

[REDACTED] b/n/f [REDACTED]	§	BEFORE A SPECIAL EDUCATION
	§	
v.	§	HEARING OFFICER
	§	
CEDAR HILL INDEPENDENT	§	FOR THE STATE OF TEXAS
SCHOOL DISTRICT	§	

**DECISION OF THE HEARING OFFICER**

**Statement of the Case**

This case arises under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 et seq. The Texas Education Agency received the case on January 20, 2004 and the original decision due date was March 5, 2004. The parties agreed to extend the due date until April 16, 2004 to accommodate their schedules, allow time to try mediation (which was unsuccessful), and allow time to file written arguments after the hearing.

Petitioner, [REDACTED] (hereafter [REDACTED]), is represented by her mother, [REDACTED] and Carolyn Morris, a non-lawyer advocate with Parent to Parent Connection Advocacy Inc. Attorney Nona Matthews, of Walsh, Anderson, Brown, & Aldridge, P.C., represents Cedar Hill ISD.

**Preliminary Fact Findings**

1. [REDACTED] is a [REDACTED]-year old [REDACTED]-grade student with a learning disability in math. She receives all her instruction in mainstream classrooms except for resource special education instruction in mathematics, and content mastery support by a special education teacher for 45 minutes a week.
2. [REDACTED] has committed two major disciplinary infractions of school rules in the current school year and the school has imposed discipline through ARD committee meetings. [REDACTED] first major disciplinary infraction for the school year occurred in October 2003. [REDACTED] As punishment, the ARD committee assigned [REDACTED] to the Disciplinary Alternative Education Program (DAEP) for 20 days. [REDACTED] successfully served her 20 days returning to her regular classes sometime in [REDACTED]-2003.
3. In [REDACTED] 2003, [REDACTED] committed her second major disciplinary infraction in this school year. She assaulted another student [REDACTED]. As a punishment, the ARD committee assigned [REDACTED] to the DAEP for a longer sentence than the one she had received earlier in the school year. This time [REDACTED] received a sentence of 45 days in DAEP, because this was her second major offense in the school year.

4. The ARD committee conducted separate manifestation determinations for both major disciplinary offenses. The committee decided in each instance that [REDACTED] behavior was not a manifestation of her learning disability, and that she could continue to follow her IEP while assigned to the DAEP.
5. After [REDACTED] served only three days of the 45-day assignment, her mother requested this special education due process hearing. The school district immediately returned [REDACTED] to her [REDACTED] in keeping with the stay put requirement. She is in "in-school suspension" (ISS) instead of her regular classes awaiting the outcome of the due process hearing.

#### Issues Raised

Cedar Hill ISD has raised as a preliminary issue:

- (1) whether Carolyn Morris (who is not a lawyer) may represent [REDACTED] and her mother in this hearing without violating the prohibitions against unauthorized practice of law.

[REDACTED] mother has raised issues (2) through (7). They are:

- (2) whether the ISD failed to provide [REDACTED] and her mother with all procedural safeguards required under IDEA;
- (3) whether the ISD and the ARD committee placed [REDACTED] in disciplinary programs for behaviors that are a manifestation of her disabilities;
- (4) whether the ISD has properly implemented [REDACTED] IEP in the DAEP and ISS programs;
- (5) whether the ISD has provided [REDACTED] a free appropriate public education;
- (6) whether the ISD has provided [REDACTED] with timely evaluations; and
- (7) whether the ISD has abided by the "stay-put rule" while this case has been pending.

Cedar Hill ISD has raised issue (8) whether the parent "unreasonably protracted the final resolution of issues in controversy in the hearing".<sup>1</sup>

In answer to issue number (1) I have concluded that Ms. Morris may appear in these proceedings on behalf of [REDACTED] and her mother without violation of the prohibitions against unauthorized law practice. I have answered issues numbers (2) through (7) by finding that the ISD has complied with applicable law with respect to each of the issues raised. I have answered issue (8) by finding the evidence is inadequate to find the parent unreasonably protracted this proceeding.

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<sup>1</sup> See 19 TAC §89.1185(m).

Additional findings of fact and conclusions of law follow together with additional discussion of the issues.

### **First Issue**

#### **Unauthorized Practice of Law- Discussion**

Cedar Hill ISD argues that it violates the prohibition against unauthorized practice of law to allow Ms. Morris, who is not an attorney, to appear on behalf of petitioner. Cedar Hill supports this argument by citing the out-of-state case of In re Arons, 756 A.2d 867 (Delaware 2000), cert. den. Arons v. Office of Disciplinary Counsel, 532 U.S. 1065 (2001). In Arons, the Delaware Supreme Court held the appearance of a nonlawyer advocate in a Delaware Special Education Hearing violated Delaware's prohibition against the unauthorized practice of law

20 U.S.C. §1415(a) requires states participating in the IDEA program to provide procedures "to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education." The required procedures must include "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. §1415(b)(6). In making such complaints, "the parents involved . . . shall have an opportunity for an impartial due process hearing." 20 U.S.C. §1415(f)(1). And "they must be accorded certain rights, including the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. §1415(h)(1). (Emphasis added).

A 1981 legal opinion of the Office of General Counsel of the U.S. Department of Education opines that Congress intended "individuals with special knowledge or training with respect to the problems of children with disabilities" to represent the parents and students at due process hearings by performing acts that would have to be performed by lawyers if the Special Education hearings were conducted in a court of law rather than as administrative proceedings.<sup>2</sup> Moreover, according to a recent law review article, a number of states including the states of Arizona, Connecticut, Illinois, Maine, Massachusetts, Minnesota, New Jersey, and Oregon, allow lay advocates to represent parents and students in IDEA hearings.<sup>3</sup>

Moreover, it has always been the law that non-lawyers may practice before federal administrative agencies without violating rules against the unauthorized practice of law to the extent that the agencies themselves allow it. See Sperry v. Florida, 373 U.S. 379 (1963) which involved an attempt by the State Bar of Florida to discipline Florida non-lawyers for engaging in unauthorized law practice by practicing before the U.S. Patent Office. In writing for the court, Chief Justice Earl

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2 A copy of this opinion is online in the appendix to the Justice Department amicus brief in the Aaron case at <http://www.copaa.net/decisions/supreme/DOJ%20Arons%20brief.doc>. (last visited April 16, 2004).

3 In the Matter of Arons: Construction of the IDEA's Lay Advocate Provision Too Narrow? 9 Geo J Poverty Law & Pol'y 193 (Winter 2002).

Warren discussed the long standing tradition of allowing non-lawyers to practice before federal administrative agencies. See especially pages 373 U.S. 396-400 of the opinion.

For Texas authority on point, see Texas Attorney General's Opinion No. H-974 (1977). In the Opinion, Texas Attorney General John Hill addresses the issue of whether non-lawyers may appear on behalf of citizens in Texas administrative hearings. General Hill opines that the purpose of the rule against unauthorized practice of law is to protect the public. He opines further that representation of citizens before state agencies by non-lawyers does not necessarily injure the public nor constitute the unauthorized practice of law and, in fact, may be quite helpful. He opines that non-lawyers may appear in administrative proceedings to the extent allowed by each particular administrative agency so long as their appearance is not banned by a specific act or decision of the Texas Legislature or the Texas courts. In support of his opinion, Attorney General Hill cites several Texas cases including Carr v. Stringer, 171 S.W.2d 920 (Tex. Civ. App. -- Ft. Worth 1943, writ ref'd w.o.m) in which the Fort Worth Court of Appeals decided that representation of parties by non-lawyers before the Texas Railroad Commission did not constitute the unauthorized practice of law. In concluding his opinion, Attorney General Hill observed, "We are mindful of the case law of other jurisdictions which would in some instances preclude representation before agencies by non-lawyers. However, the decisions are not consistent; they vary with the terms of the various statutes, and the differing views of the public welfare on the part of the courts."

Recently recommended changes in rules against unauthorized practice of law proposed by a State Bar of Texas committee deal with this issue by exempting from unauthorized law practice prohibitions lay persons representing clients before state and federal administrative agencies to the extent that the agencies allow lay persons to represent clients before them. See State Bar Of Texas Task Force Recommendation Of A New Statutory Definition For The Unauthorized Practice Of Law, proposed §81.102B (5) and (6), 64 Tex. B. J. 860, 868 (2001).

### **Conclusion of Law**

Based on the above discussion and authorities, I overrule Respondent's objection to Ms. Morris appearing on behalf of the petitioner [REDACTED] and her mother [REDACTED].

### **Second Issue**

Whether the ISD improperly failed to provide [REDACTED] and her mother with procedural safeguards?

### **Applicable Law**

34 CFR §500-§599 (Subpart E of the IDEA regulations) cover the topic of procedural safeguards available to a child with a disability under IDEA. Among other rights, it guarantees that parents will be fully informed of all information relevant to decisions related to their child's education and given an opportunity to participate in those decisions; that they will have an opportunity to examine all records pertaining to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child; that they will be afforded the opportunity to attend all

meetings of the ARD committee which makes these decisions; that they will be given reasonable advance notice in writing in understandable language of all meetings in which these decisions will be made and the issues to be covered in such meetings; and that the ISD will make reasonable efforts to ensure that the parents understand, and are able to participate in, any group discussions relating to the educational placement of their child and that they understand the various placement options. The parents of a child with a disability have, in addition, the right to obtain an independent educational evaluation (IEE) of the child at public expense including medical examinations for purposes of determining the child's disability.<sup>4</sup> They must give written consent to evaluation and reevaluation of the child. They must be informed about State complaint procedures, including the availability of mediation and due process hearings, and given a description of how to file a complaint and the timelines involved.

### **Findings of Fact**

6. Each party has filed a large volume of exhibits. These exhibits reflect the ISD has meticulously followed the procedural safeguards of IDEA. An ARD meeting has preceded [REDACTED] initial placement and evaluation, the development of her IEP and BIP plans, and each modification of her program, and [REDACTED] mother has been present at each of these meetings (other than an ARD meeting held after this request for a due process hearing was filed) and has signed documents showing her concurrence with the results reached by the ARD committee.
7. The evidence reflects that an ARD committee meeting preceded each action related to [REDACTED] placement. [REDACTED] mother presented no evidence of any irregularities in the composition of the ARD committee or in its decision making. The evidence reflects that [REDACTED] mother was a member of the ARD committee and regularly attended the committee and approved its actions. The petitioner presented no evidence which showed any wrongdoing by the ISD connected with the ARD meetings or any lack of compliance with legal requirements by the ARD committee. The school district did not withhold any informational materials from [REDACTED] mother relevant to [REDACTED] education or her procedural rights under IDEA. In the notice to each ARD meeting, the ISD provided [REDACTED] mother with a copy of the procedural safeguards. There is a log in evidence showing that [REDACTED] mother received this notice at least eighteen times.<sup>5</sup> There is no evidence that [REDACTED] mother ever suggested that she did not fully understand the actions of the ARD committee or that she ever expressed any disagreement with its decisions.

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<sup>4</sup> The right of a parent to obtain an IEE is triggered if the parent disagrees with a public initiated evaluation. Therefore, if a parent refuses to consent to a proposed public evaluation in the first place, then an IEE at public expense would not be available since there would be no public evaluation with which the parent can disagree.

<sup>5</sup> Respondent's Exhibit 25 pgs. 1-2.

### **Conclusion of Law**

I conclude that the ISD has provided [REDACTED] and her mother with all required procedural safeguards.

### **Third Issue**

Whether the ISD and the ARD committee placed [REDACTED] in disciplinary programs for behaviors that are a manifestation of her disabilities?

### **Findings of Fact**

8. [REDACTED] only identified disability is a learning disability in math. There is no evidence in this record that links [REDACTED] disability and the behaviors ([REDACTED] and [REDACTED]) sanctioned by the ARD committee. Neither do I find any evidence in the record that [REDACTED] disability weakened her ability to understand the impact and consequences of the behavior sanctioned by the ARD committee. Dr. [REDACTED], testified that he evaluated [REDACTED] for emotional disturbance on February 25, 2004. He found that [REDACTED] has mild depressive complaints which may be due to her current discipline situation, academic frustration due to her learning disability, and adolescent child-parent issues over a struggle toward independence. Dr. [REDACTED] found that, "[REDACTED] is certainly not emotionally disturbed."<sup>5</sup> I do not find any evidence which would support a finding that Tan's disability made her unable to control the behavior sanctioned by the ARD committee.

### **Conclusion of Law**

I conclude that [REDACTED] has not been disciplined for behaviors that are a manifestation of her disability.

### **Fourth Issue**

Whether the ISD has properly implemented [REDACTED] IEP while she has been in Disciplinary Status?

### **Findings of Fact**

9. The ARD committee assigned [REDACTED] to the DAEP as discipline for the [REDACTED] offense. A copy of the record documenting the ARD meeting in which this was done is in evidence as petitioner's exhibit 12/respondent's exhibit 8. The ARD committee decided that [REDACTED] IEP could be implemented while she was in the DAEP. [REDACTED] mother signed her name as in agreement with the ARD committee decision. When [REDACTED] attended the DAEP from [REDACTED], 2003 to [REDACTED], 2003, she received all the special education services that her IEP calls for. Both the testimony and the written documentation support this finding.

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5 Petitioner's Exhibit 25 p. 371/Respondent's Exhibit 18 p. 3.

10. Following the assault offense, the ARD committee again assigned ██████ to the DAEP and she was there only three days before this due process hearing was filed. ██████ received all her school work the three days that she was in the DAEP.
11. ██████ has been in in-school suspension (ISS) since January 22, 2004. Her teachers have been keeping calendars documenting their contacts with ██████, their assignments of work to ██████, and her progress on the work assigned. These calendars are in evidence as respondent's exhibits 27-34. Respondent's exhibit 35 is a copy of assignments sent to ISS that ██████ has signed for. Based upon these exhibits, I find that ██████ has received all her school work since February 2, 2004 when the teachers started keeping these logs.

### **Conclusions of Law**

I have concluded that the ISD properly implemented the IEP while ██████ has been in disciplinary status.

### **Fifth Issue**

Whether the ISD has provided ██████ a free appropriate public education?

### **Applicable Law**

The Fifth Circuit has set forth a four-factor test that can serve as indicators of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA: (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and (4) positive academic and non-academic benefits are demonstrated. Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 253 (C.A.5(Tex)1997).

### **Findings of Fact**

12. ██████, the Director of Special Education for the ISD gave the following testimony which speaks directly to the elements of FAPE identified by the Fifth Circuit. I find this testimony to be true and adopt it for my fact findings on this issue:<sup>6</sup>

Q. [Ms. Matthews] As the director and a diagnostician, did you find any indication, based on your investigation, that her IEP was not based on assessment and current performance?

A. [Ms. ██████] No, I did not. And then our teachers are directed to administer criterion-referenced testing over the Texas Essential Knowledge and Skills and to derive their

IEPs directly from the approved Texas general curriculum, which would be the Texas Essential Knowledge and Skills.

Q. [Ms. Matthews] And was that done in this case?

A. [Ms. ██████] As reported by ██████ it was.

Q. [Ms. Matthews] The second element of providing a free appropriate public education to Tan is whether her IEP was administered in the least restrictive environment. Do you have an opinion as to whether the district complied with that requirement?

A. [Ms. ██████] Based on the ARD documents that I have reviewed, again, the least restrictive environment for ██████, as determined by her ARD committee, was that she would have all of her day in general education with her nondisabled peers except for the resource math period daily and 45 minutes of content mastery support weekly.

Q. [Ms. Matthews] Then the third element of a free appropriate public education, that her services be provided in a coordinated and collaborative manner by key stakeholders. Did the district comply with that requirement?

A. [Ms. ██████] Yes, we did. The documentation that has been presented today is documentation between the high school and the DAEP. DAEP has all the teachers' scope and sequence for all their courses, and then they follow that and they e-mail grades and concerns back and forth. When ██████ has been in ISS, we just reviewed that her teachers provided -- her high school home campus teachers provided her with assignments and went into ISS to provide instructional support and check on the progress of those assignments. Collaboration extends further into the ARD committee meetings, with Ms. ██████ present at the every ARD committee meeting except for the one in February. And my understanding is that Ms. ██████ did -- was an active member who on several occasions, according to teacher reports, did talk about accommodations that she felt would be appropriate to be added not only to the accommodation pages, but to the behavior intervention plan.

Q. [Ms. Matthews] And did the ARD committee agree to add those things at her request?

A. [Ms. ██████] That is my understanding from those ARD committee members.

Q. [Ms. Matthews] And then finally, the fourth element of a free appropriate public education, that the student demonstrate positive benefit academically and nonacademically. Do you have an opinion as to whether that happened in this case?

A. [Ms. ██████] With the exception of the English, ██████ passed all of her courses. She is earned all of her credits except for English ██████. With the exception of math, in the ██████ grade, on the statewide evaluation, she has met the ARD expectations on the

state evaluation, including the writing locally determined alternate assessment that was given this year. She did meet ARD expectations in that.

Q. [Ms. Matthews] Well, we didn't have the documents from the state assessments from last year. We looked at the [REDACTED] grade. Do you have knowledge as to her performance on the state assessments for the [REDACTED] grade year?

A. [Ms. [REDACTED]] Yes. She met the ARD expectancy in the areas of reading and math.

Q. [Ms. Matthews] And were those the two areas assessed that year?

A. [Ms. [REDACTED]] Yes.

### Conclusion of Law

I conclude that the ISD has not violated [REDACTED] right to a FAPE.

### Sixth Issue

Whether the ISD has provided [REDACTED] with timely evaluations?

### Applicable Law

The regulations provide that a reevaluation of a child is conducted if conditions warrant a reevaluation, or if the child's parent or teacher requests a reevaluation, but at least once every three years. 34 C.F.R. §300.536(b). The regulations require the ARD committee to review existing evaluation data on the child as part of any reevaluation. Based on that review, the ARD committee must identify any additional data needed to determine (1) if the child continues to have a disability, (2) the child's present levels of performance and educational needs of the child, (3) whether the child continues to need special education and related services, and (4) whether any additions or modifications to the special education and related services are needed for the child to meet measurable annual IEP goals and participate in the general curriculum. 34 C.F.R. §300.533(a). When it is complete, the District must notify the child's parent of the reevaluation results and of the parent's right to request further assessment to find out if the child continues to be eligible for special education services. 34 C.F.R. §300.533(d)(1). The District is not required to conduct the assessment more frequently than once every three years unless requested to do so by the child's parent or a teacher. 34 C.F.R. §300.533(d)(2).

### Findings of Fact

13. The evidence does not support an allegation that the ISD's evaluation of [REDACTED] was untimely. The ISD completed a comprehensive evaluation of Tan on April 22, 2001, when [REDACTED] was in the [REDACTED] grade. Therefore, she would not be due for a triennial evaluation until April 22, 2004. On October 2, 2003, the ARD committee conducted a review of existing evaluation data and determined that no additional evaluation was needed to determine whether [REDACTED]

continued to be a child with a disability. [REDACTED] mother agreed with the ARD committee's determination and did not request any additional evaluation. When the ISD received the request for a due process hearing and learned that [REDACTED] mother felt that additional evaluation, including a psychological evaluation, was needed, the ISD agreed to conduct the additional evaluation. A subsequent full and individual evaluation, including a psychological evaluation, was completed on March 4, 2004.

### Conclusion of Law

I conclude that the ISD has provided [REDACTED] with timely evaluations.

### Seventh Issue

Whether the ISD has abided by the "stay-put rule" while this case has been pending?

### Applicable Law

The regulations require that during the pendency of a due process hearing, unless the District and the parent agree otherwise, the child must remain in his or her current educational placement. 34 C.F.R. §300.514(a). Time spent in "in school suspension" (ISS) is considered time spent in the current educational placement (and is not counted for purposes of the ten day limit on removal of a child with a disability from the classroom).

34 C.F.R. §300.520(1) (relating to the authority of school personnel to discipline a child with a disability) provides in part that school personnel may discipline a child by removal from the school for not more than ten days under certain circumstances. An in school suspension is not considered a removal from the school for purposes of this section. A footnote to the text of this section at the time that it was adopted makes this clear. See, 64 Federal Register 12406, 12619, in part, as follows:

An in-school suspension would not be considered a part of the days of suspension addressed in this section as long as the child is afforded the opportunity to continue to appropriately progress in the general curriculum, continue to receive the services specified on his or her IEP and continue to participate with nondisabled children to the extent they would have in their current placement.

### Findings of Fact

14. Prior to the pre-hearing conference held on February 2, 2004, the District returned [REDACTED] to her home campus in compliance with the stay-put rule. At the [REDACTED] School campus, [REDACTED] was assigned to ISS during the pendency of the hearing up to the remainder of her 45 day DAEP assignment for assault on another student. While she was in ISS she continued to receive an opportunity to appropriately process in the general curriculum, continued to receive the services specified on her IEP and continued to participate with nondisabled children to the

extent she would have in her current placement. Therefore, the days in ISS are not considered a removal from Petitioner's current placement and do not conflict with the IDEA's stay-put provision.

### **Conclusions of Law**

The ISD has not violated the stay-put rule while this case was pending.

### **Eighth Issue**

Whether the parent "unreasonably protracted the final resolution of issues in controversy in the hearing."

### **Finding of Fact**

15. I find insufficient evidence on which to conclude that the parent or her representative have deliberately raised claims for purposes of harassment or delay or to unreasonably protract these proceedings. It seems to me equally if not more likely that they have failed to reasonably assess the merits of this case and have suspicion and even fear of the ARD committee process.

### **Conclusion of Law**

The evidence in this case is inadequate to support a finding that the parent or her representative have deliberately engaged in bad faith litigation tactics or that they have raised claims for purposes of delay or to unreasonably protract these proceedings.

There is no requirement that they mediate or try to settle through an ARD committee meeting before a due process hearing. I agree with Texas Special Education Hearing Officer James W. Holtz who wrote on this same issue under similar facts as follows:

Petitioner did not unreasonably protract the litigation in this proceeding by requesting a hearing without first presenting the hearing issues to an ARD Committee since neither the Commissioner's Rules nor the IDEA require prior presentment of hearing issues to an ARD Committee. At most, the Commissioner's Rules promote and encourage parties to resolve disputes at the lowest possible level. 19 Tex. Admin. Code Sec. 89.1150(b).<sup>7</sup>

### **Order**

All relief requested is hereby denied.

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<sup>7</sup> [REDACTED] .bnf [REDACTED] . v. El Paso ISD, TEA Docket No. 87-SE-1101 (2001).

SIGNED this the 16th day of April 2004.

/s/Larry J. Craddock  
Larry J. Craddock  
Special Education Hearing Officer

**[REDACTED] b/n/f [REDACTED]** § **BEFORE A SPECIAL EDUCATION**  
v. § **HEARING OFFICER**  
**CEDAR HILL INDEPENDENT** § **FOR THE STATE OF TEXAS**  
**SCHOOL DISTRICT** §

**SYNOPSIS**

**ISSUE:** 1. Whether lay advocate claiming special knowledge or training regarding problems of children with disabilities may advocate for the child in a Texas special education due process hearing notwithstanding prohibitions against unauthorized practice of law?

**HELD:** For Petitioner Parent

**CFR CITATION:** 34 CFR § 300.509.