

STUDENT <i>b/n/f</i>	§	BEFORE A SPECIAL EDUCATION
PARENT,	§	
	§	
Petitioner,	§	
	§	
V.	§	HEARING OFFICER
	§	
NEW FRONTIERS CHARTER	§	
SCHOOL,	§	
	§	
Respondent.	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner, Student *b/n/f* Parent (“Student”), requested a Due Process Hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. §1400 *et seq.*, contending that Respondent, New Frontiers Charter School (NFCS), denied Student a free, appropriate public education (FAPE).

Petitioner states the following issues:

1. Student is going into the ** grade next school year and is regressing academically. The parent has been concerned for some time that Student has been regressing academically. Student has regressed in reading comprehension.
2. In February 2007 Student was re-evaluated and Student’s next friend discovered the 02-28-07 Full Individual Evaluation had not been administered by a Licensed Specialist in School Psychology (LSSP) but was administered by a counselor. The LSSP’s name was stamped on the evaluation. The parent called the LSSP who told her he did not review the file and had never met Student.
3. The first copy of the Full Individual Evaluation that the parent received did not show the reading comprehension results, but the second copy handed out at the ARD meeting on 3-23-07 included results amended by the counselor. The LSSP was not present at the ARD meeting and did not have knowledge of the corrected copy.
4. The parent called the LSSP to inquire about the evaluation. The LSSP has telephoned the parent many times since that phone call, but she does not take his calls because she feels uncomfortable speaking with him.
5. Respondent has failed to comply with the Student’s Individualized Education Plan (IEP).

6. Respondent's IEP's for Student are inappropriate.
7. When the 2006-2007 school year began NFCS immediately rewrote IEPs for Student rather than implementing the IEPs from San Antonio ISD that had not yet been mastered by Student. Respondent did not appropriately transition Student into the charter school from his previous school setting.
8. Student's parent has not received regular IEP progress reports from NFCS. The reports that were received were not complete.
9. Respondent has failed to provide all of Student's teachers with IEPs for the Student.
10. Student is not being taught by a certified and trained dyslexia teacher, and the resource teacher is ignoring Petitioner's IEP.
11. Respondent failed to provide Student with an IEP for the SDAA curriculum. The parent disagreed with NSCF's recommendation for the Student to receive the reading SDAA 4-1.
12. Respondent failed to reconvene from the October 2006 ARD to review benchmark testing to determine the appropriate SDAA/TAKS levels for testing this school year. The ARD meeting never happened.
13. Student was inappropriately given benchmark testing at a ** grade level this school year when he tested at a ** grade level in October 2005. This level was inappropriate for this student.
14. Respondent has failed to identify Student as learning disabled in the area of mathematics. He was classified in this area in October 2005 according to a FIE by San Antonio ISD.
15. Respondent has failed to implement appropriate modifications for Student.
16. The dyslexia program provided by Respondent for Student is inappropriate. Respondent has refused to acknowledge or implement the recommendations from the report from the Texas Reading Institute prepared on March 12, 2007.
17. Respondent has failed to provide Student with appropriate one-on-one tutoring in the areas of LD [sic].
18. Respondent has failed to provide Student with appropriate assistive technology.

Student seeks an order from the Hearing Officer for the following:

1. Full Individual Evaluation
2. IEPs based on appropriate benchmarks and appropriate baseline data from an appropriate individualized academic assessment.
3. Student's teachers to be certified and trained.
4. Appropriate SDAA/TAKS testing levels and IEP goals and objectives on the appropriate grade level.
5. Implementation of appropriate modifications.

6. Appropriate reading program and dyslexia reading program.
7. Appropriate one-on-one tutoring in the areas of LD.
8. Appropriate assistive technology.
9. Identification of a learning disabled [sic] in the area of mathematics.
10. One year of compensatory educational services or an amount of compensatory educational services deemed appropriate by the Hearing Officer as set out in *Burlington Sch. Comm. V. Department of Educ.*, 471 U.S. 359, 369-71 (1985); *Alamo Heights Indep. School Dist. V. State Bd. Of Educ.*, 790 F.2d 1153 (5th Cir. 1986); *Parents of Student W. v. Puyallup School Charter School No. 3*, 21 IDELR 723 (9th Cir. 1994).

Procedural History

On April 23, 2007, the Texas Education Agency (TEA) received Student's Request for Due Process Hearing (the complaint), assigned the case Docket No. 225-SE-0407, and appointed the undersigned Hearing Officer to the matter. On April 23, 2007, the Hearing Officer sent the Initial Scheduling Order to the parties setting forth all applicable dates related to the Resolution Period and the Hearing. The Hearing Officer set the matter for a prehearing conference with the parties on May 14, 2007 however the parties requested a continuance, which was granted.

During a lengthy interim, the parties attempted unsuccessfully to resolve the matter through mediation. Once it became clear that it would be necessary to proceed to hearing, the Hearing Officer scheduled a prehearing conference by telephone with the attorneys representing both parties. On August 7, 2007, the Hearing Officer convened the prehearing conference. In attendance were the following: 1) Mr. Christopher Jonas, counsel for the Petitioner; 2) Ms. Holly Wardell, counsel for the Respondent; 3) the court reporter, who made a record of the telephone conference; and 4) Lucretia Dillard, Special Education Hearing Officer. During this telephone conference the parties discussed the issues and agreed upon a schedule for the Due Process Hearing, which was set for August 30-31, 2007. The court reporter prepared a transcript of the prehearing conference and provided a copy to both parties.

Respondent filed a motion to dismiss on August 24, 2007, based on a perceived lack of participation in good faith by Petitioner at the Resolution Session. The Hearing Officer denied the motion. Due to a scheduling conflict, Respondent's counsel filed a motion for continuance, which was granted. The hearing was reset to October 1 and 2, 2007.

The Due Process Hearing convened as scheduled on October 1 and 2, 2007. Christopher Jonas continued to represent Petitioner at the hearing. Student's mother attended the entire hearing, and Student's father attended the first day. Also in attendance for Petitioner throughout the hearing was Debbie Valdez, Parent Advocate. Respondent was represented by its counsel, Holly B. Wardell and Emily Newhouse, of the firm Schwartz & Eichelbaum, as well as NFCS's designated representative, the Special Education Director.

Petitioner called five witnesses; NFCS called four witnesses. The Hearing Officer admitted 39 exhibits that Petitioner offered into evidence, and 17 exhibits that Respondent

offered. The parties requested the opportunity to submit closing briefs, and based upon the agreement of the parties and the availability of the transcript, the Hearing Officer set the deadline for submission of briefs as November 5, 2007. The Decision Deadline was therefore extended until December 5, 2007.

Findings of Fact

Based upon the matters of record and matters of official notice, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following findings of fact based on a preponderance of the credible evidence:

1. Student resides with parents within the jurisdictional limits of the San Antonio Independent School District. New Frontiers Charter School is a charter school in the State of Texas. Student’s parents have elected for Student to attend New Frontiers Charter School.
2. Student currently receives special education services from NFCS under the classification of Learning Disabled (LD). Student began classes there with the fall semester of 2006, attending classes in the ** grade.
3. Student previously attended classes in San Antonio ISD beginning with **. ¹ SAISD conducted a Full Individualized Evaluation for Student in October 2005 and obtained the following results:

Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV)

	<i>Composite</i>	<i>Pctile</i>
Verbal Comprehension	**	**
Perceptual Reasoning	**	**
Working Memory	**	**
Processing Speed	**	**
Full Scale	**	**5

Wechsler Individual Achievement Test – Second Edition (WIAT – II)

	<i>Std</i>	<i>Pctile</i>	<i>Gr Equiv</i>
Pseudo-word Decoding	**	**	**
Word Reading	**	**	**

¹ For whatever reason, Student’s parents chose not to continue placement in SAISD even though they obtained compensatory services that could have benefited Student over and above Student’s daily special education services.

Reading Comprehension	**	**	**
Numerical Operations	**	**	**
Math Reasoning	**	**	**
Spelling	**	**	**
Written Expression	**	**	**
Reading Composite	**	**	
Mathematics Composite	**	**	
Written Language Comp	**	**	

4. Student was again assessed in the summer of 2007, when Student's parents obtained an Independent Educational Evaluation. In this assessment Student obtained the following scores:

Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV)

Composite

Verbal Comprehension	**
Perceptual Reasoning	**
Working Memory	**
Processing Speed	**
Full Scale	**

Woodcock Johnson – III: Tests of Achievement (WJ-III)

	<i>Std</i>	<i>Pctile</i>	<i>Gr Equiv</i>
Broad Reading	**	**	**
Basic Reading Skills	**	**	**
Reading Comprehension	**	**	**
Broad Mathematics	**	**	**
Math Calc Skills	**	**	**
Math Reasoning	**	**	**

Written Expression	**	**	**
Broad Written Language	**	**	**

5. NFCS also conducted an assessment for Student. The testing date was February 1, 2007, and the report was dated February 28, 2007. The assessor administered the Kaufman Brief Intelligence Test – Second Edition and the Wechsler Individual Achievement Test – Second Edition (WIAT – II) to Student, who obtained the following scores:

KBIT – 2

	<i>Std</i>
Vocabulary	**
Matrices	**
IQ Composite	**

WIAT – 2

	<i>Std</i>	<i>Gr Equiv</i>
Word Reading	**	**
Reading Comprehension	**	**
Numerical Operations	**	**
Written Expression	**	**

6. Upon beginning school at NFCS an Admission, Review and Dismissal Committee met on August 21, 2006, and developed an Individual Education Program (IEP) for Student. The ARDC also accepted the FIE that had been conducted by SAISD in October 2005, and that district’s determination that Student qualified for special education services with a Learning Disability in the areas of reading comprehension, written expression, and math calculation. The ARDC determined that his placement should be in the resource setting for English Language Arts and math. The committee additionally determined that Student would have one class in general education English Language Arts with content mastery assistance and an additional class in general education math with content mastery assistance. The IEP developed by the ARDC contained goals that focused on three areas: reading comprehension, written expression, and math calculations.
7. The short-term objectives identified to improve Student’s reading comprehension included: 1) Develop his vocabulary through listening to selections read aloud and reciting the words to the teacher. 2) Establish and adjust purposes for reading such as reading to find out, to understand, to interpret, to enjoy, and to solve problems. 3) Determine a text’s main idea (or major’s) ideas and how those ideas are supported with details.

8. The short-term objectives identified to improve Student's written expression included: 1) Write for a variety of audiences and purposes and a variety of forms. 2) Compose original texts, applying the conventions of written language such as capitalization, punctuation, penmanship, and spelling. 3) Generate ideas and plans for writing by using prewriting strategies such as brainstorming, graphic organizers, notes, and logs.
9. The short-term objectives identified to improve Student's math calculations included: 1) Use addition and subtraction to solve problems involving whole numbers by modeling addition and subtraction through pictures, words, and numbers. 2) Use multiplication to solve problems involving one and two digit numbers by applying multiplication facts through tens using corrected models. 3) Use order of operations to simplify whole number expressions in problem solving.
10. In addition to the goals and objectives set out in the written IEP form, the ARDC decided that Student would receive dyslexia services and reading interventions. These services were only mentioned in the minutes of the ARDC meeting on August 21, 2006. Student's parent also told the ARDC that Student was receiving dyslexia services from an outside agency. The committee agreed to reconvene in December after two benchmarks were given to Student.
11. Another ARDC meeting occurred on October 23, 2006. At this time the resource math placement was discontinued, because Student was progressing and needed to be challenged with harder work. Student's parent informed the rest of the ARDC that the after school dyslexia program would be discontinued, and only the NFCS dyslexia program would be providing services. One of the teachers volunteered her support in providing reading interventions and support for Student in addition to the special education services and dyslexia services that NFCS was providing. Student's parent also requested the ARDC to attach a list of items be attached to Student's IEP :
 1. Goal is to get [Student] up to grade level in Reading, Writing and Math
 2. Goal is to exit [Student] out of Special Education by the end of 2008 in order to Receive a regular high school Diploma
 3. Adopt the evaluation and recommendation from The Scottish Rite Hospital Per Dr. ** in Reading Instruction recommendations, reading Comprehension, suggested accommodations for school
 4. Adopt from The Dyslexia Handbook pages 6, 7 and 8 ...
 5. Reading, Writing intervention [Student] needs very badly. We need to include these Two subjects with interventions.

Keep in [Student's] IEP until we reach [Student's] goals. (list quoted verbatim from Petitioner's Exhibit 36.)

12. In early October a ** Grade Reading Benchmark was given to Student. At this time Student was reading most of the time on a second or occasionally on a ** grade level.
13. Student's parent received an email from Student's English Language Arts teacher on January 11, 2007, that conveyed scores from the Rigby PM and Burns/Roe Informal Reading Inventory. The information provided to the parent was quite detailed, including accuracy levels and grade level equivalent, fluency rate, reading comprehension, word recognition, and vocabulary. However, the reading comprehension score alarmed the parent, who asked for an ARDC meeting.
14. On February 1, 2007, a meeting occurred, but an insufficient number and makeup of persons were available to constitute an official ARDC. The parent requested a Full Individual Evaluation. The appropriate consent forms were signed and testing was scheduled to begin that day.
15. The person who performed the tests on Student was a Licensed Professional Counselor (LPC). In Texas an LPC who has received appropriate training and supervision may administer formal and informal instruments and procedures for assessing and appraising intellectual ability and achievement level. The LPC had received such appropriate training and supervision to perform the KBIT-2 and WIAT-2 that were performed on Student on February 1, 2007.
16. The LPC noted during the testing that Student did not complete the reading comprehension portion of the achievement test. Student only did part of it and then stopped, stating, "I can't read anymore."
17. The LPC did not prepare the report that was given to the ARDC. The report that comprised the FIE and was given to the ARDC was prepared by an LSSP who testified at the hearing. The LSSP prepared the report based on the testing data and protocols that were provided by the LPC. The LPC discussed the report with the ARDC at its meeting on March 23, 2007. The first copy of the report did not have the reading comprehension score listed; the report was amended to include this information and was discussed at the meeting.
18. The invitation to the March 23, 2007, ARDC meeting contained an ambitious agenda:
 1. Review existing data
 2. Propose to develop/review/revise IEP
 3. State Assessment

At one time or another thirteen persons were in attendance at this meeting that began at 2:40 p.m. and ended at 8:45 p.m. without final resolution. The parent wanted to confer with the other parent and review the IEP goals. A schedule of services was developed and approved for the remainder of the 2006-2007 school year and a schedule developed for the 2007-2008 school year. Based on the testing data, grades, and teacher recommendations, the ARDC agreed that Student would take the SDAA

- 4-I state assessment for reading in a small group setting. It was further agreed that Student would take the TAKS state assessment for math in a small group. The ARDC agreed to write on Student's IEP to permit oral administration in the math TAKS, but that under the state's requirements Student must ask for the assistance and could only get a few words or phrases. The committee planned to reconvene in ten days to review the proposed IEPs.
19. Although NFCS attempted to reconvene another ARDC meeting, it never happened.² Instead the parent requested this due process hearing, as is the parent's right.
 20. Student's dyslexia teacher used the Scottish Rite method in her class. This teacher is a trained and certified dyslexia specialist. During the 2006-2007 school year she had four students when she was working with Student. During the 2007-2008 school year she has had only Student, and thus Student received one-on-one attention. As of the date of the hearing Student had progressed through 40 lessons of the 300 in the Scottish Rite program. The program focuses on phonemic awareness, phonics, and reading fluency. She uses a multi-sensory approach in teaching Student. At least one of the books Student read in her class was on the fourth-grade level.
 21. Student's English Language Arts teacher in the resource classroom was also properly credentialed to teach.
 22. Student received additional services from the Scottish Rite Institute in addition to Student's classes at NFCS for a period of approximately four weeks in the beginning of the 2006-2007 school year. The witness from the Scottish Rite Institute testified that parent pulled Student out "to receive [Student's] instruction at school."
 23. The record in this case shows numerous examples of Student's work being sent home, progress reports, and report cards sent to parents.
 24. NFCS has made tutoring services available for Student, but on a voluntary basis.
 25. The evidence shows that any difficulties that Student experiences in math seem to stem from his difficulties in reading comprehension.
 26. Student's end-of-year report card grades were all high **'s or ***'s and included good conduct grades.
 27. SAISD performed an Assistive Technology assessment in February 2005. NFCS never received this evaluation from SAISD when Student's records were transmitted. The report recommends several measures to assist Student to access the curriculum and be successful in school.

² The recessed ARDC meeting was scheduled to reconvene on April 9, 2007. The parent received a letter on April 6 and learned the school had hired an attorney who was scheduled to attend the meeting. The parent cancelled the meeting and contacted TEA to inquire about the parent's rights.

28. Modifications are being implemented for Student in Student's classes at NFCS. Student does not always take advantage of the modifications and sometimes does not wish to be singled out from Student's peers.
29. Another round of testing was also done on Student at the Texas Reading Institute. Extraordinarily detailed reporting was given to NFCS by the parent from TRI. Much of this information was boilerplate. The test results confirmed much of what was already known about Student.

Discussion

This case must be broken into sub-categories for analysis: the IEPs, the testing, the FIE, educational progress, and everything else.

The parent complains that NFCS immediately rewrote the IEPs for Student instead of implementing those San Antonio ISD had prepared. The parent participated in drafting the IEPs at that time and does not seem to have complained back then. Nothing is wrong with rewriting IEPs for a transferring student. The parent also complains that the IEPs are inappropriate for Student. At the hearing the testimony focused on lack of measurability and specificity.

However, an IEP cannot be examined in a vacuum. As recently as six weeks ago today, United States District Judge Sam Sparks summarized the state of special education law when he wrote:

A federal court's review of the [Hearing Officer's] decision requires a two-part inquiry. First, the court must decide whether the state, through its local education agency or intermediate educational unit, complied with the procedures set forth in the IDEA for evaluating the child's educational need. *Rowley*, 458 U.S. at 206-07. Second, the court must determine whether the individual education plan (IEP) developed for the disabled child was "reasonably calculated to enable the child to receive educational benefits." *Id.* The educational benefit must be "meaningful," but "need not be the best possible one, nor one that will maximize the child's educational potential." *Michael F.*, 118 F.3d at 257-48. A procedural violation does not rise to the level of a cognizable claim for relief under the IDEA unless the procedural violation resulted in a denial of educational opportunity to M.L., or infringed his parents' opportunity to participate in the IEP process. *Adam J.*, 328 F.3d at 812.

Lake Travis ISD v. M.L. b/n/f D.L. and M.L., Case No. A-06-CA-046-SS, (W.D. TX, Oct. 24, 2007) (not pub).

Essentially, NFCS inherited this student from San Antonio ISD after years of apparent lack of success in the classroom. NFCS had not had the opportunity to assess the child, nor had it any long-term history with the child or the family. Thus, NFCS cannot be faulted for any failure on the part of SAISD. The planning by the ARDC at NFCS was based on the FIE that was done by SAISD; that was reasonable. Where things may have gotten off track was when the parent requested another FIE to be performed by NFCS. In any event, the FIE that NFCS did not

meet the parent's expectations, to say the least. It did not include an assessment for assistive technology, but it is not clear from the records that a request was ever made for such an assessment by NFCS.

This student has been tested over and over again. It is a wonder Student will even pick up a pencil or a test booklet anymore, but Student patiently agreed and we have the results. Those results indicate that Student is of average intelligence, and has extreme difficulty with reading comprehension, and written expression. The test scores do not support a finding that Student is learning disabled in the area of mathematics or math calculations. The evidence points to reading comprehension as the underlying explanation for any difficulty he has in math. That is not to say that Student should not receive support services in math. It only means that there is no specific learning disability in mathematics.

Everyone associated with the case concedes that Student is dyslexic. NFCS has been providing services through its dyslexia program, which is part of regular education and not special education at NFCS. The better way to prepare Student's IEP would have been to specifically identify those services on the IEP documents and incorporate them into the program. The services have been provided, and they are the primary reason that Student has made progress.

The most helpful witness to the Hearing Officer in this case was Petitioner's expert witness that provided the independent educational evaluation of Student. Without question, those results indicate that Student has made educational progress while at NFCS. Student has gained at least one grade level in reading comprehension.³ Likewise, the scores in the various mathematics skills indicate remarkable progress as well, as much as two grade levels in some areas. On the other hand, the written expression scores have remained flat across all of the testing.

Another very helpful witness was the dyslexia teacher from NFCS. The Scottish Rite program obviously conveys benefit to Student. It works and should be continued. Whatever differences may exist between the new "Take Flight" program and the one used at NFCS do not rise to the level that NFCS should rush out and obtain Take Flight or change its entire dyslexia curriculum. The methodology used by NFCS is quite adequate for the purpose that Student needs: basic reading skills, reading comprehension, and fluency.

Where does that leave us? A new educational assessment is not the solution. The independent educational evaluation has already been done. We have those answers and can develop whatever is needed to fill in the gaps.

What about assistive technology? NFCS did not provide any assistive technology to Student. However, they knew nothing about a need, an assessment, an agreement to provide it, or anything else. Should they have known Student needed assistive technology to benefit from the educational program? It is extremely difficult on this record to say whether this one lone

³ The reading comprehension score obtained during the NFCS evaluation is discounted, primarily because Student did not complete the testing. The Hearing Officer considers the result from the independent evaluation to be the more accurate indicator of Student's level of achievement at that time.

aspect was sufficient to offset the educational progress that Student demonstrated to the point where Student was deprived of a free appropriate public education. The Hearing Officer concludes that Petitioner failed to meet the burden of proving what assistive technology, if any, that NFCS should have been giving that deprived Student of FAPE.

The record does not show sufficient evidence to conclude any violation occurred with respect to the state assessment or any other issues raised by Petitioner.

Finally, the Hearing Officer has no jurisdiction over the issues the parent complains of with respect to the LSSP and the LPC.

Conclusions of Law

After due consideration of matters of record, matters of official notice, and the foregoing findings of fact, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following conclusions of law:

1. Student is eligible for special education services as a child who is learning disabled. 20 U.S.C. §1401 (3) (A); 34 C.F.R. §300.8 (c) (10); 19 TEX. ADMIN. CODE § 89.1040 (c) (9).
2. Student is not eligible for special education services as a child who is learning disabled in the area of math calculation. 20 U.S.C. §1401 (3) (A); 34 C.F.R. §300.8 (c) (10); 19 TEX. ADMIN. CODE § 89.1040 (c) (9).
3. NFCS is required to provide Student FAPE. 20 U.S.C. § 1401 *et seq.*
4. NFCS did not fail to provide FAPE to Student during the 2006-2007 school year. *See Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
5. Petitioner bears the burden of proof with respect Student's claims that Student was denied a free appropriate public education. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984). Petitioner did not meet Student's burden of proof in this case.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the relief sought by Petitioner is DENIED. IT IS FURTHER ORDERED that the relief requested by Respondent is GRANTED.

SIGNED this 5th day of December 2007.

Luecretia Dillard
Special Education Hearing Officer