

STUDENT, b/n/f PARENTS	§	
	§	BEFORE A
Petitioner	§	SPECIAL EDUCATION
	§	
v.	§	HEARING OFFICER
	§	
NORTHSIDE	§	FOR THE
INDEPENDENT SCHOOL DISTRICT	§	STATE OF TEXAS
Respondent	§	

FINAL DECISION OF THE HEARING OFFICER

Appearances for Petitioner:

Karen Dalglish Seal
Law Office of Karen Dalglish Seal
San Antonio, TX

Appearances for Respondent:

Paula Maddox Roalson
Elvin W. Houston
Walsh, Anderson, Gallegos, Green & Treviño
Houston, TX & San Antonio, TX

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FINAL DECISION OF THE HEARING OFFICER

Statement of the Case

The Petitioner (Student or Child)¹ initiated this action against the Respondent (District or School) under the Individuals with Disabilities Education Act (IDEA), as amended (20 U.S.C. § 1400). The Petitioner complains that the Respondent violated the IDEA because it allegedly:

1. Failed to appropriately identify the Petitioner as a child with a disability.
2. Failed to appropriately evaluate the Petitioner as a child with a disability.
3. Failed to propose an appropriate placement in the “least restrictive environment” (LRE) for the Petitioner.
4. Failed to propose an appropriate “individualized education program” (IEP), including measurable annual goals and special education, related services, and supplementary aids and services, for the Petitioner.
5. Failed to provide a “free appropriate public education” (FAPE) to the Petitioner.²

As relief, the Petitioner asks that the Respondent provide the Petitioner a nonresidential placement at a local private school, including daily transportation between home and the private school. In addition, the Petitioner seeks services as recommended in an “independent educational evaluation” (IEE), reimbursement of out-of-pocket expenses, staff training, and attorney fees and costs.³

Procedural History

The Texas Education Agency (TEA) received the Petitioner’s Due Process Complaint requesting a due process hearing under the IDEA on December 30, 2011. Due to the holiday period, however, the Due Process Complaint was not forwarded to the Respondent and this Hearing Officer until January 2, 2012. The parties participated in the mandatory resolution meeting on January 13, 2012, but were unable to resolve the Petitioner’s complaints.⁴ This Hearing Officer held a series of prehearing teleconferences with the parties. Among other things, the scope of the Petitioner’s complaints was reviewed, discovery disputes were addressed, motions were heard, and the case timetable was established.

The due process hearing was conducted on May 21, 22, and 25, 2012. Altogether, 14 witnesses – including experts for both sides – were called and testified. Altogether, 106 exhibits (in full or in part) were admitted into evidence. For the hearing, the Hearing Officer utilized his authority under the TEA regulations and set time limitations on the Petitioner and Respondent for the presentation of exhibits and the calling of witnesses.⁵ In this Hearing Officer’s determination, such time limitations were reasonable and afforded the Petitioner a fair opportunity to offer and solicit

¹ To protect the privacy of the Petitioner, the Petitioner is also referred to as “Student” or “Child” in this Decision.
² This list is not a verbatim reiteration of the Petitioner’s claims in the Request for Special Education Due Process Hearing. The Petitioner’s complaints have been edited here to succinctly state them for the purpose of this introduction. See Pet’r’s Request for Special Educ. Due Process Hr’g at 1 – 3 (Dec. 30, 2011).
³ With regard to attorney fees, the Respondent objected to any award of fees by this Hearing Officer in a Plea to the Jurisdiction. During oral arguments on the Plea, the Petitioner’s counsel acknowledged this Hearing Officer does not have authority to award fees under the IDEA. This Hearing Officer granted the Respondent’s Plea. Prehearing Conf. Tr. at 9 – 10 (Jan. 27, 2012).
⁴ 34 C.F.R. § 300.510(a).
⁵ 19 Tex. Admin. Code § 89.1185(f).

evidence and testimony to satisfy its burden of persuasion as assigned under *Schaffer v. Weast*, 546 U.S. 49, 57 – 58 (2005).⁶ Subsequent to the hearing, the parties were permitted to submit written closing arguments.⁷

Findings of Fact

Based upon the testimony and evidence taken on the record in this proceeding, this Hearing Officer makes the following findings of fact:

1. The Child qualifies under the IDEA as a child with a disability. The Child has an auditory impairment as well as a speech impairment. (Pet'r Ex. 2 at 8; Resp't Ex. 10 at 2)
2. The Child's auditory impairment is a hearing impairment. The Child has moderately severe to severe bilateral sensorineural hearing loss. (Hr'g Tr. vol. 1, 334-35; Hr'g Tr. vol. 3, 782-83; Resp't Ex. 3 at 19 – 21; Resp't Ex. 81 at 4)
3. The Child's hearing loss is currently stable. (Hr'g Tr. vol. 1, 156, 334-35; Resp't Ex. 81 at 4)
4. The Child's treating professionals do not know whether the Child's hearing loss will further deteriorate and worsen in the future. (Hr'g Tr. vol. 1, 89, 130, 336, 387)
5. The Child ***. (Hr'g Tr. vol. 1, 232, 336-37; Resp't Ex. 3 at 21)
6. ***, the Child can ***. ***, the Child's hearing loss ***. The Child, however, has difficulty detecting spoken language in a noisy environment. (Hr'g Tr. vol. 1, 337, 340, 357; Resp't Ex. 3 at 21; Resp't Ex. 15 at 8)
7. ***, the Child can detect speech in an environment with some noise such as other people talking in the background. ***. The Child's ability to detect speech in a noisy environment was measured with background noise at the level of 40 decibels ***. (Hr'g Tr. vol. 1, 108, 142, 340-41, 347, 362-63; Resp't Ex. 15 at 7 – 8, 39; Resp't Ex. 43 at 1; Resp't Ex. 44 at 1 – 2; Resp't Ex. 45 at 1; Resp't Ex. 49 at 2)
8. The Child's speech impairment is impaired articulation. (Hr'g Tr. vol. 3, 859; Resp't Ex. 3 at 15 – 16)
9. While the Child was *** and approaching the age of ***, the Child's parent inquired with the District about *** (***) program in which the Child was participating to *** services through the District. (Hr'g Tr. vol. 1, 175-76, 238)
10. The Child's parent also had a discussion with a local private school – *** – about the Child obtaining *** services at the private facility. (Hr'g Tr. vol. 1, 184)
11. On or about August 10, 2011, the Child's parents enrolled the Child in the *** program at the private school. (Hr'g Tr. vol. 1, 182; Hr'g Tr. vol. 2, 549-50)
12. On August 12, 2011, the District held an *** meeting for the Child. The Child's parent attended and participated. Among other things, the District planned to conduct an evaluation of the Child in November, 2011. (Hr'g Tr. vol. 1, 240-44; Resp't Ex. 2 at 1)
13. On November 1, 2011, the District began a full and individual initial evaluation (FIIE) of the Child. Among other things, the District performed a *** assessment of the Child. The *** assessment was intended to examine the Child's *** skills as *** of the Child's overall functional level. The assessment was performed in a school setting but away from other students. The Child *** during the assessment. (Hr'g Tr. vol. 1, 176, 178-80; Hr'g Tr. vol. 3, ; Resp't Ex. 3 at 1 – 33)

⁶ The Petitioner protested the time limitations imposed by the Hearing Officer. Hr'g Tr. vol. 1, 14.

⁷ Following the hearing, the decision due date was extended to accommodate the submission of closing briefs. In addition, the decision due date was extended to allow briefing on whether the Petitioner may file an "Offer of Proof" after the conclusion of the hearing. The issue of the Petitioner's Offer of Proof is addressed below in this Decision.

14. The FIIE team included, among others, a licensed speech-language pathologist from the District. (Hr’g Tr. vol. 3, 849; Resp’t Ex. 3 at 1)
15. The FIIE was conducted in English in the Child’s mode of communication – oral (oral-aural). (Hr’g Tr. vol. 3, 795; Resp’t Ex. 3 at 2, 23)
16. The FIIE report of November 18, 2011 found that the Child’s receptive and expressive language skills were in the average range. With regard to receptive skills, the Child responded to questions, demonstrated understanding of the words used during the *** assessment, and followed directions. With regard to expressive skills, the Child communicated orally with words and sentences along with some gestures. A speech and language sample collected during the *** assessment indicated that the Child had a “mean length of utterance” metric of *, which fell in the average range for children that are the age of the Child. The Child, however, demonstrated a need to improve articulation and phonological development. Specifically, the Child had a weakness in producing “consonant-vowel-consonant” (CVC) words according to the speech and language sample collected during the *** assessment and the Goldman-Fristoe Test of Articulation – 2nd edition. The speech and language sample indicated that the Child had a “percentage of consonants correct” metric of 64% to 60% at the word and conversational levels respectively, which fell below or at the bottom of the expected range for children that are the age of the Child (63% to 96%). (Hr’g Tr. vol. 3, 852-57; Resp’t Ex. 3 at 2 – 6, 27; Resp’t Ex. 4 at 1 – 23)
17. The FIIE addendum of December 13, 2011 found that the Child has a hearing impairment. (Hr’g Tr. vol. 3, 782-83; Resp’t Ex. 3 at 17, 19 – 24)
18. The FIIE addendum included a current otological examination of the Child. The examination was performed by the Child’s otologist. (Hr’g Tr. vol. 3, 782-83; Resp’t Ex. 3 at 19)
19. The FIIE addendum included a current audiological evaluation of the Child. The evaluation was performed by a licensed audiologist employed by *** – the Child’s private school. (Hr’g Tr. vol. 3, 783; Resp’t Ex. 3 at 20 – 21)
20. The FIIE addendum included a communication assessment of the Child. The assessment indicated that in the area of audition, the Child had strengths and weaknesses in the hierarchy of listening skills. (Hr’g Tr. vol. 3, 790-95; Resp’t Ex. 3 at 22 – 23)
21. On December 1, 2011, the District held an “admission, review and dismissal” (ARD) committee meeting for the Child. The Child’s parent attended and participated in the meeting. (Hr’g Tr. vol. 1, 181; Pet’r Ex. 3 at 46; Resp’t Ex. 5 at 1)
22. The ARD committee members reviewed and discussed the child’s FIIE, draft “individualized education program” (IEP), and proposed placement. The committee members did not reach agreement on such items as eligibility and IEP goals and the members agreed to a ten-day recess of the meeting. (Hr’g Tr. vol. 1, 193, 196; Hr’g Tr. vol. 2, 705; Pet’r Ex. 3 at 69-70, 72-73; Resp’t Ex. 5 at 24-25, 27-28)
23. On December 14, 2011, the District reconvened the ARD committee meeting for the Child. The Child’s parent attended and participated in the meeting. In addition, the parent was accompanied by an advocate and legal counsel. (Hr’g Tr. vol. 1, 196; Hr’g Tr. vol. 3, 813; Pet’r Ex. 2 at 7, 43; Resp’t Ex. 10 at 1, 37)
24. An auditory impairment (AI) teacher attended and participated in the ARD committee meeting. (Pet’r Ex. 2 at 43; Resp’t Ex. 10 at 37)
25. The District proposed identifying the Child as a child with an auditory impairment as well as with a speech impairment. (Hr’g Tr. vol. 1, 199-200; Hr’g Tr. vol. 3, 810, 812; Pet’r Ex. 2 at 8, 36; Resp’t Ex. 10 at 2, 30)

26. Among other things, the District described the Child's "present levels of academic achievement and functional performance" (PLAAFP). (Pet'r Ex. 2 at 8 – 10; Resp't Ex. 10 at 2 – 4)
27. Among other things, the District proposed five IEP annual goals for the Child for the remainder of the 2011-2012 school year. (Pet'r Ex. 2 at 16 – 21; Resp't Ex. 10 at 10 - 15)
28. The District's first proposed annual goal was: "During a 36 school week period when participating in structured language activities, [the Child] will produce high frequency final consonants of /s,/z/ in 3-5 word sentences, 80% average during a 9 weeks grading period." The District described the needs of the Child that the proposed goal would address: "Speech intelligibility impacted by articulation errors and phonological patterns such as deleting final sounds and stopping continuant sounds; morphology affected by final consonant deletion in conversational speech." (Pet'r Ex. 2 at 16; Resp't Ex. 10 at 10)
29. The District's second proposed annual goal was: "During a 36 school week period when participating in structured language activities, [the Child] will produce consonant sounds of /s, z, f/ in all positions of words in 3-5 word sentences, 80% average during a 9 weeks grading period." The second proposed goal was distinct from the first proposed goal as the second goal was focused on the production of continuant sounds. (Hr'g Tr. vol. 3, 880-83; Pet'r Ex. 2 at 17; Resp't Ex. 10 at 11)
30. The District's third proposed annual goal was: "By the next annual ARD, when asked to respond to auditory information, [the Child] will follow through with a simple 2-3 step unrelated command (to each other) in 80% of data collection with no more than one verbal prompt." The District also proposed four short-term objectives that in regard to responding to auditory information, the mastery rate required increased over the course of the school year and the number of verbal prompts required decreased over the course of the school year. The District described the needs of the Child that the proposed goal would address: "[The Child] has weak functional listening skills as reported by [the Child's] classroom teacher at [the Child's private school]. [The Child] requires redirection at times to pay attention to an oral message." (Hr'g Tr. vol. 2, 681; Hr'g Tr. vol. 3, 879-80; Pet'r Ex. 2 at 17 – 18; Resp't Ex. 10 at 11 – 12)
31. The District's fourth proposed annual goal was: "By the next annual ARD, when participating in classroom activities [the Child] will independently use 3-5 word utterances that are intelligible to an adult communication partner in 80% of data collection." The District also proposed four short-term objectives that in regard to making 3-5 word utterances, the mastery rate required increased over the course of the school year and the number of verbal prompts required decreased over the course of the school year. The District described the needs of the Child that the proposed goal would address: "[The Child] needs to [make expressions] in 3-5 word utterances." (Hr'g Tr. vol. 3, 886-87; Pet'r Ex. 2 at 19 – 20; Resp't Ex. 10 at 13 – 14)
32. The District's fifth proposed annual goal was: "By the next annual ARD, when participating within the daily routine or while playing, [the Child] will be able to identify a problem with classroom materials (i.e., scissors, toys, etc) and ask for help with one verbal prompt in 80% of data collection." The District also proposed four short-term objectives that in regard to asking for help with any problems, the mastery rate required increased over the course of the school year and the number of verbal prompts required decreased over the course of the school year. The District described the needs of the Child that the proposed goal would address: "When frustrated, [the Child] will either cry or walk away from the problem. [The Child] needs to be able to appropriately ask for help." (Hr'g Tr. vol. 3, 887-88; Pet'r Ex. 2 at 20 – 21; Resp't Ex. 10 at 14 – 15)
33. Among other things, the District proposed IEP services through an AI supplement. Specifically, the District proposed providing services to the Child by a certified AI teacher. The proposed amount of services was 90 minutes of direct services per week and 60 minutes of consultation services per month. (Hr'g Tr. vol. 2, 672-73; Pet'r Ex. 2 at 27, 35, 37, 40; Resp't Ex. 10 at 21, 29, 31, 34)
34. Among other things, the District proposed IEP services through an audiological plan. Specifically, the District proposed providing educational audiology services to the Child by an audiologist. The proposed amount of services was 120 minutes of direct services and 120 minutes of consultation services per school

year. For example, direct services were to consist of observing the Child in the classroom for the implementation and effectiveness of the IEP. For example, consultation services were to consist of instructing classroom staff in checking the Child's ***. The amount of services would be equivalent of about 26 minutes per month. The District's audiologist had the capability to serve the Child and to test the Child's hearing as recommended. (Hr'g Tr. vol. 3, 784-86, 796, 809-10, 813-14, 819, 834; Pet'r Ex. 2 at 35, 37, 41 – 42; Resp't Ex. 10 at 29, 31, 35 – 36)

35. Among other things, the District proposed IEP services through a schedule of services. Specifically, the District proposed providing the related service of speech therapy. The proposed amount of speech therapy alternated depending on the week of each 9-weeks grading period. For odd weeks, 30 minutes of direct services was proposed. For even weeks, 60 minutes of direct services was proposed. (Hr'g Tr. vol. 2, 673; Pet'r Ex. 2 at 25, 27, 34, 37; Resp't Ex. 10 at 19, 21, 28, 31)
36. The District proposed placing the Child at the Child's neighborhood public school – *** School. (Pet'r Ex. 2 at 34, 37; Resp't Ex. 10 at 28, 31)
37. The District proposed placing the Child at the neighborhood school in a *** classroom referred to as the *** (***) classroom. The District also referred to the *** as the "****" classroom or *** classroom. The District's proposal was for a full-time day placement. (Hr'g Tr. vol. 2, 637, 652, 670, 705-06; Pet'r Ex. 2 at 26 – 27, 37; Resp't Ex. 10 at 20 – 21, 31)
38. The *** placement setting proposed by the District was staffed by one teacher certified in special education and *** education. The *** classroom was also staffed by two aides. (Hr'g Tr. vol. 2, 634-35, 643, 646, 684, 707-08; Pet'r Ex. 2 at 27; Resp't Ex. 10 at 21; Resp't Ex. 14 at 6)
39. The teacher in the *** classroom placement proposed by the District had training for serving the Child following the December 14, 2011 ARD committee meeting. The training included on-line courses, in-person staff development, and consultations with an AI teacher. The teacher had no prior experience serving a child with an auditory impairment. The teacher had no prior familiarity with the oral-auditory communication modality for children with auditory impairments. (Hr'g Tr. vol. 2, 639-42, 647, 661-68, 698; Hr'g Tr. vol. 3, 820-21; Resp't Ex. 15 at 1 – 3, 5, 45 – 54)
40. The *** classroom is an integrated setting with 12 students, half of which have disabilities and the other half which do not have disabilities. For the children with disabilities, most were children with speech impairments. The children with disabilities ranged in age from ***-years old to ***-years old. (Hr'g Tr. vol. 2, 487, 631, 635-36, 638, 652, 741-42; Resp't Ex. 14 at 5 – 6)
41. The *** classroom used a curriculum based on the TEA *** Guidelines as supplemented by the *** instructional framework. Among other things, instruction in the *** classroom is designed to develop the oral receptive and expressive language skills of the students throughout the day. Language development occurs through both the teacher's instruction as well as through student's interaction with one another during activities. (Hr'g Tr. vol. 2, 639, 652-61, 744-56; Resp't Ex. 13 at 1 – 9)
42. The *** classroom used a variety of approaches, techniques, and methods to help the children grow in their language development. The *** classroom was capable of incorporating and implementing listening/speaking strategies for the Child. Among other things, the teacher had a technique to maintain eye contact with the children while at the blackboard. (Hr'g Tr. vol. 2, 652-60, 690-91, 759, 761)
43. The District proposed that for the safety of the Child in the neighborhood school placement, the District would not leave the Child alone and that there would be an evacuation plan. (Pet'r Ex. 2 at 38; Resp't Ex. 10 at 32)
44. The District proposed an *** the proposed placement setting. ***. (Hr'g Tr. vol. 2, 666, 669-70; Hr'g Tr. vol. 3, 786-87, 821, 827, 1010, 1034-35; Pet'r Ex. 2 at 41; Resp't Ex. 10 at 35; Resp't Ex. 15 at 3)

45. The District proposed acoustical modifications and treatment of the *** classroom. Specifically, the District utilized area rugs, felt on the ends of chair legs and table legs, and divider screens to block off work areas. Additionally, the District planned for the installation of carpet on the floor and cork board on the walls and the hanging of curtains. (Hr’g Tr. vol. 3, 821-24; Pet’r Ex. 2 at 36 – 37; Resp’t Ex. 10 at 30 – 31)
46. The District proposed maintenance on a noisy air conditioning unit for the *** classroom. Although the air conditioning unit had been serviced, it had not yet been fully repaired. (Hr’g Tr. vol. 2, 697, 702)
47. With some acoustical modifications and treatment, the approximate sound level in the *** classroom placement setting proposed by the District was 55 decibels during one sample observation. (Hr’g Tr. vol. 3, 981, 1029, 1034)
48. The District proposed that if the school cafeteria was too loud for the Child, the Child would have lunch in the classroom with a group of friends. (Pet’r Ex. 2 at 37; Resp’t Ex. 10 at 31)
49. To facilitate the Child’s entry into the *** classroom placement setting proposed by the District, the District planned that an AI teacher would be in the classroom full-time for the first week of attendance by the Child. (Hr’g Tr. vol. 1, 282; Hr’g Tr. vol. 2, 662, 708; Pet’r Ex. 2 at 37; Resp’t Ex. 10 at 31)
50. The District has a professional counselor who has a hearing impairment and was available to serve as an adult role model for the Child. (Hr’g Tr. vol. 3, 1031)
51. During the course of the ARD committee meeting on December 14, 2011, the District recessed the ARD meeting for approximately two hours so that the District’s ARD committee members could caucus in private. During the caucus, the Child’s parent was not invited to participate in the District’s deliberations. Among other things during the caucus, the District’s ARD committee members reviewed documents newly furnished by the Child’s parents and conferred with the District’s legal counsel. The District reconvened the ARD committee meeting and invited the parent to rejoin. The parent rejoined the ARD meeting. Among other things, the District subsequently proposed the Child’s placement in the *** classroom on a full-time basis. The District also subsequently proposed five revised IEP annual goals and solicited the parent’s feedback. (Hr’g Tr. vol. 1, 212-14; Hr’g Tr. vol. 2, 485, 679-80, 682-83; Hr’g Tr. vol. 3,)
52. The Child’s parents disagreed with the District’s proposed IEP and placement for the Child. (Hr’g Tr. vol. 1, 228; Pet’r Ex. 2 at 36 – 38, 43; Resp’t Ex. 10 at 30 – 32, 37, 40)
53. The *** classroom at the private school that the Child attends has two teachers. The class has eight students – six with hearing impairments and two who do not have a disability. The students range in age from ***-years old to ***-years old. (Hr’g Tr. vol. 2, 549-51)
54. The private school utilizes as an assessment tool the “cottage acquisition scales for listening language & speech” (CASLLS). It examines the speech and language skills of a child. (Hr’g Tr. vol. 2, 557; Hr’g Tr. vol. 3, 877; Resp’t Ex. 10 at 53 – 58)
55. The Child has a written plan at the private school labeled as an “individual education plan.” Among other things, the private school’s individual education plan has annual goals and short-term objectives in the areas of listening, language, speech, and social. Among the listening goals is for the Child to follow 2 to 3 step unrelated commands in attaining the listening skills expected for a ***-year old child. Among the language goals is for the Child to use words to express emotion in attaining the conversational skills expected for a child at least ***-years old. Among the speech goals is for the Child to produce /b/ in the final position of words in attaining consonants for phonetic and phonologic speech. The social goal is for the Child to use some internal problem solving in attaining cognition/play skills expected for a child at least ***-years old. (Pet’r Ex. 14 at 248 – 52; Resp’t Ex. 10 at 66 – 70)

56. The private school provides speech and language services for the Child. (Pet'r Ex. 14 at 248; Resp't Ex. 10 at 66)
57. The private school provides accommodations for the Child. The accommodations include: preferential seating; ***, dynamic soundfield system; acoustical treatment of walls; small groups. (Hr'g Tr. vol. 2, 552; Resp't Ex. 10 at 71)
58. During the Child's attendance in the *** program at the private school, the Child's skills have improved. (Pet'r Ex. 14 at 247; Resp't Ex. 10 at 73)
59. The Child's family paid \$3,000 for the Child's enrollment in the *** program at the private school for the 2011-2012 school year. (Hr'g Tr. vol. 2, 729)

Discussion

The Petitioner's overall complaint is that the Child was denied FAPE by the Respondent and had to turn to a private school for appropriate educational services. This Hearing Officer will analyze the Petitioner's specific charges within the context of the legal standard for evaluating a denial of FAPE claim under the IDEA.

According to the standard set by the U.S. Supreme Court in *Board of Education v. Rowley*, a school district fails to provide FAPE to a child with a disability under the IDEA if the child's IEP is (1) not compliant with the IDEA procedures, and (2) not reasonably calculated to enable the child to receive educational benefits.⁸

COMPLIANCE WITH IDEA PROCEDURES

Regarding the first prong of the *Rowley* standard, the Petitioner's complaints are not procedural as they go to an allegedly substantive flawed evaluation and identification of the Petitioner by the Respondent. Further, the Petitioner's complaints go to an allegedly substantively flawed IEP, including annual goals, and a substantively flawed placement recommendation. Therefore, this Hearing Officer's analysis will center on the second prong of the *Rowley* standard.

This Hearing Officer finds that even if there were procedural flaws, there is no violation of the IDEA. Under the federal regulations implementing the IDEA, for a procedural violation to amount to a denial of FAPE, the procedural inadequacy must either impede the child's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or cause a deprivation of educational benefit.⁹ The Petitioner failed to establish by a preponderance of evidence that either the right to FAPE was impeded, the parents participation was significantly impeded, or that the child was denied educational benefit.¹⁰

REASONABLE CALCULATION OF IEP TO ENABLE RECEIPT OF EDUCATIONAL BENEFITS

Regarding the second prong of the *Rowley* standard, the U.S. Court of Appeals for the Fifth Circuit, in *Cypress-Fairbanks Independent School District v. Michael F.*, announced four factors to consider in deciding whether a child's IEP is reasonably calculated to confer educational benefits: (1) individualized services; (2) placement in the "least restrictive environment" (LRE); (3) coordination of key stakeholders; and (4) provision of positive academic and nonacademic benefits.¹¹

The analysis here will address the Petitioner's substantive assertions in light of the *Michael F.* factors. The Petitioner's substantive assertions are:

- a. Failure to appropriately identify the Petitioner as a child with a disability – namely as a child with an auditory impairment.

⁸ *Board of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982).

⁹ 34 C.F.R. § 300.513(a)(2).

¹⁰ See the discussion below.

¹¹ 118 F.3d 245, 253 (5th Cir. 1997), *cert. denied* 522 U.S. 1047 (1998).

- b. Failure to appropriately evaluate the Petitioner as a child with a disability – namely as a child with an auditory impairment.
- c. Failure to propose an appropriate placement in the LRE – namely that the *** classroom was not a suitable environment for the Petitioner.
- d. Failure to propose an appropriate IEP – namely measurable annual goals.

Individualized Services

Factor 1 under *Michael F.* is whether the child's IEP has been individualized. An IEP is individualized if it includes the goals and programming that respond to the identified disability and special needs of the child. Here, the Respondent did identify the Child as a child with an auditory impairment during the ten-day recess ARD committee meeting held on December 14, 2011. Further, the Respondent's evaluation packet indicated the evaluators used the Child's mode of communication and included the elements required under Texas law for an evaluation of a child with a hearing impairment.¹² The final recommendation of the Respondent's evaluators at the December 14, 2011 ARD committee meeting was that the Child qualified as a child with an auditory impairment. Therefore, this Hearing Officer finds that the Respondent prevails on the identification claim. The Hearing Officer further finds that the Respondent prevails on the evaluation claim. The purpose of a ten-day recess ARD committee meeting is to allow the parties to reappraise the information on hand and gather new data.¹³ The Petitioner's complaint that the Respondent did not make the proper eligibility decision at the initial ARD committee meeting, while perhaps frustrating, does not mean there was a violation of the IDEA.

The District's IEP goals were individualized for the Child. First, the District's own observations and testing did identify the Child's needs with respect to articulation. This was reflected in two measureable goals (proposed goals 1 and 2). With respect to the Child's needs for listening skills, the District recognized this need from the material from the Child's private *** program and it was reflected in proposed goal 3. Likewise, proposed goals 4 and 5 were drafted after the District recognized the Child's needs in areas of expression and problem solving. All of these dimensions of needs and goals as listed by the District and reflected in its IEP are also present on the written plan for the Child at the private school. Finally, all of these goals are in the Child's preferred mode of communication – oral.¹⁴

Least Restrictive Environment

Factor 2 under *Michael F.* is whether the child has been served in the LRE. Compliance with the LRE mandate is evaluated through the two-part test announced by the Fifth Circuit in *Daniel R.R. v. State Board of Education*.¹⁵

Here, the District's proposed setting was a *** classroom with both children with and without disabilities.

The first prong of the *Daniel R.R.* test asks whether full-time education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily. The second prong of the *Daniel R.R.* test asks which setting permits the child to be mainstreamed to the maximum extent appropriate if removed from the regular education setting. Here, the parent's choice of private *** was not a regular *** classroom but rather one mostly occupied with other children with auditory impairments. Thus, the Respondent did not violate the first prong of the *Daniel R. R.* test when it did not propose a regular *** setting but rather an integrated setting.

The next *Daniel R. R.* test is about mainstreaming to the maximum extent appropriate. Here, the Hearing Officer credits the Respondent for selecting a location that does expose the Child to typically developing peers – more than the Child is exposed to in the private *** class. All the children in the *** classroom communicate orally. With the Child's skills, the Child should be able to communicate with them orally.¹⁶ While the Petitioner expressed some worry about

¹² Tex. Educ. Code § 29.310; 19 Tex. Admin. Code § 89.1040(c)(3).

¹³ 19 Tex. Admin. Code § 89.1050(h).

¹⁴ Tex. Educ. Code § 29.303.

¹⁵ 874 F.2d 1036, 1048 (5th Cir. 1989)

¹⁶ Tex. Educ. Code § 29.305.

negative behaviors of some of the other children with disabilities in the *** classroom, the Petitioner had no direct evidence that the other children with disabilities would adversely affect the Child.

While not as abundant as at the Child's private school, the District does have a professional employee who can serve as an adult role model for the Child as an individual with a hearing impairment.¹⁷

Finally, the *** classroom as an environment for learning was sound treated. The District did implement some modifications and had others planned. To the extent the sound level in the room might be an issue, this Hearing Officer finds that the utilization of the *** should reasonably allow the Child to access the teacher's instruction and interact with peers.

This Hearing Officer finds that the Respondent prevails on the placement claim.

Key Stakeholder Coordination

Factor 3 under *Michael F.* is whether key stakeholders acted in a coordinated manner. First, in this case there is the matter of staff competence and ability. The Petitioner complains that the *** staff are not up to working with and assisting the Child. This Hearing Officer finds that this complaint is without merit and that personnel assigned are qualified.¹⁸ While certainly the teacher has never instructed a child with a hearing impairment before, the training and support for the teacher enables her to be adequately prepared to implement the IEP goals.¹⁹ Important to note here is that the District planned for an AI teacher to be in the *** all day the first week that the Child attended. With this plan, the District would have an AI certified teacher on site devoted exclusively to this Child. This would enable the teachers to gauge the IEP implementation and, if necessary, call attention to the District if even further staff training was needed or even further support was required.

Here, the key stakeholders acted in a coordinated fashion through the development of the IEP. To begin, this Hearing Officer finds that while there was some tension between District employees and the family at ARD committee meetings, it did not affect the ability of the parents and advocate to be involved and provide input.²⁰ In particular, the District's position in the areas of eligibility and IEP goals evolved after receiving material from the private school and feedback from the family.

On December 14, 2011, the ten-day recess ARD committee took an extended break at the insistence of the District. During the break, the ARD committee members from the District talked about the Child without involving the parents. While perhaps unusual or unorthodox to stop an ARD committee meeting to privately caucus, this Hearing Officer has not located any authority that designates such an action as contrary to the IDEA. In this specific circumstance, upon returning from the break, the District reengaged the Child's parent to review placement and IEP goals. The District sought direct comment from the parents on any further revisions to the proposed IEP goals. This Hearing Officer thus finds that overall, the ARD committee meeting of December 14, 2011, allowed for parental participation and collaboration among all attendees.

Educational Benefit

Factor 4 under *Michael F.* is whether the child received positive academic and nonacademic benefits. Here, the Child never attended the District as a preschooler with a disability. Since before the District's evaluation even started, the Child has been at a private school. Thus, the analysis under this factor focuses on whether the District's IEP was reasonably calculated to confer benefits.

This Hearing Officer finds that the Child's eligibility, special needs, and annual goals as proposed by the District are all aligned. There is no question the Child has an auditory impairment and speech impairment. The Child's needs as identified by the District are grounded in evaluations or drawn from the private school's own records. The District's IEP goals touch upon the same areas as the written plan from the private school. While the District's IEP goals are not as detailed as the private schools, the PLAAFP in the District's IEP indicates the District was aware of where the Child was

¹⁷ Tex. Educ. Code § 29.307.

¹⁸ Tex. Educ. Code § 29.304.

¹⁹ Tex. Educ. Code § 29.304(c).

²⁰ Tex. Educ. Code § 29.306.

and what things to address. With this alignment, it is a reasonable calculation that the District's IEP will confer educational benefit to the Child.

In conclusion, this Hearing Officer finds that after weighing the *Michael F.* factors, the Respondent satisfied the *Rowley* standard calling for an IEP reasonably calculated to confer educational benefits. Therefore, the Respondent prevails on the substantive allegations raised by the Petitioner.

REQUESTED RELIEF – PRIVATE SCHOOL PLACEMENT

In this case the Petitioner seeks as the sole relief the placement of the Child at a specified private school at public expense. Under the IDEA, reimbursement for private schooling is possible under prescribed conditions.²¹ Procedurally, parents generally must demonstrate that they provided advance notice to the school district before removing the child for private instruction.²² Substantively, parents must demonstrate that they have satisfied both parts of a two-part test: first, showing that the school district cannot offer an appropriate education to the child and, second, showing that the private facility can do so.²³

As discussed above, this Hearing Officer finds that the Petitioner has failed to demonstrate that the Respondent cannot provide an appropriate education to the Child.

While the private school is apparently outstanding with an excellent staff, this case does not turn on a comparison between the private school *** class and the Respondent's *** classroom. In fact, the District's IEP and placement do not need to be as good as the private school. As long as the Child would reasonably receive benefit from the District's plan, private placement at public expense is not appropriate. Here, as discussed above, a free appropriate public education is available through the Respondent.

In conclusion, this Hearing Officer finds that the Petitioner is not entitled to a private school placement at public expense.

OFFER OF PROOF

Following the close of the hearing record, the Petitioner filed an "Offer of Proof."²⁴ The Offer contains summaries of the purported testimony that would have been obtained from three witnesses that the Petitioner identifies as "valuable" but who were not called "because of the time limitation set" by the Hearing Officer. The Petitioner states that it submits the Offer "for consideration [by] the Hearing Officer."²⁵ Subsequently, the Respondent filed a "Motion to Strike Petitioner's Offer of Proof."²⁶ The Petitioner later filed its "Defense of Offer of Proof."²⁷

After consideration of this issue, the Hearing Officer finds that the Petitioner's Offer of Proof does not conform to Texas Rule of Evidence 103(a)(2) that dictates procedures for an offer of proof. For instance, this Hearing Officer never excluded the testimony of the three witnesses because they were never even called to the witness stand.²⁸ This Hearing Officer does not accept the Petitioner's argument that for the purpose of an offer of proof, every witness the Petitioner did not feel it had time to call was therefore denied by operation of the Hearing Officer's time limitations ruling. The Petitioner was free to manage its allotment of time as it deemed best in the presentation of its case-in-chief.

In conclusion, this Hearing Officer denies the Petitioner's request to "consider" the testimony summaries. This Hearing Officer, however, will not strike the Petitioner's Offer from this case file in the event any reviewing court may wish to examine the summaries of the purported statements of the witnesses in question.

Conclusions of Law

²¹ 34 C.F.R. § 300.148.

²² 34 C.F.R. § 300.148(d)(1).

²³ 34 C.F.R. § 300.148(c).

²⁴ Pet'r's Offer of Proof (June 25, 2012).

²⁵ Pet'r's Offer of Proof at 3.

²⁶ Resp't's Mot. to Strike Pet'r's Offer of Proof (June 27, 2012).

²⁷ Pet'r's Defense of Offer of Proof (July 3, 2012).

²⁸ Tex. R. Evid. 103(a)(2).

After due consideration of the foregoing findings of fact, this Hearing Officer makes the following conclusions of law:

1. The Respondent, Northside Independent School District, appropriately devised IEPs for the Petitioner, Student, under 34 C.F.R. § 300.320(a)(2) and did not deny FAPE under 34 C.F.R. § 300.101(a); *Board of Educ. v. Rowley*, 458 U.S. 176 (1982); and *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997), *cert. denied* 522 U.S. 1047 (1998).
2. The Respondent, Northside Independent School District, appropriately identified the Petitioner, Student, under 34 C.F.R. § 300.8(c)(5).
3. The Respondent, Northside Independent School District, appropriately evaluated the Petitioner, Student, under 19 Tex. Admin Code § 89.1040(c)(3).
4. The Respondent, Northside Independent School District, appropriately placed the Petitioner, Student, in a *** classroom under 34 C.F.R. § 300.114 and *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989).
5. The Petitioner, Student, is not entitled to a private school placement at public expense under 34 C.F.R. § 300.148.

Order

Based upon the foregoing findings of fact and conclusions of law,

IT IS HEREBY ORDERED THAT:

1. All relief sought by the Petitioner shall be and is **DENIED**.

SIGNED this 13th day of July, 2012.

/s/ Steve R Aleman
Steven R. Aleman
Special Education Hearing Officer

STUDENT, b/n/f PARENTS	§	
	§	BEFORE A
Petitioner	§	SPECIAL EDUCATION
	§	
v.	§	HEARING OFFICER
	§	
NORTHSIDE	§	FOR THE
INDEPENDENT SCHOOL DISTRICT	§	STATE OF TEXAS
Respondent	§	

SYNOPSIS

CLAIM 1: Whether the Respondent failed to appropriately identify the Petitioner as a child with a disability.

CITE: 34 C.F.R. 300.8(c)(5)

HELD: For the Respondent. Child was identified as child with auditory impairment as requested by parents.

CLAIM 2: Whether the Respondent failed to appropriately evaluate the Petitioner as a child with a disability.

CITE: 19 Tex. Admin. Code 89.1040(c)(3)

HELD: For the Respondent. Child was evaluated for auditory impairment as prescribed by TEA regulations.

CLAIM 3: Whether the Respondent failed to propose an appropriate placement in the LRE for the Petitioner as a child with a disability.

CITE: 34 C.F.R. 300.114(a)(2)

HELD: For the Respondent. Child was placed in *** classroom as an appropriate setting.

CLAIM 4: Whether the Respondent failed to propose an appropriate IEP.

CITE: 34 C.F.R. 300.320(a)(2)

HELD: For the Respondent. Child had IEP with proposed measurable goals.

CLAIM 5: Whether the Respondent denied FAPE.

CITE: 34 C.F.R. 300.101(a)

HELD: For the Respondent. Child had IEP reasonably calculated to confer education benefit