

STUDENT	§	BEFORE A SPECIAL EDUCATION
b/n/f PARENT	§	
	§	
V.	§	HEARING OFFICER FOR THE
	§	
WILLIS INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

DECISION OF HEARING OFFICER

STUDENT (“Student” or “Petitioner”), by and through her parent, PARENT, (“Parent”) requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”), 20 U.S.C. § 1400 *et seq.* The Respondent is Willis Independent School District (“Respondent,” “District,” or “WISD”).

In the request for due process hearing, Petitioner alleged that the District denied her a Free Appropriate Public Education (“FAPE”), specifically as follows:

1. The District failed to devise an appropriate Individualized Education Program (“IEP”) in May, 2009, in the following ways:
 - a. setting goals and objectives below the ** grade level through the use of pull-out resource classes for 2 ½ hours per day;
 - b. failing to provide appropriate modifications, accommodations and supplemental services including a one-to-one paraprofessional aide, so that the Student can be educated in the least restrictive environment (“LRE”), specifically, in a general education classroom on a full time basis;
 - c. setting inappropriate physical therapy (“PT”) goals; and
 - d. writing the IEP without sufficient specificity.
2. The District changed the Student’s teacher and classroom during the 2008-2009 school year and changed the Student’s paraprofessional aide.

As relief, Petitioner requested an order that directs the District to do the following:

1. Develop an appropriate and adequate IEP to include ** grade academic Texas Essential Knowledge Skills (“TEKS”) with appropriate modifications and accommodations that includes a 1-on-1 aide;

2. Explore all supplemental aids and services including assistive technologies so the Student can be taught ** grade academic goals and objectives in the LRE;
3. Placement in a general education, ** grade classroom on a full time basis;
4. Obtain an independent evaluation in speech and assistive technology at District expense by a qualified evaluator as agreed upon by the Parents;
5. Provide the Parents with a list of the types and locations of all the Student's records, and access to the Student's entire education record. (Upon receipt from the District of copies of emails and notes that pertain to the Student, the Parents agreed that Request for Relief Number 5 would no longer be included in Petitioner's requests for relief. Respondent asserted in Respondent's Proposed Findings of Fact, Argument, and Conclusions of Law that the District complied with this request, and Petitioner did not dispute this assertion.)

In addition to Petitioner's issues, Respondent filed Respondent's Original counterclaim and requested a determination regarding the appropriateness of the District's 2009 speech/language evaluation.

Procedural History

Petitioner filed this request for due process hearing on June 3, 2009. A First Scheduling Order was entered June 4, 2009. Beginning June 8, 2009, Petitioner was represented by attorney, Rebecca M. Ryan. Subsequently, Ms. Ryan filed a motion to withdraw as Petitioner's attorney, which motion was granted June 22, 2009. From that time, the Parent, PARENT, represented himself and the Student, *pro se*. Respondent was represented by attorney, Jan Watson.

On June 15, 2009, in response to Respondent' Notice of Insufficiency, Ten-Day Response to Complaint, and Prior Written Notice, the hearing officer entered an Order Regarding Respondent' Notice of Insufficiency of Complaint and overruled Respondent's objections to the sufficiency of the complaint. On June 23, 2009, a pre-hearing conference was held at which time the parties informed the hearing officer that a resolution session was held, but was unsuccessful. The parties agreed to participate in mediation, and the date for due process hearing was re-scheduled to allow time for mediation. The decision due date was extended accordingly to August 19, 2009.

The District filed Respondent's Original Counterclaim and requested a determination that the District's speech/language evaluation was appropriate and that Petitioner was not entitled to an Independent Educational Evaluation ("IEE") at District expense.

Following the due process hearing held July 15-16, 2009, the parties agreed to submit written closing arguments no later than August 5, 2009.

Based upon the evidence and argument of the parties, the undersigned hearing officer makes the following findings of fact and conclusions of law. Citations to the transcript will be designated as “Tr.” followed by the volume and page number. Citations to exhibits will be designated as “P” for Petitioner and “R” for Respondent, followed by the volume number and exhibit number.

Findings of Fact

1. Student is a student with ** and is eligible for special education and related services as a child with disabilities of ** and **. Student resides within the geographical boundaries of the Willis Independent School District. The WISD is responsible for providing FAPE to the Student. At the time Petitioner filed this request for due process hearing the Student was ** years old and finishing her ** year in the District.
2. Prior to **, the Student was in a ** in the District. Tr. Vol. I, pg. 81.
3. In **, the Student was in a regular education classroom with modifications and accommodations including a paraprofessional as support. Tr. Vol. I, pp. 81-82.
4. During the Student’s ** year, Student was in a regular education classroom with modifications and accommodations, including a paraprofessional as support. The District used a picture exchange communication system (“PECS”) to enable the Student to communicate her needs. Following that, the District used a communication device borrowed from the Education Service Center Region VI (“Region VI”). Other Assistive Technology (“AT”) materials used were pencil grips, stamps, and stencils to help the Student with her writing. The District determined that the use of a device called a Fusion worked well with the Student. Tr. Vol. I. pg. 95; R-Ex. 1.
5. A review Admission, Review, and Dismissal (“ARD”) committee meeting was held October 15, 2008 at which time the committee added modifications that included shortened assignments, simplified written and/or oral directions, allowance for alternate forms of response, and modified tests/texts. P-Ex. Vol. I-2; R-Ex. 2.
6. In response to the Parent’s request that the District try AT devices for the Student, the District asked Region VI to conduct a classroom observation of Student in October, 2008, Region VI made recommendations in the area of AT assistance. The observer noted that

the Student's paraprofessional may have been prompting Student too much. P-Ex. Vol. I-1 and Vol. I-3; R-Ex. 1 and 3.

7. Following the classroom observation by Region VI, the District moved the Student from one regular education classroom to another regular education classroom. A few weeks later, the District changed the paraprofessional who worked with her, and assigned a different paraprofessional. The transition was made gradually. The Student's placement in a regular ** class remained, as well as her accommodations, modifications, and in class support of a paraprofessional. Tr. Vol. I., pg. 217; Tr. Vol. II, pp. 58-59.
8. The ARD committee met December 18, 2008 and discussed the Parent's concerns about frustration and behavior. Alternative strategies and positive motivators which had been implemented were discussed. The District reported that the Student seemed to be doing well following the teacher change. R-Ex. 3.
9. The ARD committee did not require or perform an AT assessment. Tr. Vol. I, p. 94.
10. The Student's three-year evaluation was due May, 2009. The ARD committee requested new assessments in the areas of speech and language, occupational therapy ("OT"), and PT, each of which was completed. R-Ex. 6.
11. In her PT evaluation, the District's physical therapist reviewed records, and interviewed the parents, teacher and physical education ("PE") coach. She observed the Student in the classroom and on the playground, and observed her functional skills. The PT assessment included a standardized test to measure the Student's scope of functional skills that are required in the school day. When rated in comparison to her regular education peers, the Student scored ** score in the major school activity settings that were rated. The evaluator recommended continued PT services for Student. Tr. Vol. II, pp. 49-58; R-Ex. 6.
12. Although the Student is physically capable of moving from place to place, in order for her to keep pace with her peers, she requires ** to transition from place to place. Tr. Vol. II, pp. 50-52, 59-60; R-Ex. 5.
13. On June 1, 2009, the ARD committee determined that, as a goal for Student, she should demonstrate measurable progress in the acquisition of developmentally appropriate motor skills to include performing jumping jacks with proper form, engage in playground activities for the duration of recess, actively participate in PE activities, keep up an

appropriate pace with peers during transitions, and use scissors to cut out simple primary pictures. R-Ex. 6; P-Ex. Vol. I-7.

14. The April, 2009 speech and language evaluation included a variety of formal and informal measures, administered in the Student's native language, and reflected that the Student's receptive and expressive language skills are below average, and that she is not a functional communicator. The evaluation included the Assessment of Literacy and Language ("ALL"), the Clinical Evaluation of Language Fundamentals-4th Edition ("CELF-4"), the Goldman-Fristoe Test of Articulation-2 ("Goldman-Fristoe"), and informal observations and data gathered from school staff and the Student's parents. Multiple strategies were used by the speech language pathologist to assess the Student. Tr. Vol. I. pp. 86, 91-96, 99; R-Ex. 6.
15. The District conducted competency testing prior to the Student's annual ARD committee meeting. Tr. Vol. I, pp. 220-222; 254-255.
16. The Student does not have ** level math concepts. Her math grades reflect her calculator skills. Tr. Vol. I, pp.185-188.
17. The Student enjoys reading, but has little comprehension. Tr. Vol. I, pp. 105-117; 157-160.
18. In order to pass to the ** grade, the District requires a ** student to be on level ** of a reading scale referred to as Rigby-10. At the end of the Student's ** year, her Rigby-10 level was a **. P-Ex. Vol. 3-1.
19. A pre-ARD meeting was held with the Parent on May 14, 2009 at which time the evaluation results and drafted IEPs were presented. Tr. Vol. I-pp. 220-222; 253.
20. The May 21, 2009 annual ARD committee meeting ended in disagreement. P-Ex. 6.
21. After discussion with the Parent, the ARD committee modified the Student's 2009-2010 IEP physical education ("PE") objective to require that the Student learn new skills and activities in small groups. Tr. Vol. II, pg. 63.
22. At the reconvened ARD committee meeting of June 1, 2009, the District proposed three options to the Parent, each of which was rejected. P-Ex. Vol. I-7 and 8.
23. On June 1, 2009, the District determined to implement the recommended placement for the Student's 2009-2010 school year, as follows: placement in a regular education ** grade class with special education support, and pull-out special education time of **

minutes for language arts, ** minutes for math, and ** minutes for social skills, as well as speech therapy ** minutes, six times per month.. The following accommodations and modifications were to be implemented: modified tests/texts; shortened assignment; repeated review, positive reinforcers, picture schedule, **, skills assessed through class observations, alternate forms of response, simplify oral and written directions, visual supports, use of a word processor, and use of a calculator. The ARD minutes also stated that the District would get an AT device for the Student, and that she would use an AlphaSmart during the summer. P-Ex. Vol. I-8.

24. The form entitled “Individual Education Program (Appendix A)” used for the Student’s June, 2009 IEP goals and objectives in math, reading comprehension, writing skills, and personal safety skills has blanks that are not filled in for the position initially responsible for the goals and objectives and for the initial evaluation criteria. R-Ex. 5; P-Ex. Vol. I-7.

25. STUDENT will receive in class support from special education during the times that she is in her regular ** classroom. Such support could be either a paraprofessional or a special education teacher. Tr. Vol. I. pp. 84-85; P-Ex. Vol. I-8; R-Ex. 5.

Standard of Review

Public school districts must comply with the IDEA procedures for identifying children with disabilities who need special education, and delivering appropriate services as necessary to provide a free and appropriate public education (FAPE). 20 U.S.C. §1412(a)(1); *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, (1982); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

The Fifth Circuit has further defined a free appropriate public education by delineating four factors to consider as indicators of whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational program individualized on the basis of the child’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; and 4) Are positive academic and non-academic benefits demonstrated? *Cypress Fairbanks*, 118 F.3d at 253.

The IDEA requires that to the maximum extent appropriate, children with disabilities are educated with children who are non-disabled and that removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S. C. § 1412 (a)(5); 34 C.F.R. § 300.114. Although a school is not required to try every conceivable supplementary aid or service, it should make more than a token effort. If education in a regular classroom with supplementary aids and services cannot be achieved satisfactorily, the school must mainstream the child to the maximum extent appropriate. *Daniel R. R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989).

A petitioner who challenges the school district's eligibility determination or offer of services under the IDEA bears the burden to prove that the child has been denied a FAPE. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005).

Discussion

In order to determine whether Student has been denied FAPE, the four factors of *Cypress Fairbanks* must be satisfied. Prior to devising goals and objectives, determining appropriate modifications and accommodations, and placement for the Student, the District conducted speech and language, OT, and PT evaluations and competency tests. Based on the evaluation and competency results, the District drafted the Student's IEP goals and objectives. The first factor of *Cypress Fairbanks* is met.

At the heart of this dispute is the Parent's desire for Student to be in a ** regular education classroom for the entire school day with the assistance of a paraprofessional. While the District staff agrees that Student will benefit from being with her non-disabled peers for most of the school day, it believes that, due to the Student's deficits in reading comprehension and understanding of math concepts, she should be pulled out of the regular classroom and receive language and math instruction in a special education setting where the pace is slower and more suited to remediation.

At hearing, the Parent argued that the Student progressed while in regular classrooms during ** and ** grade, and thus should remain in a regular education setting. By the end of her ** year, the gap between the Student's progress and that of her peers had widened substantially.

Petitioner argued that the gap was a result of the change of classroom teacher and paraprofessional. However, the evidence revealed that Student made the transition easily.

In the WISD, in order to pass to ** grade, a student must reach a reading level ** on the Rigby-10. STUDENT ended her ** year at **. Although her math grades were passing, the testimony revealed that while the Student could operate a calculator to obtain correct answers to problems, she had little understanding of the underlying concepts. In light of Student's widening gap in reading comprehension and math concepts which are not on ** grade level, and her need for more intense instruction in social skills, including self help skills, the District's determination to pull her out of regular education class for a portion of her school day is the least restrictive environment for her. During the time that Student is in her regular education class, she will receive ** grade-level instruction. The Student will be educated in a regular educational environment to the maximum extent appropriate for her unique educational needs. The second factor of *Cypress Fairbanks* is satisfied.

Several ARD meetings were held during 2008-2009 at which one or both of the Student's parents attended. The Parent requested that the District look at possible AT devices for use by Student, and the District complied. The Parent and ARD committee discussed the Parent's concerns over frustration and behavior. After discussion, a PE goal was changed due to Parent input and concern. The District held a pre-ARD meeting to go over evaluation results and proposed IEP goals at which the Parent attended. The ARD meeting that followed was recessed due to failure to agree, and, in an effort to arrive at an agreement regarding Student's education program, the District devised three options for consideration by the Parent. The Parent did not accept any of the options. The Parent did not point to any goals or objectives that he thought were inappropriate or insufficient. The evidence reflects that the Petitioner's parents were active members of the ARD committee, and the District was receptive to their input. The services were provided in a coordinated and collaborative manner by the key stakeholders; thus the third factor of *Cypress Fairbanks* is met.

The Student's placement and education program of June 1, 2009 has yet to take place; therefore, at this time, there is no evidence available to determine if positive academic and non-academic benefits are demonstrated. Attention must be directed to whether or not it is anticipated that Student will receive positive academic and non-academic benefits. The Student will continue to benefit from her time in a regular education classroom with her non-disabled

peers. There, she will receive ** grade instruction for language arts, math, science, social studies, and specials. She will have accommodations and modifications, including in-class support from special education. Outside of the regular classroom, she will receive special education instruction for 2.5 hours during which time her areas of weakness in language arts and math will be addressed in a smaller setting and at a pace more appropriate to her needs. Also, she will receive more intense PT to assist her toward more independent functioning in the school setting. It is reasonable to anticipate that positive academic and non-academic benefits will result. The fourth factor of *Cypress Fairbanks* is met.

At the hearing, Petitioner spent a great deal of time eliciting testimony regarding the absence of statements of mastery criteria, length of time in which to master goals and objectives, and personnel initially responsible for the Student's IEP writing skills, reading comprehension, and math goals on the District's form entitled "Individual Education Plan (Appendix A)." The district staff testified that there is a default mastery standard of 70%. The 70% standard is stated on the "Determination of Services to Be Provided" section of the Student's IEP document, but it is not stated on the goals and objectives pages of the document. While district staff may know and understand that in the absence of specific measurement standards, the measurement defaults to 70%, it would be easier for a lay person to read and understand how a child's progress will be measured if it appeared on the pages that state the goals and objectives.

District staff testified that the goals are measured annually, and the Individual Education Plan (Appendix A) form indicates, "Goals are measured annually based on the accomplishment of their objectives for the year unless otherwise noted in the goal's Comments/Mastery Criteria field." The math, reading comprehension, and writing skills goals do not indicate the position responsible for carrying out the goal. District staff testified that the individual who teaches the Student the particular subject is the responsible person.

It should be noted that a Student's IEP consists of more than merely the goals and objectives that Respondent records on its Individual Education Plan (Appendix A). Although the Individual Education Plan (Appendix A) pages are carelessly completed and should be revisited for easier understanding by the Parent, I cannot find that the Student's IEP lacks sufficient specificity as to deny her FAPE.

Another issue to be determined is whether the District's 2009 speech/language evaluation was appropriate. When an evaluation is conducted, the IDEIA requires a district to use a variety

of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent. A school should not use any single measure or assessment as the sole criterion for its determinations regarding identification or development of an appropriate educational program for the child. . Technically sound instruments are to be used, and are to be selected and administered so as not to be discriminatory on a racial or cultural basis, and they should be administered in the child’s native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically. They must be administered by knowledgeable personnel and in accordance with the instructions provided by the producers of the assessments. A district must review existing evaluation data including evaluations and information provided by the parents of the child current assessments and classroom-based observations. 34 C.F.R. §§ 300.304 and 300.305. The evidence supports a finding that the speech/language evaluation was conducted in compliance with the IDEIA, and was appropriate. Thus, Petitioner is not entitled to an independent educational evaluation (“IEE”) in speech/language at Respondent’s expense.

In Petitioner’s requests for relief, the Parent requested an IEE in assistive technology. Although Region VI conducted an observation of Student and made suggestions for the District in the area of AT, and although the ARD documents refer to that observation as an assessment, the testimony reflected that the District did not conduct an evaluation in the area of AT. The IDEIA states, “A parent has the right to an independent educational evaluation at public expense *if the parent disagrees with an evaluation obtained by the public agency....*” 34 C.F.R. § 300.502 (emphasis added). Petitioner has no right to an AT IEE at this time.

At hearing, it was evident that Student’s parents are actively interested in the education and well-being of their child. Although it was obvious that the Parent spent countless hours in preparation for Petitioner’s case, Petitioner did not carry her burden of proving that the District failed to provide FAPE. Petitioner is not entitled to any requested relief.

Conclusions of Law

1. Student is eligible for special education and related services under the IDEIA, and the Willis Independent School District is the local education agency responsible for

providing those services to her. 20 U.S.C. § 1400 *et seq.* and its implementing regulations.

2. Willis Independent School District's educational program is entitled to a legal presumption of appropriateness. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); The Petitioner has the burden of proving that her special education program is not appropriate, or that the District has not complied with the procedural requirements of the IDEIA and has denied her FAPE. *Schaffer v. Weast*, 126 U. S. 528 (2005). Petitioner wholly failed to meet her burden of proof.
3. The District conducted its speech/language evaluation appropriately; therefore, Petitioner is not entitled to a speech/language IEE at public expense. 34 C.F.R. § 300.304.
4. The District has not conducted an AT evaluation; therefore, Petitioner is not entitled to an AT IEE. 34 C.F.R. § 300.502; *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 17 (5th Cir. 1995).

Order

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that all relief requested by Petitioner is DENIED.
SIGNED on the 14th day of August, 2009.

Brenda Rudd
Special Education Hearing Officer
For the State of Texas

NOTICE TO THE PARTIES

The decision issued by the hearing officer is final, except that any party aggrieved by the findings and decision made by the hearing officer, or the performance thereof by any other party, may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. A civil action brought in state or federal court must be initiated not more than 90 days after the date the hearing officer issued his or her written decision in the due process hearing. 20 U.S.C. §§1415(i)(2) and (3)(A) and 1415(l).

DOCKET NO. 247-SE-0609

STUDENT	§	BEFORE A SPECIAL
EDUCATION		
b/n/f PARENT	§	
	§	
V.	§	HEARING OFFICER FOR THE
	§	
WILLIS INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

SYNOPSIS

- Issue Number 1:** Whether the District denied Petitioner FAPE through its failure to devise an appropriate Individualized Education Program (“IEP”) in May, 2009
- Held:** For the school district.
- Citation:** *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff’d*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005)
- Issue Number 2:** Whether the District changed the Student’s teacher and classroom during the 2008-2009 school year and changed the Student’s paraprofessional aide
- Held:** For the school district.
- Citation:** 34 C.F.R. § 300.116; *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff’d*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005)
- Issue Number 3:** Whether the District’s 2009 speech/language evaluation was appropriate.
- Held:** For the school district.
- Citation:** 34 C.F.R. § 300.304