

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

V.

HOUSTON INDEPENDENT
SCHOOL DISTRICT,
Respondent.

§ BEFORE A SPECIAL EDUCATION,
§
§
§ HEARING OFFICER
§
§
§ FOR THE STATE OF TEXAS

DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

I. STATEMENT OF THE CASE

Petitioner, Student *b/n/f* Parent (“Petitioner” or “Student”), filed a Request for Due Process Hearing (“Complaint”) with the Texas Education Agency (“TEA”), requesting a Due Process Hearing pursuant to the Individuals With Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. §1400 *et. seq.*, contending that Respondent, Houston Independent School District (“Respondent” or “HISD” or “District”) denied Student a free, appropriate public education (“FAPE”) in the following particulars:

1. Respondent failed to provide Petitioner one-on-one instruction for school year 2010-11 until April 2011;
2. Petitioner failed to make any progress on student’s academic goals as evidenced by student’s failure to accomplish any short term objectives;
3. Petitioner lost mastered skills from school year 2009-10; and
4. Respondent failed to provide the Petitioner with an appropriate individual education plan (“IEP”).

Because Petitioner no longer resides within the jurisdictional boundaries of HISD, Petitioner seeks compensatory services, commensurate with the period of time HISD failed to provide Petitioner with a free, appropriate public education (“FAPE”).

II. PROCEDURAL HISTORY

Petitioner filed petitioner’s Complaint with TEA on June 15, 2011. On June 16, 2011, TEA assigned the case Docket No. 241-SE-0611 and assigned the matter to the undersigned Hearing Officer. On June 17, 2011, the undersigned Hearing Officer sent the Initial Scheduling Order to the parties stating that the pre-hearing telephone conference would convene on July 5, 2011, that the Due Process Hearing would take place on July 29, 2011, and that the Decision would issue by August 29, 2011.

On July 5, 2011, the parties convened the pre-hearing telephone conference. In attendance were the following: 1) Petitioner’s father, appearing *pro se*; 2) Mr. Hans Graff, counsel for Respondent; 3) the undersigned Hearing Officer; and 4) the court reporter, who made a record of the telephone conference.

The parties discussed the issues and tentatively re-scheduled the Due Process Hearing for August 25-26, 2011.¹

During the pre-hearing telephone conference, the parties stated that they had waived the Resolution Meeting and were contemplating mediation.

On July 15, 2011, the undersigned issued the Second Order Scheduling Due Process Hearing, which maintained the hearing dates of August 25-26, 2011, scheduled the Disclosure Deadline for August 18, 2011, and extended the Decision Deadline to September 26, 2011. Also on July 15, 2011, Mr. Michael O'Dell made his appearance as legal counsel for Petitioner.

The parties made their Disclosures timely and the Due Process Hearing convened on August 25, 2011, and concluded on August 26, 2011. Both parties introduced documentary evidence; Student called one (1) witness; HISD called six (6) witnesses. Both parties conducted cross-examination of the witnesses.

During the hearing, Student was represented by counsel, Mr. O'Dell. Also in attendance throughout the hearing was Petitioner's father. HISD was represented by counsel, Mr. Graff. Also in attendance throughout the hearing was ***, Senior Manager for Special Education Programs in HISD.

At the conclusion of the hearing on August 26, 2011, the parties and Hearing Officer agreed to a post-hearing schedule: the parties would file their post-hearing briefs on, or before, September 26, 2011, and the undersigned would issue the Decision on, or before, October 7, 2011. These deadlines were subsequently modified by agreement: the parties would file their post-hearing briefs on, or before, September 27, 2011, and the undersigned would issue the Decision on, or before, October 15, 2011.

III. FINDINGS OF FACT²

1. HISD is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing FAPE under IDEIA and its implementing rules and regulations.
2. Student is a ***-year old child who is eligible to receive special education and related services as a student with autism and a speech impairment ("SI") (P.2.2; R.13.374-75). Student was eighteen (18) months old when student began receiving Occupational Therapy ("OT") and Speech Therapy ("ST") in ***. At age two-and-one-half (21/2), Student began receiving Applied Behavior Analysis ("ABA") therapy, twelve (12) hours per week, until Student's family moved from *** to *** in 2009 (T.I.37-39 & 43). Student was *** years old at the time (R.1.480).

*** School District (***) : School Year 2009-10:

¹ Student's father expressed concern regarding: 1) Respondent's failure to file a written Response following the filing of the Complaint; and 2) the continuance of the hearing to August 25-26, 2011. HISD stated that it had provided the statutory Response to Petitioner during, and following, the last meeting of Student's Admission, Review, and Dismissal Committee ("ARDC"), and that a continuance of the July 29, 2011, Due Process Hearing was necessary due to counsel's schedule and the summer break for teachers. Petitioner requested time to meet with legal counsel before agreeing to the continuance of the July 29, 2011, hearing, which was granted. No subsequent discussions occurred related to either issue.

² References to the Due Process Hearing Record are identified as follows: "T.I.#" or "T.II.#" refers to the Certified Court Reporter's Transcription of testimony made on August 26 and 27, 2011, and the numbers following the volume designation refer to the pages within the particular volume of testimony. "P.#.#" refers to Petitioner's Exhibits by number and page; "R.#.#" refers to Respondent's Exhibits by number and page.

3. In summer 2009, Student enrolled in the special day *** classroom at *** in the *** School District where student participated in a language-based Special Day Class for students with significant language, cognitive, and social needs (R.1.486). By May 2010, Student was manifesting solid academic skills; student was able to decode at the *** level (***); student could tell time to the ten-minute increment and name the value of all coins; student could count by 2's, 5's, 10's, and 25's to 100; student could add two-digit numbers with regrouping and subtract two-digit numbers without regrouping; student could print legibly, although student needed reminders to use a finger space between words; and student was working on creating a sentence in response to a question or picture (R.11.460).
4. In May 2010, *** School District conducted Student's Triennial Evaluation:
 - a. The school psychologist observed Student over several days, across multiple venues. Student manifested certain behaviors consistently: 1) inattentiveness and poor eye contact; 2) compliance with adult requests, although often with a physical prompt; 3) unintelligible vocalizations; 4) inappropriately timed displays of affection; 5) smiling at internally generated stimuli; 6) rocking and smiling; 7) lack of imitation of gestures; 8) yelling, crying when asked to do things student did not want to do; 9) use of simple verbal requests or statements; and 10) memorization and repetition of song fragments and movie sound effects (R.1.481).
 - b. The school psychologist assessed Student's cognitive functioning by administering the Peabody Picture Vocabulary Test-Revised and the Beery-Buktenica Developmental Test of Visual-Motor Integration ("VMI), Visual Perception, and Motor Coordination:
 - 1) The Peabody assessed Student's receptive vocabulary, which placed student *** percentile, with an age equivalency of ***. The assessor noted that the significance of this assessment was Student's ability to engage and follow directions (R.1.482).
 - 2) The Beery assessed Student's visual motor development. On the VMI Student was shown various designs and asked to copy them, a task that Student performed very well. Student's overall performance was in the average range with a standard score of *** which placed student in the *** percentile.
 - 3) The Visual Perception assessment asked Student to identify shapes of increasing difficulty. Student scored in the average range with a standard score of ***, which placed student in the *** percentile.
 - 4) On the Motor Coordination, Student was able to trace shapes of increasing difficulty, achieving a standard score of ***, which placed student in the *** percentile. These results indicated that Student has the fine and visual motor skills necessary to interpret visual information, and these abilities are similar to students of student's own age (R.1.482-83).

The examiner attempted to administer the Universal Nonverbal Intelligence Test ("UNIT") to obtain Student's overall nonverbal problem-solving abilities, but was unable to do so (R.1.483).

- c. Student's Adaptive Functioning was assessed through the Vineland-II Adaptive Behavior Scales, which is a questionnaire that assesses the ability of an individual to perform daily activities required for personal and social sufficiency in the areas of communication, daily living, socialization, and motor skills. The questionnaires were completed by Student's parents and teacher, which revealed that Student's Adaptive Behavior Composite scores fell in the low range of adaptive functioning, signaling that Student is significantly impaired across all functional domains (R.1.483).
- d. *** Speech-Language Pathologist administered the Clinical Evaluation of Language Fundamentals-Fourth Edition ("CLEF-4") and the ***:
- 1) The CLEF-4 is used to identify, diagnose, and determine a student's language and communication skill levels, to pinpoint a student's strengths and weaknesses, and to make recommendations for intervention and accommodations in the classroom. Student was unable to complete this assessment. Student's performance indicated a severe language disability in the areas of receptive and expressive language skills (R.1.488).
 - 2) The *** revealed that Student was able to correctly point to pictures of objects when verbally given their function. Student was able to correctly identify pronouns and negatives, but student could not follow multiple step directions.
 - 3) Student manifested the following language skills: an ability to request items, demonstrate intelligible speech, greet adults, follow simple directions, and learn vocabulary through direct instruction. Student continued to demonstrate severe deficits in receptive, expressive, and social language skills (R.1.490).
- e. *** administered the Assessment of Basic Language and Learning Skills ("ABLLS"), which indicated that Student had many strengths and was able to: 1) take objects and reinforcers from an adult, as well as work for reinforcing items; 2) match pictures and objects, as well as completing puzzles with multiple connecting pieces; 3) imitate gross motor movement with legs, feet, arms and hands; 4) imitate words and phrases verbally and blend words together; 5) use three (3) words to request items and objects; 6) label items when told their function, feature, or class; 7) fill in words from songs and phrases as well as name animals when given their sounds; 8) use proper syntax and grammar in most situations; 9) play independently both indoors and outdoors with preferred items; 10) sit appropriately and attend to a teacher in a small group; 11) generalize new skills with minimal verbal prompts; 12) read at a *** grade level; 13) add with regrouping and subtract double digits without regrouping; 14) write sentences with capitals and punctuation; 15) spell many words from memory; 16) complete most dressing and grooming activities; 17) drink from a cup and eat with a fork and spoon; 18) independently toilet; and 19) complete many gross and fine motor tasks.

However, the ABLLS indicated that Student has difficulties in: 1) following a multiple component sequence instruction and selecting non-examples; 2) touching objects in a sequence when verbally asked; 3) requesting items that were not necessarily what student wanted; 4) asking for help in appropriate situations; 5) following simple rules for certain games; 6) interacting with peers without adult facilitation; 7) working independently on academic tasks; 8) answering "what" and "where" questions about a short reading passage; 9) zipping or fastening buttons and straps; and 10) hopping, galloping, bouncing a ball, or doing jumping jacks (R.2.495-98).

- f. *** also administered an OT Evaluation (R.3.492-94), which found that while Student had motor skills that were functional for classroom tasks, student displayed delayed gross motor skills. The examiner recommended OT to support Student's gross motor skills and further refine student's fine motor skills (R.3.494).
5. On May 18, 2010, Student's IEP Team met to discuss student's triennial assessment and to develop student's program and placement for implementation in *** School District (R.11) during school year 2010-11.³ The IEP Team found that Student continued to qualify for special education and related services in the areas of autism and SI. The Team noted that Student had met many of student's 2009-10 goals and those that had not been mastered would be continued. The Team discussed issues with Student's behavior and its implications with student's learning. Student's safety was a major concern based upon student's tendency to wander, especially during transitions, and student's inability to gauge student's safety when unattended. The Team concurred that Student needed constant supervision during transition times.
6. The May 18, 2010, IEP Team additionally discussed Student's tantruming when student does not want to comply with directives. Student will scream, flop to the floor, and slip out of student's chair at such times. The Team agreed that Student needed a highly trained autism/behavior aide to help in the classroom, during transition, and in the home. Because Student required a highly structured teaching environment, and mainstreaming during academics previously had proven difficult, Student would mainstream weekly with general education peers for non-academic subjects (R.11.473). The Team noted also that a) Student should increase student's peer engagement during the next school year; b) Student learned best with one-on-one instruction in acquiring new skills with generalization of such skills using a different model, such as Pivotal Response or Floortime or TEAACH; c) Student worked best with a token system and could pick what student wanted to earn; and e) Student worked well with a typical peer in turn-taking games (R.11.478).
7. Student's May 18, 2010, IEP Team developed goals and objectives in the following areas of need: a) behavior (one (1) goal, three (3) short-term objectives); b) social skills (one (1) goal, three (3) short-term objectives); c) reading (one (1) goal, three (3) short-term objectives); d) attending skills (one (1) goal, three (3) short-term objectives); e) self help (one (1) goal, three (3) short-term objectives); f) math (four (4) goals, three (3) short-term objectives per goal); g) written language (one (1) goal, three (3) short-term objectives); h) expressive language (two (2) goals, three (3) short-term objectives per goal); and i) gross motor (one (1) goal, three (3) short-term objectives) (R.1.11, 466-73).
8. Student's May 18, 2010, IEP Team provided for the implementation of these goals and objectives during school year 2010-11 as follows: a) group setting in the Special Day Class five (5) times a week, two hundred eighty (280) minutes each day; b) individual speech and language services, one (1) time per week, thirty (30) minutes per session; c) group speech and language services, one (1) time per week, thirty (30) minutes per session; d) group OT services, one (1) time per week, sixty (60) minutes per session; e) individual behavior intervention services, two (2) times per week, one hundred twenty (120) minutes per session in the home; and f) individual behavior intervention services, one (1) time per week, one hundred twenty (120) minutes per session in the home (R.11.466).

³ *** IEP Team is synonymous with Texas' ARD Committee.

9. Student's May 18, 2010, IEP Team reached consensus (R.11.477).

Houston Independent School District: ESY 2010 and School Year 2010-11:

10. Student's family moved to Houston in summer 2010 *** (T.1.39). Student's ARDC convened a Transfer ARD on June 22, 2010, to review Student's records from *** (P.1; R.12). The ARDC agreed upon a temporary placement at *** in the Incremental Program for Extended School Year Services ("ESY") and a follow-up ARDC meeting that would occur within thirty (30) days to complete Student's Annual ARD. The ARDC agreed to provide one (1) hour of OT services during ESY and then consider a re-evaluation for OT services at the Annual ARD (P.I.5; R.12.450).
11. On August 20, 2010, Student's Annual ARDC met to finalize Student's program and placement for school year 2010-11. Student's parents voiced concerns that Student appeared to be regressing during ESY at *** (P.2.55; T.I.58 & 61). The ARDC acknowledged that Student had difficulties transitioning because student had to work with different teacher aides, not all of whom were trained in working with Student (P.1.4). Student's OT reported that Student had received the one (1) hour of OT services in the summer to assist classroom personnel in designing and implementing an instructional routine. The ARDC agreed to re-evaluate OT in the first nine (9) weeks of the fall semester and to provide two and one-half (2 1/2) hours of integrated and collaborative services per nine (9) weeks until completion of the OT re-evaluation and review by the ARDC (R.13.428). The ARDC also recommended an integrated report for testing in speech and academics along with the OT re-evaluation.
12. The ARDC agreed to use the *** IEP Team's IEPs to the extent they were consistent with the Texas Essential Knowledge and Skills ("TEKS").
13. For the most part, the ARDC adopted Student's Present Levels of Academic Achievement and Functional performance ("PLAAFP"), as stated on the *** May 2010 IEP Team's IEP Report:
- a. Language Arts: Student is able to create one (1) sentence with visual prompts in response to a question or a picture (R.13.376);
 - b. Math: Student is able to tell digital and analog time to the ten-minute increment; Student does not answer questions about what we do at certain times of the day (R.13.378);
 - c. Math: Student is able to name and give the value for all coins and a one-dollar (\$1.00) and a five-dollar (\$5.00) bill; Student is beginning to add different coins to find out the value (R.13.380);
 - d. Math: Student is able to add two-digit numbers with regrouping and subtract two-digit numbers without regrouping (R.13.383);
 - e. Reading: Student is able to answer simple "what" and "where" comprehension questions about a short passage (no more than two (2) sentences) (R.13.384);
 - f. English: Student can answer "what" and "where" questions with a visual about a story read aloud to student (R.13.386);
 - g. Social Studies: Student currently does not interact with student's peers without maximum prompting from an adult (R.13.388);

- h. Social Studies: Student is able to identify and write the days of the week and the months of a calendar (R.13.390);
 - i. Speech Therapy – Language: Student is able to recognize and read sight words, tell time, follow basic one-step instructions, and answer very simple questions (R.13.392);
 - j. Physical Education: Student is unable to kick a ball without swinging student’s leg; Student is able to kick and stop a ball rolled to student while seated in a chair with hands-on physical assistance provided by an adult; Student is resistant to complying with instructions to complete the skill sequence to kicking a ball (R.13.396).
14. The ARDC determined that the least restrictive environment (“LRE”) for Student was placement at *** School in the Structured Learning Class (“SLC”), a self-contained classroom, with one hundred eighty (180) minutes per nine (9) weeks of ST and five (5) hours general education classes per week in non-academic courses: Physical Education, Technology, and Music (R.13.429). The ARDC reached consensus (R.13.430).
15. The August 20, 2010, ARDC completed the Autism Supplement, noting that an autism team would be assigned to go into Student’s classroom. The ARDC a) recommended parent training and specified positive behavior strategies; b) made recommendations for staff/student ratios for acquisition (1:1 to 2:6), fluency (1:1 to 2:6), maintenance (1:6 to 2:24), generalization (1:1 to 2:6), and transition of skills (1: 1 to 2:24) (R.13.418).
16. The August 20, 2010, ARDC specified a variety of Teaching Strategies, including a) Naturalistic Teaching (during recess, field trips, and lunch); b) Structured Learning Strategies, (tasks designed to maximize independence by employing systematic visual supports and organization and visual schedules [a student-specific list, chart, or calendar explaining the order of events from across a specified amount of time]);and c) ABA strategies (task analysis [breaking down a task into individual steps and teaching each step in a systematic manner], prompting/prompt fading [providing assistance to a student to enable completion of goal and decreasing the level of support], consistent classroom routines/expectations [teaching specific expectations and routines], and antecedent and consequence manipulation [altering what happens before and after a behavior to increase the student’s success]) (R.13.421).
17. The August 20, 2010, ARDC conducted a Functional Behavior Assessment (“FBA”) and developed a Behavior Support Plan (“BSP”), which a) targeted tantrum behavior; b) promoted the use of language as a replacement behavior; and c) targeted following two-step directions with a visual (R.13.423-26).
18. HISD completed a Review of Existing Evaluation Data (“REED”) and presented the results to Student’s ARDC at its October 26, 2010, meeting (P.11; R.7). The REED was composed using all data and information from the *** evaluations as well as additional information obtained in HISD. As part of the REED, the District’s Licensed Specialist in School Psychology (“LSSP”) asked Student’s teacher to fill out behavior rating scales, which indicated that the behaviors in the classroom were consistent with those evidenced in ***: Student a) was disruptive and unable to inhibit responses; b) rarely listened; c) was often disorganized in work; d) often overreacted, especially to new situations; e) was tolerated by others; f) rejected responsibility; g) seldom finished, even with guidance; and h) usually disregarded the feelings of others (R.7.319; T.I.198-99).

19. Student's father requested an independent evaluation, asserting that Student was not meeting student's academic goals and that additional data was necessary to determine Student's present levels of academic achievement and functional performance. Student's father questioned whether one-on-one instruction was being used and whether the teacher and aides were actually collecting appropriate data. ARDC tabled this meeting to reconvene on November 1, 2010, after more information could be gathered (R.14.330).
20. Student's ARDC re-convened on November 1, 2010 (R.15). Student's parents presented the ARDC with a list of complaints related to HISD's provision of services to Student: a) Student's teachers were not collecting data as required by student's IEP; b) Student's ARDC was inadequately equipped to consider or amend Student's IEP goals because there were no known present academic levels or the extent of Student's regression; c) Student's ARDC had not placed Student in the LRE, choosing to place Student in a self-contained class without mainstreaming Student with non-disabled peers; d) Student's teachers and providers were not implementing Student's IEPs (R.15.312-13). The ARDC again tabled this meeting to allow for the gathering of new IEP mastery data in all of Student's goals and objectives so that the ARDC could determine Student's current levels of academic achievement and functional performance (R.15.314). The ARDC agreed to re-convene on November 22, 2010.
21. Student's ARDC re-convened on November 22, 2010 (R.16). The Committee reviewed the data collection, noting that Student did well in touch math. The Committee a) developed a plan to mainstream Student into general education math ("Inclusion Math") and to review that placement after a few weeks; b) authorized data collection on Student's group work for four and one-half (4 1/2) weeks and on Student's individual work for four and one-half (4 1/2); c) increased the in-home training hours from eight (8) to ten (10) hours; d) proffered that Student no longer qualified for OT services to meet student's Physical Education goals; e) agreed to have a psychologist observe Student after Christmas and give recommendations to help Student transition between activities and class; and f) agreed to maintain all other services from the August 20, 2010, ARDC (R.17.280-82). Student's father did not agree with the OT determination and requested an OT Independent Educational Evaluation ("IEE"), to which the ARDC agreed. The November 22, 2010, ARDC reached consensus.
22. Student's ARDC met again on March 3, 2011, to review an Assistive Technology Evaluation ("AT"), to discuss OT services and in-home training, and to review Student's progress in Inclusion Math. The math teacher stated that Student had a rough start in the Inclusion Math class and appeared to be over-stimulated, but this problem diminished somewhat over time. The math teacher expressed concerns over the benefit Student had received in this class, asserting that Student did not appear to be grasping concepts, and recommended that Student would be better served in a smaller group setting. Student's father did not agree with this position.
23. Student's father learned at this ARDC meeting that Student had actually been removed from the Inclusion Math class on February 2, 2011,⁴ without ARDC approval or notice to the parents. Student's father requested data on Student's academic progress, to which the ARDC agreed.
24. Student's father stated at this ARDC meeting that student had selected an OT IEE evaluator. Because there was no current OT assessment, the ARDC determined to discontinue Student's OT services until the parents obtained the OT IEE and the ARDC reviewed it. The ARDC

⁴ This ARDC originally stated that Student's Inclusion Math ended February 9, 2011. At the subsequent ARDC on March 9, 2011, this information was corrected to state that Student's Inclusion Math ceased on February 2, 2011.

reviewed the AT report in the area of Augmentative Communication dated February 24, 2011. The ARDC recommended that Student receive a speech-generating device and that the family receive training on the device. The ARDC agreed to provide ten (10) hours of in-home training (R.17.280-81).

25. Student's ARDC met again on March 9, 2011, to review Student's progress. The ARDC discussed the removal of Student from Inclusion Math on February 2, 2011, the decision not to send Student to Inclusion Math on the days the teacher was absent, and the appropriate remedies available for such action. Student's father voiced concern that Student's skills were regressing at an alarming rate; that HISD had not taken a baseline at the beginning of the school year, as requested by the parents; that no other assessments had been done all year to enable the ARDC to quantify Student's growth or regression; and that Student's teachers continued to fail in providing the parents with data collection sheets that provided more than mere summation. The ARDC discussed whether the present levels of performance that the Committee accepted in August 2010 from *** were correct. The ARDC agreed to continue Student in the Inclusion Math for an additional six (6) weeks; to implement new data collection sheets; and to provide updates to Student's parents every three (3) weeks. The ARDC could not reach agreement on the appropriate compensatory services for the lost Inclusion Math time (R.18.175-176). The ARDC did not reach consensus and agreed to re-convene.
26. Student's ARDC re-convened on March 22, 2011, to discuss compensatory education services for Student's loss of Inclusion Math services, regression, and HISD's failure to obtain and document baseline data and performance observations of Student's current level of academic performance. The ARDC agreed to the following compensatory services: a) two (2) hours daily of direct one-on-one instruction to Student after school for nine (9) weeks; b) two (2) hours of Saturday tutorials for nine (9) weeks; c) two (2) one-hour sessions per day of one-on-one instruction by a Special Education Teacher to work towards mastery of Student's current IEPs in Math, Reading, and Language.; d) two (2) assessments of Student by using the Brigance Comprehensive Inventory of Basic Skills, with the first assessment's being administered immediately to obtain baseline data and the second assessment's being obtained prior to the end of school to measure Student's end-of-year growth. The ARDC hoped to use this data to develop an appropriate ESY program and to determine whether additional compensatory services were needed. The ARDC reached consensus (P.6.12-13 & 15; R.19.144-45).
27. HISD administered the first Brigance on March 30, 2011, to ascertain Student's baseline data (R.10.83-94). The following scores were reported:
 - a) Listening Vocabulary Comprehension – No Response;
 - b) Listening Comprehension Grade Placement Test – No Response;
 - c) Word Recognition Grade Placement Test – Grade *** (recognized 6/10 words);
 - d) Oral Reading – Lower *** (read passage - 97% accuracy, no more than one (1) error);
 - e) Reading Comprehension Passages – Below *** (read passage; responded to 1/5 questions correctly; no response to other questions);
 - f) Basic Sight Vocabulary – Read 251/400 words;
 - g) Spelling – Grade *** (spelled 4/5 words accurately);

- h) Sentence Writing – No Response (constructing/writing a sentence given a word bank);
 - i) Computational Skills Grade-Placement Test – Below *** (2/4 problems correct on *** grade level; able to add single-digit numbers and double digits + single digit; unable to subtract single-digit numbers and double digits – single digit numbers);
 - j) Problem Solving Grade-Placement Test – No Response;
 - k) Whole Number Computation – Added up to three (3) digits without regrouping (cueing required); subtracted two-digit numbers without regrouping (prompting required);
 - l) Addition of Whole Numbers – Grade *** (adds two (2) digits without regrouping with cueing);
 - m) Subtraction of Whole Numbers – No Response;
 - n) Recognizes Money – Grade *** (identified the names for a penny, nickel, dime, and quarter); Grade *** (identified value of one cent (\$.01) and ten cents (\$.10) when given three (3) choices).
28. Student's ARDC met again on May 3, 2011 (P.7.3). The Committee discontinued Student's Inclusion Math and after-school tutorials at the request of the parents, who stated that Student was making no progress in regular education. Student would receive the one-on-one tutoring after school-wide testing was completed and student would continue with Saturday tutorials until May 21, 2011. The ARDC reached consensus (R.20.122).
29. HISD administered the second Brigance on May 24, 2011 (R.10.91-92). The following scores were reported, with an asterisk (*) noting areas of improvement from the first Brigance on March 30, 2011:
- a) Listening Vocabulary Comprehension – No Response;
 - b) Listening Comprehension Grade Placement Test – Below *** ;
 - c) Word Recognition Grade Placement Test – Grade ***;
 - d) *Oral Reading – Upper *** ;
 - e) Reading Comprehension Passages–Below *** (answered 1/5 questions correctly);
 - f) *Basic Sight Vocabulary – Read 272/400 words;
 - g) Spelling – No Response;
 - h) Sentence Writing – Below *** (incomplete sentences);
 - i) *Computational Skills Grade-Placement Test – Grade *** (4/4 correct);
 - j) Problem Solving Grade-Placement Test – No Response;
 - k) *Whole Number Computation – Grade *** (addition up to three (3) digits without

regrouping; up to two (2) digits with one (1) regrouping–prompting/cueing required; Grade *** (subtraction up to two (2) digits without regrouping–prompting/cueing required);

- l) Addition of Whole Numbers–Grade *** (two (2) digits without regrouping with cueing/prompting);
 - m) *Subtraction of Whole Numbers – Grade *** (up to three (3) digits without regrouping; up to two (2) digits with one (1) regrouping – prompting/cueing required);
 - n) *Recognizes Money – Identifies the names for a penny, nickel, dime, quarter, and dollar; identifies value of one cent (\$.01) and ten cents (\$.10).
 - o) *Subtraction Facts – Subtraction of facts up to 8-6;
 - p) *Total Values of Groups of Coins – Adds cents and nickels; adds cents, nickels, dimes, and quarters up to 91 cents (\$.91).
30. Student’s ARDC began the Annual ARD on May 25, 2011. The ARDC acknowledged that Student had not received speech services during the prior grading period due to the illness of the speech therapist. The ARDC offered to provide compensatory services for such loss.
31. The ARDC reviewed the Brigance assessments. The examiner reported that Student was making progress in math; student was able to do single and double digit subtraction and addition with verbal prompting; student could also regroup with verbal prompting and visual supports; Student was not able to work on addition and subtraction on the same worksheet without verbal prompting. Student was demonstrating the ability to tell time to five (5) minute increments; student was able to answer “wh” questions about time with 100% accuracy; Student was at 54% regarding student’s money IEP objective; student was able to do two (2) and three (3) digit addition with regrouping independently; student was able to self-correct student’s work on addition independently.
32. The ARDC reported that Student’s behaviors increased in aggression. The Committee decided to target aggression and remaining in assigned area. Student’s father requested copies of data collections on student’s goals and objectives (R.21.102-05).
33. The ARDC discussed the AT communication device. It did not work when it was first delivered to the parents. The device was now working but HISD had done no training on the AT communication device.
34. Student’s ARDC re-convened on June 1, 2011, to continue the Annual ARD and to discuss ESY services (P.8; R.22.79-80). The ARDC reviewed Student’s speech goals and objectives; however, there was no progress data available since October 2010. Student’s speech therapist had been out on medical leave since March 2011.
35. The ARDC developed goals for ESY and proposed three (3) hours of compensatory speech. Student’s father disagreed and requested one-on-one instruction during ESY. The ARDC also discussed the parents’ concern that Student had regressed over the year and their concern that HISD was not providing Student FAPE. The ARDC concurred that Student manifested some regression when compared to the baseline determined by ***, and adopted by HISD, and the results of the Brigance (T.1.115 & 124). Noting the success of the compensatory program

in spring 2011, Student's father requested that ESY provide Student with one-on-one tutoring, with additional hours to compensate for loss of skills and failure to provide speech therapy. The ARDC offered ESY in a SLC, with three (3) hours of compensatory speech therapy. Student's parents agreed to the proposed ESY but insisted on additional one-on-one instruction to address the loss of skills and speech therapy services. The ARDC tabled the meeting because it did not reach consensus (R.22.79-80).

36. Student's ARDC re-convened on June 8, 2011. The ARDC again recommended ESY in a small group SLC with three (3) hours of compensatory speech; Student's father again requested one-on-one instruction in addition to ESY. The ARDC again did not reach consensus (R. 23.62-63).
37. Student's parents filed their Complaint with TEA on June 15, 2011.
38. Student's ARDC re-convened on June 22, 2011 (R.24). The purpose was to review the OT IEE dated February 25, 2011. The ARDC accepted the report. The Committee reviewed proposed IEPs for math, language arts, social studies, and reading for school year 2011-12. The Committee agreed to provide Student with two and one-half (2.5) hours of OT services per nine (9) weeks for help on student's goals and objectives in language arts, math, reading, social studies. The ARDC also agreed that the OT would provide strategies to Student's teachers a) to decrease unwanted sensory behaviors; b) increase attention to task; c) to identify when Student needs to calm himself; and d) to provide sensory equipment to assist Student in calming himself. The ARDC reached consensus (R.24.42-43).
39. Student attended ESY until the last week of ESY when student's family withdrew student from HISD and moved back to ***.
40. Student's autism ranges from moderate to severe (T.I.202-03). Student has significant problems in the areas of communication, generalization, and transfer of skills (T.I.202-03; T.II.11-12).
41. Student's relocation from *** to Texas, student's move into a new home, the enrollment in a different school (both in summer 2010 and fall 2010), and *** impacted Student's progress and generalization of skills (T.1.217-18; T.II.12-13).
42. Student's HISD IEPs did not require one-on-one services for all teaching methods. Student's IEPs provided a range of staff-to-student ratios, depending upon the services to be delivered, *i.e.*, acquisition, fluency, maintenance, generalization, and transition of skills (R.13.418).
43. The ABA Discrete Trial Program, utilized by *** with Student, may produce progress when the teacher and student are working one-on-one; however, this methodology does not lead to generalization, and transfer, of skills into other settings (T.II. 25-26).
44. Student's IEP required delivery of services using a variety of teaching methodologies: a) Naturalistic Teaching; b) Structured Learning Strategies; and c) ABA Strategies, which differs from the discrete trial program. The evidence established that the Student's teachers and aides implemented these various strategies.
45. Student's behaviors fluctuated over the school year. In the beginning of the school year, Student's behaviors were extreme and severe. By mid-term, student's behaviors were generally better. By the end of the school year, Student's behaviors had worsened. While

student's elopement tendency seemed to have diminished, student's aggression had worsened. Student's teachers worked with student on antecedent and consequence manipulation to address student's tendency to tantrum if student perceived a task to be too difficult. The teachers gave Student easier work, to evade the tantrums, and gradually increased the difficulty to achieve the target behavior. This adjustment to Student's program was appropriate.

46. Student's teachers collected data in a variety of ways on Student's activities. This data collection was not the type seen in ABA Discrete Trials, as expected by Student's parents. Data was collected with work samples and teacher's notations on the work; data sheets were developed, revised, and utilized upon request by the ARDC and Student's teachers. This method of data collection was appropriate.
47. Student's performance academically and behaviorally fluctuated over the course of the year. Student appeared to regress in areas of mastery while concomitantly failing to achieve student's goals and objectives by the end of the school year. However, Student did make progress in many areas. Student's failure to achieve all IEP goals and objectives does not mean that HISD denied student FAPE.
48. HISD removed Student from the Inclusion Math on February 2, 2011; HISD failed to provide Student with Inclusion Math during class periods when the math teacher was absent. These actions were done without ARDC approval or written notice to Student's parents. Accordingly, HISD failed to provide Student with an appropriate math program during these times of loss. HISD offered and provided appropriate compensatory services for this loss of education. The evidence established that Student made progress under the compensatory services program.
49. HISD failed to provide Student with speech therapy from March 2011 to the end of the school year. HISD offered Student three (3) hours of compensatory speech therapy. However, Student's parents declined this offer.
50. The evidence failed to establish that Student's placement in *** School's SLR was more restrictive than Student's placement in ***.
51. The evidence established that Student's placement in *** School's SLR was the LRE for Student.
52. The evidence failed to establish that Student's teachers did not implement Student's IEP.
53. The evidence failed to establish that Student's teachers created data, work samples, and graphs that presented a false picture of Student's work and achievement.
54. The evidence failed to establish that Student received no educational benefit from student's 2010-11 IEP.

IV. DISCUSSION

IDEIA mandates that all state school districts receiving federal funding must provide all handicapped children a free, appropriate, public education. The United States Supreme Court, in *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175 (1982), established a two-part test for determining whether a school district has provided a student FAPE: 1) the school district must comply with the procedural requirements of IDEIA, and 2) the school district must design and

implement a program "... reasonably calculated to enable the child to receive educational benefits." An educational benefit must be meaningful and provide the "basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational benefit to the handicapped child." *Rowley*, 458 U.S. at 200-01. In determining whether a child is receiving FAPE, the *Rowley* Court insisted that the reviewing court must not substitute its concept of sound educational policy for that of the school authorities. *Id.*, 458 U.S. at 206. Although the school district need only provide "some educational benefit," the educational program must be meaningful. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). The educational benefit cannot be a mere modicum or *de minimis*. It must be likely to produce progress, not regression or trivial educational advancement. *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000).

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

1. Student's Individualized Program in the LRE

There is no debate that Student's 2010-11 *** IEPs were adopted by Student's ARDC but modified to be consistent with the TEKS. These IEPs were based upon then-current assessments, which HISD accepted, and contained Student's then-present levels of achievement, which HISD adopted. As the school year unfolded, however, the ARDC modified Student's IEPs as the need was presented, or at the request of the parents, and collected baseline information to compare with Student's progress.

There was, however, debate over what constituted Student's LRE. Student's parents claimed that in ***, Student was successfully mainstreamed into many general education classes. Student's parents argued that student's placement at *** School in the SLC was more restrictive. Based upon this information, which proved not to be correct, Student's ARDC placed student in Inclusion Math, which proved unsuccessful. Certainly, Student's loss of several hours of Inclusion Math, when student was unilaterally withdrawn without ADRC approval, contributed to the failure of this mainstreaming effort. Aside from that, Student's math teacher believed that the effort was one of futility. He saw no benefit to Student while participating in student's class; he felt that the Inclusion Teacher was having to translate everything for Student. When Student was removed from the Inclusion Math and provided one-on-one tutoring, student regained many lost skills. Student's placement in the SLC with peer involvement in non-academic classes was the LRE for Student.

2. Collaborative and Coordinated Development and Delivery of Services

Student's parents are passionately involved in student's education. They were present at every ARDC meeting; they observed student's classroom; they provided all information requested by HISD in a timely manner; they called ARDC meetings when they had concerns; they were articulate and involved in every step of creating, modifying, tweaking, and analyzing Student's IEP program and progress.

Although the parents' perception appears to be that Student's teachers, aides, and ARDC members were less than enthusiastic, or even qualified, the evidence presents a different picture.

HISD was making plans for Student's arrival before student ever reached campus. One of Student's autism specialists met with student's classroom teacher prior to the beginning of school in the fall. She had worked with Student during ESY. She helped the teacher re-arrange the SLC to accommodate the delivery of services and the control of extreme behaviors manifested by Student. Throughout the school year she worked with the teacher on addressing Student's difficulty with transitions, helping refine teaching methods to improve skill acquisition, developing the compensatory services that proved to be appropriate.

The itinerate autism teacher also worked with Student and student's teacher in the SLC as well as providing in-home training to Student's parents. She helped the parents in structuring the home to assist with Student's behaviors, to help student tolerate student's siblings, to minimize student's vocalizations in the home. She likewise provided support for the teacher in the SLC, helping with Student's math, organizational skills, modifying teaching strategies to diminish behaviors, and generally, observing to monitor Student's acquisition of skills.

Student's ARDC was amenable to requests by the parents, such as obtaining data collected by the teachers, modifying the data collection sheets to meet parental approval, providing the OT IEE at public expense, crafting an appropriate compensatory services plan related to Inclusion Math and authorizing one-on-one tutoring in areas of concern espoused by the parents. Student's parents were in agreement with the majority of the ARDC determinations.

The only areas in which Student's IEPs were not appropriately implemented were in a) Inclusion Math, and b) speech therapy.⁵ The Inclusion Math issue was successfully and appropriately addressed by the ARDC and the parents concurred with the compensatory services provided and their success. As to the lack of speech therapy services, Student's ARDC offered three (3) hours of compensatory speech, which equates to the amount of time Student went without services. This offer is appropriate, although the parents have refused to accept it.

3. Student's Academic and Non-Academic Progress

The heart of this case revolves around Student's failure to master all of the goals and objectives established by the *** IEP Team and adopted by the HISD ARDC. The evidence clearly shows that Student did not master student's goals and objectives. While student has made progress under this program, it is not the level of progress expected by the parents, who place the blame for this unacceptable outcome squarely upon Student's teachers. Such blame is misplaced.

Student's parents believe that HISD did not implement the program utilized in ***, which was apparently an ABA Discrete Trials program. While HISD did utilize a form of ABA Strategies with Student, it likewise employed other methodologies, a right this District holds. Districts are not required to use a specific educational methodology merely because a parent prefers it. As long as the methodology meets the unique needs of the student, the District is free to choose its own. *Carlson v. San Diego Unified Sch. Dist.*, 54 IDELR 213 (9th Cir. 2010, unpublished).

In this case, HISD's methodologies met Student's unique needs. While Student did not master student's goals and objectives, student did manifest improvement between fall 2010 and March 2011,

⁵ During the hearing Petitioner also argued that the ARDC had improperly removed OT services on March 3, 2011, until the results of the OT IEE could be reviewed. At that time, Student's parents had already obtained the OT IEE, which was dated February 25, 2011. Student's parents did not present this OT evaluation to the ARDC until the June 22, 2011, ARDC meeting. Accordingly, any request for compensatory OT services is inappropriate.

as well as between March 2011, when the one-on-one tutoring services began, and the end of school.

In fall 2010, Student was able to answer “what” and “where” comprehension questions about a short passage (two sentences) from a *** grade book. In March 2011, Student was able to answer “what” and “where” comprehension questions when presented with four (4) and five (5) sentences from a *** grade level book and student had emerging skills in answering “who” and “when” questions. In fall 2010 Student was able to answer “what” and “where” questions with a visual prompt. In March 2011, Student was able to answer “who”, “what”, “when”, and “where” questions with a visual prompt.

In fall 2010, Student was able to identify the value of coins and one dollar (\$1.00) and five dollar (\$5.00) bills. In March 2011, Student was able to label and add combinations of coins portrayed by coin manipulatives, with support. In fall 2010, Student was able to add two-digit numbers when supported. In March 2011, Student was able to add three-digit numbers with one-to-one adult monitoring. In fall 2010, Student was able to tell digital and analog time to ten-minute increments. In March 2011, Student was able to tell digital and analog time to five-minute increments.

In fall 2010, Student was able to write one (1) sentence in response to a writing prompt with leading questions. In March 2011, Student was able to write two (2) sentences and was emerging with writing three (3) sentences in response to a writing prompt with leading questions.

In fall 2010, Student was able to identify the days of the week and the months of the year, verbally and in writing, with visual prompts and cues. In March 2011, Student was able to identify yesterday, today, and tomorrow both verbally and in writing, with visual prompts and cues.

Student’s parents argue that this is no progress at all because most of the skills manifested in spring 2011 were at, or below, the PLAAFP, as shown on Student’s IEP. HISD asserts that from the first day at *** School, Student was not manifesting the mastered skills set out in the *** IEPs. This could be attributable to many things: a) the skills levels were not accurate in that Student could not generalize these skills; b) the move to Texas, with its attendant stressors, was overwhelming to Student, causing severe behavior problems and communication disruption; c) the nature of autism, which manifests uneven behavioral progress, which then affects learning.

The failure to achieve all IEP goals and objectives is not enough to establish that a student with a disability did not benefit from student’s educational program. Educational benefit for purposes of FAPE means some educational progress; it does not necessarily require that the student reach a particular level of achievement. *M.P. by Perusse v. Poway Unified Sch. Dist.*, 54 IDELR 278 (S.D. Cal. 2010). Here, Student’s providers all testified that Student made progress during school year 2010-11. The assessments likewise establish progress.

IDEIA creates the presumption that a child’s program and placement are appropriate. The burden of proving otherwise inures to the party challenging the program and placement. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Accordingly, Student had the burden of proving that any or all of the delineated issues manifested a denial of FAPE and required any or all of the relief requested. Student failed to carry this burden. Accordingly, Student’s request for relief is denied.

**V.
CONCLUSIONS OF LAW**

1. Student's 2010-11 program and placement were appropriate and provided Student FAPE in the LRE. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
2. HISD failed to provide Student with Inclusion Math services during the periods of time in which a) student was unilaterally removed from the class, and b) student was not allowed to attend the class on the days student's teacher was absent. HISD offered compensatory services to Student, which were appropriate, accepted by the parents, and delivered in their entirety. Accordingly, there is no issue of a denial of FAPE related to the Inclusion Math services.
3. HISD failed to provide Student with speech therapy during the final nine (9) weeks of school year 2010-11. HISD has offered compensatory services to Student in the amount of three (3) hours of speech therapy. This offer has been rejected by the parents. This offer fully compensates Student for the missing speech therapy classes and is appropriate. Accordingly, there is no issue of a denial of FAPE related to the speech therapy services.

**VI.
ORDER**

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

**VII.
NOTICE TO PARENTS**

The Decision of the Hearing Officer is final and appealable to state or federal district court.

SIGNED this 15th day of October 2011.

Deborah Heaton McElvaney
Special Education Hearing Officer

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