

STUDENT	§	BEFORE A SPECIAL EDUCATION
	§	
	§	
V.	§	HEARING OFFICER FOR THE
	§	
FORT BEND	§	
INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioner brings this appeal, pursuant to the Individuals with Disabilities Education Improvement Act 20 U.S.C. § 1400 et seq., (hereinafter referred to as "IDEIA"), against Respondent (hereinafter referred to as "Respondent" or "School District"). Petitioner (hereinafter referred to as "Petitioner" or "Student") filed a written request for a due process hearing which was received by the Texas Education Agency on April 2, 2010. Petitioner was represented by Attorney Michael O'Dell of Houston, Texas. Respondent was represented by Attorney Pam Kaminsky of Fort Bend Independent School District, and Attorney Jeff Rodgers of the law firm Feldman, Rogers, Morris & Grover L.L.P. in Houston, Texas. A due process hearing was held on Wednesday, May 19, 2010 through Friday, May 21, 2010 in Sugar Land, Texas. The parties agreed to file post-hearing briefs on or before June 18, 2010.

Petitioner alleges that Student is a ***-year old in the *** Grade. Petitioner has been receiving special education as a student who has Mild Mental Retardation and Speech Impairment.

1. Petitioner states that Student was educated in a fully inclusive placement in regular education classes until ***, 2009, in which Student was placed in a Life Skills restrictive placement for *** and ***.

2. Petitioner claims that Respondent was not implementing the behavioral plan recommended by the June 3, 2009 Admissions, Review and Dismissal (“ARD”) Committee in Student’s Life Skills class.

3. Petitioner contends that Respondent failed to notify Parent of any incomplete assignments, failed to send notes of Student’s behavioral issues in classroom, and failed to conduct correspondence with Parent relating to Student’s lack of participation in class.

4. Petitioner claims that Respondent made no attempt to use the *** recommended by the June 3, 2009 ARDC.

5. Petitioner states that no Functional Behavioral Assessment (“FBA”) was conducted as agreed to in the June 3, 2009 ARDC. Petitioner contends that several emails were sent to Respondent regarding this matter, and the FBA was ultimately implemented only after delay.

6. Petitioner claims that Respondent failed to apply any of the behavioral plans recommended by the October 26, 2009 ARDC and the November 4, 2009 ARDC. Petitioner states that Respondent only recommended moving Student to a more restrictive classroom environment for *** and *** without assessing the progress of the behavioral plan. Petitioner further claims that School District ignored findings by the school Behavioral Consultant.

7. Petitioner maintains that only after filing a complaint with TEA did Respondent implement the recommended behavioral plan. Petitioner states that subsequently, at the January 8, 2010 ARD, Respondent violated the agreement to apply the behavioral plan and again suggested removing Student from the regular classroom.

As relief in this due process hearing, Petitioner requests that Respondent be ordered to do the following:

1. Educate Student in a fully inclusive placement setting in all regular classes.
2. Conduct no further ARD meetings to discuss Student's placement until Due Process Hearing and any appeal thereof has been resolved.
3. Hire a recognized expert in Inclusion, acceptable to Parents, in order to train the teachers and support staff and to help implement their recommendations in the regular classrooms, specifically but not exclusively in *** and ***.
4. Hire a recognized behavior expert, acceptable to Parents, to review the current behavior plan and to make appropriate recommendations for changes to such plan and its implementation, specifically but not exclusively in *** and *** classes; such expert should provide training to Student's teachers and support staff in the implementation of such plan.
5. Insert a provision into the plan that there will be regular and consistent reporting of any issues involving Student's work or behavior in the classes, so that such issues can be addressed in a timely manner.
6. Reimburse all legal fees expended on behalf of Student in this action.

Based upon the evidence and the argument of counsel, the Hearing Officer makes the following findings of fact and conclusions of law.

II. Findings of Fact

1. Student is a ***-year old student who resides within the School District.
2. The School District is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing Student a free appropriate

public education in accordance with the Individuals with Disabilities Education Improvement Act, 20 U.S.C.A. § 1400, *et seq.*, and the rules and regulations promulgated pursuant to IDEIA.

3. Student is eligible for special education placement, programs and services as a student who has Mild Mental Retardation and is Speech Impaired (“SI”).

4. An Admission, Review, Dismissal meeting (“ARD”) was convened on the Student’s behalf on January 28, 2009. The purpose of the ARD was to perform an annual ARD meeting and an annual review of the Student’s educational program and develop an individualized education program (“IEP”) to be implemented until the Student’s next annual ARD meeting.

5. The Student’s January 28, 2009 ARDC stated that in academic developmental areas, Student is making progress in the following areas: Makes social greeting/has a sense of humor, communicates more with others, and actively participates in *** and ***; attempts to decode words Student does not know and remembers words Student has learned; answers basic “wh” and yes/no questions after reading a passage out loud or listening to a text read; describes a picture/story in detail and continues to add using touch math, subtracts by Xing out objects/drawings; can respond to questions about a pictograph and create a simple bar graph with data given X using manipulative/set; copies basic simple sentences and is beginning to create own sentences when looking at a picture (with phonetic spelling); and reads simple short stories with familiar sight words and works on related worksheets.

6. The Student’s January 28, 2009 ARDC concluded that Student’s disability significantly interferes with Student’s ability to meet general academic mastery levels in ***.

7. The Student’s January 28, 2009 ARDC developed an IEP which included the following goals:

- a. Student will understand important issues, events, and individuals of the 20th Century in the United States.
- b. Understand the contributions of people of various racial, ethnic, and religious groups in the United States.

- c. Understand the contributions of people of various racial, ethnic, and religious groups to the United States.
- d. Improved fine and/or gross motor skills.
- e. Use place value to represent whole numbers and decimals.
- f. Use patterns in multiplication and division.
- g. Make generalizations based on observed patterns and relationships.
- h. Use fractions in problem-solving situations.
- i. Add, subtract, multiply, and divide to solve meaningful problems.
- j. Generate geometric definitions using critical attributes.
- k. Model transformations.
- l. Select and use appropriate units and procedures to measure volume.
- m. Solve problems by collecting, organizing, displaying, and interpreting sets of data.
- n. Know that the natural world includes earth materials and objects in the sky.
- o. Know that some changes occur in cycles.
- p. Know that energy occurs in many forms.
- q. Compose original texts, applying the conventions of written language such as capitalization, punctuation, and penmanship to communicate clearly and spell proficiently.
- r. Select and use writing processes for self-initiated and assigned writing.
- s. Apply standard grammar and usage to communicate clearly and effectively in writing.
- t. Use writing and a tool for learning and research.
- u. Produce visual images, messages, and meanings that communicate with others.
- v. Read with fluency and understanding in texts at appropriate difficulty levels.
- w. Read widely for various purposes in varied sources.
- x. Use a variety of word identification/recognition strategies.
- y. Acquire an extensive vocabulary through reading and systematic word study.
- z. Comprehend selections using a variety of strategies.
- aa. Speak clearly and appropriately to different audiences for different purposes and occasions.
- bb. Listen and speak to gain and share knowledge of own culture, the culture of others, and the common elements of cultures.

8. The Student's January 28, 2009 ARDC developed a Behavior Intervention Plan ("BIP") based on Functional Behavior Assessment Summary that contained the following goals for Student:

- a. Student will use words to affect others in a positive and appropriate ways.
- b. The Student will maintain compliant behaviors.
- c. The Student will demonstrate appropriate verbal and gestural interactions.
- d. The Student will demonstrate appropriate verbal and physical actions with self.

9. The Student's January 28, 2009 ARDC concluded that the following Service and Site Consideration findings were appropriate for Student:

- a. General education with accommodations in pacing, methods, or materials.
- b. Resource classroom in Special Education.
- c. Related Services in Occupational Therapy.
- d. Speech Therapy.
- e. ADPE.

10. Student's January 28, 2009 ARDC reviewed a Summary of Present Levels of Academic Achievement and Functional Performance. The assessment stated that Student "has made considerable progress in [Student's] behavior compared to last school year." The assessment asserted that the use of a *** has been very effective. Student still exhibits some verbal and physical aggressive; however such behavior has diminished significantly since the previous academic year. Student can be easily misdirected with humor and the ***. The assessment stated that the Student has difficulty working independently and needs adult guidance and prompting.

11. The Summary of Present Levels of Academic Achievement and Functional Performance stated that although Student is doing much better, Student's distractibility and non-compliance still get in the way of Student's learning and doing work independently. Student also has difficulty understanding grade level material. Although Student is able to express self more clearly, at times Student still gets frustrated when Student is not being understood.

12. According to the Deliberations for Student's January 28, 2009 ARDC, the Student currently receives resource instruction for ***, and *** and inclusion support in the general education classroom. The ARD ended in consensus.

13. An ARD meeting was convened on the Student's behalf on May 20, 2009. The purpose of the ARD was to perform a 3 Year Review of Student's Special Education placement. In the ARD meeting notes, Student's parent expressed disagreement with Student being excluded from the general education classroom. Parent felt that the general classroom was Student's Least Restrictive Environment ("LRE") and would be a more appropriate placement for Student. Parent felt that Student would learn more important skills in the general education classroom.

14. An ARD meeting was convened on Student's behalf on June 3, 2009. The purpose of the ARD was to perform a review of Student's Special Education placement. The ARDC reviewed Student's placement in Occupational Therapy, ***, Student's Functional Behavior, Student's and Student's Independent Evaluation. Present at ARD were Parent, School Administrator, Student Instructor, Special Education Director, Principal, Student Advocate, and Special Education Coordinator.

15. According to the June 3, 2009 ARD documents, Student is receiving Special Education in ***; a combination of General Education and Special Education in ***; and Special Education in P.E.

16. According to the June 3, 2009 ARD documents, Student is receiving Speech Modeling and Accommodations in General Education.

17. According to the June 3, 2009 ARDC, Student was given the following opportunities to participate in nonacademic and extracurricular activities available to students without disabilities to the maximum extent appropriate for Student:

- a. Lunch.
- b. Recess.
- c. Counseling services, including emergency.
- d. Transportation.
- e. Health Services.
- f. Assemblies.
- g. Athletics.
- h. Clubs.
- i. Band.
- j. ***.
- k. Other School Sponsored Activities.

18. In the Deliberations Appendix of the June 3, 2009 ARD documents, Student's Assistant Principal acknowledged that previously provided inclusion opportunities for Student in a general education environment have been beneficial to Student and Student's peers. Although School Staff felt that the Life Skills Program for *** and ***, in which Student had been placed, was still appropriate for Student, Staff would consider request for a General Education Setting. After discussion, the ARDC decided that they were willing to give Student the opportunity to be

successful in the general education setting to the greatest extent possible, specifically in *** and ***.

19. In the Deliberations Appendix of the June 3, 2009 ARD documents, it was noted that Student's behavioral issues had lessened and Student is more capable of functioning and working independently in the school environment, at times.

20. The June 3, 2009 ARD provided the following proposed criteria to determine Student's readiness for instruction in the General Education Classroom: academics, expectations to remain in the classroom, following directions, and classroom participation. Student must also demonstrate progress towards mastery of the *** and *** IEP objectives during each grading period. Student must comply with directives by ***, working on assignments presented to Student and/or leaving assignment areas with no more than 2 verbal prompts. Finally, Student must work independently on in the General Education setting 50% of the time.

21. In a Full Behavioral Assessment conducted on August 9, 2009, the following behaviors of concern were observed regarding Student: Refusing to follow directions and verbalizing statements such as: "***...", "Go away...", and "I am going to..." The Assessment determined that it is extremely important for those working with Student to provide Student with a consistent set of rules and consequences. It was recommended that Student be provided with a high level of reinforcement for positive behaviors and teach replacement behaviors that are just as effective and efficient as his inappropriate behaviors. It was further recommended that a consistent behavior management system be maintained throughout the day.

22. An ARD meeting was convened on October 26, 2009 on Student's behalf. The purpose of the ARD was to conduct a review of Student's Special Education placement. Present at the meeting were Parent, School Administrator, Special Education Teacher, Principal, Assistant Principal, Behavioral Specialist, School Department Head, Student's Teacher, and Special Education Director.

23. The October 26, 2009 ARDC determined that regarding Academic/Developmental Competencies relevant to developing Student's IEP, Student had reached competencies in the following areas:

Area 1: ***.

Area 2: ***.

Area 3: ***.

Area 4: ***.

Area 5: ***.

24. In the Deliberation Appendix of the October 26, 2009 ARD documents, the ARD noted that Student performs best in *** and ***. Student has problems in ***. Behaviorally, the ARD noted that Student's minor behavior issues were ameliorated with the ***. Student's *** stated that Student had mastered some objectives of his IEP, and the IEPs for ***, and the BIP were developed and approved.

25. In the Deliberations at the October 26, 2009 ARD documents, Parent stated that Student's work is "over [Student's] head," but that Student can learn a modified version.

26. In the Deliberations at the October 26, 2009 ARD documents, Parent stated that Parent desired for Student to be exposed to the general education curriculum to the fullest extent, and that Parent will take Student home before allowing student to be enrolled in Life Skills. Parent did not wish Student to miss classroom discussions. Teacher voiced concern about Student's focus and attention and asserted that Student does not socialize appropriately. A compromise was offered of split classes between Life Skills and the general education environment.

27. An ARD meeting was held on November 4, 2009 on Student's behalf. The purpose of the meeting was to conduct a review of Student's Special Education placement. The ARDC determined that justification indicates that Student's identified placement is the LRE appropriate for Student and is based on the needs of Student. Student is currently in a Special Education placement in ***. Student is in the General Education Setting in ***.

28. In the Deliberation at the November 4, 2009 ARD documents, it was noted that the point of disagreement between Parent and School District was in Student's placement. Parent did not agree with the School's recommendation of placing Student in a Life Skills class. Parent believes that Student's IEP can be covered in a general education setting with modifications, and Parent provided modification recommendations, including visual behavioral prompts and a visual behavior plan utilizing "happy faces" system. Teacher believes that Student needs to be placed on a modified, more structured setting.

29. At the November 4, 2009 ARD, it was determined that Student will receive *** and *** in the Life Skills classroom instead of the General Education Setting. This decision was made because Student was not being successful in current placement and was overwhelmed by Student's non-IEP goals in the general education classroom.

30. An ARD meeting was held on November 17, 2009 on Student's behalf. The Purpose of the ARD was to conduct a review of Student's Special Education Placement. The ARD asserted that in consideration of LRE, *** support will be provided to assist Student in the general education classroom; provision of OT, Speech, and resource instruction will continue as well.

31. During the Deliberations at the November 17, 2009 ARD, School stated that they had reviewed and considered the information provided by Parent in previous ARD. School stated that Student will be given a visual behavioral chart. Parent agreed with the behavior plan. New IEP's were also developed for *** and *** on Student's behalf; Parent was in agreement with the new IEPs. Parent and School District were in disagreement about whether Student requires support from *** in addition to *** and general education teacher; Parent does not believe *** is necessary.

32. A Full and Individual Evaluation ("FIE") was conducted by Student's Doctor on December 3, 2009.

33. In the December 3, 2009 FIE, Student's Doctor recommended that Student may be best served in the Life Skills classroom with social skill development interwoven in Student's

planning. Doctor believes that Student will have difficulty maintaining an on-level performance with Student's peers and will only retain minute-levels of educational curriculum due to Student's cognitive abilities. Exclusive exposure to a mainstream environment will only exhibit larger discrepancies between Student's ability and expected grade-level performance.

34. A FIE was conducted by Student's Doctor on December 3, 2009 by Student's Doctor at the request of Parent. Doctor concluded that Student appears to have deficits in intellectual faculties and that Student seems to have below average skills in reaching optimal performance for his age. Doctor suggested that Student would suffer drastic changes in performance with only subtle changes in performance demand. Student may feel may feel unsuccessful in certain educational domains and may experience increased isolation and feel different from Student's peers.

35. In the December 3, 2009 FIE, Student's Doctor stated that "observations would show [Student] to experience issues in mainstream settings and issues with distractions and work performance in resource classes with modified instruction. [Student] shows pervasive cognitive and learning issues which will hinder both organizational and relational capacity. [Student's] scoring profile would show congruity with previous assessments and would appear to need significant structure and consistency or routine in [Student's] learning environment."

36. An ARD meeting was held on January 8, 2010. The purpose of the ARD was to conduct an Annual Review of Student's Special Education placement. At the ARD, it was asserted that Student's disability still interferes with Student's ability to meet general academic mastery levels in ***.

37. At the January 8, 2010 ARD, under Service and Site Considerations, it was demonstrated that the following services at been "tried" for Student: General Education only, General Education with accommodations in pacing, methods or materials, and General Education with Support Services. It was stated that a Special Education Resource classroom and Related Services in OT is currently being provided, along with Speech Therapy.

38. In the IEP provided for the January 8, 2010 ARD, Student was marked to have been “In Progress” in all established goals, as opposed to have obtained a mastery level of any of provided goals. Student’s Goals in a number of *** IEP goals have been “Discontinued.”

39. At the Deliberations during the January 8, 2010 ARD, it was stated that the ARDC had reviewed an Independent Educational Evaluation (“IEE”) provided in December 2009. The Doctor conducting the evaluation recommended the continued eligibility of mental retardation. The ARDC was in agreement with the IEE.

40. During the January 8, 2010 ARD, Student’s Special Education Teacher determined that Student was not successful in *** and ***. Further, a review of Student’s behavior was used to assist in the development of Student’s IEP; new IEP’s were presented and accepted for behavior. IEPs were developed and accepted for ***.

41. During the Deliberations at the January 8, 2010 ARD, Parent and School District were in disagreement about Student’s placement. School District recommended that Student no longer attend general education in *** and *** and stated that Student should attend Life Skills class for *** and *** based on the recommendation from the IEE and information taken from the previous Fall Semester (demonstrating that Student was failing to succeed in his IEPs, particularly in *** and ***). Parent was in disagreement, believing peer support should be used in the *** classroom. Parent does not believe it is an academic or material problem causing Student’s problem.

42. A Psychological Evaluation was conducted on Student behalf on April 4, 2010 by Student’s Doctor. The evaluation was requested to provide additional information related to academic and developmental functioning. Parents requested the evaluation due to current concerns regarding Student that School District is trying to remove Student from the general education environment.

43. In the April 4, 2010 Psychological Evaluation, the Doctor raises concerns of how inclusion was managed, stating that Student may be being rewarded for bad behavior, and that

Student's behavior plan is not being fully implemented. Parent also voiced concerns that School does not have the proper resource *** and *** classrooms.

44. The April 4, 2010 Psychological Evaluation reported that Student has benefited from inclusion, citing improved language and communication skills, improved learning, and improved socialization. Parent's also agreed that Student benefited from inclusion.

45. The April 4, 2010 Psychological Evaluation referenced the September 29, 2009 Functional Behavior Assessment in which it was stated that Student exhibited some behavioral problems, including: responding negatively to others, using inappropriate words, refusing to work, not keeping hands to self, and out of seat behaviors. The report showed that in observation, Student was receiving adult attention when he displayed problem behaviors three times more often than when he displayed positive behaviors .

46. The April 4, 2010 Psychological Evaluation noted that while Student was able to immediately recall three objects, but after five minutes was unable to repeat recalling the same objects. With prompts he was able to recall two objects.

47. The April 4, 2010 Psychological Evaluation noted that Student has difficulty with basic math operations, and made simple math errors with single digits.

48. The April 4, 2010 Psychological Evaluation noted that in ***, in which Student had *** Teacher, Student was easily distracted and often not paying attention. Student would only perform his work of extracting information on a chart about a country after a very structured one-to-one session with many cues and prompts. The teacher and *** used prompting, attention, praise, and referenced reinforcement activities, including computer time and a call to Parent. It was observed that Student's *** class was highly lectured based.

49. The April 4, 2010 Psychological Evaluation stated that problems with inattention were most frequently observed in *** and ***. It was noted that Student has difficulty maintaining necessary levels of attention at school. The problems experienced by Student might disrupt

academic performance and functioning in other areas. Further, Student has difficulty performing simple daily tasks in a safe and efficient manner. Student demonstrates poor expressive and receptive communication skills, and has difficulty seeking out and finding information on own.

50. The April 4, 2010 Psychological Evaluation recommended that in order to gain functional independence, Student needs the development of functional academic skills, social skills, self-regulation, and organizational, pre/vocational skills, communication skills, and daily living skills. Student's ability to benefit from the lecture format is highly limited.

51. The April 4, 2010 Psychological Evaluation asserted that Student's educational programming needs to be aligned with transition goals. Academic tasks need to be project-based or embedded in a work-based learning situation. Student's program needs to include community-based learning.

52. The April 4, 2010 Psychological Evaluation recommended that Student's educational programming needs to include a focus on functional academics, including functional mathematics such as the use of money, reading a clock, using a calendar, measuring, and accessing information. Student's academic programming should also include functional reading, such as accessing information on signs, forms, and labels. The evaluation stated that it is not critical for Student to successfully perform math word problems, as these sort of problems do not and will not occur in the adult world and in Student's daily life.

53. The *** provided in Student's *** classroom were of extensive use in Student's classroom; however, Teacher's contribution to Student was strong, providing prompts and cues in which to further Student's inclusion.

54. Verbal instructions exclusively in Student's *** class are not effective; instead, visual cues and prompts are necessary the further Student's education.

55. Despite some behavioral issues with Student, including inappropriate noises, faces, and self-stimulation behaviors, Student is typically not disruptive in the *** classroom.
56. Without prompting ***, Student would do very little classroom work, left alone. Student is unfamiliar with classroom procedures and requires constant prompting. Student's attention span is only about ten to fifteen minutes, an assessment in contradiction to the testimony provided by Expert.
57. Student's noises and faces and interactions during spans in which Student is unable to pay attention is a minor distraction to the rest of the general education classroom.
58. In ***, Student has not mastered his IEP goals.
59. Student is unable to minimize distractions, does not seem to respond to Teacher and *** on a consistent basis, and is not on task enough in order to holistically grasp the concept being presented in Student's *** classroom.
60. Student had a difficult time with assimilating to environments, and handling novel or unfamiliar situations in Student's *** classroom.
61. The District's Life Skills teacher had a very good knowledge of how to modify curriculum generally, seemed to understand how to best implement social skills strategies, and how to best increase educational prowess and growth.
62. Student has a difficult time with memorizing, encoding, with retrieving information in immediate memory, working memory and in long-term memory. As a memorization demand increases in the Student's assignments, Student's performance deteriorates.
63. Student would have a difficult time without significant support in Student's relational capacity, organizational capacity, and in academic growth.

64. Sometimes, the Student has problems with the ambient noise level of the classroom, often *** when other Student's first come into the classroom.
65. In addition to ***, Student also has *** to assist Student and to prompt Student. *** often have to talk and interactive with Student during general class work and lectures.
66. If Student's *** were not present, Student would likely do very little academic work.
67. Student's attention span is at an estimated ten to fifteen minutes, and that during a lecture, Student's attention span drops to two minutes, after which Student begins ***.
68. Student does not have any interaction with the other students in Student's *** class. Initially, the other students were very kind, considerate, and respectful of Student, but over time, Student's classmates have began *** instead of interacting with Student.
69. After instruction in class, regardless of the subject, medium, or material, Student is often unable to tell *** what was talked about regarding the subject material, and if Student is able, can often only provide one word.
70. Even with positive enforcement, Student often refuses to do school work, even with different kinds of positive reinforcement programs.
71. Because Student is not grasping what is being taught in ***, and Student has often forgotten information within 15 minutes of having it presented to him.
72. Student's IEP goals would not change once moved to a Life Skills class; due to a lower number of distractions and other student working on the same task as Student, a Life Skills class would be more on Student's level.

73. Student's attention span in *** is usually around 10 minutes, after which Student begins looking around or tries to find something to play with on Student's desk. Student requires a lot of prompting in order to do work.

74. Student's attention span in *** is less than five minutes, and Student requires frequent prompting to maintain attention on work. In the classroom, Teacher is accompanied by ***.

75. A change in the Student's behavioral plan will not enhance Student's educational development, and will have a minimal effect on educational growth.

76. Life Skills classes traditionally focus on social skills development, which would be able to provide the learning opportunities to increase Student's skill level in terms of understanding verbal and nonverbal prompts and engaging curriculum in a practice-based environment.

77. In a Life Skills class, Student will benefit from a more structured and guided interaction to approximate appropriate social behaviors that will possibly, with time, become more ingrained in Student, and become easier for Student to remember, process, and retrieve.

78. Student would potentially have a higher frequency of interaction with peers and students in a Life Skills setting.

79. If remains placed in a general education environment for core academic subjects, Student will have a difficult time understanding and conceptualizing concepts and being able to apply information to the task at hand due to pervasive cognitive and learning deficits. Because of Student's limitations, even with modifications, it will be difficult for Student to benefit from a general education curriculum in most core academic courses. As Student progresses into further grade levels and the general curriculum becomes more abstract and complex, Student will have compounded problems and not be able to function in the general education environment.

III. Discussion

General Observations

This case presents issues dominated by the question of appropriate placement when issues of least restrictive environment (“LRE”) and the statutory preference of mainstreaming are balanced against one another. Petitioner raised seven issues that include allegations of a failure to implement the Student’s IEP and ensure that procedural safeguards are followed. All issues were considered and discussed in this decision. However, the predominant question in this case was where is the most appropriate placement for the Student in *** and ***-- general education placement with *** modifications; or Life Skills placement with aides and modifications. In most respects, this case requires consideration of the limits of mainstreaming in the provision of FAPE to an educationally disabled student.

Applicable Statute and Regulations

The existing section of IDEIA and implementing regulations directly applicable to the issue of mainstreaming children with disabilities are as follows, in pertinent part:

20 U.S.C. §1412(a)(5)(A) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. §300.114 LRE Requirements.

(a) General.

(1) Except as provided in Sec. 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and Sec. Sec. 300.115 through 300.120.

(2) Each public agency must ensure that--

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

§300.115 Continuum of alternative placements.

(a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must--

(1) Include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

§300.116 Placements. In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that--

(a) The placement decision--

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including Sec. Sec. 300.114 through 300.118;

(b) The child's placement--

(2) Is based on the child's IEP; and

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs;

§300.117 Nonacademic settings. In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in Sec. 300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings.

Controlling Case-law

In the Fifth Circuit, the seminal court decision regarding mainstreaming remains *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989). The Fifth Circuit Court of Appeals established a test for mainstreaming a child with educational disabilities that informs the decision in the instant due process hearing. Moreover, five days after the close of the record in this case, the Fifth Circuit re-affirmed its *Daniel R.R.* analysis in the case, *R.H. v. Plano Indep. Sch. Dist.* No. 09-40369, 2010 U.S. App. LEXIS 10842 (5th Cir. May 27, 2010). In the *R.H.* decision, the Fifth Circuit specifically reconciled its LRE analysis associated with mainstreaming in *Daniel R.R.*, with its LRE analysis included as part three of the Court's four-part test of FAPE announced in *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). [See *R.H.* at p. 10845] Also, the Court cited its unpublished decision of *Brillion v. Klein Indep. Sch. Dist.* 100 F. Appx 309 (5th Cir. 2004), which is further support for the circumstantial use of mainstreaming based on the specific needs of the disabled child. In short, *Daniel R.R.* remains the premier outline to discuss the efficacy of the Student's placement in general education classes versus Life Skills classes.

In *Daniel R.R.*, the Court established a two part test for determining IDIEA [then, Education of the Handicapped Act ("EHA"); 20 U.S.C.A §1400 et. seq.] mainstreaming compliance that requires several sub-inquiries. The test, itself, is straightforward:

“First, we ask whether education in the regular classroom, with the use of supplemental aides and services, can be achieved satisfactory for a given child....

If it cannot and the school intends to provide special education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.”

Daniel R.R. at p. 1048

In evaluating answers to the primary questions, the Court requires an *individualized*, fact specific inquiry of the nature and severity of the child’s educational disabilities and the school’s response to the child’s needs. [*Daniel R.R.* at p. 1048] In simple terms, this inquiry should be resolved by reviewing and evaluating the child’s IEP: which includes his curriculum and any modifications thereto; his supplementary aids and services, which may include an aide or para-professional; a behavioral IEP or BIP, if such is necessary; and the placement or placements for implementation of the child’s IEP. The *Daniel R.R.* Court requires the following questions (paraphrased) about the child’s IEP and special education program to be answered:

1. Does the child’s IEP require regular education instructors to devote all or most of their time to the child or to modify the regular education program beyond recognition so that the child is not required to learn any of the skills normally taught in a regular education classroom;
2. Is the child receiving an educational benefit from being in the regular education classroom and grasping elements of the regular education curriculum;
3. Considering that the child may receive non-academic benefits from being in a regular education classroom such as language or behavior/social modeling, does balancing non-academic benefits to educational deficits tip the balance in favor of mainstreaming even if the child cannot flourish academically;
4. Is the child’s presence in the regular education classroom disruptive (or positive); and
5. Has the child has been offered a continuum of services.

Daniel R.R. at pp. 1048-1050

The regulations cited herein on mainstreaming simply amplify the element of the Court’s test in *Daniel R.R.*

Facts of this Case

Therefore, after applying the *Daniel R.R.* test to the facts of this case, the reasons for my recommendation become apparent. The Student can and continues to be educated in a regular education classroom in those subjects where a modified curriculum and program provide the Student with academic and non-academic benefit. For *** and ***, however, the balancing test between the Student's educational benefit and non-academic benefit, supports the Life Skills placement. The Student's curriculum has been substantially modified to a point of near non-recognition in *** grade *** and *** regular education curriculum. It is unlikely, given the Student's struggle to master highly modified *existing* IEP goals (Student failed to meet assigned *** goals) that a *** grade modified curriculum could remotely resemble a regular education *** grade curriculum in *** or ***. However, pure academics aside, the record does not support a argument that the Student is receiving significant *non-academic benefits* from the regular education *** and *** placements. The Student does not seem to be significantly engaged with non-disabled peers in those classes and the Student is not modeling their language or social behavior to a sufficient degree. On the other hand, the Student is not a significant disruption to the regular education classroom. While the regular education teacher does not devote an inordinate amount of time to the Student, the *** is nearly constantly engaged with the Student. Overall, the Student is not sufficiently engaged with the regular education curriculum or daily instruction in *** or *** to warrant the Student's presence in either class. Moreover, the classes seem to frustrate the Student and be the root cause of off task and potentially disruptive behavior.

I am not convinced by Petitioner's evidentiary presentation that assails the Student's modified curriculum and behavioral components of the Student's IEP. The breadth of the more reliable evidence of record came from the Student's teachers, who testified about the Student's limited attention span, the Student's limited comprehension, the Student's intermittent work habits and the Student's growing frustration with a ever demanding set of educational goals. This case is not about a failure to develop or implement a detailed BIP or use a particular behavioral intervention. The record does not show behavioral concerns beyond occasional verbal out-bursts, complaints about specific assignments and a reluctance to work steadily on classroom assignments. Petitioner's expert witness suggested that these behavioral issues were attributable to deficiencies in the Student's curriculum modifications. Also, Petitioner's expert suggested that

the Student's instructors were utilizing ineffective instructional interventions to address the Student's disabilities. I found such testimony less persuasive than testimony from the Student's teachers who stated that Student was increasingly discouraged by the Student's inability to perform, consistently. Moreover, the Student's teachers *** provided convincing evidence that the Student's existing behavioral plans and interventions were being implemented consistently, with inconsistent results.

Student's existing placement and program is providing a FAPE. The Student is making some educational progress in most subjects consistent with the Fifth Circuit's four-prong definition of a FAPE discussed in *Michael F.* (at p. 253).¹ The Student's program consists of a highly individualized program based on the Student's assessment and performance. The mixture of general education placement in non-academic subjects such as ***, and lunch periods is designed to minimize restrictive educational settings and provide the Student with positive academic and non-academic learning and social modeling opportunities. Despite recent disagreements between the Student's parents and the School, the Student's last year and overall history in the District was characterized by ARD meetings that were conducted in a collaborative manner. The Student's individual instructional settings in each subject have become more restrictive only after the Student's performance levels began to decrease.

The central issue in this case is defined by perceived differences by the parties between the visions of the Student's educational future. The Student's parents are concerned that the changes to the Student's placement in *** and *** classes represent a further erosion of opportunities for the Student to be exposed to a model language and social behaviors of the Student's non-disabled peers. Without such opportunities, the Student's parents are concerned that the Student's preparation for post educational pursuits is being impaired. The District fears that with the Student's passage into *** and *** grades with the attendant increases in academic

¹ The Fifth Circuit embraced the following indicators to determine whether a Student's IEP is reasonably calculated to provide a meaningful educational benefit under IDEA:

1. the program is individualized on the basis of the student's assessment and performance;
2. the program is administered in the least restrictive environment;
3. the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and
4. positive academic and non-academic benefits are demonstrated.

Michael F. at p. 253

and social demands, the Student will fall further behind in a mainstreamed, regular education placement with modifications model and become socially isolated and emotionally frustrated. Both concerns are legitimate and the conflict seems insoluble. However, if the parties maintain the generally cooperative and collaborative approach exhibited up to now, with a continued rejection of the “all or nothing” approach eschewed by the *Daniel R.R.* court, (at p. 1050) the worst fears of either side can be avoided.

In summary, *this* incremental change to the Student’s educational program is supported by *this* evidentiary record. The whole of special education case-law or regulations is only somewhat helpful in determining whether the Student should be placed in Life Skills classes for *** and ***. The Student’s education is and will continue to be appropriately defined by individualized decisions based on supporting factors. The District’s placement choices are appropriate and are designed to continue to provide the Student with a FAPE, at this time.

IV. Conclusions of Law

1. The Student resides within the geographical boundaries of the School District and is eligible for special education services based on the classification of Mild Mental Retardation and Speech Impairment. [20 U.S.C.A. §1400 et. seq.; 34 CFR §300.8(a)]
2. Respondent School District has a responsibility to provide the Student with a free appropriate public education. (20 U.S.A. §1412)
3. Respondent’s proposed placement for the Student in *** and *** is designed to provide the Student with a FAPE in the least restrictive environment. [*Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989) and *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997)]
4. Petitioner failed to demonstrate that the Student’s educational placement and program will not afford the Student with a FAPE. [*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997)]

V. Order

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer ORDERS that the relief sought by Petitioner is DENIED.

SIGNED in Austin, Texas this 25th day of June, 2010.

Stephen P. Webb
Special Education Hearing Officer

DOCKET NO. 192-SE-0410

STUDENT	§	BEFORE A SPECIAL EDUCATION
	§	
v.	§	HEARING OFFICER FOR THE
	§	
INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

SYNOPSIS

Issue: Whether Petitioner, a *** year old student who is mentally retarded and who has multiple disabilities making him eligible as other health impaired should be “mainstreamed” in a general education *** grade classroom *** in *** and ** regular education classroom as opposed to a self-contained Life Skills special education placement as the least restrictive environment, as he had been in elementary school.

Federal Citation: 20 U.S.C.A. §1412(a)(5)(A); 34 C.F.R. §300.114; §300.115; §300.116; §300.117.

Texas Citation: *Daniel R.R. v. State Bd. Of Educ.*, 874.F.2d 1036 (5th Cir. 1989); *R.H. v. Plano Indep. Sch. Dist.*, No. 09-40369, 2010 U.S. App. LEXIS 10842 (5th Cir. May 27, 2010)

Held: For the District. School District has developed a varied, comprehensive educational program that includes regular education placement with modifications *** where possible and Life Skills self-contained placement in subjects where the Student’s disabilities prevent him from receiving sufficient academic and non-academic benefits in a regular education placement. The District’s program utilizes a continuum of placements and the proposed Life Skills placement in *** and *** is an appropriate LRE placement for the student.