

**BEFORE A SPECIAL EDUCATION HEARING OFFICER  
STATE OF TEXAS**

**STUDENT, bnf  
PARENT,  
Petitioner,**

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v.

**DOCKET NO. 117-SE-0110**

**LEWISVILLE INDEPENDENT  
SCHOOL DISTRICT,  
Respondent.**

**DECISION OF THE HEARING OFFICER**

Introduction

Petitioner, Student (“Petitioner” or “Student”) brings this action against the Respondent Lewisville Independent School District (“Respondent,” “the school district,” or, “LISD”) under the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. § 1401 et. seq (IDEA) and its implementing state and federal regulations.

Party Representatives

Student has been represented throughout this litigation by student’s legal counsel Myrna Silver, Attorney at Law, assisted by lay parent advocate Mara LaViola. The school district has been represented throughout this litigation by its legal counsel Nona Matthews with the law firm of Walsh, Anderson, Brown, Gallegos & Green. The party representative for the school district is \*\*\*, Executive Director of Special Education for LISD.

Resolution Session and Mediation

The parties waived the opportunity of attempting to settle this case in a Resolution Session in lieu of mediation. A mediation was conducted on March 2, 2010 but it was not successful.

Procedural History

Petitioner filed petitioner’s initial request for hearing on January 19, 2010 raising issues related to student’s educational program and placement for the 2009-2010 school year. An initial Scheduling Order was issued on January 20, 2010. The case was first set for hearing on March 11-13, 2010. A prehearing conference was conducted on February 19, 2010 with counsel for both parties. The issues and items of requested relief were identified, confirmed and clarified. The hearing was continued and reset, by agreement, for April 26-27, 2010 in order to resolve a scheduling conflict for Petitioner’s counsel. Respondent filed a Counterclaim Requesting Declaratory Judgment on March 29, 2010. Petitioner filed two separate responses to the counterclaim. Respondent’s counterclaim is pending and shall be addressed in this Decision. Another continuance was granted, at Petitioner’s request, to resolve scheduling conflicts for

Petitioner's counsel related to an unexpected family illness. The hearing was rescheduled for June 7-8, 2010.

### Petitioner's Motion to Amend

On May 25, 2010 Petitioner submitted a Motion to Amend Special Education Due Process Hearing adding issues related to Student's proposed educational program and placement for the 2010-2011 school year. The motion was granted. The parties convened another prehearing telephone conference to discuss the status of the case. The hearing was reset for August 30-31, 2010. Student's status during the proceedings (i.e., "stay put") was discussed at yet another telephone conference and resolved by order of the hearing officer on August 10, 2010.

### Adjustments to the Hearing Schedule

On August 19, 2010 Petitioner's counsel submitted a written request to add an additional day to the hearing schedule in order to ensure an adequate amount of time in which to present petitioner's case. A third day of hearing on September 14, 2010 was added by agreement. The due process hearing began on August 30-31, 2010. After the second day of hearing Respondent submitted a written request to add a fourth day of hearing in order to ensure the school district would have an adequate amount of time in which to present its defense. The parties conferred and selected a fourth day of hearing. The due process hearing was completed on September 14-15, 2010.

At the due process hearing both parties continued to be represented by their legal counsel. Ms. LaViola assisted Ms. Silver. Student's father, \*\*\* attended all four days of the due process hearing and student's mother, \*\*\*, attended the first two days. Ms. Matthews was assisted by her co-counsel Jan Watson also with Walsh, Anderson, Brown, Gallegos & Green. \*\*\* attended all four days of the hearing as the school district's party representative. The parties requested an opportunity to submit written closing briefs. The record remained open and the parties submitted their briefs in a timely manner. The Decision of the Hearing Officer was extended to November 10, 2010.

Petitioner confirmed and clarified the following amended issues for decision in this case:

1. Whether the school district's proposed program and placement for the 2010-2011 school year is reasonably calculated to provide Student with a free, appropriate public education (FAPE) within the meaning of the Individuals with Disabilities Education Act (IDEA); and specifically, the following:
  - a. Whether the proposed class schedule and use of \*\*\* is appropriate for Student;
  - b. Whether the proposed \*\*\* plan is appropriate for Student;

- c. Whether the proposed IEP goals and objectives are measureable, appropriate, and reasonably calculated to provide Student with an opportunity to make more than minimal educational progress;
  - d. Whether integration of the \*\*\* into Student's daily class schedule (specifically math class) is appropriate for Student without first providing student with specific instruction in the use of the \*\*\*; and,
  - e. Whether Student needs the use of \*\*\* for math or whether the omission of the \*\*\* in student's proposed program for 2010-2011 is appropriate;
2. Whether the data collection methods used by the school district during the 2009-2010 school year precluded Student's parents from meaningful parental participation in student's educational program; specifically, whether the school district provided Student's parents with graded class work and tests in a timely manner in order to assist student's parents in correlating the work with school district progress reports and verifying Student's educational progress;
  3. Whether the school district's proposed compensatory math instruction (arising from an agreement to address a dispute over math instruction provided in the spring of 2008) provides Student with FAPE within the meaning of the IDEA;
  4. Whether the school district's refusal to adopt the recommendations stated in Dr. \*\*\* independent education evaluation (IEE) constitutes a denial of FAPE within the meaning of IDEA;
  5. Whether Student's Individual Educational Plan (IEP) implemented in 2009-2010 and to be implemented in 2010-2011 is individualized in terms of the manner in which educational services are being provided to student and, if not, whether that constitutes a denial of FAPE within the meaning of IDEA;
  6. Whether the school district's alleged failure to provide Student's parents with documentation of the summer 2009 extended school year (ESY) services constitutes a denial of FAPE within the meaning of IDEA; and,
  7. Whether the school district's proposed ESY program for the summer of 2010 provides Student with FAPE within the meaning of IDEA.

Relief Requested

Petitioner requests the following:

1. Convene an ARD meeting for the purpose of revising Student's proposed schedule of

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classes to meet student's individualized needs, specifically by omitting the use of \*\*\* and provide Student with instruction in each class on a daily basis each week through the 2010-2011 school year;

2. The school district provide Student with compensatory math instruction for the full amount alleged and proven at the hearing and to include the use of \*\*\* for math instruction as an accommodation in student's educational program;
3. The school district revise Student's IEP to implement and include the recommendations stated in Dr. \*\*\* IEE;
4. The school district revise Student's IEP goals and objectives to reflect student's present levels of performance and that meet student's instructional needs within the time frame contemplated by student's current IEP;
5. The school district provide documentation of summer 2009 and 2010 ESY services or, in the alternative, provide Student with compensatory ESY services in the summer of 2011; and,
6. The school district provide Student's parents with graded work within 2-3 days of its completion.

#### Respondent's Counterclaim for Declaratory Judgment

Respondent seeks a declaratory judgment that Student is entitled to an IEP reasonably calculated to allow student the possibility of \*\*\* within the same \*\*\* time period as student's non-disabled peers. Respondent argues that its declaratory judgment action is proper because its counterclaim has greater ramifications than the original lawsuit. Respondent argues that there is a core, on-going dispute between the parties as to whether FAPE for Student includes the potential to \*\*\*. Respondent contends this on-going dispute will survive and likely result in future litigation between the parties. Respondent further argues it has an independent cause of action and standing to bring a counterclaim for declaratory relief because it seeks affirmative relief independent of Petitioner's claims.

#### Petitioner's Response to Counterclaim for Declaratory Judgment

Petitioner argues the school district only has standing to bring a declaratory judgment action if it has a justiciable interest in the litigation. The school district only has a justiciable interest if there is a possibility that it will suffer a distinct injury. Petitioner argues there is no possibility of any injury to the school district because Respondent's counterclaim does not ask the hearing officer to prevent a distinct injury to itself but only an alleged potential injury to Student. Petitioner concludes that no matter how the hearing officer rules the school district would not be "personally aggrieved" by the potential injury to Student.

Petitioner further contends there is no justiciable controversy because Student's \*\*\* is a "legal fiction" under state law. Petitioner argues that the opposite is actually true; i.e., state law provides for the possibility that a student may \*\*\*. Finally Petitioner argues that Respondent's declaratory judgment would deny Student student's rights under IDEA; specifically, the IDEA ensures that an eligible student is entitled to receive special education and related services from the ages of 3 through 21. Nothing in IDEA or under state law establishes a student's legal right to \*\*\*. Petitioner seeks sanctions against Respondent for its "frivolous" declaratory judgment action and requests attorney's fees in the amount of \$2,250.

#### Discussion – Counterclaim for Declaratory Judgment

A declaratory judgment is appropriate only when there is a justiciable controversy about the rights and status of the parties and the declaration will resolve the controversy. A judicial forum may not render advisory opinions. *Castro v. McNabb*, 2009 Tex. App. LEXIS 8262 (Ct. App. – El Paso 2009). A declaratory judgment requires (i) a real controversy between the parties; and (ii) that the controversy will actually be determined by the judicial declaration sought. *Id.* The purpose of a declaratory judgment is to settle and afford relief from uncertainty and insecurity about the rights, status and legal relations between the parties. *Tex. Civ. Prac. & Rem. Code § 37.002 (b)*; *Bright v. Addison*, 171 SW 3d 588, 606 (Ct. App. – Dallas, 2005).

A trial court has the discretion to enter a declaratory judgment as long as it will serve a useful purpose or will terminate the controversy between the parties. *Bright v. Addison*, 171 SW 2d at 660. A court may refuse to render a declaratory judgment if it does not terminate uncertainty or controversy. *Id.* In this case a declaratory judgment will not serve a useful purpose or terminate the controversy between the parties. Under the IDEA a student's educational program and placement must be reviewed at least annually by an ARD. Adjustments to that program and placement may be appropriate in order to meet Student's individual and unique needs. 34 C.F.R. §§ 300.323 (a), 300.324 (b).

Student's parents have the legal right to a due process hearing every year to resolve disputes about Student's program or placement. 34 C.F.R. § 300.507 (a). Declaring that Student has the right to pursue \*\*\* would do little to terminate any future controversies that may arise between the parties over Student's \*\*\* plan and progress towards \*\*\*. Furthermore, because the IDEA also provides that a student may also be eligible for continued educational services from the school district up through age 21, the declaratory judgment requested by the school district would not be particularly useful. 34 C.F.R. 300.101 (a).

Finally, as an administrative hearing officer and not a trial court, the IDEA does not appear to confer declaratory judgment authority onto a special education hearing officer. To issue a declaratory judgment would be to render an advisory opinion. 19 Tex. Admin. Code § 89.1170. Therefore, I conclude Respondent's request for declaratory judgment should be denied.

## FINDINGS OF FACT

1. Student is \*\*\* years old and eligible for special education services from LISD as a student with a visual impairment (VI) and speech impairment (SI). There is no dispute about Student's eligibility for special education services from LISD. (Petitioner's Exhibit 1, pp. 10, 11, 29)(referred to hereafter as "P. Ex. \_\_\_")(Respondent's Exhibit 1, pp. 12, 8)(referred to hereafter as "R. Ex. \_\_\_"); Hearing Transcript Vol. III, pp. 24, 27) (referred to hereafter as "Tr. Vol. \_\_\_, p. \_\_\_").
2. Student has a complex physiology. Student was born with \*\*\*. This syndrome resulted in \*\*\*. \*\*\*. (P. Ex. 1, p. 3) (P. Ex. 12, p. 357) (R. Ex. 1, pp. 3, 17-18) (Tr. Vol I, pp. 75-76) (Tr. Vol. III., pp. 18-19). Student's \*\*\* have a moderate to severe impact on student's speech production. (R. Ex. 1, p. 7). \*\*\*. (Tr. Vol. II, p. 159).
3. Although Student has a number of limitations student also has some very unique strengths such as \*\*\*. \*\*\*. (P. Ex. 50) (Tr. Vol. I, p. 78). \*\*\*. (Tr. Vol. I, p. 173). \*\*\*. (Tr. Vol. IV, pp. 24-25).
4. Student has been diagnosed with \*\*\*, a type of neurological movement disorder. Student exhibits \*\*\*. These \*\*\* occur across all environments and are exacerbated by anxiety. (Tr. Vol. I, pp. 80-81)(Tr. Vol. II, pp. 37-38, 41-43).
5. A variety of assessment data established Student also has cognitive impairments especially in the area of verbal functioning. However, student also exhibits a splintered or scattered profile – while some of student's skills fall within the same range as those for students with \*\*\* other skills are higher. (Tr. Vol. III, p. 197). A 2008 FIE suggests significant cognitive deficits with academic functioning \*\*\* in most areas. (R. Ex. 1) (Tr. Vol. III, pp. 17, 21, 26).
6. Student's verbal cognitive abilities are in the \*\*\* range with \*\*\* in spatial and some language skills. Student's rote learning ability is a relative strength and therefore student needs instruction that emphasizes repetition. Student also needs to repeat verbal instructions and use manipulatives to learn concepts. Student benefits from hands-on teaching methods. Student needs to use assistive technology because it significantly improves student's performance. (P. Ex. 12) (R. Ex. 21).
7. Student is a tactual learner with well developed tactual skills. Student also receives a lot of information through use of student's auditory skills. Student needs instruction on using and perfecting student's listening skills. (P. Ex. 1, pp. 3-4) (R. Ex. 1, pp. 3-4).
8. Student is a diligent student and an engaged and interested learner. Student tries to

- please, is motivated, interested in learning, and will attempt each task to the best of student's abilities. (P. Ex. 54) (Tr. Vol. I., pp. 124-125). Student is a positive, hard-working, compliant \*\*\* who gets along well with adults and peers. In PE and choir student is also attentive and organized. (P. Ex. 11, pp. 297-300) (R. Ex. 1, p. 8).
9. The term "expanded core curriculum" is a specific curriculum used to define concepts and skills typically learned incidentally by sighted students that must be sequentially presented to a student with visual impairments like Student. (P. Ex. 15, p. 395).
  10. The expanded core curriculum addresses the following areas: assistive technology, \*\*\*, compensatory skills \*\*\*, recreation and leisure, orientation and mobility, social skills, self determination, sensory efficiency skills (i.e., the use of auditory skills) and, independent living skills. (P. Ex. 15, p. 15)(P. Ex. 17, 18)(Tr. Vol. I., pp. 174, 179-180, 200-201) (Tr. Vol. III., pp. 242-243).
  11. Student needs instruction in the expanded core curriculum as identified through assessment in each of the expanded core curriculum areas. (Tr. Vol. IV., p. 302). There doesn't need to be an IEP for every area if Student shows mastery in the area. (Tr. Vol. IV., p. 302). School staff use "educational moments" or "a natural occurrence" to teach expanded core curriculum topics such as independence or social skills. (Tr. Vol. III., pp. 241-242).
  12. Instruction in the expanded core curriculum needs to be continuous throughout Student's \*\*\* school years with a focus on \*\*\*. (Tr. Vol. I., pp. 269, 308). An extended school day, \*\*\* in school, and after-school programs can be appropriate for students with visual impairments in order to address all the elements of the expanded core curriculum. (P. Ex. 15, p.400)(Tr. Vol., III., pp. 179, 181-182).
  13. The expanded core curriculum is difficult to complete \*\*\*. While many competencies stated in the expanded core curriculum can be addressed when infused within the regular core academic curriculum such infusion is risky and does not provide the appropriate urgency and emphasis needed. The additional learning experiences required by the expanded core curriculum require time to teach and the need for them does not diminish with age or competency. (P. Ex. 19, pp. 441-442).
  14. It is difficult to find time within the typical school day to address elements of both the general core academic curriculum and the expanded core curriculum. The expanded core curriculum may be addressed in a number of ways including a longer school day, \*\*\*, after school programs, summer programs, short term programs offered through \*\*\* and/or programs offered by \*\*\*. (P. Ex. 15, p. 400).
  15. The Visual Impairment (VI) teacher and Orientation & Mobility (O&M ) specialist both have a role in evaluating Student's needs in all areas of the expanded core curriculum.

- Collaboration between the VI teacher and O&M specialist ensure a comprehensive evaluation of expanded core curriculum skills. They also function as the primary resources for instruction in the expanded core curriculum. (P. Ex. 15, p. 401).
16. Student needs an adequate amount of time for O&M training to permit travel to appropriate settings as well as enough time to explore and learn decision-making skills for safety in unfamiliar situations. (P. Ex. 15, p. 413). Furthermore, as a student with multiple disabilities, Student also needs routines that create predictable patterns for learning. Both direct and consultative services are appropriate for meeting Student's expanded core curriculum needs. (P. Ex. 15, p. 414).
  17. Student has been regularly evaluated by a medical speech pathologist who is a member of a \*\*\* practice and on Student's treatment team. (Tr. Vol. II., pp. 140, 142, 146, 149, 173-174). The primary focus of the medical speech pathologist is on articulation not the development of language skills. (P. Ex. 22).
  18. Student's articulation ability ranges from \*\*\* to \*\*\* – student's conversational speech becomes less intelligible when student starts thinking about what student wants to say as opposed to when student is focused on how student is saying it. (Tr. Vol. II., p. 150). Student's \*\*\* negatively impact student's ability to be understood. (R. Ex. 1, p. 8)(Tr. Vol. II., p 153).
  19. Student has \*\*\*. (R. Ex. 1, p. 8)(Tr. Vol. II., pp. 157-158).
  20. Student would benefit from 30 minutes of direct 1:1 speech therapy per week with a focus on correcting \*\*\* through drills. In addition, because Student is an auditory learner, student would benefit from the use of a tape recorder during speech therapy so that student can review the therapy session by listening to student's voice and the speech therapist's instructions. It would be appropriate to conduct this review at home. (Tr. Vol. II., pp. 161-162, 165-166).
  21. Student was provided with direct speech therapy by the school district in \*\*\* school for 40 minutes three times a week by a speech/language pathologist and 20 minutes of consult speech therapy. (P. Ex. 2, p. 67). The speech IEP goals and objectives are appropriate in meeting Student's articulation errors and continue to improve verbal and language skills. (P. Ex. 4, pp. 116-121)(R. Ex. 10, pp. 20 23-25).
  22. Physical activity is important for Student and a medical necessity. It helps student relax, release stress, and minimizes the symptoms of \*\*\*. Student benefits from physical education on a daily basis for a minimum of 45 minutes. Some exacerbation of Student's \*\*\* can be expected without physical education. (P. Ex. 51, 52) (R. Ex. 8, pp. 18-20) (Tr. Vol. II., pp. 37-40).

23. Student attended the \*\*\* in \*\*\*. Student also attended a number of \*\*\* summer programs. Student came to LISD in the spring semester of \*\*\* grade in \*\*\*. Student was placed in a \*\*\* classroom (\*\*\*) – a self contained special education classroom with a focus on functional academics, \*\*\*, and developmental skills. (R. Ex. 1, p. 2) (Tr. Vol. I, p. 84)(Tr. Vol. II., pp. 189-190)(Tr. Vol. III, pp. 34-36, 120).
24. Student attended \*\*\* grades at an LISD \*\*\* school during the 2007-2008 and 2008-2009 school years, respectively. Student was in \*\*\* grade at a LISD \*\*\* school during the 2009-2010 school year. This current school year (2010-2011) Student is in the \*\*\* grade at the \*\*\* school. (Stipulation of Fact No. 1, Tr. Vol. I, p. 118).
25. For the 2009-2010 school year Student was placed into an academic life skills classroom (ALS) for \*\*\* grade. The instruction in the ALS classroom is much more academic in nature than the \*\*\* school \*\*\* classroom. (Tr. Vol. III., p. 37). The ALS classroom is a self contained special education classroom. This placement was made in response to parental requests for a greater focus on academics for Student. (Tr. Vol. III, pp. 52-53).
26. The ALS program is for \*\*\* academic functioning students who are nevertheless capable of learning some grade level concepts and TEKS. (Tr. Vol. IV, p. 172). The ALS teacher drops the reading level, moves at a slower pace, and spends more time on vocabulary. (Tr. Vol. IV, pp. 173, 276). Student was supported in the ALS classroom by both a paraprofessional and the VI teacher. (Tr. Vol. IV, pp. 258-259).
27. Student needs an instructional setting with a low student to teacher ratio to increase student's opportunity for one on one instruction and decrease the amount of potential distractions of a larger classroom. (P. Ex. 12, p. 359)(Tr. Vol. IV, p. 220). The ALS class averages about 10 students per year and has a low student to teacher ratio. (Tr. Vol. IV, pp. 172, 230). Student's \*\*\* grade ALS class began with \*\*\* students and \*\*\*. (Tr. Vol. IV, p. 245).
28. The \*\*\* school utilizes an \*\*\*. Class periods under this type of schedule are essentially \*\*\*. (R. Ex. 25, p. 3) (Tr. Vol. III., pp. 38-39).
29. An ARD Committee met in the spring of 2009 to plan for Student's first year in \*\*\* school at the \*\*\*. The ARD initially proposed Student would take a total of 8 courses for the whole year: \*\*\*. (Tr. Vol. III, p. 39). Student received occupational therapy, speech therapy, orientation and mobility training, VI services, adapted PE, and transportation as related and/or support services. (P. Ex. 4, p. 158) (P. Ex. 5) (R. Ex. 2, p. 41) (Tr. Vol. III. pp. 39-40).
30. Extended school year services for the 2009 summer were also planned by the ARD. The summer 2009 ESY program included \*\*\*. (P. Ex. 4, pp. 143-144) (R. Ex. 2, pp.

- 43-44) (Tr. Vol. III, pp. 40-41).
31. A VI teacher provides both direct and consultation services to Student through an integrated delivery model. (Tr. Vol., III., pp. 215-216, 223, 226, 243-244). The VI teacher adapts the instructional curriculum for learning, including adapting materials. It is also appropriate for a VI teacher to provide direct instruction in the expanded core curriculum. (Tr. Vol. I, pp. 232, 310). The VI teacher also advocates for Student's needs with teachers and other service providers. (Tr. Vol. III, p. 135).
  32. Student's \*\*\* reading skills were at a very low level when student returned to LISD from \*\*\*. Student was primarily using \*\*\* as opposed to \*\*\*. \*\*\* is reading one letter at a time. \*\*\* is a more sophisticated form of \*\*\* and a sort shorthand. Student's skills using \*\*\* were inconsistent. (Tr. Vol. III., pp. 217-219). Student made steady progress learning \*\*\* throughout \*\*\* school (R. Ex. 2, p. 6)(Tr. Vol. III., pp. 223-224) (Tr. Vol. III., p. 221) (Tr. Vol. III., pp. 124-125).
  33. Student now has a working knowledge of \*\*\*. Student does have some trouble re-establishing student's place after \*\*\* and has a tendency to reread sections of sentences. Losing student's place and rereading limit Student's reading speed. (P. Ex. 54). Student's reading speed is likely to increase with increased fluency and comprehension. (Tr. Vol. III., pp. 251-252). Student continues to need constant practice in \*\*\* and repetition is vital for Student in retaining this skill. (P. Ex. 1, p. 4).
  34. In the fall term of \*\*\* grade Student worked 1:1 with the VI teacher on \*\*\* reading. In the spring term student was placed into an English class in the ALS classroom with instruction from the special education teacher and support from the VI teacher. Student read three \*\*\* reading level, high interest novels in \*\*\* grade and learned the parts of speech. Student made progress in reading comprehension and in student's enjoyment of reading. The VI teacher ensured student's materials were \*\*\* and student had access to assistive technology to facilitate learning. By the end of \*\*\* grade Student began to read for enjoyment and knowledge. (Tr. Vol. III., pp. 228-229, 231-232)(Tr. Vol. IV, p. 18).
  35. In \*\*\* grade the VI teacher also worked with Student on learning to take notes using the \*\*\* -- an electronic device with word processor and computer capabilities. The \*\*\* is capable of saving class notes and other writing assignments. Student is competent in the use of the \*\*\*. (Tr. Vol. III, p. 234). A \*\*\* has been assigned to Student since the 2008-2009 school year and is an AT accommodation for the current 2010-2011 school year. Student is highly motivated to use the \*\*\* and it's easy for student to use. Student's parents would like to see student use it more frequently and gain proficiency. (Tr. Vol. I. pp. 90-92, 109-111)(Tr. Vol. II., pp. 14, 54-55, 69).
  36. The VI teacher and the ALS English teacher were in daily, constant communication

- about Student. The VI teacher was aware of what was going on in the English class and made sure Student had whatever materials student needed for class. The school district employs a \*\*\* who prepared the instructional materials for English and math classes \*\*\* for Student. (Tr. Vol. III, pp. 135-136, 235)(Tr. Vol. IV, pp. 177-178). The VI teacher also consulted often with Student's assigned paraprofessional as well as the PE and choir teachers as needed. (Tr. Vol. IV, pp. 26, 62).
37. The VI teacher ensured the classroom teacher understood Student's need for accommodations and how to meet those needs. She ensured that the accommodations used were successful or made adjustments when they needed to be refined. The VI teacher was always involved in developing Student's IEP's, discussed Student's visual impairment, and explained to school staff the unique educational implications. She worked with the classroom teacher to understand the importance of compensatory skills and how to address those for Student appropriately. (Tr. Vol. III., pp. 254-256)(Tr. Vol. IV, p. 174).
  38. The VI teacher also supported Student in the ALS math class. The math class used a daily routine of calendar and money sense activities and a daily lesson. The VI teacher's role in the math class was to ensure Student's assistive technology was available and to assist Student in choosing and using the appropriate equipment. As the year went on Student no longer needed the VI teacher's assistance in selecting and using the equipment. (Tr. Vol. III., pp. 235-236).
  39. Student also used a \*\*\* in the \*\*\* grade math class that was especially useful for \*\*\* – it allowed \*\*\*. Student had access to \*\*\* math materials. (Tr. Vol. III., p. 236). Student also used a \*\*\*. The \*\*\* allowed Student to set up various math problems through \*\*\*. The \*\*\* helped Student understand long division for the first time. (Tr. Vol. III., pp. 236-237). Student also had access to \*\*\* for math. (Tr. Vol. III., p. 237).
  40. Student has a tendency to rely on a teacher to initiate work, solve a problem or evaluate an answer when student thinks student can get away with it. However, over the course of \*\*\* grade Student did not require as much prompting and became more independent in everything student did. Student began to show signs of self advocacy and learned to do more things for student's self without depending on teachers or paraprofessionals as much – this was especially true in terms of getting student's materials each day and beginning to work. (P. Ex. 54, p. 1044)(Tr. Vol. III., pp. 250-251, 257, 325-326).
  41. Although Student continued to require prompting during learning activities the ALS classroom teacher did not allow the VI teacher to prompt Student during tests. (Tr. Vol. IV, pp. 16-17). Some prompting is appropriate for academic success and to avoid learning the “wrong” answer. By the end of the \*\*\* grade year Student made progress working more independently. (Tr. Vol. IV, pp. 214-215).

42. Orientation and mobility (O&M) services have been and continue to be a component of Student's educational program. (R. Ex. 1, pp. 15-16)(R. Ex. 2, pp. 24-26. Student continues to need a number of O&M services and decreasing the need for prompts. (P. Ex. 54, 55). The goal of O&M services is to teach Student safety and orientation skills within student's environment so that student can be as independent as possible. (Tr. Vol. IV., p. 88).
43. The primary focus for O&M in \*\*\* grade was to explore the larger community beyond the school campus making trips to \*\*\*. Student began to develop greater social interaction with peers and to self advocate. (Tr. Vol. IV, pp. 92-93). At this point Student's \*\*\* skills are very good in a familiar environment. Student is capable of using \*\*\* anywhere that is safe. (Tr. Vol. IV, p. 126).
44. This current school year Student's classes are now on the \*\*\* school campus. Student was provided with more intensive O&M during the initial days and weeks of the new school year for the purpose of learning to navigate safely around the \*\*\* school. Student continues to work on O&M at the \*\*\* school while this litigation was pending. (Tr. Vol. IV., pp. 121-122, 152-153).
45. Student does not yet \*\*\* independently. Student depends on the assistance of \*\*\* to do so. (Tr. Vol. IV, pp. 94-95). Independence at \*\*\* is an appropriate long term goal for Student. This year Student is learning how to \*\*\*. (R. Ex. 11, p. 23)(Tr. Vol. IV, p. 96). Student is also learning to identify and define \*\*\*, follow procedures for \*\*\*, find a \*\*\*, follow procedures \*\*\* and, \*\*\*. (R. Ex. 11, pp. 23-24)(Tr. Vol. IV, pp. 98-104).
46. The O&M teacher worked with paraprofessionals in fostering independence on the school bus and in using the \*\*\* procedure appropriately. (Tr. Vol. IV, pp. 124, 132). She also consults regularly with the teachers and paraprofessionals about reinforcement of the skills taught in each O&M session. (Tr. Vol. IV, p. 147). The O&M teacher also consulted with the PE teacher with advice about adaptive equipment. (Tr. Vol. IV, pp. 149-150).
47. Student needs a full 90 minute period of O&M training per week to meet student's needs. A longer class period would provide Student with better opportunities to practice \*\*\* – a particularly important skill for Student in order to access the community for shopping, \*\*\*, or leisure activities. (Tr. Vol. IV., pp. 98-99, 106-108, 157, 159). Student would also be able to learn to use landmarks. (Tr. Vol. IV., pp. 126-127). O&M training cannot replace student's need for PE. Student needs both. (Tr. Vol. IV, p. 151).
48. Student needs to continue working on using \*\*\*, learning how to call a taxi or car service and pay and tip the driver. Student needs to practice soliciting assistance and learn what kind of information student needs. Student also needs to develop

- opportunities, explore challenges and raise expectations toward independent travel. (P. Ex. 55, p. 1053) (Tr. Vol. IV, pp. 117-119). Mastery criteria for safety related O&M skills should be at 100%. (P. Ex. 55, p. 1053) (Tr. Vol. IV, p. 120). Student needs to continually review and practice previously taught O&M skills to ensure skill maintenance. (P. Ex. 42, p. 1041)(P. Ex. 55, pp. 1052-1053). The O&M specialist uses repetition and constant review in her lessons. (Tr. Vol. IV, pp. 122,146).
49. An initial \*\*\* plan was prepared over the course of a series of ARD meetings in spring 2009. (Tr. Vol. III, p. 10). The \*\*\* plan selected was the third of three \*\*\* plan options: i.e., Student would complete student's IEP and \*\*\*. (R. Ex. 2, pp. 35-36)(Tr. Vol. III, p. 31). The \*\*\* plan is a road map for a course of study for the \*\*\* years of \*\*\* school. (Tr. Vol. III, pp. 51-52).
  50. Student's \*\*\* plan was revisited in February 2010. (P. Ex. 11, p. 269)(R. Ex. 10, p.12). The school district proposed a new \*\*\* plan: Student would \*\*\* under the minimum \*\*\* school program and meet one of three additional specified conditions. The condition selected by the ARD contemplates Student will complete student's IEP and \*\*\*. (P. Ex. 11, pp. 271-273)(R. Ex. 10, pp. 14-16).
  51. The \*\*\* option selected by the ARD has an impact on the selection of classes and class schedule because it requires Student to take a set of specified courses required for \*\*\* including \*\*\*. (R. Ex. 10, p. 49)(R. Ex. 24, 25, 26).
  52. Under the new plan Student might be able to \*\*\*. The process for accessing those services would be initiated upon parental request and would need to be approved by an ARD. (R. Ex. 10, p. 14)(Tr. Vol. III, pp. 74-76)(Tr. Vol. III., pp. 160-161, 191). The ARD would determine the need for \*\*\* and Student would need to continue to meet \*\*\*. (R. Ex. 10, pp. 14-16).
  53. The February 2010 ARD could not speculate or know what kind of programs through other agencies or institutions might be available to Student if and when student fulfills \*\*\* under the new \*\*\* plan. (Tr. Vol. III, p. 161). Furthermore, Student may need to exhibit certain specific skills or reach a certain level of skill development in order to access those programs including \*\*\*, adapted living skills, self advocacy skills, and/or computer skills. (Tr. Vol. III., pp. 193-914). Student's father disagreed with the new proposed \*\*\* plan. (R. Ex. 10, pp. 15, 49).
  54. There has been an on-going dispute between Student's parents and the school district over the amount of math instruction. While still in \*\*\* school Student's parents were advised by school personnel at an ARD in February 2009 that the amount of math instruction (440 minutes per week) stated on the schedule of services in previous ARD documents was a clerical mistake. Instead, Student actually received 220 minutes of math instruction per week. Because Student mastered all student's math IEP goals and

- objectives for that year the school district did not see the need for compensatory math services. Student's parents insisted the school district provide compensatory math instruction until it reached the 440 minutes per week schedule stated in the previous ARD paperwork. (P. Ex. 2, p. 68) (Tr. Vol. I, p. 119-120)(Tr. Vol. III, p. 42).
55. The parties worked out a solution: the school district proposed to provide Student with 1,080 additional minutes of math instruction on new math IEP goals and objectives prior to the beginning of first period class for the remainder of the spring 2009 semester. Those services were provided by Student's VI teacher. (P. Ex. 2, p. 68) (Tr. Vol. I, p. 121)(Vol. III, pp. 41-44)(Tr. Vol. III, p. 226). Compensatory math instruction on new IEP math goals was also provided during the summer ESY program. (Vol. III, pp. 44-45). Student's parents contend the school district still owes student a minimum of 57 hours of compensatory math instruction. (P. Ex. 64, p. 1169)(Tr. Vol. I, pp. 122-123, 125) (Tr. Vol. II, pp. 82-88).
56. The \*\*\* is a \*\*\* for math. It includes hundreds of code for mathematical concepts and operations. The school district is teaching Student the \*\*\* using an "integrated" approach; i.e., the VI teacher teaches Student the \*\*\* for the math symbols and functions relevant to each specific math lesson. (Tr. Vol. I, p.134). Last school year Student added to student's knowledge of the \*\*\*. (Tr. Vol. III, p. 238). Student's father disagrees with the integrated instructional approach. Instead, he advocates teaching \*\*\* in isolation through one on one direct instruction. (Tr. Vol. I, pp. 134-135)(Tr. Vol. III, pp 238-239).
57. Student uses \*\*\* independently for addition and subtraction of whole numbers. Student uses a \*\*\* for multiplication. (Tr. Vol. I, p. 141). A disagreement arose between Student's father and school personnel about the use of the \*\*\*. Student's father wanted Student to continue to use the \*\*\* to gain a complete understanding of quantitative values and as a tool to learn multiplication and division before moving to the use of the \*\*\*. (Tr. Vol. II, pp.80-81). While Student needs the \*\*\* for "paper and pencil math" student also needs to learn using a \*\*\* because it is more commonly used, useful for doing more complex problems, and \*\*\*. (Tr. Vol. IV, pp. 202-203, 219).
58. An ARD meeting was conducted on January 15, 2010. (R. Ex. 8)(Tr. Vol. III, p. 68). The purpose of the January 2010 ARD was to address parental concerns about the proposed change in the \*\*\* grade spring term class schedule that eliminated PE. Student's father provided the ARD with letters from Student's physicians and an outside private psychologist to support Student's need for PE on a daily basis. (R. Ex. 8, pp. 18-20) (Tr. Vol. III, pp. 69-70).
59. In response to the physician letters the school district proposed splitting one 90 class period between \*\*\* and PE – that would provide Student with 45 minutes of both PE and \*\*\* on a daily basis. Student's father disagreed with this proposal. (Tr. Vol. III, pp.

- 70-71). Historically, related services were provided most often as “pull out” from student’s PE and to a lesser extent student’s \*\*\* classes. Therefore, if Student continued to be pulled out of student’s PE and/or \*\*\* for related services student would also experience a significant reduction of student’s time in those classes. (Tr. Vol. III, p. 179).
60. Another series of annual ARD meetings in the spring semester of \*\*\* grade began on February 10, 18, 2010 and continued to June 1, 2010. (P. Ex. 11, p. 312)(R. Ex. 10)(Tr. Vol. II, p. 82)(Tr. Vol. III, pp. 73-74). A set of new IEP goals and objectives were also proposed beginning at the February 2010 annual ARD. (R. Ex. 10, pp. 19-28)(Tr. Vol. III, p. 76). There were lengthy discussions about the IEP goals and objectives and Student’s parents submitted a proposed set of IEP goals and objectives of their own. School district personnel reviewed the IEP proposed by Student’s parents and incorporated a number of parental suggestions into the proposed IEP. The school district also adjusted some of the measurement methods in response to parental concerns. (Tr. Vol. III, pp. 78-81).
61. The Texas Assessment of Knowledge and Skills (TAKS) is the mandated statewide student assessment instrument. (Stipulation of Fact No. 2, Vol. II., pp.12-13). The ARD Committee has consistently decided Student should take the TAKS-ALT, an alternative assessment instrument to the standard TAKS tests. (R. Ex. 11, p. 259)(R. Ex. 22). The TAKS-Alt is for students with significant cognitive disabilities who access the curriculum through prerequisite skills or who are assessed on the curriculum through prerequisite skills. An IEP supplement specifically addresses the participation requirements for taking the TAKS-Alt. (Tr. Vol. III., pp. 31-32). Student’s father questions the propriety of administering the TAKS-Alt. (Tr. Vol. II, pp. 58-59, 77).
62. There are five criteria for TAK-Alt eligibility. Student meets all five of the TAKS-Alt criteria. (Tr. Vol. III, pp. 90-93). Student took the reading and mathematics TAKS-Alt and \*\*\*. (Tr. Vol. III, p. 108). From 2009 to 2010 Student made \*\*\* according to student’s TAKS-Alt scores. (Tr. Vol. IV, pp. 221-222).
63. At issue in this case is also the school district’s proposed schedule for \*\*\* grade. The school district proposed a fall term schedule of \*\*\*, and a PE/\*\*\* split. O&M would be provided once a week in place of the PE/\*\*\* split. The school district proposed a spring term class schedule of \*\*\* and a PE/\*\*\* split. The rationale behind the proposed class schedules was to prepare Student for the state required \*\*\* grade TAKS testing and to keep student on track to meet the minimum \*\*\* school requirements for \*\*\*. (P. Ex. 11, p. 295)(P. Ex. 14, p. 383)(Tr. Vol. III, pp. 87-88).
64. Student participates in a social club at the \*\*\* school called \*\*\*. \*\*\* is geared towards students with disabilities and run by special education personnel. The club’s focus is to work on social skills using role playing and social events. Student was very active in

- \*\*\*. (Tr. Vol. IV, pp. 59-60). In \*\*\* grade Student's ability to interact appropriately with peers improved from \*\*\* school. Student began to initiate conversation with peers, responded to peers when they initiated a conversation with student and conversed about appropriate topics. (Tr. Vol. IV, pp. 58-59).
65. Student's parents have consistently requested homework for Student. Student's parents are pro-active with a need to observe and understand student's educational progress. They view homework as a tool to help them understand what Student is working on at school. Student's parents also view homework as an opportunity for repetition and reinforcement of skills. Without homework as an aspect of student's educational program, Student loses that opportunity and student's parents continue to have questions about student's educational progress. (Tr. Vol. I, pp. 101) (Tr. Vol. II., pp. 74, 76-77). Student would benefit from daily homework. It could have a positive effect on student's self esteem, develop a sense of responsibility and reinforce and add to student's basic fund of knowledge. (Tr. Vol. IV, p. 322).
66. This year the school district has largely complied with an agreement to send home Student's work samples every three weeks. (Tr. Vol. II, pp. 237-238). Although school personnel disagree that Student needs daily homework the ARD decided teachers would have the option of assigning homework at their discretion. (Tr. Vol. III, p. 100)(Tr. Vol. IV, p. 209-210).
67. Student participated in two extra curricular events in \*\*\* school: the \*\*\* and the \*\*\*. The school district facilitated Student's participation in these events. The \*\*\* is an annual event where students with disabilities compete in various \*\*\* or experience related activities. Student performed very well at the \*\*\*. The \*\*\* is a competition for students with visual impairments at the \*\*\* with a focus on the use of assistive technology skills including \*\*\*, keyboarding, note-taker, and the computer. Student also performed well at the \*\*\*. (Vol. I., pp. 252-253)(Tr. Vol. III., pp. 245-246).
68. The parties agree Student needs to work on English and math skills for the entire school year. (Tr. Vol. III, p. 82). For the current school year the school district proposed an integrated approach to teaching Student English and math. The notion is that student would continue to receive instruction in those classes but also continue to work on English and math goals in student's other academic classes. Speech and some O&M skills were also to be reinforced and practiced throughout student's academic classes using this integrated instructional approach as well as through direct and consult services. The proposed IEP goals and objectives address Student's instructional needs as well as aspects of the expanded core curriculum. (R. Ex. 10, pp. 19-26, 28)(Tr. Vol. III, pp. 82-84) (Tr. Vol IV., pp. 218-219).
69. During the 2009-2010 school year Student's IEP was implemented using a variety of instructional techniques and strategies appropriate to meet student's needs as a student

- with visual and cognitive impairments. Student's classroom teacher used tactile and manipulative materials, \*\*\*, oral instruction, assistive technology, repetition, classroom routines, and high interest and real life situations and materials for instruction on student's individually designed IEP goals and objectives and on selected TEKS objectives. Student made progress on student's academic IEP goals and objectives in both English and math during \*\*\* grade. (P. Ex. 42, pp. 825-828)(R. Ex. 13, 19, 20)(Tr. Vol. IV, pp. 174-178, 182-184, 185-186, 189-190, 191-192, 195-196, 197-202, 203-204, 207-208, 213-214, 217, 245, 247, 252-253, 254). Student also made progress socially. (Tr. Vol. IV, pp. 211-213). The work in the classroom was reinforced and supported by the speech therapist, the O&M teacher, and the VI teacher. (P. Ex. 42, pp. 825-828)(Tr. Vol. IV, pp. 182, 207).
70. Extended school year services (ESY) were designed for the summer of 2009 prior to entering \*\*\* school. The ESY plan included academic instruction 5 days a week, direct speech therapy for 20 minutes three times a week, one OT 15 minute consult during the first summer session, direct O&M services for 45 minutes per week, direct VI services for 8 hours per week and consult VI services for 1 hour per week. The targeted areas for the ESY program were those stated on Student's current IEP at the time. (R. Ex. 2, p. 44).
71. The ESY IEP implemented in the summer of 2009 included academic goals and objectives evaluated by teacher made tests, observations, work samples, and a data collection sheet that was to be sent home electronically every 3 weeks. (R. Ex. 2, pp. 6, 8, 10, 12, 14). ESY also included speech therapy measured by observation and a data collection sheet. (R. Ex. 2, pp. 16, 18). The school district created and maintained documentation of Student's progress in meeting IEP goals and objectives during student's ESY program, including academic, speech, and O&M goals and objectives. (R. Ex. 4, pp. 1-9, 33-35). Student's parents apparently did not receive Student's ESY class work. (R. Ex. 6, p. 16). However, the ESY special education teacher provided Student's father with feedback and information about the summer program through a telephone conference and detailed responses to parental questions via email. (P. Ex. 6)
72. An ESY IEP was also proposed and implemented in the summer of 2010. It too included the continuation of working on IEP academic goals and objectives. The ESY program was provided in two four week sessions and included direct speech, O&M and VI services. (R. Ex. 10, pp. 6, 53)(R. Ex. 14). Student maintained academic, O&M, and, speech/language skills in the 2010 ESY program. (R. Ex. 12, 14).
73. In \*\*\* school the VI teacher communicated frequently with Student's parents, particularly student's mother. (Tr. Vol. III., pp. 248-249)(Tr. Vol. III., pp. 252-253). However, once Student moved to the \*\*\* school in \*\*\* grade communication was limited to weekly telephone conferences with Student's mother but those petered off by the end of the year. (Tr. Vol. IV, pp. 49-50). Student's mother has concerns about

whether school district personnel are accurately \*\*\* what Student writes in \*\*\*. She has identified a number of \*\*\* errors in some of Student's work samples. (P. Ex. 66) (Tr. Vol. II., pp. 243-244).

74. The school district typically provided Student's parents with draft IEP's 2-3 days prior to annual ARD meetings. As IEP's were revised at ARD meetings and as ARD meetings continued and reconvened over a period of time the school district provided Student's parents with the revised drafts. (Tr. Vol. II. pp. 214-215)(Tr. Vol. III., p. 77). Final ARD documents were provide either at the end of each meeting or mailed shortly thereafter. Student's father made corrections to ARD minutes, voiced concerns, and made written statements and submitted other documents to the ARD. The school district attempted to correct factual errors and made changes in ARD minutes at parental request. (Tr. Vol. III, pp. 95-96).
75. Student's father has been a very active participant in the ARD meetings for Student. School personnel have agreed to a number of parental requests and proposals including class placement and scheduling, mastery criteria, data collection, instructional focus, and IEP goals and objectives. School personnel have also explained and clarified a number of educational issues for Student's father at various ARD meetings and through frequent email communications. Student's father has had a great deal of input into Student's educational program. (P. Ex. 7, pp. 188-198)(P. Ex. 8, pp. 208-238)(P. Ex. 10, pp. 255-257)(R. Ex. 2, 3, 5, 6, 7, 8).

## DISCUSSION

### Legal Analysis to Determine FAPE: The Four Factors Test

In Texas the Fifth Circuit has articulated a four factor test to determine whether a school district's program provides FAPE. Those factors are:

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

*Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5<sup>th</sup> Cir. 1997).

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program in order to

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determine whether the program provided the student with FAPE. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 294 (5<sup>th</sup> Cir. 2009).

### First Factor: Individualized and Based on Assessment Data

#### Expanded Core Curriculum

Under state law students with visual impairments must be evaluated and then provided with instruction in not only the general regular core curriculum but also in the expanded core curriculum. *Tex. Educ. Code §§ 300.002(c)(e); 19 Tex. Admin. Code § 89.1055 (d)*. The evidence showed Student's IEP's included and addressed a number of the expanded core curriculum domains including O&M services, instruction in \*\*\*, development of tactual and auditory senses, and the use of assistive technology. Some self advocacy was addressed through the O&M IEP. Instruction in developing appropriate social skills was provided rather informally through naturally occurring interactions with classmates at school and the use of "teachable moments." Participation in the \*\*\* school club also addressed Student's social skill needs although it was not clear from the evidence how frequently the club met.

Student's \*\*\* needs were addressed through student's role as \*\*\*but student will need a more systematic approach to instruction in this domain in the future. The development of recreation and leisure skills are adequately met by Student's family enhanced by student's participation in the annual \*\*\* and \*\*\*.

While the evidence shows the school district engaged in a number of activities and addressed many of the expanded core curriculum skills through some specific IEP goals and objectives, instructional modifications, accommodations, and related services, it did so without clearly communicating what it was doing to Student's parents.

Student's educational program does not clearly establish or explain a systematic, well planned approach for the evaluation of the nine expanded core curriculum skill domains as state law requires. This aspect of student's program does not meet student's individualized needs. *Tex. Educ. Code §§ 300.002(c)(e); 19 Tex. Admin. Code § 89.1055 (d)*.

### Second Factor: LRE

Student is being educated with student's non-disabled peers to the maximum extent appropriate with student's placement in the ALS classroom and inclusion in Choir and PE. There is no real dispute that the program was administered in the least restrictive environment. *34 C.F.R. § 300.114(a) (2) (i) (ii)*.

### Third Factor: Coordinated, Collaborative Manner

The evidence established that Student's program is being provided in a coordinated, collaborative

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manner. The evidence showed the VI and classroom teacher were in close and constant communication on an almost daily basis. The classroom teacher provided the VI teacher with lessons and other instructional materials that needed to be \*\*\* ahead of time. The VI teacher ensured this was done so. They also consulted and brainstormed on how best to present concepts to Student and used assistive technology as well as tactual and other types of manipulative materials for instruction.

The PE teacher was also supported by related service personnel in securing certain kinds of equipment for Student to facilitate student's participation in PE. The O&M specialist consulted with school personnel in order to assist Student in navigating safely around the school environment. Furthermore, the evidence showed the school district attempted to respond to parental requests for information and clarification as well as incorporating many parental proposals and suggestions on placement, class selection, mastery criteria, and instructional focus. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F 2d at 253.

#### Fourth Factor: Educational Benefit

The evidence showed that the intersection of Student's various disabilities pose unique challenges for learning. Although student continues to struggle with academics and requires repetition and re-teaching of previously learned material, the evidence also showed that Student is making some meaningful educational progress. Furthermore, the evidence showed that Student showed progress in developing social skills, becoming somewhat more independent in terms of adjusting to classroom routines, and interacting more appropriately with peers. In sum, the preponderance of the evidence demonstrated Student received both academic and non-academic benefit from student educational program. *Bd. of Educ. of Hendrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 2020 (1982); *Adam J. v. Keller Ind. Sch. Dist.*, 328 F. 3d 804, 808-809 (5<sup>th</sup> Cir. 2003)(*FAPE need not be the best possible IEP nor one that will maximize potential*).

#### Proposed Class Schedule

The evidence shows that the proposed class schedule for 2009-2010 was reasonably calculated to provide Student with the requisite meaningful educational benefit. The proposed schedule includes a 90 minute weekly session for O&M which student needs in order to have enough time to engage in the community lessons necessary to address student's expanded core curriculum skills of navigating independently and using \*\*\*. The evidence showed that the proposed 90 minute split period of PE and \*\*\* would be sufficient to address student's minimum need for daily physical activity (of 45 minutes per day) as well as provide a forum for continued \*\*\* and social interaction with non-disabled peers.

The proposed schedule includes math and English classes and adds social studies and/or science to Student's program. Although it is somewhat of a fiction to place Student in an ALS "geometry" class student will be able to continue to work on student's math IEP goals and

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objectives with access to some TEKS concepts appropriate to student's cognitive abilities. The integrated approach to instruction in the content classes provides Student with appropriate peer level subject matter at an instructional level that meets student's needs while providing a context for the continuation of practice and mastery of basic and functional math, reading and writing skills.

Some adjustment to the proposed class schedule for the current spring semester is necessary given the impact of the stay put rule on Student's program while this litigation was pending. This fall semester student has essentially remained in the class schedule that was in place when the request for hearing was filed – i.e., in the spring semester of \*\*\* grade. Therefore, a new class schedule for the remaining spring semester of the current school year needs to be designed by the ARD – it should include PE and \*\*\* in a split 90 minute class period, 90 minutes once a week of O&M training, and speech services and other related services as proposed.

The schedule will need to include class periods for reading/language arts, math, and either a social studies or science class. Whatever academic class is not selected this spring semester can be added to Student's schedule next school year. Student may be a semester behind due to this litigation and the effect of the stay put rule on student's \*\*\* school program. *See, 34 C.F.R. § 300.518 (a)(d)*. However, future ARD meetings will be able to make appropriate adjustments to Student's educational program including the possibility of extending student's \*\*\* school program an extra semester or by attending summer school and/or independent learning opportunities.

The O&M specialist and the speech therapist need to work with the members of the ARD and Student's teachers to ensure student is not pulled out of the PE/\*\*\* classes since student needs both on a daily basis. Instead, the related service schedule should be planned in consultation with the ALS and VI teachers where there can be some flexibility in the use of student's academic time for that purpose.

#### \*\*\* Plan

The evidence showed that the proposed \*\*\* plan contemplates Student's mastery of \*\*\* school minimum required courses. Continued access to educational services from the school district though possible is not guaranteed under the proposed \*\*\* plan. *34 C.F.R. § 300.324 (b)(c)*. The evidence also shows that Student has a complex set of needs in terms of both academics and expanded core curriculum skills that may require extended educational programming. There is no way of knowing what student's future needs may be after \*\*\* school. Student's ability to complete and benefit from modified coursework in \*\*\* school subjects such as \*\*\* is suspect – student's overall academic skill levels are still \*\*\* grade level.

In that regard, the proposed new \*\*\* plan does not meet Student's individualized needs at this time. The original \*\*\* plan does. This does not mean that Student should not continue to receive instruction in the ALS academic classes. Instead this means only that while it is appropriate for Student to work towards a \*\*\* student should do so under an IEP designed by the ARD that

addresses student's individual academic as well as expanded core curriculum needs rather than working through the \*\*\* school curriculum. *Michael F., supra*

#### \*\*\* Instruction

The evidence shows that Student needs continued instruction in the use of the \*\*\* in order to access the math curriculum. It is not appropriate for Student to simply learn the entire \*\*\* since the \*\*\* includes many mathematical operations and concepts that are not appropriate for Student. The evidence showed that teaching Student the \*\*\* in the context of a specific math lesson is beneficial.

It is also appropriate to provide Student with reinforced practice and memorization of introduced \*\*\* for mastery and retention. The use of homework and/or daily school exercises may be appropriate for this purpose. However, Petitioner did not meet petitioner's burden of proving that specific one to one instruction in isolation and mastery of the entire \*\*\* is appropriate before integrating the use of the \*\*\* into daily math class. *Schaffer v. Weast, 546 U.S. 49, 62 (2005)(burden of proof in special education hearing is on party seeking relief).*

#### Use of \*\*\*

The evidence showed that Student needs the use of \*\*\* at times and that the school district has not eliminated it from Student's program. Instead, the credible evidence establishes that Student needs to continue to learn how to use other assistive devices and equipment to access the general curriculum and foster independence – the use of a \*\*\* and increasing Student's "mental math" abilities are also appropriate strategies for Student in developing mathematical skills. The evidence showed that the \*\*\* can be useful and has its place in student's program but that it would not be appropriate to limit Student to the \*\*\* before moving on to learning other strategies and technology. Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast, supra.*

#### Data Collection Methods

Student's father may disagree with the mastery criteria or data collection methods stated in Student's IEP's but the law does not require one method of measurement over another. *34 C.F.R. § 300.320 (a)(2)(3).* The evidence showed that Student's parents were provided with meaningful parental participation in the design and implementation of Student's educational program – even if they did not always receive graded work or progress reports in a timely manner. Petitioner did not meet petitioner's burden of proving otherwise. The real problem here is a lack of effective communication between home and school about Student's educational activities and how they address Student's needs.

Improved and more frequent communication between home and school is needed to explain and

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clarify weekly educational activities and to provide guidance to Student's parents on how and what to reinforce at home. Daily homework would be of benefit not only to Student (by meeting student's need for repetition and reinforcement) but as a conduit for communication between Student's parents and school staff to support instructional objectives.

However, parents, no matter how well intentioned, do not have a legal right to dictate the use of a specific methodology or instructional approach. *Lachman v. Illinois Bd. of Educ.*, 852 F 2d 290, 297 (7<sup>th</sup> Cir. 1988). Furthermore, Petitioner did not meet petitioner's burden of proving that graded class work or tests were not provided in a timely manner in order to verify Student's educational progress. Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast, supra*.

### Compensatory Math Instruction

The evidence showed there was a clerical error in \*\*\* school ARD documents stating the number of hours of math instruction. It is understandable that Student's father advocated for additional math instruction because this is so clearly a need for Student as student continues to struggle with learning and retaining basic mathematical facts, operations and concepts. However, compensatory services must be based on educational need and not on a clerical mistake in ARD paperwork. *Branham by Branham v. District of Columbia*, 44 IDER 149 (D.D.C. 2005)(*compensatory awards must be based on a fact specific analysis of the student's loss of educational benefit designed to restore student to where student would be but for the deprivation of FAPE*).

The evidence showed that the school district provided a considerable amount of additional math instruction to Student in response to parental requests. It was certainly appropriate to work on new math goals and objectives. The evidence showed Student receives appropriate math instruction as an aspect of student's educational program and has made some meaningful educational progress. Petitioner did not meet petitioner's burden of proving the need for additional compensatory math instruction. *Schaffer v. Weast, supra*.

### IEE Recommendations

The evidence was confusing and inconclusive on the issue of whether Student's educational program included a number of recommendations from an IEE. Even if it didn't Petitioner did not meet petitioner's burden of proving the educational program failed to provide FAPE. While the ARD must consider and review all data, including outside evaluations, it is not required by the IDEA to accept or include the recommendations of any one individual or data source. *34 C.F.R. § 300.324 (a)(1)(ii)(iii); 19 Tex. Admin. Code § 89.1050 (a)*.

### Individualized IEP

The evidence establishes Student's IEP is individualized and based on student's unique set of

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needs. Overall, the evidence showed that the academic goals and objectives met student's needs to access the general curriculum. This access was supported by appropriate related services, assistive technology, the use of manipulative instructional materials, and adapted and modified instruction and accommodations. However, there was also evidence that the IEP's lacked clarity and focus in addressing Student's expanded core curriculum needs.

There was some evidence that Student's expanded core curriculum needs were not clearly identified in student's IEP or through the ARD process. In addition, the evidence showed that Student needs daily PE and \*\*\* and by sharing a single 90 minute class as proposed Student should not be removed from that class period for the purpose of providing related services such as speech and/or O&M. Those are the only aspects of Student's educational program that do not meet student's individual needs.

### Extended School Year Services

Petitioner did not meet petitioner's burden of proving that a failure to provide Student's parents with documentation of the 2009 ESY services resulted in a failure to provide Student with FAPE. Instead, the evidence showed that student worked on appropriate academic and expanded core curriculum skills during the 2009 ESY program. The miscommunication or lack of clear information to Student's parents about the summer program (i.e., who was doing what with Student and when) did not result in a lack of meaningful educational benefit and fulfilled its purpose in preventing regression. *19 Tex. Admin. Code § 89.1065*

Similarly Petitioner did not meet petitioner's burden of proving the 2010 ESY services were not reasonably calculated to provide the requisite educational benefit. Again, the evidence showed the 2010 program continued to address Student's needs to avoid regression in skills. For ESY purposes this all the IDEA requires. *Id.*

### CONCLUSIONS OF LAW

1. The school district's proposed program and placement for the 2010-2011 school year is reasonably calculated to provide Petitioner with a free, appropriate public education within the meaning of the IDEA with the exception of the following aspects of the proposed program:

- The proposed class schedule and use of \*\*\* is appropriate with the exception of using the proposed PE/\*\*\* class split for O&M services;
- The proposed \*\*\* plan is not appropriate for Student. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5<sup>th</sup> Cir. 1997).*

2. The school district's data collection methods during the 2009-2010 school year did not preclude Petitioner's parents of meaningful parental participation in student's educational program or result in the denial of FAPE. *34 C.F.R. § 300.322.*

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3. Petitioner is not entitled to compensatory math services. *G. v. Fort Bragg Dependent Schools*, 343 F. 2d 295, 308-309 (4<sup>th</sup> Cir. 2003)(*compensatory education is an award of services to compensate for a deficient educational program provided in the past*).

4. The school district is not required to adopt the recommendations of an IEE but only to ensure that it is considered and reviewed by the ARD Committee. 34 C.F.R. § 300.324 (a)(1)(ii)(iii).

5. The IEP implemented during the 2009-2010 school year was sufficiently individualized in terms of the manner in which educational services were provided except to the extent that the program did not clearly identify Student's expanded core curriculum needs through assessment or address those needs in student's IEP. *Tex. Educ. Code § 300.002; 19 Tex. Admin. Code § 89.1055(d)*.

6. Petitioner was not denied a free, appropriate public education for the lack of documentation provided to student's parents about 2009 extended school year services. Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

7. The school district's 2010 extended school year services were reasonably calculated to provide Student with the requisite legal benefit; i.e., to avoid regression of skills. *19 Tex. Admin. Code § 89.1065*.

8. Respondent is not entitled to a declaratory judgment. *Tex. Civ. Prac. & Rem. Code § 37.002; 34 C.F.R. §§ 300.323, 300.324 (b), 300.507*.

### **ORDERS**

Based upon the foregoing findings of fact and conclusions of law it is therefore **ORDERED** that Petitioner's requests for relief are **GRANTED IN PART and DENIED IN PART** and as modified herein: the parties shall convene an Admission, Review & Dismissal Committee meeting (ARD) within 10 school days of the date of this Decision for the purpose of:

- revising Student's \*\*\* plan as described herein;
- designing the spring 2011 semester class schedule as proposed by the school district including 90 minutes of O&M training per week, splitting one daily 90 minute class period between PE and \*\*\*, but ensuring that pull out related services (including O&M) are not implemented during the 90 minute PE/\*\*\* split class period;
- devising a weekly communication system to provide Petitioner's parents with information, guidance, and support in reinforcing concepts and skills taught at school at home;
- devising a daily homework plan; and,
- scheduling an evaluation by the VI teacher and O&M specialist of Student's expanded core curriculum needs (which may be conducted through a review of existing evaluation data, educational records, and/or additional testing at the discretion of the VI teacher and O&M

Decision of the Hearing Officer

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specialist) with a written report to be completed no later than 20 school days from the date of the ARD.

It is further **ORDERED** that another ARD shall be scheduled within 10 school days from the date the written report of the expanded core curriculum evaluation is completed for the purpose of reviewing Petitioner's current IEP and overall educational program and to identify and explain to Petitioner's parents how the IEP and educational program address Petitioner's expanded core curriculum needs.

It is further **ORDERED** that the class schedule in place for the 2010 fall semester under the "stay put" rule continue through the end of the fall semester in order to allow the parties an adequate opportunity to implement these Orders unless the parties agree otherwise.

It is further **ORDERED** that Respondent's request for a declaratory judgment is **DENIED**. It is further **ORDERED** that Petitioner's request for attorney's fees as sanctions for Respondent's request for declaratory judgment is **DENIED**. It is further **ORDERED** that all other relief requested not specifically stated herein is **DENIED**.

**SIGNED the 10th day of November 2010**

**/s/ Ann Vevier Lockwood**  
Ann Vevier Lockwood  
Special Education Hearing Officer

#### **NOTICE TO THE PARTIES**

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. *19 Tex. Admin. Code Sec. 89.1185 (p); Tex. Gov't Code, Sec. 2001.144(a) (b).*

**BEFORE A SPECIAL EDUCATION HEARING OFFICER  
STATE OF TEXAS**

**STUDENT, bnf**

**Parent,**

**Petitioner,**

**v.**

**LEWISVILLE INDEPENDENT  
SCHOOL DISTRICT,**

**Respondent.**

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**DOCKET NO. 117-SE-0110**

**SYNOPSIS**

**Issue # 1:**

Whether school district's proposed program and placement for 2010-2011 school year reasonably calculated to provide \*\*\* year old student with \*\*\* visual impairment, speech impairment, \*\*\* and cognitive deficits with FAPE; specifically whether use of \*\*\* appropriate, proposed \*\*\* plan appropriate, proposed IEP goals and objectives measureable and appropriate, integration of \*\*\* instruction into academic life skills math class appropriate, and whether student needs access to use of \*\*\* to develop math skills.

**Held: FOR THE STUDENT IN PART AND THE SCHOOL DISTRICT IN PART**

Use of \*\*\* appropriate with exception of using split PE/\*\*\*\* class for pull out related services. Proposed graduation plan not appropriate. IEP contained measureable, objective and appropriate goals. Integration of \*\*\* into academic life skills math class appropriate. Student had access to \*\*\* to develop math skills but also needed access to \*\*\*. **34 C.F.R. §§ 300.17, 300.34, 300.39, 300.101, 300.105**

**Issue # 2:**

Whether school district's data collection methods precluded student's parents from meaningful parental participation in student's educational program or resulted in the denial of FAPE.

**Held: FOR THE STUDENT IN PART AND FOR THE SCHOOL DISTRICT IN PART**

Student did not meet burden of proving data collection methods failed to provide parent with meaningful participation in student's educational program. Ample evidence established student's parents actively involved in ARD meetings, had opportunity to ask questions, provide input, proposals, suggestions, and submits requests and that school district incorporated number of parental suggestions and requests. However, parents did not have legal right to dictate use of specific methodology. **34 C.F.R. § 300.322**

**Issue # 3:**

Whether student entitled to compensatory math instruction.

**Held: FOR THE SCHOOL DISTRICT**

Compensatory services appropriate to compensate for deficient educational program provided in the past not for clerical error in stating number of hours of special education math instruction in ARD documents. Student did not meet burden of proof on this issue.

**34 C.F.R. § 300.513**

**Issue# 4:**

Whether school district required to adopt recommendations of an IEE.

**Held: FOR THE SCHOOL DISTRICT**

ARD required to review and consider all evaluations but no legal requirement to adopt IEE recommendations. Evidence confusing and inconclusive as to whether school district did so. Student failed to meet burden of proof on this issue. **34 C.F.R. § 300.324**

**Issue # 5:**

Whether IEP implemented in 2009-2010 sufficiently individualized in terms of manner in which educational services provided.

**Held: FOR THE STUDENT IN PART AND THE SCHOOL DISTRICT IN PART**

Student's individualized needs were met with exception of lack of clarity in assessment of student's needs under expanded core curriculum required for students with visual impairments. Program as stated in IEP and through ARD process did not clearly identify how student's core curriculum needs were met. School district and parent required more effective communication, including assignment of daily homework for student as conduit for communication and to address student's need for repetition and practice for learning. In all other respects student's program provided FAPE. **Tex. Educ. Code § 300.002; 19 Tex. Admin. Code § 89.1055(d)**

**Issue# 6:**

Whether student denied FAPE by alleged failure to provide parents with documentation of student's ESY services in 2009 and whether student's ESY services in 2010 provided requisite educational benefit.

**Held: FOR THE SCHOOL DISTRICT**

Both 2009 and 2010 ESY programs appropriate in preventing regression. School district did provide parents with information about student's educational progress. Student failed to meet burden of proof on this issue. **19 Tex. Admin. Code § 89.1065**

Synopsis

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