

STUDENT bnf PARENTS	§	BEFORE A SPECIAL EDUCATION
	§	
VS.	§	HEARING OFFICER FOR
	§	
CALDWELL ISD	§	THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER – NUNC PRO TUNC

Student (hereinafter “the student”) through student’s next friends, Parents (Petitioner), requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. § 1400 et. seq. The Respondent is the Caldwell Independent School District.

In the Request for Hearing, Petitioner alleged that CISD denied the student a Free Appropriate Public Education (FAPE) by the following acts and omissions:

1. Failure to provide an appropriate educational program individualized to meet student’s needs during the 2009/2010 school year and the 2010/2011 school year;
2. Failure to provide Petitioner an appropriate educational program in the least restrictive environment (hereinafter “LRE”);
3. Failure to provide Petitioner the appropriate supplementary aids and services necessary to be successful in the general education classroom;
4. Failure to provide Petitioner a one-on-one aide as an appropriate supplementary aid to enable student to be included in general education classes with student’s same age peers;
5. Failure to appropriately evaluate Petitioner’s educational and academic needs taking into account student’s visual impairment;
6. Failure to appropriately evaluate Petitioner’s visual impairment to address student’s academic needs in all classes;
7. Failure to provide an evidence based reading program appropriate to meet student’s needs that would address student’s reading deficits;
8. Failure to provide an evidence based math program appropriate to meet student’s needs that would address student’s math deficits;
9. Failure to implement recommended accommodations to enhance student’s ability to learn.
10. Failure to train the student’s teachers on the student’s disabilities and on implementing student’s IEP appropriately; and
11. Reducing the student’s speech therapy services without evaluation data to justify the reduction and contrary to the student’s physician’s request for speech therapy and the student’s need to work on social skills.

Petitioner requested the following as relief:

1. An Order requiring Respondent to provide the student a FAPE.
2. An Order requiring Respondent to provide the student a one-on-one aide to assist student in the general education classroom.
3. An Order requiring Respondent to provide an independent full and individual evaluation at public expense that is appropriate to address the student's visual impairment.
4. An Order requiring Respondent to provide instruction in the least restrictive environment, specifically in social studies, science and student's electives, in the general education setting.
5. An Order requiring Respondent to provide the appropriate IEP goals and objectives individualized to meet the student's needs.
6. An Order requiring Respondent to provide a comprehensive visual evaluation to determine the student's visual deficits and how they affect student's education.
7. An Order requiring Respondent to provide a comprehensive reading assessment to determine the student's reading deficits.
8. An Order requiring Respondent to provide training for the student's teachers and staff that work with student specific to the student's disabilities and student's IEP's.
9. An Order requiring Respondent to provide a comprehensive reading program that is research based to address reading deficits.
10. An Order requiring Respondent to consult with the Texas School for the Blind and Visually Impaired Outreach Program.
11. An Order requiring the student's placement at the Texas School for the Blind and Visually Impaired.
12. A finding that Respondent denied the student a FAPE.
13. Any other compensatory education deemed necessary by the Hearing Officer.

Held for Petitioner in part and Respondent in part.

PROCEDURAL HISTORY

Petitioner filed this request for hearing on November 12, 2010, initially assigned to Hearing Officer Lucretia Dillard. The matter was reassigned to the undersigned Hearing Officer on February 25, 2011. Petitioner requested a continuance due to availability and health concerns and the matter was continued, without objection of Respondent, to April 13, 2011. A hearing was held on April 13-15, 2011. Petitioner was represented by attorneys Yvonnilda Muniz and Dorene Philpot. The Caldwell Independent School District was represented by attorneys J. Erik Nichols and Amy Tucker. At the conclusion of the hearing, both parties requested an opportunity to submit written argument and proposed findings of fact and conclusions of law. The decision due date was extended for good cause to allow an opportunity to submit written argument. The decision due date was extended to June 13, 2011. However, some of the exhibits were not in an accessible format and another exhibit could only be opened with the use of WYNN 5 software. Both parties were required to submit the exhibits in an accessible format and the necessary software. The Decision due date was then extended, with the agreement of the parties, to July 2, 2011. The Decision was timely rendered and forwarded to the parties.

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusions of law. Citations to the transcript will be designated "T" with a notation of the volume number and page number. Citations to Joint Exhibits will be designated with the letter "P" or "R" (Petitioner and Respondent), with a notation of the exhibit number.

FINDINGS OF FACT

1. The Caldwell ISD is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing the 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.

2. Caldwell ISD participates in the Burleson-Milam Special Services Co-op and the student's ARD Committee is made up of members from the District and the Co-op.

3. The student resides within the geographical boundaries of the Caldwell ISD. Caldwell ISD is responsible for providing the student with a FAPE. At the time of the hearing, the student is eligible to receive special education and related services under the eligibility categories of Other Health Impairment based on Attention Deficit Disorder (ADD), Speech Impairment and Visual Impairment. The student is *** years old and in *** grade.

4. The student's disabilities developed ***. T2-216-217; P12-003-004; P8-002. The student has had various diagnoses, including ADD, Cerebral Palsy and Mental Retardation. T2-215.

5. The student began receiving special education services at the age of ***. The student's placement was primarily in a Life Skills classroom until the *** grade, when student was placed in regular education classes for all academic subjects except English. P3-30. The student also received speech therapy, vision services, occupational therapy, physical therapy and social skills training. P3-30-31.

6. Prior to the Fall of 2009, the student's only eligibility classifications were OHI and Speech Impairment. The OHI was due to ADD.

7. The parent has always noticed that the student had visual problems. For example, student would walk down a hallway and not be able to find a shoe, student would not be able to see an eating utensil and other things in front of student, and would frequently spill things. T2-219. The parent took student to numerous eye doctors who checked only student's visual acuity, which at the time was 20/20. T2-219-220.

8. When the student was younger, school personnel told the mother that the student was not focusing and inattentive and suggested she take student to a psychologist. She did and student was diagnosed with ADD. T2-215.

9. In August of 2008, the parent contacted the VI teacher regarding the student's suspected visual impairment. The parent had obtained a report from an eye doctor that recommended vision therapy due to the student's tracking problems. T1-27. The teacher explained that the school did not offer vision therapy but referred the parent to a pediatric ophthalmologist, Dr. ***. T1-28, T2-222. The school did not pay for the evaluation. T2-222.

10. In October and November of 2008, the parent consulted with the ophthalmologist, who provided a report to the parent and the school. In his report, Dr. *** reported that the student's visual field was restricted to less than 20 degrees in both eyes and diagnosed student with Cortical Visual Impairment. The doctor reported that the student suffered from a serious peripheral visual field loss in both eyes and made a recommendation for a functional vision assessment, as well as classroom accommodations. The recommendations included use of a ***, ***, enlarged print, high contrast printed material, preferential seating toward the front of the classroom, and the services of a teacher for the visually impaired. P2-019-022. Dr. *** report also contained information that the student had Cerebral Palsy.

11. The parent presented the report to the VI teacher, who attempted to replicate the testing. The VI teacher reported that her testing indicated the results were “inconclusive” and referred the student for a low vision evaluation but took no further action. It was left to the parent to arrange and schedule the low vision evaluation. T1-30; P2-029. The ARD Committee determined in February of 2009, based on the VI teacher’s recommendations, that the student did not meet the eligibility criteria for a student with a visual impairment. P1-024-26. At that time, the VI teacher reported that although the student was visually impaired, student did not demonstrate an educational need for services specific to student’s visual impairment. The ARD Committee rejected the parent’s request that the student be identified and served as a student with Visual Impairment and there was no change in student’s eligibility at that time.

12. In the summer of 2009, Dr. *** conducted a low vision evaluation of the student and determined that the student was legally blind due to visual field loss. P2-004-006, T1-115. She characterized the loss as severe and testified that it is of a nature that will adversely impact student’s education. T1-136-137. The student’s condition is Cortical Visual Impairment (CVI), which has an onset from birth. A person with this condition may have 20/20 vision (acuity) because the eyeballs function normally. However, due to damage to the brain, the eyes do not process visual information. This is a permanent and non-correctible condition, as the damage is to the brain itself. There are no treatments that regenerate the nerve tissue or remediate the vision. T1-113-117; P2-003. Although the doctor prescribed glasses for the student, they are for protection only and not for correction. T1-114.

13. The impairment manifests itself in the student as a restricted visual field of 20 degrees or less or loss of peripheral vision. According to Dr. ***, the student also has suspected central vision loss (scotomas) as confirmed by the student’s tendency to skip letters or numbers. Central vision loss is a common complication with children with CVI. P2-012; P32-007. Although student has 20/40 central vision acuity, the student is legally blind due to the lack of peripheral vision. P2; T1-115.

14. According to Dr. ***, the student’s visual field is so restricted that it is as though student views the world through a soda straw, with no other vision. T1-122. The parent’s other vision expert described the student’s vision as looking through a paper towel roll with a piece of Swiss cheese over the opening. T2-61. On November 23, 2009, Dr. ***, in an addendum to the low vision report, provided an explanation (along with a drawing) of the combined effect of the student’s restricted visual field and central blind spots. According to Dr. ***, if the student were looking at a target with a bull’s eye, student would be able to see only the first few rings around the target, but not the target itself. To compensate, the student would need to move student’s head from side to side to glimpse the target with student’s remaining vision. According to Dr. ***, this explains the student’s searching behavior of looking to the side or away. The student must do so to “get the whole picture by getting all the pieces in view, and then student’s brain must put those pieces together to make the whole.” This is a complicated visual task that can cause the student to become overwhelmed, so student may look away from the image or target to recover or may appear to “shut down.” P32-006-007. Dr. *** description is consistent with the observations of the evaluator from *** discussed below. It is also consistent with reports of the student’s inattentive behavior observed by the teachers. According to Dr. ***, the behavior is sometimes interpreted as inattention when it is actually an attempt to interpret what is seen.

15. Dr. *** further reported that the student’s eyes sit in a permanent outward position and student’s visual tracking ability is compromised by jerky eye movements. These conditions further complicate student’s functional vision. She stated that student can lose student’s place easily or not be able to locate something specific on a page. T1-118. Student may appear that student is not looking when student is trying to use the limited amount of vision that student has without the benefit of depth perception or smooth eye tracking. P32-008.

16. The student has difficulty processing visual information and with visual clutter. Words or lines may tend to run together. Student has difficulty transferring information from one medium, such as a book or a board, to another, such as paper, and loses student's place. T1-120, 130-131. The student requires visual information presented in a simple form and in isolation to prevent overstimulation. The student's vision may be variable at times and student can suffer from fatigue. Student frequently turns student's head to look at things, attempting to use student's peripheral vision. This looks like inattentiveness, but it is the student's efforts to use student's peripheral vision. P32, T1-121-122.) Because of the student's limited field of vision, student may not be able to see things that are not centrally located directly in front of student. Student also has problems looking at information at a distance and then looking down at student's desk to transfer the information. T1-130-131. I reviewed the student's written work and find it to be illegible.

17. The ARD Committee considered Dr. *** report in August of 2009 and determined that the student met the eligibility criteria for a student with visual impairment. P2, T1-41. There is virtually no difference between Dr. *** report and Dr. *** 2008 report. The District's failure to timely identify the student as a student with visual impairment resulted in a loss of educational opportunity during the 2008-2009 school year.¹

18. Dr. *** made the following recommendations for classroom modifications and accommodations: (a) strategies for children with cortical visual impairment (CVI), (b) use of materials with high contrast and low visual clutter, presented centrally for the student; (c) materials enlarged but not beyond the limits of the student's visual field; (d) reduced information on the page; (e) ***; (f) consult with an occupational therapist to improve tracking ability; (g) orientation and mobility evaluation; (h) and glasses for protection only. P2-005.

19. Dr. *** recommended that the student's length of assignments be reduced and that student be allowed additional time to complete assignments. She also recommended that student be provided with a desk copy of distance materials and that those materials be verbalized for student. She recommended high contrast print with enlarged materials, but still within student's visual field and the use of a line guide or typoscope to help isolate words or problems. She also recommended that visual clutter be reduced, or in other words, that the material be presented simply, with a reduction of words or images on the page. P2-013.

20. Dr. *** observed the student use student's WYNN 5 program and found it to be appropriate because its features include highlighting and isolating words as well as auditory feedback. T1-132. However, she had concerns with the use of PDF documents being loaded into the student's laptop for use because they could not be enlarged, isolated, or highlighted. T1-133. When she reviewed the Power Point slides with student, student "was jumping all over that PowerPoint, just from one word to another word on a different line to another word on another line." Student was not able to visually find what student was looking for on the slide. However, student was able to locate information within the WYNN 5 system. T1-149-151.

21. Neither the student's VI teacher nor any other school personnel contacted Dr. ***. T-136.

22. The student's last FIE was completed in February 2009, after the school received information regarding the student's cortical visual impairment. The student's vision was reported to be within "normal limits." P1-010. The diagnostician reported that she consulted with the VI teacher and made the following accommodations: frequent breaks, positioning of materials to allow easy access for the student to "see", vision paired with other sensory systems, and additional time for the child to see and respond to what is being seen. P1-014. The evaluator noted that the student wore student's glasses at all times, an indicator that she did not understand the nature of student's visual impairment and the implications for testing because student wears glasses for protection only, not for correction.

¹ The parent has not alleged failure to identify in her complaint and it is outside the Statute of Limitations.

23. The evaluator administered the Woodcock Johnson III Test of Cognitive Ability. The student's General Intellectual Ability was reported to be ***, which the evaluator reported did not appear to be a true reflection of the student's cognitive ability due to "going beyond beyond the standardization of the test to get a completed testing session." She concluded that the GIA scores should be interpreted with caution. Although some of the subtests involved auditory processing, such as sound blending, and verbal cues and responses, such as the numbers reversed subtest, the evaluator noted that she gave the student more prompts than the standardization allows. Overall, she reported the student's cognitive functioning was in the low to extremely low range when compared to same age peers, but cautioned that additional IQ measures were needed to obtain a better picture of student's functioning level. P1-015-016.

24. The evaluator administered the Adaptive Behavior Assessment System II (ABAS II) to both parents and the teacher. Based on the parent administration, the composite scores from the parents' information were *** and ***, or in the very low range. Based on the teacher administration, the score was ***, or in the low average range. P1-017-018. However, the parents and teachers consistently reported the student to be in the very low range in the Conceptual Composite, which is comprised of communication, functional academics, and self-direction. The parents and the teacher were also consistent in reporting that the student's strength lies in the social domain, where student's score was in the low average range. The evaluator concluded that the student needed opportunities to participate with typically developing peers during special projects, PE and other school activities that promote socialization but cautioned that student may become easily frustrated by grade level assignments. P1-020.

25. Academic achievement tests and teacher reports reflect that the student functions at a *** to *** grade level. P1-021.

26. As a result of the February 2009 FIE, the ARD Committee found the student to be eligible for services under the categories of Other Health Impaired due to ADHD and Speech Impaired. The ARD Committee did not identify the student's visual impairment. P1-026, 030, 032.

27. The Speech Impairment Disability Report reflected that the student's speech impairment is severe and that student has deficits in expressive and receptive language, written language and articulation. P1-030.

28. The evaluator recommended that the District obtain additional IQ testing to determine a more precise measure of the student's cognitive functioning. P1-032. To date, the District has not done so.

29. Following the FIE, the parent requested an IEE at public expense. The *** conducted the evaluation on June 14, July 14 and July 21, 2009 to supplement the FIE and provide clarity regarding the student's then current functioning and to make recommendations for student's educational program. P12-001-002.

30. The evaluator administered the Stanford Binet Intelligence Scales-5th Edition (SB5) and the Leiter International Performance Scale-Revised (LIPS-R), which yielded a Full Scale IQ of *** and ***, respectively, or in the moderately impaired range. The student's Adaptive Behavior Composite Score on the Vineland Adaptive Behavior Scales-2nd Edition (BASC-2) was a ***, or in the moderately low range of functioning. P12-009-012, 024.

31. The student's adaptive skills are developed to higher levels than would be expected based on student's cognitive testing. However, the evaluator noted that the student's visual deficits affected student's performance on the cognitive testing. Although both cognitive tests reflected that student functions in the

moderately impaired range, there was no diagnosis of Mental Retardation because there were no concurrent adaptive behavior deficits. Additionally, the evaluator noted that there was clear evidence of visual impairment throughout the assessment and student demonstrated significant difficulty in visualizing whole images out of component parts, and student's lowest assessment scores occurred on visually intensive tests. P12-029-030.

32. The evaluator tested the student's academic functioning and noted that although the results were questionable because the student was unable to complete many of the subtests due to deficiencies in basic skills, student nonetheless exhibits significant delays in all general academic areas. P12-018, 029. On the reading subtests, the student's reading deficits appeared to be commensurate with student's cognitive deficits. However, on the writing subtests, the evaluator noted that in some instances the student was able to verbalize correct answers but could not in turn write the answer correctly. The student was unable to complete any of the items relying exclusively on pure reading skills. P12-019. The evaluator made recommendations that the student's academic deficits in the areas of basic reading, writing and mathematics require one to one intervention and that student should receive reminders to scan entire words in order to address student's visual difficulties. He noted that student's writing deficits could also be attributable to student's visual impairment. P12-030.

33. The evaluator administered the Beery-Buktenica Test of Visual-Motor Integration-5th Edition, yielding scores in the low range of functioning. The evaluator noted that the student demonstrates significant difficulty with copying visually presented images and his observation is consistent Dr. *** findings that the student has an extremely limited visual field. The student's performance suggests that the student does not view images as a whole, but, rather, student appears to view them in pieces. P12-028.

34. Although the evaluator recommended one-to-one intervention in basic reading, writing and math, he stated that the student requires social and language learning opportunities afforded by inclusion with same age peers. P12-031. He noted that the student would require the assistance of a paraprofessional and that student's program should reflect a balance between individual interventions in specialized locations and the social and language opportunities afforded by inclusion with same age peers. The evaluator noted that the student did not demonstrate any challenging behaviors that would interfere with student's ability to learn in a mainstream setting or create disruption to other students. P12-031. This is consistent with the testimony of the teachers. It is important to note that the evaluator recommended exposure to peers in less structured settings such as lunch and specials *in addition to inclusion*.

35. There was conflicting testimony as to whether the IEE was ever considered by the ARD Committee. The report was completed in July 2009. None of the ARD documents in evidence reflect that the IEE was considered, although all other evaluations are listed. The diagnostician testified that the IEE was discussed during the August 20, 2009 ARD meeting, but she did not review the IEE personally until the 2010-2011 school year. T3-118- 122.

36. In October, November and December of 2008, a practicum student in the School of Psychology at Texas A & M conducted a psychological evaluation of the student under the supervision of a LSSP. P8-003. The parent did not provide this report to the school. Although the evaluator noted the student's difficulties in visual tasks, the cognitive testing is similar to the IEE in that it reflects the student's cognitive functioning is in the moderately impaired range, and expressive and receptive language in the extremely low range. The evaluator diagnosed the student with ADHD and Mild Mental Retardation. P8-034. Although there is no evidence the evaluator made accommodations for the student's visual impairment, the report nonetheless shows low cognitive and academic functioning consistent with the findings in the IEE. The evaluator recommended maximizing the student's interaction with non-disabled peers, with more time in the general education setting. The evaluator recommended that the student receive social studies and science instruction in the general education classroom, with oral instructions, reduced choices, and modified assignments. P08-035. At the time

of the evaluation, the student was in a Life Skills classroom, but received reading and math instruction in a Resource classroom, and science and social studies instruction in a general education setting. P-014.

37. During the 2009-2010 school year, the student received instruction in the general education setting in all academic areas except English, which was provided in the Resource classroom. The student's 2009-2010 IEP's required mastery of goals and objectives at student's functional level rather than grade level. P3. The IEP's also contained the following classroom accommodations and modifications: change of pace instruction, oral tests, study aids/manipulatives, repeated review, preferential seating, frequent breaks, change in project/report requirements, check for understanding, enlarged print (18 pt.), content mastery, and ***. P3-030 The student's accommodations and modifications were the same for both general education and special education settings. The ARD Committee attached the modified scope and sequence for the student's general education classes.

38. Both parties assert that the student made progress during the 2009-2010 school year. The student's progress and report cards reflect that student made *** and *** during the *** grade. P24. The principal and the student's *** grade teachers testified that the student made progress on student's functional level. It is also important to note that during the 2009-2010 school year, the teachers reported increased interaction with peers. R5-122. Although the student's IEP did not specifically require a one-on-one paraprofessional to work with the student, it is undisputed that there was an aide in the classroom that worked with student, as well as with other students.

39. At the October 2009 ARD Committee meeting, the parent requested that an additional reading program, Read Naturally, be added to the student's laptop. The ARD Committee requested that additional reading interventions be researched and discussed with the parent. P3-39.

40. In May of 2010, the ARD Committee met to discuss ESY and the student's schedule for the 2010-2011 school year. The parent rejected ESY services. The ARD Committee agreed that the student would receive instruction in all general education classes with the exception of English. Many of the prior modifications and accommodations were removed, such as enlarged print, the use of a ***, and preferential seating in science, social studies and reading. Content mastery was removed, apparently at the parent request. P4-007, P4-014-015. The parent requested an AT Evaluation and the use of WYNN 5 software for the student. The parent also requested a one-on-one paraprofessional for the student. The minutes reflect that the ARD decision was for the principal to meet with the Superintendent to discuss this option. P4-014. When the ARD Committee reconvened on June 1, the principal reported on her discussion of the option of a paraprofessional with the Superintendent. The ARD Committee then determined that there was no educational need for a paraprofessional. P4-014. I find based on a preponderance of the credible evidence that the decision not to provide a paraprofessional for the student was made by the Superintendent, who was not a member of the ARD Committee.

41. The ARD Committee agreed to revisit the issue of class support at the beginning of the 2010-2011 school year after the Assistive Technology Evaluation was completed. The parent believed that the student would not need class support once student was able to utilize the WYNN 5 software. P4-015.

42. An Assistive Technology Evaluation was completed on August 13, 2010, recommending that the student have use of a laptop, with software such as WYNN 5 to enhance reading, writing and productivity. P10-007. On April 14, 2010, the parent wrote the Co-Op A.T. specialist to inform her that she had discovered a software program that she believed would be appropriate for the student's needs, the WYNN 5, which she had obtained for use on a trial basis. P33-0121. The specialist observed the student using the software and recommended that the software be implemented as a part of the student's educational program. On August 20, 2010, the ARD Committee recommended that the District provide the student with a laptop, scanner and the

software. R3-16. There were ongoing issues with procuring the software, and the parent explained that the demo version of the software was set to expire at each ARD meeting during September, October and November of 2010.

43. Although the ARD Committee agreed that the District would provide the WYNN 5 software to student on August 20, 2010, the emails between District and Co-Op personnel indicate reluctance on the part of the District to follow through with ordering the student's software. On September 15, 2011, the Diagnostician for CISD wrote the Co-Op AT Specialist and informed her as follows: "Dr. *** [the Superintendent] just felt that 1 observation wasn't enough. She wants more quantitative data. She did the demos online and doesn't think that [the student] can cognitively do the program. She thinks BMSS (the Co-Op) should pay for it." P34-015. On October 6, 2010, in response to an email from the AT Specialist regarding parent training on the WYNN 5 software, the VI teacher emailed her that parent training on the software was not in the report. P34-023. During the hearing, the VI teacher explained that the parent had requested training on the software, but there was a decision not to provide it because of the expense involved. T1-173-174. This appears to have occurred outside the ARD Committee meeting. On October 21, 2010, following an ARD meeting, the VI teacher and the AT Specialist, on behalf of the Co-Op AT Team, wrote a letter to the Superintendent informing her that the demo version was set to expire and that they recommended that CISD order the software for the student. P34-036. As of the November 8 ARD meeting, the WYNN 5 software demo had expired, the student was unable to use it, and the parent reminded the school members of the ARD Committee about it. P7, P28. It is not clear based on the evidence how many days of use were lost.

44. Exhibit 29 contains documents that were uploaded onto the student's laptop. The District provided a demo version of the software to the hearing officer to open the WYNN 5 files. The software has functions that will highlight and isolate words and read the document to the student. However, the files have to be uploaded in a WYNN 5 format. There are also functions which allow the student to dictate notes or answers to questions as well as isolate text. This would appear to not only be useful due to the student's visual impairment, but would also increase literacy given student's reading and writing deficits. By contrast, many files were scanned and loaded into the student's laptop in PDF, Word, or Power Point format which cannot be opened with the WYNN 5, so the student loses the functionality of the program with those assignments. The parent testified that many of the tests sent home with the student are not in a WYNN 5 format and her testimony is corroborated by a review of Exhibit 29. I find based on a preponderance of the credible evidence that the WYNN 5 was not consistently used by the teachers, or, in the case of student's reading teacher, at all.

45. The parent requested that the district evaluate and address the student's Cerebral Palsy. P4-054. However, the parent also revoked all consents for the District to communicate with outside providers. P4-022. On March 22, 2010, the parent consented to the discontinuation of physical therapy services with the district. P4-020. Even though the parent revoked this consent, the District was well aware of the student's Cerebral Palsy diagnosis before that time, at least as early as November 2008 from Dr. *** eye examination report. P2-109. Additionally, in February 2009, the student's physician noted mild cerebral palsy in an OHI report. P11. The VI teacher agreed that District had knowledge of the student's cerebral palsy in "an informal way" in February 2009. T1-84. The VI teacher testified that she believed the student was receiving physical therapy due to student's OHI based on student's ADHD. T1-211.

46. During the August 20, 2010 ARD Committee meeting, the parent requested dismissal from physical therapy, and the ARD Committee agreed after review of the Physical Therapy assessment. R11; R3-16.

47. The ARD Committee reconvened on September 2, 2010. All members of the ARD Committee, including the parent, agreed to change the student's placement in Math from general education to a Resource class. Additionally, the student's reading class was changed to a *** grade Reading Is Fundamental class. The

parent agreed with both changes. R3-16-17. Additionally, the student's classroom accommodations and modifications were significantly reduced. The ARD Committee removed the following modifications: enlarged print, ***, content mastery, frequent breaks, preferential seating in math and science, change in project and report requirements, oral tests (except in Math). The ARD Committee added simplified/repeated instruction and access to computer/portable keyboard. R3-17. *Contra* R5. The parent requested paraprofessional support in the classroom. The ARD minutes reflect that the aides would be requested to check in on the student at the beginning of Math, Science, Social Studies and Reading, but the time in class would be based on the classroom need (not the student's need). R3-17. The parent inquired about one-on-one tutoring in reading and math and was told that program was not available due to funding cuts. Tutoring available to all students was the only option presented to the parent. R3-17.

48. During the hearing, the principal testified that the changes to the student's modifications were made in an effort to collaborate with the parent, believing they could review it again at the student's annual ARD meeting. T3-13. However, it would appear that the District reduced the student's modifications and supports with the knowledge that the student would fail if the supports were removed and did not attempt to discuss the impact the reduction in modifications would have during the ARD meeting.

49. The student's annual ARD was conducted on October 25, November 2 and November 8, 2010, and ended in disagreement. The proposed change that resulted in disagreement was the removal of the student from the general education classroom for Science and Social Studies with placement in a Foundations class as well as the parent's request for an onsite consultation with the Texas School for the Blind and Visually Impaired (TSBVI).

50. The Foundations class is a special education placement in which the student receives instruction in grade level TEKS modified for student's functional level. Additionally, the student receives hands-on instruction in a smaller setting. T3-7-8. During the student's *** grade year, the district provided instruction in grade level TEKS modified for the student's functional level, with modified grading, scope and sequence, and classroom modifications which were removed for the *** grade year. T3-21. The only difference between the curriculum in the *** grade and the IEP proposed for the student during the November 2010 ARD was the removal from the general education classroom. Both IEPs called for instruction in grade level TEKS modified to the student's functional level. The student was successful at student's functional level in the *** grade while receiving modified TEKS in the general education classroom. Student's progress reports reflect *** and ***.

51. During the *** grade, the student received passing grades in all subjects during the first 6 weeks. P30-001. Beginning in the 2nd six weeks, the student began experiencing difficulty in Science and Social Studies and *** with a grade of *** in Social Studies and a *** in Science. P30-001. Overall, the student received *** grades for the first semester in all classes except Social Studies, where student had a *** average for the semester. The student *** all classes during the first 6 weeks of the second semester. P30-001. At the time of the hearing, the student was *** social studies and science. T2-26-27; 2-137.

52. The student's social studies teacher testified that he provided no "special education material that we give to most special education kids because the parents did not want that." T2-7. He did not provide material to the student in large font. T2-8. (This was a requirement at beginning of the school year but apparently removed after September 2010 ARD meeting.) The student participates in after-school tutoring, which is available to all students and is not individualized for student. The primary purpose of the after-school tutoring is to prepare *** grade students for TAKS. It is basically a study hall for the other students. T2-28.

53. The social studies teacher initially testified that student had an aide in the class to work with the student every day. T2-8. However he later acknowledged that the aide did not begin coming into the classroom until around November, 2010, after a parent-teacher conference, and left on maternity leave prior to the end of

the Fall Semester. At the time of the hearing, he did not have an aide in his classroom. T2-11, 25, 29. Prior to the October 21 ARD Committee meeting, the teacher informed the principal that he was limited in helping the student because of the size of his class, and recommended the following accommodations: extended time to complete work, shortened assignments, preferential seating and oral directives. He also provided a written note to the principal that the student was *** even though he read tests to student and provided student with typed notes. P7-113, 114, P18-054. He did not provide this information to the parent and did not attend the ARD meeting. The teacher testified that he spent about 5 minutes with the student every day, helping student get started and monitoring student's work, but the time reduced with the presence of an aide. T2-13, 36.

54. The social studies teacher uses Power Point slides in his classroom that he loads onto the student's laptop but does not install them into the WYNN5 program. T2-15. Petitioner demonstrated the Power Point slides at the hearing, and they were visually cluttered, very busy in that they contained different types of font and images, moving images and letters, and contrasts that would be difficult for the student. The Power Point slide, though artfully done, would be tiring to the eye of someone without a visual impairment. P29.

55. When the teacher notified the administration that the student was ***, he did not provide this information to the parent because he had been instructed not to talk with the parent because of the pending conflict. He did not attend the ARD meeting. T2-17. Examples of tests provided to the class by the teacher are fill-in-the blank which require the student to write or circle the correct answer. They do not appear to be modified in a manner consistent with what was recommended by Dr. ***. P7-115-116. On September 2, 2010, the teacher wrote an email to the principal to inform her that the student was having difficulty writing student's name on a line and that it would cover 4-5 lines. P34-005. He sent student to *** (content mastery) to complete a modified test, but was later told not to do so, presumably because the parent had requested no content mastery at a previous ARD meeting. P34-010.

56. When asked by the school's attorney if the student comprehended the material, the teacher testified that he did not know because the student rarely spoke and that he doesn't ask questions of student directly, but directs questions to the class as a whole. T2-32. He also testified that he is not sure if the aide is checking for understanding. T2-33.

57. Based on the teacher's testimony, I find that he did not have an adequate understanding of the student's disabilities, nor of the impact of student's visual impairment in the classroom. For example, he did not appear to understand that Power Point presentations were visually cluttered for the student. He also testified that the student was unable to use a grid to write a definition and then draw a picture. He also noted that the student is expected to locate vocabulary words in a textbook with regular print and has difficulty staying on the same line. The teacher testified, "it might have to do with student's vision thing. I'm not sure." T2-40. He testified that he has not asked for help from the VI teacher, that he does not know what a *** is, that he has not checked to see if textbooks could be downloaded onto student's laptop for use with the WYNN software, and that he does not load any materials he uses with the class onto the laptop in a WYNN 5 format. T2-40-43.

58. The science teacher also initially testified that he had full-time class paraprofessional support for the entire school year. T2-129. However, when pressed, he changed his testimony and said the paraprofessional had a priority for other students when in the classroom and acknowledged that as of two weeks prior to the due process hearing, she was only in the classroom for a maximum of 15 minutes because his class time and her lunch coincided. When she did go to the classroom, her priority was to take other students to content mastery rather than work with the student. The student received assistance only if the other students did not need to go to content mastery. T2-129-132, 143, 149, P27-007.

59. Prior to the October 21, 2010, the teacher recommended the following accommodations: oral tests, modified tests and shortened assignments. Although he met with the parent prior to the ARD meeting, he

did not tell her these recommendations, nor did he attend the ARD meeting. T2-135-137. He did not recommend change of pace instruction or extended time for completion of assignments because he knew the Foundations class was being considered for the student. T2-136.

60. The teacher testified that the student is functioning significantly below the other students and does not understand the concepts in student's class at grade-level. According to the teacher, the student would benefit from instruction in modified TEKS in a Foundations class. T2-146-148.

61. The student's resource math teacher testified. Although the student was not moved to Resource math until after the September 2 ARD meeting, the student has been in his classroom the entire year. T2-165. He has never attended an ARD meeting for the student. T2-164. He does not load any of the student's work onto student's laptop as the student does not bring the computer to his classroom. T2-169.

62. The math teacher further testified that the student works on a *** to *** level and is making progress on student's IEP goals. He spends about 20-25 minutes per class with the student one-on-one. T2-171-172.

63. When asked to describe the student's disabilities, the teacher stated that "we have not gone over student's disabilities. If you're asking for my opinion, student's just ... student's behind, severely behind on student's grade level." The witness did not demonstrate any understanding of the student's visual impairment and said he had never met with the VI teacher about the student. T2-175-176.

64. The student's reading teacher taught the student math in the *** grade and reading in the *** grade. T2-179-180. When asked to identify the student's disabilities, she stated student had ADHD, visual impairment and a learning disability, but could not identify a specific learning disability. T2-181. She has no support in her classroom and spends about 15-30 minutes per class with student because she prefers to sit and read with student one on one. Her reading class is a small, general education "Reading is Fundamental" class. At the time of the hearing, the student had made *** grades for the previous 2 six-week grading periods. T2-181-185. During the student's *** grade year, she instructed student on student's functional level and student received *** and ***. T2-185-186. She does not utilize the student's laptop by loading assignments onto it because all of the readings are accessed through the internet and the student does not have internet access according to student's IEP. So, instead she reads the passage to student from the internet. T2-187-188.

65. The teacher acknowledged that the difference between the student's education during the *** grade and the *** grade is that she was able to provide instruction in the general education classroom at student's functional level during *** grade math with more classroom accommodations. The student made progress during student's *** grade year. T2-195. During the 2010-2011 school year, she was instructed to reduce the modifications and to grade student on grade level. T2-189, 209-210. Her understanding was that this decision was made because student's placement was in general education classes. T2-210. Student functions on a *** to *** level. T2-193. Student is *** in reading during the *** grade year.

66. According to the teacher, student regressed in student's reading skills over the summer of 2010. T2-196.

67. Prior to the September 2010 ARD meeting, the reading teacher recommended additional modifications in a written input sheet prior to the ARD meeting. However, the ARD Committee agreed to implement only the modifications presented by the parent during September 2010 ARD meeting. T2-204.

68. The teacher testified that the student frequently appears inattentive or distracted in her class. T2-208. She did not, however, recognize these problems as being related to student's visual deficits.

69. The principal testified regarding the nature of the Foundations class. Foundations is a special education placement, like Basic math and reading, but is specifically for science and social studies. In the Foundations class, the student is instructed at a slower pace, in a more concrete and hands-on manner, on the TEKS objectives modified to the student's functional level. T3-8-11. During the 2010-2011 school year, there were five students in Foundations science and four students in Foundations social studies. The students in the Foundations class are working on different grade levels.

70. The principal acknowledged that the student made progress at student's functional level during the *** grade but not on student's grade level. T3-11. The principal testified that the student socializes very little with peers in the classroom. T3-16. However, this is inconsistent with reports made by the teachers during the student's *** grade ARD meeting in which it was reported that the student's peer interaction increased. R5-122.

71. On November 22, 2010, the principal sent the parent a letter informing her that the student qualified for the Academic Intervention program, a program available to all students that is not specifically individualized. This program was never discussed at any of the student's ARD meetings. T3-35-36.

72. Following the September 2, 2010 ARD meeting, the principal emailed the aides instructing them to maintain logs of their time spent with the student. The logs were never presented to the ARD committee, and, in fact, the principal learned during the Spring 2011 semester that such logs had never been maintained. T3-41-42. In February 2011, when she discovered this, she created a log for the aides and instructed them to begin documenting their time with the student. The logs were not turned over to the parent's attorney in response to a records request.

73. The principal obtained the logs during the hearing. The logs reflect that *** assisted the student only in the student's first period social studies class on 11 out of 15 school days in February and 13 out of 18 school days in March. On some of the dates, she worked with other students as well. P35A, 35B. The other aide, who is assigned to the student's science class, did not work with the student at all, even though her log reflects that she was in the student's classroom. P35C, P35D. The Math and English teachers requested that the aides not assist in their classrooms. T3-46.

74. During the October and November ARD Committee meetings, the school members of the ARD Committee proposed reducing the student's direct speech services from 30 minutes, 30 times per semester to 30 minutes, two times per three weeks, and indirect services for 15 minutes, 2 times per 3 weeks. P7-004. The Speech Language Pathologist explained to the parent that the amount of speech therapy needed to be reduced because the student was resistant to therapy and wanted to remain in the class with student's peers. P7-064, P28. However, the most recent Speech Evaluation characterizes the student's impairment as severe and there is no data that reflects improvement in skills that would justify a reduction in services.

75. School personnel as well as the VI teacher minimized the student's visual impairment. In fact, the VI teacher in response to a question from the parent, stated that the visual impairment presented no implications in the classroom. P33-008. During her testimony, the VI teacher testified that she does not believe the student's visual impairment has an effect on the student's education in the general education setting. T1-88, 157. Her notes reflect that she attributes many of student's difficulties to off-task behavior, distractibility, and inattentiveness. P33-008. In a typed response to the parent's question, she reported that classroom teachers report no visual issues affecting classroom performance.

76. The VI teacher's focus with regard to the student's visual impairment is primarily related to student's orientation and mobility. When questioned about the impact in the school setting, she testified that

student was able to move around the campus and in a dark classroom and able to point things out to her at school. T1-42, 157-164, 166, 184-189. She testified that the student's cortical visual impairment does not impact student's education and that she has concerns that student may no longer be eligible as a student with visual impairment. T1-163, 182, 193, 201.

77. The VI teacher described the exercises she does with the student to work on student's IEP goals. Work samples are contained in P21, pages 002-33. Two activities from November 2010 contain rows of differing size letters requiring the student to circle the upper and lower case letters. The VI teacher wrote "verbal/visual cue distracted" at the top of each assignment. It does not appear that the student correctly completed the assignment. P21-013, 014. She works with the student on dot-to-dot exercises and mazes to develop student's ability to sequence numbers and to track. Both Dr. *** and the parent's vision expert, ***, testified that many of the VI teacher's exercises are not appropriate for the student due to the complexity, visual clutter and lack of practical use (i.e., number sequencing taught with dot-to-dot pictures rather than following numbers of pages in a book, tracking numbers down the page, or training the student to use a scantron or answer sheet. T11-123-124; T2-79-82. According to Dr. *** the exercises, as well as "Where's Waldo" exercises, are extremely difficult for a student with Cortical Visual Impairment due to the visual clutter, are wasteful, visually frustrating, and will not remediate the student's problem. T1-123-124. (The school's documents reflect that the VI teacher has utilized "I Spy" books with the student.) With regard to visual tracking exercises, Dr. *** testified that student should be trained to track objects up-down, side to side, rolling a ball, using student's finger to track words – the dot-to-dot exercises and mazes do not do this.

78. ***, a teacher of the visually impaired and clinical instructor for the VI teacher program at ***, testified as an expert for the parent and completed an observation report regarding the student. P25. He reviewed work samples for the student as well as documents that were loaded onto student's laptop. Mr. *** asked to speak with the VI teacher regarding the student's programming, but that request was denied by the school's attorney, who stated in an email to the parent's attorney that any information needed by Mr. *** was contained in the student's IEP's. P25-010.

79. Mr. *** demonstrated the Power Point presentations on the student's computer during the hearing. On some of the slides, the printed material scrolled from top to bottom or side to side, faded in and out, and contained an excess of material. Another slide contained letters on a blurred background that was blue on blue with no contrast. Another, a slide presented as a jeopardy game, contained a lot of visual clutter and was difficult to follow. Some slides contained a font that would be beyond the student's visual field as it was larger than 18 point. P29. The slides would be visually tiring for the student to look at and would be expected to affect student throughout the day. T2-56-69. Other material that was uploaded into the program in a PDF format would also create difficulties for the student, because student's WYNN 5 program cannot read them. T2-69. He also observed that the worksheets and PDF material on student's laptop did not appear to be modified for student. P2-73.

80. Mr. *** observed that the student, when presented with a multiple choice format for questions, could give the right answer verbally but could not transfer the answer to an answer sheet. P1-70. Student would record the answer on the wrong line. This is consistent with Dr. *** observations and the observations of the evaluator from CARD.

81. I find that the VI teacher's testimony as whole was not credible and afford her testimony little weight. I find the testimony of Dr. *** and Mr. *** to be credible and persuasive.

82. The student participated in a two-week Functional Summer Enrichment program at the *** during the Summer of 2010. R10. The focus of the program was on the functional application of skills related to the Expanded Core Curriculum: compensatory academic skills, orientation and mobility, career education,

assistive technology, visual efficiency skills, independent living, recreate and leisure, social interaction and self-determination. R10-1.

83. The parent requested that the District consult with the Texas School for the Blind and Visually Impaired (TSBVI) as early as October 15 in a meeting with the VI teacher and on October 21, 2010 in an ARD Committee meeting. P34-0034, P28. The tape recording very clearly documents the parent's request, but the request is not noted in the ARD Committee meeting minutes. P7-088. The parent again makes the request on October 25 and November 2. The parent presented a letter to the ARD Committee making the request that is dated November 2, 2010. P7-020. Immediately following the November 2 ARD meeting, the VI teacher met with the principal to discuss the request and documented the meeting in written notes reflecting the time of her meeting. P31-026. (The principal denied having participated in this meeting during her testimony.) The VI teacher met with the principal at 3:30 and then met with the Superintendent from 4:10-4:40. Her notes reflect that she shared the parent's written request with the Superintendent and discussed TSBVI Outreach Services, and "at this time CISD does not recommend requesting TSBVI Outreach On-Site services because 1. no educational need 2. disagreed ARD –this was requested in ARD and 3. educational needs and parent's requests are currently being met." P31-026. At 7:11 p.m. that evening, the VI teacher emailed the Special Education Director for the Co-op, the diagnostician and the principal that she had met with the Superintendent. Her email states as follows:

"Dr. ***, after reading the parent letter, stated that there is no educational need for TSBVI Outreach to visit on-site, educational needs are currently being provided by CISD, and that the ARD ended in disagreement and this request was issued in part of the ARD so when [sic] are not considering this at the district level currently. Dr. *** answer was no." P31-025.

84. The VI teacher continued to email TSBVI to obtain additional information about an onsite visit on November 5, 2010, asking for explanation of the purpose of an on-site visit, and requesting if the TSBVI negotiated issues with the parent and school not related to vision such as "FAPE, LRE, and placement of students with additional needs." "Do you see my dilemma." P31-008.

85. When asked to explain the meeting with the Superintendent and the email to TSBVI, the VI teacher acknowledged that the decision not to consult with TSBVI was made by the Superintendent after the ARD Meeting but prior to the November 8 ARD. T1-73. The ARD Committee then decided not to invite TSBVI to the campus. T1-74. With regard to the email to TSBVI, the VI teacher explained that the "dilemma" in inviting TSBVI to the campus was that TSBVI is in a "tenuous" position with most school districts. She further stated that when they conduct an onsite visit, "they give basically a report that states what they might see, and what they say in their terms is that they give you the Cadillac version of what should be done in your school, when most schools can only afford the Volkswagen." T1-94-95. She knew there were District's concerns about TSBVI conducting an onsite visit. Based on the emails, the notes, and the testimony of the VI teacher, it is apparent, in the light most favorable to the District, that there is a disconnect between recognizing the student's visual needs and its implications in the classroom. The VI teacher and other district personnel clearly saw the student's vision issues as separate from the remainder of student's issues related to programming and placement.

86. No prior written notice with regard to the District's refusal to request an onsite consultation with TSBVI was provided to the parent. P7-143.

87. The parent invited the Superintendent as well as the Special Education Director for the Co-Op to the November 2, 2010 ARD meeting and both declined. P7-013. However, based on a preponderance of the credible evidence, I find that the Superintendent made the ultimate decisions on significant aspects of the

student's educational program, including the student's access to an aide, consultation with TSBVI and the delay in obtaining the WYNN 5 software for the student.

88. I listened to tape recordings of the August 20, September 2, October 25, November 2 and November 8, 2010 ARD Committee meetings (approximately 9 hours total). P28, 28A1, 28A2. The tapes clearly reflect that the relationship between the parent and the school had become toxic. It is abundantly clear from the tone and statements made by school members of the ARD Committee that they had become defensive and irritated with the parent's persistence in her requests for the student. It is also abundantly clear from the tapes that the parent had become adversarial and distrustful toward the District. For example, during the September 2 ARD Meeting, the District appeared with two District representatives, the principal and the assistant principal. The parent requested that the assistant principal leave the ARD meeting and was told she could not dictate to the ARD Committee which school personnel would be present. P28A2. The toxic nature of the relationship between the school and the parent is also reflected in the email exchanges between personnel and a handwritten note dated September 7, 2010 that states, "Do not meet with Mom alone." P34-012. The counselor was present during all parent-teacher conferences.

89. On more than one occasion the parent reminded the moderator of the ARD Committee that she was also a member of the ARD Committee. For example, during the October 25, 2010 ARD Committee meeting, as the minutes were being read, the moderator stated that the ARD Committee was in agreement with the minutes from the previous meeting but the parent was not. The parent then stated that she was a member of the ARD Meeting and disagreed. P28. The minutes for the ARD meeting reflect that the ARD Committee agreed to the minutes but the parent does not agree. P7-011. Again, this similarly occurred during the November 2, 2011 ARD meeting, wherein the minutes reflect that the ARD Committee agreed with the change in the student's speech services and placement for science and social studies, but the parent was not in agreement. P7-013. In fact, during this ARD Committee meeting, when the parent asked for prior written notice because she believed the ARD Committee is not in agreement, the moderator for the ARD Meeting states, "the ARD is not disagreeing, you are." She goes on to say that it is the school's meeting and the school is not in disagreement. P28. While some may argue that this is a matter of semantics, the semantics are important in this case. During the October 21 ARD meeting, the parent requests a consultation with TSBVI and is completely dismissed by the school members of the ARD Committee and there is no discussion regarding her request during that meeting. P28. The overall tone and tenor of the ARD meeting tapes reflect an attitude of impatience and dismissal toward the parent as a partner in the ARD process. In fact, during the October 25, 2010 ARD meeting, when there is a discussion regarding curriculum modifications, and the parent clearly wants to continue discussing her concerns, one of the school members of the ARD Committee cuts her off and tells her she is "going in circles." P28.

90. It is important to note that the parent is not wholly blameless in the breakdown of the relationship between herself and the school members of the ARD Committee. The parent makes inconsistent requests over the course of several ARD meetings. For example, in the June 2010 ARD meeting, she requested a one-on-one paraprofessional for the student. Then, during the September 2, 2010 ARD meeting, she says she is not requesting a one-on-one aide. Rather, she is requesting for an aide to be available in the classroom but not specifically assigned to the student. She further states that she believes student will not need an aide at all once student is proficient in the use of WYNN 5 program. P28A2.

91. Throughout the November 2 and November 8 ARD meetings, it is abundantly clear that the parent and the school are preparing for a due process hearing, as more time is spent on documenting the parties' respective positions than engaging a meaningful dialogue regarding what is appropriate for the student educationally during what is to be student's annual ARD. By the time the parties participated in the November 8 ARD meeting, the environment, as reflected in the tape recordings, appeared intimidating and was in no way a meaningful discussion among key stakeholders regarding the student's educational needs. P28, P28A1, P28A2.

92. Soon after the November 8 ARD meeting, the school counselor began gathering data regarding the student's progress in the general education classroom. T1-264, P18. The counselor, when first questioned about her notes regarding the student, claimed the notes were taken when she just happened to be in the classroom observing the class in general on multiple occasions. T-264. She denied going to the classroom for the specific purpose of observing the student. After cross-examination and a request for clarification from the hearing officer, she eventually acknowledged that she had not been completely forthcoming in her testimony and was in fact in the classroom for the specific purpose of observing the student. P1-274. The counselor's lack of candor during the hearing is concerning.

93. It is also apparent from a review of the ARD tapes that the parent does not have sufficient knowledge to understand what she is asking for. For example, it is apparent that the parent does not understand the nature of the Foundations class during the November 2 ARD meeting, and the parent says she would like to have an opportunity to visit with the teacher or visit the classroom, as she believes it is a Life Skills class. The Foundations class teacher was not a participant in the ARD meetings. P7, P28. The principal acknowledged that she did not visit the Foundations classroom with the parent. T3-56. In another ARD meeting, the parent requests a conference as a method of monitoring student progress, apparently not understanding that in the context of monitoring the student's progress, this meant conference with the student. During the August 20 and September 2, 2010 ARD meetings, the parent presented a list of proposed modifications that did not include modified curriculum (except in Resource English), use of a ***, enlarged text, and asked to define preferential seating as being near a plug (as opposed to centrally located). The school members of the ARD Committee asked the parent if she was requesting any additional modifications and she said she was not, and specifically requested the removal of modifications specific to student's visual deficits, the *** and enlarged print. P28A1, 28A2. However, none of the school members of the ARD Committee attempted to engage in a discussion about the removal of modifications which had been used in the previous year and the risk that posed to the student. It is also apparent from the ARD meeting tapes that the parent at times has an unrealistic evaluation of the student's deficits and needs. While she very accurately expresses concerns about student's ability to pass the TAKS-M during the October 21, 25 and November 2 ARD meetings, she requests the removal of functional speech goals in favor of articulation goals. P28. She also appears at times confused between the differences of instruction made to the student in student's Speech and Communications general education class and the purpose of speech therapy services.

94. The evidence is very clear that school personnel did not have an understanding of the student's visual impairment. It is evident in the testimony of the teachers, the VI teacher, and the work provided to the student. It is clear from the evidence that many of the teachers did not understand the difference between visual acuity and the nature of the student's impairment. For example, during the November 8 ARD meeting, when the student begins to read a statement, one of the school members of the ARD Committee asks student to put on student's glasses. The parent calmly replies that the glasses are only for student's protection, not for correction. However, the same ARD Committee member continues to ask questions in the meeting about whether or not the student can see, whether student needs student's glasses, and whether she needed to continue providing enlarged font for student. P28. Dr. *** stated in her report that functional vision is about more than visual acuity. The student's visual acuity may be normal, but the brain has difficulty processing what the eyes see. P32-008. This is a distinction that no one working with the student appears to understand.

95. It is important to note, however, that just as school personnel erroneously discount the impact of the student's visual impairment on student's access to education, the parent is also not realistic in attributing all or most of the student's deficits to student's visual impairment. The student has cognitive and academic delays as well as significant speech impairment. The student's cognitive, academic, language, and vision deficits are interrelated and all adversely impact student's education. Unfortunately, the key stakeholders in the student's education have not been able to see past their polarized positions and this has resulted in a denial of a Free

Appropriate Public Education to the student.

DISCUSSION

The educational program offered by the school district is presumed to be appropriate. Petitioner, as the party challenging the educational program bears the burden of proof in showing why the IEP is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). *Schaffer v. Weast*, 126 S.Ct. 528 (2005). This includes the burden of proof with regard to harm or a deprivation of educational benefit. The law does not require that the student's educational potential be optimal or "maximized" but that it enables to the student to receive some educational benefit from student's program.

The United States Supreme Court established a two-prong test for determining whether a school district has provided a free appropriate public education. The first inquiry is whether the school district complied with IDEIA's procedural requirements. The second inquiry is whether the student's IEP is reasonably calculated to confer an educational benefit. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S.Ct. 3034 (1982). An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Id.*; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

1. Procedural Sufficiency

IDEIA establishes certain procedural requirements for formulating and implementing a child's IEP. Procedural flaws do not automatically require a finding of a denial of a free appropriate public education. However, procedural inadequacies that impede the child's right to a FAPE, result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the development of the IEP result in the denial of a free appropriate public education." 20 USC 1415 (f)(3)(E); *Adam J. v. Keller ISD*, 328 F. 3d 804 (5th Cir. 2003). In this case, the District and the ARD Committee committed several procedural errors that resulted in a loss of educational benefit to the child and interfered with the parent's meaningful participation in the development of the student's program.

A. ARD Participation

Numerous decisions regarding the student's educational program were made outside the ARD Committee meeting by the Caldwell ISD Superintendent. While it is understandable that communications will take place within a school district following an ARD meeting to facilitate the commitment of funds and resources, the involvement of the Superintendent in the planning of the student's educational program exceeded that purpose. In essence, the Superintendent usurped the authority of the ARD Committee to make assessments regarding the student's educational need and the development of student's educational program. For example, the parent requested the assignment of a full-time aide for the student during the May 27, 2010 ARD Committee meeting. P4-014. The minutes reflect that the principal reported that she would meet with the Superintendent to discuss this option and the ARD Committee meeting was then "tabled." P4-014-015. When the ARD Committee reconvened, the principal reported on her discussions with the Superintendent, and the ARD Committee then determined there was no educational need for an aide.

The parent requested an onsite consult with TSBVI in October, 2010. She again raised the issue during the November 2, 2010 ARD meeting. According to the ARD meeting tapes, the parent stated that she realized that none of those present during the ARD meeting could make a decision. The onsite consult is necessary because of the lack of understanding among school personnel regarding the nature and impact of the student's visual impairment. The parent invited the Superintendent to the ARD meeting, but the Superintendent declined.

The ARD Committee recessed after the parent again requested the onsite consult. The VI teacher visited with the Superintendent after the November 2 ARD meeting to discuss the parent's request. The Superintendent read the parent's letter and told the VI teacher that there was no educational need for a consult with TSBVI and this was then reported back to the ARD Committee. According to the VI teacher, the Superintendent made the ultimate decision that there would be no onsite consult with TSBVI, based on her opinion that there was no educational need. Emails from the VI teacher to other personnel corroborate a finding that the Superintendent made the ultimate decision that there was no educational need for the consult.

The school's correspondence also reflects efforts by the Superintendent to second-guess the Committee's decision to implement the use of the WYNN 5 software for the student and these actions resulted in a delay in obtaining the software.

IDEA requires that the student's IEP team (or ARD Committee) must include a representative of the school who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of the child, is knowledgeable about the general education curriculum, and is knowledgeable about the availability of the school's resources. This representative may be excused from the meeting only with the written agreement of the parent and the member's attendance is not necessary because the member's area is not being addressed, or the member submits written input to the parent and the Committee prior to the meeting. 34 CFR 300.321(a)(4); 34 CFR 300.321(e). The Superintendent was invited to the ARD meeting and declined. She was knowledgeable of the availability of resources of the district, but did not communicate her input in writing to the parent or the remainder of the ARD Committee prior to the meeting, even though she was the ultimate decision maker, not just for the acquisition of services, but of the student's educational need. The District argues that even if the Superintendent's actions were a procedural violation of IDEA, they did not interfere with the parental participation in the ARD process given the parent's active involvement in the student's educational planning. This argument is without merit. The Superintendent made unilateral decisions regarding the student's educational program without participating in the ARD meetings. Decisions to deny or provide services and accommodations can only be made by a duly constituted ARD Committee. 19 T.A.C. §1050. The school members of the ARD Committee abdicated their decision to the Superintendent, who unilaterally determined that there was no educational need for the consultation and the aide. This meant that she could not be questioned by those participating in the student's ARD meetings, including the parent. This procedural violation not only interfered with the parent's meaningful participation in the student's educational planning, it impeded the student's right to a FAPE. 34 CFR 300.513 (2).

B. Lack of Current Evaluation Data

A significant issue in this case is the District's failure to appropriately accommodate and consider the student's visual impairment during the Full Individual Evaluation in February 2009. A school must ensure that a reevaluation is conducted according to the requirements in IDEA as implemented in 34 CFR 300.304-300.311. The school must ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory or speaking skills. 34 CFR 300.304(c)(3). The school must also ensure that the testing instruments are administered in the form most likely to yield accurate information regarding what the child knows and can do academically, developmentally and functionally, and in accordance with any instructions provided by the producer of the assessment. 34 CFR 300.304(c)(3)(ii), (iv). In this case, the examiner made minimal accommodations during testing: frequent breaks, positioning of materials to allow easy access for the student to see, vision paired with other sensory systems, and additional time for response. However, these accommodations are not consistent with the recommendations in the Functional Vision Evaluation, which also called for the use of materials with contrast, central presentation, short time segments, morning testing, use of manipulatives and objects, and the use of developmental profiles in addressing the Expanded Core Curriculum.

P2-032. Additionally, the evaluator noted in her report that the student wore student's glasses at all times, an indicator that she did not understand the nature of the student's visual impairment as student only wears glasses for protection. She cautioned that the test results were not a true reflection of the students' cognitive ability and recommended further cognitive testing. She also acknowledged "going beyond the standardization of the test to get a completed testing session." The evaluation does not comply with the requirements of IDEA and its implementing regulations.

The evaluator who conducted the student's IEE noted that visual deficits affected the student's performance on cognitive and academic testing and the student was unable to complete many of the subtests due to deficiencies in basic skills. The evaluator questioned the results of the testing and acknowledged that he did not have the necessary qualification or instruments to make a formal visual diagnosis. He noted that the scores were expected to be under-representative of the student's true abilities and cautioned that that results be interpreted with caution. Although the *** testing (not considered by the school) also reflected that the student functioned in the moderately impaired range, the evaluator noted some difficulties with testing involving visual tasks, but paid very little attention to the student's visual deficits.

The IEP's developed for the student during the 2009-2010 and 2010-2011 school years were based on the school's FIE, which on its face provides that the results are questionable. The evaluation reflects the child's impaired vision rather than an accurate reflection of the child's aptitude or achievement. Additionally, the evaluator went beyond the standardization of the test, which undermines the confidence in the results. Confidence in the IEE is also undermined for similar reasons. The student's identification as a result of the FIE was OHI due to ADHD, Speech Impaired and Visually Impaired. Nothing in IDEA requires a particular disability classification so long as the student who is eligible for special education and related services receives those services. 20 USC 1412(A)(3)(B). However, in this case, at least for the 2010-2011 school year, the student did not access an educational program that was individualized to student's cognitive needs, for which the District still does not have an accurate picture. The failure to appropriately identify the student is a procedural error that has impeded the student's right to a FAPE.

C. Prior Written Notice

The parent requested the District to invite the TSBVI to conduct an onsite consult as early as October 2010. The parent repeated this request at each ARD meeting in October and November, 2010. The District denied her request. IDEA requires that a school must provide a parent prior written notice of its refusal to initiate or change the identification, evaluation or educational placement of a child or the provision of FAPE to a child. 20 USC 1415(b)(3); 34 CFR 300.503(a)(2). Following the November 8, 2010 ARD, CISD provided the parent with prior written notice regarding its decision to reduce speech services, change the student's placement in Science and Social Studies, and require the student to take the TAKS-Modified state assessment, as well as its refusal to add an additional eligibility classification. The prior written notice did not address the parent's request for an onsite consultation with TSBVI. District personnel appear to view the student's visual impairment in a vacuum without consideration of its adverse impact on the student's education. The District was dismissive of the parent's request and at points during the ARD meetings, completely ignored it. The prior written notice requirements of IDEA were triggered by the refusal and the failure to address this issue in the prior written notice is a procedural violation of IDEA.

A school risks legal liability if its procedural errors result in substantive educational harm to the student. The procedural errors in this case resulted in more than a trivial denial of FAPE. The failure to appropriately evaluate, develop an IEP based on reliable assessment data, and the Superintendent's actions in usurping the authority of the ARD Committee, under the totality of the circumstances impeded the student's ability to receive a FAPE, denied the student a FAPE, and interfered with the parent's ability to meaningfully participate in the development of the student's educational program.

2. *Substantive Sufficiency*

In evaluating whether an educational program is reasonably calculated to confer an educational benefit, the Fifth Circuit Court of Appeals has identified four factors to consider:

1. Is the program individualized on the basis of the student's assessment and performance?
2. Is the program administered in the least restrictive environment?
3. Are the services provided in a coordinated and collaborative manner by the key stakeholders?
4. Are positive academic and nonacademic benefits demonstrated?

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3rd 245 (5th Cir 1997); cert. denied, 522 U.S. 1047 (1998).

In applying these factors to the facts of this case, I find that the student's educational program for the 2010-2011 school year through the date of hearing was not calculated to and did not provide a meaningful educational benefit to the student. The district's educational program is entitled to a legal presumption of appropriateness. Petitioner bears the burden of proving that it is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). Petitioner has met petitioner's burden with regard to the 2010-2011 school year. Although I have found deficiencies in the 2009-2010 IEP due to procedural errors as stated above, the primary harm to the student occurred during the 2010-2011 school year and the parent has taken the position that the student's decline was due to the removal of supports during the 2010-2011 school year. The discussion regarding substantive deficiencies will therefore focus on the 2010-2011 school year. The four actors under *Cypress-Fairbanks ISD v. Michael F.* are interrelated in this case and must be analyzed together.

First, the student's educational program during the relevant time period was not sufficiently individualized on the basis of student's assessment and performance. (This applies to both the 2009-2010 and 2010-2011 school years.) As a result of the most recent FIE, the District determined the student met the eligibility criteria for OHI based on ADHD and Speech Impairment. P1. Although the District asserts that the student has cognitive deficits that require a more restrictive placement, the most recent evaluation on its face questioned the results and recommended further cognitive testing to obtain a more accurate assessment of the student's abilities. Additionally, the student's visual impairment, which was undiagnosed until the *** grade, was not appropriately considered or accommodated during the testing. Both the school's evaluator and the evaluator for the IEE questioned their own test results and noted significant visual difficulties during the testing, especially on visually intensive tasks. The IEE notes specific observations with regard to the impact of the student's visual impairment that are consistent with the observations of Dr. ***. For example, the evaluator noted that the student demonstrates significant difficulty in copying visually presented images from one medium to the next and does not view images as a whole. The student was able to verbalize correct answers on certain subtests, but could not write the answer. The school's evaluator recommended further cognitive testing to obtain a more accurate picture of the student's functioning. The IEE evaluator noted that the results should be interpreted with caution.

The vision assessment details the student's visual impairment and its implications in the classroom. However, it does not appear that the student's teachers implemented modifications that address the student's visual needs in the classroom. The student requires low visual clutter and material presented in a simple format. However, the student's science and social studies teachers utilize complicated Power Point presentations that are not appropriate for the student. Neither student's current reading teacher nor student's math teacher utilizes the lap top or the WYNN 5 program as the student does not use student's computer at all in either class. Dr. *** recommended the use of an 18 point font and reduced information on the page, but this

was not consistently used in the previous school year, and discontinued altogether during the Fall of 2010. R3. Much of the work loaded onto the student's laptop does not appear to be modified to accommodate the student's limited visual field.

With regard to the student's vision services, both Dr. *** and *** testified that the exercises utilized by the VI teacher were not appropriate for the student. For example, both referred to the mazes and dot-to-dot exercises as being visually cluttered, and Dr. *** testified that the exercises were a waste of time and visually frustrating for the student. T1-123-124.

The most concerning aspect of this case is the student's teachers' complete lack of understanding of the nature of student's disabilities. None of the teachers demonstrated an understanding that the student's visual impairment affected the way student's brain processes visual information. In fact, all of the teachers appeared to attribute many of the student's difficulties to inattentiveness, when in fact, the student exhibits what appear to be inattentive behaviors to access what little vision student has. The student may also have attention issues related to ADHD, but none of the teachers appear to have had any training to discern the difference between inattention and the symptoms of student's visual impairment. Additionally, as stated above, it would appear that some of the teachers do not understand the difference between CVI and visual acuity deficits.

The student has cognitive and academic functioning deficits. However, the extent of these deficits is not clear based on the current testing. It is quite possible that the extent of the student's cognitive function may not be quantifiable, according to ***. However, it would be appropriate for an evaluation to be completed by an evaluator experienced in assessing students with visual impairment prior to moving the student from the general education classroom for all core academic subjects. Although the District proposes to place the student in a more restrictive setting for social studies and science because of student's cognitive deficits and academic functioning, there is no current assessment which provides a clear picture of the student's deficits in light of student's visual impairment.

The IEPs for the student during the 2009-2010 school year provided for the general education curriculum to be modified to the student's identified functional level in the general education classroom. The ARD Committee attached a modified scope and sequence for each academic subject to the student's IEP and the student was graded based on modified requirements, such as class participation and oral and modified tests. P3. Many of these modifications, as well as accommodations for the student's visual impairment, were removed at the beginning of the 2010-2011 school year, in part due to the parent request. R3. Additionally, teachers were instructed not to modify the curriculum for the student and grade student according to grade level requirements rather than based on student's individualized functional level. Once the student began to fall behind, tutoring was offered but it was not specifically individualized for student and was in essence TAKS preparation for *** grade students, with the student being primarily left to work on student's own. Although the ARD Committee recommended that an aide "check in" on the student in core academic classes each day, the assistance was not accepted by the reading and math teachers, did not occur at all in Science, and was not consistent in Social Studies. The aide's primary responsibility was for the other students in the classroom who needed assistance and not the student.

The record reflects little coordination and collaboration among the key stakeholders in this case. A key component of this is the Superintendent's practice of being the ultimate decision maker without participating in the ARD meetings with regard to the parent's request for a one-on-one aide, TSBVI onsite consult, and the timely purchase of software approved by the ARD Committee. The lack of collaboration among key stakeholders is also evident in the failure of the District to include the teacher from the Foundations class in the November 2010 ARD meeting to answer the parent's questions regarding the proposed placement. Additionally, although the student's science and social studies teachers provided suggestions for additional accommodations to be used in the general education classroom prior to the September 2010 ARD meeting, they

did not communicate those suggestions to the parent and did not attend the ARD meeting. In fact, the social studies teacher testified that he was instructed not to talk with the parent at all.

The relationship between the school and the parent has become so toxic that the ARD meetings have become a mere exercise in documenting pre-determined, polarized positions to prepare for a due process hearing rather than engaging in meaningful dialogue regarding the student's educational needs. In reviewing the ARD meeting tapes, it is apparent that District personnel do not respect the parent as a partner in her child's education, and it is apparent that the parent has become distrustful of the District. Unfortunately, the student's educational needs have suffered as a result of the adversarial nature of the relationship between the school and the parent.

Is the program administered in the least restrictive environment and are there positive academic and non-academic benefits?

The parent's complaint with regard to the least restrictive environment concerns the proposed change of placement for the student's science and social studies instruction. The student is entitled to be educated with nondisabled peers to the maximum extent appropriate. *Daniel R.R. v. State Board of Educ.*, 874 F.2d 1036 (5th Cir. 1989). In evaluating whether Respondent is educating the student with nondisabled peers to the maximum extent appropriate, there are two inquiries which must be made. The first question is whether education in the regular education classroom, with supplementary aids and services, can be achieved satisfactorily. If not, then we must evaluate whether Respondent has mainstreamed (or proposes to mainstream) the student to the maximum extent appropriate, taking into consideration student's particular disability and its manifestations.

In *Daniel R.R.*, the Fifth Circuit discussed several factors in determining whether placement in the regular education classroom is appropriate. These factors include academic benefit, benefit from association with nondisabled students, detrimental effects on the disabled child, and detrimental effects on classmates, taking into consideration the nature and severity of the child's disability. *Id.* If it is determined that education in the regular education classroom cannot be achieved satisfactorily, we must next determine whether the child has been mainstreamed to the maximum extent appropriate by reviewing whether the school has taken steps to accommodate student in regular education, including intermediate steps toward a mainstream setting. Mere token gestures are not sufficient. However, the school is not required to provide every conceivable supplementary aid and service to assist the child, or to modify the curriculum beyond recognition. *Id.*

The proposed IEP places the student in a special education setting for all core academic instruction – Basic (or Resource) reading and math and Foundations science and social studies. Although the student would participate with non-disabled peers in physical education and an elective, student's only opportunity to participate in the general education curriculum with non-disabled peers is for social studies and science. The student has a severe speech and language impairment, and at least one evaluator has opined that student requires the social and language opportunities afforded by inclusion with same age peers.

During the student's *** grade year, the student made progress on student's functional level in general education science and social studies. The student's progress reports and report cards reflect that student made *** and *** and teachers reported increased interaction with peers. R5-122. The only difference between the student's proposed program and student's *** grade program is the placement. During the *** grade, the student's teachers modified the curriculum for the student in the general education classroom and provided the student additional classroom accommodations. The District removed the modifications and accommodations in the September 2010 ARD meeting, without discussing the impact it would have on the student's education. (Although at a subsequent ARD meeting, the principal asked the parent to consider allowing the student to have access to Content Mastery.) The student moved from being graded and accommodated on student's functional level with success, to struggling without the accommodations and being graded on student's grade level. The District attempted to minimize the student's progress during the *** grade due to the fact that student's progress

was on student's functional level rather than on grade level. However, because IDEA requires individualization, a student may derive educational benefit if student is making progress at student's individualized functional level. Requiring a student to progress at grade level to remain in the general education setting would frustrate the least restrictive environment requirement.

The difficulty for the school district lies in the fact that the student made progress in the general education setting during the previous school year when student had supports and modifications. There was no testimony that during the student's *** grade year, accommodating student created an additional burden on the classroom or that student disrupted the learning of other students. There was no testimony that the student has been a disruption in the classroom during the current year. Although there was evidence that additional time was needed during the *** grade to monitor the student, one teacher acknowledged that this could be managed by a class aide (setting up the student's computer) and the science teacher admitted that the aide for his classroom primarily worked with other students. The *** grade social studies teacher asked to modify for the student and recommended to the ARD Committee that the student be allowed extended time to complete assignments, preferential seating and oral directions. He also testified that he was told not to provide the student with modified material. T2-7, 11.

Both parties agree that the student will be taught the general education curriculum for science and social studies at student's functional level. The only question is where will this take place? The District argues that the move from the general education class to the Foundations class is not a change in placement. Rather, it asserts that the curriculum being used, the modified TEKS, is the actual placement and the Foundations classroom is merely the "location" where the student's program is implemented. This argument is without merit. The proposed IEP changes the student's placement to a more restrictive setting that is not the least restrictive environment for student. The proposed placement is a resources class rather than a mainstream class as those terms are define in 19 TAC 89.63.

If the student remains in the general education classroom, student will continue to have opportunities to model non-disabled peers and experience the general education curriculum along with student's peers. The District argues that it should be allowed to reduce the student's speech therapy services because the student is reluctant to leave student's peers to work with the speech therapist and that it is stigmatizing for student. However, this position is clearly inconsistent with the District's efforts to remove the student from the general education classroom in all core academic subjects.

The District has suggested that the student's developmental levels of performance require a more restrictive setting for the student to benefit educationally. However, District's evaluator questioned whether the testing reflected an accurate assessment of the student's cognitive functioning. Two of the evaluations the District relies upon to support its position regarding the student's cognitive functioning (the IEE and the *** report) recommended increased inclusion in the general education setting, with modifications. In fact, the *** report recommended a general education placement for science and social studies. Both parties acknowledge that the student made progress with modifications and special education supports in the general education science and social studies classes during the *** grade, but removed those supports at the beginning of the *** grade year. The fact that the student struggled after the supports were removed does not justify the change in placement.

It is important to note that a number of factors weigh in favor of finding that the District's proposal is not the least restrictive environment appropriate for the student. The key inquiry is whether the student can be educated in the general education setting with the use of supplementary aids and services. 34 CFR 300.114. A number of credibility factors go into weighing the evidence to determine if the District has in fact made more than a token effort to mainstream the student in science and social studies. The fact that the District removed the student's supplementary aids and services before it proposed a change in placement and the teachers were

not forthcoming about it during the hearing undermines the District's argument that the Foundations class is the least restrictive environment. The fact that the District minimized the impact that the student's visual impairment had on the student's educational performance and failed to adequately train staff who work with the student undermines the District's assertion that it has provided adequate supplementary aids and services. The fact that none of the teachers who testified appeared to understand the nature of the student's visual impairment and its impact on student's education are indicators that appropriate supplementary aids and services have not been used in the classroom. The fact that the District proposes to provide a restrictive placement for a student based on the argument that the student's cognitive and academic functioning require it, when the student has never been determined to be eligible for services due to cognitive or learning disabilities undermines the District's proposal.² Under the totality of the circumstances, I find that the proposed placement for science and social studies are not the least restrictive environment for the student. The least restrictive environment for the student is the general education classroom with the return of the supports provided the student during the *** grade, including access to a paraprofessional. It may well be that the student's needs may eventually require increased time in a special education setting. However, the District has not made adequate efforts to include the student in the general education classroom for 2010-2011 school year.

Reading

Until the student entered the *** grade, student primarily received instruction in a Life Skills setting. During the summer preceding student's *** grade year, the student worked one-on-one with the *** school reading teacher. T3-126. By the end of the summer, the student knew the majority of student's letters, knew all of student's vowels, could sound out some CVC words, was starting to learn how to blend, and could put mixed up cards in alphabetical order. T3-129. During the student's *** grade year, student enrolled in the same teacher's Reading is Fundamental class. The class was small and highly structured. T3-132. When she first began working with the student, student was reading at a *** level. T3-127. By the end of the 2009-2010 school year, student was reading and comprehending at a *** level. T-139. Based on the testimony, I find that the student made some progress on student's functional level in reading during the 2009-2010 school year. The student's *** grade teacher was one of the few teachers who appeared to understand that student had a central vision as well as a peripheral vision loss. T3-166.

By the beginning of the 2010-2011 school year, the student had regressed over the summer, but the parent had declined ESY services. T3-196. A change was made in the student's reading class to eliminate many of student's modifications and instruct student on grade level rather than student's functional level. T2-204, 210. This has not been appropriate for student and the student has not made meaningful progress during the 2010-2011 school year. Petitioner has met her burden that the student's reading program is not appropriate for the 2010-2011 school year due to the student's lack of progress and the elimination of class support. However, Petitioner has failed to prove that Respond has failed to provide an evidence-based reading program for the student.

Math

The student is in a Resource math class and is making progress toward student's toward student's IEP goals during the 2010-2011 school year. T2-171. Petitioner's specific complaint regarding the student's math program is that that the District has failed to provide an evidence-based educational program appropriate to meet student's needs. Petitioner has failed to meet petitioner's burden on this issue.

Failure to Train Staff

² In fact, when the parent inquired as to why the student would be required to take the TAKS-Modified rather than TAKS-Alt, as student had taken during previous grades, district personnel told her it was because student did not have a cognitive disability. P28.

I find based on a preponderance of the evidence that the personnel working with the student do not have an adequate understanding of the student's visual impairment and its adverse impact on the student's education. I further find that Respondent has failed to provide adequate training to the staff about the student's disabilities and the implementation of the student's IEP. Petitioner has met her burden with regard to this issue.

Reduction in Speech Therapy

The District proposed a significant reduction in speech therapy services for the student. During the November ARD meeting, the speech therapist told the mother the reduction was necessary because the student no longer want to cooperate with services and wanted to remain in the classroom with peers. P7-064, P28. The District's position with regard to speech therapy is inconsistent with its efforts to remove the student from the general education classroom. The student's most recent speech evaluation characterizes the student's impairment as severe. P1. There has been no data to suggest that the student's impairment has improved or requires a reduction in services. The District has offered no other explanation to the parent to justify a radical reduction in services. The District has attempted to take no other measures to encourage the student, such as a behavior plan. The student's program must be designed to produce meaningful educational benefit and not regression. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S.Ct. 3034 (1982). *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). Additionally, such a change in services needs to be supported by assessment data, even if informal data. The District's proposed change in the schedule of services for speech is not appropriate. However, the parent's request that the I order the District to increase speech services is also not supported by the evidence and is denied.

CONCLUSIONS OF LAW

1. The student currently resides within the geographical boundaries of Caldwell ISD, a legally constituted independent school district within the State of Texas, and is entitled to special education services pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. §1400, et seq., as amended.

2. The District's educational program is presumed to be appropriate. As the party challenging the educational program proposed by the district, Petitioner bears the burden of proof. *Schaffer v. West*, 126 S.Ct. 528 (2005). *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), aff'd 468 U.S. 883 (1984) and must show more than a de minimis deprivation of educational benefit. *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). Petitioner has met that burden in part.

3. The relevant time period for relief in this case begins on November 16, 2009 and extends through the date of the hearing, April 15, 2011. During the relevant time period, CISD denied the student a FAPE in the least restrictive environment appropriate. The denial of FAPE in this case was more than de minimis. *Hendrick Hudson District Board of Educ. v. Rowley*, 458 U.S. 176 (1982); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

4. The District's proposed placement for the student in Foundations Science and Social Studies is not the least restrictive environment for the student. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997)

5. The District's procedural errors in development of the student's IEP resulted in a deprivation of educational benefit, impeded the student's right to a FAPE, and interfered with the parent's right to meaningful participation in the development of the student's educational program. 20 USC 1415 (f)(3)(E);

6. Petitioner is entitled to compensatory education services and prospective relief to remedy the denial of FAPE. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). IDEA requires that relief be designed to ensure that the student is appropriately educated within the meaning of IDEA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9th Cir. 1994).

ORDER FOR RELIEF

Compensatory and prospective relief is available under IDEA as an equitable device to remedy substantive violations. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). IDEA requires that relief be designed to ensure that the student is appropriately educated within the meaning of IDEA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9th Cir. 1994). The parent is entitled to prospective and compensatory relief.

Prospective Relief

1. The student is a complex child with complex needs that will require further assessment not only to determine current educational programming, but to determine the student's compensatory education needs. One of the significant difficulties in this case has been the lack of understanding by both parties with regard to the student's visual disability. The parent tends to attribute most or all of the student's difficulties to student's visual impairment. The District dismisses student's CVI, and, in fact, presented testimony that the student may no longer have an educational need for services as a student with a visual impairment. Additionally, prior testing of the student's cognitive and academic functioning is suspect given that one evaluator reported that the testing did not represent an accurate depiction of the student's functioning, and another noted that the student's visual deficits were evident during the administration of the tests. The student's three-year reevaluation is due within the next 6 months. Therefore, I am ordering that the District initiate the three-year re-evaluation according to the terms below.

2. It is further ordered that the District shall, no later than the first day of school of the 2011-2012 school year, engage the Outreach Program of the Texas School for the Blind and Visually Impaired to conduct an onsite consultation with regard to the student's educational program. The District shall request a written report outlining TSBVI's observations and recommendations for the student's assessment and educational program, including, but not limited to, the development of student's IEP and classroom modifications and accommodations to address student's visual impairment. The ARD Committee shall convene within 10 school days of receipt of the TSBVI report to review and implement its recommendations.

3. It is further ordered that the District shall, no later than the first day of school of the 2011-2012 school year, engage the services of TSBVI, or a neutral third party mutually agreed upon by the District and the parent, to provide training to all personnel working with the student with regard to student's visual impairment and its impact on the classroom.

4. It is further ordered that the District and the parent shall no later than the first day of school of the 2011-2012 school year, in consultation with TSBVI, select a professional or professionals with experience in assessing students with visual impairments to conduct the Full Individual Evaluation. In the event the District and the parent are unable to agree on an evaluator, the District shall engage a professional selected by TSBVI.

5. It is further ordered that the Full Individual Evaluation shall address all areas of suspected disability, including but not limited to vision, cognitive and academic functioning, Expanded Core Curriculum, Speech, Other Health Impairment (ADHD) and what, if any, implications the student's cerebral palsy has on student's eligibility and educational program. If the parent fails to consent to the evaluation, or provide consent

for the evaluator and district to speak to outside providers, this Decision shall serve as an override of the parent's consent.

6. It is further ordered the District shall allow the evaluator and TSBVI personnel access to student and any personnel working with the student.

7. It is further ordered that the assessment ordered herein shall also address the manner in which the student's time in the regular education setting may be appropriately maximized.

8. It is further ordered that within 10 school days of receipt of the completed FIE, the District shall convene an ARD Committee meeting to review the evaluation and shall implement its recommendations.

9. It is further ordered that the student shall receive social studies and math instruction in the general education setting, with modifications and accommodations consistent with those utilized in the 2010-2011 school year, access to student's assistive technology, and access to a paraprofessional for support.

Compensatory Relief

Determining what compensatory relief is appropriate turns on a consideration of the extent of the denial of a FAPE, as well as what services would be needed to provide a free appropriate public education in light of that denial. It also requires a consideration of the conduct of both parties during the course of the dispute. The parent has alleged that the student made progress during the 2009-2010 school year, and a request for compensatory education for that time period is inconsistent with her position. Any deficiencies in the school's program are related to assessment and consideration of the impact of the student's visual impairment on student's educational program and are best remedied with the prospective relief ordered above. Finally, the parent rejected the District's offer of ESY services during the summer of 2010, so the loss of ESY services will not be compensated.

With regard to the 2010-2011 school year, I must consider a number of factors in determining whether to award compensatory relief. First, the parent requested removal of the student's classroom modifications and content mastery, including modifications specific to the student's vision, but persisted in a request, albeit an inconsistent one, for a classroom paraprofessional to assist the student. The District was very quick to eliminate the student's classroom modifications and accommodations without any discussion of the impact on the student. The District instructed its teachers to no longer modify the student's curriculum in science and social studies to student's functional level. Additionally, the student's teachers did not have an understanding of the student's visual disability and its impact in the classroom. Finally, the relationship between the parties became so toxic the student's education became a casualty of the war between the school and the parent. The parent was distrustful of the District. However, the District was dismissive of the parent and instructed teacher not to speak with her.

Compensatory services are equitable in nature, and any award must be based on facts developed at the hearing. Compensatory services are awarded in order to do equity. These services are not awarded as "damages." Rather, such equitable relief must be designed to ensure that the student is being properly educated within the meaning of IDEA. It is proper for a hearing officer to take into consideration such factors as the complexity of the child's difficulties, as well as a parent's conduct in determining whether or not to order compensatory relief. *Reid v. District of Columbia*, 2005 WL 678385 (D.C. Cir. 2005) The ultimate award must be fact-specific and reasonably calculated to provide the student with educational benefits which would have accrued from special education services the school district should have supplied in the first place. *Id.* It is not appropriate to arbitrarily award an amount of compensatory hours equal to the number of hours the student was denied a FAPE. *Id.* The appropriate amount of compensatory education will vary from case to case, depending on the facts developed in the record.

In this case, the parent's conduct is a factor to consider in deciding whether or not to award compensatory services. If her conduct is considered in a vacuum, i.e., revoking consent for the District to obtain information regarding the student from outside providers, withholding an evaluation from the district,

requesting the removal of classroom modifications and accommodations, and the role she played in the breakdown of the relationship with the school, it might support a decision to award no compensatory services. However, I cannot view the parent's conduct in a vacuum. The District's conduct was adversarial and dismissive of the parent, and the student's educational program was not a collaborative effort among stakeholders. It was evident that the parent did not have sufficient knowledge to make some of the requests she made of the District. Neither the school personnel nor the parent have a realistic assessment of the student's disabilities, and both parties have become polarized in their views. The student's disabilities are complex. All of these factors weigh in favor of granting compensatory services. A complete denial of compensatory services in this case because of the conduct of either party would be unjust, but the conduct of both parties is taken into consideration in determining the amount of the award. Therefore it is ordered that compensatory services are awarded as follows:

1. Compensatory services in all academic areas deemed appropriate by the ARD Committee for the time period beginning with the first day of school for the 2010-2011 school year and ending with the last day of the Fall 2010 semester. The parent filed her request for hearing on November 16, 2011, and the Resolution period with regard to the request ended on December 16, 2011, so the period for compensatory services shall extend through the date the Resolution period ended. *See* 20 USC 1415(f)(B). The amount of compensatory hours shall be determined by calculating the number of school days in the above period, exclusive of absences, and shall be completed by August 15, 2012.

Further order for implementation

1. The District shall provide documentation of teacher training no later than September 30, 2011 to the parent and TEA.

2. The ARDC shall meet within ten (10) days of receipt of this decision to begin implementation of the relief ordered herein.

All other relief not specifically granted herein is hereby **DENIED**.

NOTICE TO THE PARTIES

This Decision is final and is appealable to state or federal district court.

The District shall timely implement this Decision within 10 business days in accordance with 19 T.A.C. §89.1185(p). The following must be provided to the Division of IDEA Coordination at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating that the Decision has been implemented; or 2.) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

SIGNED this 2nd day of July, 2011.

Sharon M. Ramage
Special Education Hearing Officer

SYNOPSIS

ISSUE NO. 1 Whether the student's program for the 2010-2011 school year was appropriate?

HELD: For the student. The District removed supplementary aids and supports that were necessary for the student to make meaningful educational progress in the general education setting when it had provided those supports in the previous year.

CITATION: 34 CFR 300.42; 34 CFR 300.114

ISSUE NO. 2 Whether the proposed placement was the least restrictive environment for the student?

HELD: For the student. The proposed placement would have removed the student from the general education setting for all academic subjects. The student had been successful in the previous year with supplementary aids and supports in the general education classroom. During the 2010-2011 school year, the District removed those supports.

CITATION: 34 CFR 300.42; 34 CFR 300.114

ISSUE NO. 3 Whether the District's actions interfered with the parent's right to meaningful participation in the development of the student's educational program?

HELD: For the student. The Superintendent was the ultimate decision maker regarding the student's educational need for an aide, a TSBVI consult and assistive technology but did not attend or participate in ARD meetings, even though invited by the parent. The Superintendent usurped the authority of the ARD Committee to make educational decisions for the student. Additionally, the relationship between the parent and the school became toxic and it was apparent from the evidence that the school did not acknowledge her as an equal participant in the development of the student's program. The procedural errors interfered with the parent's participation rights as well as impeded the student's access to a FAPE.

CITATION: 34 CFR 513(A)(2); 34 CFR 321(a)(14); 34 CFR 300.321(e)

ISSUE NO. 4 Whether the District inappropriately denied the student's request for an onsite consult with the TSBVI?

HELD: For the student. First, none of the staff working with student demonstrated an understanding of the nature of the student's visual disability and the program was not being implemented in a collaborative and coordinated manner. Second the District failed to provide prior written notice of its refusal of the parent's request.

CITATION: 34 CFR 513.(a)(2)

ISSUE NO. 5 Whether the student's program for the 2010 and 2011 school year was inappropriate because it was not based on current assessment data?

HELD: For the parent. The current FIE did not adequately account for the student's visual impairment and the evaluator stated in her report that the data was not an accurate measure of the student's functioning. Additionally, both the FIE and the IEE evaluators acknowledged that they went beyond the standardization of the instruments to complete the evaluation and all evaluators recommended further assessment of the student's cognitive functioning.

CITATION: 34 CFR 300.304(c)