

STUDENT b/n/f PARENTS	§	BEFORE A SPECIAL EDUCATION
	§	
vs	§	HEARING OFFICER FOR THE
	§	
FORT BEND	§	
INDEPENDENT SCHOOL DISTRICT	§	STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioner *** by next friends *** and *** (“Petitioner” is sometimes referred to within this Decision as “Student,” “Parent,” or “Petitioner”) brings this appeal, pursuant to the Individuals with Disabilities Education Improvement Act 20 U.S.C. § 1400 et seq., (hereinafter referred to as “IDEA”), against Respondent Fort Bend Independent School District (hereinafter referred to as “Respondent,” “School District,” or “District”). Petitioner filed a written Request for a Due Process Hearing and Required Notice (“Complaint”) which was received by the Texas Education Agency (“TEA”) on November 28, 2012 which was styled and docketed as shown above. Petitioner was represented by Attorneys Dorene Philpot of Philpot Law Office in Galveston, Texas and Yvonnilda Muniz of Law Office of Yvonnilda Muniz, P.C. in Austin, Texas. Respondent was represented by Attorneys Jeff Rogers of Rogers, Morris, & Grover, L.L.P. in Houston, Texas and Ms. Pam Kaminsky, Staff Attorney for Fort Bend Independent School District in Sugarland, Texas.

The Due Process Hearing in this matter was held from Tuesday, February 19, 2013 through Thursday, February 21, 2013 in the Fort Bend Independent School District Administrative Offices. Following the conclusion of the hearing, the parties agreed that written closing arguments would be filed by March 15, 2013, and that the Decision of the Hearing Officer would be issued on or before Wednesday, March 27, 2013. On March 7, 2013, the Hearing Officer issued an Order Granting Petitioner’s Request for Continuance to File Brief. The parties agreed that written closing arguments would be filed by March 22, 2013, and that the Decision of the Hearing Officer would be issued on or before Wednesday, April 3, 2013.

A Prehearing Conference was held on Monday, December 17, 2012, at which time the issues to be addressed in the due process hearing were defined. Petitioner’s Request for Special Education Due Process Hearing and Required Notice raised the following issues regarding the special education identification, evaluation, placement, programs and services of Petitioner, and Respondent’s alleged denials of a free appropriate public education (“FAPE”):

1. Respondent failed to provide to Student and to implement an appropriate Individualized Education Program (“IEP”) in the least restrictive environment (“LRE”).
2. Respondent failed to provide Student with appropriate private placement. Currently, Petitioner attends a therapeutic program *** (“***”). Student previously attended a program ***. (“***”).
3. Respondent failed to timely and appropriately evaluate Student in all areas of need, including a counseling assessment.
4. Respondent failed to provide Student’s parents’ request for an Independent Educational Evaluation (“IEE”).
5. Respondent failed to provide Student with an appropriate Functional Behavioral Assessment (“FBA”).

As relief in this Special Education Due Process Hearing, Petitioner requests that Respondent be ordered to do the following:

1. Provide Petitioner with an appropriate IEP in the LRE that complies with all procedural and substantive requirements of IDEA and Texas special education services;
2. Provide Petitioner with placement at an appropriate private facility;
3. Provide Petitioner with reimbursement for placement at *** and ***. This would include reimbursement for past private services, evaluations and mileage;
4. Provide Petitioner with all rights under IDEA; and
5. Such other and further relief as the TEA Special Education Hearing Officer may deem just and proper in law or in equity.

In its response to the Complaint, Respondent generally denied all the allegations set forth by the Petitioner. Respondent asserted that Petitioner’s unilateral decision to place Student in the residential program was made without notice to Respondent. Therefore, Petitioner is not entitled to reimbursement for placement at *** or ***.

After considering the evidence of record and the arguments of the parties, the Special Education Hearing Officer makes the following Findings of Fact and Conclusions of Law:

II. Findings of Fact

1. Petitioner is a ***-year old in the *** grade. Petitioner is eligible for special education services as a student with Emotional Disturbance (“ED”) and Other Health Impairment (“OHI”) and is currently attending a therapeutic program *** called ***.

2. Respondent is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing Petitioner 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 Federal and Texas rules and regulations promulgated pursuant to IDEA.

3. Student has a qualifying educational disability of OHI based on Attention Deficit Hyperactivity Disorder (“ADHD”). Also, Student has a qualifying educational disability that adversely affects Student’s ability to derive educational benefit from general education instruction. The disability is *** (“****”) and depression, such that Student qualifies for special education as a student with an emotional disturbance.

a. Student is ***, when Student’s parents ***.

b. Student suffers from *** disorder, specifically called ***. This disorder is ***.

c. The District’s Licensed Special School Psychologist (“LSSP”) conducted a psychological assessment of Student that was completed on August 10, 2012, as a part of a Full Individual Evaluation (“FIE”) of Student. The LSSP made the following findings about Student’s mental and emotional functioning:

i. “The mental status examination revealed a sad and anxious youth who is having a great deal of difficulty controlling student’s mood.” [Petitioner’s Exhibit 4-7]

ii. “Student reported that student has many thoughts that student cannot control but student attempts to hide for short periods of time.”

iii. “Student focuses a great deal on trying to remain calm that interferes with student’s daily functioning and task completion.”

iv. “Student denied clear and direct hallucinations, delusions, homicidal or suicidal ideations. However, student spoke of student’s ***.” [Petitioner’s Exhibit 4-8]

- v. “Additional Clinical Scales indicate that [Student] has a tendency to become irritable quickly and that student may become disruptive, intrusive, and threatening toward others.”
 - vi. “[Student’s] rating is indicative of overall severe clinical depression based on a total depression score.” [Petitioner’s Exhibit 4-10] Subscale ratings specifically indicate severe depressive symptoms in areas associated with a lack of engagement in pleasant activities, reduced motivation and effect, along with irritability, boredom and complaints of significant physical illness that may be associated with lethargy and somatic components.
 - vii. “[Student] has been demonstrating persistent emotional and behavioral problems in the school setting for a long period of time. These problems include failing grades, poor participation in classroom activities, frequent somatic illness, and ***.” [Petitioner’s Exhibit 4-11]
 - viii. “The personality rating revealed a very confused youth who demonstrates many characteristics of a mood disturbance that includes anxiety and depression....Student is responsive to one on one attention but becomes disorganized and confused when situations become complex and overwhelmed.” [Petitioner’s Exhibit 4-11] Student can be a cordial and kind youth, but student’s emotional problems tend to hinder student’s ability to establish and maintain secure relationships with others.” [Petitioner’s Exhibit 4-11] Student meets eligibility as a student with an emotional disturbance. [Petitioner’s Exhibit 4-12]
 - ix. Non verbal abilities are far better than student’s ability to make sense of complex verbal information and use of verbal abilities to solve novel problems. [Petitioner’s Exhibit 4-13]
 - x. Student’s overall cognitive ability, as evaluated by the WISC-10 cannot easily be summarized because student’s nonverbal reasoning abilities are much better than student’s verbal reasoning abilities.
- d. An Admission, Review and Dismissal (“ARD”) Meeting was held on Student’s behalf on August 23, 2012. The purpose of the meeting was to perform an initial review of the assessment request through Student’s support team and admit Student into special education. Student had been served through a Section 504 (“§504”) Committee based on Student’s previously identified ADHD. [Respondent’s Exhibit 3-14]
- e. Student’s August 23, 2012 ARD Committee (“ARDC”) reviewed Student’s FIE, Psychological, and Other Health Impaired evaluations, all dated August 10, 2012, as well as school records, and parent information. [Respondent’s Exhibit 3-1] Based on the

information presented, Student's ARDC concluded that Student met the eligibility criteria as a student with ED and OHI eligibility under ADHD. [Respondent's Exhibit 3-2]

f. During Student's August 23, 2012 ARD, Student's parents informed the ARDC that Student was currently seeking private therapy and *** for anxiety. The ARDC indicated that this information would be shared with the District's LSSP.

g. Student's August 23, 2012 ARDC reviewed the psycho-educational evaluation and Student's cognitive assessment and achievement tests. The August 23, 2012 ARDC found that the results of the assessment and tests concluded Student's overall intellectual functioning is in the average range; Student's non-verbal reasoning ability is in the superior range; Student's achievement tests are in the average to high average range; Student's overall reading (reading comprehension, math calculation, math reasoning and written expression) is in the average range; and Student's basic reading skills are advanced. [Respondent's Exhibit 3-14]

h. Student's August 23, 2012 ARDC determined that Student interacts appropriately with peers, respects authority, follows oral and written directions, has good social skills, writes complete sentences using punctuation, comprehends short passages and recalls details needed to answer questions, solves mathematical problems using the correct operations, and analyzes data used in solving problems. [Respondent's Exhibit 3-2 to 3-3]

i. Student's August 23, 2012 ARDC determined that Student's behavior impedes the learning of Student and others; significantly interferes with Student's ability to meet general academic mastery levels; and affects Student's involvement and progress in the general curriculum. A Behavior Intervention Plan ("BIP") was developed to address Student's failure to complete school work. [Respondent's Exhibit 3-3]

j. Student's August 23, 2012 ARDC determined that Student cannot achieve the goals and objectives contained in the IEP without special education even if supplemental aids and services are provided in the general education settings. Supplemental aids and services that were previously provided to Student included School Health Services, Tutorials, and Counseling. [Respondent's Exhibit 3-8]

k. Student's August 23, 2012 ARDC determined that Student's LRE is in the general education setting with In-Class support services provided by a special education teacher. The ARDC determined that Student would receive psychological services provided by the LSSP for 60 minutes, one (1) time per nine (9) weeks. [Respondent's Exhibit 3-5]

l. A Review ARD was held on Student's behalf on September 17, 2012. The purpose of the meeting was to review Student's IEP and to discuss Student's ***. The ARDC reviewed the ***, the *** and Student's ***. Additional forms were provided for ***. The meeting ended in consensus with the ARDC members, including Petitioner, agreeing that Student was ***.

m. An ARD meeting was convened on Student's behalf on November 19, 2012 at the request of Student's parents. Student's parents had previously withdrawn Student from the District and placed Student in ***. Student's parents were seeking reimbursement for the costs of their unilateral placement. Student's November 19, 2012 ARDC reviewed Student's FIE, Psychological, and Other Health Impaired, all dated August 10, 2012, as well as Student's previous IEP, school records, and parent information. [Respondent's Exhibit 1-1] Based on the information presented, Student's ARDC concluded that Student met the eligibility criteria as a student with ED and an OHI classification under ADHD. [Respondent's Exhibit 1-2]

n. Student's November 19, 2012 ARDC discussed Student's performance prior to the parents' unilateral withdrawal of Student on October 25, 2012. Student had been failing ***; having problems *** turning in work; did not seem to care about the grade in *** and received the agreed supports in the other classes. Student's ARDC did not change Student's placement or authorize reimbursement for Student's placement at ***. The ARD meeting ended in disagreement.

4. Student's true educational disabilities defied detection by the District and Student's ARDC because of Student's manner and personality; Student's educational performance in a general education setting; the information made available to the District and Student's ARDC; and the lack of a professional psychological or educational assessments which were not completed until August 10, 2012, nor made available to Student's ARDC before August 23, 2012.

a. Student did not show overt signs of depression or sadness at school. Student's affect was generally happy and friendly to teachers and peers. Student was often thought of as a "leader" by more than one teacher. However, Student had a hopelessness that things would get better, and thought that it would be better if Student just gave up or quit. Student had no sense of the future or a belief that things were going to go well. While Student would deny it to the private psychologist, Student seemed very depressed and had *** throughout the sessions with the private psychologist. [Tr. Pg. 236-238]

b. The biggest impediments to Student's academic success were Student's cycles of avoidance and crisis. Student avoided doing schoolwork for reasons associated with emotional disturbance, anxiety and depression until there was a crisis created by the real risk of failing a class. During the crisis, Student's anxiety and avoidance behaviors were heightened. [Tr. Pg. 241-243]

c. A lay person who has not been formally trained as a psychologist is not a reliable person to determine, definitively, whether a student is depressed or not. [Tr. Pg. 580-581]

d. Student was able to mask symptoms of anxiety and depression with teachers by presenting a deceptively sunny affect, which was aided by *** to alleviate some of Student's symptoms of depression. [Tr. Pg. 587-589]

e. Student's *** grade *** teacher and *** has known Student for two (2) years and developed a special rapport with Student and Student's parents. The special rapport allowed Student to talk to the *** teacher about issues and problems during free periods. It allowed the *** teacher to develop as a mentor for Student and a counselor on social and academic challenges to which Student attempted to confront. [Tr. Pg. 597-601]

f. Student's *** teacher believes Student is a bright, academically capable and popular student who is lazy and under motivated. This teacher has never seen depression or evidence of emotional disturbance in Student. The *** teacher does not believe that Student was *** and believes that the entire incident *** in December of 2011 was, as Student described it, "blown out of proportion." He believes that Student was merely trying to gain the attention of ***. The *** teacher is very familiar with Student's ***. [Tr. Pg. 601-607]

g. The *** teacher was also privy to Student's academically counter-productive plan of doing just enough to get by, barely passing, until the end of a semester. Then, Student intended to work harder to ensure that a passing grade was the result of the end of semester effort. Student had used this strategy in previous years with some success. The teacher tried to counsel Student against the strategy, but he was not successful. [Tr. Pg. 608-610]

h. The *** teacher attributes Student's problems to laziness, ***, interest in ***, and an unsound academic plan for completing schoolwork. He shared his insights of Student's issues with the *** School Principal and Student's parents during the Fall semester of the 2011-2012 school year and into the Spring semester of the same year. His assessment of Student was based on the false impression that Student presented to him that masked more serious psychological problems. [Tr. Pg. 597-615]

i. Student's *** grade Counselor and §504 Coordinator first met Student as the assigned counselor when Student was in the *** grade. Student and the *** grade Counselor talked frequently about getting work turned in and things that happened at home. The counselor's impression of Student was that Student was very popular with peers and was a leader. To the counselor, Student never appeared sad, depressed or anxious. [Tr. Pg. 630-634]

j. While the Counselor described Student as "a happy kid at school" and "upbeat," she also remembered that Student has issues with ***. Student expressed interest in knowing about ***. [Tr. Pg. 633-635]

k. The Counselor consulted with Student's *** grade *** teacher about the December, 2011 *** and seems to concur that the matter was a stunt to get the attention of ***. [Tr. Pg. 640-642]

- l. The Counselor believed in January, 2012 that Student's academic issues were a matter of motivation. Even when the counselor discussed Student's issues with Student's parents and reviewed a private report from a psychologist, she was of the opinion that nothing more could be done for Student in special education that had not been done by Student's §504 Committee. [Tr. Pg. 642-644]
- m. Student took *** during the 2011-2012 school year. The purpose of the class is to learn *** skills while working in groups. The class required Student to learn ***. [Tr. Pg. 680]
- n. Student's *** teacher found Student to be very polite, eager to *** and friendly to the other students in the class. However, there would be times when Student would put Student's head down and appear to be asleep, though Student would still be listening to the class discussion. Also, Student would not always turn in assignments. Student never presented to the teacher as either disruptive or in emotional crisis. [Tr. Pg. 680-685]
- o. Student was known to the *** School Principal from the time Student was in the *** grade. The *** School Principal noticed Student grew socially from being a good student in the *** grade with some friends to a good student in the *** grade with many friends, and with influence over those friends. By the *** grade, Student was very popular ***. Student appeared happy and very satisfied with student's social standing. [Tr. Pg. 522-526]
- p. The *** School Principal had seen Student achieve mastery over the TAKS tests and *** of Student's class, academically. However, in the *** grade, Student began to adopt a more slouchy, academically disinterested manner toward classes and about school. Student began to *** in classes and at school functions during the Fall semester of 2011. [Tr. Pg. 527-531]
- q. In December of 2011, Student ***. Student came to school, apparently *** and was agitated. Prior to the day Student came to school, Student's teachers were privy to Student's classmates' reports that Student had ***. The *** School Principal called Student's mother and insisted that Student ***. Student's mother was not, at the time, sure that Student needed ***. ***.
- r. An ARD Meeting was held on Student's behalf on November 19, 2012 at the request of the parent, seeking financial compensation for expenses incurred while Student was in the private residential placement, ***. [Respondent's Exhibit 1-1 and 1-10]
- s. It was discussed that Student's November 19, 2012 ARDC was not aware of Student's emergency placement at *** until after the change in placement was completed. In fact, school records indicated that Student had been withdrawn from school since October ***, 2012. Student's parent disagreed with the ARDC's understanding and stated that Student was never withdrawn. [Respondent's Exhibit 1-10]

5. The amount of time that the District used to perform an FIE on Student was not a significant factor in whether Student received a FAPE from November 28, 2011 until the present time.

a. During Student's March 29, 2012 §504 Committee Meeting, it was agreed that Student would receive a psychological evaluation as a part of an FIE from the District. Student's parents supported the evaluation and were prepared to provide the District with all the necessary executed consent forms, which were required. However, the consent forms for the evaluation were not provided to Student's parents until June 4, 2012. There is no justification for this delay. [Tr. Pg. 645-651]

b. Because there was little more than six (6) weeks before the end of the 2011-2012 school year, there was insufficient time to schedule and perform an FIE on Student; then schedule an ARD meeting and develop an IEP to address a disability that had not been confirmed as of the March 29, 2013 §504 Committee Meeting. Student's §504 Committee had been in contact with Student's private psychologist and was aware that Student was under professional care, which included medication. [Tr. Pg. 645-655]

c. As of the end of the 2011-2012 school year, no one with the District had been advised that Student had been diagnosed with ***. Therefore, there was no way the District could have developed an effective intervention to address ***, either in a §504 Committee or an ARDC – assuming it was within the District's capability to do so. [Tr. Pg. 647-648]

6. While Student's *** adversely affected Student's education it was not the primary cause of Student's difficulties in receiving a FAPE. The *** was, in fact, a symptom of Student's educational disabilities.

a. During Student's therapeutic sessions with Student's private psychologist, it was determined that Student's *** was not the primary cause of Student's problems. Student's *** was observed as a symptom of Student's ***. [Tr. Pg. 174]

b. During Student's 25 sessions with a private psychologist, Student exhibited symptoms of depression and chronic anxiety. Student would exhibit anxiety all the time unless ***. When Student was anxious, Student would shut down, become isolated from parents and friends, and not do any school work, whatsoever. Student would *** to alleviate the anxiety. [Tr. Pg. 234-237]

c. Student's private psychologist concluded that Student's feelings of emotional problems and Student's *** had become interdependent. In other words, Student's emotional problems were affected by *** and *** was adversely affecting Student's life. [Tr. Pg. 273-274]

d. Student's private psychologist concluded that *** is instrumental in Student's lack of motivation socially or academically because: "If [Student] begins to worry about school, [Student] can *** and make the worry go away." [Tr. Pg. 275]

e. Student's psychologist concluded that Student was *** to alleviate symptoms of anxiety and emotional pain. [Tr. Pg. 581-582]

7. The District was not given a sufficient opportunity to provide Student with a FAPE prior to Student's parents' unilateral initial removal from the District, without notice, and placement at ***.

a. Student was admitted to special education for the first time on August 23, 2012. Prior to that admission, Student had been served strictly through a §504 Committee. When Student was admitted to special education, the ARDC determined that another ARD should be scheduled to monitor Student's transition services. That ARD meeting was held on September 17, 2012. Slightly more than *** days later, on ***, 2012, Student was unilaterally withdrawn and placed in ***. [Petitioner's Exhibit 10-201, 206, and 211]

b. Student's parents did not keep Student's ARDC apprised of Student's emotional condition that led to the parents' unilateral placement of Student at ***. The parents consulted with Student's private psychologist and another private consultant who was recommended by the private psychologist. No one with the District or the ARDC was consulted, before Student was withdrawn.

c. Student had completed little more than *** weeks of the 2012-2013 school year, with absences, before being withdrawn from the District as a special education student. There was insufficient time to implement the IEP that had been developed, even though Student's existing IEP did not contain the educational setting and related service interventions designed to address Student's ***, which was the basis of Student's primary educational disability.

8. *** is not an appropriate educational placement and the expenses of such placement should not be borne by the District.

a. Student attended ***, a licensed *** in ***, from ***, 2012 through ***, 2013. ***provides ***. [Respondent's Exhibit 18-1] *** is regulated by ***. [Petitioner's Exhibit 27-13]

b. *** is a *** program that specializes in treatment of ***, who are diagnosed with behavioral and emotional problems including, but not limited to, the following diagnostic

labels: Major Depression, Bipolar Disorder, ADHD, Oppositional Defiant Disorder (“ODD”), Learning Disorder, Adjustment Disorder, Impulse Control Disorder, Substance Related Disorder, and ***. [Respondent’s Exhibit 18-4, Petitioner’s Exhibit 27-12] *** program is made up of seven (7) different stages. [Petitioner’s Exhibit 27-20]

c. *** program has two (2) therapeutic goals:

i. Disrupt a troubled student’s current behavioral pattern; and

ii. Facilitate student’s transition into a more appropriate developmental level.
[Petitioner’s Exhibit 27-13]

d. *** ultimate goal is for each student to become more skilled in finding adaptive ways of managing the difficult aspects of life, and to hold each student responsible for his/her thoughts, feelings and behaviors, rather than attributing their thoughts, feelings and behaviors to each student’s disorder. [Respondent’s Exhibit 18-5]

e. *** evaluates each student weekly in eight (8) areas of student functioning in the field. Each clinical assessment is scored by the field staff under the direction of each student’s therapist. This clinical assessment does not evaluate the student’s relationship with the field staff or individual therapist, rather, it scores the student’s willingness and ability to engage in the therapeutic process. [Respondent’s Exhibit 18-6]

f. *** conducts various therapy sessions, confronting student’s irrational beliefs. Students will participate in various therapy sessions directed at generally appropriate personal behavior. [Petitioner’s Exhibit 27-15]

g. *** field staff record each student’s behaviors throughout the week and share their observations with each student’s therapist. [Petitioner’s Exhibit 27-17] *** measures progression by the frequent therapy sessions as well as student’s application of therapy principals in daily life. [Petitioner’s Exhibit 27-19]

h. *** assigns each student a group to begin working on a value driven curriculum. *** focus is to teach students to learn the basics of how to *** and learning *** such as: ***, ***. During their stay, students become accustomed to a life without the distractions of cell phones, MP3 players and fast food. [Petitioner’s Exhibit 27-19]

i. *** students are in an immediate and continuous community-building process. Students’ roles in the *** community change as they progress through the seven (7) curriculum stages. Students are observed on how they cope with the difficulties encountered by their immediate community and their personal contributions to their community. [Petitioner’s Exhibit 27-20]

- j. Students at *** are eligible for “graduation” from the program after the student has not only completed the curriculum, but also shown through behavior, attitude, and expression, an internal change. Students must also demonstrate emotional regulation and a commitment to allowing parents to direct the relationship between the student and the parents. [Petitioner’s Exhibit 27-23]
- k. The professional work experience of Student’s therapist at *** covers treatment areas, including but not limited to: adoption, attachment and bonding, grief, loss, trauma, substance abuse/recovery, anxiety and mood disorders.
- l. Student’s daily curriculum at *** included *** and work on weekly therapy assignments. Each student wakes up at 7:00 a.m. to do health and hygiene checks, ***, and then start the day working on their *** curriculum or preparing ***. Each student would end their day in a similar way, performing their health and hygiene checks, *** and *** for going to bed. [Tr. Pg. 508-509]
- m. *** does not perform an initial assessment of Student to track the academic progress that Student has made. [Tr. Pg. 520-521]
- n. Student’s parents’ decision to place Student at *** was made, in consultation with Student’s private psychologist, as a therapeutic intervention to Student’s spiraling emotional problems, ***, and escalating general misbehavior. It was not primarily motivated by a need to change Student’s educational setting. [Tr. Pg. 262-271, 276-277, 589].
9. *** is an appropriate educational placement that is capable of allowing Student to gain psychological and educational skills needed to receive a FAPE, at any campus setting.
- a. On December 21, 2012, and again on February 1, 2013, Student’s parents notified the District that Student would be placed at ***. [Petitioner’s Exhibit 10-229, 230]
- b. Student attended ***, a residential relational-based treatment center in ***, from January ***, 2013 through the present day. [Petitioner’s Exhibit 28-38] *** provides a relationship-based change program specializing in *** and emotionally out-of-control ***. [Petitioner’s Exhibit 28-19] 95% of *** students have been ***. [Petitioner’s Exhibit 28-17] *** is licensed by the *** Department of Social Services (Children’s Division) and approved by the *** Department of Elementary and Secondary Education. [Respondent’s Exhibit 21-3]
- c. *** specializes in treating troubled ***, struggling with Attachment Issues, Trauma Issues, and Emotional Regulation Issues. Through the use of attachment therapy, *** seeks to treat struggling students with early childhood trauma, often relating to abuse or neglect. [Petitioner’s Exhibit 28-17] *** is not a wilderness program or a psychiatric

hospital. The goals of *** are to improve the brain functioning of its children so that they can get along with other people and do well in school or their chosen profession.

d. *** population consists of students who have suffered significant ***. *** is not *** facility; however, if *** in addition to the student's ***, *** will accept these students. [Tr. Pg. 142-143]

e. *** treatment model is for the students to build safe, repetitive and meaningful relationships and to create real connections and meaning with others. [Petitioner's Exhibit 28-17]

f. *** program, which uses ***, are an integral part of the therapeutic model, based on promoting the principles of trust and connection. [Petitioner's Exhibit 28-25 to 28-27]

g. All of *** classes in core subject areas are taught by *** certified teachers. Each class has an average of six (6) to ten (10) students. *** offers credit recovery courses, honor courses and Advanced Placement ("AP") courses. *** academic goal is to help students get back on track and provide a smooth transition into their next educational setting. [Petitioner's Exhibit 28-32]

h. *** mission is to create an interdependent learner. An interdependent learner is able to know how and when to ask for help, as well as to be able to work independently; to be able to trust others to lead them in the right direction; and to know the importance of knowledge and to be able to incorporate that knowledge into their daily life. [Petitioner's Exhibit 28-32]

i. Academic time at *** is designed to facilitate various learning styles and divide school hours into productive smaller blocks. Students attend school 25 hours a week in addition to non academic activities: community outings, extended school time, physical education, and art and music classes. *** students also participate in on-line learning assignments and didactic learning environments with field trips, labs, and projects. [Petitioner's Exhibit 28-32]

j. *** creates a detailed Education Plan for each student after a review of the former/current IEP's, and all background information. A Student Interest Survey ("SIS") is performed to learn about each student's unique interests and strengths. A Learning Styles Assessment ("LSA") is performed to ensure teachers will know the multitude of modalities available in reaching and teaching each student. An academic plan maps out curriculum choices for the student, and an Accommodations Checklist ("AC") ensures each student will receive any and all needed medications to facilitate their learning needs. [Petitioner's Exhibit 28-32]

k. *** offers students three (3) academic tracks:

- i. Therapy-based: Education plan designed to foster the emotional and therapeutic needs of the student. This is for students with little or no *** and those whose needs are more therapeutic in nature. Course selection is driven by the treatment team in choosing classes that foster communication, expression, personal enrichment, and other goals, including the ***.
- ii. Restorative: Designed for students who have fallen behind their peers and students who need to “catch up.” Up to two (2) years of coursework is evenly spread out over their anticipated stay. Students on this track are required to use portions of personal time, weekends, and evenings to ensure deadlines are met. This track can be targeted to completing ***
- iii. Standard/***: Designed for students who are currently at grade level and who are not “behind” in their academics. Students will neither fall behind nor move ahead of their peers. This track can be tailored for students ***. If a student earns credit for all required *** classes, families have the option to enroll their student into *** classes. *** provides guidance, support and some financial costs for the *** courses.
[Petitioner’s Exhibit 28-33]

l. *** provides students with the “experiential” and teaching connection by repetitively over and over, day in and day out the basic concepts. *** attempts to teach students communication, close safe touch, team work. It uses techniques referred to as “neurofeedback” to help “rewire the brain.” [Tr. Pg. 152]

m. *** provides Student 24-hour care, to the extent Student needs it to be. *** is a staffed therapy program available 24 hours a day, seven (7) days a week. Staff is available at 3:00 a.m. in case Student wakes up and needs to talk, needs to be near somebody, or needs some closeness. *** staff provides that safe closeness and safe touch, if needed. [Tr. Pg. 154]

n. Students begin their day between 6:30-7:00 a.m. and throughout the day have more interspersed transferable attachment work. Students are constantly working with ***. If students are struggling to regulate emotion, *** might even come down to school with them to help them just be able to *** and be soothed by interactions with ***. [Tr. Pg. 155]

o. Upon enrollment at ***, Student is taking ***, and ***. [Petitioner’s Exhibit 28-37A] *** is a fully accredited school, students led by teacher instruction and by personalized instruction through online programming using ***. [Tr. Pg. 156] *** can further provide credit recovery and tailor classes for students, such as special education. Every student that attends *** received academic credit. [Tr. Pg. 157]

p. On average, students attend *** anywhere from 12 to 19 months. [Tr. Pg. 162]

- q. Students with *** will often sabotage their educational careers by deliberately failing an examination or engaging in misbehavior at school. [Tr. Pg. 163]
- r. In order to be admitted into ***, students must have *** coming with them at the time of admission. *** facility provides students with emotional stability and a place to bond so they can move forward in their educational programs. [Tr. Pg. 164]
- s. Students with *** often exhibit depression. [Tr. Pg. 164]
- t. *** facility has a staff of licensed teachers to provide academic instruction. [Tr. Pg. 166] The staff includes approximately three (3) special education teachers. [Tr. Pg. 168]
- u. Treatment at *** would be disrupted if Student did not receive year-round services at the facility. If Student left in the middle of treatment, after eight (8) or nine (9) months, there would be significant setbacks in treatment and Student would face real regression in the behavioral and psychological treatment program. [Tr. Pg. 166-167]
- v. Student's treatment at *** is primarily treating the ***, but the schooling is equally important. The *** and academic needs are addressed at the same time. *** strives to work on Student's schooling and simultaneously taking care of Student's emotional needs and making progress on *** issues. [Tr. Pg. 169-171]
- w. Student spends about 20 hours a week of school contact. If Student is not doing well or if Student is not making progress, then *** provides more face-to-face teacher time beyond what students are already getting. [Tr. Pg. 178]
- x. *** uses neurofeedback in its treatment of its students because traditional forms of counseling are almost never helpful. The process of behavior modification using level systems, token economies, rewards and punishment associated with the traditional counseling paradigm ***. Students with *** will typically "go underground" and exhibit a behavioral change, but not an "inner core" change. If, for example, a child comes to *** exhibiting symptoms of depression, as did Student in this case, *** will seek to address the underlying root cause of the issue to alleviate the child's depressive symptoms. [Tr. Pg. 171-173]
- y. Typically, the treatment of a child's *** at *** will result in an improvement in the child's schoolwork. This has been verified by examining *** student population's performance by plotting averages school wide. [Tr. Pg. 178-179] *** has experienced 80-84 percent of its students showing improved school functioning. [Tr. Pg. 187]
- z. *** techniques, including its brain interventions and neurofeedback, have been independently verified in peer reviewed studies. [Tr. Pg. 182-185]
- aa. Because of the nature of the educational setting wherein the issues of Student's *** would be addressed in combination with academic instruction, Student would be

required to live at *** as a residential facility. It would not be feasible, logistically or economically, for Student to commute to the *** facility from Student's home residence or any residence not located within the *** facility. Room and board, as well as transportation costs to and from *** facility would necessarily be included in the costs of residential placement at ***.

bb. While *** seeks to establish a therapeutic environment where Student's *** and depression could be addressed in combination with Student's educational program, not all of the time that Student would spend at *** would be in furtherance of Student's education. Time spent in therapeutic treatment or leisure and personal domestic activities would logically fall outside of the realm of activities dictated by an appropriate educational placement.

cc. The monthly cost for Student at *** is ***, which covers the entire 24 hour placement for Student, including room and board. Assuming a thirty-one day month, the tuition expense amounts to *** per day. Based on a forty-five hour school week for in-class instruction (20 hours per week) and additional extra class instruction (25 hours per week); Student's "instructional month" can be estimated at 20, nine (9) hour school days. Therefore, an appropriate reimbursable estimate for monthly residential placement at *** would amount to *** per month. [Petitioner's Exhibit 28-39; Tr. Pg. 397-398]

dd. An appropriate reimbursable amount for Student to travel to and from *** with one (1) parent as escort is ***. [Petitioner's Exhibit 26-25 and 26-27]

10. At this time, given the nature of Student's educational disabilities, the District does not have the capability of providing Student with a FAPE.

a. Student was referred to the *** school LSSP at the beginning of the *** grade year. The LSSP met with Student on September 18, 2012 to begin the psychological counseling services of 60 minutes per week; as determined by Student's August 23, 2012 ARDC. The purpose of the initial meeting was to allow the LSSP and Student to meet; allow the LSSP to observe any overt signs of crisis or ***; and to obtain a little history on Student. [Tr. Pg. 688-693]

b. During the September 18, 2012 meeting with the LSSP, Student was honest, forthright, very cordial and smiled a lot. The LSSP asked Student about ***, which Student readily admitted. The LSSP not only suggested to Student that *** could be a reason for Student's lack of motivation in class, but concluded that Student's *** was the root cause of Student's lack of motivation. Therefore, the LSSP referred Student to ***. [Tr. Pg. 693-695]

c. The LSSP did not recommend any other services to Student as of September 25, 2012, because the LSSP did not see anything that a school psychologist could do, at the time, other than ***. [Tr. Pg. 695-696]

d. The LSSP was not aware that Student has ***, but admitted that he was not trained to diagnose or treat ***. The LSSP stated that he was not aware of anyone “in the school” who could provide the sort of specialized brain modification to deal with ***. [Tr. Pg. 696-697]

e. Student did not present to the LSSP as a student with *** because the LSSP did not see Student long enough to make a diagnosis. [Tr. Pg. 710-713]

o. The IEP developed by Student’s ARDC on August 23, 2012, particularly in the areas of educational setting and related counseling services, was inappropriate, and was not designed to provide a FAPE to Student. Student’s primary educational disability was ED related to *** and the depression produced or exacerbated by the disorder. Student’s ARDC focused on Student’s academic schedule with insufficient focus on the kind and amount of psychological counseling which would allow Student to derive an academic benefit from the schedule of services.

11. Without interventions that are designed to address Student’s *** and depression, Student cannot receive a FAPE. Student’s attendance in classes at the District during the 2011-2012 School Year and for *** weeks during the 2012-2013 School Year has not resulted in an appropriate education.

a. For most of the 2011-2012 school year, Student had failed to perform, in a consistent manner, the class and homework assignments. Student’s apparent lack of motivation and disinterest in school work was a mask for depression and nearly constant anxiety that is associated with Student’s ***.

b. Student’s lack of academic performance has caused a pattern where Student risks failure of multiple classes that are otherwise not beyond Student’s intellectual and academic capabilities. Student’s “plan” to perform at the borderline level for most of a semester in most classes and then attempt to “pull out” a passing grade at the end of a semester, is an ineffective and destructive self-devised “accommodation” to address the anxiety caused by Student’s ***.

c. Student’s *** is an attempt to *** and relieve the anxiety caused by the lack of interventions to address Student’s ***. The unavoidable social and physical consequences of *** further increase Student’s academic problems and anxiety.

d. Without effective interventions to address Student’s ***, Student is unlikely to maintain any interest or participation in Student’s education. The fact that Student ultimately passed from the *** grade to the *** grade after ***, does not obscure the fact that the District’s educational program and supports do not provide the programs and services necessary for Student to ***.

III. Discussion

The challenge of deciding a request for a due process hearing where residential placement is proposed is to apply the two prong test that the U.S. Fifth Circuit Court of Appeals announced in *Richardson ISD v. Michael Z.* 580 F.3d 280 (5th Cir. 2009). A special education hearing officer must decide whether the proposed residential placement is (1) essential in order for the disabled child to receive a meaningful educational benefit, and (2) primarily oriented toward enabling a child to receive an education. (*Michael Z.* at p. 299) IDEA does not require the Local Education Agency (“LEA”) to underwrite a student’s *medical treatment*; and IDEA’s “educational floor” enunciated by the U.S. Supreme Court in *Bd. Of Education v. Rowley*, 458 U.S. 176, 73 L.Ed 2d 690, 102 S.Ct. 3034(1982) disqualifies an educational program from public funding that is merely *helpful* to a student but not *necessary* for the disabled student to be appropriately educated [See *Klein ISD v. Hovem*, 690 F.3d 390 (5th Cir. 8-6-2012)]

As with any due process hearing, there are complications in the salient facts, and there are disputed issues that obscure the important questions. In this case there are several. Is Student really an emotionally disturbed youth with ***, or an unmotivated, albeit charming, ***? Was the District to blame for not seeing the true educational disabilities of Student, or correct in educating Student using only §504 services? Are both *** and *** appropriate educational placements which are worthy of public reimbursement, or is neither an appropriate placement the expenses of which, should be reimbursed? What is the importance of the lack of complete candor of Student’s parents in supplying all relevant information to the District – whether that be Student’s §504 Committee, ARDC or otherwise?

It does not help decide this case that Student’s educational disabilities do not present clearly. Student’s native intelligence, easy personal style, articulate delivery and apparently *honest* approach to teachers and counselors conceal inner pain that Student could not manage throughout higher grade levels and more challenging schoolwork. The ***was Student’s *** as well as the prop for Student’s chosen image of ***. The deeper problems associated with ***, a consequence of ***, were not revealed until Student’s *** and subsequent professional medical assistance.

For this reason, I do not believe that the District is liable for the cost of the Student’s private placement under an equitable theory, as urged by Petitioner. Student is *apparently* a bright, happy “leader.” There was no clear reason why the District personnel should have known otherwise. Student’s parents did not know that assessment and special education services were required and *they* had more information than the District regarding Student’s Psycho-Educational status. Blaming the LEA for lack of foresight is common in a due process hearing, but it is rarely the most productive inquiry. It is particularly inapplicable in this case.

The two residential placements for which reimbursement is sought present a clear example of the *Michael Z./Klein ISD* dichotomy. The evidence shows that *** is a *helpful* intervention for Student for non-educational purposes. It was not, however, an educational placement, at all. It was not even *meant* to be. Under *Michael Z.*, its expenses should not be reimbursed. *** is another matter. It may be a therapeutic facility that specializes in ***; but it is a facility designed to focus on the root cause of *this* student's educational disabilities.

Moreover, the goal of Student's program at *** is to return Student to *school* by addressing the persistent anxiety and depression that keeps Student from deriving consistent education benefit. The *** facility is administered by a staff that includes certified teachers, who teach the courses that Student's general education curriculum requires. *** is an educational placement.

It is not a reflection on the District that School District is not the appropriate placement for a student with ***. A public school setting is not always an appropriate educational placement for a general education student with such deep-seated emotional problems. The teachers and counselors are not sufficiently trained in *** interventions; the limited school day does not accommodate the therapeutic interventions that must occur after hours, and the normal school rules and organization is inconsistent with that of a therapeutic, structured learning environment. Student's ARDC should not be faulted for developing an IEP for Student that would otherwise fit Student's academic abilities and non-disruptive behavior. On its face, the ARDC's IEP *appears* to be the least restrictive environment for Student. It is not, however, because of Student's disabilities and unique needs. A general education setting with conventional and limited psychological counseling simply allows Student to remain locked in a "prison" of his/her own mind. The program designed by the ARDC is not sustainable for this student, at this time.

The *** program appears to be an appropriate setting, but not all portions of the program should be at public's expense. Guided by the *Michael Z.* decision, only that percentage of the expenses that can be designated for primarily educational purposes should be reimbursed. The Hearing Officer is aware that the simple solution is to reimburse *all* of the expenses if the *** program, as a whole, complies with the *Michael Z.* reasoning. This is not the approach taken here because not all of the activities can be said to be strictly educational. Using a five (5) day, nine (9) hour per day generalized approach reimburses most, but not all of the *** expenses. Moreover, the District was not given a fair opportunity to be a partner in devising an appropriate educational placement for Student as a special education student whose disabilities are known to the entire ARDC. For the sake of Student, a placement at *** for one year with limited reimbursement is warranted. However, for the sake of the District, Student's educational

progress at *** should be monitored by the rest of the ARDC and subject to review at the end of the one (1) year placement.

IV. Conclusions of Law

1. Petitioner is a student who resides within the School District who is eligible for special education as a child with the disabilities ED and OHI. [20 U.S.C.A. §1401(3); 34 C.F.R. §300.8(c)(4) and (9); 19 T.A.C §89.1040(c)(4) and (8)]

2. Respondent has a responsibility to provide Student with a free appropriate public education including reimbursement for Petitioner's private school placement if Respondent did not provide Petitioner a free appropriate public education. [20 U.S.C.A. §1412; 34 C.F.R. §300.1 *et seq.*; 19 T.A.C §89.1001]

3. Petitioner proved that Respondent has failed to offer an educational program that is capable of providing Student a free appropriate public education based on the unique needs of a child with ED and OHI. [20 U.S.C. §1414; 34 C.F.R. §300.1, *et seq.*; 19 T. A. C. §89.1001; *Bd. Of Education v. Rowley*, 458 U.S. 176, 73 Led 2d 690, 102 S. Ct. 3034(1982), *Cypress Fairbanks ISD v. Michael F.* 118 F.3d 245 (5th Cir. 1997)]

4. The District's staff is not sufficiently trained to provide Petitioner with an educational program that is based on peer-reviewed research as required by IDEA. [20 U.S.C.§1414(d)(1)(A)(i)(iv); 34 CFR §300.320(a)(4)]

5. Petitioner proved that Student should be placed in a private school at public expense in order for Student to be provided a free appropriate public education. *** is the appropriate educational placement for Student at this time. [20 U.S.C. §1412(a)(1), and §1412(a)(10)(B); 34 CFR §§300.104, 300.148(c)(d); *Richardson Independent School District v. Michael Z.*, 580 F.3d 256 (5th Cir. 2009); 19 TAC 89.1125 and §89.61; Tex. Educ. Code, §29.008]

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 GRANTED in part. Respondent is ordered to:

1. Provide funding to pay for Student's placement at the *** from February ***, 2013 to January ***, 2014 in the amount of ***.
2. It is **FURTHER ORDERED** that the District shall request progress reports and all assessment data regarding Student from the *** no later than July 1, 2013.
3. It is **FURTHER ORDERED** that the District shall convene an ARD on behalf of Student, no later than December 1, 2013, to consider Student's educational program for the remainder of the 2013-2014 School Year.
4. It is **FURTHER ORDERED** that the District shall implement this ORDER no later than April 15, 2013.
5. All other relief not specifically granted herein is hereby DENIED.

ISSUED in Austin, Texas this 3rd day of April, 2013.

/s/
Stephen P. Webb
Special Education Hearing Officer

DOCKET NO. 076-SE-1112

STUDENT b/n/f PARENTS	§	BEFORE A SPECIAL EDUCATION
	§	
vs	§	HEARING OFFICER FOR THE
	§	
FORT BEND	§	
INDEPENDENT SCHOOL DISTRICT	§	STATE OF TEXAS

SYNOPSIS

Issue: Was Petitioner entitled to private placement at public expense for a student with ED and OHI with depression and *** (***) when it was shown that the School District was not able to implement an appropriate educational program with sufficiently qualified and trained staff.

Federal Citation: 20 U.S.C. §1412(a)(1) and §1412(a)(10)(B); 34 C.F.R. §300.104; *Richardson Ind. School Dist. v. Michael Z.*, 500 F.3d 280 (5th Cir. 2009)

Texas Citation: 19 T.A.C. §89.1125 and §89.61, Tex. Educ. Code §29.008

Held: *For Petitioner.* Respondent has not yet acquired sufficiently trained staff to develop and implement a therapy based educational program to address Student’s *** in an appropriate setting that Student requires.

Issue: Was the requested placement in a private facility at public expense the appropriate placement for Student?

Federal Citation: 20 U.S.C. §1412(a)(1) and §1412(a)(10)(B); 34 C.F.R. §300.14 and §300.148; *Richardson Ind. School Dist. v. Michael Z.*, 500 F.3d 280 (5th Cir. 2009)

Texas Citation: 19 T.A.C. §89.1125 and §89.61, Tex. Educ. Code §29.008

Held: *For Petitioner.* The private facility provides the therapy that Student needs to address Student’s depression and anxiety that prevent Student from receiving an educational benefit.