BEFORE A SPECIAL EDUCATION HEARING OFFICER FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

STUDENT, b/n/f/ PARENT,	§	
Petitioner	§	
	§	
v.	§	DOCKET NO. 139-SE-0210
	§	
AUSTIN INDEPENDENT	§	
SCHOOL DISTRICT,	§	
Respondent	§	

REPRESENTING PETITIONER:

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DOCKET NO. 139-SE-0210

STUDENT, b/n/f/ PARENT, Petitioner	§	BEFORE A SPECIAL EDUCATION

2008-2009 *** Grade School Year

6. In 2008, Petitioner transferred into the district from Pflugerville Independent School District as a general education student for the *** grade. [R.Exs. 3 and 16].

7. During the *** grade, Petitioner made passing grades in all subjects, passed the Texas Assessment of Knowledge and Skills ("TAKS") Math on the first administration, and passed the TAKS Reading on the second administration without testing accommodations. [R.Exs. 16 and 17; Tr. at 206].

8. Petitioner"s teacher and the reading specialist consulted regularly throughout Petitioner"s *** grade year. Because both educators believed Petitioner could benefit from extra reading support, Petitioner began receiving small-group reading support in the reading lab every day for 30 minutes. [Tr. at 205 and 246-248].

9. The reading specialist and the *** grade teacher on occasion observed classic ADHD behaviors from Petitioner, such as fidgeting, difficulty staying focused for an extended period of time, and difficulty completing his work. These behaviors did not occur on a daily basis. [Tr. at 245-246].

2009-2010 *** Grade School Year

10. Petitioner"s neurosurgeon saw Petitioner on September 9, 2009. After hearing concerns from Petitioner"s grandmother about Petitioner"s school performance, the neurosurgeon attempted to contact the school directly to have Petitioner classified as Other Health Impaired ("OHI"). Unable to reach the school counselor, the neurosurgeon spoke with the school principal. The principal promised to investigate what needed to be done with the school counselor and then get back in touch with the grandmother. The neurosurgeon told the principal to call back if there was additional paperwork that needed to be filled out by the neurosurgeon. During the office visit, the neurosurgeon wrote a prescription for neuropsychological testing of Petitioner in order to qualify as a student with OHI, to be delivered to the school by Petitioner"s grandmother. [P.Ex. 19; Tr. at 530-532].

11. Petitioner"s grandmother delivered the prescription from the neurosurgeon to the campus office on September 10, 2009. The office secretary made a copy that became part of Respondent"s cumulative file for the student. [P.Ex. 19; Tr. at 291-293].

12. No one from the district followed up with Petitioner"s grandmother regarding the neurosurgeon"s prescription for neuropsychological testing of Petitioner. [Tr. at 294].

13. Petitioner"s grandmother approached Petitioner"s *** grade teacher regarding testing of the student. Petitioner"s teacher explained the district"s response to intervention ("RTI") process, referred to by the district as the IMPACT process. Petitioner"s teacher referred the student to the IMPACT team and the first meeting, according to written minutes, occurred on September 30, 2009. Petitioner"s grandmother was not invited to this meeting. [R.Ex. 15 at 1-8; Tr. at 74, 302, and 376-377].

14. The educational diagnostician for Petitioner‟s campus discussed the grandmother‟s desire for testing with his teacher in September 2009. The teacher received the educational diagnostician‟s phone number and gave it to the grandmother, but the grandmother and educational diagnostician did not speak by telephone. [Tr. at 129 and 382].

15. Petitioner‟s *** grade teacher informed the IMPACT committee that Petitioner‟s grandmother sought testing of Petitioner. Petitioner‟s teacher interpreted this request to be for special education testing rather than the testing that every student received at the beginning of the year. [Tr. at 413 and 417].

16. Petitioner‟s *** grade teacher understood that the IMPACT process was an absolute requirement, according to the principal, before special education testing could begin. [Tr. at 417].

17. Petitioner‟s *** grade teacher reported no concern over Petitioner‟s self-help skills. Although Petitioner from time to time has dressing issues like all *** grade boys, such as forgetting to zip up a zipper, his self-help skills were comparable to other students in his class. He exhibited no problems dressing or with toileting issues. [Tr. at 390 and 409-410].

18. Petitioner continued to receive specialized instruction from the reading specialist throughout his *** grade year. [Tr. at 228-229].

19. Petitioner‟s *** grade classroom had access to four computers. [Tr. at 453].

School Nurse

20. Petitioner‟s school nurse had kept ADHD medication for Petitioner in the nurse‟s office since September or October 2009. [Tr. at 347].

21. Petitioner‟s grandmother expressed concern about Petitioner to the school nurse early in the Fall 2009 semester. On September 21, 2009, Petitioner‟s grandmother gave written consent to the school nurse for release of medical/health records from Petitioner‟s neurologist and neurosurgeon. The purpose as stated on the release was on-going “case management.” When the school nurse sent out the requests on September 23, 2009, the neurologist and neurosurgeon forwarded the requested records by October 16, 2009. [P.Exs. 3 and 18; Tr. a

inattention as well as his reading and writing skills. The testing took place on September 29, 2009, and the written report was issued on October 8, 2009. [P.Ex. 1; Tr. at 301].

51. After the Section 504 meeting on January 19, 2010, the educational diagnostician reviewed Petitioner‟s independent testing report. On the same day, the educational diagnostician sent an electronic communication about the independent testing report addressed to Petitioner‟s grandmother and copied to Petitioner‟s teacher, reading specialist, assistant principal, and principal. The report supported the presence of ADHD and an LD in Writing, Reading, and Reading Fluency for Petitioner – disabilities tha

participants attended this meeting. No attorney appeared on behalf of Respondent or Petitioner at the resolution meeting. During this meeting, the assistant director left the meeting frequently to gather data and to consult with legal counsel present in the administration building on issues regarding attorney‟s fees. [P.Ex. 15; R.Ex. 8; Tr. at 144-145].

59. The written agenda of the resolution meeting includes Petitioner‟s requested relief and the district response.

found Petitioner may demonstrate some adaptive behavior deficits at home or school likely due to his attention deficits, but recommended no further evaluation. [P.Ex. 2 at 9; R.Ex. 3 at 10].

65. The FIE tested Petitioner‟s cognitive ability on an extended battery administration of the Woodcock-Johnson Tests of Cognitive Ability – Third Edition ("WJ-III COG"). Petitioner‟s scores on the WJ-III COG ranged from the *** to *** range compared to other students his age. His GIA score of *** fell within the *** range, a score generally comparable with his GIA score in the September 2009 independent testing. Based on the previous and new testing data, Petitioner‟s cognitive abilities fell within the *** range compared to other students his age. [P.Ex. 2 at 8; R.Ex. 3 at 9].

66. The March 2010 FIE assessed Petitioner‟s academic achievement on the Kaufman Test of Educational Achievement, 2nd Edition ("KTEA-II"). Petitioner showed reading fluency weakness and difficulty comprehending longer passages, with strengths in word reading and decoding. The FIE report noted Petitioner passed the *** TAKS Reading test with a grade of *** percentile as well as his recent benchmark score increases in fluency rate. Petitioner scored in the *** range on the KTEA-II in math skills, exhibiting weaknesses in calculation errors, misreading signs, calculation of change, reading a standard clock to the half hour, and solving multi-step problems. [P.Ex. 2 at 11-12; R.Ex. 3 at 12-13].

67. The FIE report concluded Petitioner met the eligibility criteria for special education as a student with LD in Reading Comprehension, and OHI based on his physician-confirmed diagnosis of ADHD. Petitioner exhibited a significant discrepancy in Math Calculation. Because Petitioner‟s inattention impacted his math calculation skills, this was not a separate identified area of academic concern. Petitioner was not identified as having an LD in Math at this time. [P.Ex. 2 at 13; R.Ex. 3 at 14].

68. Respondent completed an OT and PT evaluation of Petitioner on April 19, 2010. Petitioner did not meet eligibility for PT services. The report included recommendations to address Petitioner‟s AT needs by providing trial usage of a portable keyboard. For the OT portion of the report, the occupational therapist reviewed Petitioner‟s independent testing results, administered additional assessment, and reviewed records, including Petitioner‟s medical records kept by the school nurse describing Petitioner‟s *** surgery, ADHD diagnosis, and asthma history. After completing this review, the occupational therapist recommended consultative OT services to address Petitioner‟s decreased motor control, decreased handwriting legibility and indicators of Dysgraphia, delayed drawing skills, and visual-spatial confusion. [P.Ex. 4 at 1; R.Ex. 2 at 1; Tr. at 170-171].

69. The occupational therapist did not address the feeding issues or self-help skills concerns expressed by Petitioner‟s grandmother, but included input from his teacher that Petitioner has independent self-help skills in the classroom. [P.Ex. 4 at 2; R.Ex. 2 at 2; Tr. at 174-177].

70. On April 19, 2010, Respondent convened an ARDC meeting to review the completed FIE. The ARDC found Petitioner eligible for d F

accommodations from Petitioner‟s IMPACT and Section 504 plans. The IEP added monitoring by an additional staff person in the classroom, the special education teacher. [P.Ex. 20; R.Ex. 1; Tr. at 94-96, 161, 277, and 394].

71. Petitioner would begin switching classrooms for the first time in the 2010-2011 school year. Although Petitioner‟s ***

September 2009, Respondent defends the appropriateness of the intervention process to determine whether Petitioner demonstrated a need for special education services.

Petitioner bears the burden of proof to establish by a preponderance of the evidence that the school district violated the provisions of IDEA. *Shaeffer v. Weast,* 546 U.S. 49, 62 (2005).

Child Find

Under IDEA and its implementing regulations, school districts have an affirmative duty referred to as the "Child Find" obligation to identify, locate, and evaluate students whom they suspect may be disabled and provide them with special education services, including students who are advancing grade to grade. 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. §300.111(a), (c)(1). The Child Find duty is triggered when a school district has reason to suspect the student has a disability, coupled with reason to suspect that special education services may be needed to address the disability. *El Paso ISD v. R.R.,* 567 F.Supp. 2d 918 (W.D. Tex. 2008); *on other grounds,* 591 F.3d 417 (5th Cir. 2009); *citing* , 158 F.Supp. 2d 1190, 1194 (D. Haw. 2001).

In *El Paso,* the Western District of Texas applied a two-pronged inquiry to review whether the school district complied with its Child Find responsibilities. The first inquiry examines whether the school district had reason to suspect that the student had a disability, and whether the school district had reason to suspect that special education services might be needed to address that disability. The second inquiry considers whether the school district evaluated the student within a reasonable time after having notice of the behavior likely to indicate a disability. *El Paso, supra,* at 949-951.

Reason to Suspect a Disability and Reason to Suspect a Need for Special Education Services

In the current dispute, Respondent had reason to suspect OHI eligibility both because of his inattentive behaviors for which he took ADHD medication,

By the first IMPACT meeting, (1) Petitioner"s campus had a copy of the neurosurgeon"s prescription requesting neuropsychological testing and qualification as OHI, (2) the principal had direct discussion with that neurosurgeon establishing the physician"s willingness to complete any needed paperwork regarding Petitioner"s OHI status, (3) Petitioner"s grandmother executed releases for medical documents to the school nurse, and (4) campus personnel had knowledge of Petitioner"s *** surgery. The preponderance of the evidence before me established that the student"s teacher understood the testing request of Petitioner"s grandmother to be for special education testing – testing beyond what was routinely done for most students. The teacher conveyed this information to the campus principal, at which time the campus principal called the IMPACT team together. I conclude that the school district had reason to know that Petitioner was likely a student with a disability with OHI, as reflected on the IMPACT documents on September 30, 2009, and that the grandmother was requesting evaluation of that disability to access proper services. At this point, the school district had knowledge of the parental request for special education testing.

Respondent argues, in essence, that Petitioner"s grandmother made an ambiguous "testing" request which, when coupled with the neurosurgeon"s request for testing, was for OHI qualification – a disability that may be served in *either* special education or general education. Respondent further argues that Petitioner"s independent testing report recommended the Section 504 services ultimately recommended by the IMPACT process. I find these arguments do not overcome the fact that Petitioner"s grandmother made a parental request for testing for the student and, as a result, the school district had a duty to evaluate the student that overrode the district"s use of the local district RTI process – the IMPACT committee – before evaluating the student for special education. *Id*. at 496-498.

Evaluation of the Student within a Reasonable Time

The second Child Find inquiry requires a determination of whether the school district evaluated the student within a reasonable time after suspecting the student might have a disability. In *El Paso,* the Western District of Texas found a thirteen-month delay was not reasonable between the student"s request for evaluation and the school district"s offer of evaluation. *Id.* at 952. Different federal courts have applied varying standards for determining reasonableness. *Compare Cari Rae, supra,* at 1195-97 (six-month delay from point school had reat

Under Texas law, a school district must complete an FIE of a student within 60 calendar days from the date written consent is received by the school district. TEX. EDUC. CODE §29.004(a). The preponderance of the evidence established that Petitioner‟s grandmother was offered a consent form for special education evaluation at the time of the resolution session on February 14, 2010, but elected not to sign the form at that time. Ultimately, the grandmother signed the consent form on March 4, 2010, at which time the evaluation began and was completed well within 60 days. Respondent complied with this provision.

Petitioner‟s grandmother was invited, but did not attend, the second IMPACT team meeting of October 21, 2009. Petitioner‟s grandmother attended and fully participated at the Section 504 meeting in January 2010, at which time participants developed his Section 504 plan. I find no loss of educational opportunity for Petitioner occurred because of the failure to give written notice of refusal to evaluate Petitioner. Throughout this period, Petitioner had access to IMPACT accommodations and his Section 504 plan accommodations that ultimately formed the vast majority of Petitioner‟s IEP developed at the ARDC meeting on April 19, 2010. Petitioner‟s grandmother attended and fully participated in the ARDC meeting. The failure to give prior written notice to Petitioner‟s grandmother did not seriously infringe upon her opportunity to participate and develop Petitioner‟s educational program because of the procedural flaw. Based on the preponderance of this evidence, I conclude that the procedural flaw did not amount to a denial of FAPE.

Substantive Sufficiency

A hearing officer‟s determination of FAPE must be based on substantive grounds. 34 C.F.R. §500.513(a)(1). Petitioner‟s program was individualized to his needs and was based on his current assessments and performance throughout his 2008-2009 and 2009-2010 school years. Petitioner remained within the general education classroom setting with services and interventions added to that setting as his needs changed. Petitioner‟s teachers and grandmother helped develop his program, and teaching staff coordinated the delivery of the program. While Petitioner did not show mastery of his 2009-2010 benchmarks, he made increases in all subjects but Math,

Based upon the record of this proceeding, the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that the relief requested by Petitioner is DENIED.

IT IS FURTHER ORDERED that any and all additional or different relief not specifically ordered herein is DENIED.

Signed this 19th day of July 2010.

/s/ Mary Carolyn Carmichael

Mary Carolyn Carmichael
Special Education Hearing Officer

NOTICE TO THE PARTIES

This decision is final

DOCKET NO. 139-SE-0210

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v.	§	HEARING OFFICER
	§	
AUSTIN INDEPENDENT	§	
SCHOOL DISTRICT,	§	
Respondent	§	FOR THE STATE OF TEXAS

SYNOPSISOF DECISION

ISSUE A: ***Whether th*** [illegible]