
DOCKET NO. 006-SE-0905

STUDENT

B/N/F***&***

PETITIONER

vs.

HOUSTON INDEPENDENT

SCHOOL DISTRICT

RESPONDENT

BEFORE A SPECIAL EDUCATION
HEARING OFFICER
FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Procedural History

The above-captioned request for due process hearing was filed with Texas Education Agency on September 20, 2005. The Hearing Officer issued a memorandum on September 21, 2005, noting October 5, 2005, as the apparent statutory resolution-meeting deadline, and setting a tentative hearing date of October 20, 2006, soon after the 30-day resolution period. Petitioner subsequently filed a clarification to the effect that the District had been notified of the hearing request on September 19, 2006. Respondent did not file an objection to the sufficiency of Petitioner's complaint.

A pre-hearing conference convened by agreement on October 10, 2005.

Petitioner therein sought to add two complaints: first, that the District had failed to provide Petitioner a notice of refusal in connection with an Individualized Education Program ("IEP") Team (referenced in Texas law as the Admission Review and Dismissal Committee, or "ARDC") dispute concerning services, and subsequently to file such notice as required by 20 U.S.C. §1415(c)(2)(B); and

second, that the Respondent had not filed a notice regarding sufficiency of Petitioner's complaint. In other respects the parties agreed that Petitioner's statement of issues in Petitioner's initial request for hearing provided Respondent with sufficient notice of contested matters for the hearing. The parties did not anticipate the need for any further resolution session but did discuss the possibility mediation prior to the hearing.

Pre-hearing Orders issued on October 11, 2005, denying Petitioner leave to amend to add a complaint that the District had failed to file notice regarding sufficiency of Petitioner's complaint, and denying Petitioner leave to add a separate issue regarding failure to file notice of refusal. However, the issue of the District's failure to file a response was merged with the issue pled in Petitioner's original complaint alleging the District's failure to provide Petitioner with proper ARDC notice of refusal. Additionally the Pre-hearing Orders granted for good cause shown the parties' joint request for extension, and continued the hearing to November 2-4, 2005.

On October 24, 2005, Petitioner filed a request for leave to further amend the issues for hearing by adding a complaint that the District had failed to provide student with instruction by a certified, qualified, classroom teacher during a portion of the 2004-2005 school year, and another complaint that the District had failed to respond as required by law to the parent's January 2005 request for an independent educational evaluation ("IEE"). The District responded denying the allegations. Petitioner's request was granted. Notice issued on October 25, 2005, concerning the 30-day resolution period applicable to the amended issues, which were consolidated in the pending case and tentative hearing dates set for November 23-25, 2005, shortly following the mandatory resolution period. On October 26, 2005 Respondent requested without opposition an extension for good cause owing to the District's conflicting Thanksgiving holiday schedule, and the hearing was re-set to December 7-9, 2005.

On November 22, 2005, Petitioner filed a third request for leave to amend, alleging that the District engaged in harassment of student's parent in an effort to

prevent student from receiving homebound services. This request followed the District's initiation of a suit to enforce compulsory attendance. Petitioner's request was granted and the issue consolidated with the pending case. The December 7-9, 2005, hearing dates were vacated, and a new setting ordered for December 22, 2005. Respondent requested without opposition an extension owing to the District's holiday calendar, and the hearing was re-set by agreement to January 17-19, 2006. A memorandum issued on December 15, 2005, clarifying that, conduct alleged in Petitioner's third amended complaint could be relevant to Petitioner's IDEA claims, but no evidence would be taken concerning alleged intentional or deliberate harassment by the District, such conduct being immaterial under IDEA.

As of December 15, 2005, the legal issues raised by allegations in Petitioner's original Complaint and Petitioner's amended Complaints were identified as Petitioner's issues for hearing. Apparently prompted by Petitioner's allegations concerning the District's failure to provide appropriate homebound services, the District moved to obtain orders to interview student's physician directly, notwithstanding lack of consent, to obtain specific information about student's needs for homebound services. The District sought clarification of the physician's opinion that student needed such services full-time indefinitely. Petitioner opposed the District's motion alleging the sufficiency of Petitioner's prior consent to allow District nursing staff to interview student's physician. The District contended that the form of "consent" provided to the District at that time did not constitute informed consent.

On January 5, 2006, the District moved to add a request for orders permitting the District to go forward with the communications with student's physician. The motion was treated as a separate request for due process hearing, referred to the Agency, and docketed as hearing No. 099-SE-0106. Because the substance of the District's request was closely inter-related with Petitioner's claims, the new hearing was consolidated with the pending case. A continuance and extension were granted for good cause to accommodate the mandatory resolution period

that attached to the District's complaint, and also to give the parties time to resolve certain pending discovery disputes. By order issued on January 9, 2006, the due process hearing was continued for good cause to February 6-9, 2006. Counsel maintained their disagreement about the sufficiency of Petitioner's prior consent. Petitioner objected that this consent was legally sufficient and no need existed for orders to override lack of consent to obtain additional information concerning the homebound eligibility. A preliminary conference convened on this threshold issue, in lieu of a hearing on the merits, on February 6, 2006. Arguments of counsel, testimony, relevant school records were received material to the status of parent consent. On February 10, 2006, before the Hearing Officer could rule, Petitioner executed and filed a new parent consent form, which Respondent accepted as providing legally sufficient informed consent. The District's request for due process hearing No. 099-SE-0106 was dismissed as moot on February 23, 2006.

Because student's parent had granted consent, and an interview with student's physician thus was contemplated with the likely requirement of an ARDC meeting to consider additional data, counsel were ordered to confer regarding possible settlement, and to submit a status report. The hearing was re-set by agreement to April 17-19, 2006. On April 11, 2006, six days before the scheduled hearing, Petitioner moved for leave to amend to add issues involving alleged procedural violations by the District in connection with the recent ARDC meeting.

Respondent filed an objection on April 13th. I denied Petitioner's motion for leave to amend on April 13, 2006, because of the five-day requirement of 20 U.S.C. §1415(c)(2)(E), and considering that Petitioner's amended issues were severable from Petitioner's other claims. The hearing convened and evidence was taken on April 17-18, 2006, May 10-11, 2006, and June 2, 2006. The record of evidence closed on June 2, 2006, subject to submission of written oral argument and briefing on a novel issue of law as ordered by the undersigned. Counsel were allowed to file one brief and one responsive brief, with the deadline for completion of all briefing and argument set for July 28, 2006. The decision

deadline was extended, according to the allowable days as provided in the initial scheduling order, to September 1, 2006. Respondent's brief requested a finding as to whether Petitioner unreasonably protracted the litigation.

Petitioner's Complaint and Relief Request

1. Whether the District violated student's IDEA right prior written notice when it failed to notify student's parent that it would not be providing student with homebound instruction during periods of confinement at home due to medical issues;
2. whether the District violated IDEA prior written notice requirements when it failed to notify student's parent that it would be conducting an assessment of student for nursing care during fall 2004;
3. whether the District violated IDEA prior written consent provisions when it failed to obtain written parent consent before conducting a nursing evaluation of student during fall 2004;
4. whether the District violated IDEA prior written notice requirements when it failed to notify student's parent that it was denying the parent's request to transfer student to ***Elementary School;
5. whether the District failed to provide student with IEPs for academic areas of instruction and non-academic areas of instruction such as behavior IEPs, that have been reasonably calculated to provide him with meaningful educational benefit;
6. whether the District failed to provide student with an appropriate placement, and in the LRE;
7. whether the District failed to provide student with the ability to continue to participate in the general curriculum and to continue to receive those services and modifications that would enable him to meet the goals set out in his IEP;
8. whether the District failed to appropriately evaluate and identify student's educational needs in the area of nursing care;
9. whether the District failed to provide qualified and appropriate nursing staff to meet student's educational needs, when it failed to provide him with meaningful benefit from his education, and when it failed to provide him with one-to-one nursing care during his school day;
10. whether the District denied student's right to FAPE and/or violated Section 504 of the Rehabilitation Act when it denied student access to a transfer to *** Elementary because of his disability;
11. whether the District failed to provide student with instruction by a certified, qualified classroom teacher during the entire 2004-2005 school year;
12. whether the District failed to respond as required by law to the parent's January 2005 request for an independent educational evaluation;
13. whether the District failed or refused to provide homebound services to which student was entitled in fall 2005, at the time the District sought to enforce compulsory attendance against student's parent.

Petitioner's request for relief, premised on a showing of violations as alleged, consisted of orders mandating the District to do the following:

1. Provide student with IEPs and placement for academic and non-academic instruction that have been reasonably calculated to provide student with meaningful educational benefit, specifically 1-to-1 nursing care;
2. Provide student with fifty-six (56) hours of compensatory services for the period in which student had been without appropriate homebound support and services; and
3. Order the District to transfer student to *** Elementary School.

Findings of Fact

For purposes of these Findings of Fact, the designation "P-n" refers to Petitioner's hearing exhibit number; "P1-n" refers to the number of Petitioner's exhibit offered in the preliminary hearing; "R-n" refers to the number of Respondent's hearing exhibit; "R1-n" refers to the number of Respondent's exhibit offered in the preliminary hearing. "Tr. 1 n" refers to the transcript page number of the preliminary hearing; "Tr. n" Refers to the relevant page number of the hearing transcript.

1. Student is at the time of the hearing a *** year-old student who resides within Houston I.S.D. and was enrolled in the District. R-32.
2. Student is visually impaired due to retinal fibrosis and peripheral retinal detachment. He has cerebral palsy. He had infantile seizures that had been controlled with medication but are recurring. He has abnormal spinal curvature that interferes with his breathing and causes chronic respiratory complications. He has bilateral hip dislocation that requires orthotics. His ability to swallow is limited. He is fed, and certain of his medications are administered, through a ***. Student's eligibility for special education reflects the classifications of mental retardation, visual impairment, speech impairment, other health impairment, orthopedic impairment, and multiple impairment. R-2, R-6, R-20, R 43.
3. Functionally, student responds only to light and to high-contrast images. He orients and responds to sounds. His motor function is such that he cannot swallow most substances. His conditions are "stable," although the chronicity of his upper respiratory problems, seizures, and motor problems make his "stable" condition medically fragile. His ***problems, risk of ***, reduced blood oxygen content from respiratory problems, and seizures, among other things, create a continuous elevated risk of potentially fatal medical crises. It is such crises, as opposed to student's stable, chronic conditions, that pose the greatest threat for student R-3, R-4, R-6; Tr. 673-702.

4. The District performed a full and individual evaluation in 2002 after student started school in August that year, at Elementary. Student's scores on the Bayley Scales of Infant Development, 2nd Edition, reflected mental functioning with scattered skills up to the *** level and motor functioning at the *** to *** level. He could turn from stomach to back, sit with support, and bear weight if held in a standing position. The Reynell-Zinkin Scales of Mental Development indicated functioning ranging from a *** level (relative to a partially-sighted standardization sample) in sensori-motor understanding, exploration of environment, response to sound, and vocalization. Social adaptation ranged from *** level owing to student's apparent ability to differentiate familiar voices, seeking and responding to personal contact, and vocalizing a variety of sounds. His global functioning was estimated below the *** level for partially-sighted children. R-7, R-8, R-12.
5. Educational objectives in student's IEPs at the time of his enrollment and thereafter focused on student attending to sounds, distinguishing objects, responding to interpersonal stimulation, using sounds to express reactions to environmental changes, and improving several aspects of basic motor control. Speech and language evaluation in spring 2005 recorded similar functioning as seen in his initial evaluation, but also noted emergence of pre-verbal communicative vocalizations. P-7, P-8, P-9, P-21, R-21.
6. Student has been placed in a self-contained program for children with multiple impairments with little disagreement about the appropriateness of such a placement. He has always received nursing services in school but such services have not been scheduled in his IEPs as related services, other than nursing services on the bus. In-school nursing services have been contracted through outside agencies. R-24, P-7, P-8, P-9, P-10, P-11, P-12, P-13, P-14, P-15, P-16, P-17, P-18.
7. Student's parent attended an August 9, 2002, ARDC meeting and there signed a written statement indicating agreement with student's IEP and reciting that "I understand the procedural safeguards." ARDC documentation signed by the parent and school representatives states that a copy of the procedural safeguards ("rights") was provided to the parent along with the ARDC meeting notice, and that procedural rights were explained to the parent. R-24, R62.
8. During portions of the 2003-2004 school year when student was in school, he had a nurse contracted by the District to work with him. When student was in school the nurse was with him in the classroom, and when student was out sick or on homebound the nurse was not present in the classroom. Tr. 499-504, 513-516.
9. During the 2003-2004 school year, students in the classroom for multiply impaired were included in regular school activities. Special transportation and other needs of those students occasionally complicated their participation in such activities, however the school offered participation in general education classrooms and school-wide activities to student and his classmates. Tr. 537-555.
10. Student's IEP for the 2003-2004 school year contained objectives and specific mastery criteria derived from developmental assessment with the Brigance as well as pre- and post-testing. The IEP document itself did not contain a periodic recording of specific progress on mastery criteria for each objective, only whether

- the objective had been mastered or needed to be continued. Student's teacher provided the parents a communication folder that described what the child did each day on particular objectives or benchmarks. There was not disagreement regarding educational IEPs for student in the 2003-2004 school year. student was out of school attending homebound from some time in October until March of the school year, according to testimony. Tr. 505-555, 556.
11. Student's Occupational Therapist review of May 24, 2004, noted that several changes had taken place with student during the 2003-2004 school year with respect to his medical status impacting occupational therapy. He required changes to positioning and to his sensory program. Objectives still focused on improving head and trunk control, and increasing purposeful reach and grasp, with continuation of objectives related to positioning, motor functioning and sensory functioning. Student appeared to be more aware of his classroom environment and familiar school personnel. He was tolerating his time in the *** and would periodically lift his head and turn to sounds briefly. R-54, R-55.
 12. In the 2004-2005 school year, student started the year with one nurse assigned to work with student only. During the fall semester at *** another student was added to student's classroom who required nursing care, and the District required the nurse who had been attending to student to provide services to the other student as well. Other nurses were called in to assist because of conflict that arose with student's parent over student not having full-time nursing care. The nurses in the classroom consistently spent more time sitting with student than they spent with other students. At times that year the classroom had other students with needs as great as student's. Tr. 535-540.
 13. The teacher in student's classroom during the 2004-2005 school year and part of the 2005-2006 school year was a provisionally-certified teacher. Internet information posted by the State Board of Educator Certification (SBEC), the certifying state agency, showed the teacher's certificate to have expired during a two-week interval in August 2004. This reflected an issue regarding the teacher's payment of fees to SBEC, and not satisfaction of substantive requirements for holding the certification at that time. Tr. 528-532; P-44.
 14. Student's ARDC met on May 24, 2004, and discussed student's nursing needs for the 2004-2005 school year. The medical order for student at that time stated only that he required "a nurse all day." The District determined that orders would be necessary for student's full-time nurse, and the parent agreed to assist with this process. The District also clarified that a full-time nurse would have responsibility for up to three students, depending on severity. Student's parent disagreed, insisting that student's illness was such that he required one on one nursing attention. The District's nurse agreed to observe student. -32, R-45.
 15. The ARDC met again on August 23, 2004, at parent request, to address student's transportation schedule conflicting with his morning medication, a time-consuming process. Additionally, the length of the bus ride posed risks for student. The ARDC reconvened on August 26, 2004, and reached agreement on transportation to accommodate student's medication schedule. R-34, R-33, R 46, R-48.

16. Student required hospitalization in September 2004 for surgery to assist with his respiration. The physician's report dated September 3, authorized four weeks of homebound services, which the District agreed to provide commencing around October 18th. Student's parent also requested continuation of nursing services in the home, that had been provided in school. An ARDC meeting on October 15, 2004, refused this request. The District included a Notice of Refusal IEP supplement. Tr. 303-308; R-36.
17. Student's physician on September 7, 2004, wrote a letter to the District making the recommendation that student "due to his medical condition ... be cared for on a one-to-one basis." The District owing, to parent request for a one-to-one nurse, sought clarification from student's physician regarding the necessary frequency of direct nursing care. P-25, P-27.
18. On October 26, 2004, a representative from student's school phoned his parent to explain it would be necessary to withdraw student from school temporarily during the time he was enrolled in homebound services. The District requires that students be enrolled in only one "campus" at a time, and homebound is considered a "campus" for enrollment purposes. The parent, however, did not withdraw student. A homebound teacher initially went to work with student, but ceased services after the District discovered that student had not been enrolled in the homebound program. The District made further efforts to encourage student's parents to enroll him in the homebound program. Student did not return to school until February or March 2005. Some time in November or December the program for students with multiple impairments relocated from *** Elementary to the *** Elementary campus because of construction at ***. Tr. 303-310, 534, 664-665; R-36, R-62.
19. In November 2004 the District initiated correspondence with student's physician in connection with a "re-evaluation of nursing care for student" The occasion was the request for one-on-one nursing care in school, which the District did not consider necessary based on the contents of the then-current medical orders, and the District's estimate that three to four hours of nursing time was sufficient to fill those orders based on nursing records. Input from the physician was sought to clarify student's needs. P-27; Tr. 391.
20. The District did not consider its request for information from student's physician regarding changes in student's medical and nursing needs to be an "evaluation" for which parent notification and consent were required. Tr. 310.
21. An ARDC met on January 5, 2005, to discuss medical concerns regarding student. Latest procedural safeguards were given to the parent. The District determined it was necessary to re-write prior orders after student surgery. The District explained that "there will be an evaluation for eligibility for nursing services" that involves documentation of the physician's orders for frequency and duration; "[p]arents will be provided with a permission for[m] and evaluation form." The parent brought up the fact that student's physician had ordered one-on-one nursing services. The District agreed to investigate frequency and duration of nursing services, including contacting student's physician. The parent refused to return student to school until the "evaluation" had been completed. R-38.

22. The ARDC re-convened on January 18, 2005, and ended in disagreement over the parent's demand for full-time one-on-one nursing care for student in school. The District relied on prior nursing notes and current medical orders from January 6, 2005, in recommending that student receive nursing care on the bus and skilled nursing care in the classroom totaling three hours daily of nursing services, or more if needed. Student's parent and advocate disagreed with the District's proposal, claiming that the District had conducted an evaluation for which informed parent consent was required but never obtained. The parent requested an independent educational evaluation in the area of nursing services, but the District refused contending that a review of pre-existing information is not an evaluation within the meaning of the law and so the parent did not have a right to an IEE. The parent submitted a written statement of disagreement and the District prepared a Notice of Refusal ARD supplement on this issue. R-39.
23. Student's ARDC met again on January 27, 2005, in an effort to resolve or clarify disputed issues but was unable to reach agreement. Student's parent maintained that the District had done an "evaluation" and continued to request an IEE, and the District maintained that the only evaluation was that done by student's physician. The parent did not ask for a medical evaluation as such, only an independent evaluation regarding the District's decision about the amount of *** services student needed. A Notice of Refusal was completed and faxed on January 28, 2005, confirming the District's refusal to provide a one-on-one nurse and refusal to provide an independent educational evaluation for medical/nursing services. R-40, R-41, P20.
24. Student's annual ARDC met on February 16, 2005, IEPs were developed, and the parent did not generally disagree, other than to again object and request an independent evaluation regarding students need for nursing care. Student returned to school attendance thereafter. P21; Tr. 560-561.
25. The District completed a triennial full and individual re-evaluation on student that included testing on various dates in April 2005 and was reported on May 3, 2005. Student's scores on the Reynell-Zinkin scales indicated student's developmental functioning in sensori-motor understanding to be *** the scale's range of estimation. Student's exploration of environment, response to sound, and vocalization, and social adaptation ranged from the *** month level, relative to normal functioning for partially-sighted children. On this measure when compared to assessment from 2002, student did not show *** on developmental scales other than the measure of responsiveness to sound where he performed at an *** month level, compared to a below-*** -month level in 2002. It appeared that student was interested and responsive to sounds and to noise-making manipulative materials. However on the Bayley Scales of Infant Development, 2nd Edition, his demonstrated skills fell between the *** month level in mental functioning and the *** month level in motor functioning. The Bayley results suggested some regression on skills measured by that instrument. Generally speaking student's test results and the opinion of his educational evaluator who was involved in the 2005 re-evaluation suggest that student may receive some benefit from being in school by virtue of the additional educational materials and

- other sources of stimulation available to him in that setting. R-12, R-20; Tr. 715-748.
26. Student was found to function at developmental age equivalents ranging from *** months in motor areas to *** months in communication. Present skill levels suggested some slight progress since the time of the 2002 evaluation. R-20.
 27. Student's ARDC met on May 24, 2005, for the annual review and to consider new evaluation results. The ARDC drafted student's IEP for his participation in the District's program for students with multiple impairments, including for ***. The parent continued to disagree with the amount of nursing services for student, and re-asserted the request that student attend Elementary for the 2005-2006 school year on the assumption that student would receive one-on-one nursing services there. The parent withdrew the prior request for an IEE. All Committee members checked "agree" on the ARD document. P-24; Tr. 332-342.
 28. Student's teacher during the 2004-2005 school year did not consistently record student's percentage mastery of benchmarks on his actual IEP. The teacher did provide a communication notebook for parents of all students in the class, including student, that contained descriptions of what students were working on and their progress. Tr. 532.
 29. A licensed vocational nurse (LVN) was responsible for direct nursing care of student from Summer 2005 through January 2006. This included caring for student in his classroom and on the school bus from the beginning of the school year until August 16, 2005, when the LVN was removed from the classroom for refusing to work with another student in addition to student Tr. 39-131.
 30. Student's LVN described the nursing services student required in the classroom beginning of fall 2005. The nurse was contracted through an outside agency and funded, according to the agency, by Medicaid. Student has asthma which requires breathing treatments during the day. He has a severe *** that complicates his breathing, so he wears a pulse oximeter to signal when his blood oxygen level drops into a dangerous zone requiring administration of oxygen. He requires a *** to be used off and on throughout the day because he cannot *** normally and could aspirate into his lungs accumulations of saliva, or mucous that is brought up from his lungs. The *** varies in frequency but is done throughout the day as needed. He is in a *** and wears *** that helps some with his breathing. The *** can increase his body temperature and in turn increase his seizure risk, so his temperature has to be monitored during the day and the *** removed from time to time if his temperature is elevate is positioned upright with assistance, any stomach contents are *** prior to feeding or medication, the feeding. Student is maintained upright for a period of time afterward to prevent. ** Student has a seizure disorder that requires an exact protocol be followed – specifically, the administration of medication rectally if the seizure lasts more than five minutes, to ensure that he does not stop breathing – this of course makes it necessary to know when a seizure begins in order to know when he has been seizing for five minutes. He also is hospitalized for seizures. He has asthma, and receives treatments during the day with a nebulizer to help clear his airway, that require monitoring of his respiration and pulse. All things considered a nebulizer treatment requires a little more than an hour. Student now has an additional

- machine that is ordered three times per day and requires additional nurse time. Tr. 39-131.
31. Some newly-ordered treatments for student were not made known to the District after student quit attending school. He required additional oxygen, and was prescribed the ***. School nurses did not conduct home visits to review changes in student's treatments at home. Tr. 39-131.
 32. Student's prior LVN believes that he could attend school at any campus where he is provided with sufficient nursing care. The problem is that, besides requiring constant monitoring for seizure activity, he could, without such monitoring, aspirate and lose oxygen to the brain in less than a minute, and in his fragile condition could die right away. Administration of medication and *** procedures, and removing and replacing various orthotic appliances, require as a practical matter a great deal of time for both treatments that are ordered and interventions that are administered "as needed." Tr. 39-131, 107-124; P-30.
 33. In late August of the 2005-2006 school year, the District's district-wide nursing coordinator informed student's nurse that the nurse would be required to care for another student in addition to student. The nurse objected that the nurse's contracting agency and employer had ordered otherwise, and refused. The District arranged subsequently for the nurse to be removed from student's classroom, and advised student's parent that for the time being it would not be necessary for student to attend school until another nurse was made available. Tr. 394-398, 57-60.
 34. Some time after student's nurse was removed in August 2005, student's parent requested homebound services. The District requested consent to talk with student's physician regarding student's specific needs for homebound. On October 10, 2005, student's physician signed off on a homebound eligibility report, *** weeks of homebound services but omitting to describe any new or different condition. On October 18, 2005, The District wrote student's parent indicating that homebound services would be discussed by the Multidisciplinary Team after the parent signed a consent form for the school to communicate about medical information with student's physician. Student's parent returned a signed consent form dated October 24, 2004, authorizing written communication between the District and student's physician, but only up to December 1st. The District, by letter dated November 4, 2005, sought clarification, and student's physician responded on or about December 3, 2005, indicating only that student could return to school "once 1:1 nursing care available [sic]." Student did not return to school. P-34, R1-10, R1-2, R1-3; Tr.1 105-140, Tr. 395-397.
 35. Prior to November 17, 2005, the District initiated an action against student's parent through the attendance/truancy office regarding student's absences from school. Student's physician wrote the District on December 6, 2005, and again on December 8, 2005, excusing student's absences due to "chronic medical health problems." P-35, P-36, P-37.
 36. Following the initiation of this due process hearing and following the expiration of the parent's consent on December 1, 2005, the District sought and eventually obtained permission from the parent to communicate orally with student's physician regarding student's need for extended homebound services.

37. By letter transmitted to the District following the District's February 16, 2006, request for information, student's physician wrote the District describing the medical justification for providing a 1:1 nurse for student. Specifically the physician noted a serious increase in the number of acute illness episodes in 2005 including four episodes of pneumonia with difficulty breathing and hypoxia requiring frequent ***, and recurrent seizure episodes. The physician's opinion was that student's need for respiratory care had increased. In addition to recommending a 1:1 nurse in school, the physician also recommended that student not attend school at all, in order to reduce exposure to diseases that could trigger acute respiratory illness. Student's physician estimated the confinement to the home to be until late April or early May depending on the weather. P-45; Tr. 633-640.
38. After reviewing the February 2006 communication from student's physician, the District's nursing staff did not believe that the physician's information justified a recommendation for homebound services. On or near March 28, 2006, four school nurse consultants met to student's consider the situation, and decided to attempt a home visit to observe student's condition nursing needs in that setting. Two of the nurse consultants present had never seen student, and the other two had not seen in a while. The District's attorney also was present at this meeting. One of the nurse consultants during this meeting phoned student's parent requesting arrangements to observe student. The parent promised to get back with the nurse on the following day. About two days later the parent phoned and informed the nurse consultant that any home observation would have to be arranged through student's attorney because there was a hearing in progress. Tr. 633-667.
39. On April 10, 2006, the District convened an ARDC meeting attended by the parent in which the District's representatives advised the parent that the physician's recent letter was not sufficient for a recommendation that the ARDC provide homebound services. The ARDC discussed the District's request for permission for its nurse consultant to observe student in the home, for additional information about student's nursing needs that might establish that he could benefit from homebound instruction. The parent's counsel requested to see the consent form for the home visit and assessment; the District advised counsel that no such form existed. ARDC minutes do not indicate that the parent agreed to a home visit, as had been requested. The meeting ended with the District stating its position that student did not meet criteria for homebound services. P-46.
40. At the time of the April 10, 2006, ARDC meeting, the District had received through subpoena all of student's medical records from his physician. This involves some 300-400 pages of medical records. Student's medical records were not considered by the April 10, 2006, ARDC. Tr. 651-653.
41. At the time of the hearing student had been receiving his nursing services in the home reimbursed by Medicaid. The amount of services justified by Medicaid's assessment has amounted to fifty hours per week. This is based on the medically necessary services student requires because of his multiple medical conditions. Tr.1 156, Tr. 382-390.
42. Concerning delays associated with the obtaining of parent consent, after the District received student's physician's order for ***weeks of homebound services

- in October 2005, the District sought to obtain further information from the physician given that full-time, unlimited homebound services for the entire school year had not been authorized previously for student and appeared inconsistent with the District's existing records. The District did not consider the existing October 2005 consent for written communication to be sufficient; in any event, that consent expired by its terms on December 1, 2005. Consequently in December the District began attempting to obtain consent for the District's nurse consultant to communicate directly with student's physician. Tr.1: 22-24, 58-59, 80; R-3.
43. The District's understanding, at the time parent consent was sought, was that the act of communicating with student's physician to obtain information was not an evaluation as such, although it might produce information indicating the need for evaluation. Tr.-1 52-53.
 44. The District sometimes confers directly with an eligible child's physician, in determining the child's need for homebound services. Although requests for an *** of homebound services are not necessarily uncommon, in student's situation the medical records available to the District did not supply enough information, in the District's view, to justify the homebound request without obtaining additional information directly from student's physician. Tr.1 60-69, 85-88.
 45. Prior to January 6, 2006, the District had made four attempts to obtain parent consent for the District's nurse consultant to communicate with and obtain information from student's physician. R1-5.
 46. On January 13, 2006, the District filed a request for hearing seeking orders from the hearing officer allowing the District communicate with student's physician notwithstanding lack of parent consent. On January 19, 2006, student's parent sent the District a signed consent form purporting to allow communication with student's physician. The form contains certain affirmations for parents to check off – that the parent was fully informed of the activity for which consent was sought, that the parent agrees to the activity for which consent was sought, and the parent understands that consent is voluntary – that student's parent failed to affirm or acknowledge in that January 13th form by initialing or entering marks in the appropriate areas of the form. The District did not consider this form to constitute an informed consent. Tr.1 147-148; R1-4.
 47. The issue of consent was the subject of a preliminary proceeding of record on February 6, 2006. Before any orders issued from that proceeding, Petitioner provided the District with another signed consent form containing the previously-omitted affirmations, which form was acceptable to the District for allowing District representatives to communicate with student's physician.
 48. Information was obtained directly from student's physician at the time of the due process hearing when the physician testified concerning student's condition and associated medical and nursing needs. This physician has been student's pediatric physician since his birth. Student's medical condition has changed in recent months. Student in the last six to nine months has required three times the number of medical office visits than he required when he was in the school setting. Over the last six months student has experienced a worsening of his *** condition. This increases his risk of developing infections***, for example the pneumonia that he

- had at the time of the hearing. Additionally, due to some unusual behaviors that were noticed, student was given further *** studies about three or four months ago, which resulted in the diagnosis of changes in his brain function, and specifically the identification of several new areas of the brain producing seizure activity that were not previously, which changes necessitated increase in his seizure medication. From a treatment standpoint ideally student should be maintained on one-to-one nursing care at home indefinitely, or until his physicians determine whether he could tolerate surgery to improve his ***. If such surgery were undertaken, and successful, it would improve student's condition. The risk that prompts the recommendation for homebound instruction is exposure to viruses and infections in school setting. Indeed, student's condition at best is "guarded," meaning that in light of his present conditions with or without homebound services, student could die any day. Tr. 673-702.
49. Student's pediatrician who has known him since infancy is of the opinion that student is profoundly impaired and is unlikely to show progress in school particularly in light of his seizure disorder. Tr. 690-703.

Discussion

Generally speaking, IDEA entitles every child with a disability to receive individualized instruction along with sufficient related and supportive services to permit the child to benefit from the instruction. 20 U.S.C. 1412(a)(1); Board of Education v. Rowley, 458 U.S. 176 (1982). IDEA also mandates procedural safeguards to ensure that parents can participate meaningfully in development of an individualized education plan (IEP) for the child. 20 U.S.C. 1414(d); Rowley, supra; Honig v. Doe, 484 U.S. 305 (1988). The Fifth Circuit in Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 247-48 (5th Cir. 1997), offered guidelines to gauge IDEA compliance. The child's IEP must be designed specifically for the child's unique needs, must be individualized based on assessment and performance, and must be supported by services that permit the child to receive meaningful benefit from instruction. The IEP must be delivered in the least restrictive environment (LRE), and in a collaborative and coordinated manner by the key "stakeholders." The school district's program ultimately must produce positive academic and non-academic benefits. A school district's proposed IEP is presumed to be appropriate. A parent who challenges the IEP must prove by a preponderance of evidence that the IEP was not developed

according to procedural safeguards, or that the IEP failed or would fail to provide a free and appropriate public education in the least restrictive environment. Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983).

This case does not involve a dispute about the scope of related health care related services that IDEA requires, but instead whether the District employed adequate procedures in planning for such services, and did in fact plan appropriate services. The issues enumerated here in Petitioner's complaint are legally inter-related, and will be discussed according to the issues raised.

Student's parent had notice of procedural safeguards early in student's education and was aware of the District's proposed actions at all relevant times. A one-year statute of limitation applies to Petitioner's claims.

Evaluation Procedures

Petitioner complains of the District's failure to provide notice and obtain informed parent consent in connection with nursing "assessments" undertaken by the District. But the type of activity referred to as a nursing assessment, as disclosed in the case's facts, is distinguishable from activities constituting evaluation under IDEA. 20 U.S.C. 1414(a). In particular, the nurse does not diagnose the student's illness, determine whether the student has a disability, determine necessary treatment procedures, or decide the content of the student's services. 34 C.F.R. 300.500(b)(2). Those activities are the physician's responsibility. What the nurse does by way of assessment is to determine if and when to perform medical procedures ordered by the physician. This involves monitoring the student's status as a function of the medical orders. How medical orders are fulfilled involves nursing decisions including implementation strategies, but not diagnostic or treatment decisions as such. The nurse's assessment responsibility is not entirely different from that of a teacher reviewing behavior objectives drafted by an ARDC, monitoring the student for occurrences of target behaviors, and delivering a consequence provided in the behavior plan. Assessment incidental to implementation is presumed, but does not constitute "evaluation" requiring

prior notice and consent. Assessments incidental to program implementation become relevant for educational planning only when some implementation problem interferes with educational benefit for the student. The District's omission to give prior notice and obtain consent for these so-called nursing assessments did not violate IDEA.

Similarly, the District in speaking with student's physician in fall 2005 did not conduct IDEA evaluation. There, the District sought only to obtain medical assessment data, that, insofar as the District was aware, student's physician had already completed. So this involved obtaining and reviewing information from the physician, not undertaking a separate evaluation to determine if the student had a particular disability or required particular services – questions presumably answered by the physician's evaluation. School nurses needed to review medical diagnostic and prescriptive information. It was not their job to generate it. So this activity, seeking to talk with the physician, did not constitute a §1414(a) "evaluation," and it was not necessary to follow procedural requirements that attach to educational evaluations under the facts of student's situation. Parent consent may be necessary, but not for the reason that the activity constitutes an IDEA evaluation. Also, IDEA provides that reviewing existing data, whether as part of an evaluation or for other educational planning and implementation, does not require parent consent. 34 C.F.R. 300.505(a)(3). I find nothing in the 2004 IDEA amendments that modify this provision. As for planning the assignment of nursing staff, or deciding the nursing staff-to-student ratio in a classroom, this again is done by reviewing pre-existing data created and/or collected by physicians and nurses concerning the needs of individual students and groups of students - "an activity that school districts, as a matter of good practice, should be engaged in as an ongoing practice." 34 C.F.R. 300.505(a)(3); Comment, 64 F.R. 12406 (1999).

In sum, evaluation consists of activities undertaken to determine a student's disability and individual needs, but does not include every decision made in the course of implementing an educational plan or nursing plan for the student. Id. In

student's case, the evaluations that occurred were medical evaluations by his pediatrician, and his triennial educational evaluation. All of the activities that went into estimating how many nursing staff would be needed for what period of time in order to meet student's needs for nursing care in school, or how many weeks of homebound instruction might be necessary due to a condition diagnosed as the result of a medical evaluation, are not "evaluation" as such. The requirements and rights associated with IDEA evaluations as a matter of law do not attach to those activities, at least as they played out under the facts of this case.

Request for Homebound Placement

There was consensus on most issues at the last ARDC meeting of the 2004-2005 school year. During the 2004-2005 school year, and despite some disagreement over the necessary amount of nursing care, student attended school for a portion of the year without incident. As indicated by his triennial evaluation, student may even have made slight progress during a period of time in which he attended school. Considering student's very severe multiple disabilities, slight progress is still meaningful progress for IDEA purposes. Following the beginning of the 2005-2006 school year, the nurse assigned to work with student was replaced following a dispute about having to provide care to another student in addition to student. The dispute concerned the implementation of nursing services. Student did not return to school after this dispute occurred. Meanwhile student's parents requested this due process hearing. There ensued conflicting written communications from student's physician to the District – first, that student required *** weeks of homebound instruction; then, that he could return to school as soon as a 1:1 nurse was made available for him; and finally, that he required homebound services until around *** because of weather conditions. Additionally, there developed multiple disputes about consent to communicate with the physician, and about observing student at home. Ultimately, homebound services were not provided because the District was unable to determine the basis of student's need for homebound in

order to make a recommendation to his ARDC. While certain medical authorization is a prerequisite for homebound services, the appropriateness and amount of such services remains for the ARDC to decide according to analysis of the least restrictive environment. 19 T.A.C. §89.63(2)(A).

The District attempted to review medical data concerning student's need for homebound services. The District was looking for evidence of medical problems and treatments to schedule services around. However, written communications from the physician generally disclosed only that the physician thought the school ought to provide homebound, and information from the physician was not entirely student's condition. Owing to complications from the pendency of this litigation, no nursing-service estimate of student's need for homebound services ever materialized or was presented to an ARDC. The inference is merited, that ARDC's only apparent determination in the relevant time frame was that the District lacked information to establish that student was eligible for homebound services. But even up to that meeting, the District was attempting to obtain medical information. Review of the evidence reflects that a full picture of student's medical conditions including recent changes in his medical status was not made apparent until the due process hearing itself.

Concerning the restrictiveness of the proposed classroom placement, school staff testified credibly at the hearing that student was alert to activities in the classroom. His teacher believed that his behaviors indicated he experienced enjoyment from the stimulation of school activities. He may have shown some progress on his learning objectives. This Hearing Officer is not convinced by medical opinion testimony from student's pediatrician, that the risk of disease exposure in school overwhelms any odds of student receiving educational benefit. Petitioner did not establish by a preponderance of evidence that, from an educational standpoint, remaining at home for instruction is absolutely necessary now in order for student to benefit from special education. Nor is student's time spent in school a total waste that creates intolerable risk. Daniel R. v. State Board of Educ., 874 F.2d. 1036 (5th Cir.1989).

One issue is the relative risk of respiratory disease exposure at home versus at school. But testimony on this issue is necessarily speculative, making it difficult for Petitioner to satisfy his burden. There was little or no evidence about what happens in the home on a daily basis, and thus no evidence that the home is risk-free. There was little evidence about who visits in the home, or how often, or how many people are typically there compared to the number of people in the classroom for multiply impaired. Nor was there testimony about how many different people student's family members and other visitors are exposed to. Parents, school children, and staff in the classroom for multiply-impaired students, all are exposed to potential carriers of disease. There was no evidence tending to establish that student got sick because of exposure in school, and indeed student's physician told the District in December 2005 that student could return to school as soon as a one-on-one nurse was available. So the totality of evidence is not persuasive, that the home is the sole and necessary environment for delivery of instruction.

Neither was this the case at the time the District sought to enforce compulsory attendance against the parent. It is true that student's physician wrote medical excuses in connection with that truancy action, indicating that student was in need of homebound because of chronic medical conditions. However, those letters were written within a matter of days following the physician's letter opinion to the District, that student could attend school with a one-on-one nurse present. Homebound, then, was not the least restrictive educational setting appropriate for student when the District sought to enforce compulsory attendance against student's parent.

Homebound instruction always remains available as an option on the continuum of placements, for times when student is too sick to attend school. Changes in his condition are certain occur that will increase the amount of time when homebound is necessary. There is even some possibility that treatment may decrease it. Or the day may come when his ARDC agrees that full-time homebound is indeed student's least restrictive setting. This hearing decision

merely finds that the evidence is not sufficient to support Petitioner's claims at this time.

Petitioner complains that the District failed to provide notice of refusal when it determined not to provide homebound services to student after his parent removed him from school in August 2005. Throughout the time period in question, the District persisted in attempting to obtain the information it needed to make a recommendation to student's ARDC concerning homebound services. It is evident that the refusal of homebound services by student's April 2006 ARDC was partly due to the parent's opposition to school district staff observing student at home for indications of needs that might justify homebound placement. Under these circumstances, it is not entirely clear that the District actually refused the requested services. Even if it did, the omission of the notice was harmless error.

Denial of Inter-Campus Transfer

Petitioner complains of the District's refusal to transfer student to *** Elementary, when the parent made this request to student's ARDC in the hope of obtaining one-on-one nursing care at ***, and also of the District's failure to give the parent a notice of refusal. The complaint lacks merit. School administrators, as opposed to ARD Committees, generally have discretion regarding campus assignment policies. IDEA has not been read to require attendance at a campus of the parent's choosing, so long as the campus designated under school policy can implement the student's IEP. Flour Bluff I.S.D. v. Katherine M., 91 F.3d 689 (5th Cir. 1996); White v. Ascension Parish School Board, 343 F.3d 373 (5th Cir. 2003). It hardly merits mention that school districts are obligated to deliver all scheduled IEP services to eligible students at any campus the student attends under school district policies. Merely discussing the possibility of student attending *** in an ARDC meeting did not, in itself, make the choice of campus subject to the*** ARDC's authority. There is no evidence that *** attendance at *** as such implicated any IDEA issue. Under the circumstances, it does not seem reasonable to impose on student's ARDC the obligation to provide notice when it

refused to grant a request because it lacked the authority. But if such an obligation existed, the omission here did not affect student's education or interfere with his parent's effective participation in the decision-making process.

Complaints Concerning IEP Content and Implementation

Petitioner complains regarding student's IEP content, and its implementation in the least restrictive environment. Petitioner complains that IEP services were insufficient and that student lacked appropriate behavior IEPs, was not given opportunities to participate in the general curriculum and was not provided services in the least restrictive environment. A review of student's IEP and related documentation, and the testimony of his teacher and other witnesses, reveals that the only evidence in support of any of Petitioner's complaints in this regard is the fact of student's minimal progress in school. student's teacher describes school activities in which student participated, that run counter to Petitioner's allegations. But the testimony of Petitioner's physician established that student's progress, at best, will be limited by virtue of student's multiple disabilities. Determining the precise cause of progress or regression may not be possible. This testimony was credible. The comparison of student's performance in his triennial re-evaluation compared with his initial full and individual evaluation suggests some minimal progress. Petitioner has not established that student's IEPs were inappropriate by virtue of their content or implementation, and I find the District at all relevant times attempted to deliver student's IEP in the least restrictive setting and to provide the parent with current information appropriately. And with regard to student's teacher, data from the State Board of Education (SBEC) web site, as clarified in the teacher's testimony, establish that the teacher was shown to have been working under an expired teaching certificate for about two weeks, however this was due to an accidental mis-application of fees the teacher had paid SBEC in connection with obtaining her certificate. The teacher's testimony, which is not contradicted, established that the entry reflecting expiration of her certificate was error on the part of the SBEC.

Appropriate Classroom Nursing Services

Even though a particular decision – such as a decision not to provide one-on-one nursing care – is incident to implementation or methodology does not mean that the decision is unreviewable. Schools are still required to exercise discretion in such a way that eligible students receive at least “the hope of educational benefit.” Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983). It remains necessary for the District to ensure delivery of related services as necessary to enable every eligible student to benefit from special education. A medically fragile student’s ability to avoid acute medical crises in school is a prerequisite for the student benefiting from special education, and in providing appropriate related services the school district has a responsibility to act “reasonably” as the Rowley Court has said.

The issue of appropriate school nursing services for student must be addressed. The District initially applied a formula assigning standard amounts of time to each procedure on student’s list of medically-ordered procedures, and scheduled the availability of nursing services based on the standard time required to fill each of those orders, and no more. But testimony tended to show that the District’s approach failed to consider student’s individualized need for, among other things, close monitoring to determine when to implement procedures. His physician also described in testimony new medical complications that have arisen affecting his condition during the last six months or so, that also affect his needs. His seizures have become more complex, accompanying the development of additional brain areas generating abnormal activity. The onset of seizures must be recorded and the duration of any seizure activity timed in order to administer seizure medication properly – medication the omission of which could prove fatal. This obviously requires observation to recognize when a seizure begins. With his condition worsening, this issue assumes greater importance than previously. His respiratory problems have become more serious, putting him at greater risk of aspirating, which could happen at any time without monitoring and prompt suctioning. If he is without oxygen for one or two minutes, for example while the

school nurse is busy with another student, student simply dies, or suffers more neurological damage. The totality of evidence preponderates that student as of today requires continuous observation, and continuous immediate availability of skilled nursing staff to deal with emergencies, above and beyond what is required to fill his medical orders.

Unreasonable Protraction

The District lacked information necessary to fully consider and weigh the implications presented by changes in student's condition, up until the physician's last written communication and testimony at hearing. The physician's earlier written reports sent pursuant to the parents' limited consent did not describe changes in student's condition, and were confusing in terms of whether student needed homebound all year, or until a one-on-one nurse became available in school, or until the weather changed in the spring. Even the February 2006 report did not entirely clarify the need for one-on-one nursing care versus homebound placement. The District's concern was understandable: it was hard to know how to interpret the written information. And it was not realistic to expect school nursing staff to wade through several hundred pages of medical records obtained in discovery, in the midst of a lawsuit, in the effort to decide what services are reasonably necessary.

These matters considered, it would have been important to let school nursing staff talk directly with student's pediatrician in order to get the details that the staff considered necessary. Student's physician is articulate, familiar with student's condition, and genuinely concerned about student's well-being, albeit from a medical standpoint. The decision of the Petitioner to withhold or limit consent delayed the District's access to vital information. This case's facts are not exactly on point with Andress v. Cleveland I.S.D., 64 F.3d 176 (5th Cir. 1995), which did involve evaluation (notably, Petitioner maintained that the nursing assessments here constituted evaluation), but the underlying principle is too similar to overlook. The district has the legal obligation to provide services, and along with

that obligation comes the right to obtain information in a timely fashion to ascertain what services are needed. The litigation thus was unnecessarily protracted, from the date student's parent consent expired on December 1, 2005, until the parent granted consent thereafter on February 10, 2006.

Conclusions of Law

1. Houston I.S.D., as a local education agency and political subdivision of the State of Texas, is subject to requirements of IDEA, 20 U.S.C. §1400 et seq., and its implementing federal and state regulations.
2. Student is an IDEA-eligible student enrolled in Houston I.S.D. and is entitled to a free, appropriate public education provided by Houston I.S.D. in the least restrictive environment.
3. Houston I.S.D. did not violate Petitioner's right to prior written notice and consent in connection with assessments and monitoring of student for nursing care. Houston I.S.D. did not perform nursing evaluations on student that required prior notice to or consent from Petitioner.
4. Houston I.S.D. did not violate applicable IDEA regulations in regard to Petitioner's request for an independent educational evaluation because the parent's request did not involve any activity that constituted an IDEA evaluation.
5. Houston I.S.D. did not violate Petitioner's rights including the right to prior written notice and consent when it refused Petitioner's request to transfer student to a different campus within Houston I.S.D.
6. Houston I.S.D. has provided at all relevant times appropriate IEPs for student's and delivered scheduled IEP services in the least restrictive environment appropriate to student's needs.
7. Houston I.S.D. has provided student with services from appropriately trained and qualified educational and nursing staff at all relevant times.
8. Homebound instruction was not the least restrictive appropriate educational setting for student at the time of the hearing, and Petitioner failed to establish that the District had sufficient information at the time the District sought to enforce compulsory attendance that student required homebound services. The District was not obligated to provide a notice of refusal of homebound services while its staff were actively pursuing information to determine student's need for homebound services.
9. Student requires one-on-one nursing care, or a level of nursing service practically indistinguishable from it, while in school, from a qualified health professional such as a registered nurse or a licensed vocational nurse.
10. Petitioner unreasonably protracted the litigation from December 1, 2005, to February 10, 2006.

Orders

In consideration of the foregoing,

IT IS ORDERED that if and when student. returns to attend school in Houston I.S.D., the District will make available the services of a registered or licensed vocational nurse or nurses sufficient to provide virtual, continuous, and direct observation of student at all times he is in school, and additionally, to provide immediate and continuous access to emergency nursing care for student at all times he is in school.

IT IS FURTHER ORDERED that any and all other or additional relief requested by Petitioner herein is **DENIED**.

Finding that the public welfare requires immediate effect of this Decision, this Hearing Officer makes it effective immediately, pursuant to 19 Tex. Admin. Code §157.5(n).

SIGNED this 28th day of August 2006.

JAMES N. HOLLIS
SPECIAL EDUCATION HEARING OFFICER
FOR THE STATE OF TEXAS

DOCKET NO. 006-SE-0905

STUDENT

B/N/F***&***

vs.

HOUSTON INDEPENDENT FOR THE STATE OF TEXAS
SCHOOL DISTRICT

BEFORE A SPECIAL EDUCATION
HEARING OFFICER

SYNOPSIS OF DECISION

ISSUE: Whether Houston I.S.D. failed to provide required notices when it refused parental requests.

CITATION: 20 U.S.C. §1415(c)

HELD: For the District. ARDC documents in evidence contained notices of refusal with respect to services or activities proposed by the parent and refused by the District. The ARDC was not required to provide notice when it refused a request that fell outside its authority to provide. The District did not refuse the parent's request for homebound services; the District lacked sufficient information to inform the ARDC in regard to granting or refusing the request. Alternatively, any omission in regard to the notice complained of was harmless.

ISSUE: Whether Houston I.S.D. failed to provide notice and obtain parent consent for nursing assessments undertaken by the District.

CITATION: 20 U.S.C. §1414(a) et seq.; 34 C.F.R. 300.505(a)(3).

HELD: For the District. Nursing assessments undertaken by the District under the circumstances of this case were not evaluations within the meaning IDEA. No prior consent was necessary for review of existing medical and nursing data, whether as part of an assessment or otherwise.

ISSUE: Whether Houston I.S.D. failed to provide student with an appropriate placement in the LRE.

CITATION: 20 U.S.C. §1412(a)(5)

HELD: For the District. The greater weight of evidence tended to show that homebound is not the LRE for provision of a free appropriate public education for student. When student was attending school, he received opportunities for interaction with non-disabled peers that were appropriate to his disabilities and educational needs.

ISSUE: Whether Houston I.S.D. failed to provide student with appropriate IEPs for

academic and non-academic areas of instruction containing appropriate provision for student's participation in the general curriculum according to his needs, and whether Houston I.S.D. delivered IEP services with appropriately-trained teaching personnel

CITATION: 20 U.S.C. §1414(d)

HELD: For the District. There was not a preponderance of evidence that student's IEPs were inappropriate, or that parents were not informed regarding student's progress on a timely basis. While student made very little progress, according to his assessment results, testimony established this was due to the nature and severity of his multiple disabilities. student's teacher was appropriately trained and certified.

ISSUE: Whether Houston I.S.D. violated IDEA when it denied student's parent's request to transfer student's attendance to *** School.

CITATION: Flour Bluff I.S.D. v. Katherine M., 91 F.3d 689 (5th Cir 1996).

HELD: For the District. Petitioner did not satisfy his burden to establish that attendance at *** was necessary to provide student with a free, appropriate public education in the least restrictive environment. A notice of refusal under the circumstances was not required, but in any event, omitting to provide such notice did not cause the sort of harm for which IDEA affords relief.

ISSUE: Whether Houston I.S.D. improperly denied homebound services to student, or improperly rejected the parent's request for an independent evaluation to determine student's eligibility for homebound services.

CITATION: 19 T.A.C. §89.63

HELD: For the District. student was withdrawn from school in fall 2005 for the reason that the District ceased to make a 1:1 nurse available for him. Petitioner balked at the District's efforts to acquire information to present to student's ARDC concerning what, if any, homebound services to provide, and failed to establish the necessity of homebound services. Activities undertaken to obtain information relative to homebound services did not involve IDEA evaluation, and therefore independent evaluation was not available.

ISSUE: Whether Houston I.S.D. appropriately evaluated student's need for nursing care in school, and provided qualified and appropriate nursing staff.

CITATION: 34 C.F.R. §§300.23, 300.24; 19 T.A.C. §89.1131

HELD: For the Petitioner, in part. The District failed to appropriately determine the amount of nursing services student required in the classroom in the 2005-2006 school year; the District's omission was caused in significant part by difficulties the District encountered in obtaining information about student's conditions and medical needs. There is no evidence that the District failed to provide student with qualified and appropriate nursing staff.

ISSUE: Whether Petitioner unreasonably protracted the final resolution of the issues in contrary.

CITATION: 19 T.A.C. §89.1185

For the District. Parent consent for the District to communicate with student's physician expired on December 1, 2005. Thereafter the District sought consent to speak with the physician to try and

HELD: discover what changes in student's condition justified homebound instruction. Although the physician had information about changes in student's condition, the District's access to this information was delayed unnecessarily by Petitioner's withholding of consent.

Petitioner has correctly read the opinion in Timberlane Regional School Dist. v. New Hampshire State Educ. Agency, 39 IDELR 27 (SEA NH 2003) for the proposition first that the parent ought to be allowed to participate in the school district's communications with the child's own physician. But Timberlane, even if it were authority here, does not stand for the proposition that reviewing pre-existing data requires consent, or that having a conversation with an outside expert constitutes "evaluation" for purposes of §1414(a). Id.