

STUDENT	§	BEFORE A SPECIAL
BNF PARENT	§	EDUCATION
Petitioner	§	
v.	§	HEARING OFFICER FOR THE
	§	
DESOTO INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	STATE OF TEXAS

**FINAL DECISION OF THE HEARING OFFICER**

**STATEMENT OF THE CASE**

Student (hereinafter referred to as Petitioner or Student) through student's next friend, Parent (hereinafter referred to as Parent) brings this action against Respondent DeSoto Independent School District (hereinafter referred to as Respondent, DeSoto ISD, or the District) under the Individuals With Disabilities Education Improvement Act (hereinafter IDEA), 20 U.S.C. § 1400 *et. seq.* and its implementing state and federal regulations.

Petitioner alleges that Respondent has failed to provide student with a free appropriate public education in the following particulars:

1. Respondent has failed to provide Student with an appropriate IEP from student's enrollment in DeSoto ISD to the present. Student alleges that student's IEP is not based upon accurate data and does not provide student with an educational benefit;
2. Respondent has failed to provide Student with an appropriate BIP from student's enrollment in DeSoto ISD to the present. Student alleges that the methods used by Respondent in student's BIP are not appropriate to student's needs and have failed to produce progress;
3. Respondent has failed to provide appropriate speech services to Student such that student's receptive language has regressed since student's enrollment in DeSoto ISD;
4. Student's placement in a small classroom with hand over hand manding is not appropriate; and
5. Parent has been denied access to Student's educational records and the opportunity to participate in the decision making process regarding the provision of a free appropriate public education to Student?

For relief, Petitioner seeks placement in private school or home school, compensatory monies resulting from the denial of a free appropriate public education in the amount of \$720,000.00 and punitive damages in the amount of \$5,000,000.00.

**PROCEDURAL HISTORY**

On or about March 29, 2011, Student filed this request for due process with the Texas Education Agency, which was docketed as Docket No. 164-SE-0311. Throughout these proceedings, Petitioner appeared

*pro se* through student's next friend and parent \*\*\* Respondent was represented by Nona Matthews, Attorney at Law, of Irving, Texas.

A resolution session was held on April 7, 2011.

A pre-hearing conference was held on April 19, 2011. The due process hearing occurred on May 16, 2011. The Decision of the Hearing Officer is due on or before June 13, 2011.

### **FINDINGS OF FACT**

1. DeSoto ISD is a political subdivision of the State of Texas and a duly incorporated independent school district. DeSoto ISD is Student's resident district for purposes of providing special education and related services under IDEA.
2. Student is eligible for special education and related services under the disability categories of Autism (AU) and Speech Impairment (SI). (Respondent Exhibit 13, pages 1-2, hereinafter cited as R13:1-2).
3. Student's most recent Full and Individual Evaluations, one completed by \*\*\* ISD in 2008 (R2) and one completed by DeSoto ISD in May 2010 (R9; Petitioner Exhibit B, pages 114-125, hereinafter cited as Pet B: 114-125), both indicate that Student is a child with a severe to profound language disorder compounded by Autism, who is non-verbal and unresponsive to auditory information. (R9:7). Student communicates primarily with gestures, facial expressions, hand leading, and self help behaviors.
4. Student's intellectual functioning measures in the mentally deficient range with a full scale IQ score of \*\*\*. Developmental profiles used to further assess intellectual functioning place Student in the \*\*\* range of functioning. Based on Student's levels of intellectual functioning, it is expected that student will exhibit significant global delays in all areas. (R2; Pet B:114-125; Transcript of Due Process Hearing p. 141, hereinafter cited as T.141).
5. Student first enrolled in the DeSoto ISD in January 2005, where student attended school for the remainder of the 2004/2005 school year and the entire 2005/2006 school year. Student began the 2006/2007 school year in DeSoto ISD, but left in September 2006 and was homeschooled until January 2007 when student enrolled in \*\*\* ISD. (T. 119-125).
6. Student attended \*\*\* ISD from January 2007 until April 2008. In April 2008, Student left \*\*\* ISD and enrolled in DeSoto ISD. Student attended DeSoto ISD for April and May of 2008, the remainder of the 2007/2008 school year. Student began the 2008/2009 school year at DeSoto ISD, but withdrew \*\*\*, 2008 to be homeschooled. (T.119-125).
7. Student was homeschooled during the 2008/2009 and 2009/2010 school years until April 2010 when student re-enrolled in DeSoto ISD. Student attended DeSoto ISD for the remaining two months of the 2009/2010 school year, April and May 2010. Student attended DeSoto ISD during the 2010/2011 school year from the beginning of school in August 2010 until April 2011 when student was again withdrawn to be homeschooled. (T. 119-125).
8. Parent was very upset with \*\*\* ISD due to Student's experiences while enrolled there. As a result, when Student enrolled in DeSoto ISD in April 2008, Parent requested that Respondent not rely on any information from \*\*\* ISD, including the Full and Individual Evaluation (FIE) completed by \*\*\* ISD in 2008 or the Individual Education Plan (IEP) developed by \*\*\* ISD. (R3:18; Pet E:7).

9. Respondent honored Parent's request and the Admission, Review, and Dismissal Committee (ARDC) that met in June 2008 developed Student's IEP based on current data available to Respondent and requested that a new FIE be completed prior to the three year re-evaluation date. (R3:18).
10. Before the new FIE could be completed, Student was withdrawn from DeSoto ISD In September 2008 and homeschooled until April 9, 2010. (R5; T. 123-126).
11. Upon Student's return to DeSoto ISD in April 2010, following almost two years of homeschooling, Student experienced difficulty with the transition and exhibited challenging behaviors in the school setting. Student attended school for two hours per day initially and then added additional time each week to ease student's transition into the school setting. (R7:23). Respondent believed that Student had regressed during student's years of homeschooling. (T.273).
12. Behaviors noted by Student's teachers in April and May 2010 included non-compliance, impulsivity, physical aggression, \*\*\* behaviors, biting, squeezing, pinching, \*\*\*, difficulty remaining in student's seat or attending to a task, lack of control in relation to food and eating, climbing on furniture, \*\*\*, and \*\*\* (R7:26-36).
13. Parent did not observe these behaviors in the home setting. During Student's years of homeschooling, Parent developed his own methods of teaching Student life skills and of communicating with Student that allowed student to develop and acquire skills to complete basic tasks and communicate with Parent. (T. 95, 128).
14. An ARDC convened when Student returned to DeSoto ISD on April 9, 2010. The ARDC agreed to complete the FIE discussed at the June 2008 ARDC meeting. The ARDC also developed goals and objectives with the input of Parent in the areas of behavior/social skills, language and literacy, math, personal social skills, and life skills. The ARDC conducted a Functional Behavioral Assessment (FBA) and developed a Behavior Intervention Plan (BIP) to address targeted behaviors. The ARDC recommended Parent Training and In-Home Training, which were declined by Parent, as well as placement in a life skills class with a ratio of 1:1 or 1:2 and consultative speech therapy. (R7).
15. The ARDC convened again on April 19, 2010 at Parent's request to clarify the FBA to reflect that the behaviors observed in the school setting were not observed at home. (R8).
16. Respondent completed its FIE of Student on May 25, 2010 (R9; Pet B: 114-125) and the ARDC met on May 27, 2010 to review the results. Following the FIE, the ARDC added additional IEP goals and objectives and recommended Extended School Year (ESY) services to be provided during the summer of 2010. District staff noted at the ARDC meeting that Student had demonstrated notable progress in the area of behavior between returning to school in April 2010 and the ARDC meeting at the end of May. (R10; Pet E:9; T. 164-165).
17. The IEP developed and offered to Student at the April and May 2010 ARDC meetings was based on accurate data concerning Student that was provided by both Parent and District staff and assessment. The goals and objectives were appropriate to Student's present levels of performance and were reasonably calculated to provide student with an educational benefit.
18. The ARDC convened again on July 30, 2010 at Parent request due to the parent's concern over several "techniques" utilized in working with Student. Specifically, Parent did not want Respondent's staff to use hand-over-hand manding with Student, and did not want Respondent to use magazines or edible treats for reinforcers. The ARDC agreed to make each of the requested changes and incorporated such changes into Student's IEP and BIP. (R11; Pet E: 15-22; T. 166-168).

19. On August 20, 2010, the ARDC convened again at Parent request to discuss Parent's concerns with Student's FBA and BIP. Parent was very concerned with the behaviors described in the FBA and wanted them amended to reflect Student's behaviors as seen during ESY rather than the difficult transition months of April and May 2010. The ARDC agreed to update the FBA with a more recent description of Student's behaviors, added reinforcers for Student that Parent suggested, revised the BIP, and developed a behavioral IEP to match the new BIP. (R12: 10-13, 24; T. 170, 174-175).
20. On October 19, 2010, Student's annual ARDC convened. Student's teacher reported that student's current levels of achievement and performance indicated significant behavioral progress. Student's aggressive behaviors had decreased, student was able to follow verbal commands, successfully eat lunch in the cafeteria with the support of a paraprofessional, and student no longer jumped on furniture, \*\*\*, placed objects in student's mouth, or \*\*\*. The ARDC developed a new IEP based on current data from Student's teacher. (R13; T. 176-177).
21. The October 2010 ARDC also discontinued the use of \*\*\* for Student at Parent's request (T.179-180) and agreed to increase Student's exposure to verbal peers by increasing student's time in another special education classroom with paraprofessional support. (T. 180).
22. District behavioral records (Pet A: 32-60), quantitative progress reports, and qualitative teacher narrative notes (R14; Pet A: 24-31) all indicate steady progress by Student in all areas during the 2010/2011 school year until approximately two weeks before Parent withdrew student from school in April 2011.
23. Student's teacher testified definitively and in detail as to Student's progress during the 2010/2011 school year. (T. 222-244; 245-259). Student's academic and behavioral IEP goals were addressed by student's teacher throughout the year and Student made meaningful progress on both academic and behavioral goals.
24. Although District data indicates significant progress by Student in all areas during the 2010/2011 school year, Parent experienced regression in Student's behavior in the home setting. Parent believes this regression resulted, in part, from Respondent's failure to follow his methods of working with and training Student. (T. 95, 102-103, 109-115).
25. Student received the speech services provided for by student's IEP and demonstrated progress in student's communication skills during the 2010/2011 school year, particularly in student's use of assistive technology devices and student's receptive language skills. (R16; T. 271, 273-274).
26. Parent had access to Student's educational records. He received copies of the IEP documents following each ARDC meeting. (T. 184). Parent also received daily behavior sheets, IEP reports, and progress reports. (T. 260). In addition, Parent received thousands of pages of documents during the pendency of this proceeding upon his request. (R18).
27. Parent attended and participated in every ARDC meeting. Several ARDC meetings were held at parent request so that Parent could provide input to the ARDC and suggest appropriate changes to Student's program. The ARDC frequently incorporated Parent's suggestions and requests.

### **DISCUSSION**

Petitioner presents several issues for resolution in this proceeding, all related to whether Respondent provided Petitioner with a free appropriate public education during the relevant time frame: 1) Whether Student's IEP is inappropriate because it is not based on accurate data and has not provided Student with educational benefit; 2) Whether Student's BIP relies on inappropriate methods for working with Student and has failed to provide Student with behavioral progress; 3) Whether the speech services provided to Student have

resulted in progress in the area of speech; 4) Whether Student's placement in a small classroom with the use of hand over hand instruction is appropriate; and 5) Whether Parent has been denied access to Student's educational records and denied the opportunity to participate in the decision making process regarding the provision of a free appropriate public education to Student?

As the party seeking relief, Student has the burden of proof in this matter. *Schaffer v. Weast*, 546 U.S. 49 (2005); *Van Duyn v. Baker School District 5J*, 481 F.3d 770 (9<sup>th</sup> Cir. 2007).

Although Petitioner has alleged violations outside of the one-year statute of limitations applicable to proceedings under IDEA in Texas (34 C.F.R. § 300.511(e); 19 T.A.C. § 89.1151(c)), Respondent has asserted the defense of statute of limitations. Petitioner failed to produce evidence to support the applicability of any exception to the one-year statute of limitations. As such, the applicable limitations period runs from March 29, 2010 to the present.

### **Legal Standard Governing The Provision Of A Free Appropriate Public Education**

The U.S. Supreme Court has defined a free appropriate public education as one that consists of "personalized instruction with sufficient services to permit the child to benefit educationally from that instruction." *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the court developed a two prong analysis to determine if a school district has met its obligation to provide a free appropriate public education: 1) whether the district complied with the procedural requirements of IDEA, and 2) whether the district offered a program to the student that was reasonably calculated to provide educational benefit. *Id.* at 206-207.

It is well settled that a *procedural* violation of IDEA does not result in the denial of a free appropriate public education unless it results in the loss of educational opportunity to the student or seriously infringes upon the parents' opportunity to participate in the provision of a free appropriate public education to the student. 34 C.F.R. § 300.513; *Adam J. v. Keller ISD*, 328 F.3d 804 (5<sup>th</sup> Cir. 2003).

The essence of determining whether a *substantive* violation of IDEA has occurred is whether the school's program has provided the student with the requisite educational benefit. IDEA does not require an education that maximizes a student's potential; rather, the school must provide an education that is reasonably calculated to enable the child to achieve *some* benefit. *Some* benefit means an educational program that is meaningful and offers more than a *de minimus* educational benefit; it must be "likely to produce progress, not regression or trivial educational advancement." *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5<sup>th</sup> Cir. 1997).

Although courts have not adopted a specific substantive standard to determine when a free appropriate public education has been provided, the Fifth Circuit in *Michael F.* identified four factors to consider in analyzing a school's program: 1) is the program individualized and based on the student's assessment and performance; 2) is the program administered in the least restrictive environment; 3) are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) are there demonstrated positive benefits both academically and non-academically to the student. *Michael F.*, *supra*.

### **Application of Legal Standard To This Case**

During the statutory limitations period, Student attended DeSoto ISD for two months of the 2009/2010 school year (April and May 2010) and for approximately seven months of the 2010/2011 school year (from late August 2010 until April 2011). The focus then is on the District's provision of a free appropriate public education during those time periods.

Petitioner raises numerous specific challenges to the educational program provided by Respondent during this time frame, but the essence of Petitioner's complaint is that Student regressed in the home environment and became more difficult for Parent to manage when student returned to DeSoto ISD after being homeschooled for two years. Parent concluded that the regression was due to the methods and services provided by Respondent and that Student obtained no educational progress at DeSoto ISD. Parent was also very concerned by the behaviors exhibited by Student when student transitioned back into DeSoto ISD, as he had not observed behaviors of that severity in the home setting. Parent believes that Student's lack of progress is due to the District's failure to listen to him and how he believes Student should be educated. Parent testified that he simply wants the District to train Student in accordance with how he trains student instead of based on what they think will work.

The District counters that Student's transition into DeSoto ISD in April 2010 was particularly difficult given that student had been homeschooled for almost two years. After a slow transition to a full school day during April and May 2010, the District urges that Student was very successful during the 2010/2011 school year, realizing demonstrable progress in all areas of student's educational program.

The evidence produced conclusively establishes that Respondent provided Student with a free appropriate public education during the relevant time period. Student failed to meet student's burden of proof on all issues.

**1) Whether Student's IEP is inappropriate because it is not based on accurate data and has not provided Student with educational benefit?**

The ARDC developed Student's IEP in the spring of 2010 based on the FIE completed by Respondent in May 2010, Student's present levels of academic and functional performance, teacher observations, data collection, and parent input. (T. 185). Student's IEP was based on accurate data developed and obtained by DeSoto ISD and not on past data from \*\*\* ISD. The ARDC refined and revised Student's IEP several times at the suggestion and request of Parent to ensure that it was individualized for Student and based on the most up to date and accurate information. For example, the ARDC convened in both July and August 2010 to make changes to Student's IEP that reflected up to date behavioral information. Petitioner failed to prove that Student's IEP was not based on accurate data.

Even more significantly, Petitioner failed to prove that Student's IEP did not provide student with the requisite educational benefit. The evidence conclusively demonstrated that Student made meaningful progress in the school setting in all areas. Student's teacher completed detailed narrative progress reports, as well as traditional quantitative progress reports, that show Student's progress toward mastery of student's IEP goals and objectives and demonstrate progress over time.

DeSoto's educational program for Student during the 2010/2011 school year provided student with individualized, coordinated services in the least restrictive environment that was appropriate for Student. Petitioner failed to carry petitioner's burden of establishing a denial of a free appropriate public education based on an inappropriate IEP.

**2) Whether Student's BIP relies on inappropriate methods for working with Student and has failed to provide Student with behavioral progress?**

Respondent conducted an FBA and developed a BIP in April 2010 when Student returned to DeSoto ISD based on Student's then current behaviors. In August 2010, the ARDC revised Student's FBA and BIP at parent request to reflect Student's improved behavior as demonstrated during ESY and to incorporate Parent's suggestions regarding effective techniques for working with Student and effective reinforcers for behavior. The behavioral progress observed between April and August 2010 continued throughout the 2010/2011 school year

as evidenced by Student's decreased aggression, student's increased ability to follow verbal commands, student's ability to successfully eat lunch in the cafeteria with the support of a paraprofessional, and a decrease in behaviors such as jumping on furniture, \*\*\*, placing objects in student's mouth, engaging in \*\*\*, and \*\*\*. Student's BIP and IEP effectively targeted challenging behaviors and resulted in meaningful behavioral progress in the school setting. Petitioner failed to meet petitioner's burden of proof with regard to Student's BIP.

**3) Whether the speech services provided to Student have resulted in progress in the area of speech**

Parent testified that Student's receptive language declined after student enrolled at DeSoto ISD. However, the evidence demonstrates that Student has made consistent growth in receptive language skills since returning to the District in April 2010. (T. 267, 272-273). In addition, Student made significant progress in communication skills and particularly in the use of assistive technology devices. (R-16). Petitioner failed to carry petitioner's burden that speech services provided to Student did not result in the requisite progress.

**4) Whether Student's placement in a small classroom with the use of hand over hand instruction is appropriate?**

Student's placement in a small self-contained and structured classroom with a ratio of 1:1 or 1:2 was clearly necessary and appropriate based on the results of student's FIE and the nature of student's disabilities. Similarly, the use of hand-over-hand instruction was an appropriate instructional strategy for Student and was appropriate when used; however, the evidence is clear that that Respondent discontinued use of hand-over-hand as of July 30, 2010 when Parent made the request to do so.

Student achieved greater access to the environment outside of student's self-contained classroom over time, as student began to eat in the classroom and observe students in a larger special education classroom. The use of the \*\*\* was stopped upon Parent's objection to that particular approach.

Student failed to prove that student's placement or instructional techniques were inappropriate.

**5) Whether Parent has been denied access to Student's educational records and denied the opportunity to participate in the decision making process regarding the provision of a free appropriate public education to Student?**

Petitioner failed to prove that Parent was denied access to either educational records or to the ARD decision-making process.

With regard to educational records, Parent received copies of the IEP documents following each ARDC meeting and a copy of Respondent's FIE following its completion. (T.184). Petitioner's teacher provided Parent with a daily behavior sheet, IEP reports, and progress reports as required. (T.260). In addition, during the course of the instant proceedings, Respondent provided Parent with thousands of pages of educational records. Petitioner failed to prove that Parent was denied access to student's educational records.

Similarly, with regard to the ARDC meetings, the evidence shows that Parent participated in every ARDC meeting. In addition, the record reflects numerous ARDC meetings that were convened at Parent request solely for the purpose of incorporating Parent input and data into Student's IEP and BIP. The ARDC made numerous changes in Student's IEP in response to Parent request and input (discontinuing use of \*\*\* and hand-over-hand instruction, changing reinforcers for behaviors, adding goals and objectives). The evidence demonstrates that Parent was an active and important participant in the ARD process on Student's behalf.

The weight of the evidence conclusively establishes that Respondent met its legal obligation to provide Student with a free appropriate public education. The regression and behavioral challenges faced by Student when student transitioned back to DeSoto ISD from two years in the home with Parent resulted from expected and typical transition difficulties and not from a failure of services on the part of Respondent. Indeed, the evidence shows that within a month or two of student's return to DeSoto ISD, Student made notable behavioral progress that continued throughout the 2010/2011 school year. Petitioner failed to prove that Respondent violated Student's rights under the IDEA as alleged.

### **CONCLUSIONS OF LAW**

1. Respondent DeSoto ISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA and its implementing federal and state regulations. DeSoto ISD is responsible to serve Student under IDEA. 20 U.S.C. §1401; 34 C.F.R. § 300.101.
2. As the party seeking relief in this action, Student bears the burden of proof. *Schaffer v. Weast*, 546 U.S. 49 (2005); *Van Duyn v. Baker School District 5J*, 481 F.3d 770 (9<sup>th</sup> Cir. 2007).
3. The one-year statute of limitations in Texas applies to this proceeding. All claims arising prior to March 29, 2010 are barred. 34 C.F.R. § 300.511(e); 19 T.A.C. § 89.1151(c).
4. Respondent provided Student with a free appropriate public education from April 1, 2010 until student's withdrawal from DeSoto ISD in April 2011 by providing student with an appropriate IEP, BIP, and related services such that Student made meaningful academic and non-academic progress. *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5<sup>th</sup> Cir. 1997); 34 C.F.R. § 300.103; 34 C.F. R. § 300.320.
5. Parent was provided with the opportunities to examine and have access to records, and to participate in meetings with the respect to the provision of a free appropriate public education to Student. 34 C.F.R. § 300.501.

### **ORDER**

After due consideration of the record, and the foregoing findings of fact and conclusions of law, this Hearing Officer hereby **ORDERS** that all relief sought by Petitioner is **DENIED**.

Finding that the public welfare requires the immediate effect of this Final Decision and Order, the Hearing Officer makes it effectively immediately.

**SIGNED** and **ENTERED** this 13<sup>th</sup> day of June 2011.

**/s/ Lynn E. Rubinett**

Lynn E. Rubinett

Special Education Hearing Officer for the State of Texas

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**SYNOPSIS**

**Issue:** Whether Student’s IEP is inappropriate because it is not based on accurate data and has not provided Student with educational benefit

**Held:** For Respondent. Student’s IEP was based on recent evaluation data, present levels of academic and functional performance, teacher observations, data collected by Respondent, and parent input. Petitioner’s IEP provided petitioner with meaningful academic and non-academic benefit.

**Cite:** 34 C.F.R. § 300.103; 34 C.F. R. § 300.320; *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5<sup>th</sup> Cir. 1997).

**Issue:** Whether Student’s BIP relies on inappropriate methods for working with Student and has failed to provide Student with behavioral progress?

**Held:** For Respondent. Student’s BIP effectively targeted challenging behaviors and resulted in meaningful behavioral progress in the school setting.

**Cite:** 34 C.F.R. § 300.103; 34 C.F. R. § 300.320

**Issue:** Whether the speech services provided to Student have resulted in progress in the area of speech?

**Held:** For Respondent. Student made meaningful progress in student’s communication skills, particularly in the area of utilizing student’s assistive technology device and in receptive language.

**Cite:** 34 C.F.R. § 300.103; 34 C.F. R. § 300.320

**Issue:** Whether Student’s placement in a small classroom with the use of hand over hand instruction is appropriate?

**Held:** For Respondent. Student’s placement in a small classroom is supported by the data and is necessary to ensure the provision of a free appropriate public education. The use of hand over hand instruction is also supported by the data; however, the evidence shows that Respondent stopped using hand over hand instruction early in the 2010/2011 school year.

**Cite:** 34 C.F.R. § 300.103; 34 C.F. R. § 300.320

**Issue:** Whether Parent has been denied access to Student’s educational records and denied the opportunity to participate in the decision making process regarding the provision of a free appropriate public education to Student?

**Held:** For Respondent. Parent was provided with the opportunities to examine and have access to records, and to participate in meetings with the respect to the provision of a free appropriate public education to Student.

**Cite:** 34 C.F.R. § 300.501.