

**BEFORE A SPECIAL EDUCATION
HEARING OFFICER FOR THE STATE OF TEXAS**

DECISION OF THE HEARING OFFICER

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| STUDENT, b/n/f/ PARENTS, | § | |
| Petitioner and Counter-Respondent | § | |
| | § | |
| v. | § | DOCKET NO. 253-SE-0510 |
| | § | |
| DALLAS | § | |
| INDEPENDENT SCHOOL | § | |
| DISTRICT, | § | |
| Respondent and Counter-Petitioner | § | |

PETITIONER (pro se):

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| SCHOOL DISTRICT, | § | |
| Respondent and Counter-Petitioner | § | FOR THE STATE OF TEXAS |

DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner and Counter-Respondent Student and the student’s parents, *** and *** (collectively referred to as “the student” or “Petitioner”), bring this due process complaint pursuant to the Individuals with Disabilities Education Improvement Act (“IDEA”), 20 U.S.C. §1400, *et seq.*, against Respondent and Counter-Petitioner Dallas Independent School District (“the district” or “Respondent”).

Petitioner was represented by his parents pro se throughout this litigation, with assistance from lay advocate Carolyn Morris, Parent-to-Parent Connection, in Lancaster, Texas. Respondent was represented by Dianna D. Bowen and Isabel Andrade Crosby, Fisher & Phillips L.L.P., in Dallas, Texas.

The Texas Education Agency (“TEA”) received this due process request on May 25, 2010, and issued notice of the filing on May 27, 2010. By agreement of the parties and order of the hearing officer, the due process hearing began on December 13 and 14, 2010. Due to work scheduling needs of Petitioner’s parents and by the agreement of the parties, a third hearing day could not take place until January 11, 2011. The hearing took place at the district’s Pegasus Complex in Dallas, Texas, with the assistance of a court certified interpreter for English/Spanish translation. The parties requested leave to file written closing arguments and agreed that this decision would be timely issued on or before March 24, 2011, in accordance with the regulatory timeline.

Petitioner’s main issue for hearing was a failure of the district to provide a free appropriate public education (“FAPE”) to the student by refusing to identify the student as a student with a disability in need of special education or related services by:

1. Failure to conduct a proper full and individual evaluation (“FIE”) of the student using appropriate evaluation procedures with accurate input and data for all suspected areas of disability, including Other Health Impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”), to address the student’s need for behavioral intervention and related services of counseling;

2. Failure to comply with all procedural safeguards under IDEA and its implementing regulations to include the parents as full participants in the student's educational program;¹ and,
3. Failure to grant the parents' October 2010 requests for an independent educational evaluation ("IEE") at district expense without providing information to the parents on the IEE process or supporting the denial.

As relief, Petitioner seeks an IEE at district expense and an order for Respondent to convene an Admission, Review, and Dismissal Committee ("ARDC") meeting to address:

1. Identification of the student as OHI;
2. Design and implementation of an appropriate behavioral intervention plan ("BIP") and an individualized education program ("IEP") using special education and support services to address the student's social skills, counseling, and behavioral needs;
3. Address the student's need for inclusion support; and,
4. Address building a positive relationship between home and school, including parental access to the student's educational environment.

Respondent filed a counterclaim on October 26, 2010, seeking an order finding the district's FIE is appropriate in all respects and affirming the district's denial of an IEE at public expense.

Based upon the evidence and argument admitted into the record of this proceeding, the Hearing Officer makes the following findings of fact and conclusions of law:

Findings of Fact

Background

1. Petitioner is a ***-year-old student in the *** grade. He resides with his parents and siblings within the jurisdictional boundaries of the district. [Transcript ("Tr.") at 879 and 887-890].
2. The native language of Petitioner's parents is Spanish. Petitioner comes from a bilingual household but is fluent in English and has very limited fluency in Spanish. [Respondent's Exhibit ("R.Ex.") 2; Tr. at 99, 109-110].
3. Petitioner's parents understand and speak English. As a native Spanish speaker, Petitioner's mother prefers assistance of a translator when possible. A licensed court interpreter participated at all times during the due process hearing to provide simultaneous translation as needed for Petitioner's mother. [Tr. at 319-320 and 910].
4. Petitioner is a general education student. On February 22, 2010, ***, diagnosed Petitioner with ADHD. [Petitioner's Exhibit ("P.Ex.") 10; R.Ex. 26 at 410; Tr. at 848 and 861].
5. Petitioner achieved *** and *** academic scores in *** and *** grade. In *** grade, Petitioner's grades were all ***. Petitioner's early school years show a typically behaving student. In ***, he began the school year with *** conduct scores, but by the end of the school

¹ Allegations in this sub-issue include: (1) the parents' access to the student's campus beginning February 2010; (2) the parents' collaborative input into, and receipt of meeting minutes from, the Student Support Team meetings in April and May 2010; (3) the parents' collaborative input into, and review of, Respondent's 2010 FIE; (4) the May 19, 2010, parental request for an Admission, Review, and Dismissal Committee meeting; and, (5) Respondent's refusal to accept information on the student's diagnosis of ADHD, severe with medication.

year, earned ***. He achieved *** scores throughout his entire ***-grade year. [R.Ex. 4; Tr. at 739-740].

6. Petitioner's educators from *** through his current ***-grade year routinely describe him as a normal student, eager to learn with good classroom participation. He seldom needs redirection and does not exhibit behavioral problems in the classroom. [Tr. at 263, 265, 321, 543-544, 546, 643, and 651].

7. In 2008-2009 during *** grade, Petitioner received two disciplinary referrals. The first referral resulted in a *** suspension for bringing *** to school, taken from him by his campus assistant principal. He did not attempt to ***. The second referral occurred five months later concerning use of profanity and resulted in a *** suspension. Disciplinary consequences for these referrals appear effective as the student had no further disciplinary infractions in *** grade. [R.Ex. 22 at 1; Tr. at 524-525 and 1047].

8. Petitioner's parents are concerned about Petitioner's behaviors at home and school. At home, they are concerned that he *** and exhibits disruptive behaviors. Petitioner's parents believe that school personnel are not honest in reporting Petitioner's negative behaviors in the school setting. [Pleading file; Tr. at 838, 842-843, 846-847, and 907].

***** Grade – 2009-2010 School Year**

9. In *** grade, Petitioner's year-end averages ranged from *** to *** in his eight classes, or ***. Petitioner did not receive any final six-week average *** in core subjects during the first five grading periods. [R.Exs. 11 at 5 and 12 at 1-43; Tr. at 556].

10. The Scientific Research Association ("SRA") reading lab program for the *** grade includes 144 stories ranging from ***-grade through ***-grade reading levels. Petitioner completed all 144 stories by February 2010, one of approximately two or three students in his class to complete the entire SRA kit. [Tr. at 374-375 and 563].

11. Respondent administers benchmark tests to monitor student progress, as required by the State of Texas. On his ***-grade Reading Benchmark Test in October 2009, Petitioner scored a *** on the first story with *** on the second and third stories. On the January 2010 Reading Benchmark Test, he scored a ***, seen by his classroom teacher as an indicator that he would pass the Texas Achievement of Knowledge and Skills ("TAKS") test at *** level for reading. On the October and January ***-grade Reading Benchmark Tests, Petitioner scored *** on his January 2010 test. [R.Ex. 11 at 7-9 and 16-17; Tr. at 419-420 and 557-560].

12. At the beginning of the academic year, Respondent administered a ***-grade Mathematics Pre-Inventory Test to determine the math objectives retained by students over the summer. *** all math objectives when tested on August 25, 2009. In October 2009, Petitioner *** on the Mathematics Benchmark Test and improved by the January 2010 testing. [R.Ex. 11 at 20-23; Tr. at 420-421].

13. Petitioner *** on his ***-grade TAKS testing. He *** made *** score on the math portion, scoring a ***. On the reading portion of the test, he scored a ***, *** score by ***. [R.Ex. 3 at 6; Tr. at 423 and 565].

14. In *** and *** grade, general education classrooms on Petitioner's campus use a daily behavior management system – the "Conduct Club" – to track student behaviors. Parents receive weekly tally sheets, sign them, and return them to the teachers, allowing communication

between school and home on behavioral progress. Points are deducted from a student's score of 100 for misbehavior. If a student's score remains around 95 for the week, the student is considered "in the Conduct Club" that week, reinforced by permission to be "first in line" for lunch or special classes, or receive special treats such as stickers. [R.Exs. 10 and 13; Tr. at 562].

15. In the *** grade, Petitioner presented typical ***-grade behaviors such as occasionally "tattling," testing limits, or talking in class at inappropriate times. When Petitioner lost Conduct Club points for inattentiveness or talking, he was easily redirected. Over the course of the year, his behavior improved. His teachers did not find his attentiveness a major issue; none of Petitioner's behaviors disrupted his or other students' ability to learn and participate within the classroom. [Tr. at 424, 427-428, 565, 568-569, 573-574, and 579-580].

16. Petitioner received three referrals in *** grade during February 2010. The first referral, for pushing another student, resulted in a *** suspension. The second referral, for kicking another student in the restroom, resulted in a telephone call to his parents. The third referral, during jumping jacks in the gym, did not result in any disciplinary action. Petitioner did not have any repeat aggressive behaviors for the remainder of his ***-grade year. [R.Ex. 22 at 11-23; Tr. at 528-529 and 581].

17. Petitioner's parents have not complied with rules on Petitioner's campus regarding coordinating visits and interactions with staff. During 2009-2010, several incidents took place between the parents and Petitioner's educators that culminated in district staff feeling ***. Due to these events, the campus principal restricted unfettered parental access to the campus via a letter dated ***, 2010. In accordance with the district's policies and procedures, Petitioner's parents are prohibited from direct contact with teachers and school staff by telephone, cellular phone, or E-mail communication. [R.Exs. 9, 23, and 40 at 89-92; Tr. at 430, 513, 585-587, 591, 601, 721, 723, 753-754, 759, 763-764, 793, 1055, and 1059-1060].

18. Petitioner's parents have not been denied the ability to participate in Petitioner's education after the campus access restrictions began in *** 2010 but must now communicate and coordinate through the assistant principal. Petitioner's father admitted at hearing that the parents may bring questions and concerns about Petitioner's educational environment through the assistant principal. [Tr. at 766 and 943].

19. Petitioner's campus restricts lunch visits to one visit a week for all parents. Parents with multiple children on campus are encouraged to rotate their weekly lunch visits between their children. Although Petitioner's parents ate lunch on campus with Petitioner during 2009-2010, they challenged the campus restriction of one lunchroom visit per week. [Tr. at 770 and 786-789].

20. On February 22, 2010, Petitioner's father gave consent for *** to begin services for Petitioner. [P.Ex. 12 at 132].

21. On February 27, 2010, Petitioner filed a complaint with TEA alleging behavioral struggles in school, failure to identify the student's need for special education services, restricted parental access to the student's campus, and refusal to allow an audiotape of a meeting held on February 19, 2010. [R.Ex. 24 at 1-4; Tr. at 792 and 860-861].

22. Respondent received notice of the TEA complaint on March 1, 2010 – the first time Respondent learned of the parental request for special education services and of a diagnosis of the student by ***. Petitioner's mother confirmed that the parents did not provide earlier notice to

Respondent of Petitioner's diagnosis and made no earlier request for special education services for Petitioner. [Tr. at 793-794 and 860-861].

23. Before Respondent had a chance to respond to Petitioner's TEA complaint, Respondent received a Notice of Closure from TEA dated March 9, 2010, stating the complaint raised no specific violations of special education requirements. [R.Ex. 24 at 5; Tr. at 1108-1109].

24. Petitioner did not contact TEA after closure of the complaint to provide additional information or request further explanation. [Tr. at 978].

25. On April 5, 2010, Respondent convened a meeting with Petitioner's parents to discuss concerns raised in the TEA complaint and to discuss services Respondent could offer the student. Respondent's Director of Psychological Services Department attended the meeting and discussed differences between IDEA and Section 504 of the Rehabilitation Act of 1973 ("Section 504"). Petitioner's parents requested special education services and were not interested in any other service. [Tr. at 208, 238, and 797].

26. Respondent has a three-step education service delivery method, the Student Support Team ("SST"), that considers educational strategies, recommends and monitors interventions, considers intervention effectiveness, and recommends whether interventions should be continued or whether more individualized services might be needed, such as a referral for special education testing. Respondent held two SST meetings for Petitioner on April 21, 2010, and on May 19, 2010. Respondent included a certified translator in both meetings to assist the parents in English/Spanish translation. Petitioner's parents and advocate attended and participated in the two meetings. [R.Ex. 26; Tr. at 231-232, 244, 396, and 862].

27. During the two SST meetings, participants reviewed over 450 pages of documents including class work from *** through *** grade, grades, test results, Conduct Club information, ***-grade and ***-grade office referrals, teacher statements, medical information supplied by the parents including an OHI form signed by a medical doctor with an ADHD diagnosis, information on Section 504, as well as Respondent's policies on recording meetings and translation procedures. Petitioner's parents received copies of these documents, acknowledged by Petitioner's mother during the due process hearing. [R.Ex. 26 at 1-474; Tr. at 478, 798, and 877].

28. Respondent's Licensed Specialist in School Psychology ("LSSP") and Petitioner's two ***-grade teachers also participated in the two SST meetings. Neither teacher believed Petitioner exhibited a need for special education and did not see even a need for SST referral. Instead, his teachers and all participating educators found Petitioner performed at the ***-grade level or above, and the Conduct Club system effectively managed classroom behaviors without the need for further intervention. After review of all the data, the SST committee concluded Petitioner presented no educational need for any interventions and was making great progress in his general education program. [R.Ex. 26 at 3-4; Tr. at 245-246, 589, and 799-800].

29. During the SST meetings, Petitioner's parents expressed concern over Petitioner's in-home behaviors of *** and pushing/hitting his siblings. The SST committee offered a referral to the district's ***, a collaborative effort to offer mental health and health services between the district, ***, and *** for district students and their families, such as individual and family counseling. [Tr. at 175-176 and 245-246].

30. Petitioner asked for special education testing of Petitioner during the SST meetings, seeking a full psychological evaluation as part of the FIE and identification of special education

eligibility. The parents wanted an inclusion program with content mastery and related services of counseling. [R.Ex. 26 at 7 and 17].

31. Petitioner received a copy of the procedural safeguards in Spanish and English prior to the end of the second SST meeting when the SST committee denied the parental request for an FIE. By letter dated May 27, 2010, the campus principal sent Petitioner prior written notice of the SST committee's unanimous decision not to refer Petitioner for special education testing in Spanish and English, minutes of the SST meetings, another copy of procedural safeguards, and YFC information in English and Spanish. [R.Ex. 27 at 1-104].

32. After the SST meetings, Petitioner's parents never contacted *** and did not submit any paperwork to follow up on the referral to ***. [Tr. at 477-478, 863, and 958].

33. Petitioner's mother admitted at hearing that she never read the procedural safeguards although they were provided to her in English and Spanish, and she did not contact the district with any questions. Instead, Petitioner next filed this due process request, received by TEA on May 25, 2010, and assigned to the undersigned Hearing Officer on May 27, 2010. [Pleading file; P.Ex. 10; Tr. at 863 and 901].

34. After the district received the due process request around June 4, 2010, Respondent agreed to conduct an FIE of the student, despite the recommendation of the SST, and to schedule an ARDC meeting after completion of the testing. [R.Exs. 28 and 29; Tr. at 802 and 1112].

35. On June 4, 2010, the parents alleged Petitioner had turned on a microwave while unsupervised in his ***-grade classroom. After investigation, no educator could substantiate the allegation and the assistant principal wrote a letter summarizing the investigation to Petitioner. [P.Ex. 2 at 20, R.Ex. 10 at 16-20; Tr. at 449-500].

36. The parties agreed to postpone completion of the FIE past the 60-day timeline to allow the evaluation to include classroom observation of Petitioner, and the parents signed consent forms in English and Spanish for the FIE on June 14, 2010. [R.Exs. 28 and 29; Tr. at 933-934 and 1112-1113].

***** Grade – 2010-2011 School Year**

37. Petitioner made a *** on the ***-grade Mathematics Pre-Inventory Assessment given during the first week of his ***-grade year with no previous instruction. Petitioner was *** the assessment, an indicator to his ***-grade math teacher that he would possibly *** on the TAKS test. [R.Ex. 16 at 1-21; Tr. at 269-271].

38. On the ***-grade Reading Pre-Inventory Assessment at the beginning of the year, Petitioner scored a ***, or *** in his class. [R.Ex. 15 at 6-22; Tr. at 657-658].

39. Petitioner scored a *** on his TAKS pre-writing assessment in August 2010. Petitioner's language arts teacher expects he will likely score at the *** level on the writing portion of the TAKS test in March 2011, based on experience that students who score at *** or above on the August pre-writing inventory will reach *** level by the March TAKS testing administration. [R.Ex. 14 at 1-2; Tr. at 625-626].

40. It is not unusual for student's benchmark scores to decrease in the *** grade because the ***-grade benchmark tests are more difficult with an increase in higher-level skill testing coupled with new concepts and a new testing format. Petitioner's ***-grade benchmark

testing *** the district average in the Fall 2010 administration to a *** in Reading and a *** in Math, but *** with a *** for Social Studies and a *** for Science. Petitioner's reading and math scores were ***, however, when compared to the scores of his classmates. [R.Ex. 20 at 1-2; Tr. at 279-280, 620-622, and 659].

FIE Completion

41. In preparation for the evaluation, Respondent held a meeting with the LSSP, an educational diagnostician, an interpreter, and the parents to review procedural safeguards, answer questions, and obtain written consent from the parents for the FIE on June 14, 2010. The LSSP is qualified as a licensed psychologist, fluent in Spanish, and certified as a school psychologist, currently serving as the district's supervisor of psychology and bilingual evaluations. Employed by the district for 25 years, the LSSP's duties include staff training and supervision, policy development, and evaluation review for compliance with IDEA. The parents agreed to the evaluation at this meeting. [R.Exs. 29 and 30; Tr. at 31-32, 94-101 and 864].

42. As agreed by the parents, the LSSP evaluated Petitioner's in August and September 2010. The LSSP considered suspected disability areas during the evaluation, using a variety of assessment information including classroom observations by another LSSP employed by the district, teacher observations, observations of other service providers, as well as a review of school grades and testing results. [R.Ex. 34; Tr. at 74-76].

43. Petitioner's parents did not give consent to Respondent for communication with *** prior to the FIE. At the request of the LSSP on August 31, 2010, Petitioner's parents gave written consent to speak to ***. The LSSP forwarded this information to *** on September 13, 2010. Although Petitioner's *** counselor was unavailable, the LSSP spoke to another *** counselor and learned that Petitioner was *** ADHD. [P.Ex. 12 at 81 and 133-134; R.Exs. 31 and 34 at 16; Tr. at 58-59].

44. Petitioner's parents believe the LSSP gave answers to Petitioner during the FIE and as a result, the testing was biased, based on listening during the evaluation from the hallway. [Tr. at 878 and 999-1000].

45. The LSSP followed testing procedures with the administration of Petitioner's FIE. During the testing, some instruments required the LSSP to go over examples with Petitioner to ensure understanding. Other testing instruments used a controlled learning approach that required the LSSP to give feedback over missed questions. [Tr. at 154-156].

46. As part of the FIE, the evaluating LSSP evaluated Petitioner's general cognitive abilities with the General Ability – Extended (“GIA ext”) index of the Woodcock-Johnson III Tests of Cognitive Ability. On the GIA ext, Petitioner scored in the *** range at ***. Overall, Petitioner's cognitive abilities fell within the *** range, exhibiting *** in fluid reasoning, the ability to reason and solve problems. [R.Ex. 18 at 18-19; Tr. at 120].

47. The FIE measured Petitioner's achievement with the Woodcock-Johnson III Tests of Achievement, a select subtest from the Wechsler Intelligence Scale for Children, 4th Edition, and the Gray Oral Reading Test, 4th Edition. Petitioner fell in the *** range on all measures. [R.Ex. 34 at 19-20; Tr. at 120].

48. Listening Comprehension measures consist of an Oral Comprehension test and an Understanding Directions subtest. On the Oral Comprehension test, Petitioner scored in the *** range at ***. Petitioner scored a *** on the Understanding Directions subtest, exhibiting ***

when presented with complex multi-stepped tasks that must be performed within a specific sequence. As a result of the Understanding Directions *** score, his total Listening Comprehension score ***. However, Petitioner performed *** and scored within the *** range on the Listening Comprehension measure of the Oral Written and Language Scale (“OWLS”) administered by Respondent’s speech therapist as part of the FIE. Although Petitioner had *** in listening comprehension as a result of Petitioner’s Understanding Directions subtest score, this was not a *** but instead, a *** that did not require the provision of special education. Petitioner understood and followed directions on 28 subtests administered by the LSSP. Respondent’s LSSP concluded that Petitioner did not have a specific learning disability (“L.D.”), based on the FIE results. [R.Ex. 34 at 22; Tr. at 122-124].

49. The FIE assessed Petitioner’s emotional and behavioral functioning with the Behavior Assessment System for Children, 2nd Edition (“BASC2”), completed by his primary ***-grade teachers, the student, and his parents. Additional information was gathered from his ***-grade teachers who had not had him long enough at the time of the evaluation to fill out the BASC2. Petitioner’s mother tended to be *** in her scores and was the only person whose scores fell in the *** range; in according with BASC2 scoring indices, the LSSP concluded that scores from Petitioner’s mother should be “interpreted with caution” on this testing. [R.Ex. 34 at 23].

50. During the FIE, Petitioner’s mother used the Spanish version and Petitioner’s father used the English version of the BASC2. Although Petitioner’s mother completed some answers on the Spanish version and some on the English version, the LSSP had answers from the mother to all the questions to include in the FIE report. [R.Ex. 34 at 23 and R.Ex. 37 at 10; Tr. at 128-130].

51. The BASC2 Externalizing Problems composite assesses disruptive behavior by three scales: Hyperactivity, Aggression, and Conduct Problems. When compared to other males with ADHD, Petitioner’s mother rated Petitioner in the Clinically Significant range while Petitioner’s father and ***-grade teachers determined Petitioner’s behavior was unremarkable compared to other boys with ADHD. When compared to the general population, Petitioner’s parents reported ratings in the *** range. By contrast, Petitioner’s teachers rated his behavior within the *** range, indicating Petitioner’s behavior at school was not a major area of concern. [R.Ex. 34 at 23].

52. The FIE evaluated Petitioner’s depression, anxiety, and internal stress using the Child Depression Inventory (“CDI”), the Revised Children’s Manifest Anxiety Scale: Second Edition (“RCMAS-2”), and the Children’s Self-Report and Projective Inventory (“CSRPI”) to evaluate internal stress selected tests. Petitioner scored within the *** range on the CDI and the RCMAS-2, indicating no concerns for depression or anxiety. On the CSPRI, Petitioner endorsed themes of personal and relationship happiness, but expressed some concern about the amount of homework he receives. He feels like he gets in to trouble often, especially at home. The LSSP addressed the student’s *** ADHD as well as the parental concerns about *** two years ago. The LSSP concluded Petitioner does not show signs of internal stress across settings of home and school. [R.Ex. 34 at 18].

53. Respondent’s speech language pathologists evaluated Petitioner’s speech in English and Spanish as part of the FIE. [R.Ex. 34 at 11-15].

54. The English speech evaluation found Petitioner’s oral structure and function were within normal limits. Petitioner evidenced excellent articulation measured by the Goldman-Fristoe Test of Articulation-2. On the OWLS test and the Comprehensive Assessment of Spoken Language, Petitioner tested in the *** range for listening comprehension skills and oral expression.

Based on a speech-language sample, Petitioner used age-appropriate conversation and narrative skills. On a Speech/Language Skills Checklist filled out by Petitioner's teachers, Petitioner showed appropriate speech skills for participation in the classroom setting. [R.Ex. 34 at 11-13].

55. The Spanish portion of the speech evaluation was performed by a bilingual speech language pathologist. Petitioner scored lower on the Spanish evaluation, demonstrating Petitioner's preference for English usage, but did not establish a communication disorder. Based on all data, both evaluating speech language pathologists concurred that Petitioner had speech/language skills within normal limits for his age and grade, with no communication disorder. As a result, Petitioner did not qualify as speech impaired under IDEA and demonstrated no educational need for speech services. [R.Ex. 34 at 11-15; Tr. at 1083 and 1088-1091].

56. The LSSP completed the FIE on September 20, 2010, and concluded that Petitioner did not meet eligibility for OHI, Emotional Disturbance ("E.D.") and L.D. based on testing results. The LSSP included recommendations for Petitioner's general education program including breaking down directions, increased reading and rehearsal time, and preferential seating. [R.Ex. 34 at 27].

57. By previous agreement of the parties, Respondent scheduled a meeting of the ARDC for September 24, 2010. After completion of the FIE report, the LSSP called Petitioner's parents to offer to meet prior to the ARDC meeting to review the report. The parents declined a meeting with the LSSP without the presence of their advocate and the parties did not find a mutually agreeable date to meet prior to the ARDC meeting. The LSSP provided a completed FIE report to the parents prior to the ARDC on September 24, 2010. [R.Exs. 31 and 32; Tr. at 88-89 and 145].

ARDC Meeting

58. As planned, the ARDC convened on September 24, 2010, and continued the meeting on October 7 and 13, 2010. The parents and their advocate, and up to 18 individuals participated, including the FIE evaluators. The LSSP presented the completed FIE report on the first two days of the three-day meeting. As detailed in fifteen written pages of ARDC minutes, the participants discussed and reviewed 570 pages of documents, the speech evaluation results, and input from Petitioner's current ***-grade teachers. Participants gave input on Petitioner's class work, grades, testing, and participation, including input from the campus assistant principal. Participants discussed Petitioner's behavior, incidents relating to ***, and his ADHD ***. [R.Ex. 34 at 16 and Exs. 37 and 38; Tr. at 302-303, 435-436, 643, and 803-805].

59. During the three-day ARDC meeting, Petitioner's parents and advocate expressed belief that Petitioner qualified for special education services due to his ADHD diagnosis and because Petitioner's grades have decreased since *** grade. The parents stated concern that Petitioner *** previously and reported he had recently, since the FIE, attempted to *** in September 2010. In response to parental request, the LSSP compiled additional written information before and during the three-day meeting regarding raw testing scores and testing details. With the exception of the parents, the ARDC voted that Petitioner did not qualify as a student with a disability and found the FIE appropriate and complete. The ARDC denied the parents' request for an IEE at district expense and offered a 10-day recess, but the parents waived the opportunity to return to an ARDC meeting. [R.Exs. 35 and 37 at 5-20; Tr. at 146-148, 159-160, 254, 303, 642-643, 674, and 996-997].

60. The three-day ARDC meeting of September 24, October 7, and October 13, 2010, included assistance of a translator to assist the parents in English/Spanish translation as well as

input of the special education teacher in both Spanish and English. The ARDC reviewed the procedural safeguards and a written guide for the ARDC process, provided another copy of the Student Code of Conduct in Spanish and English, and contact information for district staff by telephone for any follow-up questions. At hearing, the parents confirmed review of the ARDC documents during the three-day meeting. The parents received copies of the meeting documents and audiotapes after the meeting. [Tr. at 804, 807, 832, and 989-996].

61. On October 15, 2010, Petitioner amended his due process complaint. Petitioner's parents and advocate attended a resolution meeting on October 29, 2010, but did not remain in the meeting to hear Respondent's proposal. The parties returned to a second resolution meeting on November 10, 2010, at which time Respondent presented the district's proposal to address parental concerns. A translator attended both meetings to assist the parents in English/Spanish translation. [P.Ex. 1; R.Ex. 39; Tr. at 1116-1119].

Progress during 2010-2011

62. At the beginning of the due process hearing, Petitioner had received grades for the first two six-week grading periods of his ***-grade year. He received mostly *** final six-week averages with two *** averages in Reading and Math. [R.Ex. 18].

63. Petitioner's ***-grade teachers describe his math grades as ***, his science grades as ***, his language arts grades as falling within "the *** of the class," and his reading grades as *** in comparison with his classmates. He has made *** based on work samples and the credible hearing testimony of his current teachers. His current ***-grade teachers have no concerns about his academic progress. [R.Exs. 14 -16; Tr. at 618, 619-620, 626-627 and 655].

64. Petitioner takes good notes in his math class, shows motivation in classroom projects, and is eager to help other classmates. At the end of the second six-week grading period, he scored *** on his writing assessment test. At the end of the second six-week grading period, he scored *** on his math final exam, the *** score in his class by more than *** points. Petitioner also made *** on his "geometry foldable," a graphic organizer based on his listening comprehension and ability to take and organize his classroom notes. [R.Ex. 16 at 44-53; Tr. at 274-278].

65. Petitioner's ***-grade *** teacher finds Petitioner's behaviors are consistent with those of his peers; on occasion, Petitioner misbehaves "as all students do." Petitioner does not cause behavioral concern within the classroom and none of his behaviors are overly disruptive. All three of his ***-grade teachers do not believe his behaviors interfere in his ability or that of his peers to learn and participate in the classroom. [Tr. at 280-281, 291-292, 295-296, 614, 617, 627, 640, 651, 659, and 670].

66. So far during his ***-grade year, the majority of Petitioner's Conduct Club points deducted by Petitioner's *** teacher are for failure to bring homework, *** violations, or infractions called "HALL" violations involving "Hands behind your back, All eyes forward, Lips sealed, and Low speed in line." Petitioner's reading teacher and his math teacher have never deducted Conduct Club points for Petitioner's inattention, failure to be prepared for class, playing in class, being out of his seat, failure to participate, or interrupting. His math teacher did not deduct any Conduct Club points for six of 12 weeks. [R.Ex. 13 at 1-14; Tr. at 289-290, 630-634, and 663-664].

67. Petitioner has not missed any instructional days in the current school year due to suspension, and received only one referral in the *** grade for disobeying rules in his physical

education (“P.E.”) class. Petitioner got a drink of water after the whistle had blown as a signal to line up for the next class. As a consequence for the infraction, he had a conference with the assistant principal. He has not had any repeat infractions since the incident. [R.Exs. 18 and 22 at 24-26; Tr. at 529-530, 641, and 1049-1050].

68. Petitioner has a good record of participation and getting along with his classmates in P.E. Petitioner received a *** final average in P.E. in *** grade. In the first two grading periods of *** grade, he maintained a *** for his final six-week grade. Petitioner’s misbehavior in P.E. is not an everyday occurrence and is manageable with normal classroom management techniques. [R.Exs. 9 at 6, 18, and 21 at 2; Tr. at 1042-1046 and 1052-1053].

69. Petitioner *** for ADHD at home. His parents have not asked for assistance at school with ***. [Tr. at 952].

70. Petitioner occasionally misbehaves in the lunchroom. His misbehavior is managed with the same correction used with other students in the lunchroom. Petitioner has not had any incidents at school of *** or ***. [Tr. at 698-700].

71. The parents’ campus access restrictions put in place in February 2010 remain in effect. The campus principal believes the restrictions help ensure a safe campus environment and minimize teaching and learning disruptions in the classroom. Petitioner’s parents never requested a meeting with the assistant principal or the principal to discuss educational concerns or to talk to Petitioner’s teachers since February 2010. [Tr. at 512-515, 766-768, 773-774, and 821-822].

72. Petitioner never requested counseling services from the school counselor, even after receiving several copies of the Student Code of Conduct that outlined counseling services for all students. [Tr. at 832].

73. Petitioner’s behavior did not show a need for development of additional behavior interventions for *** and *** grade as Petitioner responded well to general education behavioral supports.

Discussion

This case concerns Respondent’s failure to identify and serve Petitioner as a student with special education and related services. Respondent believes the student consistently progressed well under his general education program *without* the need for special education and related services. In response to concerns of Petitioner’s parents, Respondent performed a special education evaluation of Petitioner. The FIE concluded that Petitioner, even with an OHI diagnosis for ADHD, does not require special education and related services for his public education. By contrast, Petitioner’s parents believe their son deserves special education and related services to address his medical diagnosis of ADHD under OHI and to address his behavior.

Petitioner bears the burden of proof to establish by a preponderance of the evidence that the district violated the provisions of IDEA. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff’d on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Respondent bears the burden to prove its FIE was appropriate and, as a result, Petitioner is not entitled to an IEE at public expense. 34 C.F.R. §300.502(b)(2)-(3).

Under IDEA, qualification of a student as disabled requires two steps. First, a student must be evaluated in accordance with IDEA's implementing regulations and must be found to have a qualifying disability of mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment, a serious E.D., an orthopedic impairment, autism, traumatic brain injury, an OHI, a specific L.D., deaf-blindness, or multiple disabilities. 34 C.F.R. §300.8(a). Once a disability condition is identified, a second step requires analysis of whether, based on the identified disability, the student demonstrates a *need* for special education and related services. *Id.*

The presence of a qualifying disability is not enough to qualify a student for receipt of special education; the student must be in need of those services to progress and obtain the requisite educational benefit. *J.D. by J.D. v. Pawlet School District*, 224 F.3d 60 (2nd Cir. 2000). A student must have more than the mere presence of a disability; the student must exhibit symptoms of a qualifying disability *and* exhibit them to such a degree that they interfere with the student's ability to benefit from the general education setting. *Alvin Indep. Sch. Dist. V. A.D.*, 503 F.3d 378 (5th Cir. 2007) (emphasis added).

Pre-referral Effort

In Texas, the Commissioner's Rules Concerning Special Education require school districts to use interventions outside special education as an integral part of a school district's identification for referral to special education. 19 TEX. ADMIN. CODE §89.1011. Prior to a special education referral, school districts should consider:

. . . all support services available to all students, such as tutorial; remedial; compensatory; response to scientific, research-based intervention; and other academic or behavior support services. If the student continues to experience difficulty in the general classroom after the provision of interventions, district personnel must refer the student for a full and individual initial evaluation.

Id. A student who, with the addition of support services including accommodations, who is able to receive educational benefit in the general education classroom does not require special education evaluation or placement into special education.

Reason to Suspect a Disability and Reason to Suspect a Need for Special Education Services

The evidence established that Respondent did not have reason to believe the student had a qualifying disability until March 1, 2010, when the district received notice of Petitioner's TEA complaint. After receipt of this notice, Respondent began gathering information on Petitioner to review in light of this new information.

Respondent's SST process looks at the pre-referral requirements set out in §89.1011 of the Commissioner's Rules. *Id.* In April and May 2010, Respondent swiftly convened the SST process to review the newly-disclosed information that Petitioner might have an ADHD diagnosis and Petitioner's progress by holding two separate meetings with educators and the parents and advocate in attendance. Petitioner's SST review consisted of voluminous school records on Petitioner's progress, including his home and school behavior. By May 19, 2010, the SST committee made the determination that Petitioner's home and school issues relating to an ADHD diagnosis were being addressed with success in the general education program and did not show a *need* for special education services, based on the totality of the reviewed information including standardized test scores, grades, and behavior. As a result, Respondent declined to evaluate the student for special education at this time but offered Section 504 services that the parents refused. Petitioner's parents were collaborators in the SST process, had additional assistance of a translator to assist in parental

participation and understanding, and received documentation of the SST meetings. I find the preponderance of the evidence shows Respondent did not delay in this pre-referral process but instead undertook a thorough review of Petitioner's progress in the general education program with the input and participation of Petitioner's parents.

Procedural Safeguards for Evaluation and Parent Participation

Petitioner challenges Respondent's failure to give the parents information and meeting minutes during the SST process. As addressed above, the non-special education SST process fully included the parents in the process. Petitioner's allegations appear to cast a wider net to include the procedural requirements of IDEA, and will be addressed as such.

IDEA and its implementing regulations require school districts to give "prior written notice" to the parents of a child when a school district proposes to initiate or change, or refuses to initiate or change, "the identification, evaluation, or educational placement of the child, or the provision of a FAPE to a child." 20 U.S.C. §1415(b)(3); 34 C.F.R. §300.503. The notice must be given within "a reasonable time." 34 C.F.R. §300.503(a). In this proceeding, the procedural safeguards requirement applied after the SST committee refused to evaluate the student at the last SST meeting on May 19, 2010.

Petitioner appears to complain about a denial of an ARDC meeting at the conclusion of the SST process to review the SST committee decision. In fact, the evidence established that the conclusion of the SST process resulted in a decision not to perform an FIE of the student, at which time Respondent sent notice of its refusal to evaluate the student along with a copy of procedural safeguards to the student's parents in Spanish and English. Respondent fully complied with the prior written notice provisions on May 27, 2010, within eight calendar days of the last SST meeting. I find Respondent complied with the prior notice provisions and Petitioner failed to show any procedural violation occurred at the conclusion of the SST meeting process.

The parents complain about a lack of collaboration with and access to the student's campus from February 2010 forward. The February 2010 date coincides with restrictions put in place by the campus principal that indeed restricted – but did not eliminate – the parents' access to the student's campus; however, the evidence preponderates to show the restrictions resulted from negative parental interactions with school staff. Petitioner failed to meet his burden to show any connection with these restrictions and a denial of IDEA procedural safeguards.

Under IDEA and its implementing regulations, a copy of the procedural safeguards notice must be given to the parents of a student with a disability once a year, and must also be given upon an initial referral, upon a parental request for evaluation, upon receipt of the first State complaint and first due process complaint of the school year, upon certain disciplinary proceedings, and upon request by the parent. 34 C.F.R. §300.504(a). On the record before me, Petitioner did not sustain his burden to prove a denial of procedural rights by failing to give proper notice or procedural safeguard copies. I find that Respondent at all junctures erred on the side of caution by re-sending copies in English and Spanish to Petitioner of the IDEA procedural safeguards and other notices.

Evaluation of the Student within a Reasonable Time

Upon receipt of the parents' due process request in May 2010, Respondent began the FIE process within days as an attempt to resolve the dispute. Under Texas law, a school district must complete an FIE of a student within 60 calendar days from the date written consent is received by the school district. TEX. EDUC. CODE §29.004(a). The evidence established that the parents signed written consent for the FIE on June 14, 2010, yet the parties specifically agreed to go beyond the 60-day timeline to allow evaluation of the student within the classroom. By September 20, 2010,

Respondent completed the FIE report and as agreed by the parties, convened an ARDC meeting four days later to review the results. Petitioner did not sustain his burden to show the student was not evaluated within a reasonable time.

Appropriateness of Respondent's FIE and Request for an IEE

In October 2010, Petitioner made a post-filing request for an IEE at district expense. Upon denial of the request, Respondent filed a counterclaim asserting an appropriate FIE that met all requirements under IDEA for an initial evaluation. 34 C.F.R. §502(b)(2). Respondent asserts that the preponderance of the evidence shows the appropriateness of Petitioner's FIE and as a result, Petitioner is not entitled to an IEE at district expense. 34 C.F.R. §502(b)(3).

Requirements for an initial evaluation under IDEA and its implementing regulations mandate the use of a variety of assessment tools and strategies to gather functional, developmental, and academic information that includes information from the parent to assist in determining: 1) whether the student has a disability; and, 2) the content of the student's IEP, including information related to enabling the student to be involved in and progress in the general education curriculum. 34 C.F.R. §300.304(b)(1). To make the determination that a student has a disability and to analyze the appropriateness of the student's educational program, the evaluation must also: 1) include more than a single measure or assessment; and, 2) use technically sound instruments that assess the relative contribution of cognitive, behavioral, physical, and developmental factors. 34 C.F.R. §300.304(b)(2)-(3). Under 34 C.F.R. §300.304(c)(1), the assessments and evaluation procedures must meet additional requirements, such as, be valid and reliable, be administered by trained and knowledgeable personnel, and be administered according to instructions from the assessment producer.

At hearing, Petitioner's parents challenge proper *administration* of the FIE based on "overhearing" from the hallway the evaluator "give" the student some testing answers. Also, Petitioner's parents challenge the LSSP's administration and interpretation of parental questionnaires from the BASC2. I do not find merit in these allegations. Instead, the credible hearing testimony and documentary evidence in this dispute preponderates to show the LSSP, a psychologist with many years of testing expertise who supervises others within Respondent's psychology department, properly administered and interpreted the variety of testing instruments used in the evaluation.

Petitioner challenges Respondent's FIE as failing to address all areas of the student's suspected disability, including OHI due to the student's diagnosis of ADHD. By contrast, the evidence shows Respondent collected information from multiple sources including teachers, the parents, and medical information, in preparation for the evaluation. The LSSP specifically met with the parents to get their input. Based on all the information, Respondent's LSSP tested the student in suspected areas of disability that not only included OHI based on the ADHD diagnosis, but also considered possible eligibility due to E.D. and L.D. The evaluation included information on his health, physical, social and emotional status, general intelligence, academic performance, and communicative status – as well as his diagnosis of ADHD – all factors with a potential impact on his education. 34 C.F.R. §300.304(c)(4). The FIE addressed specific areas of Petitioner's educational need, identifying areas of strength and weakness in accordance with 34 C.F.R. §300.304(c)(2). The final FIE report included assurances of selection of all tests to avoid racial or cultural discrimination and to be standardized, validated measures in compliance with 34 C.F.R. §300.304(c)(1).

Petitioner further challenges the completeness of the FIE regarding the student's need for behavioral intervention and related services of counseling. A review of the credible hearing

testimony and copious documentary evidence of this proceeding, however, reveals that these concerns were thoroughly addressed in the FIE process through formal testing and by input from the parents, information from ***, Petitioner's teachers, and observation. Petitioner did not sustain his burden to show these areas were ignored.

The evaluation included information on his speech/language and assistive technology needs, including a speech evaluation in both English and Spanish. 34 C.F.R. §300.304(c)(1)(ii) and (c)(6). After gathering all the data, the evaluating LSSP and speech pathologists concluded that Petitioner did not meet eligibility in the three suspected disability areas of OHI, E.D., and L.D. The written report made recommendations for continued general education placement with additional recommendations for implementation in the general setting. The credible hearing testimony established that, contrary to the parents' assertions, the LSSP offered to meet with parents to review the FIE report, but the parents declined that opportunity and waited for the ARDC meeting.

I conclude that Respondent's FIE was an appropriate initial evaluation of Petitioner that complied with IDEA's implementing regulations, as discussed above. As a result, Petitioner is not entitled to an IEE at public expense.

Review of the FIE by the ARDC

After gathering the completed FIE data, IDEA regulations require a group of qualified professionals and the parents to: 1) determine whether the student is a student with a disability as defined in 34 C.F.R. §300.8; *and*, 2) *determine the educational needs of the student*. 34 C.F.R. §300.306 (emphasis added). In Texas, this determination is made by the ARDC. 19 TEX. ADMIN. CODE §89.1040(b).

When Respondent convened the ARDC on September 24, 2010, the meeting became a three-day process that involved up to 18 persons, fully including the parents and their advocate in the review of the extensive documentation. The hearing testimony of Petitioner's parents confirmed that the review looked at Petitioner's grades, standardized test scores, teacher statements, parental input, behavioral reports of the Conduct Club, and discipline referrals in addition to the completed FIE report. Ultimately, the ARDC concluded that Petitioner did not need special education or related services, with the parents in disagreement with the decision. The parents refused the opportunity for a 10-day recess and did not return to an ARDC meeting.

The preponderance of the evidence in this matter supports the FIE determination that Petitioner did not qualify as a student with a disability in the suspected areas of OHI, E.D., or L.D. Respondent completed a comprehensive FIE of Petitioner in compliance with IDEA and its implementing regulations. As a result, Respondent appropriately denied the parents' request for an IEE. When the ARDC reviewed the FIE in the context of an ARDC, the overwhelming documentary and testimonial evidence supports the ARDC's conclusion that Petitioner did not have and did not show a *need* for special education and related services in his general education program.

Petitioner made progress in his general education program with general education supports. Petitioner did not prove that the district failed to meet its legal responsibilities. Accordingly, I decline to award any relief to Petitioner.

Conclusions of Law

1. Respondent is the local educational agency responsible for determining the student's eligibility for special education and related services under IDEA. 20 U.S.C. §1400, *et. seq.*, and its implementing regulations.
2. A party who challenges the school district's eligibility determination or offer of services under IDEA bears the burden to prove that the student has been denied a FAPE. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 S.Ct. 528 (2005).
3. Respondent bears the burden to prove the appropriateness of its FIE. Respondent met this burden; as a result, Petitioner is not entitled to an IEE at public expense. 20 U.S.C. § 1415(b)(3); 34 C.F.R. §§300.304(b)(1)-(3), (c)(1)-(2), (c)(4), (c)(6), 300.502(b)(2)-(3), 300.503, and 300.504; TEX. EDUC. CODE §29.004(a).
4. The conclusions of district's ARDC that the student is not eligible for special education services as a student with a disability under IDEA are appropriate; thus, there has been no denial of FAPE. 20 U.S.C. §1400(d)(1)(A); 34 C.F.R. §§300.8 and 300.306; 19 TEX. ADMIN. CODE §§89.1011 and 89.1040(b); *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 S.Ct. 528 (2005).

ORDERS

Based upon the record of this proceeding, the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that the relief requested by Petitioner is **DENIED**.

IT IS FURTHER ORDERED that any and all additional or different relief not specifically ordered herein is **DENIED**.

Signed this 24th day of March 2011.

/s/ Mary Carolyn Carmichael

Mary Carolyn Carmichael
Special Education Hearing Officer

NOTICE TO THE PARTIES

This decision is final and immediately enforceable, except that any party aggrieved by the findings and decision may bring a civil action in any state court of competent jurisdiction or in a district court of the United States as provided in 20 U.S.C. §1415(i)(2); 34 C.F.R. §300.516; and 19 Tex. Admin. Code §89.1185(o).

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|---|---|----------------------------|
| STUDENT, b/n/f/ PARENTS, Petitioner and Counter-Respondent | § | BEFORE A SPECIAL EDUCATION |
| | § | |
| | § | |
| v. | § | HEARING OFFICER |
| | § | |
| DALLAS INDEPENDENT SCHOOL DISTRICT, Respondent and Counter-Petitioner | § | FOR THE STATE OF TEXAS |

SYNOPSIS OF DECISION

ISSUE A: *Whether the school district failed to provide a free appropriate public education to the student by refusing to identify the student as a student with a disability in need of special education or related services?*

FEDERAL CITATION: 20 U.S.C. §1400(d)(1)(A); 34 C.F.R. §§300.8 and 300.306.
Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 S.Ct. 528 (2005).

TEXAS CITATION: 19 TEX. ADMIN. CODE §§89.1011 and 89.1040(b).

HELD: **For the District.**

ISSUE B: *Whether the school district's full and individual evaluation of the student was appropriate in all respects and affirming the district's denial of an independent educational evaluation at public expense?*

FEDERAL CITATION: 20 U.S.C. § 1415(b)(3); 34 C.F.R. §§300.304(b)(1)-(3), (c)(1)-(2), (c)(4), (c)(6), 300.502(b)(2)-(3), 300.503, and 300.504.

TEXAS CITATION: TEX. EDUC. CODE §29.004(a).

HELD: **For the District.**