

**BEFORE A SPECIAL EDUCATION
HEARING OFFICER FOR THE STATE OF TEXAS**

DECISION OF THE HEARING OFFICER

**STUDENT, b/n/f
PARENT,
Petitioner**

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§
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v.

DOCKET NO. 250-SE-0507

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**NORTHSIDE
INDEPENDENT SCHOOL
DISTRICT,
Respondent**

REPRESENTING PETITIONER:

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

DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner, acting through his parent as next friend, requested a due process hearing pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400, *et seq.*, as amended. The issues for hearing were as follows:

1. Whether the goals and objectives in the student’s Individualized Education Plan (“IEP”) and Behavior Intervention Plan (“BIP”) are not measurable and are not tailored to meet the unique needs of the student;
2. Whether Respondent provided a free appropriate public education (“FAPE”) for Petitioner under the Individuals with Disabilities Education Act (“IDEA”) as a matter of law without the appropriate services delivered by adequately trained staff;
3. Whether Respondent provided the student with sign language instruction by adequately trained and certified staff;
4. Whether Respondent provided the student with specific training and instruction in sign language every day along with verbal stimulation and access to a verbal mode of communication;
5. Whether the student has regressed in the manner of modes of communication, specifically in sign language, under the school district’s IEP for the student;
6. Whether Respondent prevented the parents from being equal partners in the educational planning for the student; and,
7. Whether Respondent identified all areas of the student’s disability, specifically including identification as Other Health Impairment (“OHI”) with Down Syndrome or otherwise failing to establish how Down Syndrome impacts the student’s education for development and implementation of the student’s IEP.

As relief, Petitioner seeks the following:

1. Compensatory education and related services to address the student's disabilities;
2. Completion of an Independent Educational Evaluation ("IEE") at school district's expense in all areas of suspected disability;
3. Following completion of an IEE, timely convening a duly constituted Admission, Review, and Dismissal Committee ("ARDC") with the evaluator to be invited at school district expense for input into the ARDC meeting;
4. Private speech therapy at school district expense in both sign and verbal language;
5. Reimbursement of all out-of-pocket expenses incurred by the parent(s) for outside providers;
6. Staff training in the area of sign language;
7. Parent training;
8. Reimbursement of all costs incurred by the parents in filing this Request for Due Process; and,
9. Any and all other remedies that Petitioner may be entitled to under law.

HELD, for Respondent.

Procedural History

Petitioner ("Student") filed the above-captioned due process complaint with the Texas Education Agency ("TEA") on May 14, 2006, and the Hearing Officer received the case assignment on May 16, 2006. This is the second due process complaint involving this student before this Hearing Officer. Petitioner's previous complaint, Docket No. 198-SE-0307, was dismissed at the request of Petitioner on May 20, 2007. In the instant docket, the Hearing Officer issued an order on May 20, 2006, setting the hearing on June 26, 2007, following the required 30-day resolution period. Northside ISD ("Respondent" or "NISD") did not file an objection to the sufficiency of Petitioner's Request. The Decision Due Date was set for July 28, 2007. Matthew L. Finch of The Law Offices of Matthew L. Finch in San Antonio, Texas, represented Petitioner. Paula Maddox Roalson and Robb D. Decker of Walsh, Anderson, Brown, Schulze & Aldridge, P.C. in San Antonio, Texas, represented Respondent.

The parties timely attempted a resolution session on May 23, 2007, but were unable to resolve their dispute. During the first telephonic pre-hearing conference in this matter on June 4, 2007, the parties jointly requested a continuance due to scheduling conflicts and to accommodate a two-day hearing, which was granted for good cause shown and the hearing postponed to July 30-31, 2007, with the extended Decision Due Date of September 10, 2007.

The due process hearing took place on July 30-31 and August 4, 2007. Prior to the conclusion of the hearing, the parties sought leave to submit their closing argument in writing after receipt of the hearing transcript, granted for good cause shown. By subsequent agreement, the parties extended their submission deadline for closing argument to September 13, 2007, and extended the Decision Due Date to October 8, 2007.

The record closed upon the timely filing of the parties' written closing argument on September 13, 2007. On October 3, 2007, the Hearing Officer re-opened the record to receive Respondent's objection and response to Petitioner's written closing, Petitioner's written reply, and Respondent's written request to re-open the record. The evidentiary record of this proceeding closed on October 3, 2007. The Decision of the Hearing Officer was issued on October 8, 2007.

Based upon the evidence and argument admitted into the record of this proceeding, the Hearing Officer makes the following findings of fact and conclusions of law.

Findings of Fact

1. Petitioner is currently a ** year-old student who resides with his parents within the jurisdictional boundaries of NISD. He enrolled in the NISD ** at his home campus for the 2006-2007 school year as a student with Speech Impairment ("SI") and Auditory Impairment ("AI"). [Petitioner's Exhibit ("P.Ex.") 24; Respondent's Exhibit ("R.Ex.") 17; Transcript ("Tr.") at 649-651].
2. Prior to enrolling within the PPCD program at NISD, Petitioner received services as a child with a disability through the Easter Seals Early Childhood Intervention Program ("ECI") in the areas of speech and language. [P.Exs.10 and 29; R.Exs. 3 and 9; Tr. at 430-433].
3. Petitioner has a medical diagnosis of a mild hearing loss and Down Syndrome. He has problems with muscle tone, including a protruding tongue, with a history of thumb sucking that includes numerous parental efforts to extinguish this behavior. He frequently has cerumen impaction and fluid in his ears, often seen in a child with Down Syndrome due to a smaller ear canal and an abnormal anatomy of the Eustachian tube. When cerumen occludes his ear canal, his hearing loss will decrease an additional 20 to 30 decibels. With the mild amplification of his hearing aids, Petitioner hears at a normal level. It is important to ensure that his hearing aids are functioning properly and that he does not have occluding cerumen impaction. [P.Ex.4; R.Exs.7 and 13; Tr. at 22-23, 46-49, 450, 613-615 and 624-625].
4. Petitioner presented expert witness testimony at hearing, including the testimony of a professor and chair of a speech department in a Texas university, a licensed speech and language pathologist ("SLP") who evaluated the student on July 10, 2007. As part of the written report of this evaluation, the professor noted that the student would benefit from both sign and verbal language. At hearing, the professor noted that children with Down Syndrome tend to be quite good at visual imitation, at imitating what they observe, so that this relative skill can be capitalized when working with a Down Syndrome student. [P.Ex.34; Tr. at 105].

5. The student's mother is a certified interpreter for the deaf. The student's mother believes that she can understand about three percent of what the student says without the use of sign language, but with signing, she is able to understand approximately 85 percent of what her son says at home. [Tr. at 439 and 492].

6. In Spring 2006 as preparation for the student's ** birthday and subsequent eligibility for services through NISD, the student's parents, NISD personnel, and representatives from ECI met to plan his transition into NISD. Prior to this time, the student's parents requested and received information on NISD's programs for AI, including a copy of the procedural safeguards. The student's parents inquired concerning a specific AI program PPCD class, located off the student's home campus that services profoundly deaf students. This facility operates as a regional day school program for deaf students ("RDS-PPCD") within Bexar County. The student's parents considered placement of the student into the RDS-PPCD program from the beginning of the student's enrollment in NISD. [R.Exs.4 and 5; Tr. at 430-433, 438-439, 551-553, and 903-904].

7. On May 9, 2006, NISD evaluated the student by means of a Transdisciplinary Play-Based Assessment performed by a licensed specialist in school psychology ("LSSP"), an SLP, a special education teacher, an occupational therapist ("OT"), a physical therapist ("PT"), a teacher of AI students, and a school nurse. The student's parents participated throughout the session and gave input. Following the evaluation, the team prepared a written evaluation summary of baseline data obtained during the assessment, identified as the "Things I'm Ready For" ("TIRF") document. [P.Exs.8 and 30; R.Exs.15, 16 and 16a; Tr. at 56, 652-655, 866-867, and 881].

8. On May 10, 2006, Respondent's school nurse performed a health screening of the student. The nurse documented the student's hearing loss, checked his vision on May 9, 2006, and reviewed information from the parent dated May 8, 2006, stating that the student has Down Syndrome. Based on the nurse's review of this data, the nurse did not recommend additional medical assessment. The nurse was part of the initial evaluation team that determined that the student did not have one or more physical conditions which directly affect his ability to profit from the educational process. [P.Ex.8 at 6; R.Exs.13 and 16 at 7].

9. The Transdisciplinary Play-Based Assessment report did not allude to the student's Down Syndrome diagnosis, but did note that the student had a significant developmental and medical history. At hearing, the LSSP who helped perform this assessment clarified that the Down Syndrome diagnosis was known and discussed among the evaluators and originally included in the report, but was not archived properly. Although final report did not contain the diagnosis of Down Syndrome, the PPCD teacher, the LSSP, and the SLP were aware of the diagnosis and the way in which the student's educational program should be structured to meet his needs. [P.Ex.8; R.Ex.16a; Tr. at 873-876].

10. The LSSP on the Transdisciplinary Play-Based Assessment team does not believe that the student would qualify for special education services due to an OHI because the LSSP did not see the student's physical skills significantly impaired to the point of impacting the student's ability to perform educationally. [Tr. at 873-874].

11. On May 22, 2006, the ARDC convened to develop the student's IEP for the 2006-2007 school year. The ARDC used the recently-completed TIRF document to establish the student's baseline at that time for development of the student's IEP. Additionally, the ARDC

considered information from his parents as well as the Easter Seals ECI speech pathologist/case worker. The meeting ended in agreement with placement of the student at his home campus. [P.Exs.8 and 30; R.Ex.15, 16, and 17; Tr. 655, 862-863, and 891].

12. The student's one-on-one instructional assistant ("IA") checked the student's hearing aids on a regular basis during the 2006-2007 school year to ensure that they were in working order. [R.Ex.34; Tr. at 707, 739, and 970-971].

13. The May 2006 IEP for the student included four annual goals to address his SI and AI in four skill areas of daily living, self-help, communication, and social/emotional. Each annual goal referenced the student's baseline, as measured by data collection, as the starting point for monitoring the student's progress. Short-term objectives under each annual goal detailed specific modifications and accommodations for meeting the specified sub-goal mastery level, to be monitored on a nine-week IEP report card. As part of his third annual goal, increasing communication skills, modifications for the student included "tactile, verbal, and visual" cues. Under this goal, the student's three short-term objectives addressed improvement of articulation, oral/motor control and awareness, and improvement of expressive language skills. Under the short-term objectives, ARDC documentation specified the use of a multi-sensory approach using signs, gestures, pictures, and/or vocalizations. [P.Ex.24; R.Ex.17].

14. The student's May 2006 IEP did not reference Down Syndrome, yet school personnel including his PPCD teacher, the LSSP, and the SLP were aware of this diagnosis when developing the student's special education program at the May 2006 ARDC. Respondent's school staff believe that the student's resulting IEP met the student's unique individual needs. Further, no additional services would have resulted in the student's program with the inclusion of a statement on the Down Syndrome diagnosis in the ARDC paperwork. [P.Ex.8; R.Ex.16a; Tr. at 226, 651-652, 657, 768, 773-774, 777, 864, 873, 878, and 886].

15. The student's PPCD program on his home campus includes time in the same classrooms with about eight non-disabled peers of the same age for approximately two and a half hours each day in a collaborative arrangement with the pre-kindergarten program. During the 2006-2007 school year, the student and three other PPCD students participated in this program. [Tr. at 649-651 and 678-679].

16. Auditory input is an essential component in the development of oral expression and speech. The student receives auditory input and modeling of typically-developing speech patterns from his non-disabled classmates in his current PPCD classroom on his home campus. His NISD teachers and aides provide additional auditory input and instruction for the student. By contrast, the RDS-PPCD housed off the student's home campus is designed for profoundly deaf children, a setting that would provide minimal auditory input. As a result of being profoundly deaf, the students in that program frequently make inappropriate sounds such as screaming. [Tr. at 401, 403, 678-679, 905, and 969].

17. NISD provided the support of a one-on-one IA trained in sign language for the student during the 2006-2007 school year. The IA is fluent in sign language and has experience in the use of sign language with other students and the IA's deaf daughter. The IA helped the student express his needs and desires in addition to ensuring that the student understood the classroom teacher's oral instruction. [P.Ex.24; R.Ex.17; Tr. at 201-208, 244, 335, and 908].

18. The student's 2006-2007 PPCD teacher knew basic sign language and continued to learn sign language while teaching the student. The teacher's signing vocabulary includes between 100 and 200 signs, such as basic colors, shapes, days of the week, some foods as well as some simple requests. The PPCD teacher used signing as well as voice with the vocabulary words in the lesson plan. [Tr. at 206, 211, 243, 335, 660, 665, and 717].

19. Both the IA and the PPCD teacher were properly trained and certified to provide the student's special education services under his IEP. The IA's fluency in sign language is a hiring prerequisite for the IA position. [Tr. at 201-202 and 648-649].

20. The student's initial IEP for the 2006-2007 school year specified weekly 45-minute one-on-one instruction by a certified AI teacher and three 20-minute sessions of audiological services for 36 school weeks. In addition throughout the school year, the certified AI teacher provided sign language instruction to the PPCD teacher on key vocabulary words prior to the introduction of the vocabulary as part of the classroom lessons. Both the certified AI teacher and the NISD audiologist who served the student during the 2006-2007 school year were properly trained and certified. [P.Ex.24; R.Ex.17; Tr. at 232-238].

21. The ARDC originally carried the student's primary eligibility for special education services as SI, with secondary eligibility as AI. Following the first ARDC meeting in May 2006, the parents received a letter signed by the student's special education teacher informing them that a clerical error had been made in the ARDC paperwork and that the primary eligibility should be AI with secondary eligibility as SI. The parents were given the opportunity to call another ARDC meeting if they disagreed with the correction letter. The order of the primary and secondary eligibility designation did not change the student's special education programming. [R.Ex.17 at 30; Tr. at 743-744 and 811].

22. While the student attended the Easter Seals ECI program prior to his enrollment in NISD, his Easter Seals speech therapist found the student's oral expressions to be emerging. Petitioner's experts at hearing confirmed the ongoing emergence of the student's oral language. Prior to turning age ** while enrolled in the Easter Seals ECI program, the Easter Seals speech therapist also viewed the student's oral expression to be emerging. [Tr. at 106-108 and 465].

23. The student communicates receptively and expressively by means of sign language, sign language approximations, oral speech, and oral speech approximations. The student has yet to define his primary mode of communication. Petitioner's expert witnesses at hearing concurred that the student's oral language is emerging. [Tr. at 106-108, 235, 351, 403-404, 421, 451, 465, 475, 717, 815, and 941].

24. As the student's oral speech develops, it is anticipated that he will begin to drop the use of signs. [Tr. at 119-122 and 928].

25. According to parental report, the student could understand and produce signs for approximately 75 words but was not able to articulate any words clearly in December 2005. [P.Ex. 14; R.Ex.31; Tr. at 248, 485, 572, and 808].

26. At the end of the 2006-2007 school year, the student's parents and NISD personnel report that he was able to sign and/or understand approximately 200 words. His PPCD classroom teacher and one-on-one aid reported clearly articulated word development from the student. [R.Exs.32 and 44; Tr. at 220, 572-574, 665, 688-689, and 808].

27. The minutes of the May 2006 ARDC meeting specify that an assistant proficient in sign language would work with the student while attending school. The student began the school year with the one-on-one IA physically positioned directly in front of the student. When the student appeared non-responsive with the constant sign language from the IA, the PPCD teacher consulted with the AI teacher and AI staff around September or October 2006. At this time the IA's physical position moved from directly in front of the student to his side. In accordance with the IEP specifications for the IA's role, the IA continued to give sign language support for the student, but no longer signed all words as would an interpreter. Instead, the IA started signing only key words and concepts to reinforce the classroom teacher's instruction. [P.Ex.24 at 20; R.Ex.17 at 20; Tr. at 205, 219-220, 223, and 667-669].

28. The AI teacher has over 25 years of experience in sign language while working in various south Texas school districts with deaf children. The AI teacher holds a life-long certificate for the deaf in addition to certification to teach disabled students at the early childhood level and regular education certification for all levels. [Tr. at 232-235 and 303-304].

29. The student's parents asked for clarification of the IA's role in early November 2006. In response, the parents attended an informal meeting with several staff. On November 17, 2006, NISD documented a parent-teacher conference that includes the parents' concern on the use of more signs in a total communication approach and planned to convene an ARDC meeting on December 7, 2006. [R.Ex.20].

30. The student's parents kept a list of words that the student could sign or understand and provided this list to NISD. The PPCD teacher shared this list with the AI teacher in October or November 2006. The AI teacher and the speech pathologist conducted an informal screening of the student using the parents' list around December 12, 2006, based on handwritten notes of the AI teacher. Although the survey results did not confirm that the student knew all the words on the list, the AI teacher concluded that the student made sign and verbal approximations for many of the words at that point in the school year. [P.Ex.14; R.Ex.32; Tr.245-247].

31. On December 18, 2006, the ARDC convened and reviewed the student's progress since the start of the 2006-2007 school year. The ARDC considered the parents' observations of the student's progressing verbal skills. His parents remained concerned that his program included insufficient sign language to meet a multi-sensory approach. The meeting ended in consensus with the proposal and adoption of new goals and objectives, as stated in the minutes of this meeting. However, the goals and objectives were not printed out in the final version of the ARDC documentation of this meeting due to a clerical error. Later progress reports of the student support the implementation of the revised goals and objectives from this meeting. [P.Exs.25 and 26; R.Exs. 22 and 25; Tr. at 562, 676, and 725-726].

32. As part of the revisions from the December 2006 ARDC meeting, the AI teacher began coordination of the use of sign language across school and home settings with the PPCD

teacher, the IA, and the parents and continued to do so throughout the remainder of the school year. [P.Ex.25; R.Ex.22; Tr. at 267-268].

33. The student's parents filed a complaint with TEA on February 8, 2007. The parents alleged that the student's primary mode for expressive language was American Sign Language ("ASL") and that NISD did not deliver a total communication program to the student. The parents sought instruction of the student in ASL with the IA required to interpret or translate all information in the classroom. In response to this complaint, NISD offered summer school instruction for the student with a certified AI teacher for up to 12 hours. Subsequently on approximately February 13, 2007, the parents withdrew their TEA complaint, stating that all issues had been successfully resolved at the local level. [P.Exs.18 and 19; R.Exs.35 and 36].

34. The ARDC convened on March 8, 2007, at the request of the student's parents, to discuss the parental request to change the student for two school days each week to the RDS-PPCD housed off the student's home campus, with the remaining three days to continue in his current PPCD class at his home campus. All participating ARDC members agreed that the student had made progress and the student's parents gave consent for NISD to evaluate the receptive language and adaptive physical education ("APE") needs. The RDS-PPCD teacher attended this meeting and gave input on the teacher's two-hour observation of the student in his current PPCD placement. Based on that observation, the RDS-PPCD teacher reported that the student responded to auditory stimulation in his classroom, including responding to oral stimulation from a peer without any visual cuing. The RDS-PPCD teacher concluded that the student responded more often to auditory input, "He did not look to the signs, but he would respond to something that was given verbally." At hearing, the RDS-PPCD teacher confirmed that there are no children enrolled in that class who are not profoundly deaf, eliminating the opportunity for the student to hear language modeling input by the student's same age peers. [P.Ex.26; R.Ex.25; Tr. at 402-405].

35. The ARDC of March 8, 2007, ended in disagreement with the ARDC's placement decision for the student to remain in his current placement at his home campus. [P.Ex.26; R.Ex.25].

36. The ARDC reconvened on March 23, 2007. On the same date, the parents filed their first due process hearing request with TEA seeking placement two days a week in the RDS-PPCD class and presented a copy of their filing to the ARDC. The parents continued to disagree with the ARDC decision to keep the student in his current placement and the meeting recessed in disagreement. [P.Exs.27 and 28; R.Exs.26 and 27].

37. On April 23, 2007, the ARDC convened to discuss new evaluation results. The student qualified for receptive language and APE services. The ARDC discussed proposed IEP goals and objectives in both areas. The parents did not voice disagreement with these results during the meeting and deferred signing the signature page at the meeting until they could discuss the new evaluation data and proposed goals and objectives with their attorney. At a later date, the parents returned the signed signature page stating the following concerns: a) failure to establish a baseline; b) regression of the student; c) vague and non-specific goals and objectives; and, d) failure to receive a FAPE based on the parents' belief that the student's placement is inappropriate. [P.Ex. 28; R.Exs.27and 27a; Tr. at 283-286].

38. The record exhibits and testimony at hearing show that the student made progress during the 2006-2007 school year in all areas of his IEP, including his oral and signed receptive and expressive language skills. He was able to use three words in a sentence by the end of the school year. By parental report, the student's signing ability had increased from 75 words in Fall 2006 to approximately 250 words by July 2007. [P.Ex.14; R.Exs.28, 31, 32, 33, and 44; Tr. at 220-221, 241, 250, and 935].

39. The student's program in the 2006-2007 school year used a variety of modalities in a total communication approach to his education. Petitioner's experts agreed that the total communication approach is appropriate for the student. [Tr. at 114-115, 139, and 235].

40. The parents received multiple copies of the procedural safeguards over the 2006-2007 school year. [R.Exs.4, 5, 27a, and 37; Tr. at 574-575].

41. The student made significant progress in his program in the PPCD class on his home campus in the least restrictive environment. In this setting, the student's receptive and expressive language skills continue to emerge.

Discussion

Background

This dispute concerns the program developed by Respondent for a pre-school student whose disabilities include a hearing impairment. Respondent believes that the student is best served with a multi-modality approach in his home campus PPCD where the student's program includes signing by the IA. Respondent believes that the student has progressed in this setting that allows the student to be educated with non-disabled peers with sufficient stimulation for the student to continue expressive and receptive language development. By contrast, Petitioner believes that the student needs a more restrictive setting for two days out of the five-day school week in the RDS-PPCD in addition to three school days a week in his home campus PPCD program, so that the student is exposed to sufficient sign language that includes mirroring of signing by same-age peers. Additionally, Petitioner believes that Respondent's program did not address the unique needs of the student stemming from his Down Syndrome.

The appropriateness of the school district's educational program is presumed. *Tatro v. Texas*, 703 F.2d 823 (5th Cir.1983) *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984). Petitioner, as the party attacking the appropriateness of the school district's program for the student, bears the burden to prove why the student's IEP and placement are inappropriate under IDEA. *Schaffer v. Weast*, 156 S.Ct. 528, 44 IDELR 150 (2005). As long as the student receives "some benefit" from his educational program, the school district's program may be found appropriate as school districts are not required to maximize the student's potential or supply every conceivable program that may benefit a student. *Bd. of Educ. v. Rowley*, 102 S.Ct. 3034 (1982). Under *Rowley*, two factors must be considered to determine whether a school district has provided a student with a FAPE: 1) the school district must comply with the procedural requirements of IDEA; and, 2) the school district must design and implement a program that is reasonably calculated to enable the child to receive educational benefits. *Id.* at 206-207.

The Fifth Circuit applied a four-factor test in *Cypress-Fairbanks Indep. School District v. Michael F.*, the Fifth Circuit to assess whether an IEP is reasonably calculated to confer educational benefit to a student, including: 1) whether the eligible student's IEP was developed in accordance with proscribed procedures, including an individualized program based on the student's assessment and performance; 2) whether the program is administered in the least restrictive environment ("LRE"); 3) whether the program was delivered in a collaborative and coordinated manner by key stakeholders; and, 4) whether positive benefits are demonstrated both academically and non-academically. *Cypress Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-248 (5th Cir. 1997).

Individualized Program and Development of the IEP

The first factor of *Michael F.* requires Petitioner to prove by a preponderance of the evidence that the school district's educational program developed for the student is not individualized on the basis of the student's assessment and performance. *Id.* Petitioner did not carry this burden as the record evidence preponderated to establish Respondent's use of current assessment data, coupled with observational input of his parents and other providers familiar with the student, for development of the student's educational program.

Respondent made plans with the student's parents and service providers as the student approached his ** birthday for the student's entry into the PPCD program for the 2006-2007 school year. After completing the Transdisciplinary Play-Based Assessment of the student and completing the TIRF document, Respondent convened an ARDC that included the presence and input of his parents and Easter Seals ECI speech pathologist/caseworker. The credible hearing testimony and record evidence conclusively established that the ARDC used this information to form the baseline for the student's IEP, resulting in measurable goals and objectives that were specifically tailored to meet the student's needs. For classroom support, the ARDC designated the assistance of an IA. The record evidence established that his classroom providers received information on the student's programming needs.

The ARDC made revisions to the student's IEP during the school year as evidenced by the testimony and record exhibits in this proceeding. When the student had increased his mastery of his IEP goals and objectives, the ARDC convened and reviewed new data that included parental observations of progress and language acquisition in sign language and verbal skills. Because the student was progressing, the ARDC agreed to revise the student's IEP goals and objectives with the agreement and participation of his parents. As the year progressed, Respondent responded to parental concerns about the quantity of signing used with the student and implemented steps to ensure continuity across home and school settings on the use of specific signs. In March 2007, the ARDC gathered additional assessment for the student's receptive language needs and the possibility of APE services. After reviewing the completed assessment, the April 2007 ARDC concluded that the student qualified for additional services in these areas and proposed goals and objectives.

I conclude that Respondent repeatedly and properly convened the ARDC to develop and revise the student's IEP based on his individualized need; the student's parents functioned as full participants in the ARDC process.

Restrictiveness of the Student's Placement

Under the second factor in the four-factor *Michael F.* test, the student's program must be administered in the LRE. *Id.* Petitioner is seeking a more restrictive placement of the student into a RDS-PPCD program from the student's current PPCD placement, a change that Respondent contends is not the LRE for the student. I agree with Respondent.

Petitioner's current placement in the PPCD setting on his home campus affords him the opportunity to interact with non-disabled students, exposure to auditory stimulation from a variety of sources including his peers and teachers, while receiving the input specified under his IEP including sign language, the services of an IA, and the services of an AI teacher. The record testimony and exhibits in this proceeding establish both the emergence of his expressive and receptive language skills, a process that is not complete at his chronological age **, and the importance of multi-sensory input to foster this development.

By contrast, the parent's proposed placement into the RDS-PPCD classroom would remove the student from an environment of wide-ranging social and sensory input into a more restrictive placement with only profoundly deaf peers, no interaction with non-disabled peers, and without the auditory input that this student is able to receive with the use of his hearing aids. I find that the RDS-PPCD classroom does not meet the second prong of *Michael F.* and is a more restrictive placement in which the student would receive less verbal stimulation. *Id.* While the student's parents' concerns that additional exposure to peer signing is of some potential value, the overriding concern remains, however, for the student to have access to a total communication program. Petitioner's expert witnesses and Respondent's witnesses are in agreement that the total communication approach is important to meet this student's needs. Yet, the total communication program is not available in the RDS-PPCD classroom. As a result, the RDS-PPCD classroom is not the LRE and not appropriate for the student's individual needs.

Delivery of the Student's Program

The third factor under the four-part *Michael F.* test requires that the student's educational program be delivered in a collaborative and coordinated manner by key stakeholders. *Id.* Petitioner challenges both the content and manner in which the student received his sign language program and also alleges that the student's parents were not full participants in the ARDC process.

A. Sign Language Program. Under the Texas Administrative Code, school districts must provide a program for deaf or hard-of-hearing students in which their unique communication mode is respected, used, and developed to an appropriate level of proficiency. 19 T.A.C. §29.303. Petitioner alleges deficiencies in Respondent's sign language program for the student both in the actual amount of sign language instruction provided to the student and by virtue of inadequately trained and certified sign language providers in the classroom. As a result, Petitioner believes that the student has not received proper sign language instruction. Respondent counters that the student received all promised sign language services under his 2006-2007 IEP and that only appropriately trained and certified staff delivered those services. I agree with Respondent.

The uncontroverted record evidence establishes that the student's classroom IA used sign language in the PPCD classroom throughout the 2006-2007 school year. Likewise, it is undisputed that no ARDC meeting preceded a change in the quantity of signing used by the IA and the IA's physical positioning in relation to the student around October 2006. Although Petitioner believes that these changes required ARDC action, Petitioner did not meet his burden to show that interpretive

sign language, or word-for-word translation of English into sign language, was part of the student's IEP when the IA's reduction in sign language usage occurred. Respondent's hearing testimony of the classroom PPCD teacher, the IA, and the AI teacher as well as ARDC documentation preponderates to establish that the student's classroom providers properly provided sign language to the student throughout the 2006-2007 school year in accordance with what the ARDC specified for the student—a multi-sensory approach using signs, gestures, pictures, and/or vocalizations.

After the student's parents participated in a November 2006 meeting to discuss the role of the IA, a subsequent ARDC meeting convened at parental request for revised goals and objectives due to the student's increasing mastery of his current goals. As part of that meeting, the ARDC discussed the role of the IA. The preponderance of the hearing testimony and record evidence establishes that no designation was made by the ARDC after October 2006 to specify word-for-word interpretation of English into sign language for this student and that the student made progress in his acquisition of language both receptively and expressively during the 2006-2007 school year. I find that Respondent delivered a multi-sensory program to the student that included appropriate signing in his classroom.

Petitioner's related challenge to the sign language provided to the student focuses on the adequacy of the certification and training of Respondent's PPCD classroom staff that delivered sign language instruction. The record evidence identifies three individuals in this category, the PPCD teacher, the IA, and the AI teacher. Petitioner alleges that the student should have sign language instruction from an individual who meets the qualifications of a sign language interpreter for the deaf; therefore, as the student did not have a sign language interpreter in the PPCD classroom, Petitioner implies that the certification and training of Respondent's staff providing sign language instruction is insufficient. Yet the credible testimony of Respondent's PPCD teacher, the AI teacher, and the special education area coordinator established that, given the student's current age, relative receptive communication strengths, and correction of his mild hearing loss with amplification into the normal range of hearing, a sign language interpreter is not necessary for the student to receive FAPE. Further, as previously discussed above, the ARDC did not require the sign language services in his IEP to be delivered by a sign language interpreter for the deaf.

Petitioner did not produce any evidence to establish that the student's PPCD teacher, the IA, or the AI teacher were not properly certified to be in the PPCD classroom nor to refute the hearing testimony of Respondent's witnesses that the sign language PPCD providers were all properly certified for classroom teaching. Instead, the overwhelming record evidence established that the student's classroom IA is fluent in sign language. Although Respondent's PPCD teacher affirmed at hearing that the teacher's sign language acquisition was still progressing and currently numbered between 100 to 200 signs, the record evidence preponderates to establish that the teacher consistently signed the student's vocabulary words each week and worked with the AI teacher to ensure the correct sign would be used with the student. The ongoing collaboration by the AI teacher with the PPCD teacher, the IA, and the parents ensured consistency across all settings for instructing the student with specific signs.

B. Parental Participation. As a second consideration under the third prong of the *Michael F.* test, Petitioner alleges that the parents were prevented in their efforts to be equal partners in the educational planning for the student. *Michael F., supra*; 34 C.F.R. §300.512(a)(2)(ii). Yet, an examination of the testimony and written evidence in this proceeding substantiates Respondent's ongoing effort to communicate with the parents, include the parents in all ARDC meetings, give the parents progress reports on the student's progress, and promptly respond to parental inquiries

concerning the student's programming. The preponderance of the record evidence reveals that Petitioner did not sustain his burden to show that the parents were not fully included in the development and ongoing progress of the student under Respondent's educational program.

For the reasons discussed above, I find that the third factor under the *Michael F.* test has been met by Respondent. *Michael F., supra.*

Academic and Non-academic Benefits

The fourth and final factor of the *Michael F.* test requires the school district's individualized program for the student to result in both academic and non-academic benefits. *Id.* Petitioner believes that the student has regressed in his modes of communication, specifically alleging a regression in the student's ability to use sign language. The overwhelming weight of the data collected by Respondent and the testimony of his classroom providers establish that the student made progress under his special education program, including his emerging ability to use three words in a sentence verbally. Based upon the parents' own report, the student increased his signing ability from approximately 75 signs to approximately 250 signs by July 2007. Petitioner did not sustain his burden to show regression by the student under Respondent's program.

Identification of All Areas of Disability

Petitioner alleges that Respondent did not identify all areas of the student's disability, specifically by a failure to designate the student as OHI based on the student's diagnosis of Down Syndrome. Petitioner presented expert testimony at hearing to describe some of the impacts a Down Syndrome student may have, including muscle tone issues, protruding tongue, very narrow ear canals, and hearing loss, as well as a strength often seen in individuals with Down Syndrome, a willingness to visually imitate what is observed. Because of the failure to identify the student as OHI based on the Down Syndrome diagnosis, Petitioner alleges that the student's IEP was not developed and implemented appropriately.

Respondent acknowledges that neither the Transdisciplinary Play-Based Assessment nor the ARDC documentation contain reference to the student's Down Syndrome. Respondent asserts that this diagnosis was, in fact, discussed at the time of the student's assessment. I agree and find the hearing testimony of the LSSP involved in the student's assessment to be credible that a *de minimis* error resulted in the omission of the Down Syndrome notation in the assessment report discussed in the May 2006 ARDC meeting for development of the student's IEP. Further, I note that the initial evaluation by Respondent included the recommendation of the evaluating nurse as part of the assessment recommending no further medical evaluation was needed for the student, and including the parents' reference to Down Syndrome in the documentation. I find that the ARDC discussed the completed initial assessment report at the May 2006 ARDC meeting that referenced the significant health history of the student, yet the student did not appear to have one or more physical conditions directly impacting his ability to profit from his educational process. [Finding of Fact No. 8].

While the student does have Down Syndrome, the record evidence does not establish that even with this medical diagnosis, the student would have qualified as a student with OHI. There is no diagnosis of the student by a physician in the record that the student qualifies as OHI due to his Down Syndrome. The Texas Administrative Code requires that an eligibility determination for special education and related services, made by an ARDC for eligibility as OHI, must include a licensed physician. 19 T.A.C. §89.1040 (b) and (c)(8). Petitioner's evidence in this proceeding does not include an OHI designation by a physician and accordingly, I find that Petitioner did not meet this burden. The

record evidence preponderates for Respondent that the student did not demonstrate an *educational* need for special education and related services due to an OHI in order to meet eligibility as a student with OHI. 34 C.F.R. §300.8(a)(1). Lastly, neither the ARDC nor the parents asked for additional evaluation of possible OHI eligibility for the student through March 2007, at which time the ARDC agreed and the parents gave permission for additional assessment for receptive language concerns and APE. I agree with Respondent that the record evidence of this proceeding does not demonstrate a limited strength, vitality, or alertness of the student that negatively impacts his ability to benefit from his education.

Even if the student had been designated as eligible for services as OHI, the evidence established that there would have been no change to the student's program with an OHI designation. I find that Petitioner did not carry his burden to show the insufficiency of Respondent's program due to an omission of OHI eligibility.

FAPE

Based on the foregoing, I conclude that Respondent's staff delivered a program by appropriately trained and certified staff that provided the type of sign language instruction for the student, as agreed upon by the ARDC committee, that included a total communication approach with the sign language to give the student added verbal stimulation and access to development of a verbal mode of communication. This program meets all four factors enunciated under *Michael F.* as evidenced by the student's progress in his program as his expressive and receptive language continues to emerge. *Michael F., supra.* This program included both verbal and sign language instruction and stimulation in a total communication program that respected the student's communication mode of signing and verbal components. As evidenced by the student's ongoing progress under Respondent's program, I find that the student made meaningful progress in the LRE setting of the PPCD classroom.

Conclusions of Law

1. The student is entitled to special education and related services at no cost to the parents under the provisions of the IDEA, 20 U.S.C.A. §1400, *et. seq.*, and its implementing regulations.
2. The student and his parents reside within the jurisdictional boundaries of Respondent, a legally constituted independent school district operating as a political subdivision of the State of Texas. Respondent is responsible for providing the student with a free appropriate public education. 20 U.S.C. §1412(a)(1); *Hendrick-Hudson District Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C.A. §1412; 34 C.F.R. §300.300; 19 T.A.C. §89.1001.
3. The educational program proposed by the school district is presumed to be appropriate. Petitioner, as the party challenging the educational program offered by Respondent, bears the burden of proof. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Alamo Heights ISD v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986). Petitioner did not meet his burden of proof in this case.

4. Respondent's educational program for the student respected the student's mode of communication with both sign language and verbal components. 19 T.A.C. §§29.303 and 89.1131(d).
5. Petitioner did not meet his burden to show that the IEP developed by Respondent was not reasonably calculated to enable Petitioner to receive an educational benefit. *Hendrick-Hudson District Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *Cypress Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-248 (5th Cir. 1997); *Polk v. Central Susquehanna Inter. Unit 16*, 853 F.2d 171, 181 (3rd Cir. 1988); *Hall v. Vance County Board of Education*, 774 F.2d 629, 636 (4th Cir. 1985).
6. Petitioner did not meet his burden to show a violation of substantive or procedural violations of IDEA. Petitioner is not entitled to an award of compensatory services. *Burlington Sch. Comm. V. Department of Educ.*, 471 U.S.359, 369-371 (1985); *Alamo Heights Indep. School Dist. v. State Bd. of Educ.*, 790 F.2d 1153 (5th Cir. 1986); *Parents of Student W. v. Puyallup School District, No. 3*, 21 IDELR 723 (9th Cir. 1994).

ORDERS

Based upon the record of this proceeding, the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that all relief requested by Petitioner is **DENIED**.

IT IS FURTHER ORDERED that any findings of fact that are more properly characterized as conclusions of law, and any conclusions of law that are more properly characterized as findings of fact, shall be considered and shall have the same effect as if properly characterized.

IT IS FURTHER ORDERED that any and all additional or different relief not specifically ordered herein is **DENIED**.

Signed this 8th day of October 2007.

/s/ Mary Carolyn Carmichael

Mary Carolyn Carmichael
Special Education Hearing Officer

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