

No. 022-SE-0906

*** B/N/F	§	BEFORE A SPECIAL EDUCATION
***	§	
PETITIONER	§	
	§	
VS.	§	HEARING OFFICER
	§	
EL PASO INDEPENDENT	§	
SCHOOL DISTRICT	§	
RESPONDENT	§	FOR THE STATE OF TEXAS

FINAL DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE STATEMENT OF THE CASE

Petitioner ***, by his next friend, *** (hereinafter Student or ***) brings this proceeding against Respondent El Paso Independent School District (hereinafter Respondent or EL Paso ISD) under the Individuals with Disabilities Education Act (hereinafter IDEA), 20 U.S.C. § 1400 *et. seq.*

Petitioner alleges that Respondent denied *** a free appropriate public education during the 2005-2006 school year based on the following claims:

1. Respondent failed to timely evaluate *** for special education services in October 2005;
2. Respondent failed to provide Petitioner with IDEA procedural safeguards;
3. Respondent failed to provide Petitioner written notice of refusal to provide a special education referral; and
4. Respondent violated the "Child Find" provisions of IDEA.

Petitioner seeks a Full Individual Evaluation (FIE), an order requiring the El Paso to provide written notice of any proposed initiation, change, or refusal to identify, evaluate, or place *** in a special education setting, an order requiring the District to provide Petitioner with procedural safeguards, an Admission, Review, and Dismissal meeting, and attorney's fees.

PROCEDURAL HISTORY

Petitioner filed her request for a due process proceeding on September 26, 2006. Petitioner was represented by Mark Berry of El Paso, Texas. Carol Helms, with the Albuquerque, New

Mexico office of Walsh, Anderson, Brown, Schulze & Aldridge represented the District.

The Hearing Officer scheduled a prehearing conference for October 24, 2006, and the due process hearing for November 9-10, 2006. On October 11, 2006, the Parties held a Resolution Meeting but were unable to obtain an agreement. On October 25, 2006, the prehearing conference was held; both Parties announced ready for hearing.

The due process hearing was held on November 9-10. At the end of the second day, the Hearing Officer requested written closing arguments and legal briefs concerning certain issues. There was general disagreement concerning certain procedural matters. In order to resolve the dispute, the Hearing Officer scheduled a third day of hearing to review the issues presented by the evidence. On November 17, 2006, a telephone continuation of the hearing was held.

At its conclusion, the Hearing Officer asked the Parties to brief certain legal issues and set a December 11, 2006, deadline for the briefs, and December 19, 2006, for Petitioner's Reply brief. Both Parties timely submitted post-hearing briefs.

Taking continuances into account, the deadline for the final decision is January 19, 2007. The Hearing Officer issued her decision on January 19, 2007.

FINDINGS OF FACT

1. *** is a *** year-old student residing within the El Paso Independent School District. El Paso is a political subdivision of the State of Texas and a duly incorporated independent school district. Currently, *** has not been evaluated for special education services.
2. In ***, *** was evaluated for speech articulation difficulties following the death his grandfather. After successful intervention, *** was dismissed from special education.
3. In 2001, during *** grade, *** was again referred for special education services by his mother and teacher. That school year, *** experienced difficulties due to poor attention and concentration, disorganization, and distraction, as well as difficulty producing written work. The 2001 evaluation found that *** did not qualify for special education services. However, in November 2001, *** was referred to the Student Teacher Assessment Team (STAT) for Section 504 services. *** currently receiving accommodations through this program.
4. In the Spring 2003, while in the *** grade, *** did not pass his Texas Assessment of Skills and Knowledge (TAKS). In the 2003-2004 school year, the Section 504 Committee noted that *** had Attention Deficient Hyperactive Disorder and provided accommodations for this.
5. During *** **and *** grade years (2003-2004 and 2004-2005 respectively) , he received services under Section 504. In the Spring 2004, *** took the *** grade TAKS test and did not pass. In the Spring 2005, *** took the *** grade TAKS test and did not pass. Despite *** inability to pass the TAKS test for *three years in a row*, the District did not refer him for a

Full Individual Evaluation (FIE) or to the grade placement committee that determines whether a student will go to the next grade after failing the TAKS.

6. Long before he failed the TAKS for the third time, the District should have referred *** for a special-education evaluation. In August 2005, *** mother asked the school to test him due to his math difficulties. In response to this request, the Assistant Principal referred Petitioner to the campus STAT Committee. The Assistant Principal wrote on *** class schedule that “Parent has requested possible sp[ecial] ed[ucation] testing.” The class schedule also had the notation of “(90 days)” indicating the time in which a school district must conduct an FIE and hold an ARD meeting to review the FIE., after receiving a request for a special education evaluation. The District did not provide Petitioner a copy of the IDEA procedural safeguards when she requested an evaluation.

7. The STAT Committee is a school-based pre-referral committee that reviews student information, implements interventions to meet the student’s needs, and documents the success of the interventions. If the interventions are unsuccessful, the Committee should refer the student for a special education evaluation. The STAT handbook states that a “referral for evaluation for consideration of special education should be a last resort.”

8. All students are referred to the STAT committee before they are referred for a special education evaluation. The STAT process, while a mandatory district requirement, is not a prerequisite to conducting a special education evaluation. Upon a parental request for a special education evaluation, the campus should begin the special education evaluation process while at the same time provide intervention strategies through the STAT Committee. There is no reason that both processes cannot occur simultaneously. This did not happen in *** case.

9. Certainly, no later than the end of August 2005 — after school personnel had received *** TAKS scores — the District should have referred *** for special-education testing. The District’s failure to do so violated the Child Find provision of IDEA. The number of times he failed the TAKS, and *** continued difficulties in reading, math, and science were clear signals that an evaluation was necessary and appropriate.

10. The campus STAT Committee met in October 2005 to review *** placement and Petitioner’s request for an FIE. In discussing the request, the District personnel described *** as a “bubble child”, meaning a student who was a few points away from passing the TAKS, and given enough chances would eventually pass the test. Petitioner never received a notice of the District’s refusal to evaluate ***. Similarly, the Committee did not provide Petitioner a copy of her procedural rights because members of the Committee did not believe they had denied the evaluation. They believed Petitioner had agreed to forego the evaluation and in lieu thereof, to continue trying Section 504 services.

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11. District personnel failed to follow their own STAT handbook at the October 2005 meeting. The District did not initiate a special education referral while trying new alternative strategies. The STAT Committee process and the referral request for a special education evaluation could co-exist and provide a student needed intervention strategies while awaiting the results of the evaluation.

12. In September 2006, the District set up a STAT meeting to address the parents' request for an FIE and to get the parent's consent for the initial evaluation. The day of the meeting, the parents canceled the meeting and a few days later filed their request for a due process hearing. In September 2006, El Paso was prepared to begin the evaluation process, but *** parents failed to provide consent.

13. Both Petitioner and Respondent questioned witnesses and presented evidence which was beyond the 2005-2006 school year pled by Petitioner. Both Parties presented evidence on the first few months of the 2006-2007 school year.

DISCUSSION

The IDEA entitles every student with a disability to receive a free appropriate public education (FAPE). The United States Supreme Court established a two-prong test for determining whether a school district provided a free appropriate public education. The first inquiry is whether the district complied with IDEA procedural requirements. The second inquiry is whether the student's education program is reasonably calculated to confer an educational benefit. *Board of Education of Hendricks Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S.Ct. 3034 (1982).

Petitioner alleges that Respondent violated the procedural guarantees of IDEA pertaining to an evaluation referral, notice of procedural safeguards, and notice of the District's refusal to provide a service. Under IDEA, procedural violations warrant a finding that a school has failed to provide a free appropriate public education only when they result in the loss of educational opportunity, i.e. result in substantive harm, or seriously infringe on a parent's opportunity to participate in the ARD process. *Adam J. v. Keller ISD*, 328 F.3d 804 (5th Cir. 2003).

I. Timely Evaluation

The IDEA's referral process requires that all children referred for an evaluation receive certain procedural safeguards. While IDEA does not set time limits for completing an initial

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evaluation, Texas has implemented standards ensuring that initial evaluations are conducted within a reasonable time. In Texas, a district has 60 days from receiving parental consent to complete an evaluation, and 30 additional days to convene an ARD.

The weight of the credible evidence shows that the District received Petitioner's request for referral in August 2005. It is clear that *** parents were frustrated by his lack of progress on the TAKS and that they were concerned about his math skills. After four years of failing the TAKS and with *** a year away, the parents were seeking a different alternative than that offered by the STAT Committee.

I find that the District violated the time lines for an initial evaluation because the matter was repeatedly referred to the STAT Committee. It's clear that the STAT Committee was set up to provide a student support and intervention before a special education referral is made. However, in practice, the Committee is merely an obstacle to parents who want to access the special education referrals. I agree with the District that referrals should not be taken lightly and a student should be provided intervening strategies before being referred for a special education evaluation. IDEA, however, gives the parent a right to seek an evaluation and overrides local district policy concerning intervening procedures.

I find that the District has the obligation to conduct an evaluation in a timely manner, and in August 2005, it failed to do so.

In September 2006, the District indicated that it would refer *** for a special education evaluation. By then, the parents were refusing to cooperate with the District. At the hearing, the District asserted that once it received Petitioner's request for an evaluation in September 2006, it was prepared to conduct the evaluation and needed parental consent to do so. By then, the parents had hired an attorney and filed a due process hearing request.

II. Child Find

Both federal and state law require a school district to identify, locate, and evaluate all children with disabilities residing within its jurisdictional boundaries. This rule is known as the "child find" provision. 20 U.S.C. Sec. 1414 (a)(1)(A).

The "child find" provision requires a school district to have procedures in place to ensure that "All children with disabilities ..., and who are in need of special education and related services, are identified, located, and evaluated." This provision imposes an affirmative duty on the school district to seek out and identify students with disabilities. Although parents may request a referral for such services, they are not required or obligated to do so. The parents' lack of

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referral does not alleviate the District's obligation to look for children who may qualify for special education services. 34 C.F. R. §300.125 (a)(1) and (2).

In the present case, Petitioner asserts that based on the facts and circumstances known to the District before Petitioner filed for a due process hearing, the District should have referred *** for a special education evaluation on its own initiative. The District counters that it complied with the "child find" provision by providing *** services through Section 504, providing needed services such as tutoring, TAKS assistance, and, in the past, special education services. I am asked to determine whether the "child find" duty required the District to refer *** for a special-education evaluation at an earlier date and, if so, the date by which such referral was required. Whether *** should have qualified for special-education services at an earlier date, or whether the student ever qualifies for special-education services, is not relevant to this determination.

The persuasive evidence of *** educational progress, or the lack thereof, is his failure to pass the TAKS for four years and his problems with math. It's highly unlikely that in August 2005, after receiving his failing TAKS scores, *** parents would not ask for an evaluation. District personnel believed that if *** attended more tutoring, he would not have trouble in math and would pass the TAKS.

This is a student who, in the past, participated in tutoring, TAKS reading classes, and TAKS Saturday camp. It is difficult to understand why district personnel believed that if *** simply attended more tutoring, his *** grades would improve and he'd pass the TAKS. An special education evaluation would have clearly indicated whether *** had a disability that was affecting his educational progress or whether he was merely a "bubble child".

The District's reliance on a purported agreement to continue *** in Section 504 and not send the parent's referral to the special education department reflected a mistake on the District's part. Testimony from all district personnel showed that the STAT process was not a necessary pre-referral process to begin an special education referral. Functionally, in this case, the STAT process became a precondition for evaluation. As a result, the District did not run both processes simultaneously as anticipated by the STAT handbook.

The Hearing Officer concludes that *** is entitled to a Full Individual Evaluation based on the District's failure to identify him in August 2005. The District did, however, meet its child find obligation in September 20, 2006 when it offered to conduct an evaluation.

III. Written Notice of District's Refusal to Provide a Service

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Petitioner alleges that the District's October 2005 refusal to refer *** for special education services triggered the requirement for the District to provide a §300.503 notice. The newly adopted federal regulations require districts to provide written notice to the parent when the district refuses to initiate, inter alia, the identification or evaluation of the child.

At the October 2005 STAT meeting, district personnel believed that *** parents were in agreement to continue the Section 504 services. Based on the mistaken belief that Petitioner no longer wanted a special education referral, the District did not send a written notice of refusal to provide a special education evaluation. The District should have performed both their STAT responsibilities and sent the referral to special education.

The Hearing Officer concludes that the District failed to send Petitioner the required written notification of its refusal to provide a special education referral.

IV. Failure to Provide Procedural Safeguards

Federal regulations require that the parent be provided with notice of procedural safeguards "upon initial referral for evaluation." The District never provided Petitioner a copy of the procedural safeguards during the 2005-2006 . Since *** was never referred for an initial evaluation, Petitioner never received a copy of the procedural safeguards.

The Hearing Officer concludes that when the request for a special education evaluation was made by Petitioner and discussed by the STAT Committee, the District should have provided Petitioner with a copy of the procedural safeguards as required by federal regulations.

V. Relief

Petitioner seeks an order requiring the District to provide *** a full and individual evaluation, a notice of her procedural rights, an order to convene an ARD to review the FIE, and an order requiring the District to provide written notice of any proposed initiations, changes or refusals.

Based on the evidence in this matter, I find that Petitioner's request should be granted. Petitioner is entitled to an Order requiring El Paso ISD to conduct an FIE, to hold an ARD meeting to review the FIE, and to provide Petitioner with a copy of the procedural safeguards.

CONCLUSIONS OF LAW

1. El Paso ISD, as a local education agency and political subdivision of the State of Texas, is subject to requirements of IDEA, 20 U.S.C. §1400 et seq., and its implementing federal and state regulations.
2. *** has resided within El Paso ISD at times relevant to the claims in this due process hearing and is entitled to a free, appropriate public education from the District.
3. The District did not adhere to the IDEA04 “Child Find” requirements. 20 U.S.C. §1412(a)(3)(A) and (B).
3. The District failed to provide Petitioner IDEA procedural safeguards during the October 2005 STAT meeting concerning parents’ request for special education.
4. The District failed to provide written notice of refusal to provide a special education referral.
5. The District failed to timely initiate an evaluation following receipt of the parent’s August 2005 referral for special education services.

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, this Hearing Officer hereby **ORDERS** that the relief sought by Petitioner is hereby **GRANTED IN PART AND DENIED IN PART**.

IT IS HEREBY **ORDERED** that Respondent shall convene an ARDC as soon as practical, but no later than ten school days from the date of this decision, to provide *** a full individual evaluation, to review and discuss the suspected areas of disability, and to review the consent for initial evaluation and the related testing. Respondent shall complete the FIE and the written report no later than 10 school days from the date of the ARD meeting. After the evaluation is complete, but no later than five school days from the date of its completion, Respondent is ordered to convene an ARD meeting to review the FIE.

IT IS FURTHER ORDERED that Petitioner shall provide consent for an initial evaluation at the initial ARD meeting held in accordance with this Order, but no later than one school day after the meeting. If Petitioner fails to provide the consent for an initial evaluation, El Paso ISD shall be relieved of its obligation to evaluate until Petitioner provides her consent. Once the consent is provided, the time lines provided in this Order shall apply.

All other and further relief not expressly granted herein is hereby **DENIED**.

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IT IS FURTHER ORDERED that El Paso I.S.D. shall timely implement this decision within 10 school days in accordance with 19 TAC §89.1185(q) and 34 CFR §300.514. The following must be provided to the Division of Complaints Management at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this decision: (1) documentation demonstrating that the decision has been implemented; or (2) if the time line 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 time line, and a signed assurance from the superintendent that the decision will be implemented.

Finding that the public welfare requires the immediate effect of this Final Decision and Order, the Hearing Officer makes it effectively immediately, pursuant to 19 Tex. Admin. Code §157.5(n).

SIGNED and **ENTERED** this 19th of January 2007.

Olivia B. Ruiz
Special Education Hearing Officer

NOTICE TO THE PARTIES

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision made by the Hearing Officer, or the performance thereof by any other party, may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States, as provided in 20 United States Code (USC), §1415(i)(2). A civil action brought in state or federal court under 20 USC, §1415(i)(2) must be initiated not more than 90 days after the date the Hearing Officer issues his or her written decision in the due process hearing. 19 Tex. Admin. Code §89.1185(p).

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SYNOPSIS

Issue One: Whether El Paso I.S.D. failed to provide notice to the parent of its refusal to conduct a special education referral as required by 34 C.F.R. §300.503.

Held: For the Petitioner.

Citation: 34 C.F.R. §300.503

Issue Two: Whether El Paso I.S.D. failed to provide notice of procedural safeguards to the parent as required by 34 C.F.R. §300.504.

Held: For the Petitioner.

Citation: 34 C.F.R. §300.504.

Issue Three: Whether or not the District adhered to the IDEA04 “Child Find” requirements.

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Held: For the Parent

Citation: 20 U.S.C. §1412(a)(3)(A) and (B)

Issue Four: Whether El Paso I.S.D. failed to provide timely evaluation as required by 34 C.F.R. §§300.124 and 300.320.

Held: For the Petitioner.

Citation: 34 C.F.R. §§300.124 and 300.320