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**DOCKET NO. 186-SE-0104**

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<b>Student</b>	§	<b>BEFORE A SPECIAL EDUCATION</b>
<b>B/N/F Parent</b>	§	
	§	
<b>VS.</b>	§	<b>HEARING OFFICER</b>
	§	
<b>YSLETA INDEPENDENT</b>	§	
<b>SCHOOL DISTRICT</b>	§	<b>FOR THE STATE OF TEXAS</b>

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**DECISION OF THE HEARING OFFICER**

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**PROCEDURAL HISTORY**

The above-captioned Request for Impartial Due Process Hearing pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. (“IDEA”), was received by Texas Education Agency on January 27, 2004, assigned to the undersigned Impartial Hearing Officer, and set for hearing on March 1, 2004, with a decision deadline of March 12, 2004. A pre-hearing conference pursuant to 19 T.A.C. §89.1180 convened by telephone conference call on February 6, 2004. Mark Berry, Attorney at Law, represented the Petitioner. Jose Martin, Attorney at Law, represented the Respondent. The hearing was rescheduled for good cause shown, to March 23-24, 2004, with a decision deadline of April 6, 2004. The hearing convened on March 23, 2004, and recessed due to unanticipated discovery issues. Those issues were resolved by agreement, and the hearing re-scheduled to April 30, 2004, with an extended decision deadline of May 21, 2004. The hearing convened on April 30, 2004, and recessed for lack of sufficient time to receive all the remaining testimony on that date. The decision deadline was extended to June 23, 2004. The hearing re-convened on May 28, 2004 at which time further testimony was received the record of evidence was closed. The parties were granted time in which to file written closing argument, and the decision deadline was extended to June 28, 2004. This Decision was filed and mailed to the parties on June 28, 2004.

**STATEMENT OF THE CASE**

Petitioner complains that Ysleta I.S.D. violated Student’s right to a free, appropriate public education (“FAPE”) by failing or refusing to provide Student with the related services of physical therapy (“PT”), occupational therapy (“OT”), and adapted physical education (“APE”), which services Petitioner contends are necessary for Student to benefit from special education. As relief for these alleged violations, if proven, Petitioner requests orders for Ysleta I.S.D. to do the following:

1. Provide Student PT services by a licensed physical therapist;
2. Provide Student occupational therapy by a licensed registered occupational therapist (“OTR”);
3. Provide Student compensatory PT and compensatory OT from January 22, 2004, the date of his last annual ARDC meeting
4. Provide Student with APE;
5. Develop an IEP for Student in the areas of PT and OT.

## FINDINGS OF FACT

1. Student is an IDEA-eligible student residing within and attending YISD. He is non-verbal, does not initiate communication with others, exhibits significant deficits in social interaction, exhibits excessive fear and nervousness, engages in stereotyped behaviors, and exhibits self-stimulating and self-injurious behaviors. He has deficits in all academic skill areas. His eligibility classifications are Autism, Mental Retardation, and Speech Impairment. R-2, R-11, P-1, P-2.
2. Student's IEP Team on 3/1/01 requested evaluations for OT and APE for Student. Parent initiated the requests. R-11.
3. YISD assessed Student for OT on 4/19/01, addressing concerns about a possible sensory integration dysfunction. The evaluator identified Student as having sensory deficits that interfere with educational performance and that could necessitate adaptive equipment. The evaluator recommended instructional modifications plus OT related services for Student in the form of consultation from the OTR or licensed OT Assistant for 5 visits per year, 15 minutes per visit. R-3.
4. YISD evaluated Student for APE and reported the results on 4/23/01. At that time, Student was participating in regular physical education ("PE") with numerous modifications and constant supervision. Upon evaluation, he demonstrated no body awareness, did not imitate activities, and did not follow one-step directions. He could not perform fundamental motor skills such as hopping, jumping or balance, and demonstrated limited visual motor skills. The APE evaluator recommended consultative APE for Student, consisting of three consults per year with an APE coach. R-12.
5. As of 2/4/02 Student was receiving APE from YISD, and was demonstrating progress in the form of increased class participation with supervision and assistance. He had been receiving APE in the form of consultation by the APE specialist with his PE coaches, five times per year for 15 minutes each time. R-13.
6. YISD completed a summary report on 2/5/02 concerning Student's OT services. The report addressed services for Student in fine motor, self care, and sensory integration areas, and recommended continuing consultative OT for 5 visits per year, 15 minutes per visit. R-13.
7. YISD completed a summary report on 1/23/03 concerning Student's OT and PT services. Student demonstrated progress on two of four gross motor goals for which OT and PT support was provided – ascending or descending stairs without physical assistance, and moving around obstacles without losing balance. He had met three out of five fine motor goals – tolerate hand-over-hand tooth brushing, zip and unzip his zipper, and pour a substance from a container into a cup without spilling. YISD's OTR and physical therapist recommended consultative PT and OT services for Student, both five times per year, 15 minutes per visit. P-7.
8. Student's 1/28/03 IEP contained goals and objectives to be addressed specifically by OT and PT consultation. Gross motor objectives were to be addressed by the PE coach and the PT staff. Classroom staff and OT staff were to address fine motor and self care objectives. The IEP scheduled consultative OT and PT related services, each for five 15-minute visits annually. Parent signed indicating agreement with Student's 1/28/03 IEP. Student's IEP Team continued the objectives and related services from the 1/28/03 meeting, in a 5/6/03 meeting that Parent did not attend. Parent did participate in an IEP meeting on 8/29/03 concerning placement, and did not raise any objection to Student's OT, PT, or APE services. P-10, R-4, R-5
9. Student's ARDC met on 5/6/03, without Parent in attendance, to schedule services from 5/6/03 to 5/28/03. Consultative OT was scheduled for five visits per year, 15 minutes per visit. Consultative PT was scheduled for five visits per year, 15 minutes per visit. Student was scheduled in general education PE class during the regular school year. One OT visit and one PT visit were scheduled as extended services during the summer. R-4.
10. Student's ARDC met on 8/29/03 to discuss Student's possible participation in the transition program. Parent attended, and agreed with YISD's proposed services. R-5.

11. Student's ARDC met on 10/16/03 to propose annual goals for speech, fine motor skills, and gross motor skills. The ARDC was unable to reach agreement. Parent complained that YISD's proposed goals were not based on current levels of performance. Reports concerning current performance levels were contained in therapy logs not then available to the ARDC. R-7.
12. Student's 10/16/03 ARDC addressed measurable goals for speech, fine motor skills, and gross motor skills. The ARDC designated YISD's physical therapist or physical therapy assistant along with Student's PE coach and teachers as the responsible implementers of Student's gross motor goal and objectives. The ARDC designated YISD's OTR along with Student's teachers as the responsible implementers of Student's fine motor skills goal and objectives. Additionally the OTR was a co-implementer of Student's self-care goals and objectives. The IEP did not change Student's schedule of related services. Parent disagreed with the IEP, for the reason that YISD did not provide a sufficient statement of Student's present levels of performance, and because she did not agree with the proposed goals and objectives. R-7.
13. YISD completed a summary report on 1/22/04 concerning Student's OT and PT services. Student demonstrated some progress in gross motor areas, with emerging skills of jumping in place, tolerating bouncing on the trampoline, and catching and throwing a large ball. Student also demonstrated some progress in fine motor areas with mastery of objectives for staying engaged in a one-minute task with verbal and physical prompting, brushing teeth with help some of the time, and reducing food spills and grabbing while carrying cafeteria tray. Student has made progress but his gains are not always consistent; his disabilities are very severe. P-8; Tr. 41, 327.
14. YISD's 1/22/04 summary report contained a recommendation for seven 15-minute OT consultations annually with classroom and transition staff, to be delivered by an OTR or a licensed OT assistant. The findings also recommended five 15-minute PT consultations annually with classroom staff and with Student's PE coach, to be delivered by a licensed physical therapist or therapist assistant. R-1.
15. Student's IEP Team convened on 1/22/04, with Parent in attendance, for an annual review of Student's program and proposed IEP. The IEP scheduled OT services to address objectives in self-care, fine motor skills, and prevocational skills. The IEP scheduled PT services to address objectives in the area of gross motor skills. The OT and PT staff were scheduled as co-implementers along with instructional staff in these areas. The goals for both OT and PT were discussed and Parent offered input to this discussion. The IEP scheduled seven 15-minute consultative OT sessions per year, and five 15-minute consultative PT sessions per year. The IEP also scheduled formal OT and PT evaluations for Student. At the conclusion of the IEP meeting Parent did not signify either agreement or disagreement with Student's proposed IEP. R-8.
16. YISD delivers PE for Student through a general education PE coach, supported by special education staff and consultation from Student's physical therapist. This service is sufficient to address Student's need for adapted physical education. Student's teacher follows up on OT and PT recommendations derived from consultation with the OTR and the physical therapist. Tr. 24-37.
17. Student's OTR and physical therapist consult in Student's classroom with the classroom instructional staff by demonstrating activities with Student directly and by making recommendations. The act of consulting with classroom staff by the OTR or physical therapist is the OT or PT service. P-15, P-19; Tr. 12-64, 78-81, 108-110, 121-124, 251-335.
18. Classroom teaching staff perform OT-related activities with Student, but do not perform activities that can only be performed by a licensed OTR. Student's IEP does not call for the delivery of OT services to address any medical condition. Student's OT plan of care is set out in his OT evaluation, OT contact records, and IEP objectives and modifications involving fine-motor skills to which OT services relate. Consultative OT services do not necessarily include direct instruction to the student on OT-related IEP goals and objectives. YISD has delivered Student's OT services as scheduled. P-11, P-12, P-29; Tr. 154, 162-246.
19. Student's physical therapist has developed a plan of care for Student. As in the case of OT, the PT plan of care is embodied in the PT services evaluation or summary, the PT contact records, and the IEP objectives and modifications involving gross motor activities to which PT services relate. The

scheduled PT service, being consultation, is delivered by a licensed PT. Classroom staff follow the physical therapist's recommendations but do not deliver PT services. YISD has delivered Student's PT services as scheduled. P-11, P-13, P-30; Tr. 251-335.

20. Student has received OT and PT services pursuant to his IEP and by order of \*\*\*, M.D. YISD requires physician referral for delivery of OT and PT services. Dr. \*\*\* ordered PT and OT services for Student. Dr. \*\*\* did so based on a review of Student's special education file. Dr. \*\*\* is not Student's regular treating physician. P-18; Tr. 430-440.
21. Student was making some progress on his IEP objectives, as of March 2004. R-6.

## DISCUSSION

Public school districts must comply with IDEA requirements for delivering appropriate services to eligible students, including related services, as necessary to provide FAPE. 20 U.S.C. §1412(a)(1); 34 C.F.R. §300.121; Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 189 (1982); Cypress Fairbanks Independent School District v. Michael F., 23 IDELR 1041, 1042 (S.D. Tex., 1995). A petitioner who challenges the school district's offer of services under IDEA bears the burden to prove that the student has been denied a free appropriate public education, or that proposed IEP services are not reasonably calculated to enable the student to receive meaningful benefit. Houston I.S.D. v. Bobby R., 200 F.3d 341 (5<sup>th</sup> Cir. 2000); Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984).

### **Compliance with OT and PT Licensing Requirements**

Petitioner complains that OT and PT services were not delivered to Student by qualified professional staff. IDEA regulations provide that individuals who deliver related services under IDEA must comply with applicable state professional licensing requirements in the professional area in which the related services are provided. 34 C.F.R. 300.23; 300.136; see Evanston Community Consol. School Dist. V. John M., 356 F.3d 798, 40 IDELR 175 (7<sup>th</sup> Cir. 2004). In Texas, the Education Code requires that schools employ and utilize occupational and physical therapists only if they are licensed by their respective licensing agencies. Tex. Educ. Code §21.003(b). The Commissioner's Rules require that related service providers hold a license in the area of their assignment. 19 T.A.C. §89.1131. The term "holding a license" within the meaning of this section implies compliance with state licensing standards. 34 C.F.R. §300.136(b)(1)(ii).

Petitioner argues that professionals who provide OT and PT services for Student violate state licensing standards and by implication violate §300.136 by not working directly with Student, but instead delivering consultation to non-licensed staff who then implement directions or recommendations of the licensed OTR and physical therapist. Petitioner's argument would seem to mandate direct hands-on OT and PT services in all instances where OT and PT services are scheduled. But my reading of the Code does not support Petitioner's argument, and I am unable to identify any other state or federal regulation that specifically addresses, much less requires, the outcome Petitioner urges here. The methodology for delivering OT, PT, and other related services through consultation with classroom staff is well supported in hearing decisions, and may be appropriate so long as the student receives meaningful benefit. See, e.g., Jonathan D. v. Houston I.S.D., 25 IDELR 1182 (SEA TX 1997); Erie School Dist., 16 IDELR 60 (SEA PA 1989); Copiah County School Dist., 102 LRP 26961 (SEA MI 1997); Fullerton Elementary School Dist. et al., 508 IDELR 255 (SEA CA 1986).

OT is regulated in accordance with §454 et seq., Tex. Occ. Code. The Code at §454.006(b)(3) defines the practice of OT to include the application of "therapeutic goal-directed activities in treating patients on an individual basis, in groups, or through social systems, by means of direct or monitored treatment or consultation." The OT service scheduled by YISD, as described in IEP documents and according to

testimony of the District's OT and instructional staff, falls within the scope of treatment through social systems or by means of consultation. I find that the consultative OT service Student received according to the facts of this case is consistent with state requirements, and for that reason does not run afoul of IDEA's implementing regulations.

My findings in regard to PT services for Student mirror those for OT. PT is regulated pursuant to §453 et seq. of the Occupations Code. Under §453.005(b)(3), the practice of PT includes "treatment, consultative, educational, or advisory services to ... enable, train, or retrain a person to perform the independent skills and activities of daily living." The services scheduled and delivered for Student according to school records and testimony of Student's physical therapist establish that consultative PT services such as Student has received are authorized under state law.

OT and PT services in Student's IEP involved licensed personnel providing consultation and direction to classroom staff, pursuant to state licensing regulations and pursuant to Student's IEP and assessment. Such consultation was the only licensed service delivered. Instruction by other classroom personnel based on recommendations and directions from a licensed OTR or physical therapist is not the practice of OT or PT.<sup>1</sup>

### **OT and PT Appropriateness**

Petitioner's complaint, that OT and PT services were not delivered by licensed personnel directly to Student as a hands-on service, carries with it the argument by implication that consultative services are not appropriate for Student. However the record of documentary evidence and testimony does not disclose any qualified recommendation at all, for direct OT or PT services for Student. Student has shown some progress with the consultative model for these related services. Of course it is always a concern when an eligible student makes the sort of limited and inconsistent progress described by the YISD professionals who work with Student. Their testimony supported the proposition that Student's slow progress results from the severity of his multiple disabilities and not from the inappropriateness of instruction and related services. Petitioner offered no expert opinion or assessment to the contrary. Petitioner failed to satisfy his burden to prove by a preponderance of evidence that Student's progress was not meaningful or, by implication, that consultative OT and PT related services were inappropriate.

### **OT and PT Referral**

Petitioner raised the complaint during the due process hearing, that the medical referral YISD obtained to initiate OT and PT services for Student was not properly conducted, and thus violated the regulations governing delivery of OT and PT services. Petitioner explained, however, that his complaints did not attack the underlying OT and PT assessments conducted by YISD's OTR and physical therapist. And of course, Petitioner never challenged Student's entitlement to OT and PT services.

Petitioner seems to imply that the medical referral by Dr. \*\*\* was in itself a related service subject to IDEA regulations. This proposition lacks merit. IDEA requires that medical diagnostic services be made available as a related service, where necessary to enable the student to benefit from special education. 34 C.F.R. §300.24(a). In Student's case no medical diagnostic service was either discussed or scheduled by Student's IEP Team within the relevant time frame of this case. Rather, a medical referral was obtained incidental to delivery of OT and PT services, those being the services determined necessary to enable Student to benefit from special education and scheduled in Student's IEP. Texas' licensing law

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<sup>1</sup> I read and considered testimony of Student's current classroom staff to the effect that such services are, as a matter of law, within the exclusive province of licensed occupational or physical therapists. There is no evidence that classroom staff delivered any specific service that by law can be delivered only by a licensed OTR or physical therapist.

necessitates a health service professional's referral for any PT service, and for OT service to address a health care condition. Tex. Occ. Code §§453.351(a), 454.213(a) (PT license may be revoked or suspended for non-compliance). YISD regulations require physician referral for both types of related service. But the medical referrals per se were not OT, PT, or medical diagnostic related services. A service may be necessary to maintain a provider's license, and at the same time not necessary, in and of itself, to enable the student to benefit from special education. So by this reasoning, I have no basis to review the circumstances of Dr. \*\*\*'s referrals under 34 C.F.R. 136 and 19 T.A.C. 89.1131.

Even assuming for argument's sake that the requirements of 34 U.S.C. §300.136 and 19 T.A.C. 89.1131 could be stretched to cover the circumstances of the incidental medical referral of which Petitioner complains, Petitioner would not prevail on the issue. It is true that Dr. \*\*\* based his referrals only on a review of Student's records. However, Petitioner offers no evidence and no law citation, and none could be located by the Hearing Officer, to establish that Dr. \*\*\*'s referral violated the Occupations Code or YISD procedures with respect to delivery of PT or OT services pursuant to physician referral. I have found no standard in the law or in evidence mandating any particular methodology for medical evaluation, in order to make an OT or PT referral for educational services. Such matters are better left to medical and education professionals, under the facts presented here.

### **Adapted PE**

IDEA and state law require that physical education be made available to eligible students, including adapted physical education for development of motor skills, fitness, and skills in games and sports. 34 C.F.R. §§300.307, 300.26(b); Tex. Educ. Code 29.001. Physical education instruction pursuant to an IEP may be provided by PE teachers, special education personnel, OTRs, physical therapists, and OT or PT assistants working under supervision in accordance with their professional standards. 19 T.A.C. 89.1131(b)(6). Presumably adapted PE can be provided as a related service, a supportive service or modification, or as an instructional service. In Student's case, YISD initially delivered APE through an APE specialist, and then via consultative PT with the physical therapist. Beyond Petitioner's issues attacking consultative PT services, Petitioner offered no substantial evidence that would tend to prove YISD's APE service inappropriate for Student, whether as a related service or otherwise.

### **Billing for Related Services**

Petitioner introduced or sought to introduce testimony and documents concerning YISD's practices regarding billing payors for OT and PT services. Issues concerning billing are, however, not relevant to Petitioner's IDEA claims.<sup>2</sup> There is no contention but that such related services as were provided by YISD involved no cost to Student's parent. 34 C.F.R. §300.13. Nor did Petitioner allege that YISD provided or proposed to provide any such services at parent expense. Consequently YISD's manner of funding the related services in question is not material to any claim or legal issue before me.

### **Requested Relief**

Petitioner failed to show by a preponderance of evidence that YISD's past related services of OT and PT, or Student's APE services, failed to provide him with meaningful benefit. Likewise, there is no professional opinion of record, nor any qualified opinion testimony, tending to show that consultative services in the areas in contention are not reasonably calculated to give Student meaningful educational benefit in the future. Therefore, Petitioner is not entitled to the requested relief.

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<sup>2</sup> I admitted in evidence certain billing records solely for their probativeness on material issues concerning the type and amount of OT and PT related services YISD provided pursuant to Student's IEP, but billing practices as such are not material to any IDEA issue in contention here.

### CONCLUSIONS OF LAW

1. Ysleta I.S.D., is a local education agency and a political subdivision of the State of Texas, and is subject to requirements of IDEA, 20 U.S.C. §1400 et seq., and its implementing federal and state regulations.
2. Student is an IDEA-eligible student to whom Ysleta I.S.D. must offer a free, appropriate public education in the least restrictive environment. 20 U.S.C. §1412(a)(1); Board of Educ. v. Rowley, 458 U.S. 176 (1982).
3. Ysleta I.S.D. has provided Student with appropriate related services delivered by qualified professional staff. 34 C.F.R. §§300.121, 300.23; 300.136; Tex. Educ. Code §21.003(b); 19 T.A.C. §89.1131.
4. Student failed to establish that Ysleta I.S.D. denied his right to a free, appropriate public education. Student is not entitled to relief. Houston I.S.D. v. Bobby R., 200 F.3d 341 (5<sup>th</sup> Cir. 2000).

### ORDERS

In consideration of the foregoing,

**IT IS ORDERED** that any and all relief requested by the Petitioner herein is **DENIED**.

**SIGNED** this 28<sup>th</sup> day of June 2004.

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

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

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<b>SCHOOL DISTRICT</b>	§	<b>FOR THE STATE OF TEXAS</b>

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**SYNOPSIS OF DECISION**

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**ISSUE:** Whether Ysleta I.S.D. provided Student with appropriate services of occupational therapy, physical therapy, and adapted physical education.

**CITATION:** 34 C.F.R. 300.23; 300.24; 300.26(b), 300.136; 300.307; 19 T.A.C. 89.1131

**HELD:** For the District.

**ISSUE:** Whether the services provided or scheduled for Student failed or would fail to provide a free, appropriate public education.

**CITATION:** 34 C.F.R. §§300.13, 300.121; Houston I.S.D. v. Bobby R., 200 F.3d 341 (5<sup>th</sup> Cir. 2000).

**HELD:** For the District.