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# DOCKET NO. 160-SE-0207

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

PETITIONER

vs.

ECTOR COUNTY INDEPENDENT

SCHOOL DISTRICT

RESPONDENT

BEFORE A SPECIAL EDUCATION  
HEARING OFFICER  
FOR THE STATE OF TEXAS

## DECISION OF THE HEARING OFFICER

### **Procedural History**

Petitioner<sup>1</sup> submitted the above-captioned due process complaint to the Texas Education Agency on February 23, 2007. The case was assigned and filed by this Hearing Officer on the same date, that being the date on which Respondent was deemed to have received notice of the complaint. This Hearing Officer sent notice of scheduling deadlines to the parties on February 28, 2007, and set the case for hearing on April 10, 2007, with a decision due date of May 9, 2007. The parties attended a resolution meeting on March 10, 2007, in which Petitioner's complaint was not fully resolved. The parties jointly requested a continuance of the trial setting to undertake mediation. The request was granted. The hearing was continued by agreement to July 16, 2007, with a disclosure date of August 15, 2007. The hearing convened on July 16, 2007, and evidence was received as scheduled but for Petitioner's expert. The hearing recessed until July 25, 2007, at

which time testimony of Petitioner's expert was received and the record of evidence was closed. Counsel requested the opportunity to present closing argument in written form, which request was granted. The decision deadline was extended to September 7, 2007, and thereafter to September 21, 2007, to accommodate post-hearing motions.

<sup>1</sup>Petitioner herein refers to the student, appearing by and through the student's parent as Next Friend. Petitioner herein will be referred to as "student" when reference is made specifically the eligible child, and "parent" when referring specifically to the student's parent and Next Friend.

### **Petitioner's Complaint and Relief Request**

According to the allegations of Petitioner's original complaint for due process hearing, which was found to be sufficient by order of March 14, 2007<sup>2</sup>, Respondent Ector Count I.S.D. ("ECISD") violated the student's right to a free, appropriate public education by failing to provide appropriate and timely assessment to determine the student's eligibility under the classification of learning disabled ("LD") despite indications that the student had a learning disability; failure to provide appropriate IEP objectives in academic subjects affected by the student's disability; failure to provide a functional behavior assessment ("FBA") to address the student's behaviors resulting from his disability; failure to provide appropriate behavior consequences for the student; failure to provide related services or supplementary aids and services to address the student's disability-related behaviors; and failure to provide appropriate supplementary aids and services in the form of an inclusion teacher in order for the student to be educated in the least restrictive setting for math instruction. As relief Petitioner requested an independent educational evaluation; a FBA, a behavior intervention plan, and counseling; appropriate supplementary aids and services in math; appropriate IEP goals and objectives; and one year of compensatory educational services.

<sup>2</sup>Respondent filed a Response to Petitioner's complaint, styled only as ECISD's "Response ...." The style and title of the document did not disclose that the document contained objections to the sufficiency of the complaint. A response as such requires nothing from the hearing officer, whereas an objection requires a specific ruling. Respondent's sufficiency objections were not noted for the record until March 14, 2007, at which time they were denied by order of the undersigned.

## Findings of Fact

1. Student resides within Ector County I.S.D. ("ECISD") and is enrolled in the District. ECISD is a public school district subject to requirements of the IDEA and its implementing federal regulations as well as to the Rules of the Texas Commissioner of Education.
2. The student is eligible for special education with the classification of Other Health Impaired due to \*\* for which student has taken medication. Petitioner's Exhibit ("P")-9, P-1A, P-21, P-23.
3. The student has exhibited behavior problems to some extent throughout student's school career in ECISD, which has considered student to be immature. P-37; Tr. 62, Tr. 107.
4. The student has been instructed in the objectives of the state-mandated general education curriculum in all subject matter areas at all times relevant, with some modifications affecting instruction and classroom assessments. P-27, P-33, P-38.
5. In May 2005, at the conclusion of the student's \*\* grade year, the student was scheduled for the \*\* grade year to receive math in a resource setting, and to have alternative assessment in Reading, Writing and Math in lieu of mandated general-education grade-level statewide assessment ("statewide assessment"). Student's Admission, Review, and Dismissal Committee ("ARDC")<sup>3</sup> met in September 2005 to update instructional modifications for \*\* grade. The only modification addressing behavior was to be "clearly-defined consistent limits." P-32, P-33.

<sup>3</sup>The ARDC, defined under Texas regulations at 19 T.A.C. §89.1050, is the group of individuals referred to in federal regulations at 34 C.F.R. §300.321 as the "IEP Team."

6. In November 2005 the student's ARDC met and agreed, by consensus, to re-schedule the student to receive regular grade-level statewide assessment in Reading and Writing. Alternative grade-level assessment was left in place for Math because the alternative assessment used a less distracting format and had fewer items. The student was maintained in student's schedule of general education classes for all subject matter areas except Math, where student was to attend a resource classroom one period daily consistent with the May 2005 IEP. Student was to receive modifications for general education classes including extra time, reduced assignments, content mastery, and testing by special education if needed. Again, only one modification addressed behaviors, specifically clearly-defined consistent limits. P-27, P-33; Tr. 174.

7. Immediately following the November 2005 ARDC meeting that continued the student in resource math, ECISD unilaterally changed the student's IEP placement from resource Math to inclusion Math in a general education setting with modifications. P-28.
8. ECISD informed the parent that ECISD had no Math resource classroom available for the student. For this reason, the parent did not make a further request for resource placement. Tr. 53, Tr. 70.
9. Prior to the November 2005 ARDC meeting teachers submitted notices with information for the Committee. In Health, the student was completing work and passing, but displayed a negative attitude, distractibility, easily frustrated, poor behavior, and short attention span. Specific comments identified problems from talking, verbally arguing with other students, out of seat, and inappropriate noises. In English the student was failing, and had problem areas of excessive talking, disturbs others, inattentive, bad attitude, does not complete work on time, not prepared for class, poor test scores, disrespectful to others, and lack of effort. Problems in English were reported to ECISD by the student's teacher as early as mid-September 2005. P-29, P-30, P-31.
10. The student received variable grades during the 2005-2006 school year as of April 2006. P-35.

<b>Class Title</b>	<b>Cycle 1</b>	<b>Cycle 2</b>	<b>Cycle 3</b>	<b>Exam</b>	<b>Grade Avg</b>	<b>Cycle 1</b>	<b>Cycle 2</b>	<b>Cycle 3</b>	<b>Exam</b>	<b>Grade Avg</b>
<b>ENG 7</b>	**	**	**	**	**	**	**	**	**	**
<b>SS G7</b>	**	**	**	**	**	**	**	**	**	**
<b>PE 7</b>	**	**	**	**	**					
<b>EL GR 7</b>						**	**	**	**	**
<b>SCI G7</b>	**	**	**	**	**	**	**	**	**	**
<b>MATH G7</b>	**	**	**	**	**	**	**	**	**	**
<b>HL ED**</b>	**	**	**	**	**					
<b>PE 7</b>						**	**	**	**	**
<b>READ G7</b>	**	**	**	**	**	**	**	**	**	**

11. According to the final grades entered for the student in the 2006-2007 school year, the student failed two subjects– English 7 and EL-GR 7. P-35.
12. The student took the mandatory statewide testing in May 2006 in Reading and Writing on \*\* grade level. The student met minimum standards in Writing, but not in Reading. He was tested with alternative assessment in Math at \*\* grade level, and “met ARD expectations” scoring 17 correct items out of a total of 46 possible (approximately 37%). P-25, P-26

13. The student's parent met with ECISD administrative staff late in the 2005-2006 school year seeking to have the student retained in \*\* grade. ECISD denied the parent's request, but counseled the parent that if the student failed, student could be retained. The student subsequently failed to meet promotion criteria and was retained in \*\* grade. The parent declined to have the student participate in a summer school program ECISD offered that could have enabled the student to advance to \*\* grade despite student's failure to meet academic standards during the regular academic year. P-13; Tr. 100-105.
14. There are advantages and disadvantages to retaining a student who has failed to meet academic requirements of a particular grade. The advantages are academic, and are substantial; the disadvantages are mainly social. Tr. 104-105.
15. The student received testing throughout September 2006 for his three-year re-evaluation, which was reported out late in September 2006. The student's academic achievement in all basic skill areas including math calculation and reasoning, reading, and written expression tested in the low-average range, with standard scores of \*\* in written expression, basic reading, and reading comprehension, and \*\* in math calculation and math reasoning. P-21
16. The student's IQ composite score on a brief intelligence test used in the September 2006 assessment was \*\*. The student tested with a marked difference between verbal cognitive abilities, which were in the average range, and non-verbal cognitive abilities which tested well below the average range. The evaluation report makes no reference to that discrepancy. P-21
17. Reports submitted by teachers for purposes of the 2006 re-evaluation indicated the student had to be redirected in class; would tap on the desk or throw down notebook. Student appeared unorganized and not eager to learn. Student had a lot of excess energy. P-21
18. Recommendations from the 3-year re-evaluation included continued special education eligibility as Other Health Impaired, and providing extra time and opportunities to repeat instruction. P-21
19. ECISD obtained an eligibility form completed by the student's physician (date illegible) indicating the student's conditions of ADHD and seizures adversely affecting educational performance. P-23
20. Beginning the 2006-2007 school year ECISD scheduled the student in an "inclusion" Math classroom because no resource math class was available in the fall semester at the student's campus; ECISD assigned a support staff to the student's regular classroom that semester. The staff member was a general education paraprofessional - not a certified teacher and not a special education paraprofessional. ECISD re-assigned this staff member to a different setting for the spring semester, and supported the general education math inclusion classroom by assigning a "special education person" for 20 minutes per day to "satisf[y] the requirements of the inclusion program." ECISD did start a resource math class at the student's campus in the spring semester. P-14; Tr. 52-54, Tr. 61, Tr. 113-114, Tr. 145-146.
21. Teacher ARD report forms dated early in October 2006 indicated the student had behavior problems. Checklist comments indicate in Social Studies that the student did not use class time wisely, did not bring materials to class, was distractible,

- disorganized, and had a short attention span. Student was able to complete daily work with extra time. Student's attendance was rated good, as was rapport with peers. The report from English class described similar problem areas, indicating that the student "usually" completed work, completed home work, used class time wisely, brought materials, behaved appropriately, and had good attendance. The English teacher noted that the student appeared capable of doing the required work but was disorganized and in need of positive reinforcement. P-20.
22. The student's ARDC met in October 2006. The parent attended and expressed concern about the student's grades. The ARDC recorded that the student had not performed satisfactorily on statewide assessments. The ARDC continued regular \*\* grade statewide assessments for Reading and Writing, and alternative assessment in Math. All instruction was scheduled in general education settings. Content mastery was allowed as an optional service up to 30 minutes weekly. Instructional modifications included reduced assignments, extra time, specialized assistance out of class, reduced penalty for spelling/ grammatical errors, use of calculator and visual aids in math, and adapted testing.
  23. One behavior management modification was scheduled in the student's October 2006 IEP, namely clearly-defined consistent limits. P-24.
  24. The parent agreed with the IEP, after taking time to consider and consult school staff. P-24; Tr. 122-124.
  25. ECISD offered additional support for the student by way of tutoring before and after school hours; the student attended 32 tutoring sessions between late September 2006 and the end of the fall 2006 semester. As of March 2007 the student had not attended tutoring offered in the spring 2007 semester. P-14.
  26. After the fall 2006 semester the student's parent continued taking the student to school for tutoring, only to be told later by ECISD officials that the student had not attended. Later, the student told the parent that ECISD had cancelled the tutoring, and then that he no longer needed tutoring and refused to go. Tr. 82-84.
  27. The student's grade in math decreased after ECISD eliminated full-time inclusion support, and after the student quit attending tutoring sessions. P-14
  28. Generic counseling services are available for all ECISD students. The student did not participate in ECISD's counseling services of this nature, other than one contact that was initiated by ECISD staff and not by the student. P-14, P-15.
  29. A Math progress report from late January 2007 indicated the student had a grade average of 50. Problem areas included excessive talking, lack of effort, not prepared for class, disturbs others, inattentive, bad attitude, does not complete work on time, 4 missing assignments. A Reading progress report from the same time frame is not legible as to handwritten comments and the student's grade, but a checklist indicated the student was failing. Areas of concern from the checklist included excessive talking, lack of effort, disturbs others, inattentive, does not complete work on time, and missing assignments. P-19.
  30. Reading and Science progress reports in May 2007 show a current grade of \*\* in each class. Teacher remarks indicate excessive talking, lack of effort and (in Reading) poor test scores. The Science teacher indicated the student's talking had improved, but student still required repeated efforts to get assignments done. P-3

31. A progress report from Social Studies in May 2007 concerning the student indicates lack of effort, unprepared for class, poor test scores, incomplete assignments, inattentive, and does not complete work on time. The Student was failing Social Studies with a grade of \*\*. In May 2007, the District prepared a notice informing the parent that the student would not be promoted, or might need to attend summer school. P-3, P-4
32. The student's record of behavioral incidents in school during spring 2006 and during the relevant part of the 2006-2007 school year includes a log reflecting behavior-related parent contacts by ECISD, and the reason for the contact; a separate log of behavior incidents and consequences ECISD recorded; and narrative disciplinary action reports that ECISD staff completed. These reports reflect the following behaviors and consequences. P-2, P-3, P-4.

<b>Date</b>	<b>Behavior</b>	<b>Consequence</b>
2/10/06	Interrupting, defiant to teacher	Detention Hall
3/21/06	Tardies (3)	Detention Hall
3/23/06	Tardies (9)	Detention Hall
5/9/06	Tardies (3)	Detention Hall
5/16/06	Defiant, rude, refuse to follow directions	Detention Hall
5/18/06	Refuse to follow directions; making noise	Detention Hall
9/18/06	Tardies	Parent Contact
9/22/06	Excessive tardies (9/6, 9/15, 9/18, 9/22)	Detention Hall
9/27/06	Behavior, no book brought to class	Parent Contact
10/25/06	Behavior for subs	Parent Contact
11/9/06	Not doing work/essay	Parent Contact
11/29/06	Excessive tardies (9/6, 9/15, 9/18, 9/22, 11/2, 11/7, 11/8, 11/29)	In-Class Discipline
1/8/07	Talking out, interrupting teacher	Unspecified Consequence
1/9/07	Talking Out	Unspecified Consequence
1/11/07	Tardies (Behavior)	Parent Contact
1/22/07	Talking out, interrupting teacher	Time Out, Parent Contact
1/23/07	Excessive tardies (1/9, 1/11, 1/23)	Detention Hall
1/30/07	Disruption during award ceremony	Suspension Out of School (3 days)

2/6/07	Tardy x2	Student called Parent
2/14/07	Repeatedly talking out	Unspecified Consequence
2/28/07	Tardies	Parent Contact
3/1/07	Refusing to follow instructions, abusive or profane language	In School Suspension (3 days)
3/2/07	Tardies (3)	Detention Hall
3/8/07	Upspecified	In School Suspension
3/8/07	Came to class without materials	Unspecified Consequence
3/8/07	Tardies (6)	Detention Hall

33. Detention hall is a consequence that is imposed after regular school hours. Tr. 45.  
34. The student received the following grades during the 2006-2007 ( \*\* grade) school year.

<b>Class Title</b>	<b>Cycle 1</b>	<b>Cycle 2</b>	<b>Cycle 3</b>	<b>Exam</b>	<b>Grade Avg</b>	<b>Cycle 1</b>	<b>Cycle 2</b>	<b>Cycle 3</b>	<b>Exam</b>	<b>Grade Avg</b>
<b>SS G7</b>	**	**	**	**	**	**	**	**	**	**
<b>READ G7</b>	**	**	**	**	**	**	**	**	**	**
<b>SPEECH 7</b>	**	**	**	**	**					
<b>PE</b>						**	**	**	**	**
<b>SCI G7</b>	**	**	**	**	**	**	**	**	**	**
<b>MATH G7</b>	**	**	**	**	**	**	**	**	**	**
<b>PE 7</b>	**	**	**	**	**					
<b>ART GR7</b>						**	**	**	**	**
<b>ENG 7</b>	**	**	**	**	**	**	**	**	**	**

35. The student received a psychological evaluation in June 2007, requested by the parent that included intellectual and academic assessment using standardized tests, as well as assessment with measures of behavioral and emotional functioning. The student's cognitive assessment resulted in a low-average composite standard score of in verbal comprehension; average standard scores of in perceptual reasoning and \*\* in working memory; and a below-average standard score of \*\* in processing speed. These results added up to a low-average IQ score of \*\*. P-1A
36. The June 2007 evaluator used measures to assess academic achievement that were different from those ECISD used in September 2006. In the June 2007 evaluation,

the student received the following standard scores and grade equivalent scores in the academic achievement areas assessed, as indicated. P-1A

<b>Cluster/Test</b>	<b>Standard Score</b>	<b>Grade Equivalent</b>
Letter/Word Identification	**	**
Reading Fluency	**	**
Calculation	**	**
Math Fluency	**	**
Spelling	**	**
Passage Comprehension	**	**
Applied Problems	**	**
Academic Knowledge	**	**
Broad Reading	**	**
Broad Math	**	**
Academic Skills	**	**

37. The student's parent requested and initiated June 2007 evaluation; this evaluation was not requested by nor coordinated with ECISD, nor was the evaluation conducted to meet requirements of an educational evaluation or to support classroom recommendations. Tr. 192-193.
38. In May 2007, the student passed the modified SDAA examination in Math at the \*\* grade level by getting 18 items correct out of 46 total (approximately 39%). The student took the regular statewide Reading assessment at the \*\* grade level and did not pass. The student was absent for the Writing assessment, which he had passed previously at \*\* grade level. P-6; P-7, P-8.
39. By current assessment the student does not qualify for special education eligibility under the learning disabled classification based on the discrepancy between his IQ and achievement. Student's achievement measured by standardized testing is generally consistent with his IQ. P-1A.
40. The student has a generalized anxiety disorder and social skills deficits. Student has problems at home and at school that are essentially reflecting these disorders, as aggravated by parent-child problems. Student's condition involves a type of emotional disturbance. Tr. 178-194.
41. In the resolution meeting of March 2007, ECISD offered to convene an ARDC to schedule a functional behavior assessment; the student's parent did not agree with this resolution offer by ECISD, nor with any other offers. ECISD did not thereafter, nor at any time previously, conduct or offer to conduct a functional behavior assessment to develop a behavior intervention plan for the student. ECISD determined that a functional behavior assessment is unnecessary. ECISD has not conducted a manifestation determination review regarding the student's behavior problems. P-24; Tr. 52, Tr. 59.
42. ECISD does not require a prior determination that behavior is disability-related, in order to conduct an FBA on a student or develop a BIP. ECISD initiates FBA referrals through the ARDC process, although this procedure is not required. Tr. 144.

## Discussion

Generally speaking, IDEA entitles every child with a disability to receive individualized instruction along with sufficient related and supportive services to permit the child to benefit from the instruction. 20 U.S.C. 1412(a)(1); *Board of Education v. Rowley*, 458 U.S. 176 (1982). IDEA also mandates procedural safeguards to ensure that parents have the opportunity to participate meaningfully in development of an individualized education plan (IEP) governing instructional objectives and services for the child. 20 U.S.C. 1414(d), 1415; *Rowley, supra*; *Honig v. Doe*, 484 U.S. 305 (1988). The Fifth Circuit in *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-48 (5th Cir. 1997), offered guidelines to gauge LEA compliance with IDEA requirements. The child's IEP must be designed specifically for the child's unique needs, must be individualized based on assessment and performance, and must be supported by services that permit the child to receive meaningful benefit from instruction. The IEP must be delivered in the least restrictive environment (LRE), and in a collaborative and coordinated manner by the key "stakeholders." And whether the child in fact achieves or fails to achieve positive academic and non-academic benefits is relevant in determining compliance. A school district's proposed IEP is presumed to be appropriate. A parent who challenges the IEP must prove by a preponderance of evidence that the IEP was not developed according to procedural safeguards, or that the IEP failed or would fail to provide a free and appropriate public education in the least restrictive environment. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983). A one-year statute of limitation applies to Petitioner's claims. Petitioner's particular alleged violations will be discussed separately.

- I. Petitioner alleges that ECISD failed to provide appropriate and timely assessment to determine the student's eligibility under the LD classification, and the student's educational need, despite indications that the student might be eligible. Currently, determination of eligibility under the LD classification defined in 34 C.F.R. §300.8(c)(10) is governed by several regulations. Rules of the Commissioner of Education at 19 T.A.C. §89.1040(c)(9)(A) are read in tandem with 34 C.F.R.

§300.307(a)(1). Local education agencies (“LEAs”) can use the procedures of §89.1040(c)(9)(A) but the state agency, including the undersigned, cannot mandate their use by LEAs for the determination of LD eligibility.

The Rules at 89.1040(c)(9)(B) are not inconsistent with §300.309(a)(2). *Id.*<sup>4</sup> §300.309 provides that a student may be eligible for LD eligibility if the student does not achieve adequately for the child’s age (as opposed to intellectual ability) or meet state-approved grade level standards when provided with instruction appropriate for the child’s age in any of a variety of areas including basic reading skill, reading fluency, reading comprehension, math calculation, or math problem solving. §309(a)(1). Alternatively the child may be eligible for exhibiting a pattern of strengths and weaknesses implicating performance and/or achievement relative to age or grade-level standards, or intellectual development that is determined by the student’s ARDC to be relevant to identification of a specific LD using assessment that is appropriate according to the regulations. §309(a)(2).

<sup>4</sup>Proposed Commissioner’s Rules regarding eligibility under the LD classification track the language of §300.309.

LEAs are not presently prohibited from applying the so-called “discrepancy model” of 19 T.A.C. §89.1040(c)(9)(A) and that model was used for recommending no LD eligibility in both assessments conducted within the actionable time period, including the assessment obtained by the parent. The student did not qualify under the discrepancy model in either assessment because student’s low-average intellectual functioning did not generate a significant discrepancy with measured achievement. However, the questions of LD eligibility determination under §300.309 apply and must be addressed regardless of which permissible assessment methodology LEAs may use. In other words, factors spelled out under §300.309 must be examined to determine if the student satisfies the definition of §300.8(c)(10), regardless of whether the LEA used a discrepancy model, responsiveness to intervention, or another scientifically-based determination regarding a pattern of strengths and weaknesses. 71 Fed. Reg. 46543, 46650-46655. (August 14, 2006). The presence of an emotional disturbance that is responsible for the student’s learning problems would rule out LD eligibility, but the presence of ADHD or serious emotional disturbance **per se** does not necessarily do so. *Id. Letter to Williams*, 21 IDELR 73 (OSEP 1995).

Under this case’s facts, Petitioner has met his burden to establish that ECISD failed to address the considerations of §300.309 in the ARDC of October 2006 and make a determination concerning the student’s potential LD eligibility despite the student’s unexplained failure of age-appropriate statewide testing in Reading and inability to pass the regular statewide testing in Math. ECISD’s LD testing method is not prohibited at this time, but there is no evidence in assessment documents, ARDC deliberations, or in any other documentation in evidence, nor did ECISD offer testimony, that the potential considerations for LD eligibility under §300.309 were ever discussed by any assessment personnel, ARDC, or

other personnel in ECISD. Now, the student has twice failed the statewide Reading assessment at \*\* grade level, and despite passing the state alternate assessment according to ARDC expectations, has tested with the alternate assessment in a manner that indicates apparent **de minimis** progress. The foregoing begs the question why the student being educated in the statewide curriculum on grade level in math, with no individualized goals and objectives different from statewide curriculum objectives for general education, is unable to pass statewide testing in Math. There are probably reasonable answers to these questions, but no evidence the student's ARDC ever attempted to address them on an individualized basis. Rather ECISD decided to implement an inclusion model and the student was placed there in math without individualized determination of whether student had particular learning problems that might require more than a teacher's aide in the classroom for support.

The student's pattern of grades poses additional discrepancies in light of both statewide and standardized test scores. In the 2005-2006 school year the student passed fall semester Reading with satisfactory grades, but failed second semester Reading with two grading periods of significantly failing grades. The student received passing averages in the \*\*s in resource Math. In the 2006-2007 school year the student received grades mostly in the low \*\*s in Math, but then made a grade of \*\* on his final examination in Math. In Reading the student's semester averages for both semesters was \*\*, and student failed the fall semester examination. The student achieved generally better standardized test scores than would be expected from student's grades, including in the September 2006 evaluation. So in sum, the student's performance on statewide testing is not consistent with student's age, nor is it consistent with student's instruction or standardized test scores, in Reading and Math. The questions, under IDEA's revised LD eligibility criteria, concern why the student fails to perform consistent with student's age and grade cohort on statewide curriculum measures despite grades, standardized test scores, and student's ARDC's determination that student belongs in general education without modification of the regular statewide curriculum.

- II. Petitioner alleges that ECISD erred by failing to provide appropriate IEP objectives in academic subjects affected by the student's disability. The student was educated in general education under the state-mandated curriculum in all subject matter areas by unanimous decision of each ARDC that met during the actionable time frame. The student's ARDC did not recommend content modification to the general curriculum, even when the student was scheduled, albeit briefly, in resource Math and the parent agreed with the ARDCs decisions. No IDEA provision or regulation requires LEAs or ARDCs to provide individualized academic goals and objectives for students whose participation in the general curriculum has been determined appropriate. The appropriateness of student's ongoing full participation in the general curriculum in all subject matter areas is an issue that requires examination. But Petitioner has not met his burden to show that the omission of individualized academic goals and objectives violated IDEA regulations.

- III. Petitioner alleges that ECISD failed to timely provide a functional behavior assessment to address the student's behaviors resulting from student's disability, and tangential to this omission, failed to schedule appropriate behavior consequences in an individualized behavior plan for the student. Petitioner's allegation in this regard has merit. At the time of the student's November 2006 ARDC meeting, teacher ARDC reports were documenting negative attitude, distractibility, excessive frustration, and poor behavior. Teachers complained that student was coming to class unprepared, not completing work, getting poor test scores, not making effort, showing disrespect to others, talking out, out of seat, verbally arguing with other students, disturbing other students, and making inappropriate noises. Discipline records would have disclosed to the ARDC that the student had received consequences for 15 recorded tardies in the spring 2006 semester and that same semester had been written up and received consequences on three occasions up for rude, defiant refusals to follow teacher directions and making inappropriate noises in class. In the short time during the fall 2006 semester prior to the ARDC meeting the student had garnered in excess of eight recorded tardies and three discipline referrals necessitating parent contact. Student had failed \*\* grade, failed state-mandated assessment in Reading, and passed state-mandated Math assessment only by way of ARDC modifications despite being instructed in the general Math curriculum.

Following the November 2006 ARDC meeting, the student accumulated a minimum of 24 tardies through early March 2007, and been written up and given discipline consequences on approximately eight occasions for showing up to class without materials, talking out in class repeatedly, interrupting the teacher, refusing to follow instructions, using profane abusive language, and disrupting a school assembly. Student had six days of suspension, three in school and three out of school. For some incidents, student received discipline consequences that were not specifically documented. Within this time period, the student had at least 14 tardies and five disruptive behavior incidents between student's November 2006 ARDC meeting and the filing of Petitioner's due process complaint. Meanwhile it was known that the student had failed state-mandated assessment in reading, earned a low percentage of correct items on the alternative assessment scheduled by his ARDC in Math, been required to repeat \*\* grade due to student's failure to meet academic expectations in the 2005-2006 school year, and been characterized by teachers repeatedly and consistently as having classroom behavior problems and uncooperativeness.

- IV. Petitioner alleges that ECISD failed to provide related services or supplementary aids and services to address the student's disability-related behaviors, including inter alia an inclusion teacher to support the student's Math instruction in the least restrictive setting. Petitioner has met his burden to establish that ECISD provided inadequate services to address the student's apparent needs. While the evidence does not uniformly support the student's need for an inclusion teacher in particular, the evidence is compelling that ECISD should have conducted the FBA that Petitioner has implicated as a needed service in this case, and an individualized behavior management plan. The student's behavior problems

- manifested in school as described by teachers and in discipline reports suggest the student has both disrupted and failed in some respects to benefit from his learning environment. The parent also establishes that the student's behavior in and out of school, which, the evidence suggests, the parent cannot control any better than ECISD has, prevented the student from taking advantage of tutoring services offered after or before school by ECISD causing educational detriment.
- V. As relief Petitioner requested an independent educational evaluation; a functional behavior assessment, behavior intervention plan, and counseling; appropriate supplementary aids and services in math; appropriate IEP goals and objectives; and one year of compensatory educational services. Relief is appropriate where the student has been denied access to a free, appropriate public education. Here Petitioner has established that ECISD denied the student a free, appropriate public education on substantive grounds. 34 C.F.R. 300.513(a); *Michael F., supra*. For reasons stated the student's IEPs from November 2006 forward have not been individualized based on assessment and performance principally because appropriate assessments meeting IDEA requirements have not been obtained to address ongoing behavior problems, school failure, and failure to meet expectations of state-mandated testing despite the student receiving grade-level instruction in Reading and Math. Additionally, it also appears convincing that the significant input of stakeholders, namely the student's general education teachers, regarding the student's disruptive classroom behaviors was not taken into account by the student's ARDC, particularly as of October 2006. At that point there were consistent records demonstrating the presence of behaviors with undeniable potential to interfere with the student's instruction. Nevertheless no individualized positive behavior interventions nor indeed any individualized behavior interventions of note were considered according to the record and the testimony.

The allegation that the student was not educated in the least restrictive environment presents significant issues. It appears that a decision was made to change the student's placement from resource to inclusion math not because of an individualized determination of the student's instructional needs in math – at least no determination of which there is any evidence – but rather because of ECISD's goal to strengthen their inclusion program. This is a laudable goal, but it does not take precedence over individualized determinations for students. And there is the question of progress. Here, the record is confusing. The student's grades don't match his standardized test results, which would tend to predict average grades, not "barely passing" grades the student received in many instances. And neither student's grades or standardized test results match student's statewide test performance in Reading and Math. Both grades and test results would tend to predict the student passing statewide tests, but that has not occurred. Standardized test results do not test the curriculum objectives that the student is actually working on; statewide testing is keyed to the statewide curriculum, and provides a more credible assessment of the student's progress in school. The student's pattern of passing classroom grades in Reading and Math is odd. Grades would suggest the greater likelihood of passing scores on statewide testing that nevertheless have proved elusive for this student. I find the student's classroom

grades – in some instances inconsistent – to be less credible estimates of actual achievement than the results of statewide tests in this student’s case.

Not all school failures suffice to establish a denial of educational opportunity. Here, however, the student has twice failed statewide testing in Reading, and is plainly struggling with even a modified statewide test in Math despite student’s ostensibly passing math classes with, for example, at least one remarkably high final exam grade. Meanwhile, the student passed the statewide test in Writing. The inference is supported, that the student is receiving de minimis benefit from student’s education in two significant areas: Reading and Math. This suffices to support a finding that the student has not received a free, appropriate public education.

The issue of relief is difficult in this case. Relief is an equitable matter that should take into account a variety of factors including the conduct of both parties. *Student W. v. Puyallup School Dist. No. 3*, 31 F.3d 1489, 21 IDELR 723 (9th Cir. 1994). Much of the relief Petitioner requests is not supported by a record that raises more questions about appropriate services for this student than it answers. In such cases, evaluation is appropriate.

ECISD must reimburse the cost of evaluation obtained by the parent in June 2007 and to consider that evaluation in educational planning for the student. ECISD also must obtain and consider an independent functional behavior assessment by a licensed specialist in school psychology agreeable to the parent who meets ECISD criteria and who is available within a reasonable time frame, which assessment will include recommendations for an individualized behavior intervention plan, a recommendation regarding the student’s eligibility under the emotional disturbance classification, and a recommendation regarding the student’s need for counseling as a related service. This evaluation should be completed within 30 calendar days or otherwise by written agreement of the parties. The evaluation by the licensed specialist in school psychology is to supplement from the educational standpoint, and not duplicate, evaluation obtained by the student’s parent. ECISD’s ARDC will use all assessment information to develop a behavior intervention plan for the student as appropriate and consider appropriate eligibility and other services in an ARDC meeting within 10 school days of receiving the evaluator’s report. Independent evaluations and reimbursement herein are ordered as compensatory education.

ECISD must use the foregoing evaluation data and other data to conduct its own evaluation of the student’s eligibility for services under the LD classification that comports with IDEA criteria, which evaluation will be subject to the same requirements as would any other evaluation of the District. This evaluation will determine the extent if any of the student’s appropriate participation in the general curriculum in Reading and Math.

Petitioner seeks compensatory services, presumably in the nature of tutoring and

counseling. Tutoring and counseling may be found appropriate after assessments are completed, but at this point the record does not preponderate to support them. Counseling specifically for educational purposes was not part of the recommendations of the parent's evaluator, who acknowledged that his evaluation, while of value for some educational purposes, was not an educational evaluation as such. The evaluator was not in a position to assess the need or appropriateness of any tutoring program, nor to fully evaluate in-school behaviors, or fully assess the student's educational need for counseling services. Additionally, compensatory educational services such as tutoring, whether from a public or private source, are of questionable merit where ECISD previously offered tutoring for the student, and the parent chose not to secure or was unable to secure the student's participation in tutoring. *Student W., supra*. So Petitioner is not convincing that the student requires anything more than the same type of tutoring that ECISD has already made available and, the hearing officer assumes, will continue to make available.

## **Conclusions of Law**

1. Ector County I.S.D., 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. Student is an IDEA-eligible student enrolled in Ector County I.S.D. and is entitled to a free, appropriate public education provided by Ector County I.S.D. in the least restrictive environment.
3. Ector County I.S.D. failed to provide appropriate evaluation for student to determine eligibility based on learning disability classification, and failed to provide an appropriate functional behavior evaluation of the basis of student's school behavior problems.
4. Ector County I.S.D. did not make student's placement decision for Math instruction on the bases of his individual needs.
5. Ector County I.S.D. has failed to provide sufficient services or appropriate services to enable student to receive more than de minimis benefit in Reading and Math.
6. Ector County I.S.D. denied student a free appropriate public education

## **Orders**

In consideration of the foregoing,

IT IS ORDERED that Ector County I.S.D. will reimburse the cost of private evaluation by Dr. \*\* obtained by Petitioner's parent and Next Friend upon presentation to Ector County I.S.D. of proof of payment for such evaluation, or proof of Petitioner's legal obligation for such payment to Dr. \*\*. Payment may be

made to Petitioner's parent or to Dr. \*\* as appropriate based on documentation provided to the District, within 45 days of receipt of such documentation.

IT IS FURTHER ORDERED that Ector County I.S.D. obtain a complete functional behavior assessment on student by a qualified licensed specialist in school psychology agreeable to the parent who meets District criteria, to obtain recommendations for appropriate eligibility and services including a specific behavior intervention plan and or counseling services for educational purposes. This assessment will be completed within 30 calendar days or otherwise by written agreement of the parties.

IT IS FURTHER ORDERED that Ector County I.S.D. convene an ARDC within 10 school days of completing the functional behavior assessment, or otherwise by written agreement of the parties, to propose, consider and schedule appropriate services for student.

IT IS FURTHER ORDERED that all independent evaluations including reimbursement are in the nature of compensatory educational services.

IT IS FURTHER ORDERED that upon receipt of functional behavior assessment results Ector County I.S.D. conduct an evaluation of student's eligibility for services under the learning disabled classification with recommendations for appropriate individualized curriculum content and modifications, and present results and recommendations of such evaluation to the student's ARDC within 30 days of receipt of the functional behavior assessment results.

IT IS FURTHER ORDERED that any and all other or additional relief requested by Petitioner herein is DENIED.

SIGNED this 19th day of September 2007.

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

JAMES N. HOLLIS

SPECIAL EDUCATION HEARING OFFICER  
FOR THE STATE OF TEXAS

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# DOCKET NO. 160-SE-0207

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

PETITIONER

vs.

ECTOR COUNTY INDEPENDENT

SCHOOL DISTRICT

RESPONDENT

BEFORE A SPECIAL EDUCATION  
HEARING OFFICER  
FOR THE STATE OF TEXAS

## SYNOPSIS OF DECISION

**ISSUE:** Whether Ector County I.S.D. failed to timely identify the student for appropriate special education eligibility as a student with learning disability.

**CITATION:** §300.309(a)(2)

**HELD:** For the Petitioner. The District failed to consider the factors delineated by federal regulations for determining eligibility under the classification of learning disabled.

**ISSUE:** Whether Ector County I.S.D. failed to provide the student with a timely functional behavior assessment for a behavior intervention plan.

**CITATION:** 34 C.F.R. 300.304(c)(4)

**HELD:** For the Petitioner. The District failed to take steps to assess the reason for persistent behavior problems reported by classroom teachers, the student's refusal to participate in needed tutoring, and large numbers of tardies despite the student consistently receiving failing or borderline failing grades, failing to meet statewide academic standards in Reading, and failing to master statewide assessment requirements in Math.

**ISSUE:** Whether Ector County I.S.D. failed to provide the student with appropriate individualized goals and objectives.

**CITATION:** 34 C.F.R. 300.320

**HELD:** For the District. The student was placed in general education and scheduled to receive instruction under the standard statewide curriculum. IDEA does

not require individualized goals and objectives where the student is educated according to the general curriculum.

**ISSUE:** Whether Ector County I.S.D. failed to provide A.R. with appropriate support services including implementation of an appropriate behavior intervention plan and appropriate counseling.

**CITATION:** 34 C.F.R 300.104.33

**HELD:** For the Petitioner, in part. The evidence indicated that the student needed a functional behavior assessment and an individualized behavior plan. The evidence did not, however, establish that the student required counseling for educational purposes.