

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

**DECISION OF THE HEARING OFFICER**

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

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**v.**

**DOCKET NO. 280-SE-0709**

**BRADY INDEPENDENT  
SCHOOL DISTRICT,  
Respondent**

**REPRESENTING PETITIONER:**

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

**DECISION OF THE HEARING OFFICER**

**Statement of the Case**

\*\*\* (“the Student”), acting through Student’s parents as next friends, \*\*\* and \*\*\* (“Petitioner”) requested a due process hearing pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §1400, *et seq.*, as amended. Petitioner complains that Brady Independent School District (“Respondent” or “BISD”) denied the Petitioner a Free Appropriate Public Education (“FAPE”) by the following:

1. Whether the Admission, Review, and Dismissal Committee (“ARDC”)<sup>1</sup> provided required procedural safeguard protections and prior written notice to the parents of: a) a change of placement in August 2008; and, b) a reduction in related services of physical therapy (“PT”) and occupational therapy (“OT”) in December 2008?
2. Whether the ARDC worked collaboratively with the Student’s parents to: a) determine the Student’s individual needs; and, b) to develop an educational program to address those needs?
3. Whether the ARDC properly considered input from current staff working with the Student and from the Student’s parents prior to changing the Student’s placement on August 22, 2008?
4. Whether the ARDC revised the Student’s Individualized Education Program (“IEP”) goals and objectives, instructional services, and related services of PT and OT, without new evaluations or data to support the changes?
5. Whether Respondent developed and implemented an appropriate 2008-2009 IEP for the Student with adequate instruction, classroom supervision, classroom materials, extracurricular activities, and instructional supports to address the Student’s needs?
6. Whether Respondent implemented all services, including related services, specified in the Student’s May 2008 IEP while gathering new evaluation data on the Student?
7. Whether Respondent provided appropriate OT supports and materials as specified by the Student’s IEP?

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<sup>1</sup> In Texas, the ARDC is the term used in Texas for the individualized education program team or “IEP Team.” [19 T.A.C. §89.1050].

8. Whether Respondent provided access to appropriate assistive technology specified under the Student's IEP, including computer access?
9. Whether Respondent's support services of training, specific to the Student, for the Student's classroom providers were: a) sufficient to enable the Student to progress rather than regress; and, b) included training in OT, PT, \*\*\*, and behavioral management?
10. Whether the ARDC considered evaluations and independent educational evaluations of the Student in a timely manner?
11. Whether Respondent's IEP provided the least restrictive environment ("LRE") appropriate for the Student's needs?
12. Whether the ARDC convened a meeting to discuss Extended School Year ("ESY") services after the May 2009 ARDC meeting?
13. Whether Respondent violated the confidentiality of the Student's personally identifiable data by: a) photographing the Student without parental consent; and b) maintaining the photograph(s) in the Student's educational records?
14. Whether Respondent routinely checked the Student's \*\*\* to ensure \*\*\*?

As relief, Petitioner seeks an order of the Hearing Officer regarding the following:

1. Return the Student to the \*\*\*, with an appropriate educational program and related services, including \*\*\* and \*\*\* programs; or, in the alternative, the provision of compensatory services of ESY, including OT and PT services, during the summer of 2010;
2. Compensatory services for the 2009-2010 school year per week of: a) 25 minutes of direct OT services; b) 15 minutes of consult OT services; c) 50 minutes of direct PT services; and, d) 15 minutes of consult PT services;
3. Implementation of the recommendations from the OT independent evaluation report;
4. Supportive services of training for the Student's teacher and aide/\*\*\* in: a) \*\*\* training; and, b) 30 hours or more of \*\*\* training;
5. Provision of a computer for the Student's use at home and school;
6. Training for the Student's teacher on care and maintenance of the Student's \*\*\* ;
7. Training for Respondent and the special education cooperative on respecting the rights of parents in ARDC meetings; and,
8. Any other compensation the Hearing Officer deems appropriate.

**HELD, for Respondent.**

## **Procedural History**

Petitioner filed the above-captioned due process complaint with the Texas Education Agency and the Hearing Officer received the case assignment on July 22, 2009. Yvonnilda Muñiz, Law Office of Yvonnilda Muñiz in Austin, Texas, represented Petitioner. Holly B. Wardell, Schwartz & Eichelbaum Wardell Mehl and Hansen, P.C. in Austin, Texas, represented Respondent. On July 23, 2009, the Hearing Officer issued an order setting the hearing on August 31, 2009, following the required 30-day resolution period, and the Decision Due Date for October 5, 2009.

The parties participated in a resolution meeting on August 5, 2009, but were unable to reach an agreement. Two unopposed continuances requested by the parties, granted for good cause shown, reset the hearing October 13-14, 2009, and extended the Decision Due Date to November 17, 2009. The hearing took place as planned on October 13-14, 2009. Prior to the conclusion of the due process hearing, the Hearing Officer granted the parties' request to file written closing argument in lieu of oral closing for good cause shown by November 11, 2009. Petitioner filed an unopposed request for a brief extension of the deadlines for submission of the written closing argument to November 13, 2009, and Decision Due Date to November 30, 2009, granted for good cause shown. The record closed upon the timely submission of the parties' written closings on November 13, 2009. On November 30, 2009, the Hearing Officer timely issued the Decision of the Hearing Officer.

Based upon the evidence and argument admitted into the record of this proceeding, the Hearing Officer makes the following findings of fact and conclusions of law:

## **Findings of Fact**

### **Background**

1. The Student resides with Student's parents and siblings within the jurisdictional boundaries of BISD. The Student qualifies as a Student \*\*\*. Currently age \*\*\*, the Student functions in \*\*\* range of intelligence, is \*\*\*, has a \*\*\*, has very \*\*\*, and has a \*\*\* but is not \*\*\*. [Respondent's Exhibit ("R.Ex.") 28; Transcript ("Tr.") at 154-158 and 165].

2. The Student attended BISD through the third grade when Student began attending the \*\*\* program for \*\*\* Students within the \*\*\* Independent School District ("\*\*\* ISD") for approximately \*\*\* years. During this period, BISD remained the Student's home school district. [Tr. at 100-101 and 511-512].

3. At the end of the 2007-2008 school year, the Student's vocabulary remained at the \*\*\* level with all other academic levels remaining at the \*\*\* level. As Student's intelligence level is difficult to assess, \*\*\* ISD evaluators used the parent form of Vineland Adaptive Behavior Scales – II, as well as teacher information, observation, and previous records to determine the Student's functioning at a composite score of \*\*\*. [Petitioner's Exhibit ("P.Ex.") 2 at 002, 025, and 041-049; Tr. at 47, 201, and 443].

### **Proposed \*\*\* ISD Program for 2008-2009**

4. BISD helps meet the needs of its disabled Students through membership in the Heart of Texas Education Cooperative ("Co-op"). The Co-op director attended the Student's May 2008 ARDC meeting in \*\*\* ISD. At this meeting, the ARDC proposed 2008-2009 placement of the Student on an \*\*\* ISD \*\*\* school campus in a centralized life skills class, rather than in a \*\*\* education class, with 90 minutes of support from a teacher for Students with \*\*\* ("\*\*\*"). The proposed program included goals and objectives in English/Language Arts ("ELA"), Math, Social Studies/Science, Orientation and Mobility ("O&M"), PT, and OT, but did not include goals and objectives for \*\*\* (\*\*\*) , \*\*\*, and speech services. Services under this program included: a) speech – 50 minutes per week; b) \*\*\* – 60

minutes per six-week period; c) \*\*\* – 90 minutes per week; d) O&M – direct services for 30 minutes during first two weeks followed by consultative services of 30 minutes per semester; e) PT – 1800 minutes per year (two 25-minute sessions per week); and, f) OT – 25 minutes per week. [P.Ex. 2 at 008-013 and 020-026; R.Ex.4; Tr. at 225-226, 449, 453-454, and 511].

5. The Student’s proposed 2008-2009 \*\*\* ISD program did not include the use of a computer. [P.Ex. 2].

6. In 2007-2008, the Student took the Texas Assessment of Knowledge and Skills – Alternate (“TAKS-Alt”), the statewide assessment for Students with significant cognitive disabilities receiving special education. The Student met standards in Math, Science, and Reading. [P.Ex. 2 at 038].

7. The Student’s OT and PT services took place in a medical model clinic setting of the West Texas Rehabilitation Center (“WTRC”) through May 2008 rather than in the educational setting of Student’s classroom, requiring transportation of the Student to WTRC. Therapy progress notes from WTRC refer to the Student as “patient” during this period. The Student continued to receive OT and PT services through WTRC through Summer 2008 as ESY services. [P.Exs. 1 at 020, 2 at 026, and 13; Tr. at 225-226 and 495-499].

8. The Student’s May 2008 \*\*\* ISD program included IEP objectives specific for the Student’s PT and OT services, to be implemented by the occupational therapist and the physical therapist. For OT, the IEP specified three objectives concerning the Student’s coloring/pre-writing skills and completion of a sensory motor course with three to four steps, at 75% mastery by the Student. [P.Ex. 2 at 011-012].

9. In the \*\*\* ISD program, the Student participated in a \*\*\* program and a \*\*\* program. At hearing, the \*\*\* ISD special education director confirmed that neither program was part of the Student’s IEP nor was necessary for Student to receive a FAPE. [P.Exs. 1 and 2; Tr. at 456].

10. The Student primarily used \*\*\* and \*\*\* during Student’s placement in \*\*\* ISD. Student received \*\*\* from an \*\*\* aide. The \*\*\* ISD special education director found the Student’s \*\*\* to be very limited with consistent usage of approximately \*\*\*. In the \*\*\* ISD special education director’s opinion, a paraprofessional trained in basic \*\*\* would be able to meet the Student’s \*\*\* needs. [P.Ex. 2 at 002; Tr. at 441-442 and 454-455].

### **Planning for the 2008-2009 School Year**

11. On May 22, 2008, the Co-op director, the departing superintendent of BISD, and the Student’s parent discussed the option of returning the Student to Student’s BISD home campus. Further discussion took place with the parents on the incoming superintendent’s first or second duty day at BISD around July 2, 2008. The new superintendent and the parents met on several occasions during the summer months to discuss concerns about the Student’s program, including a meeting with the Co-op director on July 28, 2008. [R.Ex. 21 at 267; Tr. at 86-87, 92-93, and 514].

12. During Summer 2008, the \*\*\* ISD special education director and the Co-op director discussed the Student’s 2008-2009 program and BISD’s readiness to serve the Student in Student’s home district. The Co-op director requested Student records from \*\*\* ISD during this period for review and determination of whether BISD could provide appropriate services for the Student. [Tr. at 447-448 and 516].

13. Five BISD staff members previously worked with the Student before Student’s placement in the \*\*\*: a) the speech pathologist; b) the \*\*\* instructor/certified \*\*\* teacher; c) the occupational therapist; d) the physical therapist; and, e) the adaptive physical education (“APE”) teacher. The Co-op director met with staff to review the Student’s school records, information from the

parents, first-hand information from previous work with the Student, information on \*\*\*, and all information from the May 2008 \*\*\* ISD ARDC meeting. Staff discussed possible BISD program options for the Student. [Tr. at 204, 463, 515-516, 559, and 607-609].

14. On August 7, 2008, BISD sent Petitioner written notice of an ARDC meeting scheduled for August 22, 2008. The notice stated the date, time, and location of the ARDC meeting, specifically noting discussion would include a proposed change of the Student's placement, and listed who would attend the meeting. [R.Ex. 4 at 142-143].

15. Prior to the scheduled ARDC meeting on August 13, 2008, Petitioner requested a copy of the Student's records. Within 24 hours of this request, the Co-op director arranged Petitioner's access to the records and offered to make copies of the records. [R.Ex. 21 at 250; Tr. at 313].

16. BISD did not receive all requested records from \*\*\* ISD prior to the Student's August 2008 ARDC meeting. However, BISD had sufficient information to formulate preliminary program recommendations for the Student including Student's present levels of performance, a \*\*\* supplement, progress on 2007-2008 goals and objectives, \*\*\* ISD's 2008-2009 proposed special education services and supports, and O&M documentation. BISD reviewed \*\*\* ISD's evaluation data including an October 2007 FIE, an \*\*\* Report (August 2007), a \*\*\* Evaluation (August 2007), and a Functional \*\*\* and \*\*\* Assessment (September 2007). [P.Ex. 2; Tr. at 516 and 521].

#### **August 2008 ARDC Meeting**

17. The ARDC convened at BISD on August 22, 2008. The Student's parents attended the meeting with assistance from an advocate. The parents signed and received a copy of the procedural safeguards, gave input to ARDC discussion concerning \*\*\* by the Student, and received additional time to review the ARDC paperwork with their advocate after the meeting. At parental request, the ARDC added a speech objective, time for \*\*\* instruction and a \*\*\* goal. The parents returned the signed ARDC documents three days after this meeting, agreeing to change the Student's placement and return Student to BISD. [P.Ex. 3 at 003 and 032-043; R.Ex. 4 at 100 and 129-140].

18. The Student's recommended mode of communication is a total communication approach. This approach addresses every aspect of communication including spoken language, vocalizations, objects, tangible symbols, body language, gestures, \*\*\*, tactile \*\*\*, photographs, line drawings, and written text or Braille depending on an individual's needs. [R.Ex. 11; Tr. at 441-442 and 609-610].

19. The Student's August 2008 IEP placed the Student in BISD's \*\*\* school in a self-contained classroom with an individual aide. The Student's IEP provided opportunities to interact with non-disabled Students in non-academic classes and extracurricular activities including field trips and \*\*\*. [P.Ex. 3 at 031; R.Ex. 4 at 128; Tr. at 16, 43, and 58].

20. The Student's August 2008 IEP added communication, speech, and \*\*\* objectives not previously included in the \*\*\* ISD May 2008 proposed program. The August 2008 IEP included objectives similar to those proposed by \*\*\* ISD in May 2008 in ELA, Social Studies/Science, Math, and O&M. The August 2008 IEP specified an \*\*\* goal "to apply appropriate aspects of total communication to increase comprehension and functionality 60% of the time, as measured by teacher observation." The IEP designated \*\*\* goal implementation responsibility to the Student's special education teacher with assistance of an aide/\*\*\*.<sup>2</sup> [P.Ex. 2 at 008-013 and P.Ex. 3 at 008-019 and 025; R.Ex. 4 at 105-116 and 122].

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<sup>2</sup> An "\*\*\*\*" has training in specialized skills related to \*\*\* to provide \*\*\* with supervision from the ARDC. [R.Ex. 21 at 243].

21. The Student's August 2008 IEP included all proposed related services under \*\*\* ISD's May 2008 program. The August 2008 IEP added APE services and increased levels for OT, speech, \*\*\* and \*\*\* services. [P.Ex. 2 at 020 and P.Ex. 3 at 033-034; R.Ex. 4 at 097].

22. The August 2008 ARDC recommended reevaluation of the Student to supplement records from \*\*\* ISD and BISD. Participants planned completion of OT, PT, APE, and communication reevaluations by the end of the first six-week grading period, completion of an adaptive behavior evaluation by the end of the first semester, and completion of a transition needs evaluation by the end of the fifth six-week grading period in Spring 2009. [R.Ex. 4 at 130-131].

23. The August 2008 ARDC developed a PT goal with five PT objectives for the Student, with completion of the PT reevaluation by the conclusion of the first six-week grading period "to determine exact services needed." [P.Ex. 3 at 019-020; R.Ex. 4 at 116-117].

24. While gathering the new APE information, the ARDC agreed to the parental request to place the Student on the \*\*\* campus accompanied by Student's aide/\*\*\* for Student's APE instruction. [P.Ex. 3 at 032-039; R.Ex. 4 at 129-136; Tr. at 524].

25. The August 2008 ARDC did not adopt the three OT objectives from May 2008 at \*\*\* ISD. Instead, pending completion of the OT reevaluation, BISD's occupational therapist proposed one OT goal with one objective directed to the Student's caregiver and measured by 85% performance by the caregiver as follows:

<u>Goal:</u> Caregiver will demonstrate ability to implement passive and active assisted range of motion exercises independently.
<u>Short-term Objective:</u> Caregiver will demonstrate understanding and proficiency in delivering *** activities to Student at [85%] level.
<u>Direct services:</u> One session of 25 minutes per six-week period
<u>Consultative services:</u> One session, as extensive as needed, per four-week period
Services will include training with staff of *** <sup>3</sup> during the OT eval[uation] to determine goals appropriate upon completion of the OT eval[uation]. OT time: 45min/week (Con. & Dir.)

[P.Ex. 3 at 021 and 025; R.Ex. 4 at 118 and 122; Tr. at 238-239].

26. The ARDC discussed OT services in the August 2008 ARDC meeting. The BISD occupational therapist recommended training the classroom staff in a \*\*\* during the OT reevaluation using equipment specified by the occupational therapist. During the OT reevaluation, the occupational therapist recommended 45 minutes of direct and consultative OT with the Student. After the reevaluation, the minutes note "additional goals/time may be added as determined appropriate" by the occupational therapist. [P.Ex. 3 at 036; R.Ex. 4 at 133].

27. The BISD occupational therapist directed the August 2008 OT goal to the Student's caregiver, rather than to the Student, to serve as a "transition" while the occupational therapist trained the Student's caregiver, provided direct OT service to the Student "and implement everything at the same time." Implementers of the OT goal did not include the occupational therapist but instead listed the Student's special education teacher and aide/\*\*\*. The occupational therapist performed the OT reevaluation mostly through observation, with direct work with the Student occurring later while training classroom staff and doing \*\*\* with the Student. The Student received Student's total amount of direct

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<sup>3</sup> A "\*\*\*" is a program of \*\*\* used with the Student. [Tr. at 21].

and consultative therapy with the BISD occupational therapist between August and December 2008. The credible evidence established that one-on-one work with the Student occurred when the occupational therapist trained the aide as well as worked with the Student using OT equipment. [P.Ex. 3 at 021; R.Ex. 4 at 118; Tr. at 238-239 and 269-270].

28. The Student's IEP from August 2008 through December 1, 2008, did not include goals and objectives for the BISD occupation therapist's direct work with the Student. [P.Ex. 3; R.Ex. 4].

29. BISD's occupational therapist did not speak to WTRC personnel and did not have the Student's WTRC therapy notes or May 2008 OT reevaluation report to review in August 2008, but in fact, first saw the information prior to the due process hearing. [P.Ex. 13 at 014-024 and 074; Tr. at 140, 148-149, and 206-207].

### **Program Implementation in BISD**

30. The Student uses \*\*\* at school. The \*\*\* has \*\*\*. At times, the Student removes the \*\*\* and requires adult redirection for \*\*\*. The \*\*\* must be \*\*\* each school day. [Tr. at 333-334].

31. BISD staff frequently checks the Student's \*\*\*. At hearing, the \*\*\* teacher recalled staff checking the \*\*\* "at least five times a day" during the 2008-2009 school year. The \*\*\* teacher knew how to identify problems with the \*\*\* and worked with the parents to get information when the Student's \*\*\*. The Student's classroom teacher and aide/\*\*\* also knew how to check the \*\*\* function. [Tr. at 32-33, 416, and 571-572].

32. The Student's 2008-2009 \*\*\* teacher used a \*\*\* in the classroom, an assistive technology device that \*\*\*. Classroom staff used the \*\*\* with the Student \*\*\* activities. [Tr. at 32 and 65-68].

### **Training**

33. The Student's \*\*\* teacher trained Petitioner's 2008-2009 classroom staff in \*\*\* on a daily basis. The classroom teacher and aide/\*\*\* attended the "Introduction to the \*\*\* Team Model," an introductory two-day program sponsored by the \*\*\* ("\*\*\*\*") for newly-assigned and current \*\*\*. In September 2009, the Student's current classroom teacher, aide/\*\*\*, and \*\*\* teacher attended the same program. [R.Ex. 21 at 241-244; Tr. at 68-69, 365, and 531].

34. The Student's classroom special education teacher knew little \*\*\* before beginning work with the Student in 2008-2009. At the beginning of the school year, the aide/\*\*\* learned the Student's \*\*\*. During the first two months of the 2008-2009 school year, the \*\*\* teacher worked full-time in the classroom directly with the Student and classroom staff. From the third month to the last seven weeks of the school year, the \*\*\* teacher spent 12 hours per week in the Student's classroom. For the final seven weeks, the \*\*\* teacher assumed full-time classroom duties when the classroom special education teacher left on maternity leave. [Tr. at 13, 60-61, 366 and 562-564].

35. The Co-op brought in two consultants from the \*\*\* Outreach Program to give recommendations on the Student's program. At the time of the due process hearing, three visits had occurred, two of which took place in 2008-2009. [Tr. at 531].

36. At the first \*\*\* consultant visit in January 2009, the consultant worked directly with the Student and classroom staff including the \*\*\* and \*\*\* teachers. The consultant's written report of the visit noted the \*\*\* teacher's training of the classroom teacher and aide/\*\*\*. The report included eight educational suggestions as "refinements and enhancements to an existing program of good quality," such as the addition of \*\*\* to accommodate the Student's \*\*\*, limiting the Student's time in \*\*\*, and increasing the amount of \*\*\* vocabulary used in educational activities by adults. [P.Ex. 7; R.Ex. 7].

37. At the time of the January 2009 visit by the \*\*\* consultant, BISD staff immediately \*\*\*. Later during the Spring 2009 semester, BISD added a \*\*\* to the Student's classroom. [Tr. at 33, 406-407, and 592].

38. At the beginning of the 2008-2009 school year, BISD used a \*\*\* with the Student because Student liked it and \*\*\*. The Student has \*\*\*. Because Student \*\*\* at school, the use of a \*\*\* is not harmful to the Student's \*\*\*. By the end of the 2008-2009 school year, the Student seldom used the \*\*\*. [Tr. at 33, 77-78, 483-484].

39. The Student's classroom had a \*\*\* for the Student at the beginning of the 2008-2009 school year. [Tr. at 406-407 and 570].

### **Fall 2008 Reevaluation Reports**

40. Within six weeks of the August 2008 ARDC meeting, BISD completed reevaluation in OT, PT, APE, and communication. Petitioner received the completed reevaluation reports on or about October 17, 2008. [R.Ex. 21 at 237-238; Tr. at 528].

41. BISD's occupational therapist has a doctorate in OT, experience working with other individuals with \*\*\*, and previously worked with the Student in BISD prior to Student's placement in \*\*\* ISD. The occupational therapist reviewed existing data, teacher evaluations, and performed the reevaluation in six dates over the first six-week period of the 2008-2009 school year. The occupational therapist assessed the Student's muscle tone, postural control, range of motion, endurance, strength, sensory processing, vestibular processing, tactile issues, praxis, hand/eye coordination, hand strength, fine motor skills, need for adaptive equipment, and behavior related to \*\*\*. The BISD occupational therapist found the Student possesses both physical and structural foundation for functional performance in any environment. The Student's behavior exhibited both \*\*\* components as well as maladaptive and avoidance oriented behaviors. The occupational therapist recommended consultation with a behavioral specialist. Most of the Student's \*\*\* activities, according to the written OT reevaluation report, occurred in the \*\*\* to give the Student maximum physical support. [R.Ex. 8; Tr. at 126 and 223].

42. As part of the OT assessment, BISD's occupational therapist developed and recommended daily use of an individualized \*\*\* for the Student's \*\*\* and to help Student benefit from Student's instruction. Designed for use with morning, afternoon, and work-time activities, the \*\*\* included \*\*\* and the use of appropriate \*\*\*. Physical activities in the \*\*\* included \*\*\*. [R.Ex. 8; Tr. at 126].

43. In Fall 2008, BISD's occupational therapist gave OT training to the Student's classroom staff. The training included verbal and functional feedback with observation of the aide/\*\*\* correctly implementing the Student's \*\*\*. [Tr. at 27, 234-235, and 583].

44. In Fall 2008, the Student's BISD physical therapist trained classroom staff on the Student's daily motor activities, observed staff correctly implement the activities, and provided on-going monitoring of the Student's progress. [Tr. at 466-467].

45. The Co-op director brought \*\*\* and \*\*\* specialists from the education service center to give support to the Student's classroom staff. [Tr. at 531].

### **November and December 2008 ARDC Meetings**

46. On October 30, 2008, Respondent sent notice of an ARDC meeting planned for November 12, 2008, acknowledged by parental signature. The purpose of the ARDC meeting included review of completed assessment data, development and review of the Student's program and IEP, and discussion of additional educational or related services at parental request. The notice stated the date, time, and location of the ARDC meeting, and listed who would attend the meeting. [R.Ex. 2 at 091-092].

47. The parents and their advocate attended the ARDC on November 12, 2008. After review of new assessment data results, the ARDC recommended moving Student to a \*\*\* physical education (“P.E.”) class and increasing the Student’s APE services to add 90 minutes per month of direct services to Student’s 60 minutes of consultative services per month. Other recommendations included increasing \*\*\* services from four to 12 hours per week, decreasing PT services from 50 minutes per week of direct PT services to 60 minutes per six-weeks of consultative PT services, and decreasing OT services of 45 minutes per week of direct and consultative OT services to 20 minutes per three-weeks of consultative OT services. The evaluating occupational therapist explained that any benefit from direct services would not be beneficial in terms of pulling the Student out of Student’s routine. All participants agreed on the APE and \*\*\* recommendations. The parents and advocate requested an independent educational evaluation (“IEE”) in OT and PT. When the parents and their advocate disagreed with the ARDC recommendations for OT and PT, participants scheduled a 10-day recess to reconvene on December 1, 2008. Respondent sent out prior written notice to reconvene the ARDC with another copy of the procedural safeguards. [P.Ex. 5 at 018-019, 023, 028, 031, and 038-040; R.Ex. 2 at 052, 070-071, 075, 080, 083, and 091-093; Tr. at 528-529].

48. Petitioner expressed concern over the Student \*\*\* as well as the \*\*\* in the Student’s classroom at the ARDC on November 12, 2008. In response, the BISD occupational therapist recommended use of a combination of the \*\*\* to meet the Student’s needs. [P.Ex. 5 at 024-025; R.Ex. 2 at 076-077].

49. The ARDC reconvened on December 1, 2008, with the parents in attendance, the parents’ advocate participating by telephone, and another parent in attendance to support the parents. The ARDC considered a written follow-up report by the BISD occupational therapist dated December 1, 2008, input from the BISD diagnostician, reports on proposed APE, \*\*\* and \*\*\* services, and continuing recommendations for changing OT and PT services to solely consultative services. Because classroom staff could redirect the Student’s behaviors successfully, the ARDC did not implement the help of a behavioral specialist for the Student. Petitioner disagreed with the proposed services and reevaluations in OT and PT. At the conclusion of the meeting, Respondent granted the parents’ request for IEE in PT and OT. Following the meeting, Respondent began implementing the Student’s IEP changes beginning December 2, 2008. [P.Ex. 5 at 001-007 and 030-036; R.Ex. 2 at 052-059 and 082-089].

50. Respondent completed the adaptive behavior evaluation by the end of the Student’s first semester on December 8, 2008. [P.Ex. 9; R.Ex. 6; Tr. at 193-194].

51. The BISD occupational therapist trained the Student’s teacher, the aide/\*\*\*, and the \*\*\* teacher on \*\*\* and observed classroom staff correctly implement the Student’s \*\*\*. The aide/\*\*\* found this training to be adequate for implementation of the Student’s \*\*\*. As part of the Student’s \*\*\* routine, the aide/\*\*\* used \*\*\* resources of a \*\*\* with the Student. [Tr. at 27, 234-236, 362-363, and 583].

### **Independent OT Evaluation**

52. On February 20, 2009, an independent occupational therapist performed the OT IEE of the Student’s motor skills, self-care and feeding skills, and \*\*\* needs and abilities. This assessment included a record review, a \*\*\*, completed by the Student’s mother, and six-hour direct observation of the Student and BISD classroom staff. Because the classroom teacher was absent on the observation day and the Student appeared stressed, the evaluator did not do a hands-on assessment, choosing instead to do a classroom observation. In the written IEE report, the evaluator found consultative rather than direct OT services appropriate for the Student due to the number of persons working with the Student and Student’s difficulty in forming relationships. The evaluator included 17 suggestions for the BISD program such as seating at \*\*\* for classroom work instead of \*\*\*, consultation from the BISD occupational therapist on sequencing and modifications of manipulative activities, and more training and supervision for the aide/\*\*\* regarding the Student’s comfort-seeking behaviors. [P.Ex. 8; Tr. at 70 and 104-118].

53. The independent occupational therapist reviewed the Student's past and present OT goals. OT goals directed to the caregiver, in the evaluator's opinion, would not be appropriate given that the purpose of OT services in the educational setting is the facilitation of the Student's ability to function in the classroom. [Tr. at 115-116].

#### **Assistive Technology**

54. Neither \*\*\* ISD's proposed 2008-2009 program nor BISSD's 2008-2009 IEP for the Student included a specific objective requiring the Student's use of a computer. The Student had access to a touch-screen computer by the end of the 2008-2009 school year. The Student's 2009-2010 IEP includes an integrated objective for proper positioning when using the computer. [R.Ex. 1 at 127; Tr. at 407].

55. There is no evidence in the record that a computer for home use is necessary for the Student to make progress on Student's IEP.

#### **Need for 2009 ESY Services**

56. The Student has ongoing difficulty with \*\*\* and eating skills. The Student's \*\*\* teacher noted some regression after the Student \*\*\*, but skills were recouped after a reasonable amount of time under Respondent's program. [P.Ex.10 at 043-044; R.Ex. 1 at 045-046].

57. The Student's BISSD educators collected data after extended holiday breaks to assess whether the Student experienced significant regression in critical skill areas and, if so, whether Student recouped the skills within a reasonable amount of time when school resumed. The data did not show a need for ESY services to recoup lost skills. [P.Ex. 10 at 030-035 and 044; R.Ex. 1 at 032-037 and 046; Tr. at 535].

#### **May 2009 ARDC Meeting**

58. Respondent sent notice of an ARDC meeting scheduled for May 19, 2009, noting the time, date, place, and the purpose of an annual review of the Student's program with review of completed assessment reports. At this meeting, participants reviewed completed reports of the OT IEE, the adaptive behavior reevaluation, and the transition report. Both parents attended with a parent advocate from the state's \*\*\* ("\*\*\*"). Participants discussed the Student's unwillingness to \*\*\* and the need to find meaningful chore activities suitable for the Student. The parents also discussed the Student's progress, current health and medication status, and unsuccessful efforts to find a physical therapist to perform the PT IEE. The ARDC reviewed collected data regarding the Student's need for ESY services. The \*\*\* advocate suggested that 2009 ESY recommendations be obtained from \*\*\* staff, suggesting that the ARDC meet again "following that to determine any need for ESY services." At the conclusion of the meeting, the parents requested additional time to review the goals and objectives for the 2009-2010 school year but clarified that they were not disagreeing with the meeting and did not need a 10-day recess. On May 29, 2009, the Student's mother signed in disagreement with the ARDC meeting. [P.Ex. 10 at 040-047; R.Ex. 1 at 042-047; Tr. at 518 and 540-541].

59. By May 2009, the Student's academic functional levels were at the \*\*\* level, representing an increase from the \*\*\* to the \*\*\* level in Student's vocabulary. In Spring 2009, the Student met standards in Math but not Reading on the TAKS-Alt. [P.Exs. 10 at 007 and 15 at 002; R.Ex. 1 at 009; Tr. at 47].

60. The Student made progress on Student's total communication skills as observed by Student's speech pathologist. By the end of the 2008-2009 school year, Student mastered most of Student's communication objectives and began initiating communication with \*\*\*. At the time of the due process hearing, the Student had learned about \*\*\* in Student's BISSD program and initiated communication with between \*\*\*. Recently Student began spontaneous use of \*\*\* by arguing with Student's speech pathologist and asking for \*\*\*. [R.Ex. 25; Tr. at 376, 565-569, and 612-616].

61. After the May 2009 ARDC meeting, the Co-op director contacted \*\*\* staff regarding information for ESY recommendations, but \*\*\* neither assesses Students for ESY services nor makes ESY recommendations. The Co-op director notified the parents of this information and offered to convene another ARDC meeting, but Petitioner declined. [P.Ex. 10 at 036; R.Ex. 1 at 038; Tr. at 540-541].

62. Under \*\*\* ISD's proposed 2008-2009 placement, the Student would be served on a \*\*\* ISD \*\*\* school campus as the only \*\*\* Student in the school and would not be served in a \*\*\* education class. [Tr. at 454-459].

63. In BISD during the 2008-2009 school year, the Student was the only \*\*\* Student within the district. At the beginning of the 2008-2009 school year, the Student was the only Student who knew how to \*\*\* in Student's classroom. [Tr. at 15-16].

64. Petitioner consented to the release of the Student's photograph in Student's education records as directory information under the Federal Educational Rights and Privacy Act. [R.Ex. 20 at 218].

65. The Student's 2008-2009 and 2009-2010 programs at BISD include a picture calendar to add structure to Student's school day. To implement the picture calendar, BISD educators needed to take some personal pictures of the Student. [R.Exs. 20 at 218 and 27 at 310-318].

66. The BISD physical therapist took some pictures of the Student exhibiting a skill being questioned by Student's parents. These pictures are part of the November 2008 ARDC meeting documents. [P.Ex. 5 at 011-012; R.Ex. 2 at 063-064].

67. The Student made friends with nondisabled peers in Student's P.E. class within Student's BISD \*\*\* school placement. The Student and Student's nondisabled peers greet each other in the school hallways during passing periods. [Tr. at 50-52, 387, 414, 419-420, and 530].

68. By the end of the 2008-2009 school year, some peers \*\*\* in their interaction with the Student in Student's special education classroom and Student's regular P.E. class. [Tr. at 15].

69. The Student's physician noted some regression in the Student's developmental milestones of eating and toileting during 2008-2009, based on observation in the physician's office and by the mother's report. The physician did not observe the Student in Student's school setting. [Tr. at 160-161 and 165-166].

70. The Student did not demonstrate regression after Summer 2009 upon Student's return to the school setting for the 2009-2010 school year. [Tr. at 258, 481, and 587-588].

## **Discussion**

The underlying issue in this dispute concerns the determination of the least restrictive setting for implementing the Student's IEP. Petitioner believes that the LRE to meet this Student's needs remains the \*\*\* placement in \*\*\* ISD. Upon the Student's return to BISD for the 2008-2009 school year, Petitioner asserts BISD's program failed to meet the Student's needs for services and programming, resulting in a denial of FAPE. By contrast, Respondent believes the BISD program for this Student at Student's home campus meets Student's unique needs, is appropriate in all respects, and appropriately delivered a FAPE to the Student.

BISD's educational program is presumed appropriate. *Tatro v. Texas*, 703 F.2d 823 (5<sup>th</sup> Cir.1983) *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984). Petitioner must prove at hearing why the Student's program and placement are inappropriate under IDEA. *Shaeffer v. Weast*, 546 U.S. 49, 62 (2005).

### **Procedural Protections and Parental Participation**

Under IDEA and its implementing regulations, parents are part of the ARDC process and are entitled to receive notification in advance of ARDC meetings and have meetings set at a mutually agreed upon time and place. 34 C.F.R. §§300.321(a)(1) and 300.322(a). This notification must include the purpose, time, and location of the meeting and must list the persons who will attend. 34 C.F.R. §300.322(b)(1)(i). IDEA implementing regulations further require school districts to work collaboratively with parents to review records, participate in meetings, and be involved in placement decisions. 34 C.F.R. §300.501(a)-(c). The record before me established that BISD fully included the parents in the process of developing the Student's IEP. This process included multiple planning conversations with school staff over the 2008 summer months before convening the August 2008 ARDC meeting and ensuring prompt parental access to the Student's school records. The parents, with the benefit of a parent advocate, agreed to the Student's return to BISD under an initial program of services that addressed specific parental concerns with emphasis on the Student's communication needs. Petitioner did not meet Student's burden to show the ARDC disregarded parental input in changing Petitioner's placement back to BISD.

Under IDEA's regulations, a school district must give parents notice of a school district's intent to, or refusal to, initiate or change the identification, evaluation, or educational placement of a Student, or the provision of FAPE to the Student. 34 C.F.R. §300.503(a). Petitioner argues that Respondent did not properly notify the parents of a proposed reduction in related services of OT and PT, as discussed in the ARDC meetings of November and December 2008, and ultimately implemented on December 2, 2008. Yet, the evidence established BISD's completion of additional assessment and transmittal of the completed reports with recommendations for changed OT and PT services by October 17, 2008, allowing the parents almost an entire month to process the recommendations before the ARDC held on November 12, 2008. I conclude that Respondent fully complied with notification requirements for all ARDC meetings held between August 2008 and May 2009.

Likewise, the record is replete with input and data provided by the parents and considered by BISD, such as the list of the Student's \*\*\*, information on the \*\*\*, and reports on Student progress and needs during 2008-2009 ARDC meetings at BISD. Documentation of ARDC meetings held between August 2008 and May 2009 chronicle questions and concerns from the parents and advocates, as well as school district responses. I find that Petitioner failed to meet Student's burden to prove the parents were not full participants in all decisions related to the Student's program, placement, and receipt of records.

### **August 2008 Placement Change**

Petitioner challenges whether the August 2008 ARDC determined a return to BISD with proper input from current staff working with the Student. While it is undisputed that the Student remained a BISD Student while attending \*\*\* ISD through Summer 2008, it is also undisputed that no \*\*\* ISD staff or service providers who served the Student attended the August 2008 ARDC at BISD.

Respondent presented credible testimony regarding the steps taken to obtain and review the Student's \*\*\* ISD records, meet with the parents, and get BISD staff input, culminating in written notice to the parents of the August 2008 ARDC meeting. This notice specifically listed 10 additional persons invited to the meeting. [P.Ex. 3 at 045; R.Ex. 4 at 142].

Under IDEA's implementing regulations, the ARDC must include specific persons including a special education teacher and a general education teacher of the Student, a representative of the school district, an individual qualified to interpret evaluation results, and, *at the discretion of the parents or school district*, other persons who have knowledge or special expertise regarding the Student, including related service personnel as appropriate. [emphasis added] 34 C.F.R. §300.321(a)(2)-(6). This provision gives flexibility to the school district and parents for including persons in an ARDC meeting for input concerning a Student, yet does not mandate the presence of immediate past school district staff or service providers. Certainly the input of such persons may be helpful to the ARDC process, but BISD was not required to invite or ensure \*\*\* ISD provider presence at the August 2008 ARDC meeting.

It is undisputed that the Co-op director attended the May 2008 ARDC meeting in \*\*\* ISD and began consideration of whether the centralized life skills placement for the Student could be implemented appropriately in BISD. Discussion continued from May through August 2008, involving the Co-op director, the \*\*\* ISD Special Education Director, outgoing and incoming superintendents of BISD, the parents, and other BISD staff, five of whom previously worked with the Student prior to Student's \*\*\* ISD placement. Prior to the meeting, Respondent reviewed the Student's previous BISD records and new records from \*\*\* ISD, including the May 2008 ARDC documents. When the August 2008 ARDC meeting convened, participants invited by the parents and the school district discussed and developed goals and objectives comparable to the Student's \*\*\* ISD proposed 2008-2009 program. Based on the input of all the participants, including the parents, the ARDC agreed to return the Student to BISD and gather additional evaluation data during the initial weeks of Student's program before making additional changes. Petitioner did not meet Student's burden on this issue.

### **2008-2009 BISD Program**

Petitioner challenges the sufficiency of BISD's 2008-2009 educational program for the Student in four areas, discussed separately below: August 2008 IEP development, IEP implementation, evaluation review, and IEP revisions.

#### **A. August 2008 IEP Development**

**May 2008 Program Service Levels.** Petitioner challenges whether Student's new BISD program implemented all scheduled services from Student's May 2008 \*\*\* ISD program as Respondent gathered additional evaluation data. The evidence firmly established implementation by the August 2008 ARDC of all service levels for the Student's program set out in Student's \*\*\* ISD program from May 2008, with increased services in OT, speech, \*\*\* and \*\*\* services. Petitioner produced no evidence that, once put in place, BISD did not implement the Student's service levels set by the August 2008 ARDC.

**Supporting Evaluations and Data for August 2008 IEP Revisions.** Petitioner alleges Respondent revised the Student's goals and objectives, instructional services, and related services of PT and OT from service levels previously set by the \*\*\* ISD without supporting data or evaluations to support the revisions. Petitioner points to the review of the Student's current evaluation data in May 2008 – data found sufficient by the \*\*\* ISD ARDC. Because BISD did not complete any additional evaluations prior to the August 2008 ARDC, Petitioner alleges any changes to the Student's May 2008 IEP in August 2008 were not supported by new evaluation or data. Although the evidence shows BISD did not have new evaluation data gathered between May and August 2008, Respondent argues that IDEA does not require a whole new evaluation or any specific type of data to modify a Student's IEP.

Section 300.324 of IDEA'S implementing regulations requires school districts to consider four areas in development of a Student's IEP – Student strengths, parental concerns, results of the Student's most recent evaluation, and the Student's academic, developmental, and functional needs. 34 C.F.R. §300.324(a)(1). The ARDC must consider the specific needs of a \*\*\* or \*\*\* Student when developing the Student's program including: 1) the Student's language and communication needs; 2)

opportunities for direct communications with peers and professional personnel in the Student's language and communication mode; 3) academic level; and, 4) full range of needs, including opportunities for direct instruction in the Student's language and communication mode. 34 C.F.R. §300.324(a)(2)(iv). School districts must review a Student's IEP at least annually, revising the IEP to address lack of progress toward annual goals, to address reevaluation results, information from the parents, the Student's anticipated needs, or other matters. 34 C.F.R. §300.324(b)(1)(i-ii).

Although BISD did not have every record from \*\*\* ISD by August 2008 and, in fact, some evaluation data was not received until the document disclosure date in this proceeding, the preponderance of the evidence established the August 2008 ARDC included appropriate participants who considered recent evaluation data received by Respondent at the time of the meeting. As previously discussed, the August 2008 ARDC reviewed not only parental concerns about their child, but Student's present academic, developmental, and functional needs as well as Student's anticipated needs in design of Student's program. The ARDC especially considered Student's communication and language needs, determining that Student required a program with total communication with \*\*\* classroom teacher, and aide/\*\*\* as personnel for Student's instruction. The evidence established that Petitioner's classroom peers, none of whom could \*\*\* at the beginning of the 2008-2009 school year, received classroom \*\*\* after the Student joined their classroom and began to \*\*\*.

**August 2008 Goals and Objectives.** The August 2008 ARDC documentation includes copies of Petitioner's 2008-2009 goals and objectives with a schedule of Student's related and supportive services. It is undisputed that the August 2008 OT goal is not written for the Student but instead for the Student's caregivers. The hearing testimony of the BISD occupational therapist explained the intent to complete the OT evaluation of the Student over the first six weeks of the 2008-2009 school year while training the special education teacher and aide/\*\*\* in the Student's OT activities. The BISD occupational therapist was, in fact, the person implementing the Student's OT IEP for work with the Student's caregivers and the Student's evaluation, yet the OT IEP lists the Student's caregivers as implementers – the very persons to be trained during the consultative and direct work with the Student by the BISD occupational therapist. The OT IEP does not include goals and objectives for the direct work the BISD occupational therapist did with the Student during this process. These flaws in the OT IEP are of a procedural nature and the preponderance of the credible evidence in the proceeding established that the total level of services specified in the August 2008 OT IEP were, in fact, delivered to the Student, the Student's classroom teacher and aide/\*\*\* received consultative OT services as they performed the Student's OT activities, and the BISD occupational therapist completed the OT assessment by November 12, 2008.

## **B. IEP Implementation**

**Materials and Supports for OT.** The 2008-2009 BISD program included supports for the Student's OT program of a \*\*\* of activities during Student's day to address \*\*\* using equipment including a \*\*\*. Initially, the Student used \*\*\* for most of Student's work time for \*\*\* activities. When the parents questioned the Student's \*\*\* during the November 2008 ARDC meeting, the BISD occupational therapist recommended use of both \*\*\* as well as a \*\*\* for the Student. After the January 2009 \*\*\* consultant's report expressed concern about limiting \*\*\* use for leisure and ensuring the Student had an \*\*\* (concerns also expressed by the independent occupational therapist in February 2009), BISD changed \*\*\*, reduced the time spent by the Student in \*\*\*, and included a \*\*\* in the classroom. The preponderance of the evidence established BISD supplied the necessary materials to support the Student in the classroom, including making suggested changes to \*\*\* reports made by outside providers.

**PT Supports and Picture Calendar.** IDEA's regulations allow school districts to collect personally identifiable information on Students, yet require protection of such information with proper maintenance and destruction methods. 34 C.F.R. §§300.123 and 300.610-300.612. Pictures of a Student are included in the definition of personally identifiable information under IDEA's regulations as

set out by the Family Educational Rights and Privacy Act regulations. 34 C.F.R. §§99.2 and 99.3. The Student's BISD 2008-2009 program specified support of a picture calendar for the Student. The BISD physical therapist took other pictures of Petitioner for use during the December 2008 ARDC meeting. Petitioner complains that those pictures of the Student were not properly obtained as part of the PT reassessment and should not be a part of the Student's ARDC documents. Petitioner's argument is without merit. The evidence established the educational purpose of taking the Student's picture for use in the picture calendar as a required component of Student's program. Likewise, the additional pictures of Petitioner taken by the BISD physical therapist served as input to the ARDC. The inclusion of the pictures into ARDC documents had a proper educational purpose, and there is no evidence of improper maintenance or improper disclosure of the Student's photographs.

**Assistive Technology.** Petitioner alleges the Student did not have a computer to support Student's classroom work until the end of the 2008-2009 school year. Yet, Respondent presented convincing 2008-2009 and 2009-2010 IEP documentation and hearing testimony of BISD staff to establish the Student's IEP did not require a computer until the 2009-2010 school year, the Student had access to a touch-screen computer by the end of the 2008-2009 school year, and the proposed \*\*\* ISD 2008-2009 program did not require a computer for the Student. Petitioner did not meet Student's burden on this issue.

\*\*\* . Petitioner alleges BISD staff routinely failed to check external components of the Student's \*\*\* during 2008-2009, did not timely watch supportive information on the \*\*\* provided by the Student's mother, and did not properly change the \*\*\*. Routine checking of \*\*\* is included as a related service under IDEA's implementing regulations. 34 C.F.R. §§\*\*\* and \*\*\*.

Respondent presented testimony of the Student's classroom providers that, in fact, staff \*\*\* multiple times each day. I find this testimony credible and Petitioner did not sustain Student's burden to show that Respondent's related service in this area was inappropriate. While it is undisputed that at times the \*\*\* and \*\*\* during the school day, the \*\*\* at times malfunctioned during the 2008-2009 school year. I find Respondent performed routine checks for proper function during the Student's school day.

\*\*\* **Training.** Petitioner stressed the importance of communication skill development during the August 2008 ARDC meeting. It is undisputed that the Student is \*\*\*, Student's recommended mode of communication is total communication, and Student requires a program that addresses Student's complex needs for OT, PT, \*\*\*, and behavioral management. Petitioner's allegations focus on the credentials of the Student's 2008-2009 classroom staff as well as the ongoing efforts to train classroom staff in \*\*\* and program implementation. By contrast, Respondent asserts that the Student's program delivery complied with Student's unique communication needs of total communication with appropriately trained staff.

The Texas Education Code addresses the instructional needs of a \*\*\* Student, requiring that the Student's unique communication mode be "respected, used, and developed to an appropriate level of proficiency." TEX. EDUC. CODE §\*\*\*. Teachers who work with \*\*\* Students must be "\*\*\*\*." TEX. EDUC. CODE §\*\*\*. School districts must employ or provide access to appropriate qualified staff with proficient communications skills and must ensure that regular and special education personnel working with \*\*\* Students be adequately prepared to provide educational instruction and services to these Students. TEX. EDUC. CODE §\*\*\*.

The evidence shows Respondent provided daily ongoing \*\*\* training to classroom staff from the \*\*\* teacher. Training went on throughout the school year with support from the \*\*\* teacher, culminating in the \*\*\* teacher's constant presence in the classroom for the final weeks of the school year. The quality of the program, however, is not only affirmed by BISD personnel but included affirmation of the \*\*\* ISD special education director that the Student's limited proficiency in \*\*\* is adequately met by a paraprofessional trained in basic \*\*\* . [Tr. at 454-455]. Likewise,

recommendations from the \*\*\* consultant affirmed the quality of this program with only suggested enhancements to the program. I find this testimony and documentary evidence persuasive. Based on the evidence before me, Respondent's 2008-2009 program met the Student's need for instruction in Student's total communication mode delivered by adequately-trained staff and Petitioner did not sustain Student's burden to prove otherwise.

**Behavioral Issues Training.** It is undisputed that the Student has behavioral outbursts from time to time. As previously discussed, the BISD occupational therapist trained classroom staff on correct implementation of the Student's \*\*\*. Although Petitioner challenges the efficacy of the \*\*\* to manage the Student's outbursts, the preponderance of the evidence in this dispute, however, affirms BISD's management of behaviors through OT supports of the Student's behavior and basic classroom redirection techniques. On the record before me, I conclude that the training for classroom staff was sufficient to enable staff to distinguish \*\*\*-based behaviors from \*\*\* behavioral outbursts without the need for further behavioral intervention at the present time.

**PT Activities Training.** The record supports adequate training of classroom staff by a BISD physical therapist, with continued oversight of the classroom staff. The BISD physical therapist worked with classroom staff and the Student. The BISD physical therapist observed classroom staff correctly implementing the Student's motor exercises. Petitioner did not present evidence to show BISD staff did not receive PT training.

### **C. Evaluation Review and IEP Revisions**

**Evaluation Review.** Respondent produced documentation, unrefuted by Petitioner, that the OT, PT, APE, and communication evaluations were completed by October 3, 2008, transmitted to the parents during October 2008, and reviewed by the ARDC at the November and December 2008 ARDC meetings. When the parents requested an OT IEE, the ARDC agreed to provide the IEE at public expense during the ARDC meeting on December 1, 2008. The independent occupational therapist completed the OT IEE by February 25, 2009. The ARDC considered this information at the May 2008 ARDC meeting, as well as the adaptive behavior reevaluation report dated December 19, 2008, and the completed transition evaluation dated April 15, 2009. Petitioner complains that the time from completion of these reports and review by the ARDC was unreasonably long.

When a parent obtains an IEE at public expense or shares an evaluation obtained at private expense with the school district, the evaluation: 1) must be considered by the public agency, if the evaluation meets agency criteria, in any decision made with respect to the provision of FAPE to the child; or, 2) may be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child. 34 C.F.R. §300.502(c). Implementing regulations of IDEA do not impose a timeline for consideration of an IEE or for reevaluation reports. Yet, the regulations pertaining to the IEE process are clear that the information process should not be delayed. *See* 34 C.F.R. §300.502.

The ARDC reviewed the completed reevaluation available as of each ARDC meeting during the 2008-2009 school year. Upon the completion of the IEE OT report, it was not unreasonable for the ARDC to wait for the Student's annual May 2009 ARDC meeting to review the data. Petitioner can point to no request for earlier review of these reports that Respondent refused, no requirement that the ARDC convene within a set time frame for review of the data, and no ARDC action taken after completion of the various reports without looking at the new data. I conclude the record in this dispute shows no unreasonable delay in completion and consideration of the reevaluation reports and IEE by the Student's ARDC.

**IEP Revisions.** The BISD reevaluation reports of OT and PT recommended changes from direct to consultative services for the Student. The record before me established Respondent's consideration of these reports with the input of BISD staff, the Student's parents, and all participants,

before implementing changes to OT and PT services on December 2, 2008, without the agreement of the parents. In fact, the BISD occupational therapist responded to specific parental concerns discussed in the November 2008 ARDC meeting when the ARDC reconvened on December 1, 2008. The totality of the record supports the changes to consultative OT services from previous combination of direct and consultative services – including the recommendation for consultative OT services made by the independent occupational therapist in the OT IEE report. Petitioner did not meet [the] burden to show the Student required direct OT services under Student’s program from December 2, 2008, through May 2009.

#### **D. Additional Services**

**Need for 2009 ESY Services.** To provide ESY services, a school district must make a determination that the services are necessary for the provision of FAPE to a Student. 34 C.F.R. §300.106(a)(2). Respondent gathered information on possible regression by the Student after extended school breaks and made a determination in the May 2009 ARDC meeting that the Student did not show regression that would require ESY services. Although Petitioner disagreed with this determination, the record supports the steps taken by Respondent to decide the Student did not require 2009 ESY services as well as the follow-up by the Co-op director on the unavailability of \*\*\* input into ESY services. Petitioner complains that no additional ARDC meeting convened following the May 2009 ARDC meeting to take up this issue, yet Petitioner can point to no parental request to reconvene the May 2009 ARDC meeting. Instead, the credible testimony and documentary evidence in the record established the parents did not want to reconvene the meeting, the Co-op director reported follow-up information to the parents, and the Student did not show regression at the beginning of the 2009-2010 school year.

#### **2008-2009 LRE**

Section 300.116 of IDEA’s implementing regulations requires “[u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school he or she would attend if nondisabled.” 34 C.F.R. §300.116(c). While it is undisputed that the Student’s 2008-2009 BISD placement was the same placement Student would have if nondisabled, Petitioner alleges this placement was inappropriate. Instead, Petitioner argues that this Student needed the more restrictive placement in the proposed \*\*\* ISD 2008-2009 program.

The Student, had Student remained in the proposed \*\*\* ISD placement for 2008-2009, would have been in a \*\*\* school life skills class as the only \*\*\* Student, requiring transportation away from Student’s home district. Instead, Student’s BISD placement provided the same range of services proposed by the \*\*\* ISD at the home campus. The Office of Special Education Programs (“OSEP”) advises that whenever possible, a \*\*\* child should be educated in the regular classroom *if the Student can receive a FAPE in that setting*. [emphasis added] OSEP Memorandum \*\*\* (OSEP 1994). While I conclude that the BISD placement was the LRE for the Student in which Student *could* receive an appropriate program, the appropriateness of that program must yet be evaluated to determine whether, in fact, the Student received a FAPE.

The United States Supreme Court developed a two-part test for the determination of whether a school district delivered a FAPE: 1) whether the school district complied with IDEA’s procedural requirements; and 2) whether the Student’s IEP was reasonably calculated to confer an educational benefit. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Rowley, supra.*; *Houston Ind. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 350 (5<sup>th</sup> Cir. 2000).

#### **Procedural Sufficiency**

The procedural requirements of IDEA apply to the formulation and implementation of a Student’s IEP. The presence of procedural flaws in an IEP does not automatically require a finding that

the program denied a FAPE to the Student. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE *only if* the procedural inadequacies: 1) impeded the child's right to a FAPE; 2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or, 3) caused a deprivation of educational benefits. [emphasis added] *Adam J. v. Keller ISD*, 328 F.3d 804 (5<sup>th</sup> Cir. 2003); 34 C.F.R. §300.513(a)(2).

The evidence of procedural deficiencies in this proceeding reveals an OT IEP adopted by the August 2008 ARDC that specified both direct and consultative services of the BISD occupational therapist on the face of the IEP documents. The single OT goal and objective were worded for implementation by the classroom teacher and aide/\*\*\*, yet were addressed to be measured by the progress of those same individuals in implementing the OT program with the Student. The evidence established, however, that the BISD occupational therapist performed the direct services specified in the OT IEP as well as completed the OT reevaluation of the Student during the initial weeks of the 2008-2009 school year as the actual implementer of the Student's OT goal. Petitioner did not sustain [the] burden to prove inadequate or incomplete delivery of OT services despite the procedural inadequacies of the OT IEP.

### **Substantive Sufficiency**

A hearing officer's determination of FAPE must be based on substantive grounds. 34 C.F.R. §500.513(a)(1). The Fifth Circuit Court of Appeals identified four factors to consider:

- The program is individualized on the basis of the Student's assessment and performance;
- The program is administered in the least restrictive environment;
- The services are delivered in a collaborative and coordinated manner by key stakeholders; and,
- Positive academic and non-academic benefits are demonstrated.

*Cypress Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-248 (5<sup>th</sup> Cir. 1997); *cert. denied*, 522 U.S. 1047 (1998). Application of the four factors to the evidence in this dispute supports the conclusion that the school district delivered an appropriate educational program that was individualized to the Student.

First, Respondent created an individualized program based on the Student's assessment and performance in Student's \*\*\* ISD placement and with new data gathered by Respondent. This IEP focused on the Student's specific communication needs with added speech goals and therapy services. The ARDC revised the Student's OT and PT services based on the completed BISD reevaluations in these areas. When the parents disagreed with these service changes, Respondent granted the parental request for IEE in PT and OT at public expense and reviewed the completed OT IEE report in an ARDC meeting.

Second, the Student's program took place at Student's \*\*\* school campus within Student's home district in a life skills classroom. This was the least restrictive setting for the Student, and the evidence did not show that Student required a more restrictive setting to receive Student's necessary services including \*\*\* supported by an \*\*\* teacher, classroom teacher, and an aide/\*\*\* .

Third, Respondent delivered the Student's program in a collaborative and coordinated manner with full participation of Student's parents and the input of key stakeholders. The evidence in this case established that BISD educators incorporated the suggestions of outside providers such as the independent occupational therapist, recommendations from \*\*\* consultants with special expertise in

Student's complex needs, as well as the input of educational service center staff to make ongoing refinements to Student's program. As previously discussed, Student's parents were full participants in the ARDC process.

Fourth, the inquiry of the Student's progress under the BISD program requires careful consideration, as the Student's multiple and complex combination of disabilities as a Student with \*\*\* result in extremely slow progress on Student's IEP goals – even with appropriate supports and services in Student's educational program. The Student faces many medical and developmental challenges ahead. At age \*\*\*, Student's intellectual level remains at the \*\*\*, based on Student's most recent BISD assessment data.

The evidence of academic progress is mixed in this proceeding. Although the Student did not pass the TAKS-Alt in Reading, Student improved Student's vocabulary level under 2008-2009 BISD program, bringing the Student to the \*\*\* level for all academic areas by the end of Student's 2008-2009 program. The Student made significant progress in the area of communication under the BISD program. Currently in the 2009-2010 school year, the Student is beginning to initiate \*\*\* and recently argued in \*\*\* with Student's speech pathologist. While the behavior of arguing with classroom providers would not routinely indicate progress in an educational setting, the Student's intellectual and functional capacities must be used when measuring Student's unique ability to demonstrate progress. *Rowley, supra.*

The record before me established the Student's receipt of non-academic benefits under Student's program of positive interaction with nondisabled peers in Student's \*\*\* school P.E. class and in school hallways. The Student had access to and participated in extra-curricular activities of field trips and \*\*\*. The Student did not show regression within Student's 2008-2009 educational program that Student did not recoup within a reasonable time and did not require ESY services prior to the 2009-2010 year.

On the totality of the evidence before me, I find Respondent's program was reasonably calculated to provide the Student with the requisite educational benefits and was appropriate. I conclude the Student made progress, albeit slow, under Student's BISD educational program. For this multiply disabled Student, Student's progress is commensurate with Student's unique intellectual and functional capabilities and is neither trivial or *de minimis*. Because Respondent's program provided a FAPE to this Student within Student's home campus placement, I conclude that the BISD \*\*\* school placement is the LRE setting for this Student at the current time.

## Conclusions of Law

1. The Student is eligible for special education and related services as a Student with a disability under IDEA, 20 U.S.C.A. §1400, *et. seq.* and its implementing regulations.
2. The educational program proposed by the school district is presumed to be appropriate. *Tatro v. State of Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984). Petitioner bears the burden of proving that the educational program is not appropriate or that the school district has not complied with the procedural requirements under IDEA. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Petitioner has not met Student's burden to prove the inappropriateness of Respondent's 2008-2009 program. Petitioner met Student's burden to prove Respondent did not comply with IDEA procedural requirements regarding the August 2008 program for OT services.
3. Respondent's educational program developed and implemented during the Student's 2008-2009 school year was reasonably calculated to confer educational benefit and provided FAPE to the Student with an individualized program of instructional services and appropriate related services and supports. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); 34 C.F.R. §§300.34(a)-(c).
4. The procedural inadequacy of Respondent's August 2008 program for OT services did not impede the Student's right to a FAPE, did not significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the Student, and did not deprive the Student of educational benefit. Respondent delivered all related services of OT specified by the August 2008 IEP. *Adam J. v. Keller ISD*, 328 F.3d 804 (5<sup>th</sup> Cir. 2003); 34 C.F.R. §§300.34(c)(6) and 300.513(a)(2).
5. Because the Student received a FAPE, Petitioner is not entitled on an award of compensatory services. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985).
6. Respondent's placement of the Student at Student's home \*\*\* school campus is the least restrictive placement for the Student appropriate for Student's needs. Petitioner did not meet Student's burden to show the Student required a more restrictive placement to meet Student's unique needs. 34 C.F.R. §300.116(c).

## ORDERS

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

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

**IT IS FURTHER ORDERED** that any and all additional or different relief not specifically ordered herein is **DENIED**.

Signed this 30<sup>th</sup> day of November 2009.

*/s/ Mary Carolyn Carmichael*  
Mary Carolyn Carmichael  
Special Education Hearing Officer

## NOTICE TO THE PARTIES

This decision is final and immediately enforceable, except that any party aggrieved by the findings and decision may bring a civil action in any state court of competent jurisdiction or in a district court of the United States as provided in 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516; and 19 Tex. Admin. Code §89.1185(o).

DOCKET NO. 280-SE-0709

Student, Petitioner	§	BEFORE A SPECIAL EDUCATION
	§	
	§	
	§	
v.	§	HEARING OFFICER
	§	
BRADY INDEPENDENT SCHOOL DISTRICT, Respondent	§	FOR THE STATE OF TEXAS

## SYNOPSIS OF DECISION

**ISSUE 1:** *Whether the Admission, Review, and Dismissal Committee (“ARDC”) provided required procedural safeguard protections and prior written notice to the parents of: a) a change of placement in August 2008; and, b) a reduction in related services of physical therapy (“PT”) and occupational therapy (“OT”) in December 2008?*

**CITATION:** 34 C.F.R. §§300.321(a)(1), 300.322(a)-(b), and 300.503(a).

**HELD:** For the District.

**ISSUE 2:** *Whether the ARDC worked collaboratively with the Student’s parents to: a) determine the Student’s individual needs; and, b) to develop an educational program to address those needs?*

**CITATION:** 34 C.F.R. §300.324(a)(1), (a)(2)(iv), and (b)(1)(i)-(ii).

**HELD:** For the District.

**ISSUE 3:** *Whether the ARDC properly considered input from current staff working with the Student and from the Student’s parents prior to changing the Student’s placement on August 22, 2008?*

**CITATION:** 34 C.F.R. §§300.116 and 300.321(a).

**HELD:** For the District.

**ISSUE 4:** *Whether the ARDC revised the Student’s Individualized Education Program (“IEP”) goals and objectives, instructional services, and related services of PT and OT, without new evaluations or data to support the changes?*

**CITATION:** 34 C.F.R. §§300.34(c)(5) and (9), 300.305(a), 300.324(b)(1), and 300.502.

**HELD:** For the District.

**ISSUE 5:** *Whether Respondent developed and implemented an appropriate 2008-2009 IEP for the Student with adequate instruction, classroom supervision, classroom materials, extracurricular activities, and instructional supports to address the Student's needs?*

**CITATION:** 34 C.F.R. §§300.34, 300.42, 300.107, 300.117, 300.320(a)(4), and 300.324.

**HELD:** For the District.

**ISSUE 6:** *Whether Respondent implemented all services, including related services, specified in the Student's May 2008 IEP while gathering new evaluation data on the Student?*

**CITATION:** 34 C.F.R. §§300.34, 300.303(a), 300.304, 300.320(a)(4), and 300.323(a).

**HELD:** For the District.

**ISSUE 7:** *Whether Respondent provided appropriate OT supports and materials as specified by the Student's IEP?*

**CITATION:** 34 C.F.R. §§300.34, 300.42, and 300.320(a)(4).

**HELD:** For the District.

**ISSUE 8:** *Whether Respondent provided access to appropriate assistive technology specified under the Student's IEP, including computer access?*

**CITATION:** 34 C.F.R. §§300.5 and 300.324(a)(2)(v).

**HELD:** For the District.

**ISSUE 9:** *Whether Respondent's support services of training, specific to the Student, for the Student's classroom providers were: a) sufficient to enable the Student to progress rather than regress; and, b) included training in OT, PT, \*\*\*, and behavioral management?*

**CITATION:** 34 C.F.R. §§300.320(a) and 300.324(a)-(b);  
TEX. EDUC. CODE §§\*\*\* and \*\*\*

**HELD:** For the District.

**ISSUE 10:** *Whether the ARDC considered evaluations and independent educational evaluations of the Student in a timely manner?*

**CITATION:** 34 C.F.R. §§300.324(a)-(b), 300.303, 300.305(a), and 300.502.

**HELD:** For the District.

**ISSUE 11:** *Whether Respondent's IEP provided the least restrictive environment appropriate for the Student's needs?*

**CITATION:** 34 C.F.R. §300.116(c).

**HELD:** For the District.

**ISSUE 12:** *Whether the ARDC convened a meeting to discuss Extended School Year services after the May 2009 ARDC meeting?*

**CITATION:** 34 C.F.R. §300.106(a)(2).

**HELD:** For the District.

**ISSUE 13:** *Whether Respondent violated the confidentiality of the Student's personally identifiable data by: a) photographing the Student without parental consent; and b) maintaining the photograph(s) in the Student's educational records?*

**CITATION:** 34 C.F.R. §§99.2, 99.3, 300.123, and 300.610-300.612.

**HELD:** For the District.

**ISSUE 14:** *Whether Respondent routinely checked the Student's \*\*\* to ensure proper functioning?*

**CITATION:** 34 C.F.R. §§300.34(b)(2)(iii) and 300.113(b)(1).

**HELD:** For the District.