

STUDENT bnf PARENT	§	BEFORE A SPECIAL
Petitioner	§	EDUCATION
	§	
v.	§	HEARING OFFICER
	§	FOR THE
ARLINGTON ISD	§	
Respondent	§	
	§	STATE OF TEXAS

FINAL DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Petitioner, Student bnf Parent, (Petitioner or Student) brings this action against Respondent Arlington Independent School District (Respondent, the District, or AISD) 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.

The sole issue in this case is whether Petitioner is eligible for special education services under IDEA in the areas of Autism, Speech or Language Impairment and/or Other Health Impairment (OHI) based on Attention Deficit Hyperactivity Disorder (ADHD).

As requested relief, Petitioner seeks a finding that Petitioner is eligible for special education and related services under IDEA and compensatory services for the 2011/2012 school year.

PROCEDURAL HISTORY

Petitioner filed the instant request for due process on August 6, 2012. Chris Schulz, Attorney at Law, represents Petitioner in this proceeding. Respondent is represented by Gigi Maez, Attorney at Law.

The parties convened a resolution session on August 21, 2012, but did not reach resolution. A pre-hearing conference was held on August 29, 2012. The due process hearing was continued for good cause to October 29-30, 2012.

During the pre-trial proceedings, Petitioner filed a Motion to Reimburse for costs of producing documents requested during discovery on the grounds that Respondent produced duplicate copies of documents that Petitioner should not have been charged to copy. Based on the information provided to me by the parties in Petitioner's motion and Respondent's response, I find that Petitioner's motion is not meritorious and it is hereby **DENIED**.

At the conclusion of the due process hearing, by joint request of the parties, the Hearing Officer granted leave to file closing briefs. The decision of the Hearing Officer is due on or before December 21, 2012.

FINDINGS OF FACT

1. Student is *** years old and lives with ***, next friend, and legal guardian, *** (***, Guardian), within the geographical boundaries of AISD. AISD is a political subdivision of the State of Texas and a duly incorporated independent school district.

2. Student was ***. Student has lived with *** from an early age and has experienced severe stressors in student's young life due to ***. (Transcript, pp. 324-325, 344-346; Respondent Exhibit 11; Petitioner Exhibit JE4)(hereinafter cited as TR. 324-325, 344-346; R11; PJE4)¹.
3. *** reports that, from a young age, Student has had trouble sleeping and eating. Student is hyperactive, bossy, and prone to meltdowns and tantrums. Student talks all the time, appears to have imaginary friends, is easily "set off," and talks very fast and is hard to understand. (TR.325-330).
4. *** describes Student as a child with characteristics of autism. She testified to the following about Student in the home setting: Student cannot wear certain clothes because of student's sensory responses, cannot eat certain foods, and cannot regulate or respond properly to temperatures. Student has a very short attention span, has a difficult time with nonverbal communication, has minimal peer interaction, easily angers, and demonstrates repetitive and stereotyped behaviors such as ***. (TR. 325-330).
5. In June 2009, at age *** and at the request of ***, Student was screened by *** Independent School District (***) where student was then living, to determine student's eligibility for special education services. *** found Student to have age appropriate skills and require no further assessment. (R1).
6. In April 2010, at age ***, *** (***) examined Student based on *** concerns of hyperactivity, behavior problems, and a speech and developmental delay. The doctor who examined Student diagnosed student with Attention Deficit Disorder (ADHD), Other Developmental Speech and Language Disorder, and a Sleep Disturbance. The doctor also made a provisional diagnosis of "at risk for mood disorder" with a note to monitor over time. (R2).
7. In June 2010, when Student was attending the ***, *** requested evaluation for special education services from AISD, specifically requesting consideration of eligibility based on Autism and Speech Impairment. (R3).

FIE #1 by AISD And First Eligibility Determination:

8. AISD completed a Full and Individual Evaluation (hereinafter FIE #1) of Student on June 21, 2010, and found that Petitioner was not eligible for special education and related services. The FIE was completed by a multi-disciplinary team that included an educational diagnostician, two LSSPs, a Speech Pathologist, and a special education teacher. The team used a variety of assessment tools and strategies as mandated by IDEA and gathered relevant information from a variety of sources, including ***, *** teacher, and prior medical evaluation from ***. The FIE complied with IDEA evaluation criteria. (R4).
9. AISD assessed Student's speech, language, and communication utilizing one standardized measure, the ***, and informal data gathered from testing observations, review of records, and interviews with *** and teachers. On the ***, Student scored in the average range for receptive and expressive language and for the overall total language score. The informal data gathered through observation and interview were consistent with the results of the ***, with both *** and school staff indicating that articulation, voice and fluency were within normal limits. *** further reported that she had no significant concerns with Student's verbal or nonverbal communication. (R4:3-4).

¹ The Hearing Officer requested that the parties submit joint exhibits for all evaluations and ARD documents to avoid duplicate exhibits of the same evidence. The parties were unable to do so. Although both Petitioner and Respondent submitted copies of evaluations and ARD documents into evidence, I will cite to Respondent's exhibit numbers for ease of reference.

10. Based on the information gathered from all sources, AISD properly concluded that Student did not meet the eligibility guidelines for speech and language impairment or demonstrate a deficit in communication.
11. AISD also assessed Student to determine if student was eligible for special education as a student with a Pervasive Development Disorder (PDD) such as Autism, Asperger's, or PDD NOS. The basis for concern was Student's behavioral and social difficulties at home and in the community, as well as student's atypical sensory responses.
12. In assessing Student's emotional and behavioral status, FIE #1 included and relied upon data from an interview with ***; the Behavior Assessment System for Children-2nd Edition (BASC-2) and the Gilliam Autism Rating Scale, Second Edition (GARS-2), both completed only by ***; and a semi-structured play-based assessment completed by District personnel. (R4).
13. In her interview, *** reported that Student was hyperactive, over reactive, impulsive, shy with strangers, and had a short attention span and a high need for attention. She stated that Student engaged in self-talk or babble and head banging at times. She also reported that Student had fewer problems relating to and playing with other children, though student didn't play with others frequently, and that student demonstrated awareness of others and their emotions, shared enjoyment and responsiveness such as smiling, and engaged in imitative and interactive play. (R4:5).
14. The BASC-2 provides information about the emotional, behavioral, and adaptive functioning of a student, producing ratings in the possible ranges of "clinically significant" (severe level of maladjustment requiring further evaluation), "at risk" (careful and continuous monitoring warranted, though formal treatment not required), or "average." *** rated Student in the "clinically significant" range in the following areas: hyperactivity, aggression, anxiety, depression, somatization, atypicality, attention, and adaptability. She rated student in the "at risk" range on functional communication. (R4:6).
15. The GARS is a behavioral checklist used as a screening tool to help identify persons with autism or other pervasive developmental disorders. Scores in the 80-120 range indicate a person is very likely to have autism. *** ratings of Student yielded an autism quotient of ***, meaning that Student is in the "very likely" range in terms of probability of having autism. (R4:6).
16. The semi-structured play-based assessment provided data in the three areas of communication, reciprocal social interaction, and stereotyped behaviors and restricted interests. The data were collected from observation during testing via both planned social interactions or activities, and free-play or child-centered activities. In the area of *communication*, Student demonstrated no significant disruption in intonation or the quality of student's verbal skills. Student used appropriate question inflections and shared spontaneously about student's thoughts, feelings, and experiences. In the area of *reciprocal social interaction*, Student displayed adequate eye contact and facial expressions, demonstrated shared enjoyment with the examiner, engaged in reciprocal interactions and imaginative play with the examiner, had a consistently appropriate level of social response, and did not have difficulty building and maintaining rapport. In the area of *stereotyped behaviors and restricted interests*, Student did not perseverate or handle toys inappropriately, though student did display some atypical sensory behavior such as ***, repeating the examiner's instructions, and ***. (R4:6).
17. Cognitive skills, achievement levels, and adaptive behavior were all in the average range. (R4:6).
18. FIE #1 concluded that Student did not meet eligibility for special education based on Autism or Speech Impairment. FIE #1's conclusion appropriately recognized and balanced the input of *** with the

school's testing data and reached a conclusion that was consistent with the data obtained. Although *** rated Student as demonstrating severe behaviors in many areas on the BASC-2 and as very likely autistic on the GARS, *** also reported in the interview that Student was socially responsive, engaged, and able to relate to others appropriately. ***'s report was consistent with Student's socially responsive and communicative behavior observed during the assessment and the results of the play-based assessment. The data did not conclusively establish that Student meet the criteria for eligibility as a student with a pervasive developmental disorder.

19. Like the *** Report, FIE #1 also noted that Student was "at risk" for emotional difficulties and recommended that student be closely monitored. (R4:9).
20. An Admission, Review, and Dismissal Committee (ARDC) convened on July 21, 2010 to review FIE #1. Based on the results of the assessment, the ARDC determined that Student did not qualify for special education and related services. (R5; PJE-2).
21. *** subsequently withdrew Student from AISD effective ***, 2010 for personal reasons. (R6). Student did not attend AISD during the 2010/2011 school year.

***** Follow-Up Evaluation:**

22. On January 27, 2011, Student visited *** for a routine follow-up visit with Dr. ***. Dr. *** spent approximately 50 minutes with the Student, with over half of that time spent counseling ***, who expressed a strong need for help with Student and ***. (R7:5).
23. *** reported to Dr. *** that Student was experiencing increased aggression, meltdowns, unintelligibility, withdrawal, sensory issues, issues with transition, and sleep issues. *** also reported to Dr. *** that Student had been diagnosed with PDD-NOS, though nothing in the record indicates this to be accurate. The record is not clear as to how this inaccurate information impacted Dr. *** diagnosis of Student. (R7:2).
24. Based on *** reporting and Dr. *** observation of Student as having poor communication skills and difficulties interpreting nonverbal cues, Dr. *** diagnosed Student with PDD-NOS. Other diagnoses made by Dr. *** include: ADHD, Speech and Language Developmental Disorder, Sleep Disturbance, ***, ***, and Language Disorder. (R7; TR. 212-214). Dr. *** did not administer formal assessment instruments or rely on any information other than that reported by *** and what was observed in watching Student interact with student's aunt in the clinical setting. Dr. *** had no information regarding Student's performance or behaviors at school. (TR.220-226).
25. Student returned to *** at AISD in August 2011 for the 2011/2012 school year. *** insisted on a §504 plan for Student before enrolling student and completed a second referral for special education testing. (R8; R9; P7).

FIE #2 by AISD And Second Eligibility Determination:

26. Pursuant to *** referral, a AISD completed a second FIE on October 17, 2011(FIE #2). (R11).
27. A multi-disciplinary team that included an educational diagnostician, an LSSP, a Speech Pathologist, a school nurse, an occupational therapist, and Student's *** completed FIE #2 to consider Student's eligibility under the categories of autism, speech or language impairment and/or OHI. The team used a variety of assessment tools and strategies as mandated by IDEA and gathered relevant information from

a variety of sources, including ***, school staff, prior medical evaluation from ***, and results from standardized testing. FIE #2 complied with IDEA evaluation criteria. (R11:1-2).

28. AISD assessed Student's speech, language, and communication utilizing one norm referenced standardized measure, the Test of Language Development-Primary (TOLD); a portion of one criterion referenced measure, the Clinical Evaluation of Language Fundamentals-4th Edition (CELF), and informal data gathered from both *** and Teacher in language surveys. (R11). AISD also administered the Goldman-Fristoe Test of Articulation (GF), but did not report the results, which fell in the average range, in the evaluation due to a computer glitch. (R11:2-3; TR. 370, 376).
29. The TOLD is a standardized norm referenced measure of receptive and expressive language competencies in all of the major components of linguistics. Student scored in the average range in each of the components of the assessment and overall, indicating language abilities typical of student's same age peers. (R11:3; TR. 358). The pragmatics measure of the CELF uses a checklist to identify verbal and nonverbal pragmatic deficits. (R11:4; TR. 359). Student's teacher administered the pragmatics measure and Student scored ***, indicating adequate pragmatic language abilities in the school context. (R11:4; TR 359-360).
30. On the language surveys, *** identified Student's strengths and weaknesses, reporting, in relevant part, that Student rarely starts conversations, carries on conversations, or asks for help. (R11:4; TR. 359-360). Unlike ***, the teacher reported that Student asks for help when needed, uses eye gaze when communicating, and connects experiences and ideas with those of others. Concerns noted by the teacher were that Student rarely listens attentively to stories or text that is read aloud. Overall, the teacher's ratings indicated no concern in the areas of semantics, pragmatics, or syntax. (R11:5; TR. 360).
31. Student scored in the average range on every measure pertaining to speech, language, and communication except the Parent Language Survey, in which *** reported both strengths and weaknesses, but did not report an impairment such as stuttering, impaired articulation, or a language impairment that adversely affected Student's educational performance. Based on the data obtained, FIE #2 appropriately concluded that Student did not meet the eligibility criteria for speech or language impairment.
32. In assessing Student's emotional and behavioral status, FIE #2 included and relied upon data from interviews with *** and Student's teacher; review of records; classroom and testing observations; the BASC-2 completed by both *** and teacher; the Behavior Rating Inventory of Executive Functioning (BRIEF) completed by both *** and teacher; the GARS-2 completed by both *** and teacher; the Childhood Autism Rating Scale 2nd Edition-High Functioning (CARS2-HF) completed by the assessment team based on observations and information from the testing environment, ***, and teacher reports; and the Autism Diagnostic Observation Schedule-Module 3 (ADOS) completed by the assessment team consisting of two LSSPs, an educational diagnostician, and a Speech and Language therapist. (R11:6).
33. Data obtained on FIE #2 indicated a glaring discrepancy between *** and school staff's evaluation of Student. While *** perceived behaviors that strongly suggested the presence of an autism spectrum disorder, school personnel observed Student to be fairly typical of student's same age peers, except for concerns primarily in the areas of hyperactivity, attention deficit or focus issues, and emotional self-regulation. (R11).
34. Student's behavioral and emotional reactions and needs vary considerably depending on whether student is in the home or school setting.

35. Classroom and testing observations, and teacher reports were generally consistent with each other in their descriptions of Student in both the classroom and testing environments. Student initiated and enjoyed social interactions with both peers and adults, though not always positive; engaged in pretend play; displayed appropriate eye gaze and facial expressions; demonstrated the ability to communicate both verbally and nonverbally with peers and adults; displayed no repetitive activities or stereotypic movements in the classroom; and handled transitions between activities reasonably well. Student had difficulty at times with attention and focus, particularly in large groups and unstructured settings, and displayed certain atypical sensory behaviors such as *** (R11:7, 8, 12). All in all, the descriptions of Student’s behaviors indicated Student was fairly typical of ***. (TR. 391-392).
36. The ratings given Student by school staff on testing measures generally were average in all areas with the exception of slight elevations (“at risk” ratings) in hyperactivity, attention, emotional self-control, and executive functioning. On the GARS, the teacher report rated Student as in the “unlikely range” for autism. (See teacher reports on the BASC, BRIEF, and GARS). (R11:9-11).
37. The ADOS is a semi-structured standardized assessment completed by the school’s multidisciplinary team to measure the likely presence of autism by looking at the four areas of communication, social interaction, play and imaginative use of materials, and repetitive behaviors or interests. Student obtained an overall score of ***, well below the autism cutoff score of 7. Student scored below the autism cutoff score in each of the four areas of the ADOS. In the testing components of the ADOS that are not reflected in the autism cutoff score, Student also displayed behaviors that were not consistent with autism. Specific findings on the ADOS included: appropriate speech and communication patterns with no echolalia or stereotypic words or phrases; appropriate eye gaze and range of facial expressions, effective use of nonverbal and verbal communication to engage socially; spontaneous display of creativity and pretend play; and a lack of unusual sensory interests or repetitive behaviors. Student did display hyperactivity during the ADOS, but no aggression or disruptive behavior. (R11:11-13).
38. On the CARS2-HF, Student obtained an overall score of ***, which suggests “no symptoms” of autism spectrum disorder (scores 30 or above suggest the presence of autism). The CARS indicated mild deficits in the areas of emotional expression and regulation and relating to peers. It did not indicate irregularities in the areas of imaginative play, repetitive behaviors or interests, sensory relationship to toys and materials, or verbal communication. (R11:13-14).
39. Overall, the data obtained from school and testing-based sources revealed a student who displays some impulsivity, hyperactivity, and attention issues, along with mild deficits in emotional regulation. The data did not indicate a student with a pervasive developmental disorder.
40. In contrast to the data collected from school staff, the data obtained from *** indicated a student more likely to have a pervasive developmental disorder. *** detailed the following behaviors that she observes in the home environment: Student gets stuck on words; randomly repeats lines from movies; *** and displays limited interests in toys that student will play with; has decreased interaction with peers from student’s earlier years; has severe separation anxiety characterized at times by ***; struggles with changes in routines and needs strict structure; and displays unusual sensory responses such as ***, being oversensitive to *** temperature, loud noises, and food textures. (R11:8).
41. On the BASC and BRIEF, *** rated Student as “clinically significant” in every area except for social skills, adaptive behavior, and functional communication, in which she rated Student “at risk”. Specifically, *** reported the following: aggressive behaviors, anxiety and depression, physical symptoms unrelated to health concerns, difficulty making friends and joining group activities, and difficulty maintaining necessary levels of attention. She reported that Student becomes easily irritable;

has difficulty regulating emotion and self-control; displays threatening, disruptive behavior toward peers; has poor social skills and difficulty communicating; and reacts negatively to change. (R11:9-10).

42. On the GARS-2, *** rated Student in the “very likely” range of autism, reporting that student lacks eye contact; ***; repeats words, sounds and phrases; resists physical contact; is fearful; and resists changes in routine. (R11:10-11).
43. Intellectual functioning and academic achievement measured average in all areas. (R11:14-16).
44. Adaptive behavior as measured by the Vineland II followed the same discrepant pattern as other assessment data. *** rated Student as “below average” in Communication, Daily Living Skills, and Motor Skills, and as “deficient” in Socialization and the Adaptive Behavior Comprehensive measure. Student’s teacher rated student as “average” in each of the components of the Vineland II. (R11:16-18).
45. FIE #2 analyzed and discussed all of the data collected, from both home and school sources, in reaching its conclusion that Student did not display behaviors characteristic of autism across settings. FIE #2 concluded that Student did not display significant deficits in the school setting in any of the key areas of relating and affect, play and restricted interest in materials, sensory responses, and language and social interaction. Based on the data obtained, FIE #2 appropriately concluded that Student did not meet the eligibility criteria for autism. (R11:18-20).
46. FIE #2 also concluded that Student had ADHD, but that it did not adversely affect student’s academic, social, emotional, or behavioral functioning at school. (R11: 18-20).
47. An ARDC convened on November 8, 2011 to consider the results of FIE #2. The ARDC concluded that Student did not meet the eligibility criteria for speech or language impairment or autism. Though the ARDC recognized Student’s diagnosis of ADHD, it concluded that student had no educational need for special education services because student was progressing well without special education. (R12:3).
48. Parent requested an Independent Educational Evaluation (IEE) and AISD agreed to provide one.(R12:3; R13).

IEE Completed By ***

49. *** (***) was selected to perform the IEE for the purpose of addressing a disagreement between *** and AISD regarding the type of disability Student has and student’s educational needs. Dr. *** of the *** performed Student’s IEE. Dr. *** is an expert in the area of autism assessment and intervention who has completed IEEs for approximately 5 years. (R13; TR. 58-62).
50. The IEE used a variety of assessment tools and strategies as mandated by IDEA and gathered relevant information from a variety of sources, including ***, school staff, prior medical evaluation from ***, and results from standardized testing. The IEE assessed to determine Student’s eligibility for special education as Speech or Language Impaired, Autistic, and/or OHI, as well as Student’s need for related services. The IEE met the evaluation criteria of IDEA. (R13:3-4).
51. Like FIE #2, the IEE revealed a significant discrepancy between *** assessment of Student and that of the school staff. Again, *** consistently rated Student as exhibiting an array of significant social and emotional behaviors consistent with a pervasive developmental disorder. Data obtained from school staff described a student with some challenges in the areas of attention, hyperactivity, impulsivity, and emotional self-regulation. School staff did not report evidence of behaviors consistent with autism in the school setting.

52. *** administered the Childhood Autism Rating Scale (CARS-HF) via an interview with ***. (R13:6-8). *** ratings yielded a total score of “borderline moderate to severe autism spectrum disorder.” School staff did not complete the CARS-HF. Multiple sources of information are required to properly administer the CARS-HF according to the testing manual. The CARS-HF score reported in FIE #2 has greater validity for this reason. (TR. 412).
53. *** reported the following during the CARS interview: Student does not interact with peers; displays limited and brief eye contact; cannot accurately interpret facial expressions; cries frequently; is able to recognize the moods of others; suffers severe separation anxiety; struggles with change in routines which can cause meltdowns, requires support for transitions; engages in repetitive and stereotyped behaviors such as ***, hand wringing, and ***; has difficulty eating; displays atypical visual responses such as ***, ***, and has an unusually high pain threshold. (R13:6-8).
54. On the BASC, *** rated Student as “clinically significant” in every composite area. She rated Student as “clinically significant” in every subscale except Withdrawal, Attention, Social Skills, Activities of Daily Living, and Functional Communication, which she endorsed as “at risk.” *** endorsed several items as “critical” on the BASC, including three that were also endorsed by Student’s teacher: hits other children; falls down; and is easily annoyed by others. (R13:13-14).
55. On the BASC, Student’s teacher rated student as “average” overall, and on the Externalizing Problems Composite, “at risk” on the Internalizing Problems Composite (specifically in the areas of depression and somatization), and “high” on the Adaptive Skills composite. On the subscales, Teacher rated student “average” in all areas except “at risk” for Depression and Somatization and “high” for Adaptability and Social Skills. (R13:14-15).
56. On the Brown ADD scales, *** rated Student as mildly elevated on the ADD Inattention Total scale and the ADD Combined Total scale, noting mild symptoms in the areas of easily angered and irritable, worries too much, feelings get hurt easily, and has trouble sitting still and being quiet. Teacher did not complete the Brown scales. (R13:16).
57. On the Autism Spectrum Rating Scales (ASRS), *** rated Student as “very elevated” on each of the four diagnostic scales, indicating that Student exhibits many behaviors consistent with autism spectrum disorder in the home setting. Teacher rated Student as “average” on each of the four diagnostic scales except the Unusual Behaviors scale, which was “slightly elevated” due to sensory issues and challenges with changes in routine. Teacher’s ratings do not indicate an autism spectrum disorder. (R13:16).
58. The Sensory Profile completed by *** and the School Companion Profile indicate that while *** continues to endorse greater concerns and deficits related to how Student processes sensory information, student’s teacher also notes some sensory differences, particularly in the areas of movement and touch. (R13:25-28).
59. *** interviewed Student’s teacher from the fall semester who reported that student made marked improvements over the semester in the areas of attention, focus, controlling the impulse to blurt out in class, working independently without teacher assistance, and gaining academic skills. Teacher stated that Student responded well to frequent reinforcement, redirection, praise, and hugs. Teacher noted some social difficulties as Student could easily anger with peers who were assertive or who would not play as student wanted them to. In such instances, Student engaged negatively and with some inappropriate responses. (R13:8-9).

60. Dr. *** observed Student in the classroom and documented the following, in relevant part: Student engaged socially with peers and adults, though at times the other party was not engaged in the conversation with Student; Student transitioned well to restroom breaks, between activities in the classroom, and to and from lunch; Student had a difficult time remaining still, but was generally oriented and attentive to classroom activities; Student *** during classroom activity; Student *** at times while working and eating lunch, ***; Student engaged in pretend play. (R13:10-12).
61. The ADOS, Module 2 was administered to Student as part of the IEE. As with the ADOS, Module 3 that was administered as part of FIE #2, Student's overall total score was not indicative of autism spectrum disorder. Notes from the ADOS indicate the following: Student laughed and interacted with the examiner; engaged in pretend play; demonstrated adequate language and communication skills and did not display echolalia or stereotyped use of words or phrases; made eye contact; was socially responsive, displayed a quality of social interaction that was routine and less organized than expected for the context and student's age; demonstrated atypical sensory responses ***. (R13:18-19).
62. In the area of speech and language testing, *** administered the Goldman Fristoe Test of Articulation (GF), the Comprehensive Assessment of Spoken Language (CASL), and informal measures. Student showed no deficits in the areas of communication, articulation, fluency or voice. (R13:19-20).
63. On the CASL, the IEE reported scores of below average in two subtests: Basic Concepts and Antonyms. Other subtests were in the average range. The score reported on the Antonyms subtest was incorrect and the correct score, though higher, was still in the below average range. Both below average scores are above the level of concern or the cutoff for AISD, which is 1 ½ standard deviations below the mean. (TR. 364-366). Student did not take student's ADHD medication on the day of the CASL and student's distractibility and lack of focus may have affected the testing results. (R13:20-21).
64. Student's intellectual and cognitive functioning measured average to above average, as did Student's educational performance. (R13:28-31).
65. Both *** and teacher rated Student "average" in 8 areas of adaptive skills on the Adaptive Behavior Assessment System, Second Edition (ABAS-II), with ratings of "borderline" in Self Care and "below average" in Social. *** ratings on the Vineland showed improvement for Student in this area from the ratings on FIE #2. (R13:31-33).
66. Based on the data obtained, the IEE recommended that the ARDC consider eligibility based on the eligibility categories of both Autism and Speech and Language Impairment. The IEE also identified Student as requiring services at school in order to access student's education in the following areas: sensory, communication, social and emotional. (R13:35-40).
67. The conclusions of the IEE are not based on a full consideration of all of the data obtained. The IEE gave greater weight to data obtained from *** and failed to fully explain why Student does not display characteristics of autism in the school setting. The IEE failed to consider or account for the results of the standardized testing measures or observations of behavior that conflicted with the conclusions reached. (R13: 35-40; TR. 419-421).
68. In the area of qualitative impairment in social interaction, the IEE concludes that Student has "marked impairment in the use of multiple nonverbal behaviors such as eye gaze, facial expression, body postures, and gestures." This conclusion is based on isolated examples of Student behavior reported by *** and is not supported by the great weight of the data provided by ***, school staff, and testing

measures that revealed good eye contact, appropriate facial expressions, and the ability to recognize and respond to the moods of other. (R4:6; R11:7, 8,12; R13:8-12).

69. Also in the area of qualitative impairment in social interaction, the IEE states that there is a “failure to develop peer relations appropriate to developmental level,” and “lack of social or emotional reciprocity.” The IEE notes the incidents in which Student argued with or threatened peers in the classroom or on the playground and Student’s tendency to be “aloof” with peers as reported by ***. The IEE fails to consider or discuss the numerous incidents documented by both AISD and independent evaluators, and Student’s teachers, in which Student appropriately engaged with peers in the classroom and on the playground and demonstrated both social and emotional reciprocity. The IEE summary also fails to consider the standardized test scores that indicate average ratings in these areas. (R11).
70. In finding a qualitative impairment in communication, the IEE bases the conclusion on the following: “Student is not consistently intelligible, has verbal exchanges that are less frequent and complex than same age peers, and used the phrase, “what the…” repeatedly.” The IEE fails to discuss and consider the data indicating that Student has no deficits in articulation, voice, and fluency; falls in the “lack of concern” range on the CASL, and in the average range on other speech measures administered. (R11:4-5; R13:19-21; TR. 364-366, 454-455).
71. The IEE concludes that Student has “encompassing preoccupation with one or more stereotyped and restricted patterns of interests” and points to Student’s strong interest in music, *** and colors, and *** on a few occasions. The IEE does not address the reports indicating that this encompassing preoccupation is not seen at all in the school setting. (R11:7,8,12; TR. 391-392).
72. The IEE reports inflexible adherence to specific nonfunctional routines or rituals and relies on examples primarily from the home environment. The IEE does not discuss or consider the numerous times Student was observed at school to transition easily between activities, to accommodate schedule changes for holidays and parties, and to move through the day without melt downs or tantrums. (R11:7,8,12).
73. With regard to the IEE finding of sensory and motor differences, the IEE properly detailed examples from both the home and school setting in which Student displayed differences in student’s responses to sensory experiences. Student’s differences in this area were displayed in all settings. (R11:7,8,12).
74. Although the IEE reported results consistent with PDD NOS and recommended that the ARDC consider eligibility on that basis, the IEE also stated that PDD NOS may not fully describe Student’s constellation of symptoms and recommended further testing to determine if a genetic disorder might offer a more complete explanation. (R13:35).
75. The IEE also reported that the psychological testing did not yield conclusive results. The IEE noted that behaviors such as verbal threats to peers and inappropriate language (the same basis for the conclusion of autism) are likely related to stressful experiences, along with the language impairment and other deficits noted in the IEE. The IEE concludes that further testing in the psychological area may be warranted, though eligibility as a student with an emotional disturbance is not recommended as of that time. (R13:36).
76. Dr. *** explained the discrepant information from *** and school staff as resulting from teachers failing to notice Student’s atypicalities in behavior at school because of student’s typical cognitive and academic functioning.

ARDC Consideration of IEE

77. On April 19, 2012, the ARDC convened to review the IEE. Dr. *** arrived late to the ARDC, but reviewed the IEE for the committee when he arrived. The ARDC concluded that Student did not have a need for special education services given student's progress in the general education setting without specialized instruction. (R14).
78. A reconvene ARDC met on April 30, 2012. At the ARDC, additional information was shared about Student's current performance in school. Student's academic and functional skills were reported to be appropriate for student's age and grade, and Student was demonstrating progress in the general education setting. (R15).
79. The AISD lead psychologist observed Student in the classroom in advance of the reconvene ARDC meeting and credibly testified that Student played appropriately with peers on the playground, waited in line for the swings without incident, and appropriately sought the attention of and interacted with peers. (Tr. 424).
80. The lead psychologist accurately testified that many of the behaviors reported by the IEE to be indicative of autism occurred only one time or a few times and did not repeat across time and settings. Examples of such behaviors include aggressive acts toward peers, ***, visual tracking, or repeating words and phrases. (TR. 448-449).
81. The ARDC concluded that Student did not meet the eligibility definitions for Autism or Speech Impairment. The lead psychologist stated that AISD was not in disagreement with the ADHD diagnosis, but that §504 services were adequate to address those concerns and there was no educational need for special education. (R15:5).

Behavioral Logs, Progress Reports, Teacher Testimony

82. Achievement testing on standardized measures and teacher progress reports from the 2011/2012 school year indicate Student performed average to above average academically, made good progress behaviorally, and generally performed both academically and in terms of adaptive behavior at levels commensurate with student's cognitive abilities. (R11:14-15; R13:11-12, 34; R18; R19:4; R20; TR. 196-197; 510-518; 561-567).
83. At *** request, Student's teacher tracked student's behavior on an almost daily basis to ensure good home/school communication for purposes of medication management. The logs for the 2011/2012 school year indicate that Student had many more wholly positive days behaviorally (approximately 47) than wholly challenging days (approximately 10). A number of days (approximately 13) reflected both positive and negative behaviors. Of the challenging behaviors reflected on the logs, the most common included hyperactivity, lack of focus, anxiety, and *** incidents of physical aggression toward peers. (R20).
84. Student had no office referrals or formal disciplinary incidents during the 2011/2012 school year. Student's teacher was able to redirect Student and utilize positive and frequent reinforcement to effectively manage student's behaviors. (TR. 510-518; 561-567; 658-659).
85. Student's teacher during the spring semester did not participate in the evaluation ratings for the IEE; however, she did testify at the due process hearing. Her testimony supports the conclusion that Student does not have a qualitative impairment in social interaction or communication. The teacher testified that Student enjoyed socializing and playing with peers, interacted with partners and buddies in the classroom, was accepted and well-liked by peers, and comforted other students when they were upset. (TR. 556-557).

General Findings of Fact

86. Student does not demonstrate a developmental disability significantly affecting verbal and nonverbal communication and social interaction in the school setting.
87. Student does not have a communication disorder or language impairment that adversely affects student's educational performance.
88. Student does not have an educational need for special education and related services.

DISCUSSION

The sole issue raised in this proceeding is whether Student qualifies for special education and related services under IDEA. Student argues that student meets the test for eligibility on the basis of Autism, Speech Impairment, and/or OHI due to student's ADHD.

Eligibility for services under IDEA is determined by a two part test: 1) Does the student meet the criteria for one or more of the disability classifications set forth in IDEA as determined by the assessment procedures set forth in IDEA; **and** 2) Does the student, by reason of the disability, need special education and related services to receive a free appropriate public education? 34 C.F.R. §300.8(a)(1); 19 T.A.C. §89.1040. Both parts of this test must be satisfied in order to meet the eligibility requirements of IDEA.

In this case, both strands of the eligibility test are in dispute. Petitioner argues that petitioner meets the definition of the disability classifications of autism, speech and language impairment, and OHI, and that petitioner requires special education instruction by virtue of that disability. Respondent contends that Student does not meet the definitions in any of the alleged areas of disability and that, even if student did, student does not require special education services in light of student's demonstrated academic and behavioral progress without special education support.

As the party challenging the District's decision on eligibility, Petitioner bears the burden of proof in this action. *Schaffer v. West*, 546 U.S. 49 (2005).

Applying these legal standards to the evidence in this case, I find that Student does not meet the eligibility requirements for special education and related services under IDEA.

1. Whether Student Is Eligible On The Basis Of Autism

IDEA defines autism as "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three that adversely affects a child's educational performance." Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environment change or change in daily routines, and unusual responses to sensory experiences. 34 C.F.R. §300.8(c)(1)(i); 19 T.A.C. §89.1040(c)(1).

IDEA also specifies that autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance. 34 C.F.R. §300.8(c)(1)(ii). Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: an inability to learn that cannot be explained by intellectual, sensory, or health factors; an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; inappropriate types of behaviors or feelings under normal circumstances;

a general pervasive mood of unhappiness or depression; or a tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R. §300.8(c)(4)(i); 19 T.A.C. §1040(c)(4).

The difficult aspect of this case is the starkly different picture painted of Student by student's *** and the school staff. *** reporting and ratings are consistent over time in depicting a child who has many of the characteristics of autism spectrum disorder: difficulty communicating and engaging socially; limited eye contact and facial expression; stereotypic behavior such as ***, hand wringing and ***; atypical sensory responses such as ***; and repetitive behaviors such as *** and overly focusing on certain interests.

In contrast, teacher reports and ratings are equally consistent over time in portraying a child who falls within the average range in the areas of both communication and social interaction as evidenced by the following: Student engages, interacts, and enjoys student's relationships with peers and adults in the school setting; displays appropriate eye contact and facial expressions, understands and appropriately reacts to the moods of others, and demonstrates average language skills and pragmatic communication. Teachers do not report evidence of stereotypic behaviors or restricted interests in the school setting, but do see some atypical sensory responses.

Though not reporting data characteristic of autism, teachers do report indicators of inattention, impulsivity, hyperactivity, and lack of emotional self-regulation as evidenced by Student squirming, wiggling, and having a difficult time remaining still and quiet, particularly in large groups; becoming overactive and sometimes aggressive, particularly in unstructured settings such as the cafeteria and playground; blurting out in class; and more easily losing focus. Teachers also consistently note that Student seems sad and anxious at times and has physical manifestations of student's emotional conditions, rating student "at risk" on the BASC for both depression and somatization in the IEE.

I believe that both *** and school staff are truthfully reporting what they see in the home and school environment; they simply do not see the same things.

Based on the whole of the evidence presented, I find that Petitioner did not conclusively establish that Student satisfies the definition of autism in IDEA.

First, the data from assessment measures not dependent solely on reporting by either the *** or school staff do not indicate the presence of autism. Student did not demonstrate deficits in pragmatic language or score in the autistic range on the ADOS in either FIE #2 or the IEE. Observations documented in both FIE #2 and the IEE noted Student's ability to initiate and engage in social interactions, communicate with peers and read emotions, use proper eye contact and facial expressions, and transition between activities. Other than the unusual sensory responses that Student displayed, the data on these measures do not demonstrate the presence of autism in the school setting. I weigh these testing measures heavily in making the determination of whether Student has an autism spectrum disorder.

Second, I find the results and conclusions of FIE #2 to be more balanced and credible than those of the IEE. The IEE relies heavily on information obtained from *** and discounts or ignores the data obtained from school staff. For example, the IEE utilized the CARS-HF rating based solely on *** interview even though testing instructions require more than one source of information. The Brown ADD scale was administered only to the *** and not school staff. The IEE did not discuss or analyze discordant information indicating that Student was not autistic, such as scores on the ADOS, language measures, and information from school staff. In later explaining the discrepant data, Dr. *** testified that parents are generally very reliable, and that school staff would be less aware than *** of the indicators that suggest autism because they are masked by Student's average cognitive and academic functioning. This explanation is not credible when considered with the detailed behavior logs completed by Student's teachers all year and their specific testimony concerning Student's

behavioral profile at school. Clearly, Student's teachers paid close attention to student's behaviors and mannerisms in the school setting.

I also find the IEE less persuasive in its recommendation of eligibility based on autism because the IEE itself concludes that PDD NOS may not be an entirely accurate description of Student's symptoms, that eligibility categories may need to be reconsidered after further testing, and that eligibility based on emotional disturbance may potentially need to be considered. I concur with the suggestion in the IEE that the data obtained may potentially be consistent with an emotional disturbance. For example, elevated teacher ratings point to concerns with depression, sadness, fearfulness, and somatization. *** also reports concerns in these areas on the BASC. These potential emotional/psychological issues are also noted in the *** report of 2010 ("at risk for mood disorder") and FIE #1 ("at risk for emotional difficulties"). Given that IDEA definitions of disability preclude an autism designation if an emotional disturbance primarily impacts the child adversely, the IEE results suggest that it is necessary to rule out an emotional disturbance before concluding that this Student is autistic.

In contrast to the IEE, FIE #2 took into account data obtained from both *** and school sources as reflected in the summary and in the scoring of the CARS2. In explaining the discrepant data obtained at home and at school, Respondent opines that the differences in structure, expectations, and ways of interacting with Student may account for the differences. I find this explanation persuasive. The FIE identifies and acknowledges that Student has behavioral and emotional concerns, but looks at those concerns in light of data obtained from testing measures and other sources to reach the conclusion that Student does not meet the definition of autism.

Finally, I am persuaded by the FIE results and the testimony of school witnesses that Student simply does not display the characteristics of autism reported by *** in the school setting. A Student is not eligible for services under IDEA as autistic when the characteristics of autism are seen only in the home environment; rather, they must be present across settings. *Northside ISD*, Docket No. 126-SE-0112 (SEA TX 2012); *La Mesa-Spring Valley School District*, 109 LRP 54643 (SEA CA 2009); *Clear Creek Independent School District*, 108 LRP 66076 (SEA TX 2008). Further, a medical diagnosis alone does not qualify a student as eligible under IDEA as eligibility must be premised on evaluations that meet IDEA criteria. 34 C.F.R. §300.8(a)(1); 19 T.A.C. §89.1040; *Victoria ISD*, 112 LRP 16077 (SEA TX 2012). This is particularly true in this case where the medical diagnosis of PDD NOS rested primarily on clinical history, and at least one material aspect of the clinical history provided was inaccurate (the prior diagnosis of PDD NOS). (TR. 220-222).

In summary, for all the foregoing reasons, I find that the behaviors manifest by Student across settings do not clearly and conclusively establish a communication and social deficit such that they can be attributed to pervasive developmental disorder. Accordingly, Student does not meet the eligibility definition of a child with autism under the IDEA.

2. Whether Student Is Eligible On The Basis Of Speech Or Language Impairment

IDEA defines speech or language impairment as "a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance." 34 C.F.R. §300.8(c)(11); 19 T.A.C. §89.1040(c)(10).

The evidence conclusively demonstrates that Student's speech and language skills, including pragmatic language, are average and typical of student's same age peers. Student scored in the average range on the TOLD, CELF, GF, and School Language Survey in FIE #2. *** on the Home Language Survey that Student rarely starts or carries on a conversation, but reports of Student observations by the examiners in both FIE #2 and the IEE indicate that Student does not display this deficit in the school setting.

On the IEE, although Student's scores on the GF and CASL did not support identification with a speech impairment, Dr. *** recommended identification based on some below and low average scores on the CASL. The CASL results, when viewed in the context of other pertinent data, are insufficient to satisfy Petitioner's burden of proof as to speech and language impairment. First, Student did not take student's ADHD medication on the day that the CASL was administered; the IEE states that during the language assessment, "Student could not maintain attention and might have hindered student's ability to obtain all the information from the examiner." (R:19). Second, the scores reported on the CASL fall above the level of concern for identification used by AISD. (TR. 365-367). When viewed alongside Student's average scores on other testing measures and reports from both *** and school staff of adequate communication abilities, the CASL alone does not support a finding of Student's eligibility as speech and language impaired.

I find that Student does not meet the eligibility definition of a child with speech and language impairment under the IDEA. Accordingly, Student is not eligible for special education and related services on this basis.

2. Whether Student Is Eligible On The Basis Of OHI Based On ADHD?

Does Student Meet The Criteria For The Disability Classification Of OHI?

IDEA defines Other Health Impairment as "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 – (i) is due to chronic or acute health problems such as ... attention deficit hyperactivity disorder; **and** (ii) adversely affects a child's educational performance." 34 C.F.R. §300.8(c)(9); 19 T.A.C. §89.1040(c)(8).

It is undisputed that Student has a medical diagnosis of ADHD. In fact, AISD concluded in FIE #2 and reiterated at each of the ARDC meetings following FIE #2 that Student has ADHD, but that it does not adversely affect student's academic, social, emotional and behavioral functioning at school. I concur, based on the evidence presented, that Student has ADHD that results in "limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment." 34 C.F.R. §300.8(c)(9); 19 T.A.C. §89.1040(c)(8). To meet the criteria for the disability classification of OHI, Student's ADHD must also adversely affect student's educational performance.

The definition of "adversely affects a child's educational performance" is not clearly settled. Some courts define "adversely affects educational performance" in relationship to the *Rowley* standard and analyze whether the student is able to perform in a general education classroom without specially designed instruction. Essentially, this approach collapses the question of adverse affect and educational need and requires that the adverse impact be substantial enough to require special education in order for a child to meet the eligibility criteria for OHI. *Ashli C. v. Hawaii*, 2007 U.S. Dist. LEXIS 4927 (D.C. HI 2007).

Other courts view the question of adverse impact and educational need as distinct standards, holding that adverse impact means a "negative effect on educational performance... the regulation does not, however, put any quantitative limit, "significant" or otherwise on the disability." *Mr. I. v. Me. Sch. Admin. Dist. No. 55*, 480 F.3d 1, 16 (1st Cir. Me. 2007). Under this analysis, any adverse or harmful impact qualifies a student as OHI. *See also, Alvin ISD v. A.D.*, 503 F. 3d 378 (5th Cir. 2007)(holding that *Rowley* standard applies once a student is deemed eligible under IDEA and not as part of the eligibility determination). The second prong of the eligibility test concerning educational need must still be met in order for a student to qualify for services.

Assuming the correct standard to be *any* adverse impact rather than substantial enough adverse impact to require special education services, I find that Student's ADHD adversely affected student's educational performance. Teacher reports, classroom and playground observations, and behavior logs all document

Student's hyperactivity, impulsivity, blurting out in class, and difficulty with focus and attention. The reported challenges Student has with emotional self-regulation are also linked to ADHD. As a result of these challenges, Student required additional redirection and attention from student's teacher. In fact, most of the data from school staff suggest that these challenges are the most significant that Student face. In short, school staff documented in FIE #2 and in testimony at the hearing, that Student exhibits characteristics of student's ADHD in the school setting that adversely impact student's educational performance at school.

As such, I find that Student meets the definition of a child with a disability of OHI pursuant to 34 C.F.R. §300.8(c)(9). However, Student is not eligible for special education services unless Student also satisfies the second prong of the eligibility test: educational need for special education services.

Does Student, By Reason Of Student's Disability, Need Special Education?

Although I find that Student's ADHD adversely impacts student's educational performance, I do not find that student needs special education services as a result of student's disability. As the court explained in *Alvin, supra*, "the fact that ()'s ADHD adversely affects his educational performance does not necessarily mean that he is eligible for special education services under the IDEA. *Alvin, supra* at 383. Student demonstrated average to above average performance on achievement testing, classroom progress reports, and measures of academic proficiency. Behaviorally, Student experienced certain issues as documented in the behavior logs kept by student's teachers, but student had no disciplinary incidents or office referrals throughout the 2011/2012 school year. Student's teachers testified that student responded well to redirection and made progress academically and behaviorally with the general education interventions they were able to provide.

Petitioner argues that the supports and interventions received by Student during the 2011/2012 school year were themselves significant enough to constitute special education and related services. The evidence, however, does not support Petitioner's contention. Providing additional support and redirection for *** student does not constitute special education. Student's accommodations under student's §504 plan similarly do not constitute special education and related services. The evidence conclusively demonstrates that Student was successful and made adequate progress during the 2001/2012 school year, with support and intervention that is properly provided by a general education teacher.²

Because Student does not need special education services by virtue of student's disability of OHI based on ADHD, I find that student is not eligible for services under IDEA as a child with OHI.

² Student also received accommodations from student's §504 plan and services, though student's teacher testified they were not necessary to ensure student's progress. I make no determinations regarding Student's need for §504 services.

CONCLUSIONS OF LAW

1. Respondent AISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA and its implementing federal and state regulations. AISD was Student's resident district under IDEA during the 2011/2012 school year.
2. Student bears the burden of proof on student's eligibility under IDEA. *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49 (2005).
3. Student is not eligible for special education and related services under IDEA as a student with autism. 34 C.F.R. §300.8(c)(1)(i); 19 T.A.C. §89.1040(c)(1).
4. Student is not eligible for special education and related services under IDEA as a student with a speech or language impairment. 34 C.F.R. §300.8(c)(11); 19 T.A.C. §89.1040(c)(10).
5. Student is not eligible for special education and related services under IDEA as a student with an Other Health Impairment based on Attention Deficit Hyperactivity Disorder. 34 C.F.R. §300.8(c)(9); 19 T.A.C. §89.1040(c)(8).
6. Student demonstrates no educational need for special education services under IDEA based on any disability classification. 34 C.F.R. §300.8(a).
7. Student has no legal entitlement to related services because student is not eligible for special education. 34 C.F.R. §300.34(a).

ORDERS

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

It is further **ORDERED** that all other items of relief not specifically awarded herein are hereby **DENIED**.

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

SIGNED and **ENTERED** this 21st day of December 2012.

/s/ Lynn E. Rubinett

Lynn E. Rubinett

Special Education Hearing Officer for the State of Texas

STUDENT bnf PARENT	§	BEFORE A SPECIAL
Petitioner	§	EDUCATION
	§	
v.	§	HEARING OFFICER
	§	FOR THE
ARLINGTON ISD	§	
Respondent	§	
	§	STATE OF TEXAS

SYNOPSIS

Issue: Whether Student is eligible for special education and related services under IDEA as a student with autism.

Held: For the District. Student failed to prove that student met the disability definition for autism under IDEA.

Cite: 34 C.F.R. §300.8(c)(1)(i); 19 T.A.C. §89.1040(c)(1).

Issue: Whether Student is eligible for special education and related services under IDEA as a student with a speech or language impairment.

Held: For the District. Student failed to prove that student met the disability definition for speech or language impairment under IDEA.

Cite: 34 C.F.R. §300.8(c)(11); 19 T.A.C. §89.1040(c)(10).

Issue: Whether Student is eligible for special education and related services under IDEA as a student with an Other Health Impairment based on Attention Deficit Hyperactivity Disorder.

Held: For District. Student proved that student met the disability definition for OHI under IDEA; however, student did not prove an educational need for special education and related services by reason of student's disability.

Cite: 34 C.F.R. §300.8(a); 34 C.F.R. §300.8(c)(9); 19 T.A.C. §89.1040(c)(8).