

DOCKET NO. 214-SE-0517

STUDENT, B/N/F PARENT, Petitioner	§	BEFORE A SPECIAL EDUCATION
	§	
	§	
v.	§	HEARING OFFICER FOR
	§	
VERNON INDEPENDENT SCHOOL DISTRICT, Respondent	§	
	§	
	§	THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

Petitioner, STUDENT, b/n/f PARENT (“Petitioner” or “Student”) brings this action against the Vernon Independent School District (“Respondent,” “the school district,” or “Vernon ISD”) under the Individuals with Disabilities Education Act, as amended, 20 U.S.C. § 1401 *et. seq* (IDEA) and its implementing state and federal regulations. There are three main issues in this case.

The first issue is whether the school district should have identified Student as a student with Other Health Impairment (OHI) during the 2016-17 school year. The second issue is whether the school district failed to provide Student with a free, appropriate public education (FAPE) during the 2016-17 school year. The third issue is whether the school district violated parental procedural rights under the IDEA during the 2016-17 school year.

The hearing officer concludes: (i) the school district did not violate the IDEA when it failed to identify Student as a student with OHI due to lack of parental consent; (ii) the school district provided Student with FAPE during the relevant time period, although there were some weaknesses in the program; and (iii) the school district did not violate parental procedural rights under the IDEA.

A. Legal Representatives

Student has been represented throughout this litigation by Student's authorized non-attorney representative, Carolyn Morris, with Parent to Parent Connection. The school district has been represented throughout this litigation by its legal counsel, Jan Watson, with the law firm of Walsh Gallegos Treviño Russo & Kyle, P.C.

B. Resolution Session and Mediation

The parties agreed to attempt mediation in lieu of the Resolution Session. The parties convened mediation on June 26, 2017, but it was not successful in resolving the issues in this case.

C. Continuances and Extensions of Decision Due Date

Three continuances and extensions of the decision due date were granted for good cause in this case. The first was at joint request to allow the parties to participate in mediation. The second was at Respondent's request to resolve issues related to the availability of key witnesses. The third was at Petitioner's request to resolve a medical issue for Ms. Morris. The parties selected new dates for the hearing and extensions of the decision due date by agreement.

At the conclusion of the due process hearing the parties requested a fourth extension of the decision due date to November 17, 2017 to allow for submission of post-hearing closing arguments and to give the parties time to convene an Admission, Review & Dismissal Committee meeting (ARD) that might lead to the resolution of some of the pending issues in this case.

II. DUE PROCESS HEARING

The due process hearing was conducted on September 19-20, 2017. Petitioner continued to be represented by Student's non-attorney representative, Carolyn Morris. In addition,

Student's ***, ***, and Student also attended the hearing. Respondent continued to be represented by its legal counsel Jan Watson. Ms. Watson was assisted at the hearing by her co-counsel Jennifer Carroll with the same law firm. In addition, ***, Director of Special Education for the Wilbarger Shared Services Arrangement, attended the hearing as the school district's party representative. The hearing was recorded and transcribed by a certified court reporter.

At the conclusion of the hearing the parties discussed scheduling an ARD to discuss Student's identification as a student with OHI and a set of evaluations proposed by the school district. The parties filed their written closing arguments in a timely manner. The Decision in this case is due November 17, 2017.

III. ISSUES

A. Petitioner's Issues

Petitioner submitted the following issues for decision in this case:

1. Whether the school district failed to identify Student as a student with OHI based on diagnoses of *** and Attention Deficit Hyperactivity Disorder (ADHD) in addition to Student's eligibility for special education as a student with an Intellectual Disability (ID);
2. Whether the school district failed to provide Student with FAPE within the meaning of the IDEA beginning with Student's transfer into the District in March 2017, up through the end of the 2016-17 school year, including specifically:
 - a. Whether the District failed to include a Behavior Intervention Plan (BIP) as a component of Student's Individualized Education Plan (IEP);
 - b. Whether the District failed to conduct a Functional Behavior Assessment (FBA) as recommended by Student's prior school district and in the IEP adopted by the District in March 2017;
 - c. Whether the District failed to properly address Student's behavioral needs and whether disciplinary decisions were appropriate without consideration of Student's needs for a FBA and/or BIP;
 - d. Whether Student failed ***: ***, ***, and ***;
 - e. Whether the District failed to provide Student with an appropriate ***;

- f. Whether the District failed to provide Student with appropriate inclusion and other support services in Student's regular education classrooms;
 - g. Whether the District failed to provide Student with educational services while disciplined; and
3. Whether the District failed to comply with parental rights under the IDEA including specifically, whether the District failed to provide Student's *** with the requisite Notice of Procedural Safeguards and whether the District failed to notify Student's *** of Student's behavioral issues at school.

B. Respondent's Legal Position and Additional Issues

Respondent generally denies the factual allegations in the Complaint and asserts Student's educational programming was individualized based on assessment and performance, implemented in the least restrictive environment (LRE), in a coordinated and collaborative manner by key stakeholders, and that Student received both academic and non-academic benefit from Student's program. The school district contends Student's ***, but Student made progress and ***. The school district further contends it provided Notice of Procedural Safeguards to Student's ***.

In addition, the District asserted the following counterclaim: Whether Petitioner is entitled to an Independent Educational Evaluation (IEE) at public expense because the school district has not yet had an opportunity to conduct its own Full Individual Evaluation (FIE).

IV. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner requests the following items of requested relief:

1. The school district convene an ARD for the purpose of considering Student's promotion and grade placement for the upcoming 2017-2018 school year;
2. The school district fund an IEE to include evaluations of Student's academic, cognitive, social, and behavioral needs; and a psychological, and an autism evaluation;
3. A licensed specialist in school psychology (LSSP), a psychologist, or other school

district representative qualified to explain and interpret evaluations, meet with Student's *** for the purpose of explaining parental procedural rights under the IDEA and to include participation by telephone of Student's non-attorney representative;

4. Place Student in the regular education classes Student needs for *** with 1:1 inclusion support from an inclusion teacher in all of those classes;
5. The school district's Special Education Department, through the inclusion teacher or a special education teacher, closely monitor Student's academic and behavioral progress at school by staying in close contact with each of Student's teachers with regard to Student's homework, attendance, and behavior issues and provide Student's *** with regular reports of Student's progress and/or convene an ARD for the purpose of discussing Student's progress at school;
6. The school district's *** teacher assigned to Student's grade level convene a meeting with Student and Student's *** for the purpose of counseling Student in selecting a ***, formulating *** goals, ***, and ensuring Student's *** comports with the requirements of Student's ***;
7. The school district provide Student with after school outside tutoring to assist Student with classwork; and,
8. The school district cease using an intimidating tone when communicating with Student's *** and improve communications between home and school by focusing on building a positive relationship to support Student's success at school.

B. Respondent's Requested Relief

Respondent requests a ruling that Petitioner is not entitled to an IEE at public expense until the school district conducts its own evaluation.

V. FINDINGS OF FACT

1. Student first began receiving special education services from the school district at age *** when Student qualified for services as a student with an ID.¹ Student resided with

¹ Transcript Volume I at page 218 ("I. at ___").

Student's ***. Student has ***. In *** grade the school district was aware Student ***.²

2. In *** school, Student's academic abilities were several grade levels below Student's grade placement. Student required consistent assistance in the classroom through accommodations, modifications, and inclusion assistance in order to make educational progress in the general education grade level curriculum. Student's math, reading, and writing skills fell within the very low average to borderline ability range.³ In sum, Student displayed deficits in every academic area commensurate with Student's cognitive skills.⁴
3. In *** grade, Student and Student's *** conferenced with the *** counselor to ***. At that time, Student ***. The ***.⁵
4. Student's receptive and expressive language skills are below average. Student expresses ***self best orally. Student's cognitive ability falls within the delayed range.⁶ Student has deficits in phonological awareness, vocabulary, word knowledge, general information, and connecting previously learned material with present knowledge. Student has difficulty *** and difficulty with ***. Student demonstrates strength in visual memory and reasoning skills.⁷
5. Student exhibits low adaptive behavior and living skills particularly in the areas of communication and socialization. Student has significant deficits in adaptive behavior skills in comparison to same age and grade peers. Student may behave in class like a younger student due to difficulties understanding grade level materials and concepts. Student can therefore be expected to display frustration with completing assignments without significant assistance and to avoid or escape classwork through off-task behaviors.⁸
6. Student needs assistance in reading and understanding text in the classroom in all subject areas. Student's strength is in completing hands-on activities. Student can participate in class discussions and projects and prefers more active learning than book work. Student's interests are in ***, and spending time with friends and family.⁹
7. Student left the school district and enrolled in the *** (***) *** school year where

² Joint Exhibit 1 at page 7 (J. ___ at ___.”).

³ J. 1 at 13.

⁴ J. 1 at 14.

⁵ II. at 322-23, 341, 363-64.

⁶ J. 1 at 2, 4.

⁷ J. 1 at 9-10.

⁸ J. 1 at 12.

⁹ J. 5 at 17.

- Student attended *** ***. Student continued to receive special education services as a student with an ID.¹⁰ Student was distracted and struggled in class although Student was also easily redirected. Student was especially motivated when required to ***.¹¹ Student withdrew from *** on ***.¹²
8. Student transferred back into the school district on ***, 2017, when Student ***. Student's ***, ***, enrolled Student back into the school district.¹³
 9. The school district is a member of the Wilbarger Shared Services Arrangement (the SSA). The SSA is a group of school districts that pool resources to meet the needs of students with disabilities in their respective jurisdictions. The SSA provides the member school districts with a Special Education Director, a diagnostician, speech-language pathologist, and other related services.¹⁴
 10. The SSA contracts with a LSSP to conduct psychological evaluations, FBAs, and to provide some counseling services.¹⁵ The school district directly employs special education teachers (including inclusion teachers), counselors, and paraprofessionals who provide services to students with disabilities eligible for special education in the school district.¹⁶
 11. A consultation meeting convened on ***, 2017.¹⁷ Prior to the consultation meeting Student's *** and *** received Notice of Procedural Safeguards and a Guide to the ARD Process on ***, 2017, from Vernon ISD.¹⁸ The *** *** and Student's *** were the only participants in the consultation meeting.¹⁹ The *** is trained to gather relevant information to assist the school district in providing Student with comparable services to those provided by Student's prior school district – ***.²⁰ Student's transcript from *** was included in the set of documents available at the consultation meeting.²¹
 12. Student's mother signed receipt of Notice of Procedural Safeguards and receipt of the guide to the ARD process at the consultation meeting. Student's mother also signed consent so the school district could obtain special education, medical, and psychological

¹⁰ J. 1:1.

¹¹ J. 1: at 3-4.

¹² J.3. at 4.

¹³ J. 3 at 1; J.5 at 20; I. at 70-71, 201.

¹⁴ I. at 76-77, 81, 201.

¹⁵ I. at 78-79.

¹⁶ I. at 77-78.

¹⁷ J. 3.

¹⁸ J.3 at 2; J.3.at 3; J.4. Vol. I. at 332-34.

¹⁹ J.3.

²⁰ I. at 124-25.

²¹ J.3. at 4.

- records to determine Student's eligibility for special education services and an appropriate placement. She also provided contact information (***), and, acknowledged ***. The consultation meeting documents also included a list of records to be requested from ***.²²
13. At the time of Student's enrollment in the school district in *** 2017, Student had failing grades from *** for *** and ***. Student ***. For the *** at ***, Student was failing ***, ***, ***, ***, and the ***. Student ***. Student was *** by ***.²³
 14. The school district received Student's *** IEP and ARD documents dated ***, 2016. The *** IEP did not include a BIP or a FBA report. Student was identified as eligible for special education services as a student with an ID. No secondary or tertiary disabilities were noted in the *** ARD documents. There were no medical needs noted that might impact Student's involvement in or progress in the general curriculum. However Student's need for co-teaching was noted in order to progress in the general curriculum. There were *** IEPs for Writing, Reading, and English/Language Arts.²⁴
 15. The *** initially placed Student in *** based on the information received from Student's *** and the *** transcript. Once additional information from *** clarified Student had not been in *** the *** changed Student's placement to general education classes with inclusion support.²⁵ The *** placed Student in classes where Student could ***. This included a *** class for ***.²⁶
 16. When Student first arrived, the special education teacher reviewed Student's IEP and goals with Student's *** teacher.²⁷ The special education teacher also obtained information from Student's general education teachers to assist in updating progress on Student's IEP goals and objectives.²⁸
 17. An ARD convened on ***, 2017 to conduct a 30-day transfer ARD.²⁹ The ARD reviewed the most recent *** FIE and an *** Review of Existing Evaluation Data (REED) dated ***, 2016.³⁰ The ***, 2017 ARD identified Student's health/medical needs based on diagnoses of *** and ADHD, noting Student ***.³¹ The ARD confirmed

²² J.3 at 1-3, 5-9.

²³ J.3.at 4; J.6 at 22.

²⁴ J.2.

²⁵ II.at 303-304, 353-54.

²⁶ J. 5 at 18; II. at 304-05.

²⁷ I.at 260.

²⁸ I. at 260-62.

²⁹ J.5 at 1-5.

³⁰ J.1 at 1-6; J.5 at 20.

³¹ J.5 at 2.

Student's eligibility for special education as a student with an ID.³²

18. Between ***, 2017 and ***, 2017 Student had *** disciplinary referrals. The conduct subject to the referrals included failing to comply with teacher directives for inappropriate or non-compliant classroom behavior (such as ***), as well as ***. The disciplinary referrals came most often from the *** and *** classes.³³ The ***, 2017 ARD noted the number of disciplinary referrals and concluded Student's behavior impeded Student's learning and the learning of others. The ARD decided Student needed positive behavioral interventions, strategies, and supports.³⁴
19. A set of accommodations and inclusion support services were designed by the ***, 2017 ARD to address the office referrals.³⁵ School staff felt Student's misbehavior was not atypical for a student ***.³⁶ The ARD concluded Student's behavioral needs could be met with a set of accommodations without a BIP.³⁷
20. Student's ***, 2017 IEP included positive behavioral supports and accommodations to meet Student's needs including: checking for understanding, ***, small group administration, clearly defined and consistent limits, reminders to stay on task, and positive reinforcement.³⁸
21. IEPs were designed for ***, and *** for ***. The IEPs were based on a review of Student's present levels of academic achievement and functional performance (PLAAFPs). The IEP goals were objective and measureable. The IEPs focused on Student's needs to develop *** skills. The evaluation procedures for measuring progress for each IEP goal and objective and the person(s) responsible for implementing the IEP goals were stated in the IEPs.³⁹ Student's instruction was in the general education environment.⁴⁰ Inclusion support was provided for *** minutes *** times a week in *** class.⁴¹
22. A set of daily supplementary aids and services, instructional and assessment accommodations and supports were included in Student's educational program at the ***, 2017 ARD. These included: checking for understanding, ***, reduced length of

³² J.5 at 20.

³³ J.9.

³⁴ J. 5 at 3.

³⁵ J.5 at 3, 20.

³⁶ I. at 251-52, 255-56, 266.

³⁷ II. at 312-312, 365-66.

³⁸ J. 5 at 13.

³⁹ J. 5 at 2, 4-10.

⁴⁰ J. 5 at 14.

⁴¹ J. 6 at 16.

- assignments in ***, copy of teacher notes, extended time for assignments in ***, ***, small group administration, clearly defined and consistent limits, reminders to stay on task, positive reinforcement, and, average tests as daily grades if beneficial to student's grade.⁴²
23. ***. The ***, 2017 ARD discussed Student's *** needs including a review of information from ***. Student and Student's *** participated in the *** discussion. Student's *** was provided with ***. At the time of the ***, 2017, ARD Student ***.⁴³ Student needs assistance in ***.⁴⁴
24. Student had *** more disciplinary referrals between ***, 2017 and ***, 2017. The conduct subject to the referrals included: disruptive behavior in class, ***, failing to comply with directives, ***, refusing to complete assigned work, ***, and insubordination.⁴⁵ Student was disciplined through conferences with an administrator, ***, and ***. Student received ***.⁴⁶ Student also received ***.⁴⁷
25. Student's persistent misbehavior culminated in an incident in ***, 2017 when Student ***. Student was *** on ***, 2017. A disciplinary hearing was conducted on ***, 2017. The Principal, the Assistant Principal, Student, and Student's *** participated in the disciplinary hearing.⁴⁸
26. A manifestation determination review ARD (MDR ARD) convened on ***, 2017, to discuss the behavior and Student's possible placement in a Disciplinary Alternative Education Program (DAEP). Student's *** attended the meeting and Ms. Morris, as a parent advocate, participated by telephone.⁴⁹ The Principal, Assistant Principal, an educational diagnostician, a special education teacher, one of Student's general education teachers, and the SSA Special Education Director also attended the ARD.⁵⁰
27. The ***, 2017 MDR ARD discussed Student's educational program and academic issues raised by the parent advocate. The parent advocate expressed concerns the IEP and accommodations were not meeting Student's behavioral needs. The parent advocate raised the issue of whether Student should also be identified as OHI based on ADHD and ***. The MDR ARD discussion included a parental request for new evaluations, including a psychological, assessments of Student's cognitive and academic achievement

⁴² J. 5 at 13.

⁴³ J.5 at 12, 17-18, 22.

⁴⁴ J. 5 at 18.

⁴⁵ J. 9 at 1-2.

⁴⁶ J. 6 at 20; I.at 257, 267-68.

⁴⁷ I. at 234-235.

⁴⁸ J.6. at 20.

⁴⁹ J.6 at 20.

⁵⁰ J. 6 at 24.

- skills, an autism evaluation, and a FBA. The parent advocate requested an IEE.
28. The MDR ARD agreed to recess and reconvene at a later date. On ***, 2017, the Special Education Director sent Student's *** a copy of Notice of Procedural Safeguards, Notice of Proposal to Evaluate, and a Consent for Evaluation.⁵¹ Student's *** signed receipt for the documents.⁵²
29. By *** 2017 *** Student earned *** in ***, a *** in ***, a *** in ***, failed *** with a ***, earned *** in ***, *** in ***, failed *** with a ***, and earned a *** in Student's ***. Student's year-end averages were a *** in *** a *** in ***, a *** in ***, a *** in ***, a *** in *** and a *** in ***.⁵³ Before school tutorials were available to Student.⁵⁴ Student mastered one of the *** objectives in Student's IEP and made progress on *** and *** objectives.⁵⁵
30. The MDR ARD reconvened on ***, 2017.⁵⁶ The Principal, Assistant Principal, the SSA Special Education Director, the diagnostician, and a general education teacher attended the ***, 2017 ARD. The school district's attorney participated by telephone. The special education teacher who participated in the ***, 2017 ARD was *** so another special education teacher participated by telephone. Student's *** did not attend the ***, 2017 ARD. The parent advocate requested copies of the ARD meeting minutes.⁵⁷ Notices of the ***, 2017 ARD were sent to Student's *** via certified and regular mail.⁵⁸
31. By the date of the ***, 2017 meeting, Student ***. Student needed ***. However, the Principal recommended ***. Although Student passed ***, Student did not pass ***. Student was successful in completing *** for the *** class with staff support. The Principal recommended *** for *** and *** with staff support.⁵⁹ The ARD recommended remediation and summer tutoring (at no cost to the family) to address Student's failure to master the ***.⁶⁰ Student's *** did not respond to the proposed remediation services.⁶¹
32. The ***, 2017 MDR ARD agreed the school district would conduct the following

⁵¹ J.6 at 20-21,24; Respondent's Exhibit 1 at pages 1-25 ("R.__ at __").

⁵² R.2 at 5.

⁵³ J. 11 at 1, 9.

⁵⁴ I. at 258-59.

⁵⁵ J. 11 at 2, 4, 6.

⁵⁶ J. 6 at 21.

⁵⁷ J.6 at 22, 24.

⁵⁸ J. 6 at 34-37.

⁵⁹ J.6 at 22; J. 11; II: at 306, 362-63.

⁶⁰ J. 6 at 22; I at 214.

⁶¹ J. 6 at 22; I at 214.

- evaluations: language/communication (including pragmatic language), physical (motor abilities, health, vision, hearing), a medical evaluation to evaluate Student for OHI, emotional/behavioral, a FBA, a psychological (to include an autism evaluation), sociological, intellectual/adaptive behavior, academic performance, adaptive/assistive technology, and ***. The Principal withdrew the recommendation for disciplinary placement because Student fulfilled Student's assigned behavioral consequences and because of the ARD decision to conduct the set of proposed evaluations. The MDR ARD was discontinued and no further disciplinary actions were taken.⁶²
33. At the ***, 2017 ARD, the school district confirmed its willingness to schedule a meeting with Student's ***, the parent advocate, the LSSP, and the diagnostician to explain the set of proposed evaluations and the Notice of Procedural Safeguards. The ***, 2017 ARD also confirmed Student's previous selection of the ***.⁶³
34. A new Notice and Consent for Evaluation and PWN were sent to Student's *** along with the ***, 2017 ARD documents.⁶⁴ Student's *** received progress reports at the *** and *** weeks of each grading period.⁶⁵
35. On ***, 2017, the SSA Director of Special Education sent a letter to Student's *** proposing dates for the psychologist and diagnostician to meet with Student's *** to explain the Notice of Procedural Safeguards and the proposed evaluations.⁶⁶ On ***, 2017, the SSA Director of Special Education sent another letter to Student's *** confirming the school district's unsuccessful attempt to meet with her and the parent advocate to explain the Notice of Evaluation, Notice of Procedural Safeguards, and the proposed evaluations.⁶⁷
36. The ***, 2017 letter again proposed a medical evaluation at school district expense for purposes of identifying Student as a student with OHI based on ADHD and/or *** once Student's *** provided the requisite consent.⁶⁸ Student's *** signed receipt of the ***, 2017 letter sent via certified mail.⁶⁹ However, Student's *** stopped reviewing documents from the school district sent by certified mail.^{70/}
37. An ARD convened on ***, 2017, to review and develop Student's schedule for the fall semester, address accommodations, develop a BIP, and again discuss the proposed

⁶² J.6 at 22, 25-29.

⁶³ J. 6 at 22, 26.

⁶⁴ J.6 at 22, 25-29.

⁶⁵ I. at 257-258.

⁶⁶ R. 2 at 1-2.

⁶⁷ R. 2 at 3-4; I. at 189-91.

⁶⁸ R. 2 at 3-4.

⁶⁹ R. 1 at 26.

⁷⁰ I. at 220.

- evaluations.⁷¹ Student's *** and the parent advocate attended this ARD.⁷² A proposed BIP was provided to Student's *** and parent advocate in advance of the ***, 2017 ARD. Teachers reported Student had difficulty completing and turning in assignments and staying on task. Student continued to be disruptive in class. Student could be respectful and compliant in a one-on-one situation with an adult. Student could also complete assignments in the small group environment ***.⁷³ The ARD reviewed and revised the proposed BIP.
38. The final BIP designed at the ARD addressed Student's needs to comply with school rules regarding ***, compliance with teacher and staff directives, and refrain from ***. Target behaviors to meet those needs were identified in the BIP. Behavioral strategies and the staff responsible for implementing those strategies were noted in the BIP.⁷⁴ The school district was not able to conduct a formal FBA because Student's *** did not provide the necessary parental consent.⁷⁵ PWN was provided to Student's ***.⁷⁶
39. The IEP designed in *** 2017 included measureable and objective goals and objectives in *** based on Student's PLAAFPs and teacher reports. The IEPs included the evaluation procedures used to measure Student's educational progress and the person(s) responsible for implementing the IEPs. The accommodations stated in the *** 2017 IEP were included in the *** 2017 IEP.⁷⁷
40. The diagnostician offered to meet with Student's *** after the ***, 2017 ARD ended to review the Notice of Procedural Safeguards. Student's *** declined the meeting because she had to leave ***.⁷⁸ The school district has not been able to schedule a meeting between the diagnostician and Student's *** since then.⁷⁹
41. School district staff received training on the set of accommodations stated in Student's IEP and the BIP prior to the beginning of the first day of school for the 2017-18 school year.⁸⁰ The IEP designed at the ***, 2017 ARD provides Student with inclusion support for *** minutes *** times a week in each core academic class. Student also receives ***.⁸¹

⁷¹ J. 7 at 33.

⁷² J.7 at 22, 24.

⁷³ J. 7 at 25.

⁷⁴ J. 7 at 4-5, 22-23.

⁷⁵ J. 7 at 22.

⁷⁶ J. 7 at 30-31.

⁷⁷ J. 7 at 6-12.

⁷⁸ J. 7 at 31.

⁷⁹ J. 7 at 31.

⁸⁰ J. 7 at 23.

⁸¹ J. 7 at 23.

42. Student discussed *** with Student's ***,⁸² ***,⁸³ Student also discussed ***, ***,⁸⁴ Student is aware Student is currently ***,⁸⁵
43. The *** confers with the paraprofessionals who provide Student with special education support in the ***,⁸⁶ She also meets with Student weekly to support appropriate behavior at school.⁸⁷ Student's behavior at school is improving this school year.⁸⁸ By ***, 2017 Student ***,⁸⁹
44. When the school district failed to get a response from Student's *** to the Notices and proposals to meet sent by mail, the SSA Director went to the home on ***, 2017, to hand deliver a copy of the Notice of Proposal to Evaluate and another copy of the Notice of Procedural Safeguards.⁹⁰ The SSA Director of Special Education did not telephone Student's *** before coming to the house. The SSA Director of Special Education explained to Student's *** the consent document was for the psychological, counseling, and FBA she previously requested.⁹¹ Student's *** felt threatened by home visits from school district staff.⁹²
45. The school district planned to contract with an outside LSSP to conduct the psychological, the counseling evaluation, and the FBA. The LSSP contacted Student's *** by telephone to introduce ***self and explain the proposed evaluations.⁹³ However, Student's *** returned the Consent Form with notes stating she did not consent to the proposed evaluations, denied she received PWN, and that she did not understand the proposed evaluations.⁹⁴
46. At the due process hearing Student's *** produced a school district OHI Disability Report form that identified Student with a mild health impairment, ***, and confirmed the impairment would adversely affect Student's educational performance due to difficulties maintaining attention/concentration, completing tasks/assignment – especially

⁸² I. at 233-34.

⁸³ I. at 234.

⁸⁴ II. at 306-310, 343-46.

⁸⁵ J. 10 at 1; II. at 316-20.

⁸⁶ II at 346-48.

⁸⁷ I. at 233; II at 328-31.

⁸⁸ II at 331-32.

⁸⁹ J. 11 at 9.

⁹⁰ R. 5 at 1, 3-5; II. at 397.

⁹¹ R. 1 at 29; II at 398-04.

⁹² I. at 207, 221.

⁹³ I. at 207; II at 393-94, 396; R. 3 at 1.

⁹⁴ R. 1 at 29; II at 393-94.

written tasks, and remembering prior instruction or directions. Although the OHI form was signed, it was not clear who signed the form or whether it was actually signed by a licensed physician.⁹⁵

47. At the due process hearing, Student's *** also produced a document of an office visit on ***, 2017, at ***. Student was *** history of ADHD and ***. The document noted Student *** for Student's ADHD from ***. The note indicates Student discussed Student's *** with the medical provider and there was a plan to ***. The medical provider also advised the family to keep an appointment with the *** for counseling and psychiatric services.⁹⁶
48. There was a gap of time when Student was not ***. Student was not ***. There was also some period of time when Student returned to the school district that Student also was not ***. At the time of the due process hearing, Student was ***.⁹⁷

VI. DISCUSSION

A. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the IEP and placement. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.3d 127, 131 (5th Cir. 1993). There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n.4 (5th Cir. 2009). Therefore, the burden of proof in this case is on Petitioner. *Schaffer v. Weast*, 546 U.S. at 62.

B. Identification as a student with OHI

1. Definition of OHI:

⁹⁵ J. 12 at 1.

⁹⁶ J. 12 at 2.

⁹⁷ I. at 188, 202.

A student qualifies as eligible for special education services under the IDEA as a student with OHI so long as the student has been evaluated and meets the regulatory criteria. A student with OHI is a student having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that: (i) is due to a chronic or acute health problem (such as *** or ADHD); and (ii) adversely affects the student's educational performance. *34 C.F.R. § 300.8 (a)(c)(9)*. In Texas, the multidisciplinary team that collects or reviews evaluation data in determining OHI eligibility must include a licensed physician. *19 Tex. Admin. Code § 89.1040 (a)(c)(8)*.

2. *** as Basis for OHI eligibility:

The evidence showed the school district had reason to believe Student had *** when Student transferred back into the school district in *** 2017 based on the *** records. However, there is no evidence Petitioner provided the school district with a physician's statement or consent to contact a physician to confirm Student's *** or Student's need for special education services as a result of the ***. The evidence did show Student needs *** at times.

3. ADHD as Basis for OHI Eligibility:

The issue of whether the school district should also have identified Student as a student with OHI on the basis of ADHD arose as a result of the disciplinary incident in *** 2017. At that point, Student's *** contended Student's ADHD was the cause of the conduct at issue. There is no evidence Petitioner provided the school district with a physician's statement at the *** 2017 ARD meetings confirming the ADHD diagnosis or Student's need for special education based on ADHD. The school district offered to pay for a medical evaluation to confirm Student's ADHD at the ***, 2017 ARD.

The record reflects it was not until the due process hearing that Student's *** submitted an OHI disability report purportedly signed by a physician, along with a medical record documenting an office visit at *** confirming the diagnoses of *** and ADHD. However, the

OHI form did not clearly identify Student's medical condition except to note Student appeared to meet OHI criteria and that Student's impairment was mild. Furthermore, the medical record did not establish Student's need for special education services but instead primarily addressed Student's medical needs related to Student's ***.

At the conclusion of the due process hearing, the parties discussed the need for the physician to fill out a new OHI form that could be verified and relied on by the school district. The parties planned to meet in an ARD meeting while the decision was pending to attempt to resolve the OHI issue. Neither of those events occurred.

4. Reason to Suspect ADHD:

There is some evidence the school district had reason to suspect Student might be eligible for services as a student with OHI based on ADHD – especially in light of Student's frequent disciplinary referrals ***. Student's educational history in the school district, from *** through ***, indicated the school district knew Student was diagnosed with ADHD ***.

Student's constant talking, laughing, ***, and failing to complete work or follow directives suggest a behavioral need during the 2017 spring semester when Student returned to the school district. The school district did not take any steps to determine whether Student might meet eligibility for special education as a student with OHI on the basis of ADHD until the parent advocate posed the issue at the ***, 2017 ARD. To its credit, in response, the school district proposed funding a medical evaluation to initiate the OHI determination. *See, 19 Tex. Admin Code § 89.1040 (a) (c)(8).*

5. Lack of Parental Consent Required to Evaluate for OHI:

The school district cannot be faulted for failing to complete the OHI eligibility process when Student's *** refused to provide the requisite consent despite repeated attempts by the school district to obtain it. The evidence suggests Student's ADHD has an impact on Student's ability to learn at school given the high number of disciplinary referrals in a short period of time

and teacher reports of Student's distractibility and inability to complete assignments. It is reasonable to infer from the evidence that *** was also a factor in Student's inability to focus or concentrate at school.

Even if the school district should have initiated an OHI evaluation at an earlier point in time, the remedy for that violation is to order the school district to proceed with the evaluation. The refusal by Student's *** to provide the requisite consent or to secure verifiable information from the physician posed obstacles to the school district's efforts in proceeding with the OHI evaluation that it was willing to do. Parental consent was required for the OHI evaluation. *See, 34 C.F.R. §§ 300.300 (c)(1); 300.303 (a)*. Student's *** gave the school district mixed messages by agreeing to the school district's proposal to fund the medical evaluation in ARD meetings but then refusing to sign the consent forms sent to her or to meet with the diagnostician or the LSSP for explanations of the proposed evaluations.

The school district cannot complete the OHI evaluation without the participation of a licensed physician. The physician is not free to communicate directly with the school district about Student's medical conditions due to privacy rules. *See, The Health Information and Patient Privacy Act, 5 U.S.C. § 552a* (HIPPA). In short, the OHI evaluation cannot be completed without parental cooperation.

6. Duty to Provide FAPE Regardless of Eligibility Classification:

Finally, as the school district argues in its closing brief, the school district is responsible for providing Student with an appropriate educational program, whether Student is classified as a student with OHI or not. *Heather S. v. Wisconsin, 125 F. 3d 1045, 1055 (7th Cir. 1997)*; *G.I. v. Lewisville Ind. Sch. Dist., 2013 WL 4523581 @*10 (E.D. Tex. Aug. 23, 2013)*. The record shows the school district added some accommodations and a set of behavioral strategies to Student's educational program at the ***, 2017 ARD. In hindsight, those strategies and accommodations were not particularly effective since Student's misbehavior persisted with at least *** more disciplinary referrals from *** through *** 2017. That issue is addressed in more detail below.

C. Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have FAPE available to them 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 FAPE to all children with disabilities residing within its jurisdictional boundaries between the ages of 3 and 21. *34 C.F.R. § 300.101 (a)*. There is no dispute that Student was a child with a disability residing within the school district's jurisdiction or its duty to serve Student under the IDEA.

FAPE 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 an 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)*. The requisite educational benefit must be meaningful and more than simply *de minimus* but it need not maximize Student's potential. *Bd. of Educ. v. Rowley, 458 U.S. at 191, 196, n. 21, 198; Andrew F. ex. rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 1000 (2017)*. The IEP must be likely to produce progress, not regression or trivial educational advancement. *C.G. v. Waller Indep. Sch. Dist., 697 Fed. Appx. 816, 818 (5th Cir. 2017)*

D. Four Factors Test

In Texas, the Fifth Circuit articulated a four factor test to determine whether a school district's program provides a student with FAPE. Those 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, collaborative manner by the key stakeholders; and,

- Positive academic and non-academic benefits are demonstrated.

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997).

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program. *Richardson Indep. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009). Application of the four factors to the evidence in this case supports the conclusion the school district's overall program was appropriate, although there were some weaknesses.

First, the school district's program was individualized on the basis of assessment and performance. The ***, 2017 IEP was prepared on the basis of a review of the *** ** 2016 REED, the *** IEP, a review of Student's PLAAFPs, Student's ***, classroom based assessments, teacher observations, and parent information. The IEP implemented for the remainder of the 2016-17 school year addressed Student's needs in ***. Furthermore, by that date, the school district recognized Student had some behavioral needs and added a set of behavioral strategies and several instructional accommodations to the IEP to address those needs.

Petitioner complains the school district should have conducted a FBA. There is no evidence *** recommended a FBA. Furthermore, the IDEA itself does not require a FBA except in the context of an appeal of a manifestation determination decision or disciplinary placement. *34 C.F.R. § 300.530 f)(1)(i)*. Behavioral strategies and accommodations were added to Student's IEP at the ***, 2017 ARD based on teacher observations, student performance, and the disciplinary referral information available to the ARD at that point in time. Although the school district later agreed to conduct a FBA, the evidence showed the school district made an adjustment in Student's program based on informal assessments and recognition of Student's behavioral needs.

Second, the school district's program was delivered in the LRE. The IDEA states a strong preference for educating students with disabilities with their non-disabled peers to the maximum extent appropriate. *34 C.F.R. § 300.114 (a)(2)(i)*. Student's educational program was

delivered in general education classes with some inclusion support in the *** class. Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur 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. *34 C.F.R. § 300.114 (a)(2)(ii)*.

Student was also provided with an opportunity to ***. There is some evidence Student experienced behavioral issues in some of Student's general education classes. However, a need for improvement in supplementary aids and services does not mean Student's educational placement in general education classes was otherwise inappropriate. The evidence suggested Student could perform appropriately with one on one instructional support and attention from staff.

The inclusion support was not much in the 2017 *** – ***. The school district recognized this need when it revised Student's IEP and boosted the inclusion support in all core academic classes. Student's placement in general education classes, either with inclusion support and/or in the smaller classroom environment of ***, was, and continues to be Student's LRE.

Third, the services were provided in a coordinated, collaborative manner by key stakeholders. The record reflects the special education teacher consulted with the general education *** teacher by reviewing the IEP with her, and monitoring Student's progress and in devising IEP goals and objectives with all of Student's teachers. Parental concerns and suggestions were considered and discussed at the May 2017 ARD meetings. The school district agreed to conduct a number of evaluations in response to parental concerns about Student's behavior and educational performance. The counselor provided support to the paraprofessionals in Student's ***.

The principal considered the discussion at the *** 2017 ARD meetings and reversed the disciplinary decision based on the ARD consensus to conduct the set of evaluations. The school district collaborated with Student's *** by attempting to schedule meetings with her and the

diagnostician and LSSP so they could explain the set of proposed evaluations. Even though they were not successful in gaining her cooperation, the evidence showed they took the requisite steps to do so.

Finally, the school district also attempted to coordinate with Student's physician as a necessary step in the OHI eligibility determination process when it proposed to pay for a medical evaluation. Because of a miscommunication or misunderstanding between Student's *** and the physician, the OHI information was incomplete and could not be verified – but that does not mean the school district did not attempt to coordinate with the physician – a key stakeholder with regard to OHI eligibility.

Fourth, the evidence showed Student received the requisite educational benefit from Student's IEP even though the evidence showed there were some weaknesses in the program. Student came into the school district in *** from another school district where Student was not doing well, failing several core academic classes, and ***. ***. Student's placement in the *** class allowed Student to make progress and ***.

By the end of the 2016-17 school year Student ***. Student was nevertheless promoted in anticipation of Student's ability to ***. By *** 2017, Student ***. Student is now solidly on track as ***.

The weakness in Student's educational program *** was the school district's struggle to address Student's behavioral issues that impeded Student's learning and, at times, the learning of Student's classmates. It is reasonable to infer that some of the inappropriate behaviors were related to the period of time Student was without the benefit of Student's ***.

However, the evidence also suggests Student was able to demonstrate compliant behavior and perform when given individual attention by adult staff. The inclusion support was inadequate during ***. Furthermore, it is also reasonable to infer from the evidence that some of Student's behaviors were related to Student's frustration with the classroom materials and/or instruction given Student's well-documented deficits in language, cognitive ability, reading skills, and processing deficits.

The historical data predicted Student could be expected to display frustration with completing assignments and engage in off-task behaviors to avoid doing classwork that was difficult for Student. At least some of Student's misbehavior can reasonably be attributed to that frustration. Student's strengths in visual memory, reasoning skills, participation in class discussions, and active hands-on learning activities may not have been adequately utilized in keeping Student engaged in lessons and assignments.

The set of accommodations and behavioral strategies were appropriate but inadequate in terms of meeting Student's behavioral needs. The lack of a formal BIP *** was remedied in the *** 2017 ARD meetings when a BIP was designed and implemented for the upcoming 2017-18 school year. The evidence shows Student's behavior is improving. Student did not prove educational services were denied while in ISS. In fact, the credible evidence was to the contrary.

Finally, Student did not meet Student's burden of proving the *** was not appropriate. The evidence showed Student changed Student's *** this year. The *** is working with Student to *** and keep up Student's grades to accomplish those new goals. Student has the option of ***.

Although there were some weaknesses in the educational plan at issue the determination of whether the overall program provided Student with the requisite educational benefit must be determined on the basis of the whole educational experience, and its adaptation to confer benefits. *Klein Indep. Sch. Dist. v. Per Hovem*, 690 F. 3d 390, 397- 398 (5th Cir. 2012). The preponderance of the evidence showed the educational program, despite some weaknesses, was reasonably calculated to provide Student with progress, not regression or trivial advancement, and therefore provided Student with the requisite educational benefit. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F. 3d at 253; *C.G. v. Waller Indep. Sch. Dist.*, 697 Fed. Appx. at 818.

E. Procedural Rights

A copy of procedural safeguards must be given to the parents by the school district at

least once a year, upon initial referral for an evaluation, upon receipt of a due process hearing complaint, and upon parental request. 34 C.F.R. § 300.504 (a) (1)-(4). The procedural safeguards notice must contain a full explanation of all IDEA procedural safeguards related to, among other provisions, PWN. 34 C.F.R. § 300.504 (c) (2) (8).

When a school district delivers a copy of IDEA procedural safeguards to a parent, the simple act of delivering the procedural safeguards notice suffices to impute constructive knowledge of parental rights under the IDEA. *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 945 (W.D. Tex. 2008), *aff'd in part and vacated on o.g.* 591 F. 3d 417 (5th Cir. 2009); *See also, C.P. v. Krum Indep. Sch. Dist.*, 2014 U.S. Dist. LEXIS 131098 (E.D. Tex. 2014) (*one year SOL applied to limit IDEA claims where school district gave parents copies of procedural safeguards on numerous occasions*).

The credible evidence showed Student's *** received a copy of the requisite notice of procedural safeguards on numerous occasions during the relevant time period. Student's *** cannot claim a violation of her procedural rights when she chose not to read the various consent and notice documents sent to her by the school district. She also chose not to accept those documents when the school district attempted to personally deliver them to her although school personnel should have called first before appearing on her doorstep. Under these facts, Student's *** is charged with constructive notice of her procedural rights and PWN. *Id.*

Furthermore, the IEP itself may constitute PWN so long as the information of the school district's proposal to change a student's identification, evaluation, educational placement or provision of FAPE is included. In this case, the evidence showed the student's IEP, as stated in the set of ARD documents for each meeting in 2017, included the requisite PWN information. *Letter to Lieberman*, 52 IDELR 18 (OSEP 2008); *Assistance to States for Education of Children With Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46691 (Aug. 14, 2006).

Finally, even if the school district did not provide Student's *** with proper PWN or Notice of Procedural Rights, Student did not prove those violations impeded Student's right to a FAPE,

caused a deprivation of educational benefit, or significantly impeded the opportunity of Student's *** to participate in the decision-making process regarding the provision of FAPE to Student. 34 C.F.R. § 300.513(a)(2).

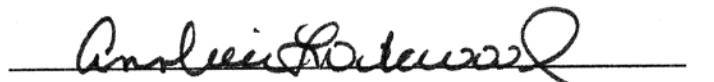
VII. CONCLUSIONS OF LAW

1. Petitioner did not meet Student's burden of proving Respondent should have identified Student as a student with OHI for purposes of special education services where parent refused consent when Respondent proposed an OHI evaluation. *Schaffer v. Weast, supra*; 34 C.F.R. §§ 300.8 (a)(c)(9); 300.300(c)(1); 19 Tex. Admin. Code §89.1040 (a)(c)(8).
2. Petitioner did not meet Student's burden of proving Respondent failed to provide Student with FAPE during the relevant time period. *Schaffer v. Weast, supra*; *Endrew F. v. Douglas Cty. Sch. Dist. RE-1, supra*; *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., supra*; 34 C.F.R. §§ 300.1, 300.17.
3. Petitioner did not meet Student's burden of proving Respondent violated parental procedural rights under the IDEA. *Schaffer v. Weast, supra*; 34 C.F.R. §§ 300.503; 300.504; 300.513 (a)(2).
4. Petitioner does not have the right to an Independent Educational Evaluation unless and until Respondent conducts its own set of evaluations and the parent disagrees with Respondent's evaluations. 34 C.F.R. §300.502 (b)(1).

VIII. ORDERS

Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief are **DENIED**. All other requests for relief not specifically stated herein are **DENIED**.

SIGNED November 17, 2017.


Ann Vevier Lockwood
Special Education Hearing Officer
For the State of Texas

IX. 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. *20. U.S.C. § 1415 (i)(2); 19 Tex. Admin. Code Sec. 89.1185 (n).*