-55; Pet'r Ex. 10)

### Discussion

The Petitioner's overall complaint is that the Child was denied FAPE in the 2010-2011 school year. This Hearing Officer will analyze the Petitioner's specific charges within the context of the legal standard for evaluating a denial of FAPE claim under the IDEA.

According to the standard set by the U.S. Supreme Court in *Board of Education v. Rowley*, a school district fails to provide FAPE to a child with a disability under the IDEA if the child's IEP is (1) not compliant with the IDEA procedures, and (2) not reasonably calculated to enable the child to receive educational benefits.<sup>7</sup>

### COMPLIANCE WITH IDEA PROCEDURES

Regarding the first prong of the *Rowley* standard, the Petitioner makes one assertion that the Respondent failed to comply with IDEA procedures. The Petitioner asserts that the Respondent failed to provide a copy of the Child's IEPs to school staff.<sup>8</sup> Under the IDEA, schools must ensure that the IEP of each child with a disability is "accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation."<sup>9</sup> Further, schools must ensure that each teacher and provider is "informed of (i) his or her specific responsibilities related to implementing the child's IEP, and (ii) the specific accommodations, modifications, and supports that must be provided for the

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<sup>7</sup> *Board of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982).

<sup>8</sup> Specifically, the Petitioner complains that "(f) Respondent has failed to provide a copy of the IEP to staff assigned to work with Petitioner to assist [the Petitioner] in attempting to meet [the Petitioner's] IEP goals." Pet'r's Amended Request for Due Process Hr'g at 1 – 2 (Aug. 25, 2011).

<sup>9</sup> 34 C.F.R. § 300.323(d)(1).

child in accordance with the IEP.”<sup>10</sup> In addition to these federal requirements, there is a state requirement that schools must ensure that each teacher who provides instruction to a child with a disability “receives relevant sections of the student’s current IEP and that each teacher be informed of specific responsibilities related to implementing the IEP . . . .”<sup>11</sup>

Here, the Petitioner’s special education teacher received the IEP. Further, the IEP was on file in the structured learning classroom and, therefore, accessible to the Child’s teacher, providers and paraprofessional aides. Finally, the aide who worked the most with the Petitioner was informed of his responsibilities for implementation of the IEP.

This Hearing Officer finds that even if there was a procedural flaw because the aide was not shown or given a copy of the Child’s IEP, there is no violation of the IDEA. Under the federal regulations implementing the IDEA, for a procedural violation to amount to a denial of FAPE, the procedural inadequacy must either impede the child’s right to a FAPE, significantly impede the parents’ opportunity to participate in the decision-making process regarding the provision of FAPE, or cause a deprivation of educational benefit.<sup>12</sup> The Petitioner failed to establish by a preponderance of evidence that either the right to FAPE was impeded, the parents participation was significantly impeded, or that the child was denied educational benefit.<sup>13</sup>

In conclusion, this Hearing Officer finds that the Respondent prevails on the Petitioner’s claim regarding distribution of copies of the Child’s IEP. Thus, the Respondent prevails on the first prong of the *Rowley* standard.

#### REASONABLE CALCULATION OF IEP TO ENABLE RECEIPT OF EDUCATIONAL BENEFITS

Regarding the second prong of the *Rowley* standard, the U.S. Court of Appeals for the Fifth Circuit, in *Cypress-Fairbanks Independent School District v. Michael F.*, announced four factors to consider in deciding whether a child’s IEP is reasonably calculated to confer educational benefits: (1) individualized services; (2) placement in the “least restrictive environment” (LRE); (3) coordination of key stakeholders; and (4) provision of positive academic and nonacademic benefits.<sup>14</sup>

The analysis here will address the Petitioner’s substantive assertions in light of the *Michael F.* factors. The Petitioner’s substantive assertions are:

- a. Failure to formulate appropriate IEP goals; the adopted goals were allegedly impossible for the Child to meet or accomplish.<sup>15</sup>
- b. Failure to include a BIP in the IEP.<sup>16</sup>
- c. Failure to implement the IEP, including failure of specialty staff to meet with the Child at assigned times.<sup>17</sup>

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<sup>10</sup> 34 C.F.R. § 300.323(d)(2).

<sup>11</sup> 19 Tex. Admin. Code § 89.1075(c).

<sup>12</sup> 34 C.F.R. § 300.513(a)(2).

<sup>13</sup> In particular, see the discussion below regarding provision of educational benefit to the Child.

<sup>14</sup> 118 F.3d 245, 253 (5<sup>th</sup> Cir. 1997), *cert. denied* 522 U.S. 1047 (1998).

<sup>15</sup> Specifically, the Petitioner complains that “(a) Respondent has formulated Individual Education Plan (IEP) goals that it is impossible for Petitioner to meet or accomplish, and that is therefore inappropriate for Petitioner.” Pet’r’s Amended Request for Due Process Hr’g at 1 (Aug. 25, 2011).

<sup>16</sup> Specifically, the Petitioner complains that “(b) Respondent has failed to articulate a Behavior Intervention Plan (BIP) for Petitioner within [Petitioner’s] IEP.” Pet’r’s Amended Request for Due Process Hr’g at 1 (Aug. 25, 2011).

<sup>17</sup> Specifically, the Petitioner complains that “(c) Respondent has failed to actively implement the IEP goals that it formulated, established and published to the parent.” Pet’r’s Amended Request for Due Process Hr’g at 1 (Aug. 25, 2011).

- d. Failure to assign appropriate staff to work with and assist the Child.<sup>18</sup>
- e. Failure of staff to properly and adequately document the Child's progress and issue progress reports to the parent.<sup>19</sup>
- g. Failure to accurately and truthfully report the Child's progress toward the IEP goals.<sup>20</sup>
- h. Failure to represent the true progress of the Child toward the IEP goals.<sup>21</sup>
- i. Failure to issue an accurate and truthful ARD committee meeting report on June 1, 2011 and AT evaluation report on May 16, 2011 regarding the Child's progress.<sup>22</sup>
- j. Failure to accurately report the Child's performance on the Spring, 2011 TAKS-Alt.<sup>23</sup>
- k. Failure to provide adequate educational and behavioral progress under the established IEP and placement.<sup>24</sup>
- l. Inappropriately advancing the Petitioner to \*\*\* although the Petitioner had not satisfactorily completed IEP goals.<sup>25</sup>

### Individualized Services

Factor 1 under *Michael F.* is whether the child's IEP has been individualized. An IEP is individualized if it includes the goals and programming that respond to the identified special needs of the child. For a child with behavioral issues, the obvious focus must be on the behavioral challenges.<sup>26</sup> Here, the Respondent accounted for the Student's behavioral needs in the social skills IEP and autism supplement. Further, the structured learning classroom provided just that -- a structured learning environment. The use of the carrel desk was more intense in the fall of 2010 but it served its purpose as behaviors improved by spring of 2011. In the circumstances in this case, a specific BIP was not required by the IDEA.

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<sup>18</sup> Specifically, the Petitioner complains that "(d) Respondent has failed to assign appropriate staff to work with Petitioner and to assist [Petitioner] in attempting to meet [Petitioner's] IEP goals." Pet'r's Amended Request for Due Process Hr'g at 1 (Aug. 25, 2011).

<sup>19</sup> Specifically, the Petitioner complains that "(e) Respondent has assigned specialty staff who have failed to properly and adequately document Petitioner's progress in attempting to meet [Petitioner's] IEP goals, and/or has failed to meet with Petitioner at assigned times or assigned periods of time, and/or has failed to issue reports reflecting the work done under the IEP to assist Petitioner in attempting to meet [Petitioner's] IEP goals." Pet'r's Amended Request for Due Process Hr'g at 1 (Aug. 25, 2011).

<sup>20</sup> Specifically, the Petitioner complains that "(g) Respondent has failed to accurately and truthfully report Petitioner's progress (or lack thereof) in attempting to meet [Petitioner's] IEP goals." Pet'r's Amended Request for Due Process Hr'g at 2 (Aug. 25, 2011).

<sup>21</sup> Specifically, the Petitioner complains that "(h) Respondent has misrepresented the true progress (or lack thereof) that Petitioner has made in attempting to meet [Petitioner's] IEP goals." Pet'r's Amended Request for Due Process Hr'g at 2 (Aug. 25, 2011).

<sup>22</sup> Specifically, the Petitioner complains that "(i) Respondent has uttered and issued false reports on Petitioner's Admission Retention and Dismissal (ARD) report of June 1, 2011, and on the Assistive Technology Report of May 16, 2011, reflecting the actual progress (or lack thereof) that Petitioner has made in attempting to meet [Petitioner's] IEP goals." Pet'r's Amended Request for Due Process Hr'g at 2 (Aug. 25, 2011).

<sup>23</sup> Specifically, the Petitioner complains that "(j) Respondent has issued conflicting representations regarding whether Petitioner passed or failed the State Alternative TAKS test that petitioner sat for in May 2011." Pet'r's Amended Request for Due Process Hr'g at 2 (Aug. 25, 2011).

<sup>24</sup> Specifically, the Petitioner complains that "As a direct result of Respondent's failures and omissions outlined . . . above, Petitioner has failed to make adequate progress – educational and behavioral – under the established IEP in the Spring ISD placement of \*\*\* School." Pet'r's Amended Request for Due Process Hr'g at 2 (Aug. 25, 2011).

<sup>25</sup> Specifically, the Petitioner complains that "At the end of the Spring 2011 semester, purportedly, Petitioner was advanced by the Spring ISD to \*\*\* School to continue [Petitioner's] education, although Petitioner had not satisfactorily completed [Petitioner's] IEP goals." Pet'r's Amended Request for Due Process Hr'g at 2 (Aug. 25, 2011).

<sup>26</sup> See, e.g., *Gellert v. District of Columbia Pub. Sch.*, 435 F.Supp.2d 18, 23 – 24 (D.D.C. 2006).

The comprehensive IEPs in other areas were individualized for the Student. First, the parent approved the IEPs for the 2010-2011 school year. Second, as discussed below, the Student made progress on all the IEPs, thus the goals and objectives were not unattainable. Third, the individualized need in the area of \*\*\* was addressed through an appropriate schedule and reports to the parent.

### Least Restrictive Environment

Factor 2 under *Michael F.* is whether the child has been served in the LRE. Compliance with the LRE mandate is evaluated through the two-part test announced by the Fifth Circuit in *Daniel R.R. v. State Board of Education*.<sup>27</sup>

Here, the Student's placement during the 2010-2011 school year was not in question. The Petitioner's complaint concerns the Student's placement during the 2011-2012 school year. The District proposed the same setting – a structured learning classroom. The only difference was that in 2011-2012, the structured learning classroom was located on \*\*\* campus as opposed to \*\*\* campus. The parent preferred \*\*\* campus.

This Hearing Officer finds that advancing the Student to \*\*\* campus was not inappropriate in the context of the LRE mandate. The first prong of the *Daniel R.R.* test asks whether full-time education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily. The second prong of the *Daniel R.R.* test asks which setting permits the child to be mainstreamed to the maximum extent appropriate if removed from the regular education setting. Here, the Respondent attempted to include the Student during the school day to the maximum extent appropriate by placing student on a campus where the Student has age appropriate peers. This Hearing Officer finds that attempting to keep the Student with age appropriate peers satisfies the second prong of the *Daniel R.R.* test.<sup>28</sup> The classroom setting itself – the structured learning class – is the LRE for this Student.

### Key Stakeholder Coordination

Factor 3 under *Michael F.* is whether key stakeholders acted in a coordinated manner. First, in this case the matter of staff competence and ability must be addressed. The Petitioner complains that there was a failure to assign appropriate staff to work with and assist the Student. This Hearing Officer finds that this claim must be dismissed as barred by the IDEA. Under the IDEA, allegations that a child's teachers and providers are not qualified are specifically prohibited.<sup>29</sup> There is no right of action for an alleged failure of a child's special education teacher to be highly qualified.<sup>30</sup> This Hearing Officer finds that this is essentially the nature of the Petitioner's assertion.

Here, there are several indicators that key stakeholders acted in a coordinated fashion and implemented the Student's IEP. To begin, this Hearing Officer finds that while there was some personality conflict among staff serving the Student, it did not affect the delivery of services and implementation of the IEP. In particular, the primary aide serving the Student was informed of what to do with the Student and did indeed follow through on activities with the Student. The special education teacher documented her implementation of IEP objectives through charts.

Regarding the parent, there was communication and involvement with the parent. The parent visited the class, received written notes of progress, and attended several ARD committee meetings throughout the 2010-

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<sup>27</sup> 874 F.2d 1036, 1048 (5<sup>th</sup> Cir. 1989)

<sup>28</sup> See *Regan-Adkins v. San Diego Unified Sch. Dist.*, 37 Fed.App'x 930 (9th Cir. 2002) (presumption in favor of educating children with disabilities to the maximum extent possible with peers that are reasonably close in age).

<sup>29</sup> 34 C.F.R. § 300.18(f).

<sup>30</sup> 71 Fed. Reg. 46561-62 (2006).

2011 school year. The parent even testified that the aide implemented some of her suggestions in the classroom.

### Educational Benefit

Factor 4 under *Michael F.* is whether the child received positive academic and nonacademic benefits. As the U.S. District Court for the Southern District of Texas in *Klein Indep. Sch. Dist. v. Hovem* pointed out, the measurement of any advancement must be centered on the areas affected by the child's disability.<sup>31</sup> Behavior is a primary area affected by the Student's disabilities. This Hearing Officer finds that the Student did make gains in the 2010-2011 school year in the area of behavior. Staff who were with the Student testified that challenging behaviors such as running or striking out that were present in the fall of 2010 improved by the spring of 2011. The number of behavior incident reports declined over the school year.

In the area of \*\*\*, all indications are that the Student improved both in terms of \*\*\*skills as well as f\*\*\* as the school year progressed.

In terms of generalizing skills to the home or other settings, the Petitioner's testifying expert acknowledged that the Student is limited in generalizing skills acquired at school. Thus, any lack of demonstration at home or in the IEE of skills indicated on school paperwork does not establish that nothing was being accomplished at school or that the school was misleading the parent.

This Hearing Officer finds that the Petitioner's complaints about allegedly inaccurate reports, inadequate documentation of ARD meetings, and misleading information on such things as the TAKS Alt. results are unsubstantiated.

Regarding IEP objectives, teacher documentation and reports clearly show that the student improved during the 2010-2011 school year. While there may have been some question over "mastery" of IEP objectives, the IDEA legal standard does not require mastery of objectives to satisfy the FAPE mandate. The Student need only demonstrate progress that is more than de minimus and that is meaningful.<sup>32</sup> In this case, the Student did progress and received meaningful educational benefit.

In conclusion, this Hearing Officer finds that after weighing the *Michael F.* factors, the Respondent satisfied the *Rowley* standard calling for an IEP reasonably calculated to confer educational benefits. Therefore, the Respondent prevails on the substantive allegations raised by the Petitioner.

### REQUESTED RELIEF – PRIVATE SCHOOL PLACEMENT

In this case the Petitioner seeks as the sole relief the placement of the Child at a specified private school at public expense.<sup>33</sup> Under the IDEA, reimbursement for private schooling is possible under prescribed conditions.<sup>34</sup> Procedurally, parents generally must demonstrate that they provided advance notice to the school district before removing the child for private instruction.<sup>35</sup> Substantively, parents must demonstrate that they have satisfied both parts of a two-part test: first, showing that the school district cannot offer an appropriate education to the child and, second, showing that the private facility can do so.<sup>36</sup>

As discussed above, this Hearing Officer finds that the Petitioner has failed to demonstrate that the Respondent cannot provide an appropriate education to the Child.

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<sup>31</sup> 745 F.Supp.2d 700, 749 (S.D. Tex. 2010).

<sup>32</sup> *Klein Indep. Sch. Dist. v. Hovem*, 745 F.Supp.2d at 706.

<sup>33</sup> Hr'g Tr. vol. 1, 127, 169; Pet'r's Amended Request for Due Process Hr'g at 2 (Aug. 25, 2011).

<sup>34</sup> 34 C.F.R. § 300.148.

<sup>35</sup> 34 C.F.R. § 300.148(d)(1).

<sup>36</sup> 34 C.F.R. § 300.148(c).

This Hearing Officer also finds that the Petitioner has failed to demonstrate that the private school selected by the parent for the Child can offer an appropriate education to the Child. No information about the private school was placed into the record.

In conclusion, this Hearing Officer finds that the Petitioner is not entitled to a private school placement at public expense.

#### REQUESTED RELIEF – AWARD OF ATTORNEY FEES AS DISCOVERY SANCTION

At this juncture of the case the Petitioner seeks reconsideration of its earlier motion for a discovery sanction against the Respondent in the form of an award of attorneys' fees. Prior to the due process hearing, the parties engaged in discovery. Among other things, the Respondent attempted to take the deposition of an anticipated witness for the Petitioner – a classroom aide (\*\*\*). After the aide declined to appear at the scheduled deposition the Respondent moved to strike the aide as a witness at the due process hearing. As part of its response in opposition to the Respondent's motion to strike the witness, the Petitioner requested that this Hearing Officer impose a discovery sanction against the Respondent. The requested sanction was an award of attorneys' fees for the time the Petitioner's counsel was at the unsuccessful deposition. Upon consideration, this Hearing Officer denied the Respondent's motion to strike the witness after determining that the venue of the deposition was improper and that the aide could not be compelled to attend.<sup>37</sup> Upon further consideration, this Hearing Officer also denied the Petitioner's request for a discovery sanction.<sup>38</sup>

The Petitioner now asks that this Hearing Officer reconsider and award the Petitioner the previously requested attorneys' fees as a discovery sanction as part of the Decision in this case. Upon reconsideration, the Petitioner's request is denied. First, this Hearing Officer finds that Special Education Hearing Officers in Texas do not have the authority to award attorneys' fees in any context in a due process hearing under the IDEA.<sup>39</sup> The IDEA delegates to the courts issues surrounding attorneys' fees and that delegation cannot be circumvented by labeling the fees request as a plea for a discovery sanction. Second, regardless of authority to impose a sanction of the nature requested, this Hearing Officer finds that a sanction of any sort in this circumstance is unwarranted.

#### Conclusions of Law

After due consideration of the foregoing findings of fact, this Hearing Officer makes the following conclusions of law:

1. The Respondent, Spring Independent School District, appropriately devised IEPs for the Petitioner, \*\*\*, under 34 C.F.R. § 300.320(a)(2) and did not deny FAPE under 34 C.F.R. § 300.101(a); *Board of Educ. v. Rowley*, 458 U.S. 176 (1982); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997), *cert. denied* 522 U.S. 1047 (1998); and *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir.), *cert. denied* 531 U.S. 817 (2000).
2. The Respondent, Spring Independent School District, appropriately devised and implemented behavioral interventions for the Petitioner, \*\*\*, under 34 C.F.R. § 300.324(a)(2)(i) and 19 Tex. Admin. Code § 89.1055(e)(4)(B).
3. The Respondent, Spring Independent School District, appropriately implemented the IEP of the Petitioner, \*\*\*, under 34 C.F.R. § 300.323(c)(2).

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<sup>37</sup> Order Denying Motion to Strike Witness (Oct. 5, 2011).

<sup>38</sup> *Id.*

<sup>39</sup> 34 C.F.R. § 300.517; 19 Tex. Admin. Code § 89.1170(b).

4. The Petitioner, \*\*\*, has no right of action against the Respondent, Spring Independent School District, for the alleged failure to assign appropriate staff to work with and assist the Petitioner under 34 C.F.R. § 300.18(f).
5. The Respondent, Spring Independent School District, appropriately documented and issued progress reports to the Petitioner, \*\*\*, under 34 C.F.R. § 300.320(a)(3)(ii).
6. The Respondent, Spring Independent School District, appropriately made accessible the IEP of the Petitioner, \*\*\*, under 34 C.F.R. § 300.323(d) and 19 Tex. Admin. Code § 89.1075(c).
7. The Respondent, Spring Independent School District, appropriately documented and issued progress reports to the Petitioner, \*\*\*, under 34 C.F.R. § 300.320(a)(3)(ii).
8. The Respondent, Spring Independent School District, accurately reported progress to the Petitioner, \*\*\*, under 34 C.F.R. § 300.320(a)(3)(ii).
9. The Respondent, Spring Independent School District, appropriately issued an ARD committee meeting report and AT evaluation report to the Petitioner, \*\*\*, under 19 Tex. Admin. Code § 89.1050(e) and 34 C.F.R. § 300.306(c)(1)(ii).
10. The Respondent, Spring Independent School District, appropriately reported TAKS results to the Petitioner, \*\*\*, under 34 C.F.R. § 300.324(a)(1)(iv).
11. The Respondent, Spring Independent School District, appropriately provided academic and nonacademic benefits under the IEP to the Petitioner, \*\*\*, under 34 C.F.R. § 300.101(a); *Board of Educ. v. Rowley*, 458 U.S. 176 (1982); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997), *cert. denied* 522 U.S. 1047 (1998).
12. The Respondent, Spring Independent School District, appropriately placed the Petitioner, \*\*\*, in a structured learning class at \*\*\* school for the 2011-2012 school year under 34 C.F.R. § 300.114 and *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989).
13. The Petitioner, \*\*\*, is not entitled to a private school placement at public expense under 34 C.F.R. § 300.148.
14. The Petitioner, \*\*\*, is not entitled to attorney's fees as a discovery sanction under 34 C.F.R. § 300.517 and 19 Tex. Admin. Code § 89.1170(b).

#### Order

Based upon the foregoing findings of fact and conclusions of law,

#### **IT IS HEREBY ORDERED THAT:**

1. All relief sought by the Petitioner shall be and is **DENIED**.

**SIGNED** this 4th day of January, 2012.

/s/ Steve R Aleman  
Steven R. Aleman  
Special Education Hearing Officer

TEA DOCKET NO. 235-SE-0611

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

SYNOPSIS

CLAIM 1: Whether the Respondent failed to formulate appropriate IEP goals.

CITE: 34 C.F.R. 300.320(a)(2)

HELD: For the Respondent. Parent approved 2010-2011 IEPs and Child made progress.

CLAIM 2: Whether the Respondent failed to provide an appropriate BIP.

CITE: 34 C.F.R. 300.324(a)(2)(i); 19 Tex. Admin. Code 89.1055(e)(4)(B)

HELD: For the Respondent. Behavioral needs adequately addressed in IEP.

CLAIM 3: Whether the Respondent failed to implement the IEP.

CITE: 34 C.F.R. 300.323(c)(2)

HELD: For the Respondent. Child made progress.

CLAIM 4: Whether the Respondent failed to assign appropriate staff to work with and assist the Petitioner.

CITE: 34 C.F.R. 300.18(f)

HELD: For the Respondent. No right of action under IDEA for claim.

CLAIM 5: Whether the Respondent failed to properly and adequately document the Petitioner's progress and issue progress reports.

CITE: 34 C.F.R. 300.320(a)(3)(ii)

HELD: For the Respondent. Unsubstantiated.

CLAIM 6: Whether the Respondent failed to provide a copy of the IEP to school personnel.

CITE: 34 C.F.R. 300.323(d); 19 Tex. Admin. Code 89.1075(c)

HELD: For the Respondent. Copies of the IEP were available.

- CLAIM 7: Whether the Respondent failed to accurately and truthfully report the Petitioner's progress toward IEP goals.
- CITE: 34 C.F.R. 300.320(a)(3)(ii)
- HELD: For the Respondent. Unsubstantiated.
- CLAIM 8: Whether the Respondent failed to represent the true progress of the Petitioner toward IEP goals.
- CITE: 34 C.F.R. 300.320(a)(3)(ii)
- HELD: For the Respondent. Unsubstantiated.
- CLAIM 9: Whether the Respondent failed to issue an accurate and truthful ARD committee meeting report on June 1, 2011 and AT evaluation report on May 16, 2011 regarding the Petitioner's progress.
- CITE: 19 Tex. Admin. Code 89.1050(e); 34 C.F.R. 300.306(c)(1)(ii)
- HELD: For the Respondent. Unsubstantiated.
- CLAIM 10: Whether the Respondent failed to accurately report the Petitioner's performance on the TAKS-Alt.
- CITE: 34 C.F.R. 300.324(a)(1)(iv)
- HELD: For the Respondent. Unsubstantiated.
- CLAIM 11: Whether the Respondent failed to provide adequate educational and behavioral progress under the established IEP and placement.
- CITE: 34 C.F.R. 300.101
- HELD: For the Respondent. Child made progress.
- CLAIM 12: Whether the Respondent failed to appropriately place the Petitioner.
- CITE: 34 C.F.R. 300.114
- HELD: For the Respondent. Placement on campus to be with age appropriate peers appropriate part of mainstreaming