

TEA DOCKET NO. 405-SE-0804

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

FINAL DECISION OF THE HEARING OFFICER

Appearances for Petitioner:

Daniel L. McCall
Attorney at Law
Katy, TX

Appearances for Respondent:

Hans P. Graff
Assistant General Counsel
Houston Independent School District

TEA DOCKET NO. 405-SE-0804

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

FINAL DECISION OF THE HEARING OFFICER

Statement of the Case

The Petitioner, Student, by her next friends, Parents, brings this action against the Respondent, Houston Independent School District (HISD), under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq. The Petitioner raises the following issues to be heard at a Due Process Hearing:

1. Whether Houston Independent School District failed to provide a free appropriate public education (FAPE) to Student?
2. Whether Houston Independent School District failed to provide notice of an admission, review and dismissal (ARD) committee meeting to the parents of Student?
3. Whether Houston Independent School District improperly disclosed personally identifiable information about Student without parental consent?
4. Whether Houston Independent School District failed to timely identify an auditory impairment of Student?
5. Whether Houston Independent School District failed to develop individualized education programs (IEPs) reasonably calculated to provide educational benefit to Student?
6. Whether Houston Independent School District failed to implement and/or deliver special education, related services, supplementary aids and services and/or assistive technology in the IEPs of Student?
7. Whether Houston Independent School District denied Student her choice of mode of communication?
8. Whether Houston Independent School District failed to provide properly trained staff to serve Student?
9. Whether Houston Independent School District failed to consider an appropriate placement for Student?

As relief, the Petitioner requests: (1) compensation to Student's parents for the costs of a private educational placement; (2) compensation to Student's parents for the cost of lost hearing aids; and (3) such other appropriate relief to which Student may be entitled.

Procedural History

The Texas Education Agency (TEA) received the request for a Due Process Hearing on August 20, 2004. The Hearing Officer, after allowing the Petitioner a delay to secure legal counsel, conducted a prehearing conference on September 30, 2004. The Hearing Officer subsequently issued the First Interim Order that, among other things, identified the issues and relief, set a hearing date and extended the decision due date. On November 2, 2004, the Petitioner requested a continuance of the hearing; the request was granted. On November 16, 2004, the Hearing Officer rescheduled the hearing and extended the decision due date to January 31, 2005. The Due Process Hearing was conducted on December 13-15, 2004 in Houston, TX. The Hearing Officer issued a Post-Hearing Order on January 12, 2004 that permitted the parties to file written closing statements and extended the due date to February 11, 2005. The parties submitted their written closing arguments on January 14, 2005, at which time the record was closed.

Findings of Fact

Based upon the testimony and evidence taken on the record in this proceeding, I make the following findings of fact:

1. Student is an *** year-old child whose dominant language is English. Tr. at v. 2, pp. 348, 360; Tr. at v. 3, p. 597, 724; Pet'r Ex. 10; Resp't Ex. 10.
2. Student is a child with a disability. She qualifies under the IDEA eligibility categories of auditory impairment, speech impairment and/or other health impairment. Tr. at v. 1, p. 37; Tr. at v. 3, p. 841; Pet'r Ex. 21, 40; Resp't Ex. 21.
3. In the 2001-02 school year, Student was in *** at *** Elementary School. Tr. at v. 1, pp. 189, 191; Pet'r Ex. 15, 16; Resp't Ex. 15, 16.
4. In the 2002-03 school year, Student was in Kindergarten at *** Elementary School. Tr. at v. 2, pp. 287-88; Pet'r Ex. 17; Resp't Ex. 17.
5. An ARD committee meeting was held for Student on October 8, 2002. Among other things, the committee continued the identification of Student as a child with a speech impairment. The committee noted that there was an indication of a severe auditory language disorder. The committee determined that it would pursue either an auditory impairment label or other health impairment label depending upon guidance from district evaluators. Student's mother expressed

concern about the possibility of an auditory-processing disorder. Tr. at v. 1, pp. 188, 196-97; Tr. at v. 2, p. 294, 335, 445; Pet'r Ex. 17; Resp't Ex. 17.

6. The October 8th ARD committee included a speech therapy IEP covering the 2002-03 school year. Student's present level of performance was assessed as having *** voice quality. The committee approved two (2) hours of speech therapy per week. The goals of the speech IEP were to increase Student's receptive and expressive language skills. The IEP had four benchmarks. Tr. at v. 1, p. 194; Pet'r Ex. 17; Resp't Ex. 17.
7. A district otological evaluation report on Student was prepared on January 21, 2003. A district communication assessment report on her was prepared on April 10, 2003. Tr. at v. 1, p. 203; Pet'r Ex. 7, 18; Resp't Ex. 7, 18.
8. Student's parents secured a private audiological test in March, 2003. The evaluator found that Student had *** hearing loss. Tr. at v. 1, p. 163; Ex. 9.
9. In Spring, 2003, Student received hearing aids. She was provided a pair of loaner aids in February, 2003. She was provided her own custom aids in May, 2003. Tr. at v. 1, pp. 143, 179; Tr. at v. 2, p. 288; Pet'r Ex. 9, 18; Resp't Ex. 9, 18.
10. An ARD committee meeting was held for Student on May 8, 2003. Among other things, the committee considered whether Student had an auditory impairment. A nurse reviewed a district otological report about four months old showing that Student had a moderately severe hearing loss. An itinerant teacher for the auditory impaired presented an audiologic examination over three (3) years old showing that Student had a mild to moderate hearing loss bilaterally. The committee qualified Student as a child with an auditory impairment but agreed that a new audiological exam and an auditory-processing disorder assessment were needed. Student's mother was present at the ARD meeting. Tr. at v. 1, p. 203; Tr. at v. 2, pp. 309-10, 319, 456; Pet'r Ex. 1, 7, 18; Resp't Ex. 1, 7, 18.
11. The May 8th ARD committee also continued the identification of Student as a child with a speech impairment. Pet'r Ex. 18; Resp't Ex. 18.
12. The May 8th ARD committee decided that Student would remain at her campus for services with a recommendation for small group instruction. Pet'r Ex. 18; Resp't Ex. 18.

13. The May 8th ARD committee developed an IEP for audiological management for the 2003-04 school year (Student's *** grade year). The audiological management IEP included three benchmarks aimed at ensuring that 75 percent of the time Student properly uses her new hearing aids and an FM loop system. Pet'r Ex. 18; Resp't Ex. 18.
14. The May 8th ARD committee completed an auditory impairment supplement. The committee indicated that Student's mode of communication is "oral/auditory." Tr. at v. 3, pp. 785-86; Pet'r Ex. 18; Resp't Ex. 18.
15. The May 8th ARD committee included a one-page tips sheet for working with hearing impaired students. The committee noted that Student's speech was *** to *** percent intelligible with noticeable articulation errors. It also noted that she needed specific speech strategies. Pet'r Ex. 7, 18; Resp't Ex. 7, 18.
16. The May 8th ARD committee extended the speech therapy IEP from the October 8, 2002 ARD committee meeting and continued two (2) hours of speech therapy per week for the 2003-04 school year. Pet'r Ex. 18; Resp't Ex. 18.
17. In May, 2003, the district provided Student an FM loop system for the last week of ***. Tr. at v. 2, p. 317, 452.
18. A district audiological evaluation was conducted and a report prepared on Student on June 27, 2003. Tr. at v. 2, p. 476; Tr. at v. 3, pp. 755, 758, 769; Pet'r Ex. 9; Resp't Ex. 9.
19. In the 2003-04 school year, Student was in *** grade at *** Elementary School. Tr. at v. 3, pp. 631-32; Pet'r Ex. 19; Resp't Ex. 19.
20. The *** Elementary school nurse oversaw the use of the FM loop system. Tr. at v. 2, pp. 407-08.
21. The campus nurse provided training on the FM loop system although that was the responsibility of a district audiologist. There was no regular consultation about the FM loop system. Tr. at v. 2, p. 398, 408, 412; Tr. at v. 3, p. 796.
22. In September, 2003, Student's FM loop system was damaged or became inoperable. The FM loop system was out of service for about two months. The school replaced the FM loop with a headphone system. Tr. at v. 1, pp. 222-23; Tr. at v. 2, pp. 410, 412, 459-61, 464; Tr. at v. 3, p. 636; Pet'r Ex. 32; Resp't Ex. 32.

23. Due to a lack of training, school personnel allowed Student, at times, to wear the headphone system over her hearing aids; wearing the headphones over the hearing aids was not proper. Tr. at v. 1, pp. 155, 157; Tr. at v. 2, p. 411, 461-64; Tr. at v. 3, pp. 637-38; Pet'r Ex. 32; Resp't Ex. 32.
24. The FM loop system remained inoperable longer than necessary due to confusion and miscommunication about the procedure to get it repaired or replaced. Tr. at v. 2, pp. 414-16, 461.
25. An ARD committee meeting was held for Student on October 7, 2003. Among other things, the committee continued Student's qualification as a child with auditory and speech impairments and maintained her in her ***-grade classroom. Student's mother was present at the ARD meeting. Pet'r Ex. 19; Resp't Ex. 19.
26. The October 7th ARD committee discussed Student's need for intensive language therapy. Her *** grade teacher relayed her concerns about Student's comprehension and not being able to understand Student's speech. The committee agreed that more testing of Student was needed, including a new audiological evaluation and learning disability assessment. The district's June 27th audiologic report was not reviewed. Tr. at v. 2, pp. 465-66, 478-79; Tr. at v. 3, p. 644; Pet'r Ex. 19; Resp't Ex. 19.
27. The October 7th ARD committee included a speech therapy IEP covering the 2003-04 school year. Student's present level of performance was assessed as having adequate voice quality and being able to follow simple/basic directions. The goal of the speech IEP was for Student to develop and use language skills to communicate meaning with others in her environment. The IEP had three benchmarks – all the same as in the speech IEP of October 8, 2002. The committee continued two (2) hours of speech therapy per week. Pet'r Ex. 19; Resp't Ex. 19.
28. The October 7th ARD committee indicated that Student would not be off grade level in her regular ***-grade class. She was to receive modifications of in-class support, frequent breaks, content mastery and speech therapy. Tr. at v. 2, pp. 466-67; Tr. at v. 3, p. 678; Pet'r Ex. 19; Resp't Ex. 19.
29. The October 7th ARD committee provided for one-on-one assistance (aide) for Student. Tr. at v. 1, p. 216; Tr. at v. 2, p. 473; Tr. at v. 3, pp. 647-48, 852; Pet'r Ex. 19; Resp't Ex. 19.

30. The October 7th ARD committee did not complete an auditory impairment supplement. Pet'r Ex. 19; Resp't Ex. 19.
31. A teacher certified in the education of auditory-impaired students was present at the ARD committee meeting per state law. Pet'r Ex. 19; Resp't Ex. 19.
32. In Fall, 2003, Student lost her hearing aids once while out on the school playground. After recovery or replacement, Student was not allowed to wear her hearing aids all day long; Student had to remove her hearing aids before going out to play. Tr. at v. 1, pp. 105-06; Tr. at v. 2, p. 398.
33. In October, 2003, Student appeared at the content mastery center in her school to work with the campus special education chair. The special education chair, in the process of covering a lesson, became impatient and frustrated with Student due to Student's limitation in grasping the lesson. The special education chair's tone of voice and conduct in reacting to Student were inappropriately harsh, retaliatory and unprofessional causing Student to cry and become unnecessarily distressed and upset. Tr. at v. 1, pp. 238-42; Tr. at v. 2, pp. 467-69; Tr. at v. 3, p. 580.
34. On or about November 11, 2003, Student's mother, Parent, and the campus special education chair had an encounter in the office of *** Elementary. They became upset with each other and their conversation became animated before Parent left the office. Tr. at v. 1, pp. 122, 129, 131, 133; Tr. at v. 3, p. 581.
35. In November, 2003, the principal of *** Elementary and/or the campus special education chair disallowed the aide for Student without an ARD committee meeting. Tr. at v. 2, pp. 474-75; Tr. at v. 3, p. 647.
36. On November 19, 2003 and December 1, 2003, HISD evaluated Student and completed a full and individual evaluation (FIE) report on December 1, 2003. Tr. at v. 3, p. 726; Pet'r Ex. 12; Resp't Ex. 12.
37. An ARD committee meeting was held for Student on January 26, 2004. Among other things, the committee continued Student's qualification as a child with auditory and speech impairments and maintained her in her ***-grade classroom while noting that she required more small group instruction. Student's mother was present with an attorney and advocate. Pet'r Ex. 20; Resp't Ex. 20.

38. The January 26th ARD committee considered the district's December, 2003 FIE and determined that Student did not qualify as learning disabled because her hearing loss could not be ruled out as the cause of significant discrepancies between intelligence and achievement in oral expression and listening comprehension. Tr. at v. 1, pp. 243-45; Tr. at v. 3, pp. 734, 741, 744, 746-47; Pet'r Ex. 13, 20; Resp't Ex. 13, 20.
39. The January 26th ARD committee reviewed the district's June, 2003 audiological report and discussed Student's failing grades and need for more services. The committee recommended a new speech and language assessment. Tr. at v. 3, pp. 813, 821; Pet'r Ex. 20; Resp't Ex. 20.
40. The January 26th ARD committee extended the speech therapy IEP from the October 7, 2003 ARD committee meeting and continued two (2) hours of speech therapy per week. Pet'r Ex. 20; Resp't Ex. 20.
41. The January 26th ARD committee meeting developed an IEP for language and listening skills. An itinerant teacher for the auditory-impaired was identified as the service provider; she was to see Student one (1) hour per week. The goal of the IEP was to improve Student's vocabulary comprehension. The IEP had three benchmarks: develop auditory memory, accurately discriminate between speech sounds and accurately discriminate between like words differing in medial vowel sounds. The Earobics program was selected as the mechanism to reach the goal. Tr. at v. 1, pp. 57-58, 219; Tr. at v. 3, pp. 669-70, 797, 813, 847; Pet'r Ex. 20; Resp't Ex. 20.
42. The January 26th ARD committee completed an auditory impairment supplement. The committee continued the indication that Student's mode of communication was oral/auditory. Tr. at v. 3, p. 833; Pet'r Ex. 20; Resp't Ex. 20.
43. The January 26th ARD committee meeting specified procedures for an aide to assist Student in her ***-grade classroom. Tr. at v. 3, p. 853; Pet'r Ex. 20; Resp't Ex. 20.
44. The January 26th ARD committee became aware of a complication with Student's use of the FM loop system. Because only the teacher wears the system microphone, Student is not receiving amplification of the voices of her peers during class and group discussions. Pet'r Ex. 20; Resp't Ex. 20.

45. The January 26th ARD committee continued content mastery for Student and added a content mastery IEP for one (1) hour per week. The goal for Student was to demonstrate grade-level mastery of the Texas Essential Knowledge and Skills (TEKS) state curriculum. Tr. at v. 1, p. 59; Tr. at v. 2, p. 482; Pet'r Ex. 20; Resp't Ex. 20.
46. The January 26th ARD committee indicated that Student would not be off grade level in the spring term of her *** grade year. She was to receive modifications of speech, amplification, visual cues, teacher facing student, preferential class seating and questioning to check understanding. The committee did not approve any testing modifications for Student. Tr. at v. 3, pp. 679-80; Pet'r Ex. 20; Resp't Ex. 20.
47. A teacher certified in the education of auditory-impaired students was present at the ARD committee meeting per state law. Pet'r Ex. 20; Resp't Ex. 20.
48. Student's *** grade teacher was not able to attend the January 26th ARD committee meeting. She testified that she would have expressed concerns about Student had she been present. Tr. at v. 3, pp. 644-45.
49. In January, 2004, a new resource teacher began working with Student in the content mastery center. Tr. at v. 2, p. 473.
50. The itinerant teacher for students with auditory impairments was slated to provide one (1) hour per week of language and listening services. The services were to begin in February, 2004. The itinerant teacher missed providing at least two and one-half (2½) hours of services between February and May, 2004. Tr. at v. 2, p. 486; Tr. at v. 3, pp. 669-70, 847-48; Pet'r Ex. 20, 21; Resp't Ex. 20, 21.
51. At the direction of the campus special education chair, without an ARD committee meeting, the *** grade teacher began modifying tests and quizzes given to Student. Tr. at v. 2, pp. 537-38; Tr. at v. 3, pp. 641-43, 649-50, 667, 677-80.
52. Student's grades began to improve in the *** and *** grading periods as a result of the testing and quiz modifications but she did not learn at the ***-grade TEKS level. Tr. at v. 3, pp. 665, 673-74, 676.
53. On April 2, 2004, HISD conducted a speech and language evaluation of Student. Tr. at v. 1, p. 246; Pet'r Ex. 14; Resp't Ex. 14.

54. An ARD committee meeting was held for Student on May 14, 2004. Among other things, the committee continued Student's qualification as a child with auditory and speech impairments and maintained her in her ***-grade classroom while noting that she required more small group instruction. Pet'r Ex. 21; Resp't Ex. 21.
55. The May 14th ARD committee meeting reviewed the district's April, 2004 speech and language evaluation. The evaluation report showed that Student had a severe language disorder with deficits in comprehension and expression. Pet'r Ex. 14, 21; Resp't Ex. 14, 21.
56. The May 14th ARD committee prepared a new speech therapy IEP covering the end of the 2003-04 school year and the full 2004-05 school year. Student's present level of performance was assessed as having *** speech fluency and voice quality and being able to follow one-step directions. The goals of the speech IEP were to increase Student's receptive and expressive language skills, develop vocabulary, comprehend and correctly use action verbs and promote speech intelligibility. The IEP had five benchmarks: (1) categorize objects or pictures by their attributes; (2) identify verbs in the same category; (3) list two or more actions that someone or something can do; (4) point to the picture showing the intended meaning of a spoken figurative expression; and (5) produce speech sounds that are targeted. The committee specified that the speech therapist would continue to work with Student for the same two (2) hours per week. Pet'r Ex. 21; Resp't Ex. 21.
57. The May 14th ARD committee meeting extended the language and listening skills IEP from the January 26, 2004 ARD committee meeting and continued one (1) hour of services by the itinerant teacher for the auditory-impaired. Pet'r Ex. 21; Resp't Ex. 21.
58. The May 14th ARD committee meeting extended the content mastery IEP from the January 26, 2004 ARD committee meeting for the same one (1) hour per week. Pet'r Ex. 21; Resp't Ex. 21.
59. During the May 14th ARD committee meeting, there were conflicting accounts of Student's progress. The itinerant teacher for the auditory-impaired reported that Student was doing well on the Earobics program. Student's *** grade teacher continued to express her same concerns about Student's comprehension skills. Tr.

at v. 2, pp. 485-86, 510; Tr. at v. 3, pp. 645, 660, 664-65, 667, 689; Pet'r Ex. 21, 32; Resp't Ex. 21, 32.

60. The May 14th ARD committee completed an auditory impairment supplement. The committee continued the indication that Student's mode of communication was oral/auditory. Pet'r Ex. 21; Resp't Ex. 21.
61. The May 14th ARD committee indicated that Student would not be off grade level except for content mastery, speech therapy and language and listening skills. She was to receive the same modifications as previously prescribed of speech, amplification, visual cues, teacher facing student, preferential class seating and questioning to check understanding. Pet'r Ex. 21; Resp't Ex. 21.
62. During the May 14th ARD meeting, Student's parent expressed disagreement and provided notice that Student would be withdrawn from HISD and placed in a private institution. Tr. at v. 2, pp. 487-88; Pet'r Ex. 21; Resp't Ex. 21.
63. A teacher certified in the education of auditory-impaired students was not physically present at the ARD committee meeting but participated by telephone. Pet'r Ex. 21; Resp't Ex. 21.
64. A recess ARD committee meeting was held for Student on May 21, 2004. Student's parent expressed her dissatisfaction with Student's program and the district asserted the appropriateness of the program. Pet'r Ex. 22; Resp't Ex. 22.
65. The school special education chair did not check with Student's classroom teacher to monitor progress. Tr. at v. 3, p. 660.
66. HISD never conducted an assessment for auditory-processing disorder. Tr. at v. 1, p. 210-11, 213.
67. In May, 2004, Student's parents withdrew her from HISD a week before the end of the 2003-04 school year. Tr. at v. 2, p. 489.
68. Student has intensive language development and auditory processing needs observed by her teachers and documented by evaluations. These needs stem from (1) a sensory hearing loss and (2) an auditory-processing disorder. Her hearing loss is *** to *** severe. Her auditory-processing disorder is ***. As a result, she has deficits in receptive skills, expressive language skills and audiological processing that significantly affect her understanding, comprehension and

intelligibility. Tr. at v. 1, pp. 33-37, 60, 95, 108, 168, 187, 247; Tr. at v. 2, pp. 316, 323-24, 364, 385-86, 535; Tr. at v. 3, p. 761; Pet'r Ex. 7, 13, 40; Resp't Ex. 7, 13.

69. In Student's case, the lack of development of her auditory system is not ameliorated by the correction of her hearing loss through amplification; she still has needs flowing from her auditory-processing disorder even after receiving hearing aids. Tr. at v. 1, pp. 31, 90, 171; Tr. at v. 2, pp. 385-86; Tr. at v. 3, p. 783.
70. An expert – an experienced and independent audiologist and speech pathologist – conducted an appropriate advanced audiological evaluation of Student in October, 2004. Among other things, the evaluation identified Student's strengths and weaknesses. Student's weaknesses are in visual memory, instructional comprehension, phonological processing and auditory reception and processing. Tr. at v. 1, pp. 32-37; Tr. at v. 2, pp. 393-94; Pet'r Ex. 40.
71. To address her needs and weaknesses, Student requires several interventions such as auditory training, memory training, phonemic awareness training, noise desensitization, sequencing ability training, gap-detection training, onset time training, visual instruction and an FM loop system. She also requires a small classroom with seating near the teacher and minimal ambient noise. Further, she should wear her hearing aids at all times while at school. Such interventions are necessary for academic and educational benefit. Tr. at v. 1, pp. 39-46, 48, 52-53, 92, 94.
72. HISD did not develop IEPs for Student that were individualized to include all appropriate and necessary interventions for her auditory-processing disorder. Her IEPs lacked noise desensitization training to enable her to selectively attend and separate out voices from background noise; gap-detection training to enable her to perceive and pick up the gaps between phonemes, words and sentences; and sequencing training to enable her to sequence sounds in the order they are heard. Tr. at v. 1, pp. 58-61.
73. HISD did provide articulation therapy and language therapy to Student but without any change. Student's speech therapist could not provide more than two hours per week of service because of her limited schedule. The array of content mastery, an aide, an itinerant teacher for auditory-impaired, an FM loop system and Earobics program were provided but did not result in meaningful progress in the area of auditory-processing needs. Tr. at v. 1, pp. 186-87, 215-18, 259.

74. The Earobics program is comparable with the Fast ForWord program in meeting Student's needs in terms of phonemic awareness. Tr. at v. 3, pp. 685-86, 709.
75. The speech therapist who treated Student since her *** class stated that Student could not understand in class and had a hard time learning. The speech therapist acknowledged that Student's standard scores on objective measures had remained flat over time. Student did not attain comprehension of the *** grade curriculum. Tr. at v. 1, p. 215, 218, 253, 264; Tr. at v. .
76. Student continued to have language development needs while at HISD. Student's *** grade teacher could not understand her and communicate with her. Student made no meaningful progress in articulation. The speech therapist for Student confirmed that her speech was unintelligible. Tr. at v. 1, pp. 215-16, 252; Tr. at v. 3, p. 627.
77. The Stanford Achievement Test, Ninth Edition (SAT-9) was administered to Student in *** prior to her receiving hearing aids. The Stanford Achievement Test, Tenth Edition (SAT-10) was administered to Student in the *** grade after she received hearing aids. The improvement in her listening score is more attributable to the hearing aids provided by her parents than programming by HISD.
78. In February, 2003, on the Oral and Written Language Scales, Student had a standard score of *** in oral expression and a standard score of *** in listening comprehension. In November, 2003, on the Woodcock Language Proficiency Battery--Revised, Student had a standard score of *** in oral expression and a standard score of *** in listening comprehension. Tr. at v. 3, pp. 723-24; Pet'r Ex. 7, 12; Resp't Ex. 7, 12.
79. In November, 2003, on the Woodcock Language Proficiency Battery--Revised, Student had a standard score of *** in picture vocabulary. In April, 2004, on the Peabody Picture Vocabulary Test, Student had a standard score of *** in picture vocabulary. Pet'r Ex. 10, 14; Resp't Ex. 10, 14.
80. In November, 2003, on the Woodcock Language Proficiency Battery--Revised, Student's score in listening comprehension indicated that while an average student performed listening comprehension tasks with *** percent success, she performed listening comprehension tasks with *** percent success. The district evaluator observed that Student will find the oral language demands of grade-level tasks very difficult to extremely difficult. Pet'r Ex. 10; Resp't Ex. 10.

81. Standard scores from testing in speech and language indicate that Student does not have the capacity to remain in a mainstream environment and achieve without appropriate interventions to address her auditory-processing disorder. Tr. at v. 1, pp. 217-18; Pet'r Ex. 14; Resp't Ex. 14.
82. The *** School is located in Houston, TX and is a private school for children with different language-learning disabilities. It serves children from *** through *** grade. It includes the *** Center that provides language services to the student body. Tr. at v. 2, pp. 370, 379-80, 400, 402; Pet'r Ex. 41.
83. Student was enrolled and began at the *** School in September, 2004. Tr. at v. 2, p. 370; Tr. at v. 3, p. 572; Pet'r Ex. 41.
84. Student is served in a small classroom of 10 with a teacher and an assistant teacher. Student's class is a ***-grade multi-age grouping with children ranging from *** years old. Tr. at v. 2, pp. 375, 378, 388.
85. Student's placement in a ***-grade class is appropriate for her level of understanding and abilities. Tr. at v. 1, pp. 85, 95, 168, 170; Tr. at v. 3, p. 799; Pet'r Ex. 41.
86. Student receives academic instruction along with 10 hours of group speech/language therapy per week. Tr. at v. 2, pp. 375, 391.
87. Student has ready access to speech pathologists that provide therapy addressing her receptive and expressive language skills. Tr. at v. 1, p. 62.
88. Student receives phonemic awareness training, auditory memory training and gap-detection training through the Fast ForWord program. Tr. at v. 1, p. 65; Tr. at v. 2, p. 396; Tr. at v. 3, p. 685.
89. Student's classmates have different strengths and weaknesses. She is exposed to peers with expressive language ability that can serve as a role model for her development. Tr. at v. 1, pp. 84-85; Tr. at v. 2, pp. 388-89.
90. The *** School has ensured that Student continues to wear her hearing aids including while on recess to benefit from the opportunity for language use. Tr. at v. 2, pp. 398-99.

91. The *** School has ensured that Student has access to a functioning amplification system supervised by an audiologist. Tr. at v. 2, p. 382, 395, 398.
92. The *** School has ensured that Student is not exposed to ambient noise whenever possible that is promoting noise desensitization. Tr. at v. 2, pp. 382, 397.
93. Her *** School individualized plan for Student includes sequencing exercises that address her auditory processing needs. Pet'r Ex. 41.
94. The *** School program is providing educational benefit to Student. The *** School has used the advanced audiological evaluation to refine its array of services to Student to ensure educational benefit. Tr. at v. 2, p. 395; Pet'r Ex. 41.
95. Student's parents paid the *** School a registration fee of \$2,781. Tr. at v. 2, pp. 402-03; Tr. at v. 3, p. 573. Pet'r Ex. 41.
96. Student's parents pay the *** School on a ten-month tuition payment plan for the 2004-05 school year; each monthly payment is \$1,700. Tr. at v. 2, pp. 402-03; Tr. at v. 3, pp. 573-74; Pet'r Ex. 41.

Discussion

Notice of Admission, Review and Dismissal Committee Meeting

The Petitioner complains that Student's parents were not provided notice of ARD committee meetings. Under IDEA, parental participation in the special education process is vital to protect the student's rights and ensure the development of appropriate placements and programming. Parents must receive timely notice of ARD committee meetings. 34 C.F.R. § 300.345.

Here, the Petitioner does not satisfy her burden of proof that Parents were not notified of the ARD committee meetings pertaining to Student's ***-grade year. At least one parent was present at all the ARD committee meetings. Thus, the parents had constructive notice even if there might have been complications in delivering written notice.

I conclude that the Respondent prevails on this claim.

Disclosure of Personally Identifiable Information

The Petitioner asserts that the chair of the special education department of Student's school caused the improper release of personal information about Student in the school's front office. In November, 2003, the special education chair and Student's mother had an encounter and somewhat loud argument in the school's front office. The Petitioner blames the department chair for putting private information being discussed at risk of being overheard by staff and parent volunteers present in the office area.

Under IDEA, school districts have a responsibility to safeguard the confidentiality of personally identifiable information that it collects on children with disabilities. 34 C.F.R. § 300.572. Regarding this incident, the Petitioner offers more speculation than proof that anyone around the school office gained unauthorized access to protected information about Student.

I conclude that the Respondent prevails on this claim.

Identification of Auditory Impairment

One of the Petitioner's allegations is that HISD did not timely identify Student with an auditory impairment. Under IDEA, schools must identify, evaluate and provide FAPE to all children with disabilities in accordance with prescribed timelines. 34 C.F.R. §§ 300.125, 300.300.

To begin my analysis of this issue, I note that there is a one-year statute of limitations in due process hearings in Texas.¹ The limitations period is important given that HISD identified Student as a child with an auditory impairment at the ARD committee meeting of May 8, 2003. If the Petitioner had a complaint about the auditory impairment designation, she should have raised this issue by May 8, 2004. The Petitioner's request for hearing was received by the TEA on August 20, 2004. The Petitioner's challenge surrounding the auditory impairment identification is not timely as it is outside the limitations period.

I conclude that the Respondent prevails on this claim.

¹ 19 Tex. Admin. Code § 89.1151(c).

Individualized Education Program

The Petitioner contends that the IEPs for Student are not reasonably calculated to provide educational benefit to Student. I will address this issue as part of my analysis of the FAPE claim below.

Related Services, Supplementary Aids and Assistive Technology

The Petitioner's challenge with regard to related services, supplementary aids and assistive technology is focused on the FM loop system providing additional amplification for Student. Under IDEA, HISD has a duty to not just provide special education but also related services, supplementary aids and services and assistive technology. 34 C.F.R. §§ 300.300, 300.308.

Here, a problem occurred with the FM loop system in Fall, 2003. The loop was damaged or became inoperable. Student had to rely on a backup headphone system for about two months. The backup system was not always used properly. While there might have been a risk to Student, the Petitioner did not offer any evidence that Student did indeed suffer some tangible negative consequence from any misuse of the backup system.

Further, under Fifth Circuit caselaw -- *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir.), *cert. denied*, 531 U.S. 817 (2000) -- the Petitioner must demonstrate that the Respondent failed to implement substantial or significant provisions of the IEP. *Id.* at 349. I find that the FM loop system is one piece of an array of IEP services and did not constitute a substantial or significant part of the IEP.

I conclude that the Respondent prevails on this claim.

Mode of Communication

The Petitioner states that she was denied the opportunity to select her mode of communication as a child with an auditory impairment. Under state law, students who are deaf or hard of hearing are entitled to choose their language mode. Tex. Educ. Code §§ 29.302-303.

I find that Student's ARD committees addressed her mode of communication in the auditory impairment supplement to the ARD documentation. This supplement was filled out several times. I am not persuaded that the Petitioner had no knowledge of this selection; she has failed to support her contention that this form was somehow prepared without her knowledge.

I conclude that the Respondent prevails on this claim.

Staff Training

This charge is that the staff working with Student was not properly trained. Under IDEA, states must have personnel standards for those persons serving disabled students. 34 C.F.R. § 300.136.

The main concern expressed by the Petitioner about inadequate staff training centers on the FM loop system. The Petitioner did prove that the school nurse should not have been the primary trainer on the FM system. I find, however, that even though an audiologist should have assumed the role of trainer, the Petitioner did not establish that any subpar instructions from the nurse resulted in the system breaking or harm coming to Student. To prevail on this claim, the Petitioner must offer not just a procedural defect (here the wrong person tapped to give training) but also some educational detriment suffered by Student per *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003).

I conclude that the Respondent prevails on this claim.

Placement

The Petitioner contends that HISD did not consider an appropriate placement for her. I will address this issue as part of my analysis of the FAPE claim below.

Free Appropriate Public Education

The overarching issue in this case is the Petitioner's FAPE claim. My analysis of the IEP and placement claims will resolve the FAPE question. In order for the Petitioner to prevail, she must demonstrate by a preponderance of the evidence that her IEPs were not in compliance with IDEA procedures and were not reasonably calculated to enable him to receive educational benefits. If the Petitioner satisfies her burden through this two-part test, then HISD would be denying Student FAPE in accordance with *Board of Educ. v. Rowley*, 458 U.S. 176 (1982).

With regard to the second prong of the *Rowley* inquiry, the Fifth Circuit's criteria to evaluate whether a program is reasonably calculated to confer educational benefits are outlined in *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998).² There are four factors in the *Cy-Fair* opinion.

² Hereafter referred to as "*Cy-Fair*."

Individualized Program

The first *Cy-Fair* factor is whether the program is individualized on the basis of the student's assessment and performance. Here, I must find that Student's IEPs have not been individualized. They do not recognize her auditory-processing disorder and needs. While the district was aware of the prospect of an auditory-processing disorder early during Student's time within HISD, and even with an ARD committee flagging the need for a processing assesment, the district refused to evaluate for a processing disorder.³ Without appreciating her needs, an individualized response cannot be developed.

LRE

The second *Cy-Fair* factor is whether the program is administered in the least restrictive environment (LRE). In Texas, the prevailing case on the LRE standard is *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989). The first part of the *Daniel R.R.* test asks whether full-time education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily. I find that Student cannot be educated in the regular classroom as demonstrated by her stagnant standard scores in language and auditory processing. Further, episodes such as the one in content mastery with the chair of the special education department at her elementary school reveal how intense her needs are and either how ill prepared or incapable staff is in dealing with her around the regular environment.⁴ In addition, because of practices such as having Student remove her hearing aids while on recess, she is being isolated on an auditory basis; she may be physically integrated, but she is not integrated on a basic communication level.

Key Stakeholders

The third *Cy-Fair* factor is whether the key stakeholders provide the program services in a coordinated and collaborative manner. On this point, I cannot credit the district because of several instances of poor communication and lack of collaboration. One example is the FM loop system; Student was without her FM loop system longer than necessary because of miscommunication about getting it either repaired or replaced. Further, testimony at hearing clarified that the special education department chair at Student's school was not monitoring progress as was initially represented.

³ See, for example, Finding of Fact No. 10 and 66.

⁴ See, for example, Finding of Fact No. 33.

Positive Benefits

The fourth *Cy-Fair* factor is whether Student's proposed plan and placement are reasonably calculated to generate positive academic and nonacademic benefits. After considering the evidence, especially the testimony of the experienced educator with the most contact with Student – her ***-grade teacher, I find that the Petitioner has demonstrated that maintaining Student at *** Elementary would be a detriment to her.⁵

In sum, I see all the *Cy-Fair* factors as weighing toward a finding that the plan and placement put forward by the district are not reasonably calculated to confer all the academic and nonacademic benefits required by Student. I conclude that the Petitioner prevails on this issue.

Relief

As a threshold matter, there is a question of whether the Petitioner is eligible for reimbursement. Under 34 C.F.R. § 300.403(d)(1), reimbursement may be reduced or denied if the parents did not take certain steps. Student's parents did comply with this requirement.

The next step in the analysis is the addressing the question of whether Student's parental placement is appropriate. In order to obtain reimbursement for Student's placement at the *** School, the Petitioner must demonstrate not only that the district's placement was not appropriate, but also that the parental alternative selected is appropriate. 34 C.F.R. § 300.403(c).

I conclude that the *** School is appropriate for Student.⁶ I award reimbursement in accordance with the documented expenses.

Conclusions of Law

After due consideration of the foregoing findings of fact, I make the following conclusions of law:

1. The Petitioner, Student, is eligible for special education and related services as a child with a disability under IDEA.
2. The Respondent, Houston Independent School District, did not deny the Petitioner's parents notice of ARD committee meetings. 34 C.F.R. § 300.345.

⁵ See *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1292 (5th Cir. 1991) regarding the weight to be given to testimony from those with daily and continuing observation within the classroom environment.

⁶ See, for example, Finding of Facts No. 82-94.

3. The Respondent, Houston Independent School District, did not breach the confidentiality of the Petitioner. 34 C.F.R. § 300.572.
4. The Respondent, Houston Independent School District, was not untimely in the identification of the Petitioner as a child with an auditory impairment. 34 C.F.R. §§ 300.125, 300.300
5. The Respondent, Houston Independent School District, did not fail to implement a FM loop system for the Petitioner. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).
6. The Respondent, Houston Independent School District, did not deny the Petitioner her choice of mode of communication. Tex. Educ. Code §§ 29.302-303.
7. The Respondent, Houston Independent School District, did not fail to provide trained staff for the Petitioner. 34 C.F.R. § 300.136.
8. The Respondent, Houston Independent School District, proposed a placement that was not reasonably calculated to provide FAPE to the Petitioner, Student, under *Board of Educ. v. Rowley*, 458 U.S. 176 (1982) and *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
9. The Respondent, Houston Independent School District, proposed a placement that was not the LRE for the Petitioner, Student, under *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989).
10. The Petitioner, Student, is being provided with an appropriate private education selected by her parents. 34 C.F.R. § 300.403.
11. The Petitioner, Student, is entitled to reimbursement of her parentally selected private placement under *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359 (1985) and *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

Order

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

IT IS HEREBY ORDERED THAT:

1. The compensation sought by the Petitioner for the cost of private placement of Student shall be and is **GRANTED IN PART**. To wit, the Respondent shall compensate the Petitioner for documented registration, tuition, fees and charges incurred for enrolling and maintaining Student at the *** School, Houston, TX, during the 2004-05 school year. Authorized expenses include only those for the *** School and the associated *** Center, Inc. The Respondent may either reimburse the Petitioner or pay the *** School, Houston, TX, directly upon receipt of invoices for such registration, tuition, fees and charges. The term of reimbursement or payment shall be 30 days. The parties may agree otherwise to the sum and manner of payments.
2. All other relief sought by the Petitioner and not specifically granted shall be and is **DENIED**.
3. The Respondent shall timely implement this Final Decision within 10 school days in accordance with 19 Tex. Admin. Code § 89.1185(q) and 34 C.F.R. § 300.514. The Respondent must provide the following to the Division of Special Education Programs and Complaints at the TEA and copied to the Petitioner within 15 school days from the date of this Final Decision: (1) documentation demonstrating that the Final Decision has been implemented or (2) if the timeline set by the Hearing Officer for implementing certain aspects of the Final Decision is longer than 10 school days, the Respondent's plan for implementing the Final Decision within the prescribed timeline and a signed assurance from the superintendent that the Final Decision will be implemented.

SIGNED this 10th day of February, 2005.

_ /s/ Steven R Aleman _____
Steven R. Aleman
Special Education Hearing Officer

TEA DOCKET NO. 405-SE-0804

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

SYNOPSIS

ISSUE 1: Whether Houston ISD failed to provide FAPE to Student?

CITE: 34 C.F.R. § 300.300

HELD: For the Petitioner. District did not reasonable confer academic and nonacademic benefits to student.

ISSUE 2: Whether Houston ISD failed to provide notice of an ARD committee meeting to the parents of Student?

CITE: 34 C.F.R. § 300.345

HELD: For the Respondent. The Petitioner failed to demonstrate that the student's parents were denied actual or constructive notice of ARD committee meetings.

ISSUE 3: Whether Houston ISD improperly disclosed personally identifiable information about Student without parental consent?

CITE: 34 C.F.R. § 300.572

HELD: For the Respondent. The Petitioner failed to show that any personally identifiable information about the student was disclosed.

ISSUE 4: Whether Houston ISD failed to timely identify an auditory impairment of Student?

CITE: 34 C.F.R. §§ 300.125, 300.300

HELD: For the Respondent. The Petitioner's challenge is barred by the statute of limitations.

ISSUE 5: Whether Houston ISD failed to develop individualized education programs (IEPs) reasonably calculated to provide educational benefit to Student?

CITE: 34 C.F.R. § 300.300.

HELD: For the Petitioner. District's IEPs did not address auditory-processing disorder of Petitioner.

ISSUE 6: Whether Houston ISD failed to implement and/or deliver special education, related services, supplementary aids and services and/or assistive technology in the IEPs of Student?

CITE: 34 C.F.R. §§ 300.300, 300.308

HELD: For the Respondent. The Petitioner failed to show any actual negative consequence to the Petitioner from an alternative amplification system used while her primary application unit was being repaired and replaced.

ISSUE 7: Whether Houston ISD denied Student her choice of mode of communication?

CITE: Tex. Educ. Code §§ 29.302-303

HELD: For the Respondent. The Petitioner's ARD documentation indicated her communication mode.

ISSUE 8: Whether Houston ISD failed to provide properly trained staff to serve Student?

CITE: 34 C.F.R. § 300.136

HELD: For the Respondent. The Petitioner failed to prove that any training provided was a detriment to her.

ISSUE 9: Whether Houston ISD failed to consider an appropriate placement for Student?

CITE: 34 C.F.R. § 300.550

HELD: For the Petitioner. District's placement did not reasonable confer nonacademic benefits to student.