

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

**STUDENT,
bnf PARENT,
 Petitioner,**

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§
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v.

DOCKET NO. 234-SE-0513

**HARMONY SCIENCE ACADEMY
(***),
 Respondent.**

DECISION OF THE HEARING OFFICER

Introduction

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

Party Representatives

Petitioner was represented throughout this litigation pro se by petitioner’s mother *** and *** and parent advocate Carolyn Morris. Nina Morris, assistant to Ms. Morris, attended the due process hearing. Respondent was represented throughout this litigation by its legal counsel Rhonda Crass and her co-counsel Dean Micknal with the law firm of Leasor Crass. ***, Data Analyst for *** and previous Special Education Programs Administrator for the charter school’s *** campus, also attended the due process hearing as the party representative.

Resolution Session and Mediation

A Resolution Session was conducted on June 14, 2013 but it was not successful in resolving the issues between the parties. The parties did not attempt mediation.

Procedural History

The initial due process hearing request in this case was filed on May 30, 2013. This case was originally assigned to another hearing officer who issued, among other orders, a Second Order Scheduling Due Process Hearing (Scheduling Order) on July 24, 2013 following the initial prehearing conference conducted on June 19, 2013. In the Scheduling Order the previous hearing officer confirmed the set of legal issues and items of requested relief and set for a due process hearing on August 19-20, 2013. The case was reassigned to this hearing officer by the Texas Education Agency on August 9, 2013.

The charter school requested a continuance of the August hearing dates to resolve a scheduling conflict that arose for the charter school’s lead counsel due to a medical issue. The charter school also requested an extension of the 45 day decision deadline in order to accommodate its request for a continuance. During a subsequent prehearing conference the parties agreed to a slight adjustment in the hearing dates and to the charter school’s request for an extension of the 45 day decision deadline. The parties agreed to begin the hearing, as originally planned, on August

19, 2013 and complete the second day of hearing on Friday, August 30, 2013. The charter school confirmed its request for an extension of the 45 day decision deadline to October 11, 2013.

The charter school requested clarification of the advocate's role for purposes of the due process hearing. The charter school argued that while the advocate could assist the pro se parent she could not represent the student or parent during the hearing nor engage in any actions that would otherwise constitute the unauthorized practice of law.

The parent advocate argued she had the requisite specialized knowledge and training to represent the student and parent in the hearing. Under a newly enacted state law the hearing officer is charged with making the determination as to whether an advocate is qualified to represent a student in a special education hearing. *See, Tex. Educ. Code § 29.0162 (a) (b) (c)*. After reviewing additional documents requested of the parent advocate the hearing officer concluded the advocate was qualified under state and federal law to represent Student in the due process hearing. *See, Letter from Hearing Officer (August 16, 2013)*.

The due process hearing was conducted on August 19, 2013 and concluded on August 30, 2013 as planned. The parties requested the opportunity of submitting written closing arguments and legal briefs. The parties selected September 26, 2013 as the date the written closing arguments were due. Both parties timely filed their respective written closing arguments and legal briefs. The due date for the Decision of the Hearing Officer was October 11, 2013 as previously established at Respondent's request without opposition from the Petitioner.

Issues

As stated by the previous hearing officer in her Second Order Scheduling Due Process Hearing issued on July 24, 2013, the issues for decision in this case under the Individuals with Disabilities Education Act (IDEA) are:

1. Whether the charter school failed to respond to a parental request for a Full Individual Evaluation (FIE) and psychological assessments in a timely manner;
2. Whether the charter school failed to timely assess Student upon receipt of signed parental consent;
3. Whether the charter school failed to appropriately and thoroughly assess Student for purposes of determining eligibility for special education and related services in all areas of suspected need;
4. Whether the charter school failed to provide Student's mother with the required information related to the evaluation process – such as adequately explaining the process, its purpose and identifying the evaluators;
5. Whether the charter school failed to meet its "Child Find" duties under the IDEA when it determined Student did not qualify for special education and related services;
6. Whether the charter school failed to consider Student's grades that fell below "70" and student's negative behaviors when conducting the evaluation and in making the determination student did not qualify for special education and related services;
7. Whether the charter school failed to consider an outside medical evaluation identifying Student as a student with Attention Deficit Hyperactivity Disorder (ADHD) when conducting the evaluation and in making the determination student did not qualify for special education and related services;

8. Whether the charter school failed to timely identify Student as eligible for special education and related services and to develop and implement an appropriate Individual Educational Plan (IEP) in the least restrictive environment (LRE);
9. Whether the charter school failed to notify Student's mother that Student failed the state standardized assessment in ***; and,
10. Whether the charter school's failure to provide Student with an appropriate educational program and placement resulted in student failing the state standardized assessment in ***.

Respondent also submitted a counterclaim raising the issue as to whether its own evaluation was appropriate within the meaning of the IDEA and whether Petitioner is entitled to an Independent Educational Evaluation (IEE) at the charter school's expense.

Relief Requested

Petitioner requests the following items of relief:

1. Order the charter school to convene an Admission, Review & Dismissal Committee (ARD) meeting to develop and implement an appropriate special education program with placement in the least restrictive environment; the program shall specifically address Student's ADHD and areas of weakness in *** and behavior;
2. Order the charter school to explain to the parent all procedural rights under the IDEA;
3. Order the charter school to provide Student with counseling as a related service;
4. Order the charter school to fund an Independent Educational Evaluation (IEE) in all areas of suspected need, including a psychological assessment; and,
5. Order the charter school to provide Student with compensatory services in the form of private tutoring at the charter school's expense to assist Student in ***.

Findings of Fact

1. Student was first diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) in *** grade during the 2009-2010 school year. Student attended the *** Independent School District (***) from *** through *** grade. Transcript Volume II, pp. 502-503(referred to hereafter as "Tr. Vol. ___, p. ___"). *** provided Student with a set of interventions in the form of an academic/behavioral checklist. A *** Student Success Team (the Team) met on February 27, 2012. The Team noted Student's difficulties with *** and failing to show student's work in ***. The Team also noted teachers felt "student can do more when student puts forth student's full effort" (Petitioner's Exhibit 6, p. 17) (referred to hereafter as "P. Ex. ___, p. ___") (Respondent's Exhibit 12) (referred to hereafter as "R. Ex. ___, p. ___").

2. Student enrolled in the charter school for *** grade during the 2012-2013 school year. (Tr. Vol. II, p. 504) (R. Ex. 6). Student's mother did not disclose Student's ADHD, a need for medication, or, any prior participation in special education programs on the initial enrollment form signed April 6, 2012 and received by the charter school on April 10, 2012. (Tr. Vol. I, p. 85)(Tr. Vol. II, p. 552)(R. Ex. 6) (R. Ex. 7, p. 1) (R. Ex. 8). Student was not taking any medication at the time student's mother completed the enrollment form and a Health

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Inventory form that would have indicated a need for special services. (Tr. Vol. I, p. 86) (Tr. Vol. II, pp. 504-505) (R. Ex. 7).

3. At some point during the 2012-2013 school year Student resumed treatment with a psychiatrist. The psychiatrist prescribed and monitored medication to address Student's ADHD symptoms. During the *** grade school year the psychiatrist increased the medication dosage to facilitate Student's ability to focus and to address homework issues raised by student's mother and teachers. (Tr. Vol. II, pp. 504, 524-525, 526-527)(R. Ex. 46). Student has been taking medication for ADHD for *** years. (Tr. Vol. II, p. 552).

4. On August 22, 2012 Student's mother sent an email to the Special Programs Administrator with a request for a conference to discuss Student and the upcoming new school year. (P. Ex. 15, p. 56) (Tr. Vol. II, p. 522). Student's mother did not receive a response from the administrator. (Tr. Vol. I, pp. 19, 21-22). Student's mother also sent an email to Student's teachers with a request for the teachers to contact her with any issues or concerns about Student's progress, homework, class work, projects, etc. She provided the teachers with an email address and phone number. (R. Ex. 69, p. 314). Student's mother was concerned with the lack of focus and organization she saw at home and worried those issues would affect Student's ability to be successful at school. (Tr. Vol. II, pp. 522-524).

5. In late September 2012 Student's mother notified the English teacher that Student had ADHD and received services from ***. (Tr. Vol. I, pp. 22, 25, 220, 245) (Tr. Vol. II, p. 522). Sometime in the fall Student's mother also told the Social Studies teacher that Student had ADHD. The Social Studies teacher did not take any action based on that information because she had no paperwork from either the parent or the school to confirm the ADHD. Based on prior experience with other parents she thought Student's mother simply wanted her to be aware of the ADHD. (Tr. Vol. II, pp. 270, 272-274, 275).

6. The English teacher shared the information about Student's ADHD diagnosis and previous 504 services with the Special Programs Administrator. As a result the charter school initiated a request for special education and/or 504 records to *** on September 26, 2012. (R. Ex. 9). GPISD responded with a fax on October 5, 2012 stating the school district had not provided Student with special education services. No special education records were provided to the charter school by GPISD. (R. Ex. 10) (Tr. Vol. I, pp. 23, 24 25, 89). The charter school's inquiry stopped there for the time being. (Tr. Vol. I, p. 23).

7. After failing *** the second six weeks, the Assistant Principal (AP), Student, student's mother, and the *** teacher met in late September 2012 to discuss the difficulties in the *** class. The *** teacher's primary concern was missing work. (Tr. Vol. I, pp. 169-170, 179-180, 185). The parties discussed ways to better communicate with Student's mother about the *** class. (Tr. Vol. I, pp. 148-149). The AP followed up with an email the next day. (R. Ex. 75, p. 427). The *** teacher gave Student a set of makeup assignments. Student ultimately completed the work and student's *** grade improved to an "A" for the third six weeks. (Tr. Vol. I, pp. 171)(P. Ex 5) (R. Ex. 32).

8. Student's mother sent a second email to the Special Programs Administrator on December 4, 2012 and again requested a conference to discuss her concerns about Student's grades and progress. The Special Programs Administrator responded to the email the same day and offered a number of dates and times for the conference and apologized for failing to respond to the earlier email. (P. Ex. 15) (R. Ex. 75, pp. 430-433).

9. Student's mother met with the Special Programs Administrator and Student's core academic teachers on December 11, 2012. (Tr. Vol. 1, pp. 21)(R. Ex. 75, p. 432). As a result of the meeting Student's mother provided the charter school with records from *** including a document that confirmed the use of some educational interventions under a Response to Intervention (RTI) process. (Tr. Vol. I, pp. 27, 78) (Tr. Vol II, pp. 508-509).

10. An academic checklist and a *** to facilitate completion and the return of homework were strategies developed at the December meeting. (Tr. Vol. I, pp. 52-53, 54)(R. Ex. 75, pp. 433-436). The parties planned to convene again in February to review the intervention strategies. (Tr. Vol. I, p. 53). Student's mother did not specifically request a special education evaluation at the December meeting. (Tr. Vol. I, p. 62) The charter school began implementing the *** interventions following the meeting. (Tr. Vol. I, pp. 29-30, 64).

11. Throughout the 2012-2013 school year Student's mother communicated frequently with Student's teachers. (Tr. Vol. I, p. 218) (Tr. Vol. II, pp. 270-271, 380, 541)(R. Ex. 69-73) (R. Ex. 74, pp. 424-426). She could also access the "parental portal" – an Internet tool for parents to communicate with teachers about grades, missing work, and attendance. (Tr. Vol. I, p. 238). Student's mother preferred communicating by email, phone calls, and the ***. (Tr. Vol. I, pp.238-239) (Tr. Vol. II, pp. 539-540). School staff had problems, at times, scheduling meetings and conferences with Student's mother. (Tr. Vol. I, pp. 270. 284)(R. Ex. 74).

12. Several teachers attempted to use the ***. Student's class participation, any behavior issues, missing work, etc. were to be documented in the ***. (Tr. Vol. I, p. 235) (Tr. Vol. II, pp. 282-283, 381-382, 540-541). However Student was very inconsistent in bringing the *** to class so it was not particularly effective. (Tr. Vol. I, p. 235) (R. Ex. 74, p. 422) (R. Ex. 75, p. 452-455). Student's mother ultimately requested eliminating the *** because it was not fulfilling its intended function as a communication device but evolved into a negative focus on Student's behavior. (R. Ex. 70, pp. 360-361).

13. The charter school distributes a Student Handbook to every student. The Student Handbook includes an explanation of the process for submitting a request for a special education evaluation. (Tr. Vol. II, p. 459)(R. Ex. 5, p. 139) (R. Ex. 41).

14. The charter school has a system for identifying "at risk" students. (Tr. Vol. I, pp. 27-28, 86-87). Teachers are required to submit a list of "at-risk" students to the principal every six week grading period. (Tr. Vol. I, p. 27). The list is organized into three categories: students with "minor struggles" addressed by teachers using their own classroom strategies; students placed by teachers in after-school tutorials based on classroom performance; and, students struggling in the classroom and in need of additional interventions beyond what the teachers could provide. (Tr. Vol. I, pp. 27-28). None of Student's teachers placed student on any at-risk list. (Tr. Vol. I, pp. 29-30, 63).

15. In the spring of 2013 Student took the *** grade reading and math State of Texas Assessment of Academic Readiness assessment known as the "STARR" test. (P. Ex. 4). Prior to the actual STAAR test Student took two practice tests for reading and math. Student earned satisfactory scores in both *** practice tests and on the second *** practice test but failed the first *** practice test. (Tr. Vol. I, pp. 128, 131)(R. Ex. 62).

16. As a result of those practice scores the charter school offered Student a special nine week tutoring program ***. Student attended only one *** session telling student's teacher that the tutoring interfered with student's ***. (Tr. Vol. I p. 100)(Tr. Vol. II, pp. 277, 420-422)(R. Ex. 61).

17. Tutorials were also offered during spring break for students who had difficulty with the practice STAAR tests. Student did not participate in the spring break tutorial. (Tr. Vol. II, p. 412). Student's mother observed that Student was discouraged by school and student did not want to spend spring break studying while student's friends were on vacation. (Tr. Vol. II, p. 549).

18. Although Student achieved satisfactory performance on the *** portion of the actual STARR test student did not meet the minimal performance standard for ***. (P. Ex. 4). The charter school notified Student's

mother that Student failed the *** portion of the STAAR test and offered summer school to address Student's need for remediation in that area. (Tr. Vol. II, pp. 412-413)(R. Ex. 63, p. 1) (R. Ex. 63).

19. The special four week summer school program was for students who failed one or both parts of the test. Students could then re-take the STAAR (P. Ex. 7) (R. Ex. 5, p. 137) (R. Ex. 64) (Tr. Vol. II, pp. 411-414). Student attended the June 2013 summer school program. (P. Ex. 7) (Tr. Vol. II, p. 415). Attending summer school and failing the STAAR was discouraging for Student. (Tr. Vol. II, p. 549). Student was anxious about whether student would be promoted to *** grade. (Tr. Vol. II, p. 550).

20. For the current 2012-2013 school year the charter school has a new plan for students who have difficulty with passing the STAAR tests. Those students will be placed into small group, remedial classes for an additional five hours each week of reading and five additional hours per week of math. The charter school planned to place Student into a remedial *** class due to student's failure on the *** grade STAAR ***. These remedial classes are to be held during the school day. (Tr. Vol. I, pp. 127, 138-140, 142). However, the charter school did not notify Student's mother of this plan and Student's mother did not have a clear idea of what the *** grade class schedule would be. (Tr. Vol. II, p. 550).

21. A Student Support Team (SST) meeting convened as planned on February 8, 2013. (Tr. Vol. I, p. 109) (Tr. Vol II., pp. 508-509) (R. Ex. 74). Student's mother attended this meeting. (Tr. Vol. II, p. 527). The SST reviewed the *** and *** grade STAAR practice tests. The set of interventions reviewed by the SST included: extended time to complete assignments, proximity to teacher; and, use of the *** system including the *** behavior and academic checklists. (Tr. Vol. I., pp 31-32).

22. Student's mother requested a special education evaluation at the February 8th SST meeting but did not specifically request that a psychological be included as a component of the evaluation. (Tr. Vol. I., pp. 65-66, 69, 230). Student did not exhibit any behaviors at school that indicated a need for a psychological. (Tr. Vol. I., p. 70). The AP (who was responsible for student behavior and discipline) had no concerns about Student's behavior and considered student to be an average *** grader. (Tr. Vol. I., pp. 149-150, 152).

23. The charter school proposed serving Student's needs under 504¹ rather than special education. The charter school typically serves students with ADHD under a 504 plan using interventions that have proven to be effective such as specialized tutoring and other accommodations. (Tr. Vol. I. pp. 57-58)(Tr. Vol. II, p.482). Student's mother specifically rejected 504 services. (Tr. Vol. I., pp. 55, 67).

24. The SST agreed to make the special education referral to determine eligibility as a student with OHI based on Student's diagnosis of ADHD and in response to the parental request. (Tr. Vol. I., pp. 31-32, 69)(R. Ex. 14). Once the request for a special education referral was made the SST meeting ended without further discussion. (Tr. Vol. I., pp. 225-226). The charter school continued to implement the interventions in place while the special education referral was pending. (Tr. Vol. I., pp. 31-32, 56-57).

25. Student's classroom performance in *** confirmed this was an area of academic weakness. Student made a 70 for the first six weeks, failed the second six weeks with a 55, and jumped to a 91 for the third six weeks. However, student made a 55 on the first semester *** final. Student made an overall 1st semester *** grade of 70. Student's grades in *** during the second semester were a bit more consistent: 71, 76, 79 with a final exam grade of 76 and an overall final 2nd semester grade of 76. (P. Ex. 5).

¹¹ Section 504 of the 1973 Rehabilitation Act of 1973, 29 U.S.C. § 794 (ensuring students with disabilities are not subject to discrimination in the pursuit of a "major life activity" such as education and learning).

26. The charter school offered after school tutoring for all students. (Tr. Vol. I, p. 126) (Tr. Vol. II, p. 511). *** tutorials were offered every *** and *** but Student's attendance at the tutoring sessions was somewhat sporadic. (Tr. Vol. I, pp. 187-188, 207) (R. Ex. 60).

27. It is typical for a *** grader to struggle academically. *** grade is *** and students may struggle until they ***. (Tr. Vol. II, pp. 273, 276-277). For example, ***. (Tr. Vol. I, p. 82)(Tr. Vol. II, p. 373). It is also typical for *** graders to have ***. (Tr. Vol. II, pp. 272-273).

28. Student's six week grades for the first semester in *** were 84, 70, and 80, with a final exam grade of 68, and an overall first semester *** grade of 76. Student's second semester six week *** grades were: 75, 78, 76, a final exam grade of 72, and an overall second semester *** grade of 75. (P. Ex. 5).

29. Student's *** grades first semester were: 86, 93, and 80, with a final exam grade of 80 and overall first semester grade of 85. Second semester *** grades were 87, 74, 76, with a final exam grade of 68 and overall second semester grade of 76. Student's *** grades first semester were 84, 70, and 80 with a final semester grade of 55 and overall semester grade of 72. Second semester *** grades were 81, 80, and 77, with a final exam grade of 50, and overall semester grade of 72. (P. Ex. 5).

30. Student also took *** in *** grade. Student's grades in that class were 86, 69, and 79, with an overall semester grade of 78 and second semester grades of 80, 73, and 77 with a final semester grade of 77. There were no final exam grades in the *** class. (P. Ex. 5).

31. By the end of *** grade Student made a "B" in *** and "C's" in all other core academic classes. Student performed much better in other classes including ***. (P. Ex. 5). Student's attendance at school was excellent with only *** absences all year. (P. Ex. 5).

32. On the report card, two teachers noted Student's behavior "needs improvement" but the majority rated student's behavior to be "satisfactory." Three teachers noted student's behavior was "excellent." (P. Ex. 5). During the fall semester Student accumulated a number of behavioral warnings including: using profanity, a lack of cooperation, not being in assigned location, and lack of class materials. (R. Ex. 20, p. 208). In the spring semester Student accumulated behavioral warnings for: disturbing the class, not being in assigned location, excessive talking, talking back to teacher, horse play, lack of cooperation, and, chewing gum. Student was suspended once for a fairly minor incident when student ***. (Tr. Vol. I, pp. 59, 72)(P. Ex. 8) (R. Ex. 47).

33. Charter school staff viewed these behaviors as fairly typical for a *** grader and therefore saw no need for a behavior plan. (Tr. Vol. I, pp. 59-60, 221). Their greatest concerns were failing to turn in work and distractibility although those issues could be adequately handled in class. (Tr. Vol. I, pp. 60, 71-72, 221, 223, 225, 234)(Tr. Vol. II, pp. 468-469).

34. Student does not need a modified curriculum or individualized instruction. Student is capable of doing grade level work although student does need some additional tutoring support and accommodations to address focus and organizational issues. (Tr. Vol. I, pp. 75, 76-77, 80, 92-93, 136, 190, 205, 216-217, 234)(Tr. Vol. II, pp. 333, 377-378, 423-424). Several charter school staff viewed the need for special education as limited to students who required a modified curriculum. (Tr. Vol. I, pp. 75-76, 123, 136, 204, 215)(Tr. Vol. II, pp. 339-340, 379, 423, 447).

35. Following the February 2013 SST meeting the charter school began gathering documents and data and put together a special education referral packet. (Tr. Vol. I, pp. 31-31) (Tr. Vol. II, p. 454) (R. Ex. 21) (R. Ex.

75, p. 23). The referral packet included information related to Student's grades and behavior. (Tr. Vol. I, p. 32). (R. Ex. 21, pp 1-2) (R. Ex. 22-41). The referral packet also included the following: vision and hearing screenings, a home language survey, STARR results, recent report cards and disciplinary records, SST meeting minutes, parent information (i.e., a sociological), classroom observation data, classroom based assessments, behavior rating scales, a language rating scale, a physician's OHI report, a signed consent form and the request for the special education referral. (R. Ex. 21-39).

36. Per charter school procedures the completed referral packet was first forwarded to the Cluster Special Programs Coordinator for review and approval. (Tr. Vol. I, p. 32) (Tr. Vol. II, pp. 453-455) (R. Ex. 21, p. 2). A Special Education Coordinator met with Student's mother on March 18, 2013 and provided her with Notice of the FIE, an Explanation of Rights, and, Notice of Procedural Safeguards under the IDEA. Student's mother provided the requisite signed parental consent for the FIE at that meeting. (Tr. Vol. I, pp. 32-34, 37, 45)(Tr. Vol. II, pp. 457, 510, 520-521) (R. Ex. 41, pp. 1-2) (R. Ex. 42) (R. Ex. 43). The consent form included assurances that Student's mother was fully informed and understood the evaluation process. (Tr. Vol. I, pp. 36, 44) (R. Ex. 43). Student's mother was familiar with the special education referral process through previous experiences with her children in other schools. (Tr. Vol. II, pp. 512, 517-518, 521).

37. As a component of the special education referral process the charter school obtained a written OHI form from Student's psychiatrist who confirmed the diagnosis of ADHD. (Tr. Vol. I, p. 42)(P. 14). The physician characterized the severity of Student's ADHD as "moderate." The OHI form was completed by the psychiatrist on March 19, 2013. (Tr. Vol. II, p. 96)(P. Ex. 3) (R. Ex. 46). The physician noted on the OHI form that Student takes medication in order to improve student's concentration and decrease disruptive behavior in the classroom. (P. Ex. 5).

38. The charter school contracts its assessment and evaluation services to an outside provider – Diagnostic Assessments Services (DAS). (Tr. Vol. I, pp. 33, 45). The charter school sent a referral packet to DAS with a "service request" for DAS for the evaluation. (Tr. Vol. I, pp. 45-46)(Tr. Vol. II, pp. 299-302, 316-327, 457)(R. Ex. 44). An educational diagnostician was assigned by DAS to conduct Student's FIE. (Tr. Vol. II, pp. 294, 297, 315-316) (Tr. Vol. I, p.46) (Tr. Vol. II, pp. 315-316, 466). The diagnostician received and reviewed all the information contained in the referral packet as part of the FIE process. (Tr. Vol. II, pp. 317-323, 327, 350-351)(R. Ex. 21).

39. A classroom observation by the charter school's Special Programs Coordinator was conducted on March 19, 2013 as a component of the FIE. (Tr. Vol. II, p. 300). The observation was conducted in the social studies class. Student's behavior during class was observed to be average and student worked independently without talking or stopping. (R. Ex. 45). The observation was reviewed by the diagnostician. (Tr. Vol. II, p. 327).

40. The diagnostician administered a number of assessments to measure Student's cognitive abilities and academic achievement. (R. Ex. 49, pp. 252-255). Student was cooperative, attentive, focused, respectful, and needed no redirection during the evaluation. (Tr. Vol. II, pp. 327-328). Student's report cards were also provided and reviewed by the diagnostician. (Tr. Vol. II, p. 300).

41. All of Student's teachers provided their input into the FIE as well. (Tr. Vol. I, pp. 212, 213, 219)(Tr. Vol. II, pp. 268, 304)(R. Ex. 49). The teachers uniformly identified difficulties with turning in homework, maintaining focus in class and, a lack of organization. (Tr. Vol. I, pp. 213-215)(Tr. Vol. II, pp. 304-305, 373)(R. Ex. 25-28) (R. Ex. 49).

42. The educational diagnostician generated a written report that was completed on May 10, 2013. The medical diagnosis of ADHD was considered by the diagnostician and referenced in the report. (Tr. Vol. II, p.

322)(R. Ex. 49, pp. 1, 5). The FIE addressed two areas of suspected disability: learning disabilities (LD) and Other Health Impairment (OHI). (P. Ex. 3) (R. Ex. 49, p. 255). The FIE included assurances that all regulatory requirements under the IDEA were met in conducting the evaluation. (Tr. Vol II, p. 317)(R. Ex. 49, pp. 255-256). The FIE identified *** as an area of weakness but it did not rise to the level of a specific learning disability. (Tr. Vol. II, pp. 303-304, 329-330)(R. Ex. 49).

43. The diagnostician's FIE report concluded that Student did not appear to meet criteria for special education as a student with a specific learning disability as there was "no evidence of a processing deficit in any area." Student scored within the average range of cognitive abilities, functioned well in the classroom, and student's reading and reading comprehension skills were within normal limits. (Tr. Vol. II, p. 320)(R. Ex. 49). The diagnostician concluded Student's ADHD "does not appear to significantly interfere with student's ability to meet regular mastery level standards." However, the FIE recommended a set of modifications and accommodations in order to assist Student in making satisfactory academic progress. (Tr. Vol. I, pp. 50-51)(R. Ex. 49, p. 255).

44. The FIE recommendations included: limiting the amount of information to be learned during an instructional session; providing extra time or reducing assignments; seating Student in a location away from distractions; ensuring teachers have Student's attention before stating a direction; encouraging Student to ask for directions, repeat information if not understood or remembered; and, checking to ensure Student retained sufficient information to work independently. (R. Ex. 49, p. 256). All of the recommendations could be implemented under an RTI process or 504 plan. (Tr. Vol. I, pp. 70-71).

45. On April 30, 2013 Student's mother asked for a report on the status of the FIE and also for the name of the evaluator. (R. Ex. 75, p. 459). Student's mother also requested a copy of the completed FIE report. The identity of the diagnostician was provided to Student's mother about one week before the ARD. The report was provided to Student's mother the day before the ARD scheduled to review and discuss it. (Tr. Vol. I, p. 39) (Tr. Vol. II, pp. 467-468, 538-529) (R. Ex. 75, p. 468).

46. An ARD convened on May 29, 2013 to discuss the results of the FIE and determine Student's eligibility for special education services. (Tr. Vol. I, p. 92) (Tr. Vol. II, p. 543)(P. Ex. 2, p. 1) (R. Ex. 51) (R. Ex. 53). At the May ARD Student's mother was accompanied by a parent advocate (***).² The charter school's attorney also participated in the ARD over the objection of Student's mother and ***. (P. Ex. 2, pp. 5-6) (R. Ex. 53, pp. 265-266) (R. Ex. 75, pp. 466-467). The May 2013 ARD noted Student's organizational, instructional, and behavioral needs. The ARD also considered student's academic, behavioral and social strengths. (P. Ex. 12, p. 47).

47. The May 2013 ARD began to review the FIE. (P. Ex. 2, pp. 1-2) (Tr. Vol. I, pp. 78-79). The discussion focused on the FIE. Charter school members of the ARD concluded Student did not meet eligibility criteria as a student with a disability in need of special education. Student's mother and *** disagreed and argued the FIE should have included a psychological. (Tr. Vol. I, pp. 48, 95)(Tr. Vol. II, pp. 331-332)(P. Ex. 2, pp. 1-2). Student's mother also requested an IEE. The charter school's attorney suggested Student's needs could be adequately served under 504 but this was rejected by Student's mother and ***. The ARD ended in disagreement. (Tr. Vol. I, pp. 71, 73)(Tr. Vol. II, pp. 333, 460-462)(P. Ex. 2) (R. Ex 76).

48. A second ARD was conducted on August 7, 2013. (Tr. Vol. I, p. 96)(P. Ex. 11). (R. Ex. 65 and 66). The ARD completed its review of the charter school's FIE and the physician's OHI report. (Tr. Vol. II, pp. 422-423). The ARD considered Student's tendency to daydream and lose focus at home and at school. The ARD also discussed student's weakness in ***, reviewed the final *** grade STAAR test results, student's disciplinary

² *** is a well-known parent advocate in the geographic region (See Letter from the Hearing Officer, August 16, 2013 regarding the advocate's role at the hearing).

history, and second semester grades. (Tr. Vol. I, pp. 99-100, 237. 249-250)(Tr. Vol. II, pp. 335-336, 423)(P. Ex. 11) (R. Ex. 66) (R. Ex. 67).

49. Although the ARD agreed Student had an OHI disability the parties again disagreed that student demonstrated an educational need for special education. Although Student needed some accommodations and supports in the area of organization and attention to task those could be provided either through an RTI process or under a 504 plan. (Tr. Vol. I, pp. 93, 200-202, 250)(Tr. Vol. II, pp. 275, 479, 482-484)(R. Ex. 66) (R. Ex. 67).

50. The charter school again offered services under 504. Student's mother rejected the offer because she felt the IDEA provided a better legal framework to ensure delivery of services than 504. Student's mother repeated her request for a psychological and an IEE. The charter school refused the request for an IEE but agreed to the psychological. (P. Ex. 11) (R. Ex. 66) (R. Ex. 67). The August ARD also ended in disagreement. (Tr. Vol. I, p. 247)(Tr. Vol. II, p. 340)(R. Ex. 66).

Discussion

The threshold question in this case is whether the charter school failed to conduct a timely evaluation to determine and identify Student as a student with a disability eligible for special education services under the IDEA. Therefore, I resolve the issues in this case in somewhat different order than originally articulated by the previous hearing officer.

Child Find

The charter school has a duty under the IDEA to identify, locate, and evaluate students with disabilities who are in need of special education and related services. This duty is known as "Child Find." *34 C.F.R. § 300.111 (a) (1) (i)*. The Child Find duty includes children suspected of having a disability and in need of special education even though they are advancing from grade to grade. *34 C.F.R. § 300.111 (c) (1)*. Under Texas law special education referral is required as part of the charter school's overall regular education referral or screening system for students experiencing difficulty in the regular classroom. *19 Tex. Admin. Code § 89.1011*.

The IDEA requires a two-pronged analysis for determining whether a student should be identified as eligible for special education services. The "Child Find" obligation is triggered when the charter school has reason to suspect the student (i) has a disability; and (ii) the student is in need of special education services. *34 C.F.R. §§ 300.8 (a) (1); 300.111 (a) (c) (1); Goliad Ind. Sch. Dist., 32 IDELR 134 (SEA Tex. 2000)*.

Disability

There was some credible evidence that the charter school knew Student was a student with ADHD in the early fall of 2012. Student's mother shared the ADHD diagnosis with the English teacher who passed it on to an administrator. Student's mother also told the Social Studies teacher about Student's ADHD but the teacher kept the information to herself. The information from the English teacher prompted the administrator to request "special education records" from Student's previous school. When those records were not received the administrator let the matter go until December 2012 when Student's mother renewed her request for a conference to discuss Student's performance at school.

As a result of the December 2012 meeting Student's mother delivered records to the charter school confirming Student's status as student with ADHD and the set of RTI interventions implemented by student's previous school. The administrator's testimony confirmed the charter school adopted and implemented the set of RTI interventions from the previous school. However, the charter school did not make further inquiries of Student's mother about the

ADHD diagnosis. A reasonable inference from this evidence is that in doing so the charter school did not question the diagnosis of ADHD and thus, at that point, had some reason to suspect Student might be a student with a disability.

Certainly by March 2013 the receipt of the OHI form from Student's psychiatrist confirmed Student was a student with a disability even though a medical diagnosis is not a prerequisite for evaluating a child for special education services. *Letter to Williams, 21 IDELR 73 (OSEP 1994)*. In its closing argument and brief the charter school does not dispute that Student is a child with ADHD. Therefore, the first prong of the Child Find test was met in this case. *34 C.F.R. § 300.111 (c) (1)*.

Educational Need

The second prong of the analysis asks whether Student is a student "in need of special education and related services." *34 C.F.R. §§ 300.8 (a) (1); 300.111 (a) (c) (1)*. Not every student who struggles in school requires an evaluation for special education. *Alvin Ind. Sch. Dist. v. A.D., 503 F. 3d 378, 384 (5th Cir. 2007)*; *34 C.F.R. § 300.111 (a)(1)*; *Carrollton-Farmers Branch Ind. Sch. Dist. 113 LRP 14998 (SEA Tex. 2013)* (school district had no reason to suspect student who performed well academically, behaviorally and socially had a disability or was in need of special education).

Educational need is not strictly limited to academics but also includes behavioral progress and the acquisition of appropriate social skills as well as academic achievement. *Venus Ind. Sch. Dist. v. Daniel S., 2002 U.S. Dist. LEXIS 6247 (N. D. Tex. 2002)*. While the achievement of passing marks and the advancement from grade to grade is important in determining educational need it is but one factor in the analysis. *Bd. of Hendrick Hudson Int. Sch. Dist. v. Rowley, 458 U.S. 176, 207, n. 28 (1982)*. *Venus Ind. Sch. Dist. v. Daniel S., supra*. The decision of whether a student who is advancing from grade to grade is in need of special education must be determined on an individual basis. *Rowley, supra*.

The charter school recognized that Student had some issues with organization, focus in the classroom, and ***. Student failed student's *** class one six week grading period and failed the *** portion of the STARR. The FIE identified *** as an academic weakness. Student's grades were affected by a failure to turn work in on time. Student clearly had difficulty with some of student's semester finals. However, student benefitted from the accommodations used by the classroom teachers and those adopted from student's former RTI plan. Furthermore, Student did not take full advantage of the instructional support of the tutoring programs available to student. Nevertheless, student was able to pass all student's classes and the *** portion of the *** grade STAAR test. Although student failed the *** portion of the *** grade STAAR, that is but one factor in determining an educational need for special education. When Student attended the special summer school program student was able to meet the necessary standards and was promoted to *** grade.

The evidence also showed that Student consistently demonstrated problems with attention and focus in many of student's classes – this was noted by student's teachers across the board. Student also had particular issues with the *** teacher who characterized student as "disrespectful." However the evidence also showed that overall Student behaved as a typical *** grader and that student's negative behaviors could be adequately managed by charter school staff as they arose from time to time. The evidence showed that student was not considered a behavior problem at school and none of student's teachers considered student to be "at risk." Most importantly the evidence showed that Student's educational needs could be adequately met through the use of instructional and behavioral strategies and interventions employed by student's teachers that could be formalized under an RTI process or a 504 plan.

Once it received the paperwork from Student's previous school district the charter school adopted the set of

accommodations previously in place. These accommodations were generally effective in supporting Student in *** grade. Although I agree with the family's sentiment that Student's needs should be accommodated primarily during school hours the charter school was not provided with an opportunity to discuss how it could meet those needs. The evidence showed that a formal RTI or 504 plan could have been developed at the February 8, 2013 meeting but the charter school was prevented from discussing those options in detail when Student's mother insisted upon services under special education and rejected the possibility of a 504 service plan outright bringing the meeting to an end.

Therefore, given the totality of the credible facts presented, I conclude Petitioner did not meet petitioner's burden of proving student was in need of special education or that the charter school failed its Child Find duty. *34 C.F.R. §300.311*.

Modified Curriculum

The evidence also showed there was a misunderstanding by some charter school staff that the educational need for special education depends on whether the student requires a modified curriculum. Although Student did not need a modified curriculum and there were many other factors that support the conclusion student did not need special education I feel compelled to address this belief so charter school personnel will not make future decisions based on this misunderstanding. Special education is defined as "specially designed instruction" that meets the unique needs of the student. Specially designed instruction means adapting (as appropriate) the content, methodology or delivery of instruction to ensure the child's success in the general curriculum so the child can meet the educational standards that apply to all children. *34 C.F.R. § 300.39 (a) (b) (3)*.

While this specially designed instruction can mean the use, if needed, of a modified curriculum it does not require or limit special education to that need. There are many students who are eligible for special education under various eligibility classifications capable of understanding and learning the general education curriculum but who, due to their disability, require accommodations, related services, or other support services in order to do so. Nowhere in the IDEA is it stated that a child's "educational need" for special education is solely determined by a need for a modified curriculum and any decisions made on that basis were in error. *See, 34 C.F.R. §§ 300.8, 300.34, 300.39, 300.42*.

Response to Interventions

The use of a response to intervention does not diminish the charter school's obligation under IDEA to obtain parental consent and evaluate a student in a timely manner. The IDEA's initial evaluation provisions are triggered where there is reason to suspect the student may have a disability and a need special education and related services – regardless of whether the charter school is using RTI strategies with the student. Pre-referral interventions do not excuse Child Find violations. *D.A. v. Houston Ind. Sch. Dist., 716 F. Supp 2d 603, 615 (S.D. Tex. 2009); Memorandum to State Directors of Special Education, 56 IDELR 50 (OSEP 2011)*.

However, under the circumstances of this case I cannot conclude the charter school's implementation of RTI strategies interfered with its Child Find obligation. Where, as here, the strategies were fairly effective and the student did not demonstrate a need for special education the charter school did not violate its Child Find duty. *34 C.F.R. § 300.111*.

Furthermore, under Texas law, before initiating a special education referral students experiencing difficulty in the general classroom should first be considered for all support services available to all students. Those services include tutorial, remedial, response to scientific, research-based interventions, and other academic and behavioral supports. It is only when the student continues to experience difficulty in the general education classroom after those interventions have proven ineffective that school personnel should initiate a referral for special education. *19*

The evidence shows that the charter school had other strategies and services available to Student that it did not have an opportunity to implement. Thus, a referral for special education was premature under the circumstances in this case. At some point in the future, after additional interventions and services have been attempted, the need for a special education referral may be reconsidered. But that time has not yet arrived. *Id.*

Free, Appropriate Public Education

Because Student did not demonstrate a need for special education and was not eligible under IDEA student was not entitled to a free, appropriate public education. The charter school had no responsibility under the IDEA to provide student with an IEP in the least restrictive environment. *34 C.F.R. §300.101 (d)*. Furthermore, Student's alleged failure of the STAAR *** test cannot be attributable to a failure to provide student with a free, appropriate educational program because student was not eligible for such a program under the IDEA.

Timeliness of Securing Parental Consent

Although the IDEA does not prescribe a specific timeframe from referral for evaluation to parental consent it is a long standing federal policy that the charter school must seek parental consent within a "reasonable period of time after the referral for evaluation if the charter school agrees an initial evaluation is needed." *Memorandum to State Directors of Special Education, supra*. In this case the charter school agreed to the parental request for a special education evaluation at the February 8, 2013 SST meeting. However, the charter school did not secure written parental consent for the initial evaluation until March 13, 2013 – about three and ½ weeks after the SST meeting. It is unclear from the evidence why it took that long.

There is some evidence that school staff generally had problems scheduling meetings with Student's mother. However the record also demonstrates that the charter school, through its own internal procedures, used that period of time to compile the referral packet. In attempting to be thorough and accurate the charter school's procedure for compiling the referral packet resulted in a three and ½ week delay before it secured parental consent. I conclude this delay was not reasonable within the meaning and intent of the law.

The charter school could have arranged to meet with Student's mother shortly after the February 8th SST meeting when the request for a special education evaluation was squarely presented. There was no reason to wait until the complete set of documents had been assembled for the referral packet. That process could have been on-going and parallel to securing the parental consent. While it is reasonable that it took three and ½ weeks to compile all the information for the referral packet it should not have taken that long to secure the parental consent. I conclude the charter school failed to respond to the parent's request for a special education evaluation in a timely manner. *Memorandum to State Directors of Special Education, supra*.

Prior Written Notice

The IDEA and state rules require the charter school to provide the parent with prior written notice within a "reasonable time" of its decision to grant the parental request for an FIE. Under state law a "reasonable time" is five school days unless the parent and school agree otherwise. *34 C.F.R. § 300.503; 19 Tex. Admin. Code § 89.1015*. The IDEA requires that the notice include a description of the action proposed, a description of each evaluation procedure, assessment, record or report the charter school used as a basis for its decision, a statement of parental procedural rights, and sources for a parent to obtain assistance in understanding the provisions of the notice.

The evidence showed that while the charter school provided Student's mother with the requisite written notice of its intent to initiate a special education evaluation it did not do so until March 18, 2013. That date is well beyond the five school day state rule and there was no evidence the parties agreed otherwise. Therefore, although the charter school did provide the requisite information regarding the special education evaluation it was not done in a timely manner. *Id.*

Finally, there is no requirement under the IDEA that the charter school should have provided Student's mother with some kind of prior written notice of Student's failure of the *** STAAR test. The credible evidence shows the charter school did in fact notify Student's mother that Student failed *** STAAR. She was also provided with information about special tutoring programs that were available to address Student's needs in that regard.

Was the FIE Appropriate?

The evidence showed the FIE met all the regulatory requirements for an appropriate evaluation including the use of a variety of assessment tools and strategies in gathering relevant functional, developmental, academic, and, parent information. No single measure or assessment was used as the sole criterion for determining Student's educational needs and the FIE included technically sound instruments to assess cognitive, behavioral, physical and developmental factors. *34 C.F.R. §§ 300.304 (b) (1) (ii) (2) (3)*. There was no controverting evidence otherwise.

The FIE included assurances that the assessment and evaluation materials were selected and administered so as not to be discriminatory on a racial or cultural basis and were provided and administered in Student's native language. The FIE assured the assessments and evaluation materials were used for the purposes for which they were valid and reliable and administered in accordance with their instructions by a trained and knowledgeable educational diagnostician. The FIE was tailored to assess Student's specific areas of educational need and were not merely those designed to provide a single general intelligence quotient. *34 C.F.R. §300.304 (c)*. Furthermore, the evidence showed that the FIE considered the OHI report from Student's physician, all of student's grades available at the time, and student's behavioral history.

However, the FIE also recognized Student exhibited some instructional needs and issues with organization and focus as a student with ADHD. Therefore the FIE included a set of specific recommendations for implementation in the regular education program. The evidence showed those recommendations could be provided without the need for special education. I conclude the charter school did assess Student thoroughly and appropriately in all areas of suspected need for purposes of determining special education eligibility under the IDEA. *34 C.F.R. §§ 300.301, 300.304*.

Psychological

Although Student's mother saw the need for a psychological the preponderance of the credible evidence showed that while Student could sometimes exhibit some challenging and negative behaviors at school student behaved within the parameters of a typical *** grader *** school. Student was not considered to be a behavior problem and was able to interact appropriately with student's peers. Student may have, at times, been disrespectful to some of student's teachers and exhibited some anxiety about school to student's mother.

Those are legitimate concerns that Student's mother and school staff should consider in addressing student's needs for the current school year but they did not, without more, establish the need for a psychological as a component of the FIE. In fact, the evidence showed that the FIE included assessment in all areas of suspected disability including student's social and emotional status. Petitioner did not meet petitioner's burden of proving the need for a

psychological. *See, 34 C.F.R. § 300.8 (c) (4).*

However, the evidence also showed that the charter school agreed at the August 2013 ARD to conduct the requested psychological. The charter school and Student's mother should cooperate to ensure a psychological is completed as soon as possible so that any recommendations from that assessment can be implemented this school year and further support Student's success in the classroom. Because a psychological was not a necessary component of the FIE the charter school's agreement to provide it as a result of the discussion at the two ARD meetings was timely.

Timeliness of the FIE

Once a parent submits the request for an evaluation and provides the requisite consent the charter school must conduct the FIE within 60 days of receiving the parental consent for the evaluation or within the timeframe established by the State. *34 C.F.R. § 300.301(c) (1).* The evidence showed that the FIE report was completed on May 10, 2013. The date of the signed parental consent was March 18, 2013. 53 days elapsed from the date of the parental consent and the date the FIE was completed. Therefore, the FIE was completed within the 60 day timeframe required by the IDEA. *34 C.F.R. § 300.301(c)(1.)*

Independent Educational Evaluation

The parents of a child with a disability have a right to obtain an independent educational evaluation of the child at the charter school's expense if the parent disagrees with the charter school's FIE. However, there is no right to a publicly funded IEE if the charter school requests a hearing to show its evaluation is appropriate and prevails. In this case the charter school submitted that very issue as a counterclaim and was able to prove it's FIE was appropriate under the IDEA. *34 C.F.R. § 300.502.*

Furthermore, the right to an IEE is limited only to those parents whose child has been identified as "a child with a disability" under IDEA. *34 C.F.R. § 300.502 (a)(1).* This provision suggests that if a child is not eligible for special education under the IDEA the child does not meet the definition of "a child with a disability" for IEE purposes. Because Student is not eligible for special education services under IDEA student's mother is not entitled to an IEE at charter school expense. *Id.*

Limited Jurisdiction

My jurisdiction as a special education hearing officer is limited only to those issues which arise under the IDEA. *34 C.F.R. §§ 300.507; 300.511; 19 Tex. Admin. Code § 89.1151 (a)(b); 80.1170 (a)(b).* I have no jurisdiction to determine whether the charter school's actions violated Section 504. Indeed, that statute establishes its own grievance procedures for resolving claims under 504 separate and apart from the due process procedures under IDEA. *See, 34 C.F.R. § 104.7 (b); Brennan v. Reg'l Sch. Dist. No. 1, 531 F. Supp. 2d 245, 278-279 (D.C. Conn. 2007)(§ 504 applies to entities that receive federal funds and prohibits discrimination on the basis of disability – denial of a free, appropriate public education to a student with a disability can constitute disability discrimination under 504).*

Student and student's mother are certainly free to pursue whatever remedies and/or procedural rights might be available under 504. The charter school can also consider whether it should proceed to serve Student under 504 as it contends it can do. It is not for me, as an IDEA hearing officer, to determine whether the evaluation, accommodations, and/or strategies implemented last year, or the plans for this year, meet 504 requirements. *34 C.F.R. § 104.7 (b).*

Conclusions of Law

1. Although Petitioner was a child with a disability within the meaning of the IDEA petitioner did not meet petitioner's burden of proving petitioner was in need of special education and therefore petitioner was not eligible for special education or related services under IDEA during the 2012-2013 school year. Respondent met its Child Find obligations under the IDEA. *34 C.F.R. §§ 300.8; 300.111; 300.*
2. Because Petitioner was not a student eligible for special education or related services under IDEA petitioner was not entitled to a free, appropriate public education within the least restrictive environment. *34 C.F.R. §300.101(a (c)(2).*
3. Petitioner did not meet petitioner's burden of proving Respondent's failure to provide petitioner with a free, appropriate public education resulted in petitioner's failure of the state standardized assessment in ***. Petitioner was not entitled to a free, appropriate public education because petitioner was not eligible for special education services under IDEA. *34 C.F.R. §300.101(a (c)(2).*
4. Respondent failed to secure the requisite written parental consent for a special education evaluation in a timely manner under the IDEA. *34 C.F.R. §§ 300.111; 300.300.*
5. Petitioner did not meet petitioner's burden of proving a psychological was a necessary component of the special education evaluation. *34 C.F.R. §§ 300.304.*
6. Respondent conducted a thorough and appropriate special education evaluation within the meaning of the IDEA in a timely manner in all areas of suspected need. Respondent considered a variety of relevant information including failing grades, negative behavior, and an outside medical evaluation *34 C.F.R. §§300.301(b)(c); 300.304; 300.306.*
7. Respondent met its IDEA responsibilities to provide Petitioner's parent with the requisite prior written notice about the special education evaluation process and notice of Petitioner's failure of the state standardized assessment in *** but it did not do so in a timely manner. *34 C.F.R. § §300.503, 300.504; 19 Tex. Admin. Code § 89.1015.*
8. Petitioner is not entitled to an Independent Educational Evaluation at Respondent's expense because the Respondent met its burden of proving its own evaluation was appropriate within the meaning of the IDEA. *34 C.F.R. § 300.502.*

ORDERS

Based upon the foregoing findings of fact and conclusions of law, consideration of the record on file in this case, and application of the relevant law it is therefore **ORDERED** that Petitioner's claims and requests for relief under the Individuals with Disabilities Act are hereby **DENIED in PART AND GRANTED IN PART** as follows:

As equitable relief for the procedural errors noted in this Decision the charter school shall provide all teaching and administrative personnel (staff) with training on the various factors, including the use of the RTI process, that may be considered in identifying whether a student should be referred for a special education evaluation, including specifically that a student's need for a modified curriculum may be a factor in making that determination but that it is only one factor among other considerations.

It is further **ORDERED** that the staff training shall also include guidance with regard to the timelines for securing parental consent and providing the requisite written notice once a parental request for a special education evaluation has been granted as explained in this Decision.

It is further **ORDERED** that the staff training as described herein shall be conducted by trainers of the charter school's choice, scheduled at the charter school's discretion (so long as it is completed before the last day of the current school year) and provided to all staff at the campus Petitioner currently attends.

It is further **ORDERED** that Respondent's counterclaim is hereby **GRANTED** and that Petitioner is not entitled to secure an Independent Educational Evaluation at Respondent's expense.

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

SIGNED the 11th day of October 2013

Ann Vevier Lockwood
Special Education Hearing Officer

NOTICE TO THE PARTIES

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

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

**STUDENT,
bnf PARENT,
Petitioner,**

§
§
§
§
§
§
§

v.

DOCKET NO. 234-SE-0513

**HARMONY SCIENCE ACADEMY
(***),
Respondent.**

SYNOPSIS

ISSUE 1:

Whether the charter school failed to respond to a parental request for a Full Individual Evaluation (FIE) and psychological assessment in a timely manner.

HELD:

For the student in part and the charter school in part.

Charter school failed to secure parental consent for an FIE within a reasonable amount of time. Charter school waited until compilation of a referral packet before meeting with parent to secure consent and provide requisite notices. This delayed the 60 day timeframe for completing the FIE. Long standing federal policy is that parental consent should be acquired within “a reasonable period of time after the referral for an FIE. *Memorandum to State Directors of Special Education, 56 IDELR 50 (OSEP 2011)*).

Charter school took 3 ½ weeks to secure parental consent after it agreed to conduct FIE for special education eligibility at a Student Support Team meeting. Furthermore, IDEA requires prior written notice of its agreement to initiate a special education evaluation within a reasonable amount of time. Under state law “reasonable time” means five school days unless parties agree otherwise.

Charter school responded in a timely manner to parent’s request for a psychological as a component of the FIE when the parental request was squarely presented at ARD meeting to determine student’s eligibility for special education. Charter school agreed to conduct the psychological at the ARD meeting.

34 C.F.R. § 300.503; 19 Tex. Admin. Code § 89.1015

ISSUE 2:

Whether the charter school failed to timely assess student upon receipt of signed parental consent.

HELD:

For the charter school.

FIE report completed within 53 days from the date parental consent was signed and therefore within the 60 day timeframe established by IDEA.

34 C.F.R. § 300.301 (c) (1).

ISSUE 3:

Whether the charter school failed to appropriately and thoroughly assess student for purposes of determining eligibility for special education and related services in all areas of suspected need.

HELD:

For the charter school.

FIE met all regulatory requirements for an appropriate evaluation including use of a variety of assessment tools and strategies; no single measure as sole criterion; technically sound instruments to assess cognitive, behavioral, physical, and developmental factors; evaluation and assessment materials selected and administered that were not discriminatory or culturally biased and used for the purposes for which they were valid and reliable and administered in accordance with their instructions by trained and knowledgeable educational diagnostician. FIE also considered and reviewed student's report cards, STAAR results, OHI report from physician, sociological information from parent, teacher input, disciplinary records, behavior rating scales, health screenings, Student Support Team meeting minutes, and classroom observation.

34 C.F.R. §§ 300.301 and 300.304 (b) (c)

ISSUE 4:

Whether the charter school failed to provide parent with the required information related to the evaluation process – such as adequately explaining the process, its purpose and identifying the evaluators.

HELD:

For the charter school

Charter school presented parent with Notice of the FIE, an Explanation of Rights, and Notice of Procedural Safeguards under IDEA. In addition, explanation of special education referral process included in Student Handbook distributed each year to all students year; parent also familiar with special education referral based on prior experiences with her children in previous schools.

Evidence showed parent was provided with identity of educational diagnostician when requested.

34 C.F.R. § 300.503 (a) (b)

ISSUE 5:

Whether the charter school failed to meet its “Child Find” duties under the IDEA when it determined student did not qualify for special education and related services.

HELD:

For the charter school.

Although *** school student with ADHD could be classified as a student with OHI under IDEA student did not meet second prong of Child Find – preponderance of evidence established student did not demonstrate requisite educational need for special education. Although student had issues with organization, focus in the classroom, and weakness in *** evidence showed student capable of doing on grade level work, made B’s and C’s in core classes, and benefitted from teacher classroom strategies and implementation of RTI plan adopted from previous school.

Evidence also showed student did not take advantage of tutorials offered by charter school which would have further supported student’s academic performance. Student passed all classes and reading portion of *** grade STAAR. Although student did not pass *** portion of *** grade STAAR that was only one factor in making the determination of whether student was in need of special education. Any accommodations or other supports that student needs could be provided to student through RTI process and/or through a Section 504 plan.

34 C.F.R. § 300.111

ISSUE 6:

Whether the charter school failed to consider student’s failing grades and negative behaviors when conducting the evaluation and in making the determination student did not qualify for special education and related services.

HELD:

For the charter school.

FIE considered failing grades and negative behaviors. FIE included a set of recommendations to address student’s needs in order to meet satisfactory classroom standards. ARD committee also considered all the relevant information compiled for the FIE, including grades and behaviors, in making eligibility determination.

34 C.F.R. §§ 300.304; 300.306

ISSUE 7:

Whether the charter school failed to consider an outside medical evaluation identifying the student as a student with Attention Deficit Hyperactivity Disorder (ADHD) when conducting the evaluation and in making the determination student did not qualify for special education and related services.

HELD:

For the charter school.

FIE included review of OHI report from physician and ARD considered student's use of medication in making the eligibility determination.

34 C.F.R. §§ 300.304; 300.306

ISSUE 8:

Whether the charter school failed to timely identify student as eligible for special education and related services and to develop and implement an appropriate Individual Educational Plan (IEP) in the least restrictive environment (LRE).

HELD:

For the charter school.

Charter school initiated special education evaluation when parent requested and had no reason to conduct a special education evaluation before then. Charter school's determination that student did not need special education supported by preponderance of the evidence and therefore student not entitled to a free, appropriate public education under IDEA.

34 C.F.R. § 300.111

ISSUE 9:

Whether the charter school failed to notify parent that student failed the state standardized assessment in ***.

HELD:

For the charter school.

Evidence showed charter school did notify parent of student's failure of *** portion of *** grade

STAAR and offered student special tutoring on Saturdays and four week summer program to address need to improve *** skills. Nothing in IDEA requires charter school provide Prior Written Notice to parent of STAAR results.

34 C.F.R. § 300.503 (a) (b)

ISSUE 10:

Whether the charter school's failure to provide student with an appropriate educational program and placement resulted in student failing the state standardized assessment in ***.

HELD:

Because student was not eligible for special education student not entitled to a free, appropriate public education (including ***) under IDEA.

34 C.F.R. § 300.111

ISSUE 11:

Whether charter school's FIE was appropriate within the meaning of the IDEA and whether Petitioner is entitled to an Independent Educational Evaluation (IEE) at the charter school's expense.

HELD:

For the charter school.

Charter school submitted counterclaim to determine whether it's FIE was appropriate and prevailed on that issue. Student not entitled to IEE at charter school expense.

34 C.F.R. § 300.502