

DOCKET NO. 163-SE-0120

STUDENT b/n/f PARENT	§	BEFORE A SPECIAL EDUCATION
<i>Petitioner</i>	§	
V.	§	
	§	HEARING OFFICER FOR THE
NORMANGEE INDEPENDENT	§	
SCHOOL DISTRICT	§	
<i>Respondent</i>	§	STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner, *** (“the student”) b/n/f *** (“the parent”)** (“the student”) b/n/f *** (“the parent”)** (“the student”) b/n/f *** (“the parent”) filed a complaint requesting an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”). The Respondent in the complaint is Normangee Independent School District, (“the district,” “NISD,” or “Normange”).

Petitioner was represented by Terry Gorman, an attorney with the Gorman Law Firm PLLC in Austin. Respondent was represented by Rebecca Bailey, Ashley Addo, and Hailey Janecka, attorneys with the firm of Thompson & Horton LLP in Houston. Petitioner's request for hearing was filed on January 28, 2020 and came on for hearing by agreement of the parties and order of the hearing officer on December 8 and 9, 2020. A record was made by Ann Berry, C.S.R., a Texas certified court reporter. A copy was electronically delivered to the parties.

The parties were afforded an opportunity to file written closing arguments, filed their arguments, and agreed that this decision would be timely issued on or before February 8, 2021 in accordance with the regulatory timeline.

Issues for the Hearing

1. Whether the district failed to identify the student as one who is eligible for special education and related services.
2. Whether the district impeded the parent's right to participate in the student's education decision making process by preventing the parent from fully participating in the September ***, 2019 Admission, Review and Dismissal ("ARD") Committee meeting.

Petitioner's Requested Relief

1. That the district provide funds for a Functional Behavioral Assessment ("FBA") of the student by a provider determined solely by Petitioner.
2. That the district provide funds for a complete occupational therapy evaluation of the student by a provider determined solely by Petitioner.
3. That the district provide funds to Petitioner for the implementation of all services needed by the student with providers determined solely by Petitioner as indicated by the FBA and occupational therapy evaluation.

Findings of Fact

1. The student resides with the student's parents within the *** Independent School District. [Tr. 18].
2. The student is currently attending the *** within the *** Independent School District. [P8; R2; Tr.18].
3. The student was enrolled and attended school in the Normangee Independent School District beginning with *** until Student was withdrawn by Student's parent on February ***, 2020. [R28; P5:8].
4. The student was diagnosed with attention-deficit hyperactivity disorder ("ADHD") in 2012. [J18:1].

5. The district has served the student through Section 504 as a student with ADHD since Student's *** grade school year and up until Student's withdrawal from NISD during Student's *** grade year in the 2019-2020 school year. An initial Section 504 evaluation was conducted when the student was in the *** grade on January ***, 2015. The Section 504 committee determined that the major life activity impaired was concentrating. [J7:55].
6. With the implementation of the accommodations in the student's Section 504 Plan during Student's *** grade year, the student generally made passing grades and passed all of Student's courses for the first semester and was passing all courses on the date of Student's withdrawal from the district. [R12; R28].
7. Failing grades on assignments made by the student during the first semester of Student's *** grade year were due to the student's failure to make up work missed because of absences accrued while out of school to ***. [J16:36-37].
8. The student was given ample opportunity to complete and turn in assignments missed due to absences. [Tr. 639-640; R27].
9. The student consistently attended school from *** through *** grade with few absences. Beginning in the *** grade the student increasingly missed excessive amounts of instruction due to ***. [J16; Tr. 319-20]. The student missed *** total days of instruction in the *** grade, *** total days in *** grade, and *** total days in the *** grade. [R16:5; Tr. 403].
10. On the *** grade *** STAAR administration, the student missed meeting the state passing standard by *** questions on the April 2019 administration; *** question in May 2019; and *** questions in June 2019. [R16:7].
11. On the *** grade *** STAAR administration, the student missed meeting the state passing standard by *** questions on the April 2019 administration, *** questions in May 2019, and *** question in June 2019. [R16:8].
12. On the *** grade *** STAAR administration, the student missed meeting the state passing standard by *** questions. [R16:8]
13. On the *** grade *** STAAR administration, the student missed meeting the state passing standard by *** questions. [R16:8].
14. The student's performance in the classroom and on state assessments was affected by Student's excessive absences. If there are gaps in instruction, there will likewise be gaps on assessments testing acquisition of skills taught during that instruction. [Tr. 404-408].

15. ***, a student may advance to the next grade level only by passing the *** STAAR assessments or by unanimous decision of his or her grade placement committee (“GPC”) that the student is likely to perform at grade level after additional instruction. The following percentage of NISD students did not meet *** requirements in 2019: 25.7% in *** and 28.8% in ***. [R16:9].

16. Per the requirements of the ***, the district sent notice to the student’s parents that Student would be retained in *** grade. The student’s parents immediately requested a GPC meeting requesting that the committee promote the student to *** grade. [J3:2-3; Tr. 317].

17. A GPC, including the parent, met on July ***, 2019, and determined that the student was likely to perform at grade level after additional instruction. [J3:1]. The GPC concluded that the student would be successful in *** grade with the added interventions of RTI to target needed skills areas and an accelerated instruction plan (“AIP”) which included targeted instruction during the school day to address deficit areas. [J3:5-6]. The student was promoted to *** grade. [J3:4-6; Tr. 317-18]. A large majority of the students who did not meet *** requirements in *** grade were also promoted that year. [R16:9; Tr. 317-18]

The Student’s Program During The 2019-2020 School Year

18. With 504 accommodations in place, the student progressed well through grade level curricula. [J12; Tr. 623; 755-59].

19. In the 2019-2020 school year, the student attended all regular education classes and actively participated in ***, including ***. [Tr. 309-11; 659; J12].

20. Despite Student’s ADHD and lack of instruction due to absences, the student did not fail any classes during Student’s time at ***. [R16]. Nor were Student’s grades far off from what Student’s peers were achieving. [J12; R16; Tr. 566].

The Private Evaluation

21. In the summer of 2019, the student’s parents obtained a private evaluation of the student from ***. The Wechsler Intelligence Scale for Children, Fifth Edition (“WISC-5”) was administered to measure the student’s cognitive abilities. This evaluation yielded a Full-Scale IQ (FSIQ) of ***. This standard score falls in the Borderline range of intellectual functioning. [J4, R16].

22. Two achievement tests were also administered (The Woodcock-Johnson and the WIAT-III). The following scores were obtained on the Woodcock-Johnson: Basic Reading (***), Reading Comprehension (***); Reading Fluency (***); Math Calculation (***); and Spelling (***). The student achieved higher scores on the WIAT-III: Basic Reading (***); Word Reading (***), Pseudoword Decoding (***); Reading Comprehension (***); Essay Composition (***); and Math Problem Solving (***). J4, p.6. Student’s achievement was within the range of prediction based on Student’s FSIQ of ***. [Tr. 429].

23. This evaluation listed the following diagnostic impressions:

- a. DSM-V-314.01 ADHD Combined Presentation (previously diagnosed)

- b. DSM-V-315.1 Specific Learning Disorder, Mathematics
 - c. DSM-V315.00 Specific Learning Disorder, Reading, Dyslexia
- [J4:10].

24. After the parent provided the district with the private evaluation in August 2019 the district immediately initiated a referral for the student to be evaluated for special education services. [J5].

25. Upon referral and consent to evaluate, the parent was provided both her Guide to the ARD Process and her procedural safeguards. [J5; J6; Tr. 234].

The September *, 2019 Full And Individual Evaluation (FIE)**

26. The district's evaluation, which adopted and supplemented the data in the private evaluation, was timely completed on September ***, 2019, and provided to the parent for her review prior to the initial ARD to discuss eligibility. [J7, R10].

27. In conducting the FIE, ***, Educational Diagnostician, with the Leon County Co-Op administered the Woodcock Johnson IV (WJIV) to obtain the cognitive processes of long-term retrieval (Glr) and auditory processing (Ga). The evaluation also provided information from the student's teachers, school administrators and staff. [J7; R16; Tr. 434-436; 445].

28. As part of the special education evaluation referral, the parent provided the district with an OHI disability report completed by Dr. *** on August ***, 2019. [J7:7].

29. The September ***, 2019 FIE considered a variety of sources of the district's educational and behavioral data on the student and adopted the data from the private evaluation. In adopting the data and conclusions from the private evaluation, the evaluators concluded that the student had qualifying disabilities under the IDEA of SLD (Specific Learning Disability) and OHI (ADHD). [J7]. Within the FIE, however, Ms. *** appropriately noted that the ARD committee must determine if the student was eligible for special education support as a result of Student's qualifying disabilities. [J7;33-4].

30. No district staff members or administrators believed the student had a need for special education, as Student was capable of accessing their general education curriculum with Section 504 accommodations and supports. [Tr. 566-67; 642-43, 649; 662-63; 680; 693-94; 701].

The September *, 2019 Initial ARD.**

31. The ARD committee met for the initial ARD on September ***, 2019. The parent was provided her procedural safeguards. [J8:2-4].

32. The parent, along with her friend and business partner, ***, an educational diagnostician with more than 20 years' experience in special education, fully and actively participated in the September ***, 2019 ARD and were able to ask and receive answers to questions. [J8:1,5; Tr. 236, 555-56, 662-664].

33. The recommendations of the private evaluation and FIE were thoroughly reviewed in the ARD committee meeting on September ***, 2019. The consensus of the ARD committee was that the student's educational progress in all areas of concern was adequate and that Student's current level of performance in reading and math was not significantly discrepant from Student's peers. [J8:2-4; Tr. 552].

34. The ARD committee also discussed the impact their decision could have on the student's ***. At the time, the student *** which the committee believed required a ***. [J8:3; Tr. 561-562].

35. The team analyzed the student's deficits and concluded that Student did not need special education and related services and that the accommodations in the student's Section 504 plan were appropriate to meet Student's needs. [J8:2-4; Tr. 553].

36. At the conclusion of the ARD meeting, Principal *** assured the parent that the ARD committee could meet again if she or any member had any concerns that the 504 Plan was not working. [Tr. 568].

37. The ARD meeting ended in consensus. The parent signed the ARD document indicating her agreement with the decision of the committee. [J8:4-6; Tr. 568; 663].

38. The parents did not request a ten-day reconvene meeting and did not request an Independent Educational Evaluation ("IEE"). [Tr. 252].

The Student's Behavior

39. At the time of the September ***, 2019 ARD meeting to discuss eligibility, the student had only one disciplinary referral – the ***, 2019 cheating incident where ***. [J17:7].

40. In the 2019-2020 school year, the student received a total of four disciplinary referrals, which included: *** Cheating ***failure to comply, and *** Disruption of the educational process; ***. [J17:7-8].

41. The discipline referrals did not suggest that there was a high frequency of behavioral problems or a pattern of behavioral concerns. [Tr. 413].

November *, 2019 Section 504 Meeting**

42. The parent requested and attended a 504 meeting on November ***, 2020 but raised no concerns regarding the student's academic or behavioral progress under Student's 504 plan and no changes were recommended or made to Student's plan. [J10:3; Tr. 262-63; 577-78].

43. No concerns were raised about the student's educational programming until January 2020 when the student committed a violation of *** that affected Student's ***. [Tr. 262-64; J17:8]. That same month, on January 28, 2020, the instant request for a due process hearing was filed with TEA.

44. The parent withdrew the student from the district on February ***, 2020. [R28].

DISCUSSION

I. The Governing Legal Standards

A. Burden of Proof

Petitioner has the burden of proof to establish that the district violated IDEA and failed to provide the student with a Free and Appropriate Public Education (FAPE). *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

B. FAPE

The IDEA requires that all children with disabilities who are in need of special education and related services are identified, located, and evaluated and that a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services. Nothing in IDEA requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of the IDEA and who, by reason of that disability, needs special education and related services is regarded as a child with a disability. 20 U.S.C. §1414(a)(3)(a)(B).

The purpose of the IDEA is to ensure all children with disabilities who have a need for special education have available to them a FAPE that emphasizes specialized instruction and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d). If a student is eligible for such services, a school district is responsible for providing the student with specially designed personalized instruction with sufficient support services to meet the student's unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with the child's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

II. Petitioner Failed to Prove That the Student by Reason of Student's Disabilities Had a Need for Special Education and Related Services

In this case, Petitioner sought an order identifying the student as eligible for and in need of special education and related services and directing the district to fund a Functional Behavioral Analysis (“FBA”) and an occupational therapy evaluation for the student. As noted above, Petitioner carried the burden of establishing this claim by a preponderance of evidence. Petitioner failed to meet this burden of proof.

A child with a disability is not inherently entitled to special education services under the IDEA. In other words, a disability (or condition) alone does not equate to eligibility. To find IDEA eligibility, it must be established that a child:

- (1) has an enumerated disability that adversely affects the child’s educational performance; and
- (2) by reason thereof needs special education.

20 U.S.C. § 1401(3)(A)(ii); 34 C.F.R. § 300.7(a).

Therefore, in order to establish IDEA eligibility, parents must demonstrate not only a qualifying condition and an educational “need” for special education and related services, but also that the “need” was caused by the qualifying conditions(s) and not any other nonqualifying diagnoses or issues in Student’s life. *Alvin Indep. Sch. Dist. V. A.D.*, 503 F.3d 378, 383 (5th Cir. 2007). Even if a student can meet the criteria of one or more of the disability classifications, a student must also demonstrate a need for special education and related services for eligibility purposes. 34 C.F.R. § 300.8 (a)(1).

In this case, there is no dispute that the district accepted that the student has at least one qualifying disability and that Student satisfies the first prong of the eligibility requirements. 20 U.S.C. § 1401(3)(A)(i). The central dispute pertains to the second prong: by reason of Student’s disabilities, does the student need special education and related services? See *Alvin Independent School District v. A.D. ex rel. Patricia F.*, 503 F.3d 378 (5th Cir. 2007).

The student’s IEP team, known in Texas as the ARD committee, reviewed the information in the private evaluation and FIE evaluations and determined that, although the student had qualifying disabilities, the student did not have a need for special education and related services. The principal and several of the student's teachers testified during the hearing that the student generally performed well in class when Student was in attendance and was able to pass Student’s classes when Student turned in assignments missed due to numerous absences for ***. They also testified that the undesirable behaviors the student exhibited most often -- *** -- were comparable to those of a typical ***, and that the student did not need intense intervention or additional academic or behavioral accommodations beyond those

provided by Student's Section 504 Plan. [Tr. 244-245; 249; 256; 263; 267-268; 297-300; 314; 326Tr. 565; 675; 689-690].

Petitioner claims that the student's failure to meet the passing standard of the STAAR test is a sufficient basis for determining Student is in need of special education and related services. Relying on this sole piece of data – without considering it in relation to the other data – is inappropriate. *See V.M. v. Sparta Township Board of Education*, 63 IDELR 184 (D.N.J. 2014) (holding that the district's procedures for SLD eligibility determinations, which required it to focus solely on the test results, violated IDEA). The STAAR exam is a test taken on one day of the school year. Failure on the STAAR exam is not alone an indicator that the student needs special education. While it is one factor to consider, it is not dispositive. Far more important factors on the issue of whether the student should have been identified as a child with a disability and provided special education and related services in the 2019–2020 school year are Student's academic performance throughout the entire school year, Student's grades, and Student's behavior.

That the student met passing standards in *** from *** through *** grade and met state standards in every area in *** grade is significant. [R16:6]. It was not until *** grade that the student failed to meet standards in every area. [R16:7]. Yet, even in *** grade, when the student had excessive absences due to ***, [R16:5; Tr. 403] Student missed meeting the passing standard for the *** STAAR exams by only one question. [R16:7-8]. If Student had answered one more question correctly, Student would have met the passing standard.

Texas hearing officers have recognized that a student's failure of the STAAR exam is not dispositive with regard to the question of whether a student is disabled and in need of special education and related services under the IDEA. In *Student v. McAllen Indep. Sch. Dist.*, Dkt. No. 002-SE-0911 (SEA Tx 2012), a student diagnosed with ADHD would become anxious and overwhelmed with lots of homework and fearful Student would not be able to complete the work. The student did not pass one part of the TAKS test, which is similar to the current state-wide test, the STAAR examination. The hearing officer agreed the student did not qualify for special education. While the student did manifest at school distractibility, spontaneity, impulsivity, off-task behaviors, and occasional disruption of work, the student was liked by teachers and peers, passed all courses on grade level, and was easily redirected when off task behaviors occurred. The hearing officer stated that the fact that the student failed one part of the TAKS test did not mean the student was in need of special education, noting that many students do not pass the

assessments and that the school provides tutoring and additional opportunities to pass it. The case of *Student v. Harmony Science Academy*, Dkt No. 234-SE-0513 (SEA Tx 2013), also involved a student who was diagnosed with ADHD and whose parents challenged the decision of the school that Student was not eligible for IDEA services either as ED or OHI. The teachers identified difficulties such as turning in homework, maintaining focus in class, and lack of organization. The student failed to meet passing standard on one portion of the STAAR but was promoted to the next grade. The hearing officer held that failing the STAAR was only one factor to consider and that the student did not qualify. Because the student's needs could be adequately met through the use of instructional and behavioral strategies and interventions that could be provided under the RTI process or a 504 plan, the student did not demonstrate a need for a modified curriculum or specialized instruction. [Tr. 471-72; 561; 567; 701; 703-04; 709].

Petitioner did not meet the burden of proving that the student demonstrated a need for special education and related services caused by Student's disabilities. 20 U.S.C. § 1401(3)(A)(ii); 34 C.F.R. § 300.7(a).

III. The Parent Meaningfully Participated in the Initial ARD Meeting Held on September *, 2019.**

The parent also claimed that the district impeded the parent's right to participate in the student's education decision making process by preventing the parent from fully participating in the September ***, 2019 ARD meeting in which the student's eligibility determination was decided based on 34 C.F.R. §300.501 and that the decision of the ARD committee was pre-determined. Under the IDEA, parents have a procedural right to participate in IEP meetings. 34 C.F.R. § 300.501(b)-(c). The IDEA allows a hearing officer to find a procedural violation resulted in a failure to provide FAPE in limited circumstances where the procedural violation impeded the student's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE or caused a deprivation of education benefit. 34 C.F.R. § 300.513(a)(2). Petitioner alleges that the district impeded the parent's opportunity to participate because the district allegedly refused to collaborate with the parent on the determination that the student had a need for special education and related services.

However, the evidence shows that the parent was a full and active participant in the September ***, 2019 ARD committee meeting. [Tr. 145, 154-155, 662-63; J8:2-4]. On August ***, 2019, the parent received a copy of the procedural safeguards as well as a copy of A Guide to the Admission, Review and

Dismissal Process. [J6:1]. In addition, at the September ***, 2019 ARD meeting the parent signed for receipt of a second copy of the procedural safeguards as well as a copy of A Guide to the Admission, Review and Dismissal Process. [J6:2]. The Guide to the Admission, Review and Dismissal Process clearly explains what options a parent has when they disagree with proposals in an ARD meeting. The parent did not exercise any of these options. [Tr. 252]. Further, the parent was accompanied at the ARD by family friend and business partner, ***. Ms. *** is a special education diagnostician, currently employed by the ***. Ms. *** testified that she has

more than 20 years' experience in special education and has attended hundreds and hundreds of ARDs. [Tr. 134]. Ms. *** testified that she, as well as the parent, participated fully in the ARD meeting. With her extensive knowledge and experience of the ARD process, if Ms. *** believed that the parent was being deprived of her right to fully participate, she knew how to intervene and assure that the parent's right to participate in the student's education decision making process was exercised.

Appropriate Prior Written Notice ("PWN") was provided to the parents prior to and after the ARD committee meeting on September ***, 2019. [J8:7]. The parents received notice of scheduling of the ARD committee meeting. [R19]. The notice informed the parents of the reasons for the meeting, who would attend, and the documentation that would be considered. It provided contact information for a person they could call with any questions. It was in their native language in plain, understandable language. The ARD committee reached consensus on all issues. [J8]. The committee reached consensus and the parent signed the ARD documents indicating her agreement with the decision of the committee. [J8:6]. Despite receiving her procedural safeguard and Guide to the ARD Process, the parent did not request a 10 day reconvene meeting. After the ARD meeting, a notice was provided of the decisions of the ARD committee. The parents signed for receipt and for receipt of another copy of the procedural safeguards. [J6:2].

The parent's input and recommendations were provided, considered, and are documented in numerous parts of the ARD document. [J8:2-4; Tr. 557-61; 568]. Documentation that an IEP team thoroughly discussed a parent's concerns can help defeat predetermination claims. *See, e.g., J.P. and M.P. v. City of New York Dep't of Educ.*, 71 IDELR 77 (2d Cir. 2017, unpublished) (ruling that evidence that a child's IEP team thoroughly discussed the parents' concerns about a proposed public school placement undermined the parents' claim that a New York district predetermined the child's IEP). The student's ***

teacher was present at the September ***, 2019 ARD Committee meeting. She testified that the parent was given meaningful participation and that she “felt like [the meeting] ended where we all came to the consensus that we were doing the best for “the student.” When asked about the principal’s demeanor in the meeting, the *** teacher replied, “Mr. ***’s demeanor is always professional. It is always looking out for the best interest of the students. And I would say that I have been in lots of ARD meetings and it was no different than any other ARD meeting, just seeking a way to serve the kid best.” [Tr. 664].

The district’s ultimate decision not to find the student eligible for special education and related services does not indicate a lack of collaboration, but rather a disagreement over the appropriate educational program for the student. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003); “Absent any evidence of bad faith exclusion of the parents or refusal to listen to or consider the [parents’] input, [the district] met IDEA requirements with respect to parental input.” *Id.* Additionally, to further address the parent’s concerns, the district added accommodations to the student’s Section 504 plan in a meeting held the day after the ARD meeting. [J9].

The evidence does not support a finding that the district excluded the parent from the ARD process. Rather, the evidence demonstrates that the parent was a full and active participant in the September ***, 2019 ARD committee meeting. Moreover, Petitioner presented no evidence that the student was deprived of educational benefit because of a procedural violation.

Conclusions of Law

1. As the party challenging the district's decision on eligibility, the Petitioner failed to meet the burden of proof on any of the claims asserted in this action. *Schaffer v. Weast*, 546 U.S. 49 (2005).
2. Petitioner failed to meet the burden of proof to show that the actions of the district in seeking to consider special education placement for the student violated IDEA under the standard of *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983), 20 U.S.C. § 1400, et seq., 20 U.S.C. § 1401(3)(A)(ii); 34 CFR 300.8(a)(1).
3. Petitioner failed to meet the burden of proof to show that the district impeded the parent’s right to participate in the student’s education decision making process by preventing the parent from fully

participating in the September ***, 2019 Admission, Review and Dismissal (“ARD”) Committee meeting under 34 C.F.R. §300.501(b)-(c).

Order

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that all relief sought by Petitioner is **DENIED**.

SIGNED on February _____, 2021.

Sandy Lowe
Special Education Hearing Officer
For the State of Texas