

STUDENT	§	BEFORE A SPECIAL EDUCATION
	§	
	§	
V.	§	HEARING OFFICER FOR THE
	§	
BEEVILLE INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioner brings this appeal, pursuant to the Individuals with Disabilities Education Improvement Act 20 U.S.C. § 1400 et seq., (hereinafter referred to as "IDEIA"), against Respondent (hereinafter referred to as "Respondent" or "School District"). Petitioner (hereinafter referred to as "Petitioner" or "Student") filed a written request for a due process hearing which was received by the Texas Education Agency on April 29, 2009. Petitioner was represented by Attorney Christopher Jonas of Corpus Christi, Texas. Respondent was represented by Attorney William C. Bednar of the law firm Powell & Leon, LLP of Austin, Texas. A telephone prehearing conference was held on Wednesday, May 20, 2009, at which time both parties waived their right to a final decision within forty-five (45) days of the date the written request for due process hearing was filed. [34 C.F.R. §300.511(c)] A due process hearing was held on Monday and Tuesday, July 20 and 21, 2009, in Beeville, Texas. The parties agreed to file post-hearing briefs on or before August 10, 2009.

Petitioner alleges that Student is ** old in **. Petitioner has been receiving special education as a student who receives special education placement, programs and services on the basis of meeting eligibility criteria as a student who is **.

Petitioner states that Respondent notified the Petitioner it would that continue to offer the same special education services to the Petitioner through the ** School in Corpus Christi, which involves traveling for two hours a day.

1. Petitioner claims that Respondent has refused to offer Student special education services at Student's home campus. Petitioner claims that Respondent has offered Petitioner no alternative to Student's placement, except to offer job placement assistance.
2. Petitioner contends that Respondent has failed to offer Petitioner appropriate extended year services, and that Petitioner regresses in academics and social skills during the summer.
3. Petitioner maintains that Respondent has denied the Petitioner's right to a Free and Appropriate Education ("FAPE").

As relief in this due process hearing, Petitioner requests that Respondent be ordered to do the following:

1. Provide a FAPE to meet Petitioner's unique individual needs, provide appropriate evaluations, and provide appropriately implemented services which are effective, goal-oriented, and educationally beneficial.
2. Provide special educational services at Petitioner's home school district.
3. Provide one year of compensatory educational services or an amount of compensatory services deemed appropriate by the Hearing Officer.

Based upon the evidence and the argument of counsel, the Hearing Officer makes the following findings of fact and conclusions of law.

II. Findings of Fact

1. Student is ** old student who resides within the School District.
2. The School District is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing Student a free appropriate public education in accordance with the Individuals with Disabilities Education Improvement Act, 20 U.S.C.A. § 1400, *et seq.*, and the rules and regulations promulgated pursuant to IDEIA.
3. Student is eligible for special education placement, programs and services as a student who is **.
4. Student has ** since the age of **. Student is not allowed to **. Student has **.
5. An Admission, Review, Dismissal meeting ("ARD") was convened on the Student's behalf on September 27, 2007. The purpose of the ARD was to perform an annual review of the Student's educational program and develop an individualized education program ("IEP") to be implemented until the Student's next annual ARD meeting.
6. The Student's September 27, 2007 ARD Committee ("ARDC") found that the Student had an **.
7. The Student's September 27, 2007 ARDC determined that the Least Restrictive Environment ("LRE") for the Student was the District's ** Program with modifications, wherein the Student was making progress. The ARDC determined that the Student would receive ** services; **, services from the **; and transportation as supplementary aides and services. The ARDC determined that it would be an educational benefit to participate with Student's peers.

8. An ARD was convened on the Student's behalf on September 16, 2008. The purpose of the ARD was to perform an annual review of the Student's educational program and develop an IEP to be implemented until the Student's next annual ARD.

9. The Student's September 16, 2008 ARDC found that the Student had **.

10. The Student's September 16, 2008 ARDC determined that the LRE for the Student was the District's ** Program with modifications, wherein the Student was making progress. The ARDC determined that the Student would receive ** services; **, and services from the ** as supplementary aides and services. The ARDC determined that it would be an educational benefit to participate with Student's peers.

11. A Full and Individual Evaluation ("FIE") on Student was completed on November 5, 2008. The FIE agreed with the findings of Student's ARDC of Student as a student with a **. The FIE stated that Student's level of proficiency in both receptive English and Expressive English were **. It further stated that Student expresses best through sign language. Student's intellectual functioning is within the **.

12. The November 5, 2008 FIE stated that Student had been receiving therapy through School District since November, 2005. It also stated that Student was unable to produce **. ** are also difficult for Student to produce.

13. The FIE stated under "Characteristic Behaviors" the following: "[Student] is described as ** in cooperating with teacher requests, developing friendships, working cooperatively with peers, and initiating activities. [Student] is reported to be very eager to learn."

14. The November 5, 2008 FIE stated that Student's "disability does not appear to significantly interfere with his/her ability to meet regular mastery level standards. With the recommended modifications, this student can be expected to meet the district's regular criteria for receiving passing grades and maintaining extracurricular eligibility." It went on to recommend that Student continue to receive speech therapy ** times per week to address goals and objectives.

15. The Texas Education Agency ("TEA") issued a mandate entitled ** Shared Services Arrangement ("SSA") Procedures, Effective January 16, 2009. The Mandate stated that under 19 Texas Administration Code §89.1080, all school districts shall have access to **. The Mandate also stated that Texas Education Code §29.007 authorizes school districts to enter into written contracts to jointly operate their special education programs and ** programs. Also, the Mandate stated that many school districts find that sharing services with one or more school districts enables them to provide special education and ** services more efficiently and effectively than would be the case if they provided the services individually.

16. The TEA Mandate also stated that "[a]ny student who has a ** impairment which severely impairs processing linguistic information through **, even with recommended **, and which adversely affects educational performance shall be eligible for consideration for the **,

subject to the recommendations of the student's Admission, Review and Dismissal Committee."
(Emphasis supplied)

17. On February 26, 2009 School District's Special Education Director sent a letter to Student's Parents stating that as of February 12, 2009, Student had missed twenty-six (26) speech therapy sessions due to a shortage in staff. The letter also stated that School District had contracted with two additional part-time speech therapists to make up the missed sessions, and that the speech therapists had already begun to work with Student.

18. In a letter dated March 13, 2009, School District notified Student's Parents that the ** in School District would be joining with a nearby ** as a result of a state mandate, and that School District would no longer provide ** services. It also stated that no Independent School District may apply for State and Federal funds to support their local **, but must join a Shared Service Arrangement.

19. The ** is about ** miles away from Student's home and would require Student to be on the bus for approximately three (3) hours per day, round trip.

20. Petitioner's Expert Witness testified that it is appropriate to remove a student from a certain placement if it were necessary for them to benefit educationally. Expert Witness stated that it is preferable to transfer the ** services to the student as opposed to bringing the student to the services. Student's Expert Witness testified that Student received educational benefit from Student's educational program during the 2008-2009 school year.

21. An ARD meeting was held on April 7, 2009 by request of Student's Parents to review Student's educational program. The ARD reviewed the following documents: Student's November 5, 2008 Speech and Language Assessment; Student's November 5, 2008 FIE; and Student's September 3, 2008 ** Impairment Assessment. The ARDC determined that Student continues to meet specific TEA and Federal eligibility criteria as a child with both ** and Speech Impairment ("SI").

22. During the April 7, 2009 ARD it was determined that Student would be mainstreamed in ** with speech therapy and ** services. According to School District, the TEA Mandate stated that all full time ** services would be provided at the nearby **. Student's April 7, 2009 ARDC based its determination that Student should be transported to the ** primarily because of state funding changes rather than a change in Student's individual educational needs.

23. Student was receiving ** minute sessions of speech therapy per week from School District during the 2008-2009 School year. Student's mother requested more speech therapy for Student, but that request was denied.

24. School District stated at the April 7, 2009 ARD that no one in School District knew **. Student's Parent asked if Student's ** Teacher could fill in as an interpreter until one could be hired. School District explained that that would require adding an additional employee to the School District. Because of Student's functional **, Student may not need an intensive ** interpreter full time.

25. Student's ** Teacher and Interpreter, who was conversant in **, who was employed with the District during the 2008-2009 school year, is no longer employed by School District.

26. School District's Special Education Director stated during the April 7, 2009 ARD that itinerant teachers can be provided based on the recommendations of an ARDC. Special Education Director also stated that this may be forty-five (45) minutes per week, whereas at the newly formed **, Student would receive full time services.

27. During the April 7, 2009 ARD, several ARDC members inquired as to what services would be available for Student if Student remained in School District. The ARDC agreed to adjourn and reconvene at a later time in order to gather more information about itinerant services that could be provided by School District to Student.

28. Petitioner and School District noted that Student interacts with peers and has made friends at school and in Student's neighborhood, which was notable because, according to School District, ** students usually do not interact directly with ** peers. Student had educational benefit during the 2008-2009 school year by virtue of being educated with **, regular education students.

29. On May 8, 2009 School District's Special Education Director sent a letter to Student's Parents informing them that Student had made up all missed speech therapy sessions as of April 27, 2009.

30. Student's grades for the 2008-2009 school year were all "Satisfactory" (as opposed to "Needs Improvement"). The only four (4) skills (out of twenty-eight [28]) that Student did not master were the following: **. In **. Student passed from ** to the **.

31. Student did not receive and Extended School Year Services ("ESYS") from School District for the Summer of 2009. Student's Parent stated that Student received private speech therapy lessons during the summer of 2009, because Student regresses, particularly by losing vocabulary.

32. The population of students with an ** during the 2008-2009 school year was approximately six students, distributed throughout all grade levels.

33. Student's placement during the 2008-2009 school year in a general education classroom with modifications and supports was the least restrictive environment for Student. The District's proposed placement for Student for the 2009-2010 school year at the ** is a more restrictive placement.

III. Discussion

The instant due process hearing revisits the familiar issue of the appropriate placement of a student with an auditory impairment where the choice is between the Student's home campus and a centralized ** located 60-70 miles from the Student's home campus. The usual controlling authorities for this issue are the Fifth Circuit decisions: *Flour Bluff ISD v. Katherine M.*, 91 F. 3d 689 (5th Cir. 1996) and *White v. Ascension Parish Sch. Bd.*, 343 F. 3d 373 (5th Cir. 2003), wherein the centralized school site for the implementation of a student's IEP is validated. Respondent has cited both decisions for its position that the Student will receive a FAPE from the **. In both of these decisions, the Fifth Circuit reviewed a placement for an ** student at a centralized, rather than home, campus where the student's ARDC had found that there was an educational need for each student to be placed at the centralized campus based on the nature of each student's disability and the practical unavailability of appropriate services at each student's home campus.

However, the facts of this case are significantly different from the *Katie M.* and *Ascension Parish* cases, and it is the Petitioner that has asserted that the controlling laws are the implementing regulations of IDEA 2004, enacted after the *Katie M.* and *Ascension Parish* rulings. Therefore, it is Petitioner's arguments and specific facts of this case that support much of Petitioner's requested relief – particularly Student's placement and educational setting for the 2009-2010 school year.

The record shows that Student received significant educational benefit in the current home campus placement for the 2008-2009 school year. Student passed most of the items in Student's IEP, and struggled most on goals pertaining to vocalization and language. This is not surprising for a student with ** impairment. Language development and vocal skills are usually challenges for ** students. Nevertheless, Student has made friends and socially interacted with the nondisabled students in class to the point that even non-disabled students have learned some sign language. In many respects, Student's ** year at the home campus was an almost idealized picture of the benefits of mainstreaming disabled students with their nondisabled peers. Rule 34 CFR §300.114 could not be less ambiguous:

“(2) Each public agency must ensure that -

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with *children who are nondisabled*; and

(ii) Special classes, *separate schooling*, or other removal from the regular educational environment occurs only if the nature or severity of the disability is such that education in *regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.*”

34 CFR §300.114(a)(2) (emphasis supplied)

The Student's ARDC was obligated on this regulation as well as 34 C.F.R. §300.116(c) to place the Student in “the school that he or she would attend if nondisabled.” LRE, by definition, incorporated education with nondisabled peers as the least restrictive setting.

For a special education hearing officer, these regulations must be the core of any placement dispute, including one involving a ** student. Student's impairment has been medically addressed with **; Student's ** may be improving; and Student received a FAPE, even though Student received ** speech therapy sessions per week and the District missed some of those sessions. In no way can Student's disability be characterized as severe enough to warrant a more restrictive placement or educational setting. The LRE placement for the Student under 34 C.F.R. §300.116, then, should be the Student's home campus.

Respondent directs the Hearing officer to the fact that Student is significantly below grade level, and that the ** could provide increased services, theoretically. However, these observations are adjudged less relevant to the issue of FAPE announced in *Board of Education v. Rowley*, 457 US 176 (1982); *Oberti v. Board of Education*, 995 F. 2d 1204 (3rd Cir. 1993); and *Board of Education v. Diamond*, 808 F. 2d 987 (3rd Cir. 1986) – all cases cited by Respondent. A student's educational progress should not be trivial or minimal, but need not be maximized for a student to receive a FAPE. In this case, the Student's educational progress over the last two years has not been *close* to being minimal.

Respondent argues that certain state and national policy initiatives for the education of ** impaired students question what is an LRE for a ** student. Respondent proffered the “critical mass” argument that ** students learn better or more in an educational environment that contains a higher percentage of ** peers. The problem with that argument is two-fold. First, a special education hearing officer in a due process hearing (as opposed to a legislative hearing, for example) should be concerned with only *one* student. In this case, this Hearing Officer is only interested in *this* Student, who seems to learn fine in the existing setting at the home campus. Secondly, the Student appeared to learn in an educational environment that did not have a “critical mass” of ** students. Apparently, that theory is not borne out empirically by this District.

Perhaps the least persuasive argument used by the Respondent is that the Student *will not* receive a FAPE in the home campus next year because of a change in state funding for the District and the change in the District's personnel. This argument is buttressed by Respondent's assertion that the Student cannot receive a FAPE using itinerant services through the ** in Corpus Christi. These arguments are self-filling prophecies if the District can lawfully dismantle services that it previously provided to this Student because of an alleged state mandate that ties the District's hands. However, nothing in this record suggests that a Hearing Officer is simply allowed to disregard an individual student's needs enunciated by the student's ARDC in favor of a state policy in determining FAPE for the Student. The Student's April 7, 2009 ARDC used the state mandate for its placement setting change; not the Student's educational needs. Moreover, the Student seemed to have received significant services for the 2008-2009 school year that appear to be very similar to what is described as itinerant services. It is not clear how additional appropriate support services could not provide the Student a FAPE at the home campus. Finally, Respondent's dire predictions of a failure to provide the Student a FAPE for 2009-2010 are legally deficient as speculative evidence.

With due respect to the Parties, the issue of the distance to the ** was not controlling in this decision. The Parties' conflicting testimony, including their expert testimony, was

inconclusive in making a determination that 2½ - 3 hours a day is or is not appropriate commuting time for a ** student. Petitioner's Parent's testimony that the Student would be psychologically traumatized benefitted from being, at least, specific to the Student. However, the Student's Parents' opinions, while valid, were not supported by any assessment to support them. Obviously, commutes of that length for any child, much less a small child, are neither desirable nor convenient. If the facts supported the necessity for the commute, based on the severity of the Student's disability and/or need, the commute *could* be justified. It was not justified on this record.

Also, Petitioner's request for compensatory relief was not justified by this record. The only evidence of regression in this record came from the Student's Mother. The Hearing Officer is unwilling to conclude that the Petitioner is entitled to compensatory education based on a failure to provide the Student with ESYS after the 2008-2009 school year or because of any other alleged failure to implement the Student's IEP in place during the 2008-2009 school year.

IV. Summary

The record as a whole shows that the Student's appropriate and least restrictive placement and educational setting is at the Student's home campus within the District with appropriate modifications and support services. The District inappropriately changed the Student's placement and educational setting based on non-educational reasons that were not specific to the Student's individualized educational needs. Petitioner is not entitled to compensatory educational relief because of any of Respondent's alleged failures to implement the Student's existing IEP.

V. Conclusions of Law

1. Petitioner is a student in the School District who is eligible for special education services based on their classification as a student with ** and Speech Impairment. 20 U.S.C.A. § 1401(3); 34 C.F.R. § 300.7; 19 T.A.C. § 89.1040.
2. Respondent has a responsibility to provide Student with a free appropriate public education. 20 U.S.C.A. § 1412; 34 C.F.R. §300.300; 19 T.A.C. § 89.1001.
3. Respondent's change of placement from the Student's home campus within the District to the ** in Corpus Christi violated the Student's right to be in the least restrictive environment; 34 C.F.R. §300.114(a); 300.116
4. The Student's LRE is the Student's home campus within the District. 34 C.F.R. §300.114
5. The District appropriately implemented the Student's IEP for the 2008-2009 school year at the Student's home campus, and the Student received a FAPE. *Hendrick Hudson Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *Cypress-Fairbanks v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997).

V. Order

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer ORDERS that the relief sought by Petitioner is GRANTED IN PART.

Respondent is ordered to convene an ARD meeting to determine the Student's placement, educational setting, and individualized educational programs, with modifications and supplementary aides and supports, to be implemented at the Student's home campus within the District.

All other requested relief not specifically granted herein are hereby DENIED.

SIGNED in Austin, Texas this 17th day of August, 2009.

Stephen P. Webb
Special Education Hearing Officer

STUDENT	§	BEFORE A SPECIAL EDUCATION
	§	
v.	§	HEARING OFFICER FOR THE
	§	
INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

SYNOPSIS

Issue: Whether the appropriate placement for a ** student is the student’s home campus or a centralized ** 70 miles away.

Federal Citation: 34 C.F.R. §§ 300.114; 300.116

Held: For the Parent. Because the Student’s ARD Committee changed the student’s placement to the ** based on state funding changes rather than the individual needs of the Student, the LRE remained at the Student’s home campus where the Student has received a FAPE for the last two years in general education classes with modifications and itinerant supports.

Issue: Is a Student entitled to compensatory education for lost supplementary services and a failure to provide ESYS.

Federal Citation: *Hendrick Hudson Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 252 (5th Cir. 1997); *Tatro v. Texas*, 703 F. 3d 823, 830 (5th Cir. 1983); *Adam J. v. Keller ISD*, 328 F. 3d 804 (5th Cir. 2003)

Texas Citation: 19 T.A.C. §§ 89.1001; 89.1050(a)(6); 89.1055

Held: Held for the School District. Petitioner failed to show that the Student did not receive a FAPE for the 2008-2009 school year.