

DOCKET NO. 172-SE-0313

STUDENT	§	BEFORE A SPECIAL
PETITIONER/COUNTERRESPONDENT	§	EDUCATION
	§	
VS.	§	HEARING OFFICER FOR
	§	
SANTA FE ISD	§	
RESPONDENT/COUNTERPETITIONER	§	THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

*** (hereinafter “the student”) through student’s next friend, *** (Petitioner), requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. § 1400 *et. seq.* The Respondent/Counter-Petitioner is the Santa Fe Independent School District (hereinafter “the District”).

PROCEDURAL HISTORY

Petitioner filed this request for hearing on March 27, 2013. Petitioner was represented by student’s parent, Pro Se. David Hodgins represented the Santa Fe Independent School District. Both parties appeared in person for a pre-hearing conference on April 9, 2013. Respondent requested a continuance of the hearing and the decision due date of 5 days to accommodate scheduling conflicts. Both parties agreed to a hearing date of May 6, 2013 and a decision due date of June 15, 2013.

Prior to hearing, Petitioner requested that the hearing officer recuse herself from the case. Hearing Officer Lucius Bunton conducted a recusal hearing and denied the Petitioner’s motion.

Prior to the hearing, Petitioner requested a dismissal of her claim, which was granted. However, Respondent requested the opportunity to present its counterclaim. The counterclaim in this matter was filed on April 9, 2013. At the time of hearing, the only remaining issue was the District’s counterclaim. Because a District-initiated claim does not require a 30-day resolution period, the Decision due date was adjusted to 45 days from the date the counterclaim was filed, May 24, 2013.

The hearing was held on May 6, 2013, and the Decision was timely rendered and forwarded to the parties.

ISSUES

The sole issue in this case is whether the District is entitled to a reevaluation of the student. As relief, the District requested an Order from the hearing officer authorizing the reevaluation and overriding the parent's lack of consent.

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusions of law. Citations to the transcript will be designated "RR" with a notation of the page number. Citations to Exhibits will be designated with the letter "R", with a notation of the exhibit number.

FINDINGS OF FACT

1. The student is an *** grade student residing within the geographical boundaries of the Santa Fe ISD.

2. Santa Fe ISD is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing the student with a FAPE pursuant to the IDEIA and is implementing regulations.

3. The student is eligible to receive special education and related services as a student with Other Health Impairment related to a diagnosis of ADHD-NOS. R2-344; R1-88.

4. In the Spring of 2012, the District conducted a Full Individual Evaluation (FIE), including a psychological evaluation. As part of the evaluation process in 2012, the District administered the following instruments on the following dates:

Woodcock-Johnson III Tests of Cognitive Abilities	April 18, 2012
Woodcock-Johnson III Tests of Achievement (WJIII-Ach)	May 9, 2012
Kaufman Assessment Battery for Children II (KABC-II)	May 9, 2012
Behavior Assessment System for Children Second Edition (BASC-II)	May 17-18, 2012
Behavior Rating Inventory of Executive Function (BRIEF)	May 18-21, 2012
Multidimensional Self-Concept Scale	May 17, 2012
Reynolds Adolescent Depression Scale-2 nd Edition (RADSD-II)	May 17, 2012
Strength-Based Assessment for Youth	May 22, 2012

Additionally, the FIE included an OHI reported dated April 3, 2012 and a Speech-Language Evaluation dated April 27, 2012. R1-83-90. The student did not meet the eligibility criteria for Speech Impairment. R1-87.

5. The initial FIE was completed on May 25, 2012, with the psychological evaluation report being completed on June 18, 2012. However, all assessment instruments were administered prior to May 23, 2012, or more than one year from the date of this Decision. R1-89-90.

6. On June 27, 2012, the ARD Committee reviewed the student's FIE and determined that the student is eligible to receive special education and related services as a student with Other

Health Impairment based on the student's diagnosis of ADHD-NOS. R-2-344, 369; R1-88.

7. According to the student's IEP, the student receives instruction in the general education classroom with no curriculum or instructional modifications. The student's schedule includes a combination of regular, Pre-AP and AP classes. R2-364. The AP and Pre-AP classes are high level, rigorous classes that generally require students to work at a faster pace and at a more advanced level than the regular *** courses. These courses also require significant work outside the classroom.

6. The accommodations provided in the student's 2012-2013 IEP include close proximity to the teacher (***); extended time on exams of 150%; extended time for assignment completion; contact parent by email on the first day assignment not turned in; note taking assistance (slot notes); *** availability; and an opportunity to take tests in a quiet location. R2-357-358.

7. The IEP also provided that the student would meet with a monitor teacher to review assignments and prepare for tutoring. R3-400. For most of the school year, the assistant principal has acted as the monitoring teacher, meeting with the student on a regular basis to assist student in organizational skills, monitor assignment completion and oversee the implementation of student's BIP. RR9-10.

8. The student's BIP and counseling goals address organizational skills and assignment completion. The counseling goals also provide that the student shall have an opportunity to access the counselor when student is depressed or anxious. R2-349, 352.

10. The parent and District personnel met multiple times and communicated through numerous emails regarding the parent's literal interpretation of the accommodations in the IEP. Multiple ARD committee meetings were held during the course of the 2012-2013 school year to clarify the accommodations for the benefit of the parent. R2; R3; R4; R5. In January, 2013, the ARD Committee recommended reducing the 5 days of extended time for assignment completion to 3 days, and clarified the remaining accommodations. R5.

11. In prior proceedings between the student and the District (hereinafter "prior proceedings"), this Hearing Officer held that the reduction in extended time for assignment completion and the clarifications were appropriate for the student. *See Student v. Santa Fe ISD*, Dkt. No. 129-SE-0213 (Ramage, April 25, 2013), R13.

12. During the Fall semester, the student made passing grades (***) in all of student's classes, several of which were AP or Pre-AP classes. During the second semester through the date of the hearing, the student has maintained *** in all classes. The student does not exhibit behavioral difficulties and has exceeded the expectations of teachers and other district personnel. R12; RR12-14.

11. The student is currently ranked *** out of *** students with a GPA of ***. R12.

12. The District provided the parent Prior Written Notice of its intent to conduct a reevaluation on April 6, 2013. R9. The notice informs the parent that the reevaluation will include an FIE with a psychological and counseling evaluation, as well as a description of the anticipated evaluation procedures and that new data is required to determine the student's continued eligibility and educational programming. R9. The parent informed the District that she would not consent to the additional assessment. R10.

13. On April 29, 2013, the ARD Committee convened to conduct an annual review. According to the student's teachers, student does exceptionally well, is a leader, and maintains *** in all classes. To the extent student has difficulty in *** and ***, it is believed the difficulty is due to the student's lack of effort outside the classroom. R14-3877; RR12-14.

14. The ARD Committee also reviewed the student's BIP and counseling goals and observed that student has made significant progress. R14-3877.

15. The school members of the ARD Committee recommended further evaluation prior to developing the student's IEP for the 2013-2014 school year in light of the student's present levels of performance. R14-3878. The parent refused to provide consent for the reevaluation. R14-3878.

16. In prior proceedings, this Hearing Officer found that the District had provided the student a FAPE at all times during the 2012-2013 school year. *See Student v. Santa Fe ISD*, Dkt. No. 129-SE-0213 (Ramage, April 25, 2013), R13.

17. Dr. *** testified as the District's expert. Dr. *** reviewed the student's prior evaluations, observed the student in the classroom and interviewed student's teachers, monitor teachers and the District's LSSP. R7.

18. According to Dr. ***, the student has no language deficits or needs. Although *** is an accommodation in the student's IEP and has been available, student does not use it and it is not necessary. RR44-45; R7-3783. In prior proceedings, I found that the student refused to use *** with no negative impact on student's academic performance. *See Student v. Santa Fe ISD*, Dkt. No. 129-SE-0213 (Ramage, April 25, 2013), R13.

19. According to the student's evaluation, student does not demonstrate academic or cognitive deficits. Student's academic performance is consistent with the evaluation results in that student maintains ***, has received passing or commended scores on the TAKS, and demonstrates high academic engagement in class. RR46-48; R7-3783. To the extent there have been performance weaknesses, the teachers attribute it to lack of effort or studying outside of class. R7-3783; R14.

20. One weakness identified in the data was in the area of associative memory. However, the student's score in the most recent testing was within one standard deviation of the mean. The weakness is addressed with tutoring and review and has not prevented the student from making academic progress in the classroom. RR68-69.

21. A review of the evaluation data reflects inconsistencies between the parent's perceptions of the student's weaknesses and needs and that of the student and student's teachers. In the emotional domain, the student and the teachers rated the student similarly and within normal limits on the self-concept, depression and anxiety scales. The parent, however, reported significant problems in these areas. R7-3784; RR74.

22. The student and teachers report no significant behavioral issues. However, the parent reports significant issues. R4-3784. According to the data from the 2012 evaluation, no behavioral needs were identified or addressed other than organizational skills. The scores derived from the assessments, according to the student and the teachers, indicate a typically developing student who is not even in the at risk category. R6-3785; RR74.

23. In the attention and organization domain, teachers reported no issues and stated that student's attention is good. The parent report indicated significant issues; the student reported an awareness of some attention issues. RR72-73; R7-3785-3786.

24. The District has provided a behavior plan, counseling goals, a monitor teacher and other accommodations to address any perceived attention issues.

25. The data clearly reflects that the parent presents a picture of *** as having significant needs, when school personnel and the student report minimal to no issues. R7; RR74-81. The only area of concern reported by the student pertained to student's relationship with student's parents, which was in the at risk category. RR82.

26. In March, 2012, the student was ***. The student reported pressure from student's parents regarding student's grades and that is mother is very focused on student's school. According to the student, the parent was the source of student's anxiety and stress. R6-950-951. The parent, however, reported that actions taken by the school caused student's anxiety. R6-909. The parent also reported a history of PDD-NOS, although the current evaluation does not reflect such a diagnosis. R6-909; RR107.

27. Treatment notes dated March and April, 2013, reflect that the student is currently being treated for Depressive Disorder NOS. The student reported that student is completing work at school and making ***, with the exception of difficulty when student missed 3 days of school. The parent, on the other hand, reported that the student had two breakdowns at school and was worried about accommodations being removed. R6-3787-3791.

28. According to Dr. ***, there are inconsistencies with the student's previous evaluation, student's accommodations and IEP derived from the evaluation, and student's actual performance. For example, although the student does not have an auditory processing disorder, the IEP provides for the availability of ***, which the student does not use. Additionally, the failure to use *** has had no impact on the student's progress. RR94-96.

29. In prior proceedings, the undersigned hearing officer made specific findings that the

student made significant academic and behavioral progress in spite of not accessing accommodations which were made available to student by school personnel. Additionally, the provision of one accommodation, 5 extra days for assignment completion, was found to be inappropriate because it encouraged procrastination when the student was capable of completing the work in the time allotted for all students. *See Student v. Santa Fe ISD*, Dkt. No. 129-SE-0213 (Ramage, April 25, 2013), R13.

30. The student's improved academic and behavioral progress during the 2012-2013 school year, as well as the inconsistencies between the prior evaluation and the student's actual demonstrated needs and performance, supports the District's request for a full re-evaluation, including a psychological and counseling evaluation.

DISCUSSION

The IDEIA's implementing regulations require that school districts conduct reevaluations of children with disabilities if the child's parent or teacher(s) request the reevaluation or if the school determines that the educational and related services needs, including improved academic and functional performance, warrant it. 34 CFR 300.303(a). While evaluations must be conducted at least once every three years, they may be conducted more frequently if warranted or requested, so long as there is no more than one re-evaluation in a one-year period. 34 CFR 300.303(b)(1). In performing the reevaluation, the ARD Committee members and other qualified professionals must review existing evaluation data on the child including evaluations and information provided by the parents of the child; current classroom-based assessments and observations; and observations by teachers and related services providers; and then determine, based on their review and input from the parent, what additional data, if any, is needed to determine:

1. Whether the child continues to have a particular category of disability;
2. The present levels of performance and the developmental and educational needs of the child; and
3. Whether the child continues to need special education and related services, or whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general curriculum.

34 C.F.R. §300.305(a).

Prior to administering the assessments, the District must provide the parent with prior written notice of the scope of the evaluation and seek informed consent. 34 C.F.R. §300.300(c). The prior written notice must include a description of the evaluation procedures the agency proposes to conduct. 34 C.F.R. § 300.304; 34 C.F.R. § 300.503. The District in this case has complied with this requirement. R-9.

In the instant case, the District diligently worked with the parent and the student throughout

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the school year. District personnel have closely monitored the student's work and progress and discussed student's improvement with the parent. It would appear that the student's current IEP was developed in response to concerns that the student was experiencing extreme emotional distress related to school. However, a review of the records reflects that the student is not experiencing stress associated with school, is excelling academically and behaviorally without accessing special education accommodations, and has made significant progress on student's counseling goals. In sum, there is a concern that the student may not be in need of special education and related services at all. A reevaluation is therefore necessary to determine the student's continued eligibility and/or appropriate special education services.

Currently, the student is eligible for special education and related services as a student with Other Health Impairment (OHI) due to ADHD-NOS. However, the most recent psychiatric records dated April 3, 2013, do not indicate such a diagnosis. R6-3791. However, even, if the student still has a diagnosis of ADHD-NOS, the applicable state and federal regulations clearly require that a medical diagnosis standing alone is not sufficient to determine OHI eligibility. An inquiry must be made into the impact such a disorder has on the child's educational performance. 34 C.F.R. §300.8(a)(1); 300.8(c)(9). The ARD Committee makes the eligibility determination with input from a multidisciplinary team that includes a licensed physician. 19 T.A.C. §89.1040(8). In other words, the applicable regulations contemplate that while a licensed physician makes the diagnosis of ADHD, it is a multi-disciplinary team that collects or reviews evaluation data to determine the student's educational need based on that diagnosis. This multi-disciplinary team *includes but is not limited to* a physician. Additionally, in conducting an evaluation, the school district must use a variety of assessment tools and strategies to gather relevant data and must not use any single measure or assessment as the sole criterion for determining whether the child has a disability or student's educational program. 34 C.F.R. § 300.304(b).

The District has an obligation to seek complete information to determine eligibility and educational need based on current data. Given the student's academic performance during the 2012-2013 school year, prohibiting the District from obtaining current assessment data would undermine the ARD Committee's ability to base its future decisions on complete information and potentially impede the provision of a Free Appropriate Public Education to the student. In fact, it could result in the implementation of a program that is inappropriate for the student given student's *** and student's academic and behavioral performance. The District's witnesses testified, credibly, that further inquiry is needed to determine whether the student continues to be eligible for special education and related services and the nature of those services. The District is obligated and has the right to augment the medical information to determine the student's eligibility and to develop an appropriate IEP to meet student's unique needs. *Conroe ISD v. Shelby S.*, 454 F.3d 450 (5th Cir. 2006). The District has the absolute right to conduct its own assessment to determine special education eligibility and educational need. This right includes the right to choose appropriate assessment procedures and instruments. *Andress v. Cleveland ISD*, 64 F.3d 176 (5th Cir. 1995); *Northside ISD v. Student*, Dkt. No. 286-SE-0404 (Tex. Hearing Officer Ann Lockwood, July 6, 2004). When a parent refuses consent, the District may seek an order overriding the parent's lack of consent. 34 C.F.R. § 300.300(c)(1)(ii); *Northside ISD, supra*.

IDEIA and its implementing regulations contemplate that a student may not be evaluated more than once a year without the consent of the parent. However, this limitation is not applicable to the facts of this case. Although the most recent evaluation in this matter was dated May 25, 2013, with the psychological *report* dated June 18, 2012, all assessment instruments were administered to the student more than one year prior to the date of this Decision. R1. Therefore, there is no bar to administering new assessment instruments and conducting a reevaluation on or after the date of this Decision because all previous assessments were conducted more than one year ago, or on or before May 23, 2012.

The District as the party seeking relief bears the burden of proof in its request for an Order overriding lack of parental consent for the evaluation. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). The District has established by a preponderance of the evidence that its request for additional data and assessment are needed for its evaluation team to make a determination with regard to the student's ongoing eligibility and educational need. The District's request for an Order overriding the parent's lack of consent to the evaluation is GRANTED.

CONCLUSIONS OF LAW

1. The student currently meets the eligibility criteria for and receives special education and related services as a student with Other Health Impairment under IDEIA, 20 U.S.C. §1400 *et seq.* and its implementing regulations.

2. The student's parents reside within the geographical boundaries of the Santa Fe ISD, a legally constituted independent school district within the state of Texas that is responsible for providing student with a Free Appropriate Public Education.

3. Santa Fe ISD is responsible for ensuring that a reevaluation of the student is conducted in accordance with 34 C.F.R. §§300.304-300.311 when circumstances warrant it.

4. With few exceptions, parental consent for a reevaluation of a student must be obtained by a School District. 34 C.F.R. §300.300(c). When a parent refuses consent, the District may seek an order overriding the parent's lack of consent. 34 C.F.R. § 300.300(c)(1)(ii).

5. Additional evaluation data is needed as part of the District's ongoing responsibility to the student. Such information is needed to determine if the student meets the eligibility criteria for Other Health Impairment and to determine student's present level of educational performance and educational need. 34 C.F.R. §300.305.

6. Santa Fe ISD may seek and obtain through the due process hearing procedures an order overriding the student's parents' refusal to consent to the reevaluation. 34 C.F.R. §300.300(c).

7. Santa Fe ISD established the need to conduct a reevaluation of the student to determine whether the student continues to meet the criteria for Other Health Impairment and to determine student's current educational need for special education and related services.

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, I hereby **ORDER** that the following relief is **GRANTED**:

1. The District shall complete a Full Individual Evaluation of the student as noticed to the parent in its April 6, 2013, prior written notice. This evaluation shall comply with 34 C.F.R. §300.304-300.311 and shall be completed no later than 45 days from the date of this Order.
2. The parent is ordered to cooperate with the District in the conduct of the FIE and to present the student for such an evaluation.
3. This Order shall override the parent's lack of consent to the evaluation.
4. The ARD Committee shall meet within ten (10) school days of the date of this decision to begin implementation of the relief ordered herein.
5. All other relief not specifically granted herein is hereby **DENIED**.

NOTICE TO THE PARTIES

This Decision is final and is appealable to state or federal district court.

The District shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(p). The following must be provided to the Division of Federal and State Education Policy of the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating that the Decision has been implemented; or 2.) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

SIGNED this 23rd day of May, 2013.

Sharon M. Ramage
Special Education Hearing Officer

SYNOPSIS

Issue: Whether the District is entitled to a reevaluation of the student absent the parent's consent.

Held: For the District. The student's improved academic achievement and functional performance warrant a reevaluation. The District is entitled to an Order overriding the parent's lack of consent.

Citation: 34 CFR § 300.303(a)(1).