

DOCKET NO. 255-SE-0608

STAR CHARTER SCHOOL	§	BEFORE A SPECIAL EDUCATION
	§	
	§	
VS.	§	HEARING OFFICER
	§	
Student	§	
B/N/F Parent	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

Star Charter School, a charter school in Austin (hereinafter "Petitioner" or "the school"), brought a complaint pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §1400, et seq., against student \*\* and the student's parents \*\* and \*\* (hereinafter "Respondent" or "the student") seeking a finding that its evaluation of the student is appropriate and that the student and parent are not entitled to an independent educational evaluation at public expense. The student and parent filed a counter-claim alleging that the student has been denied a free appropriate public education, that the parent is entitled to reimbursement for the cost of private evaluations, and that the student is entitled to compensatory educational services. The student was subpoenaed to appear at the hearing and failed to appear. Petitioner seeks sanctions against the student and parents for the failure to appear.

Petitioner's request for hearing was filed on June 13, 2008, and came on for hearing by order of the hearing officer and agreement of the parties on September 16 and 17, 2008. At the conclusion of the hearing the parties were afforded an opportunity to file written-closing arguments and briefs on the issue of sanctions. The parties filed arguments and briefs and agreed that the decision in this matter would be timely issued on or before November 7, 2008.

Petitioner was represented at the hearing by Emily Newhouse, an attorney with Schwartz & Eichelbaum, Wardell, Mehl and Hansen, P.C., and Respondent was represented by Susan Feller Heiligenthal, an attorney in Austin, and Dorene Philpot, an attorney in Galveston.

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

#### Findings of Fact

1. \*\* is a student residing with the student's parent and attends the Star Charter School in Austin. [Petitioner's Exhibits 2, 13 & 14]
2. The student was enrolled at the school in the fall of 2006 and attended school for the 2006-2007 and 2007-2008 school years. [Petitioner's Exhibits 2, 13 & 14]
3. During the 2006-2007 school year the student was in the \*\* grade. During the 2007-2008 school year the student was in the \*\* grade. [Petitioner's Exhibits 13 & 14]
4. Prior to the student's enrollment at the school, the student had attended only private schools. [Transcript Page 389]
5. The student was born in \*\*. [Petitioner's Exhibit 2]
6. When the student was enrolled at the school, the parent indicated that the student had never been placed in special education, had never been suspended or expelled from a school, had no history of criminal or juvenile adjudications, and had never been placed in a disciplinary alternative education program ("DAEP"). [Petitioner's Exhibit 2]
7. At the time of the student's enrollment, the student's parent provided private evaluations to the school concerning difficulty the student had had in private schools in social situations. The parent also told the school that the student had some difficulties with attention-deficit disorder ("ADD"). But the student's parent also told the school that the student had never

been qualified as eligible under Section 504 (29 U.S.C. §794, et seq.) and had never been provided 504 services or special education services. [Transcript Pages 10 & 11]

8. During the student's \*\* and \*\* grade years at the school, the student made grades of mostly A's with some B's. [Petitioner's Exhibits 13 & 14 and Transcript Page 12]

9. In November 2006, the student's parent requested a referral for special education evaluation. The school followed up the request with an email for them but received no response from the student's parents until February 2007. [Transcript Pages 12 & 13]

10. School officials communicated with the student's parents directly through email during the month of March concerning the request for a referral. The student's parent was unclear as to whether or not the parent wanted a Section 504 referral or a special education referral, but the school determined in March 2007 to treat the request as a special education referral. [Transcript Pages 13-15]

11. The student's parent provided to the school a psychological evaluation of the student completed in March 2007 and a vision evaluation. The student's parent had also provided a psycho educational evaluation of the student completed in May 2006. [Transcript Page 16]

12. The evaluation from 2006 concluded that \*\* had "deficits in Expressive Language Formulation." The evaluation recommended training "to aid \*\*'s focus, attention, timing, and rhythm for cognitive skills." The evaluation also recommended language therapy to "support the development of social pragmatic communication skills." [Petitioner's Exhibit 11]

13. The evaluation completed in 2007 noted problems with the student's attention, expressive language, and social cognition. The evaluation recommended the development of a learning plan to deal with the student's speech articulation, reinforcement of appropriate behavior and psychotherapy or counseling. [Petitioner's Exhibit 10]

14. The school talked with the student's parent about further evaluation, and the parent consented to a special education evaluation in May 2007. But the student's parent told the school that the parents wanted a lot of information about special education and about the evaluation before it could be performed prior to consenting to the specific evaluations. The parent also told school officials that the parents did not want a designation of special education or placement in special education for the student. The parent was interested in a team approach for evaluation of the student. The parent did agree to a pragmatic language evaluation and a development of a behavior intervention plan ("BIP"). [Transcript Pages 17 & 18 and Petitioner's Exhibit 3]

15. After consenting to evaluation of the student, the school arranged for a psychologist and a speech pathologist to meet with the student's parent and school personnel. At the meeting, the evaluations of the student were discussed and the parent told the people present at the meeting that the parents wanted to utilize the special education referral process because it is a "more formal process" and involves a team approach in looking at educational planning for the student. But the parent insisted that the parents did not want the student "to be qualified for special education services." The student's parent indicated an interest in Section 504 services. [Transcript Pages 22 & 23]

16. The student's parent at the meeting did not request a psychological evaluation, an occupational therapy evaluation or an assisted technology evaluation. [Transcript Pages 23 & 24]

17. The school personnel and the parent agreed that a functional behavioral assessment ("FBA") would be completed and that a BIP would be developed for a Section 504 plan for the student. [Transcript Page 24]

18. A BIP was drafted for the student and the student performed well academically during the \*\* and \*\* grade school years making grades of A or B and performing well on state standardized tests. [Petitioner's Exhibits 12-16]

19. The student had some minor behavior issues in the fall of 2007 because of the student's interruptions in class, and the student had two behavioral referrals. [Transcript Pages 37-39]

20. The accommodations in the student's 504 plan were implemented and the student was successful in school. The student's parent, though, reported to the school that the student had behavioral problems at home and the school arranged for the student to stay after school and provided structure for the student to complete the student's school work. The student did not always turn in assignments but the school worked with the student to see that the assignments were turned in as the student generally completed school assignments. [Transcript Pages 49-33]

21. In February, 2008, the student was suspended from school for taking screws out of desks at school which could cause them to collapse. [Petitioner's Exhibit 9]

22. After the suspension, the student's parents requested an independent educational evaluation ("IEE"). [Petitioner's Exhibit 5 and Transcript Pages 44-45]

23. An attorney for the parents met with the school personnel to discuss the IEE and told the school that the student had been diagnosed with Asperger's disorder and that their evaluation was inadequate. [Petitioner's Exhibit 45]

24. The school agreed to an IEE and provided a packet with guidelines for the IEE to the parents. [Petitioner's Exhibit 6 and Transcript Pages 45 & 46]

25. The school agreed to pay no more than one-hundred twenty-five percent (125%) of prevailing rates in the area for the IEE. The student's parent brought a contract for an IEE to

the school and sought costs of up to \$5,000.00 for the evaluation and \$1,000.00 for an FBA. [Petitioner's Exhibit 6 and Respondent's Exhibit 1 and Transcript Pages 47-49]

26. School personnel consulted with other schools in the area and determined that the prevailing rate for such an evaluation was \$1,500.00 and told the student's parents that they would pay up to \$1,875.00 for the IEE (an amount equal to 25% over the prevailing rate of \$1,500.00). [Petitioner's Exhibit 6 and Transcript Pages 47-48]

27. The student's parents told the school that they were not offering an appropriate amount for the independent evaluations and secured an evaluation from a neuropsychologist, a speech evaluation, and an occupational therapy evaluation. [Petitioner's Exhibits 20-23 and Transcript Page 52]

28. The district offered the parents \$1,875.00 for the neuropsychological evaluation and \$1,000.00 for an FBA. [Petitioner's Exhibit 6 and Transcript Pages 52 & 53]

29. The student's parents obtained private evaluations. [Petitioner's Exhibits 20, 22 & 23]

30. A neuropsychological determined that the student had a depressive disorder and attention-deficit hyper disorder ("ADHD"). The evaluation concluded that the student had no diagnosis on the autism spectrum and did not have dysgraphia. [Petitioner's Exhibit 20]

31. A speech evaluation of the student concluded that the student has problems with processing, conversational and pragmatic language difficulties, written language weaknesses and social skills problems. The evaluation did not clearly identify eligibility for special education, and the evaluation discussed Asperger's, depression, and a need for a development of social skills. [Petitioner's Exhibit 22]

32. A occupational therapy evaluation determined that the student has sensory processing difficulties and needs help with balance, posture, and processing sensory information.

The evaluation noted that the student had some weaknesses but did not conclude that the student met eligibility criteria. [Respondent Exhibit 23]

33. The speech therapist performing the evaluation of the student testified that she believed that the student was eligible as speech impaired because of difficulty in processing information in conversation and awareness of this difficulty, and because of low self-esteem. Her conclusion as to eligibility, however, was based upon her own standards in diagnosing a language impairment in that: "I can't speak for the public schools...it would be my criteria." [Transcript Page 266]

34. A psychologist who communicated with the student's parents and the psychologist who performed an evaluation on the student testified that psychological evaluations for the public schools in the area generally cost between \$3,500.00 and \$5,000.00. [Transcript Page 283]

35. The student's parent believes that the school should provide tutoring for the student separate from the school's tutoring program, cost for home schooling the student, social skills training and counseling, occupational therapy, and assistive technology. [Transcript Pages 414-419]

36. The student's parents do not believe that the student can be appropriately educated at the school, that the student is having severe emotional difficulty in contemplating in going back to school, and that he must be home schooled. [Transcript Pages 412-417]

37. One of the student's parents has a master's degree in special education and teaches part time at a college dealing with special education and students with motor difficulties. [Transcript Page 387]

38. The student was subpoenaed to testify by the Petitioner but the student did not appear at the hearing. Petitioner believes that Respondent has put the student's emotional state as issue and wanted to question the student about that allegation. [Transcript Page 324]

### Discussion

Counsel for the parties filed pleadings and developed a record on a number of issues which concerns the parties. The legal issues in the case, though, are simple. Is the evaluation of the school appropriate? If it is, is the student eligible for special education? And if the student is eligible, did the student receive a free appropriate public education?

The parties also seek a determination as to a reasonable cost for an independent evaluation, a determination about appropriate eligibility criteria if the student is eligible for special education, the propriety and extent of compensatory educational services, and a ruling on any appropriate sanction to the Respondent for the student's failure to appear at the hearing after being served with a subpoena.

The student is a \*\* year old with strong academic abilities which have been demonstrated by academic success in school. The student has weaknesses in social interaction, and ability to control behavior and problems with anxiety. While the student has benefitted from accommodations offered under Section 504, the primary issue in dispute is whether or not the school's evaluation (which determined that the student was not eligible for special education) is appropriate. If it is, then no other determinations on contested issues need to be made. After review of these issues and applicable law, I find that Petitioner met its burden to prove the appropriateness of the evaluation of the student. In finding that the evaluation is appropriate, the Petitioner met its burden of proof in the essential element of the case.

The evidence adduced at the hearing demonstrated that the school relied on evaluations meeting the requirements of IDEA to determine the eligibility of the student for special

education placement. The evaluation indicated that the student was not eligible and had no academic need for special education. Respondent's evidence from the evaluations privately secured was not persuasive as to the identification of a disability. Respondent's witnesses did not provide credible evidence that the student is eligible for special education.

Because I find that Petitioner prevailed in defending its evaluation and that the student is not eligible for special education services, the issue of sanctions for the student's failure to appear at the hearing is moot.

#### Conclusion of Law

Petitioner satisfied the requirements of 20 U.S.C. §1415(b)(d), 34 CFR 300.304 and 300.532. The evaluations of the student relied upon by the school were appropriate. Respondent is not entitled to an independent evaluation at public expense.

#### ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that Petitioner's request for relief to determine that its evaluation of the student is appropriate is GRANTED. All requests for relief by Respondent are DENIED.

All other relief requested by the parties is DENIED.

SIGNED this 7<sup>th</sup> day of November, 2008.

/s/ Lucius D. Bunton  
Lucius D. Bunton  
Special Education Hearing Officer

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SYNOPSIS

**ISSUE 1:** Whether the district relied on appropriate educational evaluation of the student.

**CFR CITATIONS:** 34 CFR 300.304 and 34 CFR 300.532

**HELD:** For Petitioner.