

STUDENT <i>b/n/f</i>	§	BEFORE A SPECIAL EDUCATION
PARENT,	§	
	§	
Petitioner,	§	
	§	
V.	§	HEARING OFFICER
	§	
CHINA SPRING INDEPENDENT	§	
SCHOOL DISTRICT,	§	
	§	
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, China Spring Independent School District (CSISD), denied Petitioner a free, appropriate, public education (FAPE). The parties have stipulated to the following issues in the case:

1. Whether the Language! Program for remediation of Student’s dyslexia and dysgraphia is being properly implemented by CSISD in student’s reading remediation class for the 2007-2008 school year;
2. Whether CSISD properly performed benchmark testing at the beginning of the 2007-2008 school year by utilizing released TAKS tests for this purpose;
3. Whether the Individualized Education Plan (IEP) annual goals and short-term objectives for the 2007-2008 school year that are allegedly based on the benchmark testing are appropriate for Student;
4. Whether the proposed scope of the features of the assistive technology device known as “the Kurzweil” that are appropriate for inclusion in Student’s IEP for the 2007-2008 school year;
5. Whether certain accommodations/modifications proposed by CSISD to be included in Student’s IEP are appropriate:
 - a. The extent to which written assignments in world geography and science should be reduced for Student and how the determination of the reduction should be made;
 - b. The opportunity to respond orally, and have answers recorded, if appropriate, in the context of the assignment/class; and

- c. Weight final exam as 1/7 if advantageous.
6. Whether the appropriate relationship between the behavior intervention plan (BIP) and the student code of conduct should be that (i) the BIP modifies the student code of conduct or (ii) the application of the code of conduct will be in conformity with the BIP and with the procedural safeguards of IDEA.
7. Whether the Hearing Officer should order training or instruction for CSISD staff by Region XII Educational Service Center in the following areas, which would provide FAPE to Student as well as other students:
 - a. Writing measurable and appropriate IEP goals based on student performance and the requirements of IDEA 2004;
 - b. Integrating appropriate teaching and testing strategies for students with dyslexia and dysgraphia in the classroom;
 - c. Implementing methodologies for effective progress monitoring to accurately determine students' levels of performance and individualized needs.

Procedural History

On March 19, 2007, the Texas Education Agency (TEA) received Student's Request for Due Process Hearing (the complaint), assigned the case Docket No. 186-SE-0307, and appointed the matter to Hearing Officer Deborah Heaton McElvaney. On March 21, 2007, Hearing Officer McElvaney sent the Initial Scheduling Order to the parties setting forth all applicable dates related to the Resolution Period and the Hearing. Pursuant to that Order, the prehearing telephone conference was set for April 9, 2007, the Due Process Hearing was set for May 2, 2007, and the Decision deadline was set for June 2, 2007.

On April 9, 2007, Hearing Officer McElvaney conducted the first prehearing conference. In attendance were the following: 1) Ms. Myrna Silver, counsel for the Petitioner; 2) Ms. Denise Anderson, counsel for the Respondent; 3) the court reporter, who made a record of the telephone conference; and 4) Ms. McElvaney. During this telephone conference the parties informed the Hearing Officer that they had convened the Resolution Session but it was not successful. The parties were prepared to continue the Resolution Session at a later date. The parties also discussed the issues and rescheduled the Due Process Hearing to June 5-7, 2007, and the Decision deadline was extended to July 8, 2007.

A second prehearing conference was conducted on June 4, 2007. In attendance were the same participants as on April 9, 2007. During the second prehearing conference the Due Process Hearing was rescheduled to July 24-26, 2007, and the Decision deadline was extended to August 26, 2007.

A third prehearing conference was conducted on July 17, 2007, again with the same participants as the first two prehearing conferences. The purpose of the third prehearing conference was to clarify the issues and relief requested and to reschedule the Due Process Hearing. During the course of this prehearing conference the parties discussed new issues and scheduled another prehearing conference for August 16, 2007. At the August 16, 2007 telephone

conference the parties discussed the new issues that had arisen and rescheduled the Due Process Hearing to October 22-24, 2007.

On September 20, 2007, Hearing Officer McElvaney called a telephone conference with the parties to explain her need for a one-week continuance of the October 22-24, 2007, Due Process Hearing. The parties agreed to re-schedule the hearing for the following week, October 29-31, 2007.

Hearing Officer McElvaney's unavailability extended longer than she had anticipated, and the case was reassigned to Hearing Officer Lucretia Dillard on October 19, 2007. Hearing Officer Dillard conducted a prehearing telephone conference with the attorneys for the parties on October 19, 2007. The hearing was moved to October 31, 2007 through November 2, 2007.

The Due Process Hearing convened at the administration offices of CSISD on October 31, 2007. Counsel for the parties spent much of the first day narrowing the issues and discussing other matters about the case outside the presence of the Hearing Officer. In attendance throughout the hearing for Petitioner were Ms. Myrna B. Silver, who served as counsel for Petitioner, and Parent of Student. Student's grandparent and stepparent attended for portions of the hearing. Respondent was represented by Ms. Denise Anderson, counsel, and its designated representative, the Special Education Supervisor. Petitioner called three witnesses; CSISD called four witnesses. The Hearing Officer admitted 23 exhibits into evidence from the parties that filled three very large binders. At the conclusion of the hearing the parties requested to present closing briefs to the Hearing Officer in writing. The date agreed upon for submission was November 30, 2007; however, due to illness of counsel for one of the parties, a joint request to the Hearing Officer for additional time was granted to submit briefs on December 17, 2007. The Decision deadline necessarily was extended to accommodate the submission of briefs and preparation of the Decision. The Hearing Officer required additional time to prepare the Decision due to acquiring additional cases from other hearing officers, and requested additional time from counsel for the parties from January 17 until January 22, 2008. Counsel agreed to the request.

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's parents reside within the jurisdictional limits of China Spring Independent School District. CSISD is a political subdivision of the State of Texas and a duly incorporated independent school district. Student resides with those parents.
2. Student currently receives special education services from CSISD under the classification of learning disabled (LD) and other health impaired (OHI). Student first came to CSISD in the ** grade, already receiving special education services.
3. The most recent Full Individual Evaluation (FIE) performed for Student was conducted on January 27, 2006. The evaluation included a psychological evaluation,

a speech and language evaluation, an assistive technology evaluation, functional behavioral analysis, occupational therapy evaluation, physical therapy evaluation, and psycho-educational evaluation. Student has been diagnosed with Oppositional Defiant Disorder (ODD) and Attention Deficit Hyperactivity Disorder (ADHD). In the past Student has also been diagnosed with Depressive Disorder Not Otherwise Specified, but in this Psychological evaluation, the evaluator did not find Student meeting any of the criteria to qualify for the special education disability of emotionally disturbed (ED).

4. The Wechsler Intelligence Scale for Children – 4th Edition (WISC-IV) was administered to Student as part of the FIE in January 2006. The Verbal Comprehension Index (VCI) for Student was **, the Perceptual Reasoning Index was **, and Full Scale IQ was **. The evaluator did not consider the Full Scale IQ to be a valid marker of Student’s general cognitive abilities due to the significant discrepancies that existed among the four components that make up the Full Scale IQ. More specifically, Student’s Working Memory Index and Processing Speed Index fall within the borderline range of intellectual functioning. Those scores are consistent with observational and teacher report data in that Student had severe impairments in the ability to process information in an efficient manner and maintain goal-directed behavior and thought processes. Such deficits are common among children diagnosed with ADHD. When such discrepancy exists among the four subtests, the literature suggests that the VCI should be used as a representative marker of a child’s general intellectual capabilities. Thus, the evaluator judged Student’s VCI of ** to be the more accurate measure of intellectual ability.
5. The Wechsler Individual Achievement Test – II (WIAT-II) was also administered to Student in January 2006. The results indicated the following:

Word Reading	Grade Equivalent	**
Reading Comprehension	Grade Equivalent	**
Pseudoword Decoding	Grade Equivalent	**
Numerical Operations	Grade Equivalent	**
Math Reasoning	Grade Equivalent	**
Spelling	Grade Equivalent	**
Written Expression	Unreportable Scores	
Listening Comprehension	Grade Equivalent	**
Oral Expression	Grade Equivalent	**

The evaluator concluded Student's performance on these tests provide evidence of a Learning Disability in Mathematics Calculation. Additionally, because of Student's VCI, there is evidence of a Learning Disability in Written Expression.

6. Student regularly receives treatment from a psychologist in the form of weekly counseling. Student also regularly receives treatment from a psychiatrist. Student takes several medications: Concerta, Stratera, Zoloft, and Depakote.¹
7. Student's classes for 2007-2008 are in the ** grade at the ** campus. Student received English/Language Arts, math, and study skills in resource classes, and reading in general education for one class period each day.
8. The Language! program is a literacy curriculum selected by the Admission, Review, and Dismissal Committee (ARDC) for Student during the 2007-2008 school year. The lessons in Language! progress through six levels, A through E. Placement for an individual to enter --at either level A or C -- is determined through a pretest. Language! may be presented in either a 45-minute or 90-minute lesson format. It does not have a literature component but is designed to teach literacy skills.
9. The Language! program is one that the ARDC agreed was appropriate for a student of this age. CSISD did not have Language! in its possession at the time the decision was made to use this program for Student in June 2007. A set of interim IEPs was developed by the ARDC for Student until the Language! program could be put in place, go through the training, see where Student would fit into that program, and then determine the appropriate IEPs that would be reflective of the program and Student's performance in the actual program.
10. At the two June ARDC meetings Student's parent also asked for additional benchmark testing to be performed at the beginning of the 2007-2008 school year.
11. On September 20, 2007, the ARDC for Student met to change the schedule of classes. The change was necessitated by changing Student from a resource reading class to a general education reading remediation class and changing the location of the study skills class for Student. Student's parent agreed to the schedule change and the location change for the study skills class. This meeting was the culmination of a series of very involved meetings that began in June 2007 to develop a program for Student. Some of the planning for the 2007-2008 school year started as far back as the March 29, 2007, ARDC meeting.
12. Student has been performing well in the general education reading class. Student reads aloud usually four times per week. Student's grades in the class are passing. So far the class has read "Narrative of the Life of Frederick Douglass: An American Slave."

¹ During the psycho-educational evaluation performed in January 2006, the evaluator noted that Student was also taking the medication Seroquel and DDADP, a medication to control episodes of nocturnal enuresis.

13. On September 14 and 20, 2007, the ARDC met to review the Language! placement testing for Student. The ARDC also reviewed additional benchmark testing for revising Student's IEPs.
14. Although Student's parent participated in the September ARDC meetings, the parent disagreed with all IEPs, contending, "they were not measurable based on the use of TAKS instruments for benchmarking."
15. Historically Student has had difficulty with semester examinations. The grades on semester exams have frequently been failing, such as **, **, and **. However, Student has also scored well on some semester examinations, with grades such as **, **, and **. At the ** school in CSISD semester examinations were weighted to account for 1/7 of the semester average for a student. At the ** in CSISD the practice is for semester examinations to account for ¼ of the semester average for a student. The ARDC proposed that Student's grades be calculated using both methods and whichever method provided the higher score would be the semester average for Student. The ARDC believed this approach to be the more appropriate method to evaluate Student's progress in conjunction with Student's daily work, unit tests, and chapter tests.
16. The Kurzweil 3000 text reader software is assistive technology provided by CSISD for Student. It performs a number of functions, including word processing, word prediction, access to scanned documents, and access to Internet. The evaluator that performed the psycho-educational evaluation in January 2006 recommended the use of the Kurzweil 3000 should be limited to assignments that cannot be shortened or exams that cannot be shortened where time is a limiting factor. The evaluator also recommended that ... "Because [Student] does show an ability to learn and achieve, albeit at a slower rate, an over-reliance on the Kursweil [sic] for daily tasks and assignments could serve to limit ...² progress towards more functional reading."
17. Because of Student's difficulties in reading, a lot of flexibility has been interwoven into the program and how the material has been presented without modifying the content. For example, the kinds of activities and evaluations might be different. Rather than using an essay examination, a multiple choice type test or even an oral test might be more appropriate. Observational data based on day-to-day activities become more important indicators of Student's performance.
18. Historically Student has had difficulty with keyboarding skills. Although there were some spikes of progress during the 2006-2007 school year, the progress has not been consistent.
19. The benchmarking tests CSISD gave to Student at the beginning of the 2007-2008 school year were taken from released TAKS exams from previous years. These tests could be given to students in chunks. After the tests were graded, a determination

² The deleted reference is to Student's gender.

- could be made where a student's deficiencies existed in terms of particular skill areas in relation to the core curriculum.
20. IEPs for Student were then developed from the benchmarking data at CSISD for the 2007-2008 school year in English/Language Arts and math.
 21. Student's content mastery teacher and study skills teacher at the middle school conducted a training session for the teachers that would be working with Student at the high school. The training session was specifically on the Kurzweil 3000 software and lasted a half-day. The instructor demonstrated all of the various tasks that would be necessary to use the software with Student. It included hands-on work with the computer, and the instructor also prepared written material for them to take with them.
 22. Student's treating psychologist believes that Student has an emerging bipolar disorder. Student does not meet the criteria at this point for the diagnosis, but there are features that are present. The psychologist points to the slow processing speed in the IQ testing along with the oppositional defiance disorder, as well as Student's fragmented thinking. She points to her work with Student, indicating three triggers for Student's behaviors: (i) genetic predisposition; (ii) interpreting most expectations and demands to be excessive; (iii) feeling the world is a very threatening and overwhelming place. Therefore, Student adopts a defiant stance in protection, to feel less vulnerable and in control, to feel more powerful.
 23. Student's psychologist recommended that what works best in dealing with Student are: (i) develop a relationship; (ii) set clear expectations; (iii) set clear consequences for not meeting expectations; (iv) frequent follow-ups; (v) speak in a calm, businesslike fashion when discussing disciplinary issues.
 24. CSISD's Curriculum Director has been presenting full-day meetings to teachers in the district concerning individual TEKS objectives. The meetings have been grouped by grade level or subject areas where they discuss ways to teach the objectives as well as learning styles and differences within the classroom, and how to evaluate the progress a student has made toward learning the individual TEKS objectives.
 25. CSISD has proposed to reduce written assignments in world geography and science based on teacher discretion. Student's parent at one point requested a flat 60% reduction, but abandoned that, and instead just requested that a limitation be placed on the amount of discretion the teachers could have. The reason for the limitation requested by the parent comes from Student's psychologist, who recommended that Student be limited to no more than one hour of homework per day. However, the reduction of written assignments does not relate exclusively to homework and is not limited to world geography and science.
 26. At the time of the hearing Student was passing all classes on the most recent report card except for world geography. The primary reason for the failing grade in world geography was failing to turn in assignments.

27. One of Student's continuing areas of need is in the area of study skills. The deficits in keyboarding skills and organization continue. The ARDC discussed and proposed objectives and multiple accommodations to enable Student to access grade level content in academic classes. The Kurzweil 3000 is one of the features of this accommodation. As it stands now the Kurzweil is being appropriately used. However, this may change, and the ARDC should be open to reviewing and revising its decision.

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 other health impaired and learning disabled. 20 U.S.C. §1401 (3) (A); 34 C.F.R. §300.8 (c) (9), (10); 19 TEX. ADMIN. CODE § 89.1040 (c) (9), (10).
2. CSISD is required to provide Student FAPE. *See Cypress-Fairbanks Indep. School Dist. v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997).
3. Petitioner bears the burden of proof with respect to the issues presented in this case. *Schaffer v. Weast*, 546 U.S. 49 (2005).
4. Petitioner did not meet its burden of proof with respect to the implementation of the Language! Program for remediation of Student's dyslexia and dysgraphia for the 2007-2008 school year. *See Teague Indep. School Dist. v. Todd L.*, 999 F. 2d 127 (5th Cir. 1993).
5. The evidence supports CSISD's proper performance of benchmark testing at the beginning of the 2007-2008 school year through use of released TAKS testing for this purpose. *See Teague Indep. School Dist. v. Todd L.*, 999 F. 2d 127 (5th Cir. 1993).
6. The evidence supports CSISD's position with respect to the issue of the accommodations and modifications proposed by the CSISD concerning the extent to which written assignments should be reduced and how the determination of the reduction should be made. *See Teague Indep. School Dist. v. Todd L.*, 999 F. 2d 127 (5th Cir. 1993).
7. The evidence supports CSISD's position with respect to the issue of the accommodations and modifications proposed by the CSISD concerning the opportunity to have Student respond orally, and have answers recorded, if appropriate, in the context of the assignment/class. *See Teague Indep. School Dist. v. Todd L.*, 999 F. 2d 127 (5th Cir. 1993).
8. The evidence supports CSISD's position with respect to the issue of the accommodations and modifications proposed by the CSISD concerning the calculation of weighting the final examination grade as 1/7 if it is advantageous to Student. *See Teague Indep. School Dist. v. Todd L.*, 999 F. 2d 127 (5th Cir. 1993).

9. Petitioner bears the burden of proof with respect to 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 22nd day of January 2008.

Lucetia Dillard
Special Education Hearing Officer