

STUDENT, <i>b/n/f</i>	§	BEFORE A SPECIAL EDUCATION
PARENTS,	§	
	§	
Petitioner & Counter-Respondent,	§	
	§	
V.	§	HEARING OFFICER
	§	
McALLEN INDEPENDENT	§	
SCHOOL DISTRICT,	§	
	§	
Respondent & Counter-Petitioner.	§	FOR THE STATE OF TEXAS

DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

**I.
STATEMENT OF THE CASE**

Petitioner, Student *b/n/f* Parents (“Student” or “Petitioner”), filed a Request for Due Process Hearing (“Complaint”) with the Texas Education Agency (“TEA”), requesting a Due Process Hearing pursuant to the Individuals With Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. §1400 *et. seq.*, contending that during the past year, Respondent, McAllen Independent School District (“Respondent” or “MISD” or “the District”), denied Student a free, appropriate, public education (“FAPE”) as follows:

A. STUDENT’S ISSUES:

1. Respondent failed in its “child find” duty to evaluate and identify Student in all areas of suspected disability, to determine student’s special education classification, and to develop and implement an appropriate education program and placement;
2. Respondent failed to provide Student with forms for student’s doctors to complete related to Student’s conditions and disabilities; and
3. Respondent failed to adequately protect Student from excessive bullying.

B. STUDENT’S REQUESTED RELIEF:

1. Respondent will conduct all evaluations related to Student’s suspected disabilities;

2. Respondent will determine that Student is a child who qualifies for special education and related services;
3. Respondent will develop and implement an appropriate Individual Education Plan (“IEP”) to meet Student’s unique and individual needs and to educate student in the Least Restrictive Environment (“LRE”), and
4. Respondent will provide Student one (1) year of compensatory educational services, or an amount of compensatory educational services deemed appropriate by the Hearing Officer.

C. RESPONDENT’S COUNTER-CLAIM ISSUE:

Respondent seeks affirmative findings that the full and individual evaluation (“FIE”) it performed on Student is appropriate, that Student does not qualify as a child with a disability under IDEIA, and that MISD does not have to pay for the independent psychological evaluation obtained by Student in March 2012.

II PROCEDURAL HISTORY

Student filed student’s Complaint on September 1, 2011. On that same date, TEA assigned the case Docket No. 002-SE-0911 and assigned the matter to the undersigned Hearing Officer. The undersigned Hearing Officer sent the Initial Scheduling Order to the parties on September 6, 2011, stating that the pre-hearing telephone conference would convene on September 22, 2011, that the Due Process Hearing would take place on October 14, 2011, and that the Decision would issue by November 14, 2011. Due to conflicting schedules the pre-hearing telephone conference was re-scheduled to September 26, 2011.

The parties participated in a Resolution Session on September 13, 2011, but did not resolve the due process issues.

On September 26, 2011, the parties convened the pre-hearing telephone conference. In attendance were the following: 1) Mr. Christopher Jonas, Student’s counsel; 2) Mr. Roland Ramirez, Assistant to Mr. Jonas; 3) Ms. Cynthia Buechler, Respondent’s counsel; 4) the undersigned Hearing Officer; and 5) the court reporter, who made a record of the telephone conference. The parties discussed the issues that had to be addressed prior to the Due Process Hearing: 1) Respondent must provide consent forms to Student’s Parents, who must sign these forms and return them to Respondent; b) the parties must cooperate in conducting the FIE; c) Respondent must provide copies of the FIE to Student’s counsel prior to the Admission, Review, and Dismissal Committee (“ARDC”) meeting; d) Student must provide Respondent with a description of the requested compensatory services prior to the ARDC meeting; and e) the parties must convene an ARDC meeting to review the FIE prior to the Due Process Hearing. The parties re-scheduled the Due Process Hearing for December 13-14, 2011.

On November 30, 2011, Student's counsel requested a continuance of the December 13-14, 2011, Due Process Hearing for medical reasons. Finding good cause, the undersigned Hearing Officer granted the continuance and asked the parties to provide dates for a second pre-hearing telephone conference to re-schedule the Due Process Hearing.

On December 13, 2011, the parties convened the second pre-hearing telephone conference. In attendance were the following: 1) Mr. Christopher Jonas, Student's counsel; 2) Mr. Roland Ramirez, Assistant to Mr. Jonas; 3) Ms. Cynthia Buechler, Respondent's counsel; 4) the undersigned Hearing Officer; and 5) the court reporter, who made a record of the telephone conference. The Due Process Hearing was re-scheduled to March 7-8, 2012.

On December 14, 2011, Respondent notified the undersigned that Respondent was not available on March 7-8, 2012, for the hearing. The parties exchanged emails and agreed to re-schedule the Due Process Hearing on March 27-28, 2012.

On February 9, 2012, Respondent's counsel requested an unopposed continuance of the March 27-28, 2012, Due Process Hearing due to the District's state achievement testing period. Finding good cause, the undersigned Hearing Officer granted the continuance and re-scheduled the Due Process Hearing to May 2-3, 2012, dates that were provided by the parties.

Also, on February 9, 2012, Respondent filed its counter-claim to defend the appropriateness of its FIE.

The Due Process Hearing convened on May 2, 2012, and concluded that day but for the telephone testimony of one of Student's witnesses, who failed to attend the Due Process Hearing pursuant to a subpoena. Both parties introduced documentary evidence; both parties called several witnesses and conducted cross-examination. Student's final witness testified via telephone on May 21, 2012. At the conclusion of that testimony, the Hearing Officer concluded the hearing and the parties agreed to a post-hearing briefing schedule: briefs would be filed by June 19, 2012, and the Decision would issue on July 10, 2012. This schedule was modified to allow Student extra time to file student's brief and due to the Hearing Officer's illness, the Decision Deadline was extended to July 11, 2012.

¹ References to the Due Process Hearing Record are identified as follows: "T.1:#" refers to the Certified Court Reporter's Transcription of testimony made on May 2 and 21, 2012, which consists of one (1) volume. The numbers following the Volume 1 designation refer to the referenced pages of testimony. "P.:#:#" refers to Petitioner's Exhibits by number and page; "R.:#:#" refers to Respondent's Exhibits by number and page.

III. FINDINGS OF FACT

1. MISD is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing FAPE under IDEIA and its implementing rules and regulations.
2. Student is a ***-year-old *** who resides with student's Parents, *** within the jurisdictional boundaries of MISD. Student just completed the *** grade. MISD does not provide Student with special education and related services. Student has never qualified for special education and related services.
3. Student has been diagnosed with severe dyspepsia (indigestion), ***, and mild myopia/astigmatism (R.3:4).
4. Student has passed all of student's classes since *** grade (R.5:1-3; R.6:1-2). In spring 2010, Student passed both the math and reading parts of the Texas Assessment of Knowledge and Skills ("TAKS") (R.6:2). In spring 2011, Student passed *** of the TAKS but did not pass *** (R.6:1).
5. Student's Parents reported student and adult bullying incidents in school years 2010-2011 and 2011-2012. They accuse the District administration of not protecting their *** from these bullying incidents. The Parents blamed one of Student's teachers for student's *** of the spring 2011 TAKS. The Parents accused the teacher of tampering with the test, an accusation that was investigated but not substantiated. During the hearing, the Parents blamed this same teacher for creating such anxiety in Student that student was too stressed to pass the TAKS. The specific claim at the hearing was that this teacher made Student wait until the day before the TAKS before informing student that student would be taking the test in her room, as requested by Student's Parents. Additionally, the Parents accused numerous other staff and teachers of bullying Student. None of these allegations were proven.
6. Student's Parents believe that Student should be classified under a special education eligibility category because Parents believe Student has an anxiety disorder that is affecting student's education. Per the Parents, Student becomes very anxious and overwhelmed when student has a lot of homework; student becomes fearful that student will not complete the work. Parents also believe that Student becomes anxious over being mistreated at school by bullying adults. They describe Student as being very sensitive and having low self-esteem. The Parents believe that student's grades, ranging between the *** and ***, are far below student's ability and exemplify the effect student's anxiety is having on student's performance. Student's *** TAKS in spring 2011 was the catalyst for this due process proceeding.
7. The Parents requested an FIE with a psychological evaluation and a counseling

component in September 2011 (R.3:29). Upon its receipt of written consent, MISD conducted Student's FIE and issued the Report on November 3, 2011 (R.3).

8. Student's FIE was conducted by a multidisciplinary team that administered assessments of Student's cognitive, adaptive, academic, and emotional functioning in October 2011 (R.3). Broad cognitive abilities were assessed by the diagnostician, ***, using the Kaufman Assessment Battery for Children, Second Edition ("KABC-II") and the Woodcock Johnson III Tests of Cognitive Abilities ("WJ-III"). A subtest score below 85 indicates cognitive deficits. Student was assessed on the following subtests, three of which indicated normative cognitive deficits:

Short-Term Memory (*)**: the ability to apprehend and hold orally presented information in immediate awareness and then use it within a few seconds; the process has a significant relationship to reading, writing, and math;

Visual Processing (*)**: the ability to generate, perceive, analyze, synthesize, manipulate, transform, and think with visual patterns and stimuli, including the ability to store and recall visual representations; this process is related to visualization abilities and math achievement;

Long-Term Storage and Retrieval (*)**: the ability to store information in long-term memory and to fluently retrieve it later through association; this process has a significant relationship with reading, writing, and math;

Fluid Reasoning (*)**: mental operations that an individual uses when faced with a relatively novel task that cannot be performed automatically; these skills are needed to efficiently solve abstract reasoning problems and are related to writing, reading comprehension, and math problem-solving;

Crystallized Intelligence (*)**: the ability to communicate one's knowledge and the ability to reason using previously learned experiences and procedures; the process has a strong and consistent relationship to reading, writing, and math, learning vocabulary, answering factual questions, and comprehending oral and written language;

Auditory Processing (*)**: the ability to perceive, analyze, and synthesize patterns among auditory stimuli; this skill is necessary for reading, writing, acquiring phonics, sequencing sounds, listening, learning foreign language, and musical skills;

Processing Speed (*)**: the ability to fluently perform cognitive tasks automatically; this skill is necessary for reading, writing and math,

completing assignments on time, processing information quickly, taking timed tests, and copying from the board.

Student scored below 85 on the *** and *** subtests. The LSSP offered suggestions for interventions in these areas (R.3:7-9).

9. Student's adaptive behavior was assessed informally and determined to be age-appropriate (R.3:9).

10. Student was administered the WJ-III Test of Achievement to measure student's academic achievement. Standard scores below 85 are considered to be normative academic weaknesses. The LSSP administered the following:

Basic Reading Skills (*)**: measures basic reading skills, sight vocabulary, phonics, and structural analysis;

Reading Comprehension (*)**: measures reading comprehension, vocabulary, and reasoning;

Reading Fluency (*)**: measures the ability to quickly read simple sentences, decide if they are true, and then circle "yes" or "no";

Math Calculation (*)**: measures computational skills and basic mathematical skills;

Math Reasoning (*)**: measures mathematical knowledge and reasoning;

Written Expression (*)**: measures written expression and fluency.

Student did not manifest below-grade academic achievement in reading or math (R.3:12).

11. The assessments revealed that Student does not need assistive technology ("AT") (R.3:12); student does not meet the criteria for a specific learning disability ("SLD") (R.3:12 & 15); and student does not exhibit educationally relevant medical characteristics (R.3:18-19).

12. Dr. *** performed the requested psychological assessment. Dr. *** interviewed Student for two (2) hours; she observed Student for an additional two (2) hours in the school environment; she interviewed Student's Parents and obtained information from student's teachers. Dr. *** noted that Student had to be re-directed several times in the classroom, although student responded well to such re-direction and engaged student's teacher and peers.

13. Student, student's Parents, and present/former teachers completed the Behavior

Assessment System for Children, Second Edition (“BASC-2”) to rate Student’s behavioral and emotional domains (R.3:32). Student’s Parents reported concerns with anxiety, depression, somatization, adaptive skills, and resiliency (R.3:32-34). One of Student’s teachers indicated concerns in the areas of hyperactivity, somatization, attention problems, learning problems, school problems, bullying and executive functioning (R.3:34). Student did not indicate any significant issues on this assessment, although the “Lie” Index on the BASC-2 Self-Report and the Revised Children’s Manifest of Anxiety Scale (“RCMAS”) suggested that student may have responded to certain questions in the way student wanted others to view student (R.3:35). On other measures, Student did not indicate clinically significant symptoms of depression (R.3:33). Student alluded to getting scared and nervous with different things, although it appeared that only very specific people or situations cause Student to feel this way. In describing the bullying incidents, Student presented stories that were conflicting and inconsistent and did not appear to affect Student’s overall functioning (R.3:35). Although Student described some feelings of anxiety, they did not appear to be clinically significant and evident across settings (R.3:35).

14. Dr. *** determined that Student does not meet disability criteria as a student with ED (R.3:35). She made several recommendations for implementation in the classroom and at home that were aimed at addressing student’s self-concept issues, anxiety, and attention (R.3:35).
15. Student was assessed for counseling as a related service by special education counselor, *** (R.3:23). The counselor interviewed Student, who reported that student was enjoying school and had very nice teachers. Student has friends and does not participate in any extracurricular activities, although student is interested in participating in *** (R.3:23-24). Student reported that student used to participate in counseling and that student liked the counselor, but student no longer meets with her and did not know the reason for that (R.3:24). The counselor observed Student in recess, reading, homeroom, and physical education. She observed that Student is accepted by student’s peers; student accepted re-direction from teachers; student is able to follow directions and instructions; student is compliant, able to stay focused, although at times student appeared hesitant to start a task; Student is able to work in group with peers (R.3:24).
16. Also included in the counseling assessment was the Behavior Evaluation Scales (“BES-3”), an evaluation completed by Student’s teachers and student’s Parents. Problems were reported in some of the subscales:

Learning Problems: measures behaviors conducive to learning, study habits, assignment and homework completion, work habits, academic performance, memory and comprehension skills, and skills in following oral and written directions. Student’s teachers reported concerns regarding Student’s responding too quickly and impulsively to questions

about academic material (R.3:25). The Parents reported more severe problems at home in the areas of difficulty with short-term memory; understanding abstract concepts; understanding what student sees, hears, reads; short attention span; problems with distraction, carelessness, and irresponsibility in maintaining organization (R.3:25);

Interpersonal Difficulties: assesses social skills conducive to the formation of positive relationships with peers and teachers, such as fighting; making inappropriate comments; agitation or provocation of other students; withdrawal behavior; and lack of acceptance by the child's peers. Student's teachers reported only one (1) concern with Student's disruption of the work of other students (R.3:25). Student's Parents did not report any concerns in this area (R.3:25);

Inappropriate Behavior: assesses atypical behaviors in the educational environment, such as attendance, stealing, predictability, sexual behavior, cheating, and rule-following. Two (2) of Student's teachers expressed concerns in off-task behaviors. Student's Parents expressed concerns about inappropriate behaviors at mealtime, such as making noises, playing with food, and playing with utensils. The Parents also reported that Student does not perform chores without reminders and/or assistance (R.3:26);

Unhappiness/Depression: measures the existence of a pervasive mood of dissatisfaction and negative feelings resulting from personal or school related experiences, such as self-blame, difficulty accepting suggestions or constructive criticism, suicidal comments, and lack of affect. Neither Student's teachers nor Parents noted concerns in this area (R.3:26);

Physical Symptoms/Fears: measures behaviors representing a negative reaction to personal or school experiences, such as complaints about physical illnesses, self-injury, temper tantrums, nervous habits, unusual speech habits, tremors, stammering, shaking, or excessive fears. One (1) of Student's teachers reported that Student engages in excessive or unnecessary body movements and self-stimulating behaviors such as hair twisting, nail biting, twirling objects. Student's Parents noted concerns related to school, meeting new people, and trying new experiences (R.3:26).

The assessor determined that Student does not qualify for counseling as a special education related service (R.3:27).

17. Student's ARDC convened on January 26, 2012, to review Student's FIE (R.2:8). The District members of the Committee determined that Student does not qualify for special education and related services (R.2). Student's Parents disagreed and presented the Committee with an Other Health Impairment ("OHI") Eligibility Form, completed by Student's doctor, Dr. ***. The OHI Form appeared to

diagnose Student with a Learning Disorder, NOS (“LD-NOS”), Attention Deficit Hyperactivity Disorder, Inattentive Type (“ADHD”), and Generalized Anxiety Disorder (“GAD”) (R.2:14). Dr. *** testified that he did not use any formal or informal assessments to make these diagnoses; Dr. *** completed the OHI form without any school information. These diagnoses were based upon information provided by Student’s Parents (T.1:313-14). Dr. *** prescribed medication for Student for anxiety and attention; Dr. *** did not make a recommendation that Student is ED (T.1:313-15).

18. The Committee considered the OHI Form but declined to accept the diagnoses. Student requested an Independent Educational Evaluation (“IEE”) at public expense, which the ARDC denied (R.2:2).
19. Student obtained an outside psychological evaluation from Dr. *** on March 15, 2012 (P.49:1). Dr. *** conducted the evaluation at her office using the following sources of information: information from school staff via school documents solely; interview of Student and student’s Parents; behavioral observation; review of medical records; and administration of a checklist to the Parents (P.49:2). Dr. *** spent approximately one (1) hour with the Student and student’s Parents and never interviewed any school personnel.
20. Dr. *** interviewed Student, who was cooperative but timid. Dr. *** noted that student’s eye contact was normal and student’s affect was appropriate. Student’s expressive and receptive language appeared to be within the normal limits. Student indicated that school was very frustrating to student, particularly in reading. Student discussed bullying as a concern as well as bullying incidents that occurred when student was in the *** grade involving a teacher or teachers (P.49:2).
21. Dr. *** used only one (1) assessment instrument, the Achebach Child Behavior Checklist, which was completed by Student’s Parents. This checklist is used to assess internalized and externalized behaviors, including syndromes, such as a) Withdrawn; b) Somatic Complaints; c) Anxious/Depressed; d) Social Problems; e) Thought Problems; f) Attention Problems; g) Delinquent Behavior; and h) Aggressive Behavior (P.49:2). Dr. *** reported that Student scored in the “clinical range” in the areas for Somatic Complaints, Attention Problems, and Anxious/Depressed Behaviors. Dr. *** noted that Student was apparently repressing some of student’s anxiety at school and releasing student’s feelings at home. She noted that Student is impulsive and lacks an appropriate level of attention and concentration as compared to student’s age-appropriate peers. Dr. *** diagnosed Student with GAD and ADHD and found that student should qualify for special education and related services under either the ED or OHI eligibility (P.49:3). Dr. *** made several recommendations for implementation in the school setting and at home (P.49:3-4).
22. On April 20, 2012, Student’s ARDC convened to review Dr. *** report (R.1:2). The

ARDC declined to accept Dr. *** report; the Committee determined to stand behind MISD's FIE (R.1:2). The ARDC did not reach consensus.

23. Student's teachers testified that they allow Student extra time on assignments, although student generally does not need that accommodation; teachers allow student to take breaks when student needs them (T.1:170); teachers testified that Student has performed well in class, student has made progress in reading, and student is not a behavioral problem (T.1:171, 183-84, 186). Although tutoring and counseling have been made available to student, Student's Parents declined these services (T.1:171).
24. The evidence does not support a finding that MISD failed to protect Student from bullying by peers and adults.
25. The evidence does not support a finding that based upon Student's diagnosis of ADHD, Student qualifies for special education and related services.
26. The evidence does not support a finding that based upon Student's diagnosis of GAD, Student qualifies for special education and related services.
27. The evidence does not support a finding that Student meets the eligibility criteria for ED.
28. The evidence does not support a finding that Student qualifies for special education or related services based upon any, or all, of student's medical conditions: severe dyspepsia, ***, mild myopia/astigmatism.
29. The District's FIE was based upon a variety of assessment tools and strategies used to gather functional, developmental, and academic information.
30. The District assessed Student in all areas related to the suspected disabilities.
31. The District's assessors reviewed all existing evaluation data, information provided by the Parents, current assessments, and observations by Student's teachers,

IV. DISCUSSION

All state school districts receiving federal funding must provide all handicapped children FAPE. The United States Supreme Court, in *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175 (1982), established a two-part test for determining whether a school district has provided a student FAPE: 1) the school district must comply with the procedural requirements of IDEIA, and 2) the school district must design and implement a program "... reasonably calculated to enable the child to receive educational benefits." The first step in designing an appropriate program is the evaluation process.

A. MISD'S FIE WAS APPROPRIATE.

Evaluation procedures are carefully spelled out in the federal and state rules and regulations implementing IDEIA. 34 C.F.R. §300.304 specifies that in conducting the evaluation, the school district must 1) use a variety of assessment tools and strategies to gather functional, developmental, and academic information; 2) not use a single measure or assessment as the sole criterion for determining a disability; and 3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The district is charged with administering assessments and other evaluation materials that are tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient. Assessments must be selected and administered in a manner that best ensures that the assessment results accurately reflect the child's aptitude or achievement level or other factors that the test is measuring. The child being assessed must be evaluated in all areas related to the suspected disability. The assessment must be sufficiently comprehensive to identify all of the child's special needs. As part of the overall evaluation, the assessors should review all existing evaluation data, including information provided by the parents, current classroom-based, local, or state assessments, classroom-based observations, observations by the child's teachers and related-services providers. 34 C.F.R. §300.305. Once the assessments and other evaluation measures are completed, the student's ARDC must consider all of the information gathered and make a recommendation based upon that information.

In this case, Student's FIE was conducted by a multidisciplinary team that administered assessments of Student's cognitive, adaptive, academic, and emotional functioning.

The Diagnostician assessed Student's cognitive and learning abilities using formal measures: the KABC-II and WJ-III. The multiple subtests measured Student's abilities in reading, writing, and math: 1) reading comprehension, reasoning, acquiring vocabulary and phonics, and fluency; 2) written expression and spelling; and 3) math achievement, problem-solving, reasoning, abstract reasoning, and computational skills. The Diagnostician determined that Student is not below grade level in reading or math and that student does not have a learning disability.

Dr. *** performed the psychological assessment. Dr. *** used formal and informal measures. She interviewed Student for two (2) hours; she observed Student for an additional two (2) hours in the school environment; she interviewed Student's Parents and obtained information from student's teachers, school records, and outside therapy records. Student, student's Parents, and present/former teachers completed the BASC-2 to rate Student's behavioral and emotional domains. Student's Parents reported concerns with anxiety, depression, somatization, adaptive skills, and resiliency. One of Student's teachers indicated concerns in the areas of hyperactivity, somatization, attention problems, learning problems, school problems, bullying and executive functioning. Student did not indicate any significant issues on this assessment, although

the "Lie" Index on the BASC-2 Self-Report and the RCMAS suggested that student may have responded to certain questions in the way student wanted others to view student. On other measures, Student did not indicate clinically significant symptoms of depression. Student alluded to getting scared and nervous with different things, although it appeared that only very specific people or situations cause Student to feel this way. In describing the bullying incidents, Student presented stories that were conflicting and inconsistent and did not appear to affect Student's overall functioning. Although Student described some feelings of anxiety, they did not appear to be clinically significant and evident across settings. Dr. *** determined that Student does not meet disability criteria as a student with ED.

The special education counselor, ***, assessed Student for counseling as a related service. She interviewed Student, who reported that student was enjoying school and had very nice teachers. She observed Student in recess, reading, homeroom, and physical education. She observed that Student is accepted by student's peers; student accepted re-direction from teachers; student is able to follow directions and instructions; student is compliant, and able to stay focused, although at times student appeared hesitant to start a task; Student is able to work in groups with peers.

*** had Student's teachers and Parents complete the BES-3. This assessment measures 1) behaviors conducive to learning, such as study habits, assignment/homework completion, work habits, academic performance, memory and comprehension skills; 2) social skills conducive to forming positive relationships with peers and teachers; 3) atypical behaviors, such as attendance, stealing, predictability, sexual behavior, cheating, and rule-following; 4) pervasive mood of dissatisfaction and negative feelings resulting from personal or school related experiences; 5) behaviors representing a negative reaction to personal or school experiences; and 6) complaints about physical illnesses, self-injury, or temper tantrums, nervous habits, unusual speech habits, tremors, stammering, shaking, or excessive fears.

Student's teachers reported minor concerns related to Student's responding too quickly and impulsively to questions about academic material; student's off-task behaviors; the occasional disruption of the work of other students; and excessive or unnecessary body movements and self-stimulating behaviors such as hair twisting, nail biting, and twirling objects. The Parents reported more severe problems at home in the areas of difficulty with short-term memory; understanding abstract concepts; understanding what student sees, hears, reads; short attention span; problems with distraction, carelessness, irresponsibility in maintaining organization; inappropriate behaviors at mealtime, such as making noises, playing with food, and playing with utensils; and Student's failure to perform chores without reminders and/or assistance. The counselor determined that Student does not qualify for counseling as a special education related service.

MISD's FIE was comprehensive and appropriate. The multidisciplinary team used a variety of technically sound, comprehensive assessment tools and strategies to gather functional, developmental, and academic information in assessing Student's cognitive,

behavioral, physical, and developmental factors. MISD used evaluation materials tailored to assess Student's specific areas of educational need. MISD reviewed all existing evaluation data, including information provided by the Parents, current classroom-based, local, and state assessments, classroom-based observations, and observations by Student's teachers and outside services providers. When these assessments and other evaluation measures were completed, Student's ARDC convened to review the results and to make a recommendation based upon that information.²

The independent assessments relied upon by Student were not comprehensive or appropriate for making an educational placement decision. Dr. *** first met with Student in December 2011 and signed an OHI Eligibility Form that diagnosed Student with GAD, ADHD, and LD. Dr. *** did not make a finding that Student is ED. Dr. *** never met with any of Student's teachers; he never asked Student's teachers to complete any checklist, such as the BASC; he never observed Student in the educational setting; he never conducted any psychological, achievement, or competency testing. Notwithstanding the fact that Dr. *** cannot diagnose a learning disability, he testified that he made the GAD and ADHD diagnoses completely upon information provided by Student's Parents.

Dr. *** diagnosed Student with GAD and ADHD and found that student should qualify for special education and related services under either the ED or OHI eligibilities. These recommendations were based upon her administering one checklist to the Parents and an hour spent with Student and student's Parents in an interview. Dr. *** did not observe Student in the school environment, although her assessment was done during the spring 2012 semester when school was still in session. Dr. *** did not interview any of Student's teachers. She relied upon the diagnoses of Dr. *** and her review of the District's documentation, which found the complete opposite.

B. STUDENT DOES NOT MANIFEST A DISABILITY UNDER IDEIA.

A child with a disability under IDEIA is a child with one or more delineated impairments and who, because of such impairment, needs special education and related services. 20 U.S.C. §1401(3)(A); 34 C.F.R. 300.8(a)(1). The delineated disabilities are: mental retardation; a hearing impairment (including deafness); a speech or language impairment; a visual impairment (including blindness); a serious emotional disturbance; an orthopedic impairment; autism; traumatic brain injury; an other health impairment; a specific learning disability; deaf-blindness; or multiple disabilities. The determination of whether a child is eligible for special education and related services is made by the child's ARDC. 19 TEX. ADMIN. CODE §89.1040(b).

² Although the FIE was completed in November 2011, the ARDC did not meet to review the FIE until January 26, 2012. The delay was to accommodate the Parents' and their attorney's schedules.

1. Student Is Not ED.

A student is diagnosed as ED if the student demonstrates one or more of the following characteristics over a period of time and to a marked degree that adversely affects the student's educational performance: 1) an inability to learn that cannot be explained by intellectual, sensory, or health factors; 2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; 3) inappropriate types of behavior or feelings under normal circumstances; 4) a general pervasive mood of unhappiness or depression, or 5) a tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R §300.8(c)(4)(i).

Student's independent evaluator, Dr. ***, diagnosed Student with ED based upon her finding that Student demonstrated four (4) of the five (5) ED characteristics listed above. The only characteristic that Dr. *** did not find applicable was number four: a general pervasive mood of unhappiness or depression. Accordingly, Dr. *** determined that over a period of time, and to such a marked degree that Student's educational performance was adversely affected, student demonstrated 1) an inability to learn that cannot be explained by intellectual, sensory, or health factors; 2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; 3) inappropriate types of behavior or feelings under normal circumstances; and 5) a tendency to develop physical symptoms or fears associated with personal or school problems. This diagnosis was based upon Dr. *** brief meeting with Student and the Parents, possibly her review of Dr. *** OHI Form and outside counseling notes. It was not based upon interviews with Student's teachers; observations of Student in the educational environment; or formal measures. Dr. *** diagnosis of ED is not supported by the evidence presented at the hearing.

Dr. *** conducted the psychological assessment of MISD's FIE. She noted that Student has some medical issues, *i.e.*, *** and indigestion. These problems are addressed by Student's *** and taking medicine on an as-needs-basis for the indigestion.

Dr. *** noted that Student has received counseling for the alleged bullying incidents during school year 2010-2011, that student has some anxiety, but student does not take any psychotropic medications. Student's feelings of anxiety and nervousness were neither pervasive nor clinically significant. Student performed well in school; student had friends and worked well in class with student's peers and adults. Dr. *** found nothing clinically significant to warrant a diagnosis of ED. Dr. *** evaluation was more comprehensive and appropriate.

2. Student's ADHD Does Not Qualify Student for Special Education Services.

The eligibility category known as Other Health Impairment, or OHI, means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that

1) is due to chronic or acute health problems ³ and 2) adversely affects a child's educational performance 34 C.F.R §300.8(c)(9). The multidisciplinary team that collects or reviews evaluation data in connection with the determination of a student's eligibility based on OHI must include a licensed physician. 19 TEX. ADMIN. CODE §89.1040(c)(8).

In the instant case, Student's ARDC did not accept Dr. *** ADHD diagnosis because it was not based on any information related to Student's educational environment but for information provided solely by the Parents.

Notwithstanding that decision, whether Student has ADHD is not the issue; whether Student's ADHD adversely affects student's educational performance is. The evidence failed to support this requisite finding. While Student manifests at school some distractibility, spontaneity, impulsivity, off-task behaviors, and the occasional disruption of work, nothing presented established that these behaviors adversely affect Student's educational performance. As such, and at this juncture of the educational process, Student does not qualify for special education and related services under the OHI eligibility criteria.

The evidence at the hearing presents a picture of a wonderful young *** who, although student has some anxiety issues, thrusts ***self into the educational arena and tackles any obstacles presented, whether it be academic or personal. Student is well liked by student's teachers and peers; student is a bright young *** who clearly wants to achieve and please student's family and teachers. While student may not be a *** student, student passes all of student's courses, which are on grade level; joins willingly in group activity; and is easily re-directed when off-task behaviors surface. The fact that Student did not pass one part of TAKS in spring 2011 does not mean student is in need of special education services. Many children do not pass all of the assessments the first time. That is why the school districts provide tutoring and additional opportunities to re-take the tests.

V. CONCLUSIONS OF LAW

1. MISD's FIE was appropriate. 34 C.F.R. §300.304-306.
2. Student does not qualify for special education and related services under emotional disturbance because student does not meet the eligibility criteria for an ED disability. 34 C.F.R §300.8(c)(4)(i).
3. Student does not qualify for special education and related services under the OHI eligibility criteria because student does not demonstrate a need for special education and related services. 34 C.F.R §300.8(c)(9).

³ The Federal Regulations name the following types of health problems contemplated under the OHI label: asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic, fever, sickle cell anemia and Tourette syndrome.

**VI.
ORDER**

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the relief requested by Petitioner is DENIED.

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

**VII.
NOTICE TO PARENTS**

The Decision of the Hearing Officer is final and appealable to state or federal district court.

Signed this the 11th day of July 2012.

Deborah Heaton McElvaney
Special Education Hearing Officer

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