

STUDENT	§	BEFORE A SPECIAL EDUCATION
	§	
V.	§	HEARING OFFICER FOR THE
	§	
SALADO 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 Salado Independent School District (hereinafter referred to as "Respondent" or "School District"). Petitioner (hereinafter referred to as "Petitioner" or "Student") filed a Request for Special Education Due Process Hearing and Required Notice ("Complaint") which was received by the Texas Education Agency on Wednesday, March 26, 2008. Petitioner was represented by attorney Karen Key Johnson of Austin, Texas. Respondent was represented by attorney Holly Wardell of the law firm Schwartz & Eichelbaum Wardell Mehl and Hansen, P.C. of Austin, Texas.

All procedural matters have been conducted by agreement of the parties and in accordance with their schedules. A telephone prehearing conference was held on Thursday, April 10, 2008 regarding the hearing schedule, and a Prehearing Order was issued the same day. A second telephone prehearing conference was held on Thursday, April 17, 2008, and a Prehearing Order was issued on Thursday, April 24, 2008. A third telephone prehearing conference was held on April 30, 2008, and a Prehearing Order was issued that same day. Disclosure occurred on Tuesday, May 6, 2008 by agreement of the parties, and the due process hearing was held on Monday, May 12, 2008 at the School District Administration Building. Petitioner and Respondent requested the opportunity to file closing arguments and agreed that the parties would file their briefs on Friday, June 13, 2008. A Post Hearing Scheduling Order was issued on Wednesday, May 21, 2008, setting forth the agreed upon briefing scheduled and confirming the previously stated decision due date. At the request of the parties and to accommodate the illness of Petitioner's counsel, the briefing schedule was extended three times on June 08, 2008, June 10, 2008, and June 19, 2008, and closing arguments were due on July 15, 2008. Respondent filed an objection to issues raised in Petitioner's closing argument. However, the Hearing Officer's consideration of the issues and requested relief was limited to those identified in the Prehearing Order of April 10, 2008. The record in this case was closed for evidence on May 12, 2008 and no further evidence or issues were considered other than those included in the record or set out in the April 24, 2008 Prehearing Order.

Petitioner states that Respondent has deprived Student of a free appropriate public education by failing to evaluate Student to determine if Student should be identified as a child with a disability in need of special education or related services under IDEIA. Petitioner alleges

that, due to behavioral matters that have resulted in suspensions and alternative placements, Student has suffered many lost educational opportunities. Petitioner cited Parents' dissatisfaction with Petitioner's alternative placement and inability to participate in general education activities, including gym and field trips. Petitioner also alleged violations of Student's privacy, and Parents' difficulty obtaining Student's records, including a recent evaluation, pursuant to which Student was determined to meet special education eligibility requirements as a student with an emotional disturbance.

As relief in this due process hearing, Petitioner requests that Respondent be ordered "comport with the law" as follows:

- a. Give Student's parents prior written notice and allow them to be equal participants in the decision-making process;
- b. Attempt less restrictive educational environments;
- c. Follow school's policies, i.e., copying Student's parents with written notices of disciplinary referrals;
- d. Allow Student to participate in regular classroom field trips;
- e. Devise a meaningful Behavior Intervention Plan ("BIP") and, if it becomes inappropriate, revise it;
- f. Follow the mandates of the Family Educational Rights and Privacy Act ("FERPA") and the Americans with Disabilities Act ("ADA"), including maintaining the confidentiality of this due process hearing; and
- g. Date all of Student's educational records.

Additionally, Petitioner asks that the Hearing Officer order Respondent to: continue providing copies of Student's educational records as they are generated; produce Student's evaluations to Student's parents; provide Petitioner with a list of diagnostic evaluators, as well as credentials for same, and provide a list of the names of the diagnostic tests that Student has been given; and provide a copy of each of the following from the School District: Section 504 plan; Section 504 self-evaluation and a copy of the grievance procedures; written guidelines for evaluating for mental or physical impairments; written guidelines that insure that students have maximum opportunities to interact with non-disabled students in all elements of the school program; written guidelines that assure that once 504 services are begun, there must be a re-evaluation prior to any proposal by the school for a significant change in placement; and self-evaluation to end discriminatory policies, practices, procedures customs or usages. Finally, Petitioner asks that Respondent reimburse Petitioner for day care expenses and lost wages due to Student's suspensions; Parent training; Extended School Year Services; special transportation; and attorney's fees and costs.

Respondent generally denied all of Petitioner's claims, and demanded strict proof thereof. Respondent strongly denied Petitioner's factual allegations. Respondent stated that the School District has complied with all procedural requirements of IDEIA and that prior to Petitioner filing a Request for Due Process Hearing and Required Notice, Respondent had begun already the evaluation process to determine Student's eligibility for special education.

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 Salado Independent School District. Student was in ** Grade at the time the Complaint was filed, and will be entering ** Grade in August, 2008. At the time the Complaint was filed, Student was not receiving special education and had not been determined to be eligible for special education.

2. The 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 IDEIA.

3. Parent and Student's Doctor were actively involved in Student's education program at ** School in the Fall Semester of School Year 2006-2007, Student's ** year. On September 17, 2006, Parent requested and received a copy of Student's most recent discipline plan. On September 21, 2006, Student's Doctor documented to school personnel that he had performed a psychological evaluation of Student, noting that Student had a diagnosis of Oppositional Defiance Disorder ("ODD") and Attention Deficit Hyperactivity Disorder ("ADHD"). Student's Doctor stated that Student was being treated with outpatient behavioral therapy and prescribed the following medications: ** Daytrana (patch); Ritalin, **; ** Clonidine **; and Flonase nasal spray.

4. Parent completed and signed a Health Information Evaluation Form for Student and delivered the completed form to the school on October 3, 2006. Student's parent stated on the form that Student's most recent screening was on September 21, 2006; that Student had ADHD; that Student received medication at home; that Student did not require adaptive equipment or facility adaptation; and that there was no need for Student's further assessment or referral for a medication problem.

5. On October 25, 2006, Parents completed a "Section 504" (of the Rehabilitation Act of 1973, as amended) referral which stated that Student's ADHD and ODD were interfering with Student's learning in the classroom. Parents requested counseling as a remedy, and did not request that Student be referred for special education. On the same date, the School District sent a Notice to Parents of Section 504 Evaluation Committee Meeting to discuss Student's eligibility for Section 504 services. The evaluation data to be reviewed included Student's profile, health information and discipline reports.

6. Also on October 25, 2006 a Student Assistance Program ("SAP") Behavior Observation Sheet was prepared regarding Student by Student's School Counselor. Student's School Counselor found that Student was easily frustrated academically; was inattentive and impulsive in the classroom; acted other than at age level; and refused to comply with requests, socially.

7. Upon review of the health, observation and discipline materials, the 504 Committee determined that Student was eligible under Section 504 of the Rehabilitation Act of 1973, as amended. It was recommended that Student remain in regular education with modifications and support, specifically Grand Central Station, as needed. Student's 504 Committee also gathered information about Student's conduct and academic weaknesses in deriving an appropriate intervention prior to a special education referral.

8. The School District uses a four level Response to Intervention ("RTI") program to monitor, evaluate and remediate academic weaknesses in its entire student population prior to a decision to refer a specific student for special education. **Level One** is a classroom based intervention wherein all students in a classroom are evaluated on the basis of their documented responses to a general education curriculum. This general education curriculum incorporates certain expectations from the student regarding conduct and classroom socialization, using the standard code of conduct. In **Level Two**, a student may be identified as having a weakness in one or more content areas, such as reading. Specific students may receive a teacher recommendation for classroom attention in certain content areas. In **Level Three**, students who have been identified as having specific subject weaknesses are in need of additional educational services, outside the extra attention in the general education classroom. In **Level Four**, a student who has been determined not to respond academically to the three prior levels which have been implemented on the continuum, is referred for a special education evaluation.

9. Grand Central Station is a content mastery program made available to all students who struggle academically with the general education curriculum. It is used by The School District as a Level Two intervention in The School District's RTI program. Grand Central Station is a research based and peer reviewed program.

10. The Grand Central Station program is designed to support "at risk" students in the 4th-8th grades. In the program, students with identified weaknesses can receive support in any subject through manipulatives, study skills software, and Kurzweil reading computer software.

11. Student was identified as "at risk" at the end of the ** year (School Year 2006-2007). Pursuant to the Texas Primary Reading Inventory ("TPRI"), Student was identified as at risk because Student was below grade level. By the end of ** Student had made progress and developed in all areas tested.

12. Although Student had made educational progress by the end of **, by the beginning of the 2007-2008 school year Student was not developed in all TPRI areas. Additionally, the School District performed a Rigby assessment which indicated that Student's reading level was low.

13. On February 12, 2007, Student's Doctor documented his review of Student's discipline reports and Student's aggressive behavior, usually during transition times or less structured situations. Student's Doctor requested that Student be kept in close proximity to the teacher or lunch monitor to minimize the likelihood of Student being drawn into altercations with other students.

14. On May 7, 2007, there was a class conference with Student's parents, teachers and counselor. During the conference, Student's classroom and bus misbehavior was discussed. Positive behavior, including Student making friends and playing with them without bossing them around and social progress was identified as a goal for Student.

15. A Section 504 meeting was convened on August 24, 2007, and the modifications adopted were: preferential seating; define limits; reduce/minimize distractions; allow a cooling off period; and use positive/concrete reinforcements. These modifications were approved for all subject areas.

16. On September 13, 2007, the School District sent Student's parents a notice that Student was reading at a Level ** (instead of the targeted Level ** for incoming ** Grade students) and would be receiving additional reading support. On October 14, 2007, Student's parents were sent a report indicating that Student was a stronger in Math and that Student behaves when the medication is working.

17. On October 22, 2007, Student's 504 Committee developed a Behavior Intervention Plan ("BIP"). The BIP addressed three goals: Student will stay on task and complete assignments; Student will use appropriate language and wait to be called on by Student's teacher; and Student will practice self control and not hit other students or teachers. The BIP called upon teachers to use verbal praise, to allow Student to be a teacher helper, and to allow Student to earn positive office visits and extra computer time as positive reinforcers.

18. On October 17, 2007, Student's Principal observed Student in the classroom. She observed that Student seemed happy and focused on the teacher; and that Student followed the class procedures and routines and responded to the teacher's requests.

19. On December 7, 2007, Student's Teacher completed a Conner's Teacher Rating Scale-Revised (5) on Student. Student's Teacher found that "Very Much True" applied to the following statements about Student's behavior and educational characteristics:

Inattentive, easily distracted

Defiant

Restless in the "squirmy" sense

Disturbs other children

Actively defies or refuses to comply with adults' requests

Poor in spelling

Cannot remain still

Leaves seat in classroom or in other situations in which remaining seated is expected

Fidgets with hands or feet or squirms in seat

Not reading up to par

Short attention span

Argues with adults

Only pays attention to things Student is really interested in

Has difficulty waiting for turn

Distractibility or attention span a problem
 Temper outbursts, explosive, unpredictable behavior
 Runs about or climbs excessively in situations where it is inappropriate
 Excitable, impulsive
 Restless, always up and on the go

Student's Teacher answered as "Pretty Much True" the following behaviors and characteristics:

Is always 'on the go' or acts as if driven by a motor
 Lacks interest in schoolwork
 Interrupts or intrudes on others (ex. butts into others' conversations or games)
 Has difficulty playing or engaging in leisure activities quietly
 Fails to finish things once started

20. From September 21, 2006 until Student's referral for special education evaluation, Student's teachers and counselors were in regular contact with Student's parents, Student's Doctor, and Student's Psychologist concerning Student's private medical treatment for ODD and ADHD. The School District consulted with Student's doctors regarding changes in medications prescribed to control Student's behavior; and apprised Student's doctors regarding changes in Student's classroom conduct and responses to the School District's efforts to control Student's behavior. In short, Student's doctors were included in the School District's RTI program prior to Student's referral to special education.

21. Before Student's referral for special education, Student's parents inquired about special education testing twice. At the beginning of **, school personnel told Parent that Student did not qualify for special education and Student was referred to the Section 504 Program. At the beginning of ** Grade, when Parent asked about special education, Parent was told that testing and assessment would take "a long time." On neither occasion did Parents direct that Student be referred for special education in response to school personnel's statements.

22. Student's parents consented to Special Education evaluations as follows:

No.	Date of Parental Consent	Assessment
1.	February 22, 2008	Full and Individual Evaluation and Emotional Disturbance Evaluation
2.	February 27, 2008	Determine Special Education eligibility and educational need
3.	March 13, 2008	Psychological Evaluation
4.	March 28, 2008	Autism/Asperger's Evaluation

23. On February 26, 27, and 28, 2008, one of Student's teachers who acted as the observer for Student's testing, was unable to observe Student because Student was either in the office or in In-School Suspension ("ISS").

24. Student's reading was specifically monitored and remediated for the six month period prior to Student's referral for a special education evaluation. During this time, the school used RTI interventions in the GCS and Reading Rallye programs.

25. The first intervention that the School District used was tutoring implemented at the classroom level. The plan was to monitor Student's response to classroom tutoring and if Student's progress failed to meet expectations, then Student would be referred to the School District's SAP at Level Two of the School District's RTI Program.

26. On February 29, 2008, a temporary placement of Student was approved by Student's Teacher, Parent, Principal, Superintendent and Section 504 Committee chair. The temporary placement stated that Student would be placed in the behavior management classroom until pending special education testing was completed. It was stated that once the testing was completed, the Admission Review Dismissal ("ARD") committee would meet to review the test results and determine the best educational setting for Student.

27. While Student was in the behavior management classroom, the Principal stated initially to Student's Mother that Student could not attend the ** Grade Easter Egg Hunt because of aggressive behaviors, but would be provided a separate Easter Egg Hunt. After consulting with Parent, Student was allowed to go on the classroom Easter Egg Hunt. Student also missed field trips to the rodeo and Inflatable Fun Land due to disciplinary infractions. Additionally, Student missed some of the 135 minutes per week of physical education with peers during the first two weeks of the behavior classroom assignment.

28. On March 12, 2008, Student had a major temper tantrum when Student did not want to sit outside to wait for Parent. Student slapped a teacher, hit the Principal with a shoe, and barricaded himself in the school secretary's office, refusing to come out even when Parent arrived. Parent had to physically restrain Student on the floor and Student hit, kicked, used profanity and bit Parent.

29. Immediately after the above incident on March 12, 2008, Student and Student's Parent spoke to the Special Education Director about Student's P.E. program. Student stated several times that Student did not want to go to P.E., and then stated that if the Special Education Director made Student go to P.E., Student would spit on her. The Special Education Director asked that Student not do that, at which point Student took a band-aid off of Student's arm and rubbed it on the Special Education Director's arm, saying "this is what I'm going to do to you if you make me go." Student's Parent attempted to re-direct Student's behavior and then the Special Education Director ended the conversation.

30. On March 13, 2008, a meeting was held to review Student's BIP and daily schedule. The Elementary School Principal, Counselor, Educational Diagnostician and Behavior Classroom teacher were in attendance. Student had displayed some appropriate behavior in the

behavior classroom, but had also had several episodes of intense acting out behavior. It was stated that Student tends to act out when asked to do any assignments which Student does not want to do. It was decided that Student's current placement in the behavior management classroom would continue. A new revised BIP was adopted, which addressed the following topics: Does not complete assignments and stay on task when directed by teacher; Uses profane language and negative remarks when Student becomes frustrated or angry; Hits, kicks, bites teachers and others when upset; Kicks and hits school property. The meeting attendees wanted Student to communicate when Student was angry, rather than acting out, and employment of "cool down" periods, positive reinforcements and calming methods to achieve these results.

31. Student's ** Grade teacher wrote Student's Psychologist on March 14, 2008, describing her journal of Student's erratic and inconsistent behavior. Student's teacher indicated that she began keeping the journal on October 15, 2007. In the note, she described Student's behavior as disruptive and sometimes violent; yet sometimes very kind, affectionate and remorseful. Also, she described Student's habit of not staying on tasks to complete assignments except for math assignments, on which Student does follow the rules and is successful. She describes the changes in Student's behavior associated with changes in medication and the intermittent success of a school developed behavioral modification plan.

32. Student's FIE was completed on March 31, 2008 and submitted to Respondent. The FIE stated that Student appeared to have limited strength, vitality or alertness, including a heightened alertness to environmental stimuli; and chronic or acute health problems in the form of severe ADHD and Obsessive Compulsive Disorder ("OCD"). The report stated that Student's conditions have an adverse effect on Student's educational performance and that Student was having difficulty maintaining alertness in the classroom.

33. From Student's enrollment in School District through April 2, 2008, School District personnel communicated extensively with Parents. When Student was in **, there were 7 school to parent communications regarding discipline issues and Student's medications from August 24 through the end of the month. For the rest of Student's ** year, there were 16 school to parent communications in September 2006 concerning whether there were or were not discipline problems; one school to parent communication in November 2006; four communications in December 2006; two school to parent communications each in January and February 2007; and four communications in May 2007 to the parents from school personnel. In Student's ** Grade year there was a daily communication log which Parent received before Student was placed in the behavior classroom. Additionally, from the beginning of ** Grade through April 2, 2008 there was one school to parent communication in August 2007; two communications in September 2007; four school to parent communications in October 2007; four communications in December 2007; ten school to parent communications in January 2008 primarily noting discipline or concerns; one communication in February 2008; three communications in March 2008; and two communications April 1 and 2, 2008. (*Please see, chart, "Student Related Communications", attached to this Decision as Attachment 1).*

34. Student was suspended from school/placed in ISS as shown on the chart below:

No.	Date	Corrective Action
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**		
1.	October 12, 2006	ISS for one day.
2.	October 20, 2006	ISS for half-day.
3.	December 11, 2006	Suspended for one day.
4.	January 30, 2007	Suspended for one day.
5.	February 6, 2007	ISS for one day.
6.	April 30, 2007	Suspended from bus for four days.
7.	May 11, 2007	Suspended for one day.
** Grade*		
8.	January 28, 2008	Suspended for four days.
9.	February 29, 2008	ISS for one day.
10.	April 17, 2008	Suspended for three days.

* Several disciplinary report pages from Student's ** Grade year were illegible.

35. From August, 2006 through April, 2008, School District documented 46 incidents of Student's misbehavior, resulting in discipline referrals, reports and notes to Parent. From August 3, 2006 through October 20, 2006, before Student was determined to be in need of Section 504 accommodations, fifteen (15) incidents were reported. From October 20, 2006 through May 11, 2007, the remainder of Student's ** year, 21 disciplinary infractions were documented. From September 10, 2007 through April 17, 2008, 10 disciplinary infractions were documented. (*Please see*, chart, "Incidents of Misbehavior", attached to this Decision as Attachment 2).

36. Student's Psychological Evaluation was completed on April 29, 2008. The Psychological Evaluation stated that Student's evaluation results did not support an Autism Spectrum Disorder, and Student did not present consistently prevalent traits suggestive of either Autism or Aspergers Disorder; neither did Student display any OCD traits during the observation. Student did however, appear to have a diagnosis of Conduct Disorder, and within that disorder, a diagnosis of ODD. Student repeatedly showed a pattern of negativity, hostility, and defiant behaviors, including losing of temper, arguing with adults, and actively defying or refusing to comply with requests. ADHD was also noted to a degree by the observers. Student was diagnosed with Conduct Disorder with significant oppositional features and ADHD, moderate to significant. The Bell County Cooperative for Exceptional Children's Ph.D./L.S.S.P. ruled out OCD. The Bell County Cooperative for Exceptional Children's Ph.D./L.S.S.P. also noted that Student did not appear to have a severe emotional disturbance in part because it appeared that there were significant problems which did not appear to be based in emotional distress.

37. The April 29, 2008 Psychological Assessment stated that Student's problems had such an intensity that they could prove a threat to Student's peers. It also noted that it was important for Student's teachers to be trained in restraint procedures, and to document restraint procedures, as well as physical harm done by Student. The report stated that Student reports bruising from Student's parents, and the assessor stated that any bruising on Student might need to report to supportive agencies. The final recommendation stated that Student needs to be isolated until Student regains a level of control where Student does not present a threat for harm to others.

38. Student's Initial Psycho-educational Report by School's Educational Diagnostician was completed and submitted to Respondent on May 2, 2008. The report stated that it appeared that Student did not require Assistive Technology ("AT") and that there was no need for a further assessment in that area. In the achievement tests, Student refused to do most of the writing and paper/pencil task subtests which were required. The sections which Student did complete demonstrated little effort and were noticeably agitated and defiant. The assessor questioned whether those results were a true indication of Student's achievement levels.

39. Student's Initial Psycho-educational Report assessor recommended that Student receive individual counseling on a supportive, as well as explorative, basis and that group counseling might prove helpful in developing more appropriate social skills for Student; that a classroom management plan to check off academic and behavioral objectives could prove useful; that Student's teachers needed to ignore, as much as possible and prudent, inappropriate attention-getting behaviors; and that Student's good behaviors should be rewarded. The report detailed how Student could be paired up with "buddies" and classmates of Student's choosing to help facilitate appropriate verbal communication and social skills.

40. Student's Psycho-educational report continually suggested that Student be placed in a highly structured classroom that provides rewards for work completion and consequences for off-task behavior. Another suggestion used throughout was that Student's assignments should be broken into smaller, more manageable tasks, and that lessons given to Student should be brief and concise.

41. Student's Initial Psycho-educational Report concluded that Student qualified for special education services as a student with Other Health Impairment ("OHI").

42. Student received the following grades in ** Grade, exactly as shown below:

	Semester:	1-1	1-2	1-3	1 st Semester Averages	2-4
Class:						
Conduct		----	*	*	*	*
Reading 1		----	*	*	*	*
Science/Health 1		----	*	*	*	*
Social Studies 1		----	*	*	*	*

Math 1		----	*	*	*	*
Language Arts 1		----	*	*	*	*
Physical Education		*	*	*	*	*
Fine Arts		*	*	*	*	*

“E” = Excellent; “S” = Satisfactory; “N” = Needs Improvement; “U” = Not at level to earn promotion.

43. Although Student continues to have difficulty in Language Arts, the primary concern of Parents and school personnel since Student began attending school has been Student’s conduct, behaviors and discipline problems which disrupt the classroom and interfere with Student’s education.

III. Discussion

Petitioner’s primary complaint is that Respondent failed to timely identify Student as a child with a disability, thereby denying Student a free appropriate public education (“FAPE”) for the year before the Complaint was filed, in accordance with 19 TEX. ADMIN. CODE, §89.1151(c). Petitioner also alleges specific denial of FAPE, such as loss of physical education and class field trips. Finally, Petitioner asserted that Respondent failed to provide certain records and assessment information requested by Parent. By the date of the hearing, Student had been assessed and records provided, such that Petitioner did not present evidence regarding lack of school files or assessment data. Petitioner noted that, apart from documented difficulties in Reading and Language Arts, Student had trouble in school from the time of Student’s enrollment in **, because of Student’s diagnosed ADHD and ODD. Nonetheless, Student was not referred for special education until second semester of ** Grade.

Respondent defends its actions stating that Student was identified as a student with a disability under Section 504, and Student received appropriate accommodations, modifications and interventions until it was determined that special education was necessary. Respondent notes that Response to Intervention (“RTI”) is both a Federal and a State mandate, such that school districts are directed to try other “whole school” approaches for students with difficulties before special education referrals. Further, Respondent notes a lack of guidance in Federal and State regulations and faults Texas Education Agency for not providing enough direction and support to allow school districts to implement legally sufficient RTI programs. Petitioner simply does not address RTI and relies on pre-IDEIA regulation analysis.

RTI is a recently enacted (October 13, 2006) educational initiative of the Office of Special Education and Rehabilitative Services (“OSERS”) in the U.S. Department of Education designed to be a systemic approach to identifying and remediating educational weaknesses in students prior to a referral for special education assessment. School districts are now being encouraged to use a continuum of educational interventions, rather than simply referring a student for special education evaluations when the student demonstrates that he might have a

disability that interferes with his education. The RTI approach is meant to eventually replace the traditional application of educational and intellectual testing instruments to the problem of a student's low classroom performance. Primarily, RTI is intended to augment the use of test results to identify learning disabilities based solely on whether there is a severe discrepancy between a student intellectual capability (IQ) and academic achievement. The determination of a specific learning disability as defined under IDEA is one of the goals of the RTI process. Where the suspected disability falls in the area of behavior that could adversely affect learning, the RTI process requires a school district to use a continuum of behavioral interventions, implemented in the student's least restrictive environment, before the student is referred for assessment for, and possible identification of, an eligible educational disability that affects a student's behavior.

Federal regulations give additional directions to states regarding RTI programs, including 34 C.F.R. §300.307, which establishes the general directive to use the RTI process, stating:

- Specific Learning Disabilities.** (a) General. A State must adopt, consistent with §300.309, criteria for determining whether a child has a specific learning disability as defined in §300.8(c)(10). In addition, the criteria adopted by the State -
- (1) Must not require the use of severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability, as defined in §300.8(c)(10);
 - (2) Must permit the use of a process based on the child's response to scientific, research-based intervention; and
 - (3) May permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability, as defined in §300.8(c)(10).
- (b) Consistency with State criteria. A public agency must use the State criteria adopted pursuant to paragraph (a) of this section in determining whether a child has a specific learning disability.

This rule does not establish the *specifics* of important operative terms and phrases used therein. For the example, the rule does not specify *which* "research-based intervention(s)," or how long a district may engage in the process prior to referral for special education assessment.

Finally, Federal regulations at 34 C.F.R. §300.309 contains more information about the structure of the RTI process, but it is similarly lacking in a detailed explanation of key details. It provides in pertinent part:

- Determining the Existence of a Specific Learning Disability.** (a) The group described in §300.306 may determine that a child has a specific learning disability, as defined in §300.8(c)(10), if -
- (1) The child does not **achieve adequately** for the child's age or to meet State-approved grade-level standards in one of more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or [specified] State-approved grade-level standards:
 - (i) Oral expression.
 - (ii) Listening comprehension.
 - (iii) Written expression.
 - (iv) Basic reading skill.
 - (v) Reading fluency skills.
 - (vi) Reading comprehension.

- (vii) Mathematics calculation.
- (viii) Mathematics problem solving.

(2)(I) the child does not make *sufficient progress* to meet age or State-approved grade-level standards in one or more of the areas identified in paragraph (a)(1) of this section when using a process based on the child's response to scientific, research-based intervention; or

(ii) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved, grade-level standards or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using the appropriate assessments, consistent with §§300.304 and 300.305; and

(3) The group determines that its findings under paragraphs (a)(1) and (2) of this section are not primarily the result of -

- (i) A visual, hearing, or motor disability;
- (ii) Mental retardation;
- (iii) Emotional disturbance;
- (iv) Cultural factors;
- (v) Environmental or economic disadvantage; or
- (vi) Limited English proficiency.

(b) To ensure that **underachievement** in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation described in §§300.304 through 300.306 -

(1) Data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and

(2) data-based documentation of repeated assessments of achievement at **reasonable intervals**, reflecting formal assessments of student progress during instruction, which was provided to the child's parents.

(c) The public agency must promptly request parental consent to evaluate the child to determine if the child needs special education and related services, and must adhere to the timeframes described in §§300.301 and 300.303, unless extended by mutual written agreement of the child's parents and a group of qualified professionals, as described in §300.306(a)(1) -

- (1) If, prior to a referral, a child has not made adequate progress after an appropriate period of time when provided instruction, as described in paragraphs (b)(1) and (b)(2) of this section; and
- (2) Whenever a child is referred for an evaluation.

[Emphasis supplied.]

Again, key descriptions of “achieve adequately,” “sufficient progress,” or “reasonable intervals” were left to the school district to determine based on student specific circumstances. Also, there is an inherent problem in the chronology of the RTI process and the applicable rules. The “group” referenced in 34 C.F.R. §300.309(a) is referenced to be the same group described in 34 C.F.R. §300.306, “Determination of Eligibility.” 34 C.F.R. §300.306(a)(1) requires a group described of “qualified professionals and the parent of the child” to review *special education* assessments developed pursuant to 34 C.F.R. §300.304 (Evaluation Procedures) and 34 C.F.R. §300.305 (Additional Requirements for Evaluations and Reevaluations) to make an eligibility determination. Such a group is, typically, the ARD Committee *after* the RTI process is completed. Therefore, it is not clear why an LEA would be required to assemble a group (who

would be required to be included) at the start of the RTI process or during the process. The only logical members of an RTI group would be the student's teacher and parents - perhaps the student's principal is included, or a specific counselor or service provider. The rule does not specify.

The role of behavioral dysfunction in the RTI process is addressed, indirectly, by the rules. 34 C.F.R. §300.307(a), cited herein, references only 34 C.F.R. §300.8(c)(10) of the complete regulation that defines a child with a disability, under IDEIA. Therefore, the RTI process is designed to apply to the determination of a specific learning disability. The subsection provides:

(10) Specific learning disability - (I) General. Specific learning disability means a disorder in one or more of the **basic psychological processes** involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write spell, or to do mathematical calculations, including conditions such as perceptual disabilities, dyslexia, and developmental aphasia.

(ii) Disorders not included. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, or **emotional disturbance** or of environmental, cultural, or economic disadvantage.

[Emphasis supplied.]

However, when one reviews what does *not* constitute a specific learning disability; and refers to 34 C.F.R. §§300.309(a)(30)(iii) and 300.311(a)(6) (cited herein), it is clear that the LEA has to *rule out* behavioral dysfunction that interferes with a student's learning, during the RTI process.

After review of the arguments and evidence, the Hearing Officer cannot fault School District for attempting an RTI program and cannot find that Student was denied a FAPE as a result of the delay in referring Student for special education. Conversely, all parties including school administrative personnel, Student's parents, teachers, doctors, and counselors worked together to address Student's academic and behavioral problems from the time Student enrolled in school. The communication and collaboration of the parties for Student's benefit in the form of medical consultation, behavior plans, Grand Central Station, Reading Rallye, and Section 504 accommodations exceeds what would reasonably be expected for a student presenting the difficulties that Student exhibited. The Hearing Officer cannot fault school districts for not timely referring a student for special education where the school district attempted an RTI program which eventually resulted in the student's referral for special education. Moreover, it cannot be overemphasized that Student's interventions were a collaborative effort; other than missing two (2) ** Grade field trips, Student suffered no educational losses or punishment due to Student's ADHD and OCD related behaviors before referral.

Ultimately, whether or not School District properly established and implemented an RTI program in compliance with extant law, the issue in this due process hearing goes beyond the letter of the Federal regulations to the fundamental determination of whether Student was denied a free appropriate public education to referral for special education.¹ Respondent is correct that Texas regulations offer little specificity, stating at 19 TEX. ADMIN. CODE, §89.1011:

Referral of students for a full and individual initial evaluation for possible education services shall be a part of the district's overall, general education referral for screening system. Prior to referral, students experiencing difficulty in the general classroom should be considered for all support services available to all students, such as tutorial; remedial; compensatory; response to scientific, research-based intervention; and other academic or behavior support services. **If the student continues to experience difficulty in the general classroom after the provision of interventions, district personnel must refer the student for a full and individual initial evaluation.** This referral for a full and individual initial evaluation may be initiated by school personnel, the student's parents or legal guardian, or another person involved in the education or care of the student.

[Emphasis supplied.]

¹ Specifically, under IDEIA, " a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies [noted in the Decision] -

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

(20 U.S.C. §1415(f)(E)(ii), Procedural Issues.)

School District's RTI program may need additional review to make it more structured and systematic as it addresses the Federal regulatory issues of data collection, student monitoring, documentation, and professional involvement. Nonetheless, School District's concerted efforts to implement RTI for Student did not act to deprive Student of FAPE while RTI was attempted.

As Respondent argues:

“...To fault The School District for doing exactly as directed would be contrary to both the Commissioner's rule requiring school to provide multiple non-special education efforts before referral and the RTI movement. According to the Commissioner's rule, what happened in this case is exactly how it's supposed to work: try regular education interventions first. This is not a case where the student “fell through the cracks” and was not provided interventions and services.”

While Petitioner's case is based on asserted procedural missteps of School District, and does not address RTI and its directives, Petitioner did not show that Student's unique educational needs were not met and that Student did not make educational progress before referral for special education. Consequently, because Petitioner did not establish that Student was denied FAPE, the Hearing Officer cannot order the relief requested by Petitioner. It is worth noting, however, that Petitioner did not prove at the hearing that the relief requested, other than damages and compensatory relief, was still needed or had not been given already by Respondent.

IV. Conclusions of Law

1. Petitioner is a student in The School District who had not been determined to be eligible for special education services at the time of the hearing. 20 U.S.C.A. § 1401(3); 34 C.F.R. §300.8; 19 T.A.C. §89.1040.
2. Respondent School District 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 show that Student was denied a free appropriate public education where Student was determined to be in need of accommodations and District worked collaboratively with parents and professionals to provide accommodations and behavioral supports in a Response to Intervention program prior to Student's referral to special education.

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 25th day of July, 2008.

Gwendolyn Hill Webb
Special Education Hearing Officer

Attachment 1

STUDENT RELATED COMMUNICATIONS			
No.	From - To	Date	Description
1	Teacher to Mother	August 24, 2006	Student oppositional, defiant, hit teacher.
2	Teacher to Teacher	August 25, 2006	Student on Ritalin. Behavior problems summarized. Parent thinks Student is borderline ODD.
3	Principal to Mother	August 25, 2006	Discipline concern.
4	Principal to Teacher	August 26, 2006	Student a "process" takes all year to figure out. Discipline workshop?
5	Teacher to Teacher	August 28, 2006	Student on new medications. Come in and observe Student?
6	Principal to Teacher	August 28, 2006	Spoke to Parent about new medications.
7	Principal to Parent	August 30, 2006	Discipline concern.
8	Principal to Teacher	September 1, 2006	Spoke to Parent about adjustment concerns.
9	Principal to Mother	September 6, 2006	Behavior concern on bus.
10	Principal to Teacher	September 12, 2006	Notification to Parent about field trip. Plan for behavior?
11	Principal to Teacher	September 14, 2006	Call Parent and tell how Student did. Moved desk away from others.
12	Principal to Teacher	September 14, 2006	Behavior problems. Linked to ADHD. Call Parent three times per week. Workshop for you to attend on ADHD kids.
13	Teacher to Parents	September 16, 2006	Discipline concern.
14	Teacher to Father	September 18, 2006	No discipline tonight.
15	Principal to Parents	September 18, 2006	Conference.
16	Teacher to Father	September 19, 2006	No discipline tonight.
17	Teacher to Father	September 20, 2006	No discipline tonight.

18	Teacher to Father	September 21, 2006	Behavior.
STUDENT RELATED COMMUNICATIONS cont.			
19	Principal to Teacher	September 21, 2006	Need to 504 Student. Parent asked about it.
20	Teacher to Mother	September 25, 2006	Behavior.
21	Principal to Mother	September 26, 2006	Bump on Student's head.
22	Teacher to Mother	September 26, 2006	Behavior.
23	Teacher to Mother	September 27, 2006	Behavior.
24	Principal to Father	November 16, 2006	Behavior concern.
25	Principal to Father	December 5, 2006	Temper tantrum.
26	Principal to Mother	December 8, 2006	Suspension from School.
27	Teacher to Teacher	December 20, 2006	Let Parent know about behavior and participation in PE class.
28	Principal to Mother	December 21, 2006	Change ** class.
29	Principal to Mother	January 26, 2007	Discipline concern.
30	Principal to Mother	January 30, 2007	Suspension from School/new plan.
31	Principal to Mother	February 7, 2007	Student's medicine increased.
32	Principal to Mother	February 15, 2007	Recess discipline.
33	Principal to Mother	May 14, 2007	Behavior concern.
34	Principal to Mother	May 16, 2007	Behavior concern.
35	Principal to Mother	May 17, 2007	Behavior concern.
36	Principal to Mother	May 25, 2007	Discipline concern.
37	Teacher to Parents	August 22, 2007	Conference to discuss Student's medications.
38	Teacher to Mother	September 7, 2007	Behavior concern; Also spoke to Student's doctor.

39	Teacher to Mother	September 17, 2007	Note documenting behavior and work habits.
40	Teacher to Principal	October 5, 2007	Problem with Student's behavior. Little more hyper than usual.
41	Principal to Mother	October 10, 2007	Praise call.
STUDENT RELATED COMMUNICATIONS cont.			
42	Principal to Teacher	October 16, 2007	During 504 new behavior plan, targeting behaviors.
43	Principal to Teacher	October 22, 2007	Outline of behavior plan.
44	Teacher to Mother	December 16, 2007	Discussed upcoming doctor appointments; wrote letters concerning Student's behaviors.
45	Principal to Teacher	December 17, 2007	Copy documentation log for Parent to give to doctor. Have both parents in for a visit.
46	Principal to Teacher	December 17, 2007	Couldn't stand Student's behavior. Talked to Parent. Student is not bringing books home. Not writing well. Dyslexia.
47	Principal to Teacher	December 18, 2007	Parent called for synopsis to give to doctor of Student's behavior. Key things to adjust for success in class. Copy synopsis for Dr. Carey.
48	Principal	January 8, 2008	Wrote that Teacher brought Student to office. Student was having temper tantrum. Called Parent. Wrote down observations of Student's hyper-active actions in office.
49	Teacher to Teacher	January 9, 2008	Discussion of Student's behavior as feedback for Student's doctor in adjusting medications.
50	Teacher to Teacher	January 9, 2008	Question about behavior to put info in communication for Student's doctor.
51	Principal to Teacher	January 15, 2008	Spoke to Parent about Student's taking new ADHD medication.
52	Principal to Teacher	January 15, 2008	Spoke to Parent about Student's medications and problems on the bus.

53	Teacher to Principal	January 16, 2008	New plan for Student. Like baseball - three strikes and out of class.
54	Teacher to Father	January 16, 2008	Bad day for Student; Father came to pick Student up from School.
55	Principal to Parent	January 17, 2008	Schedule for removal if Student cannot settle down. Be creative about interventions to ameliorate behavior.
STUDENT RELATED COMMUNICATIONS cont.			
56	Teacher to Mother	January 22, 2008	Problem on bus.
57	Teacher to Mother	January 28, 2008	Problem on bus.
58	Teacher to Teacher	February 29, 2008	Transmission of documents for Student's temporary placement.
59	Principal to Mother	March 3, 2008	New placement.
60	Principal to Parents	March 13, 2008	Behavior Modification Class.
61	Principal to Mother	March 31, 2008	After School discipline concern.
62	Principal to Mother	April 1, 2008	After School discipline concern.
63	Principal to Mother	April 2, 2008	After School discipline concern.

Attachment 2

INCIDENTS OF MISBEHAVIORS			
No.	Date	Misbehavior/Action	Consequence/Action Taken
1	August 3, 2006	Slapping, pinching	Sent report home
2	August 24, 2006	Slapping	Missed Recess
3	August 29, 2006	Illegible misbehavior	Teacher will create a behavior plan
4	August 29, 2006		Student on new medications
5	August 29, 2006	Teacher said Student bad in the morning, good in the afternoon.	
6	September 5, 2006	Out of seat, disruptive	Sent report home
7	September 14, 2006	Out of seat, disruptive	Sent report home, phoned home
8	September 15, 2006	Illegible Misbehavior	
9	September 20, 2006	Out of seat, disruptive	Sent report home
10		Swung jacket	Time out in office
11	October 3, 2006	Illegible misbehavior	Lunch detention
12	October 12, 2006	Out of seat, kicked student	Sent report home, phoned home
13	October 12, 2006	Hit other student	Loss of Recess
14	October 12, 2006	Hit teacher	ISS
15	October 20, 2006	Hit teacher	ISS
16	November 1, 2006	Illegible misbehavior	Sat in office
17	December, 2006	Hit teacher	Suspension
18	December 5, 2006	Incident in PE line	PE Coach called to properly restrain Student
19	December 6, 2006	Illegible misbehavior	
20	December 8, 2006	Hit other student	
21	December 20, 2006		Hitting conference

22	January 26, 2007	Hitting in PE class with lunch box	
INCIDENTS OF MISBEHAVIORS cont.			
23	January 30, 2007	Illegible misbehavior	Discussed discipline plan; Suspension
24	February 1, 2007	Misbehavior with hitting	Counseling with Principal
25	February 5, 2007	Bit other student	ISS; Spoke to Parent
26	February 15, 2007	Illegible misbehavior	
27	February 16, 2007	Hitting	Time out in office
28	February 18, 2007	Out of seat, disruptive	Phoned home
29	March 1, 2007	Hitting	Time out in office
30	March 7, 2007	Illegible misbehavior	Time out in office
31	April 25, 2007	Illegible misbehavior	Lunch detention
32	April 26, 2007	Scratched another student	Sent to office
33	April 26, 2007	Disobeyed teacher	Behavior plan
34	April 30, 2007	Spitting on student	Suspended from bus for four days
35	May 2, 2007	Illegible misbehavior	Time out in office
36	May 11, 2007	Hitting	Called Parent; Suspended
37	September 10, 2007	Disobedient, Disruptive	Sent report home, Phoned home.
38	November 5, 2007	Out of seat	Sent report home
39	November 28, 2007	Out of seat, disruptive	Sent report home, phoned home
40	January 28, 2008	Hitting and spitting	Suspended for four days
41	February 27, 2008	Student brought to office for general misbehavior. Misbehaved and was defiant in office.	Tried to implement behavior strategies.
42	February 27, 2008	Hitting	

43	February 29, 2008	Misbehavior and defiance in ISS	
44	February 29, 2008	Misbehavior, defiance, kicking and hitting teacher.	
45	March 13, 2008	Misbehavior and hitting teacher	Redirection to games.
INCIDENTS OF MISBEHAVIORS cont.			
46	April 17, 2008	Hitting other student	Three day suspension.

DOCKET NO. 168-SE-0308

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

SYNOPSIS

Issue: Did the School District fail to timely identify a Student when it attempted a Response to Intervention program for a Student who had below grade level reading and behavior problems (ADHD, ODD), and who was ultimately referred for special education.

Federal Citation: 34 CFR, §300.8, §300.306, §300.307, §300.309, and §300.311.

Texas Citation: 19 Tex. Admin. Code, §89.1011.

Held: For the School District. Where a school district attempts an RTI program in collaboration with school personnel, Student's parents, and other professionals, school district did not act to deny FAPE where it can be shown that Student made educational progress, even though Student was ultimately referred for special education.