

**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. 168-SE-0104

**WACO INDEPENDENT
SCHOOL DISTRICT,
Respondent**

PETITIONER: Pro Se

Parent
Waco, Texas

REPRESENTING RESPONDENT:

Peter K. Rusek
Sheehy, Lovelace & Mayfield, P.C.
501 North Valley Mills Drive, Suite 500
Waco, Texas 76710
Telephone: 254/772-8022
Facsimile: 254/772-9297

DOCKET NO. 168-SE-0104

Student, b/n/f	§	
Parent,	§	BEFORE A SPECIAL EDUCATION
Petitioner	§	
	§	
v.	§	HEARING OFFICER
	§	
WACO 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 Waco ISD (“Waco ISD” or “Respondent”). Petitioner filed her Request for Hearing with the Texas Education Agency (“TEA”) on January 16, 2004, and the Decision Due Date was set in compliance with the forty-five day rule for March 1, 2004. The undersigned Hearing Officer received the case assignment on January 20, 2004.

A telephonic pre-hearing conference was held in this matter on January 28, 2004. The due process hearing was held on February 9, 2004, in the Waco ISD Administration Building. The record was closed at the conclusion of the hearing.

Petitioner alleged that Waco ISD failed to implement Student’s individualized educational plan (“IEP”) during the Fall 2003 semester by not providing specified peer tutoring sessions and Content Mastery time, as well as by failing to provide proper instructional modifications of reduced assignments and vocabulary levels. Petitioner further alleged that Waco ISD failed to provide compensatory tutoring services as set out in Student’s revised IEP of January 8, 2004.

As relief, Petitioner seeks compensatory tutoring services for Student by an independent provider outside the school district.

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 a ***-year-old student in the *** grade at *** School in Waco, Texas.
- 2) Student resides with her father within the geographical boundaries of Waco ISD.
- 3) Student qualifies for special education and related services as a student with a learning disability.
- 4) On April 9, 2003, Waco ISD convened a meeting of the Admission, Review, and Dismissal Committee (“ARDC”) to discuss Student’s placement for the 2003-2004 school year. The ARDC placed Student in mainstream classes except for 60 minutes of Content Mastery classroom time each week. Her instructional modifications included reduced assignments of up to 25% of the original assignment, a 25% reduction in test length, multiple choice tests, extra time for assignments not to exceed 25% of the original time, peer tutoring, and spelling and language mechanics to be graded on the *** grade level of instruction. [Respondent’s Exhibit 22].
- 5) During the first nine-week grading period of the current school year, Student did not receive all the Content Mastery classroom time specified by her IEP.¹ Waco ISD discovered this mistake during the second nine-week grading period when Parent brought it to the school district’s attention.
- 6) Student received the full amount of weekly Content Mastery classroom time during the second grading period.
- 7) Student frequently refused to go to the Content Mastery classroom during her English class in the Fall 2003 semester. Student’s English teacher, ***, observed an increase in Student’s willingness to go to Content Mastery during the second grading period after one of Student’s friends moved away from *** School. [Transcript at 118-119].
- 8) Student’s April 2003 IEP did not require instructional modification of the vocabulary level of material taught to Student. [Respondent’s Exhibit 22 at 5].
- 9) Student’s assessment data is current. Waco ISD plans to perform her triennial re-evaluation by January 2005. [Respondent’s Exhibit 21].
- 10) The preponderance of the hearing testimony and record evidence established that Waco ISD implemented Student’s April 2003 IEP instructional modifications during Fall 2003.

¹Waco ISD reports grades at nine-week intervals, with two grading periods per semester. [Respondent’s Exhibit 4].

- 11) Petitioner presented no evidence that Student was denied peer tutoring services during the Fall 2003 semester.
- 12) Student's first semester grades of the 2003-2004 school year were as follows:²

	1 st GP	2 nd GP	Exam	Final
English	***	***	***	***
Physical Education	***	***	***	***
Speech	***	***	***	***
World Geography	***	***	***	***
Personal & Family Development	***	***	***	***
Algebra I	***	***	***	***
Geology, Meteorology & Oceanography	***	***	***	***

[Respondent's Exhibit 4].

- 13) At Parent's request, Student changed Algebra I teachers after the first semester of 2003-2004. The record evidence established that this change was because of a personal conflict with her previous Algebra I teacher. Student and Parent believe that her new teacher, ***, uses a specific teaching method that helps her understand and work Algebra problems.
- 14) On January 8, 2004, the ARDC convened to modify Student's IEP with Student and Parent in attendance. Revisions to Student's IEP included teacher progress reports in all classes to assist Parent in monitoring Student's grade status. The ARDC continued Student's 60 minutes per week of Content Mastery time. After direct instruction in any of her classes, Student would be able to go the Content Mastery classroom for reinforcement of skills or help in assignment completion. During the meeting, Student expressed his belief that Waco ISD should require Student go to Content Mastery and her classes, even if she does not want to go or does not want to be singled out. [Respondent's Exhibit 21].
- 15) The January 8, 2004, ARDC also addressed the issue of Content Mastery classroom time that Student did not receive during the first grading period of the current school year. As compensatory services for the missed time, the ARDC agreed to provide one-on-one tutorial services from 7:30 a.m. to 8:00 a.m. four days a week from ***, Student's Content Mastery teacher. The ARDC agreed that Student requires no modification on the Texas Assessment of Knowledge and Skills ("TAKS") in Reading and Math portions that she will take during the second semester of 2003-2004. All members of the ARDC were in agreement with Student's revised IEP. [Respondent's Exhibit 21].
- 16) During the January 2004 ARDC, the committee members discussed after-school tutoring that Student could attend through the Communities in Schools ("CIS") program at *** School – a program that is funded through the McLennan County Youth Collaboration. The CIS program is a drop-out prevention

² Grading Period is abbreviated as "GP" in this listing.

program available to all students at the *** school and is staffed with volunteers. As part of its services, CIS offers afternoon tutoring services from 3:30 p.m. to 4:30 p.m. on Tuesday through Thursday. The ARDC noted, "It would probably be best that she be tutored using Mr. ***'s strategies. Help in CIS might be for other subjects and Algebra 1 reserved for tutorials with Mrs. ***. CIS tutorials are to be followed through by Student and Parent." [Respondent's Exhibit 21 at 11].

- 17) Student and her father believe that the CIS program is part of Student's January 2004 IEP.
- 18) The credible hearing testimony established that, although Student's teachers discussed the availability of CIS services with Parent during Fall 2003 semester, Student did not start attending afternoon tutoring sessions until after January 8, 2004.
- 19) Student's hearing testimony established that she does not think CIS helps her and she frequently chooses not to attend CIS. As of the hearing, Student had not attended five CIS afternoon tutoring sessions.
- 20) Parent filed his Request for Special Education Due Process Hearing with the Texas Education Agency on January 16, 2004.
- 21) The preponderance of the hearing testimony and record evidence established that the CIS tutorials are educational resources available outside of special education at the end of Student's school day. The CIS tutorials are not part of Student's schedule of services in her January 2004 IEP.
- 22) Student frequently brings a friend with her to the Content Mastery classroom when she arrives for before-school morning tutorials with ***. While Student's friend works on the computer, *** tutors Student between 7:30 and 8:00 a.m. The credible record evidence established that *** works only with Student during this time. At 7:45 a.m., one or two students occasionally come into the Content Mastery classroom and if needed, get assistance from one of the two paraprofessionals in the classroom.
- 23) Parent is concerned that Student's compensatory one-on-one time during her morning tutorials is compromised by having other students present in the Content Mastery room.
- 24) Student's father drops her off at school between 7:00 and 7:10 a.m. each day, at which time Student prefers to socialize with friends and eat breakfast at the school cafeteria instead of going directly to her morning tutorial. Although the cafeteria begins serving breakfast at 7:00 a.m., the credible record evidence and hearing testimony established that Student is routinely late for her morning tutorial, usually arriving after 7:35 a.m. and on one occasion, at 7:50 a.m.

- 25) At the time of the hearing, Student had completed four hours of the compensatory morning tutoring services offered by Waco ISD. [Respondent's Exhibits 5 and 20].
- 26) Student's hearing testimony established that her morning tutorials with *** are helping her with Algebra I material and with learning her weekly vocabulary in her English class.
- 27) The hearing testimony of ***, Student's English teacher, established that Student receives vocabulary instruction at the *** grade level in her class. While *** grades Student's tests and assignments with spelling and mechanics at the *** grade level specified in Student's April 2003 IEP, vocabulary tests in her class do not involve spelling and mechanics and are given in a multiple choice format. While Student's classmates must match five words and five definitions, Student's vocabulary tests are reduced to matching three words and three definitions.
- 28) The credible testimony of *** and *** established that Student made low grades on her vocabulary tests when she did not study. By contrast, when Student studies her vocabulary adequately, she does well on her tests.
- 29) The record evidence established that *** sends Student's homework assignment sheet by e-mail to Parent and gives Student a copy to take with her to CIS. *** also communicates with the CIS ***, ***, regarding Student's progress on homework assignments.
- 30) Student admitted at hearing that she has not been forthcoming with CIS tutors about her homework. During one CIS tutorial, she did not share her assignment sheet with the CIS tutor and chose instead to spend the session drawing pictures.
- 31) Student's grades are improving during the third grading period of the 2003-2004 school year. After the first three weeks of the second semester, Student had the following averages: English – ***; Health – ***; Physical Education – ***; Personal & Family Development – ***; World Geography – ***; and Geology, Meteorology & Oceanography – ***. [Respondent's Exhibit 7].
- 32) The preponderance of the hearing testimony and record evidence established that Student made academic progress during the 2003-2004 school year, as reflected by her grades and mastery of underlying concepts.

Discussion

Background

Petitioner claimed that Waco ISD did not comply with Student's IEP during the current 2003-2004 school year by the following: 1) not allowing Student to attend peer tutoring sessions; 2) not allowing Student to go to the Content Mastery classroom; 3) failing to reduce Student's assignments by 25%; and, 4) failing to provide vocabulary at the level specified in her IEP. Petitioner further alleged that Waco ISD did not follow Student's revised IEP of January 8, 2004, by failing to provide compensatory services of afternoon tutoring sessions.

As the party challenging the school district's program, Petitioner bears the burden of proof of these issues. I find that Petitioner failed to establish by a preponderance of the evidence that Waco ISD denied Student a free appropriate public education ("FAPE") by improper implementation of Student's IEP during the current 2003-2004 school year.

Legal Standard

Petitioner must show that the program offered by Waco ISD 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). Under IDEA, a school district's program is deemed appropriate if the student receives some benefit from his education, but the school district is not required to maximize the student's educational potential. *Bd. of Educ. v. Rowley*, 102 S.Ct. 3034 (1982). Under this standard, a school district is not required to provide all services that may benefit the student. Instead, a school district must ensure that the student receives individualized instruction with sufficient support services to allow the student to receive an educational benefit. *Id.* at 3051. To determine whether the student is receiving an educational benefit, the school district must provide a meaningful program 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.3 341 (5th Cir. 2000); *Cypress Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

April 2003 IEP Allegations

Content Mastery

Petitioner alleged that Waco ISD failed to deliver a full hour of Content Mastery time each week to Student during the first grading period of the school year. Respondent at all times pertinent to this dispute admitted this mistake, but asserted that Student was not denied a FAPE as a result of missing less than nine hours of Content Mastery time specified by her IEP. I agree with Respondent.

The credible record evidence revealed that Student could decide if she wanted to go to the Content Mastery classroom during the first grading period. Petitioner presented no evidence that she was denied the opportunity to go to the Content Mastery classroom when she asked to do so during the first nine weeks of school. The undisputed evidence established that, instead, she refused her English teacher's requests that she go to the Content Mastery classroom. Additionally, the credible record evidence established that Student went to the Content Mastery classroom on at least two occasions during the first grading period for work relating to World Geography. The duration of these two visits, however, is not specified in the record. I conclude that Student missed an unspecified amount of Content Mastery time in the first grading period that does not exceed nine hours.

Waco ISD did not deny that it failed to keep track of whether Student had, in fact, received her hour of Content Mastery time during any given week of the first grading period, nor that the school district has the responsibility to provide the missing hours. Instead, once Student brought this mistake to Respondent's attention, the school district took corrective action to work directly with Student's teachers to monitor Student's weekly Content Mastery time. Through the ARDC process, Waco ISD worked with Parent to arrive at an agreed plan of compensatory Content Mastery time for Student beginning January 12, 2004, four hours of which she had received by the time of the hearing. To determine the impact of the missing hours at the time of the first grading period, review of Student's grades reflects that she, nonetheless, passed all her classes with grades ranging from a high of *** in Physical Education to a low of *** in English -- the class in which she refused to go to Content Mastery. Accordingly, I find that the hours of missed Content Mastery time during the first grading period do not rise to the level of denying Student a FAPE.

Instructional Modifications

Petitioner alleged that Waco ISD failed to provide instructional modifications to Student of reduced assignments by a full 25% and failed to provide vocabulary at the *** grade level. Respondent disagreed with Petitioner's interpretation of these instructional modifications in place during the Fall 2003 semester and asserted that instructional modifications were properly provided in accordance with Student's IEP. I agree with Respondent.

The ARDC documents related to Student's April 2003 IEP reflect a range of assignment reduction of *up to* 25%, not a blanket 25% reduction. At hearing, Student's English teacher and Content Mastery teacher gave credible testimony regarding their personal knowledge of reduced assignments and tests administered to Student. [Tr. at 104, 132 and 221-222]. Student, by contrast, testified at hearing that her assignments and tests had never been reduced and that she had the same test length as all other students in her classes. [Tr. at 178]. When asked by this Hearing Officer if she had ever asked her teachers for extra time on her assignments, she answered that she had not. [Tr. at 190]. I am not persuaded by Student's testimony on this issue. I find that

Waco ISD properly implemented assignment reductions for Student of up to 25%, as deemed appropriate by Student's individual teachers.

A review of the evidence admitted into the record of this proceeding fails to support Parent's belief that Student's vocabulary should be *taught* at the *** grade level. Instead, the April 2003 ARDC documents specify that Student's language mechanics and spelling are to be *graded* at the *** grade level, a modification followed by *** wherever applicable when grading Student's English assignments. By contrast, Student learns *** grade vocabulary and is tested along with the rest of her class by a weekly multiple choice test. Student's test is reduced in length in accordance with her IEP, but graded at the same *** grade standard as her classmates. It does not escape the attention of this Hearing Officer that Student is able to master *** grade vocabulary words *when she puts forth effort to study beforehand* and that she recently made good vocabulary test scores. Instead, the record evidence revealed that inadequate preparation – not the vocabulary grade level – is the source of a low vocabulary weekly test score for Student. I find that the preponderance of the record evidence established that Student received appropriate vocabulary at the *** grade level and that her IEP did not require *** grade level vocabulary be taught.

When the record evidence is viewed in its entirety, it is evident that Student is mastering her course material in the general education curriculum with the range of modifications set in place by her IEP. Even if some of her teachers exercised their professional judgment to conclude that Student did not require modification of a particular assignment, I conclude that Student made educational progress with the instructional modifications provided by Waco ISD during the 2003-2004 school year.

Peer Tutoring

As Petitioner presented no evidence to show that Student was not allowed to attend peer tutoring sessions, Respondent's program for Student is presumed to have appropriately addressed this issue.

January 2004 IEP Allegations

Petitioner alleged that the compensatory Content Mastery services put in place for Student by agreement of the January 2004 ARDC included afternoon tutoring sessions in the CIS program in addition to Student's one-on-one morning tutorials with ***. Respondent asserted that the compensatory tutoring services offered to Student consist solely of one-on-one tutorials in the Content Mastery classroom *before school*. I agree with Respondent.

The preponderance of the record evidence and credible testimony conclusively established that Waco ISD agreed to provide compensatory tutoring services to Student *before school*. The minutes of the January 2004 ARDC include the following language:

The compensatory service of tutorials will be offered *from 7:30-8:00 in the morning four days a week and will begin Jan[uary] 12th and will run through*

April 29th. This is to specifically make up for the time that she missed out of content mastery during the first nine weeks of the school year. [Emphasis added]. [Respondent's Exhibit 21 at 11].

On the same page of the ARDC minutes immediately below this statement, the ARDC minutes reflect discussion of the CIS *after-school* tutoring also available as a support to Student as well as all other general and special education students on the *** School campus "to be followed through by Student and Parent" By contrast, there is no reference to the CIS services as compensatory services, nor is there any representation by Respondent in the record evidence of this proceeding that CIS services are under the school district's control.

I find that the compensatory tutoring services designed to address Student's missed Content Mastery classroom time are limited to the before-school tutorials in the Content Mastery classroom with *** and do not include after-school sessions in the CIS program.

Conclusion

In conclusion, a review of the record in its entirety reveals that Student continues to make educational progress in the general education setting under the IEP developed by the school district, as implemented throughout the 2003-2004 school year. Although Waco ISD failed to deliver the precise quantity of Content Mastery classroom time to Student during the first nine weeks of school, the school district remedied the mistake. Waco ISD provided and implemented an educational program for Student that continues to help her progress. For the above stated reasons, I find that Student has not been denied FAPE by Waco ISD during the 2003-2004 school year and decline to award relief to Petitioner.

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. Waco ISD 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 Waco ISD, 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. Waco ISD developed and implemented appropriate compensatory services of morning tutoring beginning January 12, 2004, and ending April 29, 2004, in compensation for Content Mastery time that Student did not receive during the first nine weeks of the 2003-2004 school year.
5. Petitioner failed to meet her burden of proof that Waco ISD provided an inappropriate educational program for Student for the current 2003-2004 school year. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), aff'd 468 U.S. 883 (1984).
6. Waco ISD met its obligation to provide Student an educational program for the 2003-2004 school year with sufficient individualized instruction and support services that allow her to benefit from her education. *Bd. of Educ. v. Rowley*, 102 S.Ct. 3034, 3035 (1982).
7. Student is making academic progress under the educational program provided by Waco ISD. *Houston ISD v. Bobby R.*, 200 F.3 341 (5th Cir. 2000); *Cypress Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

ORDER

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

IT IS HEREBY ORDERED that all relief requested by Petitioner is **DENIED**.

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.

Signed this 1st day of March, 2004.

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

/s/ Mary Carolyn Carmichael
Mary Carolyn Carmichael
Special Education Hearing Officer

DOCKET NO. 168-SE-0104

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

SYNOPSIS

ISSUE: A. *Whether the school district deprived a mainstreamed student with a learning disability a free appropriate public education (“FAPE”) by not providing the full amount of Content Mastery time as specified under the student’s individualized educational plan (“IEP”)?*

C.F.R. CITATION: 34 C.F.R §§300.13, 300.300, and 300.350

HELD: For the school district.

The student received some, but not all, of the Content Mastery classroom time to which the student was entitled during the first nine weeks of school. Upon discovery of the mistake, the school district took effective action to prevent recurrence of the oversight and the student began receiving the proper amount of Content Mastery time each week. To make up for the missed Content Mastery time, the school district offered a compensatory program of one-on-one tutoring before school in the Content Mastery classroom. Because the student made academic progress in the general education setting under the school district’s plan of service, the missed Content Mastery classroom hours during the first nine weeks of the school year do not constitute a denial of FAPE and the school district remedied the mistake.

ISSUE: B. *Whether the school district failed to implement instructional modifications under the student’s IEP for reduced assignments and appropriate vocabulary levels?*

C.F.R. CITATION: 34 C.F.R §300.347(3)

TEXAS CITATION: 19 T.A.C. §89.1055

HELD: For the school district.

As part of the instructional modifications provided to the student, the school district correctly followed the range of modification specified in the student's IEP for reduced assignments and additional time for assignments. The school district was not required to modify the grade level of vocabulary taught to the student. The student was able to master the grade level vocabulary with the other instructional modifications provided by the school district.

ISSUE: C. *Whether the school district failed to provide compensatory services specified in the student's IEP of afternoon tutoring?*

C.F.R. CITATION: 34 C.F.R §300.13

HELD: For the school district.

The school district offered compensatory services for the student of one-on-one morning tutorials over a specified period. The before-school tutorial services were specifically designed to compensate the student for missed Content Mastery time during the first grading period. Although the ARDC discussed afternoon tutoring services available to all students on the student's campus, the compensatory tutoring services did not include afternoon tutorials.