

STUDENT BNF PARENT	§	BEFORE A SPECIAL
Petitioner	§	EDUCATION
	§	
v.	§	
	§	HEARING OFFICER FOR THE
GEORGETOWN	§	
INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	STATE OF TEXAS

DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Petitioner, STUDENT, by his next friend, PARENT (hereinafter referred to as Petitioner or STUDENT) brings this action against Respondent Georgetown Independent School District (hereinafter Respondent or GTSD) under the Individuals With Disabilities Education Act (hereinafter IDEA), 20 U.S.C. § 1400 *et. seq.*

Petitioner alleges that Respondent denied him a free appropriate public education during the 2002-2003, 2003-2004, and 2004-2005 school years based on the following particulars:

1. Respondent failed to maintain a safe environment commensurate with the individualized needs of STUDENT;
2. Respondent failed to provide educational services commensurate with the individualized needs of STUDENT;
3. Respondent failed to provide educational services in the least restrictive environment and least intrusive manner for STUDENT; and
4. Respondent failed to cure the environmental issues that interfered with the educational needs of STUDENT.

In addition to the above, Petitioner claims that the one year statute of limitations set forth in 19 T.A.C. § 89.1151 does not apply to this action based on a continuous violation of STUDENT's rights, fraud and fraudulent concealment of material information by Respondent, and controlling federal law governing cases arising under the IDEA.

For relief, Petitioner seeks reimbursement for tuition and transportation costs associated with his attendance at *** ISD during the 2004-2005 school year and compensatory educational services needed to prepare STUDENT for college as a result of his educational losses.

Petitioner's legal counsel, Martin Cirkiel of Round Rock, Texas represented Petitioner throughout most of this proceeding. Respondent's legal counsel, Evelyn Howard-Hand of Austin, Texas represented Respondent throughout the entire proceeding.

PROCEDURAL HISTORY

Petitioner filed his initial request for hearing on June 16, 2004. Following four continuances granted for good cause to allow time for pre-hearing dispositive motions, extensive discovery, and two attempts at alternative dispute resolution, the matter ultimately came on for hearing on May 2-5, 2005. The parties were granted the option to file post-hearing briefs on or before August 1, 2005 and this decision of the Hearing Officer is due on or before September 23, 2005.

FINDINGS OF FACT

1. At the time this dispute arose, STUDENT attended school within the jurisdictional boundaries of the GTISD. There is no dispute as to Respondent's duty to provide STUDENT with educational services under the IDEA as his resident district.
2. STUDENT entered *** School (hereinafter ***) as a *** in fall 2002, at the start of the 2002-2003 school year. Shortly thereafter, on September 28, 2002, STUDENT was hospitalized and diagnosed with aplastic anemia, a bone marrow failure. STUDENT was placed on a transplant list for bone marrow failure and began a course of immunosuppressive therapy to stimulate bone marrow production. The cause of STUDENT's aplastic anemia is unknown.
3. STUDENT's admitting physician, Dr. ***, completed a Homebound Needs Assessment on October 4, 2002, confining STUDENT to the home for all activities. Dr. ***, his primary treating physician for the aplastic anemia, completed an eligibility form for special education on October 15, 2002, identifying STUDENT's medical disability due to severe aplastic anemia. Dr. *** confirmed STUDENT's need for homebound services due to the *** risk of infectious complications given STUDENT's immune suppressed condition.
4. On October 17, 2002, an Admission, Review, and Dismissal Committee (hereinafter ARDC) timely admitted STUDENT to special education as a student with an "Other Health Impairment," (OHI) and developed an Individual Education Plan (IEP) for him. Given that STUDENT had no cognitive or social issues to address, the ARDC developed an IEP that involved homebound instruction in the general education curriculum for at least 4 hours per week, with minor modifications to address his potential weakness or lack of stamina. The ARDC properly relied on STUDENT's physicians' recommendations in developing STUDENT's IEP and determining that homebound placement was the least restrictive environment appropriate for STUDENT.
5. STUDENT's homebound instruction began on October 28, 2002, shortly after he was released from the hospital.
6. In December 2002, PARENT (STUDENT's mother and next friend) met with school personnel to discuss STUDENT's health and academic status. STUDENT, though improving, was still not regenerating bone marrow and his health continued to require

that he be served with homebound instruction. Academically, STUDENT was considerably behind in his classes, but PARENT did not want to modify the general education curriculum because STUDENT planned to attend college and did not want special education credits on his transcript.

7. STUDENT's ARDC reconvened in April 2003 to plan for the 2003-2004 school year. PARENT reported that STUDENT's doctor had cleared him to return to school in August 2003, though she couldn't be sure at that time that he would no longer need homebound services. The ARDC agreed to meet one week prior to the beginning of school to discuss dismissal from special education depending on STUDENT's health status.
8. Throughout the 2002-2003 school year, STUDENT's health required that he be served on homebound instruction. STUDENT's physician did not release him to be in a school setting at any point during the school year because of his suppressed immune state and the high risk of infection from being around large groups of students. PARENT agrees that STUDENT was too weak to attend school during the 2002-2003 school year and that he clearly needed to be at home.
9. In approximately May 2003, PARENT learned about a *** teacher's complaints concerning mold in her classroom in August 2002 and of resulting mold testing that had been completed during the course of the 2002-2003 school year by GTISD. PARENT was particularly concerned about the air quality at *** because of STUDENT's condition, so she met with the GTISD superintendent to express these concerns and discuss the status of the air quality at ***. The superintendent informed PARENT that the few areas of concern had been resolved and he provided her with copies of the three studies that had been performed to date by the Texas Association of School Boards (TASB).
10. TASB conducted three Indoor Air Quality (IAQ) studies at *** on 8/22/02, 9/12/02, and 2/1/03 in response to the August 2002 reports of visible mold growth in three classrooms and concerns about possible airborne pollutants that could cause respiratory symptoms. In August 2002, TASB found elevated levels of airborne mold in 2 of the 3 classrooms and made recommendations for cleaning and remediation. TASB followed up with air sampling and visual inspections in September 2002 and February 2003, concluding by 2/03 that the air quality samples were excellent. TASB also measured other air quality indicators such as levels of CO₂, CO, temperature and relative humidity and concluded that all levels were within established state and federal guidelines.
11. After reviewing the TASB reports, PARENT remained concerned about the possible presence of mold at ***, so she collected surface samples of suspected mold from classrooms in June 2003 and sent them to Mycotech Biological Laboratories for review. The Mycotech report indicated the presence of certain fungi and mycotoxins on the samples, however the report did not provide results of the amount found, precluding a conclusion as to whether the molds were present at background levels expected in "normal" rooms with no moisture or mold issues or at some greater level. The report made no findings on levels of airborne mold.
12. Mycotoxins present on surface samples are known to be harmful to humans only through ingestion. Air sampling science is not currently able to measure the presence of airborne

mycotoxins; as such, airborne mycotoxin concentrations and their specific relationship to human health has not been established to date.

13. In order for mold to cause a health hazard from an inhalation standpoint, it must be released into the environment with the result that indoor concentration levels exceed the appropriate standard. If visible mold damage is not apparent and air sampling results indicate levels of mold that are lower indoors than the comparative outdoor sampling, then the environment is generally considered clean and surface samples are not indicated.
14. PARENT presented the findings from Mycotech Labs to GTISD personnel in June 2003 and requested further action. In response, GTISD retained Raba-Kistner, environmental consultants recommended by PARENT, to conduct an additional IAQ survey of ***.
15. By report dated August 12, 2003, Raba-Kistner reported a finding of water and/or suspected mold growth damage on ceiling tiles in various locations, along with reports of dirty supply and return registers in the HVAC system, musty odors in certain rooms, and a light to moderate accumulation of grey dust and debris on ceiling tiles and return air registers. Raba-Kistner's air sampling showed no indoor air mold amplification, though relative humidity readings were too *** in isolated areas. Surface sampling showed evidence of some mold growth on various ceiling tiles. Raba-Kistner made numerous recommendations to address the findings, most of which were implemented by GTISD.
16. On September 25, 2003, Raba-Kistner performed a follow-up inspection and repeated air sampling at ***. By report dated 11/5/03, Raba-Kistner concluded that no indoor air mold amplification existed in the 35 sampled areas. Raba-Kistner reported that the mold levels had decreased from the 7/03 sampling and that the water/mold impacted ceiling tiles previously identified had been replaced.
17. PARENT became concerned, based on the Mycotech results and her belief that mold continued to be present at ***, that STUDENT should not return to *** during the 2003-2004 school year. She communicated her beliefs and concerns to STUDENT's doctor, Dr. ***, who completed a Homebound Needs Assessment for STUDENT on 8/13/03, placing him on homebound services for the entire school year due to severe immune deficiency. In her assessment, Dr. *** noted that the risk of mold exposure in the school could lead to a life threatening condition. She recommended that STUDENT not receive **any** instructional services on campus due to the risk of mold exposure. Dr. *** based this recommendation on information provided to her by PARENT about the IAQ at ***.
18. The ARDC convened on 8/15/03, with the *** nurse present, to consider STUDENT's medical needs and placement for the 2003-2004 school year. PARENT expressed concern about the mold and humidity levels at *** and her belief that the environment would be hazardous to STUDENT's health. The ARDC reviewed the Raba-Kistner report indicating no indoor air mold elevation and ARDC members, other than PARENT, felt that *** would be a safe environment for STUDENT and recommended his return to school. However, because of PARENT's serious concerns, the ARDC agreed to begin STUDENT on homebound services to allow time to obtain more information from Dr. *** about STUDENT's health needs.
19. In response to STUDENT's educational needs, the ARDC agreed to provide STUDENT with 6 hours per week of homebound instruction, 4 to be provided by the homebound

teacher, 1 and ½ by a Spanish tutor to be hired by GTISD, and 30 minutes per week of additional Algebra II tutoring.

20. Prior to the start of the 2003-2004 school year, STUDENT received an invitation to join the National Honor Society at ***, but STUDENT declined to act on the invitation.
21. During 8/03, STUDENT actually received an average of 11.75 hours per week homebound instruction from the homebound teacher. During 9/03, STUDENT actually received an average of 11 hours per week homebound instruction from the homebound teacher and 2.7 hours per week from the Spanish teacher.
22. Following the ARDC meeting, the GTISD special education coordinator contacted Dr. *** with a specific list of agreed questions to try to determine the conditions under which STUDENT could safely return to school. In addition, the *** principal spoke with Dr. *** about the same matters. The results of this conversation, along with Dr. ***'s written responses to the questions were reviewed at the reconvened ARDC meeting on 8/27/03.
23. Dr. *** clarified that her goal for STUDENT was to minimize environmental mold exposure as it was not known what levels of exposure might present problems for him. Based on this goal, Dr. *** concluded that STUDENT could return to *** one week after all visible mold damage had been repaired. Dr. *** further instructed that ongoing construction and mold repair efforts should be limited to school holidays to minimize airborne molds. In addition to ***'s recommendations, the school proposed to clean the AC system and vents in all of STUDENT's classrooms prior to his return.
24. As a result of the information presented, the ARDC reached consensus to return STUDENT to school as soon as the necessary steps were completed. Prior to STUDENT's return to school, personnel from GTISD, including *** building principal, GTISD superintendent, *** nurse, and special education supervisors, met to formulate a plan for his return and to coordinate necessary actions to clean his classrooms. All of STUDENT's classrooms were cleaned, as agreed to by the ARDC, prior to his return except for Field House 2, which was cleaned on 10/13/03. Ceiling tiles with possible water/mold growth were replaced as recommended by Raba-Kistner during this time period.
25. Prior to meeting on 9/25/03 for STUDENT's annual ARD and transition back to ***, the special education coordinator asked Dr. *** for a medical update on STUDENT's condition. Dr. *** completed a Homebound Needs Assessment on 9/24/03 releasing STUDENT from homebound instruction as of 10/03.
26. The ARDC planned for STUDENT's transition back to *** on 9/29/03 and agreed to continue to provide Spanish tutoring for his first 3 weeks back at school.
27. STUDENT attended school from 9/29/03 until the end of November 2003 at which point STUDENT returned to his previous homebound status. During STUDENT's tenure at school, he experienced increased respiratory symptoms and ultimately became sick with walking pneumonia.

28. At Respondent's request, Dr. *** completed a Homebound Needs Assessment on 12/1/03, which was considered by the ARDC on 12/2/03 and relied on to return STUDENT to homebound services for the remainder of the 2003-2004 school year. Dr. ***'s assessment indicated that STUDENT continued to have a suppressed immune system as a result of the treatment for his aplastic anemia and that ongoing exposure to mold remained a concern. Dr. ***'s assessment indicated that STUDENT could not receive **any** instructional services at *** or attend school for a shortened day.
29. During STUDENT's attendance at *** in the fall of 2003, his platelet count did not drop, but rather remained relatively constant at fairly low levels that were similar to those he had experienced during summer 2003. His low platelet count explained his tendency to get sick more easily when he returned to the school environment. STUDENT's platelet recovery did not reach levels that were *** enough to protect him from illness similarly to the rest of the population until approximately August 2004.
30. Dr. ***'s main concern when she placed STUDENT back onto homebound services in December 2003 was STUDENT's risk of illness from other students and the fact that he had become sick with waParenting pneumonia. Dr. *** had no knowledge of the IAQ at *** and its effects on STUDENT other than what PARENT told her.
31. In December 2003, the ARDC determined that STUDENT would receive 5 hours per week of homebound instruction and 45 minutes per day of Spanish tutoring. The ARDC also arranged for a peer tutor to work with STUDENT on conversational Spanish, but STUDENT did not pursue that option.
32. During January, February, and March 2004, STUDENT received fewer hours per week on average from the homebound teacher than provided for by his IEP. As a result, in March 2003, PARENT complained of STUDENT's slow progress in his course work, especially Spanish, and expressed his need for additional instructional time. In addition, PARENT objected to the inadequacy of STUDENT's homebound instruction, the lack of time from the homebound teacher, and his declining grades. PARENT requested that services be increased to 2 hours per day for the remainder of the school year.
33. Progress reports on STUDENT's performance as of 4/19/04 show the following grade averages: Spanish II- *** (incomplete work); Chemistry- ***; U.S. History- ***; English III- ***; and Algebra II- strong *** throughout the course.
34. At an ARDC meeting on 4/29/05, the ARDC discussed PARENT's request for additional time and agreed to increase his homebound services to 10 hours per week, plus an additional 5 hours per week for Spanish. STUDENT received the services agreed to by the ARDC for the remainder of the school year.
35. STUDENT completed the year with credits in all classes and a "B" average overall.
36. During the 2003-2004 school year, STUDENT participated in football as his health allowed. He was notified of school related events and activities by announcements and flyers brought to him by the homebound teacher.
37. Respondent's attempts to provide STUDENT with the use of a web camera to offer him greater access to the classroom environment were not successful due to lack of diligence

on Respondent's part and technological difficulties. STUDENT would have benefited from the use of the web camera, but was able to make educational progress without it.

38. During spring 2004, 4 additional IAQ studies were completed at *** in an ongoing effort by Respondent to assess the IAQ and take necessary actions to improve it.
39. In 12/03, the Texas Department of Health (TDH) surveyed the IAQ in response to a complaint filed by PARENT and documented concerns with CO2 levels, moisture intrusion, water damaged tiles, and other issues related to ventilation and the air conditioning system. As a result, TDH recommended, among other steps, that GTISD engage a consultant to inspect for signs or evidence of mold growth in certain areas.
40. In response to the TDH survey, Respondent engaged Aspen Air to clean the air conditioning system over the winter holiday and Raba-Kistner to do a more detailed mold investigation as per the TDH recommendations.
41. On 1/22/04, Raba-Kistner reported the results of its 1/7/04 air quality and surface sample surveys: Raba-Kistner did not identify mold amplification within the air or surfaces sampled. In addition, Raba-Kistner did not identify the potential for mold growth within the areas surveyed. Raba-Kistner recommended various cleaning and repair measures to improve air quality and comfort such as introducing increased amounts of outside fresh air into the classrooms where CO2 measures exceeded desired ranges.
42. On 2/19/04, TDH completed a follow-up visit to *** and noted that many items had been corrected, including duct and air conditioning cleaning, installation of motorized dampers to address fresh air and CO2 issues, removal of water damaged tiles, and repair of noted areas of concern from the previous visit. TDH noted that GTISD needed to continue working on issues related to ventilation and CO2 levels, temperature, and relative humidity, issues that TDH described as typical of many public school buildings in Texas. TDH concluded that the existing issues pertaining to ventilation, CO2, and relative humidity were not hazardous to occupants and were not the cause of any particular person's health problems.
43. On 2/26/04, Raba-Kistner completed its follow-up IAQ survey. Raba-Kistner found that CO2 levels were still too *** within areas of ***, but that no need existed for additional mold assessment or remediation based on the absence of visible suspect mold growth and on lab results for indoor air sampling.
44. GTISD continued to work on adjusting the CO2 levels and improving the operation of the HVAC system throughout spring 2004 with the installation of CO2 sensors, motorized dampers, and instructions to personnel about the proper operation of the system.
45. At the ARDC meeting on 4/29/04, PARENT asked the ARDC to place STUDENT at Round Rock ISD (RRISD) for the 2004-2005 school year based on her belief that he could not be safely educated at *** because of the IAQ issues. PARENT had no specific information concerning the IAQ at RRISD *** School. The ARDC declined to agree to the request at that time.
46. On 5/24/04, the ARDC met again to discuss STUDENT's placement for the 2004-2005 school year. PARENT reiterated her request for placement at RRISD; GTISD asked for

updated medical information concerning STUDENT and for information about the IAQ at RRISD.

47. By letter dated 5/26/04, Dr. *** provided information that although STUDENT was continuing to take immune suppressive medications and to experience low blood counts; he was now well enough to return to a campus setting. Dr. *** further explained that STUDENT's family continued to be concerned about mold exposure and that she supported their request for an alternate placement since considerable mold remediation was still needed at ***.
48. Dr. ***'s sole knowledge of the IAQ at *** stemmed from PARENT and the information she provided. Dr. *** testified that she had no reason to believe that STUDENT could not attend *** during the 2004-2005 school year or that the IAQ was better at *** than at ***. Dr. ***'s recommendations were based on her desire to support STUDENT and his family, rather than a medical opinion that the environment at *** was unsafe for STUDENT.
49. The ARDC recessed and reconvened on 5/27/04 at which point PARENT requested placement at Hutto ISD rather than RRISD. GTISD proposed that STUDENT return to *** based on the reports indicating that no IAQ issues existed at *** that would adversely affect STUDENT's health. In addition, Respondent offered to provide STUDENT with 12 hours of tutoring in Spanish and requested consent to do further medical evaluation of STUDENT to assess his continued eligibility for special education services.
50. GTISD subsequently dismissed STUDENT from special education services on 6/16/04 on the grounds that he no longer needed homebound services as per Dr. ***.
51. Petitioner filed the instant action on 6/16/04.
52. During summer 2004, a new superintendent began at GTISD, ***. Mr. *** met with PARENT about her concerns and decided to retain another company to assess the IAQ at *** to be certain about the environment's safety. Respondent retained Assured Air Quality to perform the IAQ study and on 8/30/04, Assured Air reported no mold spores or fungal organisms that would cause adverse health reactions to the occupants of the building.
53. Again, on 9/16/04, TASB surveyed the IAQ of *** and found that the CO₂ levels, CO levels, temperature, and relative humidity were all good measurements. In addition, mold spore counts were low throughout the interior of the building, measuring only 10% of the exterior sample. TASB characterized the IAQ results as "excellent."
54. During the 2004-2005 school year, STUDENT attended *** School. STUDENT's grades during his first six weeks at *** were: English-***; Pre-Calculus-***, Physics-***; and Spanish-***. Petitioner was accepted to Texas A & M University and to any University of Texas campus outside of Austin on the coordinated acceptance program (can transfer to U.T. Austin with a *** grade point average without reapplying). At the time of the hearing in this case, STUDENT planned to attend Texas A & M in fall 2005.
55. Petitioner provided no evidence of IAQ at *** school.

56. Of the eleven IAQ studies done at *** between 8/02 and 9/04, elevated measures of airborne mold were detected only in the first two studies- in the 8/02 and 9/02 TASB studies. Possible surface mold was observed by Raba-Kistner in 8/03, but subsequent air sampling done in 9/03 indicated no air mold amplification.
57. After 9/03, the IAQ issues documented and discussed in the various studies pertained to CO2 and fresh air levels, the operation and cleanliness of the HVAC system, and relative humidity and temperature levels. These issues, while important for comfort, have no effect on a person's immune system.
58. Scientific evidence does not support the view that exposure to environmental molds prolongs recovery from aplastic anemia. As a patient with an immune suppressed system, STUDENT is at greater risk from contagious infections than mold.

DISCUSSION

Petitioner raises numerous claims and legal theories in support of his contention that Respondent denied him a free appropriate public education from the time he became eligible for special education services at the beginning of his *** grade year through his graduation from *** school. Each of the years at issue will be addressed separately as the legal and factual analysis is distinct for each.

I.

The One Year Statute Of Limitations Governing IDEA Claims In Texas Bars Petitioner's Claims Arising During The 2002-2003 School Year

Petitioner filed the instant action on 6/16/04. Respondent asserts the one-year statute of limitation applicable to IDEA claims in Texas as a bar to Petitioner's claims arising prior to 6/16/03. As such, Respondent contends that all claims related to the 2002-2003 school year are time barred.

Petitioner asserts various legal theories to argue that the statute of limitations should be tolled given the facts of this case. Although Petitioner advances different theories in support of tolling, each theory is predicated on the allegation that Respondent had an ongoing hostile environment occasioned by the IAQ problems at ***, and that Respondent misrepresented to Petitioner the facts concerning the IAQ issues and the school's efforts to repair the problems.¹

The Hearing Officer rejects these theories as a basis for tolling the statute of limitations in this case because the basis for Petitioner's claims **under IDEA** during the 2002-2003 school year can relate **only** to the adequacy of services Petitioner received while on homebound

¹ The only theory advanced by Petitioner that is not based on tolling or a hostile environment is the claim that the one year statute as applied to him violates the equal protection clause of the U.S. Constitution because a student without disabilities who is injured at school is subject to the two year injury limitations period, while a student with disabilities is subject to the one year IDEA limitations period. This argument ***lights the extent to which Petitioner's claims are essentially personal injury claims, rather than IDEA issues. The claims related to Petitioner's education during the 2002-2003 school year are not related to environmental or personal injury issues; rather, those claims relate to the adequacy of the school's educational services to Petitioner during his illness.

instruction, all facts and circumstances known to Petitioner at the time he received that instruction.

The evidence is absolutely clear that Petitioner's health during the 2002-2003 school year did not allow him to attend school at ***; any air quality issues that may have existed had absolutely nothing to do with his homebound status during that school year. The homebound needs assessment completed by Dr. *** on October 4, 2002 made clear that STUDENT could not receive any services at all on the regular campus, even for a shortened day, due to his aplastic anemia. Similarly, the OHI eligibility form completed by Dr. *** on October 15, 2003 stated that STUDENT had a severe medical disability and could not attend school due to *** risk of infectious complications resulting from his immune depressed state. At the point of eligibility in October 2002, the ARDC clearly understood that STUDENT could not be in a school setting and properly relied on his doctors' recommendations to place him on homebound instruction. The quality of air at *** had nothing to do with the decision at all.

In December 2002, school personnel conferred with PARENT about STUDENT's health and academic status. PARENT reported that STUDENT still had not regenerated sufficient bone marrow to be able to attend school. In fact, STUDENT's doctor did not release him to attend school until the end of the 2002-2003 school year when he was tentatively released for attendance the following year.

In short, even if the IAQ at *** had exceeded all standards for cleanliness during the 2002-2003 school year, STUDENT's doctor would still have recommended that he receive homebound instruction during that time because of the severity of his suppressed immune system. The issue of possible risk from environmental exposure to mold did not arise until the 2003-2004 school year after PARENT became concerned about the quality of air at ***. At that point, STUDENT's medical doctor, in reliance on Mother's concern, suggested that exposure to mold might preclude his attendance **though his health would otherwise allow it**. Unlike the 2003-04 school year, in the 2002-03 school year, even if Mother had known of IAQ issues, STUDENT's health did not allow attendance at school.

Any claims that the statute of limitations should be tolled due to the school's actions related to IAQ must be rejected as those issues have no relationship to the claims related to a denial of a free appropriate public education during this time period. As such, all claims arising prior to 6/16/03 are barred by the one-year statute of limitations governing claims under IDEA in Texas.

II.

Petitioner Failed To Prove A Denial Of A Free Appropriate Public Education During The 2003-2004 School Year

Petitioner's claims that Respondent denied him a free appropriate public education during the 2003-04 school year are essentially twofold: 1) Respondent failed to maintain a safe environment that allowed STUDENT, a student with a medical disability, to attend school because of the IAQ at ***; and 2) Respondent failed to provide STUDENT with a free appropriate public education while he was on homebound instruction by providing inadequate services without regard to IDEA's least restrictive environment requirements.

A. Petitioner's Claims Of A Denial Of A Free Appropriate Public Education Based On Environmental Air Quality Issues

Petitioner advances various legal theories (hostile environment, denial of least restrictive environment) that involve the same underlying claim: Petitioner could have attended school at *** instead of being restricted to homebound instruction if Respondent had adequately addressed the IAQ issues at ***. In short, Petitioner argues that being at *** made STUDENT sick, giving rise to a duty on Respondent's part to either repair the environment or educate STUDENT elsewhere.²

For the reasons set forth below, the Hearing Officer finds that Petitioner did not prove a nexus between the air quality at *** and his health that impeded his educational rights under IDEA.

1. Are Petitioner's Environmental Claims IDEA Issues?

Although Petitioner's claim concerning environmental air quality and its effect on an immune compromised student appears to fall outside the scope of a traditional IDEA claim, courts and special education hearing officers have found that safety and environmental issues that affect an IDEA eligible student's placement or educational services do fall within the broad rubric of IDEA claims. *See, Lillbask v. State of Connecticut Department of Education*, 397 F.3d 77 (2nd Cir. 2005) (reversal of a special education hearing officer's determination that he lacked jurisdiction to consider safety complaints); *Conejo Valley Unified School District*, 38 IDELR 210 (CA SEA 2003) (evaluating the denial of a free appropriate public education resulting from school's isolation of a student who experienced health problems as a result of environmental issues at school); *Board of Education of the Onteora Central School District*, 27 IDELR 400 (SEA NY 1997) (consideration of the least restrictive environment under IDEA for a student with medical issues that allegedly resulted from exposure to the school environment).

Clearly, in this case, if the evidence were to establish that STUDENT could not attend school at *** because of the IAQ, it would have significant ramifications for his placement and educational services, both explicitly defined areas of consideration for claims brought under the IDEA.

2. Does The Evidence Establish That STUDENT Could Not Attend * Due To Poor IAQ?**

Petitioner failed to prove that his homebound status during the 2003-2004 school year was necessitated at any point by poor IAQ at ***. Instead the evidence shows that STUDENT began the school year on homebound status due to PARENT's concerns about the environment and returned to homebound status in December 2003 after an attempt to attend school because of his continued low blood counts, which caused in greater illness and infection.

² In his brief, Petitioner argues that the Hearing Officer should disregard proffered evidence on the effects of the school's IAQ on STUDENT's health as irrelevant to Petitioner's IDEA claims. Petitioner essentially argues that whether the environment was actually harmful to STUDENT is irrelevant because the ARDC accepted STUDENT's doctor's assessment that it was and based its educational planning on the doctor's recommendations. The problem with Petitioner's argument is that the ARDC also had information that no mold issues existed at *** and that the IAQ was satisfactory. The ARDC ultimately reached the conclusion that the environment at *** was safe for STUDENT despite his doctor's representations on the matter. In order to evaluate Petitioner's claims that Respondent's failure to maintain a safe environment interfered with STUDENT's education, the Hearing Officer must evaluate whether the evidence proves that the environment did actually pose such a threat.

In August 2003, Dr. *** recommended that STUDENT remain on homebound instruction for the 2003-2004 school year because of his continued severe immune deficiency and the possible risk of mold exposure at school. Dr. *** based this recommendation on PARENT's concerns about the presence of mold at *** and not on her own assessment of the IAQ at *** and its potential effects on STUDENT. In fact, Dr. *** testified that she had no reason to believe that mold at *** was of any greater concern than at any other public *** school of a comparable size. The available data at that time, in fact, established no airborne mold elevation at *** so the ARDC decided to confer further with Dr. *** to determine what could be done to safely return STUDENT to school in her estimation. After obtaining this information from Dr. ***, GTISD complied with her recommendations by replacing water/mold stained ceiling tiles at *** and cleaning the air conditioning ducts and vents in STUDENT's classrooms prior to his return. The evidence further shows that when STUDENT returned to school on 9/29/03, there was no indoor air mold amplification and mold levels overall had decreased from previous sampling.

STUDENT's status as a homebound student between the beginning of school and 9/29/03 was not due to documented IAQ issues at ***; but rather, to PARENT's understandable fears about STUDENT's health and Dr. ***'s efforts to support PARENT in her desire to protect her son from any further harm. The Hearing Officer is aware of PARENT's strong belief that the Mycotech Biological Report and the Raba-Kistner report of August 2003 support her conclusion that the IAQ at *** was unhealthy for STUDENT; however, the Mycotech Report does not allow any conclusion as to the amount of mycotoxins present on the surfaces sampled and all air sampling indicated that no airborne mold elevations were present, despite the possible existence of some mold on surface samples. By 9/25/03, Raba-Kistner documented that all surfaces with possible mold had been replaced and the air was clean.

STUDENT returned to school and attended *** in October and November 2003, and then was forced to return to homebound status due to increased respiratory illnesses. Again, PARENT firmly believed that STUDENT became ill during this time period due to exposure to poor IAQ and environmental mold. She reported her belief to Dr. *** who again referenced a concern about exposure to environmental mold in a homebound needs assessment completed in December 2003 when STUDENT returned to homebound status.

The evidence shows that STUDENT returned to homebound status in December 2003 because his immune system did not allow him to be around large groups of students without getting sick, not because of exposure to mold. Dr. *** testified that the main reason she recommended STUDENT's return to homebound status was that he was sick and she was concerned about infection from other students. Further, Petitioner produced absolutely no evidence of mold elevations in the air at *** during October and November 2003. The only evidence produced about IAQ concerns during this time frame related to ventilation, CO2, and HVAC cleanliness, none of which were raised by Dr. *** or any other medical expert as posing a health risk to STUDENT. STUDENT remained on homebound status for the remainder of the school year due to his continued low blood counts and suppressed immune system.

During the spring semester, GTISD continued to collect information about the quality of the air, with 4 additional IAQ studies completed by two different entities. The results of each study were that no mold amplification existed within the areas sampled. In February 2004, Raba-Kistner concluded that GTISD had no further need for additional mold assessment or

remediation at ***. Nonetheless, STUDENT did not return to school because his health did not allow it.

Assuming *arguendo* that Petitioner had been able to establish the presence of environmental mold at ***, Petitioner did not present evidence to support the conclusion that exposure to such mold would exacerbate or prolong STUDENT's recovery from aplastic anemia. To the contrary, the evidence established that exposure to environmental mold via inhalation does not pose a risk to immune suppressed patients or cause blood counts to drop. Even Dr. *** testified that the risk of infection by exposure to other students was much greater to STUDENT than exposure to any mold that may have existed.

In conclusion, Petitioner simply did not prove that STUDENT could not attend school during the 2003-2004 school year due to Respondent's failure to maintain a safe environment. STUDENT's health, as evidenced by low platelet counts that continued until approximately August 2004, necessitated the homebound placement agreed to by the ARDC during this school year.

B. Petitioner's Claims Of A Denial Of A Free Appropriate Public Education Based On Educational Issues

Petitioner claims that Respondent failed to provide him with an adequate educational program during the 2003-2004 school year that complied with the requirements of a free appropriate public education under IDEA. Specifically, Petitioner argues that Respondent failed to consider the least restrictive environment in which it could instruct him, failed to offer adequate educational instruction, both in amount and type, and failed to provide non-academic and related services to support his needs.

Under IDEA, students with disabilities are entitled to receive a free appropriate public education meaning that the school district must comply with the procedural requirements of IDEA, and must design and implement a program reasonably calculated to enable the child to receive an educational benefit. The benefit must be meaningful, must offer more than a trivial benefit, and must be likely to produce progress and not trivial educational advancement. *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175 (1982); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997).

A presumption exists in favor of Respondent's program, placing the burden on the party attacking the IEP and placement. *Christopher M. v. Corpus Christi ISD*, 933 F.2d 1285 (5th Cir. 1991).

Although courts have not adopted a specific substantive standard to determine when a free appropriate public education has been provided, the Fifth Circuit in *Cypress Fairbanks* identified four factors to consider in analyzing whether a school's program provides meaningful benefit and the necessary educational progress:

1. Is the program individualized and based on the student's assessment and performance;
2. Is the program administered in the least restrictive environment;
3. Are the services provided in a coordinated and collaborative manner by the key stakeholders; and

4. Are there demonstrated positive benefits both academically and non-academically to the student.

Applying these legal standards and indicia of a free appropriate public education to the evidence in this case, the Hearing Officer concludes that STUDENT's educational program and placement in the 2003-2004 school year provided him with a free appropriate public education as defined by IDEA.

1. Was the program individualized and based on assessment and performance?

The evidence establishes that STUDENT's homebound program was tailored to his individual needs as a college bound student with a medical disability. Specifically, STUDENT was able to take all of the courses he needed to prepare for college, advance in the general curriculum with good progress, and participate as his health allowed in football (his primary extracurricular activity). As a student with only a medical disability and no other cognitive or emotional/social needs, STUDENT's IEP properly addressed his needs for an educational program. Further, when STUDENT's educational needs changed during the course of his homebound program to require increased support in Spanish and additional time with the homebound teacher, the ARDC altered the amount of services provided to meet those needs.

Petitioner claims that Respondent failed to individualize his homebound program by not providing services such as P.E., inducement to participate in clubs, drivers' education, counseling, or changes to his IEP when his needs changed throughout the year. Certainly, the addition of these components to STUDENT's educational program may have enriched his experience during his time as a homebound student; however, none of the identified services or programs were needed to enable STUDENT to make progress in the general education curriculum; as such, they were not required to provide a free appropriate public education.

2. Was the program administered in the least restrictive environment?

The least restrictive environment provision of IDEA requires schools to provide students with disabilities a free appropriate public education in the least restrictive environment possible; this means, in the general education classroom to the maximum extent appropriate. Specifically, IDEA states that:

special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily ...

20 U.S.C. § 1412 (5); 34 C.F.R. § 300.550

The determination of the appropriate least restrictive environment is an individualized, fact-specific inquiry that involves the consideration of numerous factors such as the nature and severity of the child's disabilities, the child's needs and abilities, and the school's response to those needs. *Daniel R. R. v. State Board of Education, et. al.*, 847 F.2nd 1036 (5th Cir. 1989). Applying the *Daniel R.R.* test to STUDENT's particular situation, the Hearing Officer concludes that STUDENT's program during the 2003-2004 school year was administered in the least restrictive environment.

The evidence demonstrates that for the periods of time during the 2003-04 school year that STUDENT was on homebound status, the nature and severity of his disability were such that he could not be educated in a public school setting. STUDENT's platelet counts were low throughout the school year, leading to increased incidence of illness, and when he returned to school for a two month period in fall 2003, STUDENT did indeed become sick, with various respiratory symptoms and walking pneumonia. The homebound needs assessments completed by STUDENT's doctor represent that he could not attend school due to his suppressed immune state; the ARDC properly concluded, based on this information, that a homebound placement was the least restrictive environment for STUDENT. No evidence exists to suggest that Respondent could have provided any aid, service, or other accommodation that would have allowed STUDENT to attend school without getting sick. See Discussion, *infra* pp. 13-14.

Further, the evidence shows that Respondent made ongoing efforts to understand and respond to STUDENT's medical needs to allow him to attend school if possible. Respondent contacted Dr. *** in August 2003 to determine what steps were necessary to allow STUDENT to return to school. Respondent continued to retain consultants and experts to study the quality of air at *** and insure that elevated levels of mold were not present for STUDENT and all students. Even after Raba-Kistner informed Respondent in 2/04 that no further mold assessment was needed, 2 additional IAQ studies were done to insure the adequacy of the environment for STUDENT and others. Despite Respondent's efforts³, STUDENT's health unfortunately did not allow him to continue in the school setting during the 2003-2004 school year.

Petitioner complains that Respondent failed to provide services in the least restrictive environment by not providing related services, technology, and other opportunities to participate in the greater school community. Specifically, Petitioner points to Respondent's failure to provide notice to STUDENT of school events and field trips, failure to provide STUDENT with the use of a web camera or video phone, and other such actions that would have increased his inclusion into the general education environment. The evidence demonstrates that Respondent made reasonable efforts to include STUDENT, consistent with his health and his own willingness to participate. STUDENT had the opportunity to participate in football to the extent his health allowed, the opportunity to join the National Honor Society, and regularly received announcements of school activities and events. The use of a web camera or video phone, while desirable and enriching, is not required to provide a free appropriate public education where, as here, the evidence shows significant educational progress by the student without the assistance of those devices. *Janet H. v. Methacton School District*, 38 IDELR 182 (D.C.E.D. PA 2003).

3. Were the services provided in a coordinated and collaborative manner?

Petitioner alleges that Respondent failed to provide services to him in a collaborative manner by not consulting with medical and environmental experts about his needs at ARDC meetings and not providing sufficient notice to STUDENT's parents about IAQ reports.

The evidence demonstrates that the ARDC, which included the school nurse at all relevant times, communicated regularly with STUDENT's doctor as allowed by the family to evaluate STUDENT's medical needs and determine appropriate educational programming in

³ Petitioner points to GTISD's failure to clean the ducts in one of STUDENT's classrooms until 10/13/03 as evidence of their failure to respond to his needs. The Hearing Officer finds that this one example, when compared to the numerous actions taken by Respondent, does not evidence unresponsiveness to STUDENT's medical needs.

light of those needs. Similarly, at ARDC meetings and other staff meetings, school personnel reviewed the results of IAQ studies with experts to understand the air quality issues and the various recommendations for action. School personnel worked together, with PARENT, to understand STUDENT's medical needs and provide an environment that would accommodate him if his health allowed attendance at school. This satisfies the requirements of a free appropriate public education.

4. Were there demonstrated positive benefits to the student?

Evidence of a positive academic benefit is at the heart of a finding that a student's IEP is appropriate, especially in the case of a student like STUDENT whose needs were academic in nature, rather than social/emotional. *Adam J. v. Keller Independent School District*, 328 F. 3d 804 (5th Cir. 2003). The evidence is abundantly clear that STUDENT made meaningful educational progress during the 2003-2004 school year despite the hardships posed by education in a homebound setting. By his own efforts and those of Respondent, STUDENT successfully completed his *** grade year, earned 7 credits toward graduation with a "B" average overall, and transitioned smoothly into his *** year at *** *** school, making excellent grades during his first six weeks there. The evidence further shows that Petitioner's progress was both meaningful and real: in addition to a successful *** year, STUDENT was able to realize his goal of attending college and, at the time of the hearing in this matter, planned to attend Texas A & M in fall 2005.

Petitioner points to numerous ways in which Respondent's program fell short or could have been stronger: the homebound teacher was not qualified to teach the college preparatory classes STUDENT was taking; the number of hours of instruction, particularly during early spring 2004, were not sufficient to allow progress in the curriculum, and STUDENT did not have adequate non-academic opportunities. While each of these matters may have been cause for frustration for STUDENT and PARENT, the question is not whether Petitioner's educational program could have been stronger or could have provided even greater educational benefit; but rather, did the program provide meaningful and not trivial advancement. Clearly, it did. Failure to implement individual provisions of an IEP, such as falling short in a particular week on the number of hours of homebound instruction, does not constitute a denial of a free appropriate public education when the overall services provided actually conferred as substantial a benefit as in this case. *Houston Independent School District v. Bobby R.*, 200 F. 3d 341 (5th Cir. 2000). Further, Petitioner's claims that his teachers were not qualified and his services were inadequate are simply not supported by the evidence, which points clearly to his overall success in his *** grade year.

III.

Petitioner Failed To Establish His Entitlement To Reimbursement For Transfer and Transportation Expenses Incurred During The 2004-2005 School Year

The ARDC of 5/27/04 ended in disagreement between the parties; with Respondent proposing that STUDENT's placement for the 2004-2005 school year be at *** and PARENT

proposing placement elsewhere⁴ based on the belief that STUDENT would be exposed to environmental mold at *** that could adversely affect his health. When Respondent declined to agree to placement outside of GTISD, STUDENT withdrew and voluntarily transferred to Liberty Hill ISD. STUDENT now seeks reimbursement for transfer and transportation costs associated with attending ***.

Respondent is responsible for the costs associated with STUDENT's attendance at *** if the Hearing Officer determines that GTISD failed to provide an appropriate program for STUDENT and *** offered an appropriate one. *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359 (1985); *Northeast Central School District v. Sobol*, 18 IDELR 47 (N.Y. 1992). Petitioner failed to meet his burden to establish his entitlement to reimbursement for the 2004-2005 school year.

First, Petitioner did not prove that Respondent's proposed placement at *** was inappropriate for Petitioner. The sole evidence advanced in support of Petitioner's position was a 5/26/04 letter from Dr. *** recommending against STUDENT returning to *** because considerable mold remediation was still needed. Dr. ***'s statement was again based only on information provided to her by PARENT and was not a medical opinion rendered on the basis of the facts. In 2/04, Raba-Kistner informed GTISD that no further mold assessment or remediation was needed at ***. Even so, Respondent commissioned two additional IAQ studies of ***- in August and September 2004- and both confirmed low mold counts and no hazard to the building's occupants. Quite simply, no evidence was produced at all to suggest any problem with IAQ at *** during the 2004-2005 school year. Dr. *** herself actually testified that she was aware of no reason that STUDENT could not have attended *** during the 2004-2005 school year.⁵

Second, Petitioner offered no evidence at all concerning his program at *** ISD or the IAQ at ***. Petitioner testified that he was healthy during his *** year and able to attend school, but the medical evidence demonstrates that by August 2004, STUDENT's platelet count had risen to levels *** enough to preclude more frequent illness for the first time since his diagnosis with aplastic anemia. Petitioner offered no evidence to support the conclusion that Petitioner remained healthy while attending *** because of a better quality of indoor air.

Petitioner's claim for reimbursement for transfer and transportation costs associated with his attendance at *** ISD is denied.

CONCLUSIONS OF LAW

1. At all times relevant to this proceeding, STUDENT was a student residing in the GTISD who was eligible for special education services under the provisions of IDEA and its implementing regulations as a student with an other health impairment based on his aplastic anemia.

2. Respondent GTISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA and its implementing regulations.

⁴ At the ARDC meeting, PARENT requested placement first at Round Rock ISD and then at Hutto ISD. STUDENT ultimately transferred to Liberty Hill ISD.

⁵ As discussed previously, **even if** Petitioner were able to establish the presence of mold at ***, Petitioner did not prove that exposure to airborne mold was actually hazardous to his health or the cause of his health problems.

GTSD is STUDENT's resident district and has the responsibility to provide him with a free appropriate public education under the IDEA. 20 U.S.C. § 1401 (a)(18).

3. Petitioner's claims arising prior to June 16, 2003 are barred by the one-year statute of limitations governing IDEA claims in Texas. 19 T.A.C. §89.1151(c); *Texas Advocates Supporting Kids With Disabilities v. Texas Education Agency*, 112 S.W. 3d 234 (Tex. App. 2003, no pet.).

4. Petitioner failed to prove that Respondent created or maintained a hostile environment toward Petitioner due to poor IAQ that interfered with Petitioner's right to a free appropriate public education. *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982).

5. Respondent provided Petitioner with a free appropriate public education during the 2003-2004 school year by providing him with an IEP that conferred meaningful benefit in the least restrictive environment. *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982); *Daniel R. R. v. State Board of Education, et. al.*, 847 F.2nd 1036 (5th Cir. 1989).

6. Petitioner is not entitled to reimbursement for transfer and transportation costs associated with his attendance at Liberty Hill ISD during the 2004-2005 school year, as Respondent's proposed placement at *** was appropriate and reasonably calculated to provide STUDENT with a free appropriate public education. *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359 (1985); *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982).

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, this Hearing Officer hereby **ORDERS** that all relief sought by Petitioner is hereby **DENIED**.

Finding that the public welfare requires the immediate effect of this Final Decision and Order, the Hearing Officer makes it effectively immediately.

SIGNED and **ENTERED** this 23rd day of September 2005.

/s/ Lynn E. Rubinett

Lynn E. Rubinett
Special Education Hearing Officer

TEA DOCKET NO. 347-SE-0604

STUDENT BNF PARENT	§	BEFORE A SPECIAL
Petitioner	§	EDUCATION
	§	
v.	§	
	§	HEARING OFFICER FOR THE
GEORGETOWN	§	
INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	STATE OF TEXAS

SYNOPSIS

Issue: Whether Respondent failed to maintain a safe environment commensurate with the individualized needs of STUDENT?

Held: For Respondent. Petitioner failed to prove an unsafe environment for STUDENT that interfered with his right to a free appropriate public education.

Cite: 34 C.F.R. §§ 300.121& 300.300

Issue: Whether Respondent failed to provide educational services commensurate with the individualized needs of STUDENT?

Held: For Respondent. Respondent provided Petitioner with educational services commensurate with his needs and provided him with a free appropriate public education.

Cite: 34 C.F.R. §§ 300.121& 300.300; *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982); *Daniel R. R. v. State Board of Education, et. al.*, 847 F.2nd 1036 (5th Cir. 1989).

Issue: Whether Respondent failed to provide educational services in the least restrictive environment and least intrusive manner for STUDENT?

Held: For Respondent. Petitioner's educational program and homebound placement constituted the least restrictive environment in which Petitioner could be educated.

Cite: 34 C.F.R. §§ 300.550, 300.551, 300.552; *Daniel R. R. v. State Board of Education, et. al.*, 847 F.2nd 1036 (5th Cir. 1989).

Issue: Whether Respondent failed to cure the environmental issues that interfered with the educational needs of STUDENT?

Held: For Respondent. Respondent addressed and cured any environmental issues that interfered with the educational needs of STUDENT. As such, Respondent provided STUDENT with a free appropriate public education.

Cite: 34 C.F.R. §§ 300.121& 300.300; *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982).

Issue: Whether the one year statute of limitations pertaining to IDEA claims in Texas is tolled as a result of continuing violations, fraud and/or fraudulent concealment, and/or controlling federal case law pertaining to the IDEA?

Held: For Respondent. The one-year statute of limitations is applicable and bars all claims arising before 6/16/03.

Cite: 19 T.A.C. §89.1151 (c); *Advocates Supporting Kids With Disabilities v. Texas Education Agency*, 112 S.W. 3d 234 (Tex. App. 2003, no pet.).