
DOCKET NO. 201-SE-0506

B/N/F***&***

PETITIONER

vs. BEFORE A SPECIAL EDUCATION
HEARING OFFICER

HOUSTON INDEPENDENT FOR THE STATE OF TEXAS

SCHOOL DISTRICT

RESPONDENT

DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Petitioner, student (hereinafter referred to as Petitioner or STUDENT), brings this action, by his next friend, *** (hereinafter referred to as MOTHER), against Respondent Houston Independent School District (hereinafter Respondent or HISD) under the Individuals With Disabilities Education Act (hereinafter IDEA), 20 U.S.C. § 1400 et. seq.

Christopher Jonas of Corpus Christi, Texas represents Petitioner in this proceeding. Hans Graff of Houston, Texas represents Respondent.

PROCEDURAL HISTORY

Petitioner filed his request for due process on May 8, 2006. The due process hearing in this case began on July 6, 2006 and concluded on September 5, 2006. At all times during the due process hearing, Mr. Eduardo Zavala, Licensed Court

Interpreter, provided interpretation and translation services for STUDENT'S parents (hereinafter referred to as PARENTS). By agreement, both parties submitted post-hearing briefs and agreed that the due date for the Hearing Officer's decision would be October 24, 2006.

ISSUES AND REQUESTED RELIEF

Petitioner alleges that Houston ISD has denied him a free appropriate public education in the following particulars:

1. STUDENT has never been provided a designated aide since 2001;
2. Respondent has failed to provide an appropriate Individual Education Plan (IEP). Petitioner's IEP is the same every year. Goals and objectives remain the same on the IEP. Minimal progress is noted on the IEP.
3. Petitioner has never been reimbursed mileage for August 1999 to February 2000 even though she made repeated requests at ARD meetings.
4. Respondent has failed to provide physical therapy (PT), or even evaluate for PT for STUDENT.
5. STUDENT is not being provided appropriate speech services. STUDENT has been taking speech therapy for *** years and he has made minimal or no progress. STUDENT still cannot talk.
6. Respondent has failed to timely provide occupational therapy (OT) evaluation or an appropriate OT education plan.
7. Respondent has not provided appropriate training for the aides that are in STUDENT'S classroom. The aides are not trained on the individualized behaviors that STUDENT exhibits.
8. Respondent has not allowed PARENTS to participate in their son's education. Respondent has failed to provide a contact person or a liaison, to communicate with the parent in her native language.
9. Respondent has failed to implement any of the recommendations in the assistive technology (AT) evaluation that was conducted four years ago. Student has multiple disabilities and needs assistive technology to receive appropriate education, but none of the AT evaluation recommendations have been followed.
10. STUDENT is not being provided with a free appropriate public education. His diapers are not being regularly changed when they are soiled. Respondent is not being provided with appropriate interventions, or AT, to prevent him from placing his hands in his soiled diapers. These basic educational needs of STUDENT are not being met.
11. At the hearing, Petitioner also presented evidence, and subsequently argued, that STUDENT is being denied a free appropriate public education by Respondent's practice of bringing him to the school bus at the end of the day beginning at 2:45 p.m. rather than at 3:00 p.m. as with the general education students. As such,

Petitioner alleges a denial of approximately 15 minutes of instructional time per day.

As relief, Petitioner requests two years of compensatory educational services or relief deemed appropriate by the Hearing Officer.

Issue Number 3 was resolved at the due process hearing when Respondent provided and MOTHER accepted a reimbursement check in the amount of \$675.00 as full and final resolution of her claims for transportation reimbursement.

FINDINGS OF FACT

1. STUDENT is a ***-year-old student who resides within the Houston ISD and attends *** School.
2. STUDENT is eligible for special education services under the IDEA as a student having mental retardation, a speech or language impairment, an orthopedic impairment, an other health impairment, and multiple disabilities. STUDENT has been diagnosed with *** and also struggles with asthma and other respiratory difficulties. STUDENT also has ***, which results in him placing non-food items in his mouth on a regular basis.
3. HISD is a political subdivision of the State of Texas and a duly incorporated school district. HISD was responsible for providing a free appropriate public education to STUDENT under the provisions of the IDEA during the relevant time period.
4. STUDENT has been enrolled in and served by HISD since he entered school. Due to the severity of STUDENT'S disabilities, he is served in a self-contained classroom. STUDENT participates in activities with non-disabled children during lunch, breakfast, recess, passing periods in the hallways, and school-wide activities such as assemblies or pep rallies.
5. STUDENT and Respondent previously entered into a settlement agreement in April 2001 in resolution of disputes concerning STUDENT'S educational program. Some of the provisions of that settlement agreement form the basis for Petitioner's claims in the instant case.
6. The native language of STUDENT'S PARENTS is Spanish.
7. STUDENT attends *** School though it is not his home school because it offers a program appropriate for students with multiple disabilities, as well as appropriate student health services.
8. No good instruments exist for measuring STUDENT'S cognitive abilities. Respondent assessed STUDENT with the Vineland adaptive behavior evaluation in August 1995 and January 2002. The results of both evaluations yielded composite skill levels of *** year. Specific results on the Vineland from January 2002 indicate the following age equivalencies: communication (***months), daily

- living skills (***) months), socialization (***) months), motor skills (***) year, (***) months), and composite skills of (***) months.
9. STUDENT'S program at (***) since January 22, 2002 has included 30 hours per week of special education instruction, which incorporates 1 hour of direct speech therapy; 10 hours per week of school health services(**); and the related services of transportation (with an aide present on the bus) and occupational therapy (OT) in the amount of 1 hour per year of consultative services to review adaptive equipment.
 10. STUDENT has a 1:1 designated aide in his classroom and throughout the school day, except when he goes to the student health clinic for the nurse to feed him. For the past three years, Ms. (***) (hereinafter (***)) has served as STUDENT'S individual aide. (***)received training specific to working with STUDENT when she began as his aide. The special education department chair and the behavioral specialist provided the training.
 11. STUDENT does not have a 1:1 designated aide on the bus. An aide is present on the bus, but is responsible for all students on the bus and not just STUDENT.
 12. On January 4, 2006, STUDENT came home from the bus with feces on his hands and face, resulting from STUDENT'S behavior of placing his hands into his soiled diaper. The Admission, Review, and Dismissal Committee (ARDC) met on January 20 and February 10, 2006 to address this issue and determined that the aide would sit next to STUDENT to monitor him more closely. (***) disagreed with this recommendation, believing that a 1:1 aide was needed to ensure STUDENT'S safety and health.
 13. There is no evidence of additional incidents on the bus during which STUDENT'S health and safety was compromised, although STUDENT continued to return home after the long (approximately 2 hour) bus ride with wet and/or soiled diapers.
 14. STUDENT'S diapers are changed approximately 15 minutes before he leaves his classroom at the end of the school day to walk to the bus. If STUDENT soils his diaper en route to the bus, he stops at the student health clinic for a diaper change before the boarding the bus.
 15. Diaper changing facilities do not exist on the bus. The presence of a 1:1 designated aide for STUDENT on the bus would not prevent him from arriving home with wet or soiled diapers due to the length of the bus ride.
 16. STUDENT leaves his classroom approximately 15 minutes before the dismissal time of general education students to walk to the bus. STUDENT leaves early because he walks slowly and needs that much time to arrive at the bus. STUDENT'S bus leaves school at the same time as the school transportation provided to general education students.
 17. During the 15 minutes when STUDENT walks to the bus at the end of the school day, he walks independently with the guidance of his aide and communicates in a social manner with people in the hallways. STUDENT receives some benefit from this time, as he is able to walk independently to the bus and through the school building.
 18. Since at least 2001, (***) has disagreed with Respondent's OT services for STUDENT. The ARDC, with (***) disagreeing, has consistently recommended

- that STUDENT receive two (2) one half hour (.5) sessions per year of consultative OT for review of adaptive equipment.
19. Respondent's recommendation is based on the view that STUDENT'S needs are appropriately met in the classroom setting and that he will not be able to attain fine motor skills or complete self help tasks beyond what can be accomplished in the classroom due to his low cognitive level.
 20. Respondent's most recent OT assessment of STUDENT was completed on September 10, 2003. The summary indicates that STUDENT'S fine motor and self help skills appear to be within his cognitive level as indicated by the Vineland adaptive behavior scores. The recommendation continued to be 2 consultative visits per year of .5 hours duration to make adaptive equipment recommendations.
 21. Adaptive equipment provided by the OT included adaptive seating for toileting and feeding. Upon *** request, the OT provided a cut out cup, adapted spoons, and a universal cuff holder in January 2004.
 22. Two outside OT evaluations, dated November 1997 from Texas Children's Hospital and May 2000 from Baylor College of Medicine Genetics Clinic, recommended that STUDENT receive OT to address fine motor deficits. These recommendations were not accepted by the ARDC, as it believed that they relied on a medical model rather than an educational one for determining the need for OT.
 23. MOTHER requested an Independent Educational Evaluation (IEE) for OT in 2004 and Respondent approved the request; however, there is no evidence that the evaluation was ever completed.
 24. STUDENT does not possess functional or self help skills. STUDENT cannot perform any of the following skills independently: use the toilet, dress himself, feed himself, brush his hair or teeth, wash his hands or face, button a shirt or jacket, zip pants, or put on his jacket. STUDENT requires maximum hand over hand assistance from his aide to participate in hand washing, with the exception of turning on the water and rubbing his hands together.
 25. STUDENT is able to grasp and manipulate preferred objects and toys, occasionally cooperate with scheduled use of an adapted toilet, move into the kitchen area in his home to indicate a desire for drink or food, assist in dressing by lifting a body extremity that is touched, independently remove outer wear, and hold a cup, toy, shirt, pullover and other small things. STUDENT can grasp and reach, but has no fine motor control.
 26. STUDENT'S self-help IEP reflects the following progression of annual goals: 1/03 annual goal was to achieve 1 of 2 benchmarks, with each benchmark addressing the use of a loaded adaptive spoon; 1/04 annual goal was to assist with face washing at Level 2 (partial physical prompt), 11/04 annual goal was to assist with face washing at Level 3 (Verbal prompt and/or modeling), and 11/05 annual goal was to assist with the clean up of the classroom. ***
 27. STUDENT'S fine motor/vocational IEP reflects the following progression of annual goals: 1/03 annual goal was to achieve 1 of 2 benchmarks, with benchmark 1 pertaining to keeping his hands on his desk during instruction and benchmark 2 pertaining to reaching for and picking up objects on his desk; 1/04 annual goal was to hand an object to a classmate or teacher within 30 seconds of being asked

- at Level 3 (verbal prompt and/or modeling); 11/04 annual goal was to hand an object to classmate or teacher within 15 seconds of being asked at Level 3; and 11/05 annual goal was to use a napkin or paper towel to wipe his mouth at Level 2 (partial physical prompt). ***
28. STUDENT'S fine motor deficits present barriers to his accessing his curriculum and instruction in the areas of self-help, feeding, and toileting. OT reports document STUDENT'S deficits in this area.
 29. Any gains made by STUDENT in the areas of fine motor and self-help skills are minimal in nature.
 30. Respondent has not provided Physical Therapy (PT) to STUDENT or evaluated STUDENT for PT since at least 2000.
 31. An outside PT evaluation completed in February 2003 did not recommend PT for STUDENT.
 32. STUDENT'S gross motor skills do not present barriers to his accessing his special education environment or program. STUDENT is able to ambulate functionally, transfer independently between surfaces, move up and down stairs with assistance, and generally move freely throughout the school environment.
 33. Since at least 2000, Respondent has provided STUDENT with one hour per week of speech therapy services.
 34. Texas Children's Hospital conducted a speech and language IEE on STUDENT in July 1998. The evaluation determined that STUDENT'S overall speech and language abilities were below the *** age level. In relevant part, the evaluation recommended that STUDENT'S speech therapist consult regularly with his parents and teacher based on the belief that STUDENT would benefit more from increased consultative services than increased direct treatment.
 35. In December 2001, an IEE in the area of assistive technology (AT) was completed to determine STUDENT'S needs for augmentative communication technology. The evaluation emphasized that STUDENT must be able to do certain things before augmentative communication can be successful: chose a message or object from pictures or a verbal list of choices by pointing or indicating in some way; understand that a communication device can communicate his wants or needs; and use a communication device to meet a need STUDENT cannot otherwise meet.
 36. In STUDENT'S Full and Individual Evaluation (FIE) dated January 2002, STUDENT'S developmental assessment in the area of language found that STUDENT was able to respond to his name, briefly inhibit to a firm "no," comply with simple directives with verbal plus gestural cues, and indicate basic wants by proximity, facial expression, body posture and movements. Based on the developmental assessment and the results of the IEE in AT, the FIE recommended, in the area of speech, that STUDENT needed to increase skills in communicating with both familiar and unfamiliar people and that total communication methods should be continued, involving the use of natural gestures, representational objects, and approximated signs. The evaluation also recommended continued exploration of the use of Voice Output Communication Aids (VOCA) devices.

37. In November 2004, STUDENT'S speech therapist completed a speech evaluation report and concluded that STUDENT needed access to an environment of multiple listeners and responders to build conversational skills, as well as the use of representational objects, photos and line drawings for scheduling and choice making.
38. STUDENT'S speech therapy IEPs, as well as the testimony of his speech therapist, Dr.***, demonstrate that his speech program is appropriate based on assessment and student performance. STUDENT'S benchmarks, over time, reflect the use of photos, representational objects, and drawings to encourage choice making; the use of VOCAs, as well as body movements and gestures, to greet and interact with different listeners; and an increased focus on conversational turn taking and interactive communication. Evaluation codes indicate that STUDENT mastered some benchmarks in the speech IEPs, but not all.
39. Although STUDENT cannot communicate via vocalization or speech, he has progressed in developing a communication system, using eye gazing to express likes and dislikes, and in his ability to access and utilize the VOCAs. STUDENT worked initially with the Wolf single switch device and now with the Step-by-Step and Go-Talk devices.
40. STUDENT is able to utilize these devices to initiate communication outside the classroom with other members of the *** community besides Dr. ***. STUDENT was able to use these devices to successfully participate in a fundraising effort at***.
41. STUDENT'S progress in the area of speech and language is more than trivial.
42. Dr. *** has never developed a sign language system of communication with STUDENT. Although the AT IEE recommended the use of simple signs with STUDENT, Dr. ***does not believe sign language is appropriate for STUDENT as he uses his head and upper body twice as much as his hands for communication.
43. Respondent has regularly provided a qualified translator/interpreter at STUDENT'S ARDC meetings. The interpreter is usually a staff person named Ms.*** unless she is absent. In addition, when *** needs interpretation outside of the ARD meetings, Ms. *** serves that function. *** generally has access to a qualified interpreter to communicate with Respondent about STUDENT'S program.
44. Respondent provides *** with an audiotape of the ARDC meetings in her native language; however Respondent does not provide *** with a copy of the IEP documents in Spanish, her native language. *** has asked before to be provided with a Spanish copy of STUDENT'S IEP, but she did not receive one. The IEP documents are not necessarily read in Spanish in their entirety during an ARDC meeting.
45. The goals and objectives on STUDENT'S IEP in areas other than speech, fine motor, and self-help (these having been previously discussed above) reflect minimal changes in benchmarks and goals from year to year. They are largely repetitive despite any indication that the methods and strategies used to educate STUDENT were effective. Documentation on the IEP indicates *** progress or mastery of goals and benchmarks from ***.

46. For three consecutive years, STUDENT'S IEP for Cognitive Instruction addressed the skill of STUDENT giving eye contact to a person calling his name with essentially *** change in benchmarks. Without mastering the eye contact goal, STUDENT'S IEP was changed to reflect a new goal of identifying objects in a box.
47. For three years, STUDENT'S IEP for Gross Motor skills addressed the goal of placing his foot on the first step of the stairs. Although this goal was never mastered, it was replaced with the goal of putting his arm on the door handle to open a door.
48. The statements of STUDENT'S Present Levels of Performance (PLOP) on his IEP have no relationship to his annual goal or benchmarks. The annual goal and corresponding benchmarks do not appear to be based on assessment data or student's present level of functioning as STUDENT'S teachers could not explain why goals were dropped or changed from one year to the next ***.
49. No systematic plan or progression for educating STUDENT is provided by his IEP.
50. There is no evidence of STUDENT'S progress over time on his IEP. Although STUDENT may only be capable of minimal progress given the nature of his disabilities, he is entitled to an IEP that attempts to educate him with goals and objectives that reflect a systematic plan for his education.

DISCUSSION

I. CLAIMS ARISING FROM THE 2001 SETTLEMENT AGREEMENT BETWEEN THE PARTIES

Petitioner's claims that Respondent failed to provide him with a designated aide who is properly trained, failed to implement recommendations from an AT evaluation conducted in December 2001, and failed to allow parent participation by not providing a contact person to communicate with PARENT in her native language all arise from the provisions of an April 2001 settlement agreement entered into by the parties pertaining to STUDENT'S education with HISD.

Legally, STUDENT'S claims arising under this agreement are time barred by the four-year statute of limitations pertaining to contracts in Texas (Civil Practices and Remedies Code, § 16.004) and the one-year statute of limitations pertaining to special education cases in Texas. *Texas Advocates Supporting Kids With Disabilities v. Texas Education Agency*, 112 S.W. 3d 234 (TX. Ct. App.- Austin 2003); *Raymond V. v. Houston ISD*, Civil Action No. H-05-1799 (September 18, 2006). Any legal entitlement STUDENT may have to a properly trained,

designated aide, to the incorporation of the AT evaluation recommendations, or to a contact person to communicate in the parent's native language must come from his right to a free appropriate public education under the IDEA.

A. Whether Respondent Failed To Provide Properly Trained, Designated Aides Since 2001?

1. The Classroom

Assuming *arguendo* that STUDENT'S right to a free appropriate public education guarantees him a properly trained, designated aide, the evidence demonstrates that STUDENT has, in fact, been provided such an aide in the classroom for at least the past *** years. Further, when the aide began to work with STUDENT, the evidence shows that she received training from the special education department chair and a behavioral specialist on how to work with STUDENT and his particular behaviors.

*** testified that her complaint in this proceeding really is not that STUDENT has been without an aide; but rather, that Respondent has refused to identify the aide by name in the ARD documents. However, nothing in IDEA requires Respondent to specify the name of STUDENT'S aide in the ARDC paperwork. Indeed, the better practice is not to designate a particular name given that unavoidable circumstances can arise that might preclude that particular person from serving as STUDENT'S aide.

2. The Bus

*** also argues that STUDENT is entitled to a 1:1 designated aide on the bus to ensure his safety and health. *** interprets the settlement agreement as mandating a designated bus aide, but also argues that his right to a free appropriate public education encompasses such an aide given STUDENT'S Pica and behavior of placing his hands into his soiled diapers.

The evidence pertaining to STUDENT'S needs on the bus indicates that the ARDC instructed the aide to sit next to STUDENT to provide increased monitoring after the January 2006 incident when STUDENT arrived home with

feces on his body. There is no evidence of any further incidents on the bus after that date, other than STUDENT arriving home with wet or soiled diapers.

However, STUDENT'S wet and soiled diapers are due to the length of the bus ride and the lack of diaper changing facilities, and not to the lack of a designated aide. In addition, Petitioner presented no evidence concerning the needs or behaviors of other students on the bus to suggest that the aide cannot adequately meet the needs of STUDENT and other passengers in that environment.

The nature and severity of STUDENT'S disabilities are such that Respondent must look closely at the environment on the bus to determine if the aide can adequately provide STUDENT with a safe environment while also supervising other students with multiple disabilities; however, the evidence in the record does not support a conclusive finding that STUDENT needs a 1:1 designated aide at this time.

B. Whether Respondent Failed To Implement The Recommendations Of An Assistive Technology Evaluation of December 2001?

The AT evaluation of December 2001 was conducted pursuant to the 2001 settlement agreement between the parties, which specified that Respondent would provide an IEE in the area of assistive technology. Respondent provided the IEE and considered the results of that evaluation at an ARDC meeting on January 22, 2002. The evidence indicates that Respondent implemented some, but not all, of the recommendations in the AT evaluation. Claims that Respondent failed to implement necessary recommendations of this evaluation are time barred. Claims pertaining to the appropriateness of STUDENT'S current program will be considered below.

C. Whether Respondent Failed To Provide A Contact Person To Communicate With Parent In Her Native Language?

Petitioner claims that Respondent has not designated a Spanish-speaking HISD staff member to function as a liaison between PARENTS and the school to improve communication between the parties as mandated by the 2001

settlement agreement. As claims arising under the settlement agreement or time barred, the question is whether Respondent has satisfied its legal obligations to provide PARENTS with the necessary communication in their native language, Spanish.

IDEA requires that notice be provided to parents in their native language if feasible. 34 C.F.R. § 300.503. More specifically, Texas law provides that the district shall provide the parent with a “written or audiotaped copy of the child’s individualized education program translated into Spanish if Spanish is the parent’s native language...” Tex. Educ. Code, § 20.005(d)(1).

The evidence demonstrates that Respondent has made available to PARENTS a Spanish-speaking staff member to translate and interpret at all ARDC meetings and on a day-to-day basis for general communication needs. The ARDC meetings are interpreted for PARENT and an audiotaped copy of the minutes is typically provided. However, the evidence further indicates that PARENT is not regularly provided with either a written or audiotaped copy of the STUDENT’S IEP in Spanish. *** testified that she has requested Spanish translations of the IEP, but has not received them. To the extent that the IEP is discussed in the ARDC meeting, the audiotope contains information about the IEP, but *** must be provided with a Spanish translation of the IEP itself with all of its goals, objectives, and progress codes.

II. CLAIMS THAT STUDENT HAS BEEN DENIED A FREE APPROPRIATE PUBLIC EDUCATION BY RESPONDENT

Petitioner alleges that Respondent has denied him a free appropriate public education by failing to provide an appropriate program marked by reasonable progress from year to year. In particular, Petitioner argues that his IEP goals and objectives are the *** and that the services provided in the areas of speech, OT, and PT are inadequate. Petitioner further alleges that Respondent has deprived him of instructional time by the practice of his early dismissal for the bus and has failed to meet his basic educational needs by changing his diapers regularly.

The U.S. Supreme Court has defined a free appropriate public education as one that consists of “personalized instruction with sufficient services to permit the child to benefit educationally from that instruction.” *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the court developed a two prong analysis to determine if a school district has met its obligation to provide a free appropriate public education: 1) whether the district complied with the procedural requirements of IDEA, and 2) whether the district offered a program to the student that was reasonably calculated to provide educational benefit. *Id.* at 206-207. Only substantive violations are at issue in this cause. The essence of determining whether a substantive violation of IDEA has occurred is whether the school’s program has provided the student with the requisite educational benefit. IDEA does not require an education that maximizes a student’s potential; rather, the school must provide an education that is reasonably calculated to enable the child to achieve some benefit. Some benefit means an educational program that is meaningful and offers more than a de minimus educational benefit; it must be “likely to produce progress, not regression or trivial educational advancement.” *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997).

Although courts have not adopted a specific substantive standard to determine when a free appropriate public education has been provided, the Fifth Circuit in *Michael F.* identified four factors to consider in analyzing a school’s program:

1. Is the program individualized and based on the student’s assessment and performance;
2. Is the program administered in the least restrictive environment;
3. Are the services provided in a coordinated and collaborative manner by the key stakeholders; and
4. Are there demonstrated positive benefits both academically and non-academically to the student.

Applying these standards to STUDENT’S program, the Hearing Officer concludes that Petitioner met his burden of proving that Respondent’s program was inappropriate under the IDEA in the following particulars. *Schaffer v. Weast*, 126 S.Ct. 528 (2005).

A. Whether STUDENT'S IEP Was Appropriate¹?

¹This section addresses Petitioner's claims pertaining to his IEP and not to claims concerning speech, OT, and PT services, which will be discussed separately. Petitioner's IEP actually includes speech as an instructional, rather than related service, but speech will be considered separately from the remainder of his IEP as the service was segregable and performed by a speech therapist.

The Hearing Officer was provided, and reviewed, STUDENT'S IEP and progress data over a period of five years. Both Petitioner and Respondent acknowledge that STUDENT'S progress on his IEP has been***. Respondent argues, however, that STUDENT has shown progress by working on increasingly challenging objectives in terms of independence and degrees of difficulty even though he *** them. Respondent points out that STUDENT'S progress must be measured in very small increments because of the severity of his disabilities. Petitioner, on the other hand, points to the IEP itself to argue that it is repetitive***.

Evaluating the appropriateness of this STUDENT'S program is exceedingly difficult because the data available to determine what his capabilities are is***. Clearly, progress cannot be measured by the same tools and indicia used for students who possess linguistic communication skills and higher functional levels. Nonetheless, the law requires that all students, regardless of the severity of disability, be provided with a meaningful educational program that is likely to produce progress.

The evidence in this case indicates that the IEPs for STUDENT are inadequate on their face. The annual goals are not related to the Present Levels of Performance. For example, in STUDENT'S November 2005 IEP, the PLOP was that STUDENT will look where he going in the hallway (this sounds more like a goal than a PLOP; however this is how the PLOPS are written in STUDENT'S IEP). The annual goal for that PLOP was to identify objects in a box. The annual goal thus has no relationship to the student's current performance level.

The benchmarks for STUDENT'S annual goal change minimally from year to year, are *** prior year. For example, on STUDENT'S fine motor IEP, the benchmark for January 2005 was to hand an object to a classmate or teacher within 30 seconds at a Level 3 of independence. The benchmark for his next IEP, dated November 2005, was to hand an object to a classmate or teacher within 15 seconds at Level 3.

When not repetitive, the goals and objectives suddenly change completely even though the prior objectives were not mastered. STUDENT'S teacher could not explain the basis for the change in goals, why past goals were dropped or why new ones were chosen for STUDENT. See, Findings of Fact, numbers 26 & 27 as examples.

The evidence further demonstrates that despite STUDENT'S ***, the ARDC did not discuss or consider changes of program, strategy or methodology that might be more effective in working with STUDENT. The Hearing Officer agrees with Respondent that progress for this STUDENT will be measured in very small increments and that it may even, at times, be indiscernible. However, STUDENT must still be provided with an IEP that offers a systematic progression of goals and objectives based on present performance levels and assessment.

Respondent's failure to offer a program reasonably designed to produce progress for STUDENT denied him a free appropriate public education.

B. Whether Respondent Failed To Provide Appropriate Speech Services?

Petitioner claims that STUDENT'S speech services are not appropriate as evidenced by minimal gains and the fact that STUDENT still cannot talk.

Respondent counters that STUDENT has made notable gains in his communication skills and has been provided an appropriate speech and language program.

Petitioner did not meet his burden of proof with respect to his speech therapy program. The evidence shows that STUDENT'S speech therapy IEP, unlike the IEPs discussed above, contained goals and benchmarks that progressed over time and were developed on the basis of student performance and assessment.

They show a progression toward developing the skills needed for successfully using an augmentative communication device, toward more complex communication interactions, and toward increased use of VOCAs to aid in communication.

Further, the evidence also demonstrates some progress by STUDENT in the area of communication. Although *** testified that she has never seen STUDENT initiate communication with another person, school district personnel testified to STUDENT'S initiation of greetings and using VOCA devices in the hallways. STUDENT recently participated in a fundraising campaign at *** by soliciting donations via his VOCA device.

The Hearing Officer concludes, based on the IEP for speech therapy and STUDENT'S demonstrated progress in this area, that Respondent's speech therapy program for STUDENT is appropriate under the standards of the IDEA.

C. Whether Respondent Failed to Provide Physical Therapy To STUDENT Or To Even Evaluate STUDENT for Physical Therapy

The evidence establishes that Respondent has not provided PT to STUDENT since he was very young and that Respondent has not continued to evaluate STUDENT for PT services. Petitioner objects to this on the grounds that STUDENT requires PT services because he cannot walk independently for long periods of time, can't climb stairs, and has difficulty navigating curbs and uneven surfaces.

Respondent must provide the related service of physical therapy if it is required to assist STUDENT to benefit from his special education program. 34 C.F.R. § 300.34. Respondent's position is that STUDENT does not need PT or to be evaluated for PT because he is able to move freely throughout the school environment and encounters no barriers that preclude him from accessing his education.

Despite STUDENT'S physical limitations in walking and climbing independently, the evidence establishes that STUDENT is sufficiently mobile that he can fully access his educational environment without PT. STUDENT can stand, sit, walk,

move from one position to another, and navigate throughout the high school building independently. His gross motor deficits do not preclude the access to his education that would be required in order to mandate PT services.

D. Whether Respondent Failed To Provide A Timely OT Evaluation And An Appropriate OT Plan?

This aspect of Petitioner's program has been a subject of long-standing dispute between the parties. Petitioner argues that Respondent has failed to provide STUDENT with an appropriate OT plan in that STUDENT receives no direct service from the occupational therapist and STUDENT'S teacher and aide receive only one hour per year of consultation to review the appropriateness of STUDENT'S adaptive equipment. Petitioner has repeatedly requested additional OT support for STUDENT to improve his self-help skills related to toileting, eating, dressing, and washing.

Respondent counters that STUDENT'S occupational therapy needs, in terms of self-help and fine motor skills, are adequately met in the classroom by instruction from the aide and teacher. Respondent further argues that STUDENT'S fine motor and self-help skills are limited by his cognitive functioning and his current skill levels are consistent with his cognitive development.

The evidence demonstrates that STUDENT'S progress in the area of self-help and fine motor skills has been minimal at best. STUDENT is unable to perform any skills related to toileting, dressing, or self-care independently. STUDENT continues to require maximum hand over hand assistance to participate in hand washing and other tasks. STUDENT'S IEPs in this area contain annual goals that skip from using an adapted spoon to face washing to classroom clean up to picking up and handing objects to wiping his mouth with a paper towel. None of the benchmarks associated with any of these goals were ***, but STUDENT still moved on to other goals in no sequential pattern.

Although Respondent's OT coordinator testified that STUDENT is not capable of progressing beyond his current capabilities in the area of fine motor and self-help skills, the evidence demonstrates that STUDENT is capable of grasping and

manipulating preferred objects, assisting in dressing by lifting body extremities, independently removing outer wear, turning the faucet on and off, and holding small objects. These skills suggest that STUDENT may be capable of some progress if provided with an IEP with systematic goals and objectives, along with appropriate OT services.

The available OT assessment data from outside the school consists of two evaluations that recommend occupational therapy for STUDENT to address his fine motor deficits. These evaluations are not reliable evidence to support an order of increased OT, as they are remote in time and non-specific as to STUDENT'S needs in the educational environment. They do, however, suggest that additional OT evaluation from an independent source would be important to determine how STUDENT'S deficits, which clearly serve as a barrier to his access of his educational curriculum in the areas of self-help, feeding, and toileting, could be effectively addressed in the educational setting.

STUDENT'S IEPs, which contain a lack of sequential goals and objectives, and his corresponding lack of progress, demonstrate that Respondent's OT program of 1-hour consultative services per year is inadequate to meet his educational needs and allow him to benefit from his educational program.

E. Whether Respondent Fails To Change STUDENT'S Diapers On A Regular Basis

Petitioner failed to prove that Respondent does not regularly change STUDENT'S diapers. The evidence shows a regular schedule for changing STUDENT'S diapers at school, as well as a regular toileting schedule. The length of the afternoon bus ride (2-2 1/2 hours) accounts for STUDENT arriving home with wet or soiled diapers.

F. Whether Respondent Has Deprived STUDENT Of Instructional Time By Releasing Him To The Bus Early?

Petitioner spends the last fifteen minutes of his day walking from his classroom to the bus. The evidence demonstrates that this time is necessary for Petitioner to independently walk to the bus because of his physical impairment. The evidence

further demonstrates that this time provides some educational benefit to STUDENT, as he is able to work on skills addressed in his communication, socialization, and speech therapy IEPs. As such, Respondent's practice of releasing STUDENT fifteen minutes early to walk to the bus does not constitute a denial of a free appropriate public education.

CONCLUSIONS OF LAW

1. Student is a student who attends HISD and who is eligible for special education services under the provisions of IDEA and its implementing regulations. STUDENT meets eligibility criteria and presents educational need for special education services as a student with disability classification of mental retardation, speech impairment, orthopedic impairment, multiple disabilities, and an other health impairment. 20 U.S.C. § 1400, et.seq.; 34 C.F.R. § 300.8.
2. Respondent HISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA and its implementing regulations. During all times relevant to this proceeding, HISD had the responsibility to provide STUDENT with a free appropriate public education under the IDEA. 20 U.S.C. § 1401 (a)(18).
3. As the party seeking relief in this administrative proceeding, Petitioner has the burden of proving that Respondent's program was inappropriate. *Schaffer v. Weast*, 126 S.Ct. 528 (2005).
4. Respondent's program and placement for Petitioner during period of May 2005 through the present failed to provide Petitioner with a free appropriate public education under the IDEA in the following particulars:
 - a. Failed to provide Petitioner with an IEP reasonably designed to provide educational benefit. *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997).
 - b. Failed to provide Petitioner with an occupational therapy program sufficient to assist him in benefiting from his special education program. 34 C.F.R. § 300.34.
 - c. Failed to provide PARENT with an audiotaped or written copy of STUDENT'S IEP translated into Spanish. 34 C.F.R. § 300.503; Texas Education Code, § 20.005.
6. Petitioner failed to carry his burden of proof with respect to all claims other than those specifically stated in Paragraph 4 above.

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, this Hearing Officer hereby ORDERS that the relief sought by Petitioner is hereby GRANTED IN PART AS FOLLOWS:

1. Respondent shall provide STUDENT with a comprehensive independent educational evaluation that includes an occupational therapy evaluation to determine STUDENT'S current functioning levels and educational programming needs. Respondent is directed to provide PARENT with a list of providers or criteria in accordance with HISD procedures for IEEs within ten (10) days of the date of this decision. PARENT is directed to select a provider and make an appointment for the independent educational evaluation and occupational therapy evaluation within ten (10) days of receipt of the information.
2. Upon receipt of the written report from the Comprehensive Educational Evaluation and Occupational Therapy Evaluation, Respondent is directed to convene an ARDC within ten (10) school days with the evaluators participating to consider the results of the reports.
3. The ARDC is directed to reformulate STUDENT'S IEP, including implementation of appropriate OT services, in accordance with the assessment results and current student performance.
4. Respondent is directed to provide PARENT with a written or audiotaped copy of STUDENT'S IEP translated into Spanish in order to comply with legal requirements.
5. Respondent is directed to provide STUDENT with compensatory OT services in the amount and type, if any, recommended by the OT IEE for a period of one year's duration. These services, if any, shall be completed by the end of two years from the ARDC determination or sooner.

All other relief sought by Petitioner that is not specifically granted is hereby DENIED.

Finding that the public welfare requires the immediate effect of this Final Decision and Order, the Hearing Officer makes it effectively immediately.

SIGNED and ENTERED this 24th day of October 2006.

Lynn E. Rubinett
Special Education Hearing Officer