

STUDENT, <i>b/n/f</i>	§	BEFORE A SPECIAL EDUCATION
PARENTS,	§	
	§	
Petitioner,	§	
	§	
V.	§	HEARING OFFICER
	§	
CONROE INDEPENDENT	§	
SCHOOL DISTRICT,	§	
	§	
Respondent.	§	FOR THE STATE OF TEXAS

DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

**I.
STATEMENT OF THE CASE**

Petitioner, Student *b/n/f* Parents (“Petitioner” or “Student”), requested a Due Process Hearing pursuant to the Individuals With Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. §1400 *et. seq.*, contending that Respondent, Conroe Independent School District (“Respondent” or “CISD” or “the District”), is not providing Student with a free, appropriate, public education (“FAPE”) in the following particulars: 1) the amount of time allotted per week for speech therapy (60 minutes) is inappropriate; and 2) the amount of time allotted per week for occupational therapy (15 minutes) is inappropriate. Student seeks the following relief: 1) reimbursement for the cost of private educational services; 2) compensatory special education services or related services; and 3) an increase in the amount of speech and occupational therapies.

**II.
PROCEDURAL HISTORY**

On November 10, 2008, the Texas Education Agency (“TEA”) received the Request for Due Process Hearing (“the complaint”) filed by Student under Docket No. 067-SE-1008. On November 12, 2008, TEA assigned this case to the undersigned Hearing Officer. On November 12, 2008, the undersigned Hearing Officer sent the Initial Scheduling Order to the parties, stating that the pre-hearing telephone conference would convene on December 2, 2008, that the Due Process Hearing would take place on December 19, 2008, and that the Decision would issue by January 24, 2009.

On December 2, 2008, the parties convened for the pre-hearing telephone conference. In attendance were the following: 1) Mr. John Causey, counsel for the Petitioner who was participating in the telephone conference for Ms. Kenna M. Seiler; 2)

Mr. Jeffrey Rogers, counsel for the Respondent; 3) Ms. **, Respondent's representative; 4) the undersigned Hearing Officer; and 5) the court reporter, who made a record of the telephone conference. The parties discussed the issues and re-scheduled the Due Process Hearing for January 8-9, 2009.

On December 15, 2008, the undersigned issued the Second Order Scheduling Due Process Hearing setting out the issues for the hearing and confirming the extended deadlines agreed to by the parties and Hearing Officer. On December 19, 2008, Respondent notified the Hearing Officer that the issues set forth in the order were not as specific as the issues articulated in the pre-hearing telephone conference. On December 29, 2008, the undersigned issued an Amended Second Order Scheduling Due Process Hearing which set forth specifically the two issues stated on the record of the pre-hearing telephone conference.

The Due Process Hearing convened on January 8, 2009, and concluded on that day. Both parties introduced documentary evidence; Student called one (1) witness; CISD called five (5) witnesses. Both parties conducted cross-examination of the witnesses, and Student was allowed to re-call her witness for rebuttal purposes. Student introduced one (1) exhibit and CISD introduced twelve (12).

During the hearing Student was represented by counsel, Ms. Seiler. Student's mother attended the entirety of the hearing. CISD was represented by counsel, Mr. Rogers. Also in attendance throughout the hearing was Ms. **, Director of Special Education for CISD.

At the conclusion of the hearing on January 8, 2009, the parties and Hearing Officer agreed to a post-hearing schedule. The undersigned instructed the parties that post-hearing closing arguments were optional. However, if the parties wanted to file closing arguments, they would be due February 2, 2009, and the Decision would be rendered by February 13, 2009. The Hearing Officer issued a letter with these dates included and requested that the parties notify her if they were not going to file closing arguments. Both parties submitted closing arguments timely.

III. FINDINGS OF FACT

1. Student is a ** year old who resides with her parents and siblings within the jurisdictional limits of CISD. Student attends ** at her home campus, ** School.
2. CISD is a political subdivision of the State of Texas and a duly incorporated independent school district.
3. Student qualifies for special education under the following categories: 1) mental retardation ("MR"); b) speech impairment ("SI"); and c) other health impairment ("OHI"), based upon chronic health problems associated with the diagnosis of Down's Syndrome. Student has communication needs in the areas of language

and articulation. Student's behavior does not impede her learning or the learning of others. Student uses assistive technology when needed. Based upon her disabilities, Student requires accommodations in the general education curriculum, content modifications in the general curriculum, and specialized curriculum other than curriculum based upon the Texas Essential Knowledge and Skills ("TEKS").

4. CISD conducted Student's three-year full, individual evaluation ("FIE") in fall 2008. This comprehensive assessment affirmed that Student continues to manifest a need for special education intervention in the areas of a) language and articulation; b) mobility and self-help; c) fine motor, visual motor, visual perceptual, and motor coordination skills; d) intellectual ability; e) adaptive behavior skills, such as communication, functional academics, self-direction, social, school living, home living, health and safety, self-care, and community use; and f) assistive technology.
5. Prior to the beginning of school year 2008-2009, CISD and Student's mother entered into an agreement whereby Student would receive additional speech and occupational therapies until Student's FIE could be completed and her ARD Committee convened. Under this agreement, Student was receiving seven hundred twenty (720) minutes of speech therapy per nine weeks and sixty (60) minutes of occupational therapy per week.
6. Student's ARD Committee met on October 15, 2008, to conduct Student's annual ARD and to review the results of her FIE. The Committee developed measurable goals and objectives in the areas of a) communication; b) gross motor; c) math; d) language arts/reading; e) science; f) social studies; and g) writing. Occupational therapy objectives were included in the science and writing goals and objectives.
7. The ARD Committee agreed to provide services to Student in both the general and special education settings, with more than ten (10) hours per week in the general education setting and nineteen (19) hours per week in the special education setting. The ARD Committee recommended five hundred forty (540) minutes of speech therapy per nine weeks, an average of one (10) hour per week; one hundred thirty-five (135) minutes of occupational therapy per nine weeks, an average of fifteen (15) minutes per week; and one hundred thirty-five (135) minutes of physical therapy per nine weeks, an average of fifteen (15) minutes per week. Student's new IEPs would be delivered over a one-year period beginning October 15, 2008, and ending October 15, 2009.
8. Student's ARD Committee did not reach consensus on October 15, 2008. Student's mother agreed with all of the recommendations but for the amount of time Student would receive occupational and speech pull-out therapies. Student's mother requested more time in the delivery of these related services. The ARD Committee agreed to recess and reconvene on October 28, 2008.

9. Student's reconvened ARD Committee met on October 28, 2008. The Committee revised a communication goal. All ARD Committee members but for Student's mother recommended the same amount of time for speech and occupational pull-out therapies. Although Student's mother objected to the amount of allotted time for speech and occupational therapies, asserting that this was not sufficient time for Student to "reach her fullest potential," Student's mother agreed that the Committee could implement the October 29, 2008, IEPs.
10. Student is making progress under her October 2008 goals and objectives.
11. The evidence was insufficient to establish that the October 2008 IEPs were not developed in a coordinated and collaborative manner by Student's key stakeholders.
12. The evidence was insufficient to establish that the October 2008 IEPs are not being delivered in a coordinated and collaborative manner by Student's key stakeholders in the least restrictive environment ("LRE").
13. The evidence was insufficient to establish that the October 2008 IEPs are not providing positive benefits to Student in both academic and nonacademic areas.

IV. DISCUSSION

In documentary evidence and in testimony at the hearing, Student's mother repeatedly stated that she wants the best education available to her child; that she wants her child to achieve her fullest potential; and that she knows her child can be the "cream of the crop of the children with Down's Syndrome." Based upon these commendable desires, Student's mother perceives that more pull-out speech and occupational therapy services will result in the fulfillment of her desires for Student. CISD counters that the educational program sought by Student is not the standard under IDEIA or its implementing regulations and supporting case law, and that it actually is a program that would deprive Student of an appropriate education.

IDEIA mandates that all state school districts receiving federal funding must provide all handicapped children a FAPE. The United States Supreme Court, in *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175 (1982), established a two-part test for determining whether a school district has provided a FAPE: 1) the school district must comply with the procedural requirements of IDEIA, and 2) the school district must design and implement a program "... reasonably calculated to enable the child to receive educational benefits." An educational benefit must be meaningful and provide the "basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational benefit to the handicapped child." *Rowley*, 458 U.S. at 200-01. In determining whether a child is receiving a FAPE, the *Rowley* Court insisted that the reviewing court must not substitute its concept of sound educational policy for that of the school authorities. *Id.*, 458 U.S. at 206. Although the school district

need only provide “some educational benefit,” the educational program must be meaningful. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). The educational benefit cannot be a mere modicum or *de minimis*. It must be likely to produce progress, not regression or trivial educational advancement. *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000).

In *Cypress-Fairbanks Independent School District v. Michael F.*, the Court set forth four (4) factors that aid in evaluating whether a student is receiving the “basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational benefit” to that student: 1) whether there is an individualized program based on the student's assessment and performance; 2) whether the individualized program is administered in the least restrictive environment (“LRE”); 3) whether the services are provided in a coordinated and collaborative manner by the key stakeholders; and 4) whether positive benefits are demonstrated both academically and non-academically.

1. Student’s October 2008 IEPs Were Individualized And Based Upon Her Assessments And Performance.

Evaluation procedures are carefully spelled-out in the federal and state rules and regulations implementing IDEIA. 34 C.F.R. §300.304 specifies that in conducting the evaluation, the public agency, *i.e.*, the school district, must 1) use a variety of assessment tools and strategies to gather functional, developmental, and academic information; 2) not use a single measure or assessment as the sole criterion for determining a disability; and 3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The school district must ensure that the assessments are selected and administered in a non-discriminatory manner, provided in the child's native language and in a form likely to provide accurate information, used for the purposes for which the assessments are valid and reliable, administered by trained and knowledgeable personnel, and administered in accordance with any instructions provided by the producer of the assessments. The district is charged with administering assessments and other evaluation materials that are tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient. Assessments must be selected and administered in a manner that best ensures that the assessment results accurately reflect the child's aptitude or achievement level or other factors that the test is measuring. The child being assessed must be evaluated in all areas related to the suspected disability. The assessment must be sufficiently comprehensive to identify all of the child's special needs.

As part of the overall evaluation, the assessors should review all existing evaluation data, including information provided by the parents, current classroom-based, local, or state assessments, classroom-based observations, observations by the child's teachers and related-services providers. 34 C.F.R. §300.305. Once the assessments and other evaluation measures are completed, the student's ARD Committee must consider all of the information gathered and make a recommendation based upon that information.

In determining whether the child is a child with a disability and an educational need for special education intervention, the ARD Committee must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as physical condition, social or cultural background and adaptive behavior. 34 C.F.R. §300.306.

In the instant case, Student's ARD Committee met on October 15, 2008, and October 28, 2008, to review her three-year FIE and to develop a program implementing the appropriate recommendations of the various assessments and assessors. The ARD Committee reviewed a plethora of assessments, including evaluations in the areas of 1) speech/language; 2) physical therapy; 3) occupational therapy; 4) intelligence; 5) adaptive behavior; 5) academic/developmental performance; and 6) assistive technology. The only evaluations pertinent to Student's issues involve the speech/language and occupational therapy assessments.

A. Student's Speech/Language Evaluation:

Student's speech/language evaluation consisted of formal and informal evaluations of language proficiency in both the receptive and expressive domains. Testing revealed scores in the disordered range related to auditory comprehension, expressive comprehension, and articulation. The functional communication assessment revealed 1) adequate/normal range in hearing, vision, grasp, head and trunk positioning, visual tracking, and ability to balance on two feet; 2) moderate awareness of others and poor awareness of environmental events; 3) understanding of spoken phrases of three (3) to four (4) words and concepts of colors, matching, on, under, same, different, off, star, triangle, circle; 4) strength in verbal communications; and 5) normal vocal quality, pitch, and fluency for Student's age and size. According to these various assessments, Student meets the disability category of SI in the areas of articulation and language.

Based upon these assessments and Student's present levels of performance in speech/language communication, the evaluators made numerous recommendations related to Student's educational needs in the area of speech and language. These educational needs formed the basis for the communication goal and multiple supporting objectives developed by the October 2008 ARD Committee. These objectives were designed to be worked on daily in both the general and special education settings. As an additional related service, Student's ARD Committee recommended one (1) hour per week of pull-out speech/language therapy. This recommendation was provided, and supported by, the speech/language professionals and Student's teachers, who work with Student on a daily basis, and the educational diagnostician. These professionals testified that providing more than one (1) hour per week of pull-out services would serve no advantage in that Student could not progress more, or at a faster rate, than her developmental and cognitive levels allow.

B. Student's Occupational Therapy Evaluation:

Student's occupational therapy evaluation consisted of formal and informal evaluations in the areas of visual motor, visual perception, motor coordination, handwriting, functional activities in the school setting, and sensory processing. These assessments revealed that Student is performing below age expectation in fine motor, visual motor, visual perceptual, motor coordination, and self-care skills. Sensory processing does not negatively affect Student in school performance; overall school functional skills are varied with a strength in mobility but a difficulty in completing class work.

Based upon these assessments and Student's present levels of performance, the evaluators made numerous recommendations related to Student's educational needs in these areas. These educational needs formed the basis for the short-term objectives developed in the science and writing goals developed by the October 2008 ARD Committee. These objectives were designed to be worked on daily in both the general and special education settings. As an additional service, Student's ARD Committee recommended fifteen (15) minutes per week of pull-out occupational therapy. This recommendation was provided by the occupational therapist who has worked with Student for three (3) years, as well as her teacher and the educational diagnostician. These professionals testified that providing more than fifteen (15) minutes per week of pull-out services would serve no advantage in that Student could not progress more, or at a faster rate, than her developmental and cognitive levels allow.

2. Student's Special Education Services Are Being Provided In A Coordinated And Collaborative Manner By The Key Stakeholders In The Least Restrictive Environment.

Student claims that as to the speech/language and occupational therapy pull-out sessions, Student's mother was not allowed to function as a key stakeholder in the determination of the amount of time recommended for these pull-out services. Student's mother believes that the time adopted by the October 2008 ARD Committee was pre-determined by individuals who provide minimal services to Student. No amount of persuasion or argument on her part moved the Committee from the recommended time of one (1) hour of pull-out speech therapy and fifteen (15) minutes of pull-out occupational therapy per week.

IDEIA requires that parents have a right to be equal participants in the ARD Committee meetings and the development of the Student's educational program. This does not mean that parents possess veto power over recommendations with which they object. Rather, being equal participants means that the parents have a right to be heard, to express their concerns, to provide valuable input, and to work with the other members in final development of a program and placement for their disabled child. The fact that draft IEPs, goals and objectives, and other matters are brought by the committee members to the ARD does not mean the parents are being displaced from

the decision-making process. As exemplified in this case, many changes were made to the draft goals and objectives at the request of Student's parent at the October 2008 ARD Committee meetings.

Student's October 2008 IEPs were developed by various knowledgeable participants: Student's parent, an administrator, general and special education teachers, evaluators, the speech pathologist, the occupational therapist, the physical therapist, and the educational diagnostician. But for the amount of time for pull-out services, the ARD Committee reached consensus on every other aspect of Student's IEPs.

Pursuant thereto, Student receives educational services in the general and special education classes. Student spends over ten (10) hours per week with her general education peers and over nineteen (19) hours per week in special education classes.

Student's teachers are well trained in working with Student on her goals and objectives for speech and occupational therapies. The speech and occupational therapists communicate regularly with Student's teachers providing suggestions for implementing the objectives. The majority of Student's occupational therapy objectives are better fitted for implementation within the classroom. Indeed her science and writing goals contain specific objectives targeting occupational therapy needs.

IDEIA mandates that to the maximum extent appropriate, disabled children are to be educated with children who are not disabled. Removing disabled children from the regular education environment is done only when the nature or severity of the disability is such that the child's education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. §300.114(a)(2).

In this case, Student receives education in both the general and special education settings. Student further receives one (1) hour per week of pull-out speech therapy and fifteen (15) minutes per week of pull-out occupational therapy. These pull-out sessions represent a highly restrictive environment. Student's teachers and professionals agree that adding more pull-out time to Student's weekly schedule would garner no speed in acquiring skills and would actually be detrimental because it means Student is losing valuable education in her regular and special education classrooms.

3. Student Is Making Academic And Non-Academic Progress Under Her October 2008 IEPs.

Although the contested IEPs have been implemented only a few months, testimony at trial indicates that Student continues to make progress under these IEPs. Student's teachers describe her as a self-directed, spunky student who is fond of learning and models her peers. No one who works professionally with Student testified that she was not making progress.

Going into the hearing the legal presumption was that Student's October 2008 IEPs are providing her a FAPE. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). To overcome this presumption, Student had the burden of proving the opposite: that CISD was not providing Student with a FAPE. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Student failed to meet this burden.

V.
CONCLUSIONS OF LAW

1. Student is eligible for special education services, based upon her classifications of MR, SI, and OHI, as mandated under the provisions of IDEIA and its implementing regulations. 20 U.S.C. §1400 *et seq.*
2. Student failed to meet her burden of proving that the October 2008 IEPs are inappropriate and not reasonably calculated to provide her a FAPE. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000).

VI.
ORDER

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the relief requested by Petitioner is DENIED.

Finding that the public welfare requires the immediate effect of this Decision, the Special Education Hearing Officer makes it effective immediately.

Original Signed the 13th day of February 2009.

Deborah Heaton McElvaney
Special Education Hearing Officer

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