

TEA DOCKET NO. 046-SE-1107
TEA DOCKET NO. 065-SE-1207
TEA DOCKET NO. 074-SE-1207

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

DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Petitioner, Student bnf Parent (hereinafter referred to as Student), brings this action against Respondent El Paso Independent School District (hereinafter EPISD or the District) under the Individuals With Disabilities Education Act (hereinafter IDEA), 20 U.S.C. § 1400 *et. seq.*

At all times during this proceeding, Student appeared *pro se* through his next friend, Parent (hereinafter referred to as Parent). At all times during this proceeding, Respondent was represented by Elena Gallegos, attorney with Walsh, Anderson, Brown, Schulze & Aldridge.

Student raises the following issues for resolution at due process:

1. Whether the District's failure to continue to provide transportation, or reimbursement for transportation, to Student to attend *** School following Student's move to a location far outside the school's attendance zone violates a resolution agreement between the parties and/or Student's right to a free appropriate public education? For relief, Student seeks ongoing transportation to *** and/or reimbursement for private transportation.

2. Whether the vision evaluation of Student completed in Fall 2007 is accurate, appropriate and based on true and accurate information? For relief, Student seeks VI services based on the state eye form rather than the District's vision evaluation, or in the alternative, an appropriate VI evaluation completed by a qualified physician. Student further seeks assignment of a new VI instructor as his service provider.

3. Whether the District failed to implement the agreements reached in the April 2007 ARDC meeting pertaining to ***'s report and recommendations? For relief,

Student seeks compensatory services, complete implementation of the agreements reached in the April 2007 ARD concerning ***'s evaluation of Student, and a current evaluation of Student by ***.

4. Whether the District is required to provide Student with transportation or reimbursement for transportation to TAKS tutoring;

5. Whether the District violated IDEA by implementing the provisions of the November 2007 ARD pertaining to modifications for Student when being tested for TAKS when that ARD was not complete or signed by the parent; and

6. Whether the results of Student's benchmark TAKS testing from the 2007-2008 school year have been manipulated or falsified to show better performance by Student than he is truly obtaining.

PROCEDURAL HISTORY

On or about November 6, 2007, Student filed an initial request for due process with the Texas Education Agency, which was docketed as Docket No. 046-SE-1107. On November 20, 2007, the Hearing Officer granted the District's challenge to the sufficiency of Student's request for due process and entered a revised scheduling order instructing Student to amend his request for due process and beginning the timelines for resolution of his complaint anew.

On or about December 6, 2007, the Hearing Officer denied the District's motion to dismiss Student's claims related to the District's failure to provide transportation following Student's move to a different attendance zone. The District claimed in its motion to dismiss that the Hearing Officer had no jurisdiction over Student's transportation claims on the grounds that they failed to state a claim under IDEA, but rather asserted contract claims based on a Compromise Settlement Agreement entered into between the parties. In denying the motion to dismiss, the Hearing Officer found that Student's allegations that the District's failure to provide transportation denied his rights under IDEA stated a claim for relief within the Hearing Officer's jurisdiction under IDEA.

On or about December 5, 2007, Student filed a second request for due process docketed by the Texas Education Agency at Docket No. 065-SE-1207. By motion dated December 10, 2007, the District moved to consolidate the two proceedings on the grounds that each proceeding involved the same parties and concerned educational issues related to the same student. The District further agreed to move the timelines in the second case forward to ensure that no significant delay occurred in resolving the issues raised in the first proceeding filed. By order dated December 11, 2007, the Hearing Officer granted the District's motion to consolidate with no objection from Student and consolidated the two docket numbers under Docket No. 046-SE-1107. The parties jointly waived resolution sessions in both dockets in lieu of mediation, which took place on December 12, 2007, but did not result in an agreement.

On or about December 18, 2007, Student filed a third request for due process docketed by the Texas Education Agency as Docket No. 074-SE-1207. At a pre-hearing conference on January 4, 2008, the District moved to consolidate this proceeding with Docket No. 046-SE-1107 on the grounds that each cause involved the same parties and concerned educational issues related to the same student. The District further agreed to move forward the timelines in the third request filed to ensure that no significant delay occurred in resolving the pending issues in Docket No. 046-SE-1107. By order dated January 8, 2008, the Hearing Officer granted the District's request to consolidate and consolidated the two docket numbers under Docket No. 046-SE-1107.

On January 17 and 18, 2008, Student filed a request to add new issues to his claims in Docket No. 046-SE-1107. By order dated January 25, 2008, the Hearing Officer granted Student's request to amend his due process complaint. The parties agreed to waive the resolution meeting and thirty day resolution period pertaining to the new issues raised by the amendments so that all issues could be heard and resolved at the time of the due process hearing scheduled for February 11-12, 2008.

By order dated February 13, 2008, the Hearing Officer continued the case on her own motion for good cause due to an illness in the Hearing Officer's family. The parties agreed to an extension of the deadline for issuing the decision commensurate with the rescheduling of the due process hearing.

Pre-hearing conferences were held in this matter on January 4 and March 7, 2008. The due process hearing was held on March 18-19, 2008. By agreement, the parties filed written closing arguments on April 16, 2008. This decision of the Hearing Officer is due on or before May 16, 2008.

FINDINGS OF FACT

1. Student is a ** old wheelchair bound *** who resides with his Parent within the jurisdictional boundaries of EPISD.
2. EPISD is a political subdivision of the State of Texas and a duly incorporated independent school district.
3. Student is eligible for and receives special education services from EPISD under the eligibility categories of an orthopedic impairment and a visual impairment.
4. Student's Parent and the District have had ongoing disputes during the 2005-2006, 2006-2007, and 2007-2008 school years that have resulted in the filing of numerous due process hearings, two mediations, and several resolution sessions. As a result of these ongoing conflicts, there is a lack of effective communication and trust between the parties that frequently leads to misunderstandings.
5. In April 2007, Student's Admission, Review, and Dismissal Committee (hereinafter ARDC) convened for his annual review and REED (Review of Existing Evaluation Data). In relevant part to this proceeding, the April ARDC addressed issues related to Student's TAKS testing, OT, and vision.

6. Student's April 2007 IEP provided for special transportation services to *** due to his insufficient mobility skills for safe travel and his use of adaptive devices which could endanger him or others while riding a regular school bus. As of April 2007, Student lived at ***, an address not technically in the *** attendance zone, but located across the street from the attendance zone and a 5-10 minute bus ride to ***.
7. With respect to TAKS testing, the April ARDC agreed that Student would remain with his class for testing and take the regular TAKS without accommodations. The ARDC also agreed to ask for input from *** on this issue. *** is a neuropsychologist who the parties agreed would evaluate Student to provide information and recommendations related to the effects of Student's neurological status on his academic progress and program.
8. The ARDC reviewed an OT Evaluation by *** dated March 6, 2007 that had been requested by the District due to concerns about Student's possible sensory processing issues. *** reported that Student demonstrated moderate sensory processing deficits that resulted in difficulties modulating his behaviors and responses.
9. Based in part on the result of ***'s evaluation, the ARDC agreed to and adopted revised OT goals for Student: 1) Student will manage clothing, removal and replacement of incontinence pad with minimal assistance 5/5 consecutive trials in 9 weeks; 2) Student will demonstrate proper placement, letter size, sequence, and formation using modified paper with 70% accuracy for a period of nine weeks; and 3) Student will demonstrate good self-regulation of behavior as evidenced by his ability to complete one assignment daily for 9 consecutive weeks with less than or equal to three prompts for redirection. OT services were to be provided in the amount of 60 minutes per month, both direct and consultative.
10. The District designated the use of the Alert Program to address Student's sensory processing and self-regulation issues. The OT, general education teacher, and Student's assigned paraprofessional aide were designated to implement the Alert Program and address Student's self-regulation goal. The goal's reference to the Student completing an assignment daily for 9 consecutive weeks refers to a measurement of mastery and not to a level of service to be provided by the OT.
11. The OT goals developed for Student by the April ARDC substantially implemented ***'s recommendations for Student.
12. With respect to Student's vision, the nurse reported a visual screening result from October 23, 2006 that indicated visual acuities with correction as 20/100 right eye and 20/60 left eye. These acuity readings represented a significant decline in Student's vision from the District's last eye report from *** dated June 3, 2005, which indicated visual acuities with correction as 20/30 right eye and 20/30 left eye.

13. Student's Parent reported to the April ARDC that *** had examined Student on March 23, 2007 and found a similar decline in visual acuity, with measurements of 20/200 right eye and 20/60 left eye with correction.
14. As a result of this decline in acuity, the ARDC recommended that a Functional Visual Evaluation (FVE) and Learning Media Assessment (LMA) be completed for Student. In addition, the ARDC agreed to provide Student with a low vision evaluation by an evaluator to be agreed upon by the parties at an upcoming resolution session. Parent agreed to provide the Texas State Eye Report form to *** for completion so the District could obtain the results of the March 2007 exam.
15. Between the April 26, 2007 ARDC and the end of the 2006-2007 school year, the OT initiated the Alert Program by reviewing the terminology with Student and sending Parent copies of the vocabulary and materials to assist in implementation of the program in the home environment. The OT also worked on activities related to Student's handwriting goal.
16. During the 2007-2008 school year, the OT continued work on the Alert program as well as Student's other OT goals. During September 2007, the OT's focus was more on access issues relating to classroom accessibility, transfers in the building, the use of the kaye walker, and other physical access issues. During October and November 2007, the OT worked on Student's goals related to self-regulation (the Alert program) and handwriting. Beginning in December 2007, a new OT began who worked with Student primarily on the self-regulation goal and implementation of the Alert program.
17. The District properly implemented Student's IEP of April 2007 with respect to OT goals and services. Further, during the 2007-2008 school year, Student made substantial progress on each of his OT goals and is on track to master the goals by the end of the year.
18. On or about May 14, 2007, the parties entered into a Compromise Settlement Agreement (CSA) to resolve any and all claims through the execution date of the agreement. In relevant part, paragraph 5 of the CSA provides as follows: "*In exchange for a dismissal of PETITIONER'S Section 504 of the Rehabilitation Act of 1973 and Americans with Disabilities Act claims now pending before the Office for Civil Rights (OCR), DISTRICT agrees to grant PETITIONER'S request for an intra-district transfer to attend *** for each of Student's elementary school years so long as PETITIONER considers *** School to be an accessible environment for Student. PETITIONER agrees to not demand or require any modifications to the *** School building or campus that is not otherwise required by law given the age of the building and its structures. Should *** School building or campus become inaccessible to Student, the DISTRICT will offer an accessible campus closest to Student's home.*"
19. Student began the 2007-2008 school year residing on *** and attending ***.

20. Through conversations with the *** principal, Parent informed the District in late August or early September 2007 that she was **** and moving to the west side of El Paso, but that she wanted Student to remain at *** through the end of the school year. Parent also inquired about special transportation from her new address to ***. The principal informed Parent that she would be granted a pupil transfer for Student, but that the transportation decision would be made by the transportation department according to district policy. The principal requested that Parent complete a transfer form, but Parent declined on the basis that the CSA guaranteed Student attendance at ***.
21. Throughout the months of September and October 2007, Parent continued to ask about whether Student would be provided with special transportation upon the move to the west side. The District continued to make attempts to obtain a written transfer request form with a specific address in order to evaluate the transportation request, but Parent continued to decline to complete the form.
22. Parent provided one address in a telephone conversation with the Principal on or about September 5, 2007 and a revised street number for the address on October 22, 2007; however neither of the street numbers provided were correct so the District remained unclear about where Student would reside following the move. The District finally learned of the correct address on or about November 1, 2007. Student requested transportation to begin at the new address on *** on or about November 5, 2007.
23. By letter dated November 2, 2007, the District informed Parent that while Student would be granted a transfer to ***, the District would not provide special transportation from his new address on ***.
24. EPISD is divided into three areas for transportation purposes: west, central, and northeast. The most difficult transportation challenge is between the west and northeast areas due to the need to cross the mountain that divides the district. School buses cannot travel across the mountain on Trans-Mountain Road due to safety issues.
25. District transportation policy provides that students who voluntarily transfer from their assigned school do not qualify for transportation. Exceptions to this policy are made for students qualifying for special education transportation in two instances: 1) when the voluntary transfer is within the same transportation area or 2) when an ARDC provides for an out of area transfer so that a student in special education can access a particular program required for a free appropriate public education.
26. Student's new address is located in the west area and *** is located within northeast. Transportation would require a minimum of 30-35 minutes each way without taking into account traffic patterns on Interstate 10, which can be heavy.

27. Given the District's existing routes, personnel, and equipment, the District would be required to hire an additional bus driver and monitor and purchase an additional bus in order to transport Student to *** from his new address. The alternative would be to shorten Student's school day by delivering him to school late and picking him up early.
28. On November 29, 2007, Student's ARDC convened to review the results of recently completed evaluations in the areas of OT, PT, Vision, and the neuropsychological evaluation of ***. The ARDC also discussed issues related to TAKS testing and transportation,
29. With regard to TAKS testing, the ARDC discussed a newly available option for the 2007-2008 school year, the TAKS with Accommodations or TAKS-Accommodated. To test with accommodations, the principal must seek approval of the accommodations from the Texas Education Agency and the accommodations should follow those provided for in the student's IEP and used in the regular classroom. For Student, the school members of the ARDC recommended the following accommodations for TAKS testing: use of large print materials, a place marker, a laptop for the written composition test, and manipulatives for the math test. In addition, the ARDC recommended a shorter version of the TAKS without the unscored field questions to minimize Student's fatigue and small group administration.
30. The accommodations recommended followed those in Student's IEP as well as the recommendation of *** that Student be tested in a small, quiet room.
31. At the ARDC, Parent indicated openness to the proposed TAKS accommodations, but expressed the desire to consult with an attorney before finalizing them. The ARDC meeting ended in disagreement following discussion of another topic.
32. With regard to OT, the goals remained the same as the OT had recently resigned and a new OT was not yet in place.
33. The Vision Itinerant (VI) teacher presented the results of Student's recently completed FVE and LMA to the ARDC. The nurse's screening of Student completed on September 6, 2007 as part of the FVE yielded an acuity reading with correction of 20/25 with both eyes, a different and substantially improved reading than that obtained by the nurse's screening in October 2006 or by *** in March 2007.
34. As part of her review of data concerning Student, the VI teacher contacted *** concerning her March 2007 evaluation of Student to try and understand the discrepant readings in visual acuity. In talking with ***, the VI teacher learned that the low acuity readings obtained in March 2007 were measured with Student wearing the glasses that he had at that time. *** prescribed new glasses for Student in March 2007 that she expected would yield visual acuities of 20/30 right eye and 20/20 left eye. *** had requested a 6-week follow up with Student

- after prescribing the new glasses, but Student did not return. This conversation with *** was accurately reflected in the VI teacher's FVE report.
35. Because the conversation with *** confirmed the results of the nurse's screening and VI teacher's testing, the VI teacher concluded that the low readings the ARDC reviewed in April 2007 resulted from the outdated prescription Student was wearing at that time.
 36. When Parent reviewed the FVE at the November ARDC meeting and learned of the VI teacher's conversation with ***, she formed the belief that the FVE was not based on accurate information for two reasons: 1) Parent believed the VI teacher added the word "resolved" to ***'s diagnosis of papilladema on the State of Texas Eye Report and 2) Parent believed that the conversation recorded in the FVE explaining ***'s prediction of acuity readings with the new prescription was misrepresented.
 37. Papilladema is the swelling of the optic nerve and is a condition that can be resolved.
 38. The evidence does not support the conclusion that the State of Texas Eye Form was altered following its completion by *** in March 2007.
 39. Parent's belief that the conversation between the VI teacher and *** was misrepresented was based on the VI teacher representing that *** said Student's acuities would be much improved with the new glasses when, in fact, Student was not wearing the new glasses when he was screened in September 2007 by the nurse and *** had never seen Student with the new prescription.
 40. When the nurse screened Student for his FVE in September 2007, he was actually wearing a prescription given to him by *** during summer 2007. Following ***'s report in March 2007, Parent decided to obtain a second opinion and took Student for an exam during the summer months to ***. ***' prescription differed from ***'s and Parent filled ***' prescription for Student's new glasses.
 41. Parent did not inform anyone at the District during or prior to the ARDC meeting that Student had seen *** over the summer or that *** prescribed new glasses for Student that he was wearing. No record of ***' visit or prescription was entered into evidence.
 42. With respect to the issue of transportation, the ARDC discussed Student's move to the west side and the appropriateness of providing transportation. Based on the ARDC's determination that Student could receive a free appropriate public education at his assigned elementary school, ***, and that *** was substantially closer to Student's new residence, the ARDC declined to provide Student with transportation for his transfer to ***. The ARDC ended in disagreement over this issue.

43. Student's IEP can be implemented at *** and Student can receive a free appropriate public education at ***. Student is flexible enough and gets along with new students easily enough that he is likely to be successful academically and non-academically at ***.
44. The long commute between *** and Student's residence of 30-45 minutes each way would be likely to cause fatigue to Student and impact his attentiveness and energy level during the school day.
45. As of November 29, 2007, the District had in place an appropriate transition plan that would likely ensure Student's smooth transition to ***. In addition, staff from *** had already communicated Student's needs to *** staff and alternations had been made, where necessary, to the physical environment to ensure access for Student.
46. In December 2007, the *** campus administered a practice TAKS test. The practice TAKS tests were administered to Student in accordance with the discussion at the November 2007 ARDC based on the principal's belief that the parties had reached agreement on the accommodations and testing procedures. Student did very well on the practice TAKS. Upon learning that the TAKS was administered with accommodations and in a small group setting, Parent expressed concern and was told that the next practice TAKS would be administered differently for comparison of results.
47. Student's practice TAKS results were not manipulated or falsified and accurately represent his scores on the TAKS tests. The date on his answer sheet reflects the date that Student was asked to sign the test as he had forgotten to put his name on it originally and not the date when the test was administered. Student's test could be accurately identified even though he forgot to put his name on it because Student is the only fourth grader who had a large print version of the test.
48. Student was invited to attend TAKS tutoring following the practice TAKS administered in December 2007 even though Student scored above the cut-off for the tutoring program. TAKS tutoring is voluntary for all students and is not part of Student's IEP.
49. During the 2007-2008 school year, Student has been successful and happy and has made substantial progress both academically and emotionally/behaviorally.

DISCUSSION

In this cause, Student raises six issues pertaining to the educational and related services he received from EPISD during the spring of 2007 and the 2007-2008 school year. As the party seeking relief in this cause, the burden of proof is on Student. *Schaffer v. Weast*, 126 S. Ct. 528 (2005).

I.

Whether District's Failure To Continue To Provide Transportation or Reimbursement For Transportation For Student To Attend * School Following Student's Move To A Location Far Outside of *** School's Attendance Zone Violates A Resolution Agreement Between The Parties And/Or Student's Right To A Free Appropriate Public Education Under IDEA**

Student and District entered into a Compromise Settlement Agreement (CSA) on May 14, 2007 that compromised and settled IDEA, Section 504, and ADA claims. Paragraph 5 of that agreement requires the District to grant Student's request for an intra-district transfer to *** for the remainder of his elementary years. The agreement is silent on the issue of transportation should a transfer be granted. Student claims that this paragraph of the agreement, as well as his right to a free appropriate public education under IDEA, entitles him to continue to receive transportation to ***. Student argues that transportation is part and parcel of his entitlement to the transfer.

There is no dispute between these parties as to Student's right to remain at *** and, in fact, District granted Student an intra-district transfer in September 2007 immediately upon Student's request. The dispute is whether the related service of transportation that Student's IEP provides between his residence on *** Drive and *** is mandated given Student's relocation to *** Drive, a location in another geographic transportation zone that is substantially further from ***.

Paragraph 5 of the CSA pertaining to Student's right to remain at *** on a student transfer until he completes elementary school states that it is a resolution of Section 504 and ADA claims related to accessibility. This Hearing Officer's jurisdiction is limited to "any matter relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of a free appropriate public education to the child." 34 C.F.R. § 300.507(a). As such, this Hearing Officer does not have jurisdiction over Section 504 or ADA claims or the interpretation of an agreement resolving claims pursuant to those statutes.¹ Thus, any entitlement Student may have to continued transportation must derive from his rights under IDEA.

Under IDEA, transportation is a related service that must be provided if it is required to assist a child with a disability to benefit from special education. 34 C.F.R. § 300.34. When a student with a disability elects to attend a school other than the assigned campus closest to the child's home, the district is generally not required to provide special transportation as long as the assigned campus is able to provide the student with a free appropriate public education. *Fick ex rel. Fick v. Sioux Falls School District*, 39

¹ Even if this term of the agreement also pertains to a claim arising IDEA, the Hearing Officer declines to exercise jurisdiction to enforce a settlement agreement under IDEA given IDEA's provision that enforcement of such agreements is the province of the state and federal courts absent the state educational agency's provision of other mechanisms to seek enforcement of an agreement. 20 U.S.C. § 1415(f)(1)(B)(iii); 34 C.F.R. § 300.537; *Needville Independent School District*, 108 LRP 2953 (SEA TX 2008); *Eatonville School District*, 106 LRP 18798 (SEA WA 2006).

IDELR 151 (8th Cir. 2003); *Timothy H. v. Cedar Rapids Community School District*, 30 IDELR 535 (8th Cir. 1999).

Notwithstanding the above principle, students with disabilities may be entitled to receive transportation to an area outside of the assigned school even though it is not required for a free appropriate public education when the child's circumstances necessitate transportation and the request for transportation is reasonable in terms of the burden it would place on the school district. *Alamo Heights Independent School District v. State Board of Education*, 790 F. 2d 1153 (5th Cir. 1986). To assess reasonableness of a student's request, the court in *Alamo Heights* identified the following factors for consideration: 1) whether the transportation would result in substantial additional expense; 2) whether the transportation would disrupt efficient planning of school bus routes; 3) whether the transportation would entail additional time to transport other children; and 4) whether the transportation would in any way inconvenience other children.

The District's policies and practices with respect to Student are consistent with IDEA's requirements for the provision of special transportation. Student's IEP provided him with the service of special transportation between *** Drive and *** even though *** was not the assigned campus for the *** Drive address because Student's circumstances clearly necessitated special transportation and the burden of providing such transportation between the *** address and *** was minimal. The locations are very close (5-10 minutes by bus), they are within the same geographic transportation area, and providing the transportation necessitated no disruption in bus routes.

In contrast, when Student moved to *** Drive, the burden of providing the transportation became substantial, thus altering the calculation as to the District's responsibility to provide special transportation to Student. The substantial nature of the burden is evidenced by the facts that the locations are very far apart (30-45 minutes by bus depending on traffic patterns), they are not within the same geographic transportation area, and transporting Student between *** and *** would require the District to either add personnel and equipment or significantly inconvenience other students or Student by shortening his school day.

Student failed to prove that he could not receive a free appropriate public education at his assigned home campus of ***. Student's IEP can be fully implemented at *** and all indications are that Student would be successful there. In fact, the evidence suggests that he would be equally or better served at *** given its proximity to his residence, the excellence of its staff and reputation, and the presence of a different VI instructor, which is one of Parent's greatest concerns about his services at ***. The Hearing Officer understands Parent's hesitance to move Student from *** when he is enjoying a very successful year; however, the evidence indicates that Student is flexible, well adjusted, and able to adapt to change.

In summary, Student's entitlement to an intra-district transfer so that he can continue to attend *** does not encompass the right to special transportation given that

he can receive a free appropriate public education at his assigned campus, ***, and the burden of transporting Student from his new residence to *** is substantial.

II.

Whether District Is Required To Provide Student With Transportation Or Reimbursement For Transportation To After School TAKS Tutoring

For the reasons discussed in Section I herein, the District is not required to provide Student with transportation to *** during the school day or for after school TAKS tutoring. Further, even if special transportation were required for Student to continue attending ***, such transportation would not be required for TAKS tutoring as Student's participation is voluntary, TAKS tutoring is not a part of Student's IEP, and it is not required in order for Student to receive a free appropriate public education.

III.

Whether The Vision Evaluation of Student Completed In Fall 2007 Is Accurate, Appropriate, And Based On True And Correct Information

Commissioner's rules for the State of Texas governing identification and evaluation of a student with a visual impairment provide that a student with a visual impairment is one who has been determined to meet the requisite standards by a licensed ophthalmologist or optometrist and has been determined to have a need for special services by a FVE and a LMA. 19 T.A.C. § 89.1040(c)(12)(A)(i). Student claims, in this case, that each of these components of his evaluation- the State of Texas Eye Report completed by *** and the FVE completed by the VI teacher- were inaccurate and based on incorrect information. Student failed to meet his burden of proof with respect to these alleged inaccuracies.

With regard to the State of Texas Eye Report, Student argues that someone other than *** added the word "resolved" in relation to Student's diagnosis of papilladema. The only evidence Student offered in support of this claim was Parent's understanding that the condition of papilladema could not be resolved and therefore the doctor would not have designated it as such. Contrary to Parent's assertion, the testimony of *** supports the conclusion that the condition of papilladema is a swelling of the optic nerve that resolves like other swelling, though it may leave lasting damage in its wake. The VI teacher testified that she made no alterations on the State of Texas Eye Report and Student offered no evidence to contradict that other than the general distrust that exists between Parent and the VI teacher. Based on the evidence presented, the Hearing Officer concludes that the State of Texas Eye Report was not altered following its completion by ***.

With respect to the FVE, Student disputes the accuracy of the VI teacher's reporting of a telephone conversation she had with *** concerning discrepancies in Student's visual acuity readings. The VI teacher contacted *** to understand why Student obtained low acuity readings from the nurse's screening in October 2006 and ***'s exam in March 2007, but improved readings on the nurse's screening in September 2007 when examined for the FVE. *** explained that the lower acuity reading Student

had on his March 2007 exam resulted from Student wearing an out of date prescription, but that *** expected substantially improved acuity readings with the new prescription she gave Student following the March 2007 exam. *** had not, however, been able to verify the accuracy of her prediction, as Student had not returned for a follow up visit with the new glasses. The predicted improved acuity readings were consistent with the improved readings obtained on the nurse's screening of September 2007, so the VI teacher concluded that Student's lowered acuity readings were a result of an outdated prescription that were corrected by ***'s new prescription following the March 2007 exam.

Student argues that the VI teacher had to have misrepresented this conversation with *** in which she predicted improved acuity readings with Student's new glasses because *** never saw Student with the new glasses. Further, Student argues that when Student obtained improved readings on the nurse's screening in September 2007, Student was not wearing the new prescription from ***. Rather, Student was wearing a new prescription given by *** from an exam during Summer 2007. Based on this, Student argues that the VI teacher's conclusion about the discrepant readings was unwarranted because she never spoke with *** and his prescription was different from that prescribed by ***.

There are several important problems with Student's arguments. First, and most importantly, Parent never told anyone from the District that Student saw *** during Summer 2007 or had obtained a new prescription from him. When the VI teacher conducted the FVE and when the ARDC discussed the results of the FVE at the November 2007 ARDC meeting, Parent never mentioned another eye exam or doctor. Parent cannot argue that the FVE is inaccurate for failing to include the exam of *** when she herself never provided such information to the District. Second, Student presented no evidence of the eye exam results obtained by *** in Summer 2007 that would establish what, if any, difference exists between his prescription for Student and that of ***. Without such information, the fact that Student was wearing glasses prescribed by *** rather than *** does not negate the basic point that *** made in explaining the discrepant readings; that is, the low acuity readings from October 2006 and March 2007 resulted from an out of date prescription that had been changed as of the September 2007 readings. Finally, Student presented no evidence in support of the claim that the VI teacher misrepresented her conversation with *** other than the above speculations and her general mistrust of the teacher, while the VI teacher testified credibly to the accuracy of her report. For all of these reasons, the Hearing Officer concludes that the vision evaluation of Student completed in Fall 2007 was accurate, appropriate, and based on true and accurate information.²

² Even if the Hearing Officer were to find that the vision evaluation did not meet IDEA's standards for an appropriate and accurate evaluation, Student would still not be entitled to relief for this procedural violation given that the evidence is conclusive that Student received a free appropriate public education and that his visual impairment has been effectively addressed through appropriate special education, related services, assistive

IV.

Whether The District Failed To Implement The Agreements Reached In The April 2007 ARDC Meeting Pertaining To **'s Report And Recommendations**

IDEA's implementing regulations provide that following the development of an IEP, special education and related services must be provided in accordance with the IEP and each teacher and provider must be informed of his or her responsibilities in implementing the IEP. 34 C.F.R. § 300.323.

Student's April 2007 IEP contained two OT goals designed to implement ****'s report and recommendations- one related to self-regulation via implementation of the Alert program and one related to clothing management. Student claims that the District failed to implement his IEP with respect to these goals. Student bases this claim on two arguments: 1) Parent's belief that the reference to 9 consecutive weeks in the OT goal of self-regulation refers to the level of service and that the OT did not serve Student for 9 consecutive weeks and 2) the OT's lack of focus on the Alert program until late in the fall of 2007.

Student failed to meet his burden of proof on this claim. First, the level of service provided for in Student's IEP is 60 minutes per month. The reference to 9 consecutive weeks in the self-regulation goal is a measure of mastery of the goal and is unrelated to the level of service specified. The evidence conclusively establishes that the District provided Student with the requisite level of OT services. Second, the OT logs demonstrate attention to the implementation of the Alert program and focus on Student's self-regulation goal in May 2007 and throughout the fall, though the focus during the first month of school was understandably on physical access and movement issues for Student in the classroom and throughout the school building.

Most importantly, the evidence is clear that Student received a free appropriate public education, making definite progress in self-regulation and demonstrating both his understanding and application of the Alert program in the classroom and at home. Thus, even if Student could establish a failure to implement the OT portion of his IEP, he cannot show any harm as a result thereof. *Adam J. v. Keller ISD*, 328 F.3d 804 (5th Cir. 2003).

V.

Whether District Violated The IDEA By Implementing The Provisions Of The November 2007 ARD Pertaining To Modifications For Student During TAKS Testing

The issue presented to the Hearing Officer was whether the District violated stay put by administering a practice TAKS test to Student in December 2007 utilizing the

technology, and supplementary aids and services. *Adam J. v. Keller ISD*, 328 F.3d 804 (5th Cir. 2003).

accommodations that resulted from the November 2007 ARDC meeting, which ended in disagreement, rather than the last agreed upon set of TAKS related accommodations from the April 2007 ARDC meeting.

34 C.F.R. § 300.518(a) provides that Student is entitled to remain in his current educational placement pending the outcome of the instant due process proceeding. Student argues that the District erred in implementing the November 2007 ARD when administering a practice TAKS test in December 2007 given that the ARD ended in disagreement and due process had been filed. In response, the District argues that the portions of the November 2007 ARDC pertaining to Student's modifications for TAKS testing were agreed upon and were not the reason that the ARDC ended in a disagreement that led to due process. As such, the District claims that these provisions can therefore be implemented despite the pending due process proceeding. The Hearing Officer disagrees. Parent testified that she expressed openness to the revised TAKS modifications, but also indicated a desire to speak with her attorney before a final agreement. Further, once the ARDC ended in disagreement and due process was filed, Student became entitled to the procedural protections of stay put under IDEA.

Even so, the Hearing Officer finds that the District's implementation of accommodations and modifications discussed at the November 2007 ARD rather than those contained in Student's April 2007 IEP when it administered the practice TAKS to Student in December 2007 did not violate IDEA. First, the test Student took during December 2007 was not the TAKS test, but merely a discretionary practice test that the District chose to administer. Student's IEP does not govern the administration of a practice TAKS test. When Parent expressed concern about the implementation of the November modifications, the District indicated it would revert to the April modifications for the next practice TAKS test to collect data about which modifications would better serve Student. Not only is this an acceptable practice on the District's part, it is the practice recommended by *** in her evaluation of Student. Second, the District's implementation of a changed set of accommodations on a practice TAKS test does not rise to the level of a change of placement for purposes of IDEA's stay put provision as it does not affect the Student's learning experience in a significant way. *DeLeon v. Susquehanna Community School District*, 747 F.2d 149 (3rd Cir. 1984); *Matthew Cavanagh, et.al. v. Nancy Grasnick, et.al.*, 31 IDELR 158 (U.S.D.C. MD 1999).

VI.

Whether The Results Of Student's Practice TAKS Testing Of December 2007 Were Manipulated Or Falsified To Show Better Performance By Student Than He Truly Obtained

Student failed to prove that his practice TAKS results from the December 2007 testing were altered or falsified in any way. Student's claim is based on the fact that the date written by Student on the practice TAKS test was a date several weeks after the administration of the test, leading Parent to believe that the scores reported from

December 2007 had been falsified. The evidence demonstrated a clear and plausible explanation for the discrepancy in date that was not challenged by Student: Student forgot to write his name and date on the test when he originally took it in December. When asked in January 2008 by the principal to put his name and date on the test, Student wrote the date on which he signed the test rather than the date on which he took it. As Student was the only *** grader to take a large print version of the TAKS practice test, there is no concern that the test he signed and dated was not his own. The evidence conclusively established that the December 2007 practice TAKS test was administered fairly, according to the law, and that the results were not altered or falsified.

CONCLUSIONS OF LAW

1. Student is eligible to receive special education and related services from EPISD under the eligibility classifications of orthopedically impaired and visually impaired. 34 C.F.R. § 300.8; 19 T.A.C. § 89.1040.
2. EPISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA and its implementing federal and state regulations. As Student's resident district, EPISD has the responsibility under IDEA to provide Student with a free appropriate public education. 20 U.S.C. §1401; 34 C.F.R. § 300.101.
3. As the party seeking relief in this proceeding, Student has the burden of proof. *Schaffer v. Weast*, 126 S. Ct. 528 (2005).
4. EPISD's failure to provide Student with the related service of special transportation between his residence on *** and *** School during the school day or for after school TAKS tutoring did not violate the provisions of IDEA or result in a denial of a free appropriate public education to Student. 34 C.F.R. § 300.34; *Fick ex rel. Fick v. Sioux Falls School District*, 39 IDELR 151 (8th Cir. 2003); *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986).
5. EPISD's Functional Vision Evaluation of Student completed in Fall 2007 is accurate, appropriate, and based on true and accurate information in accordance with the requirements of IDEA. 19 T.A.C. § 89.1040(c)(12)(A)(i).
6. EPISD fully and adequately implemented the OT portion of Student's April 2007 IEP that reflected the recommendations of ***'s evaluation of Student. 34 C.F.R. § 300.323.
7. EPISD did not violate the stay put provisions of IDEA by implementing the portion of the November 2007 ARD pertaining to TAKS accommodations and modifications when administering a practice TAKS test to Student in December 2007. 34 C.F.R. § 300.518(a); *DeLeon v. Susquehanna Community School District*, 747 F.2d 149 (3rd Cir. 1984); *Matthew Cavanagh, et.al. v. Nancy Grasnick, et.al.*, 31 IDELR 158 (U.S.D.C. MD 1999).

8. The results of Student's practice TAKS testing in December 2007 were not falsified or manipulated and are accurate reflections of Student's performance. 19 T.A.C. § 89.1075.
9. During the 2007-2008 school year, EPISD's program and placement for Student provided him with a free appropriate public education. *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998).

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, this Hearing Officer hereby **ORDERS** that all relief requested by Student is hereby **DENIED**.

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

SIGNED and **ENTERED** this 16th day of May 2008.

/s/ Lynn E. Rubinett

Lynn E. Rubinett

Special Education Hearing Officer for the State of Texas

TEA DOCKET NO. 046-SE-1107
TEA DOCKET NO. 065-SE-1207
TEA DOCKET NO. 074-SE-1207

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

SYNOPSIS

Issue: Whether District's failure to continue to provide transportation or reimbursement for transportation for student to attend *** during the school day or for after school tutoring following student's move to a location far outside of ***'s attendance zone violates a resolution agreement between the parties and/or student's right to a free appropriate public education under IDEA?

Held: For Respondent EPISD. EPISD's failure to provide Student with the related service of special transportation between his residence on *** and *** School during the school day or for after school TAKS tutoring did not violate the provisions of IDEA or result in a denial of a free appropriate public education to Student. Student's transfer to *** School was voluntary in nature, not necessary for the provision of a free appropriate public education, and the burden on the District to provide such transportation would be substantial.

Cite: 34 C.F.R. § 300.34; *Fick ex rel. Fick v. Sioux Falls School District*, 39 IDELR 151 (8th Cir. 2003); *Alamo Heights Independent School District v. State Board of Education*, 790 F. 2d 1153 (5th Cir. 1986).

Issue: Whether the FVE of Student completed in Fall 2007 is accurate, appropriate, and based on true and correct information?

Held: For Respondent EPISD. EPISD's Functional Vision Evaluation of Student completed in Fall 2007 is accurate, appropriate, and based on true and accurate information in accordance with the FVE requirements of IDEA.

Cite: 19 T.A.C. § 89.1040(c)(12)(A)(i).

Issue: Whether the District failed to implement the agreements reached in the April 2007 ARDC meeting pertaining to ***'s report and recommendations?

Held: For Respondent EPISD. EPISD fully and adequately implemented the OT portion of Student's April 2007 IEP that reflected the recommendations of ***'s evaluation of Student.

Cite: 34 C.F.R. § 300.323.

Issue: Whether the District violated the IDEA by implementing the provisions of the November 2007 ARD pertaining to modifications for Student during TAKS testing^L ?

Held: For Respondent EPISD. EPISD did not violate the stay put provisions of IDEA by implementing the portion of the November 2007 ARD pertaining to TAKS accommodations and modifications when administering a practice TAKS test to Student in December 2007.

Cite: 34 C.F.R. § 300.518(a); *DeLeon v. Susquehanna Community School District*, 747 F.2d 149 (3rd Cir. 1984); *Matthew Cavanagh, et.al. v. Nancy Grasnick, et.al.*, 31 IDELR 158 (U.S.D.C. MD 1999).

Issue: Whether the results of Student's practice TAKS testing of December 2007 were manipulated or falsified to show better performance by Student than he truly obtained?

Held: For Respondent EPISD. The results of Student's practice TAKS testing in December 2007 were not falsified or manipulated and are accurate reflections of Student's performance.

Cite: 19 T.A.C. § 89.1075.