

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

DECISION OF THE HEARING OFFICER

Student, b/n/f	§	
Parent,	§	
Petitioner	§	
	§	
v.	§	DOCKET NO. 210-SE-0204
	§	
WEBB CONSOLIDATED	§	
INDEPENDENT SCHOOL	§	
DISTRICT,	§	
Respondent	§	

REPRESENTING PETITIONER:

Christopher Jonas
Center for Special Education Law
3349 Jamaica
Corpus Christi, Texas 78418
Telephone: 361/937-1801
Facsimile: 361/937-1802

REPRESENTING RESPONDENT:

Peter F. Bagley
Blumberg & Bagley, L.L.P.
1119 West Randol Mill Road, Suite 101
Arlington, Texas 76012
Telephone: 817/277-1500
Facsimile: 817/277-1170

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b/n/f Parent,	§	BEFORE A SPECIAL EDUCATION
Petitioner	§	
	§	
v.	§	HEARING OFFICER
	§	
WEBB CONSOLIDATED	§	
INDEPENDENT SCHOOL DISTRICT,	§	FOR THE STATE OF TEXAS
Respondent	§	

DECISION OF THE HEARING OFFICER

Statement of the Case and Procedural History

Petitioner, Student (“Student” or “Petitioner”), by next friend Parent, requested an impartial due process hearing under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400, *et seq.*, as amended, against Webb Consolidated Independent School District (“Webb CISD” or “Respondent”). Petitioner filed his Request for Hearing with the Texas Education Agency (“TEA”) on February 18, 2004, and the Decision Due Date was set in compliance with the forty-five day rule for April 3, 2004. The undersigned Hearing Officer received the case assignment on February 20, 2004.

Two telephonic pre-hearing conferences were held in this matter on March 9 and May 11, 2004. There have been two continuances of the hearing date granted for good cause shown. The due process hearing was held on May 21, 2004, in the Webb CISD Administration Building in Bruni, Texas. The Parties requested and were granted leave to file written closing argument by June 8, 2004, and the Decision Due Date was extended accordingly to June 28, 2004. Due to the Hearing Officer’s computer malfunction, the Parties agreed to an extension of two days of the Decision Due Date to June 30, 2004. The Decision was issued on June 30, 2004.

Petitioner alleged that:

1. Webb CISD improperly reduced Student’s school week and school day length without appropriate supportive assessment data; and,
2. Webb CISD failed to provide Student with an appropriate school day length during periods of his enrollment in the school district during the 2003-2004 school year.

Petitioner’s requested relief included the provision of a full five-day school week length consisting of full school days and compensatory services to make up for school days Student did not receive during the 2003-2004 school year.

Based upon the evidence and argument admitted into the record of this proceeding, the Hearing Officer makes the following findings of fact and conclusions of law:

Findings of Fact

- 1) Student is an ***-year-old student in the *** grade at *** School (“****”) in Bruni, Texas.

- 2) Student resides with his mother within the geographical boundaries of Webb CISD in Oilton, Texas.
- 3) Student qualifies for special education and related services as a student with a Learning Disability (“LD”) in Language Arts and Math.
- 4) On April 24, 2003, Student is alleged to have violated the Webb CISD Student Code of Conduct for ***. Student was charged with two state felony counts of *** and attempted ***. Due to the nature of the charges, *** proposed expulsion of Student to the Juvenile Justice Alternative Education Program (“JJAEP”).
- 5) The Admission, Review, and Dismissal Committee (“ARDC”) was not able to convene a manifestation determination meeting with Student’s parents in attendance until May 20, 2003. During that meeting, the ARDC determined that Student’s alleged misconduct was not related to his disability and recommended that Student be placed in an alternative educational placement (“AEP”) for 180 days. [Petitioner’s Exhibit 1; Respondent’s Exhibit 4].
- 6) Student’s individualized educational program (“IEP”) for the 2002-2003 school year prior to the discipline incident is not in the record of this proceeding.
- 7) Student’s grades, courses, and credits received during the 2002-2003 school year included the following: English II – *** (no credit); *** – *** (***); US History – (***); World History – *** (***); Art II – *** (***); Art I – *** (***); Metal Trades – *** (***); Resource Math – *** (***); Reading Improvement – *** (***). [Respondent’s Exhibit 21].
- 8) Webb CISD held Student’s expulsion hearing on May 28, 2003. As a result, Webb CISD expelled Student from *** and placed him in an AEP for 180 days. [Petitioner’s Exhibit 2; Respondent’s Exhibits 5 and 6].
- 9) After April 28, 2003, Student did not attend Webb CISD for the remainder of the school year, which officially ended on May 30, 2003.
- 10) Student did not return to Webb CISD in Fall 2003. Student was employed during the fall semester.
- 11) Dr. ***, Webb CISD Superintendent, set up a meeting with Parent in early January 2004 to discuss re-enrollment of Student in the school district. At that time, Parent agreed to place Student in the school district’s ***. [Transcript at 126-128].
- 12) The ARDC convened on January 13-14, 2004, for the purpose of reviewing Student’s program for his return to Webb CISD. At the time of this meeting, Student had earned *** and a *** credits toward ***. During this meeting, the ARDC reviewed his grades for the 2002-2003 school year and noted that Student had not passed World History the previous school year. [Petitioner’s Exhibit 3; Respondent’s Exhibit 21].
- 13) Documentation from the ARDC meeting January 13-14, 2004, specified Student’s school hours *** as 8:00 a.m. to 11:30 a.m. His class schedule consisted of instruction in Reading, Math, 2nd Semester World Geography, and Speech. He would be able to earn a half credit in each of these classes, or a total of two credits, upon successful completion of the instruction. The ARDC further concluded that

Student's *** credit requirement should be reduced from 26 credits to 22 credits. [Petitioner's Exhibits 3 and 4; Respondent's Exhibits 2, 19, and 21].

- 14) The January 2004 ARDC documents do not contain assessment information or discussion of why the ARDC proposed a reduction Student's *** credits.
- 15) At the conclusion of the meeting on January 14, 2004, Parent, Student, and ***, Student's advocate, did not agree with the *** placement. The ARDC made plans to reconvene on January 27, 2004, but did not on that date. [Petitioner's Exhibit 4; Respondent's Exhibit 2].
- 16) The January 2004 ARDC members, including Student's advocate, agreed to reduce the *** credits from 26 to 22 to "put him on the road" to *** in May ***. [Transcript at 94-96].
- 17) Webb CISD is a small school district with a total enrollment of approximately 360 students. The school district operates on a year-round calendar beginning July 1st with one-week inter-sessions scheduled between six-week grading periods. Instead of using a specific inter-session week as vacation time, students have the opportunity to finish coursework and earn credit during these weeks. [Respondent's Exhibit 33].
- 18) The preponderance of the evidence established that there were between four and five students in the *** during the Spring 2004 semester of the 2003-2004 school year. In Webb CISD, all students in the *** attend school five days a week for three and a half hours each day.
- 19) The length of the *** instructional day was set at three and a half hours rather than four hours because of teacher scheduling and the need to have the *** teacher move to another classroom. [Transcript at 166].
- 20) Webb CISD personnel knew that this *** school day length was thirty minutes less than a full four-hour day, but explained that Student would be able to make up the missing hours of instruction during his two inter-session weeks before the end of the 2003-2004 school year. [Transcript at 155-156 and 164-166].
- 21) The instructional services developed by the January 2004 ARDC set Student's instructional class time at 42 minutes for each of his four subjects, for a total instructional time of two hours and 48 minutes. [Petitioner's Exhibit 2; Respondent's Exhibit 5].
- 22) The preponderance of the evidence established that the ARDC did not conclude that Student's disability was such that he needed less than a full school day in order to receive a benefit from his IEP. The proposed daily instruction for Student in the *** involved less instruction and less special education than Student's previous ARDC had found necessary for him to receive an educational benefit during the 2002-2003 school year. No ARDC deliberation or assessment supported this reduction in services. [Respondent's Exhibit 21].
- 23) The Webb CISD 2003-2004 spring semester ran from January 6 to May 26, 2004, and included three six-week grading periods.
- 24) The January 2004 ARDC discussed how Student would be able to earn sufficient course credits and *** in May ***. As part of this plan, the ARDC developed a plan for Student's inter-session breaks for the remainder of the 2003-2004 school year. The inter-session breaks in March and April 2004

would be available for Student to complete three additional academic courses in addition to the four courses he was taking in the regular sessions of the ***, including the following: 2nd semester U.S. History; 2nd semester ***; and, 1st semester World History. Successful completion of this work would increase his earned credit hours by one and a half credit hours for a total of 12 credit hours. [Petitioner's Exhibits 3 and 4; Respondent's Exhibits 2, 19, and 21].

- 25) Respondent's Summer 2004 inter-session period runs from May 31 to June 30, 2004. Rather than take a summer break from school, Webb CISD planned for Student to complete additional coursework in three electives and one computer class, thus increasing his earned credits to 14 by the end of the summer inter-session period. [Petitioner's Exhibits 3 and 4; Respondent's Exhibits 2, 19, and 21].
- 26) If Student completes the January 2004 ARDC plan for making up lost credits, he would be on-track to *** in May ***. [Petitioner's Exhibits 3 and 4; Respondent's Exhibits 2, 19, and 21].
- 27) Student's Spring 2004 IEP included individual IEPs for instruction at the *** grade Math level and *** grade Reading level through May 2004. His annual goal for Math was to master 19 pre-Algebra targeted objectives at the *** percent mastery level. For Language Arts – Reading: Self-extending Reader, his annual goal was to attain an instructional book level of *** to *** grade. Student was to receive three hours of special education services, or one and a half hours each in Reading and Math, to be delivered by a special education teacher and a general education teacher. [Respondent's Exhibit 2 at 7-13].
- 28) During Spring 2004 in the ***, Student received instruction from Ms. ***, a general education teacher in the ***, and Mr. ***, a resource teacher hired specifically to work with Student. Neither teacher is certified as a special education teacher. Half of Student's *** day is spent working one-on-one with Mr. ***. [Transcript at 73, 148, and 197].
- 29) The preponderance of the evidence established that Student has not received direct instruction by a teacher certified in special education ***.
- 30) Student's triennial reevaluation by Webb CISD was due in Fall 2003, but could not be completed because he was not enrolled in the district. Upon his return to Webb CISD in Spring 2004, the ARDC began the overdue reevaluation and met for a triennial review on February 13, 2004. [Petitioner's Exhibit 5; Respondent's Exhibit 1].
- 31) February 2004 ARDC members discussed Student's continued eligibility for special education services and a summary of the triennial reevaluation results. His cognitive intellectual ability standard score was *** or the *** average range of intelligence. His test results indicated that he functioned higher than his cognitive intellectual ability in Broad Reading, Thinking Ability, and Broad Math. He fell *** his ability level in Writing. The test results showed that he did not qualify for special education services under Method I, since he did not have a severe discrepancy between his intelligence and achievement levels. [Petitioner's Exhibit 5; Respondent's Exhibit 1].
- 32) The Brigance test was administered to inventory Student's basic skills on February 12, 2004. On the Brigance, he achieved a *** percent comprehension level of *** grade Reading levels. In Grammar mechanics, he had achieved *** grade level in capitalization with punctuation at Level 3. In Math, he had achieved a *** grade computational level and a *** to *** grade comprehension level. [Petitioner's Exhibit 5; Respondent's Exhibit 1].

- 33) The February 2004 ARDC unanimously concluded that Student remained eligible for special education services under Method II as a student with LD classification. The ARDC noted that Student has difficulty with reasoning. [Petitioner's Exhibit 5; Respondent's Exhibit 1].
- 34) The February 2004 ARDC meeting included discussion about his current levels of academic achievement. At that time, Student had achieved *** grade levels in Reading and Writing. The ARDC determined that he should take the Texas Assessment of Essential Knowledge and Skills ("TAKS") testing at the *** grade level for Math and Reading and at the *** grade level for Writing.
- 35) As part of the February 2004 ARDC meeting, Student's program *** was reviewed. The minutes of the February 2004 ARDC meeting reflect that Student would continue to have a three and a half hour school day *** and that Mr. ***, Webb CISD Special Education Director, would "work on an additional 30 minutes." [Petitioner's Exhibit 5 at 20; Respondent's Exhibit 1 at 20].
- 36) The February 2004 ARDC meeting concluded in disagreement regarding Student's *** placement, with Student, Parent, and Student's advocate, ***, dissatisfied with the *** placement. All ARDC members unanimously agreed to the proposed 2004-2005 placement for Student in the *** grade with a mainstream placement that included modifications in English, Government/Economics, and Algebra I. [Petitioner's Exhibit 5; Respondent's Exhibit 1].
- 37) The preponderance of the record evidence did not establish a plan with sufficient specificity to show how Student would recoup the missing 30 minutes per day of *** time as well as simultaneously earn additional academic credits in other courses.
- 38) Although Student performed the work he received ***, he has completed less work and has felt pushed to complete the work within his three and a half hour day.
- 39) Student had the following averages at the end of the fourth six-week grading period in March 2004: Reading Improvement– ***; Math – ***; 2nd Semester World Geography – ***; and Speech – ***. [Respondent's Exhibit 20].
- 40) Student has made limited academic progress during the second semester of the 2003-2004 school year under the four-course curriculum ***.

Discussion

Background

The underlying events of this proceeding stem from Student's disciplinary infractions of the Webb CISD Student Code of Conduct and Webb CISD's subsequent decision that Student should be disciplined by expulsion from school. The appropriateness of the disciplinary decision to expel Student from Webb CISD is not before this Hearing Officer; rather, the appropriate implementation of the student's program *following* the disciplinary decision to place Student in the Respondent's *** in lieu of expulsion is the crux of this dispute.

Petitioner claimed that Webb CISD improperly reduced Student's school day and school week length without appropriate supportive assessment data. Upon Student's enrollment within Respondent's *** in January 2004, Petitioner asserts that Student failed to receive an appropriate school day length.

Legal Standard

The Webb CISD program is presumed appropriate for Student and as the party challenging Webb CISD's school program, Student bears the burden of proof and must show that the program offered by Webb CISD is inappropriate. *Tatro v. Texas*, 703 F.2d 823 (5th Cir.1983) *aff'd on other grounds sub nom.*, *Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883; *Alamo Heights ISD v. State Board of Education*, 709 F.2d 1153 (5th Cir. 1986). The IDEA requires a student to receive some benefit from his education in order for the school district's program to be deemed appropriate, but does not have to maximize the student's educational potential. *Bd. of Educ. v. Rowley*, 102 S.Ct. 3034 (1982). Under this standard, a school district must ensure that the student receives individualized instruction with sufficient support services to allow the student to receive an educational benefit, but not all services that may benefit the student must be provided. *Id.* at 3051. Under *Rowley*, two factors must be considered to determine whether a school district has provided a student with FAPE: 1) the school district must comply with the procedural requirements of IDEA; and, 2) the school district must design and implement a program that is reasonably calculated to enable the child to receive educational benefits. *Rowley* at 206-207.

To determine whether the student received an educational benefit, the school's program must be a meaningful one that is reasonably calculated to result in the student's progress rather than regression or trivial educational advancement. *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000); *Cypress Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). Under *Michael F.*, the Fifth Circuit set out factors for retrospective assessment of whether a student actually received a FAPE, including: 1) whether the eligible student's IEP was developed in accordance with proscribed procedures, including an individualized program based on the student's assessment and performance; 2) whether the program is administered in the least restrictive environment; 3) whether the program was delivered in a collaborative and coordinated manner by key stakeholders; and, 4) whether positive benefits are demonstrated both academically and non-academically. *Michael F.* at 247-248.

The IDEA places strong emphasis on procedural compliance. *See Board of Educ. v. Rowley, supra; Hall v. Vance County Board of Educ.*, 774 F.2d 629 (4th Cir.1985); *Bobby R., supra*. In *Bobby R.*, the Fifth Circuit did not find educational harm resulting from procedural error because the school had substantially implemented the IEP, the student showed more than trivial academic progress, and the student received meaningful benefit in other academic areas. *Bobby R.* at 349-350. The IDEA does not require maximization of a disabled student's educational potential, nor does a student have to improve in every area to obtain an educational benefit. *Id.* at 350. In another case, the Fifth Circuit found that procedural defects alone do not constitute a violation of the right to a FAPE unless they result in a loss of educational opportunity. *Adam J. v. Keller I.S.D.*, 328 F.3d 804 (5th Cir. 2003).

Reduction of Student's School Day and School Week Length

While Webb CISD removed Student from his *** school placement due to disciplinary infractions, whether or not the ARDC made an appropriate determination to reduce his school day and school length remains in dispute. Student alleged that Webb CISD made this determination without appropriate assessment to support the reduction. Instead of a full school day *** of four hours, Petitioner was deprived of 30 minutes of instructional time each school day for a total of two and a half hours a week, or 15 hours per six-week grading period. By contrast, Respondent alleged that the district had no legal requirement to provide a full school day to Petitioner after his removal from the classroom for disciplinary purposes. Further, Respondent asserted that the January 2004 ARDC meeting did not make a determination that a three and a half hour school day length for Student was somehow inappropriate. I agree with Petitioner.

Upon Student's return to Webb CISD in January 2004, the ARDC met to review his placement and schedule. At the ARDC meeting on January 13-14, 2004, the record evidence established that Webb CISD set Student's *** school day between the hours of 8:00 a.m. to 11:30 a.m. The reason for the three and a half hour schedule was due to the *scheduling needs of the *** teacher*, rather than a need to shorten Student's day *based on his needs*.

Texas law provides that a regular school day for a disabled child is defined as the period of time *determined to be appropriate* by the ARDC. 19 T.A.C. §89.63(b). Under this provision, the ARDC must find that the school day length is appropriate. The Fifth Circuit spoke to the issue of such an ARDC determination of appropriate school day length for a disabled student in *Christopher M. v. Corpus Christi I.S.D.*, 933 F.2d 1285, 1291 (5th Cir. 1991). In *Christopher M.*, the Fifth Circuit upheld the district court's determination that a four-hour school day was appropriate for a profoundly mentally and physically disabled student with intellectual functioning of an infant between two and six months old. Christopher M. had limited neurological capabilities and negative physical responses to prolonged stimulation that impacted his ability to receive educational programming. Christopher M.'s ARDC made a determination that a four-hour rather than a seven-hour school day was appropriate. In the instant proceeding, Respondent relied on *Christopher M.* for the proposition that a disabled student's school day may be less than a full day if the ARDC finds the shorter day to be appropriate. Respondent deems the January 2004 ARDC decision to have made this determination, noting that there was no ARDC finding that a three and a half hour day was *inappropriate*. Respondent's reliance on *Christopher M.* for these propositions under the facts of this proceeding is misplaced. The *Christopher M.* case does not stand for the proposition that an ARDC can reduce an eligible student's school day for *no reason* or for *administrative convenience*. Although Webb CISD relies on *Christopher M.* for the proposition that an ARDC has the ability to reduce a school day, the ARDC's determination that the school day should be reduced for Student was inappropriate.

Under the current facts, the record evidence established that Student's January 2004 ARDC failed to make a determination that Student's special needs necessitated a shortened school day, rather than a full school day, in order to benefit from his educational programming. Instead, the record evidence and testimony established that *sole* reason for the three and a half hour school day was for scheduling purposes of the teacher and district – not for Student's unique needs. There is no evidence in the record to show that Student could not benefit from a full day of instruction *** of four hours. Also, there was no discussion of the benefits of a shortened school day to the Petitioner. I find that the January 2004 ARDC meeting failed to find that a three and a half hour school day for Student was appropriate. The ARDC did not present for discussion any assessment data to support a reduction of the school day length that Student received during the 2002-2003 school year. I further find that the decision to provide a three and a half hour day was procedurally flawed.

I found Student's testimony convincing that he feels rushed to finish his work in four classes within the limited three and a half hour school day, receives limited work, and is under time pressure. I infer from the record evidence that Petitioner's program *** contained such a drastic reduction of services from his full school day in the 2002-2003 school year that it was insufficient to confer, and did not confer, a meaningful educational benefit to Student.

Respondent argues that Student is not being treated differently than the other *** students enrolled within *** who also have a three and a half hour day. While the situation of other *** students in Webb CISD is not before this Hearing Officer, the failure to provide a full school day to non-disabled children does not relieve Webb CISD from its responsibility to provide a full rather than a shortened school day to *** since there is no basis for the ARDC to shorten his school day for FAPE reasons.

Provision of an Appropriate School Day Length

While it remains undisputed that Student received a three and a half hour school day, this Hearing Officer notes that the three and a half hours includes all of his activities *** and does not allow additional time for non-instructional time. Student's schedule of instructional time as listed in his IEP was actually two hours and 48 minutes of instructional time – an amount of time far short of four hours. Yet within the confines of this schedule, Student had work for four courses to complete *without* the direct assistance of a special education teacher.

The January 2004 ARDC specified that Student would receive three hours of special education instruction in the *** placement, to be delivered by a general education teacher and a special education teacher, through May 2004. Yet these services were not delivered to Student by a special education teacher with proper special education certification. Instead, Student's instruction was delivered by the *** general education teacher and Mr. ***, a resource teacher without special education certification who was hired to work one-on-one with Student for one half of his *** instructional day. Mr. *** specifically worked with Student on his Math.

Texas law provides that local school districts bear the responsibility to provide instructional arrangements and settings with special education personnel to students with disabilities. 19 T.A.C. §89.63(a). Additionally, all special education personnel must be certified, endorsed, or licensed in the area or areas of their assignment in accordance with IDEA's implementing regulations. 19 T.A.C. §89.1121(a). Because Student's IEP called for special education instruction in Reading and Math for a total of three hours per week of special education instruction to be implemented with a general education and a special education instructor, I find that Webb CISD failed to provide the instructional arrangement specifically developed for Student ***.

While Respondent failed to provide the specific services called for in Student's IEP, the impact of that failure upon Student's educational progress must be considered. Student was functioning at the *** grade level in Math and the *** grade Reading level when the ARDC developed his IEP ***. After the triennial assessment was completed and reviewed in February, Student's actual academic achievement levels reveal that he had achieved the *** grade levels in Reading and Writing and was able to comprehend *** grade reading materials at a 70 percent comprehension level. His Grammar mechanics lagged behind around the *** grade level. I infer from this information that Student was not receiving a benefit from his *** instruction as his Reading level had decreased to the *** grade level and his Writing skills had decreased down to the *** grade level.

The record evidence in this proceeding is limited in regard to Student's previous levels of achievement prior to his May 2003 expulsion. I am unable to compare his achievement levels in 2004 with those of 2002-2003 because of the lack of assessment data in the record. Based on the limited evidence before me regarding his classes and grades for the 2002-2003 school year, and without the specifics of his last IEP prior to his expulsion, I note that Student failed English II with a grade of ***. Presumably following that failure, he was placed in Reading Improvement where he made an *** average. Student received less than three credits for that school year with grades below *** in at least four semester courses.

Based on Student's needs at the time of his re-enrollment in Webb CISD in January 2004, I find the IEP proposed by the January 2004 ARDC, and subsequently delivered ***, inadequate to deliver sufficient special education instructional time to address Student's LD in Language Arts and Math. Further, I find that as a result, he was denied a free appropriate public education during Spring 2004.

Compensatory Services

Compensatory relief may be indicated to provide a FAPE to a student if a school district violates IDEA's procedural requirements or, in some cases, if the school district does not deliver an IEP that meets the *Michael F.* standard. *Burlington School Comm. v. Department of Educ.*, 471 U.S. 359 (1985); *Alamo Heights, supra*; *Michael F., supra*. Compensatory relief should be designed to ensure that a student is appropriately educated within the meaning of IDEA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9th Cir. 1994). Therefore, an inquiry as to whether compensatory services are needed should assess whether the student was denied an appropriate education, and if so, what services would be needed to provide an appropriate education.

As previously discussed, the ARDC failed to determine that Student required a shortened school day in order to receive an educational benefit prior to reducing his school day to three and a half hours ***. This determination was made without regard to Student's individualized needs and without assessment data. I find that this violation meets the first prong of the test enunciated in *Michael F., supra*, and is a procedural violation of IDEA. However, the seriousness of the denial of an appropriate education does not stop at this point.

The *** setting is arguably a more restrictive setting than Student's previous placement during the 2003-2004 within the *** setting of *** classrooms and, thus, fails the second prong of the *Michael F.* test.

Petitioner established by a preponderance of the evidence that Webb CISD failed to provide the special education services as specified in Student's January 2004 IEP within the three and a half hour *** school day. I find that the program delivered to Student was a drastically reduced program from his 2002-2003 school year and, as such, fails the third factor enunciated in *Michael F.*

The fourth prong of the *Michael F.* test concerns whether positive benefits are demonstrated both academically and non-academically. Based on a review of the record in its entirety, I conclude that while Student continues to make educational progress in his *** placement toward earning credits ***, he has not received the minimal amount of instruction to which he is entitled.

To the credit of Student's dedication to return to school and ***, he has thus far followed the non-stop schedule of instruction without a vacation break through two inter-session weeks and the summer break. As measures of his progress, there is limited evidence in the record of Student's past levels of achievement with which to compare his 2004 triennial reevaluation. There are no report cards or progress reports other than the fourth six-week progress report of March 2004, prepared after Petitioner filed his Request for Due Process, with which to evaluate his recent progress ***. Yet his language skill levels and measured levels of academic achievement, as measured in his recent triennial reevaluation and as discussed by the February 2004 ARDC, lag behind his classification as a *** grade student for the 2003-2004 school year – as well as his *projected* classification of a *** grade student for the 2004-2005 school year in a general education setting with resource support. Further, the January 2004 ARDC failed to develop a broad IEP for other areas of Language Arts in addition to the IEP for a "Self-extending Reader." Likewise, no testimony was offered at hearing to indicate that Student worked on his other deficit areas of Language Arts such as Grammar and Written Expression. I find that his academic progress *** is minimal at best, with indicators of some regression, as discussed above.

As a student eligible to receive special education services, Student has not received the specialized instruction and services necessary to provide a meaningful education within the standards enunciated in *Bobby R., supra*. Progress in a drastically curtailed educational program is not meaningful progress. While Webb

CISD's plan is to help Student gain *** credits and "***," it is troubling to this Hearing Officer that Student has not received the instructional services to which he is entitled during the Spring 2004 school year.

The *Rowley* analysis measures whether the student's IEP was reasonably calculated to supply FAPE at the time the IEP was written. *Rowley, supra*. I conclude, for the reasons previously discussed, that the IEP fails both prongs of the *Rowley* when the IEP was written. Under the retrospective four-factor analysis of *Michael F.*, I find that the IEP for the *** placement did not provide FAPE.

Based on the above reasons and according to the greater weight of the evidence and balance of equities, my order will grant 30 hours of compensatory educational services, reflecting most of the hours of missed instruction that Student did not receive ***.

Conclusions of Law

1. Student is a student entitled to special education and related services under the provisions of IDEA, 20 U.S.C.A. §1400, *et. seq.*, and its implementing regulations.
2. Webb CISD is the local education agency responsible for providing Student with a free appropriate public education. *Bd. of Educ. v. Rowley*, 102 S.Ct. 3034 (1982).
3. The educational program proposed by the school district is presumed to be appropriate. Petitioner, as the party challenging the educational program offered by Webb CISD, bears the burden of proof. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Alamo Heights ISD v. State Board of Education*, 709 F.2d 1153 (5th Cir. 1986).
4. Webb CISD failed to make a determination based on valid assessment data that Student's *** school day should be shortened from four hours to three and a half hours in order for Student to receive a meaningful benefit from his instruction.
5. Webb CISD failed to provide Student with all the hours of instruction to which he was entitled during periods of enrollment in the *** during the 2003-2004 school year.
6. Webb CISD failed to meet its obligation to provide Student an educational program during his enrollment in the *** in the 2003-2004 school year that included sufficient individualized instruction and support services to allow him to benefit from his education. *Bd. of Educ. v. Rowley*, 102 S.Ct. 3034, 3035 (1982).
7. Petitioner met his burden to prove that Webb CISD failed to provide an appropriate educational program for Student during periods of his enrollment in the *** during the 2003-2004 school year. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd* 468 U.S. 883 (1984).
8. Petitioner is entitled to an award of compensatory educational services to compensate him for missed hours of instruction during periods when Petitioner received less than four hours of instruction within the ***. *Burlington School Comm. v. Department of Educ.*, 471 U.S. 359 (1985); *Alamo Heights ISD v. State Board of Education*, 709 F.2d 1153 (5th Cir. 1986).
9. Petitioner met his burden to show that Student failed to make meaningful academic progress under the educational program provided by Webb CISD in the *** during the 2003-2004 school year. *Houston*

ISD v. Bobby R., 200 F.3d 341 (5th Cir. 2000); *Cypress Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

ORDERS

Based upon the record of this proceeding, the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that Webb CISD provide Student with 30 hours of compensatory tutoring within the next nine calendar months, under the terms of his IEP for the 2004-2005 school year, as compensatory educational services. In the alternative, Webb CISD must provide other compensatory educational services as Student's ARDC, including Parent, determines and agrees to be appropriate based on Student's current evaluation.

IT IS FURTHER ORDERED that Webb CISD shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of Special Education Programs and Complaints 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.

IT IS FURTHER ORDERED that any findings of fact that are more properly characterized as conclusions of law, and any conclusions of law that are more properly characterized as findings of fact, shall be considered and shall have the same effect as if properly characterized.

IT IS FURTHER ORDERED that any and all additional or different relief not specifically ordered is herein is **DENIED**.

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

Signed this 30th day of June 2004.

/s/ Mary Carolyn Carmichael

Mary Carolyn Carmichael
Special Education Hearing Officer

Student	§	
b/n/f Parent	§	BEFORE A SPECIAL EDUCATION
Petitioner	§	
	§	
v.	§	HEARING OFFICER
	§	
WEBB CONSOLIDATED	§	
INDEPENDENT SCHOOL DISTRICT,	§	FOR THE STATE OF TEXAS
Respondent	§	

SYNOPSIS

ISSUE: A. *Whether Respondent improperly reduced the student’s school week and school day length without appropriate supportive assessment data?*

C.F.R. CITATION: 34 C.F.R §§300.9(c)(2), 300.346, and 300.347

TEXAS CITATION: 19 T.A.C. §89.1055

HELD: For the student.

ISSUE: B. *Whether Respondent failed to provide the student with an appropriate school day length during periods of his enrollment in the school district during the 2003-2004 school year?*

C.F.R. CITATION: 34 C.F.R. §§300.9(c)(2), 300.346 and 300.350(a)

TEXAS CITATION: 19 T.A.C. §§89.63(a)-(b) and 89.1121(a)

HELD: For the student.