

STUDENT <i>b/n/f</i>	§	BEFORE A SPECIAL EDUCATION PARENTS, §
	§	
Petitioner,	§	
	§	
V.	§	HEARING OFFICER
	§	
LEWISVILLE INDEPENDENT	§	
SCHOOL DISTRICT,	§	
	§	
Respondent.	§	FOR THE STATE OF TEXAS

**DECISION OF THE SPECIAL EDUCATION HEARING OFFICER**

**I  
STATEMENT OF THE CASE**

Petitioner, Student *b/n/f* Parent (“Petitioner” or “Student”), filed a Request for Due Process Hearing (“Complaint”) with the Texas Education Agency (“TEA”), requesting a Due Process Hearing pursuant to the Individuals With Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. §1400 *et. seq.*, contending that Respondent, Lewisville Independent School District (“Respondent” or “LISD” or “District”) denied Student a free, appropriate public education (“FAPE”) in the following particulars:

1. Respondent failed to timely evaluate Petitioner in all areas of suspected disability;
2. Respondent developed an inappropriate individual education plan (“IEP”) for Petitioner that a) is based upon out-dated evaluations, b) contains no measurable goals and objectives, and c) is not delivered in the least restrictive environment (“LRE”);
3. Respondent violated IDEIA when it cancelled the January 20, 2011, meeting of Petitioner’s admission, review, and dismissal committee (“ARDC”) and informed the Parents that their advocate could not participate in the meeting;
4. Respondent cannot meet, and has not met, Petitioner’s medical needs to ensure petitioner’s safety;
5. Respondent’s paraprofessionals failed to comply with Petitioner’s IEP when they a) declined to use Petitioner’s \*\*\*, despite having been trained to do so; b) failed to \*\*\* Petitioner; c) failed to \*\*\*; d) failed to provide Petitioner with breathing treatments; e) failed to give Petitioner pain medications when needed; and f) refused to use \*\*\* as instructed by the physical therapist, thereby creating an unsafe environment; and
6. Respondent violated IDEIA when it refused the Parents access to Petitioner’s classroom.

Petitioner seeks the following relief:

1. Respondent shall fund Petitioner’s placement in an appropriate private educational facility;

2. Respondent shall evaluate Petitioner in all areas, including psychological, intellectual, speech, assistive technology (“AT”), physical therapy (“PT”), occupational therapy (“OT”), in-home training, and any other areas associated with Petitioner’s disabilities;
3. alternatively, Respondent shall change Petitioner’s placement to another campus that can implement Petitioner’s IEPs and meet the Petitioner’s medical needs;
4. Respondent shall develop appropriate IEPs with measurable goals and objectives, based upon the evaluation recommendations and input from the Parents; and
5. Respondent shall provide Petitioner appropriate compensatory services in the areas of speech, PT, and OT.

In response to Petitioner’s issues, Respondent requested dismissal of all of Petitioner’s issues 1) that relate to any act or omission occurring more than one (1) year prior to the date of the filing of Petitioner’s Complaint on January 24, 2011, and 2) that relate to any claims over which the Hearing Officer has no jurisdiction, such as recovery of reasonable and necessary attorneys’ fees and costs.

## II. PROCEDURAL HISTORY

Petitioner filed petitioner’s Complaint with TEA on January 24, 2011. On that same date, TEA assigned the case Docket No. 112-SE-0111 and assigned the matter to the undersigned Hearing Officer. On January 25, 2011, the undersigned Hearing Officer sent the Initial Scheduling Order to the parties, stating that the pre-hearing telephone conference would convene on February 14, 2011, that the Due Process Hearing would take place on March 10, 2011, and that the Decision would issue by April 9, 2011. Due to conflicting schedules the pre-hearing telephone conference was re-scheduled to February 17, 2011.

On February 3, 2011, Respondent filed its Response to Complaint and Partial Motion to Dismiss, requesting that the undersigned dismiss 1) all claims that are outside the one-year statute of limitations, *i.e.*, prior to January 24, 2010, and 2) Petitioner’s request for attorneys’ fees and costs, which are outside the jurisdiction of the undersigned Hearing Officer.

On February 13, 2011, Respondent filed its Status Update on Resolution Meeting, asserting that Petitioner was refusing to participate in an in-person Resolution Session but was insisting on a telephone conference Resolution Session. Respondent requested that the undersigned order the Petitioner to participate in an in-person Resolution Session prior to the conclusion of the resolution period, which would end on February 23, 2011. Otherwise, Respondent would be filing a Motion to Dismiss, pursuant to 34 C.F.R. §300.510(b)(4).<sup>1</sup>

On February 17, 2011, the parties convened the pre-hearing telephone conference. In attendance were the following: 1) Mr. Tomas Ramirez III, counsel for Petitioner; 2) Ms. Nona C. Matthews, counsel for Respondent; 3) the undersigned Hearing Officer; and 4) the court reporter, who made a record of the telephone conference. The parties discussed the issues related to the Resolution

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<sup>1</sup> 34 C.F.R. 300.510(b)(4) provides that if the District is unable to garner the Petitioner’s participation in the Resolution Session after reasonable efforts have been made, at the conclusion of the resolution period the District may request the Hearing Officer to dismiss the due process proceeding.

Session and re-scheduled the Due Process Hearing for April 6-8, 2011. At the conclusion of the telephone conference, the Hearing Officer instructed Petitioner's Parents to convene an in-person Resolution Session before February 23, 2011. The undersigned followed up with a letter to the parties on February 18, 2011, confirming these instructions.<sup>2</sup>

On February 25, 2011, Petitioner's counsel informed the undersigned that the Resolution Session had convened on February 23, 2011, but no resolution of the parties' disputes occurred.

On March 17, 2011, the parties convened a second pre-hearing telephone conference. In attendance were the following: 1) Mr. Ramirez, counsel for Petitioner; 2) Ms. Matthews, counsel for Respondent; 3) the undersigned Hearing Officer; and 4) the court reporter, who made a record of the telephone conference. The parties discussed the status of the case and asked for a short continuance based upon the timing of the mediation. Finding good cause, the undersigned granted the continuance and re-scheduled the Due Process Hearing for April 11-13, 2011.

The Due Process Hearing convened on April 11, 2011, as scheduled, and concluded on April 13, 2011. Both parties introduced documentary evidence; Student called eleven (11) witnesses; LISD called three (3) witnesses. Both parties conducted cross-examination of the witnesses.

During the hearing, Student was represented by counsel, Mr. Ramirez. Also in attendance throughout the hearing were 1) \*\*\* and \*\*\*, Petitioner's Parents; and 2) Ms. Melanie Watson, Assistant to Mr. Ramirez. LISD was represented by counsel, Ms. Matthews. Also in attendance throughout the hearing was \*\*\*, Executive Director of Special Education for LISD.

At the conclusion of the hearing on April 13, 2011, the parties and Hearing Officer agreed to a post-hearing schedule: Petitioner would make his closing argument on the record at the conclusion of the testimony on April 13, 2011; Respondent would file its written closing argument by May 9, 2011, and Petitioner could file a written response thereto by May 16, 2011; and the Decision would be rendered by May 20, 2011.<sup>3</sup>

### III. FINDINGS OF FACT

1. Student is a \*\*\*-year old child who resides with student's Parents and siblings within the jurisdiction of LISD (R.8.1). LISD is responsible for providing special education and related services to Student.
2. Student was born prematurely at approximately \*\*\* weeks. Student suffered \*\*\* brain damage \*\*\* (R.13.17). Student is globally developmentally delayed (R.13.17). Student is \*\*\*, cortically blind,<sup>4</sup> has cerebral palsy, \*\*\*, a history of recurrent pneumonia, \*\*\*, and \*\*\* (R.13.17; P.12.20).

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<sup>2</sup> During the February 17, 2011, telephone conference, Petitioner's counsel affirmed that Petitioner was not seeking relief for acts or omissions occurring more than one (1) year prior to Petitioner's Complaint. In the Second Order Scheduling Due Process Hearing, the undersigned dismissed all of Petitioner's claims over which a Texas Special Education Hearing Officer has no jurisdiction, including requests for attorneys' fees and costs.

<sup>3</sup> References to the Due Process Hearing Record are identified as follows: "Tr. I" or "Tr. II" or Tr. III" refers to the Certified Court Reporter's Transcription of testimony made on April 11, 12, and 13, 2011, and the numbers following the volume designation refer to the pages within the particular volume of testimony. "P.#.#" refers to Petitioner's Exhibits by number and page; "R.#.#" refers to Respondent's Exhibits by number and page.

<sup>4</sup> Student's cortical blindness was caused by premature birth \*\*\* (R.2.1-2).

Student is \*\*\*. Student is nonverbal and can only communicate through smiling and crying (P.12.18). Student cannot walk, feed \*\*\*self, \*\*\* (Tr.I.17). Student's cognitive ability is \*\*\*, resulting in a determination of severe mental retardation ("MR"); student's educational prognosis is poor (Tr.II.220-21; 224).

3. Student is \*\*\*. Student's Parents \*\*\* for the initial months after student's birth. Ultimately, they \*\*\*, and enrolled student in LISD when student was \*\*\* years old (P.12.1-2).
4. LISD conducted a full and individual evaluation ("FIE") of Student when student first enrolled. The District conducted evaluations in the areas of intelligence, adaptive behavior, developmental/learning competencies, speech, OT, PT, functional vision, and other health impairment ("OHI") (P.12.7-29).
5. LISD conducted a three-year evaluation in February 2004. This assessment included evaluations for intelligence, adaptive behavior, competencies, functional communication, OT, PT, functional vision/learning media, and adaptive PE (P.13.9).
6. In 2005, \*\*\* to control student's \*\*\*; in 2006, Student received a \*\*\* (R.1.13). Student currently does not \*\*\*.
7. On August 30, 2006, LISD conducted a Review of Existing Evaluation Data ("REED"), which determined Student's next assessments in the areas of vision, intellect, developmental adaptive behavior, and adaptive PE (P.14.2-5). Student's ARDC determined that Student did not need evaluations in speech, OT, PT, or OHI (P.14.5; R.1.1).
8. Due to student's cortical blindness, Student required testing tactically and/or auditorily (Tr.II.122). LISD used informal measures in ascertaining Student's intellectual functioning and formal measures, the Vineland Adaptive Behavior Scales ("VABS") in ascertaining Student's adaptive behavior (R.1.3; 5). The District also administered the Developmental Profile-II ("DP-II"), which is an inventory of skills designed to assess a child's development from birth to \*\*\*. This inventory provides an individual profile, which depicts a child's development-age level functioning in the following areas: a) physical; b) self-help; c) social; d) academic; and e) communication (R.1.4).
9. LISD proceeded with the necessary re-evaluations and completed the FIE in December 2006 (R.1.1-13). Student's re-evaluation determined that student's adaptive behavior demonstrated deficits in functioning that exist concurrently with student's deficits in intellectual functioning (R.1.8). The DP-II manifested severe delays with Student's functioning at levels between \*\*\* (R.1.4). The evaluators recommended that Student's eligibility for special education services are MR, Vision Impaired ("VI"), Speech Impaired ("SI") and OHI (R1.6).

### **School Year 2009-10:**

10. Student receives educational instruction in LISD's Functional Life Skills ("FLS") classroom. During school year 2009-10, this classroom contained \*\*\* students and had one (1) special education teacher and two (2) paraprofessionals (T.I.310). Student continues in this placement during school year 2010-11, although student has a new teacher.
11. On October 29, 2009, Student's ARDC met and again performed the REED and determined Student's re-evaluation plan (R.3.3-4). The ARDC requested updated evaluations in the areas

of medical (including vision), school health services, and adaptive PE. After reviewing Student's progress and current academic and functional levels, the ARDC determined that it did not need additional re-evaluations to determine eligibility, OT, or PT (R.3.3-4; R.3.12-13; R.3.29; T.II.144). The ARDC continued student's eligibility categories of Intellectual Disability ("ID"), VI, OHI, and SI (R.3.6). LISD completed Student's re-evaluation on December 1, 2009 (R.4).

12. During the October 29, 2009, ARDC meeting, the Committee developed IEPs for Student. The ARDC developed goals and objectives to be implemented by Student's special education teacher, paraprofessionals, speech pathologist, occupational therapist, physical therapist, VI teacher, and adaptive PE teacher (R.3.16-17). Student would receive these services in the FLS with the exception of adaptive PE (R.3.27). Student would receive direct speech therapy, consultative services from the VI teacher, OT, PT, transportation, and health services (R.3.30).
13. The October 2009 ARDC developed goals and objectives to be implemented in the FLS classroom. The objectives were to be evaluated by observation and data collection (R.3.16). Student's teacher in spring 2010 and student's new teacher in fall 2010 had no difficulty implementing Student's IEPs or measuring Student's progress (T.I.243-261).
14. Student's 2009-2010 IEPs contain measurable goals and objectives.
15. The October 2009 ARDC developed accommodations for Student, including \*\*\* to the classroom and school bus; one-on-one instruction with tactile and auditory materials; multisensory approach/vibration; single function switches; tactile materials with auditory cues; \*\*\* with monitoring, and \*\*\* (R.13.19). Assistive technology included \*\*\*, and switches/adapted toys (R.3.20).
16. Student's mother attended the October 2009 ARDC and fully agreed with the proposed IEPs, accommodations, and related services (R.3.30). Student's mother is \*\*\* (T.I.132).
17. On December 1, 2009, Student's ARDC convened to review Student's proposed program and the results of re-evaluations (R.5). The Committee adopted the proposed IEP goals and objectives and agreed to carry forward all evaluations (R.5.7).
18. In spring 2010, Student's \*\*\*, which caused student to \*\*\*. \*\*\* was discontinued (T.I.78-9).
19. Because Student could not \*\*\*, student required periodic \*\*\* (T.I.79).
20. In April 2010, Student's physical therapist conducted a \*\*\* assessment and determined that Student's \*\*\*; all active movement was \*\*\*; range of motion in both arms and legs was limited; and Student had \*\*\* (R.7).
21. Student's 2009-10 IEPs were developed and implemented in a coordinated and collaborative manner by the key stakeholders.
22. Student's 2009-10 IEPs were based upon current evaluations.
23. During spring 2010, Student demonstrated some progress on student's IEP goals and objectives (R.10.1-2). Student participated in the Texas Assessment of Knowledge and Skills – Alternate ("TAKS-Alt"). The complexity level of student's assessment was \*\*\*, which is the \*\*\*

level. Student was not assessed in the area of “generalization of skill,” but student was provided maximum support during the assessment. The assessment was administered by Student’s 2009-10 special education teacher, \*\*\*, who determined that Student met the requisite standards based on prerequisite skills in reading and math (R.11.3; T.I.270-72).

24. The FLS classroom, along with some interaction with non-disabled peers in PE, the cafeteria, and \*\*\*, is the LRE for Student.

#### **School Year 2010-11:**

25. Student’s FLS teacher changed at the beginning of school year 2010-11. Student’s class continues to be made up of \*\*\* students served by one (1) special education teacher and two (2) paraprofessionals (T.I.142; 145).
26. Student’s ARDC met on October 6, 2010, to develop Student’s annual IEP. The ARDC determined that Student continued to qualify for special education and related services under the classifications of VI, ID, OHI, and SI (R.8.3). The ARDC developed new IEPs with a goal and objectives to address Student’s need for a) exploring sensory toys; b) increasing range of motion in arms and legs, as well as \*\*\*; and c) responding to sensory environment outdoors (R.8.7-8; 10-12). Student’s placement would remain in the FLS and adaptive PE. The Committee determined accommodations, such as \*\*\*, use of auditory cues, testing with teacher supervision, and data collection (R.8.13). Student would have access to \*\*\*, and switches/adapted toys (R.18.14). Student would receive consultative services from the speech therapist, VI teacher, occupational therapist, and physical therapist. Student would likewise receive transportation and health services (such as \*\*\* and breathing treatments) (R.8.19; 21). The ARDC determined that Student would not \*\*\* (R.8.25).
27. Student’s mother attended the October 6, 2010, ARDC meeting and agreed with all of the decisions made by the ARDC (R.8.23; 25). Student’s mother affirmed that student had no concerns at that time (R.8.25). Student’s teacher had developed and sent the Parents, prior to the meeting, draft copies of the new goal and objectives (T.I.262). Student’s mother made no changes to the goal and objectives (T.I.203; 262).
28. Student’s teacher and Parents communicated everyday through a communication notebook (P.28.23-33a; R.12.1-17; T.I.273-74). Student’s teacher communicated to the Parents her concerns about Student’s \*\*\* (P.28.25a; 27a; 28; R.15.1). \*\*\* concerns had been an issue in spring 2010 and continued throughout fall 2011. Student’s teacher learned of the prior problems with Student’s \*\*\* on the first day Student attended school. While the paraprofessionals were less than enthusiastic about \*\*\*, the evidence did not establish that Student’s teacher or paraprofessionals neglected caring for student’s \*\*\*.
29. Student’s teacher collected weekly data to measure Student’s progress on the goal and objectives developed in October 2010 (R.10.9-10). Student’s teacher ultimately collected data on a daily basis and sent that home to Student’s Parents (R.10.10-64).
30. On \*\*\*, 2010, Student’s mother received a call from the phone in Student’s FLS classroom. The caller informed the Parent that Student needed to \*\*\* and that there was no one in the classroom who could \*\*\*. The Parent immediately sent \*\*\* to the school to check Student out and take student home to \*\*\* (T.I.80-81). No one in the FLS classroom remembered making the call; however, the teacher remembered taking Student to the office and meeting \*\*\*

(T.I.214-215). Contrary to the statements made by the unknown caller, there were several providers who were trained in \*\*\* who were also in attendance at school on the day of the call (T.I.215-216; 278; T.II.85).

31. When Student initially checked out of school on \*\*\*, 2010, student's sign-out sheet noted that student was leaving school because of illness (P.20.2). However, this document was subsequently changed to state that Petitioner was being withdrawn for the day for "court" (P.20.2a). There was no explanation proffered by the District to explain either a) why anyone from the school called and informed Student's mother that no one at the school on \*\*\*, 2010, was capable of \*\*\*, or b) why the check-out document was changed. The evidence is sufficient to support reasonable conclusions that a) someone in Student's classroom did, in fact, call the Parent and inform her that Student needed \*\*\* and no trained person was available to do it, and b) someone at the District altered the \*\*\*, 2010, check-out sheet after the Complaint was filed.
32. In \*\*\* 2010, around \*\*\*, one of Student's providers at the school \*\*\* (R.12.31). Student's mother was extremely upset with \*\*\*, which was ultimately \*\*\*. Student's mother came to the FLS classroom without an appointment and confronted the special education teacher (T.I.276). Ultimately, Student's mother was informed that she would have to call and make an appointment to visit Student's classroom, a requirement with which Student's Parents strongly disagreed (R.12.9-10; R.1).
33. After the \*\*\*, the relationship between the Parents and LISD soured significantly. In November, the parties had a dispute over the use, and return, of \*\*\*. LISD did not send \*\*\* home \*\*\*; Student's mother insisted that it be sent home \*\*\* because she could not \*\*\* without it (R.12.2-5). The physical therapist developed a plan to send the District's \*\*\* home if Student's \*\*\* (R.15.5; T.I.237).
34. On December 1, 2010, Student's Parents requested an ARDC meeting (R.15.2). LISD scheduled the meeting for December 6, 2010, but it was postponed by Student's Parents due to a family emergency (R.15.4). The ARDC meeting was subsequently re-scheduled for January 20, 2011 (R.9.1).
35. The ARDC met, as scheduled, on January 20, 2011, but it was immediately cancelled by LISD because Student's advocate, Ms. Melanie Watson, accompanied the Parents at the ARDC meeting without providing prior written notice of her participation, as previously instructed (T.I.7.14-18; R.17.1; T.III.72-77; T.II.75-76; 81). LISD had sent Ms. Watson a letter in another proceeding informing her that she would no longer be allowed on any LISD campus without providing prior written notice of her participation in the ARDC meeting (P.17). LISD took this unusual measure because Ms. Watson's prior adversarial conduct had required police escort from the LISD campus and LISD wanted to have the opportunity to have a District special education administrator in attendance at any ARDC meeting Ms. Watson attended.
36. Neither LISD nor the Parents attempted to re-schedule the ARDC meeting requested by the Parents. On January 24, 2011, Student's Parents filed her Complaint.
37. Student's 2010-11 IEPs were developed and implemented in a coordinated and collaborative manner by the key stakeholders.
38. Student's 2010-11 IEPs were based upon current evaluations.

39. Student's 2010-11 goal is not measurable; Student's 2010-11 objectives are measurable.
40. Student demonstrated progress under the 2010-11 IEPs.
41. The FLS classroom, along with some interaction with non-disabled peers in PE, the cafeteria, and \*\*\*, is the LRE for Student.
42. The evidence fails to support a finding that LISD cannot meet Student's medical needs. The nurse provides Student with student's breathing treatments (T.II.280). The 2009-10 teacher testified that Student's paraprofessionals administered medication at the teacher's request (T.I.321). The 2010-11 teacher and paraprofessionals reported that Student does not require medication very often. When Student cries and cannot be calmed, the staff contacts the nurse (T.I.280-81). Other times the teacher or the paraprofessionals administers medication (T.II.18-20; 45; 57). If Student continues to cry after five (5) minutes, the staff contacts the nurse.
43. The evidence fails to support a finding that LISD cannot provide a safe environment for Student related to student's need for \*\*\*. All the staff working with Student have been trained in \*\*\* and the only report of \*\*\* occurred on \*\*\*, 2010. Typically the nurse \*\*\* if the teacher and paraprofessionals are otherwise engaged (T.I.234). The paraprofessionals have not been asked to \*\*\* this school year; Student's teacher last year performed this function (T.II.60).
44. The evidence fails to support a finding that LISD cannot provide a safe environment for Student related to the use of \*\*\*. \*\*\* is designed to \*\*\* (T.II.149-50). The staff has been trained in using \*\*\* (T.II.150). During both school years the caregivers have used \*\*\* (T.I.318; II.151).
45. The evidence fails to support a finding that Student's teachers and/or paraprofessionals failed to maintain Student's \*\*\*. Student's 2009-10 teacher \*\*\* three (3) times a day and \*\*\* on a daily basis (T.I.337-338). Notwithstanding the fact that \*\*\* has been removed from Student's IEP, Student's 2010-11 teacher \*\*\* on an as-needs basis as do the paraprofessionals (T.I.195; 240; 279).
46. LISD's requirement that Ms. Watson provide prior written notice before coming on an LISD campus is not unreasonable. LISD has not banned Ms. Watson from attending and participating in ARDC meetings with parents (T.III.78; P.17).
47. LISD's requirement that Student's Parents set up an appointment prior to coming to the FLS classroom is not unreasonable.

#### IV. DISCUSSION

IDEIA mandates that all state school districts receiving federal funding must provide all handicapped children a free, appropriate, public education. The United States Supreme Court, in *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175 (1982), established a two-part test for determining whether a school district has provided a student FAPE: 1) the school district must comply with the procedural requirements of IDEIA, and 2) the school district must design and implement a program "... reasonably calculated to enable the child to receive educational benefits." An educational benefit must be meaningful and provide the "basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational

benefit to the handicapped child.” *Rowley*, 458 U.S. at 200-01. In determining whether a child is receiving FAPE, the *Rowley* Court insisted that the reviewing court must not substitute its concept of sound educational policy for that of the school authorities. *Id.*, 458 U.S. at 206. Although the school district need only provide “some educational benefit,” the educational program must be meaningful. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998). The educational benefit cannot be a mere modicum or *de minimis*. It must be likely to produce progress, not regression or trivial educational advancement. *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 347 (5<sup>th</sup> Cir. 2000).

In *Cypress-Fairbanks Independent School District v. Michael F.*, the Court set forth four (4) factors that aid in evaluating whether a student is receiving the “basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational benefit” to that student: 1) whether there is an individualized program based on the student's assessment and performance; 2) whether the individualized program is administered in the LRE; 3) whether the services are provided in a coordinated and collaborative manner by the key stakeholders; and 4) whether positive benefits are demonstrated both academically and non-academically.

#### **A.**

#### **Student's 2009-10 IEPs Provided Student FAPE; Student's 2010-11 IEPs Provide Student FAPE.**

#### **I. Student's IEPs Are Individualized, Contain Measurable Goals And Objectives, And Are Based On Student's Assessments And Performance.**

##### **a. Student's Evaluations Were Comprehensive.**

Evaluation procedures are carefully spelled out in the federal and state rules and regulations implementing IDEIA. 34 C.F.R. §300.304 specifies that in conducting the re-evaluation, the public agency, *i.e.*, the school district, must 1) use a variety of assessment tools and strategies to gather functional, developmental, and academic information; 2) not use a single measure or assessment as the sole criterion for determining a disability; and 3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The school district must ensure that the assessments are selected and administered in a non-discriminatory manner, provided in the child's native language and in a form likely to provide accurate information, used for the purposes for which the assessments are valid and reliable, administered by trained and knowledgeable personnel, and administered in accordance with any instructions provided by the producer of the assessments. 34 C.F.R. §300.303(c).

The district is charged with administering assessments and other evaluation materials that are tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient. Assessments must be selected and administered in a manner that best ensures that the assessment results accurately reflect the child's aptitude or achievement level or other factors that the test is measuring. The child being assessed must be evaluated in all areas related to the suspected disability. The assessment must be sufficiently comprehensive to identify all of the child's special needs. As part of the overall evaluation, the assessors should review all existing evaluation data, including information provided by the parents, current classroom-based, local, or state assessments, classroom-based observations, observations by the child's teachers and related-services providers. 34 C.F.R. §300.305. Once the assessments and other evaluation measures are completed, the student's ARD Committee must consider all of the information gathered and make a recommendation based upon that information.

Student asserts that student's evaluations 1) were not performed in a timely manner; 2) were not comprehensive; and 3) were incapable of assessing all areas of suspected disability. Student first alleges that the 2006 FIE, which was relied on for subsequent re-evaluations, was defective because 1) it contains no signatures;<sup>5</sup> 2) it is not the most accurate assessment of a child with visual deficits; and 3) it contains the VABS, which required the assessor to have the extensive graduate training that Student's assessor did not possess. Student failed to prove such contentions.

Of first note is the fact that any claims Student has related to the 2006 FIE are barred by the one-year statute of limitations. However, to the extent Student's 2006 FIE was used to develop Student's program in spring 2010 and fall 2011, its analysis is appropriate.

On August 30, 2006, LISD conducted a REED and determined the scope of Student's next assessments in the areas of vision, intellect, developmental adaptive behavior, and adaptive PE. Student's ARDC determined that Student did not need evaluations in speech, OT, PT, or OHI as there had been no significant change in these areas. The VI teacher participated in the re-evaluation, presenting Student's test materials tactically or auditorily.

LISD used both informal measures, in ascertaining Student's intellectual functioning, and formal measures, the VABS and the DP-II. The VABS measured Student's ability to perform daily tasks required for personal and social sufficiency. Student's Composite Score of \*\*\* indicated that student is functioning in the \*\*\* level when compared to student's age-appropriate peers. Student's re-evaluation determined that student's adaptive behavior demonstrated deficits in functioning that exist concurrently with student's deficits in intellectual functioning.

The DP-II provides an individual profile, which depicts a child's development-age level functioning in the following areas: physical; self-help; social; academic; and communication. The DP-II manifested severe delays with Student's functioning at levels between \*\*\*. LISD proceeded with the necessary re-evaluations and completed the FIE in December 2006. The evaluators recommended that Student's eligibility for special education services be MR, VI, SI, and OHI. The ARDC adopted these suggestions and Student continues to receive special education and related services under these same categories.

In October 2009, Student's ARDC once again conducted a REED, which allows the District to carry forward any prior evaluations that it deems appropriate. This process is appropriate under 34 C.F.R. §300.305. The ARDC requested updated evaluations in the areas of medical (including vision), school health services, and adaptive PE. However, after reviewing Student's progress and current academic and functional levels, the ARDC determined that it did not need additional re-evaluations to determine eligibility, OT, or PT. The ARDC continued student's eligibility categories of Intellectual Disability ("ID"), VI, OHI, and SI. LISD completed Student's re-evaluation on December 1, 2009. Student would receive services in the FLS with the exception of adaptive PE. Student would receive direct speech therapy, consultative services from the VI teacher, OT, PT, transportation, and health services.

Student's ARDC met on October 6, 2010, to develop Student's annual IEP. Because the ARDC had conducted Student's three-year evaluation in fall 2009, the ARDC determined that

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<sup>5</sup> Student fails to cite any authority for this proposition. The copy of the 2006 FIE does not bear signatures; however, this argument was not raised until after the completion of the Due Process Hearing. Any harm attributable to such omission of signatures is *de minimis*.

Student's evaluations were current, especially in light of the spring 2010 \*\*\* evaluation conducted by the physical therapist. No additional evaluations were sought. The ARDC continued to qualify Student for special education and related services under the classifications of VI, ID, OHI, and SI. Student's placement would remain in the FLS and adaptive PE.

Based upon the evidence presented, Student failed to establish that student's evaluations 1) were not performed in a timely manner; 2) were not comprehensive; and 3) were incapable of assessing all areas of suspected disability.

**b. Student's IEPs Generally Were Appropriate.**

34 C.F.R. §300.320 defines an IEP as a written statement for a student with a disability that is developed, reviewed, and revised by the child's ARDC. Section 300.320 requires that the IEP contain certain statements of 1) the child's present level of academic achievement and functional performance; 2) measureable annual goals, including academic and functional goals; 3) how the child's progress toward meeting the annual goals will be measured and when reports will be provided; 4) the special education and related services and supplementary aids and services that will be provided; 5) the extent to which the child will not participate with nondisabled peers; 6) any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child; and 7) the projected date for the beginning of the services and modifications.

In this case, Student challenges the goals and objectives developed by the October 2009 and October 2010 ARDC, asserting that the goal and objectives are not measurable.

Crafting IEP goals and objectives can be problematic. Some goals may be too ambitious; others not ambitious enough. In formulating the goals and objectives, the ARDC should craft goals and objectives based upon the student's specific disability. The goals and objectives should align with one another and be measurable. If the teacher or parent can answer "when" and "how" the student is expected to reach the goals and objectives, then they are appropriately measurable. In this case, Student's 2009-10 goals and objectives are measurable; they provide sufficient information to the Parents and ARDC to enable them to chart progress.

**i. Student's 2009-10 Goals and Objectives:**

Student's first goal states "[g]iven structured opportunities to communicate pleasure or dislike and to control aspects of student's own environment, [Student] will develop and maintain a repertoire of 3 out of the following 4 skills by October 2010." The listed skills included 1) physically responding to auditory stimuli; 2) moving student's head or hands to activate switches on stimulatory objects; 3) communicating hunger; and 4) expressing pleasure by smiling or vocalizing as well as dislike by grimacing or pulling away.

Student's second annual goal for 2009-10 states "[g]iven structured opportunities to maintain student's level of physical functioning and awareness, [Student] will increase time in 3 out of 4 [delineated] positions by October 2010." The four (4) positions were 1) \*\*\* on a daily basis; 2) stretching student's hands, arms, and legs; 3) wearing \*\*\* without crying, grimacing, or showing other signs of distress; and 4) \*\*\* without crying, grimacing, or showing other signs of distress.

The 2009-2010 goals and objectives are measurable. The goals and respective objectives are readily aligned and provide sufficient information to allow Student's Parents and the ARDC to track

progress. Specific target behaviors were evaluated by specific numbers of successes; the evaluations were made by observation and data collection. Student's Progress Report revealed that student improved in all but one (1) of student's objectives and mastered five (5) of the objectives.

**ii. Student's 2010-11 Goal and Objectives:**

Student's 2010-11 goal changed in October 2010. This goal states globally that "[Student] will make progress toward enrolled grade level Reading, Math, Science, History and English by demonstrating mastery of at least 3 of the following 5 short-term objectives." The five (5) objectives are 1) Student will explore sensory toys with maximum physical assistance three (3) out of four (4) trials for six (6) weeks; 2) Student will respond to sensory environments outdoors by eye gazing, squinting, or smiling for three (3) out of five (5) trials for six (6) weeks; 3) Student will increase range of motion in arms and legs for three (3) out of four (4) trials for four (4) consecutive weeks; 4) Student will access switch with physical assistance for learning and assistive technology for three (3) out of five (5) trials for six (6) consecutive weeks; and 5) Student will tolerate eight (8) transitions per day between \*\*\*. Student's teacher collected data on each of the five (5) objectives on a weekly basis and then, beginning in November 2010, Student's teacher provided the Parents with daily updates on the five (5) objectives.

Student's 2010-11 teacher testified that she used the "global language" in the IEP goal because that is what she was taught to do. In comparing this goal with the five (5) delineated objectives, one cannot say that they align properly. In fact, the 2010-11 goal appears to have absolutely no basis in relation to Student's multiple disabilities. Notwithstanding that fact, the five (5) supporting objectives are generally measurable as shown by the teacher's progress reports. Accordingly, while Student's 2010-11 goal is not measurable, this does not render Student's 2010-11 IEP infirm. The measurability of the specific objectives redeems the insufficient goal.

**2. Student's IEPs Were Developed By Key Stakeholders; Have Been, And Will Continue to Be, Delivered In The LRE In A Coordinated And Collaborative Manner; And Have Provided, And Will Continue To Provide, Student With Academic And Non-Academic Progress.**

**a. FLS Is Student's LRE.**

There is no doubt that Student's placement in the FLS classroom is highly restrictive and does not provide Student with much opportunity to interact with student's non-disabled peers. In *Daniel R. R. v. State Board of Education*, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989), the Court developed a two-part test to use in determining whether the proposed placement is too restrictive: 1) whether, with the use of supplementary aids and services, the child's education can be achieved satisfactorily in the regular classroom, and 2) if not, whether the child has been mainstreamed to the maximum extent appropriate. Because Student cannot be educated in the regular classroom, even with the use of supplementary aids and services, and indeed, no one has advocated that position, the analysis turns on the second prong of the *Daniel R. R.* test.

In this case, Student's IEP called for student's participation with regular education students in adaptive PE, recess, lunch, and \*\*\*. Student's objectives contemplated interaction with students to garner responses to touch and sound. Student seems to have an affinity for \*\*\*, who interact with Student occasionally. All in all, Student's placement in the FLS with the attendant time with the general education population, is the LRE for Student.

**b. Development of IEPs.**

On October 29, 2009, Student's ARDC met and continued student's eligibility categories of Intellectual Disability ("ID"), VI, OHI, and SI. The ARDC developed IEPs for Student. The ARDC developed goals and objectives to be implemented by Student's special education teacher, paraprofessionals, speech pathologist, occupational therapist, physical therapist, VI teacher, and adaptive PE teacher. Student would receive these services in the FLS with the exception of adaptive PE. Student would receive direct speech therapy, consultative services from the VI teacher, OT, PT, transportation, and health services. The October 2009 ARDC developed accommodations for Student, including wheelchair access to the classroom and school bus; one-on-one instruction with tactile and auditory materials; multisensory approach/vibration; single function switches; tactile materials with auditory cues; \*\*\*, and \*\*\*. Assistive technology included \*\*\*, and switches/adapted toys. Student's mother attended this ARDC meeting and concurred with the ARDC's decisions.

On December 1, 2009, Student's ARDC convened to review Student's proposed program and the results of the re-evaluations. The Committee adopted the proposed IEP goals and objectives and agreed to carry forward all evaluations. The objectives were to be evaluated by observation and data collection. Student's teacher in spring 2010 and student's new teacher in fall 2010 had no difficulty implementing Student's IEPs or measuring student's progress.

Student's ARDC met on October 6, 2010, to develop Student's annual IEP for 2010-11. The ARDC determined that Student continued to qualify for special education and related services under the classifications of VI, ID, OHI, and SI. The ARDC developed new IEPs with a goal and objectives to address Student's need for a) exploring sensory toys; b) increasing range of motion in arms and legs, as well as tolerating transitions \*\*\*; and c) responding to sensory environment outdoors. Student's placement would remain in the FLS and adaptive PE. The Committee determined accommodations, such as \*\*\*, use of auditory cues, testing with teacher supervision, and data collection. Student would have access to \*\*\*, and switches/adapted toys. Student would receive consultative services from the speech therapist, VI teacher, occupational therapist, and physical therapist. Student would receive health services and transportation.

Student's mother attended the October 6, 2010, ARDC meeting and agreed with all of the decisions made by the ARDC. Student's mother affirmed that she had no concerns at that time.

Student's teacher and Parents communicated everyday through a communication notebook. Student's teacher collected weekly data to measure Student's progress on the goal and objectives developed in October 2010. Student's teacher ultimately collected data on a daily basis and sent that home to Student's Parents. The progress reports indicate some progress on Student's objectives.

**3. LISD Did Not Violate IDEIA By A) Cancelling The ARDC Meeting and B) Imposing Visitation Restrictions.**

LISD unilaterally cancelled the scheduled January 20, 2011, ARDC meeting when Student's advocate, Ms. Watson, appeared with the Parents at the school for the ARDC meeting. Ms. Watson previously had been escorted by a police officer from an LISD campus because of her behavior in an ARDC meeting. \*\*\* sent Ms. Watson a letter informing her that although she was certainly not banned from attending LISD ARDC meetings, she was required to provide notice that she would be in attendance so that the District could have an appropriate special education administrator present. Because she had declined to provide the specified written notice, LISD cancelled the ARDC meeting.

Nothing in IDEIA prohibits a parent's advocate from attending an ARDC meeting unless state law or a court order provides otherwise. *Letter to Serwecki*, 44 IDELR 8 (OSEP 2005). Indeed, 34 C.F.R. §300.321(a)(6) provides that optional attendees, such as lay advocates, at an ARDC meeting include "at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, ..." However, this right to have a lay advocate in attendance is tempered with some common sense.

Section 300.321 provides for the attendance of an optional attendee "at the discretion of the parent or the agency." It is well settled that Districts have the right to promulgate rules and regulations that allow for the smooth flow of educating students in a safe environment. While nothing suggests that \*\*\* was a threat, nothing prohibits the District from imposing restrictions on her attendance in light of the past behavior. The District did not ban \*\*\* from attending and participating in Student's ARDC meetings. Rather, she was deprived of participating in the January 20, 2011, ARDC meeting because she declined to provide the requisite written notice. The intent of this notice requirement is to allow the District to also have someone from the special education administration present; nothing more. Likewise, LISD did not ban Student's Parents from ever coming to the school to monitor Student in the classroom. It is standard operating procedures for anyone visiting a campus to sign in at the office before heading to a classroom. Classroom visitations are allowed if prior approval is obtained. The Principal notified Student's Parents that they would need to make an appointment if they wanted to meet with personnel or observe Student in the classroom. If they simply wanted to meet with Student, then the Principal would gladly have student brought to the office. Such requirements do not compromise the Parents ability to participate in the education of Student.

IDEIA creates the presumption that a child's program and placement are appropriate. The burden of proving otherwise inures to the party challenging the program and placement. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Accordingly, Student had the burden of proving that any or all of the delineated issues manifested a denial of FAPE and required any or all of the relief requested. Student failed to carry this burden. Accordingly, Student's request for relief is denied.

## V. CONCLUSIONS OF LAW

1. Student's 2009-10 IEPs were appropriate and provided Student with FAPE in the LRE. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998); *Houston Independent School District v. Bobby R.*, 200 F.3d 245 (5<sup>th</sup> Cir.), *cert. denied*, 531 U.S. 817 (2000).
2. Student's 2010-11 IEPs are appropriate and are providing Student with FAPE in the LRE. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998); *Houston Independent School District v. Bobby R.*, 200 F.3d 245 (5<sup>th</sup> Cir.), *cert. denied*, 531 U.S. 817 (2000).
3. LISD failed to fully implement Student's IEP when a staff member contacted the Parent regarding the need to \*\*\* Student. LISD altered Student's information on the \*\*\*, 2010, sign-out sheet. While such actions may give rise to the need for internal investigations, such actions do not rise to violations of IDEIA sufficient to 1) impede Student's right to FAPE; 2) deprive Student's Parents of the opportunity to participate in the IEP process; or 3) deprive Student of educational benefits. 20 U.S.C. §1415(f)(3)(E)(ii).

4. LISD did not commit procedural violations of IDEIA when it a) cancelled the January 20, 2011, ARDC meeting, and b) imposed visitation restrictions. Such actions did not 1) impede Student's right to FAPE; 2) deprive Student's Parents of the opportunity to participate in the IEP process; or 3) deprive Student of educational benefits. 20 U.S.C. §1415(f)(3)(E)(ii).
5. LISD did not fail to timely and appropriately evaluate Student in all areas of suspected need. LISD did not fail to develop and implement measurable annual goals and objectives for Student's 2009-10 IEPs that were based upon Student's present levels of academic achievement and functional performance. 34 C.F.R. §300.320.
6. LISD failed to develop and implement a measurable goal for Student's 2010-11 IEP. However, LISD did not fail to develop and implement measurable objectives for Student's 2009-2010 IEP that were based upon Student's present levels of academic achievement and functional performance. 34 C.F.R. §300.320. Accordingly, LISD's failure to develop an appropriate goal did not deprive Student of FAPE.

## VI. ORDER

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the relief requested by Student is DENIED.

Finding that the public welfare requires the immediate effect of this Decision, the Special Education Hearing Officer makes it effective immediately.

SIGNED this 20<sup>th</sup> day of May 2011.

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Deborah Heaton McElvaney  
Special Education Hearing Officer

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