

STUDENT	§	BEFORE A SPECIAL
BNF PARENT	§	EDUCATION
Petitioner	§	
v.	§	HEARING OFFICER FOR THE
	§	
GEORGE WEST INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	STATE OF TEXAS

FINAL DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Student (hereinafter referred to as Petitioner or Student) through student's next friend, Parent (hereinafter referred to as Parent) brings this action against Respondent George West Independent School District (hereinafter referred to as Respondent, GWISD, or the District) under the Individuals With Disabilities Education Improvement Act (hereinafter IDEA), 20 U.S.C. § 1400 *et. seq.* and its implementing state and federal regulations.

In the Request for Hearing, Petitioner alleges that GWISD has failed to provide student with a free appropriate public education in the following particulars:

1. GWISD inappropriately removed Student's special education eligibility classification of Autism and replaced it with the eligibility classification of Emotional Disturbance;
2. GWISD failed to provide an appropriate IEP and necessary services for Student in the areas of counseling, social skills training, and occupational therapy.

For relief, Student seeks identification for special education services under the eligibility classification of autism rather than emotional disturbance, in addition to those other designations student currently has; compensatory services in the areas of counseling, social skills training, and occupational therapy; and an appropriate IEP that addresses Student's individualized needs.

PROCEDURAL HISTORY

On or about August 4, 2010, Student filed this request for due process with the Texas Education Agency, which was docketed as Docket No. 310-SE-0810. Throughout the proceedings, Petitioner was represented by Christopher Jonas, Attorney at Law of Corpus Christi, Texas. Throughout the proceedings, Cynthia Buechler, Attorney at Law, of Austin, Texas represented Respondent GWISD.

A resolution session was held on August 16, 2010.

A pre-hearing conference was held on September 2, 2010. The due process hearing was continued twice for good cause; once due to scheduling conflicts of both attorneys with the hearing date and once due to the illness and hospitalization of Petitioner's counsel. The due process hearing occurred on February 9, 2011. At the close of the hearing, I granted the parties leave to file post-hearing briefs and, by agreement, ordered the briefs to be submitted on or before March 24, 2011. I subsequently granted a joint request to extend the time for filing briefs to April 1, 2011. The parties agreed to extend the due date for the decision of the Hearing

Officer commensurate with the time allowed for the filing of the parties' briefs, making the due date for the decision on or before May 5, 2011.

FINDINGS OF FACT

1. Student currently (2010-2011 school year) attends *** grade at *** School in George West ISD.
2. GWISD is a political subdivision of the State of Texas and a duly incorporated independent school district. GWISD is Student's resident district for purposes of providing special education and related services under IDEA.
3. Student is currently eligible for special education and related services under the disability categories of Learning Disability (LD) in Mathematics and Written Expression, and an Emotional Disturbance. (Petitioner's Exhibit 18, p. 10; hereinafter cited as P18:10; Respondent's Exhibit 1, page 11; hereinafter cited as R1:11).
4. There is no dispute between the parties as to Student's eligibility as a student with a learning disability; however, Parent disagrees with and disputes Student's classification as a student with an emotional disturbance and believes that Student should properly be characterized as eligible based on the category of autism. (Transcript, page 134, Lines 3-16; hereinafter cited as T.134: 3-16).
5. Student was first identified as eligible for special education during the *** grade. Parent initiated a private assessment of Student due to academic difficulties in mathematics to see if Student had a learning difference. (T.117; P2:21). At the time of referral, Parent indicated that Student had "mild early language and social delays, described as generally resolved with maturity." (P2:22).
6. Dr. *** conducted the private assessment of Student during the spring of 2006 and diagnosed student with Asperger's Disorder, Attention Deficit Hyperactivity Disorder, a Mathematics Disorder and a Disorder of Written Expression. (P2:26). Based on the Asperger Syndrome Diagnostic Scale (ASDS), Dr. *** found, in relevant part, a "possible" likelihood of Aspergers. (P2:25). Dr. *** finding of possible Asperger Syndrome was based on information obtained only from the parent.
7. Also during the spring of 2006, the District completed a Full and Individual Evaluation (FIE) of Student to determine if a disability existed that was affecting Student's school performance. Referral data indicated difficulties in the area of academic delays in math; the data did not indicate language/communication delays or behavioral/social delays. (P2:2).
8. The 2006 FIE indicated average receptive and expressive language skills and no need for additional assessment in the area of language or communication. (P2:3-4).
9. An Admission, Review, and Dismissal Committee (ARDC) convened in May 2006 to review the FIE and Dr. *** psychological assessment, and to consider Student's eligibility for special education. (P2). The ARDC found Student to qualify with a learning disability and referred Student for an outside Autism Evaluation to make a determination about the "possible Aspergers" identified by Dr. ***. (P2:53; T.118: 17-23).
10. Dr. *** performed the outside evaluation in October 2006, Student's *** grade year, and provided his final report to the District on February 15, 2007. (P3:30). Dr. *** administered the ASDS, which again yielded a score in the "possible" range and was based solely on information from the Parent. Dr. *** found that Student appeared to be improving in behaviors at school that had been noted by Dr. ***, but that the core issues of inappropriate social skills and short attention span remained. (P3:5). Dr. ***

found that Student met the criteria for Asperger's Disorder based on student's test scores, marked impairment in the use of nonverbal behaviors, failure to develop appropriate peer relationships, lack of emotional reciprocity, adherence to specific nonfunctional routines or rituals, and a significant impairment in social areas of functioning. (P3:6).

11. The ARDC met in March 2007 to review Dr. *** evaluation. Based on the evaluation, the ARDC added Autism based on Asperger's Disorder to Student's eligibility classifications. (P3:27; T.119). Other than providing parent training in the form of attendance at an Autism conference, the District did not provide other services to Student pursuant to the Autism supplement or otherwise change student's IEP. (P3:12; P3).
12. Student's annual ARDC for student's *** grade year met on January 21, 2008. No services were provided pursuant to the Autism supplement. (P4:8-9). Student did not receive counseling as a related service and did not have social skills goals and objectives as part of student's IEP or receive social skills training. (P4). Teacher input sheets considered by the ARDC reflect that Student interacted appropriately with peers and adults and worked well with other students. (P-4: 11-20).
13. Student's ARDC next convened on November 18, 2008, Student's *** grade year, for an annual and three-year review. Parent identified concerns in the areas of math and stress/anxiety due to academic and social difficulties. (P5:24). The ARDC determined that additional assessment data were needed in all areas to determine Student's current categories of disability, present levels of performance and educational need, and the nature and scope of special education and related services needed by Student. (P5:3).
14. An FIE was completed for Student's three-year reevaluation on April 22, 2009 and reviewed by the ARDC on May 7, 2009. A new psychological assessment was scheduled for completion by October 6, 2009. (P-7:1, 64). The District's FIE supported continued eligibility as a student with a learning disability in the areas of Math Problem Solving, Math Calculation, and Written Expression. At the ARDC, Parent expressed that Student was becoming more independent and did not require much support. Parent also indicated that Student still had a problem with social cues and anxiety. The school members of the ARDC indicated that work on social cues was done in the math resource setting and behavioral concerns were handled through general education. Staff also reported that Student's communication in the classroom and socially was effective. (P7:65).
15. Dr. ***, a clinical psychologist and LSSP, completed the District's psychological evaluation portion of Student's FIE on or about September 17, 2009. *** psychological evaluation included a review of special education records and previous psychological evaluations by Drs. *** and ***. Dr. *** administered numerous tests to assess the presence of autism, emotional issues, adaptive behavior, and intellectual and academic functioning. In addition to testing, Dr. *** interviewed Student, obtained information from four of Student's *** grade teachers, four of student's *** grade teachers, and from Parent.
16. Dr. *** psychological evaluation of Student utilized a variety of assessment tools and strategies to gather information about Student, including information provided by Parent; it did not use any single measure or assessment as the sole criterion for determining whether Student has a disability; and it utilized technically sound instruments to assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.
17. Dr. *** administered several instruments that are nationally normed and used to identify the presence of characteristics of Aspergers: the Asperger Syndrome Diagnostic Scale (ASDS), the Childhood Autism Rating Scale (CARS), the Vineland II and the Vineland Adaptive Behavior Scales (VABS), the Social

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Responsiveness Scale (SRS), and the Pervasively Developmentally Delayed Characteristics Checklist (PDDCC). (P11: 25-52; T. 260:15-20).

18. The ASDS measures the probability of Aspergers. Of eight (8) teacher informants, six indicated the probability of Aspergers for Student was “very unlikely,” and two indicated the probability was “unlikely.” Parent indicated the probability of Aspergers was “very likely.” (P11:39; T. 260:21-25).
19. The CARS measures scores on 15 subscales to generate a total score that places a student in a range: non-autistic, mild-moderate autism, or severely autistic. Seven (7) teacher informants and Parent all placed Student in the non-autistic range. (T.261:8-10; P11:40).
20. The Vineland II Teacher Ratings completed by two of Student’s then current teachers revealed moderately low to low scores in the Socialization domain, with other domains measured as adequate. (P11:41).
21. Parent ratings on the VABS indicate lower ratings on most subdomains than the three teacher ratings; however, all four raters placed Student in the low or moderately low adaptive level for interpersonal relationships. Student’s adaptive behavior composite was rated as adequate by two of the teacher informants and as moderately low by one teacher and the Parent. (P11:42-43, T. 262).
22. The SRS identifies an individual’s capacity for social relationships and places the individual in a range of social skills: non-autistic social skills, mild to moderate autistic social skills, or severely autistic social skills. (T.262:12-16; P11:43). On the SRS, Parent’s ratings placed Student in the severely autistic range. Of Student’s three *** grade teachers, one placed student in the non-autistic range and two in the mild to moderately autistic range for social skills. Of Student’s two *** grade teachers, both placed student in the non-autistic range for social skills. (P11:43).
23. Characteristics reported on the PDDCC are not normed and are not reported in terms of frequency or severity. (T.263:1-18). Informants included Parent and eight teachers. Few characteristics of PDD were noted in the areas of Physical/Motor Skills, Behavior, or Intellectual. In the Communication area, 7 informants noted the presence of “Little Eye Contact;” six noted the presence of “Flat Affect,” and four noted the presence of “Trouble Relating to People.” Dr. *** attributes these indicia to Student’s anxiety and depression rather than to the disability of Aspergers. (T.263).
24. To assess the condition of Student’s emotional state and the possible presence of anxiety, depression, or other clinically significant emotional concerns, Dr. *** administered the Millon Pre-Adolescent Clinical Inventory (MACI) and the Behavior Dimension Scale: Home and School Version (BDS). (P11:45-47; T.267). The MACI is a nationally normed objective clinical test of emotional/developmental conflicts. (P11:45). The BDS is a nationally normed scale that identifies issues in three areas: ADHD, behavioral difficulties, and emotional difficulties. (T.267:10-13).
25. Student’s MACI profile revealed significant anxiety and depression, with a response of social withdrawal and isolation. (P11:45; T.267). Student’s depression is closely linked to student’s social isolation and feelings of not having friends. (T.290-291).
26. On the BDS: School Version, Student’s four *** grade teachers noted anxiety and/or depression in their responses. Student’s three *** grade teachers did not. Parent also endorsed anxiety and depression. (P11:46).
27. ***, Certified Speech Language Therapist, completed a Speech Language Evaluation of Student as part of the FIE in September 2009. Ms. *** administered the Comprehensive Assessment of Spoken

Language (CASL) and the Pragmatic Language Skills Inventory (PLSI) to measure Student's pragmatic communication, an important aspect of evaluating students for an autism spectrum disorder. (T.229, 232, 237).

28. On the CASL, Student obtained a standard score of 103, in the average range of oral language functioning. Student's score of 103 places student above the state's eligibility standard score of at or below 77 for a communication disorder. (P11:5).
29. The PLSI is a standardized, norm-referenced teacher-rating instrument that helps identify students with pragmatic language disabilities. Of Student's two *** grade teachers who completed the PLSI, both rated student as "Below Average." Of Student's two *** grade teachers, one rated student as "Average," and one as "Poor." (P11:6).
30. Student's score on the CASL indicates that student has pragmatic language skills, but student's score on the PLSI indicates that student does not use them in the classroom. (T. 291: 6-18). This indicates the presence of social anxiety rather than a natural pragmatic language deficit. (T.292: 8-10).
31. Based on the results of the Speech Evaluation, the ARDC determined that Student does not have a communication disorder and does not have an educational need for speech therapy. (T.232-233; P11:6).
32. *** performed an Occupational Therapy evaluation of Student as part of student's FIE on or about October 27, 2009 (P11:53; R14). The evaluation indicated a need for the related service of OT to work on visual perceptual skills and handwriting. (P11:54; R14). Goals and objectives were developed and it was recommended to the ARDC that Student receive six OT visits of thirty (30) minutes each per school year. (T. 214). Student received those services from Ms. *** during student's *** grade year. (T. 214). The OT services were increased at parental request to thirty (30) minutes per month during Student's *** grade year, though Ms. *** believes Student was making good progress without the increase. (T. 216-217). Student has made excellent progress on student's OT goals and objectives. (T. 217; R15).
33. An ARDC convened on November 4, 2009, Student's *** grade year, for Student's annual review and to review the psychological, OT, and Speech evaluations. The results of the evaluations were shared with the ARDC.
34. Teacher input forms for the ARDC indicated, in relevant part, that Student had "excellent" classroom behavior, "average" to "above average" speech/language skills, and included notations that Student "has grown in social interaction skills, joining in voluntarily on group activities, and initiating conversation with teacher and select peers, and "will talk and interact with peers at appropriate times; does well in group, partner, and individual settings." (P11:69-74).
35. In addition to the results of the psychological evaluation, Student had reported anxiety, sadness and *** to school personnel during the course of the evaluations. To address Student's anxiety and depression, counseling was offered at the ARDC, but declined by Parent. (T.307-308; 360). As a result, the ARDC referred Student to an outside agency called *** to receive counseling. The referral indicated the counseling was for the purpose of developing social skills and reducing anxiety. (P11:65).
36. Based on the results of the evaluations and teacher input, the ARDC determined that Student did not meet the eligibility criteria for Aspergers or an Autism Spectrum Disorder. The ARDC concluded that Student's deficits in the areas of social skills were more attributable to an emotional disturbance than to Aspergers, in light of student's anxiety and depression. Parent disagreed with the removal of the Autism classification and its replacement with that of emotional disturbance and requested an Independent Educational Evaluation (IEE), which was granted. The only change in services was to add the

occupational therapy and the ARDC agreed to retain the AU eligibility until the IEE was complete. (P11:97).

37. Dr. ***, an LSSP, completed the IEE of Student on May 3, 2010. In completing her IEE, Dr. *** reviewed school records, interviewed Parent, Student, and one teacher, and administered the following assessments: Behavior Assessment System for Children, Second Edition, including the parent rating scales (BASC-2-P), teacher rating scales (BASC-2-T), and Student self report scales (BASC-2-S); Gilliam Autism Rating Scale, Second Edition (GARS-2); Childhood Autism Rating Scale (CARS); Adaptive Behavior Assessment System, Second Edition (ABAS II); and the Vineland Adaptive Behavior Scales. (P17:2-21). Dr. *** also administered intellectual and cognitive testing, but the results were not valid. (P17:15).
38. The BASC-2 describes behaviors and emotions of children based on T-Scores obtained using norms. Scale scores in the clinically significant range suggest a high level of maladjustment; scores in the “at risk” range may identify a potential problem or a significant problem that may not be severe enough to require formal treatment. (P17:4).
39. Parent reported on the BASC-2-P “clinically significant” T- Scores on Depression and on the Internalizing Problems Composite Score. Parent reported “at risk” T-scores in Anxiety, Somatization, Withdrawal, Negative Emotionality, Developmental Social Disorders, and Executive Functioning. Parent did not report elevations in the area of social skills and her ratings indicate a view that Student possesses sufficient social skills and does not generally experience debilitating or abnormal social difficulties. ((P17:5; T.81).
40. The teacher rater reported one “clinically significant” T-Score in the area of anxiety. The teacher reported “at risk” T-Scores in the areas of Internalizing Problems Composite Score and Adaptability. The teacher reported Student to be in the typical range in social skills, leadership, and atypicality. (P17:6-7; T. 77-78).
41. Student’s self report on the BASC-2-S shows “clinically significant” elevations in Anxiety, Self Esteem, and Somatization, with “at risk” elevations in Depression, Sense of Inadequacy, and Interpersonal Relationships.
42. The GARS and CARS were the only instruments administered by Dr. *** that related specifically to the presence of autism. Each of these was endorsed solely by Parent. On the GARS, Parent endorsed Student as being within the “very likely” probability range of autism; on the CARS, Parent endorsed Student in the non-autistic range on the CARS. (P18:13).
43. Student’s special education teacher completed the ABAS II. Results indicate that Student is within average range in all skill areas, including in relevant part, Communication (functional) and Social (interpersonal relationship skills). (P17:16; T. 73-76).
44. In contrast to the teacher’s ratings on the ABAS II. Parent rated Student as moderately low /low in the domains of Communication and Socialization and Interpersonal Relationships on the VABS. (P17:17).
45. Dr. *** concluded that Student has significant emotional factors associated with depression and anxiety, along with learning problems, attention issues, and social skills deficits. Based on this cluster of symptoms and Student’s previous diagnostic history that is positive for autism spectrum disorder, *** concluded that Student continues to be eligible for services as a student with autism. To the extent that Student no longer presents symptoms of autism or Aspergers within the school setting, Dr. *** attributes

this to the success of parent and school interventions rather than the absence of a disability, as autism cannot be cured and is a life long condition. (P17:19; T.54, 62).

46. Parent ratings and reports to both Drs. *** and *** reflect greater concern with Student's social relationship and communication skills than is evidenced by school personnel. In addition, Parent reports concerns with tactile and noise sensitivities, eating issues and difficulties with transitions that are observed in the home or community environment. (T121-123; P17:3). Parent also reports early developmental social delays. (P17:3).
47. An ARDC convened on June 7, 2010 to consider the results of Dr. *** evaluation. Both Dr. *** and Dr. *** attended the ARDC. The ARDC decided to remove the Autism eligibility (AU) effective June 7, 2010 and to add the eligibility of Emotional Disturbance (ED). (P17:49). The ARDC viewed Dr. *** evaluation as a more accurate assessment of Student's needs as they impact student's educational performance, both academically and behaviorally/emotionally, because it included more assessment measures with both teacher and parent input, information from the speech therapist, and more specific measures designed to assess the presence of autism. (P17:49-52).
48. Parent reported to the ARDC that Student's counseling through *** had ended in February. Dr. *** recommended in-school counseling to address anxiety and develop social skills. (P17:51).
49. The counseling that Student received through *** was useful and helped Student make progress with student's emotional difficulties and with student's adaptive and social skills. (T.124-125).
50. The ARDC discussed programming for Student based on student's identified educational needs and agreed that Student would receive counseling as a related service to address social skills deficits, anxiety, and other concerns identified by the psychological evaluations. (P17:52). Parent agreed with Student's programming, but not with the eligibility determination concerning ED rather than AU.
51. On or about September 7, 2010, the ARDC convened and adopted goals and objectives for a Counseling IEP. (P18:13). Student's IEP provides for thirty (30) minutes per month direct counseling and one per month of consult with Student's teacher regarding social skills. Student has received these services since September 2010. (T.328-238; P18:23).
52. Dr. *** incorrectly testified that a student cannot be considered eligible under IDEA with both a Learning Disability and Autism. (T.45, 61-62).
53. During the course of the 2009-2010 and 2010-2011 school years, Student has made meaningful academic and non-academic progress. Student has developed some friendships, ***, ***, and ***. (T. 161:12-16; 183-186; 196-198; 202-205; 217-218; 329).
54. Dr. *** agreed that Student has made significant progress in addressing the symptoms of student's autism, i.e. social skills deficits, attention span issues, elevated anxiety, and does not currently present with salient symptoms of autism in the school environment. (T. 44, 92).

DISCUSSION

The issue presented by Petitioner is whether Respondent denied petitioner a free appropriate public education by: 1) inappropriately removing Student's special education eligibility classification of Autism and replacing it with the eligibility classification of Emotional Disturbance; and 2) failing to provide Student with an appropriate IEP and services in the areas of counseling, social skills training, and occupational therapy.

As the party seeking relief, Student has the burden of proof in this matter. *Schaffer v. Weast*, 546 U.S. 49 (2005); *Van Duyn v. Baker School District 5J*, 481 F.3d 770 (9th Cir. 2007).

The U.S. Supreme Court has defined a free appropriate public education as one that consists of “personalized instruction with sufficient services to permit the child to benefit educationally from that instruction.” *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the court developed a two prong analysis to determine if a school district has met its obligation to provide a free appropriate public education: 1) whether the district complied with the procedural requirements of IDEA, and 2) whether the district offered a program to the student that was reasonably calculated to provide educational benefit. *Id.* at 206-207.

It is well settled that a *procedural* violation of IDEA does not result in the denial of a free appropriate public education unless it results in the loss of educational opportunity to the student or seriously infringes upon the parents’ opportunity to participate in the provision of a free appropriate public education to the student. 34 C.F.R. § 300.513; *Adam J. v. Keller ISD*, 328 F.3d 804 (5th Cir. 2003).

The essence of determining whether a *substantive* violation of IDEA has occurred is whether the school’s program has provided the student with the requisite educational benefit. IDEA does not require an education that maximizes a student’s potential; rather, the school must provide an education that is reasonably calculated to enable the child to achieve *some* benefit. *Some* benefit means an educational program that is meaningful and offers more than a *de minimus* educational benefit; it must be “likely to produce progress, not regression or trivial educational advancement.” *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997).

Although courts have not adopted a specific substantive standard to determine when a free appropriate public education has been provided, the Fifth Circuit in *Michael F.* identified four factors to consider in analyzing a school’s program: 1) is the program individualized and based on the student’s assessment and performance; 2) is the program administered in the least restrictive environment; 3) are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) are there demonstrated positive benefits both academically and non-academically to the student. *Michael F.*, *supra*.

While the determination of whether a student is eligible for services under IDEA may present either procedural or substantive issues (or both), it is clear that the designation of a particular eligibility category is procedural in nature and does not constitute a denial of a free appropriate public education unless the student’s program is itself inappropriate and fails to substantively provide the student with a free appropriate public education. IDEA provides that:

“Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed...in this title and who, by reason of that disability needs special education and related services is regarded as a child with a disability under this subchapter.”

20 U.S.C. § 1412(1)(3)(B)

As explained by the seventh circuit, IDEA “charges a school with the responsibility of developing an appropriate education, not with coming up with a proper label.” *Heather S. v. Wisconsin*, 125 F.3d 1045, 1055 (7th Cir. 1997). *See also, Pohorecki v. Anthony Wayne Local School District*, 637 F. Supp. 2d 547 (N.D. OH 2009) (Classification of disability is not critical to determining the provision of a free appropriate public education; rather, the determination rests on whether the goals and objectives are appropriate for the student); *Eric H. v. Judson ISD*, 2002 U.S. Dist. Lexis 20646 (W. D. TX 2002) (Dispute over eligibility classification where student continues to be eligible for special education is a procedural matter and parent must prove that

change in eligibility status resulted in cognizable harm to student); *** v. *Banquette ISD*, Docket No. 048-SE-1010 (SEA TX 2011).

In the instant case, where Student remained eligible for special education and related services following Respondent's reclassification of student's eligibility from AU to ED, Petitioner must show that the change in designation was inappropriate *and* that it resulted in harm to Student by causing the development of an inappropriate IEP that failed to provide Student with the requisite educational benefit under IDEA. Here, Student alleges that Respondent failed to provide student with a free appropriate public education by not adequately addressing student's needs in the areas of social skills, counseling, and occupational therapy.

I. Whether Respondent's Reclassification of Student From AU to ED Was Inappropriate

Petitioner's primary concern in this cause is Respondent's decision to reclassify Student's eligibility under IDEA from Autism/Aspergers (AU) to Emotional Disturbance (ED). The parties agree, and the record reflects, that Student experiences anxiety, depression, inattentiveness, and social skills deficits which adversely impact student's educational performance and which require counseling and social skills training as part of student's IEP. The parties disagree, however, as to the origin of these issues. Petitioner views this constellation of symptoms, along with Student's early developmental history, as pointing toward eligibility based on Autism, while Respondent believes that current performance and assessment data support a designation of ED. The evidence presented suggests that the nature of Student's disability is difficult to categorize, but the weight of the evidence supports Respondent's classification of ED.

IDEA defines Autism as "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. 34 C.F.R. § 300.8(c)(1)(i). Significantly, IDEA provides that autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance. 34 C.F.R. § 300.8(c)(1)(ii).

Thus, in this case, it is important to determine whether the evidence taken as a whole establishes that Student's education is adversely affected primarily by an emotional disturbance in order to assess if autism applies.

An emotional disturbance is defined in IDEA as "a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: A) an inability to learn that cannot be explained by intellectual, sensory, or other health factors; B) an inability to build or maintain satisfactory interpersonal relationship with peers and teachers; C) inappropriate types of behavior or feelings under normal circumstances; D) a general pervasive mood of unhappiness or depression; or E) a tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R. § 300.8(c)(4)(i).

In Student's case, there are some indicators in student's assessment and performance that suggest the presence of high functioning autism or Asperger's Disorder. Student's early developmental history as described by Parent indicates social delays, resistance to change, and unusual responses to sensory experiences. Parent ratings on the GARS (administered by Dr. ***), the ASDS and the SRS (administered by Dr. ***) suggest the presence of Aspergers. Two of Student's *** grade teachers endorsed the SRS in the mild to moderate range for autistic social skills. Both Parent and teachers describe deficits in the areas of non-verbal communication, interpersonal relationships, and social skills, which could be consistent with the presence of autism.

There are also, however, strong indicators in Student's assessment by both Drs. *** and ***, as well as student's performance in school, that negate the presence of an autism spectrum disorder. On the ASDS (administered by Dr. ***), all eight teachers placed Student in the very unlikely to unlikely range for the presence of autism. On the CARS (administered by Dr. ***), all seven teachers and Parent placed Student in the non-autistic range. On the SRS, one of Student's *** grade teachers and all of student's *** grade teachers placed student in the non-autistic range for social skills. Student's speech evaluation found no communication disorder and that student's pragmatic language skills fall within the average range, even though student does not always display those skills in the classroom setting. On the whole student's teachers report that student joins group activities in class, initiates conversation with teachers and peers, and works well in group, partner, and individual settings. Importantly, Dr. *** acknowledged that Student does not display characteristics of autism in the school setting, but only when tested.

In addition to the foregoing data related to autism, Student's assessment on measures administered by both Drs. *** and *** that are designed to provide information about student's emotional condition strongly suggest the presence of an emotional disturbance. On the MACI (administered by Dr. ***), Student's profile showed significant anxiety and depression. On the BDS (administered by Dr. ***), Student's *** grade teachers endorsed both anxiety and depression, though student's *** grade teachers did not. On the BASC-2 (administered by Dr. ***), Student, Parent, and teachers all endorsed elevations in depression, anxiety, somatization, and internalizing of emotions. None of the BASC respondents reported elevations in the area of social skills. Further, the information provided by Parent and teachers about adaptive behavior on the Vineland II, the VABS, and in interviews to both Drs. *** and *** portrays concerns with interpersonal relationships, poor eye contact, flat affect, and trouble relating to people. These characteristics are consistent with anxiety and depression as well.

Beyond formal assessment results, Student's depression and anxiety, particularly during student's *** and *** grade years, were evident to student's teachers and to Parent. In *** grade, Student reported *** to school staff, resulting in counseling at ***, which reportedly helped to improve Student's functioning.

The evidence, when taken as a whole, reasonably supports the conclusion that Student meets the criteria for an ED under IDEA based on a general mood of unhappiness or depression, somatization, and excessive anxiety under normal circumstances. 34 C.F.R. § 300.8(c)(4). Although some of the characteristics of Student's disability, such as difficulties with interpersonal relationships, social skills, and anxiety could also be indicative of Aspergers, the clear presence of depression, somatization, and anxiety, coupled with the lack of a communication disorder and ratings that place Student in the non-autistic range on most standardized assessments, render the conclusion of ED more appropriate for Student. In light of this conclusion, autism by definition does not apply. 34 C.F.R. § 300.8(c)(1)(ii).

The only evidence in support of the conclusion that Student is overall more properly characterized as having autism/Aspergers is Dr. *** evaluation. I find Dr. *** conclusion to be unconvincing on several grounds. First, Dr. *** evidenced a lack of understanding of IDEA disability classifications by virtue of her testimony that a student cannot be characterized as both LD and AU. Second, Dr. *** obtained information from only one of Student's teachers and that information was on the BASC-2-T; *** obtained no information from educators on assessments specifically designed to measure the likelihood of autism. Third, Dr. *** utilized only two measures directly designed to measure autism. She obtained opposite results from Parent on the two measures and offered no analysis or explanation for the inconsistency. Fourth, Dr. *** based her conclusion in some significant part on the fact that Student had a positive history for an autism diagnosis based on Dr. *** evaluation; however, Dr. *** found a "possible" likelihood of Aspergers based only on information provided by Parent. As such, Dr. *** assessment cannot properly be characterized as positive for an autism diagnosis. Finally, Dr. *** testified that Student was doing well academically at the time of student's

evaluation, had made definite progress in the area of social skills, and was essentially showing symptoms of Autism/Aspergers only when tested and not in the school environment.

When measured against Dr. *** evaluation, which included information from Student, Parent, eight (8) teachers over two school years, and ratings on multiple nationally normed assessment measures, Dr. *** evaluation falls short of offering data that is as reliable, consistent, and determinative as that found in Dr. *** evaluation.

In conclusion, the preponderance of the evidence supports Respondent's determination that Student is more properly characterized as eligible on the basis of ED than AU. Petitioner failed to meet petitioner's burden of proving that reclassification of petitioner's eligibility status was inappropriate and not supported by assessment and performance data.

As discussed previously, even if Petitioner had proven that Student's reclassification was improper, Petitioner must still establish that Respondent's program did not provide petitioner with a free appropriate public education on the basis of petitioner's unique needs, regardless of the disability label given to describe those needs. As a practical matter, Student's disability category did not change until student's *** grade year. The evidence is clear that the only changes made in Student's program during *** grade were to increase Student's OT time, add direct and consultative counseling as a related service, and add goals and objectives related to social skills. Student had not previously received services pursuant to the autism supplement, and no services were removed as a result of the reclassification. The evidence is also clear (and discussed more fully below) that Student made meaningful progress, both academically and socially/emotionally, in *** grade following student's reclassification. As such, even if Petitioner was improperly reclassified from AU to ED, petitioner has failed to prove any cognizable harm that resulted from the reclassification.

II. Whether Respondent Failed To Provide Student With An Appropriate Program In The Areas of Social Skills, Counseling, and Occupational Therapy

Regardless of Student's eligibility classification, Respondent must provide a free appropriate public education to eligible students, meaning a program that addresses a student's unique educational needs and provides meaningful academic and non-academic benefits. *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997). Petitioner argues that Respondent failed to provide petitioner with such a program due to the lack of necessary services in the areas of social skills, counseling and occupational therapy.

With regard to occupational therapy, Petitioner does not dispute the OT evaluation or petitioner's OT goals and objectives; rather, petitioner disputes the frequency of service. The evidence established that Student has made progress on student's OT goals and objectives with the levels of service provided and Petitioner offered no evidence to the contrary. As such, Petitioner failed to prove that Petitioner's program was inappropriate by virtue of petitioner's OT services.

In the areas of Counseling and Social Skills, the services provided by Respondent have been scant. In *** grade, following Dr. *** finding that Student suffered from significant anxiety and depression and Student's self report of ***, Respondent offered Student counseling and proposed goals and objectives related to social skills, but Parent declined the service. As a result, Respondent helped Parent access free counseling at an outside agency, which lasted for approximately 3-4 months. Despite the short-term nature of the counseling, Parent testified that it helped Student make progress and improved student's negative emotionality.

At the conclusion of *** grade, Respondent learned that the Counseling had ended and immediately offered again to provide school counseling. Petitioner accepted and has been receiving direct and consultative

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counseling during petitioner's *** grade year to work on social skills and anxiety. In addition, Respondent developed social skills goals and objectives to go along with the related service of counseling.

Although I find the social skills and counseling services provided by Respondent to be minimal in light of Student's documented needs, I also find that the evidence establishes that Student has made meaningful gains in the areas of social skills and emotional well being at school. Teachers reported that Student is doing better in these areas in *** grade than in ***, Student has improved relationships with peers as evidenced by ***, Student is participating in the social and extracurricular life of the school community, and Student is no longer experiencing *** or symptoms of extreme anxiety. Both Parent and Dr. Williams agreed with school staff that Student has demonstrated progress in these areas.

For these reasons, I find that Petitioner has failed to prove that Student was denied a free appropriate public education by reason of inappropriate services in the areas of counseling and social skills.

CONCLUSIONS OF LAW

1. Respondent GWISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA and its implementing federal and state regulations. GWISD is responsible to serve Student under IDEA. 20 U.S.C. §1401; 34 C.F.R. § 300.101.
2. As the party seeking relief in this action, Student bears the burden of proof. *Schaffer v. Weast*, 546 U.S. 49 (2005); *Van Duyn v. Baker School District 5J*, 481 F.3d 770 (9th Cir. 2007).
3. Respondent's reclassification of Student's eligibility under IDEA from Autism to Emotional Disturbance was appropriate and did not deny Student a free appropriate public education. *Heather S. v. Wisconsin*, 125 F.3d 1045, 1055 (7th Cir. 1997); 34 C.F.R. § 300.8(c)(1)(4).
4. Respondent provided Student with a free appropriate public education by providing student with requisite services in the areas of counseling, social skills, and occupational therapy, such that Student made meaningful academic and non-academic progress. *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997).

ORDER

After due consideration of the record, and the foregoing findings of fact and conclusions of law, this Hearing Officer hereby **ORDERS** that all relief sought by Petitioner is **DENIED**.

Finding that the public welfare requires the immediate effect of this Final Decision and Order, the Hearing Officer makes it effectively immediately.

SIGNED and **ENTERED** this 5th day of May 2011.

/s/ Lynn E. Rubinett

Lynn E. Rubinett

Special Education Hearing Officer for the State of Texas

STUDENT	§	BEFORE A SPECIAL
BNF PARENT	§	EDUCATION
Petitioner	§	
v.	§	HEARING OFFICER FOR THE
	§	
GEORGE WEST INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	STATE OF TEXAS

SYNOPSIS

Issue: Whether GWISD inappropriately removed Student’s special education eligibility classification of Autism and replaced it with the eligibility classification of Emotional Disturbance?

Held: For Respondent. Student failed to show that that the ARDC inappropriately reclassified Student’s eligibility from AU to ED because the preponderance of the evidence established that Student more closely met the criteria for an emotional disturbance than for Aspergers’ Disorder. Further, even if the evidence did not support the reclassification, Student failed to show that it resulted in cognizable harm to Student given Student’s meaningful academic and non-academic progress

Cite: *Heather S. v. Wisconsin*, 125 F.3d 1045, 1055 (7th Cir. 1997); 34 C.F.R. § 300.8(c)(1)(4).

Issue: Whether GWISD failed to provide an appropriate IEP and necessary services for Student in the areas of counseling, social skills training, and occupational therapy?

Held: For Respondent. Respondent provided Student with a free appropriate public education by providing student’s with requisite services in the areas of counseling, social skills, and occupational therapy, such that Student made meaningful academic and non-academic progress.

Cite: *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997); 34 C.F.R. § 300.101.