

**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 “Student”) brings this action against the Respondent Dallas Independent School District (“Respondent,” “the school district,” or, “DISD”) under the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. § 1401 et. seq (IDEA) and its implementing state and federal regulations.

Party Representatives

Student has been represented throughout this litigation pro se by student’s mother, Parent assisted by lay parent advocate Carolyn Morris. Respondent Dallas Independent School District has been represented throughout this litigation by its in-house counsel, Joni Jalloh, School Law Attorney.

Resolution Session and Mediation

The parties met in a Resolution Session on December 14, 2009 but were not successful in reaching an agreement. The parties attempted mediation on January 7, 2010 but did not reach a final resolution.

Procedural History

Petitioner filed petitioner’s initial request for hearing on December 4, 2009. An initial Scheduling Order was issued on December 9, 2009. The case was first set for hearing on January 5, 2010. Petitioner initially raised the issue of whether student was entitled to an expedited due process hearing arising from complaints about the disciplinary decision making process.

The Petitioner withdrew petitioner’s request for an expedited hearing in order to attempt alternative forms of dispute resolution including an agreement to complete a manifestation determination review meeting. The case was continued and reset by agreement for February 15-16, 2010.

Prehearing Telephone Conference

A prehearing telephone conference was conducted in this case on January 5, 2010. Petitioner continued to

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 requested relief were clarified and confirmed during the prehearing conference.

Due Process Hearing

The hearing was conducted on February 16-17, 2010 (a one day delay due to severe winter weather). A third day of hearing was added by agreement and completed on March 4, 2010. Parent and Ms. Morris continued to represent Student. Student also attended portions of the hearing. In addition, ***, ***, and **** attended the hearing as assistants to Parent and Ms. Morris. Ms. Jalloh continued to represent DISD. In addition, Michael Milstead and ***, assistant principal at *** School ("****" or "****") attended the hearing as the school district's party representatives. The parties submitted written closing arguments and legal briefs in a timely manner and the due date for the Decision of the Hearing Officer was extended to April 26, 2010.

Issues

The issues for decision in this case are:

1. Whether the school district failed to conduct an evaluation of Student within the requisite timeframe when student transferred into the school district as a student with a disability in need of special education services under the Individuals with Disabilities Education Act (IDEA) beginning in ***;
2. Whether the school district failed to provide Student with special education services and a free, appropriate public education within the meaning of the IDEA beginning in *** up through the present;
3. Whether the school district falsified Student's educational records, specifically records of an Admission, Review and Dismissal Committee (ARD) meeting, and if so, whether that constitutes a violation of the IDEA and denied Student a free, appropriate public education;
4. Whether the school district denied Student's mother of the opportunity of tape recording ARD meetings and/or manifestation determination review meetings beginning in the fall 2009 up through the present, and if so, whether that constitutes a violation of the IDEA and of state law (specifically, 34 C.F.R. §§ 300.346, 300.347 and Tex. Educ. Code § 29.005) and denied Student a free, appropriate public education;
5. Whether the school district failed to provide Student's mother with all requisite ARD documents and if so whether that constitutes a violation of the IDEA and denied Student a free, appropriate public education;
6. Whether the school district's disciplinary placement decision was made outside of the ARD

process and without a manifestation determination review and, if so, whether that constitutes a violation of the IDEA and denied Student a free, appropriate public education; and,

7. Whether Student is entitled to an independent educational evaluation for a Full Individual Evaluation at this point in time.

Relief Requested

Petitioner requested the following items of relief:

1. The school district provide Student with a Full Individual Evaluation to be conducted as an Independent Educational Evaluation at public expense;
2. The school district conduct a psychological evaluation of Student;
3. Convene an ARD to review the independent FIE and the school district's psychological, to design an Individual Educational Plan (IEP), including a Behavior Intervention Plan (BIP) based on the results and recommendations of the FIE and the psychological evaluations;
4. Continue Student's educational placement on student's current school campus and place student in inclusion classes with sufficient support services in order to implement the IEP, BIP and recommendations of the FIE and psychological evaluations;
5. Provide Student with special education services in whatever placement is ultimately decided upon by the ARD based upon the recommendations of the FIE and psychological evaluations; and,
6. Provide Student with private educational tutoring in an off campus setting in all areas identified by the FIE and/or psychological evaluations.

Respondent requested the following items of relief:

1. Dismiss Petitioner's request for an independent FIE as premature since the school district contends it has not yet had the opportunity of conducting its own FIE and that Petitioner's right to an independent evaluation does not arise unless and until the parent challenges the school district's own evaluation; and,
2. Dismiss Petitioner's request for private tutoring as the school district contends this would not be an effective support service for Student.

Evidentiary Issue

During the hearing the school district objected to the admission of Petitioner's Exhibit 29 – (P. 29) an email purported to be an attorney-client communication on the issue of tape recording ARD meetings. Respondent submitted a formal written motion on the second day of hearing objecting to the admission of the exhibit as a privileged attorney-client communication and seeking its return. Respondent's objection

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 related to the school district's policy regarding tape recording ARD meetings. I conclude that the school district's in-house counsel was providing professional legal services to her client – there is no evidence that she was functioning in any other capacity. *Harlandale Ind. Sch. Dist. v. Cornyn, 25 S.W. 3d 328, 332 (Tex. App. – Austin 2000)(attorney's investigative report was excepted from disclosure where attorney's investigation was akin to outside counsel performing a legal service)*. The privilege applies even if the school district's counsel was acting in a dual role as both negotiator and lawyer. *See, In Re City of Dallas, 2003 Tex. App. LEXIS 3842 (Tex. App. – Dallas 2003); Tex. R. Evid. 511*.

The privilege is waived if the holder of the privilege discloses the substance of the privileged communication to a third party. *Tex. R. Evid. 511; See, Pequenco v. Schmidt, 126 Fed. Appx. 158, 164 (5th Cir. 2005) (attorney's disclosure of conversation with client in letter to bankruptcy trustee resulted in waiver of attorney-client privilege); SEC v. Microtune, Inc., 258 F.R.D. 310, 317 (N.D. Tex. 2009)(attorney-client privilege related to internal stock option documents waived when disclosed to outside auditing firm)*.

In this case the record supports the conclusion that the email sent from the school district's counsel to school district personnel was voluntarily disclosed to third parties and therefore waived. Any privilege attached to the email was therefore waived. *Tex. R. Evid. 511*. Petitioner's Exhibit 29 is therefore admitted.

FINDINGS OF FACT

1. Student is eligible for special education services as a student with Other Health Impairment (OHI) arising from a history and diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). Student has also been recently identified by the school district as eligible for special education services as a student with an emotional disability. Petitioner's Exhibit Nos. 2 and 8, referred to hereafter as (P. Ex. ___); Respondent's Exhibit 26, referred to hereafter as (R. Ex. ___). Student's eligibility for special education services under IDEA is not in dispute.
2. ADHD is a disorder that affects a student's attention and concentration resulting in a loss of focus and inattention at times. Students with ADHD often exhibit off-task behavior. Student has a history of difficulty performing well in school. Student lacks maturity, needs coaxing to complete tasks, and avoids tasks that require a sustained effort. (P. Ex. 21) (R. Ex. 26) Transcript Volume I, page 275, referred to hereafter as (Tr. Vol. ___, p. ___)(Tr. Vol. II, pp. 109-110)(Tr. Vol. III, pp. 135, 285).

3. Student first enrolled at *** on ***. Prior to student's enrollment Student attended *** School (***) -- a private school. Student was *** from *** and enrolled in *** shortly thereafter. Student's grades at *** were poor with failing grades for the first grading period in all academic subjects. (R. Ex. 19, 20) (Tr. Vol. II., pp. 215-218) (Tr. Vol III., pp. 198-199).
4. Student previously attended *** ISD and *** School in the DISD. Student is repeating *** grade at *** because student does not have the requisite number of academic credits to be classified as a *** grader. Student needs 2.5-3.5 more credits in order to be promoted to the *** grade. (R. Ex.21, 22, 24) (Tr. Vol. I, pp. 284-285) (Tr. Vol. III., pp. 112, 203, 207).
5. Student was first identified as a student with special needs in *** school and received special education services from the *** ISD. Special education services were not available at ***. Student did not wish to receive special education services when student attended ***. Student did not receive any special education services for the *** years prior to student's enrollment at *** in ***. (P. Ex. 18)(R. Ex. 24)(Tr. Vol. I, p. 284)(Tr. Vol. III., pp. 124-125).
6. Student has some history of attendance problems; while attending *** student was ***. Attendance is an indicator of academic success at *** and a lack of attendance can be a symptom of other behavioral issues. Student is at high risk for recidivism. (R. Ex. 23) (Tr. Vol. III, pp. 32-33, 231).
7. The *** counselor assisted Student and student's mother in completing the requisite enrollment paperwork. The counselor treated Student as a transfer from ***. The counselor referred Student and student's mother to the Special Education Department Chair when Student's mother told her that Student was in need of special education services during the enrollment process. (R. Ex. 19) (Tr. Vol. II, pp. 147-148).
8. The Department Chair treated Student as an out of district transfer student for purposes of special education services. Student's mother provided the Department Chair with *** ISD ARD documents and assessment information. The Department Chair also provided Student's mother with a set of procedural rights and explained various aspects of the ARD process. (R. Ex. 6, 7, 19) (Tr. Vol. I, pp. 44-45, 47, 53, 56, 139).
9. *** ISD completed a full and individual evaluation (FIE) in 2005 when Student was in the *** grade. The Department Chair accepted the *** FIE temporarily for purposes of identifying Student as a student with a disability. However, the Department Chair also explained that DISD would need to conduct an updated evaluation to confirm Student's continued eligibility for special education. (R. Ex. 13) (Tr. Vol. I, pp 54-55).
10. An ARD on *** temporarily confirmed Student's eligibility for special education as a student with OHI. Student was placed in all regular mainstream classes. Two instructional accommodations were to be implemented based upon the last *** ISD IEP: additional time and seating in close proximity to the teacher. Student was also to receive "external support" in both English/Language Arts/Reading and Mathematics although "external support" is not defined or explained in the ARD documents. Student's grades were to be determined jointly by both

special education and regular education staff. (R. Ex. 9)(Tr. Vol. III., p. 93)

11. Most of Student's teachers were initially unaware of student's status as a student with special needs, the need to implement instructional accommodations, that student was repeating *** grade, or about student's failing grades at ***. Student's case manager delayed communicating with student's teachers until an updated FIE could be completed in order to confirm student's eligibility for special education. (R. Ex. 10) (Tr. Vol II., pp. 78-80, 81-82, 91-92, 117-118, 124-125, 136, 180, 182, 200-201).
12. A draft FIE was prepared on ***, 2009 and the final report prepared on ***, 2009 ("the *** 2009 FIE"). The final *** 2009 FIE included information from Student's mother, existing educational records, a *** ISD home language survey (completed in November 2000), and *** ISD health information (completed in November 2004). The *** 2009 FIE also included a physician's OHI report dated ***, 2009. Student's physician described Student's OHI as "moderate" and noted the use of the medication *** was needed to assist Student in maintaining concentration in the classroom environment. (P. Ex. 14);(R. Ex. 10)(Tr. Vol. I. pp. 171-172, 278).
13. The *** 2009 FIE relied on the *** year old *** FIE for a description of Student's intellectual functioning and academic achievement. No updated academic, cognitive or behavioral assessments were conducted for purposes of the *** 2009 FIE. The December 2009 FIE did not include a classroom observation or any in-depth student interview with Student. (P. Ex. 9, 14) (R. Ex. 10) (Tr. Vol I. pp. 159-160, pp. 256-257, 258).
14. The final *** 2009 FIE report was a result of a joint effort between two diagnosticians: the first gathered most of the information and prepared both the draft FIE and the final report; the second filled in for the first diagnostician at a *** 2nd ARD meeting where she observed Student and explained the draft FIE to the members of the ARD. The final report included the observation information from the December 2nd ARD. (P. Ex. 8) (Tr. Vol. I, pp. 116, 120, 151-152,164-165 166-167, 175-176, 260).
15. Student did not perform particularly well academically at ***. Although Student made good grades in two electives (*** and ***) student did not fare as well in others: Student made ***. Student did not receive any specialized instruction from special education. (P. Ex. 23) (Tr. Vol. III., p. 91).
16. Several of Student's teachers reported that student was frequently off-task in class, had difficulty completing work, was a "daydreamer" and required frequent re-direction. Student was also described as very withdrawn and lethargic although student posed no overt behavioral issues in class. Student failed to bring school supplies to class and required repeated instructions in order to work on assignments. (R. Ex. 26) (Tr. Vol. II., pp. 117, 120, 124).
17. Student was involved in a disciplinary incident on ***. Student was caught *** by a school district peace officer. Because the *** the peace officer exercised his discretion and merely issued a citation ***. The peace officer then turned Student and the other two boys over to the assistant principal (AP) on duty that day. (P. Ex. 27) (Tr. Vol. I, pp.193, 195, 202-203).

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 consent to be tape recorded in a meeting. The policy states that employees shall not electronically record meetings unless each person at the meeting consents to the recording. The policy includes a provision that DISD employees must perform their duties in accordance with state and federal law. *DISD Board Policy DH (Local) Employee Standards of Conduct – Electrical Recording (DH Local)*.
26. Student's mother was permitted to tape record an ARD meeting only when all participants in the meeting consented. DHL Local does not include a specific exception to allow tape recording when necessary to ensure parental understanding of ARD proceedings. However, in practice, school personnel were advised to do so in an appropriate case by their legal counsel. (P. Ex. 29) (R. Ex. 4) (Tr. II, pp. 258-259) (Tr. Vol. II, pp. 104-105, 111-112).
27. There was extensive discussion and dispute over the tape record request throughout the month of *** 2009. School personnel consulted one another to determine whether the meetings had to be tape recorded or not. At some point a DISD ARD member shared an email with Student's mother and her parent advocate. The email consisted of a series of communications between the school district's attorney and other DISD staff regarding the tape recording of ARD meetings. (P. Ex. 4, 5, 29) (Tr. Vol. I., pp. 65-67, 154-155) (Tr. Vol. II., pp. 258-260).
28. Despite the on-going dispute over tape recording the members of the *** ARD meetings managed to discuss whether Student was at risk for failure, student's educational history (including the fact that student had been retained), parental concerns on the need for behavior interventions, IEP goals and objectives, and Student's difficulties with concentration and need for medication. Student's mother also asked questions and raised concerns about the accuracy of information noted in the *** 2009 FIE. Her concerns about the FIE were later addressed by the DISD Director of Evaluation who attempted to clarify and explain how information is collected and noted on an FIE. (P. Ex. 14) (R Ex. 10) (Tr. Vol. I., pp. 171-173, 231)(Tr. Vol. II, pp. 71-72, pp. 85-86. 87, 88-89, 187-188)(Tr. Vol. III., pp. 44, 46-47, 51-52).
29. An MDR ARD began on ***10, 2009 and reconvened on *** 11, 2009 to determine whether Student's *** was a manifestation of student's disability. The MDR recessed and reconvened a third time on ***, 2010. The ***, 2010 MDR ARD was tape recorded at parental request because all ARD members consented to it. Ultimately, the MDR ARD concluded that Student's conduct was not a manifestation of student's disability and therefore student was subject to the regular disciplinary procedures under the Student Code of Conduct. Student's mother disagreed with the manifestation determination. (P. Ex. 4, 5)(R. Ex. 2, 4)(Tr. Vol. I, pp. 121-122).
30. The ***, 2009 ARD members agreed that Student needed an updated FIE to determine continued eligibility as a student with OHI and if student also met criteria as a student with a specific learning disability and/or an emotional disturbance. The ARD also agreed on the need to determine Student's present levels of performance for purposes of educational placement. (P. Ex. 3, 4, 7) (R. Ex. 4).

31. A four year plan of coursework was developed at the *** ARD meetings. Additional instructional accommodations and supports were added to student's program including: administer tests in a small group, allow use of a calculator for math computation, break assignments into smaller sections, provide step-by-step instructions, and provide Student with a cooling off period. Student also continued to receive additional time to complete tests and assignments and for preferential seating in the classroom. (R. Ex. 15).
32. The updated FIE was completed and a report issued on ***, 2010 ("the updated FIE"). A licensed school psychologist (LSSP) conducted the updated FIE. The updated FIE included current parent information and health information from the school nurse and Student's physician. It also included a psychological assessment and assessments of academic achievement and cognitive abilities using a combination of both formal and informal measures. (R. Ex. 26).
33. The updated FIE concluded that Student was eligible for special education services as a student with OHI and an emotional disturbance. Student performed below age and grade level expectations in reading comprehension, math reasoning, and written expression although student's basic reading and math calculation abilities were within the average range. The LSSP concluded that Student was extremely stressed, overwhelmed by school, anxious, and worried about student's performance. In sum, Student was "completely unhappy" and lacked effective coping skills. (R. Ex. 26)(Tr. Vol. III., pp. 134-135)
34. In addition, the updated FIE concluded that inattention, distractibility and limited motivation likely have an impact on student's school performance. Although there was some evidence of a possible learning disability the LSSP noted that other factors may have a role in Student's academic deficits such as attendance issues and the fact that student had attended several different schools within *** month period of time. She also noted that student's recent placement in ISS was not equivalent to receiving instruction in a general education classroom and could also have been a factor in student's performance. (R. Ex. 26)(Tr. Vol. III, pp. 138, 151).
35. The LSSP also reviewed teacher reports. Student was described as generally a well-behaved student who complied with requests and worked rather well with others. Difficulty paying attention for sustained periods of time and becoming easily distracted were two areas of concerns for teachers. Teachers described Student as somewhat shy and quiet. Although student could sit and listen to lectures and instructions student's attention tended to vary. Student's ability to complete assignments independently was "poor" and completing assignments on time and accurately was difficult. Teachers also noted that changes in behavior were short-lived despite classroom management techniques such as redirection and/or encouragement. (R. Ex. 26).
36. Student has a history of "adjustment problems" dating back to *** ISD. Student's ability to respond appropriately when faced with frustration has been poor. Emotionally student feels sad. Student has a long history of learning difficulties, needs encouragement to complete homework (particularly more complicated assignments) and becomes easily frustrated. In the past few years student has become more withdrawn and depressed over failing grades and other personal

issues. (R. Ex. 26)(Tr. Vol. II, pp. 234-236)

37. Student admitted strong negative feelings about school and a desire to quit. Teachers were perceived as demanding, uncaring individuals. Student feels student can do nothing right and no one listens to student. Student has little confidence in student's ability to make decisions or solve problems. Student feels badly about getting into trouble but confused about how to avoid it. (P. Ex. 25) (R. Ex. 26).
38. The LSSP concluded that Student is overwhelmed by stressors such as school performance and personal issues. Although Student wants to do well accomplishing this goal seems to escape student. Student lacks study skills. When faced with adversity Student struggles with the problem-solving process due to a limited ability to devise constructive solutions. It is essential that Student develop coping and problem solving skills to learn more effective ways of handling frustrating situations or student will continue to struggle. (R. Ex. 26).
39. The updated FIE recommended the use of positive reinforcements for on-task, socially appropriate behaviors and to ignore minor misbehavior. Setting firm limits and delivering consequences quickly for undesired behavior was also recommended. Student needs increased opportunities to be successful to increase self-confidence. Student also needs opportunities to speak with someone (such as a mentor) who will listen attentively whenever student needs to discuss problems and assist student in processing feelings in a nurturing environment. Student needs support from school personnel in order to reduce feelings of isolation. (R. Ex. 26).
40. Other recommendations included: a specific time and location for completing homework that is free from distractions, initial assistance to get student started and frequent checks to ensure understanding and minimize frustration as well as continued praise and encouragement. Frequent communication between home and school was also recommended -- specifically the use of an assignment notebook or folder so both home and school can monitor assignments and homework completion. (R. Ex. 26).
41. The updated FIE also found Student would benefit from counseling services. The LSSP recommended a referral to *** for weekly counseling to address the development of coping skills and to process depressed feelings. Appropriate counseling goals would include learning to self monitor thoughts and feelings in situations where student perceives criticism or blame and to develop alternative interpretations of events to foster more socially appropriate responses. (R. Ex. 26).
42. Student needs limited opportunities of unstructured time to decrease student's chances of getting off task. Student needs reduced distracting stimuli and/or a quiet area so that student will not be distracted and able to focus on academics. Teachers need to make eye contact first before delivering instructions and follow up with step by step guidance. Student needs tasks broken down into smaller components so that student does not feel overwhelmed and can more easily process assignments. (R. Ex. 26).

DISCUSSION

Failure to Conduct Evaluation in Timely Manner and Right to an IEE

There are specific state and federal regulations that apply to a student newly enrolled in a public school district who has been previously served by another school district in Texas. *34 C.F.R. § 300.323(e); 19 Tex. Admin. Code § 89.1050 (f) (2)*. Under these rules the new public school district has the option to adopt the child's IEP from the previous public school or develop, adopt and implement a new IEP. In so doing, a public school must ensure that a student with a disability is re-evaluated not less than every three years unless the parent and school agree a reevaluation is not necessary. *34 C.F.R. § 300.303 (a)(b)(2)*. However, these rules apply only to students who transfer from one public school district to another in Texas *within the same school year. 34 C.F.R. § 300.323 (e)(emphasis added)*.

At the time of student's enrollment at *** Student was coming from *** school. Student had not been receiving special education services for several years. Once DISD had notice that Student might be eligible for special education services it proceeded with a re-evaluation to confirm continued eligibility. The evidence showed that the school district completed an FIE by ***, 2009 – 14 school days from the date it received written consent to evaluate from Student's mother. A second and more thorough updated FIE was completed by ***, 2010.

Child Find

The regulations that apply to special education evaluations are somewhat difficult to apply to the facts in this case. Student does not really fall under the Child Find provisions of the IDEA because student was already identified as a child with a disability by the *** ISD. Under Child Find provisions a school district is required to conduct an initial evaluation for special education eligibility within 60 days of receiving parental consent. *34 C.F.R. § 300.301 (c)(1); Tex. Educ. Code § 29.004 (a)*. Even if Student's case is analyzed under Child Find the school district did conduct an FIE within the requisite 60 day period.

Three Year Re-evaluation

If Student's case is analyzed as a student previously identified as eligible for special education the three year re-evaluation rule would apply. The *** initial FIE was dated ***, 2004. Therefore, Student should have been re-evaluated no later than ***, 2007. *34 C.F.R. § 300.303 (b)(2)*. Had that been accomplished Student would not be due for another re-evaluation until ***, 2010. The evidence was unclear as to whether Student was attending a public school or private school in *** 2007. If student was in public school, the public school had a duty to conduct a re-evaluation. *Id.* Even if student was in private school a re-evaluation was the responsibility of the public school district where the private school was located. *34 C.F.R. § 300.131; Fed. Reg. Vol. 71, No. 156 (Aug. 14, 2006)*.

However, there was no evidence that *** school Student attended in *** 2007 was within the DISD. Therefore, I cannot conclude that DISD was responsible for coordinating the re-evaluation with ***

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)(2)(c)*. The lack of updated data in the *** 2009 FIE deprived the ARD Committees of current information required to make decisions about Student's educational needs, program and placement. *34 C.F.R. § 300.324*.

The Updated *** 2010 FIE

However, the *** 2010 FIE was broader in scope, included both academic achievement and intellectual assessments, a psychological, classroom observation, and assessment of all areas of suspected disability. The *** 2010 FIE confirmed continued eligibility for special education as a student with OHI and added emotional disturbance as an additional eligibility classification with concomitant recommendations for Student's IEP.

While the *** 2010 FIE concluded Student did not meet eligibility as a student with a specific learning disability it noted student's difficulties with reading and writing and included specific recommendations for meeting those needs as well as other academic and behavioral recommendations. The *** 2010 FIE was therefore sufficiently comprehensive to identify Student's needs and assist future ARD meetings in making educational decisions. *34 C.F.R. § 300.304 (c)(6)(7)*. Petitioner is not entitled to an IEE. *34 C.F.R. § 300.502 (b)(2)(ii)*.

FAPE

The Four Factors Test

In Texas the Fifth Circuit has articulated a four factor test to determine whether a school district's program provides a free, appropriate public education under IDEA. Those factors are:

- The program is individualized on the basis of the student's assessment and performance;
- The program is administered in the least restrictive environment;
- The services are provided in a coordinated, collaborative manner by the "key" stakeholders; and,
- Positive academic and non-academic benefits are demonstrated.

Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997).

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 (5th 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 support" without defining or clarifying what "external support" meant. The evidence showed that although the IEP was individualized it was developed on the basis of outdated assessment data and not on the basis of an accurate measure of Student's current aptitude or achievement level. 34 C.F.R. § 300.304 (b) (c).

By *** 2009 additional accommodations and instructional strategies were recommended by the *** 2009 FIE including additional instructional accommodations and an IEP with annual goals and objectives for *** and *** and a Transition plan. However, due to a continuing and unresolved dispute over tape recording ARD meetings the evidence is unclear as to whether the proposed educational program was ever implemented. The reasonable inference from the evidence is that it was not in large part because Student was in *** by that point under a disciplinary placement.

Second factor

Student's program was administered entirely within the regular classroom setting except for the periods of time spent in *** and in student's current *** at ***. While there is some evidence that Student enjoys working with peers in small group activities the evidence also showed that student was often overwhelmed with class assignments, had difficulty concentrating, and needed frequent encouragement and re-direction to initiate and/or complete schoolwork. Thus, it is not at all clear that delivery of Student's program within the regular classroom, without additional inclusion support, was the least restrictive environment.

Third factor

The evidence showed that services were not provided in a collaborative, coordinated manner by key stakeholders. The school district has a responsibility to ensure that Student's IEP was accessible to each of student's regular education teachers and that each teacher be informed of student's or her specific responsibilities in implementing the IEP and the stated accommodations. 34 C.F.R. § 300.323 (d). There was some evidence that a number of Student's teachers were not even aware that student needed instructional accommodations and the special ed staff did not communicate soon enough with teachers about Student's needs or history of academic difficulties. Furthermore, there was credible evidence that Student did not receive much work from student's teachers for the *** weeks student was in ***.

Fourth factor

The evidence established that Student was in trouble and at risk for failure. Student struggled academically in the majority of student's classes. Student's feelings of low self esteem, anxiety, and lack of motivation increased as student struggled to cope with the consequences of the *** incident. The *** 2010

FIE confirms that Student needs specific instruction to enhance reading comprehension skills, math reasoning, and to improve writing skills as well as a number of behavioral interventions, the support of a mentor, and counseling services. Student did not receive the requisite positive educational benefit from student's program.

Therefore, based on the application of the four factors test I conclude that the educational program at issue did not provide Student with the requisite educational benefit and thus student was denied a free, appropriate public education. *Bd. of Educ. of Hendrick Hudson Sch. Dist. v. Rowley, 458 U.S. 176 (1982); Michael F., supra.*

Educational Records and Failure to Provide ARD Documents

Petitioner contends that the school district falsified Student's educational records and failed to provide Student's mother with all requisite ARD documents. Specifically, Student's mother questioned the accuracy of certain dates related to sources of information noted on the *** 2009 FIE reports. In addition, an issue arose during the hearing regarding the school district's alleged failure to produce a tape recording of the *** disciplinary hearing. Student's mother also questioned the truth of a document that purported to confirm Student's teachers received timely notice of student's status as a special education student and need for instructional accommodations.

The Records at Issue

The evidence showed that the dates for the sources of information noted on the ***2009 FIE were adequately explained to Student's mother. During the due process hearing the school district produced the tape of the disciplinary hearing and it was marked and entered into evidence as Joint Exhibit 1 with a copy provided to Petitioner.

The evidence did, however, call into question the truthfulness of Respondent's Exhibit 31- a form meant to confirm receipt of ARD/IEP information by each of Student's teachers. The form purports to confirm that Student's teachers received notice of instructional accommodations and a pledge by each teacher to implement those accommodations. The dates on the form are somewhat suspect in that they appear to have been written over and in some instances changed.

The school district was unable to produce the original form when asked to do so by the hearing officer (Tr. Vol. III, pp. 85-86, 165-167, 169-170). Testimony from two of Student's teachers contradicts the veracity of the form as well.

Substantive Educational Harm

In matters alleging a procedural violation a hearing officer may find a child did not receive a free, appropriate public education only if the procedural inadequacies result in a substantive educational harm. *34 C.F.R. § 300.513 (a) (2) (i)-(iii)*. Even if the dates on the draft FIE report were incorrect and the disciplinary tape recording was not produced in a timely manner there was no evidence that these omissions or errors resulted in the denial of any substantive educational harm to Student.

While it is reasonable to infer from the evidence that Respondent's Exhibit 31 may not be an accurate

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. 1990); *V.W. v. Favolise*, 131 F.R.D. 654 (D.C. Conn. 1990).

The Tirozzi Decision

In *E.H. v. Tirozzi*, *supra*, the parent, whose native language was Danish, had trouble understanding and following both written and spoken English. She needed a tape recording of IEP meetings so she could listen to the tape at home with a dictionary at hand to assist her in understanding and following the discussion. The student's teacher felt uncomfortable being recorded and argued that tape recording the meeting would have a chilling effect on the free exchange of ideas and plans. *E.H. v. Tirozzi*, 735 F. Supp. 2d at 54.

The *Tirozzi* court concluded the parent should be permitted to tape record the IEP meeting over the objection of any member of the IEP team. The court reasoned that for this particular parent tape recording the meeting was an essential part of her participation in the planning and evaluation of the IEP – a right she was guaranteed under the IDEA and the regulatory requirement that the school district “take whatever action is necessary” to ensure parental understanding of the IEP process. *Id.* at 57. *See*, *34 C.F.R. § 300.322 (e)*.

The court also considered whether the teacher had a concomitant privacy right to refuse to be tape recorded. The court concluded any privacy right of the teacher was outweighed by the legitimate and substantial interests of the statute in ensuring parents a right to meaningful participation. *Id.* at 58. Furthermore, the teacher's “personal predilection against being tape recorded” and her discomfort were not sufficient to prohibit the parent from tape recording the meeting when balanced against the parent's need to do so. The parent's interest in ascertaining what was said at the IEP meetings could not be subordinated to the personal convictions of another party. The court found the argument that the teacher felt “uncomfortable” was “completely self-serving.” The procedural safeguards of the statute could not be subjected to the “whimsy and caprice” of individual IEP team members. *Id.* at 58-59.

Updated OSEP Policy Interpretation

Parental rights to tape record ARD meetings have also been addressed by the Office of Special Education Programs (OSEP). *Letter to Anonymous*, 40 IDELR 70 (OSEP June 4, 2003). OSEP explained that because

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 difficulty taking notes at the IEP meeting. *V.W. v. Favolise*, 131 F.R.D. 654, *supra*. The court declined to limit the ruling in *Tirozzi* to its facts. Instead, the parental right to tape record IEP meetings was affirmed for the parent with a hand injury to ensure parental rights to attend and participate in IEP meetings. *Favolise*, 131 F.R.D. at 655-656.

The Horen Decision

In contrast, an Ohio federal court recently affirmed a state educational agency's decision that parents did not have the right to tape record IEP meetings. *Horen v. Bd. of Educ. City of Toledo Pub. Sch. Dist.*, 655 F. Supp. 2d at 803-804. The parents failed to allege or prove that tape recording was necessary to ensure they understood the IEP, the IEP process or to implement other parental rights. The parents did not prove the level of need established in *Tirozzi* or *Favolise*. *Id.* at 804; *See also, Norwood Pub. Sch.*, 44 IDELR 104 (SEA Mass. 2005)(parent failed to allege she was unable to understand what was discussed at IEP meeting or that she was otherwise limited in her ability to participate; failure to allege harm resulted in no relief granted)

The School District's Policy

The application of the school district's policy about tape recording meetings was somewhat unclear. I note first that the policy is published on the DISD website and thus constitutes a public record of which I may take judicial notice. *Tex.R. Evid.* 201, 803 (8). The policy was also submitted into the record as an exhibit to school district pleadings.

A school district policy that prohibits tape recording ARD meetings must include an exception for a parent who has difficulty understanding written or spoken English or with an identified impairment or disability in order to ensure their understanding and participation in the ARD process. 34 C.F.R. § 300.322 (e); *See also, Gardner v. Sch. Bd. of Caddo Parish*, 958 F. 2d 108, (5th Cir. 1992) (parents required to file for due process to challenge school district policy that required consent of all participants to tape record meetings).

While there was some evidence that school district personnel were advised of the need to apply such an exception in an appropriate case there was also evidence that some school district personnel were confused by the policy. The written policy lacks a specific exception to allow parents to tape record ARD meetings when necessary to ensure parental understanding as required by federal law. There was some evidence that in practice the school district made the appropriate exception as needed but this was not entirely clear on the face of the policy.

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, student was first placed in *** pending attempts to resolve issues related to Student's educational program and placement through the ARD process. This meant that Student spent a good *** weeks in *** in ***. School administrators could lawfully remove Student to an AEP for up to 45 school days without regard to whether student's conduct was or was not a manifestation of student's disability because student was ***. *** is a "special circumstance" that relieves school personnel from the obligation of conducting a manifestation determination. 34 C.F.R. § 300.530 (g) (2).

Therefore, I conclude that while school district placement decisions were made outside of the ARD process the school district was allowed to do so under IDEA "special circumstance" disciplinary provisions. *Id.* Any harm that occurred because of a delay in convening an MDR was cured by the series of MDR ARD meetings conducted in December to January.

CONCLUSIONS OF LAW

1. Petitioner did not meet student's burden of proving the school district failed to conduct an evaluation within the requisite timeframe when student transferred into the school district as a student with a disability within the meaning of IDEA. 34 C.F.R. §§300.303, 300.323; 19 Tex. Admin. Code § 89.1050(f)(2); *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Petitioner is therefore not entitled to an independent educational evaluation at public expense. 34 C.F.R. §300.502 (b)(2)(ii).
2. The school district did not provide Petitioner with a free, appropriate public education within the meaning of IDEA beginning in *** 2009. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5th Cir. 1997); 34 C.F.R. § 300.304(b)(c).

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

Ann Vevier Lockwood
Special Education Hearing Officer

NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 19 Tex. Admin. Code Sec. 89.1185 (p); Tex. Gov't Code, Sec. 2001.144(a) (b).

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

**STUDENT, bnf
Parent,
Petitioner,**

§
§
§
§
§
§
§

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 completed less than 30 school days after the initial FIE report was issued.

34 C.F.R. §§ 300.502 (b) (2) (ii), 300.513(a) (2) (i)-(iii).

Issue:

Whether the school district provided FAPE to high school student with OHI and history of academic difficulties and attendance issues with FAPE.

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; student's eligibility and need for instructional accommodations were not communicated in a timely manner to classroom teachers; and student did not receive adequate instruction or schoolwork for *** weeks while placed in ***.

34 C.F.R. § 300.304 (b) (c); Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997).

Issue:

Whether school district falsified educational records and failed to provide parent with educational records and if so whether failures led to denial of FAPE.

Held:

FOR THE SCHOOL DISTRICT. Student did not meet burden of proving records were false or inaccurate or that parent denied educational records and even if records were false or inaccurate or parent did not receive records student did not meet burden of proving inaccuracies or omissions resulted in substantive educational harm.

34 C.F.R. § 300.513(a) (2) (i)-(iii).

Issue:

Whether parent had procedural right to tape record ARD meetings despite school district policy prohibiting tape recording of meetings without consent of all participants.

Held: FOR THE SCHOOL DISTRICT. Although school district's policy did not on its face provide for exception when necessary to ensure parental understanding of ARD proceedings some evidence exceptions made in appropriate cases as required by federal regulation and parent did not allege or prove the requisite level of need for tape recorded meetings in order to understand the proceedings or participate.

34 C.F.R. § 300.322 (e); Horen v. Bd. of Educ. City of Toledo Pub. Sch. Dist., 655 F. Supp. 2d 794 (D.C. Ohio 2009).

Issue:

Whether school district made disciplinary placement decisions in lawful manner.

Held:

FOR THE SCHOOL DISTRICT. Nature of student's conduct fell within exception to requirement that school district make manifestation determination prior to making change in educational placement for disciplinary reason. School district conducted regular disciplinary hearing as required and attempted to address parental concerns in a series of manifestation determination meetings.

34 C.F.R. § 300.530 (b) (1) (g) (2).