

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

**STUDENT,  
bnf PARENT,  
    Petitioner,**

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v.

**DOCKET NO. 126-SE-0112**

**NORTHSIDE INDEPENDENT  
SCHOOL DISTRICT,  
    Respondent.**

**DECISION OF THE HEARING OFFICER**

INTRODUCTION

Petitioner, Student bnf Parent (“Petitioner” or “Student”) brings this action against the Respondent Northside Independent School District (“Respondent,” or “the school district”) under the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. § 1401 et. seq. (IDEA) and its implementing state and federal regulations.

Party Representatives

Petitioner was represented throughout this litigation by petitioner’s legal counsel Matthew Finch, Attorney at Law, assisted by lay advocate Debra Liva. Student’s grandmother, \*\*\*, was present throughout the due process hearing. Student’s mother, \*\*\*, was also present for a portion of the hearing.

Respondent was represented throughout this litigation by its legal counsel Elvin Houston and his co-counsel Eric Rodriguez with the law firm of Walsh, Anderson, Gallegos, Green & Trevino. In addition, Dr. Barry Dewlen, head of psychological services for the school district, was present at the due process hearing as the party representative. Petitioner requested an open hearing. A few observers attended portions of the hearing over the two day hearing period.

Resolution Session and Mediation

The parties did not convene a Resolution Session nor attempt mediation in this case. The parties proceeded to the due process hearing on dates selected by mutual agreement.

Procedural History

This case was initially set for a due process hearing on March 7-8, 2012. However, the parties agreed to set the hearing for February 29, 2012 and March 2, 2012 in order to resolve a scheduling conflict for Petitioner’s counsel with the original dates. Two preliminary issues were resolved prior to proceeding to the hearing: Respondent’s Objection to the Sufficiency of Petitioner’s Request for a Due Process Hearing and Respondent’s Plea to the Jurisdiction. Respondent’s Motion for Continuance was denied and the hearing proceeded as scheduled on February 29, 2012 and March 2, 2012. Both parties requested the opportunity to submit written closing arguments and legal briefs. The parties selected April 5, 2012 as a mutually agreeable date for the submission of written closing arguments and legal briefs. The parties requested an extension of that deadline to April 10, 2012 which was granted. The Decision of the Hearing Officer was extended to May 4, 2012 in accordance with the agreement of the parties and the regulatory requirements of the IDEA.

## Issues

Petitioner submitted the following issues for decision in this case:

1. Whether the school district should have identified Student as a student with a disability, specifically as a student with Other Health Impairment (OHI), for purposes of special education eligibility under the Individuals with Disabilities Education Act (IDEA);
2. Whether the school district's alleged failure to identify Student as a student eligible for special education resulted in a denial of a free, appropriate public education (FAPE) under IDEA;
3. Whether the 2011 Admission, Review & Dismissal Committee (ARD) decision to continue Student's placement at the local Juvenile Justice Alternative Educational Placement (JJAEP) was and continues to be appropriate; and,
4. Whether the school district failed to provide Student's parent with the requisite prior written notice following the August 2011 ARD.

Respondent submitted the following additional issues for decision in this case:

5. Whether Petitioner's claims should be limited to the application of the one year statute of limitations rule in Texas; i.e. only those claims that arose after January 13, 2011;
6. Whether Petitioner's claims are barred by the terms of the May 16, 2011 Resolution Agreement;
7. Whether the school district owes any duty to provide Student with FAPE or any educational services because student is not currently enrolled as a student in the school district; and,
8. Whether Petitioner's claims should be dismissed under the affirmative defenses of laches and mootness.

Respondent's claims that Student's grandmother lacked standing and that Petitioner's clarification of issues during the prehearing conference constituted an amendment of petitioner's hearing request were resolved in Petitioner's favor prior to the hearing.

## Requested Relief

Petitioner requests the following items of relief:

1. The hearing officer determine that Student is eligible for special education under the IDEA as a student with OHI;
2. The school district provide Student with compensatory education and related services including private counseling, tutoring, and social skills training;
3. The school district provide Student with a one time medical examination to confirm prior diagnoses of Attention Deficit Hyperactivity Disorder (ADHD) and Bi-polar disorder;
4. The school district place Student in one of the following three placement options: a private, out-patient facility; back on student's home school campus with appropriate interventions; or, at "\*\*\*\*" -- the school

district's campus for \*\*\*;

5. The school district convene an ARD meeting to develop an Individual Educational Plan (IEP) for Student with specific and measureable goals and objectives;
6. The school district conduct a behavioral analysis by a certified behavior analyst;
7. The school district reimburse Petitioner for out-of-pocket expenses incurred for the cost of home-schooling;
8. The school district reimburse Petitioner for attorney's fees and other costs incurred in filing the request for a due process hearing; and,
9. Any other relief to which Petitioner may be entitled.

Respondent submitted the following items of requested relief:

1. Dismiss all claims arising prior to January 13, 2011 as outside the one year statute of limitations period applied in Texas;
2. Dismiss all claims to the extent they are barred by the May 26, 2011 Resolution Agreement; and,
3. Dismiss all claims under IDEA because Student is no longer enrolled as a student in the school district and on the basis of laches and/or mootness.

#### FINDINGS OF FACT

1. At the time of the due process hearing Student was \*\*\* years old and living with student's \*\*\* within the jurisdictional boundaries of the school district. (Transcript Volume I, pp. 285-286)(referred to hereafter as "Tr. Vol. \_\_\_, p. \_\_\_"). Student was previously enrolled in the school district until student was withdrawn in November 2010 following parental disagreement with the school district's decision to place Student at the local Juvenile Justice Alternative Educational Placement (JJAEP) (Tr. Vol. I, pp. 190-191. Student has been home-schooled ever since. (Tr. Vol. I, p. 285).
2. Student lived with student's \*\*\* prior to living with student's \*\*\*. An older brother does not live at home. Student's biological father and mother are divorced. Student's mother remarried \*\*\*. Student lost a close \*\*\*. Student was apparently upset by \*\*\* and has a complex relationship with student's biological father – \*\*\*. (Petitioner's Exhibit 1, pp. 30 to 31)(referred to hereafter as "P. Ex. \_\_\_, p. \_\_\_").
3. Student has a history of behavior issues at both home and school that arose in \*\*\* school and increased in frequency and intensity through \*\*\* grade and into the first year of \*\*\* school. Beginning in 2008 up through 2010 discipline records establish Student engaged in the following negative behaviors at school: disturbing class; insubordination; using profane or obscene language; being disrespectful towards teachers, peers and administrators; persistent misbehavior; disruptive behavior in the school environment; disobedience; mischief; horseplay; conflicts with classmates; dress code violations; disobeying school rules; and, physical aggression. (Tr. Vol. I, pp. 139-143)(Respondent's Exhibit 12)(referred to hereafter as "R. Ex. \_\_\_, p. \_\_\_").
4. In response to increasing concerns about Student's behavior student's mother requested an evaluation for special education. She signed consent for the evaluation on November 13, 2009 – fall semester of \*\*\*

grade. She acknowledged receipt of Notice of Procedural Rights as well as information related to the evaluation. (P. Ex. 3)(R. Ex. 2-1 to 2-4)(R. Ex. 3). (Tr. Vol. I, p. 46). A Full Individual Evaluation (FIE) was completed and a report issued on January 8, 2010. The 2010 FIE included the results of the Behavior Assessment System for Children (BASC) a set of behavioral rating scales and the Attention Deficit Disorders Evaluation Scale (ADDES). The BASC was completed by Student's \*\*\* grade teachers, student's mother, grandmother and by Student \*\*\*self. The ADDES was completed by student's \*\*\* grade classroom and \*\*\* teachers. The ADDES checklist was sent home but no responses were received from Student's mother or grandmother on this instrument. (P. Ex. 3-4, 3-5, 3-6)(R. Ex. 3-2, 3-4, 3-5, 3-6).

5. In the 2010 FIE Student scored within the average range of verbal intelligence, non-verbal intelligence and for composite intelligence. (P. Ex. 3-6, 3-7) (R. Ex. 3-6, 3-7). Student performed within the average range in all academic areas when compared to same age peers. Although teachers noted student rushed to complete work (so that quality suffered) student did turn assignments in on time. (R. Ex. 3-8). Student's behavior issues at school appeared to occur more frequently during unstructured times such as during lunch, PE, and recess and less often in student's regular classroom. (R. Ex. 3-4). In addition, student's mother and grandmother noted that student did not exhibit disrespectful behavior with student's biological father or father's family as student did at home. (Tr. Vol. I, pp. 47-48). Student behaved appropriately during the FIE. This data led the evaluator to conclude that Student's behavioral difficulties at school were controlled and not pervasive across all settings. The evaluator found no data to suggest that behavioral concerns were a result of an impulse control disorder such as ADHD as opposed to a social maladjustment disorder. (R. Ex. 3-6, 3-8, 3-10).
6. An ARD was conducted on February 11, 2010 to review and discuss the results of the 2010 FIE. The ARD concluded Student did not meet eligibility requirements for special education nor did student demonstrate an educational need. Behavioral strengths noted by teachers were that student was a leader and had lots of friends. Behavioral weaknesses were that student was often unmotivated to do school work and exhibited attention-seeking and defiant behavior. However, student's behavior did not impede student's ability to learn as student was successful academically. (R. Ex. 4-1, 4-2, 4-3, 4-16, 1-17)(P. Ex. 8). Student's mother disagreed with the results of the FIE. The school district agreed to her request for an IEE. She again received Notice of Procedural Rights. (R. Ex. 4-11, 4-12, 4-14, 4-15). The school district provided Student's mother with Prior Written Notice of its refusal to identify Student as eligible for special education and its agreement to provide the IEE. (R. Ex. 5-1, 5-2, 5-3).
7. The IEE was completed on May 22, 2010 by a licensed psychologist/licensed specialist in school psychology (LSSP) at the end of \*\*\* grade. The purpose of the IEE was to obtain an independent opinion regarding Student's emotional status. The IEE included the use of a variety of assessment tools. In the student interview Student reported that student enjoyed sports (especially \*\*\*) and acknowledged misbehaving at school at times and at home. Student was cooperative, polite, and respectful throughout the interview. (R. Ex. 6-1, 6-2). The IEE noted that Student appeared to be \*\*\* than student's chronological age of \*\*\* at the time of the evaluation. The IEE evaluator concluded that Student knows when student is breaking a rule but allows momentary preferences to influence student's behavior. The May 2010 IEE found Student was of average intelligence with some need to develop a greater vocabulary. (R. Ex. 6-2, 6-3).
8. The May 2010 IEE found no marked elevations that indicated an emotional disturbance and no significant problems with unusual thoughts or peculiar circumstances. Furthermore, the data did not indicate clinical depression, mania, chronic anxiety or characteristics associated with ADHD. The IEE evaluator concluded that when Student was not allowed to have student's own way student will go to great lengths to influence others until a change of opinion is reached. Student was described as a "strong willed young \*\*\*" who was "not easily dissuaded from what student wants to do." (R. Ex. 6-4).

9. The May 2010 IEE concluded Student could be expected to intermittently question the authority of parents, teachers, and other adults as a result of student's tendency to externalize conflict. (R. Ex. 6-4). The IEE evaluator concluded Student's needs were being satisfactorily met in the regular classroom. The IEE recommended a number of resource materials for adult family members to use in developing additional skills to manage student's adolescent behavior. The IEE also recommended supplementary word study to improve student's vocabulary. (R. Ex. 6-5).
10. An ARD was conducted on September 14, 2010 to review the results of the 2010 IEE. Student's mother was very concerned about student's behavior and the intensity of student's anger at home. She expressed frustration in coping with student and noted student's need for a positive \*\*\* role model. The ARD agreed to provide Student's mother with support in meeting this need by setting up a conference to identify potential community resources. (R. Ex. 8-1, 8-3, 8-19). The ARD again concluded Student did not qualify for special education although the ARD agreed student exhibited characteristics of oppositional defiant disorder (ODD) (R. Ex. 8-18, 8-19, 8-21).
11. The ARD discussed different options to support Student's needs through regular education. Student's mother agreed with the decision of the September 2010 ARD. (R. Ex. 8-18, 8-19, 8-21). The school district subsequently attempted to provide Student with a \*\*\* mentor at school but this required a schedule change which Student refused as it meant losing lunch time with student's friends. (Tr. Vol. I, p. 59)(R. Ex.9-1).
12. At home Student became increasingly hostile, belligerent, non-compliant, disrespectful and ultimately physically and verbally aggressive by threatening to harm family members. (Tr. Vol. I, p. 60)(P. Ex.1-30-1-32). Student's negative behavior at home escalated in the fall of 2010. Student's mother was so fearful that student would hurt \*\*\*self or a family member she hospitalized student at \*\*\* in October 2010. Student was treated and released \*\*\* days later. At the hospital Student tested positive for benzodiazepines – a highly addictive drug used to treat anxiety. Sudden cessation in taking this drug can lead to withdrawal symptoms including violent and aggressive behavior. (Tr. Vol. I, pp. 114-115)(P. Ex. 1-28, 1-29). Student's mother suspected Student may have been using drugs prior to the hospitalization. (Tr. Vol. I, p. 61)(P. Ex. 1-30, 1-32).
13. Upon admission to the hospital Student was suspicious and guarded. Student felt nobody wanted or needed student. Student felt abandoned and the object of gossip and ridicule. Student felt negatively towards student's family and school authorities, teachers, and coaches. (P. Ex. 1-30 to 1-32). Upon discharge student was calm, less depressed, denied suicidal thoughts or ideation, and was cooperative with hospital staff. The hospital psychiatrist's final diagnoses included Bipolar 1 disorder, depressed, acute exacerbation; Generalized anxiety disorder; Oppositional defiant disorder; and, Conduct disorder. Student also exhibited histrionic traits and continued to contend with severe psychosocial stressors. Student was referred to a pediatric psychiatrist for follow up. (P. Ex. 1-28, 1-29)(R. Ex. 10-6, 10-7).
14. Student's mother informed the school district of student's hospitalization and shared the hospital discharge summary at a staffing with school district personnel on November 8, 2010. The LSSP at the staffing expressed concern over the bipolar diagnosis – in her professional opinion it was a serious disorder and diagnosis should be made thoughtfully with enough supporting data collected over time and across various settings including school, home and community. (P. Ex. 7)(R. Ex. 11-1). The hospital psychiatrist did not have the benefit of reviewing school records in making his diagnoses. (R. Ex. 11-1).
15. The hospital psychiatrist saw Student in a follow up on November 24, 2010. In a professional care statement the psychiatrist confirmed the previous diagnosis of Bipolar disorder-mixed and added an

“Inattentive Disorder” diagnosis. The treatment plan continued medication therapy with \*\*\* and \*\*\*. The psychiatrist recommended “special programming” due to Student’s “severe emotional disorder that impacts interpersonal relationship [sic] behavior and learning.” (P. Ex. 1-16). It does not appear the professional care statement was shared with the school district until this litigation. (R. Ex. 16)(R. Ex. 17)(Petitioner’s Disclosure)

16. By the fall semester of 2010, student’s first year in \*\*\* school, Student had several discipline referrals each week and sometimes several in a single day. (R. Ex. 12). School district attempts to address Student’s behavior included student conferences, parent conferences by phone, letters home, withdrawal of privileges, detention, in school suspension and out of school suspension ranging from several hours to several days. (R. Ex. 12). By November 2010 Student was placed in the school district’s \*\*\* school alternative educational placement program (AEP) as a behavioral intervention. (Tr. Vol. I., pp. 147, 214)(P. Ex. 3-1) (R. Ex. 12-44).
17. However, on student’s first day at the AEP student ended up in a fight with another student who apparently provoked student with insults and taunts. This led to suspension and a disciplinary hearing. As a result the school district expelled Student to the local JJAEP. (P. Ex. 2-1)(R. Ex. 12-44, 12-45). Student’s family disagreed with placement at the JJAEP and contended student’s behavior was a result of emotional problems and not because student was “a criminal.” (Tr. Vol. I., pp. 163, 164). Student was withdrawn from school and litigation ensued with the filing of a request for a due process hearing in March 2011. (R. Ex. 13-1). Student has not reported to the JJAEP or re-enrolled in the school district since then. (Tr. Vol. I, pp. 150, 163)(R. Ex. 16-1).
18. The March 2011 hearing was resolved through mediation in a written Resolution Agreement signed on May 16, 2011. The Resolution Agreement included a release of any and all claims through the date of the agreement arising, in part, under the IDEA. Claims arising under Section 504 of the Rehabilitation Act of 1973 were specifically excluded from the release. (R. Ex. 13-2, 13-3). A subsequent 504 hearing was conducted and resolved in the school district’s favor on November 11, 2011. (R. Ex. 25).
19. One of the provisions in the Resolution Agreement was that the school district would conduct an updated FIE. (R. Ex. 13). Student’s mother signed consent for the FIE on June 2, 2011 and acknowledged receipt of information about the FIE and Notice of Procedural Rights. (R. Ex. 14-1, 14-4). The updated FIE was completed on July 29, 2011. (P. Ex. 2)(R. Ex. 16).
20. The 2011 FIE sources of data included review of the hospital’s psychiatric evaluation, the January 2010 FIE, the May 2010 IEE, a home language survey, behavior rating scales completed by Student’s mother, grandmother, teachers, and a self reporting rating, the Children’s Depression Inventory, the Revised Children’s Manifest Anxiety Scale, the House-Tree Perception Inventory and the Thematic Apperception Test. (R. Ex. 16-2). The FIE also included the Woodcock-Johnson Test of Cognitive Abilities, the Koppitz2, Bender-Gestalt Test, the Woodcock-Johnson Tests of Achievement, the Rorschach Psycho diagnostic test, and an Assistive Technology assessment and report. (R. Ex. 16-2). The multidisciplinary team who compiled evaluation data and conducted further evaluation consisted of an LSSP and an Assistive Technology Specialist. (R. 16-1).
21. Student was tested over the course of three ½ day sessions. Student was cooperative during the testing and behaved appropriately. Student expressed a desire to return to school because student missed student’s friends. Student continued to maintain that student was provoked in fighting the other student at the AEP that led to student’s placement at the JJAEP. Student confirmed student’s continued interest in playing \*\*\* and reported student was attending a \*\*\* camp and expressed a desire to play \*\*\* at school. (P. Ex. 2-4)(R. Ex. 16-4).

22. The only at-risk area revealed by Student's self report using the behavior rating scales was a negative attitude towards teachers. Student reported no areas of concern and student displayed average emotional issues when compared with same age peers. The July 2011 FIE noted Student's tendency to act out with oppositional tendencies, a reluctance to access student's true feelings, less willingness to process emotional stimuli, and some feelings of inadequacy. Student is not as introspective as others but has the general ability to form an accurate impression of himself and interpret the intentions of others without distortion. The July 2011 FIE found that Student has the adaptive capacity to think logically and coherently with good reality testing. (P. Ex. 2-4)(R. Ex. 16-4).
23. Feedback from Student's teachers was included in the July 2011 FIE. (Tr. Vol. II, pp. 485-486)(P. Ex. 2-4)(R. Ex. 16-4). The validity of the teacher responses were confirmed except for the \*\*\* teacher -- some caution was recommended in interpreting her responses. Five teachers scored Student either "at risk" or "significant" for hyperactivity; five teachers scored student "at risk" or "significant" for attention problems and all seven teachers scored student "at risk" or "significant" for aggression. Five teachers scored student "at risk" or "significant" for problems with social and/or study skills. All seven teachers scored Student as either "at risk" or "significant" for conduct problems. At least two teachers also had concerns about withdrawal and leadership. (P. Ex. 2-4)(R. Ex. 16-4).
24. Student's mother and grandmother reported similar concerns to the teachers along with depression, adaptability, functional communication and atypicality. Their responses were also considered, on the whole, valid. (P. Ex. 2-4)(R. Ex. 16-4). Despite the behavioral concerns noted by family and teachers the July 2011 FIE nevertheless concluded that Student did not indicate emotional distress or an emotional disturbance in meeting criteria for special education services and that student's behavior in and out of school did not appear to influence student's learning, educational placement, programming or discipline. (P. Ex. 2-8, 2-9)(R. Ex. 16-4, 16-7).
25. The July 2011 FIE found that Student demonstrated a low average overall intellectual ability when compared to same age peers and that student's level of intellectual functioning was consistent with student's adaptive behavior. The July 2011 FIE also found Student was performing within the average range in all academic areas when compared to same age peers. Therefore, the July 2011 FIE also concluded student did not meet eligibility criteria for special education as a student with a learning disability. (P. Ex. 2-6)(R. Ex. 16-5).
26. An ARD convened on August 16, 2011 to review and discuss the results of the July 2011 FIE. Student's mother and grandmother attended the ARD and a parent advocate participated by telephone. School district members of the ARD agreed that Student did not meet eligibility criteria for special education services. Student's mother and grandmother disagreed. The school district advised Student's mother of her right to an IEE. The parent advocate requested the family be provided an opportunity to secure the requisite medical information from Student's physician so student could qualify for special education under the OHI category. The ARD agreed to recess to allow Student's family an opportunity to secure the signed OHI form from Student's physician in order to consider OHI eligibility. (R. Ex. 17-20)(R. Ex. 18). The ARD agreed to reconvene on August 24, 2011. (R. Ex. 17-27).
27. The ARD reconvened on August 24, 2011. There was a dispute over the status of the purported consent from Student's mother for release of medical information from the physician. At the request of the parent advocate the release was faxed to Student's physician. There was a short recess while this task was accomplished. The ARD then continued and Student's mother confirmed her request for an IEE as she continued to disagree with the results of the July 2011 FIE. The LSSP attempted to contact Student's physician during another short recess but was unable to do so. The ARD agreed to recess again to allow the

family to secure a signed OHI form from the physician and reconvene later that day to review it. (R. Ex. 17-20)(R. Ex. 18-1)(R. Ex. 20)(R. Ex. 21).

28. During the August 24<sup>th</sup> ARD the LSSP explained she needed to confer directly with the physician to understand the basis for the physician's diagnosis of ADHD. In her view the evaluation data did not support it and the physician did not have school input or educational records or information in making the diagnosis. Student's family and parent advocate continued to take the position that feedback from the teachers already supported the diagnosis. Two members of the August 24<sup>th</sup> ARD (the AEP principal and an AEP regular education teacher) did not know Student well and were not prepared to decide whether student exhibited an educational need for special education. (Tr. Vol. I., pp. 240-241)(R. 17-20). The family and parent advocate returned to the ARD without a signed OHI form but did present a consultation form by a physician dated August 17, 2011. (R. Ex. 21-1) The school district agreed to provide the FIE test protocols to Student's physician. Without the signed OHI form and an opportunity to confer directly with the physician the ARD again ended in non-consensus. (R. Ex. 17-20, 17-21).
29. The ARD reconvened on August 26, 2011 to discuss the additional information requested from the physician. However, no further medical information was provided. The school district members of the ARD continued to agree Student did not qualify for special education and student's family continued to disagree. Student's mother was again provided with Notice of Procedural Rights and an opportunity to submit an addendum to the ARD documents. The school district also agreed to the parental request for another IEE and to meet again after the IEE was completed. (R. Ex. 22-1, 22-21 to 22-23, 22-27, 22-28, 22-31).
30. The school district responded to the parental request for another IEE with an explanation of the IEE criteria, information about the IEE process and how it works. The school district provided a list of four psychologists who met school district IEE criteria but also stated the parent could select someone of her own choice. The IEE response was sent to Student's mother via certified mail but returned unclaimed. (R. Ex. 23-3, 23-4, 23-7).
31. The parent advocate ultimately faxed a signed and dated OHI form from Student's treating physician to the school district's attorney on October 10, 2011. (R. Ex. 24-1, 24-3). However, by that time the parties were engaged in litigation. A 504 hearing was conducted on October 17, 2011. A decision was issued on November 11, 2011 in favor of the school district. (R. Ex. 25).

## DISCUSSION

### Statute of Limitations

Petitioner does not contend that student's claim of eligibility for special education as a student with disabilities arose beyond the one year statute of limitations rule applied in Texas. Indeed, the claim arose no earlier than the final August 26, 2011 ARD meeting when the parties continued to disagree as to whether the school district had adequate information to determine Student's OHI eligibility for special education under IDEA. It was on that date that Petitioner knew or had reason to know of the alleged action that forms the basis of student's complaint (i.e., the school district's refusal to identify Student as eligible for special education under OHI). *See, 19 Tex. Admin. Code § 89.1151 (c)*.

Therefore, Petitioner's claims related to the OHI eligibility arose on August 26, 2011. Under the one year statute of limitations rule Petitioner had until August 26, 2012 to file a request for hearing on that claim. The due process hearing was filed on January 13, 2012 well within the limitations period.

The conclusion that the claim did not arise until August 26, 2011 did not preclude the introduction of ARD



meetings and evaluations conducted prior to that date as relevant evidence and indeed both parties submitted that evidence at the hearing.

### Prior Resolution Agreement

The parties resolved a prior due process hearing through the mediation process – neither party contests that fact. Furthermore, Petitioner does not raise IDEA claims that arose prior to or on the May 16, 2011 date of the written mediation agreement. Instead, Petitioner’s OHI eligibility claim arose on August 26, 2011 when the school district clearly refused to identify Student as a student with an OHI within the meaning of the IDEA. Therefore, the OHI eligibility claim and other IDEA claims flowing from that are not barred by the release provision of the prior written mediation agreement.

### Eligibility as a Student with OHI

#### General Rule

A free, appropriate public education must be available to any individual child with a disability who needs special education and related services. *34 C.F.R. § 300.101 (c)(1)*. The determination that a child is eligible for special education and related services must be made on an individual basis by the group responsible for making eligibility determinations. *34 C.F.R. § 300.101 (c)(2)*. In Texas that group is the Admission, Review & Dismissal Committee (ARD). *19 Tex. Admin. Code §§ 1040 (b); 89.1050 (a)(5)*. The student must be a “child with a disability” within the meaning of the IDEA to be eligible for special education services in Texas. *19 Tex. Admin. Code § 1040 (a)*.

#### Child With a Disability

A “child with a disability” is a defined term under the IDEA. *34 C.F.R. § 300.8 (a)*. In this case the issue is whether the school district should have identified Student as a student with Other Health Impairment (OHI) -- an eligibility classification recognized by the IDEA. *34 C.F.R. § 300.8 (c)(9)*. OHI under the IDEA means the student has limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment due to chronic or acute health problems such as attention deficit disorder or attention deficit hyperactivity disorder. In addition the health problem must adversely affect the child’s educational performance. *34 C.F.R. § 300.8 (c)(9)(i)(ii); 19 Tex. Admin. Code § 89.1040 (c)(8)*.

#### Evaluation

The ARD must make the eligibility determination on the basis of an evaluation that meets IDEA criteria. *34 C.F.R. §§ 300.8 (a)(2)(i); 300.304 – 300.311; 19 Tex. Admin. Code § 89.1040 (b)*. A multidisciplinary team must collect and/or review the evaluation data in connection with the determination of a student’s eligibility for special education in Texas. *Id.* The multidisciplinary team that collects and/or reviews evaluation data in determining eligibility based on OHI must include not only a licensed specialist in school psychology (LSSP) but also a licensed physician. *19 Tex. Admin. Code §§ 89.1040 (b)(1)(2)(c)(8)*.

### Threshold Issue in this Case

The major issue in this case is the eligibility determination decision made at a series of ARD meetings conducted in August 2011. Based on the results of the July 2011 FIE school district members of the August ARD meetings concluded Student did not meet eligibility requirements for special education once OHI eligibility was raised as a possibility by the parent advocate. Petitioner argues the school district ignored relevant information from Student’s physicians and behavior information from Student’s teachers that supported Student’s identification as a student with ADHD.

### Medical Information

Under the terms of the written mediation agreement the focus of the July 2011 FIE was to determine whether Student was eligible for special education as a student with an emotional disturbance – consideration of whether eligibility might also be established under the OHI classification was not specifically included in the July 2011 FIE. The only medical records available to the LSSP in conducting the July 2011 FIE was the psychiatric evaluation completed by Student’s treating physician at \*\*\*. The psychiatric evaluation did not include a specific diagnosis of ADHD.

Numerous attempts after the initial August 16<sup>th</sup> ARD to secure an ADHD diagnosis from Student’s treating physician were not immediately successful due to communication issues between Student’s family, parent advocate, the school district, and, the physician. A completed OHI form was not available in the August 2011 ARD meetings. The school district was not successful in attempting to communicate directly with Student’s physicians to determine the basis of an ADHD diagnosis.

The medical information available to the school district to support OHI eligibility was somewhat vague when compared to other and rather extensive evidence that Student’s behavior problems arose from ODD and a conduct disorder exacerbated by family-related psycho-social stressors. It is also reasonable to infer from the evidence that at least some of Student’s negative behaviors were related to possible drug use and perhaps \*\*\*.

### Weighing the Evidence

It is true that at least some of Student’s behaviors in school were characterized by the teachers who knew student best as hyperactive and inattentive. It was reasonable for Student’s family to view the teacher feedback as supportive of an ADHD diagnosis and therefore OHI eligibility. On the other hand the preponderance of the evidence also showed those same teachers described a number of other negative and oppositional behaviors that can be characterized as “social maladjustment” behavior. Under the IDEA an emotional disturbance does not apply to children who are socially maladjusted unless they otherwise meet the other criteria for an emotional disturbance. *See 34 C.F.R. § 300.8 (4)(ii).*

Furthermore, all of the evaluation data -- when taken together -- support the reasonable inference that because Student was apparently able to control student’s behavior in certain settings, situations, and with certain people, and that student continued to perform academically -- student did not exhibit characteristics of ADHD across all environments to the degree required for eligibility purposes. In addition student was performing academically commensurate with student’s abilities so that even if student had ADHD it did not seem to adversely affect student’s educational performance. *34 C.F.R. §300.8 (c)(9)(i)(ii).*

Although there is some medical evidence that Student exhibits some characteristics of ADHD the preponderance of the controverting evidence supports the conclusion that student’s behaviors are largely attributable to social maladjustment. Furthermore even if student does have ADHD the preponderance of the evidence showed it did not adversely affect student’s educational performance – a necessary requirement for IDEA eligibility. Petitioner did not meet petitioner’s burden of proof on this issue. *See, Schaffer v. Weast, 546 U.S. 49, 62 (2005).*

### Conclusion

This is not to say that Student is a young \*\*\* free from distress or without any behavioral problems. Student’s mother and grandmother are certainly justified in their deep concern for student’s well-being and student’s social, emotional, and behavioral needs. This is a close case to be sure – but there was simply more evidence than not that Student did not meet OHI eligibility under IDEA. However, it is also clear that Student certainly continues to

exhibit a need for medical services and firm, loving guidance from the adults in student's life. The evidence showed that the school district had some services to meet some of those needs within the regular education program.

It would benefit Student to serve student's time at the JJAEP so student could return to school as soon as possible, rejoin student's friends, \*\*\*, and continue to mature and grow in a positive way. I do not question Student's need for intervention or assistance. Nor do I question the family's need for support. However, based upon the record on file in this case the school district is not legally required to meet those needs or provide that support through special education services under the IDEA.

#### Duty to Provide FAPE

The school district's obligation to provide FAPE arises only when a student is identified as eligible for special education services under the specific classifications recognized by the statute. Because Student does not meet eligibility criteria under IDEA student is not entitled to a free, appropriate public education through special education services. *See, 34 C.F.R. §§ 300.8 (a)(2)(i); 300.101 (c)(1)(2).*

#### JJAEP Placement

The IDEA allows a parent of a child with a disability to appeal a disciplinary placement under an expedited hearing process. *34 C.F.R. § 300.532 (a)(c).* Certain other procedural protections apply in the context of a disputed disciplinary placement. *34 C.F.R. § 300.530.* A child who has not yet been determined to be eligible for special education and who has engaged in conduct that violates a student code of conduct may assert certain IDEA procedural protections if the school district had knowledge that the student was a child with a disability within the meaning of the statute. *34 C.F.R. § 300.534 (a).* A school district is deemed to have knowledge that a student is a child with a disability under certain specified circumstances. However, the school district is *not* deemed to have that knowledge if the student has been evaluated and determined *not* to be a child with a disability within the meaning of IDEA. *34 C.F.R. § 300.534 (b)(c)(2).*

If the school district does *not* have knowledge that the student is a child with a disability the child may be subjected to the disciplinary measures applied to children without disabilities. *34 C.F.R. § 300.534 (d).* That was the case here. At the time of the disciplinary decisions at issue in this case the school district conducted an FIE and an IEE in 2010 and determined student did not meet eligibility criteria. The IDEA also establishes that if a request is made for an evaluation during the time period the student is subjected to the disciplinary placement the student remains in the educational placement determined by school authorities. That placement can include suspension or expulsion. *34 C.F.R. § 300.534 (d)(2)(i)(ii).*

Even if the IDEA litigation that ensued in March 2011 and the agreement to conduct an FIE as a result of mediation can be construed as a request for an evaluation -- school personnel could enforce the JJAEP placement while that evaluation was pending. Because Student was again determined not eligible for special education services following the July 2011 FIE as well as under the previous 2010 FIE and 2010 IEE Student was not entitled to the procedural protections related to disciplinary placement at the JJAEP. *34 C.F.R. § 300.534(d)(1)(2).*

#### Prior Written Notice

The information that a school district must provide to parents under IDEA is specific and includes:

- Notice of evaluation procedures the school district proposes to use;

- Notice that the school district has determined no further evaluation is necessary and that parents may then seek an IEE;
- Notice of procedural safeguards; and,
- Prior notice any time the school district proposes to initiate or change the identification, evaluation or educational placement of the child or the provision of FAPE or refuses to change the identification, evaluation, or educational placement of the child or the provision of FAPE.

*20 U.S.C. § 1415 (b) (6) (A) (B) (c); 34 C.F.R. § 300.511 (f).*

The simple act of delivering the procedural safeguards notice suffices to impute constructive knowledge of parental rights under IDEA whether parents later examine the text to acquire actual knowledge of procedural rights or not. *See, El Paso Ind. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 945 (D.C. Tex. 2008), aff'd in part and vacated on o.g. 591 F. 3d 417 (5<sup>th</sup> Cir. 2009).* The evidence showed that the school district met its obligation to provide Student's mother with the requisite prior written notice when the series of ARD meetings in August 2011 ended in non-consensus over the eligibility issue. The credible evidence showed that Student's mother received Notice of Procedural Safeguards and prior written notice of both the school district's refusal to identify Student as a student with either ED or OHI and its agreement to provide an IEE. The notices included the information required under the IDEA. *34 C.F.R. § 300.503 (b).* There was no credible evidence to the contrary.

#### Laches or Mootness

Because I have resolved the underlying substantive issue of Student's eligibility in favor of the school district there is no need to address Respondent's claim that Student's claims should be dismissed on the basis of laches or mootness.

#### CONCLUSIONS OF LAW

1. Petitioner is not eligible for special education and/or related services under the Individuals with Disabilities Education Act (IDEA) as a student with an Other Health Impairment based upon Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder. *34 C.F.R. § 300.8(a)(c)(9)(i)(ii); 19 Tex. Admin. Code § 89.1040 (c)(8).*
2. Petitioner was not eligible for special education services as a student with a disability and therefore was not entitled to a free, appropriate public education within the meaning of the IDEA. *34 C.F.R. §§300.8 (a);300.101 (c).*
3. Respondent could enforce the disciplinary placement at the local Juvenile Justice Alternative Educational Placement (JJAEP) because Petitioner was not entitled to the procedural protections related to disciplinary decisions under the IDEA. *34 C.F.R. § 300.534.*
4. Respondent fulfilled its legal obligations under the IDEA to provide Petitioner's parent with the requisite prior written notice of its refusal to identify Petitioner as a student with a disability (specifically as a student with an OHI) and of its agreement to provide an IEE upon parental request. *34 C.F.R. §§ 300.503; 300.504.*
5. Petitioner's claims regarding IDEA eligibility under the OHI classification arose within the one year statute of limitations period applied in Texas. *34 C.F.R. 300.511 (e); 19 Tex. Admin. Code § 89.1151 (c).*
6. Petitioner's claims regarding IDEA eligibility under the OHI classification and related claims that logically flow from that claim were not barred by the terms of the May 16, 2011 Resolution Agreement. Petitioner's

claims arose when Petitioner's parent knew or should have known of the action that is the basis of Petitioner's claim. That action occurred after the effective date of the Resolution Agreement. *19 Tex. Admin. Code § 89.1151 (c)*.

### **ORDERS**

Based upon the foregoing findings of fact and conclusions of law it is therefore **ORDERED** that Petitioner's requests for relief are **DENIED**. It is further **ORDERED** that all other items of relief not specifically stated herein are **DENIED**.

**SIGNED the 5<sup>th</sup> day of May 2012**

*/s/ Ann Vevier Lockwood*

Ann Vevier Lockwood

Special Education Hearing Officer

### **NOTICE TO THE PARTIES**

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. *19 Tex. Admin. Code Sec. 89.1185 (p); Tex. Gov't Code, Sec. 2001.144(a) (b)*.

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

**STUDENT,  
bnf PARENT,  
    Petitioner,**

§  
§  
§  
§  
§  
§  
§

v.

**DOCKET NO. 126-SE-0112**

**NORTHSIDE INDEPENDENT  
SCHOOL DISTRICT,  
    Respondent.**

**SYNOPSIS**

**ISSUE:**

Whether school district should have identified \*\*\* school student with history of behavior issues as a student with Other Health Impairment for purposes of special education eligibility under IDEA.

**HELD:       FOR THE SCHOOL DISTRICT**

Eligibility for special education a two-pronged inquiry: first, does student have a disability within the meaning of IDEA (i.e., does student meet criteria for one or more of the eligibility classifications stated in IDEA as assessed using IDEA evaluation procedures?); second, is student in need of special education? Evidence showed that while student exhibits numerous behavioral issues over time it was reasonable to conclude from the preponderance of the evidence that behaviors were related to social maladjustment rather than an emotional disturbance or Other Health Impairment based on ADHD.

Evaluation data both past and present showed student able to control behavior under certain circumstances and situations and with certain people and thus did not exhibit ADHD across all environments to the degree required for eligibility purposes. Vague and sparse medical information from physician did not support diagnosis of ADHD (and thus OHI eligibility) when viewed in light of other controverting evidence that behavior was related to oppositional and conduct disorders exacerbated by psycho-social stressors.

Furthermore, student made academic progress while in school despite behavioral and disciplinary issues and thus even if student had ADHD it did not appear to adversely affect educational performance – a requirement under the IDEA. While teachers and family had good reasons to be concerned about student’s behavior student did not meet burden of proof on eligibility issue.

**34 C.F.R. §§ 300.8 (a) (c) (9); 19 Tex. Admin. Code §89.1040 (c) (8).**

**ISSUE:**

Whether school district failed to provide student with a free, appropriate public education due to its alleged failure to identify student as eligible for special education as a student with OHI.

**HELD:       FOR THE SCHOOL DISTRICT**

Because eligibility resolved in school district’s favor school district had no duty to provide student with FAPE under IDEA. **34 C.F.R. §§ 300.8(a); 300.101 (c).**

**ISSUE:**

Whether school district's decision to place student at local JJAEP was and continues to be appropriate.

**HELD: FOR THE SCHOOL DISTRICT**

Because eligibility resolved in school district's favor student not entitled to procedural protections related to disciplinary placement under IDEA. School district could enforce placement at JJAEP because student not eligible for special education under IDEA. School district not deemed to have knowledge student was student with disability at time of disciplinary decisions at issue because prior evaluations determined student was not eligible under IDEA. **34 C.F.R. § 300.534.**

**ISSUE:**

Whether school district provided parent with requisite prior written notice following ARD meeting which ended in disagreement over eligibility.

**HELD: FOR THE SCHOOL DISTRICT**

Evidence showed parent was provided with requisite prior notice at third and final ARD meeting in series of three ARD meetings that recessed and reconvened as parties worked on resolving eligibility issue. Evidence showed prior written notice provided as to both school district's refusal to identify student as eligible for special education and with its agreement to parental request for IEE. **34 C.F.R. §§ 300.503; 300.504.**

**ISSUE:**

Whether student's IDEA claims should be dismissed as outside one year statute of limitations rule applied in Texas.

**HELD: FOR THE STUDENT**

Student did not allege claims outside of applicable one year limitations period in Texas. Student alleged claims arising on date parent knew or had reason to know that school district refused to identify student as OHI at last ARD meeting in series of three ARD meetings held in August 2011. Student filed request for hearing in January 2012. Student had until August 2012 to file complaint on OHI eligibility claim. Evidence regarding previous ARD meetings and evaluations conducted prior to August 2011 were relevant to eligibility issues and both parties submitted such evidence at the hearing. **34 C.F.R. § 300.511(e); 19 Tex. Admin. Code § 89.1151 (c).**

**ISSUE:**

Whether student's claims were barred by release provision in prior written mediation settlement agreement.

**HELD: FOR THE STUDENT**

Student's claim that school district should have identified student as student with OHI did not arise until final ARD meeting in August 2011 ended in disagreement. Written settlement agreement signed in May 2011 resolved other IDEA claims but not OHI issue. Parent did not know or have reason to know of school district's action that formed the basis of the complaint (i.e., determination that student not eligible under OHI) until ARD meeting in August when school district refused to identify student as OHI after considering available medical information; as such those claims were not barred by release in written settlement agreement. **19 Tex. Admin. Code § 89.1151 (c).**