BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS

STUDENT,		
bnf PARENT and PARENT,	**§**	
Petitioner,	**§**	
	§	
v.	**§**	**DOCKET NO. 292-SE-0814**
	§	
CLEAR CREEK	**§**	
INDEPENDENT SCHOOL DISTRICT,	**§**	
Respondent.	**§**	

DECISION OF THE HEARING OFFICER

Introduction

Petitioner, *** bnf *** and *** ("Petitioner" or "the Student") brings this action against the Respondent Clear Creek 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.

Party Representatives

Petitioner was initially represented pro se by Petitioner's parents *** and ***. On October 25, 2014 Petitioner retained Michael O'Dell, Attorney at Law as Petitioner's attorney. Mr. O'Dell represented Petitioner from that date forward. Respondent has been represented from the inception of this litigation by its legal counsel Amy Tucker, with the law firm of Rogers, Morris, & Grover.

Resolution Session and Mediation

The parties convened a Resolution Session on August 12, 2014 but it was not successful. The parties declined the use of mediation in this case.

Due Process Hearing

The hearing was conducted on September 29-30, 2014. Petitioner was represented by Petitioner's attorney Michael O'Dell, Attorney at Law. Student's parents, *** and *** also attended the due process hearing along with Student's grandmother ***. Respondent was represented by its attorney Amy Tucker with the law firm of Rogers, Morris & Grover. In addition ***, Executive Director of Special Education attended the hearing as the school district's party representative. The hearing was recorded and transcribed by a certified court reporter. The parties requested an opportunity to submit written closing arguments and they both did so in a timely manner. The decision of the hearing officer is due November 14, 2014 at the request of the parties.

Petitioner's Issues

Petitioner confirmed the overall, broad issue for decision in this case is whether the school district's proposed program and placement for the 2014-2015 school year is reasonably calculated to provide Student with a free, appropriate public education (FAPE) in the least restrictive environment (LRE) within the meaning of the Individuals with Disabilities Education Act (IDEA). Sub-issues include whether the school district violated various procedural rights of both Student and Student's parents.

Petitioner's Requested Relief

Petitioner requests the following items of relief:

1. The school district provide Student with a FAPE within the school district's boundaries that addresses Student's individual and unique needs with instruction delivered by appropriately trained personnel; and,

2. Compensatory Extended School Year (ESY) services and transportation to and from school;

or in the alternative,

3. Continued placement at *** with ESY services in the summer of 2015 and transportation to and from school.

Petitioner also requests attorney's fees but acknowledges that an award of attorney's fees is outside the hearing officer's authority. Instead, a court of competent jurisdiction, in its discretion, may award reasonable attorney's fees to the parent who is a prevailing party. *34 CFR 300.517 (a) (i).*

School District's Legal Position

The school district disputes Student's allegations with regard to procedural issues related to the placement decision at issue. The school district asserts the proposed program and placement meet IDEA requirements of FAPE in the LRE. The school district also raises two issues: (i) whether some of Petitioner's claims should be dismissed as outside the one year statute of limitations as applied in Texas; and, (ii) whether some claims were subject to a previous settlement agreement and should therefore be dismissed. The school district requests Petitioner's remaining IDEA claims be denied.

Withdrawal of Some of Petitioner's Claims

During the prehearing telephone conference conducted on August 26, 2014 Petitioner confirmed that any claims subject to either the previous settlement agreement and/or the one year statute of limitations were withdrawn. Petitioner confirmed the major issue for decision is the proposed program and placement for the 2014-2015 school year.

Findings of Fact

1. Student is eligible for special education services from the school district as a student with an emotional disturbance. (Joint Exhibit 1, pp. 1, 14)(referred to hereafter as "J. Ex. __, p. __.").(J. Ex. 2, p. 57) (J. Ex. 18, p. 36). Student was entering the *** grade in the 2014-2015 school year. Student's home campus is ***. (J. 1, p. 1) (J. 2, p. 2). Student was first evaluated for special

education by the school district in the *** grade at age ***. Student was identified as eligible for special education in February *** as a student with an emotional disturbance. (J. Ex. 6, pp. 1, 11).

2. Student has been diagnosed with *** and Oppositional Defiant Disorder (ODD). Student also has a history of *** (a *** disorder) which involved multiple *** and extensive *** as a young child. The *** issues included ***, ***, having to be ***, and, being ***. As a result, highly restrictive, tightly controlled, and punitive environments appear to activate and increase Student's fight or flight mechanisms. Student tends to become more frequently and more intensely aggressive in environments that are less structured without adequate staffing. (J. Ex. 5, p. 53) (Petitioner's Exhibit 8)(referred to hereafter as "P. Ex. ___.") (Transcript Volume I, pp. 346-348) (referred to hereafter as "Tr. Vol. __, p. __.").

3. Student's *** and ODD as well as a lack of impulse control are manifested by a variety of behaviors. When Student's mood is depressive Student feels overwhelmed and Student's coping threshold is weakened. Student then deteriorates and feels very badly about ***self. Student's mood disregulation is a critical component of Student's behavior. Disruptive, negative behavior is a result of Student's unstable mood and when impulse control is disregulated. Just about anything can therefore be a behavioral "trigger" given the circumstances. Student has a fragile hold on Student's behavior and even normal stressors may result in an exaggerated response. Student has a lowered ability to tolerate certain levels of social exchanges, life circumstances, and/or changes in routine. (Tr. Vol. I., pp. 175-177).

4. School staff need to have a personal relationship with Student in order to respond effectively to Student's behavior. (Tr. Vol. I, p. 186). Student needs to anticipate and prepare ***self for stressful situations and learn how to calm ***self and self-regulate. (Tr. Vol. I., pp. 192-193). Student has great difficulty controlling ***self when in a psychiatric episode. Student requires a full blown effort to keep it together – Student is a good kid, wants to do well and needs the opportunity to "reconstitute" when Student becomes disregulated. (Tr. Vol. I, pp. 182-184).

5. Student attended *** in *** and *** grade. Student had many disciplinary incidents and behavioral difficulties in *** and *** grade. (J. Ex. 6) (J. Ex. 7) (J. Ex. 8) (P. Ex. 2) (P. Ex. 4) (Respondent's Exhibit 1) (referred to hereafter as "R. Ex. __.")(R. Ex. 2) (R. Ex. 3). In *** school Student exhibited aggressive behaviors such as hitting, kicking, punching, biting, spitting, *** and ***. Student also used inappropriate language including swearing, yelling, and taunting classmates. Student engaged in property destruction including kicking, hitting, punching, throwing and breaking school property. Student also frequently refused to follow staff instructions. During this time Student was served in the *** - a self contained special education class. (***). (J. Ex. 18, pp. 1- 3).

6. The *** utilized the Boys Town Model of classroom management (Boys Town). (Tr. Vol. I, p. 34.). Boys Town is based on positive behavioral supports research and utilizes many principles of Applied Behavior Analysis. (J. Ex. 7, p. 5). As implemented in the *** Student earned points for positive behaviors and lost points for problem behaviors. (J. Ex. 8, pp. 1-2). Student was discouraged by the point system. (Tr. Vol. II, p. 356). Student's mother was very upset to learn that, at times, Student was placed in a separate area called the "***" tantrumming for long periods of time as a de-escalation technique while school staff observed and monitored Student's behavior through a door window. (Tr. Vol. I, p. 38)(Tr. Vol. II pp.355, 358-359, 407).

7. A Functional Behavior Assessment (FBA) conducted by the school district in December 2011 and amended in early February 2012 and an independent FBA conducted in February 2012

recommended modifications in the way Boys Town was being implemented by school district staff. (J. Ex. 7). The use of Boys Town in the *** was not particularly effective in addressing Student's behavioral needs the way school staff implemented it. School staff followed the Boys Town program too literally instead of using it as a framework which would have been more effective. (J. Ex.7) (J. Ex. 9).

8. Student's behavioral episodes in school are most often motivated by escape from demands. Antecedents to behavioral episodes involve activities that Student does not want to do at the time and are non-preferred tasks. (J. Ex. 7, p. 3) (J. Ex. 8, p. 4). Once a behavior begins and escalates Student's behavior is maintained by access to attention. Although Student exhibits many inappropriate behaviors Student's target behavior is properly defined as an entire episode or tantrum that encompasses several behaviors. (J. Ex. 7, p. 4).

9. In *** school Student's physically and verbally aggressive, destructive, and disruptive behaviors in the classroom were a significant problem. They were a problem to Student because they interfered with Student's learning. They were a problem to the class because school staff spent a considerable amount of time responding to Student's behavioral episodes rather than teaching the rest of the class. (J. Ex. 8, p. 4).

10. The school district filed a request for an expedited due process hearing in late February 2012 over concerns about Student's behavior. (P. Ex. 5). At that time the school district proposed a change in placement from the *** at the *** school to *** (***), an off-campus, self-contained placement for students with significant cognitive and/or behavior issues. *** is a placement the school district uses for children who need a more restrictive setting than what can be provided on a campus. It is a facility run by the ***. It is not an alternative disciplinary placement. Transportation was also proposed as a related service. (J. Ex. 5, p. 14) (Tr. Vol. I, pp. 42-43). The recommended change in placement was in response to safety issues posed by Student's behavior and elopement on the *** school campus. (P. Ex. 5) (Tr. Vol. I, p. 20). Student's parents disagreed with the proposed change in placement to ***. (J Ex. 5, p. 14).

11. The 2012 litigation was resolved through mediation and confirmed in a written Settlement Agreement executed in March 2012. The 2012 mediated settlement included reimbursement by the school district to Student's parents up to a maximum amount for the purpose of obtaining private educational and related services at a school of parent's choice. In addition the school district was relieved of the responsibility to provide educational services or a FAPE until the end of the 2012-2013 school year in May 2013. The settlement also allowed the school district to observe services provided in the private placement from time to time and the right to receive copies of educational and therapeutic records including progress reports or data. Subsequent to the 2012 mediation Student's parents unilaterally placed Student in ***. (***)(R. Ex. 7) (Tr. Vol. I, p. 32) (Tr. Vol. II, pp. 347, 372).

12. Student attended *** from April 2012 to January 2013. (J. Ex. 4, p. 53). At the *** Student, although highly intelligent, anxiously struggled with internal regulation. Student intermittently displayed moments of control with social appropriateness, but there were also times when Student's aggression would disrupt the school day. At times this included yelling, kicking over desks, throwing chairs, physically threatening classmates, and running out of the classroom. At other times Student would go outside and angrily scream to be left alone. During these episodes Student would burst into tears and remorsefully verbalize apologies and attempt to make amends with others. Outbursts could last for minutes or hours. (J. Ex. 4, p. 53).

13. Student remained at the *** until it was determined Student needed a more contained environment and therapeutic treatment to manage Student's affective experience. (J. Ex. 4, p. 53) (J. Ex. 18, p. 4) (Tr. Vol. II, p. 374). Student's parents then made a unilateral private placement at *** (***) for the remainder of the 2012-2013 school year. (Tr. Vol. II., p. 377).

14. *** is a *** school. It is accredited by the *** and is on the Texas Education Agency list of approved private school providers. *** accepts both private pay students and students placed by their home public school districts. (Tr. Vol. I, pp. 173-173). The cost for students placed by a public school district is negotiated with the school district depending on the student's needs. (Tr. Vol. I, pp. 236-237). *** is an out of district private school. (Tr. Vol. I., pp. 42, 73).

15. A second due process hearing was filed in 2013 -- this time by Student's parents over concerns about Student's educational placement for the upcoming 2013-2014 school year. (J. Ex. 3, pp. 13-17) (J. Ex. 4, pp. 49-52) (P. Ex. 6). The 2013 due process hearing was also resolved through the mediation process and confirmed in a written Settlement Agreement executed in September 2013. The 2013 mediated settlement also included reimbursement by the school district to Student's parents up to a maximum amount for a private placement at parental choice for the remainder of the 2013-2014 school year as well as for summer services in 2014. In addition, the 2013 Settlement Agreement also contained the same terms with regard to observations and records. The school district was specifically relieved from the responsibility of providing Student with educational services or a FAPE until the first day of the following 2014-2015 school year. (R. Ex. 6) (Tr. Vol. I, p. 32).

16. Student made behavioral progress at *** during the 2013-2014 school year. Student matured along normal developmental lines during Student's time at ***. Although Student continued to display neuropsychiatric symptoms Student had several breakthrough episodes during the school year as Student's ability to maintain control fluctuates as both a natural course of Student's disorders and environmental circumstances. Student has greater insight about ***self. Explosive behavior is less frequent and not as intense as in the past. With the support of *** staff and programming Student worked daily to manage Student's behavior and emotions. (J. Ex. 1, p. 17)(Tr. Vol. I, pp. 196-197).

17. During the *** at *** Student demonstrated an overall downward trend in most of Student's challenging behaviors although there were behavioral spikes in February and May 2013 and February and May 2014. (J. Ex. 18, p. 19) (Tr. Vol. I, p. 199). The behavioral spikes at *** were similar to those that occurred in *** grade in the *** that led to the initial recommended change in placement to an off-campus, self contained educational setting. (J. 7, p. 9). Student did well academically at ***. The *** academic plan is tailored to enable Student to accelerate in areas of strength and slow down in areas of weakness. At times Student was able to complete work above Student's grade level. (Tr. Vol. I., pp. 182-184).

18. *** staff used empathetic listening and their personal relationships with Student to assist Student to de-escalate. These techniques are effective with Student. At times, when Student continued to be physically aggressive or engaged in property destruction, *** staff used physical re-direction or even physical restraint. *** also has a therapy room where de-escalation efforts can continue. (Tr. Vol. I., pp. 186-188). Some students at *** utilize the school's ***. Student accessed the *** at ***. (Tr. Vol. I., pp. 239-240)(Tr. Vol. II, p. 417).

19. The current litigation arose in May 2014 when Student's parents approached the school district requesting an ARD to discuss returning to the public school or, in the alternative, continued placement at *** at school district expense for the 2014-2015 school year. (J. Ex. 1) (J. Ex. 2). Once the school district obtained the necessary parental release school district staff contacted *** for the necessary information in order to assist the ARD in developing an IEP. (J. Ex. 12, pp. 1, 6, 9) (J. Ex. 13, pp. 1-4). (Tr. Vol. I., pp. 31, 54, 71). *** provided the school district with incident reports, therapeutic hold reports, and a report card. (J. Ex. 9) (J. Ex. 13, pp 1-4) (J. Ex. 15) (Tr. Vol. I., p. 252).

20. School district staff also observed Student at *** in late May 2014. (J. Ex. 11)(Tr. Vol. I., p. 254). Additional information from *** was obtained during the school district visit. (J. Ex. 12, p. 5). School district personnel would have preferred more information from *** but *** did not provide additional documentation at that time. (Tr. Vol. I., pp. 146-148, 253).

21. An Admission, Review & Dismissal Committee (ARD) first met on June 12, 2014 as a "transfer ARD." The ARD was held on Student's home campus once Student enrolled. (J. Ex. 1)(Tr. Vol. I, pp. 63, 132-133, 137-138). The school district proposed holding the ARD in August or early fall 2014 after Student was enrolled, and attending school, so that more information could be collected. However, Student's mother insisted on convening the ARD as soon as possible. (J. Ex. 12)(Tr. Vol. I., p. 75).

22. Participants at the June 12th ARD included: Student's parents, a general education teacher, a special education teacher, an administrator, a licensed specialist in school psychology (LSSP), a special education *** school coordinator, a lead team leader and the campus principal. (J. Ex. 2, p. 56)(Tr. Vol. I., p. 63). School district personnel convened a staffing prior to the June 12th ARD. (Tr. Vol. I, pp. 63, 74, 136-137). Several school district members of the ARD reviewed Student's file prior to the ARD. (Tr. Vol. I., p. 66).

23. The school district's use of the transfer ARD procedures contemplated an initial ARD to design a "temporary" IEP and initial educational placement. The school district planned to collect additional information over a 30 school day period in the initial placement once school resumed and then reconvene the ARD to finalize and revise the program and placement based on the additional information collected. (J. Ex. 1) (J. Ex. 2)(Tr. Vol. I., pp. 251-252, 255).

24. At the June 12th ARD the school district, as it had in the past, proposed placement and Extended School Year services (ESY) at ***. The school district has an annual contract with *** to ensure a set number of student "slots" per academic year. The contract with *** allows the school district to maintain a full range of placement options for its students including those that require a self-contained educational setting. (P. Ex. 7) (Tr. Vol. I, pp. 43-44, 45, 273). The school district proposed inviting a representative from *** to the ARD but the parent declined the offer. (J. Ex. 2) (Tr. Vol. I., p. 258). However, the LSSP at the ARD had extensive knowledge about ***. (Tr. Vol. II, pp. 305, 313-317).

25. Student's mother had a negative view of ***. She canvassed various unidentified professionals about *** and it was her understanding that the students at *** would not be appropriate classmates for Student. She was also put off by the presence of a *** and *** – these features led her to view *** like a juvenile detention center rather than a school. (J. Ex. 3, p. 13) (Tr. Vol. I, p. 43) (Tr. Vol. II, p. 364). In fact, *** is not a disciplinary placement. (Tr. Vol. I., p. 313). Student's parents

disagreed with the recommended placement at *** and requested continued placement at ***. The parties could not reach consensus on Student's placement for the 2014-2015 school year. (J. Ex. 1)(J. Ex. 2) (P. Ex. 7).

26. Student's present levels of performance for purposes of the June 2014 ARD meetings were taken from a 2014 proposed *** grade IEP. (J. Ex. 2, pp. 13-39). The *** records showed Student was making good grades and on grade level but continued to exhibit physical and verbal aggression and non-compliance. (Tr. Vol. I., p. 254). The June 2014 ARD meetings also utilized a review of existing evaluation data (REED) which included prior FIEs from 2010 and 2011 and the FBAs conducted in 2011 and 2012. (J. Ex. 1, pp. 4-12). (Tr. Vol. I., pp. 73, 135).

27. The purpose of the REED was to confirm Student's eligibility but the ARD also agreed on the need for further evaluation in the areas of emotional/behavioral, intellectual, achievement, and psychological services in order to provide more information about Student's strengths and weaknesses and to identify Student's present levels of performance in those areas. (J. Ex. 1, p. 10). Student's previous Full Individual Evaluation (FIE) was conducted on February 25, 2012. Had Student remained in public school a re-evaluation was due February 24, 2014. (J. Ex. 1, p. 1)(J. Ex. 2, p. 1)(J. Ex. 18, p. 1)(Tr. Vol. I, pp. 66, 144-145).

28. The school district proposed an IEP/BIP at the June 12th ARD. The proposed IEP/BIP was designed on the basis of the IEP/ BIP proposed the previous year along with the information from ***, the REED and, the observation by school district staff at ***. (J. Ex. 2, pp. 4-10)(Tr. Vol. I., pp. 153-154, 335). The *** behavioral approach (although not confirmed in a written BIP) is very similar to the IEP proposed by the school district; both the *** program and proposed IEP/BIP emphasize personal relationships, discussion, de-escalation techniques and, when necessary, the use of restraint. (J. Ex. 2, p. 13) (Tr. Vol. I, pp. 186-188, 190) (Tr. Vol. II, pp. 456, 459, 465-467, 469, 480-481). The *** program is comparable to the *** program. (Tr. Vol. I., pp. 151, 311-313).

29. The proposed IEP included 52 minutes per day in the following academic classes: English/Language Arts, Math, Social Studies, Science, PE and an elective. 52 minutes of social skills training throughout the day was also contemplated by the proposed IEP. (J. Ex. 1, p. 14). Transportation was proposed as a related service. (J. Ex. 1, p. 15) (J. Ex. 2, p. 63-69). The proposed placement in a *** grade classroom at *** consisted of a ratio of *** students to two adults. Counseling and crisis intervention were also available at *** on a daily basis. (J. Ex. 1, pp. 2, 12).

30. At parental request extended school year services (ESY) to prevent significant loss of acquired behavior skills were also proposed as a component of the proposed program for 6 hours/day for 6 weeks at ***. ESY IEP goals were for Student to participate in all activities throughout the day, refrain from using physical or verbal aggression, comply and work cooperatively with adults and peers, and remain in Student's assigned area. A set of behavioral strategies and interventions were also identified in the proposed ESY IEP. Data sheets were contemplated to track Student's progress towards meeting these goals at a 90% mastery level. (J. Ex. 2, pp. 15, 49-50).

31. Boys Town is a behavior management framework with a focus on developing relationships between staff and students, helping students identify their behavioral triggers and social skill deficits and teach students alternatives through behavior education. (Tr. Vol. II, p. 430). The relationship between student and teacher is at the heart of the Boys Town framework. This means the teacher reads the student's physical and non-verbal cues to proactively intervene to head off escalation of a behavioral episode. (Tr. Vol. II, pp. 480-482). *** staff have a substantial level of Boys Town

training. *** staff have the support of a Boys Town trainer and consultant who also serves as the school's behavior interventionist. When a student at *** begins to escalate and is in crisis a team is activated to support the staff in addressing student's needs. (Tr. Vol. II, pp. 501-502).

32. De-escalation techniques are used before requiring the student to cognitively process behavior. (Tr. Vol. II, p. 480). De-escalation techniques are not limited to those included in the Boys Town framework but may also include other techniques recommended by mental health experts. The strategy is to teach the student coping strategies pro-actively when the student is calm. (Tr. Vol. II, pp. 480-481). Boys Town uses a level and a motivation system. There are positive and negative consequences with a daily positive reward. The approach focuses on reinforcement of positive decisions and behavior. (Tr. Vol. II, pp. 430-431, 454-455).

33. The school district used the Boys Town framework very successfully within the past *** years supporting students return to general education classes in whole or in part. (Tr. Vol. II, pp. 463, 49-499). The staff at *** is highly trained in implementing a student's IEP and BIP as well as in crisis prevention strategies and using the Boys Town framework. (Tr. Vol. II, pp. 314-316).

34. Although *** utilizes Boys Town the school district individualizes for every student based on the student's IEP and BIP. The IEP/BIP is the guiding document in providing the student with educational services. (Tr. Vol. I., p. 35). Although Boys Town has a structure it also allows for flexibility and adaptability in order to implement a student's IEP/BIP. (J. Ex. 8, p. 4) (Tr. Vol. II, pp. 431, 447-448). Student's BIP could eliminate or modify some features of the Boys Town framework depending on Student's needs. (Tr. Vol. I, pp. 255-258, 314)(Tr. Vol. II, p. 468).

35. If a student is not making progress working through the Boys Town point and level systems the BIP can be adjusted based on a review of what is or is not effective. (Tr. Vol. II, pp. 469, 477, 488-489). The BIP does not specifically refer to the Boys Town methodology – instead, the BIP is individualized to address the student's unique needs. (Tr. Vol. II, pp. 488, 493-494). Student has the skills to behave appropriately. Boys Town can be more effective with Student when the reinforcers used are actually motivating to Student. (J. Ex. 8, pp 4-5).

36. The June 12, 2014 ARD reconvened on June 19, 2014 and continued to deliberate. The ARD discussed the continuum of placement options including on campus behavioral programs as well as continued placement at ***. (Tr. Vol. I., pp. 256-257, 259, 308-309)(Tr. Vol. II, p. 414). The members of the June 19th ARD were the same persons who attended the June 12th ARD. (J. 1, p. 13).

37. In addition, the *** Director (a licensed psychologist) also participated in the June 19th ARD by telephone. (J. Ex. 1, pp. 12, 16) (P. Ex. 1) (Tr. Vol. I, p. 196). A progress report prepared by the *** Director was also shared at the June 19th ARD. (J. Ex. 1, pp. 12, 16-17). The school district shared information about the low *** teacher to student ratio at ***. A representative from *** also participated for a time by telephone to answer parental questions. The June 19th ARD discussed the counseling and crisis intervention services available at ***. (J. Ex. 1, pp. 12-13).

38. The school district continued to propose placement at *** because *** is an equivalent educational environment to ***. (J. Ex. 1, p. 13)(Tr. Vol. I., p. 256). Student needs a smaller educational environment with staff well versed in behavior strategies, trained to understand Student, and able to respond appropriately. These features are available at ***. (J. Ex. 1, p. 12) (Tr. Vol. I, pp. 222, 256, 317).

39. Student's parents reported "peace and stability" with Student's progress at ***. (J. Ex. 1, p. 13). Student's parents were concerned that moving Student from the therapeutic environment at *** where Student made progress to a new environment would be detrimental. (J. Ex. 1, p. 12). A change in schools would be a significant challenge for Student. Student cannot succeed in a typical school environment at this time. Student's behavior continues to be challenging. (J. Ex. 1, pp. 12-13, 17) (Tr. Vol. I, pp. 196-197). Although Student may have some difficulty making a change from one school to another *** staff are very familiar with transition issues and have worked with other students with similar transition needs and are equipped to facilitate the transition for Student. (Tr. Vol. II, p. 312).

40. The June 19th ARD agreed Student needed an updated evaluation. By that time Student's previous Full Individual Evaluation (FIE) was over three years old. Student was not evaluated by the school district during the period of time Student was attending private school and no longer enrolled in the school district. The school district proposed conducting the updated FIE by October 7, 2014. The rationale for conducting the FIE over a 30 day school day period once school resumed in the fall was to observe Student in the initial educational environment. The FIE could also have been completed during ESY if Student had attended the proposed ESY program. (J. Ex. 1, pp. 1, 14)(J. Ex. 2, p. 1)(Tr. Vol. I., p. 255).

41. A Notice of Proposal to Evaluate was provided and Student's mother gave written consent for the FIE, including a psychological, on June 19, 2014. (J. Ex. 1, pp. 74-78). Although the parents agreed with the need for an updated FIE the June 19, 2014 also ended in disagreement over the proposed placement at ***. (J. Ex. 1, pp. 25, 26) (J. Ex. 3, p. 13). Petitioner filed Petitioner's request for a due process hearing on August 4, 2014. (Petitioner's Request for Special Education Due Process Hearing and TEA Notice of Special Education Hearing).

42. The FIE was completed on September 24, 2014 while this litigation was pending. (J. 18). The FIE included the May 2014 *** observation, the June 12, 2014 REED, and the other *** information available to the June ARDs. The FIE also included a good number of other information collected in September 2014 including a parent interview, a parent screening tool, the Behavior Assessment System for Children – second edition (BASC II), additional school observations at ***, report cards, incident reports, behavior sheets, and work samples from ***. (J. Ex. 18, pp. 1-2).

43. Other sources of information for the FIE included a student clinical interview, a children's depression inventory, *** teacher interviews, a standardized achievement test, a standardized cognitive test, an interview with the *** Director, and a functional screening tool completed by *** teachers. (J. Ex. 18, pp. 1-2). The FIE confirmed Student needs a small, structured environment and continues to engage in behaviors that pose danger to self and others. The FIE supported Student's need for an educational environment where Student can safely de-escalate. (J. Ex. 18, p. 25)(Tr. Vol. I., pp. 279, 303-305).

44. The FIE also supported Student's need to develop appropriate social behavior in order to be successful in a regular education classroom, a low student to teacher ratio, a quiet school environment, a variety of interventions including verbal counsel, physical space to "cool off," respect for Student's patterns of struggles and carefully placed negative and positive consequences. (J. Ex. 18, p. 37). These are all aspects of the proposed IEP and BIP capable of implementation at ***. (J. Ex. 1, p. 16) (Tr. Vol. I. p. 325)(Tr. Vol. II, p. 311). The FIE also recommended psychological services to assist Student in developing coping strategies. (J. Ex. 18, p. 28)(Tr. Vol. I, p. 324).

45. The FIE found Student's cognitive processing factors fall within the average to above average range except for overall processing speed which falls into the low average range. (J. Ex. 18, p. 30). The updated FIE also measured Student's academic achievement – Student fell within the normal to above normal range except for written expression which was identified as an area of academic weakness. (J. Ex. 18, p. 25).

Discussion

Introduction

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free, appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. *20 U.S.C. § 1400 (d).* Under the IDEA the school district has a duty to provide a free appropriate public education to all children with disabilities who attend the school district. *34 C.F.R. § 300.101 (a.).*

The broad issue in this case is whether the school district's proposed educational program and placement at *** was reasonably calculated to provide Student with a free, appropriate public education (FAPE) during the 2014-2015 school year in the least restrictive environment. Student also alleges a number of procedural violations of the IDEA that Student claims resulted in the denial of a FAPE and denied parental participation in the educational decision making process.

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 proposed IEP and placement was reasonably calculated to provide the requisite meaningful educational benefit. *Rowley, 458 U.S. at 206-207.*

Burden of Proof

In addition, 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).*

[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).*

Retrospective Evidence

Finally, substantive compliance of the IEP must be reviewed by looking only to the proposed IEP and placement as written and not whether subsequent offers of additional services should also be considered. The IEP must be evaluated prospectively as of the time of its drafting – therefore, retrospective testimony that the school district would have provided additional services beyond those listed in the IEP may not be considered in a unilateral placement case. *R.E. v. New York City Dept. of Educ., 694 F. 3d 167, 186, 188) (2d Cir. 2012); Systema v. Academy Sch. Dist., 538 F. 3d 1306, 1315-1316 (10th Cir. 2008.).* However, evidence that explains or justifies the services listed in the IEP may be considered in determining whether the IEP at issue is reasonably calculated to provide the student with the requisite educational benefit. *R.E. v. New York City Dept. of Educ., 694 F. 3d at 186-187.*

Proposed Placement at ***

The evidence shows Student needs a small, structured, quiet learning environment with a low teacher to student ratio and school staff trained and experienced in meeting Student's therapeutic and behavioral needs. There is no real dispute that Student is not ready to be educated on a regular school campus -- Student's own expert, the *** Director, supported the recommendations of school district staff in that regard. The evidence also showed that the proposed placement at *** was a comparable educational placement to Student's current private placement at ***.

The evidence also showed that ***, with its *** and the family's comfort level with its procedures and staff was beneficial for Student. However, the IDEA does not require the school district to offer the best possible educational program or one which would maximize Student's potential. *Rowley, 458 U.S. at 198.* It is understandable that Student's family prefers *** as Student's placement – it's been a largely positive experience for Student and Student's family. However, so long as the school district's proposed program is reasonably calculated to provide Student with an educational benefit in the least restrictive environment the school district has met its responsibility under the IDEA. *Rowley, 458 U.S. at 188-189, 199; 20 U.S.C. § 1412 (a)(5).*

Therefore, to the extent that *** constitutes a small, structured, off-campus learning environment with a behavior education component that meets Students needs the proposed placement at *** constitutes the least restrictive environment. Although the IDEA establishes a preference for mainstreaming a student in the least restrictive environment the statute also recognizes doing so is not necessarily appropriate for all students given the statutory phrase "to the maximum extent appropriate." Furthermore, the statute itself explicitly provides for separate schooling as a placement option in the appropriate case depending on the severity of the disability. *20 U.S.C. § 1412(a) (5); 34 C.F.R. § 300.114 (a).*

Cost as a Factor in Placement Decisions

The record suggests the school district's recommendation for placement at *** rests, in part, on its annual contract with *** and the financial arrangement that guarantees the school district a specified number of student "slots" at ***. The record does not include cost comparisons between *** and ***. It is reasonable to infer from the evidence that the school district chose to contract with *** in lieu of setting up an in-district, small, self-contained, structured learning environment with a small staff to student ratio or funding the out of district private school.

Cost and the allocation of school district staff resources, like geographic proximity, can be a factor in the

determination as to whether a particular placement provides a special education student with a FAPE in the LRE. *See, Flour Bluff Ind. Sch. Dist. v. Katherine M., 91 F. 3d 689, 695 (5th Cir. 1996)(district court erred in focusing only on cost of implementing program for deaf student at home school and failed to consider resource costs; geographic proximity is not presumptive factor in placement); Cheltenham Sch. Dist. v. Joel P., 949 F. Supp. 346 (E.D. Pa. 1996), aff'd 135 F. 3d 763 (3d Cir. 1997)(school district may take into account impact of proposed placement on limited financial and educational resources).*

Appropriate Features of *** Placement

The evidence showed a focus at *** is on the development of personal relationships between staff and student -- to that extent *** is comparable to the focus of the therapeutic approach at ***. The evidence also showed that while *** utilizes the Boys Town framework its use can be modified to meet Student's needs and to implement Student's IEP/BIP. The record confirms *** is the kind of small, self-contained, structured educational setting Student needs with a low staff to student ratio.

The Proposed IEP

The IDEA requires that an appropriate program must be designed on the basis of current evaluation data. *34 C.F.R. § 300.324 (a) (i) (iii).* Although the June ARD meetings did not have the benefit of an updated FIE there was information from *** and from the REED upon which the proposed IEP was designed. The evidence showed the school district attempted to postpone the ARD meeting until an FIE could be completed but Student's parents insisted on going forward before that could be accomplished. Even so, the evidence showed the proposed IEP set up a schedule of core *** grade academic classes along with PE and an elective based on *** reports that Student's academic skills were on or above grade level.

Furthermore, the evidence showed that many of the behavioral strategies and interventions used at *** were also included in the proposed IEP/BIP to be implemented at ***. The availability of social skills training, counseling and crisis prevention services at *** were also available to Student as part of the proposed program. Although not determinative of the decisions and proposals made at the June ARD meetings the September 2014 FIE supports the proposed behavioral and academic program in meeting Student's needs.

Student did not meet Student's burden of proving that Student was denied a FAPE by unnecessary academic IEPs, an improperly designed BIP, or an "unrealistic re-integration plan." *Schaffer v. Weast, supra.* Instead, the evidence showed the proposed IEP, based on the information available to the June ARD meetings, was reasonably calculated to provide Student with the requisite educational benefit. *Rowley, supra.*

Procedural Claims

Formulation of Student's Present Levels of Performance:

Student contends the school district failed to use accurate information in formulating Student's present level of academic performance for purposes of designing an appropriate IEP at the June 2014 ARD meetings. The evidence showed that the ARD contemplated further evaluation to confirm Student's present levels of performance. Student had not attended public school for two years. Although the school district relied, in part, on performance levels stated in previous ARD meetings, additional information regarding Student's academic and behavioral skills from *** was also utilized in formulating the IEP until such time as the FIE could be completed and used to revise Student's IEP if needed.

Even if the data used by the school district stating Student's present levels of performance could have been more up to date, the evidence showed that any procedural error in that regard did not deny Student a FAPE. Procedural defects alone do not constitute a violation of the IDEA unless they result in the loss of educational opportunity. *Adam J. v. Keller Ind. Sch. Dist., 328 F. 3d 804, 811-812 (5th Cir. 2003); 34 C.F.R. § 300.513 (a)(2)(i)(iii).*

Transfer ARD Rules

Student contends the school district improperly used IDEA transfer rules in scheduling Student's ARD and in designing a "temporary" IEP and then giving itself 30 school days to collect information, reconvene, and then formulate a "permanent" IEP. In Texas there are specific rules for students "newly enrolled" in a public school district. *19 Tex. Admin. Code § 89.1050 (f).* However, those rules appear to apply to students who transfer from one public school district into another public school district either within Texas or from another state. *19 Tex. Admin. Code § 89.1050 (f)(2)(3).* There are no rules that specifically address the situation here: when a private school student (previously identified as a student with a disability) enrolls in a public school district without an existing IEP.

For students transferring from one public school to another Texas permits the receiving public school district (so long as special education is verified) to either adopt and implement the student's previous IEP or to develop and implement a new one. *19 Tex. Admin. Code § 89.1050 (f).* The Texas "transfer rules" comply with federal regulations that establish when an IEP must be in effect; i.e. at the beginning of every school year and, in the case of transfers between public school districts, adoption of the IEP in effect at the time of the transfer. *34 C.F.R. § 300.323 (a)(e)(1)(2).* If the transfer student was in the process of an initial special education evaluation the receiving school district has 60 calendar days from the date the parent provides consent to complete the evaluation. *19 Tex. Admin. Code § 89.1050 (f)(1).*

In this case Student left the school district and later returned after a period of time in a private school where no written IEP existed or was implemented. The school district previously identified Student as eligible for special education so the rules related to initial evaluations did not apply. *See, 34 C.F.R. § 300.111; 300.301.* The school district was therefore left with having to develop a new IEP. The evidence showed the school district convened an ARD as soon as possible after: (i) the parent requested the ARD, (ii) the school district collected some information from the private school, and (iii) the Student was officially enrolled back into the public school system.

The June ARD meetings formulated a proposed an IEP and placement based on the best information available at the time. It made sense for the school district to propose scheduling a follow up ARD after the first thirty days of school, conduct the FIE during that time period, and then reconvene to review the results of the FIE and revise Student's IEP if needed. Even if the school district was in error by using the transfer rules to schedule the ARD meetings the error did not result in the denial of a FAPE and therefore the error is not a violation of the IDEA. *Adam J. v. Keller Ind. Sch. Dist., supra; 34 C.F.R. § 300.513 (a)(2)(i)(iii).*

Predetermined Placement Decision

Student contends the school district made a predetermined decision about Student's placement and failed to consider other options during the June 2014 ARD meetings and that these together constitute a procedural violation of the IDEA. Student did not meet Student's burden of proof on this issue. *Schaffer v. Weast, supra.* The mere fact that school personnel conducted a staffing prior to the first June ARD meeting does not prove the school district failed to provide Student's parents with a meaningful opportunity to participate in the decision-making process or that the ultimate proposed placement decision was improper. *See, 34 C.F.R. § 300.513 (a)(2).*

The evidence showed that other placement options and the rationale for the placement at *** were thoroughly discussed at the two ARD meetings. School district staff may certainly have had *** in mind prior to the two ARD meetings but Student's parents were provided with opportunities to share their thoughts and preferences as well and they did. The school district explained that *** was an option on the school district's continuum of educational placements for students who needed a more restrictive setting in lieu of setting up its own separate, self contained facility *See, 34 C.F.R. § 300.114 (a)(2)(ii); 300.115.* There is no violation of the IDEA under these circumstances.

ARD Members

Student argues there was an insufficient number of school district participants at the ARD meetings who were knowledgeable about Student, that the ARD should have included Student's special education teacher at ***, and that the administrator in charge of the ARD meetings did not have sufficient authority to commit funds or resources. The evidence showed the requisite members attended and participated in the June 2014 ARD meetings. *19 Tex. Admin. Code § 89.1050 (c)(1)(A)-(E).* There was nothing preventing Student's parents from inviting the *** special education teacher to the ARD – state rules allow ARD membership to include other individuals who have knowledge or special expertise regarding the child *at the discretion of either the parents or the school district*. *19 Tex. Admin. Code § 89.1050 (c)(1)(F)(emphasis added).*

The use of the phrase "at the discretion" is crucial here – the private school special education teacher is not a required member of the ARD under the rules – his or her attendance was merely optional at the discretion of either party. The fact that the school district chose not to invite the private school special education teacher does not mean the ARD was improperly constituted. In any event, the private school Director participated in the June 19th ARD and shared information about Student's mental health issues and academic and behavioral progress at the private school.

Furthermore, Student did not meet Student's burden of proving that the administrators who attended the ARD meetings did not meet IDEA requirements. State rules require, in pertinent part, the ARD include a representative of the school district who is *knowledgeable* about the school district's resources. *19 Tex. Admin. Code § 1050 (c)(D)(iii)(emphasis added).* The IDEA does not require the school district administrative representative to have a specified level of authority to *commit* school district resources – only that the representative be *knowledgeable* about them. There were several school district representatives who appeared to fulfill those requirements at the ARD meetings including a special education coordinator and the campus principal. *See, 34 C.F.R. § 300.321 (a)(4)(i)-(iii).*

Timeliness of FIE

Finally Student contends the FIE was not conducted in a timely manner. Because Student was previously evaluated by the school district and identified as eligible for special education it was appropriate for the school district to refer Student for a re-evaluation. Had Student attended public school the re-evaluation was due February 24, 2014. However, the evidence showed Student was attending an out of district private school and not enrolled in the school district at that time. Any obligation to conduct a re-evaluation fell on the school district where the private school was located. *See 34 C.F.R. § 300.130; 300.131; 300.132.*

Furthermore, under the terms of the mediated Settlement Agreement, the school district had no obligation to provide Student with educational services until the first day of the 2014-2015 school year. It was appropriate for the June ARD to conduct a REED. *34 C.F.R. § 300.305 (a).* It was also appropriate for the ARD to refer Student for an updated FIE and to do so once school resumed in the fall so Student could be evaluated and observed in the educational setting. The evidence showed the school district contemplated all

along that an ARD would reconvene following the results of the FIE and make whatever adjustments or revisions to Student's IEP that were recommended.

Should Student's parents choose to accept the school district's proposed program and placement the parties have an opportunity to re-convene an ARD and consider the September 2014 FIE results and recommendations and make whatever adjustments to the existing IEP that may be needed. However, because an appropriate IEP and placement were available and ready for implementation on the first day of school I find no substantive educational harm resulted from the delay in conducting the FIE and therefore no violation of the IDEA in that regard. *34 C.F.R. § 300.513 (a)*

Conclusions of Law

1. The Respondent school district's proposed educational program and placement at *** is reasonably calculated to provide Petitioner Student with a free, appropriate public education in the least restrictive environment within the meaning of the Individuals with Disabilities Education Act. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982); Houston Ind. Sch. Dist. v. VP; 582 F. 3d 576 (5th Cir. 2009); 34 C.F.R. § 300.101.* Petitioner did not meet Petitioner's burden of proof on this issue. *Schaffer v. Weast, 546 U.S. 49 (2005); Richardson Ind. Sch. Dist. v. Michael Z., 580 F. 3d 286, 292 n. 4 (5th Cir. 2009).*

2. Respondent committed no procedural violations of the Individuals with Disabilities Act that impeded the Petitioner's right to a free, appropriate public education, significantly impeded the right of Petitioner's parents the opportunity to participate in the decision-making process regarding the provision of a free, appropriate public education to Petitioner, or caused a deprivation of educational benefit. *34 C.F.R. § 300.513 (a)(1)(2)(i)(ii)(iii).*

ORDERS

Based upon the foregoing findings of fact and conclusions it is hereby **ORDERED** that Petitioner's claims and requests for relief under the Individuals with Disabilities Education Act are hereby **DENIED**. All other relief not specifically stated herein is **DENIED.**

SIGNED the 14th day of November 2014

/s/ Ann Vevier Lockwood
Ann Vevier Lockwood,
Special Education Hearing Officer

NOTICE TO THE PARTIES

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

BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS

STUDENT,		
bnf PARENT and PARENT,	**§**	
Petitioner,	**§**	
	§	
v.	**§**	**DOCKET NO. 292-SE-0814**
	§	
CLEAR CREEK INDEPENDENT	**§**	
SCHOOL DISTRICT,	**§**	
Respondent.	**§**	

SYNOPSIS

ISSUE:

Whether school district's proposed program and placement at separate, self contained off-campus facility for *** grader with an emotional disturbance who needed a small, structured, separate learning environment with a small staff to student ratio trained in variety of behavior intervention strategies and techniques and that used a specific classroom management behavioral framework was reasonably calculated to provide the student with a free, appropriate public education in the least restrictive environment.

HELD:

FOR THE SCHOOL DISTRICT.

The evidence showed the proposed program and placement at the separate, self contained off-campus school was comparable in all important aspects with student's current out of district *** unilateral placement. Proposed program contemplated appropriate academic classes and appropriate behavioral goals, strategies, modifications and accommodations to address student's academic and behavioral needs. Proposed placement also had counseling and crisis prevention services on campus. For student with significant behavioral issues separate schooling was the least restrictive environment. School district could utilize cost and allocation of staff resources as one factor in making its placement recommendation.

Although program and placement at the out of district *** was successful for student the public school district is not required to maximize the student's potential or provide student with the best possible educational program. The classroom management framework utilized at the proposed placement was flexible enough to be modified to meet student's needs – student's Individual Education Plan (IEP) and Behavior Intervention Plan (BIP) dictated the behavioral strategies and interventions. Evidence showed staff at the proposed placement was highly trained in variety of behavioral techniques and that the approach to addressing the student's behavioral needs was comparable in many respects to the approach used by the private ***.

34 C.F.R. § §300.101; 300.114.

ISSUE:

Whether a variety of alleged procedural violations impeded the student's right to a free appropriate public education, caused a deprivation of educational benefit or significantly impeded parents' opportunity to participate in the decision-making process regarding the provision of a free, appropriate public education to their child.

HELD:

FOR THE SCHOOL DISTRICT

Student alleged school district failed to formulate appropriate present levels of performance for purposes of designing the proposed IEP/BIP, improperly used transfer rules to schedule Admission, Review & Dismissal Committee (ARD) meetings, failed to ensure proper persons attended those meetings, that school district staff predetermined the placement prior to those meetings, and that the Full Individual Evaluation (FIE) was not conducted in a timely manner.

Evidence showed school district used best information available at the time of the meetings in June to formulate the present levels of performance for IEP/ BIP. Evidence showed it was reasonable for school district to look to the transfer rules for guidance in unique circumstance were student was previously identified and served as a special education student by the public school district (so no need for an initial FIE) but left the school district for two years under two separate mediated settlement agreements and returned to enroll at the public school without an existing IEP from the private, out of district ***.

At ARD meetings in June school district used information provided by the private school, a review of existing educational data (REED), and information from previously proposed educational plans to design an IEP and propose a placement. School district proposed plan to conduct a re-evaluation FIE that was overdue during the first 30 school days of the upcoming new school year and return to ARD to revise and update student's IEP/BIP as recommended by the FIE. School district was not legally responsible for conducting the re-evaluation while student was attending an out of district private school.

All requisite members of ARD were in attendance; at least several school district members of ARD reviewed student's educational file prior to ARD, the licensed specialist in school psychology (LSSP) had extensive knowledge about the proposed placement, and the designated administrative school district representative had the requisite knowledge of school district resources.

The mere fact that school district personnel met in a staffing prior to the first ARD meeting did not prove school district staff made a "predetermined" placement decision – evidence showed continuum of placement options were discussed at ARD including options within the school district and the private *** placement preferred by student's parents.

Even if the school district did commit procedural violations none of the violations denied student a FAPE, caused a deprivation of educational benefit, or significantly impeded parents' opportunity to participate in the decision-making process regarding the provision of a free, appropriate public education to their child.

34 C.F.R. §§300.303;300.305; 300.130; 300.131; 300.132; 300.301; 300.321; 300.323; 300.513 (a); 19 Tex. Admin. Code § 89.1050 (c).