

STUDENT	§	BEFORE A SPECIAL EDUCATION
	§	
V.	§	HEARING OFFICER FOR THE
	§	
ALVIN 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")<sup>1</sup>, against Respondent Alvin Independent School District (hereinafter referred to as "Respondent" or "Alvin 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 ("TEA") on May 24, 2005. Petitioner was represented by Attorney Rhoda Nelson of Ft. Lauderdale, Florida and Attorney Andreanna Gusman of Houston, Texas. Respondent was represented by Attorney Jeffrey Rogers of the law firm Feldman & Rogers in Houston, Texas. A telephone prehearing conference was held on May 26, 2005, 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)] After several continuances documented by prehearing orders, a due process hearing was held from Thursday, November 10, 2005, through Friday, November 11, 2005, in Alvin, Texas. The parties agreed to file post-hearing briefs on or before December 2, 2005 and also agreed to a decision due date of December 14, 2005.

The issues identified in this hearing were Petitioner’s complaints that:

1. Respondent failed to identify Student as a student with a disability;
2. Respondent failed to evaluate Student as a child with a disability;
3. Respondent’s failure to place Student in special education deprived Student of a free, appropriate public education; and
4. Respondent’s failures have resulted in Student’s removal from the general education classroom for long and short time periods;

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<sup>1</sup>This case was filed before the Individuals with Disabilities Education Improvement Act was applicable.

Respondent contends that Student is not eligible for special education services because he meets the educational standards established by TEA by passing all classes, passing TAKS, and consequently has no educational need for special education.

As relief in this due process hearing, Petitioner requests that Student receive an Independent Educational Evaluation, that Respondent place Student in special education, provide him with a Behavior Intervention Plan as part of his Individualized Education Program, and provide compensatory services based on his removal from the general education setting and the assessment data. Respondent objects to an IEE, and requested that this hearing provide an opportunity to prove that Respondent's Full and Individual Evaluation is appropriate.

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 in the \*\*\* grade who resides within the Alvin Independent School District and attends \*\*\* School. Student has attended school in Alvin ISD from the time he was enrolled in the Early Childhood program at age \*\*\* until the present.

2. Alvin 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 was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") at age \*\*\*. Student participated in the Alvin ISD Early Childhood and Preschool Program for Children with Disabilities ("PPCD") on the basis of a handicapping condition of speech impairment. Student was also known to have ADHD and taking medication for the disorder.

4. Student's PPCD teacher had familiarity with ADHD based on training courses and workshops taken and a son with the disorder. She taught Student for three years and continues her friendship with Student's mother. She sees Student regularly, as he is friendly with her sons. Student's former PPCD teacher notes that Student has exhibited traits of high activity levels, inattention, inability to focus, difficulty completing work on time, and lack of compliance with behavioral directives. Student's PPCD teacher is concerned that Student is not in special education now and that he does not have a behavior program.

5. In addition to his speech impairment and ADHD diagnoses, Student was determined to be eligible for special education for Other Health Impaired ("OHI") and Learning Disability, also, at the following Admission Review and Dismissal Committee meetings ("ARDs"): November 12, 1996, April 28, 1997; May 1, 1998, and March 11, 1999. At every ARD regarding Student's special education, it was noted that Student had a physical condition which affected: "Other - ADHD, taking Ritalin."

6. Student continued in special education with an Individualized Education Program (“IEP”), until the ARD meeting of September 10, 1999, when he was dismissed from special education. After reviewing Student’s Comprehensive Individual Assessment all ARD Committee members, including Student’s mother agreed: “Based on the CIA, Student no longer qualified for special education under any category.”

7. After dismissal from special education, Student’s mother reports that Student passed his classes and performed satisfactorily throughout elementary school.

8. In \*\*\* grade, however, Student began to have increasing incidents of behavior referrals and behavior complaints. Student received discipline referrals from September 11, 2003 through March 18, 2004, with referrals in each month except December. The issues raised in Student’s \*\*\* grade discipline file include: hitting another student’s arm, spit balls on class wall; disruption; throwing pencils at another student, getting out of seat, obscene remarks; refusal to lower voice; Student’s belongings found in a backpack that had been reported stolen by another student; objected to returning to class and responded with inappropriate language; dress code violation with shirt; throwing pen cap across the room and hitting another student with it; throwing spit balls at other students; reprimanded three times; mocking the teacher; sticking hand up the drink machine; running and sliding in halls; disrespectful to teacher; consistently unprepared for class; rude and disrespectful to teacher; dialed a false 911 call from office phone; sleeping in In School Suspension; found in the gym when should have been in In School Suspension<sup>2</sup>; throwing objects across the room at students.

9. In \*\*\* grade, Student was removed from the general education classroom to In School Suspension by discipline referrals 3 times for a total of 13 days, was assigned to Saturday Adjustment class twice, and received 8 detentions.

10. Student passed seventh grade, with the following grades: Language Arts \*\*\*; Math \*\*\*; History \*\*\*; Science \*\*\*; Art I \*\*\*; Theater Arts \*\*\*. Student met the standard on the Reading and Math and portions of the TAKS test and was absent for the Writing portion of the TAKS test. Student’s grades included a \*\*\* in Math.

11. Student was placed in the At Risk program for \*\*\* as of May, 2004. In May, 2004, it was noted that he was having problems focusing. As part of the At Risk program, a Student Success Team (“SST”) met regularly to consider Student’s school performance. Notes from the team of teachers considering Student’s educational performance mention his baby brother’s death (8/18/04), his Academic and Behavior Contract (9/22/04); his risk taking (“arrived at school covered in wounds”), violation of contract; and his inconsistent medication; (9/29/04); continued class disruption (10/13/04); his “getting into lots of trouble in class” and their doubts about his taking his ADHD medication (10/20/04); teachers seeing “significant improvement (11/3/04); back on medication (3/16/05); out of medication (5/4/05); has mother’s request for testing, expulsion to ADAPT for alleged robbery, and placement in ISS at a separate location at parent request (5/18/05). The group recommended at one point that Connors rating

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<sup>2</sup>Respondent’s notation for ISS is IGSC. However, no evidence was presented as to what the initials stand for.

scales be used to identify Student's behavior issues, and at another point that Student be considered for §504 of the Rehabilitation Act of 1978. These options were not pursued. On November 8, 2004, the team recommended that Student receive two interventions: small group and tutorials, and these interventions were not implemented.

12. In \*\*\* grade Student continued to have behavioral difficulties. For example, on August 24, 2004, Student received three discipline referrals, resulting in three days of In School Suspension.

13. Following the discipline problems with Student early in the school year, school personnel met with Student and his mother on or about September 21, 2004. Present at the meeting were \*\*\*, Student's academic team leader, \*\*\* School Principal Deborah Roberson, Student and his mother. During the meeting, officials discussed Student's academic and behavior issues and required Student to commit to an Academic and Behavior Contract dated September 21, 2004. The contract required A.D to agree:

I, Student, realize that my academic performance and behavior in my classes has been unacceptable by my teachers and by my parent. In order for me to continue attending \*\*\* School and finish my \*\*\* grade year successfully, I agree to do the following;

1. Agree to go to the [school] nurse to take medication after breakfast each day.
2. Manage my behavior and mouth in an appropriate way by not talking out, talking excessively, or trying to argue with teachers.
3. Cooperate with all my teachers and all school staff by following all classroom and school rules and procedures. I will not cause a class disruption by singing or doing any other inappropriate activity in class.
4. Be in dress code everyday by having a belt on and keeping my shirt tucked in.
5. Complete all my assigned school work on time.
6. Concentrate to stay focused in all my classes.
7. Request help from my teachers by setting time for extra help.
8. Agree to weekly reports being sent to my parent.

9. Agree to filling-in my student planner each class I attend, getting my teachers to sign it, and showing it to my parent at the end of the day.

If I do not do the above mentioned things and get an office referral, the following things will happen: 1. Office 3 hr. detention; 2. time in In School Suspension; 3. Possible referral to ADAPT (Alternative School); 4. Do not get to go on team field trip; 5. Do not attend \*\*\*grade play day; 6. Could possibly get a ticket for class disruption.

Student signed the contract on September 22, 2004. The contract had a place for Student's mother to sign, but she did not fully agree with the contract and did not sign it.

14. Following the contract, school records indicate that Student did take his medication daily on all school days from November 11, 2004 through May 21, 2005, with the exceptions of: January 3, 2005 when it was reported that no medications were present; March 30, 2005 absence, when Student was absent from school, and the week of May 2-6, 2005, which included Student's last two absences from school. Student attended school each day of the school year with the exception of the 3 days noted above.

15. In \*\*\* grade language arts class, Student had passed for the year after failing one nine weeks grading period. Student liked to read to the class and did not have to listen to pass. She noted behaviors of inattention, problems completing and turning in work, and objections to being corrected. Modifications she implemented for Student included allowances to make up assignments and sending him outside the classroom to cool off if he needed time to cool off. She also reported that she disciplined him by giving him lunch detentions and wrote him up twice in September, 2004 in Teacher Discipline Notice to Parents for being disrespectful, failing to follow directions, not having his supplies, talking back, not listening to instruction, talking back and disrupting the class. Although she knew of his Academic and Behavior Contract, she did not participate in signing his weekly planner, and did not provide weekly progress reports to his parent.

\*\*\* reported Student's behavior "Unsatisfactory" in all four of the Nine Weeks grading periods.

16. \*\*\*, Student's \*\*\* grade Art teacher, reported success with Student in her classroom, in part because Student was engaged in her subject and enjoyed drawing. She noted off task behavior and disrespectful behavior. A significant incident in her class not mentioned in her testimony was the alleged theft of two metal rulers on April 22, 2005, for which Student was referred to five days In School Suspension.

17. Student continued to have discipline and behavior problems throughout his eighth grade year. The issues raised in Student's \*\*\* grade discipline file included: Taking 20 minutes to go to locker during class after previous verbal warning; shirt untucked; told to tuck in shirt again; told to tuck in shirt twice more; lack of cooperation in In School Suspension; throwing pen cap across the room in In School Suspension; missed detention; skipped 2 detentions; arguing with teacher; defiance; not working in class; put arms in shirt pretending they were "stumps"; told numerous times to tuck in shirt; served partial detentions instead of full; asked

twice to tuck in shirt; argued about behavior contract; unprepared for class; disruptive and not working; played with water faucet; disruptive; insisted on retaking exam; ran and jumped on table in cafeteria; inappropriate and sexually suggestive comments; back talk; detention slip not signed or handed in; burglarizing concession stand/felony with three other students; alleged damage/theft estimated at approximately \$500 from school concession stand; alleged theft of school property (2 metal rulers); running in halls; wrote inappropriate words on another student's paper; student was sent to office but instead wandered halls; escorted to office by teacher but left office; took a stack of bookmarks from library after being told not to do so; physical confrontation with another student; inappropriate name calling; sticking notes through the IGSC door; arguing with another student; insubordination.

18. On February 8, 2005, \*\*\* Student's English teacher emailed Student's other teachers stating: "I think we might need to team him again. . . . I am going to talk to him today about his behavior in my class today, but I don't know that it will make enough of an impact."

19. Student's disciplinary problems in the \*\*\* grade culminated in a referral for allegedly breaking into a school concession stand after school hours and taking some things from that locked building, and the alleged theft of the Art Room rulers. Student was removed from his regular education classroom and placed in In School Suspension for at least ten days. Respondent further recommended that Student be expelled from school and placed in an Alternative Educational Placement for 13 weeks for the concession stand incident.

20. Student passed \*\*\* grade, with the following grades: Language Arts \*\*\*; Math \*\*\*; History \*\*\*; Science \*\*\*; Art I \*\*\*; Music Expression \*\*\*. Student met the standard on the Math and Social Studies portions of the TAKS test and was a commended student in Reading. Student grades included a \*\*\* in History and a \*\*\* in Language Arts.

21. On May 11, 2005, Student's mother wrote to \*\*\*, Assistant Principal of \*\*\* School requesting that Student be referred for special education. A request for due process hearing was filed on May 24, 2005.

22. On June 13, 2005, Respondent completed a Full and Individual Evaluation of Student. Formal evaluation measures included Behavior Assessment Scales for Children with information supplied by Student's teachers and mother, Adolescent Psychopathology Scale (Short Form), Rorschach Inkblot test, and the Woodcock Johnson III tests of cognitive abilities and intellect. Informal evaluation measures included teacher interviews, parent interview, and review of school files. Although information was requested from Student's physicians, it was not received before the completion of Respondent's FIE. Respondent also reviewed Student's special education file and discipline records.

23. \*\*\*, Ph.D., LSSP, performed a psychological evaluation of Student. He concluded: "Despite the educational concerns evident in this evaluation, Student's behavior does not appear to meet the state's eligibility criteria for emotional disturbance. . . . Furthermore, Student's behavior does not appear to meet eligibility criteria for a student with an Other Health Impairment, as his symptoms of ADHD do not appear to prevent him from making age expected

academic and social progress.” \*\*\* psychological conclusions were made without reference to the reports of Student’s physicians, Dr. \*\*\* and Dr. \*\*\*, which were submitted on August 10, 2005 and July 8, 2005, respectively, after Dr.\*\*\* report was completed.

24. \*\*\*, Educational Diagnostician and certified \*\*\* special education teacher, administered the Woodcock Johnson tests of Cognitive Abilities and Achievement and interpreted the results. She found Student’s IQ to be in the \*\*\* range and concluded that his achievement in the \*\*\* range matched his IQ. Based on the tests results and psychological evaluation, and Student’s academic performance in \*\*\* grade, she concurred with the August 25, 2005 ARD Committee that “even though he had the eligibility of OHI, through my testing and through the report that we had received, we did not feel there was an educational need; that he was making academic progress” and did not need any more services to continue to make that progress.

25. There was no disagreement among Student’s teachers, parent, and school administrators regarding Student’s behavior problems. Student was known to be inattentive, impulsive, hyperactive, distractible, inappropriately outspoken, having anger control problems and subject to disruptive classroom behavior. There was also no disagreement that Student’s behavior problems were related to his ADHD; school personnel noted that Student’s behavior was more problematic when he was not on medication.

26. There also seemed to be no disagreement that Student's behavior problems interfered with his education and the education of other students. Student's teachers acknowledged his limitations and provided him with modifications such as extra time for assignments, keeping extra supplies for him because he could not be counted on to bring his own supplies, and not penalizing him for disorganization.

27. Student's behavior and academic contract looks similar to a behavior intervention plan, with modifications inferred. Important differences between the September 21, 2005 contract and a behavior intervention plan are the contract's preparation in the absence of a functional behavior assessment; lack of requirements for school personnel<sup>3</sup>; lack of progress measures because the items require 100% compliance; lack of positive reinforcers; absence of school assistance in complying with the contract.

28. Despite the modifications provided by Student's teachers and his passing grades and TAKS scores, Student's ADHD related behaviors were not managed effectively, and he was removed from the general education classroom for at least ten days in the last days of his eight grade school year.

29. Petitioner's physicians and experts recommended that Student be placed in special education with an OHI eligibility.

30. On August 25, 2005, an ARD Committee met to consider Student's eligibility for special education, including the Full and Individual Evaluation performed by Respondent. Present at the ARD were Student's mother, \*\*\* School Principal \*\*\*, \*\*\* grade science teacher \*\*\*, Special education teacher \*\*\*, Assessment personnel \*\*\* and Dr. \*\*\*, Special Education Director \*\*\*, Respondent's attorney and Petitioner's two attorneys, and another person from Respondent's special education department. The ARD Committee discussed Dr. \*\*\* Psychological evaluation dated June 13, 2005. During the meeting, Dr. \*\*\* also read and reviewed the letters from the Devereaux Group (Dr. \*\*\*), recommending Student for special education with an OHI eligibility and the OHI eligibility form completed by Dr. \*\*\*. After reviewing the information, Dr. \*\*\* stated his opinion would not change as to Student's eligibility based on no educational need.

31. The ARD concluded with student's mother and his two attorneys, disagreeing and requesting to table the ARD pending an IEE and the due process hearing. Respondent's attorney stated that the ARD would not be recessed and that placement in an Alternative Educational Placement was pending. Over the objections, Respondent declared the August 25, 2005 ARD considering the Full and Individual Evaluation and denying Student special education complete.

32. According to Dr. \*\*\*, M. D. board certified in general psychiatry and board eligible for child and adolescent psychology, Student's ADHD is at the moderate level and the

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<sup>3</sup>The school personnel responses, however, are inferred. For example, Item 7. requires Student to request extra help from my teachers by setting time for extra help." Presumably, school personnel will set aside time for his additional help when Student asks. Similarly, the "weekly reports" (Item 8) would be sent by his teachers.

educational implications of his ADHD are that he may have difficulty in completing tasks, being forgetful, not turning in assignments, as well as not being able to finish tests on time. Impulsivity and distractibility cause Student to be removed from the classroom and place him at risk for not completing his education. Dr. \*\*\* placed Student on Strattera to help his focus, concentration and self-esteem, which would reduce his impulsive behaviors. Dr. \*\*\* also concluded that Student had other Axis I diagnoses, including Oppositional Defiant Disorder which was developing into a conduct disorder and alcohol abuse.

33. According to Dr. \*\*\*, M.D., Student's pediatrician since Summer, 1999, Student has limited strength, vitality or alertness including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment that was due to his ADHD, which adversely affected Student's educational performance. Dr. \*\*\* noted that Student was taking Concerta to improve his concentration. Dr. \*\*\* referred Student to Dr. \*\*\*.

34. According to both Student's medical doctors, Student's medications mitigate his ADHD behaviors, but do not eradicate his inattention, impulsivity, distractibility, and class disrupting behaviors. Student's doctors are experts in ADHD students. They unanimously recommended that Student be placed in special education and stated that he needed counseling, smaller, structured class settings, with education and assistance in organizational skills and additional time for completion of assignments. Expert recommendations also included task analysis so that Student was instructed in how to accomplish the goals of the Academic and Behavior Contract. Most importantly, all experts recommended a Behavior Intervention Plan for Student developed in consultation with a behavioral specialist, so that Student could develop coping mechanisms for his ADHD related behaviors, which have spiraled out of control.

35. Student is not able to modify his behavior to cease class disruptions and ADHD related behaviors in accordance with the Academic and Behavior Contract.

36. Student's current grades show that he does not continue to make academic progress. A Progress Report dated September 19, 2005 indicated the following grades in the first Nine Weeks: English \*\*\*; World Geography \*\*\*; Spanish \*\*\*; Advertising \*\*\*; Algebra \*\*\*; Biology \*\*\*; Computer Application \*\*\*; Comments from his teachers indicate missing assignments; incomplete make up work and not working to potential.

### III. Discussion

This case involved a two step analysis:

- (1) Does the student have a handicapping condition; and
- (2) Did the student have an educational need for special education?

No one seemed to disagree that the student has ADHD and that his ADHD behaviors adversely affect his educational performance, although the parties disagree that this adverse impact demonstrates educational need. Respondent attempted to address his educational needs by providing individual modifications for his education, while at the same time failing to test him for either §504 or special education, and then, following testing and disability reports from his treating physicians, refusing to agree that he should be placed in special education. The primary basis for the refusal is Respondent's Full and Individual Evaluation, which exclude the medical determinations of Student's OHI eligibility, and focus on Student's passing classes and passing TAKS. But, Respondent's position is untenable because all school personnel noted his increasing inability to manage his behaviors, and his student success teams and school administrators both tied his problems to his ADHD by requiring him (by contract) to take his medication at the school nurse's office so that he could remain in the classroom, despite their best efforts to provide individualized educational modifications for him, such as the Academic and Behavior Contract. But, Respondent's efforts outside of special education have failed to develop adaptive behaviors in Student sufficient to allow him to make reasonable educational progress.

#### Failure to Evaluate Student as a Student with a Disability

Special Education regulations at 19 Tex. Admin. Code § 89.1011 require a school district to refer a student for a full and individual evaluation, "if the student continues to experience difficulties in the general education classroom after the provision of interventions. Further, TEA regulations require **a licensed physician** to be part of the team which determines OHI eligibility, 19 Tex. Admin. Code § 89.1040. Despite significant and ongoing behavior problems, Respondent failed to evaluate Student until his mother requested in writing a special education referral. Respondent's student success team had recommended Connors and §504 again in October, 2004, "if behavior did not improve." Student's behavior did not improve and his teachers thought they needed to meet and develop additional strategies for him in February, 2005, before Student's behavior reached the crisis level it did in May, 2005. Throughout \*\*\* grade, Student's teachers reported his behavior interfering with his own education and that of others.

#### Failure to Identify

TEA special education regulations require compliance with IDEA and federal and state regulations implementing IDEA. Federal special education regulations specify that a local education agency, in evaluating children for special education eligibility and placement, must

consider a variety of sources and information, not limited to grades and TAKS scores. For example, 20 U. S. C. §1414(b) Procedures for a full and individual **evaluation** states:

In conducting the evaluation, the local educational agency shall

- (A) use a variety of assessment tools and strategies;. . .
- (B) not use any single procedure as the sole determining criterion [for determining eligibility for special education programs]; and
- (C) use technically sound instruments that may assess the relative contributive of **cognitive and behavioral factors**, in addition to physical and developmental factors.

Additionally, special education regulations at 34 C. F. R. §300.532 Evaluation Procedures provides that each public agency shall ensure, at a minimum, that the following requirements are met:

- (g) The child is assessed in all areas of suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status.

34 C. F. R. §300.533 also provides that school districts must review evaluation data including observations by teachers and related services providers (Which include “psychological services” and “medical services for diagnostic or evaluation purposes.” See, 34 C.F. R. §300.24). In 34 C. F R. §300.535 Procedures for Determining Eligibility and Placement, it states:

- (a) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under §300.7 and the educational needs of the child, each public agency shall –
  - (1) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; and
  - (2) Ensure that information obtained from all of these sources is documented and fully considered.

Finally, in developing an IEP, the ARD committee is directed to address behavioral factors. See, 34 C. F. R. §300.346(a)(2) Development of IEP –

Consideration of special factors. The IEP team shall –

- (I) In the case of a child whose behavior impedes his or her learning or that of others, consider if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.

The record and evidence in this case, and the Individuals with Disabilities Education Act and regulations promulgated pursuant thereto, do not support Respondent's forceful argument that Student is not eligible for special education, because he has no educational need. Moreover, Respondent's teachers and administrators were brought to the point of devising a makeshift individualized program for Student, including a behavior contract and *ad hoc* instructional modifications because Student's ADHD-related behaviors interfered so much with his own education and that of others. High levels of activity, impulsivity, disorganization and lack of concentration and focus, which were only partially mitigated by medication, proved a challenge to all Student's teachers – a challenge which some met more effectively than others. Contrary to IDEA and its regulations, Respondent refuses to consider the validity of Student's physicians, related services providers, and even its own Student Success Team, which recommended and implemented, at least partially, a "special" education program for Student. In order to deny Petitioner's requested relief, I would have to, as Respondent did, ignore all contemporaneous reports and evidence from persons other than school personnel, to conclude that Student was making appropriate educational progress.

#### Request for Independent Educational Evaluation (IEE)

Petitioner is entitled to an IEE if she disagrees with the FIE, unless the school district seeks a due process hearing and proves that its FIE was adequate. 34 C. F. R. §§ 300.502 and 300.507. Respondent did not prove in this due process hearing, as required by 34 C. F. R. §300.502, that its full and individual evaluation ("FIE") was appropriate. Because Respondent failed to consider Petitioner's related services providers and Student's licensed physicians in its June 13, 2005 FIE, which it did not amend, Respondent should be required to provide an IEE which includes and addresses information from a variety of sources, including Petitioner's physicians and experts. Petitioner is entitled to an IEE at Respondent's expense.

#### Request for Compensatory Services

Following the IEE, the student is entitled to an Individualized Educational Program, developed daily, instituted by his ARD committee, including strategies for addressing his behaviors, and such additional services, such as tutoring or content mastery services as are agreed upon by the ARD committee.

#### Summary

Respondent's main arguments were:

Petitioner's interfering behaviors were not solely caused by his ADHD; and Respondent is not obligated to address Petitioner's behaviors as long as he passes his classes and the TAKS.

First, IDEA does not require that a student is eligible as "Other Health Impaired" if he has limited vitality and alertness with respect to the educational environment that is due solely to ADHD. There is no requirement that ADHD be the sole cause of the behaviors. The Federal

definition is appropriate because children with disabilities may have a variety of conditions, all of which have an effect on them, but not all of which have any relationship to educational performance. Student is not ineligible for special education because a variety of psychological factors, not just ADHD, have an impact on his educational performance.

Secondly, Respondent's forceful claim that Student is passing his classes and making educational progress is no longer accurate. Respondent provided for Student to be graded for conduct as part of his education, and he consistently failed to meet age appropriate expectations. Now, in high school, Student is failing his classes and Respondent still claims he has no educational need for special education. As the independent and impartial Special Education Hearing Officer, I cannot agree.

#### IV. Conclusions of Law

1. Petitioner proved that Respondent failed to assess Student in all areas of suspected disability, including Other Health Impairment, when it disregarded the recommendations of Student's related service providers including a licensed physician and contemporaneous teacher and administrator reviews. 20 U.S.C. §1414(b); 34 C. F. R. §300.24; 300.533-300.535; 19 Tex. Admin. Code §89.1040.
2. Petitioner proved that Respondent failed to identify Student As a student with a disability. 20 U. S. C. §1401; 34 C. F. R. §300.24; 19 Tex. Admin. Code §89.1040.
3. Petitioner proved that Student was entitled to an Independent Educational Evaluation. 20 U.S.C. §1414(b); 34 C. F. R. §300.24; 300.533-300.535; 19 Tex. Admin. Code §89.1040.
4. Petitioner proved that Student was entitled to an IEP, including a behavior intervention plan. 20 U.S.C. §1400 *et seq.*; 34 C. F. R. §300.340-300.347; 19 Tex. Admin. Code §89.1055.
5. Petitioner Student is a student in Alvin ISD who is eligible for special education services based on his classification as a student with Other Health Impairment. 20 U. S. C. A. §1401(3); 34 C. F. R. § 300.7; 19 Tex. Admin. Code §89.1040.
6. Respondent Alvin ISD has a responsibility to provide Student with a free appropriate public education. 20 U. S. C. A. §1412; 34 C. F. R. §300.300; 19 Tex. Admin. Code §89.1001.

#### V. Order

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer ORDERS that the relief sought by Petitioner is GRANTED.

Respondent is ordered to:

1. Provide an Independent Educational Evaluation for Student; and

2. Convene an ARD to consider the IEE and develop an appropriate special education program, including an IEP and Behavior Intervention Plan, and appropriate compensatory services, as needed.

The district shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of **Special Education Programs and Complaints** at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating that the Decision has been implemented; or 2.) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

Finding that the public welfare requires the immediate effect of this Final Decision, the Hearing Officer makes it effective immediately.

SIGNED this 14<sup>th</sup> day of December, 2005.

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Gwendolyn Hill Webb  
Special Education Hearing Officer

### **NOTICE TO THE PARTIES**

Under State Board of Education rules, it is not necessary for a party to perfect an appeal to state district court by filing a Motion for Rehearing. However, either party may request, within ten (10) days after the date of this decision, specified additional or amended findings of fact or conclusions of law. 19 T.A.C. § 89.1185(n) (o).

DOCKET NO. 322-SE-0505

STUDENT § BEFORE A SPECIAL EDUCATION  
V. § HEARING OFFICER FOR THE  
ALVIN INDEPENDENT §  
SCHOOL DISTRICT § STATE OF TEXAS

**SYNOPSIS**

**Issue:** Did Alvin ISD fail to conduct a proper evaluation under IDEA?

**Federal Citation:** 20 U.S.C.A. §§ 1401, 1414; 34 C.F.R. § 300.7; 300.502; 300.532-535.

**Texas Citation:** 19 T.A.C. § 89.1011, § 89. 1040.

**Held:** For the Petitioner. Student is a \*\*\* year old student with Attention Deficit Hyperactive Disorder (“ADHD”) who is currently on medication and attends Alvin ISD. Student has chronic behavior problems that have resulted in multiple discipline referrals, detentions, and In School Suspensions. Moreover, Student has demonstrated evidence of classroom hyperactivity, inattention, impulsiveness and lapses in concentration. Based on his persistent misbehavior, a previous ADHD diagnosis, and the recommendations of his treating physicians, Student should have been determined for eligibility under Other Health Impairment (“OHI”).

**Issue:** Did Alvin ISD fail to provide a free appropriate public education?

**Federal Citation:** 34 CFR §300.300; §§ 300.340-300.347.

**Texas Citation:** 19 T.A.C. §§ 89.1089.1055.

**Held:** For the Petitioner. Student’s persistent misbehavior and multiple discipline referrals for behavior which are related to his ADHD, combined with classroom removals and sometimes failing grades rendered him eligible for special education. Failure to provide and IEP and behavior intervention plan is a denial of a free appropriate public education, in spite of his previous passing scores in his classes and academic assessment tests.