

---

# DOCKET NO. 229-SE-0506

---

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

PETITIONER

vs.

NORTH EAST INDEPENDENT

SCHOOL DISTRICT

RESPONDENT

BEFORE A SPECIAL EDUCATION  
HEARING OFFICER  
FOR THE STATE OF TEXAS

## DECISION OF THE HEARING OFFICER

### STATEMENT OF THE CASE

Petitioner, \*\*\*& \*\*\* (“Petitioner”), requested a Due Process Hearing pursuant to the Individuals With Disabilities Education Improvement Act of 2004 (“IDEIA”), 20 U.S.C. §1400 et. seq., contending that North East Independent School District (“Respondent” or “NEISD” or “the District”) denied Petitioner a free, appropriate, public education (“FAPE”) when it failed to identify him as a student in need of special education services under the qualifying category of other health impaired (“OHI”) based upon attention deficit, hyperactivity disorder (“ADHD”). The issues presented were 1) whether Petitioner currently qualifies for special education services, and 2) whether Petitioner qualified for such services during school year 2005-2006. Petitioner requested that the Hearing Officer enter an Order requiring Respondent to place Petitioner in special education and create a program that

will provide him with an appropriate education and compensate him for services lost during school year 2005-2006.

## **PROCEDURAL HISTORY**

### **A. DUE PROCESS SCHEDULING ISSUES**

On May 30, 2006, the Texas Education Agency (“TEA”) received the Request for Due Process Hearing filed by Petitioner against Respondent and assigned the case Docket No. 229-SE-0506 and assigned the case to the undersigned Hearing Officer. On June 2, 2006, the undersigned issued the Initial Scheduling Order, setting forth all relevant deadlines pursuant to IDEIA. Based upon the date TEA received the Request for Due Process Hearing, the Initial Scheduling Order set the pre-hearing telephone conference for June 19, 2006; the Due Process Hearing for July 12, 2006; and the Decision deadline for August 13, 2006.

On June 19, 2006, the parties convened for the pre-hearing telephone conference. In attendance were the following: 1) Ms. Karen Seal, Petitioner’s counsel; 2) Ms. Jo Ann Collier, Respondent’s counsel; 3) the court reporter, who made a record of the telephone conference; and 4) the undersigned Hearing Officer. During this telephone conference, the parties discussed the issues and re-scheduled the Due Process Hearing to July 17-18, 2006, with Disclosures due July 10, 2006, and the Decision deadline extended to August 18, 2006.

On July 10, 2006, the Petitioner filed a Motion for Continuance of the July 17-18, 2006, Due Process Hearing. Respondent opposed this continuance. The undersigned Hearing Officer requested a telephone conference to discuss the continuance and other relevant issues.

On July 12, 2006, the parties convened for the second pre-hearing telephone conference. In attendance were the following: 1) Ms. Karen Seal; 2) Ms. Jo Ann Collier; 3) the court reporter, who made a record of the telephone conference; and 4) the undersigned Hearing Officer. Following discussion, the undersigned found good cause for the requested continuance of the Due Process Hearing and granted Petitioner’s motion. The parties re-scheduled the hearing to September 13-14, 2006, with Disclosures due September 6, 2006, and the Decision deadline extended to October 16, 2006. Additionally, the parties agreed upon attendant briefing deadlines and discovery cut-off.

### **B. DISCOVERY ISSUES**

On June 2, 2006, Petitioner filed a letter requesting that the undersigned issue subpoenas to the parents of two \*\*\* school students who were involved in a disciplinary action along with Petitioner. The District had set an expulsion hearing related to the incident and Petitioner wanted these two middle school students to provide testimony in support of Petitioner’s contention that the events did not

occur as alleged by the District.

During the initial pre-hearing telephone conference on June 12, 2006, the parties discussed these requested subpoenas. Respondent's counsel objected, arguing that a Texas Special Education Hearing Officer had no jurisdiction to issue subpoenas in a local disciplinary action. The Hearing Officer requested that Petitioner provide briefing to support the request. Petitioner provided no briefing and the Hearing Officer never issued the subpoenas requested for the expulsion hearing.

During the second pre-hearing telephone conference, convened on July 12, 2006, to discuss the Petitioner's continuance request and other procedural matters, the subpoena issue was again discussed. Petitioner argued that he needed the testimony of the two students in this Due Process Hearing; Respondent objected, and the undersigned instructed the parties to provide legal briefing on this matter.

On July 21, 2006, Petitioner filed his Pre-hearing Brief, arguing that the identity of these students should be revealed and that they should be compelled to testify in the Due Process Hearing. On July 25, 2006, Respondent filed its Motion To Strike, And In The Alternative, Response To Petitioner's Pre-hearing Brief, again objecting to Petitioner's request for subpoenas on the grounds that the testimony of the two middle school students would be irrelevant to the issues presented in this due process proceeding. Finding that Petitioner had failed to articulate "good cause" for the issuance of the subpoenas, the undersigned denied the request.

The undersigned had previously issued a discovery order, requiring that all discovery responses and objections be filed and served no later than twenty-one days after receipt. On August 1, 2006, Respondent served Petitioner with four Requests for Production. On August 23, 2006, Respondent filed a Motion to Compel responses and/or objections to these production requests, stating that Petitioner had filed nothing by the twenty-one-day deadline and requesting that the Hearing Officer order Petitioner to file and serve his responses by August 25, 2006. Alternatively, Respondent sought a continuance of the September 13, 2006, Due Process Hearing. The undersigned granted Respondent's Motion to Compel Production of Documents and ordered Petitioner to produce all responsive documents within his care, custody, or control, responsive to the four Requests for Production, but denied Respondent's Motion for Continuance.

On September 11, 2006, Petitioner requested subpoenas and subpoenas duces tecum related to certain of Respondent's employees: Ms. \*\*\*, Mr. \*\*\*, Ms. \*\*\*, and Ms. \*\*\*. Because Respondent had agreed to produce all of these witnesses but for Ms. \*\*\*, the undersigned denied the requests for subpoenas and subpoenas duces tecum, but agreed to issue the subpoena for Ms. \*\*\* if Respondent declined to produce her at the Due Process Hearing.

#### C. THE DUE PROCESS HEARING

On September 13, 2006, the Due Process Hearing convened at North East ISD.

The following were in attendance on September 13, 2006: 1) Ms. Seal 2) Mr. \*\*\*, Petitioner's father; 3) Ms. Collier; 4) \*\*\*, NEISD Chief Psychologist; 5) the court reporter; and 6) the undersigned Hearing Officer.

Prior to taking testimony on September 13, 2006, each side introduced one volume of documentary evidence. Petitioner called six witnesses and Respondent cross-examined each witness: 1) \*\*\*, Special Education Campus Coordinator at \*\*\* School; 2) Mr. Steve Boncek, one of Petitioner's experts in ADHD; 3) Mr. \*\*\*, Petitioner's father; 4) Ms. Kristie Metting, Petitioner's experts in academic and intellectual assessments; 5) \*\*\*, Assistant Principal at the District's \*\*\* School; and 6) \*\*\*, Principal at \*\*\* School.

The second day of Hearing convened on September 14, 2006. Petitioner called two witness: 1) \*\*\*, Petitioner's reading teacher during school year 2005-2006; and 2) \*\*\*, Petitioner's science teacher during school year 2005-2006. Petitioner recalled \*\*\* before resting. Respondent then called six witnesses, whom Petitioner cross-examined: 1) \*\*\*, Respondent's expert who evaluated Petitioner in August 2005; 2) \*\*\*, Petitioner's math teacher in school year 2005-2006; 3) \*\*\*, Petitioner's reading and Texas History teacher in school year 2004-2005; 4) \*\*\*, Petitioner's art teacher during a portion of school year 2005-2006; 5) \*\*\*, Assistant Principal at \*\*\* School; and 6) \*\*\*, a licensed specialist in school psychology ("LSSP") who assessed Petitioner in June 2006. Following Respondent's case presentation, Petitioner called, in rebuttal, Mr. \*\*\* and Dr. Charles Tatum, one of Petitioner's experts in ADHD who assessed Petitioner in May 2005. However, Dr. Tatum was not available at that time. Accordingly, the record remained open until September 20, 2006, when the parties convened for a final telephone hearing to take the sworn testimony of Dr. Tatum. At the conclusion of his testimony, the record was closed.

At the conclusion of the Hearing, the Hearing Officer requested that the parties file their post-hearing Briefs by October 27, 2006, a request with which the parties fully complied. The Decision deadline was extended to November 1, 2006, by agreement. A transcript of the Hearing was provided to the parties prior to their briefing deadline.

## **FINDINGS OF FACT**

1. Petitioner is a \*\*\* year-old young man who resides with his parents and brother within the geographical boundaries of NEISD. Petitioner is in the \*\*\* grade. Prior to fall 2006, Petitioner attended school at \*\*\* School. Petitioner is currently being home schooled.
2. NEISD is a political subdivision of the State of Texas and a duly incorporated independent school district.
3. Petitioner received speech therapy in kindergarten. In early elementary school, Petitioner was diagnosed with ADHD and received special education services under the OHI category.

4. During school year 2004-2005, his \*\*\* grade year, Petitioner's Admission, Review and Dismissal Committee ("ARD Committee") met on February 1, 2005, to complete Petitioner's \*\*\* evaluation. Petitioner was not taking any medication for his ADHD. Petitioner's teachers reported that he was unprepared at times and in need of re-directing; that he had many friends; that he could be talkative and distracted; that he was respectful. At that time, Petitioner had a few low grades but he had passed all areas of the Texas Assessment of Knowledge and Skills ("TAKS") since third grade. The Committee, including Petitioner's father, decided unanimously that Petitioner was not manifesting ADHD symptoms and that he no longer required special education services.
5. In April 2005, Petitioner filed a Request for Due Process Hearing based upon several disciplinary referrals occurring after he was removed from special education in February 2005. Petitioner was suspended for dress code violations, which resulted in numerous absences. Petitioner ended his \*\*\* grade year, 2004-2005, with several failing grades based upon excessive absences. He also failed the \*\*\* grade math TAKS. The parties ultimately settled the matter with a written agreement executed in September 2005. Under the terms of the agreement, Respondent agreed to pay for an Independent Educational Evaluation ("IEE") and to allow Petitioner to take tests for Credit by Examinations to receive credit for failed seventh grade courses so that he could pass to the \*\*\* grade.
6. In May 2005, Dr. Charles Tatum assessed Petitioner and found that he manifested characteristics of ADHD. Dr. Mary Garcia-Holguin, M.D., completed an OHI form in May 2005, which diagnosed ADHD. This form was not submitted to the ARD Committee in September 2005.
7. \*\*\* performed the IEE and issued a report in August 2005. \*\*\* found that Petitioner is in the low average to average range of intelligence and that he manifests no discrepancy between intelligence and achievement. Petitioner scored significantly lower on the verbal section of the assessment than on the nonverbal section. He scored at the \*\*\* grade level in arithmetic and the \*\*\* grade level in reading. \*\*\* did not find any learning disability.
8. \*\*\* also found that Petitioner's responses on the personality tests indicate that Petitioner has conventional interests and attitudes; that he shows some signs of restlessness and irritability; that he has a low tolerance for frustration; that he exhibits age-appropriate attitudes about pleasing significant others and conforming his behavior to what he believes is expected of him; that he exhibits positive attitudes toward school, that he will exhibit mild rebellious tendencies; that he will sometimes fail to adhere to the rules and expectations of authority figures; and that he may at times express his displeasure by engaging in argumentative or passively resistant behavior. \*\*\* found evidence of mild oppositional defiant disorder; mild impulse control disorder; and mixed receptive/expressive language disorder. \*\*\* did not find substantial evidence that Petitioner had ADHD or any other condition qualifying him for special education services. However, \*\*\* deferred the ADHD finding to a physician qualified to make that diagnosis.
9. Petitioner's ARD Committee met on September 23, 2005, to discuss \*\*\* evaluation. The committee did not recommend placement in special education.

- \*\*\* disagreed and the meeting was adjourned. \*\*\* . attached his disagreement to the ARD documents. This ARD Committee reconvened on November 14, 2005, and made its final decision that Petitioner did not qualify for special education services. \*\*\* was not in attendance. The evidence was insufficient to establish whether \*\*\* received notice of this meeting. Petitioner did not file any complaint related to the November 14, 2005, ARD Committee meeting.
10. Petitioner did not pass the exams necessary for obtaining Credits by Examinations. However, on September 26, 2005, Petitioner and \*\*\* signed an Acceleration Contract for school year 2005-2006. Under this contract, Petitioner agreed that he would have no missing assignments in math; that he would utilize study hall time appropriately; that he would be passing all subjects on the second progress report of the second nine weeks; and that he would attend any teacher recommended tutoring. In exchange for adherence to these terms, Petitioner was placed in the \*\*\* grade. Petitioner met these requirements and remained in the \*\*\* grade throughout school year 2005-2006. Petitioner passed all classes.
  11. In \*\*\* grade, Petitioner passed the reading and math TAKS. In \*\*\* grade Petitioner passed the reading TAKS and failed the math TAKS. In \*\*\* grade Petitioner passed the reading, science, and social studies TAKS but failed the math TAKS.
  12. During fall 2005, Petitioner played football and had only two disciplinary referrals. In spring 2006, Petitioner was not allowed to play basketball because he was failing reading. On a personal level, he and his girlfriend broke up. His behavior deteriorated, resulting in five disciplinary referrals.
  13. In March 2006, Petitioner was involved in an incident that was classified as an assault. He was sticking classmates with a needle during P.E. and lunch. This resulted in his assignment to the \*\*\* School (“\*\*\*”). While attending \*\*\*, Petitioner had numerous disciplinary referrals, including making a threat against a teacher. On May 15, 2006, the principal at \*\*\* recommended that Petitioner be expelled from NEISD for the remainder of the year and through the first semester of the 2006-2007 school year. At that time, Petitioner had attended \*\*\* seventeen school days and had eleven absences; he had been referred to the office eight times with eighteen redirections. Petitioner was expelled on June 22, 2006, following an expulsion hearing, and referred into the Bexar County Juvenile Justice Alternative Education Program (“JJAEP”). This expulsion was appealed and on August 9, 2006, NEISD altered the prior decision and expelled Petitioner for a minimum of sixty days. He would serve thirty successful days at JJAEP and thirty successful days at NEISD \*\*\* School.
  14. Petitioner filed his Request for Due Process Hearing on May 30, 2006. Pursuant to the Resolution Meeting, the parties agreed to conduct a Full and Individual Evaluation (“FIE”). \*\*\*, L.S.S.P., conducted the evaluation in June 2006 over three sessions. At the time of the evaluation, Petitioner was not taking medication for his ADHD. \*\*\* evaluation concurred in many respects with \*\*\* assessments and findings. She found him to be in the low average to average intelligence range; he does not manifest a learning disability; there was not substantial evidence that his classroom behavior of distractibility and hyperactivity were

- attributable to ADHD. Petitioner, though at times uncooperative, did not evidence hyperactivity or restlessness during the assessments.
15. The evidence is insufficient to establish that Petitioner did not make educational progress during school year 2005-2006.
  16. The evidence is insufficient to establish that Petitioner needs special education services to make educational progress.

## **DISCUSSION**

Under IDEA, all state school districts receiving federal funding must provide all children with disabilities a free, appropriate, public education (“FAPE”). 20 U.S.C. §1412(1). The determination of whether a school district has provided a student with FAPE is two-fold: 1) the school district must comply with the procedural requirements of IDEA, and 2) the school district must design and implement a program “... reasonably calculated to enable the child to receive educational benefits.” *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175, 206-207 (1982). However, before these mandates become applicable, the student in question must qualify as a “child with a disability.”

20 U.S.C. §1401(3)(A) defines a “child with a disability” as a child “(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.

In this case, there is a dispute over whether Petitioner actually has ADHD. Under TEA guidelines, only a medical doctor can make a diagnosis of ADHD. Petitioner contended that in May 2005, Dr. Holguin, a medical doctor, executed an OHI form that diagnosed Petitioner with ADHD. However, it appears from the record that this form was not presented to Petitioner’s ARD Committee in fall 2005. During her assessment in summer 2006, Ms. \*\*\* contacted Dr. Holguin to discuss the 2005 OHI form and ADHD diagnosis but received no reply. However, \*\*\* did testify that his testing showed that Petitioner had ADHD and that Dr. Holguin had,

in fact, executed an OHI form to that effect in May 2005. Dr. Holguin executed a second OHI form in August 2006, which, again, diagnoses Petitioner with ADHD. This form was presented to Petitioner's September 2006 ARD Committee.

In contrast, Respondent argued that the evidence failed to prove that Petitioner has ADHD. \*\*\* and \*\*\* made independent findings that there was not substantial evidence that Petitioner has ADHD. Those who worked with Petitioner on a daily basis, his teachers, all testified that although he was sometimes distractible and ill-prepared for class, he seemed to be in control of his behavioral decisions related to class work, extra-curricular activities, and inter-personal relations with peers and teachers, concluding that Petitioner did not manifest ADHD characteristics.

It is undisputed that Petitioner was diagnosed with ADHD in early elementary school and that he previously received special education services for the ADHD. Based upon that fact, and the evidence presented by Petitioner, I find the evidence to be sufficient to establish that Petitioner is a student who has ADHD. As such, he has a qualifying disability under the OHI classification. 34 C.F.R. §300.8(a) and (c)(9)(i). However, that, alone, does not garner special education services. To be entitled to special education services, as well as the requested compensatory services, Petitioner had to prove that he has, and had, an educational need for such services that was caused by the ADHD. The evidence fails to support this finding.

Petitioner was without special education intervention during school year 2005-2006. Although the parents did not agree with the ARD Committee's decision not to provide services, they did not file any complaint or due process request until the end of the school year in May 2006 and only after the \*\*\* principal recommended his expulsion.

By his own admission, Petitioner chooses his behaviors, depending upon the stimulus. He sometimes feels resentful towards his parents and teachers. He has a tendency to try to escape challenging situations. While he has friends and interacts with peers and teachers, he does evidence some difficulty managing

relationships. He demonstrates low self-esteem and sometimes declines to take responsibility for his actions. In essence, Petitioner is a fifteen-year-old young man whose immaturity gets in the way of appropriate choices at times.

Petitioner started school year 2005-2006 in a very positive manner. He played football and was quite successful in sports. He met the requirements of his Acceleration Agreement and remained in the \*\*\* grade the entire year. He only had two office referrals in the fall and appeared to be working hard at keeping up his grades and monitoring his behavior. Things took a bit of a turn in the spring semester when he was not allowed to play basketball due to a failing grade in reading. Likewise, he had some personal problems with his girlfriend. By March 2006 he had received more office referrals and some of his grades were quite low. By the end of the year, however, Petitioner had pulled his grades to passing, although he finished the school year at \*\*\*.

Those who worked with Petitioner daily at school all testified that he did not need special education intervention to be successful. Petitioner's teachers testified that he is very likable, friendly, and popular. He has a tendency to be distracted in classes that he shares with his friends and when he is bored with the work. In other settings, he can be quiet, compliant, and complete his work. On his own, he worked closely with \*\*\*, the campus special education coordinator, during 2005-2006, often seeking her help with assignments, visiting with her about school and personal matters, and generally, evidencing that he was having, as he described, a good year.

There is no debate that Petitioner made some bad choices in the spring and summer of 2006 and he was properly disciplined. However, the evidence simply does not establish that these negative behaviors flowed from his ADHD or that he presented an educational need for special education intervention. To the contrary, with appropriate encouragement, the continuity of structure at home and school, and simple modifications to aid him in completing his assignments and governing his behavior, Petitioner can certainly be very successful in his educational experience without the intervention of special education.

## **CONCLUSIONS OF LAW**

1. Petitioner is a student residing within the North East Independent School District. North East Independent School District would be charged with providing Petitioner special education services if he qualified. However, Petitioner did not qualify for special education as Other Health Impaired in school year 2005-2006. Petitioner does not currently qualify for special education as Other Health Impaired. 20 U.S.C. §1401(3)(A); 34 C.F.R. §300.8(a)(1).
2. North East Independent School District has no duty to provide Petitioner special education services at this time.

## **ORDER**

Based upon the record of this proceeding and the foregoing Findings Of Fact and Conclusions Of Law, it is ORDERED that the relief requested by Petitioner is DENIED.

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

SIGNED this 1st day of November 2006.

Deborah Heaton McElvaney  
Special Education Hearing Officer

---

# DOCKET NO. 229-SE-0506

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

PETITIONER

vs.

NORTH EAST INDEPENDENT

SCHOOL DISTRICT

RESPONDENT

BEFORE A SPECIAL EDUCATION  
HEARING OFFICER  
FOR THE STATE OF TEXAS

## SYNOPSIS OF DECISION

**ISSUE:** Whether Petitioner qualified for special education services during school year 2005-2006 and qualifies for such services during school year 2006-2007 under the category of other health impaired (“OHI”) based upon his diagnosis of attention deficit, hyperactivity disorder (“ADHD”).

**CITATION:** 34 C.F.R. §300.8(a)(1), 20 U.S.C. §1401(3)(A)

**HELD:** For Respondent. While Petitioner has been diagnosed by a medical doctor with ADHD, and he does at times manifest some characteristics of ADHD, he did not manifest an educational need for special education intervention during school year 2005-2006; he does not exhibit an educational need for special education services at this time.