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# DOCKET NO. 008-SE-0906

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

PETITIONER

vs. BEFORE A SPECIAL EDUCATION  
HEARING OFFICER

AUSTIN INDEPENDENT FOR THE STATE OF TEXAS

SCHOOL DISTRICT

RESPONDENT

## DECISION OF THE HEARING OFFICER

### Statement of the Case

Petitioner, acting through his parents as next friend, requested a due process hearing pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §1400, et seq., as amended. The issues for hearing were as follows:

1. Whether Respondent failed to properly identify and timely assess the student as eligible to receive special education services, despite concern expressed by the parent to the school district over the student’s lack of progress and need for testing due to failing the \*\*\* grade twice;
2. Whether the student’s current misbehaviors are likely a direct result of:
  - a. The student’s failure of the \*\*\* grade twice;
  - b. Lack of appropriate interventions by Respondent;
  - c. Failure of Respondent to offer related services to ensure the meaningful educational progress of the student; and,
  - d. Whether the student should receive the protections of a child not identified under the Individuals with Disabilities Education Improvement Act;
3. Whether Respondent denied the student a free appropriate public education (“FAPE”) with meaningful benefit and has discriminated against the student due to the student’s disabilities; and,
4. Whether Respondent failed to determine, without completed testing and or evaluations, the following:

- a. Whether the student's home campus is the least restrictive environment for the student; and,
- b. What related services, in addition to counseling, are appropriate for the student.

Petitioner requests the following relief:

1. Compensatory education and related services to address the student's disabilities to the greatest extent possible to ensure the student's success, including but not limited to:
  - a. Counseling and/or a mentor; and,
  - b. Tutoring and/or a credit retrieval program;
2. Modifications and accommodations that would meet the student's unique needs while the student's evaluation(s) are pending;
3. Placement into an appropriate grade level, taking into consideration the student's age;
4. Independent educational evaluation ("IEE") at school district expense in all areas of suspected disability;
5. A one-time medical evaluation to determine Other Health Impairment ("OHI") eligibility;
6. Abate a change in the student's placement pending a resolution in this dispute by means of mediation, settlement, or a due process hearing decision;
7. Reimbursement of costs and fees incurred by the student's parents in filing this Request for Due Process; and,
8. Any and all other remedies that Petitioner may be entitled to under the law.

HELD, for Petitioner in part; for Respondent in part.

## **Procedural History**

Petitioner ("Student") filed the above-captioned request for due process ("Request") with the Texas Education Agency on September 11, 2006, and the Hearing Officer received the case assignment on September 13, 2006. The Hearing Officer issued an order on September 15, 2006, setting September 25, 2006, as the apparent statutory resolution-meeting deadline and setting the hearing on October 17, 2006, following the required 30-day resolution period. Austin ISD ("Respondent" or "AISD") did not file an objection to the sufficiency of Petitioner's Request. The Decision Due Date was set for November 25, 2006. The parties participated in a telephonic pre-hearing conference on October 3, 2006, at which time the parties discussed the placement of the student. Petitioner

sought a “stay-put” placement of the student at his current campus during the pendency of this dispute because of possible disciplinary consequences for the student’s \*\*\*. Respondent opposed the “stay-put” placement as Petitioner is not an identified IDEA-eligible student, school district records do not show that the student’s parents expressed concern of the student’s lack of progress during 2005-2006 or during Fall 2006, and the IDEA, as amended, does not prevent the “stay put” removal of a student to an alternative setting for \*\*\*.

Petitioner requested a 22-day continuance, unopposed by Respondent, to allow additional time for the parties to discuss the student’s placement pending completion of this docket and the parties agreed to a revised hearing date of November 8, 2006, with an extended Decision Due Date of December 20, 2006. On November 3, 2006, Respondent requested a continuance of the hearing date for additional time to review newly-filed documents from Petitioner. Petitioner opposed the continuance and the Hearing Officer denied the request by written order on November 6, 2006.

The matter proceeded to an evidentiary hearing on November 8, 2006. Prior to the conclusion of the hearing, the Hearing Officer granted the parties’ request to file written closing statements on December 11, 2006, with an extension of the Decision Due Date to January 8, 2007, to accommodate the expected date for receipt of the hearing transcript on December 4, 2006. Due to a delay in receipt of the transcript of this proceeding, the Hearing Officer granted the parties’ joint request to extend the procedural schedule to allow additional time for the parties to prepare their written closing statements until December 18, 2006, with the Decision Due Date extended to January 15, 2007. Upon Petitioner’s unopposed request, the written closing statement deadline was extended to December 19, 2006, and the Decision Due Date revised to January 16, 2007. Petitioner filed his Written Closing and Respondent filed AISD’s Closing Argument and Motion for Summary Judgment (“MSJ”) on December 19, 2006.

Petitioner’s written closing was in the form of a written closing argument; Respondent’s written closing included Respondent’s MSJ, not previously raised

in this proceeding prior to or during the due process hearing. In its MSJ, Respondent urges that this matter be dismissed, as the student withdrew from AISD five days prior to hearing on November 3, 2006, as confirmed through hearing testimony. Additionally, Respondent alleges that partial summary judgment for Respondent is proper, as Petitioner did not establish at the time of hearing that the student was a student who qualified for special education eligibility and special education services, and because Petitioner did not provide consent for special education eligibility testing during the course of due process proceedings. As the record in this matter closed upon submission of the parties' written closing statements, the Hearing Officer re-opened the record to allow Petitioner to file a response to Respondent's allegations by January 23, 2007, with the Decision Due Date extended to January 30, 2007. Due to inclement weather conditions, Petitioner sought and was granted two additional days for Petitioner's Response to Respondent's MSJ, and the record closed on January 25, 2007, with the decision issued in this matter on January 30, 2007. Based upon the evidence and argument admitted into the record of this proceeding, the Hearing Officer makes the following findings of fact and conclusions of law:

## **Findings of Fact**

### **Background**

1. Petitioner is a \*\*\* year-old student who lives with his parents and sister within the jurisdictional boundaries of AISD. [Petitioner's Exhibit ("P.Ex.") 9; Respondent's Exhibit ("R.Ex.") 17; Transcript ("Tr.") at 53 and 187].
2. The student is repeating the \*\*\* grade for the third time during the 2006-2007 school year. As of the close of the record, the student remained classified as a \*\*\* by AISD with \*\*\* credits earned and without the requisite \*\*\* required for \*\*\* classification. The student's AISD 2006-2007 course load included sophomore level courses for subjects in which the student completed \*\*\* course credits. [R.Ex. 14; Tr. at 36 and 137-138; Pleading file].
3. The student has a history of illicit drug usage beginning at age \*\*\* with marijuana. His continued drug usage resulted in \*\*\* removals from AISD to the \*\*\* in November 2004 and October 2006, and several periods of confinement

during the past \*\*\* years in Gardner Betts Juvenile Justice Center. [R.Ex. 15; Tr. at 15 and 170; Pleading file].

4. At the time of filing this Request for Due Process, the student was subject to possible disciplinary consequences for his possession of a controlled substance. On September 29, 2006, an associate principal at the student’s campus approved removal of the student to the \*\*\* for \*\*\* days, beginning on October 2, 2006, through November 13, 2006. [R.Ex. 15; Pleading file].
5. The disciplinary decision for a \*\*\*-day removal was reduced to a \*\*\* day removal as long as the student and a parent participated in Respondent’s INVEST program, a drug awareness program requiring parental participation, and the student successfully completed these requirements. [Pleading file].
6. The student performed well on state assessments through his \*\*\* grade year. Beginning his \*\*\* grade year in 2002-2003, he missed passing the Mathematics test on the Texas Assessment of Knowledge and Skills (“TAKS”) exam, scoring \*\*\* of \*\*\* items for a Mathematics scaled score of \*\*\*, or \*\*\* points below the standard scaled score of \*\*\*. During his \*\*\* grade year in 2003-2004, the student did not pass the TAKS test in Mathematics and Social Studies with the following scores: Mathematics – \*\*\* of \*\*\* items correct, scaled score of \*\*\*, or \*\*\* points below the standard scaled score of \*\*\*; and, Social Studies – \*\*\* of \*\*\* items correct, scaled score of \*\*\*, or \*\*\* points below the standard scaled score of \*\*\*. [P.Ex. 2; R.Ex 12; Tr. at 33-34].

**2004-2005 School Year**

7. In 2004-2005, the student attended AISD through the fifth six-week grading period. He received the following grades during this period:

Course	1st	2nd	3rd	Exam	4th	5th
Spanish 1A	***	***	***	***	***	***
Office Aide	***	***	***	***	***	***
Health Ed/ Fitness	***	***	***	***	***	
Algebra 1A/1B	***	***	***	***	***	
World Geography	***	***	***	***	***	***
English 1A/1B	***	***	***	***	***	***
Biology A/B	***	***	***	***	***	
Math Lab A/B	***	***	***	***	***	

8. [R.Ex.13].

**Spring 2005 Residential Drug Treatment Program**

9. The student entered a residential drug treatment program in \*\*\*, Texas, in Spring 2005, with support from a charter school in the area. According to the student’s parent, the placement resulted when the student failed to “test clean” while on probation for an earlier drug offense. [Tr. at 41 and 171-172].

10. The charter school assessed the student with a full and individual evaluation (“FIE”) on March 29, 2005, performed by an educational consultant for the charter school’s special education cooperative. The written report concluded that the student currently had OHI condition “with health factors escalating to primary concern and recommendation for placement in treatment center with part day school,” noting the student’s substance abuse over the past five years, the student’s non-substance related incidents of depression, and that the student was not under treatment for depression at the current time. The report assessed the student’s estimated grade level as the following: Word Attack – \*\*\* Grade; Reading Vocabulary – \*\*\* Grade; Reading Comprehension – \*\*\* Grade; Math – \*\*\* Grade; Writing Samples – \*\*\* Grade. [P.Ex. 10].
11. An Admission, Review, and Dismissal Committee (“ARDC”) meeting for the student by the charter school took place on April 6, 2005. As the student’s parents did not attend the meeting, a temporary guardian represented the student. The ARDC reviewed the completed FIE and an OHI medical assessment, with deliberations indicating that the student’s specific needs related to current health factors and chemical dependency issues, with goals and modifications to support general education reintegration. The student’s schedule of service indicates grade-level instruction with no modifications and reasonable accommodations for his four subjects of English, Math, Science, and Social Studies, as well as chemical dependency counseling services. [P.Ex. 9].
12. The OHI medical assessment form from Spring 2005 is not a part of the record of this proceeding. AISD has not received any documentation by a physician of an OHI disability designation for the student. [Tr. at 42].

### **2005-2006 School Year**

13. Routinely, the residential placement records of a student placed by the court system, although available to the court system, parole or probation officers, and the family, are not given to school districts unless there has been a release of information signed by the parents. When a student returns to AISD from such a court placement, unless the parents inform the school district, the school district does not know where the student has been. [Tr. at 40].
14. The student re-entered AISD in Fall 2005. The student’s parents did not provide any records from the residential placement and charter school in \*\*\*, Texas, nor did the parents indicate that the student had received special education services in Spring 2005 in \*\*\*, Texas. Instead, the student’s parents believed that the student’s probation officer would send a copy to AISD. [Tr. at 174 and 184-185].
15. AISD did not make a request for the student’s records or receive any information from the student’s Spring 2005 placement in \*\*\*, Texas – including any information that the student had been assessed for special education and had received special education services as a student with OHI – until receipt of Petitioner’s disclosure five business days prior to the due process hearing. [Tr. at 40-42].
16. In preparation for the hearing, an AISD Assistant Special Education Director contacted the director of the Houston charter school and learned that students from the drug and alcohol substance abuse rehabilitation facility routinely are

- given a temporary eligibility based on the temporary medical condition related to substance abuse. This temporary eligibility is removed when treatment has progressed and the student is discharged from the facility. If the facility believes that additional educational needs exist at discharge for return to the home school district, a student is referred for services under Section 504 of the Rehabilitation Act. This charter school did not forward records and did not make any referral for Section 504 services in preparation for the student's return to AISD. [Tr. at 41-43].
17. In 2005-2006, the student's grades, by semester, include the following: English – \*\*\*, \*\*\*; Spanish 1A/Math Lab \*\*\* – \*\*\*, \*\*\*; Algebra I – \*\*\*, \*\*\*; World Geography – \*\*\*, \*\*\*; Computer – \*\*\*, \*\*\*; Biology – \*\*\*, \*\*\*; Physical Education – \*\*\*, \*\*\*. [R.Ex. 13].
  18. In April 2006, the student received the following scaled TAKS scores: Reading –; Mathematics –\*\*\*. The student's English teacher believes, based on these scores, that he passed the TAKS Reading test. [R.Ex. 12; Tr. at 223-225].

#### **Student Social Interaction**

19. AISD staff and his mother describe the student as a loner who routinely does not have many interactions with peers during class periods. [R.Ex. at 16; Tr. at 106, 261, 263, and 325].
20. On repeated occasions over the past two school years, AISD instructional and administrative staff observed the student wearing colored bandanas and other gang-related attire and socializing with known gang members in the high school hallways between classes. [Tr. at 252-253 and 270-271].
21. The student's mother does not believe that her son is involved in any way with gang activity. [Tr. at 324].

#### **Student Classroom Behavior**

22. The student has had the same campus counselor over the past three school years. The counselor met with the student two to three times each semester and found the student to be capable, polite, yet noted that the student appeared lethargic, non-responsive, had poor attendance, and was not involved in school. Although the counselor discussed his participation in math tutoring offered to all students on campus before

- school, after school, and on Saturdays, the student was not interested. [Tr. at 138-140].
23. The assistant high school campus principal for 2005-2006 and 2006-2007 interacted with the student for disciplinary referrals and on frequent “walk-through” visits to the student’s classroom and the school hallways. The assistant principal found the student to be a capable young man, for the most part respectful of his teachers and not antagonistic to his peers, but with spotty attendance in his classes once at school, a lack of motivation for work in class or at home, and periodic drug usage that the school learned about after criminal cases were filed for illegal drug possession. On a daily basis, the administrator told the student to put up electronic devices or take off his hat, and ultimately confiscated the student’s CD player on one occasion. The administrator does not recall the student actually being on-task and working in the classroom setting during any interaction with the student. [Tr. at 287-299].

#### **Course Credit, Discipline, and Attendance**

24. AISD held a meeting in Fall 2005 with the student’s parent to discuss the student’s lack of credit and to develop a plan to get him back on track with his \*\*\* credits. The student, his parent, his school counselor, and the campus assistant principal participated in the meeting. The assistant principal gave the parent a list of charter schools in the area as a possible smaller setting for the student. In addition to in-person meetings, the assistant principal made telephone contacts with the parent during the school year. [Tr. at 296].
25. The student had relatively few disciplinary referrals over the past three school years. On occasion, he was verbally disrespectful and used profanity with school staff, resulting in suspension days as noted above. [R.Ex. 15].

26. Because no course credit may be awarded if the student has more than nine unexcused absences, the student's assistant principal excused "quite a few" absences, yet the student did not receive additional credits because he did not achieve \*\*\* grades in his current classes. [R.Ex. 11; Tr. at 151-153 and 301-302].
27. The student has had ongoing problems with attendance during his high school years. Classroom attendance documentation by school year shows a continued pattern of unexcused absences and tardies, reflected below by semesters, as follows<sup>1</sup>:

School Year	Unexcused Absences (All/Part Day)	Unexcused Tardies (Per Class)	Suspensions <sup>2</sup> (Per Day)	Discipline (DI) Made Up (MU) <sup>3</sup> (All/Part Day)
2004-2005	All: 13, 1 Part: 7, 1	59, 2	HSS - 1 ISS - 1	DI - (none), 4 <sup>4</sup>
2005-2006	All: 4, (none) Part: 18, (none)	13, 2	HSS - 5 ISS - 2	DI - 4, 12 MU- all day: 14 MU- part day: 22
Fall 2006	All: 5 Part: 10	7	HSS - 6 ISS -(none)	DI - 4

- 28.<sup>1</sup> The information in each cell is divided by semesters, with each semester separated by commas.
- <sup>2</sup> Home suspensions are abbreviated as "HSS" and in-school suspensions are abbreviated as "ISS."
- <sup>3</sup> Excessive absences may be "made up" in Saturday school to replace the original absence notation with a "MU" designation. The student's MU days are all in the Spring 2005 semester.
- <sup>4</sup> Excessive absences may be "made up" in Saturday school to replace the original absence notation with a "MU" designation. The student's MU days are all in the Spring 2005 semester.

29. The student's mother reports that his attendance problems increased in \*\*\*. When he missed the morning school bus on several occasions, his parents began taking him to school. The parents' frustration grew when they received AISD computer-generated calls in the evening informing them that the student had been absent in one or more classes, despite dropping him off at school in the morning. [Tr. at 166-167].
30. The student and his mother attended a mandatory attendance session on a weekend at the end of the 2005-2006 school year to "make up" his excessive absences as noted in his attendance record. Yet soon after the session, the mother again received calls from school saying that the student was not there. The student's mother informed the school that she knew the student was attending school as he returned home on the bus each evening. [Tr. at 167-168].

### **AISD Interventions**

31. Over the past three school years, AISD offered the student a variety of general education supports to assist the student in making up credit, attending tutoring before and after school, alternative forms of education such as computer-based tutoring, information on the Delta program, and summer school classes to recoup credits. AISD also provided the student and parents with information on classes, and outside agencies that might assist with tutoring, training, or in-home assistance. [Tr. at 222-223 and 244].
32. The student's \*\*\* teachers used regular education interventions with the student, such as additional time for assignments and projects. Even with additional time for completion, the student repeatedly chose not only to complete but at times even commence his assignments. Redirection of the student at times produced a limited amount of in-class work. Efforts of teaching staff to monitor the student to determine his comprehension of subject matter were hampered by the student's poor attendance and

- refusal to open up and share information or to receive assistance from others. His teachers concluded, based on the data from his limited performance in their classes, that he was capable of doing grade-level work. [Tr. at 190, 242-244, 268, 290-291].
33. The student received progress reports during his \*\*\* years that were sent home to his parents with requests for parent/teacher conferences, but his mother indicated that she did not always have time to participate in such meetings. [Tr. at 190].
34. AISD took steps to inform the parent of IDEA special education provisions and Section 504 of the Rehabilitation Act provisions through back-to-school letters, newspaper articles, and the student-parent handbook. The mother testified that she had received the back-to-school letter and newspaper supplement sent by U.S. Mail, but did not remember reading the special education provisions because she had not read all the way through the material, stating that her husband may have been the individual who signed the receipt for the handbook that would have been returned to the school. [Tr. at 185-186].
35. The student was offered but chose not to attend summer school in Summer 2006. [Tr. at 132-133 and 167-168].

### **Fall 2006**

36. During the first six weeks of the 2006-2007 school year, the student received a \*\*\* average in six of seven classes. He earned a \*\*\* average in Physical Education. [R.Ex.13].
37. The student had two disciplinary incidents in August 2006, including possession of a controlled substance at school on August 31, 2006, which ultimately lead to the removal decision made on October 2, 2006. [R.Ex. 15].
38. The student and his mother previously participated in the INVEST program in 2004. Yet despite his mother's efforts to attend INVEST in Fall

- 2006, the student refused to participate in the program a second time. On October 3, 2006, Petitioner enrolled in the \*\*\* but did not return to complete the program or studies. [Tr. at 15, 191, and 287-288].
39. Respondent offered an FIE to the student throughout the course of this due process proceeding to see if the student qualifies for special education services, yet Petitioner did not consent to the offered FIE as of the close of the record. [Tr. at 196-198].
40. Respondent did not request a Due Process Hearing to challenge Petitioner's failure to consent to Respondent's offer for an FIE.
41. Prior to the student's Request for Due Process in September 2006, neither Respondent nor the student's parents referred the student for special education testing. [Tr. at 317-318 and 321].

#### **Special Education Testing Referral**

42. At AISD, the Local Support Team ("LST") on a student's campus initiates the "child find" process by meeting to review data and records and make a determination that a student is in need of a referral for special education. After the student filed for due process in mid-September 2006 as part of the school district's settlement efforts in this dispute, the campus LST made preparations to convene a meeting by gathering written input from current teachers, observing the student in the classroom, and conducting a vision/hearing screening. Current teachers of the student gave written input on the student, noting that the student's excessive absences impacted their ability to fully evaluate his work and behavior, noting his failure to come to class with completed assignments, supplies, failure to be motivated, and a lack of interaction with peers. On September 29, 2006, AISD completed the classroom observation and the student passed a vision/hearing screening. [R.Exs. 4, 5, and 16; Tr. at 94].
43. The LST meeting convened in early to mid October 2006, with the assistant principal and campus Licensed Specialist in School Psychology

("LSSP") in attendance. Although the assistant principal contacted the mother by telephone to arrange the meeting, the student's parents chose not to attend the meeting because they no longer trusted the school district. The LST prepared consent for an FIE documentation for the parents' signature, but did not receive subsequent signed consent for evaluation. [R.Exs. 6-10; Tr. at 94, 198-199, and 304].

44. After reviewing the student's cumulative folder, the campus LSSP discovered nothing that should have triggered the LST process over the previous two school years. Instead, the LSSP noted a one-to-one correspondence between the student's school attendance and achievement. For example, during the student's first six weeks at his \*\*\* campus in 2004, the student achieved grades at \*\*\* and above in three classes, including Algebra 1A. The LSSP noted that the student's failure to pass Math on the recent TAKS testing fell within the range for improvement of the deficiency with tutoring or Math lab and did not suggest a learning disability. At hearing, the LSSP stated that it was appropriate to test the student nonetheless to be able to "move forward" from the due process hearing request and address the student's problems that are not, in the LSSP's belief, due to a disability but are rather consequences of the student's choices made over time. [Tr. at 76-78 and 100-101].

### **Petitioner's Psychological Evaluation**

45. Petitioner offered an independent evaluation of a psychologist in private practice who evaluated the student on October 19, 2006. The psychologist did not testify at hearing. The psychologist's written one-page report states that the student presented with concerns of significant difficulties with school functioning and poly-substance abuse, predominately alcohol and marijuana that previously led to in-patient treatment. The psychologist reported the student's plans to attend orientation to begin a program to

study for and pass the General Educational Development Test. Clinical impressions on the report note the presence of a generalized anxiety disorder, poly-substance abuse, and “rule out Tic Disorder” with a recommendation for a comprehensive psycho-educational evaluation to assist in educational planning. [P.Ex. 3; Tr. at 198].

46. An LSSP from the student’s campus reviewed Petitioner’s independent psychological evaluation report at hearing. The LSSP concluded that this report did not evaluate all areas necessary to meet requirements under Texas state law to determine special education eligibility of the student, failed to designate any specific disability establishing eligibility, and did not establish the need for special education service under state law. [R.Ex. 3; Tr. at 57, 67, 72-73, 80, and 87].

#### **Petitioner’s Withdrawal from AISD**

47. The student did not attend school by choice since October 2006. The student withdrew from AISD on November 3, 2006, at which time he planned to attend Lifeworks Charter School in Austin, Texas. Two days prior to the due process hearing, the student was incarcerated and did not participate in this proceeding. [Tr. at 177-178 and 189].

### **Discussion**

#### **Background**

It remains undisputed in this proceeding that Petitioner withdrew from AISD five days prior to the due process hearing. It is further undisputed that prior to filing Petitioner’s Request for Due Process, Respondent did not offer to test the student for possible IDEA eligibility until after Petitioner filed his Request for Due Process. Instead, the undisputed evidence established that Respondent first convened a meeting of the campus LST team and made a recommendation for special education testing in October 2006. While Respondent posits that this offer to test the student was an effort to “move forward” beyond Petitioner’s

Request for Due Process rather than based on belief that the student actually requires special education services, Petitioner believes that Respondent's offer to test the student came too late. Petitioner, instead of facilitating Respondent's evaluation of the student, decided to withhold written consent for Respondent's FIE through the due process hearing.

### **"Child Find"**

The "child find" provisions of the IDEA require school districts to have procedures in place to ensure the identification, location, and evaluation of all students, including private school students, with disabilities who reside within the jurisdictional boundaries of the school district and who are in need of special education and related services, regardless of the severity of the disability. 20 U.S.C. §1414(a)(1)(A); 34 C.F.R. §300.125(a)(1). Further, school districts must ensure that a FAPE is available to all students with disabilities, ages three through 21, including students with disabilities who have been suspended or expelled from school. 34 C.F.R. §300.300(a)(1) and (2). School districts have an affirmative duty to identify, locate, and evaluate all children with disabilities who need special educational services within the jurisdictional boundary of the school district, whether or not the student and parents have requested evaluation or services. 34 C.F.R. §§300.125 and 300.128.

Petitioner suspects that the student's disabilities include OHI<sup>5</sup> and may include Emotional Disturbance ("ED")<sup>6</sup> and a Learning Disability ("LD")<sup>7</sup>. The multidisciplinary team that collects and reviews evaluation data in connection with the determination of a student's eligibility based on OHI must include a licensed physician. 19 Tex. Admin. Code §89.1040(c)(7).

The district's proposed educational program is entitled to a legal presumption of appropriateness. Petitioner bears the legal burden of proving that the educational program currently proposed is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). Petitioner has not met that burden in this case.

<sup>5</sup>"Other Health Impairment" means the student possesses limited strength, vitality or alertness, including a heightened alertness to environmental stimuli,

that results in limited alertness with respect to the educational environment, that (i) is due to chronic or acute health problems such as asthma, attention deficit disorder, or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and (ii) adversely affects a child's educational performance. 34 C.F.R. §300.7(c)(9).

<sup>6</sup>“Emotional Disturbance” means the student exhibits one or more of six characteristics over a long period of time and to a degree that adversely affects the student's educational performance. Three of the six categories include: (i) an inability to build or maintain satisfactory interpersonal relationships with peers; (ii) inappropriate types of behavior or feelings under normal circumstances; and, (iii) a general pervasive mood of unhappiness or depression. 34 C.F.R. §300.7(c)(4).

<sup>7</sup>“Learning Disability” means the student possesses a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, but does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage. 34 C.F.R. 34 C.F.R. §300.7(c)(10).

### **Fall 2006 Disciplinary Removal**

On September 29, 2006, the student was removed to the \*\*\* for possession of a controlled substance on campus on August 31, 2006. AISD allowed him to attend the \*\*\* for an abbreviated removal of ten days, so long as the student and his parent completed the school district's “INVEST” program of drug awareness. Respondent asserts that the student is not entitled to IDEA protections in connection with his discipline because he does not qualify for special education. The threshold issue in this dispute is whether the school district had some reason to suspect that the student has a disability. The IDEA requires school districts to use a two-pronged analysis to determine whether a student should be identified

and referred for special education services. First, the school district must have some reason to suspect that the student has a disability. Second, the school district must have some reason to suspect that the student is in need of special education and related services. *Spring Branch ISD v. Paris A., bnf Alice A.*, Docket No. 197-SE-392 (SEA Tex. 1992). In this proceeding, AISD contested both prongs, claiming that there was no reason to suspect that the student had a disability or that he was in need of special education and related services. Under the first prong analysis, AISD claims that neither the student, the student's parents, nor any educator ever suggested to the school district that the student might be a student eligible for special education. In fact, the school district claims, and I agree, that there is no evidence contained in the school district records of any parental concern that the student might be eligible for special education and needed special education services to progress in his program after the student returned from his Spring 2005 residential drug placement to AISD for the 2005-2006 school year. The evidence confirmed that when the student re-enrolled in AISD for the Fall 2005 semester, the student's parents did not inform the school about the details of the placement, make any request from the placement to forward records to AISD, request that AISD obtain the student's Spring 2005 educational records, or even communicate the placement's name. At hearing, the parent admitted that the original ARDC documents from the charter school's decision to place the student into special education as an OHI student during his drug treatment were in the parent's possession after the student left the Spring 2005 placement. Although the parent took copies of the documents to Gardner Betts Juvenile Justice Center, the parent assumed that documents would be shared with AISD by the charter school. [Tr. at 184]. While the school district possesses an affirmative duty to seek out disabled students to identify and serve them, the law does not require school districts to undertake extensive steps to ascertain special education eligibility if there is no reason to believe the student may be an eligible student. Respondent observes that juvenile justice system is not required to share information from the juvenile

court system or court-ordered placements with the school system. More particularly, where the parent refuses or declines to execute a required release authorizing disclosure of juvenile justice records or does not volunteer to share such records with the school district, then specific details of the student's court involvement would not be available to the school system as a basis for suspicion regarding special education eligibility.

Under Article 15.27 of the Code of Criminal Procedure, law enforcement personnel must notify the school when a student has been detained, adjudicated, or placed on probation with a listing of the offense. I find no other requirement of notice concerning any additional information regarding where the student is detained, the period of detention, or any circumstances of the offense. In the event a probation officer is assigned to the student, Respondent notes that the probation officer "may" contact the school to check on the student's attendance – especially if attendance is a requirement of probation. The evidence confirmed that the student has had more than one probation officer and has been detained in addition to the court-ordered placement at the drug treatment facility. [Tr. at 170-171].

The record supports the inference that the school district cannot demand juvenile court records and, if the student's parents do not cooperate in voluntarily turning over court documents to the school, cannot force parents to turn over court documents and any resulting student records generated during court-ordered placements. Simply put, the student's parents did not communicate information from the Spring 2005 placement to AISD that would have revealed the student's temporary classification as OHI during his drug treatment. Had the school district received information that included the charter school's FIE at that time, the school district would have had a reason to inquire further as to whether the student was eligible for special education services after release from the drug treatment center, including review the medical diagnosis for OHI accepted by the charter school ARDC committee but not included in the record of this proceeding by Petitioner.

Likewise, as the Fall 2005 semester progressed, the parent did not share any specific information about student's residential placement during a conference with the assistant principal to plan ways for the student to recoup course credit. This meeting included discussion of other educational settings for the student such as area charter schools; there were no expressed parental or teacher concerns that the student \*\*\* do work on grade level or that the student had qualified for special education services in the temporary Spring 2005 placement. [Tr. at 296-300].

### **Grades, Attendance, and Test Scores**

According to Petitioner, Respondent had ample notice of a need to assess the student for special education services when the student failed the \*\*\* grade after the 2004-2005 school year and believes that the school district should have evaluated the student for special education eligibility when the student repeated the \*\*\* grade in 2005-2006. Respondent counters that the student's failing grades, when viewed with his illegal drug usage and poor school attendance, did not point to a student with disabilities, but instead to a student making poor choices that impacted his school success and denies that the school district should have known to evaluate the student at the beginning of the 2005-2006 school year. I agree with Respondent, noting that the student's first \*\*\* grade year in 2004-2005 included periods of good grades that correlate with the student's school attendance as well periods of his removal for drug usage in November 2004 and his residential placement outside the school district for drug usage in March 2005. See Findings of Fact 7, 26, and 42. The student's unexcused absences escalated during his second ninth grade year in 2005, 2006, with unexcused absences of four full school days the first semester and 14 full days during the second semester. Although the school district assisted the student in making up the second semester absences, the impact of the student's absences on his coursework is abundantly clear.

Petitioner believes that the student's state wide assessment scores are a further indicator that the student required special education eligibility testing.

Respondent disagrees, noting that the student consistently passed his Reading assessments, but lagged behind in Mathematics by a margin that would have been correctable by accessing the school district's tutoring and Math Lab general education supports. The record evidence supports the Respondent's assertions that Petitioner refused to take advantage of tutoring opportunities before and after school for assistance in passing state assessments. The preponderance of the record evidence includes convincing testimony from the student's teachers that the student's absences impacted his ability to master course content and even when the student attended class, he did not put forth effort to complete his work. In spite of the student's lack of effort, the student passed his most recent TAKS test in reading, according to his Fall 2006 English teacher.

### **Student Misbehavior**

Petitioner seeks to show that Respondent's failure to identify the student as a student in need of special education services resulted in a related series of events that included the student's failure of \*\*\* grade twice that would have been avoided or lessened had Respondent intervened to test the student for special education services, provide special education services to the student, and provide a program for the student that would have avoided the student's downward path over the past two school years. Respondent points to the student's long-standing drug usage, his drug offenses, his probation violations and even possible involvement that the student has with gang activity as reasons why the student's choices, rather than the presence of an unidentified disability, have shaped the student's education over the 2005-2006 and 2006-2007 school years. I agree with Respondent and find that the record evidence preponderates to show that the school district did not fail to deliver an appropriate education to the student before September 11, 2006.

It is uncontroverted that the student has been using drugs since age \*\*\* when he began using marijuana and that the student's drug usage resulted in the disciplinary removals for drugs in 2004 and 2006 during the student's school year, interrupting his education at his \*\*\* school campus. The student's parent

gave credible testimony at hearing regarding the student's violation of probation during 2005-2006 resulting in his court-ordered residential placement in Spring 2005, again interrupting his education within the school district, in an effort to stem the student's drug usage through drug treatment. Yet, despite the court involvement, the student's drug involvement continued into the current school year, resulting in disciplinary consequences that precipitated Petitioner's Request for Due Process in September 2006. When the school district modified its \*\*\* day placement of the student in the \*\*\* to a \*\*\* day stay with a condition of student and parent participation in the INVEST drug awareness program and completion of the same, the student did not attend the program and failed to complete his \*\*\* day requirement. At hearing, the parent testified that the student's arrest two days prior to the due process hearing was related to the student's non-attendance. I find no convincing explanation for the student's choice not to complete the program other than he simply chose not to do so.

There is conflicting evidence in the record concerning the student's social interaction with gang members. At hearing, the student's parent testified that to the parent's knowledge, the student did not have any involvement with gang activity because the parent supervises the student after school and he is a loner [Tr. at 324-325]. Yet the evidence preponderates that at school his teachers and campus assistant principal have observed the student with known gang members in the hallways and the student has been corrected on different occasions by AISD staff for wearing attire associated with gangs. I find that the evidence preponderates in favor of the school district that the student's social interactions may well include gang activity. While this is not an excuse for the student's choices, the record when viewed as a whole indicates that the student's personal choices are indeed impacting his education.

### **Protections for a Student Not Yet Identified**

Petitioner claims the protections of a student not yet identified under IDEA in his Request for Due Process and presented an independently-obtained psychological evaluation at hearing by a psychologist who interviewed the

student and his parent on October 19, 2006, and made a recommendation for a comprehensive psych-educational evaluation of the student and made the diagnosis of a General Anxiety Disorder with a notation to “rule out” a Tic Disorder and Specific Learning Disorders.

Under IDEA’s implementing regulations, as amended, a student who is not yet identified for special education and is subject to disciplinary action for certain offenses that include possession of an illegal drug, may assert that the school district had knowledge that the student was a student with a disability under four conditions: 1) whether the parent expressed concern in writing (or orally if the parent cannot write) that the student is in need of special education and related services; 2) whether the behavior or performance demonstrates a need for special education services; 3) whether the parent of the student requested an evaluation of the student; and, 4) whether a teacher of the student or other school personnel expressed concern about the behavior or performance of the student in accordance with the school’s “child find” or special education system. 34 C.F.R. §300.527(a)-(b). Subsection (d)(2) of this provision gives additional protection to the student if the student requests an evaluation of the student during the time period in which the student is subjected to disciplinary measures for conduct that includes possession of illegal drugs, the school district must ensure the following: 1) that the evaluation is completed *in an expedited manner*; 2) until the evaluation is completed, the student remains in the disciplinary setting determined by school authorities; and, 3) if the student is determined to be a student with a disability, considering information from the *evaluation conducted by the agency* and from information provided by the parents, the school must provide special education and related services to the student. 34 C.F.R. §300.527(d)(2). (Emphasis added).

Based on the record evidence in this proceeding, Petitioner clearly invoked the procedural protections of a student not yet identified under 34 C.F.R. §300.527 when Petitioner filed his Request for Due Process while disciplinary proceedings were pending for the student’s illegal drug possession at school on August 31,

2006, and requested evaluation for the student under 34 C.F.R. §300.527(d)(2)(i). Further, I note that Respondent correctly refused the initial “stay-put” request by Petitioner, as the alleged conduct included illegal drug possession, an offense identified under IDEA that allows the school district to take disciplinary action of even an identified disabled student under 34 C.F.R. §300.500(d)(2). Considering the four requirements of 34 C.F.R. §300.527(b) under which the school district may be deemed to have knowledge of whether the student is a disabled student during such disciplinary proceedings, the preponderance of the record evidence shows that the parents did not express concern orally or in writing of possible special education eligibility of the student nor did they request special education evaluation prior to the disciplinary event. There is no evidence in the record that school staff ever proposed to the school district administration that the student might be in need of special education or was there any school personnel referral made for evaluation. The inquiry becomes whether or not the behavior or performance of the student demonstrates a need for special education services. After review of the record as a whole, I find that the school district did not have reason to believe, based on the student’s poor grades and attendance, that his inappropriate drug possession behaviors had any other possible cause other than the student’s choice to engage in drug behavior.

However, once the student filed his Request for Due Process during the pendency of the disciplinary proceedings, the school district was on notice that special education qualification was suspected and the school district’s duty to assess the student in an expedited manner began. I do not fault the school district for the parental refusal to give written consent to the school district’s request to perform its own evaluation of the student, but I cannot ignore that the school district did not file a counterclaim in this dispute seeking to override the lack of parental consent to proceed with its own evaluation of the student. As of this date, the student has not been evaluated by the school district and there is no evaluation that addresses the psycho-educational needs of the student with a

view to the three suspected areas of disability: OHI, ED, and LD. Further, there is no physician's diagnosis in the record of this proceeding of a physician's diagnosis of OHI for the student while he attended the residential drug treatment program in 2005. Instead, the charter school ARDC documents merely reference the completion of an OHI eligibility report.

Due to the school district's delay in ensuring that this student is not only timely assessed but in an expeditious manner, I find that a compensatory award of an IEE is appropriate.

### **Respondent's MSJ**

Respondent raised the student's voluntary withdrawal from the school district in the form of its MSJ in its Written Closing Statement. After re-opening the record to ensure Petitioner's Response to Respondent's MSJ, and after consideration of the same, I turn now to the issue of what impact the student's withdrawal from the school district five days prior to the due process hearing.

Respondent argues that Petitioner has waived his rights under IDEA upon his voluntary withdrawal from AISD prior to the scheduled hearing and based on that fact, asks for dismissal of this dispute. In the alternative, Respondent seeks a Motion for Partial Summary Judgment for Petitioner's failure to establish that the student qualifies for special education eligibility. I will address Respondent's two requests separately below.

### **Student Withdrawal from the School District**

Respondent argues that Petitioner waived his rights under IDEA, including his right to proceed herein, upon his voluntary withdrawal from AISD prior to the scheduled hearing, citing *Ron J. as next friend of R.J., a minor child v. McKinney Independent School District, et al*, for this proposition, 2006 WL 2927446 (E.D. Tex) (slip copy). After reviewing Petitioner's cited case, I note that the opinion was issued by a Magistrate and subsequently approved by the District Court absent timely opposition by the petitioner in that case. See *R.J. v. McKinney Indep. Sch. Dist.*, No. 04:05cv257 (E.D. Tex. October 11, 2006). Nevertheless, I do not find this persuasive authority under the facts of the case before me. First,

the Magistrate's opinion concerned different facts, namely where the student voluntarily withdrew from school prior to the hearing without further complication. *Id.* at 5. In the case before me, the student first withdrew, but later was involuntarily incarcerated, before the hearing, thus complicating the issue of whether his refusal to advantage himself of his due process rights was in fact voluntary. The student has demonstrated a long history of self-defeating behaviors including confusion about whether to attend school. He remained incarcerated when the hearing took place.

More importantly, though, the Magistrate's opinion contains what appears to be a plain contradiction of Congressional intent stated in IDEA as interpreted by the Fifth Circuit. IDEA's Child Find framework requires districts to offer, and in an appropriate case take steps to compel, evaluation of all students suspected of having a disability. 20 U.S.C. §1412(a)(3). Here, it has been concluded that the student was one as to whom the district was, as of the disclosure date of October 31, 2006, deemed to have knowledge that the student was a student with a disability for purposes of disciplinary placement change. The District was obligated to offer assessment, which it had done, but also, in this Hearing Officer's opinion under these circumstances, to seek compulsory evaluation. Thereafter, the parent could of course elect whether to make the student available for services, and the district would be relieved of its obligations under IDEA. 20 U.S.C. §1414(a)(1)(D)(ii).

The Magistrate's broadly-stated interpretation of IDEA, reflecting that "parents cannot be compelled to have their child tested ...," is an interpretation that this Hearing Officer is not prepared to adopt. The statement contradicts a number of Fifth Circuit decisions. Most recently, see *Shelby S. v. Conroe Indep. Sch. Dist.*, 454 F.3d 450 (5th Cir. 2006, cert. denied *Shelby S. v. Conroe Indep. School Dist.*, 2007 U.S. Lexis 57 (Jan. 8, 2007) (district is entitled to compel medical evaluation, and parent, to refuse services). The problem in the case before this Hearing Officer is that it is unreasonable to infer that a parent who has pursued

due process through an evidentiary hearing is a parent who intends to refuse services.

In Petitioner's Response to Respondent's MSJ, Petitioner points to the fact that Petitioner is seeking compensatory relief in this dispute and the student and parent continue to reside within the school district after the student's withdrawal from AISD. Petitioner argues that Petitioner's compensatory claims survive in a situation where the parent and student remain within the school district and there is a possibility of meaningful application of relief in the future. I agree with Petitioner and find authority to support this position. See, e.g., Anthony F. v. Goliad ISD, 34 IDELR 133 (SEA TX 2001); Northside Independent School District, 103 LRP 17160, (SEA TX 2003).

### **Petitioner's Burden**

Respondent claims that, in the alternative, Respondent's Partial Motion for Summary Judgment should be granted as Petitioner did not meet his burden at hearing to prove that the student is a student eligible for special education and needed special education services. As a result, Respondent claims Petitioner is unable to sustain a claim for FAPE and obtain compensatory relief. In response, Petitioner argues that Respondent did not meet its "child find" obligations and that AISD denied the student a FAPE as a matter of law. I agree with Petitioner that Respondent did not meet its "child find" obligations for the time period after September 11, 2006. I also agree that AISD failed to provide the student with a FAPE by not invoking procedural safeguards that would have clarified once and for all for this parent, the school district's undeniable right to evaluate the student and would have brought the parent necessarily into the decision-making process. 20 U.S.C. §1415(f)(3)(E)(ii). Only after that right had been established, in my view, would the parent's refusal to make the student available – again, this is a parent who has pursued procedural safeguards through a full evidentiary hearing – constitute a meaningful refusal. The circumstances are unusual, but in this Hearing Officer's opinion justify a finding that the school district's stated omission interfered with the parent's opportunity to participate fully in the decision-making

process. That is to say, to participate with a full understanding of the implications of the safeguards afforded the parent as well as the rights of the District.

Under this case's very unusual facts, where the school district before the due process hearing had deemed knowledge of a disability under IDEA, Respondent was free to state this claim in the hearing or otherwise and have the claim heard with little delay, and where the parent previously refused consent for whatever reason, the school district's only avenue to discharge its "child find" duty would be to utilize available safeguards to compel evaluation and thereby compel parent participation. Frankly in this unusual situation, this Hearing Officer sees no alternative to resolve the issue of eligibility, and whether the parent (and student) wish to avail themselves of services. Under IDEA's framework, these questions are essential and fundamental.

Of course, in a case such as this it is not Petitioner's obligation to prove that that student has an eligibility-conferring disability, only that the student meets a condition of suspected disability, or in the case of disciplinary placement change, other conditions as addressed heretofore that give rise to deemed knowledge by a school district. However, absent eligibility, it is not possible to charge the school district with a duty to provide FAPE, beyond its "child find" obligation and the obligation to provide for meaningful parent participation in decision-making.

In summary, the affirmative duty of the school district to fully evaluate the student in all suspected disabilities was triggered during disciplinary proceedings when the school district received notice sufficient to trigger deemed knowledge of special education eligibility when Petitioner filed his Request for Due Process. It became incumbent upon the school district to take steps to evaluate the student at that time, steps that undeniably were thwarted when the parent did not give parental consent for AISD's evaluation. The fault of AISD lay not with its decision to refer the student to the LST team and then rapidly completing the paperwork for obtaining parental consent by mid-October 2006, but instead in the school district's failure to utilize available procedures to override the lack of parental consent to ensure the school district discharged its duty to complete the

evaluation an expedited manner as previously discussed under 34 C.F.R. §300.527(d)(2). (Emphasis added).

Finally, Petitioner did not sustain a claim for showing that the student was denied meaningful access to educational opportunities. The limited period of time between mid-October prior to the student's voluntary withdrawal from AISD on November 3, 2006, did not constitute such denial, even if the student's assessment had been completed and the student ultimately qualified for special education services.

Ultimately, the student will have to choose whether or not he is serious about completing his educational requirements for graduation. If the student returns to AISD, a completed IEE appears to this Hearing Officer to be the only conceivable option to deal with the evident mistrust in this case and to fulfill, or discharge, the District's obligation. It should assist all parties in deciding whether the student is a special education student in need of services within the school district.

## **Conclusions of Law**

1. Petitioner did not meet his burden to show that the student is entitled to special education and related services at no cost to the parents under the provisions of the IDEA, 20 U.S.C.A. §1400, et. seq., and its implementing regulations.
2. The student and his parents reside within the jurisdictional boundaries of Respondent, a legally constituted independent school district operating as a political subdivision of the State of Texas. Respondent is responsible for providing the student with a free appropriate public education. 20 U.S.C. §1412(a)(1); *Hendrick-Hudson District Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C.A. §1412; 34 C.F.R. §300.300; 19 T.A.C. §89.1001.
3. The educational program proposed by the school district is presumed to be appropriate. Petitioner, as the party challenging the educational program offered by Respondent, bears the burden of proof. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Alamo Heights ISD v. State Board of Education*, 709 F.2d 1153 (5th Cir. 1986). Petitioner did not meet the burden of proof in this case.
4. Petitioner met its affirmative duty for "child find" through mid-September 2006 at which time Respondent received notice of Petitioner's possible need for special education services when Petitioner filed his request for due process. 20 U.S.C. §1414(a)(1)(A); 34 C.F.R. §300.125(a)(1).
5. Once Respondent had notice of Petitioner's possible special education need for testing in September 2006, Respondent timely proceeded with steps to identify the

- student and offered to test the student for special education services by the end of September 2006 with an FIE.
6. When Petitioner withheld written consent for Respondent's FIE after October 2006, Respondent did not file a counter-due process request to override lack of parental consent and as a result, did not meet its affirmative duty for "child find" after October 2006 through the remainder of this proceeding. 34 C.F.R. §§300.505(b) and 300.507(a); 19 T.A.C. §89.1150.
  7. When Petitioner continued to withhold consent after AISD had deemed knowledge that Petitioner was an eligible student with a disability, AISD failed to meet its "child find" obligation by omitting to request an override of the parents' consent refusal.
  8. Respondent's duty to provide an educational program to the student ended on November 3, 2006, at which time the student voluntarily withdrew from the school district.
  9. As of the close of the record, Respondent has not timely evaluated the student in all areas of suspected disability by completion of a FIE and seeking to override the lack of parental consent to evaluate the student.
  10. Petitioner, through the pursuit of this hearing through the evidentiary phase and beyond, established by a preponderance of the evidence the inference that Petitioner intends to pursue services with AISD.
  11. Petitioner as a matter of law cannot be compelled to accept special education services from AISD.
  12. Petitioner met his burden to show that Petitioner is entitled to an IEE of the student at school district expense as compensation for a significant omission in the exercise of appropriate procedural safeguards by the AISD.
  13. Petitioner must make himself available for an independent evaluation to be delivered at public expense by AISD, such that all requirements for compliance with IDEA regulations governing evaluations, including identification of a provider who meets District criteria, can be fulfilled within 90 calendar days following entry of this Decision. Burlington School Comm. v. Department of Educ., 471 U.S. 359 (1985); Alamo Heights ISD v. State Board of Education, 709 F.2d 1153 (5th Cir. 1986); 34 C.F.R. §300.532(g).
  14. Should Petitioner fail to satisfy the preceding requirement, AISD's obligation to provide an IEE shall cease.
  15. Respondent is not entitled to a summary judgment.

## **Orders**

Based upon the record of this proceeding, the foregoing Findings of Fact and Conclusions of Law,

**IT IS HEREBY ORDERED** that Respondent make available to Petitioner an independent educational evaluation of the student, at public expense, to be performed by an evaluator who meets the qualifications of Respondent, which

qualifications shall be delivered to Petitioner in written form within 48 hours of receipt of this Decision.

**IT IS FURTHER ORDERED** that Petitioner, within 10 school days of this Decision, inform the District of the identity of an evaluator acceptable to Petitioner who meets District criteria, along with an executed consent authorizing said evaluator to complete all elements of a full and individual evaluation of the student.

**IT IS FURTHER ORDERED** that failure of Petitioner to comply with the required delivery of consent and identification of an evaluator acceptable to Petitioner who meets District criteria provided to Petitioner as ordered herein shall terminate and discharge all of AISD's obligations under this Decision and Order.

**IT IS FURTHER ORDERED** that should Petitioner, having granted consent for the independent evaluation, not make the student available for completion of all evaluation required pursuant to IDEA regulations governing full and individual evaluation by the independent evaluator within 60 days following the granting of consent, all of AISD's obligations under this Decision and Order are terminated and discharged.

**IT IS FURTHER ORDERED** that Respondent shall timely implement this Decision within 10 school days, or as otherwise provided herein, 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 Amended 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.

**IT IS FURTHER ORDERED** that all additional or different relief requested by Petitioner is DENIED.

**IT IS FURTHER ORDERED** that any findings of fact that are more properly characterized as conclusions of law, and any conclusions of law that are more properly characterized as findings of fact, shall be considered and shall have the same effect as if properly characterized.

**IT IS FURTHER ORDERED** that any and all additional or different relief not specifically ordered herein is DENIED.

Signed this 30th day of January 2007.

/s/ Mary Carolyn Carmichael

Mary Carolyn Carmichael

Special Education Hearing Officer

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

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# DOCKET NO. 008-SE-0906

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

PETITIONER

vs. BEFORE A SPECIAL EDUCATION  
HEARING OFFICER  
FOR THE STATE OF TEXAS  
AUSTIN INDEPENDENT  
SCHOOL DISTRICT  
RESPONDENT

## SYNOPSIS OF DECISION

**ISSUE:** A. Whether the school district received notice of the student's possible eligibility for special education services due to the student's failure of the \*\*\* grade twice and based on parentally-expressed concerns to the school district about the student's progress?

**CITATION:** 34 C.F.R. §300.527(a)-(b).

**HELD:** For the District

**ISSUE:** B. Whether the school district properly identified and timely assessed the student for special education services?

**CITATION:** 20 U.S.C. §1414(a)(1)(A); 34 C.F.R. §300.125(a)(1).

**HELD:** For the Student.

**ISSUE:** C. Whether the student's misbehaviors entitled the student to the protections under IDEA for a student not yet identified?

**CITATION:** 34 C.F.R. §300.527(d)(2).

**HELD:** For the Student.

**ISSUE:** D. Whether the school district provided a free appropriate public education to the student during the 2005-2006 school year and during Fall 2006?

**CITATION:** 34 C.F.R. §300.300(a)(1)-(2).

**HELD:** For the Student, in part; for the District, in part.

**ISSUE:** E. Whether the student is entitled to an independent educational evaluation

(“IEE”) at school district expense to assess the student in all areas of suspected disability?

**CITATION:** 20 U.S.C. §1414(a)-(c); 34 C.F.R. §§300.502 and 300.532.

**HELD:** For the Student.