

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

**STUDENT,
bnf PARENT & PARENT,
Petitioner,**

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v.

DOCKET NO. 322-SE-0615

**DESOTO INDEPENDENT
SCHOOL DISTRICT,
Respondent.**

DECISION OF THE HEARING OFFICER

Introduction

Petitioner, STUDENT bnf PARENT and PARENT (“Petitioner” or “the Student”) brings this action against the Respondent DeSoto Independent School District (“Respondent,” or “the school district”) under the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. § 1401 et. seq. (IDEA) and its implementing state and federal regulations.

The fundamental issues in this case are whether the school district provided Student with a free, appropriate public education (FAPE), whether placement in a self-contained special education classroom was the least restrictive environment for Student, and whether the school district violated any student or parental procedural rights under the IDEA.

Party Representatives

Petitioner was represented throughout this litigation by Petitioner’s legal counsel Tommy Ramirez of the Law Office of Tomas Ramirez III. Respondent was represented throughout this litigation by its legal counsel Gigi Maez with the law firm of Walsh, Gallegos, Trevino, Russo & Kyle, P.C.

Resolution Session and Mediation

The parties waived the Resolution Session in writing on July 1, 2015 and agreed to attempt mediation in lieu of the Resolution Session. The parties met in mediation on August 3, 2015 but were not successful in reaching a settlement.

Due Process Hearing

This case was continued once in order to allow the parties an opportunity to attempt settlement through mediation before proceeding with further litigation. The decision due date was extended at the request of parties in order to accommodate the new hearing date and mediation. The decision due date was extended a second time to provide the parties with an opportunity to submit post-hearing briefs with time for the hearing officer to review and consider the briefs in preparing the Decision.

The due process hearing was conducted on September 9-10, 2015. Petitioner continued to be represented by Petitioner's attorney Tommy Ramirez, assisted at the hearing by parent advocate Melanie Watson. Student's parents PARENT and PARENT also attended the hearing. Respondent continued to be represented by its attorney Gigi Maez. Dr. ***, Assistant Superintendent for Operations and Compliance, also attended the hearing as the school district's party representative. The hearing was recorded and transcribed by a certified court reporter. The decision of the hearing officer was due November 9, 2015 at school district request to allow filing and consideration by the hearing officer of post-hearing briefs.

Issues

The issues raised by Petitioner in this case are:

1. Whether the school district failed to provide Student with a free, appropriate public education (FAPE) within the meaning of the Individuals with Disabilities Education Act (IDEA) with the one year statute of limitations period as applied in Texas; specifically Student contends the following:
 - The Individualized Education Plan (IEP) was designed without current medical information for Student's physician;
 - The IEP goals and objectives are not measurable nor has Student mastered any of the goals and objectives;
 - The school district *** leaving Student without an adequate amount of instruction;
 - The school district failed to provide Student with homebound services to supplement Student's ***;
 - The school district failed to assess Student's needs for Assistive Technology (AT) services;
 - The school district failed to design appropriate IEP goals for the Extended School Year (ESY) program for the summer of 2015;
2. Whether the school district's placement of Student in a self-contained special education classroom provides Student with a FAPE in the least restrictive environment (LRE) within the meaning of the IDEA or whether Student needs a private placement to receive a FAPE under the IDEA; including the following specific allegations:
 - The self contained placement lacks opportunity for social time with peers;
 - The self contained placement does not provide opportunities for Student to go to lunch, recess, PE, *** or art classes with peers – in sum – there is virtually no opportunity for Student to learn or socialize with peers in the general education setting denying Student with a social, non-academic educational benefit;
3. Whether the school district violated any student or parental procedural rights under the IDEA; including specifically the following sub-issues:
 - Whether the Admission, Review & Dismissal Committee (ARD) meeting on ***, 2015 was

- convened without notice or invitation to Student's parents;
 - Whether the school district failed to consult with Student's parents in making the decision to ***;
 - Whether the school district made a unilateral decision to *** without parental input;
 - Whether the school district refuses to revisit Student's IEP;
 - Whether the school district failed to provide Student's parents with the requisite Notice of Procedural Safeguards; and,
 - Whether the school district improperly classified Student as a student with Other Health Impairment (OHI) without securing the requisite written confirmation of OHI status by Student's physician;
 - Whether the school district failed to provide Student's parents with requested educational records in a timely manner; and,
4. Whether the school district violated Student's rights under the following: Section 504 of the Rehabilitation Act of 1974; the Americans with Disabilities Act; the Family Educational Rights Privacy Act; the No Child Left Behind Act; Section 1983 and Title VI of the Civil Rights Act of 1964; and the Technology Related Assistance for Individuals with Disabilities Act and Student is entitled to attorney's fees under the IDEA, Section 504, Section 505, the Civil Rights Attorney's Fee Award Act of 1976; Section 1983, Section 1927 and Section 794a(b) of the Civil Rights Act of 1871.

The school district raised the following additional legal issues for decision in this case:

1. Whether any of Student's claims should be limited by the one year statute of limitations rules as applied in Texas;
2. Whether Student's claims and/or causes of action arising under any law other than the IDEA should be dismissed as outside the hearing officer's jurisdiction;
3. Whether Student's request for attorney's fees and costs are outside the hearing officer's authority under the IDEA; and,
4. Whether procedural errors, if any, impeded Student's right to a FAPE, caused a deprivation of educational benefit or significantly impeded the parents' opportunity to participate in the decision-making process.

Requested Relief

Petitioner requests the following items of relief:

1. The school district fund an Independent Educational Evaluation (IEE) in all areas of suspected disability;
2. The school district convene an ARD and revise and/or design a new IEP with measureable

goals and objectives addressing all areas of need, including an ESY program with measurable goals and objectives;

3. The school district fund a private placement for Student for the upcoming 2015-2016 school year;
4. The school district reimburse Student's parents for the cost of private therapies and transportation costs associated with those therapies;
5. The school district provide Student with compensatory services in all areas where the school district denied Student a FAPE; and,
6. Reasonable and necessary attorney's fees and costs.

Findings of Fact

Background

1. Student has ***. The ***. Student ***. Student requires daily support in ***. Petitioner's Exhibit 1, p. 2 (referred to hereafter as "P. Ex. __, p. ____")(P. Ex. 1, p. 4) (P. Ex. 4, pp. 4, 6, 8, 11).
2. Student's *** is severe. (Transcript Volume I, pp. 97-98)(referred to hereafter as "Tr. Vol. __. p. ____"). Student requires ***. (Tr. Vol. I, p. 100). Student's medical needs are followed by both Student's long time pediatrician and a neurologist. (Tr. Vol. I, pp. 94, 100, 102). Student's medical impairments impact the following at school: ***; and, difficulty performing activities in a general education classroom such as ***. (Tr. Vol. I, pp. 98-99).
3. Student needs daily physical and occupational therapy (PT) (OT) to avoid *** – without daily therapy Student's ***. Student's ***. Student needs daily *** to maintain ***. (Tr. Vol. I. p. 95). In *** 2014 Student's physician prescribed therapy for a minimum of ***. (P. Ex. 1, pp. 2-3) (Tr. Vol. I, pp. 94-96). The purpose of the prescription was to ensure insurance and/or *** coverage for the therapies as a medical service. (Tr. Vol. I, p. 97). Student also needs the therapies to learn how to communicate, socialize, and learn life skills. (Tr. Vol. I, p. 103).

4. Student attended *** for children with disabilities beginning ***. (Respondent's Exhibit 1, p. 1)(referred to hereafter as "R. Ex. __, p. ____"). The *** evaluated Student at age ***, ***, and at ***. The *** evaluation included *** -- a standardized assessment given to children ages *** of age. (R. Ex. 1, p. 1) (Tr. Vol. I, p. 332). Age equivalent scores were obtained for Student in the following domains: personal-social, adaptive, gross and fine motor, receptive and expressive communication, and cognitive. (R. Ex. 1). Student made very slow

and incremental progress in all areas. (R. Ex. 1, p. 2).

5. From *** (***). Student's overall age equivalent scores in the communication domain were ***. In the personal-social domain Student's age equivalent scores were ***. In the adaptive domain Student's age equivalent scores were ***. Student's age equivalent scores overall in the motor domain were *** with some progress in gross motor skills and regression in fine motor. Student's age equivalent scores in the cognitive domain were ***. Student's overall *** age equivalent scores were ***. (R. Ex. 1, p. 2). (Tr. Vol. I, p. 333). The rate of progress measured by the *** evaluation is consistent with the severity of Student's multiple disabilities. (Tr. Vol. I, p. 334).

2010 Full Individual Evaluation (FIE)

6. The school district conducted a Full Individual Evaluation (FIE) of Student in 2010 when Student's parents ***. The 2010 FIE included information about Student's various medical conditions. Student's primary means of communication were identified as ***. (R. Ex. 2, pp. 1, 4, 6-8, 17) (Tr. Vol. II, pp. 645-646). A report summarizing the *** evaluations was presented to the school district by the parent. (R. Ex. 1)(R. Ex. 2) (Tr. Vol. I, pp. 331-332).
7. Student was *** years old at the time of the 2010 FIE. Student's overall cognitive function was measured at the level of *** developmentally. (R. Ex. 2, p. 11) (Tr. Vol. I, pp. 334-335). Overall, the scores identified Student as a student with a severe cognitive delay and profound intellectual disability. (Tr. Vol. I, p. 335). Student's adaptive behavior scores fell in the extremely low range. (R. Ex. 2, p. 12) (Tr. Vol. I, pp. 335-336).
8. Information from the *** stated in the *** evaluation was considered as a component of the school district's 2010 FIE. A Developmental Profile – provided to the parent – was also a component of the school district's 2010 evaluation. (Tr. Vol. I, p. 334). The school district's 2010 cognitive assessment confirmed Student exhibited a profound intellectual disability. (R. Ex. 2, p. 11) (Tr. Vol. I, p. 335). The Adaptive Behavior Assessment (ABAS-II) -- a parent rating scale -- was also utilized in the school district's evaluation. The scale confirmed Student's adaptive behavior skills were extremely low. (R. Ex. 2, p. 19) (Tr. Vol. I, p. 336). The 2010 assessment confirmed Student fell within the severe range of adaptive behavior. (R. Ex. 2, p. 12).
9. The school district's 2010 FIE also included determination of Student's eligibility for special education as a student with ***/Other Health Impairment (***/OHI). Student's physician completed the Physician's Information Report and confirmed Student had a severe *** impairment which adversely affects educational performance. The physician noted Student was *** in the classroom ***. The physician also noted Student needed PT, OT, and speech therapy. (Joint Exhibit 14)(referred to hereafter as "J. Ex. __, p. __")(Tr. Vol. I, p. 338). Additional information from the physician regarding Student's medical history and condition was included in the 2010 ***/OHI form. (J. Ex. 14) (Tr. Vol. I, p. 339).

10. The school district also conducted a PT evaluation in 2010. (R. Ex. 3, p. 1). The PT evaluation noted Student's *** results in severe *** – all of which pose a significant challenge to Student in ***. (Tr. Vol. II, pp. 685-686). The PT evaluation confirmed Student's need for PT. (Tr. Vol. II, p. 692). The school district also conducted an OT evaluation in 2010. Student was functioning at the level of *** in terms of fine and gross motor skills. (R. Ex. 4, pp. 1-2) (Tr. Vol. II, pp. 801-802).

Student's Enrollment in Public School – Program and Placement

11. Student ***. (Tr. Vol. I, pp. 246, 331). Under the 2010 FIE Student was identified as eligible for special education as a student with Other Health Impairment (OHI), *** (***), an Intellectual Disability (ID), and a Speech Impairment (SI). (R. Ex. 2). Upon enrollment Student's parents requested a *** so Student could ***. (Tr. Vol. I, pp. 246-247). Student was placed in *** Classroom, a self contained special education classroom staffed by a special education teacher and two paraprofessionals. (Tr. Vol. I, p. 339). Student's special education classroom teacher for the past *** school years has 31 years of experience as a special education teacher. (Tr. Vol. II, pp. 501-503).
12. *** Classroom utilized *** curriculum with Student. The *** curriculum is a research-based curriculum approved by the Texas Education Agency. (Tr. Vol. II, pp. 546-547, 758-759, 764-765). The classroom teacher's lesson plans included *** as recommended by the school district's 2010 FIE. (R. Ex. 11, pp. 1-31) (Tr. Vol. II, pp. 546-553).

2013 FIE

13. The school district conducted an updated FIE in *** 2013. (J. Ex. 1). Student's scores confirmed a severe delay in all domains assessed. (J. Ex. 1, p. 11) (Tr. Vol. I, p. 339). By 2013 Student had been in the school district for *** in *** Classroom. (J. Ex. 1)(Tr. Vol. I, p. 339). The 2013 FIE confirmed Student's continued eligibility as a student with OHI, ***, ID, and SI. (J. Ex. 1, pp. 1-16). Student's language skills were commensurate with those of ***. (Tr. Vol. I, p. 648). The FIE noted Student was unable to complete most academic tasks due to the severity of Student's physical, cognitive, and language deficits. (J. Ex. 1, pp. 6, 11).
14. The 2013 FIE included an OHI form but it was not signed by a physician. (J. Ex.1, p. 14). However, there is no dispute that Student meets criteria as a student with OHI, ***, ID and SI. (Tr. Vol. I, pp. 97-99, 100). The 2013 FIE did not include vision or hearing screenings but noted Student's hearing and vision were not within normal limits based on information gathered from the physician's clinical notes and other medical records. (J. Ex. 1, p. 8). The 2013 FIE included a speech/language evaluation conducted by a Speech Pathologist Intern. (J. Ex. 1, pp. 1, 13, 16)(Tr. Vol. II, pp. 467, 469-470). The Intern was qualified to administer the speech/language evaluation. (Tr. Vol. II, p. 467).
15. The 2013 FIE did not include a formal Adaptive PE evaluation although the FIE report stated Adaptive PE was indicated. (J. Ex.1, p. 8). Nor did the 2013 FIE include a formal AT

evaluation despite Student's need for AT noted in both the 2010 and 2013 FIE reports. (J. Ex. 4, pp. 3, 11-12) (R. Ex. 2, p. 12) (Tr. Vol. II, pp. 464-465).

Private PT, OT and Speech

16. Student received private physical, occupational and speech therapies for many years. These therapies were prescribed by Student's physician for medical reasons. (Petitioner's Exhibit 1)(referred to hereafter as "P. Ex. __, p. __") (Tr. Vol. I, pp. 60, 96-97). Student received private OT beginning in ***, private PT therapy ***, and (***) private speech therapy ***. (P. Ex. 3, p. 1) (P. Ex. 4, pp. 4, 6, 8, 11) (P. Ex. 5). The costs of the private therapies were claimed by Student's parents as medical expenses on their tax return. (Tr. Vol I, p. 245). Private medical insurance covered the private therapies for a period of time but not during the 2014-2015 school year. (Tr. Vol. I, p. 318, 387). Although Student is *** none of Student's private therapy providers are ***. (Tr. Vol. I, pp. 245-246).
17. Student was evaluated for private speech services at *** 2011. At that time Student demonstrated ***. (P. Ex. 5, p. 3). Student demonstrated severe receptive and expressive language delays and limited ***. (P. Ex. 5, p. 4). Private speech therapy is aimed at helping Student communicate with Student's caregivers and teachers with the ultimate goal of ***. Student is making slow, steady progress in private therapy showing improvement in ***. (P. Ex. 1, p. 3) (P. Ex. 4, p. 11).
18. Private PT is physical and rehabilitation medicine aimed at maximization of Student's functional skills. (Tr. Vol. I, pp. 223-224). Student requires time to process commands in private OT and often responds when the therapist is "not looking." At home Student's mother reported steady progress with ***. Student needs to continue to work towards more independence with ***. (P. Ex. 3, p. 3). Medically prescribed PT services were also contemplated for rehabilitation purposes following ***. (Tr. Vol. I, p. 228).
19. Student needs PT and OT services for a minimum of ***. to maximize Student's potential, improve Student's physical capabilities, and prevent ***. The use of adaptive equipment is needed to facilitate appropriate *** throughout the day. (P. Ex. 1) (Tr. Vol. I, pp. 94-96).

*** 2013 ARD

20. An annual Admission, Review & Dismissal Committee (ARD) met on *** 2013 to consider the results of the 2013 FIE. The ARD confirmed Student's continued eligibility for special education services under the eligibility classifications of OHI, ***, ID, and SI. (J. Ex. 4, p. 2). There was no updated OHI form signed by a physician. (J. Ex. 4) (Tr. Vol. I, pp. 342-343). Information from the 2010 Physician's OHI Report was added to the current form by the educational diagnostician. (Tr. Vol. I, p. 343).
21. Student continued to demonstrate a severe intellectual disability, and a severe expressive and receptive language disorder. Student's primary means of communication consists of ***. (J.

Ex. 4 p. 4). The nature and severity of Student's disabilities continued to confirm Student's need for special education instruction and related services in a special education instructional setting. (J. Ex. 4, p. 5). A new IEP was developed at the *** 2013 ARD to be implemented beginning in *** 2014 through *** 2015. (J. Ex. 4).

22. The *** 2013 ARD designed an IEP that included some assistive technology (AT) – including specifically *** and use of *** during classroom and speech therapy instruction. (J. Ex. 4, pp. 3, 11). The ARD did not recommend further AT assessment. (J. Ex. 4, pp. 12, 19). The *** 2013 IEP included classroom goals and objectives that addressed ***, improvement in cognitive skills measured by ***, focusing attention and ***, and ***. (J. Ex. 4, pp. 20-22) (Tr. Vol. II, pp. 503, 508). The overall goal was improvement in cognitive skills as measured by the objectives. (J. Ex. 4, pp. 20-21) (Tr. Vol. II, pp. 504, 508).
23. The annual communication goal was improvement in communication and language skills. (J. Ex. 4, pp. 22-23) (Tr. Vol. II, pp. 649-650). Short terms objectives included working on ***. (J. Ex. 4, p. 23) (Tr. Vol. II, pp. 650, 655). *** were included in the *** 2013 IEP. The IEP confirmed Student required constant supervision throughout the day. The *** included ***. (J. Ex. 4, pp. 14-15).
24. The *** 2013 IEP included PT goals and objectives: working on ***. (J. Ex. 4, p. 24) (Tr. Vol. II, pp. 692, 694). The *** 2013 IEP included OT goals and objectives focused on ***. (J. Ex. 4, p. 25) (Tr. Vol. II, pp. 806, 812).
25. Implementation of the *** 2013 IEP continued to be in *** Classroom *** of participation in the general education setting for ***. Related services included *** sessions of direct OT every ***, *** sessions of direct PT every ***, and, *** sessions of direct speech therapy ***. (J. Ex. 4, p. 8). OT services were reduced from the previous IEP in response to the therapist's concerns over the progression of Student's ***. (Tr. Vol. II, pp. 812, 814). Student's mother participated in the *** 2013 ARD and agreed with the ARD decisions. (J. Ex. 4, p. 19).

Educational Progress

26. Student's multiple disabilities significantly impact Student's rate of progress in all areas. From 2010-2013 Student made incremental progress in *** Classroom consistent with Student's historical rate of progress prior to enrollment in the school district. (J. Ex. 1, p. 11) (R. Ex. 1, p. 2) (Tr. Vol. I, pp. 340-341) (Tr. Vol. II, p. 556). Student's rate of progress while enrolled in the school district is consistent with Student's historical rate of progress as measured by the 2010 *** assessment. (Tr. Vol. I, p. 334).
27. It takes years for Student to demonstrate growth. (Tr. Vol. II, pp. 555-556). Though slow and incremental Student demonstrated some progress over time by moving from "with assistance" to "independent" on some tasks during the 2014-2015 school year. (J. Ex. 12, pp. 1-2) (R. Ex. 7, pp. 1-18) (Tr. Vol. II, pp. 559-560). Student's overall level of functioning is that of ***

with gaps in skills. (Tr. Vol. II, pp. 561-562).

28. In 2010 Student's adaptive behavior was assessed at an age equivalent of *** – in 2013 the age equivalent score was of *** – ***. This is consistent with Student's historical rate of growth. (J. Ex. 1, p. 11) (R. Ex. 1, p. 2) (Tr. Vol. I, pp. 340-341). In 2010 Student's cognitive skills were measured at an age equivalent of *** – by 2013 cognitive skills were measured at an age equivalent of ***. (J. Ex. 1, p. 11) (R. Ex. 1, p. 2) (Tr. Vol. I, p. 341). Student *** in the motor domain although virtually no growth in the social/emotional domain. (Tr. Vol. I, p. 341). These growth rates are consistent with the growth rate assessed by the ***. (R. Ex. 1) (Tr. Vol. I, p. 342).
29. Student demonstrated slow and steady progress in communication skills at a rate commensurate with the severity of Student's disabilities during the 2014-2015 school year. (J. Ex. 2, p. 3) (Tr. Vol. II, pp. 663, 665-666). Student made some progress on Student's PT goals and objectives. (J. Ex. 12, pp. 6-8) (Tr. Vol. II, pp. 705-707). Student's medical conditions significantly impact Student's ability to master OT goals and objectives. Therefore the OT services focused on maintenance of skills. (Tr. Vol. II, pp. 783-784). Student demonstrated growth of *** in motor skills which is commensurate with the severity of Student's needs and multiple disabilities. (J. Ex. 12, p. 14) (Tr. Vol. II, pp. 787-801, 819-823).

Inclusion Opportunities

30. The 2013 ARD document noted opportunities for Student to participate in nonacademic and extracurricular activities available to students without disabilities including lunch, recess, transportation, health services, recreational services, assemblies, and other school sponsored activities. (J. Ex. 4, p. 5). In fact Student's only real opportunity to participate in activities with non-disabled peers was in *** class and ***. (Tr. Vol. II, pp. 587-588, 614-615). During the relevant time period Student did not *** 2013 ARD document. ***. (J. Ex. 4, p. 5) (Tr. Vol. I, pp. 84-85) (Tr. Vol. II, pp. 587-588, 614-615).
31. Subsequent ARD Committees in *** 2015 confirmed Student would have the opportunity to participate in all nonacademic, extracurricular and "other activities" with non-disabled peers. (J. Ex. 6, p. 18)(J. Ex. 7, p. 13). The *** 2015 ARD meetings did not discuss inclusion opportunities in depth. (J. Ex. 6) (J. Ex. 7, p. 17). Student's general education inclusion *** class was on ***. (Tr. Vol. II, p. 510). Student attended *** therapies on *** on those days. Therefore Student missed most of the *** classes. When Student was in school on a *** Student attended the *** class. (R. Ex. 7, pp. 1-18) (Tr. Vol. I, pp. 147-148) (Tr. Vol. II, pp. 510-511, 557). Student ***. Student's mother ***. Student is capable of ***. (P. Ex. 14)(Tr. Vol. II, p. 54)

Intermittent Homebound Services 2013-2014

32. At the *** 2013 ARD the school district agreed to provide intermittent homebound services for Student whenever Student was absent from school for multiple days. (J. Ex. 4, p. 11).

The intermittent homebound services did not require medical information from a physician – only parental notice to the attendance clerk whenever Student was absent. (J. Ex. 4, p. 11) (Tr. Vol. II, p. 421).

Summer 2014 ESY

33. On *** 2014 an IEP amendment to the *** 2013 IEP was executed with the agreement of Student’s mother and the school district. The purpose of the IEP amendment was to verify Extended School Year Services (ESY) for summer 2014. *** was offered but Student’s mother preferred *** herself. (J. Ex. 5) (Tr. Vol. I., pp. 343-344).

Annual ARD 2014-2015

34. The school district began attempts to schedule Student’s annual ARD due ***, 2014 beginning on ***, 2014. The school district made multiple attempts thereafter to schedule the annual ARD. (R. Ex. 6, pp. 35-36) (Tr. Vol. I., pp. 344-346, 347). The school district initially proposed ARD dates ahead of the ***, 2014 deadline but those meetings were rescheduled at parental request. (J. Ex. 6, pp. 35-36) (Tr. Vol. I., pp. 344-345). Notice of the annual ARD meeting was sent again on ***, 2014. The ARD Notice gave Student’s mother three options for an ARD meeting in *** 2015. The parent indicated her choice of ***, 2015 and returned the form to the school district. (J. Ex. 6, p.36).
35. A subsequent ARD Notice sent home in Student’s backpack proposed ***, 2015 for the ARD – a date that conflicted with a doctor’s appointment. (J. Ex. 6, pp. 37, 39). However, the educational diagnostician – who had the responsibility for communicating with Student’s mother to schedule the ARD – sent written notice confirming the *** ARD date and left a voice mail message on the parent’s phone also confirming the *** ARD date. (J. Ex. 6, p. 36) (Tr. Vol. I., pp. 345-346, 347-348). The diagnostician also called Student’s mother 30 minutes prior to the beginning of the *** ARD and left another voice mail. (Tr. Vol. I., p. 348). School staff waited a few minutes and then proceeded with the ARD on ***, 2015 without parental participation. (P. Ex. 10, p. 3) (Tr. Vol. I., pp. 348-349).
36. Student’s IEP was updated based on the results of the Brigance Inventory - a criterion referenced assessment tool – to establish Student’s present levels of performance at the ***, 2015 ARD. (J. Ex. 6, p. 2) (Tr. Vol. II, p. 518). The new IEP included the use of visual aids, auditory aids, instructional aids, and manipulatives as recommended in the *** 2013 FIE. (J. Ex. 6, p. 8). The educational diagnostician sent copies of the ***, 2015 ARD paperwork home to the parent either that day or the next. (Tr. Vol. I., pp. 349-350). A copy of the Notice of Procedural Safeguards accompanied the ARD paperwork. (J. Ex. 6, p. 33) (Tr. Vol. I., p. 350). The ARD proposed Student’s placement for the 2015-2016 school year *** Life Skills unit. (J. Ex. 7, p. 17).

37. Student ***. ***. Student's mother discussed the *** issues with school district staff on a number of occasions. (Tr. Vol. I., pp. 184-185).
38. The ***, 2015 ARD agreed *** as recommended by the classroom teacher to address ***. (J. Ex. 6, pp. 14, 16) (J. Ex. 7, p. 14) (Tr. Vol. I., pp. 350-351) (Tr. Vol. II, pp. 522-523). Student's ***. (J. Ex. 10, p. 11). The new IEP established *** minutes in special education. (J. Ex. 6, p. 14)(J. Ex. 7, p. 14). *** minutes was for ***, *** minutes for ***, and another *** spent preparing for dismissal. (Tr. Vol. II, pp. 597-598).
39. Student's mother advised school staff Student ***. (J. Ex. 14, p. 5) (Tr. Vol. II, p. 527). The purpose of ***. (J. Ex. 14, p. 5) (Tr. Vol. II, p. 527). The *** ARD contemplated Student would *** were currently interfering with Student's ***. (J. Ex. 6, p. 14) (Tr. Vol. II, pp. 400, 527). As of the date of the due process hearing ***. (Tr. Vol. I., p. 246). *** one of the two paraprofessionals who supported *** Classroom ***. (Tr. Vol. II, pp. 584-585, 599). ***. (Tr. Vol. II, pp. 586-587).

School-Based Related Services

40. The PT goals proposed at the *** ARD were based on Student's present level of functioning and the progression of Student's ***. (J. Ex. 6, p. 27) (Tr. Vol. II, pp. 696, 699). The PT goals were implemented by the educational staff with assistance from the physical therapist. (J. Ex. 6, p. 27). Direct PT services were *** minutes, *** times every six weeks. The services included consult with the teacher and paraprofessional. (J. Ex. 6, p. 14) (J. Ex. 7, p. 14) (Tr. Vol. II, p. 713).
41. The annual PT goal continued to focus on Student's ability to perform in the areas of *** to increase participation in the educational setting at 75% mastery. Daily *** and *** programs were components of the PT IEP. A short term objective included ***. (J. Ex. 6, p. 27) (Tr. Vol. II, pp. 692-693). Certain *** goals were eliminated from the PT IEP because Student ***. (Tr. Vol. II, pp. 696-697).
42. Student's speech IEP was delivered by a certified speech/language pathologist with 16 years experience. The speech/language pathologist supervised a Speech Intern who worked directly with Student. She also consulted with the Intern and the classroom teaching staff about Student's speech/language program. (Tr. Vol. II, pp. 645, 647). The annual speech/language goal focused on improvement in communication skills with measureable, short term objectives related to cause/effect, making choices, and attention to sound. (J. Ex. 6, p. 6).
43. The occupational therapist recommended a reduction in OT until after ***. (J. Ex. 6, p. 17)(Tr. Vol. II, pp. 809-810). The OT IEP also included *** program for ***. The OT IEP included objectives to address facilitation of ***. (J. Ex. 6, p. 30).

44. A *** program was also a component of the OT IEP. Education and training on sensory mediums for school-based activities for Student's teachers, support staff, and parents were also included in the OT IEP. (J. Ex. 6, p. 30). Direct OT services were reduced to *** minutes, *** times every six weeks. (J. Ex. 6, pp. 14, 16). The OT contemplated re-evaluating OT services after ***. (J. Ex. 6, p. 17) (Tr. Vol. II, p. 815).
45. During the 2014-2015 school year the school district's physical therapist became concerned about the *** and discussed those concerns with Student's mother. (Tr. Vol. II, pp. 695-696, 698, 700). School staff observed that ***. (Tr. Vol. II, pp. 528-529).

***, 2015 ARD

46. Following the *** ARD the diagnostician spoke with Student's mother by phone to inform her of the ARD meeting held that day. (Tr. Vol. I, pp. 163-164). The diagnostician, as a result of a directive from the Director of Special Education, proposed another ARD so Student's mother could attend and review the *** ARD deliberations. (Tr. Vol. I, p. 351). Student's mother was distressed the *** ARD proceeded without her. (P. Ex. 10, pp. 3-4) (Tr. Vol. I, pp. 162-168).
47. A follow up ARD convened on ***, 2015. Student's mother attended this ARD. The *** ARD reviewed the IEP and generally covered all the topics discussed in the *** ARD. (J. Ex. 7) (Tr. Vol. I, pp. 345, 357). The school district did not implement the IEP proposed at the *** ARD until after the *** ARD when Student's mother agreed to the proposed IEP revisions. (J. Ex. 7, p. 19) (Tr. Vol. I, p. 360).
48. At the *** ARD the Committee revised the language goals to include *** at parental request. (J. Ex. 7, p. 6) (Tr. Vol. II, pp. 401, 659-660). The *** ARD discussed the proposal ***. Student's mother expressed concerns about how Student's IEP could be implemented under ***. In response *** was prepared and shared at the ARD. (J. Ex. 7, p. 17) (J. Ex. 10, p. 1) (Tr. Vol. I, p. 358) (Tr. Vol. II, pp. 525-526).
49. The rationale for the reduction in OT services was also explained to Student's mother at the *** ARD. (J. Ex. 7, p. 17). In response to parental request the *** ARD added a goal for Student to ***. (J. Ex. 7, p. 27) (Tr. Vol. II, p. 701).

Revised IEP for 2015-2016

50. The IEP designed at the *** ARD and implemented thereafter included goals and short term objectives in the areas of reading, math, speech therapy/language and daily living skills. There were four annual goals: one for each area. In reading the annual goal was for Student to *** measured by teacher observation and data collection. These goals would be accomplished with and without assistance. The IEP did not define the specific nature of the "assistance" or explain how the differences between "with" or "without" would be identified. (J. Ex. 7, p. 4).

51. For math the *** IEP annual goal was for Student *** measured by teacher observation and data collection. The short term objectives required Student to ***. Another short term objective required the ***. (J. Ex. 7, p. 5).
52. An annual speech therapy/language goal was also designed at the *** ARD. The goal was for Student to improve communication/language skills in at least 2 out of 4 trials given visual cues, visual prompts, and verbal cues. The short term objectives contemplated Student's *** to demonstrate an understanding of ***. (J. Ex. 7, p. 6).
53. The annual goal for Daily Living Skills was for Student to ***. ***. The short term objective was for Student to *** measured by teacher observation and data collection. (J. Ex. 7, p. 7) (Tr. Vol. I, p. 260).
54. At home Student *** minimal assistance and at times independently. However Student *** independently. Student ***. Although Student is *** Student is still dependent ***. Student is able to *** but needs help to ***. (P. Ex. 3, p. 2). The Daily Living Skill IEP did not include a goal to work on independent ***. (J. Ex. 7).

Homebound Services and Absence Issues

55. The *** ARD agreed to secure medical information from Student's physician to determine if Student would require homebound services following ***. (Tr. Vol. I, pp. 354-355). Student missed a total of *** days of school during the 2014-2015 school year. (J. Ex. 11, pp. 1-2). These absences included *** absences for attendance at *** therapies ***. (P. Ex. 1, pp. 1-5) (Tr. Vol. I, p. 148) (Tr. Vol. II, pp. 514).
56. Despite these absences school district personnel assured Student's mother that no truancy charges would be filed – even though the school district's attendance software automatically generated truancy warning letters – because the school district viewed the absences as excused for medical reasons. (R. Ex. 12, p. 2) (Tr. Vol. I, pp. 146-147, 240-241) (Tr. Vol. II, p. 816). Nevertheless, Student's mother was concerned about the risk of truancy charges and felt she had no choice but to agree to *** (J. Ex. 9, p. 3) (Tr. Vol. I, pp. 179-180). Even with the implementation of the *** Student still had difficulty some days ***. (R. Ex. 12, pp. 4-11) (Tr. Vol. II, p. 526). When Student *** Student was always *** classroom. (Tr. Vol. II, p. 526).
57. At the *** ARD the diagnostician provided a consent form to Student's mother in order to obtain the physician's orders for homebound services ***. (Tr. Vol. I, p. 356). Following the meeting Student's mother submitted the consent form but it was incomplete. The diagnostician later obtained a corrected consent form from Student's mother and transmitted the form to Student's physician. (Tr. Vol. I, p. 36).
58. The diagnostician contacted the physician's office several times to obtain the physician's order. (Tr. Vol. I, pp. 361, 363). Student's mother would not consent to allow school district

staff to speak directly with the physician. (Tr. Vol. I, p. 117). The physician's order was finally received on ***, 2015. (J. Ex. 4, p. 11) (J. Ex. 9, pp. 11-12).

59. In ***, 2015 Student's mother contacted the classroom teacher with a request for homebound services for the rest of the year. (P. Ex. 10, p. 13) (Tr. Vol. II, p. 851). Although Student often missed school ***, therapies Student was not absent more than *** consecutive days at a time – the trigger under Student's IEP for implementation of intermittent homebound services. (Tr. Vol. I, pp. 161-162) (Tr. Vol. II, p. 514).

*** 2015 ARD

60. On ***, 2015 Student's mother requested another ARD meeting. (J. Ex. 8, p. 11). The diagnostician responded the same day requesting a set of dates from Student's mother and inquiring as to the subject matter to be discussed at the ARD so the school district could properly prepare for the meeting. (J. Ex. 8, pp. 10-11). The school district made at least two more inquiries to identify the subject matter of the ARD as the parties worked to select a mutually agreeable date. (J. Ex. 8, p. 9) (Tr. Vol. I, p. 367). The parties ultimately agreed to convene on ***, 2015. (J. Ex. 8, pp. 18-19).

61. The parties convened an ARD on *** as planned. This time Student's mother was accompanied by a parent advocate. (J. Ex. 8, p. 5). Student's mother expressed a number of concerns previously unknown to the school district and not previously shared with school district staff. (Tr. Vol. II, pp. 532, 535). Student's mother requested reimbursement for the cost of the private therapies although she did not request any revisions to the related service IEP goals and objectives implemented at school. (Tr. Vol. I, pp. 367-368, 369).

62. The classroom teacher explained the curriculum used in *** Classroom and confirmed the physician had not yet provided the written order to confirm Student's need for homebound services. Student's mother also requested an IEE. The school district agreed to the IEE request. (J. Ex. 8, p. 2) (Tr. Vol. I, p. 368). Unfortunately, the parent advocate often interrupted the discussion with questions and comments. School staff felt they could not provide their input and described the ARD meeting as "chaotic" and "intimidating." (P. Ex. 14) (R. 13) (Tr. Vol. I, pp. 365-367) (Tr. Vol. II, pp. 535-536). The ARD was adjourned at school district request but the parties agreed to reconvene within ten days. (J. Ex. 8, p. 2).

*** 2015 ARD

63. The ARD reconvened on ***, 2015. (J. Ex. 9) (R. 14). The classroom teacher shared her data collection related to Student's IEP goals. Student's mother declined to review the proffered data at the ARD. (J. Ex. 9, pp. 14-16) (Tr. Vol. II, pp. 408-409, 539-540). The school district also proposed ESY for the summer of 2015 and a proposed ESY IEP with targeted goals drawn from the current IEP. (J. Ex. 9, pp. 4, 13) (Tr. Vol. II, pp. 407-408, 538-539).

64. By the end of the 2014-15 school year Student showed slow but steady progress with

communicative intent in private speech therapy. (P. Ex. 5, p. 14). Student's mother again requested reimbursement for the cost of the private therapies. (Tr. Vol. I., p. 290)(Tr. Vol. II, pp. 404-406, 537, 663-664, 702-704). Student's mother declined to answer questions from school staff to confirm whether *** the private services. (J. Ex. 9, p. 3).

65. The *** continued to be a topic of discussion. The Educational Regional Service Center advised the school district *** possible so long as Student ***. (P. Ex. 10, p. 1). Student's mother disagreed with ***. (P. Ex. 10, p. 2). Prior Written Notice of the school district's refusal to place Student in a private school or to grant the parental request for reimbursement of private therapies was included in the *** 2015 ARD documents. (J. Ex. 9, p. 8).
66. Student's mother declined to provide consent for school district staff to confer by direct oral communication with the private therapists or to the release of medical data or health history. Student's mother limited the method of consent to emails and production of OT, PT and speech records. (J. Ex. 9, pp. 1-3) (P. Ex. 12, pp. 23-25). Student's mother also requested a private school placement at school district expense at the *** 2015 ARD. At that point Student's parents had not yet identified a private placement. (J. Ex. 9, p. 40)(Tr. Vol. I., p. 242).
67. By the *** ARD the school district had the physician's order confirming Student's need for homebound services during ***. (J. Ex. 9, pp. 4, 11). In order to initiate the homebound services the school district advised Student's mother to email the teacher and diagnostician (and copy the principal) to notify the school of Student's absences and need for homebound services. (J. Ex. 9, p. 4).
68. The *** ARD ended in partial disagreement. The school district agreed to the parental request for IEES in all areas of suspected disability and to provide Student's mother with a list of independent evaluators. (J. Ex. 9, pp., 2, 8). However the school district declined parental requests for reimbursement for the private therapies, related transportation costs, and, private school placement at school district expense. (J. Ex. 9, p. 8). The parent disagreed with the school district's decisions and waived the opportunity to reconvene within ten school days. (J. Ex. 9, p. 4).

Proposed Private School Placement

69. Following the *** 2015 ARD Student's mother visited *** – a private day school for students with moderate to severe developmental disabilities including intellectual disabilities, autism, brain injury, and neurological disorders. (P. Ex. 11) (Tr. Vol. I., p 127). Some students have the same diagnoses and developmental delays as Student. (Tr. Vol. I., p. 130). The student population consists entirely of students with disabilities. (P. Ex. 11). Although Student visited *** and was observed by the staff Student's mother has not yet completed the application process. (Tr. Vol. I., pp. 128-129, 136).

Communications Between Parent and School

70. Student's mother communicated frequently with school district and campus staff during the 2014-2015 school year with questions and concerns about various matters related to Student's education. School district and campus staff responded to those communications. (P. Ex. 10). School staff maintained ongoing communications regarding Student's functioning at school. (R. Ex. 12, p. 1) (Tr. Vol. II, pp. 541-543). IEP progress reports were sent home every six weeks including the fall of 2014. (Tr. Vol. I, pp. 353-354)(Tr. Vol. II, p. 666). The classroom teacher offered a parent-teacher conference to address parental concerns and questions about the daily class schedule. Student's mother did not accept the offer. (P. Ex. 10, p. 14) (Tr. Vol. II, pp. 213-214, 533-534).
71. A daily/weekly communication log identified the IEP goal worked on each day, a spot for teacher/parent communication, information about lunch and snack, what kind of therapy Student received (if any), and *** information. (P. Ex. 13, pp. 72-81). A "Student Daily Report" form was filled out by the teacher noting Student's daily mood/affect, lunch and *** information, teacher comments, a one line description of what Student worked on, school supply requests, a parent signature line, and place for parent comments. (P. Ex. 13). Many of the Student Daily Reports contained very little or no information at all. (P. Ex. 13, pp. 2, 13,18-19, 25-26, 28-29, 32-71).
72. Student's mother ***. (Tr. Vol. I, pp. 82-83). Student's mother had a number of informal conversations with the school district's OT and OT therapists over the progression of Student's ***. (Tr. Vol. I, p. 210). The school district's PT therapist maintained ongoing communications with Student's mother regarding Student's *** program at school. (R. Ex. 5, pp. 1-8) (Tr. Vol. I, pp. 238-239) (Tr. Vol. II, pp. 708, 713).
73. The school district's OT therapist collaborated with Student's mother regarding OT goals and objectives, services, and the progression of Student's ***. (Tr. Vol. I, pp. 238-239)(Tr. Vol. II, pp. 786, 814). The school district related service staff collaborated with the classroom teacher and paraprofessionals in the *** Classroom – sharing techniques, strategies, and activities to reinforce and support Student's functional skills and implementation of Student's IEP. (Tr. Vol. II, pp. 529-531, 564-566, 656-657, 713). The teacher utilized the *** as well as ***. (Tr. Vol. II, p. 519).
74. The OT and PT also frequently conferred with one another. (Tr. Vol. II, p. 708). Attempts to confer and collaborate with the private therapists were not successful due to the lack of parental consent to do so – it was not until *** that the private OT and PT therapists conferred with school district related service personnel. (R. Ex. 9, pp. 4-5, 6-7) (Tr. Vol. II, pp. 710-712, 828). School district personnel did not learn anything new from the private therapists. (Tr. Vol. II, pp. 710-712, 828).

Procedural Safeguards and Prior Written Notice

75. Student's mother was provided with the Notice of Procedural Safeguards on numerous occasions over the years. Student's mother confirmed in writing receipt of the Procedural Safeguards several times beginning with Student's initial enrollment ***. (R. Ex. 10). The Procedural Safeguards were also routinely provided to Student's mother as part of the ARD paperwork. (J. Ex. 4, p. 11) (J. Ex. 6, p. 16) (J. Ex. 8, p. 1) (J. Ex. 9, p. 48) (Tr. Vol. II, pp. 410-411).
76. The Procedural Safeguards were provided to Student's mother at the ***, 2015 and ***, 2015 ARD meetings. (Tr. Vol. I, pp. 349, 358, 365)(Tr. Vol. II, p. 402). The Procedural Safeguards included contact information for assistance in understanding the Procedural Safeguards. Student's mother did not seek that assistance. (Tr. Vol. I. pp. 265, 359). Prior Written Notice of the school district's refusal to reimburse Student's parents for the cost of private therapies and to pay for private school placement was provided to Student's mother as a component of the ***, 2015 ARD documents. (J. Ex. 9, pp. 4, 8).

Educational Records

77. On ***, 2014 Student's mother received and signed receipt of Student's FIE, IEP and ARD meeting documents, OT and PT therapy documents, and speech/language reports. (R. Ex. 8) (Tr. Vol. II, pp. 409-410). The diagnostician provided Student's mother with a copy of Student's special education records at one of the ARD meetings *** 2015. (Tr. Vol. II, pp. 403-404). Student's mother also received a set of educational records on ***, 2015 and signed an acknowledgment that she received Student's complete file beginning with records from 2010 through 2015. (R. Ex. 8, p. 4) (Tr. Vol. II, pp. 409-410).
78. The Director of Special Education notified Student's mother that in order to obtain emails she needed to make an Open Records request and provided Student's mother with the information to do so. (R. Ex. 8, pp. 5-7). A set of educational records was also available to Student's mother on ***, 2015. (R. Ex. 8, pp. 8-9). Student's mother signed a receipt for a copy of the related service records, the *** ARD documents, campus information, and teacher information on ***, 2015. (R. Ex. 8, p. 11).

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 (5th 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.

FAPE for Every Student Regardless of the Severity of the Disability

For students with severe and multiple disabilities the IDEA mandates an appropriate public education regardless of the level of achievement such students might attain. The plain language of the statute makes clear that a “zero-reject” policy is at its core regardless of the severity of the child’s disability. See, *Timothy W. v. Rochester New Hampshire Sch. Dist.*, 875 F. 2d 954, 960-961 (1st Cir. 1989). Furthermore, for students with significant needs the statute’s concept of special education is broad -- encompassing not only traditional cognitive skills but also basic functional and/or elemental life skills. *Id.* 875 F. 2d at 961-962, 970-973.

Amendments to the statute since its initial passage reflect Congressional intent that a student’s unique educational needs are to be broadly construed to include academic, social, health, emotional, communicative, physical, and vocational needs. *Id. at 967*. The concept of education is necessarily broad under the IDEA for students with severe disabilities -- ***. ***.

Related services -- such as physical, occupational and/or speech therapy -- may form the core of a student’s special education. The possibility that the student may never achieve the goals in a traditional classroom does not undermine the student’s right to an education even if it means training in basic life skills. *Polk v. Central Susquehanna Int. Unit 16*, 853 F. 2d 171, 176, 183 (3d Cir. 1988); *DeLeon V. Susquehanna Community Sch. Dist.*, 747 F. 2d 149, 153 (3d Cir. 1984).

Burden of Proof

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

The Four Factors Analysis

¹ 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 (5th Cir. 2009).

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

- 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 (5th Cir. 1997). There is no requirement the four factors be considered or weighed in any particular way. Instead the factors are merely indicators of when an IEP meets IDEA requirements. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d, 286, 293 (5th Cir. 2009).

Individualized on the Basis of Assessment and Performance

The evidence showed that Student's IEP goals and objectives and placement in a self contained special education classroom were individualized on the basis of assessment and performance. The IEP's were based on the results of the 2013 FIE and recommendations by related service professionals based on Student's performance at school. The use of *** applications and revisions to the IEP were included at parental request and explanations of how *** was being used at home and in private speech therapy. The use of *** program was included in the IEP's as recommended by Student's physician to address Student's physical needs despite staff concerns that the use ***. Significantly, the limited nature of parental consent interfered with the ability of school staff to confer directly and dialogue with Student's physician and private therapists.

Student contends the IEP goals and objectives were not appropriate because they were designed without updated medical information, failed to include an AT evaluation and were not objective or measureable. Student also argues the goals and objectives were based on assumptions about Student's hearing and vision abilities without current vision or hearing assessments. Student argued the school district should have conducted an Adaptive PE evaluation, that *** provided Student with an inadequate amount of instructional time, and that the school district failed to provide homebound services.

The evidence showed that the IEP goals and objectives – developed and implemented at the *** 2014 ARD meetings and as proposed in the *** 2015 ARD meeting were objective and measureable. A few goals were somewhat inartfully or broadly worded but overall they met IDEA requirements. 34 C.F.R. § 300.320. The school district proposed an ESY program with an IEP based on the annual goals stated in Student's current IEP. Although the school district did not conduct a formal AT evaluation the use of assistive technology was incorporated into Student's IEP as recommended by related service personnel and at parental suggestion. Furthermore, the school district agreed to parental request for an independent AT.

The evidence shows the school district did not conduct hearing and vision assessments but instead relied on prior information from Student's physician and mother. The evidence also shows the private therapies engaged in many of the same activities using Student's visual and hearing senses – suggesting that these were appropriate goals despite the lack of formal hearing or vision assessments.

The evidence shows the school district did not conduct a formal Adaptive PE assessment despite recommendations from the ARD to do so. This was an oversight in the development of the school district's program. However, the evidence also shows that the severity of Student's physical disabilities and progression of Student's *** had an impact on Student's *** and ***. It is doubtful whether an adaptive PE program, if any, would have provided Student anything different or of greater benefit than what Student received from Student's *** program.

The evidence shows *** was an accommodation the school district made in deference to Student's ***. There was some evidence to suggest *** also met a staffing issue in the classroom. However, the preponderance of the evidence establishes that *** was largely in response to the attendance issues that arose when Student's ***.

The school district was prevented from conferring freely with Student's physician about *** and how it could be addressed at school when Student's mother limited the scope and nature of parental consent. The record is silent as to whether the physician was even aware of how *** affected Student's ability to ***. It would be unfair to hold the school district liable under the IDEA for *** when it relied on parental representations of medical need and faced lack of consent to confer directly with Student's physician.

Finally, Student's complaint about the failure to provide homebound services is undermined by the evidence that the medical information from Student's physician to confirm Student's need for homebound services was not forthcoming due to communications issues with the physician's office and limited parental consent that interfered with the school district's ability to communicate directly with the physician. Furthermore, Student's mother did not follow the protocol for invoking intermittent homebound services established by the IEP in place during the 2014-2015 school year.

Administered in the Least Restrictive Environment

The IDEA requires that a student with a disability shall be educated with non-disabled peers to the maximum extent appropriate and that special classes, separate schooling and other removal from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the "least restrictive environment." 34 C.F.R. § 300.114 (a)(2)(i)(ii).

The evidence supports the conclusion that Student needed the extensive support, small staff to student ratio, ***, and curriculum provided in the self contained special education classroom due to the nature and severity of Student's multiple disabilities. However, the evidence also shows that inclusion opportunities were virtually nonexistent due, in large part, to Student's frequent absences from school

on the days Student was scheduled to attend the regular education *** class. Student's mother chose to *** class days. On the other hand the record is also silent as to whether another *** class was available on other days of the week or whether school district staff even attempted to explore other inclusion options.

Furthermore, the school district did not provide Student with an opportunity to *** which Student could have done *** nor did the class *** with non-disabled peers very often. While Student's placement in the self contained special education classroom met Student's needs the record shows a lack of inclusion opportunities. The evidence showed that Student responds to *** and it was unfortunate that the *** class was not a regular part of Student's education although the IEP offered Student that opportunity.

Services Provided in Coordinated and Collaborative Manner

The evidence supports the conclusion school district personnel collaborated with one another in a coordinated manner under Student's IEP. Related service personnel conferred and consulted with the teacher and paraprofessionals in delivery of Student's OT, PT and speech/language services. Related service personnel also communicated with Student's mother about Student's physical and medical issues. School district attempts to confer and collaborate with Student's private therapists and to secure information from Student's physician were thwarted by parental resistance to provide consent for direct, oral communications between the professionals and limited access to medical and therapeutic records.

Furthermore, although Student's mother had every right to be accompanied by a parent advocate at the *** 2015 ARD meetings, the parent advocate was not effective in communicating or collaborating with school district staff during those meetings. Instead of productive discussions school district personnel were intimidated and confused by the advocate's somewhat assertive approach in raising questions and proposing certain parental requests.

The evidence showed the classroom teacher made attempts to explain Student's daily schedule to Student's mother in response to parental concerns. The teacher prepared and shared a written daily schedule with Student's mother, a daily communication log was sent back and forth, and the teacher offered to convene a parent-teacher conference to further explain the educational program and daily schedule. The evidence showed the daily communication log was pretty limited in terms of information provided but the evidence also showed that Student's mother *** and chose not to accept the teacher's offer of a parent-teacher conference.

Positive Academic and Non-Academic Benefits

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. The record clearly establishes that Student's progress in physical, occupational and speech therapy has been incremental – whether

provided by the school district or by the private therapies. However, the evidence also shows that incremental progress is meaningful progress for Student given the severity and global nature of Student's intellectual and physical deficits.

The evidence suggests that at home Student is capable of working on some independent ***. The evidence also showed that Student can interact with ***. To its credit the school district revised Student's IEP to include the use of *** to work on demonstrating communicative intent.

During the 2014-2015 school year Student ***. *** are educational needs for Student within the meaning of the IDEA. *See, Timothy W. v. Rochester New Hampshire Sch. Dist.*, 875 F. 2d at 960-962. The IEP as implemented failed to provide Student with the benefit of working on independent *** and receiving the non-academic benefit of *** with non-disabled peers. These were weaknesses in Student's program.

The evidence shows that Student's need for related services was met by the school district's program. The physician's recommendation that Student needed *** hours of PT, OT, and speech therapy *** was aimed at meeting Student's medical needs and to maximize Student's physical abilities. The IDEA does not require the school district's program to maximize Student's potential. *Bd. of Hedrick Hudson Cent. Sch. Dist. v. Rowley*, 458U.S. at 198. In that regard the recommendation was medical rather than educational in nature.

On the other hand -- for students with severe, multiple disabilities -- related services may be the core of a student's educational program. *Timothy W. v. Rochester New Hampshire Sch. Dist.*, *supra*. The school district addressed Student's educational needs in that respect by including *** program as components of the IEP. While the services were more often delivered by classroom personnel, related service professionals proposed the related service IEP goals and objectives based on their professional assessments, delivered some direct therapies, and monitored, supervised, and collaborated with the classroom staff in implementing the related services goals and objectives.

Certainly the parent and Student had the right to secure private therapies as medical services recommended by the physician. However, Petitioner did not meet Petitioner's burden of proving by a preponderance of the evidence that any progress Student made over the years was attributable solely to the private therapies. Student's challenges are significant and complex including the progression of Student's *** and how that affected Student's ability to *** certain aspects of Student's related services program.

Petitioner argues the school district failed to implement certain provisions of Student's IEP -- such as providing inclusion opportunities, homebound services, and direct instruction. However, a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of the IEP and instead must demonstrate the school district failed to implement substantial or significant provisions of the IEP. *See, Houston Ind. Sch. Dist. v. Bobby R.R.*, 200 F. 3d 341, 349 (5th Cir. 2000). The record shows that overall the school district's program was appropriate despite the weaknesses noted herein.

Educational Placement

Private placement is justified when a student's needs cannot be met in the public school and the private placement is "essential" for the Student to receive the requisite educational benefit. Furthermore, the private placement must be primarily oriented toward enabling the student to obtain an education as opposed to treatment of medical needs. *See, Richardson Ind. Sch. Dist. v. Michael Z., 580 F. 3d at 299-300.* Petitioner did not meet Petitioner's burden of proof in that regard. The preponderance of the evidence showed that even though there are some weaknesses in Student's public school program -- overall the program and placement met Student's needs.

In addition, there is insufficient proof in the record to establish that *** – the private school selected by Student's parents – provided Student with an appropriate program. There is some evidence that it addressed the needs of some students with disabilities similar to Student. However, the private school also appears to be a more restrictive setting without inclusion opportunities and a student body consisting entirely of students with disabilities. *See, Florence Cnty. Dist. Four v. Carter, 510 U.S. 7, 15 (1993) (parents are entitled to reimbursement for private placement only if the public school placement is not appropriate and the private placement is proper under the IDEA).*

Procedural Rights

The school district was not required to provide Student's mother with prior written notice until the ***, 2015 ARD. There was no final disagreement with regard to reimbursement of private therapies or private school placement until that ARD. The ***, 2015 ARD simply adjourned and the parties agreed to convene within ten days. Prior written notice of the school district's refusal was included in the ***, 2015 ARD documents. The federal rule requires prior written notice to the parent within a reasonable time before the school district proposes or refused to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE. *34 C.F.R. § 300.503 (a).*

The state rule requires prior written notice must be provided five school days before the school district refused the parental requests unless the parent agrees to a shorter timeframe. *19 Tex. Admin. Code § 89.1050 (g).* The state rule is somewhat difficult to apply in this case. Student's mother verbally waived her right to reconvene the *** ARD (which state rules allow) when it ended in disagreement over the reimbursement and private placement issues. *19 Tex. Admin. Code § 89.1050 (f).* Had the parties reconvened in ten school days from the date of the *** ARD the Prior Written Notice included in the *** ARD documents would have met the five day requirement under the state rule -- however no such ARD occurred.

The evidence shows the school district was aware of the parental requests for reimbursement and private school placement beginning with the *** 2015 ARD. The school district did not provide Student's mother with Prior Written Notice of its refusal five school days prior to the *** ARD. However, even if those actions constitute a procedural violation under the IDEA, the violation did not impede Student's right to a FAPE, cause a deprivation of educational benefit, or significantly impede the opportunity of Student's mother to participate in the decision-making process regarding the

provision of FAPE to Student. *34 C.F.R. § 300.513(a)(2)*.

The evidence showed Student's mother was an active participant in all ARD meetings and that school staff incorporated some of her ideas and suggestions into Student's IEP. They attempted to answer and address her questions and concerns and worked to accommodate ***. Furthermore, the evidence showed Student's mother received Notice of Procedural Rights on a number of occasions over the years including with ARD documents provided in 2014-2015.

Even if she did not review the Notice of Procedural Safeguards document itself the law charges Student's mother with constructive notice of its contents. When a school district delivers a copy of IDEA procedural safeguards to parents the simple act of delivering the procedural safeguards notice suffices to impute constructive knowledge of parental rights under IDEA. *El Paso Ind. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 945 (D.C. Tex. 2008), *aff'd in part and vacated on o.g.* 591 F. 3d 417 (5th Cir. 2009); 19 *Tex. Admin. Code § 89.1151 (c)*. The record on file in this case supports the conclusion that Student's mother received the requisite notice of procedural safeguards.

Petitioner argues the *** ARD was convened without notice or invitation. The preponderance of the evidence showed otherwise. The evidence showed the annual ARD should have been conducted in *** 2013 but due to parental requests it could not be scheduled until *** 2014. There was evidence that a series of communication missteps led to confusion over scheduling the annual ARD. The evidence shows the diagnostician attempted to notify Student's mother of the ***, 2014 ARD meeting and confirm it with her— a date proposed by the parent. Student's mother contends she did not receive those communications and assumed the ARD was going to be rescheduled again. The parent was dismayed when she learned the ARD proceeded without her.

It is unfortunate there was such a misunderstanding between the parties in scheduling the annual ARD. However, any harm that might have occurred as a result of the parent missing the *** ARD was cured when the school district offered to convene another ARD -- which it did on ***, 2014. The record demonstrates that the procedural violation, if any, did not impede the parent's opportunity to participate in the decision-making process – just because the parties did not ultimately agree does not mean the parental opportunity to participate was denied. *34 C.F.R. § 300.513 (a)(2)*.

Petitioner contends the school district failed to consult with Student's parents and made a unilateral decision in ***. The record demonstrates that Student's mother was consulted and that her practice in *** precipitated the decision. The record showed the school district did not pursue truancy charges and attempted instead to work with the parent in accommodating Student's ***. The evidence shows the decision to *** was initially made at the *** ARD and again discussed at the *** ARD to which Student's mother agreed.

The evidence showed that her fears of facing truancy charges were unfounded and undermines her claim she felt compelled to agree to ***. There is some evidence that *** was also related to a staffing issue in the special education classroom. However, that is not enough evidence to overcome the preponderance of the evidence that *** was an accommodation to meet Student's medical needs.

The school district did not improperly classify Student as a student with OHI. The evidence showed the school district did not secure a physician's signature on an updated OHI form for the 2014-2015 school year. However, the federal regulations have no requirement that a physician must sign a particular form attesting to the student's eligibility. The evidence shows Student met the criteria as a student with OHI under the IDEA. *34 C.F.R. § 300.8 (c)(9)*.

The state rule for OHI eligibility refers to the criteria in the federal regulation. However, the state rule requires a licensed physician be a member of the multidisciplinary team that collects or reviews evaluation data in making the OHI eligibility determination. *19 Tex. Admin. Code § 89.1040 (c)(8)*. In this case the school district relied on the physician's previous signed OHI report from 2010 in concluding Student continued to meet OHI eligibility. While technically a procedural violation the evidence demonstrates there is really no dispute that Student meets relevant OHI eligibility criteria: limited strength and vitality due to a chronic or acute health problem that adversely affects the student's educational performance. *34 C.F.R. § 300.8 (c)(9)*.

Finally, the preponderance of the evidence shows the school district responded to parental requests for educational records in a timely manner. All record requests were provided without unnecessary delay, before the due process hearing, and/or no more than 45 days after the requests were made. *34 C.F.R. § 300.613 (a)*.

Claims Arising Under Laws Other than the IDEA

The jurisdiction of a special education hearing officer in Texas is strictly limited to those arising under the IDEA. Specifically, a hearing officer has the authority to determine claims related to the identification, evaluation or educational placement of a student with a disability or the provision of a FAPE to the student. *34 C.F.R. §§ 300.507; 300.511; 19 Tex. Admin. Code §§ 89.1151 (a), 89.1170*.

Therefore, to the extent Petitioner raises claims under laws other than the IDEA those claims shall be dismissed as outside the jurisdiction of the hearing officer, including specifically: Section 504 of the Rehabilitation Act of 1974; the Americans with Disabilities Act; the Family Educational Rights Privacy Act; the No Child Left Behind Act; Section 1983 and Title VI of the Civil Rights Act of 1964; and the Technology Related Assistance for Individuals with Disabilities Act and Student is entitled to attorney's fees under the IDEA, Section 504, Section 505, the Civil Rights Attorney's Fee Award Act of 1976; Section 1983, Section 1927 and Section 794a(b) of the Civil Rights Act of 1871.

Attorney's Fees

The prevailing party who is the parent of a child with a disability may be entitled to an award of attorney's fees as a component of the costs of litigation. The award of attorney's fees is within the discretion of either the federal district court or a state court of competent jurisdiction. A special education hearing officer in Texas does not have the authority to make an award of attorney's fees in the context of a special education hearing. Therefore, to the extent that Petitioner seeks reimbursement for attorney's fees and costs that item of requested relief shall be denied as outside the hearing officer's jurisdiction. *34 C.F.R. § 300.517 (a)(i)*.

Conclusions of Law

1. Petitioner did not meet Petitioner's burden of proving the Respondent failed to provide a free, appropriate public education within the meaning of the Individuals with Disabilities Education Act during the 2014-2015 school year. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).
2. Petitioner did not meet Petitioner's burden of proving an educational need for private placement or that the proposed private placement was appropriate. *Schaffer v. Weast*, *supra*; *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 299-300 (5th Cir. 2009).
3. Respondent did not violate any student or parental procedural rights under the IDEA and even if it did any procedural violation did not impede the parent's opportunity to participate in the decision-making process with regard to the provision of a free, appropriate public education or result in a substantive educational harm. 34 C.F.R. §§ 300.8; 300.503; 300.513 (a)(2); 19 Tex. Admin. Code §§ 89.1040 (c)(8); 89.1050.
4. Petitioner's claims arising under laws other than the IDEA are outside the hearing officer's jurisdiction in a special education hearing in Texas and shall be dismissed. 34 C.F.R. §§ 300.507; 300.511; 300.613(a); 19 Tex. Admin. Code §§ 89.1151 (a); 89.1170.
5. Petitioner's request for attorney's fees and costs is outside the jurisdiction of the hearing officer's authority in Texas and shall be dismissed. 34 C.F.R. § 300.517 (a) (i).

ORDERS

Based upon the foregoing findings of fact and conclusions of law it is therefore **ORDERED** that Petitioner's claims for relief under the Individual with Disabilities Education Act are hereby **DENIED**.

It is further **ORDERED** that Petitioner's claims arising under any law other than the Individuals with Disabilities Education Act are hereby **DENIED FOR WANT OF JURISDICTION**.

It is further **ORDERED** that Petitioner's requests for attorney's fees and litigation costs are hereby **DENIED** as outside the authority of the special education hearing officer.

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

SIGNED the 7th day of November 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).*

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

**STUDENT,
bnf PARENT & PARENT,
Petitioner,**

§
§
§
§
§
§
§

v.

DOCKET NO. 322-SE-0615

**DESOTO INDEPENDENT
SCHOOL DISTRICT,
Respondent.**

SYNOPSIS

ISSUE:

Whether school district provided FAPE to *** student with severe intellectual and physical disabilities under the IDEA.

HELD:

FOR THE SCHOOL DISTRICT.

Student did not meet of burden of proving school district failed to provide FAPE – although there were some weaknesses in the school district’s program overall the school district’s program provided Student with the requisite educational benefit. Although Student’s progress was fairly incremental given the severe and global nature of Student’s multiple disabilities such progress was meaningful for Student under the IDEA. School district’s program met the *Michael F.* factors as indicators the IEP met IDEA requirements. *20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17*

ISSUE:

Whether placement in self-contained special education classroom provided Student with a FAPE in the LRE.

HELD:

FOR THE SCHOOL DISTRICT

Student did not meet burden of proving proposed private school placement was essential for Student to receive an educational benefit or that the private school placement was primarily oriented towards enabling Student to obtain an education as opposed to treatment of medical needs. Preponderance of the evidence showed the public school placement met Student’s needs in the LRE. *34 C.F.R. § 300.114*

ISSUE:

Whether school district violated parent and/or student procedural rights under the IDEA.

HELD FOR THE STUDENT IN PART AND THE SCHOOL DISTRICT IN PART

Although school district provided parent with Prior Written Notice (PWN) at ARD meeting when it refused parental requests for reimbursement of private therapies or for private placement at school district expense the PWN was untimely under the state rule. Student did not meet burden of proving ARD meetings were scheduled without proper notice or that an ARD meeting was improperly convened without the parent in attendance. Decision to *** was made with parental participation at properly constituted ARD and was not a unilateral decision.

School district failed to include physician as member of multidisciplinary team in updating Student's eligibility for special education as student with OHI under state rule. However, ARD relied on a previous OHI form signed by Student's physician and there was no real dispute that Student continued to qualify for services as a student with OHI. School district responded to parental requests for educational records in a timely manner. Any procedural violations did not impede parent's opportunity to participate in the decision-making process or result in substantive educational harm to student. *34 C.F.R. §§ 300.8; 300.503 (a); 300.513 (a); 300.613; 19 Tex. Admin. Code §§ 89.10.40; 89.1050*

ISSUE:

Whether Student's claims arising under any law other than the IDEA should be dismissed as outside the hearing officer's jurisdiction.

HELD:

FOR THE SCHOOL DISTRICT

Hearing Officer's jurisdiction strictly limited to claims arising under the IDEA and all claims arising under any other law including § 504, ADA, FERPA, etc. were dismissed for want of jurisdiction. *34 C.F.R. §§ 300.507; 300.511; 19 Tex. Admin. Code §§ 89.1051; 89.1170*

ISSUE:

Whether Student entitled to attorney's fees and costs of litigation.

FOR THE SCHOOL DISTRICT

Hearing Officer has no authority to make award of attorney's fees or costs – only a state court of competent jurisdiction or a federal court may award attorney's fees and costs to a prevailing party. *34 C.F.R. § 300.517*