

**BEFORE A SPECIAL EDUCATION HEARING OFFICER  
STATE OF TEXAS**

**STUDENT, bnf  
Parent,  
Petitioner,**

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**v.**

**DOCKET NO. 075-SE-1209**

**DALLAS INDEPENDENT  
SCHOOL DISTRICT,  
Respondent.**

**DECISION OF THE HEARING OFFICER**

Procedural History

Petitioner, Student (“Petitioner” or “

be represented pro se by student's mother, Parent assisted by Carolyn Morris, parent advocate. Respondent continued to be represented by its legal counsel Joni Jalloh, DISD School Attorney. In addition, Michael Milstead, Critical Case Coordinator for Special Education, and Dr. Wayne Tiritilli, Special Education Supervisor, also participated in the conference on the school district's behalf. The issues and items of



remained pending during the hearing in order to allow Petitioner an opportunity to prove the privilege was waived and to file a written response to the motion.

#### Attorney-Client Privilege

The heart of the lawyer-client privilege allows a client to refuse to disclose and/or to prevent another from disclosing confidential communications between the client or a representative of the client and the client's lawyer made for the purpose of facilitating the rendition of professional legal services. *Tex. R. Evid. 503 (a)(b)(1)(A)*. The privilege may be claimed by the client or the client's lawyer. *Tex. R. Evid. 503 (c)*.

There is no dispute that P. 29 is an email from the school district's in-house counsel to school district personnel





18. There are \*\*\* types of \*\*\* offenses under the DISD Student Code of Conduct that result in mandatory removal or expulsion from school: \*\*\*. Students who commit those offenses must be removed from school for no less than 30 days but no more than 60 days. A regular disciplinary hearing was required under the regular Student Code of Conduct. (Tr. Vol. II, pp. 254-255).
19. The AP discovered Student was a student with special needs when he pulled Student's record. The AP contacted the Special Ed Department Chair for guidance and was advised about the need to convene a manifestation determination review (MDR) ARD. The AP and Department Chair explained the various disciplinary procedures to Student's mother when she arrived to pick Student up. Student was \*\*\*. (P. Ex.27) (Tr. Vol. II, pp. 31-32).
20. There were a series of ARD meetings conducted in \*\*\* 2009 following the disciplinary incident and \*\*\*. The first was an Annual/Failure ARD conducted on \*\*\*, 2009 where the draft FIE was presented and discussed. The purpose of that ARD was to confirm Student's special education eligibility and discuss educational services. (P. Ex. 8, 4)(R. Ex. 14, 17).
21. A regular disciplinary hearing was also conducted on December 2, 2009. The hearing was tape recorded per school district policy and procedure. The disciplinary hearing concluded Student committed \*\*\*. Student was assigned to an alternative educational placement known as \*\*\* for \*\*\* days as a result of the Code of Conduct violation. Joint Exhibit 1, referred to hereafter as (J. Ex.1) (P. Ex. 28) (Tr. Vol. I, pp. 194-195, pp. 225-226) (Tr. Vol. II, pp. 43-44, 243-244).
22. Student was initially assigned to \*\*\* pending assignment to \*\*\*. A certified teacher presided over the \*\*\*. Although Student was supposed to be provided with assignments from student's teachers student received very little work and minimal instruction, if any. Indeed, a number of student's teachers were not even aware of student's placement in \*\*\*. Student's math teacher learned about the \*\*\* placement through a chance encounter with Student at school and subsequently provided some math assignments. Student spent the remainder of \*\*\* 2009 in \*\*\*. Student was assigned to \*\*\* thereafter. (Tr. Vol. I, pp. 97-98) (Tr. Vol. II, p.142, 193, 233, 234-235).
23. A manifestation determination review ARD (MDR ARD) was conducted on \*\*\*, 2009 and continued on \*\*\*, 2009. The MDR ARD recessed \*\*\* and reconvened a third time as a facilitated ARD on January 13, 2010. The ARD facilitator assisted the participants in their deliberations. The MDR meetings also addressed Student's educational needs. The facilitated MDR ARD lasted about two hours – much shorter than previous ARD meetings. The facilitated ARD was tape recorded with the consent of all participants. (R. Ex. 2); (Tr. Vol. II, pp. 131-132).
24. Student's mother had difficulty understanding the various parameters of the IDEA in terms of services and supports for Student. She was referred to an IDEA website by the parent advocate but found it was complex and confusing. Student's mother planned to listen to the tape recordings at home in order to gain a better understanding of services that might be available for Student and become more familiar with the process. (Tr. Vol. II, p. 90).

25. There is no specific school district policy addressing the tape recording of ARD meetings. The school district does have a policy that addresses a school district employee's right to refuse







## **DISCUSSION**

school. Furthermore, even if it was, the one year statute of limitations applied in Texas bars any claim that DISD failed to conduct a timely re-evaluation. *19 Tex. Admin. Code § 89.1151 (c)*.

Deficits in the \*\*\* 2009 FIE

It appears that Petitioner's real complaint is that the \*\*\* 2009 FIE was simply not appropriate. Petitioner has a right to an IEE if the school district agrees to provide it or if the school district's own evaluation is not appropriate under IDEA. *34 C.F.R. § 300.502 (a)(b)(2)(ii)*. The \*\*\* 2009 FIE did not include new or updated academic achievement or intellectual testing, it did not include a classroom observation and it relied on data and records of special education services from \*\*\* that were out of date – services and accommodations provided to a student in \*\*\* and \*\*\* grade may or may not continue to be appropriate for a student in \*\*\* school. *34 C.F.R. §§300.304 (b)(c); 300.305 (a)(1)(269.81 557.38 Tm 0 Tc{34*

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5<sup>th</sup> Cir. 2009).

First factor

The evidence showed that the IEP in place during the \*\*\* 2009 semester beginning in late \*\*\* was pretty slim consisting of only two or three instructional accommodations and a vague reference to "external

FIE confirms that Student needs specific instruction to enhance reading comprehension skills, math reasoning, and to improve

educational record I must still ask whether the inaccuracy in the document itself resulted in a deprivation of educational benefit to Student under IDEA. *34 C.F.R. § 300.513*. Even if the document is a falsified record the document itself did not result in a denial of FAPE.

A false or inaccurate educational record might lead to the denial of FAPE if Student's mother relied on it to such an extent that that she delayed seeking assistance for Student or was denied an opportunity to participate in ARD meetings because she relied on its truthfulness. There was insufficient evidence to support either of those possibilities. To the contrary, the evidence showed that Student's mother took an active role in advocating for her son throughout the fall 2009 semester.

#### Tape Recording Issue

Parental rights to tape record ARD meetings have been addressed by at least three federal courts. *Horen v. Bd. of Educ. City of Toledo Pub. Sch. Dist.*, 655 F. Supp. 2d 794 (D.C. Ohio 2009); *E.H. v. Tirozzi*, 735 F. Supp. 53 (D.C. Conn.

the statute neither authorizes nor prohibits tape recording an IEP meeting a school district has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings. However, OSEP advised that if a school district has a policy that limits or prohibits tape recording IEP meetings the policy must also provide for exceptions if necessary to ensure the parent understands the IEP, the IEP process, or to implement other parental rights under IDEA. Furthermore, any school district rule regulating the tape recording of IEP meetings should be uniformly applied. *Id.*

#### The Favolise Decision

The use of tape recording IEP meetings was also considered in a case involving a parent with a hand injury who had difficultt Id.



### Level of Parental Need.

Despite the confusion in applying the policy the record in this case fails to support the need for Student's mother to tape record ARD meetings in order to understand or participate in the ARD process. *34 C.F.R. §300.322 (e)*. Although there was some evidence that Student's mother had difficulty understanding the scope and complexity of the IDEA there was equally credible evidence that she understood the ARD process, the role of an IEP in Student's education and voiced concerns about services, behavioral issues, and the accuracy of educational records.

English is not a second language for Student's mother. She did not have a physical impairment or a disability that interfered with her ability to understand or participate in ARD meeting discussions. To the contrary, the record shows that Student's mother was able to advocate effectively for her son's needs and did so in almost every meeting. I conclude Petitioner did not meet student's burden of proof on this issue.

### Disciplinary Placement Decision Procedures

Petitioner contends that the school district disciplinary placement decisions were made outside of the ARD process, without the requisite manifestation determination review and thus denied Student a free, appropriate public education. The evidence showed that Student was \*\*\* immediately following the disciplinary incident of \*\*\*. The assistant principal was within student's right to \*\*\* Student for that period of time when Student violated the student code of conduct. *34 C.F.R. § 300.530 (b)(1)*.

The evidence established that the school district conducted a regular discipline hearing and assigned Student to the \*\*\*. However,

3. Petitioner did not meet student's burden of proving the school district falsified educational records or failed to provide the parent with all requisite ARD documents. Petitioner failed to meet student's burden of proving procedural errors or omissions resulted in a substantive educational harm. *34 C.F.R. § 300.513(a)(2)(i)-(iii)*.
4. Petitioner did not meet student's burden of proving the requisite level of need in order to invoke an exception to the school district's policy that prohibited tape recording ARD meetings without consent of all participants. *Horen v. Bd. of Educ. City of Toledo Pub. Sch. Dist., 655 F. Supp. 2d 794 (D.C. Ohio 2009); E.H. v. Tirozzi, 735 F. Supp 53 (D.C. Conn. 1990); V.W. v. Favolise, 131 F.R.D. 654 (D.C. Conn. 1990); Letter to Anonymous, (OSEP June 4, 2003); 34 C.F.R. § 300.322 (e)*.
5. Respondent made disciplinary placement decisions in a lawful manner given the nature of Petitioner's conduct as a "special circumstance" which fell under the exception to the general rule that the school district make a manifestation determination prior to a change in educational placement. *34 C.F.R. § 300.530 (b)(1)(g)(2)*.

### ORDERS

Based upon the foregoing findings of fact and conclusions of law it is therefore **ORDERED** that Petitioner's requests for relief are **GRANTED IN PART and DENIED IN PART** as follows:

1. The school district shall convene a facilitated ARD meeting at a date and time mutually agreed upon by the parties, but no later than ten (10) school days from the date of this decision for the purpose of reviewing the \*\*\* 2010 FIE and revising Student's IEP to include the recommendations stated in the \*\*\* 2010 FIE including the assignment of a mentor, counseling services, instructional strategies, a behavior intervention plan, a communication/assignment notebook, as well as the set of modifications and accommodations previously agreed upon by the parties in \*\*\* 2009 and those stated in the \*\*\* 2010 FIE; the LSSP who conducted the \*\*\* 2010 FIE shall be a participant in the facilitated ARD ;
2. The school district shall implement the revised IEP for the remainder of the current school year and in the following academic year through the date of Petitioner's next annual ARD;
3. The ARD Committee shall immediately place Petitioner in inclusion classes with additional special education teacher support and instruction in all core academic courses for the remainder of the current school year and for the following academic year up through the date of Petitioner's next annual ARD;
4. As compensatory relief, the school district shall provide Petitioner with individual tutoring by school personnel after school no less than three days per week to assist Petitioner in catching up with classes, completing homework and other school projects and assignments, and, studying for tests and quizzes, for the remainder of the current school year and for the following academic year up through the date of Petitioner's next annual ARD;

5. As compensatory relief, the school district shall provide an individual tutoring and/or a credit recovery program for no less than three weeks during the summer 2010 to address the status of Petitioner's credits by the end of the current school year.

It is further **ORDERED** that the parties may make adjustments to the implementation of the revised IEP, the provision of individual after school and/or summer tutoring (or credit recovery program) by agreement in any facilitated ARD meeting convened prior to Petitioner's next annual ARD for the purpose of reviewing Petitioner's educational progress, educational and/or behavioral needs, and/or the schedule of services.

All other relief not specifically stated herein is **DENIED**.

**SIGNED the 27th day of April 2010**

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Ann Vevier Lockwood

**BEFORE A SPECIAL EDUCATION HEARING OFFICER  
STATE OF TEXAS**

**STUDENT, bnf  
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v.

**DOCKET NO. 075-SE-1209**

**DALLAS INDEPENDENT  
SCHOOL DISTRICT,  
Respondent.**

**SYNOPSIS**

**Issue:**

Whether school district failed to conduct an evaluation within the requisite timeframe when \*\*\* school student transferred into public school district from \*\*\* school where student previously identified as OHI and received special education services as \*\*\* school student from neighboring public school district but had not been receiving special education services for several years prior to enrollment in public \*\*\* school.

**Held:**

**FOR THE SCHOOL DISTRICT.** School district conducted FIE within 14 school days of date student enrolled in public \*\*\* school. Student should have been re-evaluated in 2007 but no evidence public school district was responsible for doing so.

**34 C.F.R. §§ 300.303, 300.323; 19 Tex. Admin. Code § 89.1050 (f).**

**Issue:**

Whether student entitled to IEE for school district's alleged failure to conduct timely evaluation.

**Held:**

**FOR THE SCHOOL DISTRICT.** Student did not meet burden of proving school district failed to conduct evaluation in timely manner. Any deficits in initial FIE were cured by updated FIE that included psychological and updated aptitude and achievement testing and co

**Held:**

**FOR THE STUDENT.** Initial FIE though timely relied on achievement and aptitude data that was at least \*\*\* years old which deprived ARD Committee of information required for programming and placement decisions;