

Student b/n/f Parent                    §     BEFORE A SPECIAL EDUCATION  
   §  
V.     §     HEARING OFFICER FOR THE  
   §  
HOUSTON INDEPENDENT                   §  
SCHOOL DISTRICT                           §     STATE OF TEXAS

**DECISION OF THE HEARING OFFICER**

I. Statement of the Case

Petitioner Student brings this appeal by his next friend, Parent, pursuant to the Individuals with Disabilities Education Act 20 U.S.C. § 1400 *et seq.*, (hereinafter referred to as "IDEA"), against Respondent Houston Independent School District (hereinafter referred to as "Respondent" or "Houston ISD"). Petitioner Student by next friend Parent (hereinafter referred to as "Petitioner" or "Student") filed a written request for a due process hearing which was received by the Texas Education Agency on February 12, 2004. Petitioner was represented by his next friend Parent. Respondent was represented by Attorney Hans Graff of Houston, Texas. A telephone prehearing conference was held on March 2, 2004, at which time both parties waived their right to a final decision within forty-five (45) days of the date the written request for due process hearing was filed. [34 C.F.R. §300.511(c)] By agreement, a due process hearing was held on Friday, April 23, 2004, in Houston, Texas.

Petitioner alleges that Student is a \*\*\*-year-old student in Houston ISD who receives special education placement, programs and services on the basis of meeting eligibility criteria as a student who is Other Health Impaired ("OHI") by virtue of his attention deficit hyperactivity disorder ("ADHD"). Student is also learning disabled in the areas of language, reading and written expression.

Petitioner raised the following issues regarding the identification, evaluation, placement and educational program of Student:

1. Petitioner asserts that Student was inappropriately labeled as emotionally disturbed ("ED") because of an erroneous evaluation.
2. Petitioner's next friend asserts that Respondent conducted an Admission, Review and Dismissal Committee ("ARD") meeting, wherein Student was labeled emotionally disturbed ("ED") and that she was not given the opportunity to participate in the decision making at that meeting.

3. Petitioner asserts that Respondent conducted an ARD meeting, wherein the ED label was removed from Student's classification and that again, she was not given the opportunity to participate.
4. Petitioner's next friend requested the opportunity to speak with Student's diagnostician about her evaluation and conclusion that Student was ED and that the district refused to allow her to do so.
5. Petitioner's next friend requested an independent education evaluation ("IEE") and the District refused to provide her with information necessary for her to proceed with her request.
6. Petitioner asserts that Student is not ED.
7. Petitioner asserts that Respondent denied his next friend access to Student's diagnostician, when access was requested.

As relief in this due process hearing, Petitioner requests that Respondent be ordered to do the following:

1. Petitioner seeks a determination that Houston ISD denied Petitioner's next friend equal participation in the ARD process.
2. Petitioner seeks a determination that Houston ISD inappropriately denied his next friend an IEE, when requested.
3. Petitioner seeks an order removing all reference to any ED label from Student's school records and the records of any government agency, including the Texas Department of Protective and Regulatory Services ("TDPRS").

Based upon the evidence and the argument of counsel, the Hearing Officer makes the following findings of fact and conclusions of law.

## II. Findings of Fact

1. Student is a \*\*\*-year-old male student who resides within the Houston Independent School District.
2. Houston ISD is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing Student a free appropriate public education in accordance with the Individuals with Disabilities Education Act, 20 U.S.C.A. §1400, *et seq.*, and the rules and regulations promulgated pursuant to IDEA.
3. Student's existing eligibility classification is Other Health Impaired ("OHI") by virtue of his attention deficit hyperactivity disorder ("ADHD").

4. A neuropsychological evaluation conducted by \*\*\*, Ph.D., on April 25, 2000 observed that Student had a history of disruptive and aggressive classroom behavior. In kindergarten, Student's behavior was so difficult for his teachers to manage that he was suspended 23 times, in that school year. He was diagnosed with ADHD.
5. In her April 25, 2000 evaluation, Dr. \*\*\* observed that Student seemed to be contending with significant depression and frustration so overwhelming to him that they were exacerbating his problems of inattention and distractibility. She noted poorly modulated outbursts and aggressive posturing.
6. On April 25, 2000, Dr. \*\*\* recommended that Student's mother consider consulting a child psychiatrist regarding Student's behavioral and emotional issues and opined that he might benefit from individual psychotherapy.
7. On May 20, 2002, an ARD meeting was convened on Student's behalf at \*\*\* School. The purpose of the meeting was to perform an annual review and to consider any parent concerns. The ARD committee determined that Student met the eligibility criteria for learning disability and OHI based on his ADHD. Because it was determined that Student's behavior significantly interferes with his classroom participation, a behavior management plan ("BMP") was developed.
8. Because he was mainstreamed in a general education class and his behavior regressed, he was returned to a behavior service class, with a BMP. Student's mother agreed with the recommendations of the ARD Committee.
9. At the May 20, 2002 ARD, it was determined that Student needed a small setting to be successful. Student was referred for a Functional Behavioral Assessment (FBA) at an October 17, 2002 ARD meeting because of an increase in noncompliant behaviors and defiance at school. According to the December 9, 2002 report of \*\*\*\*, Ph.D., Student's behaviors from 9/19/02 until 11/19/02 included: refusing to complete work, lethargic and uninvolved with class activities, shouting out in class, yelling, refusing to follow teacher directives, being argumentative with peers, teachers and aides, making noises and disrupting the classroom, refusing to go to "time-out" or isolation, physical aggression, running away from the teacher, running from the teacher when going to the bus, leaving an assigned area, being out of his seat, and "charging", pushing or swinging his elbows and hands at a teacher's aide.
10. In the Fall of the 2002-2003 school year, Student experienced a noticeable deterioration in his behavior from the previous school year. Student would have good days that would pass uneventfully and he would have other days when he had outbursts in the classroom. On those days that Student's classroom outbursts were extreme, he would be taken to the principal's office. \*\*\*, principal, would attempt to calm Student from whatever had upset him. Student would spend part or most of the school day in Ms. \*\*\*'s office.

11. On days where Student had outbursts that did not respond to time in Ms. \*\*\*'s office, Student's mother would be called to take Student home.
12. On October 17, 2002 Respondent sent out a Notice of Full and Individual Evaluation and Test Description ("FIE") for Student. The notice indicated that the FIE was sought because of changes in Student's behavior and discipline problems.
13. On December 10, 2002 \*\*\*, M.A., a Licensed Specialist in School Psychology, completed her report on her psychological evaluation of Student. Ms. \*\*\* assessed Student during the course of two sessions with him. In those sessions, she conducted a student interview to ascertain his mental status. To complete the evaluation, Ms. \*\*\* also administered all or portions of the following instruments:
  - Wechsler Intelligence Scale for Children 3<sup>rd</sup> Ed. (WISC-III)
  - Behavior Assessment System for Children: Self-Report (BASC: SRP)
  - Behavior Assessment System for Children: Parent Rating Scales (BASC: PRS)
  - Attempted
  - Behavior Assessment System for Children: Teacher Rating Scales (BASC:TRS)
  - Roberts Apperception Test for Children (Roberts)
  - House-Tree- Person Projective Technique (H-T-P)

Ms. \*\*\* reviewed Student's state folder, which included Dr. \*\*\*'s evaluation, and conducted a parent interview of Parent.
14. Ms. \*\*\* concluded that Student was uncooperative, oppositional, uncompromising and inflexible. She repeated information that he was disruptive in the classroom with adults at school, and was verbally abusive and disrespectful. Ms. \*\*\* also concluded that Student had an inability to build or maintain interpersonal relationships with peers and teachers; and had inappropriate types of behavior or feelings, under normal circumstances. Based on these conclusions, Ms. \*\*\* concluded, on December 10, 2002, that Student appeared to meet eligibility criteria for special education services under the Emotionally Disturbed handicapping condition.
15. After Ms. \*\*\* completed her December 10, 2002 evaluation of Student, Parent was told, on more than one occasion, that she could speak with Ms. \*\*\* about the evaluation. Parent never attempted to speak to Ms. \*\*\* outside of a scheduled ARD meeting.
16. On January 22, 2003 an ARD meeting was convened on Student's behalf at \*\*\* School. The purpose of the ARD meeting was to review evaluations of Student, his annual review, his placement, his discipline, his IEP, his progress and extended school year services. At the ARD meeting, Student's mother inquired about the absence of Ms. \*\*\*, whose presence she had previously requested. When it was stated that Ms. \*\*\* could not be present for the ARD meeting due to a scheduling conflict and that Dr. \*\*\* would review Student's Psychological Evaluation for the ARD Committee, Parent rose from her seat and left the meeting. Parent was advised that the ARD meeting would proceed and

the remaining members of the ARD Committee reviewed Student's counseling report, audiology report, and his FBA. Parent returned to the meeting but refused to sign the deliberations page of the ARD documents. The meeting recessed without it being completed.

17. On February 3, 2003 Parent was mailed a notice of an ARD meeting to be held on February 12, 2003. The notice stated that the purpose of the meeting was to continue the ARD process initiated on January 22, 2003 and interrupted.
18. On February 12, 2003 an ARD meeting on Student's behalf was reconvened. The purpose of the ARD meeting was to resume the review of Student's evaluations and special education program that originally began on January 22, 2003. Parent did not attend the meeting, even though she received written notice and invitation to the meeting and was given oral notice, as well. Ms. \*\*\* was present at the meeting and reviewed her Psychological Evaluation for the Committee. The ARD Committee accepted the recommendation of an emotional disturbance as a handicapping condition. The Committee agreed that the OHI eligibility would remain in effect and would be addressed at Student's Triennial ARD. The committee developed a Behavioral IEP for Student, which included a Level Management System. Student's primary placement was determined to be the Behavioral Services Classroom.
19. On May 1, 2003 Respondent sent Student's mother a Notice of an ARD meeting to take place on May 9, 2003. The Notice indicated that the purpose of the ARD was to review Student's educational program. Also, the Notice indicated that Student had reached the highest point in the level system and was being considered for general education classes.
20. On May 4, 2003 Student's mother wrote \*\*\* of \*\*\* School that she could not attend the ARD scheduled for May 9, 2003. Her reasons for not attending included her statement that the time was inconvenient; her observation that the notice did not state if it was an annual or triennial ARD; and that she had parent concerns that had not been addressed at the January 22, 2003 ARD meeting.
21. On May 29, 2003 a meeting convened on Student's behalf. The meeting included Student's mother and members of Student's ARD Committee, but the meeting was not considered an ARD because Parent objected that she had not received five days prior notice of who would be present at the meeting. She had requested that Ms. \*\*\* be present at the ARD meeting.
22. Ms. \*\*\* was not available for Student's ARD meeting on May 29, 2003 because she had been scheduled for two ARD meetings for other students, on that day.
23. On September 5, 2003 an ARD meeting convened on Student's behalf at \*\*\* School. The purpose of the ARD meeting was for the ARD Committee to consider Student's Triennial review. Parent was present at the ARD, as was Ms. \*\*\*. One of the stated purposes of the ARD was to consider placing Student in general education classes.

Parent raised questions about whether the ARD was an annual ARD or a Triennial ARD and stated that she had not consented to Student being labeled emotionally disturbed. Parent raised questions about the chronology of events that led to Ms. \*\*\*'s December, 2002 psychological evaluation of Student and the procedure used in the evaluation. Also, she questioned other aspects of Student's special education program. Parent stated that she felt her concerns were not being addressed and walked out of the meeting. When Parent left the ARD meeting, it adjourned.

24. Parent requested an IEE during Student's September 5, 2003 ARD and following that ARD, Ms. \*\*\*, principal of \*\*\* School, referred Parent to \*\*\*, for information about obtaining an IEE. \*\*\* is the Chair of the Special Education Department at \*\*\* School. Parent asked Ms. \*\*\* for information about obtaining an IEE. Ms. \*\*\* neglected to give the information to Parent.
25. On September 30, 2003 Respondent sent Student's mother a Notice of an ARD meeting to take place on October 9, 2003. The Notice indicated that the purpose of the ARD meeting was to report results of Student's psychological evaluation, and to discuss Student's progress and to review his IEP.
26. On October 9, 2003 an ARD meeting was convened on Student's behalf at \*\*\* School. The purpose of the ARD meeting was to conduct a Triennial and annual review of Student's progress in special and regular education classes. Student's mother did not attend the ARD meeting. The ARD committee considered reports from Student's Behavioral Services Classroom teacher that Student continued to have some impulse problems in class when he blurted out answers rather than first raising his hand. Student also maintained a disorganized assignment folder. However, Student's behavior had improved substantially and he exhibited appropriate behavior most of the time. Moreover, Student had mastered his BMP and the ARD committee agreed that there was no need to develop a new one. The ARD Committee concluded that Student no longer met the criteria for the Emotionally Disturbed classification as a handicapping condition, but continued to meet the OHI classification, based on his ADHD. The Committee voted to mainstream Student into general education classes with Behavioral Services Classroom support from his current teacher, because of the rapport established between Student and his teacher.

### III. Discussion

Parent requested this due process hearing because she alleges that Houston ISD denied her the opportunity to participate in her son's special education program. She alleges that her son, Student, was labeled ED and then the label removed without her consent or opportunity to participate in that decision. She contends that the ED classification was erroneous. She contends that Houston ISD refused to allow her the opportunity to challenge the validity of Student's psychological evaluation with the evaluator and to obtain an IEE. Parent requests that I rule that the classification of Student as ED was erroneous substantively and procedurally. She requests that I order Houston ISD to remove the classification from his school records.

The record in this case does not support Parent's allegations or her requested relief. Student's behavior in the Fall of 2002 gave his ARD Committee reason to suspect an additional handicapping disability. His ARD Committee's referral of Student for a psychological evaluation was the appropriate action under the "Child Find" provisions of IDEA, given Student's educational history and his classroom behavior. Ms. \*\*\*'s December 10, 2002 evaluation seems appropriate. She based her conclusions and recommendations on educational history, anecdotal evidence, standardized tests, current reports, and parental input. Student's ARD Committee made a logical recommendation to add the ED classification based on Ms. \*\*\*'s evaluation and ARD Committee input. The program that Student's ARD Committee put in place was not only appropriate, under the circumstances, but it was also effective. Based on Student's progress under the revised IEP enacted on February 12, 2003, his ARD Committee removed the ED classification within a relatively short period of time (by October 9, 2003).

The record shows that Student's ARD Committee acted appropriately in spite of Student's mother's lack of cooperation with the ARD process. Parent seemed more interested in confrontational and, frankly, dilatory criticisms of the process than in addressing Student's teachers' justifiable concerns. The ARD process is designed to be collaborative. All members of a special education student's ARD Committee are vital to the process, particularly the student's parents. However, if a parent refuses to recognize the realities of scheduling, availability of school personnel, and the continuing requirement to adjust a student's educational program, the process must proceed anyway. ARD meetings should be scheduled for the convenience of all its members, but no member, including a parent, has a right to dictate who attends an ARD meeting, as long as the ARD committee contains all *required* members. Dr. \*\*\* was qualified to review the evaluation of Houston ISD's LSSP for the ARD Committee on January 22, 2003, especially since she performed the FBA. Parent is mistaken in her belief that the law supports her boycotts of a duly constituted ARD Committee meeting or walk-outs on a duly called ARD meeting, in progress. The law only obligates Houston ISD to give her the opportunity to participate in the process. If she refuses to attend a duly-called ARD meeting or leaves an ARD meeting convened on her son's behalf, the remainder of his ARD Committee has a legal obligation to continue the meeting and act without her.

There are areas of the record that are missing from the complete picture of the process, but do not affect my decision. There is no clear showing of what efforts Houston ISD made to secure Parent's attendance at the October 17, 2002 ARD meeting when the decision was made to refer Student for a psychological evaluation. However, Parent never testified that she was *not* invited to his October 17, 2002 ARD meeting. It does appear that Ms. \*\*\* did not diligently provide Parent with the information to obtain an IEE. The issue is moot, however, because Parent requested the IEE to challenge an evaluation that was no longer relevant to Student's IE at the time when she requested it. Presumably, *both* Ms. \*\*\* and an independent evaluator would conclude that Student did not meet the criteria for the ED classification *after* October 9, 2003.

Because the record does not support a finding that Houston ISD deprived Parent of the opportunity to participate in Student's ARD process, it is not necessary for an extended discussion of how a hearing officer has no authority to order a school district to *alter* a special



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**SYNOPSIS**

**Issue:** Did Respondent Houston ISD deny Petitioner’s mother the right to participate in the process of classifying a \*\*\* year student as emotionally disturbed and removing the classification.

**Federal Citation:** 20 U.S.C.A. §§1401; 1414(a)(1)(A); 34 C.F.R. §§300.300(a)(2); 300.125, 300.320, 300.503; 300.349-300.347

**Texas Citation:** 19 T.A.C. §§89.1050(1), 89.1151; 89.1045  
*Cypress Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997)

**Held:** For Respondent. Houston ISD gave Petitioner’s mother notice and opportunity to participate in the ARD process that she declined. IDEA obligated the District to take action to modify Petitioner’s eligibility classification and IEP even if his parent refused to participate.

**Issue:** Did Respondent Houston ISD erroneously classify Petitioner as emotionally disturbed.

**Federal Citation:** 20 U.S.C.A. §§1414; 34 C.F.R. §§300.340-300.350; 300.502

**Texas Citation:** 19 T.A.C. §§89.1050, 89.1055  
*Tatro v. State of Texas*, 625 F.2d 557 (5<sup>th</sup> Cir. 1980)

**Held:** For Respondent. Respondent’s actions to add and then remove the emotionally disturbed eligibility classification were based on sound factual support, in each case.