

DOCKET NO. 097-SE-0108

STUDENT <i>b/n/f</i>	§	BEFORE A SPECIAL EDUCATION
PARENTS,	§	
	§	
Petitioner,	§	
	§	
V.	§	HEARING OFFICER
	§	
WAXAHACHIE INDEPENDENT	§	
SCHOOL DISTRICT,	§	
	§	
Respondent.	§	FOR THE STATE OF TEXAS

**DECISION OF THE HEARING OFFICER**

**I. Procedural History and Issues**

Mr. and Mrs. \*\*, the parents of \*\*, (collectively referred to as “Petitioner”), filed this request for Due Process Hearing on January 11, 2008, under the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §1400 *et seq.*, complaining about the failure of Waxahachie Independent School District (“Respondent,” “WISD,” or “the District”) to provide Student with a free appropriate public education (“FAPE”).

On January 14, 2008, the Hearing Officer provided the parties the Initial Scheduling Order in writing setting forth the dates for the procedural deadlines, including the first prehearing conference date of February 4, 2008. The prehearing conference went forward as scheduled. Myrna Silver, Attorney, appeared on Petitioner’s behalf; and Nona Matthews, Attorney, appeared on behalf of Respondent. During the prehearing conference the parties discussed the issues and the hearing date. Because the hearing required two days, the parties agreed to reschedule the hearing to April 10-11, 2008, with disclosures due April 3, 2008.

On April 10, 2008, the Hearing Officer convened the Due Process Hearing in the boardroom of Waxahachie Independent School District. Ms. Silver appeared as counsel for Petitioner; also appearing on Petitioner’s behalf, were Mr. and Mrs. \*\*, \*\*’s parents. Ms. Matthews and Jan Watson appeared as counsel for Respondent; Evelyn Knize, Special Education Director served as the District representative. The hearing lasted two complete days<sup>1</sup> and concluded on April 11, 2008.

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<sup>1</sup> The hearing began each day at approximately 9:00 a.m. and ended at approximately 7:00 p.m.

The parties called eleven witnesses and presented documentary evidence consisting of approximately 56 exhibits contained in three three-ring binders. The court reporter produced a 640-page transcript of the proceedings. The parties requested to present post-hearing closing arguments and briefs. The Hearing Officer approved, and the agreed date for submission was June 12, 2008. Because of illness of one of the attorneys, the parties agreed to extend the submission date to June 18, 2008, which the Hearing Officer approved. The Decision of the Hearing Officer was prepared in compliance with the deadline of July 18, 2008.

## **II. Due Process Hearing Issues and Relief Requested**

1. Whether the District failed to provide a free, appropriate public education during the time the student was in Transition Class at \*\* School from January 2007 until May 2, 2007, because he remained in a placement that was not the least restrictive environment for him;
2. Whether the District failed to provide a free, appropriate public education during the time the student was in Transition Class at \*\* School from January 2007 until May 2, 2007, because he did not receive appropriate instruction in math and language arts;
3. Whether the evaluation that determined the student is eligible for special education as a child with autism was properly performed, and the eligibility on that basis should be removed; and
4. What is the appropriate placement for the student?

The Petitioner seeks the following relief:

1. Reimbursement of private educational services; and
2. An Order requiring the Respondent to remove autism as a basis for special education eligibility.

## **III. 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 evidence:

1. Student is an \*\* age child residing with his parents within the geographic boundaries of Waxahachie Independent School District.
2. As a very young child Student manifested a delay in speaking and received speech therapy through Early Childhood Intervention Services. He has been diagnosed with a Mixed Receptive-Expressive Language Disorder from age \*\*. Student first received speech therapy services from WISD through a dual enrollment arrangement in 2005. His parents withdrew him from the dual enrollment in April 2005 because WISD declined to provide individual speech therapy rather than the group therapy student was receiving.

3. In January 2006 Student's parents enrolled him in \*\* at \*\* School in WISD. On March 10, 2006, the Admission, Review and Dismissal Committee (ARDC) conducted the 30-day placement review for Student to develop a program. The ARDC developed an Individualized Education Program (IEP) that included behavioral accommodations, goals and objectives in speech, and 60 minutes of speech therapy per week. Another ARDC meeting followed on April 21, 2006, to review Student's behavior. A Behavior Intervention Plan (BIP) was developed based on a Functional Behavioral Assessment (FBA).
4. In May 2006 the ARDC again met, this time at the parent's request to discuss transition to \*\* grade. The ARDC did not make any changes to Student's IEP. Student did not qualify for extended year services. The parents arranged for him to attend a private program during June and July, however, at a school he had previously attended.
5. Student began \*\* grade in the fall of 2006 at \*\* School. The ARDC met on August 24, 2006, to discuss parent's concern that Student would miss classroom time when he would be getting speech therapy. Additionally, the ARDC addressed concerns about Student's behavior. The ARDC elected to implement the BIP for the first nine-week grading period and to meet again at that time. The IEP was left unchanged.
6. Student's \*\* grade teacher attempted numerous interventions as she worked with him to address his behavior, including verbal cues, tangible behavior feedback, use of music to ease anxiety, verbal praise, behavior contract, picture cues, very short instructions, cooperative learning and discipline, and teaching to his interests, to name but a few. Moreover, the teacher collaborated with other teachers and the behavior specialist to develop other strategies to limit or prevent Student's behaviors. Eventually, Student's behaviors interfered with the class so much that the school's principal limited the class size to 16 students and hired an additional teacher, thereby allowing the regular teacher to focus on Student and his behaviors.
7. Student's behaviors became more extreme, though. He began talking out, running from school personnel, taking things from students, screaming, and exhibiting aggression toward peers and staff. The classroom teacher, accordingly, exercised her right under Texas Education Code § 37.002<sup>2</sup> to request Student be removed from her classroom on September 26, 2006.

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<sup>2</sup> TEXAS EDUCATION CODE Section 37.002 provides:  
REMOVAL BY TEACHER

(a) A teacher may send a student to the principal's office to maintain effective discipline in the classroom. The principal shall respond by employing appropriate discipline management techniques consistent with the student code of conduct adopted under Section 37.001.

(b) A teacher may remove from class a student:

(1) who has been documented by the teacher to repeatedly interfere with the teacher's ability to communicate effectively with the students in the class or with the ability of the student's classmates to learn; or

(2) whose behavior the teacher determines is so unruly, disruptive, or abusive that it seriously interferes with the teacher's ability to communicate effectively with the students in the class or with the ability of the student's classmates to learn.

(c) If a teacher removes a student from class under Subsection (b), the principal may place the student into another appropriate classroom, into in-school suspension, or into a disciplinary alternative education program as provided by Section 37.008. The principal may not return the student to that teacher's class without the teacher's

8. Student's parents responded by providing WISD a notice of intent to withdraw him from WISD and place him in a private school at District expense on September 28, 2006.
9. Although the teacher agreed to allow Student to remain in her class for a period of time, on October 13, 2006, she again requested that he be removed.<sup>3</sup> The principal placed Student in in-school suspension until the ARDC meeting could be held. A meeting was scheduled for October 20, 2006.
10. The parents withdrew Student from WISD and placed him at a private school. He only attended the private school for about one week. He was asked to leave because of his behavior. Parents home-schooled Student for the remainder of 2006.
11. The ARDC met on October 20, 2006. The District requested a Full and Individual Evaluation (FIE), including a psychological evaluation and evaluations in the areas of autism, counseling, and occupational therapy in order to evaluate the suspected disability of autism, rule out an emotional disturbance, and to revise Student's educational plan. The parents declined consent for the evaluations, and stated they were removing Student from public school, were not requesting services, and would pursue a private evaluation.
12. Dr. \*\*, the private neuropsychologist that evaluated Student in November 2006 determined that Student had Mixed Receptive-Expressive Language Disorder, Articulation Disorder, and Attention Deficit Hyperactivity Disorder – Combined Type. The ARDC reviewed his report at a meeting on December 6, 2006. An Other Health Impaired (OHI) form was obtained at that time as well. Dr. \*\* diagnosed Student with mild to moderate ADHD and prescribed the Daytrana patch to assist him with better focus and concentration and less distraction. Additionally, the parents agreed to provide consent for the additional evaluations, provided they not be started until Student returned to school in January 2007. The ARDC recommended placement in the Transition Class because of Student's behavioral problems.
13. Student's parents re-enrolled him on January 3, 2007, in WISD, where he began classes in the Transition Class. The special education teacher in the Transition Class used three daily reward systems in the class: the apple chart (red, green, yellow) to assist with behaviors during transitions, the behavior chart for each class period, and a

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consent unless the committee established under Section 37.003 determines that such placement is the best or only alternative available. The terms of the removal may prohibit the student from attending or participating in school-sponsored or school-related activity.

(d) A teacher shall remove from class and send to the principal for placement in a disciplinary alternative education program or for expulsion, as appropriate, a student who engages in conduct described under Section 37.006 or 37.007. The student may not be returned to that teacher's class without the teacher's consent unless the committee established under Section 37.003 determines that such placement is the best or only alternative available. If the teacher removed the student from class because the student has engaged in the elements of any offense listed in Section 37.006(a)(2)(B) or Section 37.007(a)(2)(A) or (b)(2)(C) against the teacher, the student may not be returned to the teacher's class without the teacher's consent. The teacher may not be coerced to consent.

<sup>3</sup> The Hearing Officer was very impressed by the testimony of this teacher and the techniques utilized in her classroom.

- class reward system for the entire group. She also provided social skills training to Student using the Room 14 program.
14. At the beginning of his time in the Transition Class Student displayed much out-of-control behavior, such as screaming, running around the classroom, and throwing things. Academically he was at or above grade level, but with some gaps in what he had learned. For example, he had difficulty with reading comprehension and with math, even though he was at grade level for most of the elements in those subjects.
  15. In the Transition Class the teacher taught from the Scholastic Reader, the same curriculum used in the general education \*\* -grade class, along with Stop-to-Think Reading, and other supplemental materials. For the math program she used Saxon Math, also the same curriculum used in the general education \*\* -grade class.
  16. The FIE conducted by WISD consisted of a multidisciplinary team, qualified in the areas of each person's expertise, including an educational diagnostician, a speech language pathologist, two occupational therapists, and an experienced psychologist that specializes in working with children with autism spectrum disorders. The team gathered information from parents, teachers, and Student's physician. Previous evaluations and observations were reviewed and considered along with current data and tests results.
  17. The speech language pathologist administered the Goldman Fristoe Test of Articulation-3 and the Comprehensive Assessment of Spoken Language. Based on the results of these two tests, he recommended that Student continued to qualify as a student with a Speech Impairment due to a mild articulation disorder and moderate Receptive-Expressive Language Disorder.
  18. The diagnostician conducted intelligence and achievement tests including the Wechsler Intelligence Scale for Children – IV (WISC-IV) and the Woodcock-Johnson Test of Achievement – III (WJ-III). Both of these tests are valid and reliable instruments to measure children's cognitive abilities and academic achievement respectively. Student scored within the average range in all areas of cognitive abilities, and the results of the academic achievement did not indicate a learning disability.
  19. The occupational therapist advised that Student exhibited sensory sensitivity and recommended occupational therapy to address those issues.
  20. Dr. \*\* administered the Behavior Assessment Scale for Children – 2 (BASC-2), the Childhood Autism Rating Scale (CARS), Psycho-Educational Profile – 3 (PEP-3), and the Diagnostic Student Interview: Monteiro Interview Guidelines for Diagnosing Asperger's Syndrome (MIGDAS). Dr. \*\* concluded that Student's behavioral profile was consistent with a child with high functioning autism. This conclusion was based on a pattern of mild, but significant development differences in the three key areas of autism spectrum disorders: language/communication, social relationships/emotions, and sensory use of materials. Dr. \*\* does not believe that Student's behavior and language profile is fully explained by a language disorder alone. She believes Student's profile is atypical for a nonverbal learning disability, but is typical for high functioning autism.

21. The ARDC met on April 24, 2007, to review all of the evaluation reports, present competencies, and draft goals and objectives. Dr. \*\*,<sup>4</sup> a private speech language pathologist from Vanderbilt University, also participated in the ARDC meeting via telephone. After reviewing all of the information, the committee recommended eligibility as Speech Impaired, Autism, and Other Health Impaired. Student's special education teacher reported that his behavior had improved drastically.<sup>5</sup> She recommended that Student be placed in the general education classroom in first grade with instruction in the Transition Class in social skills.
22. The ARDC was not able to complete its agenda on April 24, 2007, but continued the meeting on May 1, 2007.<sup>6</sup> Although the agreement was for general education setting, the parents requested placement in a class with no more than 10 students. The District responded that general education classes may have up to 22 students, but if a student cannot be successful in the general education setting with supportive aids and services, a more restrictive educational environment would be considered. Other matters addressed during the May 1, 2007, meeting included the development of the IEP, the decision not to recommend extended school year services, and an agreement to provide speech therapy for 60 minutes per week of direct therapy and 45 minutes per nine weeks on a consult basis. The parents agreed with the ARDC with the exception of the Autism eligibility and the class size.
23. Student attended a \*\* grade general education class for the remainder of the 2006-2007 school year, beginning about May 1. The teacher noted that Student was a strong reader, but was lacking some math skills and attributed the deficit to not being in school from mid-October through December. She described Student's behavior as very good during that time. The daily teacher reports also show Student's behavior improvements.
24. At the May 21, 2007, ARDC meeting the regular education teacher told the committee that Student no longer needed the paraprofessional. His conduct grades were excellent for the spring semester. The ARDC recommended that he attend \*\* grade in all general education classes with one period in the Transition Class at the end of the day to receive training in social skills. At this ARDC meeting the parents again asked for a general education class with only 10 students or less. Again the District refused, noting that Student was showing success in the general education class with 22 students and very little support from the paraprofessional. The meeting ended in disagreement.
25. WISD provided written Notice of Refusal to the parents on June 6, 2007, "refusing to fail to identify the Autism eligibility and refusing to provide a general education classroom with ten or fewer students with no behavior problems."
26. The reading level expected for a \*\* grader at the end of school is Level 16. Student was reading at Level \*\*, exceeding expectations.

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<sup>4</sup> Dr.\*\* is one of the most respected experts in his field.

<sup>5</sup> Crying and shutting down when he got frustrated were the only two behaviors left to target.

<sup>6</sup> The meeting concluded early on April 24 due to a tornado.

27. Parent provided written notice to WISD of their intent to enroll Student in private school on August 10, 2007. WISD sent its Notice of Refusal on August 14, 2007, based on its position it had provided and could continue to provide Student with FAPE in the least restrictive environment.
28. Student was evaluated by Dr. \*\* at the end of March 2008 at the request and expense of the parents. Dr. \*\* concluded that Student has a nonverbal learning disability. Dr. \*\* stated it would be detrimental to Student if he were incorrectly diagnosed with autism, and as a result, provided with inappropriate interventions to address his disability. She believed Student needs to be in a classroom where the level of language would not be “over his head” or affecting his ability to understand. Her report has never been provided to the ARDC to review or consider with respect to planning any programming for Student.
29. Student attended \*\* in Dallas, Texas for the 2007-2008 school year. \*\* is a school for students with learning differences, most of whom have language delays and learning disabilities. Student performed very well there.

#### **IV. Discussion**

##### Did the District Provide an Appropriate Education?

To determine whether the District provided an appropriate education to Student, the standard is described as one that enables a student to obtain “some benefit” from her education. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 189 (1982). Whether the education is designed to maximize a student’s potential is not the test. Rather, the IDEA guarantees a “basic floor or opportunity,” requiring a school to provide “access to specialized instruction and related services which are individually designed to provide educational benefit.” *Rowley*, 458 U.S. at 201.

The four-factor test approved by the Fifth Circuit in *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253, (5th Cir. 1997) is used to determine whether an IEP is appropriate. The Court said that an IEP must be geared to provide some benefit, and that is demonstrated where:

- (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.

Moreover, the school is entitled to a presumption that the educational plan established by the IEP is appropriate, and the party attacking the IEP bears the burden of proof to demonstrate

its inappropriateness. *Schaeffer v. Weast*, 546 U.S. 49 (2005); *Salley v. St. Tammany Parish Sch. Bd.*, 57 F.3d 458 (5<sup>th</sup> Cir. 1995), citing *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1290-1291 (5<sup>th</sup> Cir. 1991).

### Petitioner's First Issue

Petitioner's first issue focuses on the second factor above, least restrictive environment (LRE). The ARDC changed Student's placement from the general education setting to the more restrictive setting of the Transition Class. This decision did not occur without careful consideration or without good reason. In *Daniel R.R. v. State Bd. Of Educ.*, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989), the Fifth Circuit devised a two-part test to determine whether LRE has been complied with:

First, we ask whether the education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. *See* § 1412(5)(B). If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second whether the school has mainstreamed the child to the maximum extent appropriate. *See id.* A variety of factors will inform each state of our inquiry; the factors that we consider today do not constitute an exhaustive list of factors relevant to the mainstreaming issue. Moreover, no single factor is dispositive in all cases. Rather, our analysis is an individualized, fact-specific inquiry that requires us to examine carefully the nature and severity of the child's handicapping condition, his needs and abilities, and the schools' response to the child's needs.

*Daniel R.R.*, 874 F.2d at 1048. The answer to the first question, whether Student can be educated in the regular classroom with the use of supplemental aids and services, in this case, based on the evidence, is no. His behavior interfered with the education of the rest of the classroom, and the behaviors were increasing, not decreasing in the fall semester of 2006.

The second question focuses on what opportunities the Student has to interact with typical children outside the special education setting. In this case Student attended general education classes for music, art, computer and PE, with the remainder of his time in the special education Transition Class. Under the facts of this case, the answer to the second question is yes, the school has mainstreamed the child to the maximum extent appropriate.

### Petitioner's Second Issue

Petitioner's second issue centers on the math and language arts instruction provided in the Transition Class. All of the evidence in this case, however, seems clear that the math and language arts instruction were quite appropriate from January 2007 until May 2, 2007.

### Petitioner's Third Issue

Petitioner seeks to remove the Autism classification that WISD added in May 2007, challenging whether the evaluation was properly performed. Petitioner offers competing evaluations prepared by other experts, and essentially, asks the Hearing Officer, to throw the District's expert's evaluation out the window, and recognize their experts' evaluations as the only correct versions worthy of credence.

Because it is Petitioner who is seeking to overturn the classification, and therefore is the party seeking relief under the IDEA, Petitioner bears the burden of proof on this matter. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 535-537 (2005). In *Schaffer* the Court stated, "a party attacking the appropriateness of an IEP established by a local educational agency bears the burden of showing why the IEP and the resulting placement were inappropriate under the IDEA."

Dr. \*\*'s testimony was very persuasive to the Hearing Officer, but he has not seen Student in quite some time. Neither has Dr. \*\* seen any of the school records or indicators of Student's progress. Dr. \*\*'s testimony was less persuasive to the Hearing Officer. Some of her testimony simply contradicted itself. Other portions of her testimony seemed plausible, but need time to see if they will be borne out. Taken together, is their testimony sufficient along with the rest of the evidence, including the criticisms of Dr. \*\*'s work, to sustain the burden of proof the Petitioner bears?

Dr. \*\* is a pre-eminent expert in her field. The instruments she selected for evaluating Student were highly appropriate for determining whether Autism could be ruled in or out. Likewise, it was completely appropriate to rule in or out an emotional disturbance, and the instruments she selected there, too, were appropriate. The rest of the multidisciplinary team that participated in the FIE cannot be forgotten either. Their work was conducted in accordance with all of IDEA's requirements, with the use of valid and reliable instruments assessing all areas of suspected disabilities.

It does appear that many of the characteristics of the Mixed Receptive-Expressive Language Disorder and high functioning Autism Spectrum Disorder would overlap, thereby making it extremely difficult to differentiate. Obviously, well-qualified, well-respected experts disagree about what they see in the same child. Given that this is such a difficult question, the Hearing Officer must go back to the burden of proof and whose responsibility it is to tip the scales. There was not enough evidence to conclusively state that Dr. \*\*'s methods or her expertise were improper.

### Petitioner's Fourth Issue

The fourth issue presented by Petitioner is that of placement. Petitioner seeks to place Student at Oakhill Academy where he attended during the 2007-2008 school year. However, the proper analysis for this issue is the *Michael F.* four-factor test -- whether the District can provide an appropriate program -- and only if it cannot, does the question of Oakhill present itself.

The first factor inquires into the program's individuality, if it is designed around that student's assessments and performance. WISD has shown its willingness to design a program around Student's unique needs, and it has already assessed him and kept records of his performance. It has developed programs in the past that were designed around his individual assessments and performance. The evidence in the record indicates the first factor is met.

The second factor – that of LRE – has been discussed above, but merits additional explanation. The general education classroom setting requested (or at least agreed to) by the parents, with the qualification that it contain no more than ten students, is no longer a general education classroom in the truest sense with that limitation. The classroom has been artificially modified to have a smaller class size than the 22 students permitted by Texas law, and by definition, is no longer general education. The LRE issue under the evidence in the record in this case favors the District.

The third factor, provision of services in a collaborated manner has not been put in issue in this case. From the testimony of the teachers and the records in evidence, Student demonstrated success in the general education classroom, both from academic and nonacademic benefits gained – the fourth factor.

Therefore, whereas \*\* is a fine school and Student made great progress there during 2007-2008, the issue is not reached whether it would be appropriate, because WISD is able to provide a free, appropriate public education for him under the *Rowley* standard.

### **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 under the IDEA as a child who is other health impaired, speech impaired and autism. 20 U.S.C. §1401 (3) (A); 34 C.F.R. §300.8 (c) (9), (11), (1); 19 TEX. ADMIN. CODE § 89.1040 (c) (8), (10), (1).
2. Petitioner bears the burden of proof with respect to its claims in this case. *Schaffer v. Weast*, 546 S. Ct. 49, 126 S. Ct. 528, 535-537 (2005).
3. Petitioner did not meet its burden of proof to demonstrate the program provided by WISD for January through May 2007 was inappropriate in terms of the least restrictive environment element. *See Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997).
4. Petitioner did not meet its burden of proof to demonstrate the program provided by WISD for January through May 2007 was inappropriate in terms of the math and language arts instruction.

5. Petitioner did not meet its burden of proof to demonstrate the eligibility determination by WISD is inappropriate.
6. The placement offered to Student by WISD at the May 21, 2007, ARDC meeting is appropriate under the analysis set forth in *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997).

**ORDER**

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the relief sought by Petitioner at the conclusion of the Due Process Hearing on April 11, 2008, is DENIED. Finding that the public welfare requires the immediate effect of this Final Decision, the Hearing Officer makes it effective immediately.

SIGNED this 18<sup>th</sup> day of July 2008.

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*Lucretia Dillard*  
Special Education Hearing Officer