

DOCKET NO. 179-SE-0409 (123-SE-0107)

STUDENT BNF PARENT § **BEFORE A SPECIAL EDUCATION**
§
VS. § **HEARING OFFICER**
§
EL PASO INDEPENDENT §
SCHOOL DISTRICT § **FOR THE STATE OF TEXAS**

DECISION OF THE HEARING OFFICER

** (hereinafter “the student”) through her next friend, ** (Petitioner), requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 *et. seq.* The Respondent is the El Paso Independent School District.

PROCEDURAL HISTORY

On January 16, 2007, Petitioner filed a Request for Due Process Hearing in Docket No. 123-SE-0107, alleging that Respondent failed to provide a Free Appropriate Public Education (FAPE) by failing to provide the student specially designed instruction, as follows:

1. EPISD failed to develop an appropriate IEP in that the student’s IEP did not include a statement of her present levels of academic achievement and functional performance.
2. EPISD failed to develop an appropriate IEP in that the student’s IEP did not include a description of benchmarks and short-term objectives aligned to an alternate assessment.
3. EPISD failed to provide an appropriate IEP in that the IEP did not include a statement of the student’s measurable annual goals, including academic and functional goals.
4. Petitioner alleged that these acts or omissions impeded the student’s right to a FAPE, significantly impeded the parent’s opportunity to participate in the decision making process, and caused a deprivation of educational benefits.

Petitioner requested the following relief:

1. An order requiring EPISD to conduct an ARD meeting and develop specially designed instruction to meet the student’s unique needs, including an IEP that:
 - a. contains a description of benchmarks or short-term objectives aligned to her alternate assessment.

- b. a statement of the student's present levels of academic and functional performance; and
- c. a statement of measurable annual goals including academic and functional goals designed to meet her educational needs that result from her disability.

On February 19, 2007, EPISD filed a Motion to Dismiss, claiming the hearing officer no longer had jurisdiction because it had made a settlement offer to Petitioner, offering her the relief she had requested. The Hearing Officer dismissed the complaint, finding that the settlement offer mooted the case. Petitioner thereafter filed a civil action in the United States District Court for the Western District of Texas, complaining of the Hearing Officer's dismissal. On March 30, 2009, the United States District Court for the Western District of Texas reversed the hearing officer's dismissal and remanded the case to the Texas Education Agency for a due process hearing. Petitioner then notified the Agency of the District Court's order and the Agency re-docketed the case and re-assigned it to the undersigned Hearing Officer on March 30, 2009.

This matter was initially set for hearing on April 17, 2009, but was continued to May 21-22, 2009, due to the pending motions to stay the hearing in the Federal District Court and the Fifth Circuit Court of Appeals. Following the denial of the motions to stay, the due process hearing was held on May 21-22, 2009. Petitioner was represented by attorney, Mark Berry. Respondent was represented by Evelyn Howard-Hand and Elena Gallegos. At the conclusion of the hearing both parties requested an opportunity to submit briefs and proposed findings of fact and agreed to a continuance of the decision due date. I found good cause existed to grant the continuance and established a post-hearing scheduling order, with a decision due date of July 21, 2009. Petitioner's counsel requested an additional continuance for post-hearing submissions on July 2, 2009 due to illness, and I found good cause to grant the continuance and extended the decision due date to August 11, 2009. The Decision was timely issued and forwarded to the parties via email and U.S. Mail on August 11, 2009.

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 volume number and page number. Citations to exhibits will be designated as "P" for Petitioner exhibits or "R" for Respondent exhibits, with a notation of the exhibit number.

Statute of Limitations

Petitioner filed her request for hearing on January 16, 2007, complaining that EPISD had failed to provide her with any special education services from the 2004-2005 school year through the date of filing. Respondent raised the affirmative defense of the one year statute of limitations. Prior to the date the matter was dismissed in 2007, Petitioner filed an "Opposition to Respondent's Motion to Dismiss, and Alternatively, Motion for Summary Judgment", and acknowledged that the one year statute of limitations applied and further clarified that she was only complaining of the May 15, 2006 IEP, which was well within the limitations period. *See* Administrative Record, pg. 0219. Following the remand from the United States District Court for the Western District of Texas, Petitioner re-urged her same request for hearing without

amendment. Additionally, Petitioner failed to plead or prove that she had been prevented from requesting the hearing prior to January 16, 2007 due to (i) specific misrepresentations by EPISD that it had resolved the problem forming the basis of the complaint; or (ii) that EPISD had withheld required information from the parent. *See* 20 U.S.C. §1415(f)(D). Therefore, the one-year statute of limitations applies in this case and all claims arising prior to January 16, 2006 are barred and will not be addressed in this Decision. *See* 19 T.A.C. § 89.1151(c); *Texas Advocates Supporting Kids with Disabilities v. Texas Education Agency*, 112 S.W.3d 234 (Tex. App.—Austin 2003, no pet.).

Findings of Fact

1. The student resides within the geographical boundaries of the El Paso ISD. El Paso ISD is responsible for providing the student with a FAPE. The student is eligible to receive special education and related services under the eligibility category of learning disabled. The student has a learning disability in basic reading skills, reading comprehension, listening comprehension, and math reasoning. (P-7; R-11).

2. During the student's **, ** and ** grade years (2004-2007), the ARD Committee exempted the student from the statewide assessment (TAKS) for reading and writing, and instead recommended that she be assessed according to an alternate assessment, the SDAA. In the ** grade, the student was responsible for ** grade instructional material on the writing SDAA. In the ** grade, the student was responsible for ** grade reading material on the SDAA. (R-65). The student failed the Math TAKS during the **, ** and ** grades, and the Science TAKS during the ** grade. During the student's ** grade year, the ARD Committee recommended that the student take the SDAA for math as well. (R-13, pg. 18; R-65, pg. 11)

3. The IEP in question developed on May 15, 2006, contains **no** measurable goals in any of the student's areas of need. (P-1; R-13)

4. The IEP developed on May 15, 2006 contains **no** short-term objectives that are aligned with the ARD Committee's expectations for the student on the SDAA. (P-1; R-13)

5. The IEP developed on May 15, 2006 contains **no** data regarding the student's then present levels of performance. (P-1; R-13)

6. The student's evaluation indicated a need for modified instructional and grading criteria based on her deficits in listening comprehension, basic reading skills, reading comprehension and math reasoning. (R-11, pg. 15).

7. The evaluation concluded that prior interventions (tutoring, modified or shortened assignments, and extra time for work completion) were not sufficient to enable the student to make meaningful educational progress without additional special education supports and services. (P-7; R-11)

8. The IEP developed on May 15, 2006 contained only three modifications which were to be provided in all subject areas: extra time for oral and written responses, modified

exams, and extra time for completion of assignments. (P-1, pg. 10; R-13). The IEP did not specify that the student was to receive tutoring, although the evidence supports a finding that the school provided some tutoring through general education.

9. Following the dismissal of this case in April 2007, the District convened an ARD Committee meeting to develop the student's IEP for the 2007-2008 school year on May 8, 2007. The IEP contains data regarding the student's then present levels of performance and IEP goals and objectives specific to the student's needs in the areas of reading comprehension, math reasoning and calculation, and listening comprehension. (R-33)

10. The May 2007 IEP also provided for 80 hours of compensatory education in the area of reading comprehension. The ARD Committee's stated purpose in providing the compensatory education was to provide necessary services to improve the student's reading comprehension following the District's failure to provide goals and objectives for reading in the student's prior IEP. (R-33, pg. 2-5)

11. The May 2007 ARD Committee also conducted a Review of Existing Evaluation Data and concluded that the student required supplemental instruction in the area of reading comprehension. (R-33, pg 40).

12. Beginning in the summer of 2007, the District began to provide the student with supplemental instruction in reading. (R-28)

13. Respondent made a settlement offer to Petitioner on January 25, 2007 which was rejected. (RR-24, 25 and 26) *See also* discussion of settlement offer as contained in the Court's opinion at *A. O. v. El Paso Independent School District*, Civ No. EP-07-CA-243-FM, 2009 U.S. Dist. LEXIS 50222 (W.D. Tex. March 30, 2009)

14. On March 29, 2007, Respondent notified Petitioner through her attorney that it intended to implement a general education reading program for the student with the parent's consent called the Voyager Passport Journeys. This was a general education program and would have only required a change in teachers. (R-28).

15. Following the dismissal of the case in April 2007, Respondent by and through its attorney attempted to schedule an ARD Committee meeting to address the student's IEP goals and objectives and attempted to invite the parent to participate. (RR-29, 30, 31). The ARD Committee proceeded with the meeting on May 15, 2007 without the parent's participation. The outcome of the ARD meeting was the development of the 2007-2008 IEP which contained measurable annual goals, additional modifications, and the provision of compensatory education. (R-33)

DISCUSSION

Mootness

On the day of hearing, Respondent filed a “Motion and Memorandum in Support to Introduce Evidence,” seeking the admission of evidence of subsequent remedial measures. Respondent asserted that the evidence was relevant on the issue of whether this hearing officer has jurisdiction over the dispute. Additionally, Respondent re-urged its motion to dismiss in its final argument, alleging that since it had provided the relief requested in the request for hearing, this hearing officer no longer had jurisdiction.

Respondent’s argument fails for two reasons. First, the issue of mootness was addressed by the United States District Court for the Western District of Texas. The previous hearing officer dismissed Petitioner’s claim for want of jurisdiction. The Court reversed that decision, holding that the settlement offer did not moot the case. The Court then remanded the case with a specific order that the hearing officer conduct a hearing on the merits. This hearing officer is bound by the Court’s remand order. *See, e.g., Blake C. v. Dept. of Educ.*, 2007 WESTLAW 1240211 (D. Hawaii 2007) (scope of hearing officer authority limited to scope of remand). This hearing officer will not re-visit the legal issue of mootness as it has been decided. Rather, the Court’s specific order was that Petitioner receive the hearing to which she is entitled. IDEA specifically provides that a parent’s right to a hearing includes the right to obtain written findings of fact and a decision. 34 C.F.R. §300.512(a)(5).

The second reason Respondent’s argument fails is that it did not provide the relief requested in Petitioner’s request for hearing in a timely manner. Petitioner complained that Respondent denied her a FAPE by failing to include annual goals in the May 2006 IEP (which was for the 2006-2007 school year, or the student’s ** grade year).¹ The IEP developed at the May 8, 2007 ARD Committee meeting was for the student’s ** grade year, or the 2007-2008 school year. *See* R-33, pg 3 (Prior Written Notice that provides the District would begin implementation of the IEP at the beginning of the 2007-2008 school year; *see also* R-33, pg. 15-16 (IEP Annual Goals for ** grade and compensatory education² to occur during the summer of 2007). Although the schedule of services for the May 8, 2007 IEP includes a schedule for the one month remaining in the 2006-2007 school year, there are no corresponding annual goals for that same time period). Petitioner filed her request for hearing on January 16, 2007. Petitioner’s complaint obviously did not pertain to an IEP or school year that had not yet occurred. Rather, the complaint specifically pertained to the May 2006 IEP which was in effect through the end of the 2006-2007 school year and Petitioner complained that she had been denied a FAPE as of the date she filed the petition. Although Respondent subsequently remedied the denial of FAPE

¹ Although Petitioner’s original request for hearing appears to allege that she was denied a FAPE beginning in the 2004-2005 school year through the date of filing, Petitioner later clarified that her complaint was limited to the May 2006 IEP. *See* Opposition to Respondent’s Motion to Dismiss, and Alternatively, Motion for Summary Judgment filed in Docket No. 123-SE-0107 (Administrative Record, pp. 0219). Petitioner’s requested relief was also limited to a request for an order that would have only had the effect of prospectively correcting the provision of FAPE during the 2006-2007 and subsequent school years.

² The May 8, 2007 IEP provided for the provision of 80 hours of compensatory education in the area of reading comprehension to remedy the failure to include reading comprehension goals in previous IEP’s.

arising out of the deficient IEP through an award of compensatory education, and Petitioner does not contest the adequacy of the compensatory education award, EPISD did not timely convene an ARD Committee meeting to correct the error when Petitioner filed a request for hearing. Although there is evidence that Petitioner refused to participate in an ARD Committee meeting while the case was pending, Petitioner nevertheless had a duty to provide a FAPE to the student at all times and could have convened an ARD Committee meeting to do so without parent participation.³ See 34 C.F.R. §300.322(d). The fact that Respondent subsequently provided compensatory education after the hearing was improperly dismissed and while the case was pending before the U.S. District Court does not deprive the hearing officer of jurisdiction to hear this case and issue a decision *on remand*.

May 15, 2006 IEP – 2006-2007 School Year

The educational program offered by the school district is presumed to be appropriate. Petitioner, as the party challenging the educational program bears the burden of proof in showing why the IEP is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). *Schaffer v. Weast*, 126 S.Ct. 528 (2005). The law does not require that the student’s educational potential be optimal or “maximized” but the IEP must be designed to enable the student to receive some educational benefit from her program. An educational program must be reasonably calculated to produce progress rather than regression or trivial educational advancement. *Hendrick Hudson District Board of Educ. v. Rowley*, 485 U.S. 176 (1982); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

In *Rowley*, 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 IDEA’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 (1982). An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Id.*; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

In evaluating whether an educational program is reasonably calculated to confer a meaningful 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?

³ The impact that Petitioner’s conduct may have on the issue of attorney’s fees or unreasonably protracting the proceedings before the U.S. District Court may only be addressed in that forum.

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

There is no dispute that the student received instruction in a mainstream setting that was the least restrictive environment for her. However, based on this record, I find the District's educational program for the 2006-2007 school year to be deficient because it was not individualized on the basis of the student's assessment and performance as it contained *no* annual goals, and for the reasons set forth below, and will analyze each of Petitioner's complaints with regard to the May 15, 2006 IEP.

Lack of Present Levels of Academic Achievement and Functional Performance

IDEA requires that a student's IEP contain a statement of the student's present levels of academic achievement and functional performance, including how the student's disability affects her involvement and progress in the general education curriculum. 20 U.S.C. 1414(d)(1)(A)(I); 34 C.F.R. §300.320(a)(1)(i). In this case, the student's IEP contains no data concerning the student's then present levels of academic achievement and performance other than to state that she is committed to completing her assignments, has improved on standardized tests (without stating what "improved" means), and identifies generally that she has weaknesses in comprehension and word problems. The IEP does not on its face state the manner in which her disability affects her involvement in accessing the general education curriculum for a ** grade, ** month student who is going into the ** grade. (P-1, pg. 3-4) The District argues that the ARD Committee considered the student's FIE conducted April 20, 2006 in the development of the IEP, so the omission of the present levels of academic achievement and functional performance from the IEP did not result in a denial of FAPE. (In fact, school personnel testified that the FIE was discussed during the ARD Committee meeting at which the IEP was developed.) The FIE consists of three tests: the Woodcock-Johnson III Test of Cognitive Abilities and the Universal Nonverbal Intelligence Test (IQ testing) and the Woodcock-Johnson III Test of Achievement (achievement testing). The FIE (three-year reevaluation) was conducted to determine if the student continued to meet the eligibility criteria as a student with a learning disability. (R-11) The referral for the evaluation included information from the student's ** grade teacher completed on April 25, 2006, that she was working ** in language arts, reading, and math. (R-7) Her teacher reported that she comprehended material at a ** grade level, read aloud at a ** grade level, and performed math computations at a ** grade level. (R-7, pg. 10) The FIE included reports from the teacher regarding the student's classroom performance. Although the achievement testing reported the student's performance in terms of age rather than grade equivalency, the teacher's report included a discussion with regard to the student's grade level in the areas of reading skills, reading comprehension and math. (R-11, pg. 11) The FIE also contained a discussion regarding the student's learning competencies and her strengths and weaknesses. (R-11, pg. 14) The FIE was completed on May 1, 2006 and discussed by the ARD Committee on May 15, 2006. While, the District failed to comply with IDEA's procedural requirements by not including a statement regarding the student's present levels of performance within the IEP, it is clear from the record that this information was shared with the ARD Committee, including the parent, in the development of the IEP.

The failure to include present levels of academic achievement and functional performance in the student's IEP is a procedural violation of the IDEA and its implementing regulations. 34 C.F.R. §300.320(a)(i) However, a procedural violation, standing alone, will only support a finding of a

denial FAPE when it results in impeding the child's right to a FAPE, significantly impedes the parent's opportunity to participate as a decision maker, or causes a deprivation of educational benefit. *See Adam J. v. Keller ISD*, 328 F.3d 804 (5th Cir. 2003); 34 CFR §300.513(a)(2). The purpose of IDEA's requirement that the IEP contain data regarding the student's current level of achievement is so that the parent and the school officials have available information that will enable them to develop an educational program that is individualized to the student's current needs. The student's parent and the district personnel had that information before them in the form of the student's FIE, so the failure to include the data within the four corners of the IEP, standing alone, will not support a finding of a denial of FAPE. However, the ARD Committee's failure to appropriately use that information to develop an appropriate IEP, as discussed below, did result in a denial of a FAPE.

Lack of Annual Academic and Functional Goals and Lack of Short-Term Objectives Aligned to the Student's Alternate Assessment

A student's IEP must be individualized based on her assessment and performance. An "individualized program" is one that meets IDEA's procedural requirements, is current, and is individually tailored to the student's needs as known to the school district at the time. *See Rowley, supra*. "Based on assessment and performance" means accurately reflecting assessment that is current and appropriate from a procedural standpoint, as well as current classroom performance, *See ** vs Harlingen Consolidated Independent School District*, Docket No. 078-SE-1198 (January 26, 1999) I find that the District's program for the student failed to appropriately address her specific needs in the areas of her learning disability, i.e., listening comprehension, basic reading skills, reading comprehension and math, as identified in the student's FIE and her classroom performance.

The May 15, 2006 IEP is wholly devoid of **any** goals and objectives. IDEA requires that an IEP must contain a statement of measurable annual goals, including academic and functional goals designed to (a) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (b) meet each of the child's other educational needs that result from the child's disability. 20 U.S.C. §1414(d)(1)(A)(II); 34 CFR 300.320(A)(2)(i). In this case, the IEP developed on May 15, 2006, which continued through the end of the 2006-2007 school year including after the date the request for hearing was filed, contains **no** measurable academic or functional goals.

IDEA also requires that for students who take alternate assessments, such as the SDAA, the IEP must contain a description of benchmarks or short-term objectives aligned to alternate achievement standards. 34 C.F.R. 300.32(A)(2)(ii). In this case, the student was required to take an alternate assessment, the SDAA, in reading, writing, and, after the spring of 2006, in math. However, the IEP contains no benchmarks or short-term objectives by which the student's progress would be evaluated. In fact the ARD Committee specified that the student performed ****** in reading when it determined that she was exempt from the TAKS and responsible only for ****** instructional material on the SDAA during her ******, ******, ****** and ****** grade years. The ARD Committee determined that the student was only responsible for ****** grade instructional material in the area of writing on the SDAA during her ****** grade year. (R-65) The FIE reviewed by the ARD Committee reflected that the student was functioning ****** in basic reading skills, reading

comprehension and math. At the end of the student's ** grade year (2006), she took the SDAA in reading at a ** grade instructional level and did not pass the TAKS in Math. (R-65) At the end of the 2006-2007 school year (** grade), she took the SDAA in reading at the ** grade level and in math at **, after having failed the TAKS math assessment during the **, ** and ** grades. However, the student's IEP for the 2006-2007 school year contained no annual goals in any of the above subject areas, and no objectives related to the alternate assessments. In essence, the ARD Committee adopted an empty IEP that contained only minimal classroom modifications that according to the student's FIE had not been previously successful without additional special education support and instruction.

Respondent contends that since the student made "passing grades", a requirement that her IEP include measurable annual goals would place "form over substance," relying on an *unpublished* opinion from the United States District Court for the District of New Jersey. (*G.N. v. Bd. Of Ed. Of the Township of Livingston*, 2007 WL 2265035 (D.N.J. 2007, *aff'd* 309 Fed. Appx., 542, 2009 WL 25569 (C.A.3 (N.J.)(unpublished opinion)). In that case, the Court found that a school's failure to include IEP goals for a student who received instruction in the general education setting was a procedural violation that did not result in a denial of FAPE, stating that elevating such a failure to a denial of FAPE would be elevating form over substance. *Id.* Respondent cites to no published (or unpublished) opinion from the Fifth Circuit or any U.S. District Court in the Fifth Circuit that holds that the failure to include *any* IEP goals in a student's IEP does not result in a denial of FAPE. I do not find the cited unpublished decision to be persuasive. The very heart of an Individualized Education Program is the statement of the student's measurable annual goals. The annual goals are critical in the delivery of the specialized instruction mandated by IDEA. *See* 20 U.S.C. §1401(29) (definition of special education means specially designed instruction to meet the unique needs of the child with a disability). The annual goals provide the objective criteria for determining whether the student is making progress. Failure to include such criteria is not harmless and constitutes a substantive violation of IDEA and a denial of a FAPE. *See Cleveland Heights-Univ. Heights Sch. Dist. v. Boss*, 144 F3d 391, 398-399 (6th Cir. 1998). An IEP without measurable academic and functional goals is empty and meaningless. Respondent's assertion, taken to its logical extreme, could result in a finding that a district's failure to develop an IEP at all may not necessarily cause a denial of FAPE. This position is inconsistent with IDEA.

Passing grades are not the only factor to consider in determining whether a student's IEP provides the student with a FAPE. Educational needs include all aspects of a student's education, including social, developmental, and *functional* skills. *Venus Ind. Sch. Dist. v. ***, 36 IDELR 870 (N.D. Tex. 2002). Although the student made passing grades, the student's IEP provided no annual goals designed to address her *functional* skills in the classroom that were a direct result of her disability, i.e., basic reading skills, reading comprehension, and listening comprehension. The student's IEP in no way addressed the student's deficits in those areas.

The student not only ** the math TAKS in 2004, 2005 and 2006, she was exempt from the TAKS in reading and writing and was only tested on instructional material ** grade level on the SDAA in those subject areas. During her ** grade year, according to her SDAA reading results, the student was only tested on and expected to achieve proficiency of the Texas Essential Knowledge Skills (TEKS) at the ** grade level. (R-65, p. 12) At the end of her ** grade year,

the student's teacher estimated her basic reading skills to be at a ** grade level, with comprehension at a ** grade level. (R-7, p. 10). However, her IEP contained no goals (or objectives) that correlated with the criteria she was expected to master on the alternate assessment. It is entirely possible that in 2006 the student may have been capable of achieving at least minimal skills at the ** grade level as this was the ** year in which the student was tested on a ** grade level. Alternatively, if the student was only capable of achieving proficiency at the ** grade level in reading, then the student had not made meaningful progress since the first administration of the SDAA in ** grade. (R-65, p. 1) The District's failure to include IEP goals in the areas of basic reading skills, reading comprehension and math resulted in a lack of objective criteria to assess her gains (or lack thereof) in order that she could be provided appropriate instruction to help her improve in those areas. The student's IEP in no way addressed the student's weaknesses in the areas of her learning disability although she did not function at grade level in those areas. Additionally, the IEP lacked goals designed to address her listening comprehension. The annual goals are the heart of the IEP for a reason. They provide the objective criteria for determining whether the student is making progress in her area or areas of educational need. The student's IEP did not provide for this and the student's continued performance significantly below grade level remained unaddressed as evidenced by her performance on the TAKS and the SDAA. I find that the IEP's failure to include annual goals is a substantive violation of IDEA, and not merely a procedural one, and that the failure to include annual goals in the student's IEP is a denial of FAPE. I further find that the IEP's failure to include short-term objectives aligned to the student's alternate assessment resulted in a denial of FAPE in that it impeded the student's right to a FAPE and caused a deprivation of educational benefits as evidenced by her failure on the TAKS and her performance on the SDAA.⁴

Relief

Petitioner requested as relief an order requiring EPISD to conduct an ARD meeting and develop specially designed instruction to meet the student's unique needs, including an IEP that:

- a. contains a description of benchmarks or short-term objectives aligned to her alternative assessment.
- b. a statement of the student's present levels of academic and functional performance; and
- c. a statement of measurable annual goals including academic and functional goals designed to meet her educational needs that result from her disability.

⁴ It is important to note that failure on the TAKS alone, and the student's performance on the SDAA, does not lead me to the conclusion that the student did not receive a FAPE. I am well aware of hearing officer decisions which state that failure on the TAKS standing alone is not dispositive of the issue of whether the student received a FAPE, though it may be relevant evidence. See *Student v. Mesquite ISD*, Docket No. 171-SE-0406 (June 2006); *Student v. Corpus Christi*, Docket No. 233-SE-0508 (December 2008). This case is distinguishable from the cited cases because the student's IEP contained no annual academic and functional goals in any subject area or area related to her disability, and contained no objectives aligned to the SDAA. The student's ongoing failure of the TAKS and performance on the SDAA is evidence that she was denied a FAPE under these circumstances.

On May 8, 2007, EPISD convened an ARD Committee meeting, after proper notice and multiple attempts to gain the involvement of the parent, and developed an IEP which Respondent stated in its prior written notice would be implemented for the 2007-2008 school year. (R-33) The IEP contains annual goals for listening comprehension, reading and communication skills, and math. According to the IEP, the student's annual goals in reading and math required the student to master the ** grade TEKS, with emphasis on specific objectives designed to address her weaknesses in those areas. The IEP also contained a detailed description of her then present levels of academic and functional performance. (R-33) Although the ARD Committee did not convene prior to May 8, 2007 to develop an appropriate IEP for the student with annual goals and (where appropriate, objectives) for the remainder of the 2006-2007 school year, the ARD Committee did attempt to remedy the deficiency by providing 80 hours of compensatory education in the area of reading to improve the student's reading comprehension. (R-33, pg. 5) As a part of this hearing request, Petitioner has not asked for compensatory education, nor has she alleged that the compensatory education provided was inadequate. While I agree that the provision of compensatory education was appropriate and necessary given the deficiencies in the student's IEP, and would have been warranted as relief if this case had been heard in 2007, I will not address whether the amount provided is sufficient. Therefore, there is no further relief that can be provided, except as ordered hereinbelow.

Did Petitioner Unreasonably Protract Resolution

Pursuant to 19 Tex. Admin. Code § 89.1185(m), Respondent requested findings with regard to whether Petitioner unreasonably protracted the resolution of the issues in this case. As a hearing officer responsible for presiding over an administrative hearing, I can only address this question with regard to Respondent's actions during the administrative hearing, both prior to dismissal and after the remand.⁵

Respondent argues that Petitioner unreasonably protracted the proceedings by failing to accept a settlement offer made prior to the dismissal of this case in 2007, and, by continuing to pursue her remedies in a due process hearing after it had in fact convened an ARD Committee meeting to correct the deficient IEP. Respondent offered certain exhibits into evidence regarding subsequent remedial measures taken by the District after the date of filing and dismissal of this action in 2007. I find that Exhibits R-28-34, though relevant, are not dispositive on the issue of Petitioner's conduct.

With regard to the assertion that Petitioner unreasonably protracted the proceedings by not accepting a settlement offer made in 2007, the United States District Court for the Western District of Texas held that Petitioner was justified in rejecting the settlement offer because the conditional offer would not have provided her with an enforceable order or agreement. *See A. O. v. El Paso Independent School District*, Civ No. EP-07-CA-243-FM, 2009 U.S. Dist. LEXIS 50222 (W.D. Tex. March 30, 2009). Therefore, given the Court's ruling, I cannot conclude that

⁵ The issue of whether Petitioner unreasonably protracted the proceedings in Federal District Court by pursuing an appeal following the May 8, 2007 ARD Committee meeting is an issue which must be addressed to the Court, not this hearing officer.

Petitioner unreasonably protracted the proceedings through the date of the dismissal on April 10, 2007 by failing to accept a settlement offer or by failing to participate in an ARD meeting after the request for hearing was filed.

Additionally, on March 30, 2009, the Court reversed the prior hearing officer's dismissal and *remanded* this case with a specific order that the hearing officer conduct a due process hearing. On April 13, 2009, I scheduled a pre-hearing conference for April 17, 2009. On April 15, 2009, Respondent forwarded notice to the hearing officer and opposing counsel that it had filed a Notice of Appeal and requested that the hearing be delayed pending a ruling on the Motion to Stay. On April 16, 2009, I issued an order that the pre-hearing conference would proceed as scheduled. During the pre-hearing conference, Respondent again requested a continuance of this matter pending final resolution of its appeal and/or the Motion to Stay which was then pending before the U.S. District Court. In fact, counsel for Respondent even objected to any dates being scheduled for the hearing. (*See* Transcript of Prehearing Conference, April 17, 2009). I granted a continuance of 39 days to provide Respondent time to pursue a ruling on its Motion to Stay. Both the United States District Court for the Western District of Texas and the Fifth Circuit Court of Appeals denied Respondent's Motion to Stay. During another pre-hearing conference on May 18, 2009, Petitioner's counsel stated that it would enter into an enforceable agreement with a stipulated order (which would be enforceable under the Court's prior ruling) and Respondent rejected such offer. (*See* Transcript of Prehearing Conference, May 18, 2009) Petitioner asked for no continuance of the matter, but merely insisted on proceeding with the hearing the Court found she was entitled to receive. Petitioner did not unreasonably protract the resolution of the controversy before the hearing officer under the circumstances.

CONCLUSIONS OF LAW

1. The student is eligible for special education services as a student with a disability under IDEA, 20 U.S.C. §1400 *et. seq.* and its implementing regulations.

2. The district's educational program is entitled to a legal presumption of appropriateness. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). Petitioner bears the burden of proving that it is not appropriate or that the District has not complied with the procedural requirements under the IDEA. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Petitioner has met her burden.

3. Respondent failed to provide the student a FAPE by not including any measurable annual academic and functional goals in the student's IEP for the 2006-2006 school year. 34 C.F.R. §300.320(a)(2)(i).

4. Respondent failed to provide the student a FAPE by not including a description of benchmarks or short-term objectives aligned with the alternate achievement standards expected of the student on the SDAA in reading and writing. 34 C.F.R. §300.320(a)(2)(ii).

5. Compensatory education services are appropriate to remedy the denial of FAPE. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). However, Respondent has previously provided compensatory education hours according to the May 6,

2007 IEP. As Petitioner has failed to challenge the appropriateness of the compensatory education hours or provide any evidence that further compensatory relief is warranted, no further compensatory relief will be granted.

ORDER

Based upon a preponderance of the evidence and the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the relief requested by Petitioner is **GRANTED IN PART**.

1. I find that the May 15, 2006 IEP was not reasonably calculated to provide Petitioner with a meaningful educational benefit and that the absence of any annual academic or functional goals is a substantive violation of IDEA.

2. I find that the May 15, 2006 IEP was not reasonably calculated to provide Petitioner with a meaningful educational benefit and that the absence of any description of benchmarks or short-term objectives aligned to her expectations under the SDAA is a substantive violation of IDEA. To the extent the lack of benchmarks or short-term objectives is a procedural violation of IDEA, I find that the violation resulted in a denial of FAPE because it impeded the student's right to a FAPE and caused a deprivation of educational benefits.

3. IT IS ORDERED that within ten school days of this decision, Respondent shall provide to the Texas Education Agency Division of IDEA Coordination evidence that it has completed the provision of compensatory education in the area of reading comprehension provided the student under the May 6, 2007 IEP.

4. IT IS ORDERED that Respondent shall convene an ARD Committee meeting within ten school days of this decision to review the student's current IEP, and to ensure that the IEP contains measurable goals and objectives, as well as statements regarding her present levels of performance.

IT IS ORDERED that all other relief not specifically awarded herein is DENIED.

Finding that the public welfare requires the immediate effect of this Final Decision and Order, the Hearing Officer makes it effective immediately.

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 IDEA Coordination at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating that the Decision has been implemented; or 2.) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

SIGNED this 11th day of August, 2009.

/s/Sharon M. Ramage
Sharon M. Ramage
Special Education Hearing Officer

SYNOPSIS

Issue No. 1: Whether the District's failure to include statements regarding the present levels of performance in the IEP resulted in a denial of FAPE.

Held: For Respondent. The ARD Committee reviewed the FIE at the time it developed the IEP, including teacher reports regarding classroom performance and estimated grade equivalencies, strengths and weaknesses. The failure to include the data within the four corners of the IEP under the circumstances is a procedural violation that did not result in a denial of FAPE.

Citation: 34 C.F.R. §300.320(a)(i); 34 C.F.R. §500.513(a)(2)

Issue No. 2: Whether the District's failure to include any annual academic and/or functional goals in the student's IEP is a substantive violation of IDEA and a denial of a FAPE.

Held: For the Petitioner. IEP goals are a required substantive component of the IEP and the failure to include them is a violation of IDEA and a denial of FAPE.

Citation: 34 C.F.R. §300.320(a)(2)(i)

Issue No. 3: Whether the District's failure to include a description of benchmarks or short-term objectives aligned with expectations for the student on the SDAA in reading and writing denied the student a FAPE.

Held: For the Petitioner. The student failed the math TAKS during her 3rd, 4th, and 5th grade years, and was responsible for below-grade level instructional material in the areas of reading and writing on the SDAA. However, the IEP contained no benchmarks aligned to the SDAA.

Citation: 34 C.F.R. §300.320(a)(2)(ii)

Issue No. 4: Whether Petitioner unreasonably protracted a resolution of the dispute.

Held: For Petitioner. The US District Court for the Western District of Texas held that Petitioner was justified in rejecting a pre-hearing settlement offer and that Petitioner was entitled to a hearing. The Court remanded the matter to the TEA and ordered that the hearing officer conduct a due process hearing, so Petitioner's post-remand conduct does not justify a finding that he acted unreasonably.

Citation 19 Tex. Admin. Code §89.1185(m).