

STUDENT bnf PARENT & PARENT § BEFORE A SPECIAL EDUCATION  
§  
VS. § HEARING OFFICER FOR  
§  
WEST ORANGE COVE § THE STATE OF TEXAS  
CONSOLIDATED ISD

**DECISION OF HEARING OFFICER**

Petitioner, \*\*\* (hereinafter “the student”), through next friends, \*\*\* & \*\*\*, requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. § 1400 *et. seq.*, to challenge the student’s educational program. The Respondent is the West Orange Cove Consolidated Independent School District (hereinafter “WOCCISD” or the “District”).

**PROCEDURAL HISTORY**

Petitioner filed a Request for Due Process Hearing on September 8, 2014. The parties participated in a Pre-Hearing Conference on September 23, 2014, at which time the undersigned hearing officer granted a continuance for good cause for the hearing on the merits of Petitioner’s claims. The parties appeared for hearing on November 20-21, 2014, with Petitioner appearing with attorneys Dorene Philpot and Yvonnilda Muniz. The Respondent appeared with attorneys of record, David Hodgins and Amber King. At the conclusion of the hearing, both parties requested an extension of the decision due date in order to submit briefs and proposed findings of fact. The decision due date was initially extended to January 28, 2015. I subsequently found good cause to extend the decision due date to February 4, 2015. The Decision was timely issued and forwarded to the parties.

Prior to the filing of this case, the parties appeared before the undersigned hearing officer in an appeal of a manifestation determination review (MDR) (Docket No. 120-SE-0114). A decision in that case was rendered in favor of the parent on April 9, 2014. Both parties requested that I take official notice of the MDR decision and a copy of the decision was included in the record as P18. References to factual findings in that matter are included in this decision to provide background history and context for the current matter.

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusions of law. References to the court reporter’s record will be designated “RR” followed by the page number. References to the exhibits will be designated “P” for Petitioner or “R” for Respondent, followed by the exhibit number and page number if applicable.<sup>1</sup> Citations to relevant findings and conclusions from the MDR hearing will be designated “*prior decision.*”

**ISSUES PRESENTED BY PETITIONER**

The issues identified for hearing are as follows:

1. Whether the Respondent failed to implement the student’s IEP (Petitioner also characterizes this as a unilateral change to the IEP);
2. Whether Respondent failed to develop an appropriate IEP for the student;

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<sup>1</sup> Many exhibits were produced by both Petitioner and Respondent. For ease of reference, only one party’s exhibit

3. Whether Respondent failed to develop an appropriate IEP for ESY for the summer of 2014;
4. Whether Respondent failed to assign a paraprofessional to the student who was adequately trained;
5. Whether the Respondent failed to provide appropriate counseling and tutoring services;
6. Whether Respondent inappropriately changed the student's IEP and BIP to make the student subject to the Student Code of Conduct;
7. Whether the Respondent's proposed IEP improperly removed the student's autism eligibility;
8. Whether the BIP is appropriate;
9. Whether the Respondent failed to comply with the student's and parents' procedural rights by failing to provide copies of ARD documents, failing to provide a copy of the student's records prior to the Resolution Session, or failing to provide prior written notice when required;
10. Whether Respondent (by and through its personnel) harassed, bullied or retaliated against the student in a manner that deprived the student a FAPE;
11. Whether Petitioner's due process hearing request is frivolous, unreasonable, groundless, meritless, without foundation, pursued in bad faith and/or for an improper purpose;
12. Whether Respondent's acts or omissions denied the student a FAPE.

Petitioner requests the following relief:

1. An order requiring the District to provide an appropriate IEP in the least restrictive environment;
2. Prospective private placement and/or reimbursement for private placement if the District is unable to provide a FAPE;
3. Compensatory educational services as determined by the hearing officer to be appropriate;
4. Any other relief deemed appropriate by the hearing officer.

### **FINDINGS OF FACT**

1. WOCCISD is a political subdivision of the State of Texas and a duly incorporated Consolidated Independent School District responsible for providing a FAPE under IDEIA and its implementing regulations.
2. The student is a \*\*\* year old, \*\*\* grade student who is eligible for special education and related services.
3. Until \*\*\*, 2014, the student received services as a student with Autism and Emotional Disturbance. R2. At that time, the ARD Committee, after reviewing the parent's outside evaluation and the District's evaluation, changed the student's eligibility classification to Emotional Disturbance and Other Health Impairment (based on ADHD). R4

4. The student's psychiatrist completed an OHI form, identifying the student's impairment as being due to Autism Spectrum Disorder and ADHD. P20-19.

5. The student's diagnostic history has been varied over the years. In \*\*\*, 2010, when the student was \*\*\* years old, the District referred the student for a psychological evaluation. The psychologist identified physical aggression, non-compliance, poor frustration tolerance, extreme hyperactivity, skewed perceptions, mood swings and poor problem solving strategies. P1. At that time, the evaluator diagnosed the student with Bipolar Disorder and ADHD and stated that the student met the criteria for Severe Emotional Disturbance under applicable law. P1-3. The ARD Committee adopted the recommendations and identified the student under the category of Emotional Disturbance. P2-1.

6. In \*\*\*, 2011, the student's psychiatrist referred the student for an outside evaluation to determine if the student had Asperger's Disorder. P3. According to the parent, she sought the referral from the psychiatrist because a teacher and the school's diagnostician suggested that the student exhibited symptoms similar to those associated with Asperger's Disorder. RR350. The psychologist at that time reported that the student had limited coping skills and significant stress overload. As a consequence, the student is at significant risk of overt anxiety, tension, nervousness, irritability, loss of self-control and impulsive behavior. It was also noted that the student demonstrates a tendency to repress angry feelings and then have explosive anger, as well as rigid thought processes. According to the psychologist, the student works very hard at containing to the point of interfering with the student's ability to exercise good judgment and limit self-control. This evaluator administered a variety of assessment tools and determined that the student's mood fluctuations and social and behavioral difficulties were more likely attributable to Asperger's Disorder rather than Bipolar Disorder and recommended special education eligibility under the Autism classification. P3.

7. The 2011 evaluation also noted that while the student may appear to behave as though the student has no regard for consequences for the student's behavior, the student actually does have a sense of responsibility for the student's actions. P3-6.

8. In December 2013, the same evaluator re-evaluated the student and diagnosed the student with Autism Spectrum Disorder and ADHD.<sup>2</sup> According to this evaluation, the student demonstrates difficulty shifting attention from one matter to another, lacks mental flexibility, disregards social expectations, may fail to anticipate consequences of the student's actions and may misconstrue the boundaries of appropriate behavior, causing the student to make the same mistakes repeatedly, misperceives events around the student, is immature, and has a limited capacity to form close attachments to others. The evaluator continued to recommend eligibility for special education and related services as a student with Autism and ADHD. P4.

9. It is undisputed that the District adopted the eligibility of Autism following the 2011 and 2013 evaluations. As of April, 2014, the District continued to identify the student's primary eligibility as Autism, with Emotional Disturbance as a secondary eligibility. P9. It is also undisputed that OHI based on ADHD has not been an eligibility classification until September, 2014.<sup>3</sup>

10. During the 2013-2014 school year, the student received \*\*\* disciplinary referrals, including \*\*\* for physical aggression, \*\*\* for disruptive or insubordinate behavior, and \*\*\* for horseplay. One teacher reported that fighting and/or physical aggression occurred on a weekly basis. *See prior decision.*

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<sup>2</sup> The use of the term "Asperger's Disorder" has been removed from the DSM-5 since the previous evaluation. The evaluator determined that the student met the criteria for Autism Spectrum Disorder. P4-8.

<sup>3</sup> Petitioner alleges for the first time in her brief that the failure to specifically identify the student under the category of OHI due to ADHD is a denial of FAPE. Petitioner failed to raise this in her complaint and no finding of a denial will be made based on it. However, there is no evidence that programming should have been different based on the student's ADHD.

11. One physical aggression referral involved an altercation \*\*\*. I found that the incident reflected the student's limited coping skills and anger problems, even though it appeared to be a planned rather than an impulsive act. There were other referrals, however, that appeared to be impulsive or involve off-task behavior. For example, the student engaged in \*\*\*. There were numerous other instances of fighting and aggressive behavior. *See prior decision.*

12. At the time of the previous hearing, the ARD Committee had discontinued the student's BIP and elected to utilize an agenda notebook with the student instead. Additionally, the ARD Committee failed to adopt behavioral goals. *See prior decision.*

13. On February \*\*\*, 2014, the student became involved in an altercation \*\*\*. The teacher directed \*\*\*, and the student struck the teacher \*\*\*. *See prior decision.* According to the credible evidence, the student continues to \*\*\*, as well as other interests that are not age appropriate.

14. The February 2014 incident resulted in the student's placement in the DAEP and an appeal of the ARD Committee's manifestation determination review (MDR). I held in the prior case that the student's conduct was a manifestation of the student's disability and ordered the District to return the student to the student's prior placement and to conduct a functional behavior assessment.

15. The student's Special Discipline Plan for Administrative Intervention that was in effect at the time of the prior hearing did not provide for AEP placement as an option for discipline, although it allowed for "emergency removal." At the conclusion of the MDR determination, the school members of the ARD Committee, at the request of the assistant principal, recommended that the Plan be removed from the student's IEP altogether, after the ARD Committee made the decision to place the student in the DAEP. *See prior decision.*

16. During the MDR hearing, Respondent called Dr. \*\*\* (hereinafter "contract evaluator") as a retained, testifying expert who was engaged solely for the purpose of rendering a litigation opinion. Respondent's expert testified that she had never met with or evaluated the student and based the totality of her opinion on her review of records and testimony provided during the hearing. She testified that the student's conduct at that time was not a manifestation of the student's disability and that the DAEP placement was warranted. P17. I found that the expert's testimony and opinion in the MDR hearing was neither probative nor helpful. *See prior decision.*

17. Following the MDR hearing and decision, the District and the parent entered into a mediated agreement disposing of all substantive FAPE issues through April 17, 2014. R21.<sup>4</sup>

18. The District agreed to fund an IEE at District expense, including an independent psychoeducational evaluation with Dr. \*\*\* (hereinafter "independent evaluator") and an independent functional behavior assessment. The District also agreed to conduct an FIE which would consist of psychological, psycho-educational, speech-language, and counseling evaluations, as well as a functional behavior assessment. The District agreed to convene an ARD Committee meeting to develop an appropriate educational program and address the student's discipline plan following the completion of the evaluations. The parties agreed that all other components of the student's then existing IEP would remain in place until the completion of the reevaluation. R21-0600-0601.<sup>5</sup>

19. The independent evaluator conducted the IEE beginning late in the 2013-2014 school year and completed his report during July, 2014. P5.

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<sup>4</sup>Petitioner requested enforcement of the MSA. However, enforcement of the MSA is not within the jurisdiction of the hearing officer.

<sup>5</sup> The IEP in existence between the date of the MSA and the 9/5/2014 IEP, is specifically governed by the terms of the MSA, the enforcement of which is outside the jurisdiction of the hearing officer.

20. The independent evaluator administered a variety of instruments and obtained information from a variety of sources. Although he was unable to observe the student in school because of the time of year in which the evaluation was conducted, he attempted to obtain information from the student's teachers and reviewed school records. The independent evaluator also provided the BASC-II Teacher Rating Scales form and the Vineland II to the District to provide its personnel for completion. P5; *see testimony of independent evaluator*.

21. Counsel for the District emailed the contract evaluator and suggested that she should meet with the teacher to explain the questionnaire prior to the time it was completed and suggested which teacher should not complete it. P32-22. The contract evaluator testified that she never met with the teacher.

22. The \*\*\* teacher completed the BASC-II Teacher Rating Scale, a school questionnaire, and the Vineland II Teacher Rating form. The Vineland II was returned unscorable because of an excessive number of estimated items and an insufficient number of actual ratings completed. P5-14 The GADS (Gilliam Asperger's Disorder Scale), though completed and returned with the \*\*\* teacher's questionnaire, did not identify the person completing the instrument. P5-14.

23. The IEE evaluator also administered cognitive and achievement testing, a Social Communication Questionnaire (SCQ), the Autistic Diagnostic Interview Revised (ADIR), the Conner's Continuous Performance Test, and measures for executive functioning. P5. Additionally, he reviewed all prior evaluations, physician's letters, prior school evaluations and IEP's, prior functional behavior assessments, and discipline records. The IEE evaluator concluded that the student met the criteria for Autism and Emotional Disturbance and noted that there are overlaps in the symptoms of both disorders. P5-16. It is important to note, however, that the independent evaluator did not include a speech language assessment or a school observation. *See testimony of independent evaluator*. Additionally, the parent's expert testified that the independent evaluation lacked important components of an FIE, specifically a speech-language evaluation, school observation, a functional behavior assessment. RR302-305.

24. The District's contracted evaluator who had previously been retained specifically for the purposes of litigation coordinated the District's FIE. The team also included Dr. \*\*\* (hereinafter "psychologist") who administered portions of the evaluation, but the contract psychologist was primarily responsible for assimilating the data from all team members and coordinating the report. RR630. Other members of the evaluation team included a speech language pathologist and a behavior specialist. R1.

25. The contract evaluator requested that the psychologist follow up with the parent to question her about what she perceived as inconsistencies with her report to the psychologist from 2011 and 2013 and the SCQ completed for the IEE evaluator. The contract evaluator also requested that specific questions from the SCQ pertaining to symptoms associated with Autism be asked in a different manner. P32-2. Both the IEE evaluator and the parent's expert questioned this practice. The IEE evaluator raised concerns that the items to be addressed were all items consistent with Autism Spectrum Disorder and it appeared that the questioning of the parent could be an effort to impeach her rather than gather information. RR91-92. Although, the parent's expert raised similar concerns regarding the appropriateness of the process, she also acknowledged that gathering additional information based on the parent's answers could also be acceptable if done to clarify prior answers and obtain additional information. *See testimony of parent's expert*.

26. The psychologist also utilized and modified the Monteiro Interview Guidelines for Diagnosing Asperger's Syndrome as a guide for a structured interview. She did not administer the interview to the teacher and did not administer it in its full format to the parent. R31-1416l. The psychologist did not interview the parent until August, just prior to completing her portion of the report. RR543. She observed the student in the DAEP and regular classroom setting and when she administered testing instruments. She acknowledged the student's behavior was very different in the DAEP's structured setting than the other classroom, where the student was distracted, \*\*\*, acted immature, and had behavioral difficulties. P33-2; RR532-534. She also acknowledged that she had a very different experience with the student compared to the contract evaluator, who observed mood dysregulation. RR496.

27. The contract evaluator reviewed and summarized all prior testing and evaluations, and compiled the data obtained from the speech pathologist, the behavior specialist and the psychologist. The only direct assessments administered by the evaluation team were the CASL, NEPSY-II, which is an assessment of social perception, and behavior ratings scales administered to the teacher. RR523.

28. The contract evaluator provided the Autism Spectrum Rating Scale (ASRS) to the student's case manager. According to the instructions, the instrument should have been completed by someone who had taught and observed the student over the previous 4 weeks. R31-1158. The instrument was completed by someone who had never been the student's classroom teacher, but had tutored the student during the previous school year and summer. RR576-580. The case manager acknowledged that she questioned the evaluator about how to proceed, and the evaluator instructed her to base her answers on the most recent four week period that she had spent time with the student. RR580. This time period would have been months previous to completing the instrument. RR580-581. The evaluator scored the instrument and included the findings in the evaluation to support the conclusion that the student does not present with a profile consistent with autism spectrum disorder. R1-1979, 1996.

29. When questioned about this instrument, the evaluator acknowledged that she should not have scored it, that the manner in which it was administered invalidated the results, and that she knew it was invalid when she made the report. RR633, 676. However, this information was not presented in the report itself, not presented to the ARD Committee, and it is apparent from the report that she intended the reader to conclude that the ASRS completed by the case manager supported her conclusions. R1-1996; P37. The report misrepresented the validity of this instrument. It is reasonable to infer from the evidence that the evaluator misrepresented the validity and the usefulness of the instrument in communicating her conclusion.

30. The contract evaluator also administered and relied upon the NEPSY-II social perception sub-tests. According to the parent's expert, the particular sub-tests used were not the best measure of social perception for the student. According to the parent's expert, the student has had social skills intervention and experience reviewing static representations of facial expression. Therefore, a measure of the perception of *changes* in facial expressions would provide more information with regard to social perceptions than a review of static representations in the NEPSY-II. RR287-288.

31. The speech-pathologist on the school's evaluation team administered the CASL (Comprehensive Assessment of Spoken Language). R1-1957. According to the parent's expert, the CASL will not always reflect subtleties with regard to pragmatic language and a more extensive language sample would have been appropriate for the student. RR333.

32. On August 14, 2014, the contract evaluator emailed the other psychologist on the evaluation team and said she planned to submit the "working document" to the school's attorneys for their input prior to the final editing. P32-5. The final report was dated August 18, 2014.

33. The ARD Committee convened on August 22 and September 5, 2014. The contract evaluator reviewed the FIE with the ARD Committee and recommended that the student's eligibility be changed to Emotional Disturbance and OHI based on the student's ADHD. The school members of the ARD Committee and the parent disagreed on the student's eligibility. The Committee also adopted a BIP and social skills and counseling goals, and determined that the student was capable of following the student code of conduct with the support of the student's BIP. R4. The IEP does not address the elements contained in the Autism Supplement pursuant to 19 Tex. Admin. Code 89.1055(e).

34. The student's counseling and social skills goals are currently being implemented by the school guidance counselor who has no special education certification. RR607. On direct examination, the counselor testified that the student was making progress this school year, that the student engages with other students and has friends at school. RR596. On cross-examination, she admitted telling the contract evaluator that the student does not have a group of friends. P32-1075, RR599. She then clarified her testimony by saying, "\*\*\* does not have enemies." Although she testified the student has a group of friends, she could not name one.. RR599-600, 605. The counselor disagreed with the teacher who referred to the student as "Aspergerish", but acknowledged that she is not a psychologist, LSSP or diagnostician and has no special education certification. RR607.

35. The student's BIP identifies physical aggression, inappropriate comments and non-compliance as target behaviors. The behavioral goals focus on reduction of non-desirable behavior rather than the development of replacement behaviors. R4-0048. Although the focus of the BIP is on consequences for behaviors rather than the development of replacement behaviors or positive interventions, the parent's expert agreed that the BIP identified appropriate target behaviors, antecedents and functions of the behaviors, and intervention strategies. RR 324-326; RR0047. She also testified that the targeted behaviors were consistent with the behaviors identified in the functional behavior assessment and appropriate. RR327-328. According to the parent's expert, the appropriate focus should have been on the identification and development of appropriate replacement goals. RR279; 324-326.

36. The parent's expert testified that the student's eligibility should be categorized as Autism rather than Emotional Disturbance. RR289. According to the expert, Autism Spectrum Disorder has broader implications for the classroom which must first be addressed prior to the emotional component of the student's behavior. RR187-188.

37. The independent evaluator questioned the contract evaluator's role in acting as a retained testifying expert in a prior hearing regarding the student and then contracting to complete the evaluation. According to the evaluator, this raised questions about the goal of the evaluation, whether it was focused on ruling in or ruling out a particular diagnosis or focused on making a point for a legal proceeding. RR101-102.

38. The parent's concerns regarding the manner in which the student's eligibility was changed and the impact on the student's education program are not unfounded. Therefore, I do not find that the due process hearing request was frivolous, unreasonable, groundless, meritless, without foundation, pursued in bad faith and/or for an improper purpose.

## **DISCUSSION**

The educational program offered by the school district is presumed to be appropriate. Petitioner, as the party challenging the educational program bears the burden of proof in showing why the IEP is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983). *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Petitioner failed to present sufficient testimony or evidence that the District failed to implement the student's IEP, that the student required ESY to receive a FAPE, that the paraprofessional was not adequately trained, that the District failed to provide tutoring other than as required by the Mediated Settlement Agreement, failed to provide the student's records prior to the Resolution session, failed to provide copies of ARD documents, or harassed, bullied or retaliated against the student

in a manner that denied the student a FAPE. As Petitioner wholly failed to meet her burden on these issues, they will not be further addressed in this Decision.

The remaining issues relate to the triennial reevaluation and cannot be resolved without it. As a result of that reevaluation, the student's eligibility was changed, the student's IEP and BIP were developed, and the ARD Committee changed course on whether the student could comply with the student code of conduct. Eligibility and program development flow from an appropriate evaluation. If the evaluation is not appropriate, then programming decisions based on that evaluation are called into question. Petitioner specifically complains that the District improperly removed the student's Autism eligibility classification based on an improper evaluation. In turn, she alleges that this action denied the student a FAPE.

The United States Supreme Court established a two-prong test for determining whether a school district has provided a free appropriate public education. The first inquiry is whether the school district complied with IDEIA's procedural requirements. The second inquiry is whether the student's IEP is reasonably calculated to confer an educational benefit. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S.Ct. 3034 (1982). An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Id.*; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000).

IDEIA establishes certain procedural requirements for formulating and implementing a child's IEP. Procedural flaws do not automatically require a finding of a denial of a free appropriate public education. However, procedural inadequacies that impede the child's right to a FAPE, result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the development of the IEP result in the denial of a free appropriate public education." 20 USC 1415 (f)(3)(E); 34 CFR § 300.513(a)(2); *Adam J. v. Keller ISD*, 328 F. 3d 804 (5<sup>th</sup> Cir. 2003). In this case, the District and the ARD Committee committed several procedural errors which impeded the student's right to a FAPE and interfered with the parent's meaningful participation in the development of the student's program.

In evaluating whether an educational program is reasonably calculated to confer an educational benefit, the Fifth Circuit Court of Appeals has identified four factors to consider:

1. Is the program individualized on the basis of the student's assessment and performance?
2. Is the program administered in the least restrictive environment?
3. Are the services provided in a coordinated and collaborative manner by the key stakeholders?
4. Are positive academic and nonacademic benefits demonstrated?

*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3rd 245 (5<sup>th</sup> Cir 1997); cert. denied, 522 U.S. 1047 (1998). The 5<sup>th</sup> Circuit Court of Appeals has held that the four factors do not necessarily need to be applied in a particular manner or afforded the same weight. Rather, the factors are intended as a guide in the determining whether the student received a FAPE. *Richardson ISD v. Leah Z*, 580 F.3d 286 (5<sup>th</sup> Cir. 2009).

In this case, the manner in which the District conducted the student's evaluation impacts not only the procedural sufficiency of the student's program, but also the substantive sufficiency factors set forth in *Michael F.*, *supra.*, specifically, whether the program is individualized on the basis of the student's assessment and whether the services are provided in a coordinated and collaborative manner by key stakeholders. The manner in which the evaluation was conducted calls into question the credibility of the report as well as the evaluator. In other words, under the totality of the circumstances, the procedural and credibility deficiencies undermine the evaluation and the evaluator's testimony to such an extent that neither is credible nor can they be relied upon by the undersigned hearing officer. Because the basis of the student's eligibility, IEP development and programming are driven by the evaluation, if the evaluation is not appropriate, then the program itself fails.



The MDR hearing between the student and the District was contentious. In that matter, the District disciplined the student by placing the student in the DAEP following an ARD Committee determination that the student's aggressive and assaultive conduct was not a manifestation of the student's disability. The evidence at that hearing very clearly established that the student was a student with autism spectrum disorder, had a history of verbal and physical aggression, a lack of coping skills, poor self-control, and anger. The undersigned hearing officer found in that matter that the student's conduct was caused by and had a direct and substantial relationship to the student's disability, i.e., autism spectrum disorder. The contract evaluator testified as a retained, testifying expert in that case. She acknowledged during the hearing that she had never seen or evaluated the student, but nonetheless appeared at the hearing to listen to testimony, review student records, and render an opinion adverse to the student. *See* P17. In other words, she was retained specifically for the purpose of providing a litigation opinion for the District, and more specifically, an opinion that was consistent with the District's position in that matter.

Following the decision in that case, the parties agreed in mediation that a Full Individual Evaluation of the student would be conducted. The mediated settlement agreement provides that the parent by signing the agreement provided "irrevocable consent"<sup>6</sup> to the evaluation. R21. The contract evaluator acknowledged that there was no further informed consent for the evaluation and believed that the MSA supplied the requisite consent. RR660. It is undisputed that no further consent was obtained.

Prior to conducting a reevaluation of a student, a school district shall provide prior written notice and obtain informed consent consistent with 34 CFR 300.9, 34 CFR § 300.503 and 34 CFR 300.504 unless it has made reasonable efforts to do so and the child's parent has failed to respond. 34 CFR §300.301(c). In this case, the District argues that the MSA supplied the requisite informed consent. However, by the terms of the MSA, the consent is irrevocable. While this provision of the MSA would create an enforcement issue if the parent attempted to subsequently revoke consent (over which this hearing officer has no jurisdiction), the language of the MSA standing alone does not meet the requirements for informed consent under IDEIA and its implementing regulations. Additionally, it would appear that prior written notice was not provided consistent with 34 CFR §503, which provides that when a school proposes an evaluation of a student, it shall provide written notice that includes a description of the proposed action, an explanation as to why such action is proposed, a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed action, a statement that of the means by which the parents may obtain a copy of the procedural safeguards, and a description of other options the ARD Committee considered or other factors relevant to the proposed action.. 34 CFR § 300.503. Additionally, under State law, upon request of a parent, prior to conducting a psychological evaluation a school must provide the parent with the name and type of each examination or test to be administered and an explanation of how it will be used to develop the child's IEP. Tex. Educ. Code §29.0041. It is undisputed that neither the prior written notice for the evaluation nor the notice required under state law was provided.

The evaluation primarily consisted of a review of existing evaluation data, augmented by additional instruments<sup>7</sup>. The evaluation did not include a counseling assessment, as agreed to by the parties. The evaluator reviewed the 2010 psychological evaluation of Dr. \*\*\*, the 2011 and 2013 evaluations by Dr. \*\*\*, and the most recent independent evaluation and challenged their findings. P1; *See testimony of contract evaluator.*

Additionally, when the contract evaluator conducted additional assessments, she failed to administer all instruments in accordance with the instructions provided by the producer of the instrument as required under IDEIA. 34 CFR §300.304(c)(1)(v). For example, the evaluator provided the Autism Spectrum Rating Scale to the student's

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<sup>6</sup> Informed consent by definition cannot be irrevocable. 34 CFR §300.9(b).

<sup>7</sup> It is well-settled that parental consent is not required for a review of existing evaluation data (REED). 34 CFR § 300.301(d)(1)(i). It is also appropriate for a school to augment existing data to determine the student's educational needs. *Conroe ISD v. Shelby S.*, 454 F.3d 450 (5th Cir. 2006).

case manager. According to the instructions, the instrument should have been completed by someone who had taught and observed the student over the previous 4 weeks. R31-1158. The instrument was completed by someone who had never been the student's classroom teacher, but had tutored the student during the previous school year and summer. RR576-580. The witness acknowledged that she questioned the evaluator about how to proceed, and the evaluator instructed her to base her answers on the most recent four week period that she had spent time with the student. RR580. This time period would have been months previous to completing the instrument, according to the witness. RR580-581. The evaluator scored the instrument and included the findings in the evaluation to support the conclusion that the student does not present with a profile consistent with autism spectrum disorder. R1-1979, 1996.

When questioned about this instrument at hearing, the contract evaluator acknowledged that she should not have scored it, that the manner in which it was administered invalidated the results, and that she knew it was invalid when she made the report. RR633, 676. However, this information was not presented in the report itself, and it is apparent from the report that she intended the reader to conclude that the ASRS supported her conclusions. R1-1996. The report misrepresented the validity of the results. Although the contract evaluator testified that she could still rely on the qualitative information gained from the case manager, she did not include this information in the report or discuss it with the ARD Committee. R1; P37.

The report also leaves out important information. For example, according to the report, the parent stated that the student gets along well with peers \*\*\*, but the evaluator left out information from the parent that the student does not associate with age-mates and that \*\*\* the student primarily sits with a parent and plays with \*\*\* rather than interacting with peers. The report also leaves out information that the student tends to interact with much younger children \*\*. P1-1973, P37; RR535-538. The report is also inconsistent with subsequent teacher reports that the student is immature, ignored by the student's peers, treated as a younger sibling, does not have a best friend, has interests that are not age appropriate (i.e., \*\*\*), and is childish, awkward and "Aspergerish." P32-9-21.

The report also suggests that the student has few disciplinary difficulties at school, with issues occurring primarily in \*\*. R1-1972. The evaluator acknowledged during the ARD meeting that the \*\*\* class did not have a significant amount of structure and this could have led to problem behaviors in that case. P37. The report portrayed the student as a "model" student in the DAEP, a highly structured setting. R1-1972. However, this portrayal is inconsistent with behavior occurring immediately before the evaluation in that the student had \*\*\* disciplinary referrals by April of 2014, leading to a DAEP placement and MDR hearing. *See prior decision*; P16, P17. It is also inconsistent with disciplinary referrals during the current school year as of the date of the hearing and the fact that physical aggression, non-compliance and inappropriate comments are interfering with the student's educational performance enough to warrant being addressed in the student's BIP. Additionally, at least one observation of the student by the psychologist occurred in the DAEP.

It is undisputed that the evaluator was hired specifically for the litigation in the MDR hearing and that subsequent to that time she was engaged to perform the assessment of the student. While I do not make a conclusion as to whether this action violates her ethical standards, I do make the finding that it significantly impairs her credibility and undermines confidence in her report. Her opinions are further suspect based on the failure to conduct testing in accordance with the instructions provided by the producer of the test. Such failure is directly in violation of the mandates of 34 CFR § 300.304(c)(1)(v). This failure was further compounded when she did not report to the parent and the ARD Committee that the results were not valid even though she knew better. Additionally, the contract evaluator's failure to include certain information in the report that was consistent with a finding of Autism undermines confidence in the report. And, finally, communications with the school's attorney during the course of drafting the report, and seeking input from the attorney, also supports the conclusion that the report was being created for the purpose of supporting a position in litigation rather than objectively evaluating the student's needs.

The parent's perception of the evaluator in this case is that she predetermined the outcome of the evaluation before she commenced it. The above actions, in combination with the action of submitting the evaluation to counsel for input prior to completing it, give support to that perception. It very well may be that the outcome was not predetermined and that another evaluation by a different evaluator would yield the same results. However, a primary principle of IDEIA and a Free Appropriate Public Education is the collaboration with key stakeholders and the inclusion of the parent in the decision making process. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., supra.* The actions of the contract evaluator in their totality created the perception that she was part of the school's legal team rather than the child's evaluation team. These actions impeded the child's access to a FAPE and seriously infringed the parent's right to participate in the development of the student's educational program, denying the student a FAPE.

The question regarding the eligibility and programming of the student is also not appropriately left to the independent evaluation because it did not include multi-disciplinary approach, a speech evaluation, a classroom observation, or other important components of an FIE, as noted by the parent's own expert. RR296-303. Rather, there is no evaluation in this case that can be relied upon with confidence to answer the questions of eligibility, which ultimately identifies the student's needs for programming.

It is important to note that the decision in this case is not a decision that the student should be properly classified as AU rather than ED. In fact, this hearing officer has previously held that eligibility classification alone does not determine whether the student receives a FAPE. *Student v. Banquette ISD*, Dkt. No. 048-SE-1010 (Ramage, March 8, 2011). Although reasonable minds may differ on the student's eligibility, the identification of the student is a procedural component of the development of the student's IEP. The procedural error in this case is the process by which the evaluation was conducted, from a lack of informed consent, to the failure to administer testing instruments in accordance with the instructions of the producer, to the failure to include key information in the report. This report formed the basis for the ARD Committee's determination regarding eligibility and programming. The procedural error, under the totality of the circumstances, and given the credibility of the evaluator and report, resulted in a denial of a FAPE.

Having determined that the procedural errors associated with the evaluation in this case resulted in a denial of FAPE such that a new evaluation should be conducted, this decision will not address the substantive sufficiency of the student's IEP.

### **CONCLUSIONS OF LAW**

1. The student is eligible for special education services as a student with a disability under IDEIA, 20 U.S.C. §1400 *et. seq.* and its implementing regulations. The student resides within the physical boundaries of the WOCCISD.

2. WOCCISD is a political subdivision of the State of Texas and a duly incorporated Consolidated Independent School District responsible for providing the student a FAPE under IDEIA and its implementing regulations.

3. Petitioner, as the party challenging the District's educational program bears the burden of proof. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Petitioner has met this burden in part.

4. Procedural errors that occurred during the evaluation relied upon by the ARD Committee in changing the student's eligibility and developing the student's IEP impeded the student's right to a FAPE and seriously infringed the parents' opportunity to participate in the development of the student's educational program. 20 USC 1415 (f)(3)(E); 34 CFR § 300.513(a)(2); *Adam J. v. Keller ISD*, 328 F3d 804 (5<sup>th</sup> Cir. 2003).

## ORDER AND RELIEF

Compensatory and prospective relief is available under IDEIA as an equitable device to remedy violations. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). IDEIA requires that relief be designed to ensure that the student is appropriately educated within the meaning of IDEIA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9<sup>th</sup> Cir. 1994). The parent is entitled to limited prospective relief in this case to remedy the errors that occurred during the evaluation of the student. The relief is limited to an order requiring the District to provide an outside evaluation that complies with the procedural requirements of IDEIA and by a process that provides confidence in the outcome.

1. IT IS THEREFORE ORDERED that the District shall arrange and pay for an evaluation to be conducted by an outside evaluator who is not associated with either the District or the parent.

2. IT IS ORDERED that the District and the parent shall attempt to agree on the identity of the evaluator. If they are unable to reach such an agreement, then each party shall submit three names to Dr. \*\*\* that meet District's general requirements for IEE evaluators. Dr. \*\*\* shall then select the evaluator to conduct the evaluation and notify the parties of the same.

3. IT IS ORDERED that attorneys for the parties shall not contact the evaluator to discuss the evaluation prior to its completion.

4. IT IS ORDERED that a full individual evaluation shall be conducted that addresses all areas of suspected disability and that complies with 34 CFR §300.304-311. The evaluation shall be completed by a multi-disciplinary team selected by the evaluator.

5. Upon completion of the evaluation, the District shall convene an ARD Committee meeting to review the report and develop the student's IEP based on that report. The District shall invite the evaluator to the ARD Committee meeting and pay any fees necessary for his or her attendance. The ARD Committee shall implement the recommendations of the evaluator with regard to eligibility, the student's IEP, BIP and discipline plan, if any.

3. IT IS ORDERED that Respondent shall convene an ARD Committee meeting within ten school days of February 4, 2015, to implement this decision.

All relief not granted herein is DENIED.

Signed and entered this 4<sup>th</sup> day of February, 2015.

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Sharon M. Ramage  
Special Education Hearing Officer

## NOTICE TO PARTIES

This Decision is final and is appealable to state or federal district court as to the appeal of the student's disciplinary placement.

The District shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(o). 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.

## SYNOPSIS

Issue No. 1: Did the District improperly change the student's eligibility classification from Autism to Emotional Disturbance.

Held: For the parent. Procedural errors such as lack of informed consent, improperly administering an assessment, failure to include relevant information in the evaluation, combined with the lack of credibility of the report impeded the student's access to a FAPE and seriously infringed the parent's right to meaningful participation in the development of the student's educational program.

Citation: 34 CFR §300.513(a)(2); 34 CFR §300.9; 34 CFR §300.304-305; 34 CFR § 502.

Issue No. 2: Did the District deny the student a FAPE by failing to implement the student's IEP, failing to provide ESY services, failing to adequately train the student's paraprofessional, failing to provide tutoring, failing to provide the student records, and bullying, harassing, or retaliating against the parent.

Held: For the District. Petitioner wholly failed to meet Petitioner's burden of proof.

Citation: Schaeffer v. Weast, 126 S.Ct. 528 (2005).