BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS

STUDENT, bnf PARENT,	§	
Petitioner,	§	
	§	
v.	§	**DOCKET NO. 045-SE-1011**
	§	
KILLEEN INDEPENDENT SCHOOL DISTRICT,	§	
Respondent.	§	

ORDER ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, PLEA TO THE JURISDICTION AND MOTION TO DISMISS

Procedural History

Petitioner filed petitioner's initial request for a due process hearing on October 18, 2011. Petitioner submitted a number of issues for decision in this case. One set of issues were related to a disputed disciplinary placement and whether Student was entitled to certain procedural safeguards afforded students with disabilities in resolving disciplinary issues under the Individuals with Disabilities Education Act (IDEA). The other set of issues were related to Student's eligibility for special education under the IDEA and an alleged failure by the school district to provide Student with a free, appropriate public education within the meaning of the IDEA.

The issues related to Student's disciplinary placement and whether the IDEA's disciplinary procedural safeguards applied to Student were subject to the expedited hearing process under the IDEA. *34 C.F.R. §§ 300.532, 300.533, and 300.534.* The issues related to the school district's alleged failure to evaluate, identify, and appropriately serve Student under the IDEA are subject to the general rules for due process hearings. *34 C.F.R. §§300.508 – 300.515.*

Bifurcated Hearings and Decision of the Hearing Officer (Expedited Hearing)

The two sets of issues were bifurcated. The expedited due process hearing on the disciplinary issues was conducted on November 15, 2011. *The Decision of the Hearing Officer (Expedited Hearing)* was issued December 1, 2011 and is attached to this Order as *Exhibit A* (referred to hereafter as the "expedited hearing decision"). The hearing officer takes notice of the findings of fact and conclusions of law stated in the expedited hearing decision and incorporates and relies on those findings and conclusions for all purposes in this Order. A hearing on Petitioner's remaining issues is currently set for January 10-11, 2012.

Petitioner's Issues

Petitioner's remaining and unresolved issues are:

1. Whether the school district should have evaluated and identified Student as a student with a disability under its IDEA "Child Find" obligations and thus whether Student was eligible for special education services under IDEA; and,

2. Whether the school district failed to provide Student with a free, appropriate public education in the least restrictive environment by:

    A. failing to provide Student with accommodations to address student's academic and behavioral

needs as a student with an Attention Deficit Hyperactivity Disorder (ADHD);

B. failing to provide Student with an individualized accommodation plan as opposed to a "cookie cutter' plan provided to all students with ADHD served by the school district;

C. failing to provide Student with an appropriate educational program to meet student's academic and behavioral needs, such as "Fast Forward Catch Up Math" and other programs established as successful for students with ADHD; and,

D. failing to provide Student with appropriate interventions and accommodations to address student's needs as a target of bullying by students and school district staff.

Respondent's Motion for Summary Judgment, Plea to the Jurisdiction and Motion to Dismiss

Respondent submitted a Motion for Summary Judgment, Plea to the Jurisdiction and Motion to Dismiss on December 9, 2011 (Respondent's Motion). Petitioner submitted petitioner's Response to Respondent's Motion on December 16, 2011. The issues raised by Respondent's Motion are:

1. Whether the school district is entitled to summary judgment on Petitioner's IDEA identification claim as a matter of law because there is no genuine issue of material fact regarding an essential element of Petitioner's claim; i.e., that the school district failed to meet its Child Find obligations under IDEA;

2. Whether any remaining IDEA claims are not ripe for resolution through the hearing process because Petitioner filed petitioner's request for a due process hearing before the school district was given an opportunity to complete the IDEA evaluation and convene an Admission, Review & Dismissal Committee (ARD) meeting;

3. Whether Student is entitled to the procedural safeguards of the IDEA, including the right to a due process hearing, because student is not eligible as a child with a disability within the meaning of the IDEA; and,

4. Whether Petitioner's remaining claims should be dismissed as outside the hearing officer's jurisdiction because those claims arise under Section 504 of The Rehabilitation Act of 1973 (504) and the hearing officer's jurisdiction is strictly limited to issues arising solely under the IDEA;

5. Whether Petitioner's remaining claims should be dismissed under the doctrines of res judicata, collateral estoppel and claim preclusion where Petitioner fully litigated claims asserted in this case in a previous 504 hearing.

Evaluation for Special Education

While the expedited hearing was pending the record established (and the parties confirmed) that the school district was in the process of conducting an evaluation to determine Student's eligibility for special education under the IDEA. Following the expedited hearing decision, and in compliance with the hearing officer's orders in that decision, the school district completed the evaluation, provided a copy of the evaluation report to Student's mother and reviewed the results of the evaluation with her in a one on one conference. (*Email from Respondent's legal counsel, December 16, 2011)(Exhibit B).*

Summary Judgment Standards

A party against whom a claim is asserted may move for a summary judgment in its favor. *Tex. R. Civ. P. 166a (b).* Judgment on the motion will be granted if the record on file in the case establishes there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion. *Tex. R. Civ. P. 166a (c).* A summary judgment may be based on uncontroverted testimonial evidence of an interested witness or of an expert witness if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies and could have been readily controverted. *Id.*

Affidavits in support of the motion may be submitted as long as they are made on the basis of personal knowledge, that the affiant is competent to testify, and that set forth facts that are admissible into evidence. *Tex. R. Civ. P. 166a (f).* Respondent included affidavits from six school district staff members in support of its Motion. The six affidavits met the criteria set by the rule. Petitioner did not submit any controverting affidavits in petitioner's Response to Respondent's Motion.

Threshold Issue: Child Find

Petitioner's threshold issue is whether the school district met its "Child Find" obligations under the IDEA. The IDEA "Child Find" provision establishes an affirmative, on going obligation on the school district to identify, locate and evaluate all children with disabilities residing within its jurisdiction that have or are suspected of having disabilities and in need of special education. *34 C.F.R. § 300.111.* Only a student with a disability found eligible for special education is entitled to a free, appropriate public education under IDEA – thus Petitioner's other IDEA claims hinge on the resolution of this threshold issue. *See, 34 C.F.R. §300.101 (a) (c) (2).*

The IDEA also requires parental consent in order to conduct an initial evaluation to determine special education eligibility. *34 C.F.R. § 300.300(a) (1) (i).* If a parent does not provide that consent the school district may, but is not required to, override the lack of parental consent in a due process hearing or in a mediation. *34 C.F.R. § 300.300 (a) (3) (i).* There is no violation of the IDEA if the parent refuses to provide consent for the initial evaluation or if the school district chooses not to pursue the hearing process to override lack of parental consent.

Specifically, the school district does not violate the requirement to provide the student with a free, appropriate public education by failing to provide the student with special education and/or related services when the parent refuses consent to conduct an IDEA evaluation. *34 C.F.R. § 300.300 (b) (4) (i).* Furthermore, in such circumstances, the school district is not required to convene an ARD to develop an IEP. *34 C.F.R. § 300.300 (b) (4) (ii).*

The record on file in this case, including the findings of fact and conclusions of law issued in the expedited decision *(Exhibit A)*, as well as the evidence on file and in the supporting, uncontroverted affidavits, establish that Student's mother repeatedly refused to provide the requisite consent to allow the school district to evaluate Student to determine special education eligibility when approached by a variety of school district personnel to do so.

The record on file in this case also supports the uncontroverted fact that once Student's mother finally agreed to an IDEA evaluation she initially only provided limited consent to evaluate Student only for an emotional disturbance. This limited consent was not valid because the school district must evaluate Student in all areas related to the suspected disability and conduct a sufficiently comprehensive evaluation in order to identify all areas of need. *34 C.F.R. §300.304 (c) (4) (6).* The record shows there was reason to suspect Student was a student with Other Health Impairment and/or a specific learning disability. The record on file also shows that efforts by school staff to

explain IDEA evaluation procedures and the need for broader parental consent to Student's mother were not successful.

It was not until October 19, 2011 (after the school district attempted to resolve parental concerns through mediation and after Petitioner filed petitioner's request for a due process hearing) that Student's mother finally provided the requisite consent. The record confirms the IDEA evaluation proceeded once the school district received this consent.

Conclusion on IDEA Claims

I conclude there is no genuine issue of material fact on the essential elements of Petitioner's claim that the school district failed to identify Student as a student in need of special education in a timely manner and failed to provide student with a free, appropriate public education; it is uncontroverted that Student's mother refused to provide the requisite parental consent to evaluate Student for special education. The school district does not violate the IDEA under such circumstances. *34 C.F.R. §§ 300.300 (b) (4).* However, because the record does not establish the outcome of the IDEA evaluation that was ultimately completed I draw no conclusions on whether that evaluation was appropriate or if the school district reached the proper conclusion. *If* the school district's evaluation concluded that Student did *not* meet IDEA eligibility Petitioner may have a IDEA claim on that issue alone going forward and to that extent any summary judgment does not include such a potential claim.

Petitioner's Prior Written Notice Argument

In petitioner's Response to Respondent's Motion and throughout the expedited hearing Petitioner argued that the school district failed to provide Student's mother with prior written notice of its proposal to conduct an IDEA evaluation. Petitioner appears to argue that the school district should have provided Student's mother with documentation of its response to intervention efforts as part of the special education referral process before asking for parental consent to conduct the special education evaluation. Petitioner argues the school district failed to do so and therefore Student's mother was justified in refusing to consent to the special education evaluation.

Under IDEA prior written notice must be given to the parent of *a child with a disability* whenever the school district proposes to initiate or change or refuses to initiate or change the identification, evaluation, educational placement or provision of a free, appropriate public education. *34 C.F.R. § 300.503 (a) (emphasis added).* It is important to note that the phrase "child with a disability" has a very specific meaning under the IDEA – the phrase refers to a child who has been evaluated in accordance with the IDEA evaluation procedures and who has been identified as eligible for special education under one or more of the 13 eligibility classifications established by the statute and who, by reason of the disability, needs special education and related services. *34 C.F.R. § 300.8 (a) (c) (1-13).*

This definition means that the procedural protection of the prior written notice requirement does *not* apply to Student or student's mother because student was not evaluated for IDEA eligibility due to the lack of parental consent to conduct that evaluation. Therefore, the school district was not required to provide prior written notice within the meaning of IDEA under the circumstances of this case.

Petitioner's Remaining Claims are Outside the Jurisdiction of the Hearing Officer

The record on file also establishes that Petitioner's remaining claims arise under Section 504 and thus are outside

the jurisdiction of the hearing officer in this case. The jurisdiction of the hearing officer is strictly limited to claims related to the identification, evaluation, educational placement and/or the provision of a free, appropriate public education under IDEA. The record shows that the school district served Student under 504 and continued to do so even while it periodically attempted to secure parental consent for an IDEA evaluation.

The record further establishes that any complaints Petitioner may now have about the educational program provided by the school district arise under Section 504 and not the IDEA. As such, those claims are outside the jurisdiction of the hearing officer. Therefore, I make no ruling or finding nor do I draw any conclusions as to whether Petitioner's 504 claims are precluded by the doctrines of res judicata, collateral estoppel or claim preclusion.

ORDERS

Based upon the foregoing and the record on file to date in this case it is therefore **ORDERED** that Respondent's Motion for Summary Judgment is hereby **GRANTED** with respect to all of Petitioner's claims arising under the Individuals with Disabilities Education Act and that such claims are hereby **DISMISSED WITH PREJUDICE** except as to any claim regarding the outcome of the special education evaluation that was completed by December 2011.

It is further **ORDERED** that Petitioner's remaining claims arising under a statute or law other than the Individuals with Disabilities Education Act are outside the jurisdiction of the hearing officer in this case and that Respondent's Plea to the Jurisdiction is **GRANTED** and those remaining claims are therefore **DISMISSED FOR WANT OF JURISDICTION**.

It is further **ORDERED** that the due process hearing set for January 10-11, 2012 is hereby cancelled and removed from the hearing officer's docket. All other relief not specifically stated herein is **DENIED**.

SIGNED the 27th day of December 2011

/s/ Ann Vevier Lockwood
Ann Vevier Lockwood
Special Education Hearing Officer

EXHIBIT A

BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS

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v.	**§**	**DOCKET NO. 045-SE-1011**
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KILLEEN INDEPENDENT SCHOOL DISTRICT,	**§**	
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DECISION OF THE HEARING OFFICER (EXPEDITED HEARING)

Introduction

Petitioner, Student bnf Parent ("Petitioner" or "Student") brings this action against the Respondent Killeen 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

Student was represented pro se throughout this litigation by student's mother, *** supported by Phyllis Nairn. Respondent was represented by its legal counsel Kelly Shook and Holly Wardell with the law firm of Schwartz & Eichelbaum Wardell Mehl and Hansen, P.C. Dr. ***, Director of Special Education, served as the school district's party representative.

Resolution Session and Mediation

Prior to filing petitioner's request for a due process hearing the parties convened in a mediation session on October 10, 2011. Unfortunately, the mediation was not entirely successful in resolving the issues between the parties. After this litigation was initiated the parties met in a Resolution Session on October 28, 2011. However, the parties were not successful in reaching an agreement during the Resolution Session either.

Procedural History

The initial request for an expedited due process hearing was filed on October 18, 2011. The school district filed its Answer, Plea to the Jurisdiction and Required Notice on October 28, 2011 and an Amended Answer, Plea to the Jurisdiction and Required Notice on November 11, 2011. A prehearing telephone conference was conducted on October 31, 2011. Petitioner clarified and confirmed that petitioner was submitting a number of issues for resolution through the hearing process including issues related to a disputed disciplinary placement as well as issues related to Student's eligibility for special education and whether the school district provided student with an appropriate education under IDEA.

Bifurcated Hearing

The parties agreed to bifurcate the due process hearing – with the expedited hearing on the disciplinary placement issues set for November 15, 2011 and the hearing on the remaining IDEA issues set for January 10-11, 2012 by agreement. An Order on Bifurcated Hearing and Revised Scheduling Order was issued on October 31, 2011 confirming the issues and items of requested relief for both hearings. The Decision of the Hearing Officer on the expedited hearing is due on or before December 2, 2011.

Issues for Expedited Hearing

During the prehearing conference on October 31, 2011 the parties confirmed the following issues for decision under the expedited due process hearing:

3. Whether Student's disciplinary placement into the school district's Disciplinary Alternative Education Program (DAEP) is appropriate under the Individuals with Disabilities Education Act (IDEA); and,

4. Whether the school district is deemed to have knowledge that Student was a student with a disability and thus subject to the disciplinary procedural protections under the IDEA; or,

5. Whether Student is not entitled to the procedural protections under the IDEA because Student's mother did not allow the school district to conduct an evaluation.

Petitioner's Requested Relief

Petitioner seeks the following items of requested relief under the expedited due process hearing:

1. The school district return Student to student's regular education placement at *** School from student's current placement in the DAEP; and,

2. Any other relief deemed equitable and appropriate by the Hearing Officer.

Respondent's Requested Relief

Respondent requests conclusions of law that Student is not entitled to the disciplinary procedural protections of the IDEA because student's mother did not allow the school district to conduct an evaluation to determine student's eligibility for special education.

Findings of Fact

1. Student has attended the school district since pre-kindergarten beginning in August ***. Student struggled academically and was retained in *** grade. (Respondent's Exhibit 2)(referred to hereafter as "R. Ex. ___"). Student was ultimately identified as a student with attention deficit disorder – inattentive type (ADD) in April 2008 by a private psychologist. (R. Ex. 2).

2. The psychologist noted Student had problems with attention and concentration, was highly distractible and had significant problems with written language. Student was also experiencing considerable anxiety as a result of ***. The psychologist recommended the school district accommodate Student's needs under Section 504. (R. Ex. 1).

3. A grade placement committee met on July 30, 2008 and decided to promote Student from *** to *** grade even though Student had not been successful in passing the TAKS test. A referral for special education evaluation was also discussed at the grade placement committee meeting. Student's mother refused consent for the special education evaluation at that meeting. (R. Ex. 1 and 2) (Transcript Volume I., p. 77) (referred to hereafter as "Tr. Vol. I., p. ___").

4. A 504 Committee also met on the same day and concluded Student was eligible for regular education placement with 504 accommodations. The 504 Committee recommended a number of instructional interventions. The campus committee members of the 504 Committee also recommended a special education referral for Student. Student's mother did not agree. (R. Ex. 1 and 2) (Tr. Vol. I, pp. 76-77).

5. Student attended *** School from August 2008 until February 2009 but Student was failing *** grade. Student withdrew from the school district and enrolled in *** for the remainder of the school year. (R. Ex. 2). Student was placed into a *** grade class at parental request even though Student had not passed *** grade. Despite implementing a number of interventions the private academy had concerns over Student's difficulties at the school. The administrator of the academy also recommended an evaluation to determine whether Student was a student with a disability. (R. Ex. 17).

6. Shortly thereafter Student withdrew from *** and re-enrolled in the school district at ***. Student attended *** from April ***, 2009 to the end of the school year in June 2009. (Petitioner's Exhibit 5)(referred to hereafter as "P. Ex. ___")(R. Ex. 17) (Tr. Vol. I., p. 13).

7. The principal at *** also recommended a special education evaluation after reviewing Student's educational records and hearing teacher concerns. (Tr. Vol. I., pp. 194, 196-198). This recommendation was not received well by Student's mother who filed a grievance against the principal objecting to the way the principal approached the conversation about special education testing. (R. Ex. 2) (Tr. Vol. I., pp. 195-196).

8. Over the years, Student has attended *** different schools within the school district and changed campuses *** times. (Tr. Vol. I., p. 76)(R. Ex. 12). Student has a history of both academic and behavioral difficulties throughout student's time in the school district. The school district attempted to meet Student's needs under 504. Nevertheless Student continued to struggle. (P. Ex. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 19) (R. Ex. 2, 15).

9. It is school district policy and practice to secure informed parental consent before proceeding with a special education referral. Typically, an educational diagnostician meets with the parent after the initial referral packet is completed in order to explain what informed consent means and to ensure that the parent understands what is contemplated by the evaluation and that the parent agrees. (Tr. Vol. I., pp. 46-47, 92). A special education evaluation cannot proceed without securing parental consent. (Tr. Vol. I., pp. 90-91). On each campus there were school district personnel available to explain the procedures for securing informed parental consent to Student's mother. (Tr. Vol. I., pp. 64, 76).

10. Numerous attempts to secure parental consent to evaluate Student for special education were made by

the school district over the years including conferences with campus principals and at every 504 meeting beginning in 2008 but these efforts were not successful. Student's mother consistently refused to provide consent for a special education evaluation. (P. Ex. 7, 8)(R. 7, 10)(Tr. Vol. I., pp. 47-48, 64, 75-76, 95, 100-101, 120-121, 169-170, 186-187, 193-195, 210, 218-219, 236-237, 239, 275-276, 287-288)(R. Ex. 1, 8, 9, 10).

11. Student's mother continued to resist these recommendations. Instead, she felt all available and appropriate response to intervention (RTI) strategies should be given a chance to work first before considering the need for a special education evaluation. (R. Ex. 2) (Tr. Vol. I, pp. 129, 133, 218-219, 220-221, 237). Student's mother also insisted on reviewing documentation from the school district showing its efforts at implementing the RTI strategies. However Student's mother felt the school district was never able to provide her with the requested documentation. (Tr. Vol. I, pp. 135-136, 200, 289-90).

12. The school district considered filing a due process hearing to override the lack of parental consent to evaluate Student for special education. However, special education staff had a number of concerns with taking that approach. First, filing a lawsuit would require going to the school board. Second, Student's mother ***. Third, special education staff feared Student's mother would not consent to special education services even if the school district prevailed at the hearing given her long history of resistance to special education testing. (Tr. Vol. I., pp. 174-175).

13. By April 2011 Student's persistent misconduct led to a recommendation by campus administration that student be placed in the school district's DAEP at *** School. A manifestation determination review was conducted on or about April ***, 2011. (P. Ex. 9, 13, 18) (R. Ex. 8) (Stipulation of Fact No. 1) (Tr. Vol. I., p. 124).

14. Student was placed in the DAEP on or about April ***, 2011 for truancy, conduct toward others, being tardy, and, disruptions in class. (Stipulation of Fact No. 2)(Tr. Vol. I., pp. 124-125). A referral for special education evaluation was discussed at a 504 meeting conducted shortly after Student enrolled at the DAEP. Student's mother again refused to provide consent for the special education evaluation. (P. Ex. 10) (R. Ex. 8, 9) (Tr. Vol. I., pp. 79-80).

15. A review of Student's disciplinary placement was conducted on or about October ***, 2011. (Stipulation of Fact No. 4)(Tr. Vol. I., p. 125). Student was to complete the program at the DAEP by January ***, 2012. Failure to do so leads to an expulsion hearing. (P. Ex. 18). Student continued to remain in the DAEP as of the date of the expedited due process hearing. (Stipulation of Fact No. 3)(Tr. Vol. I., p. 125). Student is having difficulty with student's behavior at the DAEP. (P. Ex. 4, 13).

16. Student's mother provided conditional, limited consent in September 2011 for an emotional/behavioral evaluation. This was insufficient for purposes of conducting an evaluation for special education. (P. Ex. 22) (R. Ex. 11, 14) (Tr. Vol. I., pp. 171, 173). School staff met at least twice with Student's mother to discuss the evaluation, answer questions, and provide whatever information Student's mother needed in order to feel comfortable about the special education evaluation process. (R. Ex. 11, 14) (Tr. Vol. I., pp. 45, 47, 143, 172, 261-263).

17. Prior to filing the due process request the parties met in a mediation session on October 10, 2011 but it was not successful. (Tr. Vol. I., pp. 44-45, 172). It was not until October 19, 2011 that Student's mother finally provided the requisite full parental consent for a special education evaluation. (R. Ex.

14) (Tr. Vol. I, p. 173).

18. A special education evaluation was in progress at the time of the expedited due process hearing but was not yet completed. (Tr. Vol. I., pp. 175-176, 179, 263-264, 266). Student's mother needs to submit sociological data, a few more tests need to be administered by the educational diagnostician, and teacher protocols need to be collected before the special education evaluation will be complete. (Tr. Vol. I., pp. 263-264, 266). The testing is being conducted over several days at parental request. The testing has been delayed because Student has not been attending school and has not been readily available to school personnel. (Tr. Vol. I., p. 175).

19. A 504 hearing was conducted on May 24, 2011 that considered a number of issues including whether the school district properly implemented Student's 504 plan and behavior intervention plan. The 504 hearing officer also considered whether Student's placement in the DAEP was proper or whether the behaviors at issue were "linked to student's disability." (R. Ex. 12).

20. The 504 hearing officer concluded the school district followed the proper procedures and that the manifestation determination and disciplinary placement decisions were both appropriate. (R. Ex. 12) (Tr. Vol. I., pp. 79, 147-148). A second request for a 504 hearing was dismissed for failure to state a claim upon which relief could be granted. (R. Ex. 13).

Discussion

A parent of a child with a disability may appeal a disciplinary placement and/or manifestation determination decision under IDEA through the due process hearing procedure. *34 C.F.R. §300.532.* The procedural protections afforded by the disciplinary appeal provisions of the IDEA may extend to a student who has not yet been determined to be eligible for special education and who has engaged in a violation of a code of student conduct only if the school district had knowledge that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred. *34 C.F.R. § 300.534 (a).*

The school district is deemed to have knowledge that the student is a student with a disability if:

- The parent expressed concern in writing to supervisory or administrative personnel or to a teacher that the student is in need of special education;
- The parent requested an evaluation for special education; or,
- A teacher or other school district personnel expressed specific concerns about a pattern of behavior demonstrated by the student directly to the school district's director of special education or other supervisory personnel.

34 C.F.R. § 300.534 (b) (1)-(3).

However, a school district is *not* deemed to have the requisite knowledge if the parent has not allowed a special education evaluation or has refused special education services. *34 C.F.R. § 300.534 (c).* In that case, the student may be subject to the same disciplinary measures as applied to children without disabilities who engage in comparable behaviors. *34 C.F.R. § 300. 534 (d) (1).*

Unfortunately the evidence demonstrated that Student's mother repeatedly refused consent for Student to be evaluated for special education when approached by a variety of school district personnel with a request to do so.

While it is understandable that Student's mother advocated for implementing a number of instructional interventions before considering special education, the evidence also showed that Student continued to experience academic and behavioral difficulties despite the efforts of both home and school to address them.
Certainly Student's mother is deeply concerned with Student's prolonged placement and continuing behavior problems at the DAEP. However, whatever the source of the resistance to special education, it is reasonable to infer from the evidence that Student's mother did not provide the requisite consent for testing until she realized the need for IDEA procedural protections when Student ended up in the school district's disciplinary placement and after she was unsuccessful in securing an administrative remedy under 504.

Under these facts I conclude that the school district is *not* deemed to have knowledge that Student was a student with a disability prior to the code of conduct violations that form the basis of student's disciplinary placement. Therefore, Student is *not* entitled to the procedural protections of IDEA for appealing a manifestation determination and disciplinary placement. *34 C.F.R. §§ 300.534 (c) (d) (1).*

The evidence also showed that once Student's mother finally provided the requisite consent the school district began the process of completing a full, individual evaluation for special education. The school district is now under an obligation to complete the evaluation in an expedited manner. *34 C.F.R. § 300.534 (d) (2) (i).* The evidence showed the school district needs to complete some additional testing, gather teacher protocols, and secure sociological data from Student's mother in order to finish the evaluation.

Completing the evaluation and conducting an ARD meeting to review the results of the evaluation afford both parties the best opportunity to address Student's needs and make sound educational decisions to support Student in being more successful at school. If the evaluation determines Student is a student with a disability under IDEA, the school district must provide student's with special education and related services, including reconsideration of whether the DAEP continues to be an appropriate placement. *34 C.F.R. §§ 300.8 (a) (c), 300.534 (d) (iii).*

Conclusions of Law

1. The school district is not deemed to have knowledge that Petitioner was a student with a disability prior to the code of conduct violations that form the basis of the disciplinary placement at issue because Petitioner's parent refused to allow the school district to conduct an evaluation for special education eligibility under IDEA. *34 C.F.R. § 300.534 (c) (1) (i).*

2. The procedural protections afforded by the disciplinary appeal provisions of the IDEA do not extend to Petitioner because the school district is not deemed to have the requisite knowledge that Petitioner was a student with a disability before the behavior that precipitated the disciplinary action occurred. *34 C.F.R. § 300.534 (b) (c).*

3. The school district's exercise of its discretion in applying the same disciplinary measures to Petitioner that it applies to students without disabilities who engage in comparable behaviors was lawful under the IDEA. *34 C.F.R. § 300.534 (d) (1).*

4. The school district must conduct the agreed upon evaluation for special education in an expedited manner. *34 C.F.R. § 300.534 (d) (2) (i).*

5. If the evaluation determines Petitioner qualifies as a student with a disability under IDEA the school district must provide Petitioner with special education and related services, including reconsideration of whether placement at the DAEP continues to be appropriate. *34 C.F.R. §§ 300.8 (a) (c); 300.534 (d) (iii).*

ORDERS

Based upon the foregoing findings of fact and conclusions of law it is therefore **ORDERED** that Petitioner's appeal of the manifestation determination and disciplinary placement at issue in this expedited hearing is **DENIED** and that Petitioner's request to be returned to the regular middle school campus is also **DENIED**.

It is further **ORDERED** that the school district shall complete the evaluation for special education, including a written report of the evaluation, and convene an Admission, Review & Dismissal Committee meeting (ARD) for the purpose of reviewing the results of the evaluation no later than the first day of the spring semester 2012 and/or at a date and time mutually agreed upon by the parties.

It is further **ORDERED** that Petitioner and petitioner's mother will make every reasonable effort to cooperate with the school district in completing the special education evaluation.

It is further **ORDERED** that the school district shall provide Petitioner's mother with a copy of the evaluation report and review the results of the evaluation in a one-on-one conference with the parent on a date mutually agreed upon by the parties but prior to the ARD meeting.

It is further **ORDERED** that the deadlines to complete the evaluation, issue a written report, and convene an ARD meeting shall be extended by one school day for every day that Petitioner fails to be available to complete any necessary testing and/or Petitioner's mother delays in submitting the
information requested by the school district in order to complete the special education evaluation.

All other relief not specifically stated herein is **DENIED**.

SIGNED the 1st day of December 2011

/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).*

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KILLEEN INDEPENDENT SCHOOL DISRICT,	**§**	
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SYNOPSIS (EXPEDITED HEARING)

ISSUE:

Whether school district deemed to have knowledge that student currently served under § 504 was a student with a disability and therefore entitled to procedural protections for appealing manifestation determination and disciplinary placement under Individuals with Disabilities Education Act.

HELD:

For the school district. School district not deemed to have knowledge that student was a student with a disability prior to the code of conduct violations that were the basis of the manifestation determination and disciplinary placement decisions at issue because student's parent refused to allow the school district to conduct an evaluation for special education eligibility.

34 C.F.R. §§ 300.532, 300.534 (c) (1)(i)

ISSUE:

Whether procedural protections afforded by disciplinary appeal provisions of the IDEA extend to student currently served under § 504 and not yet identified as a student with a disability under IDEA.

HELD:

For the school district. Procedural protections to appeal manifestation determination and disciplinary placement do not extend to student where school district not deemed to have the knowledge that student was a student with a disability prior to the misconduct at issue where student's parent consistently refused to allow special education evaluation.

34 C.F.R. §§ 300.532, 300.534 (a) (c)

ISSUE:

Whether disciplinary placement into school district's Disciplinary Alternative Education Program (DAEP) was appropriate for student served under § 504.

HELD:

For the school district in part and the parent in part. Where school district not deemed to have knowledge that student was a student with a disability prior to misconduct at issue student may be subject to same disciplinary measures as applied to students without disabilities who engage in comparable behaviors.

34 C.F.R. § 300.534 (d)(1).

However, once parent consented to special education evaluation during the time period student continued to be subjected to disciplinary placement the evaluation must be completed in an expedited manner. Until evaluation is completed student remains in the disciplinary placement. School district ordered to complete evaluation, issue evaluation report, convene meeting with parent to review evaluation, and convene ARD for purpose of reviewing and discussing the evaluation.

If evaluation determines student qualifies as a student with a disability under IDEA school district must provide special education and related services, including reconsideration of whether disciplinary placement continues to be appropriate.

34 C.F.R. §§ 300.8 (a)(c), 300.534 (d)(1)(2)(i)(ii)(iii).

EXHIBIT B