

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

DECISION OF THE HEARING OFFICER

**STUDENT,
Petitioner and Counter-Respondent**

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v.

§ **DOCKET NO. 233-SE-0508**

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**CORPUS CHRISTI
INDEPENDENT SCHOOL
DISTRICT,
Respondent and Counter-Petitioner**

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Petitioner and Counter-Respondent	§	
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v.	§	HEARING OFFICER
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CORPUS CHRISTI INDEPENDENT	§	
SCHOOL DISTRICT,	§	
Respondent and Counter-Petitioner	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner and Counter-Respondent student (“Petitioner”) requested a due process hearing pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §1400, *et seq.*, as amended. The issues for hearing were as follows:

1. Whether Respondent and Counter-Petitioner Corpus Christi Independent School District (“Respondent”) denied Petitioner a Free Appropriate Public Education (“FAPE”);
2. Whether Respondent failed to timely evaluate and identify Petitioner as a student in need of special education services, including timely production of completed evaluation results;
3. Whether Respondent failed to identify Petitioner as a student eligible to take the State Developed Alternative Assessment (“SDAA”) rather than the Texas Assessment of Knowledge and Skills (“TAKS”), resulting in Petitioner’s failure of the TAKS test three times, and as a result, Petitioner’s failure to meet the ** requirement of passing the TAKS test;
4. Whether Respondent failed to hold an emergency Admission, Review, and Dismissal Committee (“ARDC”) meeting to establish Petitioner’s classification and to agree to waive the TAKS requirement for Petitioner to **; and,
5. Whether Respondent failed to timely identify Petitioner as a student with Other Health Impairment (“OHI”) upon receipt of a completed OHI form from Petitioner’s physician.

As relief, Petitioner seeks the following:

1. Classification as a student in need of special education services;

2. Receipt of a **;
3. Reimbursement of the costs of the student's educational evaluation by Petitioner's psychologist in the amount of \$750.00; and,
4. One year of compensatory educational services or an amount of compensatory educational services deemed appropriate by the Hearing Officer.

Respondent seeks a finding that the full individual evaluation ("FIE") of the student of May 16, 2008, is appropriate and meets the requirements for evaluation procedures under IDEA and its implementing regulations.

HELD, for Respondent.

Procedural History

Petitioner filed the above-captioned due process complaint with the Texas Education Agency ("TEA") and the Hearing Officer received the case assignment on May 27, 2008. The Hearing Officer issued an order on May 27, 2008, setting the hearing on July 2, 2008, following the required 30-day resolution period, and the Decision Due Date for August 10, 2008. Respondent did not file an objection to the sufficiency of Petitioner's Request. Christopher Jonas of the Center for Special Education Law, Corpus Christi, Texas, represented Petitioner. Jose Martín of Richards, Lindsay & Martín, L.L.P., represented Respondent.

On June 12, 2008, Respondent file a Motion to Dismiss ("MTD") because Petitioner did not attend the scheduled Resolution Meeting on June 9, 2008. On the same date, the parties participated in the first telephonic pre-hearing conference. On June 15, 2008, Petitioner's Counsel informed the Hearing Officer that Petitioner did not attend the Resolution Meeting due to the birth of his child and requested a resetting of the Resolution Meeting. For good cause shown, the Hearing Officer denied the MTD and issued a revised date and time for the Resolution Meeting. The parties were unable to resolve the dispute in the resolution process. On July 16, 2008, the parties jointly sought a continuance of this matter, granted for good cause shown. The hearing date was revised to July 22, 2008, and the Decision Due Date reset to August 22, 2008. On July 24, 2008, Respondent filed its written counterclaim in this matter, asserting Respondent's denial of Petitioner's Request for an independent educational evaluation ("IEE"). On August 15, 2008, the parties jointly requested a continuance, granted for good cause shown; the Hearing Officer consolidated the counterclaim with this docket, reset the hearing for September 15-16, 2008, and extended the Decision Due Date to October 17, 2008.

On September 4, 2008, Petitioner requested a brief continuance to ensure the completion of Petitioner's evaluation report before the hearing, unopposed by Respondent. The Hearing Officer granted the request for good cause shown, reset the hearing for October 1-2, 2008, and extended the Decision Due Date to November 3, 2008. On September 23, 2008, Petitioner asked for leave to amend his requested relief to add a claim for reimbursement for fees associated with Petitioner's newly-completed assessment. Over the objection of Respondent and more than five calendar days

before the scheduled hearing, the Hearing Officer granted the request by written order on September 25, 2008.

The hearing took place on October 1-2, 2008. Prior to the conclusion of the hearing the Hearing Officer granted the parties' agreed request to file written closing arguments by November 17, 2008, with a corresponding extension of the Decision Due Date to December 1, 2008. By the parties' subsequent agreement and for good cause shown, the Hearing Officer extended the parties' written closing deadline to November 24, 2008, and the Decision Due date to December 22, 2008.

The record closed upon the timely filing of the parties' written closing argument on November 24, 2008. On December 22, 2008, the Hearing Officer issued the Decision of the Hearing Officer.

Based upon the evidence and argument admitted into the record of this proceeding, the Hearing Officer makes the following findings of fact and conclusions of law.

Findings of Fact

1. Petitioner is a ** year-old student who resides within the jurisdictional boundaries of Respondent. Respondent has not determined Petitioner to be eligible for special education services under IDEA. [Transcript ("Tr.") at 14].

2. Petitioner received his ** school instruction in the regular education program with §504 of the Rehabilitation Act of 1973 accommodations. **. [Petitioner's Exhibits ("P.Exs.") 1, 2, 3, and 9; Respondent's Exhibits ("R.Exs.") 5, 12, 14, and 16; Tr. at 41, 127, 237, and 256-257].

Section 504 Accommodations

3. In May **, Petitioner's psychologist reported screening results suggesting the student had Attention Deficit Hyperactivity Disorder ("ADHD") by letter to Petitioner's middle school. The psychologist recommended classroom accommodations for Petitioner. In response, Respondent completed a §504 referral and developed a §504 accommodation plan for Petitioner. Since **, Petitioner received accommodations under §504. [P.Exs. 2 and 13; R.Exs. 14 and 18].

4. Petitioner's psychologist acknowledged that the ** letter was not a recommendation for special education evaluation or eligibility. In the psychologist's view, the development of a §504 plan in response to this letter was an appropriate response. [Tr. at 21-22 and 47-48].

5. Respondent did not receive the ** evaluation information from Petitioner's psychologist until May 2008. [P.Ex. 12 at 63; R.Ex. 4 at 95; Tr. at 198-200].

Grades

6. Petitioner passed all but four of his ** classes. In his ** year in **, he passed all classes with an overall grade point average (“GPA”) of **. During his ** year in **, he failed his **, **, and ** classes with an overall GPA of **. He recouped credit for ** in Summer **. In his ** year in **, he passed all classes including ** with an overall GPA of **. In his ** year in **, he passed all classes – with the exception of his TAKS preparation class – with an overall GPA of **. Petitioner received solid passing grades on normally challenging classes, including: ** – **, ** – **, ** – **, ** – **, and, ** – **. [P.Ex. 1; R.Exs. 5 and 10 at 1-2; Tr. at 242-252].

7. Petitioner did not take all summer classes available to him to recover missing course credit. As a result, his ** year schedule was full. [Tr. at 249].

Attendance and Behavior

8. Petitioner’s behavioral issues are limited to low motivation and sleeping in class. [Tr. at 258-259].

9. Petitioner’s attendance record for his ** and ** years is poor. In his ** year, Petitioner missed the approximate equivalent of 18 school days or 129 class periods, only 13 of which were excused absences. Petitioner’s absences continued throughout his ** year for the approximate equivalent of 20 missed school days or 140 class periods, only seven of which were excused. Petitioner was tardy without excuse 45 times during his ** year. [P.Exs. 1 and 12; R.Exs. 10, 13, and 19; Tr. at 72-73 and 264-267].

10. Petitioner enjoyed playing baseball on the ** team at his ** school through his ** year. In contrast to his frequent absences in other classes, Petitioner had only one excused absence in his baseball athletics class during his ** year based on Respondent’s attendance records. Petitioner’s baseball participation caused Petitioner to miss additional classes due to “away” games that were not counted against him. [Tr. at 266].

TAKS Testing and Preparation

11. Petitioner insisted on pursuing the “recommended” ** plan. In order to reach the ** credit requirements under this plan, he did not have room in his class schedule for both his required classes and TAKS preparation classes. [R.Ex. 16; Tr. at 248-249].

12. Petitioner did not take all the TAKS remediation classes available to him including summer TAKS classes. [Tr. at 146].

13. On December 13, 2007, Respondent’s Licensed Specialist in School Psychology (“LSSP”), Petitioner’s school counselor, and Petitioner’s parents met for a §504 review and discussion of Petitioner’s failure to meet TAKS standards. His parents requested special education testing at this meeting, but withdrew the request at the end of the meeting. Meeting participants developed and agreed to interventions to assist Petitioner, including TAKS preparation classes, TAKS booklets for Petitioner’s individual self-study, plans for parental monitoring of Petitioner’s work at home, and monitoring at school by Petitioner’s counselor. Participants discussed ways to

make room in Petitioner's crowded class schedule for a TAKS preparation class, including the possibility that Petitioner could drop his athletics course and still participate in the extracurricular activity of baseball. His parents rejected the suggestion to drop the athletics class but agreed to move Petitioner from a "recommended" ** plan to the "minimum" plan to open his class schedule for TAKS preparation classes. [R.Ex. 9; Tr. at 249, 253-254, and 262-263].

14. There is no evidence in the record that Petitioner utilized tutoring offered by his ** school or individual teachers. Petitioner's ** English teacher never saw Petitioner for tutoring offered in the class. Similarly, Petitioner's counselor had no evidence that Petitioner attended the tutoring sessions offered by his teachers. Even when the counselor specifically arranged for morning tutoring in TAKS math preparation, both the counselor and Petitioner's Algebra II teacher confirmed that he did not attend any sessions. [Tr. at 129, 259, 264, 293, and 324].

15. During his ** year, Petitioner missed 27 TAKS math periods and 26 TAKS science periods, and did not show up for his final exam in the TAKS science period. [R.Ex. 10; Tr. at 167-168, 300, and 305-306].

16. Petitioner's educators believe he can pass the TAKS assessment. Petitioner scored only nine questions short of passing the Science TAKS assessment, according to Petitioner's Science teacher who also taught Petitioner's TAKS preparation class. In the Science teacher's experience, students who score over 2000 are "relatively close to getting there, and they just need a little bit of help in particular areas and also analyzing the problems and with some science vocabulary to bump them over. So they can make it." Petitioner's Algebra II teacher agrees that students scoring above 2000 are able to pass the TAKS with additional study, correctly targeted TAKS objectives, and the addition of tutoring or other assistance. [Tr. at 277, 289, 308, and 331].

17. Petitioner's school counselor interacted with Petitioner's teachers on a regular basis, monitored Petitioner, and, as agreed in the §504 December 2007 meeting, frequently reviewed Petitioner's progress. On one occasion while reviewing the TAKS workbook the counselor gave Petitioner weeks before, the counselor found only the first pages had a few pencil marks and concluded that Petitioner "wasn't really, you know, making serious attempt at home to work with the book." Although the counselor believes that Petitioner has the ability to pass the TAKS tests, Petitioner's attendance problems and failure to apply himself impacted his ability to reach passing standards on the TAKS, "If his attendance had been spotless and he had really been applying himself, it stands to reason in my mind that he would have scored these few points more and passed these tests." [R.Ex. 9; Tr. at 261, 264, 269, and 279].

18. After several attempts, Petitioner passed one of four TAKS ** assessments – Social Studies – with a score of **. Petitioner came quite close to meeting the passing standard of 2100 on the other three TAKS areas with the following scores: Math – **; English Language Arts – **; and, Science – **. [R.Ex. 12; Tr. at 186, 279, and 282].

Initial Evaluation

19. Petitioner's parents believe that they never rejected special education services from Respondent and assert that they did not withdraw a request for special education testing after the meeting on December 13, 2007. There is no supporting evidence in the record that Petitioner's parents made any E-mail or other written request for special education testing after the §504 review meeting in December 2007 until February 26, 2008, at which time Petitioner's mother wrote, "At this time, I am requesting that you start a referral for [Petitioner] to be tested." [P.Ex. 12 at 1; R.Ex. 4 at 1; Tr. at 336-338].

20. Respondent issued a referral packet to the parents by March 13, 2008, and his parents signed consent for an FIE on March 31, 2008. Respondent completed the FIE of the student by May 16, 2008. [P.Ex. 12 at 26; R.Ex. 6 at 25 and 38].

21. The FIE included information from his parents, five of his teachers, his school counselor, classroom observations of Petitioner, screening information from his school nurse, TAKS information, a home language survey, records of attendance problems, and results from a variety of testing instruments, and addressed areas pertinent to the areas of suspected disability, including Petitioner's health, vision, hearing, social and emotional status, and his ADHD diagnosis. The written FIE report assures the usage of standardized tests appropriately selected, validated, with proper administration of the testing by trained personnel. [P.Ex. 7; R.Ex. 6].

22. Petitioner produced no evidence on the appropriateness of Respondent's FIE.

23. Results of the FIE demonstrate that Petitioner's cognitive ability is in the borderline range of intellectual functioning. Respondent's FIE assessed Petitioner's General Intellectual Ability ("GIA") score on the Woodcock-Johnson III ("W-J III") Tests of Cognitive Ability, Extended Battery as a **, or in the low range of standard scores. The FIE included all subtests of the W-J III. According to Respondent's LSSP, Petitioner's motivation seemed to affect the Visual-Auditory Learning subtest, lowering the overall GIA. Broad scores on this instrument show scores within the normal range and limits for Fluid Reasoning, Visual Spatial Thinking, and Auditory Processing. By contrast, Petitioner's Comprehension-Knowledge, Processing Speed, Long-Term Retrieval, and Short-Term Memory subtest scores were below average and are considered normative weaknesses. Petitioner's educational and developmental levels as measured on the W-J III Tests of Achievement, when compared to others at his age level, are in the average range in Broad Mathematics, Math Calculation Skills, Math Reasoning, Brief Mathematics, and Written Expression. He scored in the low average range in Broad Reading, Reading Comprehension, Brief Reading, Broad Written Language, and Brief Writing. Based on this data, Petitioner showed no significant discrepancies between his intellectual ability and his measured reading, mathematics, written language, and oral language development. [P.Ex. 7; R.Ex. 6].

24. The LSSP reviewed Petitioner's high absence level as part of the FIE. The LSSP believes that his high absence rate negatively impacted his education since many of his absences occurred in his TAKS preparation classes. [Tr. at 167-168].

25. The FIE applied an integrated model for Learning Disability ("LD") determination. At the time of the FIE evaluation, Petitioner's learning rate was not significantly below grade level expectations. Petitioner was making academic progress, including passing all his classes, and

improved in TAKS results during critical periods. According to the Response to Intervention model, a student must receive systemic intervention to address academic weakness with progress monitoring using repeated measurements, and despite these interventions, the student failed to make sufficient progress. The written FIE report concluded that Petitioner did not meet the requirement of a scientific research-based intervention with Curriculum-Based Assessment, nor did Petitioner qualify as LD by either the regression ability-discrepancy model or the cross battery assessment approach. [P.Ex. 7 at 8-10; R.Ex. 6 at 8-10].

26. The FIE report specified that OHI eligibility may be considered by the ARDC, but at the time of the FIE, Petitioner did not appear to present an educational need for special education services. Petitioner's English, Algebra II, Science, Economics, and Chemistry teachers rated his skills to be in the below average to average range compared to his same-age peers. Based on the FIE data, Petitioner did not meet specific state and federal eligibility for special education services as a student with LD. [P.Ex. 7 at 11; R.Ex. 6 at 11; Tr. at 164-165].

May 2008 ARDC Meeting

27. On May 22, 2008, the ARDC convened to review the completed assessment results. Petitioner and his parents attended the meeting. The ARDC meeting minutes report parental agreement that the request was for an exemption from passing the ** TAKS test. Respondent's LSSP, a participant in this ARDC meeting, confirmed that the parents did not desire the development of a special education program for Petitioner at this meeting. [P.Ex. 6 at 7; R.Ex. 8 at 7; Tr. at 174].

28. After review of the completed FIE, the ARDC determined that Petitioner did not qualify for special education services under IDEA. ARDC documentation of this meeting did not rule out an OHI disability, specifying that the ARDC could meet again if a physician's evaluation is requested and/or completed. Petitioner's parents disagreed with this determination and requested that the ARDC qualify him for special education with an exemption from the TAKS requirement. Respondent's refusal precipitated the present legal action. [Pleading file; P.Ex. 6; R.Ex. 8].

May 2008 **

29. Petitioner learned that he would not be allowed to participate **. Petitioner and his parents believed that Petitioner ** and believed that Respondent planned to hold an emergency ARDC meeting several days later. After Petitioner contacted legal counsel, Petitioner's parents report that Respondent cancelled the plans by telephone for an emergency ARDC meeting and **. [Tr. at 121-122].

30. There is no written documentation of plans for an emergency ARDC meeting in the record of this proceeding, nor is there a written request by Petitioner for an emergency ARDC meeting.

Private Evaluation

31. Petitioner's psychologist performed a second private evaluation of Petitioner on July 25, 2008. On this evaluation, Petitioner scored a full-scale intelligence quotient ("IQ") of **, essentially the same score obtained by Respondent's FIE. [P.Ex. 14; R.Ex. 6; Tr. at 33 and 51].

32. According to both Petitioner's and Respondent's evaluations, Petitioner's achievement corresponds with his cognitive ability. Likewise, his achievement test scores correspond with his borderline range cognitive ability, resulting in grade equivalencies that are lower than expected for his chronological age. Petitioner's psychologist evaluated Petitioner's Broad Reading and Broad Written Language scores at ** and his Broad Math score at **, all commensurate with his full-scale IQ score of **. In the private evaluation report, Petitioner's psychologist concluded that Petitioner showed strength in Broad Math but that the skill area was "still weak." Respondent's FIE had similar scores of ** in Broad Reading, ** in Broad Math, and ** in Broad Written Language. [P.Ex. 14 at 5-8; R.Ex. 6 at 8].

33. Neither Respondent's FIE nor the private evaluation by Petitioner's psychologist concluded that Petitioner met criteria as a student with LD. [P.Ex. 14; R.Ex. 6].

34. In 2008, Petitioner's psychologist acknowledged that Petitioner qualified under §504 "to receive any necessary modifications," noting that graduation was Petitioner's primary goal. Recommendations from the psychologist included assistance from a learning specialist experienced in working with learning disabilities, a suggestion "more oriented to the future than it was at this present time. My thought was is that preparation for the TAKS test was the priority to get him out of ** school is what we are talking about here." To help Petitioner reach the goal of graduation, Petitioner's psychologist suggested that an OHI eligibility for special education "might give the ARD committee flexibility in making decisions on what they might do that was appropriate for him." Petitioner's psychologist acknowledged unfamiliarity with new testing guidelines for TAKS-alternative assessments, but suggested that an alternative TAKS test might be more appropriate for Petitioner – "I'm just not sure that the TAKS test is the most appropriate test." [P.Ex. 14 at 8-9; Tr. at 40-41 and 60-64].

35. Petitioner's psychologist agreed that Petitioner did not have an LD but instead required accommodation for his ADHD. [Tr. at 48 and 65].

OHI Eligibility and July 2008 ARDC Meeting

36. On or about May 22, 2008, following the ARDC meeting of May 22, 2008, Petitioner's parents believe they submitted an OHI form completed by Petitioner's physician stating, "child grade [*sic*] is very poor cannot concentrate" with a notation of ADHD, severe. [P.Ex. 5; R.Ex. 7; Tr. at 121-122].

37. On July 14, 2008, the ARDC reconvened with Petitioner and his parents to reconsider OHI eligibility. After review of the OHI letter from Petitioner's physician, the ARDC members, with the exception of Petitioner and his parents, did not find that Petitioner exhibits a need for special education services. [R.Ex. 17].

Request for IEE

38. Petitioner's parents were specifically informed of their right to request an IEE at the ARDC meeting of May 22, 2008. [P.Ex. 6 at 7; R.Ex. 8 at 7].

39. Petitioner made a request for an IEE at school district expense at the ARDC meeting of July 14, 2008. The ARDC meeting included discussion that Respondent would respond to the request by close of business on July 16, 2008. Respondent subsequently denied Petitioner's request for an IEE and filed a counterclaim regarding the appropriateness of its FIE. [Pleading file; R.Ex. 17 at 8].

Recent Effort by Petitioner regarding TAKS

40. After Petitioner ** in May 2008, there is no evidence in the record that Petitioner enrolled in summer TAKS remediation courses or for a Fall 2008 TAKS preparation class, even though Petitioner was aware of these opportunities.

Discussion

Background

This dispute concerns Petitioner's failure to pass the ** TAKS exam and ** from Respondent. As Petitioner's **, Petitioner's parents disagreed with Respondent's conclusion that Petitioner did not qualify for special education services. His parents asked the ARDC to qualify Petitioner for special education, exempt Petitioner from the TAKS requirement, and **. When Respondent refused this request, Petitioner filed the present legal action, later amending his request to seek reimbursement for a private evaluation. Respondent denied an IEE at school district expense and believes that the educational program for Petitioner is appropriate in all respects including the FIE.

Legal Standard

The appropriateness of the school district's educational program is presumed. *Tatro v. Texas*, 703 F.2d 823 (5th Cir.1983) *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984). Petitioner, as the party attacking the appropriateness of the school district's program for the student, bears the burden to prove why the student's program and placement are inappropriate under IDEA. *Schaffer v. Weast*, 156 S.Ct. 528, 44 IDELR 150 (2005). Under the facts of this dispute, Petitioner must prove, by a preponderance of the evidence, that he is a student in need of special education services and thus eligible for services under IDEA. Based on its counterclaim, Respondent bears the burden to show the appropriateness of its FIE under IDEA and its implementing regulations.

Under IDEA, qualification of a student as disabled requires two steps. First, a student with a disability must be evaluated in accordance with IDEA's implementing regulations and must be found to have a qualifying disability of mental retardation, a hearing impairment (including

deafness), a speech or language impairment, a visual impairment, a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an OHI, a specific LD, deaf-blindness, or multiple disabilities. 34 C.F.R. §300.8(a). Once a disability condition is identified, the second step mandates that as a result of the identified disability, the student must demonstrate a *need* for special education and related services. *Id.* Students who meet eligibility criteria for an IDEA disability category must still demonstrate a need for special education services; consequently, a student meeting IDEA-eligibility criteria, but who does not show a need for special education services, is not a student with a disability under IDEA. *See, e.g., Student v. Corpus Christi ISD*, Dkt. No. 298-SE-0496 (Sp. Ed. Hearing Off'r A. Lockwood – July 1, 1996).

In the context of a special education referral, a school district must meet a two-pronged analysis to show: 1) an indication that the student may be disabled; and, 2) because of the disabling condition, the student cannot achieve reasonable educational progress without the addition of special education and related services. *Student v. North East ISD*, Dkt. No. 503-SE-0895 (Sp. Ed. Hearing Off'r A. Lockwood – October 17, 1995); *see also Student v. Corpus Christi ISD*, Dkt. 225-SE-0399 (Sp. Ed. Hearing Off'r D. McElvaney – August 15, 1999).

Section 89.1011 of the Texas Commissioner's Rules mandates the use of interventions outside special education as an integral part of a school district's identification for referral to special education. 19 TEX. ADMIN. CODE §89.1011. Prior to a special education referral, school districts should consider:

. . . all support services available to all students, such as tutorial; remedial; compensatory; response to scientific, research-based intervention; and other academic or behavior support services. If the student continues to experience difficulty in the general classroom after the provision of interventions, district personnel must refer the student for a full and individual initial evaluation.

Id. A student who, with the addition of support services including accommodations, who is able to receive educational benefit in the general education classroom does not require special education evaluation or placement into special education.

School districts must provide a basic floor of opportunity *for a student identified as IDEA-eligible* with an educational program that is reasonably calculated to confer an educational benefit. *Bd. of Educ. v. Rowley*, 102 S.Ct. 3034, 3039 (1982) (emphasis added). As long as the student receives "some benefit" from his educational program, the school district's program may be found appropriate as school districts are not required to maximize the student's potential or supply every conceivable program that may benefit a student. *Id.* at 3046. In *Rowley*, the Supreme Court stated that the achievement of passing grades and advancement from grade to grade is an "important factor in determining educational benefit." *Id.* at 3049.

Educational Performance

Petitioner asserts that Respondent did not properly identify Petitioner as a student who needed special education services, and as a result, the student struggled in ** school. Petitioner believes this struggle culminated in his inability to pass the TAKS ** assessments because he did not have special education services. Respondent, by contrast, denies that Petitioner is a student in

need of special education services and believes that Petitioner's educational performance clearly establishes that he did not need special education to benefit from his educational program.

The uncontroverted evidence in this proceeding established that Petitioner, although he struggled, passed all but four classes during ** school, earned all course credits necessary for ** plan, and during his ** year, only failed one class – his TAKS preparation class. His grade averages showed passable and more than marginal grades during his ** years of ** school. Furthermore, based on testing results from Petitioner and Respondent, Petitioner's achievement level measures below his peers but is in line with his cognitive ability. While not dispositive evidence, evidence of grades is dispositive evidence in evaluating whether or not a student could make academic progress without special education services. *Student., supra.* The record is clear that Petitioner indeed made passing grades, and on the few courses he failed, was able to recoup credit when he repeated the course in summer school or during normal academic semesters. I conclude that Petitioner's grades show steady progress, albeit slow, commensurate with his cognitive ability level.

Petitioner's General Education Program and Interventions

Petitioner's emphasis in this dispute is on Petitioner's failure to pass his ** TAKS assessments. However, the inquiry into this issue requires close examination of his scores. Respondent asserts that Petitioner's failure to master three of the four ** TAKS scores hinged not on his ability, but on his failure to make the effort to utilize the supports and resources Respondent made available to him within the general education program with §504 accommodations and supports. Included in this list of available supports are tutoring sessions, TAKS preparation classes, TAKS remediation classes, workbooks for home study, and close monitoring by his school counselor.

Because Petitioner pursued the ** plan in accordance with his parents' wishes through the first semester of his senior year, he did not have extra room in his schedule for required courses *and* TAKS preparation classes. His scheduling difficulties exacerbated when he had to recoup failed course credits during summer months or in subsequent semesters. As a result, Petitioner's schedule remained crowded with required courses through his first semester of his ** year with no extra room for TAKS preparation classes. [Tr. at 293].

After review of the record evidence, I conclude that the evidence preponderates to show that Petitioner did not fully utilize these supports even with the direct encouragement and reminders of his educators. The combination of Petitioner's frequent class absences, choice of courses, refusal to forego his athletics class to work on TAKS preparation courses, and decision to follow the more rigorous **, overwhelmingly support his educators' opinion that with the requisite effort, Petitioner had the ability and opportunity to achieve passing scores on all four assessment areas. Even with his diminished efforts failure to attend TAKS classes and tutoring, Petitioner was mere points from achieving passing TAKS scores.

In light of Petitioner's failure to pass all three areas, I turn to whether or not less than passing TAKS scores nonetheless establish a lack of educational benefit. Based on similar circumstances in *Mesquite ISD*, a Texas hearing officer found that a student did not qualify for special education services despite not passing the math portion of the ** TAKS test. *Mesquite ISD*,

Dkt. No. 171-SE-0406 (Sp. Ed. Hearing Off'r A. Lockwood – July 19, 2006). In that case, the student with ADHD, a low-average IQ, asthma, and episodic behavior issues was unable to pass all areas of the ** TAKS assessment, and subsequently chose not to sign up for summer TAKS tutoring or summer math TAKS testing. The hearing officer concluded that IDEA requires not only the identification of a disability but also whether the student *needed* special education and services:

In this particular case, although the evidence showed that [the student] struggled somewhat in school, the evidence showed that he was able to pass most of his classes, receive the requisite credits for **, and, had few behavioral issues in school. The results of the FIE demonstrated that [the student's] achievement in school was commensurate with his intellectual, performance, and verbal skills. Despite the single area of identified learning disability in decoding reading, [the student's] ability to learn and pass his English/Language Arts classes and to pass the exit level English/Language Arts portion of the TAKS, shows he was not a student in need of special education as a result of that disability.

Id. Although a student's performance on the TAKS assessment is not an insignificant component to determine special education eligibility, it is not the sole determiner of eligibility. *See, Uvalde CISD*, Dkt. No. 280-SE-0507 (Sp. Ed. Hearing Off'r D. McElvaney – September 17, 2007); *see also Student v. Flour Bluff ISD*, Dkt. 325-SE-0603 (Sp. Ed. Hearing Officer J. Armstrong – January 27, 2004) (student as a slow learner passed classes when making the necessary effort to access tutoring and support services and was not eligible for special ed services). Under the facts before me and based on Petitioner's educational progress, I conclude that Petitioner's failure to pass three of the TAKS ** assessments does not show a failure to receive an educational benefit.

Eligibility as OHI

While both Petitioner's and Respondent's evaluation data agreed that Petitioner was not a student with LD, Petitioner believes that he should have been found eligible for special education services as a student with OHI due to his ADHD diagnosis. Respondent believes, however, that Petitioner does not show a need for special education because of his ADHD, and despite an OHI designation by a physician in late May 2008, Petitioner did not require special education to maintain passing grades and receive credit.

Petitioner's mother gave hearing testimony that she personally gave the 2004 evaluation that suspected ADHD from Petitioner's psychologist to Respondent. I find, however, that the evidence preponderates to show that Respondent did not receive a copy of that evaluation before May 2008. [Tr. at 125]. There is no evidence in the record to establish that Respondent received a completed OHI form by a physician for Petitioner until *after* the ARDC meeting of May 22, 2008. Once Respondent received the completed OHI form, the ARDC reconvened in July 2008 specifically to revisit the OHI disability designation. Petitioner's educators did not change their opinion that Petitioner did not exhibit a *need* for special education as a result of the completed OHI form.

Based on the evidence before me, I agree with Respondent and find that Petitioner did not require special education based on an OHI designation. Petitioner did not prove by a preponderance of the evidence that his educational performance has been or is now so impacted by ADHD or any other condition or combination of conditions that he *required* special education to progress from

grade to grade and to receive academic and non-academic benefits in his school program. *See, e.g., Student v. Corpus Christi ISD*, Dkt. No. 042-SE-0999 (Spec. Ed. Hearing Off'r J. Hollis – December 1, 1999).

State-mandated Assessment Requirements

Respondent believes that Petitioner's complaint is not about the receipt of special education services but instead centers on a waiver of the regular ** TAKS assessment to be able to **. Indeed, Petitioner's psychologist specifically suggested that IDEA eligibility might allow Petitioner to be eligible for an alternative TAKS test to help Petitioner reach his goal of graduation. At the due process hearing in October 2008, Petitioner's psychologist stated, "We're into October, and I'm not sure that it would – you know, that [Petitioner] would want to go back and do academic curriculum work with a learning specialist at this point in time since he's already got his credits for ** school. At least he didn't tell me he wanted to do that." [Tr. at 64-65]. The ARDC minutes of the May 2008 ARDC meeting tend to support this position as Petitioner's parents specifically sought a TAKS exemption.

The Texas Commissioner's Rules allow an ARDC to make a determination, *for an eligible special education student*, whether satisfactory performance on a required state assessment will be required for the student's graduation. 19 TEX. ADMIN. CODE §89.1070(b)(2). Under the current Texas assessment model for IDEA-eligible students, the SDAA are no longer administered. Instead, an ARDC currently has the following choices for IDEA-eligible students: 1) the regular TAKS; 2) the TAKS-Accommodated form with fewer items per page and no embedded field-test items; 3) the TAKS-M form on grade level but with less items per page, fewer multiple-choice items, and no embedded field-test items; or, 4) an alternative TAKS test, the TAKS-Alt, below grade level for students with severe cognitive impairments. *See TEA Website Home Page, Assessment/Testing link*. Unlike the former SDAA test, all IDEA-eligible students are expected to take the statewide assessment *on grade level* unless they are cognitively impaired. *Id.* at "TAKS-Alt Assessment Resources."

At hearing, Petitioner's psychologist was unfamiliar with the new guidelines for alternative assessments, but was generally familiar with the SDAA. However, even if Petitioner had been eligible for special education services, he received instruction on grade level; presumably, he would have been expected to take the regular TAKS or the TAKS-Accommodated form based on testing guidelines on the TEA website. *Id.* at "TAKS link, Resources for Teachers/Administrators, Special Education Resources link, ARDC training link, 2007-2008 ARDC Decision-Making Process." Finally, this Hearing Officer finds no authority or case, and Petitioner presents no authority, to order the ARDC to "waive" the ** exam under the current TEA guidelines.

Appropriateness of Respondent's FIE

In July 2008, Petitioner made a post-filing request for an IEE at school district expense. Upon denial of the request, Respondent filed a Counterclaim asserting an appropriate FIE that met all requirements under IDEA for an initial evaluation. 34 C.F.R. §502(b). Respondent asserts that it proved, by a preponderance of the evidence, the appropriateness of Petitioner's FIE and as a result, Petitioner is not entitled to an IEE at school district expense. 34 C.F.R. §502(b)(3).

The requirements for an initial evaluation under IDEA and its implementing regulations must include a variety of assessment tools and strategies to gather functional, developmental, and academic information that includes information from the parent to assist in determining: 1) whether the student has a disability; and, 2) the content of the student's individualized education program ("IEP"), including information related to enabling the student to be involved in and progress in the general education curriculum. 34 C.F.R. §300.304(b)(1). The determination that a student has a disability and whether the student's educational program is appropriate must also: 1) include more than a single measure or assessment; and, 2) use technically sound instruments that assess the relative contribution of cognitive, behavioral, physical, and developmental factors. 34 C.F.R. §300.304(b)(2)-(3). Under 34 C.F.R. §300.304(c)(1), the assessments and evaluation procedures must meet additional requirements, such as, be valid and reliable, be administered by trained and knowledgeable personnel, and be administered according to instructions from the assessment producer.

Respondent presented credible evidence that Petitioner's FIE included information collected from parents, teachers, and his school counselor that addressed his functional, developmental, and academic progress. The assessment included a variety of assessment tools with proven technically sound instruments, administered by a trained and experienced LSSP over a couple of days to allow Petitioner rest periods, and resulted in information on his cognitive, behavioral, physical, and developmental factors. [Tr. at 145].

Petitioner's health information, physical condition, emotional and behavioral factors as well as his diagnosis of ADHD, all factors with potential impact on his education, are included in the evaluation. 34 C.F.R. §300.304(c)(4). The FIE addressed specific areas of Petitioner's educational need, identifying areas of strength and weakness. 34 C.F.R. §300.304(c)(2). Petitioner's school performance issues, classroom observation of Petitioner, and lack of motivation are addressed by the FIE. The written FIE report included assurances of selection of all tests to avoid racial or cultural discrimination and to be standardized, validated measures in compliance with 34 C.F.R. §300.304(c)(1). The FIE addresses the suspected disability areas of LD and OHI, including his past diagnosis of ADHD, and makes an eligibility determination in accordance with IDEA's implementing regulations. 34 C.F.R. §§300.305 and 300.306. Additionally, the FIE addressed the appropriateness of Respondent's instructional program for Petitioner, including his poor attendance and choice not to access tutoring and other services, as required by IDEA's implementing regulations. 34 C.F.R. §§300.306(b) and 300.309(b).

At hearing, Petitioner's parents alleged delays in the evaluation process. The preponderance of the evidence established, however, that Respondent promptly responded to Petitioner's renewed March 2008 evaluation request, completing the evaluation within 46 days after receipt of Petitioner's written consent. The ARDC convened within six days of the completed report, well within the 30-day timeline. *See* 19 TEX. ADMIN. CODE §89.1050(d). The evidence established Respondent's compliance with the referral and evaluation timelines for Petitioner's FIE.

I conclude that Respondent's FIE was an appropriate initial evaluation of Petitioner that complied with IDEA's implementing regulations, as discussed above. As a result, Petitioner is not entitled to an IEE at public expense.

Petitioner seeks relief in the form of a ** and participation in ** exercises, yet Petitioner presents no authority for the award. Such relief would require this Hearing Officer to substitute her judgment for that of Petitioner's educators to find Petitioner qualified for special education services, to order that the ARDC waive the mandated ** exam, and to order the issuance of a ** for Petitioner from Respondent. Even if I were inclined to award Petitioner's requested relief – and I am not – the result would not put into place an IEP or a program of special education services to address Petitioner's educational needs, other than a request for compensatory services. Based on the foregoing, I decline to order Petitioner's requested relief in its entirety.

Conclusions of Law

1. Petitioner does not qualify as a student entitled to special education and related services at no cost under the provisions of the IDEA, 20 U.S.C.A. §1400, *et. seq.*, and its implementing regulations.
2. Petitioner resides with his parents and brother within the jurisdictional boundaries of Respondent, a legally constituted independent school district operating as a political subdivision of the State of Texas. Respondent is responsible for providing the student with a free appropriate public education. 20 U.S.C. §1412(a)(1); *Hendrick-Hudson District Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C.A. §1412; 34 C.F.R. §300.300; 19 T.A.C. §89.1001.
3. The educational program proposed by the school district is presumed to be appropriate. Petitioner, as the party challenging the educational program offered by Respondent, bears the burden of proof. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Alamo Heights ISD v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986). Petitioner did not meet his burden of proof in this case.
4. Respondent bears the burden to prove the appropriateness of its FIE. Respondent met this burden. 34 C.F.R. §300.502(b)(2).
5. Petitioner did not meet his burden to show an entitlement to an IEE at public expense. 34 C.F.R. §300.502(b)(3).
6. Petitioner did not meet his burden to show a violation of substantive or procedural violations of IDEA. Petitioner is not entitled to an award of compensatory services. *Burlington Sch. Comm. V. Department of Educ.*, 471 U.S.359, 369-371 (1985); *Alamo Heights Indep. School Dist. v. State Bd. of Educ.*, 790 F.2d 1153 (5th Cir. 1986); *Parents of Student v. Puyallup School District, No. 3*, 21 IDELR 723 (9th Cir. 1994).

ORDERS

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

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

IT IS FURTHER ORDERED that any findings of fact that are more properly characterized as conclusions of law, and any conclusions of law that are more properly characterized as findings of fact, shall be considered and shall have the same effect as if properly characterized.

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

Signed this 22nd day of December 2008.

/s/ Mary Carolyn Carmichael

Mary Carolyn Carmichael
Special Education Hearing Officer

Finding that the public welfare requires the immediate effect of this Decision, the Special Education Hearing Officer makes it effective immediately.

DOCKET NO. 233-SE-0508

STUDENT, Petitioner and Counter-Respondent	§	BEFORE A SPECIAL EDUCATION
	§	
	§	
v.	§	HEARING OFFICER
	§	
CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, Respondent and Counter-Petitioner	§	FOR THE STATE OF TEXAS

SYNOPSIS OF DECISION

ISSUE: A. *Whether the school district denied the student a free appropriate public education (“FAPE”)?*

CITATION: 34 C.F.R. §§300.17, 300.101, 300.320, and 300.324.

HELD: **For the District.**

ISSUE: B. *Whether the school district failed to timely evaluate and identify the student as a student in need of special education services, including timely production of completed evaluation results?*

CITATION: 34 C.F.R. §§300.304, 300.305, and 300.306.
19 TEX. ADMIN. CODE §89.1050(d).

HELD: **For the District.**

ISSUE: C. *Whether the school district failed to identify Petitioner as a student eligible to take the State Developed Alternative Assessment (“SDAA”) rather than the Texas Assessment of Knowledge and Skills (“TAKS”), resulting in Petitioner’s failure of the TAKS test three times, and as a result, Petitioner’s failure to meet the ** requirement of passing the TAKS test?*

CITATION: 19 TEX. ADMIN. CODE §89.1070(b)(2).

HELD: **For the District.**

ISSUE: D. *Whether the school district failed to hold an emergency Admission, Review, and Dismissal Committee (“ARDC”) meeting to establish Petitioner’s classification and to agree to waive the TAKS requirement for Petitioner to **?*

CITATION: 34 C.F.R. §§300.322 and 300.324.
19 TEX. ADMIN. CODE §§89.1050 and 1070(b)(2).

HELD: **For the District.**

ISSUE: E. *Whether the school district failed to timely identify Petitioner as a student with Other Health Impairment (“OHI”) upon receipt of a completed OHI form from Petitioner’s physician?*

CITATION: 34 C.F.R. §300.8(c)(9).
19 TEX. ADMIN. CODE §89.1040(c)(8).

HELD: **For the District.**

ISSUE: F. *Whether the school district provided an appropriate full individual evaluation (“FIE”) of the student that meets the requirements of IDEA and its implementing regulations?*

CITATION: 34 C.F.R. §§300.304(b)-(c), 300.305, 300.306, 300.309(b) and 300.502(b)(2)-(3).
19 TEX. ADMIN. CODE §89.1050(d).

HELD: **For the District.**