

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

**DECISION OF THE HEARING OFFICER**

I. Statement of the Case

Petitioner brings this appeal by his next friend, pursuant to the Individuals with Disabilities Education Improvement Act 20 U.S.C. § 1400 *et seq.*, (hereinafter referred to as "IDEIA"), against Respondent Houston Independent School District (hereinafter referred to as "Respondent" or "School District"). Petitioner (hereinafter referred to as "Petitioner" or "Student") filed a written request for a due process hearing which was received by the Texas Education Agency on December 11, 2007. Petitioner appeared *pro se* by next friend Parent of Houston, Texas. Respondent was represented by Attorney Jeffrey A. Rogers of Feldman & Rogers, LLP in Houston, Texas.

Procedures have been conducted by agreement of the parties and in accordance with their schedules. A telephone prehearing conference was held on January 7, 2008, and a Prehearing Order was issued on January 11, 2008. Disclosure occurred as scheduled on April 3, 2008, and the due process hearing was also held as scheduled on April 11, 2008 at Houston ISD.

Petitioner states that Respondent has deprived Student of a free appropriate public education ("FAPE") by not identifying Student as a Student with a disability. Petitioner states that Student was dismissed from special education previously in a meeting in December, 2005, but that Student continues to struggle with school work and that Petitioner's agreement for dismissal from special education was either a mistake or a misunderstanding.

In the 2007-2008 school year, Petitioner believes that Student was tested for "three items, but not the last parts" of an evaluation for special education eligibility. At a meeting on or about October 18, 2007, it was stated that Student did not qualify for special education, but that perhaps additional testing was needed. Petitioner believes additional information is available from Student's doctor, perhaps, and that testing is needed, including a behavior assessment.

As relief in this due process hearing, Petitioner requests that Respondent be ordered to undertake additional testing, especially for behavior issues; review additional data provided by Petitioner to determine that Student is eligible for special education; complete Student's assessment expeditiously; identify Student as a child with a disability; and provide appropriate services.

Respondent contends that the question of Student's disciplinary placement was addressed by Houston ISD, and Student was not assigned to the disciplinary placement at the time of the Complaint. Respondent also notes that although Student was dismissed from Special Education, Houston ISD is providing appropriate accommodations for Student under §504 of the Rehabilitation Act of 1978, as amended.

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 \*\* years old and resides within the Houston Independent School District. Student attends \*\* grade.
2. Houston ISD 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 state and Federal rules and regulations promulgated pursuant to IDEA.
3. Student was dismissed from Special Education at an Admission, Review and Dismissal Committee Meeting ("ARD") on December 7, 2005. At that meeting, it was determined that Student no longer met eligibility requirements for special education services as a student who is Other Health Impaired ("OHI") The determination was based on previous testing, teachers input and information provided by a nurse consultant. All ARD Committee members were in agreement, including the parent.
4. Since dismissal from Special Education at the December 7, 2005 ARD, Student has not been found to be eligible for special education, but has received accommodations under Section 504 of the Rehabilitation Act of 1978, as amended ("Section 504").
5. Texas Assessment of Knowledge and Skills ("TAKS") testing from May, 2006 showed that Student met the required standards in all areas except Writing; Student earned no designation of "Commended Performance." In May, 2007 TAKS testing, however, Student met the standards in all tested areas, and received a "Commended Performance" designation in Writing.
6. In February, 2006, Student took the Stanford Achievement Test 10<sup>th</sup> Edition ("Stanford 10"), where Student was tested in 76 different areas, including reading vocabulary, mathematics problem solving, language expression, science and listening. Student scored above average on eleven subjects. In Language Expression, all of Student's scores were above average. Student scored average in 51 subjects, and below average in thirteen subject areas. The majority of Student's below average scores were in the area of \*\*\*.
7. Section 504 Committee Meetings were held on December 10, 2007 and February 22, 2008. At each meeting, Section 504 accommodations were discussed and developed.

8. Student's Section 504 Accommodations for the current school year include: Providing Student with encouragement to participate and positive reinforcement, including verbal praise and social rewards; ignore some of Student's minor misbehaviors; repeat structured instructions; and discuss rules/Code of Conduct with Student, and verbally remind Student of the consequences of Student's actions.

9. Student was referred for a Full and Individual Evaluation ("FIE") by Student's parent in May, 2007, due to Student's poor behavior in school and failing grades in Reading. The FIE Report was dated May 19, 2007. Student scored high average in basic reading skills and written expression; average in the English oral language skills; English oral expression; ability to apply academic skills; reading comprehension; math calculation skills; and math reasoning; and low average in English listening comprehension skills.

10. In February, 2007, Student took the Stanford 10 standardized test, and was again tested in 76 separate areas. Student scored Above Average in 18 areas. Student scored Average in 50 areas, and Below Average in eight areas. While Student had scored mostly below average in \*\*\* in 2006, almost all of Student's scores in that area were average, with only two below average marks in 2007.

11. On May 16, 2007, Student was evaluated for Speech Impairment eligibility for special education services. The weaknesses Student displayed were a limited knowledge of classroom scripts/routines and limited use of effective strategies when attempting curricula tasks. The evaluation of receptive and expressive language skills indicated Student's abilities were at or above age level expectancies. It was stated that Student's speech and language functioning was judged to have little or no interference on communicative and academic functioning. Because of these results, assistive technology devices/services were not recommended by the evaluators.

12. Student was referred for a Emotional/Behavioral Component of the FIE-Psychological Evaluation in May, 2007 by Student's parent, who wanted a new evaluation of Student's cognitive and behavioral functioning, to explore the possibility of special education services based on attention deficit hyperactivity disorder ("ADHD") as well as concerns about Student's disruptive behaviors.

13. The evaluators for Student's Emotional/Behavioral component of the FIE stated that it did not appear that Student's emotionality influenced learning in such a way as would affect educational placement, programming, or discipline. The evaluators stated that Student did not demonstrate the characteristics of Emotional Disturbance, as defined by IDEIA. It was recommended that Student be taught to STOP-THINK-DEEP BREATH techniques, and that planned ignoring of Student's inappropriate remarks be implemented by Student's teachers.

14. Based on Student's scores and classroom observations, the FIE evaluator determined that Student did not meet the specific criteria for a student with a Learning Disability as of May 19, 2007.



22. Student had twenty-three recorded behavior incidents in the 2004-2005 school year (Sixth Grade); Student had fifteen behavior incidents in the 2005-2006 school year (Seventh Grade), including summer school. In a one week time span, March 23, 2007 through March 30, 2007, Student had four behavior incidents.

23. Between October 22, 2007 and February 20, 2008, Student had fifteen separate behavior violations reported. Two of the behaviors resulted in detention for Student; Five incidents resulted in Student being suspended; Two incidents resulted in In-School Suspension; Three incidents resulted in 1/2 day suspensions; and Student was placed in Alternative Placement twice. Three of the recorded behavior incidents were for gang related activities.

24. An ARD was held on October 18, 2007. The purpose of the ARD was to initiate placement and evaluation of Student, and to reconvene from the May 23, 2007 ARD meeting. The ARD reviewed the following information:

- FIE, dated May 19, 2007;
- Psychological/Psychiatric Evaluation, dated May 21, 2007;
- Speech/Language Evaluation, dated May 22, 2007;
- Information from Student and/or Student's parent, gathered on October 18, 2007; and
- Information from Student's school personnel, taken on October 18, 2007.

Student was not referred for any additional evaluations. Student was found not to qualify for any special education services.

25. Student's parent stated that Student had been diagnosed with ADHD in 2000, and that Student showed the stereotypical rocking body movements, as noted by Student's doctor. Student's parent requested additional behavioral testing for Student, specifically for ADHD. Student's parent also requested short term goal setting for Student. The ARD agreed to begin the process to possibly refer Student for the OHI label, if necessary.

26. Student was referred for an FIE by Student's parent in January of 2008, due to Student's poor behavior in school and failing grades in Reading. Student scored high average in Basic Reading skills and Written Expression; average in the English Oral Language skills; English Oral Expression; Ability to Apply Academic Skills; Reading Comprehension; Math Calculation skills; and Math Reasoning; and low average in English Listening Comprehension skills.

27. An ARD meeting was convened on January 28, 2008 to initiate identification and evaluation for Student. The ARD reviewed the following information:

- FIE, dated May 19, 2007;
- Psychological, psychiatric Evaluation, dated May 4, 2007;
- Speech/Language Evaluation, dated May 22, 2007;
- Functional Behavioral Assessment ("FBA"), dated January 28, 2008;

- Information from Student and/or Student's parent, gathered on January 28, 2008;
- Information from Student's school personnel, taken on January 28, 2008; and
- Student's Standardized Assessment, taken from June, 2007.

No other further referrals for evaluations were made at that time. Student was found to not meet the disability condition criteria to be eligible for special education services.

28. The FBA was reviewed, and the administrator noted that Student showed three specific behavior issues: Non-completion of work; violating the school dress code; and talking out-of-turn. The administrator also stated that the recommendations she made for Student based on the FBA could be implemented in any program in the school which serves Student. The administrator noted that the recommendations were not limited to Special Education Services because the recommendations were created for Section 504 services.

29. Student's Assistant Principal stated that Student has responded well to In-School Suspension ("ISS") and that Student has been able to complete all work while in ISS. While in ISS, Student also received counseling and participated in a behavior improvement activity.

30. Several ARD Committee members, including Student's parent, showed concern that Student showed an interest in gangs and also had a fear of being beaten up. Student's parent noted that Student has mentioned the names of several students who want to fight Student. Student's counselor stated that he would like to continue to work with Student in counseling sessions.

31. Student's Nurse Consultant reviewed the medical report of Student's doctor, dated December 19, 2007. The report indicated that Student did have a diagnosis of moderate to severe ADHD. Student's doctor prescribed medication, which Student's parent stated Student takes at home, in the morning before school. Student's Nurse Consultant stated that while a diagnosis of ADHD is a behavioral issue, the recommendation for an OHI label is a two part process that also considers academic performance. Student's teachers stated that Student has above average grades in most classes, and that in the classes where Student is struggling, Student's teachers felt that Student needed only redirection to get Student's grade average above \*\*. As such, Student's Nurse Consultant stated that there was no educational need for Special Education Services. Student's Teacher stated that Student's 504 Committee should "follow up" on Student's FBA.

32. Student's parent stated that she was in disagreement with the ARD Committee, and left the meeting before the deliberations were final. The remaining ARD Committee set a date for a 10-day ARD meeting with Student's parent since she was in disagreement with the ARD proceedings. All other ARD Committee members were in agreement with the minutes of the meeting.

33. The ARD Committee reconvened on February 7, 2008 after the January 28, 2008 ARD meeting ended in disagreement. Student's parent reiterated disagreement with the ARD,

and requested, several times, a second FBA to be conducted on Student by a different assessor to compare the results. Student's teacher (who was also acting as the interpreter for Student's parent) told Parent that the FBA is actually conducted by two psychologists and four teachers. Student's parent stated that she wanted a second FBA to be conducted as a second opinion after speaking to Student's psychologist, but that she was not disagreeing with the first FBA.

34. In the absence of a completed eligibility form from Student's doctor, Student's parent was asked about information from Student's doctor. Parent did not know if Student's doctor had obtained the appropriate form. Student's teacher stated that a release of confidential information was needed to allow the school to communicate with Student's doctor.

35. Student's teachers told Student's parent that Student was currently passing all classes, and that, therefore, there was no academic need for special education services at the time. The ARD recommended that Student continue to receive Section 504 services. Student's parent signed in disagreement of the ARD before the minutes were read, and left before the deliberations were read.

36. Student's parent contended that Student's disciplinary problems in school were caused by ADHD, difficulties with ADHD medications, lack of sleep related to ADHD, and School District's failure to accommodate Student's unique needs.

38. Student's \*\*\* Grade English Language Arts teacher describes Student as an excellent writer, with problems in the classroom talking about gangs, throwing gang signs, writing gang symbols, and trying to get other students to talk about gangs, which problems were addressed by redirection and the Section 504 accommodations.

39. Student's \*\*\* Grade Math teacher described Student as needing a lot of redirection and having problems with the same gang related activities described by Student's English teacher. Student also displayed some impulsive getting up and walking around the class, which the teacher accommodated by allowing Student to move throughout the class, provided Student stated the purpose of his movement to the teacher beforehand. Student's Math teacher states that Student has demonstrated his ability to perform at least on grade level; Student's Math teacher stated that Student could possibly benefit from a "gifted and talented" class, because Student may be bored.

40. In addition to Section 504 accommodations, School District assisted Student as follows:

- Transfer to a Math Class with a strong role model, willing to provide additional educational support before, during and after school;
- Tutoring for Math;
- Counseling from the principal regarding behavior incidents;
- Meeting with a gang intervention specialist;
- Arranging with Parent to pick Student up right after school to preclude Student's congregating with groups of other students suspected of gang involvement;

- Referral to the Disciplinary Alternative Education Program after a significant conduct violation related to gangs.

41. Student rarely attends Math tutorials. Parent never requested further assistance from the gang intervention specialist after one meeting, and has not acted always to keep Student from congregating after school. Parent excuses Student's infraction, rationalizes Student's improper conduct, and tolerates Student's interest in and focus on gangs in violation of the Student Code of Conduct.

42. Student signed a Student Behavior Contract on February 13, 2008, stating that Student would no longer draw gang related drawings nor talk about gang related activities. Student acknowledged that if Student did any of these activities again, that Student might be suspended or referred to CEP, the Disciplinary Alternative Educational Placement. The Behavior Contract was presented to Student's parent on February 13, 2008, but Parent did not sign it.

43. After being warned repeatedly and counseled against gang related activities, Student wrote a paper on February 13, 2008, entitled "Official Rules." The paper outlined the rules of a gang, \*\*\*\*\*. Following this incident, which is a Level 4 violation of the Student code of Conduct, Student was referred to CEP, School District's Disciplinary Alternative Education Placement.

### III. Discussion

Petitioner alleges that Student's difficulties in school arise from a need for special education services. Apart from repeated disciplinary infractions and low grades because of absences and missing assignments, Student's assessment data showed a student capable of at least grade level performance in the general education setting. Student's classroom difficulties related to ADHD were addressed with Section 504 accommodations, redirection, and tutoring and makeup opportunities offered by Student's teachers. Student's gang related activities, ranging from throwing gang signs to developing gang recruitment procedures, should not be tolerated by School District, nor viewed as a manifestation of Student's ADHD. There was no evidence that Student was a child with a disability, or that School District had denied Student a free appropriate public education.

### IV. Conclusions of Law

1. Petitioner is a student in Houston ISD who has not been determined eligible for special education services.
2. Respondent Houston ISD has a responsibility to provide Student with a free appropriate public education. 20 U.S.C.A. § 1414; 34 C. F. R. §300.300; 19 T. A. C.§ 89.1001.

3. Petitioner did not prove that Respondent failed to evaluate and identify Student as a child with a disability in need of special education services. Student does not have an educational need for special education. 20 U.S.C.A. § 1401(3); 34 C. F. R. § 300.7; 19 T. A. C. § 89.1040.

4. Educational assessments of Student were conducted appropriately and in accordance with applicable law and extant regulations. 20 U.S.C.A. §1414(b)(2); 34 CFR §300.305(a).

5. Respondent provided Student with a free appropriate public education. [*Board of Education v. Rowley*, 458 US 176, 73 L. Ed. 690, 102 S. Ct. 3034 (1982); *Cypress-Fairbanks ISD v. Michael F.*, 118 F. 3d 245 (5<sup>th</sup> Civ. 1997)]

#### 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 DENIED.

SIGNED in Austin, Texas this 16<sup>th</sup> day of May, 2008.

Gwendolyn Hill Webb  
Special Education Hearing Officer

DOCKET NO. 068-SE-1207

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**SYNOPSIS**

**Issue:** Whether the School District failed to timely assess and identify a student who has been served through §504 of the Rehabilitation Act of 1978, as amended, for eligibility for special education services, based on the student's ADHD and discipline infractions alleged to be related to a disability.

**Federal Citation:** 34 CFR §§300.125, 300.300(a)(2)

**Texas Citation:** 19 TAC §89.1101

**Held:** For the Respondent. Respondent timely evaluated the Student for all suspected educational disabilities. The Student's classroom difficulties related to ADHD were addressed with §504 accommodations, redirection, tutoring and makeup opportunities offered by the Student's teachers.

**Issue:** Was the FIE conducted by the School District done thoroughly, professionally and in accordance with the law, and extant regulations?

**Federal Citation:** 20 USCA §1414(b)(2); 34 CFR §300.305(a)

**Texas Citation:** 19 TAC §89.1040; 19 TAC 89.1001

**Held:** For the Respondent. The FIE was conducted appropriately and in accordance with applicable law and extant regulations.