

**DOCKET NO. 188-SE-0413**

**STUDENT** § **BEFORE A SPECIAL EDUCATION**  
§  
§  
**VS.** § **HEARING OFFICER FOR**  
§  
**BROWNSVILLE I.S.D** § **THE STATE OF TEXAS**

**DECISION OF HEARING OFFICER**

\*\*\* (hereinafter “the student”) through student’s next friend, \*\*\* (Petitioner or parent), 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 Brownsville Independent School District.

In the Request for Hearing, Petitioner alleged that BISD denied the student a Free Appropriate Public Education (FAPE) during the one year preceding the date of filing, April 9, 2013. During the pre-hearing conference, the parties stipulated that the issues for hearing and requested relief are as set forth in Petitioner’s Request for Due Process Hearing. Petitioner alleged that the District failed provide the student a Free Appropriate Public Education and identified the following issues for hearing:

1. Whether the District failed to develop an IEP with appropriate goals and objectives specific to the student’s reading deficits and specific learning disability.
2. Whether the District failed to provide the student with an appropriate reading program to address the student’s individualized needs in reading.

As relief, Petitioner requested the following:

1. An Order requiring the District to provide the student with a Free Appropriate Public Education to meet the student’s unique and individual needs.
2. An Order requiring the District to provide a FAPE in the least restrictive environment.
3. An Order requiring to the District to provide and implement appropriate modifications, interventions and services appropriate for the student.
4. Compensatory education services in an amount deemed appropriate by the Hearing Officer.

**PROCEDURAL HISTORY**

Petitioner filed this request for hearing on April 9, 2013. Both parties requested a continuance of the hearing and extension of the decision due date to accommodate scheduling conflicts of school personnel. I found good cause to continue the hearing and the decision due date for a period of 13 days and the hearing was held on June 20, 2013. Petitioner was represented by attorney Christopher Jonas. The Brownsville Independent School District was represented by attorney Baltazar Salazar. 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 to August 2, 2013, to allow both parties an opportunity to submit written argument. The Decision was timely rendered and forwarded to the parties on August 2, 2013.

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 “RR” with a notation of the page number. Citations to Exhibits will be designated with a notation of the “P” followed by the exhibit number.<sup>1</sup>

### FINDINGS OF FACT

1. The Brownsville Independent School District (BISD) 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 (FAPE) 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. The student resides within the geographical boundaries of the Brownsville Independent School District. BISD is responsible for providing the student with a FAPE.

3. The District completed its triennial Full Individual Evaluation for the student on November 8, 2012. The ARD Committee reviewed the FIE and determined that the student meets eligibility criteria for special education and related services as a student with a Specific Learning Disability in Basic Reading, Reading Comprehension, Reading Fluency, Written Expression, Math Calculation and Math Problem Solving. P4-19; P7-1. Although the District’s FIE did not identify specific weaknesses in reading fluency, the ARD Committee identified the student with a Specific Learning Disability in Reading Fluency. P4-14.

4. According to the District’s FIE, the student’s standard score in Basic Reading Skills (consisting of Letter-Word Identification and Word Attack subtests) is \*\*\*, or below the 1<sup>st</sup> percentile when compared to student’s peers. Student’s expected performance in the areas of sight vocabulary, phonics and structural analysis is expected to be 0% mastery when compared to the average performance of student’s age peers. P4-10.

5. In Reading Comprehension, the student obtained a standard score of \*\*\*, ranking below the 1<sup>st</sup> percentile, when measuring comprehension, vocabulary, and reasoning. The student’s expected performance in reading comprehension was expected to be 0% mastery when compared to the average performance of student’s age peers. P4-10.

6. During the Passage Comprehension subtest, the examiner noted that the student’s reading was very labored and student struggled to decode almost every word presented and resorted to guessing some of the items with the assistance of picture clues. P4-10.

7. During the October and December, 2012 ARD Committee meetings, the ARD Committee considered whether limited English proficiency was a determinant factor for the disability and concluded it was not. P6-5; P7-1. In fact, neither ARD Committee determined the student as being limited English proficient. P6-5; P7-2.

8. Both ARD Committees also considered whether lack of instruction in reading and its essential components (phonic awareness, phonics, vocabulary development, reading fluency and reading comprehension) was a determinant factor for the disability and concluded it was not. P6-5; P7-1.

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<sup>1</sup> Respondent failed to make timely disclosure of documents pursuant to 34 CFR 300.512(a)(3) and did not offer any exhibits into evidence.

9. Both ARD Committees made findings that the TEKS objectives for the student's grade level exceed student's present level of educational performance and that student requires small group or individual instruction based on present competencies which are significantly below student's grade placement. P6-12; P7-9.

10. Both ARD Committees determined that the student should take the modified STAAR test because student receives modified TEKS instruction in reading and math. P6-12; P7-8.

11. According to the parent, she first asked for a Dyslexia evaluation during the student's \*\*\* grade year, when student first began to receive special education and related services. The parent testified that District personnel informed her that Dyslexia testing could not be completed because of the student's lack of reading skills. According to the parent, she asked for Dyslexia testing every year since that time. I find the parent's testimony to be credible, and, in fact, it is unrebutted.

12. The IEP developed at the October, 2012 ARD Committee meeting, contains one goal for Reading:

\*\*\* Grade TEKS: Within 36 instructional weeks and with Resource reading support, [the student] will comprehend selections using a variety of strategies with 70% mastery.

13. The October 2012 IEP contains the following benchmark or short-term objective for Reading:

\*\*\* Grade TEKS: Within 36 instructional weeks and with academic support in Reading [the student] is expected to use student's own knowledge and experience to comprehend passages with 70% mastery.

14. I find that the October 2012 short-term objective merely restates the long-term goal and is vague and unmeasurable.

15. The IEP developed at the October, 2012 ARD Committee meeting, contains one goal for Writing:

\*\*\* Grade TEKS: Within 36 instructional weeks and with English Resource for academic support, [the student] will work on writing/penmanship/capitalization/ punctuation and will compose original texts, applying the conventions of written language, including capitalization, punctuation, and penmanship to communicate clearly with 70% Mastery.

16. The October 2012 IEP contains the following benchmark or short-term objective for Writing:

\*\*\* Grade TEKS: Within 36 instructional weeks and with English Resource for academic support, [the student] is expected to capitalize and punctuate correctly to clarify and enhance meaning such as capitalizing titles, using possessives, commas in a series, commas in direct address, and sentence punctuation with 70% Mastery.

17. I find that the October 2012 short-term Writing objective merely restates the long-term goal and is vague and unmeasurable.

18. The IEP developed at the October, 2012 ARD Committee meeting, contains one goal for Math:

\*\*\* Grade TEKS: Within 36 instructional weeks and with Math Resource for academic support, and by using underlying processes and mathematical tools, [the student] will apply Grade \*\*\* mathematics to solve problems connected to everyday experiences and activities in and outside of school with 70% Mastery.

19. The October 2012 IEP contains the following benchmark or short-term objective Math:

\*\*\* Grade TEKS: Within 36 instructional weeks and with Math Resource for academic support, [the student] is expected to select or develop an appropriate problem-solving strategy, including drawing a picture, looking for a pattern, systematic guessing and checking, making a table, working a simpler problem or working backwards to solve a problem with 70% Mastery.

20. In December, 2012, following a review of the student's FIE, the ARD Committee adopted the same Reading, Writing and Math goals and objectives contained in the October 2012 IEP. P6-7-8; P7-4-5.

21. The ARD Committee adopted the following accommodations for reading: Oral administration (i.e., read questions and answer choices to student); emphasis on major points, shortened instructions (1-2 steps); student repeats/explains instructions; visual aids; teacher check for understanding; directions given in a variety of ways/simplified vocabulary; reduced assignments/tests; opportunity to leave class for specialized assistance (Content Mastery support); use multiple choice tests, limit answer choices to 3; assignment notebooks/trackers; minimize distractions to student; preferential seating; small group setting for testing. P6-9; P7-6. The ARD Committee adopted these same accommodations in all subject areas, adding the accommodation of supplemental aids in Math, and no penalty for spelling and grammatical errors in English. The student's IEP includes almost every modification provided on the pre-printed IEP form. P6-9; P7-6.

22. The schedule of services adopted by both the October and December 2012 ARD Committees provides for General Education placement in all core subjects, with Resource class support in Reading, Language Arts and Math. P6-15; P7-11. However, neither IEP contains specific goals or objectives for the resource class other than mastery of the \*\*\* grade TEKS (Texas Essential Knowledge Skills) curriculum. Additionally, the IEP does not address goals or services specific to the student's Dyslexia-related deficits. P6-15; P7-11.

23. BISD offers a specific Dyslexia class, but BISD's ARD committee members did not recommend a Dyslexia class for the student. According to the parent, BISD's evaluator told her the student could not read at a sufficient level to qualify for the class. RR-41-43; RR-188. I find the parent's testimony to be credible.

24. During the December, 2012, ARD Committee meeting, the parent expressed her disagreement with the evaluation due to the failure to identify Dyslexia as a specific characteristic of student's learning disability and the District's failure to offer Dyslexia services. P7-13; RR-53. Despite finding skill deficiencies in basic reading that would be consistent with Dyslexia, the FIE did not include recommendations for coordinated, intensive instruction to address the student's Dyslexia-related skill deficiencies. P4. The parent requested an IEE, which was agreed to by the District.

25. The student is an English-speaking student and has not received ESL instruction since \*\*\*. Student speaks English and Spanish at home and English at school. RR-25.

26. The student's parent observed that student could not master \*\*\* grade reading and language arts goals as contained in student's IEP because student reads at a first grade level. RR33-34. The parent's testimony regarding student's inability to read was credible, notwithstanding the District's assertion that she does not have the sufficient educational background to provide an opinion on student's academic progress. The

parent's testimony is also supported by the testimony and the report of the independent evaluator.

27. The student's deficits in reading have an impact across all subject areas. For example, the ARD Committee noted that the student has difficulty in math in that student cannot solve word problems that involve more than one step. The ARD Committee also noted that student has difficulty spelling "irregular" words and difficulty transferring student's thoughts to paper. Student has difficulty recalling facts from stories student has read, but can answer questions after text is read to student. P6-5.

28. It is undisputed that the parent requested a Dyslexia reading program for the student when student first began to receive special education services in \*\*\* grade, and at later ARD committee meetings prior to the time the parent filed her Request for Due Process Hearing. It is also undisputed that BISD did not provide a Dyslexia class for the student until after it considered the IEE at the ARD meeting on June 4, 2013, and after the parent filed her Request for Due Process Hearing. RR43-44; RR135; RR144; RR166-167; RR188.

29. The IEE was completed by an experienced Certified Educational Diagnostician and Texas Professional Educational Diagnostician on March 3, 2013. P5; RR83-85.

30. The IEE evaluator's testing identified the student as having a Learning Disability in basic reading skills, reading comprehension, written expression, and also Dyslexia. RR86, 94-96; P5-3-5, 7-8, 10-13.

31. According to the IEE, the student's reading performance is equivalent to a first grade, second month skill level and student cannot read basic sight words. Student's reading level was too low to attempt a test for reading fluency as it would have been stressful and frustrating for student. RR96-97, 118-119.

32. The IEE also reflects that the student's cognitive ability is in the average range, with an IQ of \*\*\*. RR103. According to the evaluator, the student's reading deficits are not attributable to student's intellectual functioning. RR-120.

33. Based on criteria from the state Dyslexia handbook, the evaluator determined that the student meets the criteria for Dyslexia based on deficiencies in letter-word identification, word decoding, spelling, reading comprehension, written expression, phonological processing, phonological awareness, and rapid word naming that cannot be attributed to lack of classroom instruction or lack of adequate intelligence. RR98-101, 108-109.

34. The independent evaluator observed that the student uses both Spanish and English in conversation and in different settings. The student displays some strengths and weaknesses in oral language consistent with second-language acquisition and not caused by any impairment in student's oral language functioning. RR90-91.

35. The independent evaluator concluded that there were no sociological or emotional factors affecting Student's learning ability. RR92; P5.

36. The student's classroom teacher failed to provide the independent evaluator with requested information regarding student's classroom performance. RR111-112.

37. The independent evaluator concluded that the student's deficits in basic reading skills, reading comprehension, written expression and deficits related to Dyslexia are severe. RR-109; P5. The student's reading difficulties are evidenced by student's inability to break apart words with phonetic analysis, inability to recall names of pictured objects, and difficulties with verbal similarities, word reasoning, and retrieval fluency.

RR-105-109; P5.

38. The independent evaluator recommended that the student receive intensive, explicit and systematic reading instruction on a daily basis in a small group, targeting student's areas of weakness in reading and writing skills. RR-108; P5.

39. The student currently reads below the level expected for a child with Dyslexia who has average intelligence and adequate functional oral vocabulary skills, and who has been receiving appropriate resource instruction in reading and language arts. RR-113, 119, 130, 131.

40. The independent evaluator testified that the student's IEP objectives for special education that required reading and language arts instruction at the \*\*\* grade TEKS curriculum level were inappropriate at the time of the hearing and at the time the goals were written. RR147-148. I find, based on a preponderance of the evidence, that the student's IEP goals and objectives for reading and language arts are inappropriate for student.

41. The independent evaluator testified, credibly, that the student's reading goals inappropriately focused on comprehension at a \*\*\* grade level when student currently requires focus on developing basic reading skills beyond a first grade level and identifying basic sight words. RR138-139.

42. The independent evaluator testified, credibly, that the student's writing goals inappropriately focused on penmanship, capitalization and punctuation, which are not problem areas for the student. Rather, student's goals should focus on spelling basic sight words. RR139-140.

43. I find, based on a preponderance of the evidence, that the student was not reading at a \*\*\* grade TEKS curriculum level prior to the time of student's IEE and at all times during the 2012-2013 school year. RR-147. BISD's IEP goals for the student in Reading and Language Arts during the 2012-2013 school year were not measurable and well beyond the student's ability level. RR137-139.

44. The independent evaluator testified, credibly, that there is no reason for a \*\*\* grade student with Dyslexia who has been in school since \*\*\* to continue struggling to read at a first grade level, other than lack of adequate teaching in reading. RR119-121. I find, based on a preponderance of the evidence, that the student's lack of progress in reading is due to the District's failure to provide an appropriate public education, specifically, its failure to provide appropriate specially designed instruction to meet the student's unique educational needs.

45. The parent and the independent evaluator acknowledged the student's passing grades during the school year, with the exception of failing one six-week period in reading. RR-75-76, 115-116. The parent questioned student's grades and attributed to them to the number of accommodations provided to student, including reading all materials to student rather than teaching student to read. RR-59-60, 75-76. Given the student's overall reading performance based on both the FIE and the IEE, as well as the testimony of the independent evaluator and the parent, I find that the student's passing grades are not an accurate reflection of student's academic performance.

46. I find, based on a preponderance of the evidence, that appropriate reading services for the student include daily intensive phonics instruction, sight words instruction, using a multi-sensory strategy based on numerous specific and measurable objectives and that phonics instruction should be integrated in both reading and writing. The student's IEP for 2012-2013 fails to adequately address the student's needs. RR131-132, 141, 146.

47. The District's sole witness was the Special Services Administrator for the District. She testified based solely on a review of the student's record and her experience in logistically arranging for the student's IEE. RR157-158. She did not participate in any ARD Committee meetings or evaluation of the student. P6; P7. Her conclusory opinions that the student made progress based on student's promotion from grade, without any interaction or evaluation of the student, are accorded no weight. Further, the witness's testimony was generally evasive when questioned about student's Dyslexia and the District's lack of services. RR165, 165-169. I do not find the witness's testimony that BISD provided the student a FAPE to be credible.

48. The student's education program during the 2012-2013 school year was inappropriate to meet the student's individual needs. RR146.

## **DISCUSSION**

The issues in this case are as follows:

*Did the District develop an IEP with appropriate goals and objectives specific to the student's reading deficits and specific learning disability?*

*Did the District fail to provide the student with an appropriate reading program to address the student's individualized needs in reading?*

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. *Schaffer v. West*, 126 S.Ct. 528 (2005); *Tatro v. Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983). 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 the program enable the student to receive some educational benefit from student's program. The Petitioner has met this burden.

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 (5<sup>th</sup> Cir. 2000).

### **1. Procedural Sufficiency**

IDEIA establishes certain procedural requirements in 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 (5<sup>th</sup> Cir. 2003). In this case, the District and the ARD Committee committed several procedural errors that impeded the child's right to a FAPE and resulted in a loss of educational benefit to the child in that the student's IEP contained objectives that are vague and incapable of measurement that impeded the student's access to a FAPE. Additionally, the IEP was not based on a complete assessment of the student's deficits. Since both of these errors are not only procedural, but also impact the substantive sufficiency of the IEP, these issues will be analyzed below.

## 2. *Substantive Sufficiency*

Petitioner complains that the student's IEPs for 2012-2013 school year was not appropriate. The school's program is appropriate if it is reasonably calculated to confer a meaningful 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 (5<sup>th</sup> Cir. 2000).

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 (5<sup>th</sup> Cir 1997); cert. denied, 522 U.S. 1047 (1998).

The 5<sup>th</sup> Circuit Court of Appeals has held that the four factors do not necessarily need to be applied in a particular manner or afforded the same weight. Rather, the factors are intended as a guide in the determining whether the student received a FAPE. *Richardson ISD v. Leah Z*, 580 F.3d 286 (5<sup>th</sup> Cir. 2009). In applying the *Michael F.* factors to this case, the critical issues are whether student's IEP was based on student's assessment and performance, individualized to meet student's unique needs, and whether positive academic and nonacademic benefits have been demonstrated.<sup>2</sup> In applying the relevant factors to the facts of this case, I find that the student's educational program for 2012-2013 school year through the date of hearing was not calculated to and did not provide a meaningful educational benefit. 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 (5<sup>th</sup> Cir. 1983). Petitioner has met this burden.

### *Is the Program Individualized on the Basis of the Student's Assessment and Performance?*

A fundamental principle of IDEIA is that disabled students have access to a free appropriate public education. During the relevant time frame, the preponderance of the credible evidence establishes that the student accessed no meaningful benefit from student's educational program in BISD because the program was not individualized for the student based on student's assessment and performance. The Petitioner testified, credibly, that she made numerous requests for the District to evaluate the student for Dyslexia and that the student was unable to read beyond a first grade level. The parent's testimony is supported by the testing completed by the District as well as the independent evaluator.

The District's FIE indicated skill deficiencies in basic reading consistent with Dyslexia, yet it failed to develop an IEP to address Dyslexia-related deficits. For example, the District's evaluator noted that the student performed below the 1<sup>st</sup> percentile in Basic Reading Skills and Reading Comprehension and further noted that the student struggled to decode almost every word presented and resorted to guessing some of the items with the assistance of picture clues. P4-10. The student's expected mastery in basic reading and reading comprehension when compared to average performance of age peers was determined to be 0%, and 1% in written expression.

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<sup>2</sup> The student received instruction in the general education setting, with special education support, which would appear to be an appropriate placement. However, the critical issue is the failure to deliver appropriate services in the student's placement.

P4-10, 11. However, the student's intellectual functioning was determined to be in the low average range by the District, with independent evaluator determining that student has an IQ of \*\*\*. P4-10, 11, 20; P5; RR-103. The District's findings are consistent with the findings of the IEE evaluator - the student could not read basic pre-primer and primer sight words despite having the cognitive capacity to do so. Despite the District's findings in its own evaluation, the District failed to further evaluate the student for Dyslexia and failed to develop a program to identify the deficits it identified. Rather, the IEP includes only one vague goal for mastery of reading comprehension and written expression at the \*\*\* grade TEKS level and no goals for Resource Reading and Writing. The reading and written expression goals aligned to the \*\*\* grade TEKS for reading comprehension and written expression are not appropriate for the student, who struggles to read at a first grade level.

IDEIA and its implementing regulations require that for students who take alternate assessments aligned to alternate achievement standards, the IEP must include a statement of benchmarks or short-term objectives. 34 CFR § 300.320(2)(ii). In this case, the ARD Committee determined that the student would take the modified STARR, an alternate assessment aligned to alternate achievement standards. P6, P7. However, neither the single reading nor the single written expression goal contains such short-term objectives. Rather, the short-term objective merely restates the annual goal aligned to the fifth grade TEKS, which is inappropriate according to the student's evaluations and the testimony of the evaluator.

The student has significant deficits in basic reading, reading comprehension and written expression. Additionally, the student's deficits related to student's Dyslexia are severe. However, the goals and objectives fail to address the student's weaknesses in phonics, recognizing basic sight words, basic reading skills, and spelling. RR-138-140. In fact, the goals for reading and writing are so vague that they are really not goals at all. The student in this case, has had the functional equivalent of no IEP for the 2012-2013 school year. This is a denial of FAPE.

Additionally, the District has wholly failed to provide special education services for the student as that term is defined under IDEIA. Special education and related services are defined as specially designed instruction to meet the unique needs of the disabled student. 34 CFR 300.39(a). The District wholly failed to provide specially designed instruction to meet the student's significant reading and writing deficits. Rather, the District merely provided accommodations for the student by adopting virtually every accommodation listed on its pre-printed IEP form. Accommodations, although important, are not a substitute for specially designed instruction. An education program that consists only of accommodations for this student does not meet the definition of special education as it is contemplated under IDEIA. According to the evaluator, the student requires systematic, daily intensive phonics and sight word instruction using multi-sensory strategies, including goals and objectives that specifically address student's severe deficits in basic reading, reading comprehension and written expression. The student's IEP goals and objectives in no way address the student's deficits and are not appropriate for student.

*Are positive academic and nonacademic benefits demonstrated?*

This factor addresses the meaningful benefit requirement under IDEIA. The student is entering the \*\*\* grade reading at a first grade, second month level. Although the District asserts that student has passed from grade to grade (\*\*\*), it is clearly evident based on the record that student has stalled in student's performance at the first grade level in that student is not able to read beyond that level. It would appear that the student has made passing grades due to the District's exclusive use of every accommodation available as a substitute for actually teaching student. The student has the intellectual ability and the motivation to read, according to the evaluator. However, rather than teaching student to read, the District has read to student. As the evaluator testified, there is no reason this student, with average intelligence and motivation, should not have been taught the strategies and compensation skills to read closer to student's grade level. RR-121. Based on the evidence, it is reasonable to conclude that the District has not provided an appropriate education.

Reading significantly impacts all areas of education, especially all core academic subjects. In fact, in reviewing the student's present levels of performance, the ARD Committee noted that student was unable to complete word problems in math or comprehend passages that student had read. The ARD Committee also documented that student expressed understanding when they read for student, rather than providing focused, specific goals and objectives to address student's reading deficits. P6-5; P7-2. The student's lack of progress in reading from the first grade to date is evident. The student's lack of meaningful benefit is clearly demonstrated by student's inability to read at even a basic level. The District's argument that the student has demonstrated academic benefit based on passing grades is without merit. It is incredulous to conclude under the facts of this case that the student's grades are an accurate reflection of student's progress. The parent appropriately questioned student's grades and attributed to them to the number of accommodations provided to student, including reading all materials to student, rather than the District teaching student to read. RR-59-60, 75-76. Given the student's overall reading performance based on both the FIE and the IEE, as well as the testimony of the independent evaluator and the parent, I find that the student's passing grades are not an accurate reflection of student's academic progress. Rather, I find that the student's lack of meaningful academic benefit is demonstrated by student's inability to read.

The District has wholly failed to provide appropriate goals and objectives or educational programming in the student's areas of need. The student requires appropriate goals and objectives to address student's specific learning disabilities as well as a Dyslexia program. The District's failure to provide such an IEP and a Dyslexia program has resulted in a denial of FAPE. 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 (5<sup>th</sup> Cir. 2000). The student's program has not produced and was not calculated to produce even trivial educational advancement in all critical academic areas because all critical academic areas are impacted by the student's ability to read.

### **RELIEF**

For relief, Petitioner requests prospective relief and compensatory services. Compensatory 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 (9<sup>th</sup> Cir. 1994). Thus, determining what compensatory relief is appropriate turns on a consideration of the extent of the denial as well as what services would be needed to provide a free appropriate public education in light of that denial.

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 the district'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.* Although a *per se* hour for hour award is not always warranted, it may be warranted under the facts of the case depending on the facts developed in the record.

In this case, the nature and equitable amount of compensatory services should be measured by the length of time the student was unable to access educational benefit from student's program due to the District's failure to recognize the significance of student's reading disability and student's Dyslexia, and its failure to develop

and implement an appropriate IEP, including provision of services specifically related to student's Dyslexia. Another factor that weighs in favor of the compensatory award in this case is the impact of the student's disability across all areas of student's education and the increasing gap in student's reading ability and student's grade level as student \*\*\* based on the District's failures.

The student's program provided no meaningful educational benefit for the 2012-2013 school year to the date of hearing for the reasons set forth herein. While there is no specific formula which must be applied in determining an appropriate award, the student's progress or lack of progress must be taken into consideration. In this case, the District failed to develop appropriate, measurable annual goals for the student, but instead identified only one goal in reading, writing and math<sup>3</sup> pertaining to mastery of the grade level TEKS. Moreover, the student's reading and language arts goals wholly failed to address the student's needs in the areas of student's Dyslexia-related deficits, i.e., phonetic awareness, word attack, recognition of sight words, and spelling. Not only are the goals adopted vague and not measurable, they are wholly inappropriate for student. This is the functional equivalent of no IEP at all. It cannot be said that the student made meaningful progress when progress is being measured by a goal that is neither individualized nor appropriate.

The student's specific learning disability is in Basic Reading, Reading Comprehension and Written Expression. Student has specific deficits related to Dyslexia that were not identified, and in fact were ignored. Reading, or the inability to read, impacts every subject area required of a student. As the student \*\*\* and core subjects become more difficult and require increased independent reading skills, the gap between student's reading performance and grade level becomes more significant. The student reads at a first grade level and, according to the expert, should not be had student received instruction designed to address student's Dyslexia-related deficits.

The student begins \*\*\* grade in the Fall of 2013 and reads at a first grade level. Given the student's cognitive abilities, there is no reasonable explanation for the significant deficit and lack of improvement other than the district's complete failure to provide a Free Appropriate Public Education. Therefore, based on the facts in this case, I find that it is appropriate to award the student compensatory educational services in the form of reading instruction specifically designed to address student's Dyslexia-related deficits. BISD wholly failed to provide appropriate services in the areas of reading and language arts for the entire 2012-2013 school year. According to the schedule of services, student should have received 270 hours of special education instruction in reading and language arts (45 minutes Resource in Reading and Language Arts per day). P6-15; P7-11. The failure to provide appropriate reading and language arts instruction negatively impacts the student's ability to perform in other areas, as evidenced by the over-use of classroom accommodations in all core academic subjects. An award of 270 hours of compensatory services takes into consideration not only the amount of hours the district failed the student in reading and language arts, but also the ongoing impact in all academic areas due to the student's inability to read beyond a first grade level and the severity of the student's deficit caused by the District's ongoing failure to recognize or address student's Dyslexia. Therefore, I am ordering the District to provide 270 hours compensatory education to address the student's Dyslexia-related deficits. Specifically, the District is ordered to provide 270 hours of 1:1 tutoring with a certified academic language therapist or other professional qualified to provide services for students with Dyslexia. All compensatory services shall be provided outside of the regular school day and may include a summer program. All compensatory services must be completed prior to the last instructional day of the 2014-2015 school year, or at a later time if mutually agreed upon by the parent and the District. In the event the District provides compensatory educational services over the summer months, these services shall be in addition to and not in lieu of Extended School Year services absent an agreement of the parent.

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<sup>3</sup> The parent's request for hearing and the evidence presented did not address the student's math performance or the services provided so there will be no compensatory services awarded that are specific to math.

The District shall convene an ARD Committee meeting within 10 school days of this Decision to develop a schedule for the provision of compensatory services. The District shall invite the IEE evaluator and implement her recommendations for goals and objectives for the compensatory service hours.

As prospective relief, the District shall convene an ARD Committee meeting to develop goals and objectives specifically designed to address the student's deficits in reading comprehension, basic reading and written expression (as well as math). The District shall invite the IEE evaluator to the ARD Committee meeting and implement her recommendations for goals and objectives for the student, and shall consider the impact of the student's reading deficits in all core academic areas, including math, and shall follow the recommendations of the IEE evaluator.

As additional prospective relief, the District shall provide the student with specific instruction in the form of a Dyslexia class or other program recommended by the IEE evaluator. The program shall include daily, systematic instruction both individually and in a small group, using multi-sensory strategies to address the student's reading deficits.

### CONCLUSIONS OF LAW

1. The student currently resides within the geographical boundaries of Brownsville 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. The student is eligible as a student with Specific Learning Disabilities in Basic Reading, Reading Comprehension, Written Expression, Math Calculation and Math Reasoning.

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. Weast*, 126 S.Ct. 528 (2005). *Tatro v. State of Texas*, 703 F.2d 823 (5<sup>th</sup> 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 (5<sup>th</sup> Cir. 2000). *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000). Petitioner has met that burden with regard to the educational program in place for the student during the 2012-2013 school year.

3. During the relevant time period, BISD denied the student a FAPE. Student's IEP goals were not reasonably calculated to provide an educational benefit in that they were not measurable and not specially designed to address the student's specific learning disabilities or student's Dyslexia-related deficits. Additionally, the student made no meaningful academic progress during the relevant time period as evidenced by student's lack of reading progress. 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 (5<sup>th</sup> Cir. 2000); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000).

4. 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). IDEIA requires that relief be designed to ensure that the student is appropriately educated within the meaning of IDEIA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9<sup>th</sup> Cir. 1994).

## ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, I hereby **ORDER** that the relief sought by the Petitioner is hereby **GRANTED** as follows:

1. BISD shall provide the student with compensatory education services consisting of 1:1 tutoring with a certified academic language therapist or other professional qualified to provide Dyslexia services. The amount of compensatory services shall be 270 hours to be completed no later than the last instructional day of the 2014-2015 school year, or at a time mutually agreed upon by the parent and the District. The compensatory services shall occur outside the regular school day and may include a summer program. If the student is eligible for ESY, then the compensatory services hours shall be in addition to the ESY program provided by the District. BISD shall convene an ARD Committee meeting to develop a schedule and specific goals and objectives for the compensatory hours. BISD shall invite the IEE evaluator to the ARD Committee meeting and implement her recommendations.

2. BISD shall convene an ARD Committee meeting to develop specific, measurable goals that address the student's deficits in Basic Reading, Reading Comprehension and Written Expression. Additionally, the ARD Committee shall consider and address the impact of the student's reading deficits in other core academic areas. BISD shall invite the IEE evaluator to the ARD Committee meeting and implement her recommendations for academic goals and objectives.

3. BISD shall provide the student with a Dyslexia program that includes daily, systematic instruction both individually and in a small group, using multi-sensory strategies to address the student's reading and writing deficits. BISD shall follow the recommendations of the IEE evaluator in the implementation of the Dyslexia program.

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

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

**SIGNED** this 2nd day of August, 2013.

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Sharon M. Ramage  
Special Education Hearing Officer

## 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 school days in accordance with 19 T.A.C. §89.1185(p). The following must be provided to the Division of Federal and State Education Policy of 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 August, 2013.

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Sharon M. Ramage  
Special Education Hearing Officer

## SYNOPSIS

**Issue No. 1:** Whether the District failed to develop an appropriate IEP with goals and objectives specific to the student's reading deficits and specific learning disability?

**Held:** For the Parent. The District failed to develop measurable annual goals designed to the meet the student's Dyslexia-related deficiencies and student's specific learning disabilities in basic reading, reading comprehension and written expression. The student takes an alternate assessment aligned to alternate achievement standards and the IEP failed to provide a description of benchmarks or short-term objectives specific to each IEP goal.

**Citation:** 34 CFR.320(a)(2)(ii).

**Issue No. 2:** Whether the District failed to provide an appropriate reading program to address the student's individualized needs in reading?

**Held:** For the Parent. The District failed to provide an appropriate Dyslexia program for the student and wholly failed to address her unique needs related to her specific learning disabilities in basic reading, reading comprehension and written expression.

**Citation:** 34 CFR § 300.39(a)(1)