

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

DECISION OF THE HEARING OFFICER

**I.
PROCEDURAL HISTORY**

On March 2, 2010, the Texas Education Agency (“TEA”) received the Request for Due Process Hearing (“the complaint”) filed by Student *b/n/f* Parents (“Petitioner”) against Keller Independent School District (“Respondent”) and assigned the case Docket No. 153-SE-0310.

On March 4, 2010, the undersigned Hearing Officer issued the Initial Scheduling Order, setting forth all relevant deadlines pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”). Pursuant to that Order, the prehearing telephone conference was set for March 23, 2010, the Due Process Hearing was set for April 16, 2010, and the Decision deadline was set for May 16, 2010.

On March 12, 2010, the Respondent filed its Response to Complaint and Notice of Insufficiency of Complaint. The undersigned granted the insufficiency challenge, abated the case, and ordered Petitioner to re-plead by March 19, 2010.

Petitioner filed the Amended Complaint on March 22, 2010. On March 25, 2010, the undersigned lifted the abatement and re-scheduled the prehearing telephone conference for April 12, 2010, the Due Process Hearing for May 5, 2010, and the Decision deadline for June 5, 2010. Due to conflicting schedules the prehearing conference was re-scheduled to April 23, 2010.

On April 1, 2010, the Respondent filed its Response to the First Amended Complaint, Counter-Claim and Partial Motion to Dismiss for Lack of Jurisdiction.

On April 23, 2010, the Hearing Officer convened the prehearing conference by telephone as scheduled. In attendance were the following: 1) Mr. Matthew Finch, counsel for Petitioner; 2) Ms. Debra Liva, advocate for Petitioner; 3) Ms. Amanda Bigbee, counsel, counsel for Respondent; 4) the Special Education Director for Respondent; 5) the Hearing Officer; and 6) the court reporter, who made a record of the prehearing conference. During the prehearing conference the parties discussed several matters, including the issues and the relief requested by Petitioner. Because the parties agreed that the Due Process Hearing would require more than one day, the hearing was re-scheduled for June 1-3, 2010.

II. DUE PROCESS HEARING ISSUES AND REQUESTED RELIEF

Based upon discussions and clarifications during the prehearing telephone conference, the Hearing Officer deemed the following issues relevant to this proceeding:

Petitioner's Issues

Petitioner bears the burden of proof and persuasion on the following issues:

- 1) whether Respondent failed to devise appropriate Individual Education Program[s] (hereafter "IEPs") for Student to meet his unique needs;
 - a. Respondent failed to provide Student with supplemental aids and related services (i.e., recreation therapy, music therapy, paraprofessional aide, sign language, liaison);
 - b. Respondent failed to devise and implement an appropriate functional behavioral assessment and failure to devise and implement an appropriate behavioral intervention plan to address the Student's unique needs;
 - c. Respondent failed to devise an IEP that would be specific or measurable with appropriate baselines;
 - d. Respondent failed to provide adequate speech services to enable meaning progress;
 - e. Respondent failed to provide Student with the appropriate support when in the regular education setting as agreed upon at his ARD through his IEP;
 - f. Respondent failed to provide appropriate staff training to address the Student's unique needs as a student with Down Syndrome;
 - g. Respondent failed to provide the family with training in sign language to help communication with Student;
 - h. Respondent failed to consider and consult with the Student's treating physician when completing the assessments in OT, PT, and the FIE and how the diagnosis of Down Syndrome impacts the testing and/or educational setting, yet, decided to change eligibility to mental retardation;
 - i. Respondent failed to explain data (***) that would drive baselines for measurable goals;
 - j. Respondent failed to assess Student's needs for assistive technology and as a result failed to provide appropriate assistive technology;
 - k. Respondent failed to devise appropriate and measurable goals and objectives based on present levels of performance in all of Student's academic areas of need;

- l. Respondent failed to provide progress reports to the parents on Student's IEP goals and objectives at least as frequently as regular education students received mid-terms and grade reports;
- m. Respondent failed to use scientifically based, peer-reviewed methods of instruction with Student; and
- n. Parents were not made equal partners when the school failed to provide all records at the request of the advocate and the family prior to the ARD to adequately prepare for the ARD.

Petitioner seeks an order from the Hearing Officer requiring:

- 1) Respondent be ordered to provide to Student an appropriate IEP in the least restrictive environment that complies with all the procedural and substantive requirements of the IDEA and Texas special education laws to meet Student's unique needs;
 - a) Respondent will conduct a training session for teachers and staff member who work with Student for the fall and spring semesters of this school year, once each semester, for teachers and staff regarding the issues raised in this case;
 - b) Respondent will provide an independent, AT, OT, Speech and FIE at District's expense;
 - c) Respondent will conduct one half-day training session on the IDEA and state law during the fall semester and in the spring semester for parents in the school district who have special needs children. The meeting shall be open to the public and shall be advertised in the local newspaper and fliers shall be mailed to the homes of all students who have been found eligible for special education and related services in the school district;
 - d) Respondent shall provide the family with sign language classes for the remainder of the 2009-2010 school year, and through the summer of 2010 and then as deemed necessary by ARD;
 - e) Respondent will contract with a private services provider to perform a functional behavioral assessment and devise a behavioral intervention plan that the District agrees to implement;
 - f) Respondent will provide to Student a communication notebook that will travel between home and school and will include entries from the school about significant problems that occurred during the school day and any other information that the school and/or parents believe to be relevant to convey to the other to include what therapy Student had that day and what was discussed;
 - g) Respondent agrees to provide to the parent's written progress reports on Student's IEP goals and objectives every week;
 - h) Respondent agrees to provide the following accommodations and modification to Student: 1:1 aid and/or inclusion and a liaison;

- i) Respondent's staff who works with Student directly shall receive specialized in-service training that continues each semester for the next two years in sign language and whole language communication;
- j) Respondent shall provide extended year services to Student for the summer of 2010 and 2011 and otherwise as agreed to by the ARD committee;
- k) Respondent shall provide compensatory speech therapy with whole language to determine primary mode of communication;
- l) District shall design a program to address the disability of Down Syndrome as allowed by 20 U.S.C. 1401; and
- m) District will provide compensatory educational services due to the school's denial of FAPE.

Respondent's Issue

Respondent bears the burden of proof and persuasion on the following issue:

Because Petitioner has requested independent evaluations in the areas of assistive technology, occupational therapy, speech therapy, and full and individual evaluation, Respondent filed a counterclaim to defend its assessments. Respondent contends it prepared appropriate evaluations in each area where independent evaluations have been requested.

As relief, Respondent requests that Petitioner's request for the independent evaluations be denied.

III. THE DUE PROCESS HEARING

On June 1, 2010, the Hearing Officer convened the Due Process Hearing in the special education administrative offices of Keller Independent School District. Mr. Finch represented Petitioner; also appearing on Petitioner's behalf, were Student's mother, and Ms. Liva, a parent advocate. Ms. Bigbee represented Respondent, and ***, Director of Special Education, appeared as the District representative. The hearing lasted two days.

The parties called eight witnesses and presented documentary evidence consisting of approximately 59 exhibits contained in two extremely large, three-ring binders. The court reporter produced a 350-page transcript of the proceedings. The parties requested to present post-hearing closing arguments and briefs. The Hearing Officer approved, and the agreed date for submission was July 7, 2010. By Rule 11 Agreement the parties agreed to extend the submission date until July 12, 2010, which the Hearing Officer approved. Both parties filed post-hearing briefs on July 12, 2010.

Under the timeline of the parties' Rule 11 Agreement the Decision of the Hearing Officer would be due July 18, 2010, but the Hearing Officer requested, and received, permission from the parties to complete the Decision by July 19, 2010.¹

¹ July 18, 2010 was a Sunday, and the Hearing Officer wished to submit the Decision on a business day.

IV. FINDINGS OF FACT

Based upon the matters of record and matters of official notice, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following findings of fact based on a preponderance of the evidence:

1. Student is an *** school age child residing with his parents within the geographic boundaries of Keller Independent School District.
2. Prior to the 2009-2010 school year Student qualified for special education “as a student with *** with the suspicion of mental retardation and a speech impairment.” RX 5, p. 24.²
3. Student has been diagnosed with Down Syndrome and developmental delay. Student’s treating physician checked both boxes on the Other Health Impairment form, the first referring to limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment; the second, referring to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia. The physician then identified the specific condition as Down’s [sic] Syndrome. RX 18, pp.2-3.
4. When Student began the 2009-2010 school year at Respondent he started classes in the general education classroom of Teacher A with accommodations as specified in his IEP. Transcript, Vol. 1, p. 149.³
5. Respondent performed a Full and Individual Evaluation (FIE) for Student and prepared a report dated October 26, 2009. The following assessments and evaluations were included:
 - *** Language Scale-4
 - Goldman Fristoe Test of Articulation-2
 - Wechsler *** Scale of Intelligence – Third Edition (*** III)
 - Wechsler Nonverbal Scale of Ability (WNV)
 - Vineland II Parent/Caregiver Rating
 - Vineland II Teacher Rating
 - Health History
 - Assistive Technology Screening
 - Occupational Therapy Assessment – including Peabody Developmental Motor Scales – 2nd ed., teacher interviews, information evaluation and observation by therapist
 - Physical Therapy EvaluationVol. 2 pp. 28-39.

² Note that citations to exhibits are almost exclusively to Respondent’s exhibits. Most of the exhibits cited are ARD meeting reports and are duplicated in Petitioner’s exhibits. The parallel citation is omitted for sake of brevity.

³ Citations to the transcript hereafter will only refer to either Vol. 1 or Vol. 2, omitting “Transcript.”

6. The results of the ***-III revealed a Full Scale IQ score of *** for Student, indicating an overall cognitive ability in the *** range. He performed better on the verbal than on nonverbal reasoning tests, with a Verbal IQ of *** and Performance IQ of ***. Vol. 2 p. 35. RX 7, p. 7.
7. The Wechsler Nonverbal Scale of Ability is an individually administered clinical instrument designed to measure the general cognitive ability of children ages 4-21. The instrument uses a variety of nonverbal subtests to eliminate or minimize verbal requirements. Student's overall standard score of *** indicated his overall cognitive ability was within the *** range when compared with that of his same aged peers. RX 7, p.7
8. Student's parents completed the Vineland II Parent/Caregiver Rating Scale, 2nd Edition. This is an individually administered measure of adaptive behavior for ages birth to 90. The scale assesses adaptive behavior in four broad domains: communication, daily living, socialization and motor skills. In all four domains Student's standard score classified him in the *** range as compared to his same aged peers, with a composite standard score of ***, ranking him in the *** percentile level. RX 7, p. 8. Vol. 2, p. 88.
9. Student's special education teacher (Teacher B) completed the Vineland II Teacher Rating form, and similar results were obtained. Student's composite standard score of *** reflected the teacher's different assessment of Student's daily living skills (*** vs. ***) and motor skills (*** vs. ***). RX 7, pp. 8-9.
10. The FIE dated October 26, 2009, prepared by the multidisciplinary team for Respondent concluded that based on the data in the report Student appeared to meet the criteria for Mental Retardation and Speech Impairment. RX 7, p. 14.
11. Although Student began the 2009-2010 school year in Teacher A's general education classroom, that decision was based on the preference of Student's mother. Vol. 1, pp. 80-82. At the first Admission, Review and Dismissal (ARD) committee meeting of the year on August 26, 2009, Student was placed in the general education setting, with support from Life Skills. The minutes from the ARD meeting reflect the following: "Parent feels that [Student] will benefit from inclusion in the general education classroom. Parent reported that he is making progress, he is easily redirected, does not demonstrate behaviors, and feels he would benefit being from nondisabled peers." Much discussion at this ARD meeting focused on the Life Skills class and the goals that Student brought with him from ****. RX 3, p. 23.
12. By September 30, 2009, it was clear that Student simply could not keep up with the pace of the general education classroom. Respondent conducted an ARD meeting to discuss a change in placement to address Student's difficulties. Teacher A reported the skills Student was unable to do: ***, engage with other students or the teacher, identify ***, ask for help. Plus, he was *** in class. Teacher B reported on the activities Student was reviewing in her class such as ***. He comes into her classroom in the morning and *** time, and is engaged at this time. He knows ***. When in the Life Skills classroom he works on ***, ***, and small group instruction. Teacher B reported Student needed prompting frequently. The ARD committee agreed to change Student's placement to Life Skills. RX 2, p. 21.
13. After the FIE was completed for Student, the ARD committee met on November 3, 2009, to review the report dated October 26, 2009. Parent was accompanied at the ARD meeting by an advocate. Parent disagreed with the Mental Retardation eligibility and the data that support that eligibility. The physical therapist reported at this ARD meeting concerning Student's physical therapy assessment. Although he had made progress over the last three years, there were areas he was lower than his same aged peers. Student would continue to demonstrate a need for services. The occupational therapist reported

on the occupational therapy assessment that was performed, and that Student would continue to demonstrate a need for continued direct services.

14. The November 3 ARD meeting was recessed and continued on November 11, 2009. The meeting ended without the parties reaching consensus. Specifically, Parent requested an independent educational evaluation. Parent's advocate reported they did not agree with the IEP goals, the placement in Life Skills, and the failure to provide an extended school year. A separate list was provided that was attached to the ARD meeting records. RX 1.
15. The *** – Revised (***) is a skills-based, criterion-referenced test that actually measured Student's skills. ***. By using a criterion-referenced test, a pattern of strengths and weaknesses can be seen more in-depth; therefore, it provides more relevant data for development of an IEP. Vol. 2, pp. 44-45.
16. The Texas ***, also a criterion-referenced test, differs from the *** in that it is criterion-referenced against state standards regarding the *** curriculum. Vol. 2, pp. 45-46. Although both tests are criterion-referenced, the *** would most closely identify Student's true strengths and weaknesses. Vol. 2, p. 46.
17. Student came to the 2009-2010 school year with existing IEP goals he had when he was in *** addressing cognitive skills, language skills, and self-care skills. Student continued work on those goals in the Life Skills classroom until a new IEP was developed. The goals were revised at the September 30, 2009, ARD meeting. One of the goals developed was: Listen attentively and engage actively in a variety of oral language experiences. Two objectives cascaded from that goal: (1) By January 2010 [Student] will participate in songs, rhymes, discussions and conversations using gestures and words 4 out of 5 times 40% of the time. (2) By June 2010 [Student] will participate in songs, rhymes, discussions, and conversations using gestures and words 4 out of 5 times 50% of the time. RX 5, RX 2.
18. Teacher B drafted many of the goals and objectives for Student in that IEP and others later in the school year. They read similarly to the one quoted above.
19. The instruction programs used in both the general education and special education classrooms in Respondent for Student are scientifically-based, peer-reviewed methods. Vol. 2, pp. 53-54.
20. Student has demonstrated academic progress since the beginning of the 2009 school year. One such example is a *** that he was not able to complete in September. By the end of school when he ***, the result was recognizable as ***. Vol. 1, pp. 118-119. RX 32, pp. 9, 40.
21. Additionally, Teacher B has seen non-academic progress in Student since the beginning of the 2009 school year. In the beginning he had difficulty understanding and following instructions, even simple things such as getting up and getting in line or going to the bathroom. Now Student knows and follows the routine without any difficulty. He is more engaged with the other children in the class. He is no longer over-cautious at recess. While he is still a very calm, well-mannered child, he will occasionally initiate conversation. Vol. 1, pp. 103-105.
22. Those benefits have carried over into Student's participation in the general education classroom. Teacher A reports that in the beginning of the year Student would stand in the doorway and not know where to put his backpack or how to get his folder. By the end of the year Student came into the room, knew where his spot was, where his *** was, and how to see what he needed to do. Vol. 1, p. 173.
23. Even though Student has made progress, both Teacher A and Teacher B concur that his current placement in Life Skills is appropriate. Neither believes that Student could keep up with scope and sequence of the curriculum in the regular *** classroom. Vol. 1, p. 100, 174. Student is still working on pre-requisite skills. Vol. 2, p. 48.

24. Teacher B sent regular reports home to Parent regarding Student's progress. The reports explained what activities Student worked on, what behaviors Student exhibited, and how his overall day went. The reports also informed Parent of school events and activities. These reports went to Parent on at least a weekly basis. Vol. 1, pp. 119-120; Vol. 2, pp. 225-226.
25. Student's IEP specified certain modifications and accommodations, such as check for understanding, allow extra time for oral response, simplify the wording that is used, adaptive scissors and others. Both Teacher A and Teacher B provided these modifications and accommodations. Vol. 1, pp. 106-107,
26. Student's IEP did not specify music therapy. Music therapy was provided for all students in Life Skills though, so Student received this benefit. Vol. 1, p. 142.
27. Student spent about three hours each day in the general education setting (approximately 46%). Student had social studies or science, recess, snack, and then one of the following: science, social studies, or literacy centers. Student then went back to Life Skills to prepare for dismissal from school. Vol. 1, p. 159.
28. During the time spent in the general education class, Student was pulled out for speech therapy. Student received all of the speech therapy sessions for which he was scheduled, even when his regular speech therapist left the district. Vol. 1, p. 166.
29. Additional support was provided to Student when he went to the general education class because the paraprofessionals from the Life Skills class went to the general education classroom with the other Life Skills students when they rotated in and out of the classroom. However, there was not a specific person dedicated as a one-on-one aide to Student alone. Vol. 1, pp. 147-148.
30. Student's primary form of communication is verbal. Some persons also use simple signs with Student to augment or supplement the communication as a way to encourage or assist him with his verbal communication. Vol. 1, p. 166; Vol. 2, p. 95.
31. Parent requested that Respondent provide classes in sign language, and the district agreed to look into it. However, the regional day school for the deaf did not have a class that in the spring, so Respondent was unable to offer the class to Parent. This was never a part of Student's IEP. Vol. 2, p. 55.
32. Student has never been a behavior or discipline problem. Vol. 1, pp. 101, 176-177.
33. Parent had previously explained to school personnel there were no medical concerns, so there was no reason to talk to the doctor about Student's Down Syndrome. Vol. 1, p. 53. On the forms completed by Parent, including the OHI form, and other paperwork from Student's treating physician, there is no information to indicate particular medical implications for school personnel to consider when preparing his IEP.
34. Parent regularly attended the ARD meetings and always brought an advocate to the meetings as well. Discussion was active, and there were meetings that were adjourned and reconvened. Vol. 2, p. 223.
35. Student was not working on grade level. Vol. 1, p. 161.

V. DISCUSSION

Petitioner's issues may be grouped into four general areas for purposes of discussion: 1) the appropriateness of Student's IEP; 2) the Least Restrictive Environment for Student; 3) Respondent's FIE and the

report dated October 26, 2009; and 4) the eligibility classifications for Student. In discussing all of the general areas, the most important, overarching consideration is the standard to which Respondent is held.

Respondent must provide a free appropriate public education to Student, described as one that enables a student to obtain “some benefit” from her education. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 189 (1982). Whether the education is designed to maximize a student’s potential is not the test. Rather, the IDEA guarantees a “basic floor or opportunity,” requiring a school to provide “access to specialized instruction and related services which are individually designed to provide educational benefit.” *Rowley*, 458 U.S. at 201.

The Fifth Circuit in *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 253, (5th Cir. 1997) approved the four factor test to determine whether an IEP is appropriate. The Court said that an IEP must be geared to provide some benefit, and that is demonstrated where:

- (1) the program is individualized on the basis of the student’s assessment and performance;
- (2) the program is administered in the least restrictive environment;
- (3) the services are provided in a coordinated and collaborative manner by the key “stakeholders”; and
- (4) positive academic and non-academic benefits are demonstrated.

Moreover, the school is entitled to a presumption that the educational plan established by the IEP is appropriate, and the party attacking the IEP bears the burden of proof to demonstrate its inappropriateness. *Schaeffer v. Weast*, 546 U.S. 49 (2005); *Salley v. St. Tammany Parish Sch. Bd.*, 57 F.3d 458 (5th Cir. 1995), citing *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1290-1291 (5th Cir. 1991).

Development of the IEP

Teacher B gathered data using the ***(***)*, a criterion-based instrument. This information was specific to Student about his strengths and weaknesses and showed the relevant patterns in depth. One could hardly fault use of this educational tool in this context. It did exactly what it was supposed to do. It provided detailed information about Student’s skills and areas of need. Teacher B used that information to develop the goals and objectives that were presented to the ARD committee for approval. Petitioner quibbles with the explanation provided by Teacher B to Parent, and that Parent does not understand it. While regrettable, Parent’s failure to understand would not invalidate the instrument or the results derived from it.

Petitioner also challenges the goals and objectives in the IEPs, that they are not specific or measurable. If an objective identifies that a child will perform a specific act 4 out of 5 times he has the opportunity, and then states that by Date X he will be doing that 40% of the time, that is measurable. Stated another way: 40% of the times that he is being graded, does he get 4 out of 5 acts correct? By Date Y, the level of mastery moves higher, to 50%. During 50% of the times that he is being measured, does the student perform 4 out of 5 times correctly? Those are measurable objectives.

Is it arbitrary to start at 20%, one of the criticisms from Petitioner? Measurement must begin somewhere, and Teacher B’s selection of 20% as the starting point for most objectives seems reasonable on its face. Without any evidence to dispute the reasonableness of Teacher B’s explanations of how, where, and why she used the

information she did as the basis for drafting the goals and objectives to Student's IEP, Petitioner's complaints must be rejected.

Least Restrictive Environment

Much of Petitioner's focus during the hearing was on the provision of services to Student in the general education setting. The decision to move Student to Life Skills occurred with good reason, even though Parent disagrees. In *Daniel R.R. v. State Bd. Of Educ.*, 874 F.2d 1036 (5th Cir. 1989), the Fifth Circuit devised a two-part test to determine whether LRE has been complied with:

First, we ask whether the education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. *See* § 1412(5)(B). If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second whether the school has mainstreamed the child to the maximum extent appropriate. *See id.* A variety of factors will inform each state of our inquiry; the factors that we consider today do not constitute an exhaustive list of factors relevant to the mainstreaming issue. Moreover, no single factor is dispositive in all cases. Rather, our analysis is an individualized, fact-specific inquiry that requires us to examine carefully the nature and severity of the child's handicapping condition, his needs and abilities, and the schools' response to the child's needs.

Daniel R.R., 874 F.2d at 1048. The answer to the first question, whether Student can be educated in the regular classroom with the use of supplemental aids and services, in this case, based on the evidence, is no. Behavior is not an issue for this student. Full-time inclusion was tried without success. Providing a paraprofessional would not have changed that outcome, contrary to Petitioner's argument.

Under Petitioner's proposed scenario, *i.e.*, the provision of a 1:1 dedicated paraprofessional to Student full-time in regular education, the only way that Student would have been successful would have been to import the entire Life Skills classroom into the regular education classroom, including the procedures, the pace, the structure, the bucketful of manipulatives, the environment, etc. – a feat that defies common sense.

The second question looks at what opportunities the Student has to interact with typical children outside the special education setting. In this case Student participated in the general education classroom for almost half his day. He gained access to the same activities and special events as the rest of the children. Perhaps the truest measure, though, is that of acceptance. As Teacher A testified, "The kids in my class love him. He's part of our family."

According to the analysis of *Daniel R.R.*, the least restrictive environment for Student is being met by Respondent in the education placement. He is mainstreamed to the maximum extent appropriate.

Respondent's FIE and the October 26, 2009 Report

Respondent demonstrated that its FIE met all the requirements for acceptability. The appropriate instruments were selected. They are valid and reliable instruments. They were administered by qualified persons in accordance with the instructions by the assessment producers. They were given to Student in his native language. They were likely to yield accurate information. The instruments were used for the purpose they were

intended. As to the instruments assessing intelligence, materials were used that assessed specific areas of educational need and not just a single, general intelligence quotient. All of the persons administering assessments were trained and knowledgeable.

The report recommended that standards for determining passing grades and maintaining extracurricular eligibility should be based on revised grading criteria for the ***curriculum, and based upon the level of mastery criteria on the IEPs for Student.

Petitioner failed to present any evidence to challenge the validity of Respondent's testing in any way. Petitioner disagrees with the results but presents nothing to contradict the conclusions drawn from Respondent's evaluations. Accordingly, Respondent's assessments prevail.

Removing the Mental Retardation Eligibility Classification

Petitioner seeks to remove the classification that Respondent added in November 2009. Because it is Petitioner who is seeking to overturn the classification, and therefore is the party seeking relief under the IDEA, Petitioner bears the burden of proof on this matter. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 535-537 (2005). In *Schaffer* the Court stated, "a party attacking the appropriateness of an IEP established by a local educational agency bears the burden of showing why the IEP and the resulting placement were inappropriate under the IDEA."

When Student entered the 2009-2010 school year, the *** eligibility classification was still available to him since he had not yet reached his *** birthday. By definition, however, the *** eligibility could no longer be used for him as soon as he hit that *** birthday under Texas law. See 19 TAC § 89.1040 (c) (13). The suspicion of mental retardation was already in the picture – as shown in several exhibits, and in the previous testing done as early as 2006.

It would not be appropriate to use the OHI (Other Health Impaired) eligibility classification for Student on the basis of his medical diagnosis, simply because in his case, the Down Syndrome does not affect his educational programming. There has been no evidence that he has suffered any ill effects due to anything that has a direct nexus to Down Syndrome. He may have been *** in class earlier in the school year, but so were other *** year olds who got *** during the day. Once he was changed into the Life Skills class, the *** in class stopped.

Individualized versus Stereotypical

Petitioner stressed the stereotypical characteristics of Down Syndrome throughout the hearing. A number of the issues presented by Petitioner require a balance between the unique needs of Student as an individual and his medical diagnosis of Down Syndrome. IDEA itself and the accompanying federal regulations and state provisions do not recognize Down Syndrome as a separate category for special education eligibility purposes. In fact, the first of the four *Michael F.* factors examines whether the program is *individualized* on the basis of the student's assessment and performance.

Thus, to the extent that a program would be built upon characteristics generalized to persons with Down Syndrome, such a program would not meet the first *Michael F.* factor. Into this category belongs the issue about sign language. Although it may be useful for Student and his family to learn sign language, it is not a violation of FAPE if Respondent does not provide the training to the entire family.

The evidence in this case showed the Respondent used pictures and other visually stimulating methods to enrich Student's educational experience. It would be incorrect to conclude that only verbal communication was being used with Student during his school day. Regardless of terminology – whole language, total communication, or anything else – Respondent has been aware that an enriched program works best for Student and has worked toward that end.

Concerning Petitioner's complaint about staff development, it might be useful if Respondent provided training to its staff about Down Syndrome, but it is not a violation of FAPE that it did not.

Procedural Complaints

Petitioner complained about progress reports, receipt of records, and participation at ARD meetings. The law is clear in this area. Unless there is a loss of an educational opportunity, there is no violation of FAPE where procedural violations alone are concerned. *Adam J. v. Keller ISD*, 328 F.3d 804, 812 (5th Cir. 2003). Parent participated in every ARD meeting, a fact abundantly clear from the record in this case. The advocates were active on Parent's behalf as well. Whatever complaints Petitioner may have, they do not rise to the level of a loss of FAPE.

VI. CONCLUSIONS OF LAW

After due consideration of matters of record, matters of official notice, and the foregoing findings of fact, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following conclusions of law:

1. Student is eligible for special education services under the IDEA under the following categories: mental retardation, speech impairment. 20 U.S.C. §1401 (3) (A); 34 C.F.R. §300.8 (c) (6), (11); 19 TEX. ADMIN. CODE § 89.1040 (c) (5), (10).
2. Petitioner bears the burden of proof with respect to its claims in this case. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 535-537 (2005).
3. Petitioner did not meet his burden of proof to demonstrate the program provided by Respondent for the 2009-2010 school year was inappropriate. *See Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
4. Petitioner did not meet his burden of proof to demonstrate the eligibility determination by Respondent is inappropriate.
5. There were no procedural violations that rose to the level of a violation of FAPE. *Adam J. v. Keller ISD*, 328 F.3d 804, 812 (5th Cir. 2003).
6. Respondent bore the burden of proof to demonstrate that the evaluations it conducted in October 2009 on Student were appropriate.
7. Respondent met its burden of proof. Consequently, Respondent is not required to provide independent evaluations to Petitioner in the areas of assistive technology, occupational therapy, speech therapy, and full and individual evaluation.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the relief sought by Petitioner at the conclusion of the Due Process Hearing on June 2, 2010, is DENIED. Finding that the public welfare requires the immediate effect of this Final Decision, the Hearing Officer makes it effective immediately.

SIGNED this 19th day of July 2010.

Lucretia Dillard
Special Education Hearing Officer