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# DOCKET NO. 166-SE-0306

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B/N/F\*\*\*&\*\*\*

PETITIONER

vs. BEFORE A SPECIAL EDUCATION  
HEARING OFFICER  
FOR THE STATE OF TEXAS

BRYAN INDEPENDENT

SCHOOL DISTRICT

RESPONDENT

## DECISION OF THE HEARING OFFICER

### Statement of the Case

Petitioner student brings this appeal by his next friend, \*\*\*, pursuant to the Individuals with Disabilities Education Act 20 U.S.C. § 1400 et seq., (hereinafter referred to as "IDEA"), against Respondent Bryan Independent School District (hereinafter referred to as "Respondent" or "Bryan ISD"). Petitioner student by next friend \*\*\* (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 March 31, 2006. Petitioner was represented by Attorney Gary Bledsoe of Austin, Texas. Respondent was represented by Attorney J. Erik Nichols of Henslee, Fowler, Hepworth & Schwartz, LLP of Houston, Texas. A telephone prehearing conference was held on April 20, 2006, 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)] A due process hearing was held on Tuesday, May 9, 2006, in Bryan, Texas. The parties agreed to file post-hearing briefs on or before Monday, June 5, 2006.

Petitioner alleges that student is a \*\*\*-year-old student in Bryan ISD. Petitioner asserts that Respondent was responsible for:

1. Failure to refer student for appropriate and timely educational and psychological assessments as needed to determine possible eligibility for special education and related services;
2. Failure to identify student as a student with a disability as defined under the IDEA despite having knowledge of facts indicating the existence of one or more qualifying disabling conditions;
3. Failure to conduct a functional behavior assessment in response to student's ongoing behavioral difficulty which clearly impeded his learning and that of his student peers;
4. Failure to develop an appropriate and balanced behavior intervention plan consisting of strategies, including positive behavioral interventions and supports, as needed to address student's behavioral challenges;
5. Failure to develop an appropriate Individualized Education Plan;
6. Failure to provide appropriate related services as needed for student to benefit from any special education services required.
7. Failure to properly address and respond to the fact that student suffered from \*\*\* syndrome and other disabilities.

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

1. Perform all appropriate assessments and evaluations, including a functional behavioral assessment and psychological evaluation; student's behaviors;
2. Provide compensatory educational services to compensate student for Respondent's failure to provide a free and appropriate public education ("FAPE"), including but not limited to:
  - a. Up to one (1) year of compensatory counseling because student has always had behavioral issues that have never been properly addressed, the specific amount and nature determined by student's ARD committee;
  - b. Up to one (1) year of compensatory tutoring, particularly in Math and Science, since those classes appear to be the ones in which his ADHD has had the most negative effects, but the specific amount determined by his ARD Committee;
  - c. student as a student with a disability based on "Other Health Impaired" as a result of ADHD and/or \*\*\* syndrome and other disabilities that may be diagnosed;
  - d. Psychological evaluation to determine whether student suffers from any type of emotional disturbance; and
  - e. A functional behavior assessment so that an appropriate behavior intervention plan can be developed so that appropriate classroom

- modifications, interventions and supports can be provided to student to help him control his misbehavior in the classroom setting
3. To provide all additional educational services as may be determined necessary by a duly constituted ARD Committee.

Respondent denies that the child should be in Special Education services.

Respondent contends the evaluations performed in December of 2002 and subsequent reviews under Section 504 are sufficient to establish that student does not have an educational need that would trigger eligibility under the IDEIA.

Respondent asserts that the parents have never delivered updated evaluations or doctor reports detailing any condition which would indicate a direct and substantial relationship with the child's behavioral actions even after these documents were requested. Respondent is of the opinion that its evaluations are appropriate, that student is not eligible for special education services, and that its MDR was performed in compliance with applicable laws and based on the child's known or suspected enabling conditions.

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

## **Findings of Fact**

1. Student is a \*\*\*-year-old male student who resides within Bryan Independent School District. He began the \*\*\* grade at the start of the 2005-2006 school year at \*\*\* School.
2. Bryan 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 Improvement Act, 20 U.S.C.A. § 1400, et seq., and the rules and regulations promulgated pursuant to IDEIA.
3. Student is not now in special education. He has received accommodations as a student with Attention Deficit Hyperactivity Disorder (“ADHD”) characteristics under Section 504 of the Rehabilitation Act [29 USC 16 §701(b)(1)] for, at least, the past three school years. [R. Exs. 5, 6, 7]
4. Student was referred for an FIE in 2002. At the time of the FIE, student was years old \*\*\* months, and in the \*\*\* grade. The reason for the referral was to determine if he had an educational disability. Student has \*\*\* the first six weeks of Math and made a \*\*\* in reading even though the grades were made with modifications; student was struggling in most subject areas and worked rapidly without staying focused. The FIE was completed on December 9, 2002. [P. Ex. 18]

5. In the December 9, 2002 FIE, the diagnostician administered a Wechsler Intelligence Scale for Children – Third Edition. student scored a verbal IQ of \*\*\*, a Performance IQ of \*\*\*, and a Full Scale IQ of \*\*\*. The diagnostician concluded that student was functioning in the \*\*\* average range of intelligence and had performance skills falling in the \*\*\* range of intelligence. [P. Ex. 18]
6. In the December 9, 2002 FIE, the diagnostician administered the Woodcock-Johnson III Tests of Achievement. Student’s scores for these tests were the following:

<b>Individual Test</b>	<b>Age Equivalent</b>	<b>Grade Equivalent</b>	<b>Percentile Rank</b>	<b>Standard Score</b>
Letter-Word Identification	***	***	***	***
Calculation	***	***	***	***
Spelling	***	***	***	***
Passage Comprehension	***	***	***	***
Applied Problems	***	***	***	***

7. [P. Ex. 18]
8. The December 9, 2002 FIE did not include a psychological evaluation. Student’s emotional functioning was evaluated by a general education teacher. This teacher found student to be cooperative and compliant. He was observed to have friends at school, but had difficulty working cooperatively with others. The teacher concluded that student’s in school behavior did not appear to influence his learning or affect his educational placement. [P. Ex. 18; TR 56]
9. The December 9, 2002 FIE concluded that student did not demonstrate significant educational developmental deficits, significant emotional/behavioral deficits, and did not meet specific eligibility criteria for special education services. [P. Ex. 18]
10. Bryan ISD has a teacher-assisted process in place that contains guidelines for when a student is to be referred for a special education evaluation: the Teacher Assistance Program (“TAP”). [TR 32]
11. Persistent misbehavior, or increasing amounts of discipline referral that affect the student’s academic perform, is one of the “triggers” of the TAP. Teachers and school administrators, consultation with the student’s parents, would typically initiative a TAP referral. When behavior is at issue, the District’s Department of Psychological Services may become involved. [TR 33]
12. Simply because student received 17 discipline referrals since the start of the 2005-2006 school year, the TAP process may or may not be triggered. [TR 36]
13. A campus TAP “team” for a particular intervention on a student would typically consist of a school administrator, a seasoned professional teacher, a teacher that has a concern, a counselor, and any other individual that may have input regarding the student. The team may meet to discuss an ongoing issue of concern and then contact the parent to inform him or her that the team met. At that point,

various interventions and strategies may be used to develop an action plan, for the student. [TR 37]

14. Student and his family have gone through 3 or 4 TAP referrals during the \*\*\* years that he has been in Bryan ISD. [TR 84]
15. If the student is already a 504 student, his 504 committee has the responsibility of determining if his program modifications and accommodations are working. If they are not the Committee and the District is responsible for determining initiatives that do support the student's educational success. [TR 39]
16. The December 9, 2002 FIE was more of an academic evaluation rather than a more detailed report that addressed behavior, even though the report addressed student's emotional behavioral adjustment. [TR 40-41] The teacher who did the report was not the Licensed Specialist in School Psychology ("LSSP") that the District employs. There was no testing or analysis involved – only observation. [TR 41]
17. Bryan ISD operates an alternative educational placement for students called Special Opportunity School ("SOS") campus. The placement is highly structured and more individualized setting with a smaller classroom setting. However, there is not the direct instruction for each individual subject by individual teachers as a placement on a regular campus. [TR 42-43]
18. The SOS placement has the following rules and procedures for students placed there:

**Rules:**

- There is to be no communication between students. This includes all forms of communication: verbal, nonverbal, sign language, gestures and note passing.
- You are to remain in your seat in an upright position and facing forward.
- Students will be in study carrels.
- Students may not bring food, gum, candy, or drinks on campus.
- Only work assignments, books, and writing instruments are permitted at your desk.
- You are not allowed to use the phone.
- Students will work on assignments from their scheduled classes of language arts, math, science, and social studies.
- ID must be on and visible at all times.

**Procedures:**

- You are expected to complete any work assigned to you.
- During the lunch period, you are required to sit where instructed. There will be no talking in the cafeteria. There will be no getting up out of your seat without permission.
- Restroom break will be once in the morning, at lunch, and once in the afternoon. Students will form a line and walk with hands behind their back.

*SOS students not following/conforming to all rules, policies, and regulations may receive a possible extension of assignment, be expelled or other appropriate discipline actions in accordance with the Student Code of Conduct and SOS Handbook. (Emphasis in original)*

18. Certain SOS rules may prevent a problem for a student with ADHD. For example, the rule against verbal communication between students, remaining in the seat in an upright position and facing forward, could be a problem for a student with ADHD, depending on the level of the impairment. [TR 44]
19. The SOS rules provides that a student's stay at the school may be extended if the student violates the rules. The rules do not provide an exception for student with ADHD. [TR 45]
20. On February 24, 2006, an MDR was held. The MDR Committee considered allegations of student's repeated sexual harassment of other students. Student's parents were present at the meeting. [R. Ex. 10]
21. Student's 504 Committee met only once during the 2005-2006 school year on matters related to student's 17 discipline referrals – the last incident and the meeting was a Manifestation Determination Review ("MDR"). [TR 137-138] The February 24, 2006 MDR was held because of an event that occurred on February 22, 2006. [TR 148] Student's mother and father were present at the MDR and requested that psychological testing be done, in light of the inappropriate touching. As of the hearing, no psychological testing was done on student. [TR 154-155]
22. The February 24, 2006 MDR Committee considered several instances where student had inappropriate contact with a female student. In one instance, he reportedly stared at the breasts of female students. In one or more instances, he touched the backsides and/or breasts of female students. [R. Ex. 10]
23. The February 24, 2006 MDR Committee considered the fact that student had ADHD for which he was taking medicine and was a student receiving 504 accommodations. Over the objections of student's parents, the

Committee concluded that student’s 504 accommodations were appropriate; his disabilities did not impair his ability to understand the impact and consequences of his behavior; and his disabilities did not impair his ability to control his behavior.

24. Following the February 24, 2006 MDR meeting, student was assigned to the SOS Campus for a term of \*\*\* successful days, for the offense of repeated sexual harassment. The assignment was upheld, on March 2, 2006, by the school principal. [R. Ex. 14]

25. On March 8, 2006, Bryan ISD held a Level II grievance hearing at its Travis Education Support Center, as an appeal of student’s assignment to the SOS. The decision to uphold the assignment was made based on the documentation of student’s “pattern of inappropriate behavior with girls.” [R. Ex. 15]

26. As a 504 student, student had a regular discipline plan and he did not have a Behavior Intervention Plan (“BIP”). [TR 51]

27. The District has been working on its Response to Intervention (“RTI”) in connection with its TAP process. The RTI is designed to ensure that multiple interventions are tried in multiple general education setting before a student is referred to special education. [TR 57]

28. Student had the following discipline record for the 2005-2006 school year:

Date (Incident No.)	Incident Category	Comments/Allegations
***	Punch/Hit	Chasing another student, calling names, punching and hitting student
***	Disobey Staff	Did not stay in seat, left classroom without permission
***	Inappropriate Sexual Conduct	Touched another student inappropriately
***	Disruptive Behavior	Disobey substitute teacher, excessive talking
***	Disruptive Behavior	Class disruption with substitute teacher
***	Disobey Staff	Refusing to work, making faces

***	Disruptive Behavior	Beating on desk, talking out, calling students' names
***	Disruptive Behavior	Out of seat, talking without permission
***	Fighting	Fighting in English/Language Arts class
***	Inappropriate Sexual Conduct	Rubbed another student's bottom in PE class
***	Disruptive Behavior	Refuse to work, drumming on desk, putting feet up
***	Disruptive Behavior	Not doing classwork, distracting other students
***	Disruptive Behavior	Refuse to work, put keys in mouth and pretended to choke
***	Disobey Staff	Sent to office, but did not show, lied to teacher, threw referral in trash
***	Disruptive Behavior	Pushed other students in hall; takes students' pens; tries to trip other students
***	Disruptive Behavior	Will not settle down, not doing work, talking out of turn
***	Significant Sexual Harassment	Touched multiple *** grade female students, inappropriately

29. [TR 61-63]

30. Bryan ISD has used graduated discipline for student before it referred him to the SOS placement. [TR 59]

31. Since student was in Kindergarten in Bryan ISD, he has had problems with failing grades and recommendations that he repeat \*\*\* grades. He demonstrated inattention and hyperactivity in the \*\*\*, and \*\*\* grades. Also, he experienced discipline problems in each of these grades. He was specifically diagnosed with ADHD in the \*\*\* grade and placed on medication.

32. Student has had failing grades in classes for different six week periods during the \*\*\* school year, however he never received a failing grade for any class. [TR 92] At the time this due process hearing request was filed, student was failing \*\*\* classes. [TR 93]

33. Bryan ISD is aware that student has been diagnosed with ADHD. The school nurse has been administering his medication (Ritalin and Adderall) to him since he was in the \*\*\* grade. [TR 94-96]
34. Student has \*\*\* Syndrome, a perception problem that causes him to see written words as blurry or as moving on the page. \*\*\* Syndrome pertains to visual activity and can cause headaches, strain, fatigue, light sensitivity, lack of depth perception, attention deficit, restricted span, contract sensitivity, color sensitivity and distortions on the written page. [TR 98]  
Printing writing on different colors of paper can be help the symptoms of the disorder. [TR 99]
35. \*\*\*, PhD, is a clinical child psychologist licensed to practice in the State of Texas. Dr. \*\*\* first examined student when he came to him in August of 2004 with a diagnosis of ADHD. His examination confirmed the diagnosis. [TR 107-108, 110] Dr. \*\*\* examined student again on March 24, 2006 and April 7, 2006, in his office.
36. After the most recent incident involving student being accused of sexual touching, Dr. \*\*\* attempted to contact student's school with the intention of assisting in a BIP that consisted of more than just punitive consequences for student's misbehavior. [TR 112] In Dr. \*\*\* opinion, punishment would not be effective for student's learning alternative behaviors. [TR 113]
37. Dr. \*\*\* states that student would have difficulty complying with the SOS school rule of no communication between students; sitting still and facing forward; and excessive talking because of the impulsive nature of his ADHD and his social immaturity. [TR 113-114]
38. Based on his observations of student and his parents reports of his in-school behavior, Dr. \*\*\* believes that student's inattention and hyperactivity are not being addressed by his medication. [TR 117]
39. Dr, \*\*\* states that an incident where student. touched a female classmate, ran around the room and touched her again, could be an example of his impulsivity associated with his ADHD. Also, he believes that the fact that

- he inappropriately touches girls only is irrelevant to the question of his impulsivity associated with ADHD. [TR 126-128, 130-131]
40. Student has been out of school since March \*\*\* or \*\*\*, when his parents took him out and did not bring him back. [TR 162]
  41. Student made some academic progress during the 2004-2005 school year. [TR 165]
  42. On February 24, 2006, the MDR Committee determined that student's 504 accommodations would be continued at SOS. [TR 168]
  43. During the course of the school year, when student was receiving the 17 discipline referrals, his teachers and the school counselor were attempting to talk to him about his behavior. These counseling sessions occurred on multiple occasions. Also, student's mother was involved in the process of progressive discipline. [TR 169-170] The progressive disciplinary measures included SAC placements in which his accommodations were carried through. [TR 173-174]
  44. \*\*\* is an educational diagnostician with 24 years of experience assessing students with disabilities. Her experience includes work as a teacher of children with ADHD, emotional problems, and learning disabilities. In her last seven years with Austin Independent School District, she worked as the District's dyslexia specialist and Section 504 specialist. [TR 186-187] She retired in June, 2004 and now has a part-time practice in Austin, Texas.
  45. Ms. \*\*\* reviewed all of the available assessments from Bryan ISD regarding student obtained information from student's parents, obtained and reviewed student's physical and medical history, and administered to student the kind of testing that would normally be performed by a District in an FIE. [TR 195]
  46. Ms. \*\*\* states, based on her examination and review that student would benefit from special education services, particularly in the development and implementation by a special education teacher, and a BIP. Moreover,

- Ms. \*\*\* believes that student's ADHD is now serious enough that he requires special education. [TR198-201]
47. Ms. \*\*\* agrees with Dr. \*\*\* analysis that student has shown impulsivity from Kindergarten to the present grade. His behavior, which includes blurting out, speaking, acting, even knowing the consequences and doing it anyway, not being able to think beyond the passing of the incident – are key characteristics of ADHD. [TR 205] Based on her experience, Ms. \*\*\* believes that student would qualify for special education under an Other Health Impaired (“OHI”) eligibility classification. [TR 206]
48. Ms. \*\*\* states that the second rule of SOS that student. Not communicating with other students would be exceedingly difficult for him, as well. [TR 207-208]
49. Ms. \*\*\* states that student qualifies for dyslexia based on her administration of the Comprehensive Texas of Chronological Processing, Test of Word Reading Efficiency, and the Gray Oral Reading Test Edition IV, with several component test comprehension, reading rate, reading accuracy and fluency. [TR 212]
50. Ms. \*\*\* believes that student needs special education interventions regarding his lack of organizational skills, beyond what is generally available from a regular education teacher using 504 accommodations. [TR 227-231]
51. At the beginning of the \*\*\* school year, student was enthusiastic and helpful in his social studies class. During the second six weeks, his social studies teacher noticed that student began to fidget and lose concentration. He began to seek out her classroom because she kept the overhead lights turned off and used colored paper. When she noticed how colored paper and lowered light levels helped student's concentration, she referred him for an \*\*\* evaluation. [TR 254-255]
52. Student made academic progress in his social studies class for the \*\*\* school year. [TR 264]

53. Student's social studies teacher noticed that student would have good days or bad days because of his ADHD. Some days she could tell when he was going to have difficulty controlling himself. [TR 268-269]
54. Student was an agreeable student in his PE class. He liked basketball very much and it was evident that he practiced. He had trouble paying attention during demonstrations, and his PE teacher would explain to him the importance of paying attention in athletics. He would practice sitting and focusing and its importance in athletics. Student's PE teacher is certified in special education.
55. On the day of the incident when student was accused of inappropriately touching girls in the orchestra choir, the \*\*\* grade assistant principal informed the \*\*\* grade assistant principal who reported the incident that student had been through the level system and he needed to be placed in the SOS. The\*\*\* grade assistant principal was instructed to schedule an MDR meeting with student's parent. [TR 317]
56. Bryan ISD used the regular school Code of Conduct in deciding whether to place student in the SOS. It was determined that student was capable of the school's regular Code of Conduct. [TR 329-330]
57. RTI is a new process that Bryan ISD is implementing in general education. The process is in response to what the District concludes are the requirements of IDEA 2004. The process requires the District to evaluate each child's individual needs and document whether the child responds to the interventions. If the intervention does not work, it is "tweaked" until it either works or all general education interventions are exhausted. [TR 352-355]
58. \*\*\*, PhD, is a Licensed Specialist in School Psychology who has been employed with Bryan ISD for nine years. Dr. \*\*\* created the District's Department of Psychological Services, which just completed its second full year. While Dr. \*\*\* reviewed student's file, she has never met him. [TR 349, 355, 367]

## Discussion

In this case, the most important disputed issue is student's eligibility for special education services. Petitioner has asserted that student is eligible for special education under a designation of Other Health Impaired ("OHI") based on his ADHD; and possibly eligible based on his suspected \*\*\* Syndrome; and an unspecified emotional problem. Respondent has acknowledged student's ADHD but asserts that he is not eligible for special education; that he is being served by appropriate 504 accommodations; and that the issue is largely irrelevant because the special education label would not alter the substance of the interventions that the District has made, thus far.

This last assertion is key to the second disputed issue in this case – whether Bryan ISD inappropriately and inadequately responded to student's need for interventions over the past 2005-2006 school year. Petitioner directs me to three broad needs for intervention: behavioral interventions; academic support, presumably related to student's organizational deficits (related to his ADHD); and the special requirements of his \*\*\* Syndrome. By far, the producing incident for the filing of this case, however, is the adverse disciplinary action taken against student by the District for his chronic behavior problems, generally, and his repeated inappropriate sexual contacts with his female classmates. Petitioner is also concerned about his limited academic progress. Petitioner has asserted that student's five straight years of \*\*\* grades \*\*\* assessments of academic tests, and need for summer academic augmentation is evidence of an inadequate response from the District to student's academic needs. Nevertheless, the District's placement of student at the SOS Campus for the aforementioned discipline infractions was the reason for this case.

Respondent asserts that student has made consistent educational progress and his behavior is the result of conscious actions that are not impaired by a disability that satisfies the IDEIA standard for an eligible educational disability. [§1404(3)]. Respondent refers me to a 2002 FIE and ARD decision that found that student is not eligible for special education. Respondent asserts that its 504 interventions

have been comprehensive in that they include non-punitive initiatives and supports, including the identification of his \*\*\* Syndrome. Finally, Respondent claims that student's misbehavior, particularly of the sexual nature, is the result of conscious choices under his control and not impulsive manifestations of a disability.

Therefore, the first important question to answer is whether the District has responded appropriately under IDEIA to student's misbehavior in the \*\*\* school year. The current enabling statute (IDEIA) and its predecessor (IDEA) have always contained a dichotomy in the question of eligibility between a disability based on academic need versus and behavioral concerns. As student who otherwise possesses the academic tools for educational success, could be eligible for special education if he suffers from a disability (such as emotional disturbance [§1401(3)]) that interferes with his education. IDEIA at §1414(d)(3)(B) provides that the student's IEP team shall:

(l) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions, and other strategies, to address that behavior.

§1414(d)(3)(B)(l)

This mention of the IEP team (ARD Committee) is particularly important to this discussion and this case because IDEIA authorizes only the IEP Team to make eligibility determinations. At §1414(b)(4), IDEIA states that:

Upon completion of the administration of assessments and other evaluation measures –

(A) the determination of whether the child is a child with a disability...and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child...

§1414(b)(4)

Therefore, it is a given that this decision shall not purport to contain a determination of whether student is or is not eligible for special education. Even if the record contains convincing evidence from qualified professionals that student should, in their opinions, be eligible, only an IEP team/ARD Committee can make that determination. It follows, then, that if functional behavior assessments, behavior intervention plans, individualized education plans, and related special education services are elements of the protections and benefits afforded a special education student (at least as far as this IDEIA due process hearing is concerned) then I cannot decide those issues as well. Therefore, Petitioner's issues (as set forth in the procedural history above) 3, 4, 5, and 6 in his complaint must be denied. This would mean that the only issues that I am authorized to decide are 1, 2, and 7.

After all, issues 1 and 2 encompass the key question: did Bryan ISD timely respond to student's misbehavior with timely referrals for assessment; or was special education assessment not indicated. Existing regulations that implement IDEA are still in effect. Child Find regulations §300.125, 300.300 (a)(2) and state rules obligate Bryan ISD to identify all students with eligible special education disabilities. The question is whether Bryan ISD failed to identify student and provide special education services.

Based on the record as a whole, I am of the opinion that Respondent did fail to satisfy student's unique needs. Without determining that student is eligible, I can only address the questions raised in issues 1 and 2 by evaluating the question of whether Bryan ISD had reason to refer student for special education evaluation because of his misbehavior. Evaluation, in this case, an FIE, with a psychological component, must be the starting point for a timely intervention. In this context, the FIE to determine initial eligibility requires an answer to the question of student is a student who is known to Bryan ISD. His ADHD borderline and academic performance, and chronic discipline issues associated with his "ADHD characteristics," have been an issue in his education since 2002. The very

reason for the 2002 FIE should have put the District on guard for adverse changes in his behavior. The sudden escalation of serious behavioral infractions that could be prosecuted, conceivably, should have prompted District personnel to seek permission to perform an FIE with a psychological evaluation, and/or request to send an OHI form to student's doctor(s) to determine if his ADHD worsened.

Frankly, Petitioner's expert testimony was the more persuasive, in this case. Dr. \*\*\* examination conclusions and Ms. \*\*\* evaluation testimony were student confront his behavior that, I conclude, is characterized by chronic impulsivity. The benefit of a BIP and a special education teacher was only supported by Respondent's witness, Mr. \*\*\*, student's P. E. teacher. Mr. \*\*\* described his manner of responding to student's hyperactivity and tendency to lose control. His counseling and practice "being still" sessions can be described as the beginnings of a rudimentary BIP. He seemed to be very successful in his techniques. It may not be surprising that he has a special education certification, with experience teaching children who require behavior modification.

Also, I tend to believe Petitioner's testimony that the SOS placement would be an inappropriate and, at times, "inhumane" placement for student. It is not clear how District personnel could believe that the rigid rules of the SOS Campus and the term of \*\*\* successful days would not be an indefinite placement for this student. IDEIA does provide for some protections for students who violate a code of student conduct before they are determined to be eligible. At §1415(K)(5), IDEIA provides:

(A) In General. A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this part if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of Knowledge. A local educational agency shall be deemed to have knowledge that a child is a child with a disability if,

before the behavior that precipitated the disciplinary action occurred –

(i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or teacher of the child, that the child is in need of special education and related services;

(ii) the parent of the child has requested an evaluation of the child pursuant to section 1414(a)(1)(B) of this title; or

(iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

While I am not purporting to reverse the SOS placement, I am ordering the District to convene an ARD meeting following the completion of an FIE with a psychological evaluation and the completion of an OHI form – to review the appropriateness of the SOS discipline placement. Perhaps, if student is found to be eligible, modifications to SOS rules could be considered.

## **Summary**

Based on the record as a whole, I conclude that Bryan ISD failed to refer student for appropriate and timely educational and psychological assessments as needed to determine eligibility for special education and related services, including the identification of all disabling conditions. I conclude that Bryan ISD appropriately identified and accommodated student's needs created by his \*\*\* Syndrome.

## **Conclusions of Law**

1. Petitioner student is a student in Bryan ISD who is eligible for special education services based on his classification as a student with ADHD. 20 U.S.C.A. § 1401(3); 34 C.F.R. § 300.7; 19 T.A.C. § 89.1040.
2. Respondent Bryan 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 T.A.C. § 89.1001.
3. Respondent Bryan ISD failed to refer student for timely educational and psychological assessments to identify all potential educational disabilities. 34 CFR §300.125, 300.300; 19 TAC §89.101.
4. Respondent Bryan ISD did not fail to conduct a functional behavioral assessment, behavior intervention plan, individualized education plan, or provide student with special education services.
5. Respondent Bryan ISD did not fail to properly address and respond to the fact that student suffered from \*\*\* Syndrome.

## **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 hereby GRANTED IN PART as follows:

Respondent is ordered to perform a full and individual educational evaluation, including a psychological assessment on student and submit an OHI form to student's doctor for completion.

Respondent is further ordered to convene an ARD as soon as practicable after receipt of the aforementioned FIE and OHI form to consider student's eligibility and the appropriateness of his discipline placement.

All other relief not expressly granted is herein DENIED.

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

The district shall timely implement this decision within 10 school days in accordance with 19 TAC §89.1185(q) and 34 CFR §300.514. The following must be provided to the Division of Complaints Management 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.

SIGNED this 13th day of June, 2006.

Stephen P. Webb

Special Education Hearing Officer

This section is not subject to the new rules:

## **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).

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# DOCKET NO. 166-SE-0306

B/N/F\*\*\*&\*\*\*

PETITIONER

vs. BEFORE A SPECIAL EDUCATION  
HEARING OFFICER  
FOR THE STATE OF TEXAS

BRYAN INDEPENDENT

SCHOOL DISTRICT

RESPONDENT

## SYNOPSIS OF DECISION

**ISSUE:** Whether Bryan ISD failed to timely assess a \*\*\* year old student who has previously been served through §504 for eligibility for special education services.

**CITATION:** 34 CFR §§ 300.125, 300.300 (a)(2) and 19 T.A.C. § 89.1101

**HELD:** For the Petitioner. Bryan ISD was aware that the sudden adverse change in the behavior of a student known to it could be evidence of an increase in the severity of his ADHD. His removal to an inappropriate SOS Alternative Education Program placement because of his significant sexual harassment of his female peers impeded his education.

**ISSUE:** Did Bryan fail to provide an IEP, BIP, FBA and related Special education services to the student.

**CITATION:** 20 U.S.C.A. § 1400 et seq.

**HELD:** For the Respondent. As a student not yet found to be eligible for special education, Respondent was not obligated to provide the student with special education services.