

**DOCKET NO. 106-SE-1204**

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

**DECISION OF THE HEARING OFFICER**

**STATEMENT OF THE CASE**

Student, (Student or Petitioner), through his next friends Parent and Parent, requested a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, et seq., as amended. The issues for hearing were as follows:

- 1) Whether the least restrictive environment appropriate for Student is a resource placement for all academic instruction and speech therapy, or placement in the life skills classroom;
- 2) Whether the Clear Creek Independent School District (the district or CCISD) failed to provide: an appropriate individualized education program (IEP); an independent educational evaluation (IEE) in all areas; homebound instruction; an appropriate crisis plan to address Student’s behavior of running away from class; and appropriate and timely functional behavior assessments (FBAs) and behavior intervention plans (BIPs);
- 3) Whether district personnel used improper restraint procedures to stop aggressive and running away behaviors;
- 4) Whether the district provided Student appropriate paraprofessional support, and whether the district deprived the parent of meaningful input into the admission, review, and dismissal committee (ARDC) process by not specifying the exact nature of Student’s paraprofessional support services in his IEP;
- 5) Whether the district violated IDEA by providing a designated aide on Student’s last day of attendance without convening an ARDC meeting to consider whether he should have a designated aide.

As relief, Petitioner requested placement in the resource room for academics and speech therapy; an inclusion expert to develop a program with appropriate opportunities to interact with age-appropriate and nondisabled peers; compensatory services; a new BIP; training of staff who work with Student on proper restraint procedures; a designated aide; and a crisis plan.

Held, for Respondent.

### **PROCEDURAL HISTORY**

Petitioner's request for hearing was received by the Texas Commissioner of Education on December 8, 2004, and was received by the Hearing Officer on December 9, 2004. Petitioner was represented by Christopher Jonas. Respondent was represented by Jeff Rogers.

This matter previously was filed as Docket No. 401-SE-0804, and was assigned to the same Hearing Officer. That filing was dismissed without prejudice on December 9, 2004. No prehearing conference was held in the instant case because the parties agreed to adopt the issues for hearing defined in a prehearing conference held on November 22, 2004, in Docket No. 401-SE-0804.

The hearing in the instant case was scheduled for February 1 and 2, 2005, and was held on those dates. The parties submitted written closing statements on February 28, 2005. The Decision due date was extended to March 14, 2005, to allow time for the Hearing Officer to review the closing statements prior to issuance of the Decision. The Decision was issued on March 14, 2005.

### **FINDINGS OF FACT**

1. Student is \*\*\* years old and in \*\*\* grade in CCISD. He has Down Syndrome and receives special education as a student with mental retardation (MR) and speech impairment. He began receiving special education in the district's \*\*\* program for children with disabilities (PPCD) at age 3.
2. In \*\*\* grade, Student received instruction in reading, written expression, math, social studies, and science in the resource classroom. He was mainstreamed in regular education for art, music, and PE, with an adaptive PE consultation once per nine weeks. He also received related services of speech therapy, and occupational therapy (OT) to address self-care skills involved with fastening clothing. His IEP for behavior/social skills addressed sitting quietly with hands and feet to self, following one-step directions, remaining in his assigned area, not leaving without permission, sitting quietly in a small group for 30 minutes, and sitting quietly in a large group for five minutes. Respondent's Exhibit 2 (R-2).
3. The ARDC met on November 3 and 7, 2003. An FBA was performed which noted problem behaviors that interfered with Student's learning: short attention span of five minutes in a large group, leaving class without permission, and inappropriate physical displays of affection such as \*\*\* others and \*\*\*. The behaviors were deemed to be due to attention-seeking, work avoidance, attempting to control situations, and sensitivity to sensory stimulation. The committee drafted a BIP with consequences and positive reinforcements to address refusal to comply with staff directives, aggressive physical displays in the form of grabbing, kicking, pushing, yelling, and destroying property, leaving his small group and large group instructional activities, running down the hall or away from assigned area, name-calling and inappropriate greeting and touching of others. R-2.
4. The committee noted that Student had made good progress in reading but had regressed somewhat in math and writing, and that he had missed a significant amount of school due to illness.

Extended school year (ESY) services were recommended for Summer 2004 but parent later declined ESY services. The ARDC proposed that Student receive science and social studies instruction in the life skills classroom, known as the Alternative Academics (AA) classroom. The parents disagreed and requested continued placement in the resource room for all academic subjects. The committee agreed to this placement pending completion of Student's full individual evaluation (FIE). R-2.

5. Student's behaviors increased during Spring 2004. The ARD committee met on May 11 and May 14, 2004, to review Student's FIE and plan his \*\*\*-grade year. Academic and behavioral IEPs were drafted, as well as a BIP. The ARDC committee proposed to place Student in the life skills classroom for all academic subjects, with regular education classes in art, music, and PE. The parents disagreed with the life skills placement and with most of the IEPs. The parents filed a request for due process in August 2004, resulting in a stay-put placement for all academic subjects in the resource room, and preventing implementation of the proposed life skills placement. R-1.

### **Evaluations and Academic Performance**

6. The district's FIE was performed by \*\*\*, Licensed Specialist in School Psychology (LSSP) trainee, during January and February of 2004. The evaluation report noted that Student's mother described him as excitable, impulsive, distractible, easily frustrated, \*\*\* to other children, and a child who does not like or follow rules or restrictions. His teacher reported that he usually had a happy disposition at school but had below average or poor skills in attention and concentration, participation, cooperation and compliance, remaining seated, working independently, and making and keeping friends at school. During testing, Student had difficulty concentrating on tasks that were difficult for him and looked around the room or tried to grab the test papers. "When the tasks were commensurate with his abilities, Student appeared attentive to the tasks and appeared at ease and comfortable." The district's intellectual testing of Student indicated a moderate degree of mental retardation. His achievement test scores were commensurate with his cognitive abilities. R-6.

7. Student's speech and language skills were evaluated by \*\*\*, his speech language pathologist, in January 2004. During the testing he was impulsive and had difficulty attending to task. \*\*\* has significant delays in receptive and expressive speech skills. His language abilities are commensurate with his intellectual ability. The testing indicated he did not understand the concepts of money, quantity, time, same/different, more/less, right/wrong, alive/dead, or symbols. He can communicate using simple words and phrases, and simple sentences of. He has difficulty understanding and following oral directions, and his conversation is not always related to the topic being discussed. He has difficulty using age-appropriate pragmatic language and communicating with peers of his own age. Visual cues help him answer questions. R-7.

8. Christus St. John Hospital performed a speech and language evaluation in January 2004, which indicated a severe expressive and receptive language delay and delay in receptive vocabulary development, and articulation skills within normal limits. An oral motor examination was attempted but could not be administered because Student would not cooperate. R-8.

9. CCISD occupational therapist \*\*\* performed an OT evaluation in December 2003. He is able to

participate in regular education PE and playground activities with his nondisabled peers, with added supervision from an aide for safety and following directions. Tumbling and contact sports should be avoided because Atlanto-Axial joint instability has not been ruled out medically. Student has significant delays in visual motor and visual perceptual skills. He has made good progress in fine motor control. On the testing he wrote his first and last name. His handwriting skills are on a kindergarten level. He has high oral sensitivity to various textures and eats only \*\*\* foods, and a very limited number of them. "Student performs most self-care activities independently with supervision and/or with minimal cues/assistance in the school setting. He is modified independent with \*\*\* with other children due to behavior difficulties) . . . [he has] difficulty in the areas of safety, written work, clothing management (manipulation of fasteners), and task/behavior completion." R-9.

10. \*\*\*, the district's lead psychologist contacted parent to discuss her request for various independent evaluations. He explained that because the district had not conducted its own inclusion testing there was no disagreement that would trigger the right to an independent evaluation at public expense in that area. In their discussions, parent agreed that an independent FIE would provide the information she was seeking. She requested an evaluation by the Battin Clinic, and the district agreed. Testimony of \*\*\*.

11. The independent evaluation by the Battin Clinic was performed in July 2004 by Dr. \*\*\*, Clinical Neuropsychologist and Audiologist, and \*\*\*, LSSP. Student has trouble retaining previously learned information, trouble understanding verbal concepts, and poor reading and spelling ability. During the testing, he was friendly, impulsive, grabbed test materials, and required redirecting and rewards to answer test questions. He tried to bolt from the room. On a test of reading fluency, he read the sentences aloud but did not comprehend their meaning. Petitioner's Exhibit 27 (P-27).

12. Student hearing is within normal limits, but a test of selective attention demonstrated that he has great difficulty following speech in the presence of any type of auditory distraction. He demonstrated his understanding of a list of spoken vocabulary words, but when background noise was added his understanding dropped to below \*\*\* percentile. "He was unable to handle a steady state noise [such as a fan], a random noise or a voice as the competing message. He appeared to go into overload and this may well be a factor in his behavior in the classroom." P-27.

13. On the Stanford-Binet Intelligence Scale, Student had a test composite score of \*\*\*, placing him in the moderate range of retardation, which is commensurate with his IQ score in the district's testing. His scores on a developmental neuropsychological assessment were consistent with his IQ scores. He has significant problems with short-term memory and off-task behavior. Academic testing indicated skills in the kindergarten to first grade level. His achievement levels are commensurate with his intellectual abilities. "Student has the ability to acquire functional or life skills in reading, math and writing and it is recommended that his academic program be directed to his acquiring these skills . . . his behavior will need to be improved so that he can attend long enough to acquire the information." P-27.

14. The Battin report recommended that Student's pediatrician review the testing to determine whether medication should be prescribed to address behavior. He needs a highly structured environment with minimal auditory and visual stimulation to prevent him from going into overload and exacerbating his off-task behaviors. An FM, might improve his ability to hear and process what the teacher is saying. "He needs a multi-sensory approach to learning with information provided in short increments accompanied by a strong reward system" such as a star chart or colored discs that can be exchanged for a toy or food. P-27.

15. Student is tested at school using State-Developed Alternative Assessment (SDAA) instruments. In Spring 2004, his achievement level on the SDAA was \*\*\* for both math and reading. R-10.

### **Functional Behavior Assessments (FBAs)**

16. CCISD performed functional behavioral assessments of Student's behavior in November 2002, November 2003, and November 2004. The November 2004 FBA report was written by \*\*\*, LSSP in collaboration with \*\*\*, lead psychologist for the district. \*\*\* began trying to observe Student early in Fall 2004 but he frequently was absent due to illness or had been sent home due to misbehavior when she arrived. \*\*\* observed Student twice, once during an incident in the gym. \*\*\* observed Student in his resource room and on another occasion in the principal's office, shortly after he ran away from campus on October 4, 2004, and was returned to school by a police officer. She observed him instructing staff to call his mother, refusing to answer questions, and generally appearing to enjoy the attention. School staff report that when Student engages in appropriate behavior he frequently tells them to call his mother so he can go home. "The only setting at school in which Student has not engaged in inappropriate and oppositional behaviors is speech therapy. He is compliant in this setting and does not attempt to run . . . Clearly the low student to teacher ratio in the speech therapy setting may positively impact Student's behavior. The students in Student's speech group receive academic instruction in an Alternative Academics (AA) instructional setting, and he appears to get along well with them." R-2; R-3; R-26.

17. The function of Student's is to escape schoolwork and go home, the function of his failure to comply with teacher directives is to avoid work that he perceives as too challenging or boring and to gain attention, and the function of his defiance of authority is to gain attention and a sense of control over his environment. "Above all, Student seems driven to engage in those types of behaviors that he feels will result in him being sent home for the day." An appropriate placement is "a powerful strategy for managing behavior." Many behavior problems can be reduced or prevented by placement in an educational setting that meets a child's individual needs and helps him to learn at his own pace. R-26.

### **Instructional Settings**

18. In Fall 2004, the Alternative Academics class had six students at various academic levels: one at the kindergarten level, two at first-grade level, two at second-grade level, and one at fifth-grade level. The class had a full-time teacher, a full-time aide, a part-time aide, and a part-time substitute. P-13.

19. In Fall 2004, the resource classroom had 12 students working at grade levels two through four in

language arts, plus Student at the \*\*\* level; four students working at grade levels two through four in math, plus Student at the \*\*\* level; and a content mastery science/social studies component where students from fourth and fifth grade floated in and out from their regular classes as needed, with 17 who came regularly. Student was taught science and social studies one-on-one. P-13.

20. In \*\*\* -grade resource class, if she left Student to work independently in a small group, he began grabbing other students' materials, pencils, and scissors, and sometimes marked or ripped up their work, or kicked them under the table. She had other students at the kindergarten and first-grade level in her class, but they began to master their goals and objectives and move on. Student became upset and he started lashing out at them when they were able to answers questions more quickly than he was. \*\*\* . He was never restrained in her classroom. She worked with Student one-on-one for science and social studies as he was her \*\*\* in those subjects. The Alternative Academics class has other students on his academic level, and one of his friends from her resource class has now moved to the AA class. Testimony of \*\*\*.

21. In \*\*\* and \*\*\*-grade resource class, Student worked at a \*\*\* level. He worked well with her on a one-on-one basis, but was unable to function independently in any group. He would get up, interrupt her while she worked with other students, crawl under a table, and refuse to work. She would go through the steps on his BIP, moving his clip down to various colors and eventually making an office referral if the behavior did not stop. \*\*\* is certified in Crisis Prevention Intervention. He was restrained on one occasion in her room using a team control technique taught in the CPI classes. The incident occurred after he had refused to go to the office and the principal, assistant principal, and counselor came to her room. \*\*\* is certified in mental retardation and has 27 years of teaching experience. She is familiar with the Alternative Academics class. "[T]he levels that they work on in the AA classroom, in my opinion, are commensurate with the levels that Student is functioning at." Testimony of \*\*\*.

22. \*\*\* is Student's tutor. She tutors him in her home, one-on-one or with at most two other students. She finds him easy to redirect, and he is not a discipline problem in this setting. She works with him on functional math skills with a calculator, using money, reading comprehension, writing skills, following directions and communication. He is very polite in her home. Testimony of \*\*\*.

23. Student does not have behavior problems in \*\*\* speech class, where he is taught in a small group with four students from the life skills classroom. Testimony of \*\*\*.

### **Aides**

24. Parent understood from \*\*\*, former principal \*\*\*, and other school staff that Student would always have someone with him, and she took this to mean that Student had a designated aide. Student's ARDC documents do not indicate that he had a designated aide at any point. His resource classrooms in \*\*\* and \*\*\* grades had instructional classroom aides, one aide in the mornings and a different aide in the afternoons, who worked with Student as well as other students. In addition, an aide was responsible for Student and some other special education students in regular education block classes of art, music and PE, in the library, and in the lunchroom. Parent was told that an aide accompanied Student in the lunchroom to keep him from spitting food on other students. Parent was

frequently on the campus and observed aides with her son. \*\*\* understanding was that Parent wanted Student to gain independence and not have an aide always right beside him in the classroom. All aides, special education teachers, and regular education teachers who worked with Student were trained regarding his BIP. Testimony of \*\*\*.

25. An additional designated one-on-one was provided for safety reasons, on a temporary basis, after Student ran off the campus in October 2004, but Student stopped attending school after the first day this aide was present. P-13; Testimony of \*\*\*.

### **Behavior and Restraints**

26. Student was restrained by staff during some of his numerous aggressive outbursts and darting episodes during \*\*\* and \*\*\* grade. His parents were provided with written summaries of each restraint used, and were notified of his behavioral infractions by telephone, teachers' notes, and conduct sheets. The parents were called to take him home from school numerous times when he could not be calmed down enough to return to class and cooperate. R-13, R-15; R-16, R-17, R-18, R-19.

27. On May 4, 2004, Student was restrained in a children's control position by his resource room teacher, \*\*\*, when he \*\*\* to get past her and run out of the room. R-15.

28. On May 12, 2004, Student pushed \*\*\* to the ground. He was restrained \*\*\* times, for 30-45 seconds each time, by \*\*\* as he \*\*\*. He laughed throughout the incident. A grandparent came to pick him up and he crawled under a desk. R-15; R-16.

29. During Fall 2004, \*\*\* had office referrals for disruptive misconduct on August 19 (two referrals for separate incidents, one resulting in \*\*\*), September 3, September 8, September 9 (two referrals for separate incidents, one resulting in \*\*\*), September 20, September 23 (resulting in \*\*\*), September 27, and October 4 (two referrals for separate incidents). R-14.

30. On August 19, 2004, Student lay down, blocking the hallway, hit and threw things at staff, and climbed on furniture. In a separate incident he hit another student's nose with his head. R-14.

31. On September 3, 2004, Student was sent to the office for \*\*\*, sitting down in the hallway on the way back from the gym, and crawling on the floor. R-14.

32. On September 4, 2004, Student was crawling under the time-out carrel in the office and a staff member restrained him by holding his hands. P-8.

33. On September 8, 2004, Student threw himself on the floor of the resource room and crawled under tables, kicked and hit at staff members and at desks and chairs, pulled on staff member's clothes, threw objects at staff members, \*\*\*, \*\*\*, and went through the teacher's materials. Other students were removed from the room and the principal, the teacher, and three other staff members attempted to calm Student. He was restrained \*\*\*, but the behaviors immediately resumed and he

was restrained again. When he began to calm down he was released and allowed to walk around the room. He refused to follow directions and went through his teacher's materials. His mother was called to take him home. R-13.

34. On September 9, 2004, Student charged at and kicked several staff members. He was restrained \*\*\*. He calmed down, but repeated the aggressive behavior in the assistant principal's office and was restrained again. He calmed down and his mother was called to take him home. R-13.

35. On September 10, 2004, Student had a time-out on the playground for \*\*\* another student. He\*\*\*. The teacher grabbed him and called for assistance. He was \*\*\*. He was taken to the office, where he refused to do a time-out, \*\*\*. R-13, R-14.

36. On September 20, 2004, Student tried to \*\*\* on the playground and was taken to the office, where \*\*\*. \*\*\*. He was verbally redirected and given a choice of a \*\*\*. He was uncooperative and could not be returned to class after repeated efforts. His mother came and tried to get him back to class and \*\*\*. She and a neighbor got him into the car and took him home. R-13, R-14.

37. On September 23, 2004, Student was sent to the office because of work refusal and \*\*\*. \*\*\*. \*\*\* His mother was called to take him home. R-14.

38. On September 27, 2004, Student ran onto the \*\*\* during lunch and refused to take direction from an \*\*\* the \*\*\*, and the \*\*\*. \*\*\*. The incident in the gym lasted about 30 minutes, and it took about 15 more minutes to get Student back to class. \*\*\*. R- 14; Testimony of \*\*\*.

39. On October 4, 2004, Student \*\*\* followed by \*\*\*. He climbed playground equipment while they tried to redirect him. After 20 minutes he returned to the office and served a time-out, then went back to class. \*\*\*. His mother was called to take him home. R-14.

40. On October 13, 2004, a designated aide was provided for the first time. Student \*\*\*. A 30-minute time-out was given and he went on to his PE class without incident. R-14.

41. Student's mother took him to his pediatrician, Dr. \*\*\*, on October 14, 2004. Dr. \*\*\* wrote the school a letter saying that Student had \*\*\* bruises on his shoulder from being restrained on October 13, 2004. Dr. \*\*\*stated that such restraint techniques should not be used, since instability of the cervical joints has not been medically ruled out for him. Dr. \*\*\* also wrote a similar letter on September 22, 2004. P-20; P-23.

42. \*\*\* as principal at \*\*\* campus in Fall 2004. She was present for all but one of the restraints in Fall 2004. She is trained in Crisis Prevention Intervention and Texas Behavioral Support Initiative.. She never observed bruises or marks on Student. At times he would twist, turn, and throw himself around. After Parent stated she had seen marks on Student, \*\*\* had him checked by the nurse \*\*\*. Testimony of \*\*\*.

43. Student is a "complex little boy" who is very sweet but very active, very manipulative, and

capable of being a behavior problem. It is possible for even a well-meaning adult to bruise a child in a situation the adult perceived to be an emergency that required the adult to grab the child. It is appropriate to grab a child to prevent him from harming himself or others. Testimony of Dr. \*\*\*

44. Student had frequent absences due to colds and viruses. He has not attended school since October 13, 2004, due to his mother's safety concerns. He attended school approximately 22 days of school in Fall 2004. On those 22 days, he had \*\*\* incidents approximately 10 to 15 times.\*\*\*. Testimony of \*\*\*.

## DISCUSSION

### **Background**

Student is an \*\*\*-year-old boy who has Down Syndrome and receives special education as a student with mental retardation and speech impairment. He is included in regular education in art, music, PE (with adaptive PE consult services), library, lunch, and recess. He receives related services of speech and occupational therapy. The parties do not dispute that Student should receive his academic instruction in a special education setting. The dispute centers on which special education setting is appropriate and the district's response to his disruptive behaviors.

During \*\*\* grade, Student was placed in the resource room for all academic subjects. In November 2003, the ARDC proposed to place him in the life skills classroom for science and social studies, and the parents disagreed. The committee agreed to keep the resource placement for all academic subjects pending completion of his FIE in Spring 2004. Student displayed increasingly disruptive behavior during the spring semester of \*\*\* grade, and in May 2004 the ARDC proposed to place him in the life skills class for all academic subjects. The parents disagreed and filed for due process in August 2004. This triggered a stay-put placement in the resource classroom during the current school year, which is \*\*\*-grade year. In Fall 2004, Student's \*\*\* escalated severely. His last day of school was October 13, 2004, a day on which he was \*\*\* by staff. Parent stopped allowing Student to attend school on the advice of her attorney.

### **Placement**

Student needs frequent if not constant one-on-one attention to stay on task. His resource classroom has an instructional aide, and a staff-to-student ratio that fluctuates as different groups of children come in for periods of the day. \*\*\*. He appears to be frustrated and bored in the resource classroom, where the other students work at a higher academic level in small groups, on activities in which he cannot meaningfully participate due to his \*\*\* abilities. His \*\*\*-grade resource class teacher testified that Student's IEP objectives are so significantly \*\*\* the other students in the resource classroom that group instruction is not feasible for him. He works on approximately a \*\*\*-grade level. Because he is easily distracted and unable to work independently for more than a few minutes, Student was \*\*\*\*.

The only setting in which student has not displayed \*\*\* behavior in recent years is speech therapy, where he was taught in a small group of \*\*\* students, including \*\*\* students from the life skills classroom. He was compliant with the speech pathologist, presented no discipline problems, and \*\*\*. He appeared to get along well with the students from the life skills class. \*\*\* private tutor

works with him one-on-one or in groups of two or three. Like the speech pathologist, she has no discipline problems with him and is able to redirect him easily to keep him on task.

The life skills classroom has a teacher and two aides, with a staff-to-student ratio of approximately two staff to \*\*\* students. Student can dress himself, feed himself, and use the restroom independently most of the time, although he needs supervision in the restroom for behavior. He does many household chores at home. However, life skills instruction also addresses functional academic skills, such as math skills necessary for the use of money. Student's resource teachers testified that the life skills classroom is an appropriate setting for implementing his IEPs because it provides opportunities to interact with other children working at his level.

The life skills placement is supported by Student's evaluations. The independent assessment by the Battin Clinic recommends that Student's program focus on functional or life skills: "Student has the ability to acquire functional or life skills in reading, math and writing, and it is recommended that his academic program be directed to his acquiring these skills." R-4. Student is extremely sensitive to auditory distraction of any kind, and needs a highly structured environment with minimal auditory and visual distraction. According to the Battin Clinic assessment, Student's full scale IQ is \*\*\*, which falls in the \*\*\* range of mental retardation and is commensurate with the intellectual testing performed by the district. His achievement scores are commensurate with his cognitive abilities.

As noted in his functional behavioral assessments, Student's behaviors appear to be an effort to manipulate his environment so that he can \*\*\*. During episodes of misbehavior he frequently instructs staff to call his mother. The FBA completed by \*\*\*, CCISD LSSP, in November 2004, stressed the importance of matching a student's needs to the appropriate educational setting. \*\*\* testified that Student's misbehaviors were caused by frustration and boredom due to the resource placement being unsuited to his academic and developmental level, and that an appropriate instructional setting would improve his behavior as well as his academic performance.

Many of Student's IEP goals have been carried over to subsequent years due to his problems with staying on task. It is obvious that his disruptive behavior in the resource setting had a detrimental effect on the learning of both Student and his classmates. His teachers testified that he had little positive interaction with the rest of the resource class due to his frustration, often lashing out at them because they were working at a \*\*\* academic level.

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). Schools are not required to provide all services from which a child might benefit. Rather, the district must provide personalized instruction with sufficient support services to permit the student to receive an "educational benefit," i.e., a program that is meaningful and is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Rowley*; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997). \*\*\* needs and is entitled to instruction that is tailored to his unique needs. *Daniel R.R. v. State Board of Educ.*, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989); *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7<sup>th</sup> Cir.1988).

The district's proposed educational program is entitled to a legal presumption of appropriateness. Petitioner bears the legal burden of proving that the life skills placement recommended by the ARD committee is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983). Petitioner failed to meet that burden.

### **Behavior Intervention Plan and Restraint Issues**

Petitioner alleged generally that CCISD failed to develop and implement an appropriate BIP, but did not demonstrate that any specific aspect of the BIPs developed by the ARD committee was inappropriate, or that a different BIP would have allowed Student to be successful in the resource classroom. Unfortunately, Student's behavior has at times been extreme enough to cause emergency situations requiring the use of restraints to ensure his safety and/or the safety of others.

Restraint is defined as "the use of physical force or a mechanical device to significantly restrict the free movement of all or a portion of the student's body." Tex. Educ. Code §37.0021 (b) (1); 19 Tex. Admin. Code §89.1053(b)(2).

School staff can use restraint only in an emergency, with the restraint "limited to the use of such reasonable force as is necessary to address the emergency . . . discontinued at the point at which the emergency no longer exists . . . [and] implemented in such a way as to protect the health and safety of the student and others." An emergency is "a situation in which a student's behavior poses a threat of: (A) imminent, serious physical harm to the student or others; or (B) imminent, serious property destruction." 19 Tex. Admin. Code §89.1053.

Restraint does not include "limited physical contact with a student to promote safety (e.g., holding a student's hand), prevent a potentially harmful action (e.g., running into the street), teach a skill, redirect attention, provide guidance to a location, or provide comfort." 19 Tex. Admin. Code §89.1053.

No evidence was adduced that any CCISD staff member who dealt with Student was not properly trained with respect to the details of his BIP or in restraint techniques. The principal at \*\*\* Elementary, \*\*\*, was involved in all but one of the restraints during Fall 2004. She is trained in Crisis Prevention Intervention and has trained other trainers in the Texas Behavioral Support Initiative. She testified that restraints were used only as a last resort, and that each use was documented. When Parent indicated to \*\*\* that Student had been bruised during a restraint, \*\*\* ensured that he was checked by a nurse after subsequent restraints.

Student's pediatrician, Dr. \*\*\*, testified that children with Down Syndrome sometimes have a condition that causes instability of the cervical vertebrae. It is not known whether Student has this condition, but his PE and OT goals have been modified to address the possibility, and it is important that all staff be aware of this possible vulnerability. When Student is placed in a more appropriate setting, restraints may no longer be necessary to prevent dangerous behavior by him. However, if it later appears that further restraints will be necessary on a regular basis, the ARDC should consider amending his BIP to specify restraint techniques and triggering events.

Shortly after Student \*\*\* the school campus for the \*\*\* time on October 4, 2004, district staff decided to provide a temporary one on one aide to help ensure his safety. This aide was in addition to the classroom aides who were in proximity to Student throughout the day, and he began working with Student on October 13, 2004, which was Student's last day of school. On that day, Student had an aggressive incident and was restrained by the new aide and another staff member.

Parent took Student to Dr. \*\*\*the following day, October 14, 2004. Dr. \*\*\* observed bruises on Student shoulder which he and \*\*\* attribute to the restraint used at school. While the possibility that school staff inflicted bruises or marks on a child's body is deeply troubling, in this case the child's aggressive behavior repeatedly created dangerous situations that necessitated physical restraint. Dr. \*\*\* testified on cross-examination that it is reasonable for adults to grab children when they believe the child is in danger of injuring himself or others, and that bruises may result.

As demonstrated when Student darted off campus and ran two blocks down a busy street, it is imperative for his safety that he not be allowed to persist in dangerous behavior. Petitioner did not demonstrate that any restraint was conducted for improper reasons, that improper techniques were used, or that restraints lasted an improper length of time. I note that the record contains many instances of aggression and darting behavior in which physical restraints were not used. The preponderance of the evidence indicates that that the aggressive outbursts and darting episodes in which restraint techniques were used met the definition of "emergency" in 19 Tex. Admin. Code §89.1053.

### **Paraprofessional Support**

The evidence established that paraprofessional support was provided to Student throughout the school day except for very short periods at the beginning and end of the day. The resource classroom has two aides, one in the mornings and a different one in the afternoons. In addition, an aide went with Student and other special education students to lunch and to regular education classes. The testimony of district witnesses and Parent indicate that both parties understood that Student's resource classes had instructional aides, and that he had paraprofessional support when he attended regular education. Parent was often on campus and was aware that aides were being utilized. Parent testified that she understood that Student had a designated aide. However, none of these aides were designated for Student alone, and his ARDC documents do not mention a designated aide.

An aide was present on October 4, 2004, when Student bolted off the campus. Leaving the campus was unprecedented for Student, and district staff responded by arranging additional paraprofessional support for him. On October 13, 2004, Student's last day of attendance, his new aide was with him. According to the special education director, this aide was designated for Student alone and was provided on a temporary basis in response to his recent run off-campus. The ARDC did not meet or attempt to meet to consider whether Student needed a designated aide. Apparently school staff believed that an ARDC meeting could not be held during the stay-put placement. While it is true that the district must keep the child in the last agreed-upon placement under the stay-put provision (unless the parent agrees otherwise or the district seeks a hearing officer order due to perceived danger to the child or others), an ARDC meeting can always be held if either a parent or school staff believe some aspect of the child's education needs to be discussed.

I cannot fault the district for providing a designated aide to protect a student's safety. While an ARDC meeting should have been convened or at least offered to Petitioner as soon as possible to discuss this addition to Student's support services, given that Student only had the aide for one day and then stopped attending school, the failure to convene an ARDC meeting to discuss the aide was a *de minimis* procedural error and not a denial of FAPE. See *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997).

### **Crisis Plan**

Petitioner's request for a crisis plan is premature. Petitioner did not prove that Student's BIPs were inappropriate or not implemented, or that he needed a crisis plan to address his running away, as distinct from the BIP and paraprofessional support that were provided. Again, it is critical that his placement be changed to reduce his frustration level and desire to escape from school. The ARDC has long proposed to change Student's placement to the life skills setting to more effectively address his behavioral and academic needs, and that proposal should be given a chance to work. It is reasonable to expect that his behavior will improve in the life skills classroom, given recent assessment data and the fact that student has no behavior problems in his small-group speech therapy setting or in small-group instruction with his private tutor. If the aggressive behaviors recur to a significant degree even after changing his placement and updating his BIP based on the new FBA, then the ARDC at that point should of course consider further action to address his behavior.

### **Appropriateness of IEPs**

IDEA requires that a student's IEPs be individualized based on assessment and performance. 34 C.F.R. §300.346. Petitioner argued that the IEP goals and objectives recommended by the ARD committee were set too low for Student's abilities, but the record does not bear this out. The testimony of Student's teachers and the multiple assessments offered as evidence establish that Student's IEP goals and objectives were appropriate based on his abilities and his classroom performance.

### **Independent Evaluation**

A parent has a right to an IEE at public expense if the parent disagrees with an evaluation obtained by the District. 34 C.F.R. §300.502. An appropriate independent evaluation was conducted by the Battin Clinic, which was the evaluator requested by \*\*\*, which was the evaluator requested by Parent.

### **Homebound Services**

Petitioner alleged that CCISD failed to offer homebound services when Student was ill. Homebound services are provided to students who are expected to be confined for a period of four consecutive weeks during the school year, as documented by a licensed physician. 19 Tex. Admin. Code §89.63. Although Petitioner requested "intermittent homebound services" by letter to the ARD committee in late May 2004, no evidence indicates that a doctor's recommendation was provided. After October 13, 2004, Student was absent on the advice of his attorney, not because he was ill and confined to

the home. Petitioner did not demonstrate that Student should have received homebound services.

### CONCLUSIONS OF LAW

1. Student resides in Clear Creek 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. Student is eligible for special education as a student with mental retardation and speech impairment. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

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. Petitioner did not demonstrate that Clear Creek ISD denied \*\*\* a free, appropriate, public education. *Tatro v. State of Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983), aff'd 468 U.S. 883 (1984); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000).

3. Student needs specialized instruction in academic subjects in a structured, small group setting with minimal distractions and a small student-to-staff ratio, due to the nature and severity of his disabilities. The proposed placement in the life skills classroom for academic subjects, with inclusion in regular education for art, music, PE and lunch, as well as a behavior intervention plan, occupational therapy, and speech services, is the least restrictive environment appropriate at this time. *Daniel R.R v. State Bd. Of Educ.*, 874 F.2d.1036 (5<sup>th</sup> Cir. 1989); *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7<sup>th</sup> Cir.1988).

4. Petitioner did not demonstrate that the restraint techniques used by school staff violated the IDEA or state and federal regulations. During episodes of serious aggression and/or running away behaviors, school staff determined that restraint techniques were necessary in response to emergency situations. Petitioner did not prove that staff lacked proper training, or that the restraint techniques were improper, or applied with more than reasonable force, or for more than an appropriate duration of time. 19 Tex. Admin. Code §89.1053.

5. Petitioner did not prove that Respondent should have provided a crisis plan, or that the district failed to provide and implement appropriate IEPs, behavior intervention plans, and support services, including appropriate paraprofessional support. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997); 34 C.F.R. §300.346.

6. Petitioner did not prove that the district failed to provide appropriate and timely evaluations, including functional behavioral assessments, and an appropriate independent evaluation requested by the parent. 34 C.F.R. §§300.502; 300.532.

7. The parent was not denied meaningful input into the ARDC process by virtue of her misunderstanding of the nature of Student's paraprofessional support Student had paraprofessional support in his resource classes, regular education classes, lunch, and recess. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997).

8. Petitioner did not prove that Student should have been provided a designated aide sooner than he was. Given that Student had a designated aide for only one day and then stopped attending school,

the failure to convene an ARDC meeting to discuss the designated aide, was provided as an emergency measure in response to Student's recent behavior of darting off-campus, was a *de minimis* procedural error and not a denial of FAPE. See *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

**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 **DENIED**.

**SIGNED** this 14<sup>th</sup> day of March, 2005.

*Janis Herd*  
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Janis Herd  
Special Education Hearing Officer

**DOCKET NO. 106-SE-1204**

<b>Student, b/n/f</b>	§	<b>BEFORE A SPECIAL EDUCATION</b>
<b>Parent &amp; Parent,</b>	§	
<b>Petitioner</b>	§	
<b>v.</b>	§	<b>HEARING OFFICER</b>
	§	
<b>CLEAR CREEK INDEPENDENT</b>	§	
<b>SCHOOL DISTRICT,</b>	§	<b>FOR THE STATE OF TEXAS</b>
<b>Respondent</b>		

**SYNOPSIS**

**Issue 1:** Is the district's proposal to move the student's academic instruction from the resource classroom to the Alternative Academics (life skills) classroom appropriate?

**Held:** For Respondent. The student has \*\*\* level. He is highly distractible and needs frequent one-on-one attention and/or instruction in a very small group to stay on task. He appeared extremely frustrated in the resource classroom and displayed serious aggressive behaviors in that setting, with the goal of being sent to the office or home. Due to the nature and severity of his disabilities, he needs specialized instruction in academic subjects at his functional level, in a structured, small-group setting with minimal distractions and a small student-to-staff ratio. The proposed placement in life skills classroom for academic subjects, with inclusion in regular education for art, music, PE and lunch, as well as a behavior intervention plan, occupational therapy, speech services, and adaptive PE consultation, provides a FAPE and is the least restrictive environment appropriate at this time.

**Citation:** 34 C.F.R. §§300.300; 300.550; 300.551.

**Issue 2:** Did CCISD provide the student a FAPE, with special education instruction and support services reasonably calculated to enable him to receive an educational benefit?

**Held:** For Respondent. Petitioner did not prove that the district failed to provide appropriate IEPs, behavior intervention plans, and support services, including appropriate paraprofessional support, or that the district should have provided a crisis plan separate from the behavior intervention plans. The ARDC's attempt to change the student's placement to address his academic and behavioral needs was prevented by the stay-put placement, and the student's most serious behavior problems occurred while he was in the stay-put placement.

**Citation:** 34 C.F.R. §§300.300; 300.346.

**Issue 3:** Did CCISD provide appropriate evaluations, including functional behavior assessments and an appropriate independent educational evaluation?

**Held:** For Respondent. Petitioner did not prove that the district failed to provide appropriate and timely evaluations, including functional behavioral assessments. The IEE was appropriate and was provided by the evaluator requested by the parent.

**Citation:** 34 C.F.R. §§300.502; 300.532.

**Issue 4:** Was the parent denied meaningful input into the ARDC process?

**Held:** For Respondent. The parent participated fully in ARDC meetings and was not denied meaningful input into the ARDC process, although she misunderstood the nature of her son's paraprofessional support. She had frequent communication with school staff, was often on campus, and knew from observation and

discussions with staff that the student had paraprofessional support in his resource classes, regular education classes, lunch, and recess.

**Citation:** 34 C.F.R. §§300.345; 300.346.

**Issue 5:** Should the district have provided a designated aide sooner, and did the district violate IDEA by providing a designated aide on the student's last day of attendance without convening an ARDC meeting to consider whether he should have a designated aide?

**Held:** For Respondent. Petitioner did not prove that the student should have been provided a designated aide earlier, or that it was error to provide a temporary designated aide for safety reasons after the day he suddenly bolted off the campus. Given that the student had the designated aide for only one day and then stopped attending school, the failure to convene an ARDC meeting to discuss the designated aide was a *de minimis* procedural error and not a denial of FAPE.

**Citation:** 34 C.F.R. §§300.343; 300.347.

**Issue 6:** Did district personnel use improper restraint procedures during aggressive and running away episodes?

**Held:** For Respondent. During some episodes of serious aggression and/or running behaviors, school staff determined that restraint techniques were necessary as a response to emergency situations. Petitioner did not prove that the restraint techniques were used improperly or for improper reasons, or that staff lacked proper training in restraint techniques.

**Citation:** 19 Tex. Admin. Code §89.1053; 34 C.F.R. §300.346.