DOCKET NO. 286-SE-0610

STUDENT, *b/n/f* PARENTS,	§	BEFORE A SPECIAL EDUCATION
Petitioners/Counter-Respondents,	§	
V.	§	HEARING OFFICER
HOUSTON INDEPENDENT SCHOOL DISTRICT,	§	
Respondent/Counter-Petitioner.	§	FOR THE STATE OF TEXAS

DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

I
STATEMENT OF THE CASE

Petitioners, Student *b/n/f* Parents ("Petitioners" or "Student" or "Parents"), 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"). Respondent filed a counter-claim, related to the need for an additional evaluation of Student, as well as affirmative defenses.

A.
STUDENT'S DUE PROCESS HEARING ISSUES

Student asserts that HISD committed numerous procedural and substantive violations of IDEIA, which denied Student FAPE, in the following particulars:

1. Respondent failed to perform a full and individual evaluation ("FIE") of Petitioner between November 2008 and May 2010, despite the Parents' written consent;

2. Because of such failure to assess, Respondent failed to provide Petitioner with an appropriate educational program and placement addressing all of his educational needs;

3. Respondent failed to provide Petitioner with appropriate speech therapy services and effect progress;

4. Respondent failed to properly supervise Petitioner and maintain a safe environment;

5. Respondent *** Petitioner;

6. Respondent interfered with the Parents' participation in the ARD Committee meetings by failing to provide proper notice, by including the District's attorney in the meeting, and by proceeding with the ARD Committee meetings in the absence of personnel requested by the Parents;

7. Respondent created an environment that is so poisoned that Petitioner cannot receive an appropriate education within HISD; and

8. Respondent reported inaccurate information in the ARD Committee minutes and prevented the Parents from reporting their opinions accurately in those minutes.[1]

Petitioner seeks an order requiring Respondent to provide the following relief:

1. direct, one-to-one occupational therapy ("OT") services to compensate for eighteen (18) months of inappropriate services;

2. speech services to compensate for inappropriate and ineffective speech services;

3. private educational placement and related services for the remainder of school year 2010-2011 and reimbursement of costs to the Parents for Student's private placement beginning October 4, 2010;

4. appropriate speech and related services, including use of an appropriate assistive technology device; and

5. reimbursement to the Parents for all outside evaluations.

B.
HISD'S AFFIRMATIVE DEFENSES/COUNTER-CLAIM

1. Respondent seeks an order to override the refusal of the Parents to consent to a medical evaluation;

2. Because these parties participated in a Due Process Hearing in May 2010, just one (1) month prior to filing this complaint, the doctrines of *res judicata* and collateral estoppel preclude any award in this proceeding related to the following claims/issues:

[1] Petitioner included claims in his first complaint, asserting that a) Respondent altered Petitioner's report cards and other records; and b) Respondent posted confidential information without parental consent. These claims were dropped in the amended complaint.

a) appropriateness of the speech services provided to Student;

b) failure to provide Student with an appropriate educational program and placement addressing all of his educational needs;

c) failure to conduct an FIE between November 2008 and May 2010;

d) request for private school tuition; and

e) concerns related to Petitioner's safety at school.

II.
PROCEDURAL HISTORY

A.
THE INITIAL COMPLAINT

On June 28, 2010, TEA received the complaint filed by Student, assigned the case Docket No. 286-SE-0610, and assigned the matter to the undersigned Hearing Officer. On June 28, 2010, the undersigned Hearing Officer sent the Initial Scheduling Order to the parties, stating that the pre-hearing telephone conference would convene on July 16, 2010, that the Due Process Hearing would take place on August 6, 2010, and that the Decision would issue by September 11, 2010.[2]

On July 16, 2010, the parties convened the first pre-hearing telephone conference. In attendance were the following: 1) Mr. Willard P. Conrad, counsel for Petitioner; 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 re-scheduled the Due Process Hearing for September 9-10, 2010.

On September 9, 2010, the parties met for the Due Process Hearing. However, by agreement the hearing was recessed to allow for additional evaluations and an ARD Committee meeting. The parties agreed to re-schedule the Due Process Hearing for October 7-8, 2010.

On September 28, 2010, the parties requested additional time for the evaluations and ARD Committee meeting. Finding good cause, the undersigned granted the continuance of the October 7-8, 2010, Due Process Hearing and requested that the parties provide alternative dates for the hearing.

On September 30, 2010, Respondent filed a counter-claim requesting that the Hearing Officer enter an order overriding the Parents' refusal to consent to a medical evaluation.

[2] The parties reported that they waived the Resolution Session attendant to this first complaint.

Based upon information from the parties, on October 11, 2010, the undersigned issued the Third Order Scheduling Due Process Hearing, which re-scheduled the Due Process Hearing for November 8-9, 2010.

B.
THE AMENDED COMPLAINT

On October 18, 2010, Petitioner filed its First Amended Request for Due Process Hearing. On October 20, 2010, the undersigned Hearing Officer sent out the Amended Scheduling Order, which re-calculated all procedural deadlines and scheduled the pre-hearing telephone conference for November 8, 2010, the Due Process Hearing for December 1, 2010, and the Decision Deadline for January 1, 2011.

The second pre-hearing telephone conference was postponed to November 10, 2010. In attendance were the following: 1) Mr. Conrad, counsel for Petitioner; 2) Mr. Graff, counsel for Respondent; 3) Ms. ***, Special Education Manager for Respondent; 4) the undersigned Hearing Officer; and 5) the court reporter, who made a record of the telephone conference. The parties discussed the issues and re-scheduled the Disclosure Deadline to December 2, 2010, and the Due Process Hearing to December 9-10, 2010.[3]

On November 18, 2010, Petitioner requested formal responses to Petitioner's First Requests for Production of Documents, stating that a continuance of the December 9-10, 2010, Due Process Hearing would be sought if Petitioner did not receive the responsive documents by the December 2, 2010, Disclosure Deadline. Respondent replied that all responsive documents had been transmitted to Petitioner on September 29, 2010.

On November 26, 2010, Petitioner filed a Motion to Shorten Time for Production Response related to Petitioner's Second Requests for Production of Documents. The date of such service of production requests is unknown to the undersigned. Again, Petitioner stated that a continuance of the December 9-10, 2010, Due Process Hearing would be sought if Petitioner did not receive the responsive documents by the December 2, 2010, Disclosure Deadline.

On November 29, 2010, the undersigned requested that Respondent reply to Petitioner's Motion to Shorten Time for Production and Petitioner's qualified Motion for Continuance. Respondent served its objections and responses on November 30, 2010. Respondent objected to the Second Set of Requests for Production of Documents on the following grounds: 1) the requests were untimely; 2) the requested information related to another legal proceeding between the parties; 3) the requested information was irrelevant to this due process proceeding; and 4) information sought was either a) not available at all or b) readily obtainable by Petitioner.

On November 30, 2010, Mr. Michael O'Dell filed and served a Notice of Appearance as co-counsel with Mr. Conrad in representing Petitioner. On that same date,

[3] Under these deadlines, Petitioner declined to waive the Resolution Session. By agreement, the Resolution Session convened on November 15, 2010, but the parties did not resolve the issues.

the undersigned informed the parties that there would be no continuance of the pending Due Process Hearing unless agreed to by both parties. No such agreement was forthcoming.

The Due Process Hearing convened on December 9-10, 2010, as scheduled. Both parties introduced documentary evidence; Student called three (3) witnesses; HISD called six (6). Both parties conducted extensive cross-examination of the witnesses.

During the hearing, Student was represented by counsel, Mr. O'Dell and Mr. Conrad. Student's father attended the hearing both days. HISD was represented by counsel, Mr. Graff. Also in attendance throughout the hearing was the District representative, ***.

At the conclusion of the hearing on December 10, 2010, the parties and Hearing Officer agreed to a post-hearing schedule: closing arguments would be due by January 14, 2011, and the Decision would be rendered January 25, 2011. Due to unforeseen personal matters, the parties agreed to allow the Hearing Officer to extend the Decision Deadline to February 2, 2011.[4]

III.
FINDINGS OF FACT

1. Student is a ***-year old child who resides with his parents and sibling within the jurisdiction of HISD (R. Ex. 10, pp. 708-09). HISD is responsible for providing special education and related services to Student.

2. Student has been receiving special education services since the age of *** under the eligibility classification of speech impairment ("SI") (R. Ex. 3, p. 750).

3. Student was privately evaluated in October 2008 by ***, which recommended that the Parents *** to receive speech therapy ("ST") (R. Ex. 3, p. 750). Student's Parents contacted HISD to obtain speech services (R. Ex. 18). Student's mother provided written consent for an FIE, which stated in pertinent part that she was consenting to recommended testing (R. Ex. 21). Per the evaluation from ***, a speech evaluation was the recommended assessment. Additionally, the Parents completed sociological evaluations that indicated that Student was a normal child in all respects except for limited speech (R. Ex. 22, pp. 498-99).

4. Student's initial Admission, Review, and Dismissal ("ARD") Committee meeting convened on January 12, 2009, to review the *** evaluation as well as the District's speech and language evaluation. The ARD Committee found him eligible for special education services under the SI category and recommended Student's placement in a *** ("***") at his home *** school, ***. The Parents rejected this recommendation because they did not want Student in a small

[4] References to the Due Process Hearing Record are identified as follows: "Tr. Vol. 1" or "Tr. Vol. 2" refers to the Certified Court Reporter's Transcription of testimony made on December 9-10, 2010; "P. Ex." refers to Petitioner's Exhibits; "R. Ex." refers to Respondent's Exhibits.

class. Student was transferred to *** School, ***, to receive ST one (1) day per week for thirty (30) minutes (R. Ex. 3, pp. 498-99; R. Ex. 7, p. 393; P. Ex. 15 [Transcript from prior hearing], Vol. 2, pp. 64-67).

5. Student started attending *** full time in fall 2009 in the regular education *** class. Immediately his teachers reported significant concerns about his speech and behaviors. An ARD Committee convened in mid September and again in October to discuss additional assessments, conduct a functional behavior assessment ("FBA"), and develop a behavior service plan. The Parents declined to provide written permission for the requested assessments (P. Ex. 15 [Transcript from prior hearing], Vol. 2, pp. 68-73; R. Ex. 8, pp. 452-53).

6. On January 27, 2010, Student's ARD Committee met to review updated speech evaluations provided by the Parents. The Parents indicated that they were obtaining an independent evaluation from ***. The Parents continued to refuse HISD's request for assessments. The ARD Committee referred Student for an assistive technology ("AT") evaluation and agreed to increase his speech therapy and to implement an information log between the general education teacher and the Parents (R. Ex. 9, pp. 19-23).

7. On March 5, 2010, Student filed his first Request for Due Process Hearing, alleging that HISD had failed to provide him with FAPE because the ST was not sufficient or adequate. The District filed a counter-claim seeking to override the Parents' continued refusal to allow the District to fully assess Student.

8. On April 14, 2010, Student's ARD Committee met to discuss the AT evaluation, extended school year ("ESY") services, and the Parents' position on letting HISD perform the FIE it had been requesting. Student's mother provided the ARD Committee with her written termination of any consent for evaluations dated January 2010 (R. 10, pp. 736-39). She also declined all ESY services for summer 2010.

9. The Due Process Hearing in the first case convened on May 6-7, 2010. Prior to that hearing, the Parents provided the District with written consent for the requested FIE.

10. At the conclusion of the first hearing, the Hearing Officer determined that HISD had provided Student FAPE, that Student's IEP was appropriate, that Student's speech services were adequate, that Student was making progress, and that Student was in need of additional testing. Noting that the Parents had just provided written consent, the Hearing Officer conditionally ordered that if the Parents revoked the written consent for an FIE, the Hearing Officer's conditional order would be activated and the Parents would be required to present Student for all necessary testing (R. Ex. 36).

11. The District began assessing Student in May 2010, but met with some difficulties in garnering the Parents' compliance in completing all forms, transmitting

required information, and allowing necessary observations (Tr. Vol. 2, p. 12). Before the District could obtain all evaluations, the Parents filed this complaint in June 2010.

12. In June 2010, Student was evaluated by ***. This evaluation was not provided to the District until counsel presented it in Disclosures in this case in September 2010. The *** assessment determined that a) Student has Encephalopathy Not Otherwise Specified; 2) Apraxia; and 3) Global Developmental Delay. Noting that Student was functioning on a ***-year old level, the assessor recommended that Student's educational services include a) speech/language therapy; b) occupational therapy ("OT"); and a combination placement in the *** and regular *** classes during school year 2010-2011 (P. Ex. 1).

13. The District's FIE found that Student was not functioning at the same level as his peers; that he was exhibiting some developmental delays; and that he was exhibiting behaviors of real concern (R. Ex. 45; Tr. Vol. 2, p.13). Based upon the psychological evaluation, Student did not qualify as a child with autism, a pervasive developmental disorder, or an emotional disturbance (R. Ex. 45; Tr. V. 2, p. 20).

14. The District's assessment of Student's cognitive functioning revealed a score of *** in General Conceptual Ability, which is in the *** range; a score of *** on the non-verbal composite (non-verbal responses); a score of *** on Student's non-verbal standard score, leaving an overall special standard score of ***, which is *** (R. Ex. 45; Tr. Vol. 2, pp. 20-21).

15. The District's behavior assessment, BASC-2, was completed by Student's teacher and the Parents. The Parents reported no scores in the clinically significant range; the teacher reported clinically significant behaviors in aggression, at-risk behaviors related to restlessness, impulsivity, and difficulty maintaining self-control (R. Ex. 45, Tr. Vol. 2, pp. 19-20).

16. Student's adaptive behavior scores, obtained from the Behavior Assessment System, Second Edition (ABAS), differed considerably between the reports from the Parents and the teacher. The Parents' scores were a) composite score of ***; b) conceptual score of ***; c) social score of ***; and d) practical score of ***. The teacher's scores were a) composite score of ***; b) conceptual score of ***; c) social score of ***; and d) practical score of ***. Based upon these results, Student did not qualify as a child with mental retardation (R. Ex. 45; Tr. Vol. 2, pp. 21-23).

17. The April 2010 AT evaluation recommended use of an AT device (Tr. Vol. 2, p. 26).

18. The overall finding of Student's FIE was that he qualified as a student with SI and the ARD Committee recommended placement in a *** classroom with a smaller

staff-to-student ratio (Tr. Vol. 2, p. 26). HISD evaluated Student in all areas of suspected need.

19. The District also requested a medical evaluation to address such concerns as Student's impulsivity, short attention span, and off-task behaviors. Student's Parents expressed concern over providing written consent for the medical evaluation. At one point, the Parents agreed to meet with the school nurse at the doctor's office where the evaluation would be performed; Student's Parents failed to keep the appointment and further attempts to garner cooperation for this assessment were met with hostility (R. Ex. 45, p. 23; Tr. Vol. 2, pp. 55-60, 65).

20. Student's ARD Committee convened on September 28, 2010, to review HISD's and the *** evaluations and to discuss school safety issues raised by the Parents. A copy of the FIE was included in the invitation to the Parents. At the time of that invitation, HISD had not received a copy of the *** evaluation because it was disclosed to the District in Student's mandatory hearing Disclosures after September 15, 2010.

21. Based upon the review of the evaluations, the ARD Committee recommended a) that Student be placed in a *** program; b) that new academic goals and objectives be developed; and c) that Student have a full OT evaluation as well as a medical evaluation. The ARD Committee agreed to table the proceedings and meet on October 14, 2010, to discuss the results of the recommended assessments; review the *** assessments that were only provided in Disclosure just a few days prior to the ARD Committee meeting; and discuss the proposed IEPs, FBA, and *** placement (R. Ex. 43, pp. 2-3 [ARD minutes]).

22. Student's Parents withdrew him from *** School on ***, and enrolled him in private school, *** School. Student is not receiving speech therapy at this school (Tr. Vol. 2, p. 268).

23. Student's Parents chose not to attend the October 14, 2010, ARD Committee meeting. The ARD Committee discussed Student's OT evaluation, goals, objectives, speech modifications, a behavior plan, and placement in the *** class with inclusion services for part of the day (R. Ex. 47, pp. 26-27).

24. In the prior May 28, 2010, Decision, the Hearing Officer held that HISD provided Student FAPE. As such, all of Student's claims related to the District's failure to perform an FIE were litigated in Docket No. 158-SE-0310 and are, therefore, denied.

25. In the prior May 28, 2010, Decision, the Hearing Officer held that HISD provided Student FAPE. As such, all of Student's claims related to the appropriateness of his program and placement were litigated in Docket No 158-SE-0310 and are, therefore, denied.

26. In the prior May 28, 2010, Decision, the Hearing Officer held that HISD provided Student FAPE. As such, all of Student's claims related to the failure of Respondent to provide Student with appropriate speech therapy and success were litigated in Docket No. 158-SE-0310 and are, therefore, denied.

27. In the prior May 28, 2010, Decision, the Hearing Officer held that HISD provided Student FAPE. As such, all of Student's claims related to Respondent's failure to properly supervise and protect Student up to May 2010 were litigated in Docket No. 158-SE-0310 and are, therefore, denied.

28. There was insufficient evidence to establish that HISD personnel *** Student.

29. There was insufficient evidence to establish that HISD could not provide a safe environment for Student during school year 2010-2011.

30. There was insufficient evidence to establish that HISD prevented the Parents from participating in ARD Committee meetings.

31. There was no evidence that the Parents have poisoned the mind of the Student to the point that HISD could not provide Student FAPE.

32. There was insufficient evidence to establish that HISD deliberately created inaccurate ARD Committee notes or declined to allow the Parents to report their information.

33. The September 28, 2010, and October 14, 2010, IEPs and proposed placement in the *** and general education classrooms are based on current assessment data.

34. The September 28, 2010, and October 14, 2010, IEPs were developed in a coordinated and collaborative manner by Student's key stakeholders. The Parents' decision not to attend and participate in the October 14, 2010, ARD Committee meeting does not change this fact.

35. The September 28, 2010, and October 14, 2010, IEPs are appropriate and are likely to provide Student with an appropriate education, both academically and non-academically.

36. The recommended placement in the *** classroom, with some inclusion time in the general education environment, is appropriate in that such placement is the least restrictive environment ("LRE") for Student.

37. Student's September 28, 2010, and October 14, 2010, ARD Committee developed measurable goals and objectives in every area of educational need. The Parents prevented the implementation of these IEPs when they unilaterally withdrew Student from HISD and placed him in a private school.

38. The evidence is insufficient to establish that Student's private school can provide an appropriate education.

39. The evidence established good cause for the District's request for an order overriding the Parents' lack of consent to allow a medical evaluation.

IV.
DISCUSSION

The delineation of Student's issues and requested relief set forth above derive from the original complaint, the amended complaint, the pre-hearing telephone conferences, and Student's acceptance of these issues as outlined in the Hearing Officer's prior orders. However, during Mr. O'Dell's opening statement on behalf of Student, he urged that this case actually involves two (2) basic issues: 1) whether HISD failed to fully evaluate Student between November 2008, when the Parents provided written consent, and May 2010, when HISD obtained an order from the prior Hearing Officer to perform an FIE, a failure on the part of the District that has deprived Student for years from making any educational progress;[5] and 2) the relationship between the parties has become so poisoned that Student cannot receive FAPE in HISD.

HISD asserts that 1) Student is unlawfully attempting to re-litigate issues that were raised and denied in the prior Due Process Hearing, which issues are precluded under the affirmative defenses of *res judicata*, collateral estoppel, and limitations; 2) Student is creating the doctrine of "poisoned waters," which is not recognized by the Fifth Circuit Court of Appeals, in an effort to justify Student's placement in private school; and 3) Student is seeking reimbursement for, and continued placement in, a private school, despite the fact that a) Student failed to provide notice of his withdrawal from HISD; b) HISD can provide Student FAPE; and c) the private school, ***, cannot provide Student FAPE.

[5] In his opening statement, Mr. O'Dell couched the argument related to the prior Hearing Officer's order for an FIE in a manner that suggested that it was the Petitioner who obtained that order, not the District: "it took at least 14 months and … an order before there already was a full evaluation conducted" (Tr. Vol. 1, p. 18).

A.
RES JUDICATA AND COLLATERAL ESTOPPEL DEFEAT STUDENT'S CLAIMS/ISSUES:

The doctrines of *res judicata,* claim preclusion, and collateral estoppel, issue preclusion, establish that once a case has reached a final judgment, re-litigation of the claims and issues is barred. In other words, claims between the same parties that result in a final judgment cannot be re-litigated in a new proceeding, whether before the same or any other tribunal. *Texas Water Rights Commission v. Crow Iron Works*, 582 S.W.2d 768, 771-72 (Tex. 1979). The scope of *res judicata* is not limited to matters actually litigated; the judgment in the first case precludes a second action by the parties not only on matters actually litigated, but also on causes of action that arise out of the same subject matter and that might have been litigated in the first case. *Id.* While the doctrine of collateral estoppel concurs with the doctrine of *res judicata* to the extent that litigated issues between the same parties cannot be re-litigated, collateral estoppel does not preclude litigation of new issues that could have been brought in the prior proceeding. The Texas Supreme Court has ruled that these doctrines apply to administrative hearings. *Coalition of Cities for Affordable Utility Rates v. Public Utility Com'n of Texas*, 798 S.W.2d 560 (Tex. 1990).[6]

In this due process proceeding, the majority of Petitioner's claims were either specifically pled, or should have been pled, in the prior case. The May 28, 2010, Decision made specific findings that 1) Student's speech services were appropriate; 2) Student was receiving FAPE under his IEPs; and 3) Student should have an FIE, but because the Parents would not give consent, the Hearing Officer entered an override order.

By these determinations, and the logical conclusions drawn there from, the May 28, 2010, Decision precludes Petitioner's recovery for the following claims that were, or could have been, tried in the first hearing: that Respondent failed 1) to timely perform an FIE; 2) to develop an appropriate educational program and placement pursuant to a timely FIE; 3) to provide Petitioner with appropriate speech therapy services and ensure progress; 4) to properly supervise Petitioner and maintain a safe environment up to May 28, 2010; 5) to prove that HISD used inappropriate restraints on Petitioner; and 6) to ensure that the educational environment was not so poisoned that Petitioner cannot receive FAPE within HISD. [7]

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[6] *See also Westheimer Independent School Dist. v. Brockette*, 567 S.W.2d 780 (Tex. 1978) ("Continued litigation of issues or piecemeal litigation should be discouraged. Therefore, to constitute material changes of conditions, the allegations must reflect that the changes have intervened since the rendition of the order and must not constitute issues which have been raised in the prior hearing had adequate and diligent research been conducted to discover such facts."

[7] Issues related to the Parents' concern about Student's safety during school year 2010-2011, the Parent's participation in the ARD Committee meetings, and the inclusion of accurate information and parental opinions in ARD Committee minutes were addressed in the Findings of Fact.

B.
PARENTS ARE NOT ENTITLED TO HISD'S FUNDING PRIVATE SCHOOL EXPENSES.

34 C.F.R. §300.148 provides the standard for Student's request for reimbursement of his private school expenses. First of all, the District is **not** required to pay for the cost of education, including special education and related services, if the District made FAPE available and the Parents elected to place Student in private school anyway. However, the District may be ordered to reimburse the Parents if they enroll the Student in a private school and the Hearing Officer finds that 1) the District is not making FAPE available, and 2) the private placement is appropriate.[8]

1.
The Proposed IEPs for 2010-2011 Would Provide FAPE.

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 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 least restrictive environment ("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.

[8] Because of the finding that all claims related to the period of time prior to the May 28, 2010, Decision, the analysis of Student's reimbursement claim is limited solely to school year 2010-2011.

a. The September/October 2010 IEPs Are Individualized And Based On Student's Assessments and Performance.

Evaluation procedures are carefully spelled out in the federal and state rules and regulations implementing IDEIA. 34 C.F.R. §300.304 specifies that in conducting the evaluation, the public agency, *i.e.,* the school district, must 1) use a variety of assessment tools and strategies to gather functional, developmental, and academic information; 2) not use a single measure or assessment as the sole criterion for determining a disability; and 3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The school district must ensure that the assessments are selected and administered in a non-discriminatory manner, provided in the child's native language and in a form likely to provide accurate information, used for the purposes for which the assessments are valid and reliable, administered by trained and knowledgeable personnel, and administered in accordance with any instructions provided by the producer of the assessments.

The district is charged with administering assessments and other evaluation materials that are tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient. Assessments must be selected and administered in a manner that best ensures that the assessment results accurately reflect the child's aptitude or achievement level or other factors that the test is measuring. The child being assessed must be evaluated in all areas related to the suspected disability. The assessment must be sufficiently comprehensive to identify all of the child's special needs. As part of the overall evaluation, the assessors should review all existing evaluation data, including information provided by the parents, current classroom-based, local, or state assessments, classroom-based observations, observations by the child's teachers and related-services providers. 34 C.F.R. §300.305. Once the assessments and other evaluation measures are completed, the student's ARD Committee must consider all of the information gathered and make a recommendation based upon that information.

Student's ARD Committee met two (2) times upon completion of Student's FIE and the District's receipt of Student's assessments at ***. The September 28, 2010, ARD Committee met to review the new assessments and to address the safety issues concerning the Parents. The ARD Committee offered a medical evaluation and the Parents agreed to the evaluation. The Committee reviewed 1) information from a) the Parents, b) educational records, and c) classroom teachers. The Committee determined that Student did not qualify as a student with autism, an emotional disturbance, an other-health impairment, mental retardation, or a learning disability. The Committee continued to classify Student as a child in need of special education and related services due to his speech impairment in language and articulation. The Committee recommended new academic goals and objectives and reviewed Student's behavior plan. The Committee recommended a full OT evaluation, placement in a *** program, and offered to set up an appointment for the Parents to observe the proposed *** classroom. The Parents agreed to table the meeting and agreed to meet on October

14, 2010, to discuss the OT evaluation, the results of the medical assessment, the proposed IEPs, and placement.

Student's ARD Committee had met with resistance from the Parents every time the discussion of placement in a *** classroom arose. During the September 28, 2010, ARD Committee meeting, Student's teacher and other Committee members discussed Student's success in practicing skills or learning new skills as long as he was in a one-on-one or small group setting. Student's placement in the general education environment was extremely distracting to the teachers and peers. Student had a tendency to "shut down" in the general education setting when new objectives and activities were presented. Student's constant need for assistance took teacher time away from other students, which resulted in parental complaints.

Student's ARD Committee met, as agreed, on October 14, 2010. The Parents, although expected to be in attendance due to their agreement, refused to attend this ARD Committee meeting or to even participate via telephone. The Committee noted that Student had been withdrawn from HISD on ***. The Committee discussed the OT evaluation, the Parents' request that Student not take his AT device home. The Committee discussed and modified some of his accommodations, small group and one-on-one instruction, speech modifications, and a behavior support plan (to include praise and positive reinforcement). The ARD Committee agreed to place Student in the *** program with general education inclusion for part of the day.

Clearly, Student's September and October 2010 proposed program and placement were determined on the basis of evaluations, anecdotal information, information from Student's teachers, information from a variety of professionals, and information from Student's Parents. The record establishes that HISD assessed Student by using a plethora of instruments, consisting of standardized tests, observations, informal assessments, and interaction with Student.

b. Student's Special Education Services Under The September/October 2010 IEPs Were Developed By The Key Stakeholders And Will Be Provided In A Coordinated And Collaborative Manner In The Least Restrictive Environment.

There is no doubt that Student's placement in the *** classroom is highly restrictive and appears to obstruct IDEIA's requirement that students be educated with their non-disabled peers. The Fifth Circuit developed a two-part test to use in determining whether the proposed placement is too restrictive: 1) whether, with the use of supplementary aids and services, the child's education can be achieved satisfactorily in the regular classroom, and 2) if not, whether the child has been mainstreamed to the maximum extent appropriate. The Court then defined four factors to guide in the analysis of part one.

First, the Court looked to see if the school had taken more than token steps to accommodate the child's needs in the regular education classroom through the provision of supplementary aids and services. In addressing this factor, the Court

specifically determined that in making accommodations for the student, a) the regular education teacher is not required to act as a special education teacher in the regular education setting; b) the District is not expected to so radically modify the curriculum that it is unrecognizable; and c) the District is not required to provide every conceivable supplementary aid or service. Rather, if a District has taken sufficient steps to accommodate the student's disability, *i.e.*, the teacher made genuine and creative efforts to reach the child, modified his curriculum, and spent a disproportionate amount of time attending to the child, then the school has taken sufficient steps to accommodate the child's disability. *Id*., 874 F.2d at 1048.

Secondly, the Court examined whether the child was receiving an educational benefit from mainstreaming. Here, the Court saw this inquiry as focusing on the child's ability to grasp the essential elements of the regular education curriculum. *Id*., 874 at 1049. This inquiry requires consideration of the nature and severity of the child's disability as well as the curriculum. This inquiry must also address the nonacademic benefits of mainstreaming. *Id.*

Thirdly, the Court analyzed the child's overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education for each individual child. Mainstreaming must provide an education that is attuned to the unique needs of the child, which necessarily requires that the child's education be individualized, based on his/her assessment. *Id*., 874 F.2d 1047.

Finally, the Court inquired into what negative effect the child would have on the education of other children in the regular education classroom. The Court noted that the child could cause problems in two areas: a) where a child is so disruptive that he/she interferes with the education of the other students, then that child's unique needs are not being met in the general education setting; or b) where the child requires so much of the teacher's or the aide's time that the rest of the class suffers, then the balance will tip in favor of placing the child in special education. *Id*., 874 F.2d at 1049-50.

In applying these standards to the case at bar, it is clear that for now, Student requires the more restrictive environment of the *** classroom. Everyone who has worked with Student unanimously agreed that he cannot receive an appropriate education in the regular education, even with a plethora of supports and supplements.

c. It Is Likely That Student Will Make Academic And Non-Academic Progress Under the September/October 2010 IEPs.

Student has made some progress under IEPs that have been implemented in regular education. The evidence presented in the hearing, with the reasonable inferences drawn there from, establishes that Student requires an extreme amount of the teacher's time, which is often disruptive to other children. Once under control, Student can focus on academics and relationship-building to hopefully garner a meaningful education in the LRE.

2.
Student's Private School Placement Is Not Appropriate.

There was no evidence presented that would support a finding that the *** private school is appropriate for Student. Considering that his special education classification is SI, the testimony of Student's father, that Student was not receiving any speech services at the private school, is telling.

B.
THE DISTRICT'S COUNTER-CLAIM IS GRANTED.

The District has requested an order overriding the Parents' continued failure to cooperate and allow the District to conduct a medical evaluation. 34 C.F.R. §300.300 provides for an order overriding the Parents' denial of consent for evaluations. While this procedure is not mandatory, it is a responsible action where, as here, the Parents continue to provide mixed signals related to whether they will allow certain assessments. Because the Parents have been willing, in the past, to allow the medical evaluation, and because the District believes this assessment is necessary to fully explore Student's disabilities, I GRANT Respondent's counter-claim and ORDER the Parents to present the Student for the medical evaluation requested. Failure to comply with this order will relieve the District of any liability related to the provision of FAPE in this area of evaluation.

V.
CONCLUSIONS OF LAW

1. The proposed September/October 2010 IEPs are appropriate and are reasonably calculated to provide Student FAPE. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

2. Student's placement in the *** classroom with some inclusion in the general education population is the least restrictive environment for Student. *Daniel R. R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989).

3. The District did not commit procedural violations of IDEIA that equate to a denial of FAPE and preclude the Parents' meaningful participation in making educational decisions.

4. The doctrines of *res judicata* and collateral estoppel bar the majority of Student's claims, in this due process proceeding, that were already adjudicated in the May 28, 2010 Decision in Docket No. 158-SE-0310. *Coalition of Cities for Affordable Utility Rates v. Public Utility Com'n of Texas*, 798 S.W.2d 560 (Tex. 1990).

5. The District is entitled to an order overriding the Parents' refusal to give consent for a medical evaluation. 34 C.F.R. §300.300.

6. The District did not commit substantive violations of IDEIA.

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 Student is DENIED. It is further

ORDERED that the relief requested by the District is GRANTED. Upon Student's return to HISD, his Parents will present him for the ordered medical evaluation.

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

SIGNED this 2nd day of February 2011.

Deborah Heaton McElvaney
Special Education Hearing Officer

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