

ALIEF INDEPENDENT § BEFORE A SPECIAL  
EDUCATION §  
SCHOOL DISTRICT § HEARING OFFICER FOR THE  
V. §  
STUDENT § STATE OF TEXAS

**DECISION OF THE HEARING OFFICER**

I. Statement of the Case

Alief Independent School District (hereinafter referred to as "Petitioner" or "School District") brings this appeal through its attorney J. Erik Nichols of the law firm Feldman & Rogers, LLP in Houston, Texas, pursuant to the Individuals with Disabilities Education Improvement Act 20 U.S.C. § 1400 *et seq.*, (hereinafter referred to as "IDEA"), against Respondent Student (hereinafter referred to as "Respondent" or "Student") . Petitioner filed a written request for a due process hearing which was received by the Texas Education Agency on August 17, 2007. This case is the last of three requests for special education due process hearings concerning School District and Student.

In the first case, Docket No. 141-SE-0207, School District filed a request for due process hearing which was received by the Texas Education Agency ("TEA") on February 5, 2007. In that case, Petitioner had been trying to obtain consent for evaluation and re-evaluation since the Admission, Review and Dismissal Committee meeting ("ARDC") on May 22, 2006, and Student's parent had refused consent. As relief in the due process hearing, Petitioner requested that Respondent be ordered to provide consent, or that Petitioner be authorized to override the parent's failure to provide consent and allow Petitioner to provide the student with a Full and Individual Re-Evaluation, psychological evaluation, and speech evaluation. Petitioner requested authorization to conduct the Student's three year re-evaluation for the purpose of providing the student with a free, appropriate public education. The Decision of the Hearing Officer in Docket No. 141-SE-0207 was issued on April 5, 2007, stating:

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer ORDERS that the relief sought by Petitioner is GRANTED as follows:

Respondent is authorized to undertake Student's reevaluation, including a full and individual evaluation, psychological evaluation, and speech evaluation.

Student did not participate in Docket No. 141-SE-0207 in either the prehearing conference or the hearing, did not disclose any evidence or make any arguments, and did not respond to the Decision of the Hearing Officer.

Subsequently, Student filed a Request for Special Education Due Process Hearing and Required Notice (“Petitioner’s Complaint”), Docket No. 273-SE-0507, with the Texas Education Agency on May 29, 2007, which was subsequently amended with leave from the Hearing Officer on August 20, 2007. In Docket No. 273-SE-0507, Petitioner Student raised the following issues concerning the special education identification, evaluation, placement, programs and services of Student under IDEA:

1. Petitioner maintains that Student has not received all proper written notices required by IDEA when School District refused to initiate or change the identification, evaluation, or educational placement of the Student or the provision of a free appropriate public education (“FAPE”) to the Student.
2. Petitioner complains that Student was not evaluated in all required areas, including the following:
  - a. Scotopic Sensitivity Syndrome (Irlen Syndrome) to address perceptual, neurological, and other health impairments;
  - b. Multiple Chemical Sensitivity (“MCS”) to address toxic environment(s), acute reactions to chemicals, food, and medications, as well as severe neurological problems, muscle and joint pain, memory and respiratory difficulties and other health impairments;
  - c. Asthma to address infections, allergies, other chronic conditions and other health impairments;
  - d. Complete physical examination to address overall health;
  - e. Adaptive/ Assistive Technology evaluation to address the needs and services to access areas and function within the educational environment;
  - f. Student’s identification and evaluation were not conducted in a timely fashion; and
  - g. Respondent did not conduct all required evaluations before proposing a program for the Student.
3. Petitioner asserts that Student did not receive the proper written notice required for refusal of requested services.

4. Petitioner states that because a complete evaluation of Student was not done regarding suspected or known other health impairments, the Student's Individual Education Program ("IEP") did not address all of his educational needs.

5. Petitioner alleges that Petitioner has not yet received all of the Student's educational records and some of the educational records that were received were not in good condition.

6. Petitioner alleged that Petitioner asked Respondent about extra services such as extended school year, because the Student was regressing, but Respondent refused.

As relief in Docket No. 273-SE-0507, Petitioner Student requested that Respondent be ordered to:

- a. Continue the educational placement of the Student in special education and related services.
- b. Continue Student's Life Skills Placement.
- c. Continue Student's Autism and Speech Impaired eligibility.
- d. Develop an appropriate IEP after a complete comprehensive evaluation to include, Irlen Syndrome, MCS, Asthma, and a complete comprehensive physical at Respondent's expense.
- e. Provide compensatory special education and related services, such as Extended School Year ("ESY"), Assistive Technology Resource, Speech Therapy, and education for regression.
- f. Reimburse Petitioner immediately for all expenses arising out of Respondent's noncompliance, including evaluations, therapies, tutors, and the cost of advocate services to advocate for Petitioner's legal rights.

In Docket No. 273-SE-0507, Petitioner Student did not disclose any evidence, nor did Student appear at the due process hearing nor present any evidence or arguments as to any of its claims before requesting dismissal of both Docket No. 273-SE-0507 and Docket No. 321-SE-0807 on October 8, 2007. The Hearing Officer dismissed only the Complaint brought by Petitioner Student in Docket No. 273-SE-0507, pursuant to Student's request.

The present case was originally consolidated with TEA Docket No. 273-SE-0507 on August 21, 2007. A telephone prehearing conference was held on September 7, 2007, and a Prehearing Order was issued on September 12, 2007. Petitioner School District timely disclosed on October 16, 2007, and the due process hearing was held on October 24, 2007 at the School District Administration Building. Petitioner requested the opportunity to file written closing arguments and it was agreed that Petitioner would file its brief on November 19, 2007. A Post

Hearing Scheduling Order was issued on October 26, 2007 setting forth the agreed upon briefing scheduled and confirming the Decision Due Date of Friday, December 21, 2007.

Petitioner filed the current Request for Special Education Due Process Hearing and Required Notice (“Complaint”) in response to claims in Docket No. 273-SE-0507 to establish that its evaluation of Student is appropriate under IDEA and to request an Order that Respondent is not entitled to an Independent Educational Evaluation (“IEE”) at public expense. School District requested a special education due process hearing pursuant to IDEA, 20 U.S.C. §1414(a)(1)(D)(ii)(I), and the Federal implementing regulations, 34 C.F.R. §300.507(a)(1) to establish that the Full and Individual Re-Evaluation (“FIE”) completed by School District is appropriate. Respondent further stated that it sought to confirm, despite the dismissal of Student’s complaint in Docket No. 273-SE-0507, that Student had been tested in all areas of suspected disabilities, that Student made meaningful educational progress during the 2006-2007 school year, and that the IEP developed for the 2007-2008 school year are appropriate to provide Student with a free appropriate public education (“FAPE”). Petitioner School District seeks a finding from the Hearing Officer that Petitioner has not been denied FAPE.

Finally, in consideration of the actions of and procedures employed by Respondent, Petitioner also sought to obtain a ruling that Respondent’s parents and advocates harassed School District throughout the process.

Respondent Student did not disclose any evidence prior to the due process hearing, did not appear at the due process hearing, and did not provide any evidence or argument following the due process hearing on or before the date for closing arguments. Therefore, all evidence and arguments presented by School District are undisputed.

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

## II. Findings of Fact

1. Student is a \*\* year old who resides within School District.
2. School District is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing Student a free appropriate public education in accordance with the Individuals with Disabilities Education Improvement Act, 20 U.S.C.A. § 1400, *et seq.*, and the rules and regulations promulgated pursuant to IDEA.
3. Student is eligible for special education placement, programs and services as a student who has autism and speech impairment.

4. Student attends \*\* school with current placement in the life skills classroom. Student participates in general education science, social studies, and physical education classes with the assistance of a para-professional.
5. The ARDC met on May 19, 2006 and May 22, 2006 for its annual review of Student, to schedule Student's three year re-evaluation, and to plan Student's IEP for the 2006-2007 school year. The ARDC determined that Student continued to meet eligibility criteria for autism and speech impairment. The ARDC determined that Student's placement would continue to be in Self Contained Life and Speech for the upcoming 2006-2007 school year. The ARDC also determined that additional data was needed, including a Full and Individual Re-Evaluation, with psychological and speech and language assessments. The May, 2006 ARDC did not reach an agreement due to parental objections and the meeting was tabled.
6. The ARDC reconvened on May 24, 2006 to continue consideration of the matters not resolved at the May 19, 2006 and May 22, 2006 meetings. Student's parent was initially in attendance, but left during the proceedings. While in attendance, Student's parent denied consent for evaluation of Student. Student's parent was informed before leaving the meeting that the ARDC would proceed in the parent's absence. The ARDC also discussed the need for an In-Home training for parents, because of difficulties experienced by Student during Community Based Instruction, and by Parent during shopping trips with Student. Although Parent left the meeting on May 24, 2006 before its completion, the ARDC members present were all in agreement regarding the need for a new FIE, speech and psychological evaluations in order to program for Student.
7. On September 20, 2006, a Phone Conference was held between Student's parent and the School District's LIFE Skills teacher. The purpose of the conference was to relay general information regarding Student's progress during the current school year, to ask Student's parent if she would sign a Consent to Test form, giving permission to test so that the School District could proceed with a FIE, psychological and speech testing, and to inquire as to parent's interest in an In-Home evaluation. Student's parent wanted to know who would be doing the evaluation and stated that she did not want an In-Home assessment, nor was she interested in those services. Student's parent stated that she would sign the Consent to Test form.
8. On October 12, 2006, Student's parent stated to the Special Education Coordinator that she was in agreement with reevaluating Student and would sign the Consent to Test form for permission to test Student. The School District never received the signed consent form.
9. On October 17, 2006, School District attempted to contact Student's parent by letter to obtain a signature on the Consent to Test form providing written consent for the Student's testing.
10. On January 31, 2007, School District made a Request for Due Process Hearing and Required Notice to TEA (TEA Docket No. 141-SE-0207) to request that Respondent be ordered to provide consent, or that Petitioner be authorized to override Respondent's failure to provide consent and allow Petitioner to provide the student with a Full and Individual Evaluation,

psychological evaluation, and speech evaluation. Petitioner requested authorization to conduct Student's three year re-evaluation for the purpose of providing Student with a free, appropriate public education.

11. Respondent did not participate in any of the proceedings held in TEA Docket No. 141-SE-0207, and could not be reached by the Hearing Officer. The Decision of the Hearing Officer issued on April 5, 2007 authorized School District to undertake Student's re-evaluation, including a full and individual evaluation, psychological evaluation, and speech evaluation.

12. After the April 5, 2007 Order of the Hearing Officer, School District began conducting the following evaluations: Vision and Hearing Screening; FIE Re-Evaluation Speech/Language; Intellectual and Academic testing; Psychological Assessment; and Documentation of Condition.

13. The Vision and Hearing Screening conducted by the school nurse showed Student's results to be within the normal range.

14. Because of the severity of Student's language and developmental delays, psychological and behavioral testing was based primarily upon informal observations, consultations, rating scale results, and available history, including the following:

- Review of Existing Data (Including School records)
- Observations (Classrooms and Individual)
- Interview with Student (attempted)
- Staff Interviews with Student's Speech teacher, Special Education teacher, Diagnostician/LSSP Intern, Diagnostician, teacher, and two Special Education aides.
- Checklists, including: Achenbach's Teacher's Report Form; and Childhood Autism Rating Scale;
- Attempted Assessments, including: Sentence Completion assessment; House-Tree-Person assessment; and Kinetic Family Drawing Assessment; and
- Parent Observations, which were given during an April 18, 2007 phone conference, although no formal parent conference was able to be coordinated.

Observations of student were conducted in special education and regular education settings. It was also noted that, in the event that additional information was received from Student's parents, that further interpretation of overall assessment results might be appropriate.

15. On April 10, 2007, a phone conference was held between Student's parent and Student's Life Skills teacher. Student's parent was concerned that the testing was being performed on Student to place Student in a more restricted environment. Student's Life Skills assured Student's parent that a more restrictive environment was not being considered. During the phone conference, Student's teacher explained that Student continued to do well in the current placement and that there was no evidence that Student's placement needed to be changed. Student's parent

stated that the Student would be kept at home and home schooled until receipt of written notification from School District that the testing was not going to be used to place Student in a more restrictive environment.

16. The FIE Psychological Assessment was completed on April 10, 2007 and accepted by the ARDC on May 22, 2007.

17. The FIE psychological assessment results and interpretations were: Student continues to demonstrate impairments in his social interactions, significant expressive and receptive language delays, and restricted repetitive or stereotyped patterns of behaviors. While general behaviors are consistent with Autism, Student displays higher levels of social interest through his observed displays of affection and responsiveness to others. At this time, Student continues to present behaviors that support his current diagnosis as a student with a Pervasive Developmental Disorder, Not Otherwise Specified, and, based on the assessment, Student meets Texas Education Agency criteria for Autism.

18. The FIE psychological assessment results completed by the speech therapist and diagnostician reflect delays in overall cognitive, speech, adaptive behavior, and academic functioning compared to same age peers. At the same time, Student's teachers observed that Student generally presented appropriate behaviors in the academic environment this school year. Student seemed cooperative, calm and happy in the Life Skills classroom, transitions well from one classroom to another with the support of an aide, and responds well to instruction with visual and tactile presentations. Student displays strength in ability to read sight words. Weaknesses include stereotypical facial tics, sensory sensitivity, unusual body posturing, and occasional silliness. Social difficulties included anxiety with dogs and bathrooms, tiredness at the end of the school day, and some resistance to activities. Socially, Student is able to interact with others to get needs met, can be tolerant when others initiate contact, and initiates interactions to show affection. Student is compliant with redirection when social boundaries are crossed in an attempt to gain affection. Student appears to understand what is being said, but to have difficulty expressing his own ideas.

19. The FIE Psychological Assessment summarized that while Student did show general behaviors that were consistent with Autism, Student also displayed higher levels of social interest through displays of affection and responsiveness to others.

20. According to the FIE Psychological Assessment, Student continued to present behaviors that support the current diagnosis of Pervasive Developmental Disorder, Not Otherwise Specified. Based on this information, Student continues to meet the eligibility criteria for Autism.

21. Sixteen (16) recommendations for Behavior Support/Management were included in of the psychological assessment, including recommendations for maintenance of consistent, routine and well-organized atmosphere, limitations of verbalizations and distractions, shortened assignments, teaching and rehearsal of social skills and appropriate responses, consistent, calm visual prompts

(such as a visual schedule), and assistance in giving for eye contact and displaying appropriate body postures. Additionally, making the effort to involve Student in class activities, allowing adequate response time, and moving slowly academically will allow Student to continue to learn.

22. The Documentation of Condition, dated May 22, 2007, showed that Student evidenced the DSM-IV-TR criteria for Pervasive Developmental Disorder Not Otherwise Specified (Including Atypical Autism). It further stated that “a severe and pervasive impairment in the development of reciprocal social interaction or verbal and nonverbal communication skills, but the criteria are not met for a specific Pervasive Developmental Disorder, Schizophrenia, Schizotypal Personality Disorder, or Avoidant Personality Disorder. The documentation was signed by all who participated in the FIE, including Student’s Licensed Specialist in School Psychology, Diagnostician, Speech Therapist and Life Skills teacher. The assessment team recommended parent training, behavioral supports and interventions including a consistent, routine environment where principles of behavior modification are used.

23. The Documentation of Condition provided by a Licensed Specialist in School Psychology also concluded that Student continued to meet the criteria for the condition of Speech Impairment.

24. A Full and Individual Re-Evaluation (“FIE”), Speech/Language for Student was completed on May 3, 2007 and accepted by the ARDC on May 23, 2007. The speech/language re-evaluation, in conjunction with the psychological assessment, was requested to determine present levels of performance and also to determine if a communication impairment continued to exist to such a degree that there was a continuing need for special education services. Assessment instruments included: EASIC (Evaluating Acquired Skills in Communication-R), LCRA (Language Curriculum Referenced Assessment), observations and teacher reports. Assessment took place over several sessions to address reported and observed fluctuations in ability and attention.

25. The 2007 FIE Speech/Language evaluation showed that Student exhibited a greater length of utterance during spontaneous speech (as compared to previous assessments); that Student often needed prompts to respond to questions; and that responses were only 1-2 words in length, but were appropriate to the situation. The evaluation indicated that Student has the linguistic abilities to respond with longer and more complex sentences, but lacks reciprocal conversation skills. It was also noted that Student was beginning to demonstrate appropriate use of the pronoun “I” instead of speaking in the third person.

26. The summary of the FIE Speech/Language re-evaluation stated that Student continued to exhibit an expressive and receptive language disorder. Comprehension was judged to be slightly more developed than expressive communication skills. Attention, motivation, and desire appear to influence Student’s ability to communicate more effectively. The structure and function of Student’s “oral mechanism” is considered adequate for communication. Some unusual facial expressions were also noted. Student extends the upper lip over teeth when speaking, which appears to be related to behavior rather than the structure or functioning of the oral mechanism.

27. Student's annual ARD meeting was held on May 22, 2007 to review the recently completed testing on Student and plan for 2007-2008 school year when the student would move from elementary school to middle school as of August 27, 2007. The ARDC determined that Student continued to meet the eligibility requirements of autism and speech impairment. Student's placement continued in Life Skills; with special education classes in Life Skills content domains of Vocational, Domestic, Community, and Recreation/Leisure; Adaptive Physical Education; general education classes with modifications for electives; and Speech Therapy 30 minutes per week; with progress reported on the same schedule as general education students, with progress reports and report cards. IEPs were developed for all content areas and for Speech Therapy.

28. In discussing the Speech/Language Re-Evaluation during the May 16, 2007 ARD, Student's parents stated that Student's facial expressions were related to the parents' teaching Student another language. Student's parent advocate requested that the evaluation be changed to reflect that the facial expressions were due to a cultural issue. Based on the Speech and Language evaluation, it was determined that Student continues to have a communication disorder with an Expressive and Receptive Language Impairment.

29. The Speech/Language Pathologist at Student's elementary school who conducted the FIE, Speech/Language concluded that the testing was appropriate to assess speech and language disabilities and that no additional testing was needed in order to rule in or out other disabilities related to speech.

30. During the ARD to consider the FIEs, both psychological and speech/language, Student's Life Skills teacher concluded that, based on her experience, no other testing was needed to rule in or rule out other suspected disabilities, and the student was assessed in all areas of suspected disability.

31. A Ph. D. independent behavioral consultant and autism specialist reviewed the student's file and determined that School District had used appropriate assessment tools and data to develop the autism intervention strategies which were included in Student's IEP for the 2007-2008 school year. According to the behavioral specialist, the IEPs developed at the May, 2007 ARDC provide appropriate behavioral intervention to allow Student to receive an educational benefit, if the IEPs are implemented in a Life Skills classroom as proposed by the ARDC.

32. The ARDC also determined that Student should have additional testing, including testing for Occupational Therapy, Physical Therapy, and a functional behavior assessment.

33. The ARDC refused the following parent requested action: Resource placement; specific/separate IEPs for Reading, Math and Speech; "Functional Social Skills" assessment (requested by Student's parent advocate); compensatory education; and ESY.

34. The parent requested actions were refused, based on the FIE, psychological and speech/language assessments, for the following reasons: Life Skills with general education inclusion is Student's Least Restrictive Environment ("LRE"); Appropriate IEP goals for Reading, Math and Speech are embedded in Student's Life Skills IEPs, including Reading, Math and Speech; School District is not familiar with a "Functional Social Skills" assessment; School District personnel's documentation of Student's meaningful educational progress; and lack of regression data to support ESY services.

35. Student's parent refused In-Home training, although school personnel would continue to advise Parent of district-wide training available for parents.

36. Student's parent advocate stated that he felt that Student had regressed over the past two years, and requested ESY services. Student's parent stated during the May 16, 2007 ARD meeting, however, that this was the first time that Student had not been offered summer school [ESY], but also stated that the parent did not like the ESY program, and had not placed Student in the program previously. School District stated that Student had not shown any regression, and therefore ESY was not necessary or appropriate.

37. During the ARD, Student's parent stated concerns regarding Student's behavior during the 2005-2006 school year, but also stated that Student's Life Skills teacher had "done a good job with [Student] behaviorally this school year [2006-2007]." Student's parent advocate also stated, "[T]his year is not as much the concern as previous years."

38. The ARD meeting ended in disagreement, with Student's parents signing that they disagreed. Student's parents did not state why they were refusing to accept assessments completed for Student by School District and Student's IEP.

39. Student's Report Card for the 2006-2007 school year showed improvement in most areas. The following tables display Student's progress during the year, with the first table explaining the marks. With the exception of "Listens Attentively," Student showed satisfactory or excellent progress in all areas by the end of the 2006-2007 school year. The FIE, Speech/Language noted Student's struggles with communication and recommended accommodations and supports to address the communications weaknesses.

<b>EXPLANATION OF MARKS</b>	
E - Excellent Progress	N - Needs Emphasis
S - Satisfactory Progress	U - Unsatisfactory Progress
<b>EXPLANATION OF PERFORMANCE</b>	
P - Does with physical prompts	
V - Does with verbal prompts	
I - Does Independently	

<b>GRADING PERIOD:</b>	1	2	3	4
<b>LIFE SKILLS:</b>				
Domestic:	*	*	*	*
	*	*	*	*
Vocational:	*	*	*	*
	*	*	*	*
Community:	*	*	*	*
	*	*	*	*
Recreation/Leisure:	*	*	*	*
	*	*	*	*
<b>PARTICIPATES IN:</b>				
Art:	*	*	*	*
	*	*	*	*
P.E.:	*	*	*	*
	*	*	*	*
Music:	*	*	*	*
	*	*	*	*
<b>BEHAVIOR:</b>				
Courteous to Others:	*	*	*	*
Respects Authority:	*	*	*	*
Follows Directions:	*	*	*	*
Listens Attentively	*	*	*	*

40. Based on a review of Student's file, Student's Special Education Coordinator at elementary school concluded that Student made meaningful educational progress in the 2006-2007 school year.

41. Respondent's Special Education assessment coordinator and educational diagnostician conducted part of Student's 2007 re-evaluation and wrote part of the psychological assessment. The coordinator is an educational diagnostician and mid-management principal. The

coordinator attended the May, 2007 ARD and noted that all school personnel, including the speech therapist, reported that Student made considerable progress during the 2007-2006 school year.

42. During the May, 2007 ARDC, Student's representatives were obnoxious, disrespectful, and refused to work in a collaborative manner to fulfill the purposes of the ARDC. Some School District personnel were upset and crying over the mean-spirited approach Student's parents and lay advocates took, especially one of Student's parent advocates, who threatened a "blood bath" when the ARDC reconvened.

43. Earlier this school year, Student's parents and lay advocates requested information from School District; and 1,026 pages of information were provided at an agreed upon time and place. A group of nine (9) of Student's parents, lay advocates, and other assistants appeared at the agreed upon location, which was a small office, *en masse*, and occupied the space in a threatening manner which disrupted School District activities, including videotaping the proceedings. Student's representatives refused to leave when asked and blocked ingress and egress to the office, such that School District personnel sought assistance from an Assistant Attorney General of Texas regarding their options in providing public information upon request. The Student's group refused to leave, backed school personnel into a corner, and argued with school staff until the police were called. The group finally left the office after two police officers arrived, but not before additional threats, accusations of assault, and attempts to go into another office further escalated the fear and frustration of the school district personnel, and the anger and apparent frustration of Student's parents, lay advocates and other assistants.

### III. Discussion

In this due process hearing, Petitioner proved that Student was tested in all areas of suspected disability after obtaining an order in a special education due process hearing overriding the parents' refusal to consent to Student's re-evaluations. The FIE, Speech/Language and Psychological assessments completed in May, 2007 were used by the ARDC to develop appropriate IEPs for Student for the 2007-2008 school year. Student's teachers and all school personnel concluded that Student was making appropriate progress in 2006-2007 and that Student's IEP allowed Student to be educated with appropriate instructional supports and services in the least restrictive environment. The evidence was undisputed that Petitioner's Full and Individual Re-Evaluation was conducted using appropriate procedures, and that Student was tested in all areas of suspected disability. Although Parents' claim in Docket No. 273-SE-0507 listed numerous tests which were not performed, nothing in the parents' comments or their participation in the ARDCs indicated that the requested tests were necessary for Student, although the ARDC did agree to gather additional data, including occupation therapy, physical therapy and a functional behavior assessment. Further, parental concerns regarding a change in Student's placement appear to have been unwarranted; Student placement in the Life Skills classroom continues, with mainstreaming in general education electives classes and extra-curricular opportunities. Student's Individualized Education Program for school years 2006-

2007 and for 2007- 2008 were appropriately individualized, allowed for placement in Student's least restrictive environment, and, if implemented this 2007-2008 school year, would allow Student to continue to make meaningful educational progress.

Petitioner also argues that School District should be granted attorney's fees under 20 U.S.C. §1415(i)(3)(B)(i)(III); 34 C.F.R. §300.517(a)(1)(iii). Petitioner's request is based on Student's parents and lay advocates' conduct during the May, 2007 ARDC before this due process hearing was filed, and also during a visit to School District's Public Information Office during the pendency of this due process hearing. Moreover, Petitioner argues that Respondent's actions were done solely for the purposes of harassment and delay, stating:

1. Respondent's actions during the ARDC and the events at the Public Information Office were harrassive.
2. Respondent misrepresented the facts on a Certificate of Service, stating that they had served Petitioner and the Hearing Officer, when, in fact, Respondent did not serve Petitioner until later in the day. Respondent filed a Motion to Recuse the Hearing Officer which was denied. The Motion to Recuse alleged, in part, *ex parte* communication between the Hearing Officer and Petitioner, because the Hearing Officer provided Petitioner with a copy of Respondent's Motion.
3. Most importantly, after filing the original complaint, amending the complaint, and filing motions and requests for continuance from May 29, 2007 through October 8, 2007, Respondent summarily requested dismissal of all special education Complaints related to Student.

The Hearing Officer also notes that Respondent's participation in this case, other than the text of the Complaint and the Amended Complaint in the dismissed Docket 273-SE-0507, did not provide any substantive support for their special education claims under IDEA.<sup>1</sup>

The Hearing Officer believes that if 20 U.S.C. §1415(i)(3)(B)(i)(III) and 34 C.F.R. §300.517(a)(1)(iii) should ever be applied, it should be only be applied in the most egregious cases, where there are no questions of malicious intent, and, therefore, the improper purpose is clear. 20 U.S.C. §1415(i)(3)(B)(i)(III) states:

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<sup>1</sup>During the Prehearing Conference on September 7, 2007, after being told that only IDEA related claims would be considered in this due process hearing, Respondent's parents and advocates refused to argue any of their pending motions or elements of their complaints, stating that they wished either to dismiss their claims or have the Hearing Officer recused. Ultimately, they chose to file a Motion to Recuse, which was denied.

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

34 C.F.R. §300.517(a)(1)(iii) states:

In any action or proceeding brought under Section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to a prevailing SEA or LEA against the attorney of a parent, or against the parent, if the parents request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

The standard for the Hearing Officer's review is whether Respondent brought the due process hearing for an improper purpose, meaning for a purpose other than to pursue Respondent's legitimate special education complaints. Although the actions of Student's parents in this case were unacceptable in some instances, and definitely did not involve the pursuit of the Student's special education claims, after extensive consideration, I am unable to apply 20 U.S.C. §1415(i)(3)(B)(i)(III) and 34 C.F.R. §300.517(a)(1)(iii) because:

1. Petitioner did not bring forward its claim for attorneys' fees until the due process hearing. A recent court decision, *Lago Vista ISD v. S.F.*, Cause No. A-07-CA-641-SS, in the U.S. District Court for the Western District of Texas, Austin Division (October 24, 2007), held that an issue is not properly before a hearing officer if the "issue was not raised and is not included in the ...request for a due process hearing." In that case, even though the issue of educational placement arose apparently during the prehearing conference, the court held that a school district "was not given proper notice, and the hearing officer acted outside the scope of his authority by ruling on an issue not presented by the pleadings or the parties." Presumably, the Court's notice requirements would apply to parents, and they would be allowed to take appropriate action to address the concerns of the school district if they were given notice of those concerns.
2. Respondents dismissed their request for a special education due process hearing in Docket No. 273-SE-0507 on October 10, 2007. Respondent requested dismissal of all claims, including Petitioner's due process hearing on October 8, 2007. Had Respondent had no other goal than to harass or delay, Respondent could have continued to pursue its claims, at least through disclosure or the due process hearing. Under the present circumstances, the case under consideration is Petitioner School District's Complaint, not Respondent Student's previous Complaints.
3. Apart from Respondent's failure to offer evidence and argument in support of its claims in Docket No. 273-SE-0507, and Respondent's ultimate dismissal of that Complaint, the Hearing Officer has no knowledge that actions by parent were done in the context of the present due process hearing. The actions of Parent at the May, 2007 ARD and in the context of the exchange of public information may have occurred outside the timeline of the due process hearing. Certainly, the ARDC occurred before any complaint was filed. And, it is unclear whether the document exchange involved discovery for this case, or the school district's response to an open records request.

At the same time, the Hearing Officer remains concerned that finding that a parent brought an action solely for an improper purpose under the present circumstances, would have a chilling effect on parents' pursuit of special education claims. I cannot conclude with the required certainty that the parents, through their participation in the special education due process hearings in Docket No. 273-SE-0507 and Docket No. 321-SE-0807, including the prehearing filings, conferences and orders, along with the information obtained from School District, only sought to harass, delay and drive up

litigation costs for School District, as opposed to simply coming to the conclusion that their claims were not likely to prevail. Accordingly, because 20 U.S.C. §1415(i)(3)(B)(i)(III); 34 C.F.R. §300.517(a)(1)(iii) is meant to be used only when there is no question as to the improper purpose, I cannot conclude that Respondent's actions in this case meet that standard.

#### IV. Conclusions of Law

1. Petitioner School District filed this Request for Special Education Due Process hearing regarding its re-Evaluation of Student who qualified for special education as a student with autism and speech impairment. 20 U.S.C. §1401(3); 20 U.S.C. § 1401 (9); 20 U. S. C. §1414(a)(1)(D)(ii)(I); 20 U. S. C. 1414(a)(2); 20 U.S.C. 1414(b); 34 C. F. R. §300.502(b)(2); 19 T. A. C. §89.1011; 19 T. A. C. §89.1040.

2. Petitioner School District has a responsibility to provide Student with a free appropriate public education. 20 U.S.C. § 1400(d); 34 C.F.R. §300.17; 34 C.F.R. §300. 300- 300.328; 19 T. A. C. § 89.1001.

3. Petitioner proved that its Full and Individual Re-Evaluation of Student, including Speech/Language and Psychological assessments, was appropriate. Student was tested in all areas of suspected disability, using a variety of assessment tools and strategies, including information from the parents, and an Independent Educational Evaluation is not needed. School District followed all appropriate procedures in its conduct of Student's re-evaluation. 20 U.S.C. § 1414(a)(1)(D)(ii)(I); 20 U.S.C. §1414(b); 20 U.S.C. §1414(d)(1),(2),(3); 20 U.S.C. § 1415(b)(6); and 34 C.F.R. §§ 300.502(b)(2), 300.507(a)(1).

4. Petitioner proved that Student made meaningful educational progress during the 2006-2007 school year. 20 U.S.C. §1414; 34 C.F.R. §300.320-300.324. *Bd. of Ed. of Hendrik Hudson Cent. Sch. Dist. v. Rowley*, 458.U.S.176, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982); *Cypress-Fairbanks ISD v. Michael F.*, 118 F. 3d 245, 247-248 (5<sup>th</sup> Cir. 1997).

5. Petitioner proved that Student's Individual Education Program for 2007-2008 was individualized and appropriate, was reasonably calculated to provide educational benefit, was based on the Full and Individual Re-Evaluation, included placement in Student's least restrictive environment and, if implemented, would allow Student to continue to make meaningful educational progress during the 2007-2008 school year. 20 U.S.C. § 1414(d)(1),(2),(3); 20 U.S.C. §1414(e); 34 C.F.R. §§ 300.320-300.324; *Bd. of Ed. of Hendrik Hudson Cent. Sch. Dist. v. Rowley*, 458.U.S.176, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982); *Cypress-Fairbanks ISD v. Michael F.*, 118 F. 3d 245, 247-248 (5<sup>th</sup> Cir. 1997).

6. Petitioner proved that it did not deny Student a free, appropriate public education under the Individuals with Disabilities Education Improvement Act. 20 U.S.C. § 1401 (9); 20 U.S.C. § 1414; 34 C. F. R. §300.300- 300.328; 19 T. A. C.§ 89.1001.

7. Petitioner did not prove that Respondent's special education due process hearing in Docket No. 273-SE-0507, or its actions in this docket, were brought for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation. 20 U.S.C. §1415(i)(3)(B)(i)(III); 34 C.F.R. §300.517(a)(1)(iii).

#### V. Order

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer ORDERS that the relief sought by Petitioner is GRANTED.

Petitioner has prevailed in this due process hearing. Petitioner has complied fully with all substantive and procedural requirements under the Individuals with Disabilities Education Improvement Act, its implementing regulations and extant case law. Petitioner has tested Student in all areas of suspected disability, and used the Full and Individual Re-Evaluation results to fashion an appropriate Individual Education Program, which would allow Student to make meaningful educational progress in the 2007-2008 school year. Petitioner provided a free appropriate public education in the 2006-2007 school year which allowed Student to make meaningful educational progress, Petitioner has not denied Petitioner a free appropriate public education.

SIGNED in Austin, Texas this 19<sup>th</sup> day of December, 2007.

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Gwendolyn Hill Webb  
Special Education Hearing Officer

ALIEF INDEPENDENT § BEFORE A SPECIAL EDUCATION  
SCHOOL DISTRICT §  
§ HEARING OFFICER FOR THE  
V. §  
§  
STUDENT § STATE OF TEXAS

**SYNOPSIS**

**Issue:** When is Petitioner School District entitled to a finding that its testing re-evaluation of Student is appropriate, such that an Independent Educational Evaluation at public expense is not required?

**Federal Citation:** 20 U.S.C. §1414(a)(1)(D)(ii)(I); 20 U.S.C. §1414(a)(2); 20 U.S.C. §1414(d)(1),(2),(3); 20 U.S.C. § 1415(b)(6); and 34 C.F.R. §§ 300.502(b)(2), 300.507(a)(1).

**Texas Citation:** 19 T.A.C. §§ 89.1001 - 89.1011.

**Held:** For the Petitioner. Petitioner School District is entitled to a finding that its FIE is appropriate, such that no additional testing or Independent Educational Evaluation is required when it shows:

- The FIE was conducted using proper procedures and a variety of assessment tools and strategies, including information provided by the parent to gather relevant functional development and academic information;
- The FIE was used to determine the Student’s disabilities and to develop the content of the Student’s IEP; and

The IEPs developed using the evaluations allow the student to make meaningful educational progress.

**Issue:** When is Petitioner School District entitled to a finding that parents brought a special education due process hearing for an improper purpose, such as to harass, cause unnecessary delay, or to needlessly increase the cost of litigation.

**Federal Citation:** 20 U.S.C. §1415(i)(3)(B)(i)(III); 34 C.F.R. §300.517(a)(1)(iii).

**Held:** For Respondent. A Special Education Hearing Officer can only find that School district is entitled to a finding that a parent brought special education due process hearing for an improper purpose, such as to harass, cause unnecessary delay, or to needlessly increase the cost of litigation, when there is no question of malicious intent or improper purpose, and the actions occurred during the course of a due process hearing. Where parents brought a case and ultimately dismissed it, and where parents escalated the conflict with the school district outside of the due process hearing, there can be no certainty as to improper purpose.