

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

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

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§
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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 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:
 - x The Individualized Education Plan (IEP) was designed without current medical information for Student's physician;
 - x The IEP goals and objectives are not

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

5.

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 (***)Tj 02(ed)-4ciaTj 210(1)/73 0 Td.o4fc 0.15 ih84(n)nsss

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 skills. (J. Ex. 4, pp. 20-21) (Tr. Vol. II, pp. 504, 508).

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).

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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. 586-598) [w]2(ou)-16w (***)Tj 7.89 0 Td (,)e14(d)B. w 1 0.0T

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 (d) (i) - 2029 (1) 2103 (b) 2 (he) - 5 (he) h (**) Tj OP(5)JTJ ©

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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 ***

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

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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.

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

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, 583rd 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 200.

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. Rochester New Hampshire Sch. Dist.*, 875 F. 2d 964, 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 969, 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

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:

- x The program is individualized on the basis of the student's assessment and performance;
- x The program is administered in the least restrictive environment;

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

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

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 962. The IEP as implemented failed to provide Student with the benefit of working on 4(bn/3 0)2(i81(e)4.1(of)3

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 thotiorance o

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

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

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DESOTO INDEPENDENT

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 §§ ~~89.10.40~~; 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