

DOCKET NO. 136-SE-1203

**Student b/n/f Parent,
Petitioner**

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BEFORE A SPECIAL EDUCATION

v.

HEARING OFFICER

**GREENVILLE INDEPENDENT
SCHOOL DISTRICT, Respondent**

FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Student, (Student or Petitioner), through her next friend Parent, requested a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, et seq., as amended.

Petitioner alleged that Greenville ISD did not provide adequate inclusion support and services in the regular ***-grade classroom, but that Student nevertheless made some progress and the regular classroom for all subjects is the least restrictive environment (LRE) appropriate. As relief, Petitioner requested full-time placement in the regular classroom with a part-time classroom aide.

Held, for Petitioner.

PROCEDURAL HISTORY

Petitioner’s request for hearing was received by the Texas Commissioner of Education on December 19, 2003, and was received by the Hearing Officer on the same date. Petitioner was represented by Elise Mitchell, of Advocacy, Inc. Respondent was represented by Nona Matthews, assisted by co-counsel Jill Nikirk, of Walsh, Anderson, *et al.*

The hearing was scheduled for January 27 and 28, 2004. A prehearing conference was held on December 30, 2003, and was transcribed by a court reporter. Petitioner requested a continuance to accommodate scheduling conflicts. The continuance was granted and the hearing was reset to February 17 and 18, 2004. Petitioner obtained counsel and requested a continuance to allow time for case preparation and to pursue settlement. The continuance was granted and the hearing was reset to March 23, 2004, and was held on that date. The Decision due date was extended to accommodate the continuances and was further extended at hearing, by agreement, to April 12, 2004, to allow time to review written closing statements. The Decision was issued on April 12, 2004.

FINDINGS OF FACT

1. At the time of hearing Student was an ***-year-old ***-grader in Greenville ISD. Student has Down Syndrome, and she is eligible for special education as a student with mental retardation and speech impairment. Student is friendly, well-behaved, and well-liked by other students. She follows class rules and is not a discipline problem.
2. Student began attending school in Greenville ISD on October 20, 2003. She previously attended school in the Longview Independent School District, where she was mainstreamed in a regular ***-grade classroom for all subjects, with a classroom aide present half of the day.
3. *** taught Student in *** and *** grades in Longview ISD. In Fall 2003, Student attended Ms. ***'s ***-grade reading, language arts, and social studies classes. A classroom aide walked around the room and monitored the work of other students while Ms. *** worked with Student, and monitored Student's work when the teacher was instructing the rest of the class. In a typical 75- minute class period, Ms. *** would teach Student one-on-one for approximately 15 to 20 minutes. Student was not a behavior problem and this was true even when the aide was not present, such as in the ***-grade social studies class.
4. Student usually did the same basic activity as the rest of the class, but at a lower instructional level. Ms. *** used peer tutoring by students who had completed their work. Sometimes this consisted merely of reminding Student to stay on task. Ms. *** received support and consultation from the special education department for approximately 30 minutes once a week.
5. Student made academic progress in Ms. ***'s class in *** and *** grades. She also made progress in a mainstreamed setting in *** grade, because at the beginning of *** grade she had acquired some academic skills she did not have at the end of her *** grade year.
6. Student began attending Greenville ISD on October 20, 2003. In a transfer ARDC meeting held on that day, the committee placed Student in a regular ***-grade classroom, with provision of speech therapy and occupational therapy services. Classroom accommodations were provided in the form of reduced and modified exams and assignments; peer tutoring; and a calculator for math.
7. In November 2003, the Greenville ISD diagnostician performed CLASS curriculum-based testing to ascertain Student's functional grade level in reading, written language, and math. Student functions at approximately a ***-grade level, with some scattered skills going up to almost a *** grade-level.
8. The ARDC met on December 1, 2003, after records were received from Longview ISD. Based on the CLASS testing and student's classroom performance, the committee proposed IEP goals and objectives for math, reading, and written language at the ***-

grade level, as well as IEPs for study skills and speech. The committee reached agreement on the speech IEP and on classroom accommodations only. The district members of the committee proposed that Student receive instruction in language arts, reading, and math in the resource room, continue in regular education for all other subjects, and receive content mastery assistance for science and social studies. The parents did not agree and requested a recess to visit the resource classrooms.

9. Parent spent several hours separately visiting both the math and language arts resource classrooms. Student tends to mimic behavior. They saw negative behaviors that they feared Student would emulate, such as students walking out of the resource class and talking out. When the ARDC reconvened on December 8, 2003, the parents rejected any resource instruction and requested a classroom aide. The committee recessed because no one was present who could commit funds to an aide.
10. The committee reconvened on December 17, 2003. The parents presented some proposed goals and objectives. Student's math teacher stated that Student had made no academic progress in her class. The committee proposed a trial placement in resource instruction for math only. The parents refused and the ARDC meeting ended in non-consensus.
11. On December 19, 2003, the parents submitted a request for due process hearing to the Texas Education Agency. A stay-put placement was implemented in which Student continued to receive all her instruction in the regular ***-grade classroom.
12. The ARDC met on January 21, 2004, to review records and determine the extent of testing needed for Student's full individual evaluation (FIE). Parental consent for re-evaluation was provided. The district again proposed resource placement for language arts, reading, and math, and the parents continued to disagree. No agreement was reached on IEP goals or placement in these subjects. The committee agreed to modify the Texas Essential Knowledge and Skills (TEKS) for science and social studies.
13. Student's FIE was performed by ***, diagnostician, in February 2004. The FIE indicates that Student has a full scale IQ of ***, which is in the moderate range of mental retardation. Her adaptive behavior and academic achievement scores are commensurate with her intellectual functioning. Student also received evaluations in the areas of speech and language, occupational therapy, and adaptive PE. She was found not to need adaptive PE.
14. The ARDC met on February 18, 2004, to review the recent evaluations. The parents continued to disagree with the proposed IEP goals and objectives and with the proposed resource placement for math, language arts, and reading.
15. The committee reconvened on February 24, 2004. After some revisions and additions proposed by the parents, the committee reached consensus on the IEP goals and objectives for math, reading, written language, independent study skills, science, social studies, and

speech. The parents requested some additional classroom accommodations, which were agreed by the ARDC: assistance with completion with homework in all academic subjects, and access to student computer for independent practice in math, science, and social studies. Student receives 60 minutes per week of group speech therapy, 15 minutes per six weeks of consultative occupational therapy, and 90 minutes per six weeks of content mastery. The parents continued to disagree with the proposed resource room placement for math, language arts, and reading.

16. Student's Greenville ISD math teacher and reading/language arts teachers teach her using ***-grade-level books and worksheets obtained from the resource teacher and other sources. Both teachers provide accommodations such as manipulatives, flashcards, computer software with headset, extra time for oral and written responses, one-on-one assistance with exams, reduced assignments, modified curriculum, extended time to complete assignments, and consideration of effort when grading.
17. Student's reading and language arts teacher spends five to ten minutes a day in one-on-one instruction with Student. She believes Student has made no academic progress in her class.
18. Student's math teacher spends a few minutes per day one-on-one with Student on most days. Student has made little if any progress in her class. Student is at times distracted by the group activities of the rest of the class, such as when they watch a ***-grade-level video-stream math lesson on a TV monitor at the front of the room. Video-stream math lessons probably are available on Student's instructional level, but this has not been explored. If the math class had an instructional aide, the teacher would be able to provide more one-on-one instruction to Student and other students.

DISCUSSION

Student is an ***-year-old ***-grader in Greenville ISD who has Down Syndrome. She receives special education as a student with mental retardation and speech impairment. Student attended school in the Longview Independent School District until she moved to Greenville ISD in October 2003. In Longview ISD, Student was mainstreamed in a regular ***-grade classroom, with a part-time classroom aide for language arts, reading, and math. This arrangement was used in Longview for at least the last several years of Student's academic career.

Student's parents began requesting a classroom aide in Greenville ISD in early December 2003. The ARDC denied the request and proposed to place Student in the resource room for instruction in language arts, reading, and math. The parents filed a request for due process in December 2003. Student remains in a regular ***-grade classroom for all subjects, in a stay-put placement pending this Decision. The parties reached consensus on IEP goals and objectives in an ARDC meeting on February 24, 2004. The district maintains that the IEP goals can be fully implemented only in the resource room. The sole issue for hearing is the appropriateness of the proposed placement in the resource classroom for language arts, reading, and math.

An appropriate placement under IDEA is one that enables a student to obtain “some benefit” from his education, and does not require that a student’s educational potential be optimal or “maximized.” *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). The district’s proposed educational program is entitled to a legal presumption of appropriateness. Petitioner bears the legal burden of proving that the educational program currently proposed is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). Petitioner has met that burden in this case.

The IDEA contains a strong preference for educating disabled children in regular education. See 34 C.F.R. §300.550. Student is entitled by the Act to be educated with her nondisabled peers to the maximum extent appropriate. In *Daniel R.R. v. State Board of Educ.*, 874 F.2d 1036 (5th Cir. 1989), the court stated a two-part test for determining compliance with the mainstreaming requirement. “First, we ask whether education in the regular classroom, with supplementary aids and services, can be achieved satisfactorily for a given child If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.” *Id.*

Daniel R.R. discussed several factors in determining the appropriate level of mainstreaming, including academic benefit, benefit from association with nondisabled students, and detrimental effects of mainstreaming on the child with a disability and/or classmates. No single factor is dispositive. An individualized examination must be made of the nature and severity of each child's disability, his needs and abilities, and the school's response to his needs, including whether the school has taken steps to accommodate him in regular education. Mere token gestures to accommodate handicapped students are not sufficient. However, school districts are not required to provide every conceivable supplementary aid and service to assist a child. *Id.*

I am not persuaded that genuine consideration was given to how Student, as an individual student, could be served in regular education in Greenville ISD. The ARD committee decided within less than two months of her enrollment that she should be in resource instruction for math, reading, and language arts. This involves four class periods and is a very significant increase in restrictiveness. No attempt was made to accommodate her needs by use of a classroom aide, despite parental requests, Student’s recent history of successful inclusion with an aide in Longview, and reports by her Greenville teachers that they did not have adequate time to instruct her. The district takes the position that an aide is not necessary for behavioral management, but behavior was not the reason for the parents’ request. It is undisputed that Student is well-behaved and follows class rules.

A district is not required to provide a “classroom within a classroom” for one student. However, the evidence from Longview indicates that Student does not need that type of arrangement to make progress. She does need more one-on-one instruction than most students, but she made progress in Longview ISD without continuous one-on-one instruction and with the provision of a classroom aide for only part of the day.

Student’s ***-grade teacher from Longview ISD, Ms. ***, also taught Student in *** grade. She testified that Student made academic progress in regular ***, ***, and *** grade classrooms with a part-time aide in Longview ISD, and this continued until Student moved to

Greenville in October 2003. According to Ms. ***, the aide in her classroom did not provide instruction to Student or other students. She was used for classroom organization, monitoring the class work of all students, and freeing some of the teacher's time for one-on-one instruction of students who needed it, including but not limited to Student. The arrangement appeared to work well. Student's parents believe she made more progress during the time a student intern was in the Greenville ISD math class, which allowed the math teacher to spend a little more time with Student.

In contrast to Longview ISD, no evidence indicates that Student's Greenville ISD teachers receive consultation or support from the special education department other than the provision of some ***-grade worksheets. Also, the record bears little evidence of any attempt by Greenville ISD to tie Student's education to that of the rest of the class. For example, the rest of the math class periodically watches a ***-grade level video-stream math lesson, but providing video-streamed lessons on Student's instructional level has not been considered.

Student's inability to master the ***-grade curriculum, standing alone, is not reason enough to exclude her from regular education. See *Lucy M. v. City View ISD*, TEA No. 290-SE-693 (1993). A child cannot be denied access to regular education simply because her educational achievement lags behind that of her classmates. *Daniel R.R.* The Fifth Circuit noted that it is incorrect to focus exclusively on academics when determining whether regular education will provide the child an educational benefit. It is undisputed that Student is well-liked and benefits socially from interacting with her nondisabled peers, and it is undisputed that she does not disrupt the regular classroom. As a student with speech impairment, she presumably also benefits from the language models provided by her nondisabled peers.

Student must not be placed in a more restrictive placement prior to the district making a good-faith effort to accommodate her, on an individual basis, in regular education. In determining necessary supplemental aids and services, the ARDC cannot ignore interventions that have helped her be successful in the past. Given Student's long history of successful inclusion with a part-time classroom aide, it is not reasonable to remove this needed support from her program, fail to provide some other type of support in the regular classroom to compensate for the lack of an aide, and then use the resulting lack of academic progress to justify a significantly more restrictive placement.

My ruling today is based on the unique facts of Student's case. I do not mean to imply that all students with cognitive disabilities must be provided with aides, or that resource placement could never be appropriate for Student. School districts are required by law to provide a continuum of services, including one-on-one instruction or small-group instruction in a resource setting for students who need such instruction to make academic progress. 34 C.F.R. §300.551. Student may need such a placement in the future, especially as she progresses into higher grades. But before she is placed in a more restrictive setting, she is entitled to an opportunity to be served in regular education with supplemental aids and services that address her individual needs.

CONCLUSIONS OF LAW

1. Student resides in Greenville ISD, a legally constituted independent school district within the State of Texas, and is entitled to special education services pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, et seq., as amended.
2. The educational program proposed by the school district is presumed to be appropriate. As the party challenging the educational program proposed by the district, Petitioner bears the burden of proof. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), aff'd 468 U.S. 883 (1984); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). Petitioner met the burden of proof in this case.
3. IDEA contains a strong statutory preference for educating children with disabilities in the regular education classroom. Student is entitled to receive a free, appropriate, public education in the least restrictive environment appropriate. *Daniel R.R. v. State Bd. Of Educ.*, 874 F.2d 1036 (5th Cir. 1989).
4. Greenville ISD has not demonstrated sufficient efforts to meet Student's needs in the regular education classroom with supplemental aids and services. Given Student's long history of successful inclusion in regular education with a part-time classroom aide, it is not reasonable to deprive her of this needed support, fail to provide other support in the regular classroom to compensate for the lack of an aide, and then use Student's lack of academic progress to justify a more restrictive placement in the resource room. *Daniel R.R.; Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991); *Lucy M. v. City View ISD*, TEA No. 290-SE-693 (1993).

ORDER

Based upon a preponderance of the evidence and the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the relief requested by Petitioner is **GRANTED**.

It is **ORDERED** that the district convene an ARDC meeting as soon as possible, but no later than two weeks from the date of this Decision, to amend Student's IEP in conformity with this Decision, and specifically to consider the provision of a part-time classroom aide or other equivalent supplementary aid or service that will accommodate Student's needs in reading, language arts, and math instruction in the regular classroom.

NOTICE TO THE PARTIES

This Decision is final and is appealable to state or federal district court.

The district shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of Special Education Programs and Complaints at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating that the Decision has been implemented; or 2.) If the timeline set by the Hearing Officer for implementing certain aspects

of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

SIGNED this 12th day of April, 2004.

/s/Janis Herd
Janis Herd
Special Education Hearing Officer

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

SYNOPSIS

Issue 1: Does placement in the resource room for reading, language arts, and math provide education in the least restrictive environment appropriate for a ***-grade student with mental retardation and speech impairment?

Held: For Petitioner. The district has not demonstrated sufficient efforts to meet Student’s needs in the regular education classroom with supplemental aids and services. Given Student’s long history of successful inclusion in regular education with a part-time classroom aide, it is not reasonable to remove this needed support from her program, fail to provide other support in the regular classroom to compensate for the lack of an aide, and then use Student’s lack of academic progress to justify a more restrictive placement in the resource room.

Citation: 34 C.F.R. §§300.550, 300.551, and 300.552.