

STUDENT,	§	BEFORE A SPECIAL EDUCATION
B/N/F PARENT,	§	
Petitioner	§	
	§	
v.	§	HEARING OFFICER FOR
	§	
ROBSTOWN INDEPENDENT SCHOOL	§	
DISTRICT,	§	
Respondent	§	THE STATE OF TEXAS

FINAL DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

Petitioner, *** (Student), b/n/f Parent, ***, filed a complaint requesting a special education due process hearing (due process complaint) pursuant to the Individuals with Disabilities Education Improvement Act (IDEA).¹ The Respondent is the Robstown Independent School District (District).

The sole issue in this case is whether Student is eligible for special education services under IDEA and the implementing state and federal regulations because Student has a specific learning disability (SLD) in the form of dyslexia. As requested relief, Student seeks a finding that Student is eligible for special education and related services and compensatory educational services.

II. PROCEDURAL HISTORY

Student filed Student’s due process complaint with the Texas Education Agency (TEA), which received the complaint on September 29, 2014. The complaint was assigned to this hearing officer on August 29, 2014. Attorneys Christopher Lee Jonas and James Neil Harris² represent the Student, and attorney Cynthia S. Buechler represent the District.

The parties participated in a resolution session on October 14, 2014, but the issues were not resolved. The hearing officer convened a telephonic prehearing conference on October 16, 2014. The due process hearing was continued for good cause and ultimately held in Corpus Christi, Texas, on June 3-4, 2015. After the conclusion

¹ 20 U.S.C. § 1401 *et seq.*, as amended.

² Mr. Harris filed a notice of appearance on July 25, 2015.

of the due process hearing, the parties agreed to the following deadlines: June 24, 2015, for the transcript; July 24, 2015, for the parties' closing arguments; and August 10, 2015, for the hearing officer's decision.

III. FINDINGS OF FACT

1. Parent is the biological mother and next friend of Student.³
2. Student is a *** student who at the time of the due process hearing had just completed the *** grade at ***, which is within the District.⁴
3. Student resides within the boundaries of the District.
4. Student has dyslexia and receives instruction and accommodations under Section 504 of the Rehabilitation Act of 1973.⁵ Student meets the eligibility requirements for a disability under Section 504.
5. Student has been attending school within the District for the past *** years and will be attending school within the District next year.⁶
6. Student attended *** grade at a school within *** and *** grade within the District.⁷
7. The District had previously evaluated Student for a learning disability in 2009 and 2012. The District concluded that the testing results did not show that Student met the criteria for special education services because Student did not have a pattern of strengths and weaknesses.⁸
8. Student has passed all of Student's classes in the ***, ***, and *** grades.⁹
9. The dyslexia program used with Student is ***. This program addresses all of the components of dyslexia, including phonological sound awareness, symbol association, symbol location, orthography, morphology, syntax reading, comprehension, and reading fluency.¹⁰
10. In *** of 2014, Student's one-to-one dyslexia reading instruction was increased from two times per week to five times per week.¹¹

³ Tr. at 15, 16.

⁴ Tr. at 16.

⁵ Dist. Ex. 15 at 4.

⁶ Tr. at 17.

⁷ Tr. at 81.

⁸ Dist. Exs. 4, 6; Tr. at 82, 83.

⁹ Dist. Ex. 8 at 4.

¹⁰ Tr. at 208-09.

¹¹ Tr. at 90, 187.

11. Student's teachers describe Student as a good student and a typical *** grader. When compared to the other students in the class, Student is an average student.¹²
12. On September 29, 2014, TEA received Student's due process complaint. Student alleged that the District failed to evaluate Student for special education and related services.
13. The parties participated in a resolution session on ***, 2014, but the issues were not resolved.
14. On October 16, 2014, the hearing officer convened a telephonic prehearing conference.
15. At the beginning of the 2014/2015 school year, Student read at a ***-grade level. At the end of the year, Student read at ***-grade level.¹³
16. After Student filed Student's due process complaint, the District conducted a full individual evaluation (FIE) for a learning disability, which was completed on ***, 2014.¹⁴
17. At the time the District conducted its *** 2014 FIE, the District did not know that Student had an outside evaluation done in *** 2014.¹⁵
18. After the completion of the ***, 2014 FIE, the District scheduled an Admission, Review, and Dismissal (ARD) meeting and sent three separate notices inviting Parent to attend. The ARD meeting convened on ***, 2015, and Parent did not attend. The District gave Parent the option to participate in the ARD meeting by telephone.¹⁶
19. Parent was unable to participate in the scheduled ARD meetings because she could not get off work.¹⁷
20. At the ***, 2015 meeting, the ARD committee reviewed and considered the ***, 2014 FIE and found that Student did not meet the eligibility criteria for a learning disability. The FIE used the following procedures, tests, records, and reports: Weschler Individual Achievement Test, Third Edition (WIAT-III); Woodcock-Johnson, Third Edition (WJ-III) Test of Achievements; WJ-III Tests of Cognitive Abilities, teacher information, teacher observation, grades, and parent information. The ARD committee considered that, according to Student's teachers, Student does well academically, socially, and behaviorally. The ARD committee noted that Student had passed all Student's classes in the first semester of the 2014/2015 school year.¹⁸
21. The District scheduled another ARD meeting for ***, 2015, and Parent attended. After the school reviewed its evaluation, Parent produced an outside evaluation by ***, and Psy.D. L.S.S.P., dated ***, 2014, which used some of the same testing instruments as the District's ***, 2014 FIE. Parent had not informed the District that any testing had occurred at the time the District was conducting its *** 2014

¹² Tr. at 157, 209-10, 242-43.

¹³ Tr. at 209.

¹⁴ Dist. Ex. 15.

¹⁵ Tr. at 93; Pet. Ex. 2 at 1; Dist. Ex. 14 at 1.

¹⁶ Dist. Ex. 14.

¹⁷ Tr. at 93.

¹⁸ Dist. Ex. 14 at 5.

evaluation. Because the school staff had not had an opportunity to review the outside evaluation prior to the ***, 2015 ARD meeting, the ARD committee scheduled another meeting for ***, 2015.¹⁹

22. On ***, 2015, the ARD committee convened a meeting to review the outside evaluation done by Dr. *** in *** 2014. Dr. *** used the Diagnostic and Statistical Manual of the American Psychiatric Association, 5th Edition (DSM-V), which is a clinical practice guide, to determine that Student had a learning disorder. Dr. *** did not utilize the educational criteria under IDEA nor did he determine eligibility for a learning disability under special education in accordance with IDEA.²⁰
23. On ***, 2015, the ARD committee noted that Dr. *** did not review school information and did not recommend special education for Student. Additionally, the ARD committee noted that Dr. ***'s evaluation "did not utilize the recognized method of determining [SLD] for education purposes." The ARD committee agreed that Student did not qualify for special education services.²¹
24. Parent initially agreed at the ***, 2015 ARD meeting that Student did not qualify for special education services. However, she subsequently changed her mind and informed the ARD committee of the change in her decision later that day.²²
25. The District administered the WJ-III tests to Student in *** 2014 not knowing that Dr. *** had administered the same tests in *** 2014. Administering the same WJ-III tests within such a short time frame invalidated the District's test results according to the Woodcock Johnson instruction manuals.²³
26. Dr. ***'s evaluation of Student used the following tests and information: WJ-III NU Tests of Cognitive Abilities – Extended Version; WJ-III NU Tests of Achievement – Extended Version; pediatric questionnaire; behavioral observations; and clinical information.²⁴
27. Dr. ***'s evaluation does not indicate that it reviewed or assessed information from the District regarding Student's grades or ability to meet requirements. Dr. ***'s evaluation recognized that Student had not passed any of the STAAR exams.²⁵
28. According to Dr. ***, Student's test results indicated the presence of a severe discrepancy between Student's cognitive abilities and Student's achievements.
29. Dr. *** concluded that significant differences in Student's reading and writing scores meet the diagnostic criteria for specific learning disabilities as defined in the DSM-V and the International Code of Diagnosis, 10th Edition update.²⁶

¹⁹ Dist. Ex. 13 at 15; Tr. at 95.

²⁰ Dist. Ex. 12 at 5; Pet. Ex. 2 at 13.

²¹ Dist. Ex. 12 at 4.

²² Dist. Ex. 12 at 3; Tr. at 98.

²³ Tr. at 122-23.

²⁴ Pet. Ex. 2 at 1.

²⁵ Pet. Ex. 2 at 1, 3.

²⁶ Pet. Ex. 2 at 12.

30. Under Dr. ***'s evaluation, Student's overall standard score for written expression was ***, which is within the average limits and would not be considered impairment in written expression.²⁷
31. Under Dr. ***'s evaluation, Student did not have cognitive deficits, Student's overall global abilities are within the average range, and all of the cognitive areas tested were within normal limits.²⁸
32. On ***, 2015, the ARD committee, including Parent, agreed to have an independent evaluation completed by ***, Ph.D.²⁹
33. Dr. *** completed his evaluation on ***, 2015. Dr. ***'s evaluation showed that Student's global ability scores did not show a pattern of strengths and weaknesses, and, therefore, Student did not have a learning disability under IDEA.³⁰
34. In conducting his *** 2015 evaluation, Dr. *** interviewed Student, obtained information from the school and Parent, reviewed records, and interpreted test results.³¹
35. During his *** 2015 evaluation, Dr. *** administered the following tests: the Weschler Intelligence Scale for Children; the Kaufman Assessment Battery for Children; the Comprehensive Test of Phonological Processing; and the WIAT-III.
36. Using the Cattell-Horn-Carroll (CHC) Theory of Cognitive Abilities and the Cross-Battery Assessment approach, Dr. *** concluded that Student's global intelligence scores did not reveal a significant pattern of strengths and weaknesses.³²
37. Student's global scores do not meet the eligibility criteria for an SLD. Although Student evidenced weaknesses in some academics, the eligibility criteria for an SLD was not met.³³
38. Dr. ***'s evaluation of Student relied on an inappropriate method to determine Student had an SLD. Dr. *** used the DSM-V clinical classification approach, applicable to a clinical practice, to determine that the Student had an SLD. Dr. *** should have used the educational classification system to determine whether Student had an SLD.³⁴
39. Dr. ***'s evaluation did not use the CHC Theory of Cognitive Abilities or the Cross-Battery Assessment approach to determine whether Student had a pattern of strengths and weaknesses.³⁵
40. Dr. *** applied the CHC pattern of strengths and weaknesses analysis to Dr. ***'s test scores to determine whether there was a pattern of strengths and weaknesses in Dr. ***'s testing. Using this CHC approach,

²⁷ Pet. Ex. 2 at 10; Tr. at 61.

²⁸ Tr. at 64.

²⁹ Dist. Ex. 12 at 6.

³⁰ Dist. Ex. 15 at 14.

³¹ Tr. 119-20.

³² Dist. Ex. 15 at 14.

³³ Dist. Ex. 15 at 14.

³⁴ Tr. at 127.

³⁵ Tr. at 127.

Dr. ***'s testing showed that Student did not have a pattern of strengths and weaknesses and, therefore, did not meet the eligibility criteria as a student with a learning disability.³⁶

41. Dr. ***'s evaluation of Student was insufficient to show that Student met the criteria for an SLD because it used the DSM-V clinical approach to determine eligibility instead of using the educational framework. Dr. ***'s evaluation did not use the CHC approach to determine whether Student met the criteria for an SLD.³⁷
42. During Dr. ***'s evaluation, Student would *** during testing but continue to answer questions and participate in the work. The examiner had the impression that this was a habit of Student's when performing cognitive tasks.³⁸
43. Beginning in Student's ***-grade year, the statewide assessment was changed to the "STAAR" exam. The STAAR exam was not scored in the first year it was administered. In Student's ***-grade year, the STAAR exam was scored for the first time and approximately ***-grade students at ***, including Student, did not pass the STAAR exam in math. Approximately ***-grade students at ***, including Student, did not pass the STAAR exam in reading. In Student's ***-grade year, the STAAR math exam was not scored by the state. With respect to the STAAR reading exam, ***-grade students at ***, including Student, did not pass the STAAR reading exam.³⁹
44. As an accommodation for Student's dyslexia, Student is taking the "STAAR exam with accommodations."⁴⁰
45. Student has not passed the statewide STAAR assessments.
46. Student *** because Student did not pass Student's STAAR exam with accommodations.⁴¹
47. Student is performing well on grade-level assignments in Student's core subjects, indicating that Student is able to master the curriculum.⁴²
48. Student's principal, *** observed Student reading in Student's *** class, and Student read ***-grade passage fluently.⁴³
49. Student reads grade-level texts aloud in Student's *** classes, and Student's reading ability is comparable to other *** graders. Student receives B's and C's in Student's *** class and ranks in the middle in terms of performance.⁴⁴

³⁶ Tr. at 128.

³⁷ Tr. at 127.

³⁸ Pet. Ex. 2 at 2.

³⁹ Tr. at 260-62.

⁴⁰ Tr. at 262.

⁴¹ Tr. at 70.

⁴² Tr. at 269.

⁴³ Tr. at 264-65.

⁴⁴ Tr. at 157.

IV. DISCUSSION

The sole issue in this hearing is whether Student meets the criteria for a specific learning disability and qualifies for special education and related services under IDEA. Student argues that Student meets the eligibility criteria for an SLD. Applying the legal standards to the evidentiary record in this case, the hearing officer finds that Student did not meet Student's burden of proof that Student is a child with an SLD.

1. Legal Requirements

Public school districts must identify children with disabilities who need special education and delivery of appropriate services to provide a free and appropriate public education (FAPE).⁴⁵ A child with a disability under IDEA is a child with one or more specific impairments and who, because of such impairment, needs special education and related services.⁴⁶ The listed disabilities are: intellectual disability; a hearing impairment; a speech or language impairment; a visual impairment; a serious emotional disturbance; an orthopedic impairment; autism; traumatic brain injury; other health impairment; a specific learning disability; deaf-blindness; or multiple disabilities.⁴⁷

In this case, Student seeks to establish IDEA eligibility on the basis of an SLD. To establish IDEA eligibility, the child must demonstrate “(1) inadequate achievement relative to age or grade level standards; *and* (2) insufficient progress after intervention, or a pattern of strengths and weaknesses in achievement relative to age, grade-level standards, or intellectual development, which indicates a ‘specific learning disability.’”⁴⁸ The eligibility criteria for an SLD are found in 34 C.F.R. § 300.309 and 19 Texas Administrative Code § 89.1040(c)(9).

As the party seeking relief, the Student has the burden of proof in this matter.⁴⁹

⁴⁵ 34 C.F.R. § 300.111; *see also* 20 U.S.C. § 1412(a)(1); *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

⁴⁶ 20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1).

⁴⁷ 34 C.F.R. § 300.8(a)(1).

⁴⁸ *Michael P. v. Department of Educ.*, 656 F.3d 1057, 1061-62 (9th Cir. 2011) *citing to* 34 C.F.R. § 300.309(a) (emphasis in orig.).

⁴⁹ *Schaffer v. Weast*, 546 U.S. 49 (2005).

2. Background

Student is a student who attends *** within the District. Student has dyslexia and is currently receiving instruction and accommodations under Section 504 of the Rehabilitation Act of 1973.⁵⁰ ***, a dyslexia specialist, and another teacher, provide Student with dyslexia services for 45 minutes, five times a week.⁵¹ Student also receives accommodations in the form of oral testing, preferential seating, and extended time on tests.⁵²

In addition, Student receives accommodation on the statewide assessments called the “STAAR” exams. Student takes the STAAR exam with accommodations, which differs from the regular STAAR exam. The STAAR exam with accommodations contains the same passages as the regular exam but has three answer choices instead of four. Also, the STAAR exam with accommodations does not contain field test questions that are used for research.⁵³ Students receiving Section 504 services are allotted seven hours to take the STAAR exam with accommodations.⁵⁴ Student has not passed any of the STAAR exams since Student began taking them in the *** grade.

3. Does Student Meet the Eligibility Criteria for an SLD?

The hearing officer concludes that Student did not meet Student’s burden to show that Student is a child with an SLD. The primary reason for this decision is that Dr. ***’s evaluation is insufficient to demonstrate eligibility in the IDEA context.

As part of his evaluation, Dr. *** made several observations. In terms of Student’s abilities, Dr. *** noted significant deficits in auditory processing⁵⁵ and fluid reasoning.⁵⁶ Regarding Student’s achievements, Dr. *** stated the Student had significant deficits in basic reading skills, basic writing skills, broad reading, reading comprehension, broad written language, and brief reading.⁵⁷ Dr. *** concluded that the scores indicated a

⁵⁰ Dist. Ex. 15 at 4.

⁵¹ Tr. at 174-75.

⁵² Tr. at 156.

⁵³ Tr. at 262.

⁵⁴ Tr. at 270.

⁵⁵ On cross-examination, Dr. *** agreed that Student’s standard score of *** on auditory processing would not be a deficit and would be in the high range. He also agreed that “all [standard] scores that are listed are within the normal range.” Tr. at 69.

⁵⁶ Pet. Ex. 2 at 7; Tr. at 40.

⁵⁷ Pet. Ex. 2 at 11-12; Tr. at 43-44.

“significant discrepancy” between Student’s abilities and achievements in basic reading skills, reading comprehension, basic writing skills, and brief reading.⁵⁸ Dr. *** took the results of Student’s scores and stated, “[t]he significant differences in [Student’s] Reading and Writing scores meet[] the diagnostic criteria for Specific Learning Disabilities as defined in the Diagnostic and Statistical Manual of the Manual of the American Psychiatric Association, 5th Edition (DSM-5) and the International Code of Diagnosis 10th Edition update”⁵⁹ As a result, Dr. *** recommended the use of the response to intervention system (RTI), specifically Tier III interventions.⁶⁰

The hearing officer concludes that Dr. ***’s evaluation is insufficient to meet Student’s burden of proof. A major flaw in Dr. ***’s evaluation is his use of the DSM-V criteria to diagnose Student with an SLD in the educational context. As Dr. *** testified, the definition of a learning disability under the DSM-V is intended to be used in a clinical setting by psychologists and psychiatrists to diagnose mental health issues.⁶¹ In this case, the special education eligibility criteria for an SLD⁶² are the appropriate criteria to use to determine eligibility under IDEA, and Dr. *** did not apply those criteria. Student did not provide rebuttal evidence of the propriety of using the DSM-V in the educational context or argue in Student’s closing that Dr. ***’s reliance on the DSM-V criteria was appropriate. For the reasons stated herein, the hearing officer cannot rely on Dr. ***’s evaluation to conclude that Student meets the criteria for an SLD based on his use of the DSM-V criteria.

Dr. *** further testified that the severe discrepancy model used by Dr. *** is no longer relied upon to identify individuals with an SLD. Dr. *** stated that the discrepancy model compared the intelligence test with the standard scores on the achievement test. A 16-point or more difference between the two scores would constitute a learning disability. However, according to Dr. ***, the discrepancy model only identified underachievement, and not the reason for the underachievement, and that is why the severe discrepancy model is no longer used.⁶³

⁵⁸ Pet. Ex. 2 at 12.

⁵⁹ Pet. Ex. 2 at 12.

⁶⁰ Pet. Ex. 2 at 13.

⁶¹ Tr. at 126-27.

⁶² 34 C.F.R. § 300.309; 19 Tex. Admin. Code § 89.1404(c)(9).

⁶³ Tr. at 112-13.

Dr. ***'s opinion regarding the use of the severe discrepancy model is corroborated by case law. In the 2011 case of *Michael P. v. Department of Education*, the court recognized that for many years, federal regulations required the use of the severe discrepancy model to identify the need for special education under the SLD classification.⁶⁴ The court noted:

Over the last decade, scientific research has established that the “severe discrepancy model” is not necessarily a good indicator of whether a child has a learning disability. . . . The “severe discrepancy model” is based on the premise that underperforming students with relatively high IQs must have a learning disability, whereas underperforming students with low IQs are just “slow” This premise is subject to dispute because intelligence testing is not the best indicator of academic potential. . . . As a result, reliance on the “severe discrepancy model” tends to under-identify children with below average intelligence. . . . Moreover, education experts have criticized the model as unreliable, invalid, easily undermined, and harmful because it delays early treatment.⁶⁵

According to the court, Congress amended IDEA in 2004 to address the concerns with the severe discrepancy model. The amended federal regulations now provide that a child is eligible for special education because of an SLD if the child demonstrates “(1) inadequate achievement relative to age or grade level standards; and (2) insufficient progress after intervention, or a pattern of strengths and weaknesses in achievement relative to age, grade-level standards, or intellectual development, which indicates a ‘specific learning disability.’”⁶⁶

This is the model advocated by Dr. ***. He applied a cross-battery approach that used objective national norms to determine whether Student had a pattern of strengths and weaknesses. Dr. ***'s cross-battery approach identified seven major global abilities to determine weaknesses. According to Dr. ***, if the Student showed a pattern of strengths and weaknesses in the global abilities, then this would indicate that Student had a learning disability.⁶⁷

Dr. *** administered the following tests to Student during his *** 2015 evaluation: the Weschler Intelligence Scale for Children; the Kaufman Assessment Battery for Children; the Comprehensive Test of Phonological Processing; and the WIAT-III.⁶⁸ Dr. *** interviewed Parent and Student and reviewed information

⁶⁴ *Michael P.*, 656 F.3d at 1060.

⁶⁵ *Michael P.*, 656 F.3d at 1060-61 (citations omitted).

⁶⁶ *Michael P.*, 656 F.3d at 1061-62 *citing* 34 C.F.R. § 300.309(a).

⁶⁷ Tr. at 114.

⁶⁸ Tr. at 121.

from Student's math teacher and *** teacher.⁶⁹ Dr. *** computed the test results through the Cross-Battery Assessment data system, which provides a statistical analysis of the test scores.⁷⁰ Student's norm-based global ability scores, based on the CHC Theory of Cognitive Abilities and the Cross-Battery Assessment approach, did not show a pattern of strengths and weaknesses indicative of an SLD,⁷¹ and Student's scores were all within the normal limits, according to Dr. ***.⁷²

In addition to his evaluation, Dr. *** took Dr. ***'s test results and "ran them through" the same data system used by Dr. *** in an effort to compare "apples to apples."⁷³ Dr. *** testified that when he applied the CHC model to Dr. ***'s test results, Student did not show a pattern of strengths and weaknesses, and thereby, Student does not meet the IDEA eligibility criteria for an SLD.⁷⁴ The hearing officer finds Dr. ***'s testimony credible and his approach appropriate.

Another flaw with Dr. ***'s report is that although he concluded that Student had a learning disability under the DSM-V, Dr. *** did not recommend special education or related services for Student but simply recommended a "fresh approach" to Student's remediation.⁷⁵ He stated that he had "read literature showing excellent results using the RTI or response to intervention system, specifically Tier III interventions," and stated that "the forms for the RTI are no doubt part of the educational armamentarium of *** and if not are available from the ***."⁷⁶ He also recommended weekly practice for the standardized tests to help Student become familiar with the format and performance requirements.⁷⁷ However, Student's current intensive daily ready program through Section 504 meets Dr. ***'s recommended Tier III RTI intervention, according to Dr. ***.⁷⁸

⁶⁹ Tr. at 125. In Student's closing arguments, Student asserts that Dr. ***'s evaluation was deficient because the District's "evaluators looked only at Student's pattern of cognitive test scores to determine Student's potential [S]LD eligibility." Pet. Closing at 20. However, the evidence shows that Dr. ***'s evaluation did not rest solely on Student's cognitive test scores. Dr. *** considered educational background based on information from Student's teachers. Dist. Ex. 15 at 1-2. He also interviewed Student and Parent and considered Dr. ***'s evaluation. Dist. Ex. 15 at 2, 10. He also reviewed the 2009 and 2012 assessments. Dist. Ex. 15 at 3-6. Therefore, the hearing examiner disagrees with Student's contention that Dr. *** based his recommendation solely on cognitive test scores.

⁷⁰ Tr. at 125.

⁷¹ Dist. Ex. 15 at 14.

⁷² Tr. at 126.

⁷³ Tr. at 128.

⁷⁴ Tr. at 128.

⁷⁵ Pet. Ex. 2 at 13.

⁷⁶ Pet. Ex. 2 at 13.

⁷⁷ Pet. Ex. 2 at 13.

⁷⁸ Tr. at 139.

In addition, Dr. ***'s evaluation did not rely on any information obtained from the school, and he did not interview any of Student's teachers.⁷⁹ In Student's closing argument, Student states, without citation to the record, that "Dr. *** sent questions to RISD teachers that were never return[ed] to his office."⁸⁰ However, the hearing officer did not find evidence in the record to support this statement. Therefore, the hearing officer cannot consider that assertion in support of Student's burden of proof.

Dr. *** also relied on Student's lack of success on the STAAR exams as one basis for his conclusion that Student is a child with an SLD.⁸¹ Although Student has not passed the statewide assessment, the hearing officer cannot conclude that Student's lack of success is indicative of an SLD. As Dr. *** testified, a student would not meet the eligibility criteria for IDEA by not passing the STAAR exams.⁸²

Furthermore, the evidence suggests that other factors may be the cause of, or heavily contribute to, Student's lack of success on the STAAR exams. ***.⁸³ ***. ***. ***.⁸⁴

As several witnesses testified, *** has a high percentage of students who did not pass the STAAR exam. Ms. *** testified that ***-grade students this past school year failed the STAAR exam in reading.⁸⁵ The last time the STAAR exam in math was scored, approximately ***-grade students did not pass that exam.⁸⁶ This tends to indicate that Student's failure to pass the STAAR exam may be attributable to issues at the school.

In addition, Student's teachers and principal have observed Student *** during the STAAR exams and in class. Ms. *** has worked with Student for the last two years⁸⁷ and has personally administered the STAAR exams to Student during that time. She testified that Student *** during the testing, and she has to "constantly"

⁷⁹ Tr. at 67-68.

⁸⁰ Pet. Closing at 19-20.

⁸¹ Tr. at 49.

⁸² Tr. at 138.

⁸³ Tr. at 257.

⁸⁴ Tr. at 257-58.

⁸⁵ Tr. at 260.

⁸⁶ Tr. at 260. The last STAAR exam in math was not scored.

⁸⁷ Tr. at 174.

tell Student to ***.”⁸⁸ Student has also *** when Ms. *** works with Student through the dyslexia program.⁸⁹ The principal, Ms. ***, also testified that she personally observed Student during the STAAR exam with ***.⁹⁰

Although Student testified in rebuttal that Student does not ***,⁹¹ Dr. ***’s evaluation tends to corroborate Ms. *** and Ms. ***’s testimonies regarding Student’s ***. The evaluation states that “[t]here were times during the testing when [Student would] *** but continue[] to answer questions and participate in the work. The examiner ha[d] the impression this was a habit of [Student’s] when performing cognitive tasks.”⁹² Ms. *** stated that she has seen Student do this during the dyslexia program, and when Student does, Student is not ***.⁹³ Student’s *** during testing may contribute to Student’s lack of success on the STAAR exams.

Also, Ms. *** testified that Student does not use the extended time allotted to Student for the STAAR exam with accommodations. As a dyslexia accommodation under Section 504, Student has seven hours to complete the exam, but Student usually finishes the tests in about an hour and a half, according to Ms. ***.⁹⁴ Further, Ms. *** does not think that Student checks Student’s answers once Student completes the test, a strategy on which she has worked with Student through the dyslexia program.⁹⁵ She also believes that Student is able to do the same level of passages in the dyslexia program that are on the STAAR exam.⁹⁶

Given this evidentiary record, the hearing officer cannot say that Student’s lack of success on the STAAR exams demonstrates that Student has met the criteria for special education eligibility due to an SLD. Student’s teachers and principal testified credibly that at times, Student is *** during the exams. This testimony is corroborated by Dr. ***’s evaluation. The evidence shows that Student does not check Student’s answers or spend sufficient time on the STAAR exam. Therefore, the hearing officer concludes that the lack of success on the STAAR exams is insufficient to demonstrate that Student has met the eligibility requirements.

⁸⁸ Tr. at 211.

⁸⁹ Tr. at 212.

⁹⁰ Tr. at 266-67.

⁹¹ Tr at. 290.

⁹² Pet. Ex. 2 at 2.

⁹³ Tr. at 213-14.

⁹⁴ Tr. at 211. Student testified that Student spent *** on the exam, and has never completed a STAAR exam in only an hour and a half. Tr. 290-91.

⁹⁵ Tr. at 211.

⁹⁶ Tr. at 211.

In addition, the evidence shows that Student is passing Student's subjects. Ms. *** testified that she would not recommend Student for special education because Student is performing well on grade-level assignments in Student's core subjects, indicating that Student is able to master the curriculum.⁹⁷ Ms. *** also stated that she has observed Student reading in Student's *** class, and Student read ***-grade passage fluently.⁹⁸ ***, Student's ***-grade *** teacher, stated that Student reads grade-level texts aloud in her class, and Student's reading ability is comparable to other *** graders.⁹⁹ Student receives B's and C's in her class and ranks in the middle of her class in terms of performance.¹⁰⁰

Student also argues that Student's handwriting and spelling errors show that Student is not writing at ***-grade level, and Student relies on examples of Student's handwriting.¹⁰¹ Although some of Student's writing samples are illegible to the hearing officer, Ms. *** was able to read the passages and stated that the handwriting in the samples was typical of what she sees in her class.¹⁰²

In sum, the hearing officer concludes that the preponderance of the evidence shows that Student does not meet the eligibility requirements for an SLD. As Dr. *** testified, Student does not show a pattern of strengths and weaknesses in Student's cognitive abilities to demonstrate that Student is a student with an SLD. Furthermore, Student's lack of success on the statewide STAAR exams is insufficient to demonstrate Student's eligibility for special education and related services. The evidentiary record indicates that other factors may contribute to Student's poor performance on the STAAR. For the reasons stated herein, the hearing officer finds that Student has failed to meet Student's burden of proof on the issue of Student's eligibility for special education and related services, and the District has not denied a FAPE to Student.

4. ARD Committee Eligibility Determination Requirements

In Student's closing arguments, Student contends for the first time that the ***, 2015 ARD committee did not meet the legal requirements necessary to determine that Student is not eligible for special education services.

⁹⁷ Tr. at 269.

⁹⁸ Tr. at 264-65.

⁹⁹ Tr. at 157.

¹⁰⁰ Tr. at 157.

¹⁰¹ See Dist. Ex. 16.

¹⁰² Tr. at 165, 168.

Student filed Student's due process complaint on September 29, 2014, and alleged that the District had failed to evaluate Student for services under IDEA. The District subsequently evaluated Student in *** 2014, and convened three ARD meetings regarding Student's eligibility on ***,¹⁰³ ***,¹⁰⁴ and ***, 2015.¹⁰⁵

Student did not amend Student's due process complaint to address the sufficiency of the ***, 2015 ARD meeting. Nor did Student present any evidence regarding the alleged inadequacy of that meeting during the June 3-4, 2015 due process hearing. The first time Student asserted that the ARD committee failed to meet the necessary requirements was in Student's July 24, 2015 closing arguments, at a point when the District did not have an opportunity to respond through the presentation of evidence or argument. The hearing officer concludes that Student gave no notice to District regarding the alleged inadequacy of the ***, 2015 ARD meeting and declines to address this argument in this Decision.

5. The District's Counterclaim

In response to the September 2014 due process complaint, the District conducted an FIE, which concluded on ***, 2014. After making several attempts to schedule an ARD meeting to discuss the results of the FIE with Parent, the District held the ARD meeting on ***, 2015, but Parent did not attend. At the ***, 2015 meeting, the ARD committee determined that the FIE did not show that Student was eligible for special education.¹⁰⁶

On March 4, 2015, the District filed a counterclaim "in accordance with 34 C.F.R. § 300.503(b)(2)." This section sets out the content of the notice provided by a public agency to a student when it "refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child."¹⁰⁷

In its closing arguments, neither the District nor Student addressed the merits of the March 4, 2015 counterclaim. Likewise, the hearing officer will not address the merits because the District has apparently abandoned its counterclaim or no longer wishes to pursue it.

¹⁰³ Dist. Ex. 14.

¹⁰⁴ Dist. Ex. 13.

¹⁰⁵ Dist. Ex. 12.

¹⁰⁶ Dist. Ex. 14 at 6.

¹⁰⁷ 34 C.F.R. § 300.503(a), (b)(2).

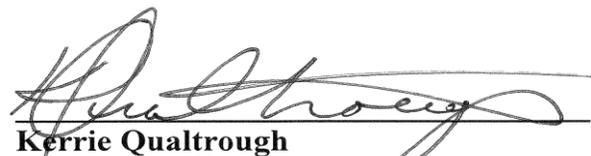
V. CONCLUSIONS OF LAW

1. The District was Student's resident district under IDEA during the 2014/2015 school year.
2. Student bears the burden of proof on Student's eligibility under IDEA. *Schaffer v. Weast*, 546 U.S. 49 (2005).
3. Student did not meet Student's burden to prove that Student is eligible under IDEA for special education and related services. 34 C.F.R. § 300.309; 19 Tex. Admin. Code § 89.104(c)(9).
4. Student is not eligible for special education and related services under IDEA as a student with a specific learning disability. 34 C.F.R. 300.309; 19 Tex. Admin. Code § 89.1040(c)(9).

VI. ORDER

After due consideration of the record and the findings of fact and conclusions of law set out in this Decision, this hearing officer hereby ORDERS that all relief sought by Student is hereby DENIED.

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



Kerrie Qualtrough
Special Education Hearing Officer
For the State of Texas

NOTICE TO THE PARTIES

This Final Decision of the Hearing Officer is a final and appealable order. Any party aggrieved by the findings and decision made by the Hearing Officer may bring a civil action with respect to the issues presented at the due process hearing in a court of competent jurisdiction. 19 Tex. Admin. Code § 89.1185(n).

DOCKET NO. 032-SE-0914

STUDENT,	§	BEFORE A SPECIAL EDUCATION
B/N/F PARENT,	§	
Petitioner	§	
	§	
v.	§	HEARING OFFICER FOR
	§	
ROBSTOWN INDEPENDENT SCHOOL	§	
DISTRICT,	§	
Respondent	§	THE STATE OF TEXAS

SYNOPSIS

Issue 1: Whether Petitioner is eligible for special education and related services under IDEA because Student is a student with a specific learning disability.

Held: For the District. Petitioner did not meet Petitioner’s burden of proof that Student meets the eligibility requirements for a special learning disability.

Citation: 34 C.F.R. §§ 300.8; 300.309; 19 Tex. Admin. Code § 89.1040(c)(9).