

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

**STUDENT,  
bnf Parent and Parent,  
Petitioner,**

§  
§  
§  
§  
§  
§  
§

v.

**DOCKET NO. 028-SE-0914**

**CANYON INDEPENDENT  
SCHOOL DISTRICT,  
Respondent.**

**DECISION OF THE HEARING OFFICER**

Introduction

Petitioner, \*\*\* bnf \*\*\* and \*\*\* (“Petitioner” or “the Student”) brings this action against the Respondent Canyon Independent School District (“Respondent,” or “the school district”) under the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. § 1400 et. seq. (IDEA) and its implementing state and federal regulations.

Party Representatives

Petitioner was represented by Petitioner’s legal counsel Dorene Philpot of the Philpot Law Office. Respondent was represented by its legal counsel Andrea Slater Gulley and her co-counsel Slater Elza with the Underwood Law Firm.

Resolution Session/Mediation

The parties agreed to waive the Resolution Session and attempted mediation via written submissions instead. On November 11, 2014 the parties notified the hearing officer that mediation was not successful.

Student’s Issues

Petitioner seeks resolution of the following issues under the Individuals with Disabilities Education Act (IDEA) in this case:

1. Whether the school district failed to provide Student with a free, appropriate public education (FAPE) within the least restrictive environment (LRE) beginning on or about September 26, 2013 up through the present within the meaning of the Individuals with Disabilities Education Act (IDEA) and the one year statute of limitations period as applied in Texas; including specifically whether the school district failed to devise appropriate Individual Education Plans (IEPs), failed to comply with student and parental procedural rights under the IDEA, and failed to protect the family from bullying, harassment and/or retaliation; and,
2. Whether the school district violated Student’s and/or parental rights under other causes of action, including specifically claims arising under Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Education Act, the Family Educational Rights & Privacy Act, the No Child Left Behind Act, Section 1983 of the Civil Rights Act of 1964, Title VI of the Civil Rights Act of 1964, the Technology

Related Assistance for Individuals with Disabilities Education Act, the Civil Rights Attorney's Fee Award Act of 1976, and, the Civil Rights Act of 1871.

Petitioner's claims arising under any law other than the IDEA were previously dismissed by the hearing officer in an order issued on December 22, 2014 as outside the jurisdiction of the special education hearing officer in Texas. Petitioner previously confirmed claims arising under laws other than the IDEA were raised solely for the purpose of exhaustion of administrative remedies. *See, 34 C.F.R. §§ 300.503; 300.507.*

Petitioner also requests the following findings:

3. Petitioner's request for a due process hearing was not frivolous, unreasonable, groundless, meritless, without foundation, filed in bad faith, and/or pursued for an improper purpose; and,
4. Neither Petitioner nor Petitioner's counsel unreasonably protracted the final resolution of the issues in controversy.

#### Student's Requested Relief

Petitioner requests the following relief:

1. A finding that the school district denied Student a FAPE within the meaning of the IDEA;
2. The school district revise Student's IEP and provide Student with a FAPE in the LRE including, for example, changes in the addition of services, accommodations, modifications, revised IEP goals and objectives, evaluations in all areas of suspected need, and any other relief deemed appropriate by the hearing officer; or, in the alternative,
3. Reimbursement for private placement, including past reimbursement for private services, evaluations, and mileage and prospective funding of private placement, evaluations, and/or related services for a time period deemed appropriate by the hearing officer;
4. Compensatory educational services in an amount and type deemed appropriate by the hearing officer and based on the evidence presented at the due process hearing;
5. Incorporate the hearing officer's Order into Student's IEP;
6. Reimbursement of expert witness fees and attorney's fees; and,
7. Any other relief deemed appropriate by the hearing officer.

Petitioner conceded that a special education hearing officer in Texas does not have the authority to make an award of attorney's fees or other litigation costs and that this item of relief was included to put the school district on notice that Petitioner will seek these items of relief in the appropriate forum. *See, 34 C.F.R. § 300.517.*

#### School District's Issues

Respondent submitted the following additional issue for decision in this case:

1. Whether Petitioner's claims and/or items of requested relief arising under any law other than the IDEA should be dismissed as outside the jurisdiction of a special education hearing officer in Texas.

Respondent also seeks the hearing officer make the following specific finding:

2. Petitioner's request for a due process hearing is frivolous, unreasonable, groundless, meritless, without foundation, filed in bad faith and/or pursued for an improper purpose.

### School District's Requested Relief

Respondent requests the following relief:

1. Dismiss all of Petitioner's claims and requests for relief that arise under any law other than the IDEA as outside the jurisdiction of the special education hearing officer;
2. Make the requested finding (See No. 2 above);
3. Order Student's parents to execute sufficient parental consent under the Family Educational Rights & Privacy Act (FERPA) to allow the school district to share educational records with Petitioner's counsel;
4. Deny Petitioner's requests for relief under the IDEA;
5. Declare the school district the "prevailing party;"
6. Deny Petitioner's requests for attorney's fees and litigation costs; and,
7. Any other relief deemed just and proper by the hearing officer.

### Due Process Hearing

The due process hearing in this case was conducted on December 17-19, 2014. At Petitioner's request the hearing was open and members of the public and local media attended the hearing. Petitioner continued to be represented by Petitioner's legal counsel Dorene Philpot of the Philpot Law Office. In addition, Yvonnilda Muniz, Law Offices of Yvonnilda Muniz, participated in the due process hearing as Petitioner's co-counsel. Jamie Rodriguez, parent advocate, also participated in the due process hearing as legal assistant to Student's attorneys. Student's parents \*\*\* and \*\*\* were present throughout the hearing. \*\*\*, Student's designated expert, was also present throughout the hearing.

The Respondent school district continued to be represented by its legal counsel Andrea Slater Gulley and her co-counsel Slater Elza, with the Underwood Law Firm P.C. \*\*\*, Director of Special Services, was present throughout the hearing as the school district's party representative.

In addition, \*\*\*, Special Litigator and Regional Attorney for the Texas Department of Family and Protective Services (DFPS), made an appearance during the testimony of a DFPS investigator on the second day of the due process hearing.

The hearing was recorded and transcribed by a certified court reporter. The parties requested an opportunity to submit written closing arguments and did so in a timely manner by January 26, 2014 as agreed. The decision of the hearing officer is due February 20, 2015 by previous request of the parties.

### Findings of Fact

#### Eligibility

1. Student is eligible for special education services as a student with Other Health Impairment (OHI), Visual Impairment (VI) and a Speech Impairment (SI). (Joint Exhibit 4, pp. 15-16)(referred to hereafter

as “J. Ex. \_\_\_\_.”). Student has been diagnosed with \*\*\*, developmental delay, and \*\*\*. Student was a \*\*\*. \*\*\*. Student and Student’s \*\*\*. (Transcript Volume I, p. 163)(referred to hereafter as “Tr. Vol. \_\_\_\_, p. \_\_\_\_.”)(J. Ex. 3, p. 14) (J. Ex. 14, p. 355). Student uses \*\*\* as assistive devices to support Student’s ability to participate in the educational program. (J. Ex. 4 p. 18).

#### *Medical History*

2. Student’s other medical conditions include \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\* and \*\*\*. Student has a history of \*\*\*. (J. Ex. 6, p. 116) (Petitioner’s Exhibit 21, p. 3) (referred to hereafter as “P. Ex. \_\_\_\_, p. \_\_\_\_.”)(Respondent’s Exhibit 14, pp. 515-518)(referred to hereafter as “R. Ex. \_\_\_\_, p. \_\_\_\_.”).
3. The portion of Student’s brain that stores information appears intact. However, the “white matter” portion of Student’s brain is damaged i.e. the connective fibers that transmit and coordinate information from one information storage area in the brain to the other. This means the rest of Student’s brain is not very efficient at communicating from one part to the other in coordinating more complex tasks. (Tr. Vol. II, pp. 512-513). In addition the \*\*\* was particularly damaging to the “white matter.” (Tr. Vol. II, p. 514).
4. Student had multiple \*\*\*. (Tr. Vol. II, p. 607) (R. Ex. 4, p. 515). The \*\*\* of Student’s \*\*\* had an impact on Student’s brain development over time. (Tr. Vol. II, pp. 478, 513). Student’s brain was further damaged by \*\*\* was successful. (Tr. Vol. II, p. 517).
5. At birth Student’s corpus callosum was very small in comparison to what it should have been. The corpus callosum is the major communication system of the brain. Due to Student’s \*\*\* and the \*\*\*. As a result Student’s corpus callosum \*\*\*. (Tr. Vol. II, pp. 512-513). The probability that Student’s corpus callosum is working as it should is very limited. (Tr. Vol. II, pp. 512-514).
6. These conditions together suggest Student will have a lot of difficulty dealing with complex tasks in a timely manner. (Tr. Vol. II, p. 513). However, Student demonstrates some higher level abilities and some of Student’s brain matter is working very well. The challenge is figuring out a way for Student to access that portion of the brain that works well and work around the communication limitations imposed by the damaged portion. (Tr. Vol. II, p. 514).

#### *Student’s Strengths*

7. Student’s strengths are socialization -- particularly with adults -- an eagerness and enthusiasm to learn and motivation to socialize with peers. Student is a determined child and works well with manipulatives. (Tr. Vol. I, pp. 164, 238, 275-276, 295). Student has a great sense of humor. (Tr. Vol. III, p. 815). Student is a sweet, friendly, engaging, and loving child. Student can be compliant with requests Student understands and that are within Student’s repertoire. Student is able to focus and participate in some instructional activities. (Tr. Vol. I, pp. 238, 275-276, 295) (Tr. Vol. II, p. 476).

#### *Vision*

8. Student has \*\*\*. It is important to present visual information to Student in Student’s effective vision field. (Tr. Vol. II, p. 434). The vision specialist recommends horizontal presentation of information. However, Student also responds well to vertical presentation. The vision specialist’s recommendations are related primarily to visual acuity. However, Student’s vision problem is related to Student’s brain injury and optic nerves rather than visual acuity. (Tr. Vol. II, pp. 435-436). It is important to present visual information to Student during the instructional process that Student can see, appreciate, and process. (Tr. Vol. II, p. 436). It is also important to assess whether Student has any scotomas (i.e. a blind spot in the visual field). Student will not be able to see or respond to information presented in a blind spot. (Tr. Vol. II, pp. 436-437).

#### *Sensory Needs*

9. Student is hypersensitive to sound. Student experiences sensory overload and reacts negatively to loud

sounds by screaming, yelling and tearing up – this is most frequent in \*\*\* school. (Tr. Vol I, pp. 184, 252-253) (Tr. Vol II, p. 437) (P. Ex. 10, p. 7). Student’s behavioral responses to loud noises are inconsistent. (Tr. Vol. I., pp. 183-185).

10. Sensory integration is the ability to correctly respond to stimuli in the environment. A person with a sensory integration disorder has difficulty responding appropriately to environmental stimuli. (Tr. Vol. I., p. 339). A sensory diet could provide Student with a set of sensory breaks throughout the school day on a regulated schedule. None of Student’s IEPs included a sensory diet. (Tr. Vol. I., p. 345).
11. An occupational therapist cannot diagnose a sensory integration disorder but is qualified to assess the different areas of need to address a student’s difficulties in the sensory integration process. However, the school district has never proposed a sensory integration evaluation. (Tr. Vol. I., pp. 339-341).

#### *Educational History*

12. Student first received special education services from the school district in \*\*\* at \*\*\* School No. 1 for the 2011-2012 and 2012-2013 school years. However, Student missed much of the 2011-2012 school year due to serious medical issues. (Tr. Vol. II., pp. 578-579) (J. Ex. 9) (J. Ex. 10) (J. Ex. 11) (J. Ex. 12) (J. Ex. 13). Student then attended \*\*\* for the 2013-14 school year at \*\*\* School No. 2. (J. Ex. 5, p. 62) (J. Ex. 8). Student experienced some educational setbacks as a result of the medical issues and regressed somewhat over the summer between the \*\*\* and \*\*\*. (Tr. Vol. I., pp. 165, 224-226).
13. The school district contracts with \*\*\* for a number of related services including physical (PT), occupational (OT) and speech therapy. (Tr. Vol. I., p. 314). Student has received OT services from \*\*\*. (Tr. Vol. I., pp. 315-316). Over the years Student’s parents also provided Student with outside OT, PT, and \*\*\*. (Tr. Vol. II, pp. 586, 647)(Tr. Vol. III, pp. 813-814)(R. Ex. 21, p. 595). Student received OT and PT as a component of the \*\*\*. Although Student made some progress in these areas Student did not master the OT or PT objectives. (J. Ex. 9, pp. 198-201).
14. Student’s annual Admission, Review & Dismissal Committee (ARD) review was conducted on April 25, 2013. (J. Ex. 9, pp. 184, 217). The ARD planned for Student’s transition into \*\*\* and agreed Student would be placed in a self contained special education program known as \*\*\* or “\*\*\*\*.” The ARD selected \*\*\* School No. 2 -- the campus closest to Student’s home with a \*\*\* classroom. (Tr. Vol. I., p. 163)(J. Ex. 4, p. 29) (J. Ex. 5, pp. 60-61) (J. Ex. 9, p. 218). The \*\*\* classroom serves students in \*\*\* grade, ages \*\*\*. All of the students in the \*\*\* have significant cognitive disabilities. (Tr. Vol. I., p. 166).

#### *August 2013 ARD*

15. Prior to the beginning of Student’s \*\*\* year another ARD met on August 29, 2013. The ARD noted Student’s three year re-evaluation would be due the following September in 2014. The ARD agreed Student continued to meet eligibility for special education services as a student with OHI, VI, and a SI. (Tr. Vol. I, p. 163) (J. Ex. 8, pp. 162, 173).
16. The August 2013 ARD agreed to implement the \*\*\* Individual Educational Plan (IEP) until Student’s annual ARD convened the following April. (Tr. Vol. III, p. 802)(J. Ex. 8, p. 173). The IEP included annual goals for acquisition of reading, writing, motor, language, cognitive, and functional vision skills. Recognition that information is accessible through technology was also a goal. (J. Ex. 9, pp. 192-197). Two annual IEP goals with a focus on Activities for Daily Living were added to Student’s program at the August 2013 ARD. (J. Ex. 8, pp. 165).
17. The speech therapist refined the speech goals to be more specific to Student’s needs and recommended reducing the amount of time for direct services from 30 minutes to 20 to better meet Student’s tolerance level. (Tr. Vol. III, pp. 803-805). Participants at the August 2013 ARD included: student’s mother, the campus principal, a general education teacher, the special education teacher, an assessment specialist, the speech pathologist, and a vision teacher. (J. Ex. 8, p. 175).

*\*\*\* Services 2013-2014*

18. Student was placed in the \*\*\* program for most of the school day with 30 minutes of inclusion PE and Music daily with inclusion support. Student received speech therapy services – 20 minutes two times/week for three out of every four weeks with indirect services on the fourth week. Student also received vision services six times every four weeks for 15 minutes/session. (J. Ex. 8, p. 174). The school district did not assess Student for Adaptive PE because accommodations in the general education PE class were successful. (Tr. Vol. I., pp 94-95). During the 2013-14 school year Student received direct 1:1 instruction from the special education teacher for 30 minutes each day. (Tr. Vol. II, p. 651).

*Implementation of IEP by Aides*

19. The \*\*\* teacher was the direct supervisor for the aides and the school district responsible for their training. (Tr. Vol. I., p. 174). During the 2013-14 school year classroom aides did not review Student's IEP or know the specific set of goals and objectives or other components. (Tr. Vol. I., pp. 297-298)(Tr. Vol II, pp. 868-869). The classroom aides need training on implementing Student's IEP. (Tr. Vol. II, pp. 418-419). However, at the beginning of the year the \*\*\* teacher met with the aides, and advised the aides what they needed to work on and of any parental requests. In addition, she met with the aides weekly to determine what needed to be improved or changed throughout the school year. (Tr. Vol. I., pp. 180, 237, 290-291)(P. Ex. 10, p. 2).

*April 2014 ARD – New IEP*

20. An annual ARD met on April 15, 2014 to plan for the 2014-2015 \*\*\* grade year. Student continued to be eligible for special education services. (J. Ex. 5, pp. 46-47). Participants in the April 2014 ARD were Student's mother, a regular education teacher, a special education teacher, a speech therapist, an occupational therapist, a vision specialist, an educational diagnostician, and the campus principal. (J. Ex. 5, pp. 62, 65). The April 2014 ARD discussed Student's progress in meeting educational goals and objectives. Related service personnel made recommendations for continuation of related services including music therapy, PT, and OT. (J. Ex. 5, pp. 46-47, 71-75, 78-87).
21. Student's special education teacher proposed new goals and objectives for Student's IEP. Annual goals with benchmarks/short-term objectives were developed for English/Language Arts, Reading, Mathematics, Social Studies, Adaptive Behavior, Activities of Daily Living, Speech Therapy-Language, and Vision. (J. Ex. 5, pp. 50-54). A set of accommodations and modifications were also components of the IEP. (J. Ex. 5, p. 55). Related service personnel also reviewed goals and objectives for speech, PT, mobility training, OT, and vision training. New goals were proposed for speech and OT. (Tr. Vol. III., pp. 806-807)(J. Ex. 5, pp. 60, 64, 76-77).
22. A Vision ARD/IEP Supplement was also a component of Student's educational program developed at the April 2014 ARD. (J. Ex. 5, p. 67). Large print materials and auditory/listening skills were to be provided by the classroom teacher. Low vision efficiency training and compensatory skill training were to be provided by a certified teacher of the visually impaired. (J. Ex. 5, p. 68). The vision teacher reported Student could only tolerate instruction in 15 minute increments. (Tr. Vol. III, p. 804).
23. A personal care plan was developed at the April 2014 ARD. Student does not \*\*\* independently. (J. Ex. 5, p. 69). Student requires personal care services including: \*\*\*. Personal care services were to be provided throughout the school day. (J. Ex. 5, pp. 63, 69).

*Schedule of Services*

24. The schedule of services developed at the April 2014 ARD included: 60 minutes per day in the general education setting split between PE and music and in the special education setting for the remainder of the school day. 15 minutes of inclusion at the end of each school day in the general education setting was also a component of Student's schedule. (J. Ex. 5, pp. 60-61).
25. The April 2014 ARD also agreed on a set of related services including 15 minutes four times per month

of OT, 30 minutes four times a month of PT, 30 minutes five times every six weeks of music therapy, vision services for 15 minutes six times every four weeks, and 15 minutes per day of in class support. (J. Ex. 5, pp. 61). Student's mother received Notice of Procedural Safeguards and signed a Medicaid reimbursement consent form on April 15, 2014. (J. Ex. 7, pp. 142-143).

#### *Occupational Therapy*

26. OT services were provided through direct therapy with the occupational therapist and functional activities in the classroom with the teacher. The therapist did not see the need to increase the frequency of direct OT services because Student was adequately served in the classroom. (Tr. Vol. I., pp. 342-344). The occupational therapist changed activities frequently to hold Student's attention and found Student was more compliant with a shorter therapy session. (Tr. Vol. I. p. 322)(R. Ex. 16, pp. 535-539).
27. Student made some progress using Student's fine motor skills during the 2013-14 school year -- particularly in the emerging use of Student's \*\*\*. However Student's progress and participation were somewhat inconsistent and Student was not able to master any of the OT goals and objectives. (P. Ex. 16, p. 10) (R. Ex. 15, p. 536) (Tr. Vol. I., pp. 323-324, 326, 331).

#### *Extended School Year Services*

28. The ARD decided Student did not demonstrate a need for extended school year services. (J. Ex. 5, pp. 60, 64). However, there is very little documentation to support this decision. (Tr. Vol. II, pp. 597-598)(P. Ex. 26, pp. 35, 42). The general focus of ESY services is to maintain a particular level of functional performance over the summer and therefore minimize the amount of re-teaching that might be required. Student needs ESY. (Tr. Vol. II, pp. 410-411).

#### *Safety Issues in 2013-2014 and Relationship Between the Parties*

29. In the August 2013 ARD at the beginning of the 2013-2014 school year Student's mother expressed concerns that Student was \*\*\* in the \*\*\* and the two students would be together again in the \*\*\* program for \*\*\*. The special education teacher advised the ARD the two students would either be separated in the classroom or supervised by an aide or teacher at all times. (J. Ex. 8, p. 173). Unfortunately, the \*\*\*. (Tr. Vol. I, pp. 50-51, 93, and 172) (P. Ex. 6) (R. Ex. 13).
30. Following the \*\*\* incidents Student's mother began lingering in the classroom after morning drop off. The \*\*\* teacher felt this interfered with Student's smooth transition into the school day. (Tr. Vol. I., p. 170)(Tr. Vol. III., p. 759). The teacher's attempt to conference with the parent about the situation was not successful and led to ill will. The teacher conferred with the principal and expressed her own concerns about the parent's negative view of the classmate. By May 2014 the school's previously positive relationship with the family had now deteriorated. (Tr. Vol. I., pp. 171-173, 198-199).
31. Student's parents met with the \*\*\* teacher and the principal over their concerns about Student's safety at school. The parties disagreed over how to handle the situation. The principal became frustrated with the poor relationship between the parties. He also felt Student's father was disrespectful of the \*\*\* teacher. The principal endorsed the possibility of Student transferring to another \*\*\* school campus. (Tr. Vol. I., pp. 172-173)(Tr. Vol. III, pp. 746-748, 750-751, 757-758, 760-761)(P. Ex. 10, p. 23) (P. Ex. 16, p. 115).

#### *September 2014 ARD and Evaluation Issues*

32. Student's three year re-evaluation was due September 11, 2014. (J. Ex. 4, p. 33). It was not until August 19, 2014 that school district staff remembered the re-evaluation was due. (P. Ex. 17, p. 44). An ARD met on September 3, 2014 to make decisions about Student's educational programming for \*\*\* grade. (J. Ex. 4, pp. 15, 33, 44). Student's mother, the campus principal, a regular education teacher, a special education teacher, a licensed specialist in school psychology (LSSP), a speech pathologist, a vision teacher, and an occupational therapist attended the ARD. (J. Ex. 4, pp. 35, 38).

33. The ARD used current teacher data and conducted a Review of Educational Evaluation Data (REED) (i.e. previous evaluation data) as the Full Individual Evaluation (FIE) because it was not possible to conduct an FIE by the due date. (Tr. Vol. I, p. 127)(Tr. Vol II, p. 614)(J. Ex. 4, pp. 15, 36) (J. Ex. 6) (P. Ex. 10, p. 41).
34. Due to the nature and severity of Student's disabilities it is difficult to use standardized assessment tools with validity to evaluate Student. Instead other sources of information were used as the basis for the ARD decisions including: parent information, classroom observation, school records (including permanent records, and group/individual achievement records), medical and health records, and new information from Student's teachers and related service providers (including criterion-based data). (J. Ex. 4, pp. 33, 36).
35. Evaluation drives the instructional process. Without current evaluation data, including an accurate understanding of Student's present levels of performance, the ARD cannot design an appropriate set of goals and objectives. Establishing Student's present levels of performance is critical to educationally sound decision-making. (Tr. Vol. I, pp. 59-60, 72) (Tr. Vol II, p. 410).
36. Formal music therapy, OT and PT evaluations have not been conducted since 2011. (J. Ex. 6, pp. 207, 122, 126). Although Student needs access to a touch screen computer no Assistive Technology evaluation has been completed. (Tr. Vol II, p. 551)(J. Ex. 8, p. 164). The school district has never proposed parent training, counseling, or in-home training for Student. (Tr. Vol. I, p. 197) (Tr. Vol. II, p. 673).
37. It is also important to determine whether Student has a hearing problem. The school district had difficulty conducting hearing screenings in 2011, 2013 and 2014. The school district could have arranged for a specialist to assess Student's hearing but never offered that option at any ARD meetings. (Tr. Vol. I, pp. 54-55) (P. Ex. 6, p. 37).
38. Student has never been evaluated for Adaptive PE because of accommodations in place in the regular PE classroom. (Tr. Vol. I, pp. 94-95). School staff did not sufficiently explain what Adaptive PE is to Student's mother at ARD meetings. Student needs an Adaptive PE evaluation. (Tr. Vol. II, p. 609)(J. Ex. 9, p. 217).

*\*\*\* Grade 2014-2015 School Year*

39. Despite the way the \*\*\* year ended Student returned to the same \*\*\* school campus to begin \*\*\* grade. The September 2014 ARD confirmed Student's continued eligibility for special education services. (J. Ex. 4, p. 33). The ARD made no changes to the prior IEP for the 2014-2015 school year since the IEP designed at the annual ARD in April 2014 remained in effect through April 2015. (J. Ex. 4, pp. 21-24, 33) (J. Ex. 5, pp. 50-55). There was no Behavior Intervention Plan (BIP) added to Student's educational program for \*\*\* grade. (Tr. Vol. I, p. 346)(Tr. Vol. II, pp. 438-439) (J. Ex. 4, p. 24).
40. The September 2014 ARD agreed the \*\*\* self-contained special education class on a regular campus continued to be an appropriate educational placement for the 2014-2015 \*\*\* grade school year. (J. Ex. 4, pp. 27, 29). Student had the opportunity to participate with students without disabilities in nonacademic, extracurricular and other activities. (J. Ex. 4, p. 28). Student continued to be included for 60 minutes each day in regular education PE and music. (J. Ex. 4, p. 29). Student needs carefully designed exposure to general education peers as appropriate behavior and language models. (P. Ex. 21) (Tr. Vol. II, pp. 441-443).
41. In \*\*\* grade Student continued to receive 15 minutes per day of instruction in the regular education classroom. Student spent the remainder of the instructional day in the special education setting. In addition, Student received 15 minutes, 4 times per month of OT, 30 minutes, four times per month of PT, and 30 minutes, five times per six weeks of music therapy. (Tr. Vol. I, pp. 317-318)(J. Ex. 4, pp. 16, 29). Student continued to receive speech and language therapy and VI services, (J. Ex. 4, pp. 29-30).

\*\*\* Incident

42. \*\*\* Student was again \*\*\* as before. Student's parents kept Student home until a safety plan could be developed. Student returned to school a few days later on \*\*\*. (Tr. Vol. I., pp. 208-210)(P. Ex. 27, p. 40). \*\*\* there was an incident in \*\*\*. During \*\*\* Student began using inappropriate language, was over stimulated, pinched the aide assigned to Student during \*\*\*, refused \*\*\*, and \*\*\*. (Tr. Vol. I, p. 210) (P. Ex. 1, p. 86) (R. Ex. 35, p. 923) (R. Ex. 35, p. 927) (R. Ex. 57A, p. 2821).
43. The aide sat next to Student at the \*\*\*. In response to Student's behavior the aide lifted Student up out of Student's chair with her hands under Student's armpits. (Tr. Vol. II, pp. 362-363, 381). This method is particularly risky for Student because of the way Student's \*\*\*. \*\*\*. \*\*\*. (Tr. Vol. II, pp. 430-431, 515-518)(Tr. Vol. III, pp. 712-713). An improper restraint could \*\*\*. (Tr. Vol. III, p. 713).
44. The aide transported Student from the \*\*\* into a small room where the custodian stored his supplies. Students also used the room to throw away trash and drop off \*\*\*. The custodian himself referred to the room as "the wash room" because he used it to wash buckets used for cleaning and for disposing milk and cereal. The washroom is about \*\*\* from the \*\*\*. (Tr. Vol. 1, pp. 144, 155, 287) (P. Ex. 1, pp. 97, 103, 109) (R. Ex. 57A, p. 2820).
45. Under Crisis Prevention Intervention protocol (CPI) a transport is appropriate only after the child has regained control and needs to move to another area. A transport is not appropriate until the student has regained control. (Tr. Vol. I, pp. 48-49, 97). CPI procedures are used when a child's behavior poses an imminent danger to self or to others. (Tr. Vol. I, p. 97). The proper procedure is to first attempt to calm the student verbally. If a transport become appropriate two people are required to ensure the student's safety. (Tr. Vol. II, pp. 367, 429).
46. Student was agitated during the transport and responded by yelling. (Tr. Vol. I, p. 364). Student's feet were dragging on the floor. The aide looped her foot around the leg of a chair and, as she walked backward while transporting Student, shoved the chair into the washroom. (Tr. Vol. II, pp. 363, 386-387, 392-393) (P. Ex. 25, p. 17). The aide did not first calm Student or seek the assistance of another adult before transporting Student to the washroom. This was improper. (Tr. Vol. I., pp. 49, 100, 103, 105)(Tr. Vol. II, pp. 362, 367-368)(P. Ex 4, pp 9-10).
47. The aide previously used the washroom on a number of other occasions when Student misbehaved in the \*\*\*. (Tr. Vol. I., pp. 105-106, 148-149, 155)(Tr. Vol. III, pp. 714, 860)(P. Ex. 1, p. 86) (R. Ex. 35, p. 926) (R. Ex. 57A, pp. 2828, 2830). The principal was aware of this practice. (Tr. Vol. II, p. 596)(Tr. Vol. III, pp. 740, 775)(P. Ex. 1, p. 97) (R. Ex. 57A, pp. 2827-2828).
48. The washroom was fairly dim. (Tr. Vol. I., p. 151)(Tr. Vol. II, p. 364). The aide initially closed the door but at some point propped it open slightly with a doorstop. (Tr. Vol. I, p. 154)(Tr. Vol. II, p. 365)(R. Ex. 35, p. 923) (R. Ex. 57A, p. 2829). The Assistant Principal poked her head into the washroom to see why Student was yelling. The Assistant Principal reprimanded Student. Student calmed down in a few minutes and was able to leave the washroom and return with Student's classmates back to class. (Tr. Vol. II, pp. 365-366, 383-384)(R. Ex. 35, pp. 924-925, 926).
49. Another parent of a \*\*\* student who happened to be at the \*\*\* witnessed the incident and reported it to Student's parents at the end of the work day. (Tr. Vol. II, pp. 368-369). The next business day Student's parents came to the school to discuss the incident with campus leadership. Student's parents met the custodian who showed them the washroom. (Tr. Vol. I., p. 140).
50. When Student's parents saw the washroom it contained the custodian's mop, broom, two wash carts, cleaning supplies, and a set of boxes piled somewhat haphazardly on some shelving. The floor was not particularly clean and there was not much light. Student's parents were upset by what they saw. (Tr. Vol I, p. 287)(Tr. Vol. II, pp. 591, 594-596, 605)(Tr. Vol. III, pp. 715-716)(P. Ex. 25, p. 48) (P. Ex. 27, pp. 41-42) (R. Ex. 57A, p. 2830).

### *Investigations*

51. The principal investigated the incident. He interviewed the aide, the Assistant Principal, the school counselor, another special education aide, and the custodian. (Tr. Vol. I, pp 146-147)(R. Ex. 35). It was not until this litigation -- through the discovery process -- that Student's parents learned the washroom was used multiple times to isolate Student in addressing behavioral issues in the \*\*\*. (Tr. Vol. I, pp. 249-250)(J. Ex. 1, pp. 9-13). The use of the washroom to calm Student when Student misbehaved in the \*\*\* was not in line with teacher directives or \*\*\* protocol. Instead, Student was to be returned to the \*\*\* when Student misbehaved in the \*\*\*. (Tr. Vol. I, pp. 212-214, 253).
52. Prior to this incident the \*\*\* aide had been the subject of complaints and concerns expressed by other \*\*\* aides to the teacher and campus leadership. The other aides felt she did not interact appropriately with \*\*\* students, including Student. (Tr. Vol. I, pp. 49, 243-245, 288-290, 293-295)(Tr. Vol. III, p. 766-770)(P. Ex. 16, p. 120). The aide was ultimately terminated from her position for failing to follow a directive; i.e., she failed to seek assistance when Student's behavior was out of control. (Tr. Vol. I, pp. 114-115) (Tr. Vol. III, pp. 770-773) (R. Ex. 8).
53. The incident was also reported to Child Protective Services (CPS) by the parent witness 5-6 days later. (Tr. Vol. II, pp. 369, 389). The principal was advised of the CPS report. (Tr. Vol. III, p. 717)(P. Ex. 26, p. 53). CPS conducted an investigation. (R. Ex. 57A, 58A). However, the washroom was tidied up by the time the CPS investigator visited the school. There were posters hanging from the ceiling, cleaning supplies and mops were removed, and the boxes were neatly stacked. The room was transformed. (Tr. Vol. I, pp. 143, 287-288)(Tr. Vol. II, p. 590)(Tr. Vol. III, pp. 717, 727) (P. Ex. 27, pp. 61-62). CPS ruled out physical abuse by either the aide or the Assistant Principal. (Tr. Vol. II, p. 380)(P. Ex. 5) (R. Ex. 57A) (R. Ex. 58A). The CPS investigator was not aware Student has a \*\*\*. (Tr. Vol. II, p. 701).

### *New \*\*\* Classroom on Home Campus*

54. In \*\*\*, following the \*\*\* incident, Student transferred to a \*\*\* program on Student's home school campus - \*\*\* School No. 3. (Tr. Vol. I, pp. 53-54)(Tr. Vol. III, pp. 578-579, 906)(P. Ex. 27, p. 4). The new \*\*\* teacher provides Student with 15 minutes of 1:1 instruction twice a day and interacts with Student frequently throughout the day. Student continues to be included in 30 minutes of music and 30 minutes of PE each day. Student also has \*\*\* with a general education \*\*\* grade class. (Tr. Vol. III, p. 908). Student receives one to one support throughout the school day. (Tr. Vol. II, pp. 504-505, 509).
55. Student continues to attend a general education PE class with the assistance of an aide and participates in \*\*\*. Student actively participates in the general education music class and seems to enjoy both PE and music. (Tr. Vol. II, pp. 908-910). The \*\*\* classroom at \*\*\* School No. 3 includes \*\*\* students, a certified special education teacher and \*\*\* educational aides. (Tr. Vol. III, pp. 905-906, 930). Student needs a highly structured instructional environment with a small staff to student ratio. (Tr. Vol. II, pp. 446-447)(P. Ex. 21, p. 10). The level of activity in the \*\*\* classroom needs to be monitored and considered in designing instruction for Student. (Tr. Vol. II, pp. 449-451).

### *Behavioral Issues*

56. Student has a history of maladaptive behavior. (Tr. Vol. I, pp. 165, 184, 189)(Tr. Vol. III, pp. 838-839)(P. Ex. 8, pp. 1-22) (P. Ex. 26, p. 17). Maladaptive behavior is behavior that is not consistent with adaptive behavior; i.e., appropriate interactions with the environment at a given time. (Tr. Vol. II, p. 415). Maladaptive behavior is not limited to severe or extreme behaviors. (Tr. Vol. II, p. 416). As a general matter, school staff do not have a good grasp of the meaning of maladaptive behavior. (Tr. Vol. I, pp. 110, 177, 239)(Tr. Vol. III, p. 879).
57. Student's maladaptive behaviors include \*\*\*. (Tr. Vol. I, pp. 138-139, 185) (Tr. Vol. II, pp. 874, 878, 880-881) (J. Ex. 1, pp. 9-13) (R. Ex. 48, pp. 2793-2794). Student has also hit Student's teachers and instructional staff. (P. Ex. 10, pp. 13-14). A number of the maladaptive behaviors were noted in the

September 2014 REED and in the OT report. (J. Ex. 6, pp. 99-141) (R. Ex. 44, p. 2585).

58. Student is not able to inhibit behavioral responses well because of Student's neurological condition. A variety of stressors trigger Student's behavior. One stressor is when Student doesn't know what Student is supposed to do in a particular situation. If Student experiences too much stimuli it overloads Student's system and may trigger a rather primitive behavioral response. Therefore, Student needs reinforcement of appropriate behaviors so the alternative behaviors become as available to Student as the inappropriate behaviors are now. (Tr. Vol. II, pp. 489-490, 493, 504).

#### *Behavioral Assessment*

59. Instructional staff did not systematically collect behavioral data during the 2013-14 school year nor did Student's IEPs include a BIP. (Tr. Vol. I, pp. 168, 186-187, 192). Instead, there were some functional Adaptive Behavior IEP goals. (Tr. Vol. I, pp. 63, 187) (J. Ex. 4, p. 21) (J. Ex. 5, p. 52). It was not until after the first few weeks of the current school year that instructional staff began to collect behavioral data. The \*\*\* teacher initiated the data collection on her own as a result of attending some workshops to improve her teaching skills – taking data for educational purposes was an area she wished to improve. (Tr. Vol. I, p. 168). The \*\*\* teacher gave Student a few weeks at the beginning of the year to adjust back to school before beginning the behavioral data collection. (Tr. Vol. I, pp. 192-194).

60. The behavioral data collection continued at the new \*\*\* placement at \*\*\* School No. 3. (R. Ex. 39) (R. Ex. 41) (R. Ex. 48). However, none of the behavior data collection included antecedent or consequence data. Antecedent and consequence data is important in order to determine the effectiveness of the behavioral interventions being used. (Tr. Vol. I, pp. 192-193)(Tr. Vol. II, pp. 431, 458-459)(R. Ex. 39) (R. Ex. 41, pp. 1004-1005). One of the educational aides working with Student was, without intending to, positively reinforcing Student's inappropriate behavior. (Tr. Vol. II pp. 413-415, 674-675). School staff are not generally able to identify Student's behavioral triggers. (Tr. Vol. I, p. 185) (Tr. Vol. III, pp. 881-883).

61. Student's ability to learn is contingent upon behavior management. Understanding the source of the behavior is critical in terms of extinguishing inappropriate behaviors and teaching Student replacement behaviors. (Tr. Vol. II, pp. 427, 452-453, 482, 489). Student needs consistency across all settings and situations and therefore in-home training and parent training are appropriate for Student. However, those services are not included in Student's current educational program and were never suggested by school personnel. (Tr. Vol. I, p. 197)(Tr. Vol. II, pp. 425-427).

62. Student needs a behavioral assessment to establish a baseline. Student needs a BIP to measure Student's behavioral progress in participating in the instructional process over time and to determine the effectiveness of the behavioral interventions. (Tr. Vol. II, pp. 408-409). The Adaptive Behavior goals and objectives are stated rather generally and there is not enough data being collected or analyzed to meet Student's needs. (Tr. Vol. II, pp. 458-459).

#### *Collaboration Among Key Stakeholders*

63. Student's mother communicated frequently with Student's teacher throughout the 2013-14 school year via text message, email, phone conferences, written communications, in person and in ARD meetings. (Tr. Vol. I, p. 327)(P. Ex. 27, p. 74) (R. Ex. 3, 4, 5, 20). Student's mother was very involved in Student's education and well being. (R. Ex. 3, 4, 5, 7). Student's teachers communicated with Student's mother on a regular basis. Student's teachers collaborated with Student's mother to ensure consistency between home and school and to problem solve. (Tr. Vol. I, pp. 171, 181, 189, 190) (Tr. Vol. II, pp. 672, 675, 932) (P. Ex. 27, p. 74) (R. Ex. 49).

64. School district staff coordinated their efforts and collaborated with one another and with related service personnel. The related service personnel also collaborated with one another in providing services to Student. (Tr. Vol. I, pp. 325-326) (Tr. Vol. II, pp. 799-800, 884) (R. Ex. 45).

### *Progress Reports*

65. Student's IEP required periodic reports on Student's progress in meeting IEP goals concurrent with the issuance of report cards. (J. Ex. 4, pp. 19-23). Progress reports were sent home along with Student's report card every six weeks. (Tr. Vol. I, p. 201)(J. Ex. 5, pp. 50-54)(J. Ex. 8, p. 165) (R. Ex. 6, p. 373). However, students in regular education also received progress notes every three weeks. (Tr. Vol. I, pp. 39-40, 203). While Student's \*\*\* received three week progress notes Student did not. (Tr. Vol. I, pp. 41-43)(Tr. Vol II, pp. 583, 650)(P. Ex. 10, p. 27).
66. The \*\*\* teacher issued a single progress report that included feedback from related service personnel. (Tr. Vol. III, pp. 822-823). The OT issued a single annual progress report that was sent to the school district's educational diagnostician. (Tr. Vol. I, p. 336). This year the first progress notes were not received by Student's parents until December 5, 2014. (P. Ex. 23).

### *Student's Progress*

67. Student is making some progress academically and behaviorally. (Tr. Vol. I, pp. 216-217, 268, 323)(Tr. Vol. II, pp. 444, 460)(P. Ex. 21, p. 12). Student is having fewer behavioral episodes in the new \*\*\* classroom. Student no longer engages in "screaming fits" – a need identified in Student's Adaptive Behavior IEP. Student is making some progress towards seeking help from the teacher during class time in an appropriate manner. (Tr. Vol. II, pp. 880, 918-919)(J. Ex. 5, p. 51). Student made some progress in oral expression during the 2013-14 school year. (Tr. Vol. I, p. 238)(J. Ex. 5, p. 53).
68. At the beginning of the 2013-2014 school year Student struggled to complete tasks and would \*\*\*. (Tr. Vol. I, pp. 268, 271-272). By the end of the year Student was able to complete tasks and tell the aide Student was finished. (Tr. Vol. I, p. 273). Student's ability to remain on task also progressed and Student became somewhat more independent. (Tr. Vol. I, pp. 273-274). On some days Student was able to do everything asked of Student and had fewer "problem" days as the year progressed. (Tr. Vol. I, p. 217). (R. Ex. 5, pp. 47, 71-73, 78-79).
69. Student made some academic progress. For example by the end of the 2013-2014 school year Student worked more independently with \*\*\* and was able to identify colors and shapes Student could not identify the previous year. (Tr. Vol. I, pp. 215, 272)(J. Ex. 4, p. 16). Student also made some minimal progress \*\*\*. (Tr. Vol. I, pp. 300, 302). Student's attention span increased somewhat. Student showed some progress in communicating needs and desires (such as selecting food or asking to go to PE). (Tr. Vol. I, pp. 296, 300, 302-303) (J. Ex. 5, pp. 53, 71, 85).
70. Student is beginning to repeat the days of the week and months of the year in order. Student showed some progress answering questions and began to speak in more complex sentences. (Tr. Vol. I, p. 215)(J. Ex. 5, pp. 51, 72-73). Although still inconsistent behaviorally Student also began to use "replacement words" more often and showed less aggression towards teachers and others. (Tr. Vol. I, pp. 216-217)(Tr. Vol. III., p. 818)(J. Ex. 5, p. 51).
71. This year Student's ability to reach for an object has improved; Student is able to quickly locate different classrooms in the building on Student's own; Student can count consistently to 7 independently and to 10 with assistance – an improvement from April 2014 when Student could only rote count to 5 with assistance. (Tr. Vol. II, p. 915)(J. Ex. 5, p. 47).
72. Student made some progress on Student's speech goals. Student made progress in the number of words Student was using and the appropriate amount of words. The speech therapist and teaching staff continue to work on increasing the length of Student's utterances. Student mastered all Student's articulation goals and overall increased appropriate communicative responses. (Tr. Vol. II, pp. 802-803)(Tr. Vol. III, p. 803).
73. Student is beginning to consistently answer questions such as "What is your name?" and "Who is next?" although it is not entirely clear whether Student actually understands the meaning of the questions and

answers or whether Student is simply retrieving readily available information neurologically. (J. Ex. 5, p. 80) (Tr. Vol. II., p.467) (Tr. Vol. III, pp. 817-818, 829). Student mastered two out of five PT goals by the April 2014 ARD. (J. Ex. 5, p. 81). Student mastered two of four objectives with regard to eye gaze and color and made some progress on the other two. (J. Ex. 5, pp. 78-79).

74. Student's mother and father are pleased with Student's progress in the new \*\*\* classroom at \*\*\* School No. 3 this year. They feel they have a more positive relationship with Student's \*\*\* teacher and that Student benefits from Student's OT and vision therapy. (Tr. Vol. II, p. 497)(P. Ex. 26, p. 37) (P. Ex. 27, pp. 71, 72, 82).

#### *Independent Educational Evaluation*

75. An Independent Educational Evaluation (IEE) was conducted while this litigation was pending. (P. Ex. 21). The independent evaluator was unable to complete the cognitive component of the IEE due to some miscommunication over scheduling the cognitive testing with the \*\*\* teacher. (Tr. Vol II, pp. 402-403, 405-406, 468, 471).

#### Discussion

##### Free, Appropriate Public Education

A free, appropriate public education is special education, related services and specially designed personalized instruction with sufficient support services to meet the unique needs of the child in order to receive a meaningful educational benefit. The instruction and services must be provided at public expense and comport with the child's IEP. *20 U.S.C. § 1401(9); Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).*

While the IDEA guarantees only a "basic floor of opportunity" the IEP must nevertheless be specifically designed to meet Student's unique needs, supported by services that permit Student to benefit from the instruction. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. at 188-189.*

While the IEP need not be the best possible one nor must it be designed to maximize Student's potential the school district must nevertheless provide Student with a meaningful educational benefit – one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist. v. VP, 582 F. 3d 576, 583 (5<sup>th</sup> Cir. 2009) cert. denied, 559 U.S. 1007(2010).* The basic inquiry in this case is whether the IEP implemented by the school district was reasonably calculated to provide the requisite meaningful educational benefit. *Rowley, 458 U.S. at 206-207.*

##### Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. <sup>1</sup> *Schaffer v. Weast, 546 U.S. 49, 62 (2005); Teague Ind. Sch. Dist. v. Todd L., 999 F. 2d 127, 131 (5<sup>th</sup> Cir. 1993).*

##### The Four Factors Analysis

In this jurisdiction there are four factors to determine whether the IEP at issue and as implemented was reasonably calculated to provide Student with the requisite meaningful educational benefit under the IDEA. These factors are:

---

<sup>1</sup> There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z., 580 F. 3d 286, 292 n. 4 (5<sup>th</sup> Cir. 2009).*

- 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 provided in a coordinated and collaborative manner by key stakeholders; and,
- There are positive academic and non-academic benefits demonstrated.

*Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5<sup>th</sup> Cir. 1997). There is no requirement the four factors be considered or weighed in any particular way. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d, 286, 293 (5<sup>th</sup> Cir. 2009).

#### *Least Restrictive Environment*

The evidence showed that Student’s program was administered in the least restrictive environment – there is no real dispute between the parties that Student needs the structure and specialized instruction provided by the \*\*\* classroom for the majority of Student’s instruction. The evidence also showed that Student was included to an appropriate extent with same age peers for PE, music and \*\*\* which Student appears to enjoy. 34 C.F.R. § 300.114.

#### *Coordination and Collaboration by Key Stakeholders*

The evidence also supports the conclusion that the services provided to Student are indeed provided in a coordinated and collaborative manner by key stakeholders. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d at 253. The evidence shows the special education teachers worked closely with related service personnel and related service personnel with one another. Both \*\*\* teachers communicated frequently with Student’s mother and she was very involved in Student’s education. There is evidence that the relationship between home and school deteriorated by May 2014 over safety concerns and then broke apart altogether following the \*\*\* incident in September 2014. However, the evidence also showed Student’s parents have a renewed and more positive relationship with the \*\*\* teacher at the new \*\*\* school campus this school year.

#### *Individualized Program Based on Assessment and Performance*

The record is somewhat mixed with regard to this factor. There is evidence that related service personnel and teachers proposed IEP goals and objectives that were approved by ARD Committees based on informal assessments of Student’s performance by staff who knew Student well. Adjustments were made by related service personnel to reduce the amount of direct instruction based on their informal assessments of Student’s inability to sustain attention to tasks. However formal OT, PT and music therapy evaluations are overdue. The IEP goals and objectives overall appear to address many of Student’s needs with regard to the development of functional skills. However, while the IEPs implemented were appropriate the evidence shows that they were simply incomplete because the school district lacked sufficient assessment data in other the areas and failed to consider Student’s needs in those areas.

Failure to Conduct FIE and use of a REED: The credible evidence leads me to conclude that the school district resorted to the use of a REED rather than conducting an updated FIE because school staff simply ran out of time to do so by the three year anniversary date. 34 C.F.R. § 300.303. While the use of the REED was appropriate in terms of confirming Student’s continued eligibility for special education services – which no one really disputes – the failure to conduct updated assessments in all areas of suspected need led to some gaps in Student’s educational program.

AT, Sensory Integration, Adaptive PE: The evidence showed the school district did not conduct an Assistive Technology evaluation, a sensory integration assessment, or an Adaptive PE evaluation. The evidence showed Student needs these assessments. For example, a sensory integration assessment and implementation of a sensory

diet might have an impact on Student's ability to lengthen Student's ability to attend to instruction longer and/or tolerate loud noises in a more consistent manner. Although the evidence showed Student enjoys PE with Student's peers Student's gross and fine motor deficits suggest that Student may also benefit from some Adaptive PE that could be woven into Student's regular PE program.

Behavioral Assessment and Lack of BIP: The evidence showed the school district did not collect adequate behavioral data. This meant teaching staff and related service personnel did not have the information they needed to determine which behavioral interventions are effective and which were not. There is no baseline behavioral data to work from. Without collecting antecedent and consequence data there is no clear understanding of how to shape and guide Student's behavior. The evidence demonstrates that Student's behavior has an impact on Student's ability to learn and access the educational environment.

While it is certainly to the credit of the \*\*\* teachers to undertake some behavioral data collection at their own initiative it is reasonable to conclude from the evidence they need the support and guidance of a behavioral specialist to further refine those efforts in a way that is not unduly burdensome but also results in the collection of accurate behavioral data. The evidence also showed Student would benefit from a Behavior Intervention Plan designed on the basis of a sound and comprehensive behavioral data collection system. That feature is missing from Student's program.

A Behavior Intervention Plan could have included an intervention protocol – including specifically how school staff were to address escalation of maladaptive behaviors. A specific protocol that both school staff and parents could understand -- implemented in a way that did not impose a medical risk to Student -- would benefit Student, strengthen collaboration between school and home, and ensure consistency across all settings. There is also evidence that in-home training and parent training were never discussed at ARD meetings. Given Student's need for consistency in terms of behavioral and instructional approaches it makes sense for the school district to conduct in-home and parent training assessments and collaborate with Student's parents about how those services might support what Student is learning at school.

ESY: The evidence also showed that consideration of ESY services was summarily dismissed at ARD meetings and there was no real data to support those decisions. In Texas the need for ESY is based on documentation that shows, in one or more critical areas addressed in the student's IEP, that the student *exhibits or may reasonably be expected to exhibit* severe or substantial regression that cannot be recouped *or* that the student *has been or will be unable to maintain* one or more acquired critical skills in the absence of ESY services. *19 Tex. Admin. Code § 89.1065(emphasis added)*. The failure to compile or review the requisite documentation in order to make an appropriate decision about ESY services shows this aspect of Student's program was not individualized on the basis of assessment as the IDEA requires. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., supra*.

Hearing, Additional Visual, and Cognitive Assessment: There is also evidence Student needs a hearing assessment and an assessment to determine whether Student has any blind spots in Student's visual field. The results of those assessments may have an impact on how instructional material should be presented to Student so Student can process it effectively. Furthermore, Student needs a cognitive assessment to better identify Student's instructional modalities in order to design lessons and educational activities that work around Student's neurological deficits and utilize the cognitive skills Student has. The independent evaluator needs an opportunity to complete that portion of the IEE. It is unfortunate there was apparently a miscommunication or misunderstanding between the evaluator and the \*\*\* teacher in scheduling that portion of the IEE.

#### *Positive Academic and Non-Academic Benefit*

Again the evidence with regard to this factor is also somewhat mixed. While there is certainly evidence that Student made some progress both academically and behaviorally the evidence also showed that the progress was

fairly incremental. The IDEA requires that the student's benefit from the educational program must be meaningful and more than simply "de minimis." *Polk v. Cent. Susquehanna Int. Unit 16*, 853 F. 2d 171, 180, 182 (3d Cir. 1988). The educational program must be likely to produce progress and not merely trivial advancement. *Houston Ind. Sch. Dist. v. VP*, 582 F. 3d at 583. It is difficult to determine whether Student's progress was meaningful enough since there is a lack of adequate behavioral data and a current cognitive assessment by which Student's progress can be measured. Therefore I conclude that while Student did demonstrate some progress Petitioner produced sufficient evidence to meet Petitioner's burden of questioning whether that progress was sufficiently meaningful. *Id.*

### Student and Parental Procedural Rights

The evidence showed Notice of Procedural Rights was provided to Student's mother, that the requisite members of the ARD convened each time and that Student's mother was actively involved in Student's education. There is some evidence that the school district has been inconsistent with regard to providing IEP progress reports. For the most part the school district provided IEP progress reports along with the six week report cards as stated in Student's IEP. There is also evidence that general education students received progress "notes" every three weeks and that Student did not.

However, the IDEA only requires that the IEP include a description of when periodic reports on a student's progress towards meeting IEP annual goals will be provided. The IDEA permits the use of quarterly or other periodic reports concurrent with the issuance of report cards. 34 C.F.R. § 300.320 (a) (3) (ii). The evidence showed that related service personnel either issued their own six week progress reports or shared Student's progress with the \*\*\* teacher who included their feedback in her own six week report. Since the evidence shows Student's progress towards meeting annual IEP goals was provided concurrent with the six week report cards as required by the IEP I find no violation of procedural rights in that regard. *Id.*

There is some evidence that Student's parents were unaware that school staff were using isolation, especially by the aide in the \*\*\*, to cope with Student's maladaptive behaviors. As discussed infra this was a result of the failure to design a BIP with a clear intervention protocol and not a procedural violation.

### Bullying, Harassment, Retaliation

There was some evidence that Student was the victim of \*\*\* during the relevant time period. However, those actions do not rise to the level of bullying or harassment to constitute a denial of a free, appropriate public education. *See, T.K. v. New York City Dept. of Educ.*, 779 F. Supp 2d 289 (D.C. N.Y. 2011). While certainly upsetting school staff took reasonable steps to minimize the risk to Student \*\*\*.

There is evidence to conclude that the relationship between the staff at \*\*\* School No. 2 and Student's parents deteriorated by the end of the 2013-14 school year and after \*\*\* incident at the beginning of the current school year. Feelings were high on both sides. Negative comments were made by both parties towards one another that eventually came to light as a result of this litigation. However, I find insufficient evidence to conclude that either Student or Student's parents were targets of any retaliation by the school district. Even so, claims of retaliation are not proper claims under the IDEA. *See, 34 C.F.R. § 300.507.*

### Specific Findings Requested by the Parties

In Texas either or both parties may request specific findings of fact be included in the Decision of the Hearing Officer with regard to the following:

- Whether the parent or the school district unreasonably protracted the final resolution of the issues in controversy in the hearing; and,
- Whether the parent's attorney provided the school district the appropriate information in the hearing request in accordance with the federal regulation at 34 C.F.R. § 300.508 (b). *19 Tex. Admin. Code § 89.1185 (m) (1) (2)*.

There was insufficient evidence to conclude that either party or their lawyers unreasonably protracted the final resolution of the issues in this case. A review of the procedural history of this case shows the parties submitted pleadings in a timely manner, worked cooperatively and collaboratively together to conduct and complete discovery, waived the Resolution Session and attempted mediation (as the law encourages them to do), notified the hearing officer as soon as it was clear mediation was not successful, reached agreements on scheduling the case for hearing, proceeded to hearing as scheduled, and, submitted written closing briefs in a timely manner.

Furthermore, there is insufficient evidence to support a finding that Petitioner's IDEA claims were frivolous, unreasonable, groundless or filed in bad faith or for an improper purpose. Student's parents were legitimately concerned about whether Student was receiving the requisite educational benefit during Student's placement at \*\*\* School No. 2. They exercised their lawful rights under the IDEA to request a due process hearing to resolve that question. *34 C.F.R. §§ 300.507, 300.508; 19 Tex. Admin. Code § 89.1151 (a)*. Therefore, I decline to make the specific findings requested by the parties in this regard.

### Conclusions of Law

1. Petitioner met Petitioner's burden of proving the school district failed to provide Student with a free, appropriate public education within the meaning of the IDEA to the extent that Student's educational program was not sufficiently individualized based on assessment or evaluation, lacked key components in meeting Student's complex needs, and was not sufficiently meaningful. *Schaffer v. Weast, 546 U.S. 49, 62 (2005); Houston Ind. Sch. Dist. v. VP, 582 F. 3d 576, 583(5<sup>th</sup> Cir. 2009) cert. denied, 559 U.S. 1007(2010); Teague Ind. Sch. Dist. v. Todd L., 999 F. 2d 127, 131 (5<sup>th</sup> Cir. 1993); Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5<sup>th</sup> Cir. 1997); Richardson Ind. Sch. Dist. v. Michael Z., 580 F. 3d, 286, 293 (5<sup>th</sup> Cir. 2009).*
2. Petitioner did not meet Petitioner's burden of proving the school district violated the procedural rights of Student or Student's parents within the meaning of the IDEA. *Schaffer v. Weast, 546 U.S. at 62; 34 C.F.R. § 300.513(a)*.

### **ORDERS**

Based upon the foregoing findings of fact and conclusions of law it is therefore **ORDERED** that Petitioner's requests for relief are hereby **GRANTED IN PART AND DENIED IN PART AS FOLLOWS**:

1. The school district shall make arrangements for Dr. \*\*\* (or her designee and subject to Dr. \*\*\*'s availability or that of her designee) to: (i) return to the school district and complete the cognitive assessment portion of the IEE; and, (ii) confer with the school district's Vision Specialist about conducting an assessment to determine whether Student has scotomas; the school district shall initiate communications with Dr. \*\*\* (or her designee) to schedule the return of Dr. \*\*\* (or her designee) for

these purposes within 5 school days of the date of this Decision;

2. The school district and Dr. \*\*\* (or her designee) shall work cooperatively together to complete the cognitive assessment and confer with the Vision Specialist so that the cognitive and additional visual assessment can be completed and shared at an ARD meeting to be conducted within 30 school days of the date of this Decision or by any other date mutually agreed upon by the parties;
3. The school district shall make arrangements for a behavior specialist chosen by the school district to: (i) review the way behavioral data is currently being collected; (ii) to assist the teachers and instructional staff in improving the collection of behavioral data to establish baseline behavioral data and to include identification of antecedent and consequence behavior; (iii) to make recommendations to an ARD committee on the design of a Behavior Intervention Plan for implementation as a component of Student's educational program; and, (iv) to provide training to all instructional staff, related service personnel and campus administrators on the data collection system and the BIP within 5 school days of the ARD meeting;
4. The consultation by the behavior specialist with the instructional staff and implementation of the redesigned behavioral data collection system shall be completed no later than 15 school days from the date of this Decision;
5. The design of the BIP shall be completed and proposed at an ARD meeting to be conducted within 30 school days of the date of this Decision or by any other date mutually agreed upon by the parties;
6. The school district shall conduct the following additional assessments and be prepared to share the results of those assessments by the date of the ARD meeting to be conducted within 30 school days of the date of this Decision or by any other date mutually agreed upon by the parties:
  - a. A hearing assessment (conducted by an outside specialist if needed);
  - b. A sensory integration assessment (conducted by the school district's occupational therapist or an examiner chosen by the school district);
  - c. An Adaptive PE assessment (conducted by an examiner chosen by the school district);
  - d. A vision assessment to determine whether Student has scotomas by the school district's Vision Specialist or by another professional recommended by the school district's Vision Specialist;
  - e. An Assistive Technology assessment by an examiner chosen by the school district; and,
  - f. In-home training and parent training assessments by an examiner chosen by the school district;
7. Student's IEP shall be reviewed and revised to include a BIP and further revised as needed based upon the results and recommendations of the additional assessments required by these Orders presented to an ARD to be scheduled within 30 school days of the date of this Decision or by any other date mutually agreed upon by the parties;
8. Student's need for ESY for the summer of 2015 shall be thoroughly discussed at Student's next annual ARD as scheduled by mutual agreement of the parties and based upon documentation compiled by the school district that addresses the regulatory criteria noted in this Decision related to ESY services;
9. The school district shall provide training to all aides who work with Student on Student's current IEP, including a review of the IEP goals and objectives, within 5 school days of the date of this Decision;
10. The school district shall provide updated training to all aides who work with Student on any changes, revisions or additional components made to Student's IEP at any and all upcoming ARD meetings within 5 school days of those ARD meetings;

11. The school district shall conduct updated and formal OT, PT and music therapy evaluations, by examiners chosen by the school district, and be prepared to share the results and recommendations of those evaluations at Student's next annual ARD as scheduled by mutual agreement of the parties.

**All other relief not specifically stated herein is DENIED.**

**SIGNED the 20th day of February 2015**

**/s/ Ann Vevier Lockwood**

Ann Vevier Lockwood

Special Education Hearing Officer

#### **NOTICE TO THE PARTIES**

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. *34 C.F.R. § 300.516; 19 Tex. Admin. Code Sec. 89.1185 (n); Tex. Gov't Code, Sec. 2001.144(a) (b).*

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

**STUDENT,  
bnf Parent and Parent,  
Petitioner,**

§  
§  
§  
§  
§  
§  
§

v.

**DOCKET NO. 028-SE-0914**

**CANYON INDEPENDENT  
SCHOOL DISTRICT,  
Respondent.**

**SYNOPSIS**

**ISSUE:**

Whether school district failed to provide FAPE within the least restrictive environment to \*\*\* school student with OHI, VI, and SI, significant medical history including \*\*\* and subsequent \*\*\*, and complex academic and behavioral needs.

**HELD:**

**For the student in part and the school district in part.**

Student met burden of proving school district failed to provide a FAPE to extent Student's educational program did not meet two of the four factors analysis of *Michael F.*:

- (1) The IEP was not sufficiently individualized on the basis of assessment or evaluation because the school district failed to conduct a number of appropriate assessments including: three year FIE re-evaluation [resorting to use of a REED when school ran out of time to meet three-year re-evaluation deadline] AT, Adaptive PE, hearing, additional visual assessment, sensory integration, adequate behavioral assessment, updated formal OT, PT and music therapy assessments, and parent training and in-home training assessments;
- (2) The IEP lacked key components in meeting Student's complex needs (no BIP, failure to adequately consider or document Student's needs for ESY); and,
- (3) Although Student made some academic and behavioral progress it was fairly incremental and therefore not sufficiently meaningful.

School district provided special education services to Student in coordinated and collaborative manner by key stakeholders. Program delivered in LRE with structure and specialized instruction in self contained special education classroom Student needed with appropriate amount of interaction with general education peers in music and PE for 60 minutes each day, and 15 minutes in general education classroom at the end of each day. Student provided with 1:1 support throughout school day. Level of activity in Student's special education classroom needs to be monitored and

considered in designing instruction for Student.

**20 U.S.C. § 1401 (9); 34 CFR §§ 300.17, 300.114**

**ISSUE:**

Whether school district failed to provide student with FAPE due to alleged violations of Student and parental procedural rights.

**HELD:**

**For the school district.**

School district provided timely reports on Student's progress towards meeting IEP goals and objectives under the terms stated in Student's IEP and in compliance with IDEA regulations. Student's mother received Notice of Procedural Rights and was active participant in Student's education and educational decision-making. Failure to inform parents of the use of isolation as a behavioral intervention not a procedural violation but instead an outcome of school district's failure to design and implement an appropriate BIP.

**34 CFR § 300.320 (a) (3) (ii).**

**ISSUE:**

Whether school district failed to protect student and parents from bullying, harassment or retaliation.

**HELD:**

**For the school district.**

School district took reasonable steps to protect student from \*\*\*. Student did not meet burden of proving those actions rose to level of bullying or harassment to constitute denial of FAPE. Relationship between home and school that deteriorated over parental safety concerns for student led to negative feelings and comments on both sides that came to light as result of litigation but do not prove retaliation by the school district. Hearing officer in special education IDEA hearing does not have jurisdiction over retaliation claims.

**34 CFR §§ 300.17, 300.507**