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DOCKET NO. 325-SE-0603

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Student	§	BEFORE A SPECIAL EDUCATION
B/N/F Parent,	§	
Petitioner,	§	
VS.	§	HEARING OFFICER
FLOUR BLUFF INDEPENDENT	§	
SCHOOL DISTRICT,	§	
Respondent	§	FOR THE STATE OF TEXAS

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**DECISION OF THE HEARING OFFICER**

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**PROCEDURAL HISTORY AND STATEMENT OF THE CASE**

**The Request for Due Process Hearing**

Petitioner Student instituted this proceeding by filing a Request for Due Process Hearing against Respondent Flour Bluff Independent School District (“the District”) under the Individuals with Disabilities Education Act (“IDEA”). *See* 20 U.S.C. §1400 et seq. The Texas Education Agency received the Request on June 10, 2003 and assigned the case to the undersigned Hearing Officer.

**Claims and Requested Relief**

Petitioner's Request complained that the District violated IDEA and denied Student a free appropriate public education (“FAPE”) by failing to identify Student as a child with a disability who needs special education. Specifically, Petitioner alleged that Student qualifies for special education services as a child with disabilities in the categories of other health impairment (based on attention deficit disorder with inattention) and emotional disturbance.

Petitioner sought the following relief against the District for this alleged violation:

1. An Order finding that Student is a child with a disability and is eligible to receive special education under IDEA.
2. An Order directing the District to develop an Individualized Education Program (“IEP”) with services appropriate for Student’s needs.

3. An Order directing the District to provide services to Student to compensate for the District's failure to identify Student as a child with a disability who needs special education.

### **The Due Process Hearing**

The due process hearing began as scheduled on December 5, 2003. The presentation of evidence concluded the same day. At the request of Petitioner, the hearing was closed to the public, and Student attended.

At the conclusion of the evidence, counsel for the parties asked to be allowed to submit their closing arguments in post-hearing briefs. The request was granted. Counsel agreed to submit their post-hearing briefs on or before January 7, 2004. The hearing officer found that their agreement and the holiday season constituted good cause for extending the decision due date to January 21, 2004. Counsel later requested additional time to submit their post-hearing briefs. The request was granted and was found to be good cause for extending the decision due date to January 27, 2004. This decision was mailed to the parties on January 27, 2004.

### **Stipulations**

During the due process hearing, the parties stipulated to the following facts:

1. Flour Bluff Independent School District is a political subdivision of the State of Texas and a duly incorporated independent school district.
2. At all relevant times, Student and her mother have resided within the jurisdictional boundaries of the District.
3. Student is a \*\* year old student who currently attends \*\* grade at Flour Bluff \*\* School in the District.

### **FINDINGS OF FACT**

Based on a preponderance of the evidence admitted at the hearing, the Hearing Officer makes the following findings of fact:

1. Student has been in regular education throughout her school years in the District. She has never received or qualified to receive special education services from the District.
2. At the request of Student's mother, the District has made Section 504 services and modifications available to Student for several years. Under her Section 504 plan, Student is permitted to access content mastery and to receive some accommodations.

3. Student's mother referred Student for special education in \*\* grade, \*\* grade, and \*\* grade. Each time, the District tested Student, and each time she failed to qualify for special education services.
4. In the 2002-03 school year when Student was a \*\*, Student's mother referred Student for an evaluation because she suspected Student had a learning disability in math. At the time, Student was having difficulty in her Algebra I course, which is a required course that all District students must take and pass to graduate.
5. Student passed all her \*\* courses except Algebra I, which she failed with a score of \*\*. To pass, she needed a score of \*\*. That year, approximately 40% of all \*\* at Flour Bluff \*\* School failed Algebra I, and approximately 45% of the students in Student's Algebra I class failed it.
6. According to Student's \*\* Algebra I teacher, Student would have passed the course if she had accessed available tutoring and content mastery. Other students with similar ability levels who accessed tutoring services did pass the course.
7. Like the other \*\* who failed Algebra I, Student was given the option of completing the course through Novanet, a self-paced, computer-based program. During the first semester of her \*\* year, using the Novanet program, Student completed and passed Algebra I with a grade of \*\*.
8. In the spring of 2003 Dr. \*\*, a District psychologist, evaluated Student. Her testing showed that Student has an IQ of \*\*, a result consistent with previous testing of Student.
9. As part of the evaluation, Student's mother completed a behavior checklist for Student. She did not indicate that Student had poor attention or excessive anxiety. She did indicate that Student suffers from excessive withdrawal.
10. Dr. \*\* determined that Student does not have a learning disability in math, does not have an emotional disturbance, and does not qualify for special education.
11. Student's mother disagreed with the results of Dr. \*\*'s evaluation of Student. As a result, she elected to have Dr. \*\*, an outside psychologist, evaluate Student.
12. Dr. \*\* also concluded that Student does not have a learning disability in math. His testing showed that Student has a low average IQ, a result consistent with the prior testing of Student.
13. Dr. \*\* concluded that Student suffers from an emotional disturbance. He noted that she and her mother reported that she had vomited on a number of occasions on the way to school. Student has never vomited during her classes at school.

14. Dr. \*\* also concluded that Student suffers from attention deficit disorder, with inattention. However, other than reviewing Student's records and interviewing her, Dr. \*\* did not obtain information concerning her classroom behavior or performance.
15. Following Dr. \*\*' evaluation, an ARD Committee met to consider it. Because Dr. \*\* had not obtained teacher information as part of his evaluation, the Committee, with the agreement of Student's mother, decided to obtain another psychological evaluation of Student.
16. The District therefore retained Dr. \*\*, another outside psychologist, to evaluate Student. He performed numerous tests of Student and obtained information from her teachers. He agreed with Dr. \*\*' conclusion that Student suffers from general anxiety, but concluded that her symptoms do not create an educational need that cannot be met within the regular education setting.
17. Dr. \*\* further concluded that Student is a slow learner who needs more time and effort to learn but who can learn adequately without special education.
18. At the time of the due process hearing Student was passing all her \*\* classes except Geometry and Biology.
19. Student's Geometry teacher believes that Student does not need special education and has the ability to pass Geometry if she will regularly access tutoring services.
20. Earlier in the semester, Student had been passing Biology until her regular teacher took maternity leave and was replaced by a substitute teacher. Student likes science and believes she does well in Biology.

## **DISCUSSION**

### **I. The Dispute**

Petitioner's central contention here is that Student needs special education services because she suffers from an emotional disturbance and/or from attention deficit disorder ("ADD"). In support, Petitioner relies on Dr. \*\*' evaluation of Student and points to Student's failing grades in Algebra I last year and Geometry this year as evidence that she cannot progress adequately in math without special education.

### **II. The Legal Standards and Burden of Proof**

The Individuals with Disabilities Education Act places on each public school district the responsibility to identify, locate, and evaluate all children within the district's jurisdictional boundaries who have qualifying disabilities that cause them to need special education. 20 U.S.C. §1412(a)(3); 34 C.F.R. §§300.125, 300.220; 19 Tex. Admin. Code §89.1011. Each district also

must ensure that each eligible student receives a free appropriate public education. 34 C.F.R. §§300.300, 300.341.

Under IDEA, a “child with a disability” is defined, in pertinent part, as one “(i) with . . . serious emotional disturbance (hereinafter referred to as ‘emotional disturbance’), . . . other health impairments, or specific learning disabilities; *and (ii) who, by reason thereof, needs special education and related services.* 20 U.S.C. §1401(3)(A) (emphasis added).

To qualify under the category of “emotional disturbance,” a child must exhibit one or more specific emotional characteristics “over a long period of time and to a marked degree that adversely affects a child’s educational performance.” 34 C.F.R. § 300.7(c)(4). To qualify with ADD under the category of “other health impairment,” a child must exhibit an attention deficit in the educational environment to a degree that adversely affects the child’s educational performance. 34 C.F.R. §300.7(c)(9); 89 Tex. Admin. Code §89.1040.

Thus, to prevail here, Petitioner had to prove that Student suffers from an emotional disturbance or ADD to such a degree that it adversely affects her educational performance and prevents her from making adequate progress without special education.

## **II. The Evidence**

Petitioner did demonstrate that Student has some emotional distress. In fact, both Dr. \*\* and Dr. \*\* characterize her as anxious, and she and her mother testified that she has vomited on numerous occasions on the way to school. There is also some evidence, mainly from Student’s mother, that Student’s attention span may be weak. (Respondent’s Exhibit 2: \*\* Report at p. 9).

The parties point to different reasons for Student’s anxiety. The District attributes it to recent turmoil in her life, including illnesses in her family. Student and her mother say that Student’s frustration with her math courses and the pressure she feels at school are responsible.

Both parties are probably right about the causes of Student’s anxiety. In addition to her recent worries about her ailing loved ones, Student has shown that she wants to do well in school and worries about her performance there. But Student’s teachers describe her as a slow learner, a description supported by all her evaluations, including the one Dr. \*\* did. It is therefore not surprising that Student has experienced some academic difficulties, especially in math courses, which tend to present learning obstacles for many students. It is also not surprising that she may sometimes feel frustrated and anxious when she is unable to grasp subjects as quickly as some of her classmates.

The key issue here is whether the evidence showed that Student has anxiety or an attention deficit to such a degree as to cause her to have an educational need that can only be met with special education. The evidence does not show that she has such a need. The behavior rating information that Dr. \*\* and Dr. \*\* collected from Student’s teachers showed that Student has exhibited some anxiety and poor attention at school, but not to a marked or significant degree. (Respondent’s Exhibit 2: \*\* Report at p. 13; Respondent’s Exhibit 7.) The testimony of

Student's teachers at the hearing corroborated these ratings. They testified that Student is sufficiently calm, attentive, and involved in class to learn and that when she devotes sufficient efforts to her work, she progresses adequately. This testimony was consistent and credible.

Other than reviewing Student's records and interviewing her and her mother, Dr. \*\* collected no information concerning Student's behavior or performance in school. He therefore could not persuasively controvert Dr. \*\*'s findings or the teachers' testimony. Moreover, information provided by Student's mother further supports the District's position. On the behavior rating scales that she completed as part of Dr. \*\*'s evaluation of Student, she did not indicate that Student had excessive anxiety or poor attention. (Respondent's Exhibit 7.) And she told Dr. \*\* that "once Student is in the school environment, she has no difficulty functioning." (Respondent's Exhibit 2: \*\* Report at p. 4). The fact that Student seems not to exhibit a serious attention deficit or excessive anxiety in classroom behavior and performance, even in math classes, undercuts the claim that she needs special education to achieve adequate progress.

Furthermore, Student has proven over the years that despite being a slow learner, she is capable of passing her classes, even math, when she makes the necessary extra effort and accesses tutoring and other support services when she needs them. Her teachers testified credibly that she can and does make adequate progress without special education when she makes these efforts. They also testified that the reason she failed Algebra I last year and is failing Geometry this year is that she did not make these efforts. Specifically, she did not take advantage of available tutoring sessions, did not access content mastery when she needed it, and did not always complete her assignments. She also did not access the counseling assistance that is available for her, despite her anxiety. Moreover, Student eventually did pass Algebra I, with a grade of \*\*, on the self-paced Novanet program. This fact further indicates that Student may sometimes need to devote more time or effort to her studies than others do, but she can learn and make adequate progress within the regular education setting.

In summary, the record does not support a finding that Student needs special education in order to progress adequately and receive a meaningful educational benefit. Petitioner therefore has not demonstrated that Student has an educational need that regular education cannot meet. For this reason, Petitioner's claim must be denied.

### **CONCLUSIONS OF LAW**

1. Respondent Flour Bluff Independent School District is a local education agency and political subdivision of the State of Texas and is subject to the requirements of IDEA.
2. Petitioner has not shown that Student is eligible for special education as a child with a qualifying disability under IDEA.
3. Petitioner has not shown that Student has an educational need for special education.
4. Petitioner has not shown that the District denied Student a free appropriate public education.

## **ORDER**

Based on the foregoing findings of fact, conclusions of law, and discussion, **IT IS ORDERED** that Petitioner's requests for relief are **DENIED**.

Finding that the public welfare requires immediate effect of this Decision, this Hearing Officer makes it effective immediately, pursuant to 19 TEX. ADMIN. CODE §157.5(n).

**SIGNED** this 27<sup>th</sup> of January 2004.

/s/ Jeff A. Armstrong  
JEFF A. ARMSTRONG  
SPECIAL EDUCATION HEARING OFFICER  
FOR THE STATE OF TEXAS

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SCHOOL DISTRICT,	§	
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**SYNOPSIS**

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**ISSUE:** Whether Student is entitled to special education as a student with an emotional disturbance or attention deficit disorder.

**CITATIONS:** 20 U.S.C. §1401(3)(A); 34 C.F.R. §300.7(a)(1), (c)(4), and (c)(9).

**HELD:** For Respondent.