

|           |   |                            |
|-----------|---|----------------------------|
| STUDENT   | § | BEFORE A SPECIAL EDUCATION |
|           | § |                            |
| V.        | § | HEARING OFFICER FOR THE    |
|           | § |                            |
| HUTTO ISD | § | STATE OF TEXAS             |

**DECISION OF THE HEARING OFFICER**

I. Statement of the Case

Petitioner brings this appeal, pursuant to the Individuals with Disabilities Education Improvement Act 20 U.S.C. § 1400 et seq., (hereinafter referred to as "IDEIA"), against Respondent (hereinafter referred to as "Respondent" or "District"). Petitioner (hereinafter referred to as "Petitioner" or "The Student") filed a written request for a due process hearing which was received by the Texas Education Agency on April 23, 2007. Petitioner was represented by Attorney Matthew Finch of San Antonio, Texas. Respondent was represented by Attorney J. Erik Nichols of Houston, Texas. A telephone prehearing conference was held on Wednesday, May 30, 2007, at which time both parties waived their right to a final decision within forty-five (45) days of the date the written request for due process hearing was filed. [34 C.F.R. §300.511(c)] A due process hearing was held on Thursday and Friday, August 9 and 10, 2007, in Hutto, Texas. The parties agreed to file post-hearing briefs on or before August 31, 2007.

Petitioner alleges that the Student is a \*\* old who attends high school in the District. Petitioner alleges the following:

1. That the Student is eligible to receive special education services whom is emotionally disturbed ("ED") and who has another health impairment ("OHI"), because of Asperger's Syndrome;
2. That Respondent has had information and documentation of the Student's eligibility and has blatantly denied the Student services under IDEA to ensure meaningful benefit that would prepare him for transition into post-secondary education and independent living;
3. That Respondent has failed to timely assess and/ or seek consent to test the Student, nor has it provided the student's parents with a "Notice of Refusal" of services;
4. That Respondent has deliberately denied the Student's parents an opportunity to be equal partners in the ARD process, which is tailored to meet the Student's unique needs;
5. That Respondent has ignored the Student's parents' notifications of the Student's physical limitations, which resulted in physical harm to the Student and continuing medical problems;

6. That the Respondent has ignored the Student's parents' requests for services and have denied the Student a free appropriate public education ("FAPE");

7. That the Respondent has been unwilling to address the Student's parents' concerns about the Student's educational setting and that the Student's current setting will remain ineffective and provide the Student with no educational benefit; and

8. That the Student would benefit from counseling, social skills training, transition planning, tutoring and other available interventions and services.

Respondent generally denies Petitioner's allegations and demands strict proof thereof. Respondent contends that the Student does not qualify for special education services because he does not have a disability that cannot be served through Section 504. The Student is currently placed in general education classes, is making progress and has not shown the need for special education services. Respondent asserts that Petitioner's request was brought in bad faith.

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

## II. Findings of Fact

1. The Student is a \*\*-year-old who resides within the School District.
2. The School District is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing the Student a free appropriate public education in accordance with the Individuals with Disabilities Education Improvement Act, 20 U.S.C.A. § 1400, et seq., and the rules and regulations promulgated pursuant to IDEIA.
3. The Student's eligibility for special education placement, programs and services as a student who is Other Health Impaired ("OHI") by having Asperger's Syndrome and being Emotionally Disturbed ("ED") is contested by Respondent.

### **Student's Assessment History**

4. On April 16, 1996, a Comprehensive Individual Assessment ("CIA") was performed on the Student, in order to determine whether the Student was eligible for Special Education services. The Student was four years old at the time. The Student's language skills, physical skills, vision, hearing and health history were all reviewed. Sociological, emotional/behavioral and intellectual skills were all tested. The Student did not appear to have any intellectual deficits. Other tests taken into consideration were the Vineland Adaptive Behavior Scales Parent Edition. The Student was shown to have significant emotional/behavioral deficits, but those were determined to be secondary to the Student's health issues. It was determined that

the Student met specific eligibility criteria for special education services based on classification of Other Health Impaired.

5. On April 25, 1996, an initial Admission, Review, Dismissal (“ARD”) meeting was convened on behalf of the Student to consider admission into Special Education. The ARD Committee (“ARDC”) reviewed the following assessment data: a CIA, dated April 16, 1996, which included a speech evaluation; information from parents; and information from School District personnel. The ARDC determined that the Student needed an additional assessment in the form of an Occupational Therapy (“OT”) assessment, to be performed by October 15, 1996.

6. The April 25, 1996 ARDC determined that the Student met specific TEA and federal eligibility criteria to receive special education services as a student with an OHI, based on an emotional disturbance.

7. The April 25, 1996, ARDC determined that the Student would not be able to participate in physical education classes without modification, due to low/ low average motor skills and concerns about the Student’s asthma.

8. The April 25, 1996, ARDC determined that the Student would be able to follow the Student Code of Conduct without modification.

9. The April 25, 1996, ARDC acknowledged that the Student’s behavioral problems, due to multiple hospitalizations, and expressed concern over whether the Student’s social skills and compliance with teacher requests would be impeded. However, no Behavioral Management Plan (“BMP”) was developed for the Student, at that time.

10. The April 25, 1996, ARDC determined that the Student would have certain classroom modifications:

11. The Student’s Individualized Educational Plan (“IEP”) was developed by the April 25, 1996 ARDC, and contained the following short term educational goals for the Student:

Successfully adjust to the expectations of the school settings;  
Participate in finger plays and hand games with the group;  
Work independently and follow directions and make simple choices; and  
Participate in daily activity related to personal cleanliness and health.

Both of the Student’s parents and teachers were to observe the Student’s behavior for the next six weeks to see if these goals were being met.

12. The April 25, 1996, ARDC determined that placement in the general education classroom prohibited the student from achieving the goals and objectives contained in the IEP, even though supplementary aids and services were used. However, it was also determined that the Student would have the opportunity to participate with students without disabilities in all nonacademic and extracurricular activities. The ARDC determined that there would be no anticipated harmful effect by placing these modifications on the Student's education.

13. The April 25, 1996, ARDC agreed that the Student should also attend the Extended Year Services Program ("EYS") in the form of Summer School. This determination was based on the CIA, dated April 16, 1996, which included a speech evaluation as well as parent and assessment team observations done on the Student. The purpose of placing the Student in EYS was to allow the Student to become comfortable and familiar with the school setting and maintain progress in toileting and personal cleanliness.

14. On September 23, 1996, an ARD meeting was convened to discuss the Student's OT Report. It was determined that the Student did not qualify for OT placement. The IEP remained in effect, and no modifications were added.

15. On April 29, 1997, an annual ARDC meeting was convened to review the Student's progress, thus far. No assessments were reviewed, nor were any additional assessments requested. The Student continued to meet the TEA and federal eligibility requirements to receive special education services as a student with an OHI.

16. The April 29, 1997 ARDC reviewed the Student's achievement on the previous year's short term objectives on the Student's IEP. No additional modifications were placed onto the Student's IEP.

17. The April 29, 1997 ARDC determined that as the Student was entering into Kindergarten and since the Student's health had improved, the Student would be mainstreamed/ placed into General Education Classes.

18. On April 27, 1998, an ARD meeting was convened to review the Student's progress. A CIA, dated April 16, 1996, as well as information from the Student, the Student's parents and School District personnel were reviewed. No additional assessments were requested. The Student's previous IEP was not reviewed. The Student continued to meet the TEA and federal eligibility requirements to receive special education services as a student with an OHI.

19. The April 16, 1998 CIA reviewed by the ARDC indicated that the Student displayed normal vision and hearing, as well as interacting appropriately with adults, interacting appropriately with peers, adjusting easily to new situations, respecting authority, being cooperative and completing tasks. It was determined by the April 27, 1998 ARDC that Prevocational/ vocational modifications were not appropriate for this student. Assistive Technology was addressed thorough one or more of the following: modifications, IEP goals and objectives, related services, supplementary aids and services.

20. The April 27, 1998 ARDC determined that the Student's placement should be in regular education with modifications in pacing, methods or materials. It was determined that the Student was being educated with regular education students to the maximum extent appropriate to the needs of the student and was unable to benefit from education with regular education students to any greater extent.

21. On May 20, 1999, an ARD Meeting was convened to dismiss the Student from Special Education Services. The Student's parent requested the Student's dismissal from Special Education Services. It was determined that the Student could be re-entered into Special Education should the need for intervention arise in the future. The ARDC reviewed a CIA, dated April 16, 1996, and information from the Student, the Student's parents and School District personnel; the current CIA, other assessments, and associated eligibility reports had been given to the parents. The Student's previously developed IEP was not reviewed. The Student continued to meet the TEA and federal eligibility requirements to receive special education services as a student with an OHI.

22. The May 20, 1999 ARDC concluded that the Student displayed normal vision and hearing, and interacted appropriately with adults, and with peers, adjusted easily to new situations. The ARDC observed that the Student respected authority and was cooperative when completing tasks. The ARDC determined that the Student was mentally and emotionally able to follow regular discipline rules.

23. The Student was provided with regular education only, and regular education with modifications in pacing, methods, or materials were considered by the May 20, 1999 ARDC.

24. On September 22, 2003, the Student's performance was reviewed by a Section 504 committee to determine the most appropriate school services for the Student. The Student's parent and teacher information, as well as a letter from the Student's medical doctor were reviewed by the 504 Committee. It was determined that the Student had 504 eligibility in the way of Asthma and neurological/ mood disorder. It was also noted that the Student is currently on medication for both of those areas of concern.

25. The September 23, 2003 504 Committee adopted modifications to allow the Student to preview test questions; to allow the Student access to the school counselor; to give the Student constant access to drinking water; and to allow the Student to use the bathroom whenever needed.

26. On May 5, 2004, the 504 Committee reconvened to review the Student's Accommodation Plan. Parent and teacher information were reviewed. The May 5, 2004 504 Committee adopted the following modifications: outlines and study guides; providing the Student with copies of class notes; giving the Student written instructions; altering format of math assignments; allowing the Student to preview test questions; allowing water/ frequent breaks; and

encouraging the Student's participation. It was also noted that as the Student was frequently absent, planning for make up work would be essential.

27. On August 3 and 13, 2004, a Neuropsychological Assessment was conducted on the Student, who was \*\*years and \*\*months old at the time. This assessment was requested to evaluate the Student's cognitive and emotional functioning in order to provide recommendations for treatment and educational planning. The assessment was provided by a clinical and forensic Psychologist and Neuropsychologist. The assessors reviewed the Student's relevant history, including living conditions, hospitalization and early childhood traumas. Also used in the assessment was information gathered from the Student, the Student's parents, and the Student's psychiatrist. The Student was evaluated by a pediatric neurologist to determine whether or not Student had a seizure disorder. Although both an MRI and EEG performed on the Student came back normal, the Student's psychiatrist still noted that the Student has a seizure disorder. The evaluator noted that the Student earns A's and B's in school, but struggles with math. The Student receives special education services under Section 504, with modifications due to the Student's bipolar disorder, anxiety and motor tics.

28. On October 6, 2004, the 504 Committee reconvened to review the Student's Accommodation Plan. Parent and teacher information were reviewed, as were the Student's TAKS test scores. The Student's teachers reported that the Student was doing well and becoming more social. It was determined that the Student had 504 eligibility in the way of Asthma and neurological/ mood disorder, for which the Student was taking medications.

29. The October 6, 2004 504 Committee adopted the following modifications: outlines and study guides; providing the Student with copies of class notes; giving the Student written instructions; altering format of math assignments; allowing the Student to preview test questions; allowing water/ frequent breaks; encouraging the Student's participation; and modifying the Student's schedule by being an office aide.

30. On September 15, 2005, the 504 Committee reconvened for the Student's Fall Review. The Committee reviewed parent and teacher information; a letter from the Student's Pediatric Neurologist regarding the Student's health information and the Student's test scores, specifically TAKS. The Student was determined to be eligible for 504 by diagnosis of Other Medical Condition, specifically encephalopathy. It was noted that the Student was currently taking medications for that condition. The Student's Pediatric Neurologist noted that the Student would need to be withheld from P.E. classes the following year and given some comparable class for credit.

31. The September 15, 2005 504 Committee adopted the following modifications: providing the Student with outlines and study guides; providing copies of class notes, as needed; providing written instructions to the Student, as needed; reducing the length of the Student's assignments, as needed; offering alternative assignments; allowing the Student to preview test questions; allowing the Student to have water and frequent breaks; and encouraging the Student's

participation. It was also noted that the Student was currently in P.E. class at the Student's parents' request.

32. On January 26, 2006, the 504 Committee reconvened to review the Student's progress. Parent and teacher information, attendance records, medical reports (not specified) and the Student's test scores, specifically TAKS, were all reviewed for the meeting. The Student was deemed eligible for 504 accommodations by having ADD/ ADHD and Other Medical Condition (not specified). No modifications were added to the Student's accommodation plan.

33. A Student Placement Committee Review was held on February 14, 2006 as the Student's parents had concerns about accommodations for the Student. The 504 Committee recommended that the Student should continue with the current educational program.

34. On February 21, 2006, one of the Student's treating physicians wrote a note indicating that it was medically necessary that the Student be excused from physical education for a period of not less than four weeks. This note was included within the Student's educational records maintained by the District.

35. On February 22, 2006, LSSP \*\*, initially met with the Student and the Student's mother, with a goal of developing a process for the Student to temporarily escape and recharge while at school without missing an entire day and panicking. The Student participated in individual counseling on four (4) separate occasions and group counseling on five (5) or six (6) separate occasions. It appeared that the Student benefited from the individual counseling, but not from group counseling. LSSP \*\* concluded that the Student did not have the ability to seek out counseling alone, and was often panicky and wanted to go to sleep.

36. LSSP \*\* testified that he did not feel that the Student had Asperger Syndrome, and did not feel that it was the correct diagnosis. He also stated that he did not feel that Student needed special education services. However, LSSP \*\* did state that the Student needed counseling, and he felt that the Student was unable to seek out the counselor on own initiative. LSSP \*\* also went on to state that the Student *does* have a unique disability that affects the Student's education.

37. On March 8, 2006, the 504 Committee met for the Student's Spring Review. Parent and teacher information were reviewed, as well as a letter from the Student's Pediatric Neurologist. The Student was deemed eligible for 504 accommodations by having ADD/ ADHD and encephalopathy.

38. The March 8, 2006 504 Committee adopted the following modifications: providing the Student with outlines and study guides; providing the Student with copies of class notes, as needed; giving the Student written instructions, as needed; reducing the length of the Student's assignments, as needed; offering alternative assignments; allowing the Student to preview test questions; allowing water/ frequent breaks; and encouraging the Student's participation.

## **Review Period of Instant Due Process Hearing**

39. On May 7, 2006, an FIE was completed on the Student by an LSSP, MA, Diagnostician, Regular Education Teachers and a school nurse. The Student was fourteen years and one month old at the time of testing. The FIE was conducted to determine eligibility for special education services and to determine current levels of functioning. The following materials were reviewed for this evaluation:

- Review of records;
- Parent information;
- Health screening;
- Teacher reports;
- Informal observation;
- Clinical interview;
- the Weschler Intelligence Scale for Children - Fourth Edition;
- Woodcock-Johnson Tests of Achievement - Third Edition;
- Oral and Written Language Scales;
- Behavior Assessment System for Children - Second Edition from the Student's parents, the Student's teachers and a self report from the Student;
- Children's Depression Inventory;
- Haak Sentence Completion (Elementary Form);
- How-I-Feel Questionnaire;
- House-Tree-Person;
- Revised Children's Manifest Anxiety Scale; and
- Children's Apperception Test - (C.A.T.).

40. One of the resources used by the Multidisciplinary Team was the Student Interview, conducted by \*\*, LSSP on April 24, 2006. In it was stated the following:

“The best part of school for [the Student] is seeing friends. [the Student's] best friend is \*\*. They like to just ‘hang out’ and play video games... [the Student] stated that [the Student's] father fusses about the chores, while [the Student's] mother fusses about ‘almost everything.’ When asked what would help the most at school, [the Student] stated that having a quieter classroom, being allowed to have breaks, and extra time to complete math assignments would be most helpful. Additionally, [the Student] stated that s/he had been having significant difficulty falling asleep and then staying awake at night.”

41. The Multidisciplinary team that completed the FIE on May 7, 2006 made the following summary:

“The legal definition of an Emotional Disturbance for educational purposes includes either Schizophrenia or a condition in which at least *one* of the *five* following characteristics is exhibited. The condition must not be solely due to a social maladjustment and must have been exhibited over a long period of time, to a marked degree, in a way that adversely affects educational performance. [the Student] does not exhibit symptoms of Schizophrenia.

1. An inability to learn, which cannot be explained by intellectual, sensory, or health factors. This is *not* an issue for [the Student].

2. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. This is *not* an issue for [the Student]. Based upon data collected through this assessment, [the Student] appears to have some peer relationship difficulties (few close friends) and recently has become resistant to parent directives at home. While [the Student] has been reported to be at-risk of developing more intense difficulties, some of this behavior can be attributed to being an adolescent male.

3. Inappropriate types of behavior or feelings under normal circumstances. This has been a problem for a long time (approximately 9 years). Student has excessive worries about storms, what others think, and about family members dying. This *is* an issue for [the Student].

4. A general pervasive mood of unhappiness or depression. Although there is some evidence (only mother endorsed items in the clinically significant range on BASC-2, previous diagnosis of Bi-Polar 03-31-04) to support a depressed mood. [the Student] is currently on a medical regime, which seems to be helpful and generally [the Student] is happy at school, so this does *not* seem to be a pervasive problem at this time.

5. A tendency to develop physical symptoms or fears associated with personal or school problems. This is *not* an issue. School Records from the nurse do not indicate a cause for concern in this area.”

42. The multidisciplinary team noted, in the History portion of the FIE, that the Student’s psychologist did not have the impression that the Student had ADHD or was otherwise behaviorally disordered. The Student’s psychologist felt that many of the

Student's behaviors were age appropriate and could be addressed by his parents with firm, structured, and consistent discipline.

43. At the time of the May 7, 2006 FIE, the Student's grades on regular education classes were as follows: Math, \*\*; Language Arts, \*\*; Social Studies, \*\*; and Computers, \*\*.

\*\* The May 7, 2006 FIE multidisciplinary team concluded that the Student did meet the criteria as a student with ED, but left all determinations pertaining to a future eligibility, educational planning/ programming, services to be provided, and placements to ARDC determination. LSSP B.M. did not participate in the FIE evaluation, but he did sign off on it.

45. On May 23, 2006, an ARD Meeting was convened to review the Student's placement. The Student's mother attended the ARD and participated, throughout. The following documents were reviewed: an FIE dated May 5, 2006; a CIA dated April 16, 1996; a psychological assessment dated May 5, 2006; information from the Student and the Student's parents; and information from District personnel, including TAAS/ TAKS, SDAA, LDAA and district-wide assessments. The Student's previously developed IEP was not reviewed.

46. The May 23, 2006 ARD determined that the Student did not meet specific TEA and federal eligibility criteria to receive special education services. The Student displayed normal vision, normal hearing, good general health, as well as interacting appropriately with adults, interacting appropriately with peers, adjusting easily to new situations, respecting authority, being cooperative and completing tasks. The Student was also determined to be able to participate in P.E. classes with no modifications.

47. The main focus of the May 23, 2006 ARD was the FIE, completed on May 5, 2006 by \*\*, LSSP. \*\* stated that the Student did have a disability based on an Emotional Disturbance ("ED"), but that there was no educational need for special education services. The ARDC concluded that while the Student did have some difficulty in Math class and had failed the Math portion of the TAKS test, that tutoring would be able to help, as well as having a quiet place to test at. The ARDC noted that modifications were available through the Student's 504 program. The ARDC *unanimously* determined that the Student's current grades indicated that the 504 accommodations were sufficient.

48. The ARDC suggested that other 504 accommodations could include: for the staff to concentrate on Student's positives, not the negatives; to provide a calm, nurturing environment with positive reinforcements; and not to assess the Student on a level with other students.

49. On June 28, 2006, the Student's pediatrician reported, by letter, his findings that suggested the possibility that the Student had a mild manifestation of Asperger's Syndrome.

50. On August 9, 2006, the 504 Committee reviewed Student's Accommodation Plan. Only parent information was reviewed. The Student's eligibility was based on minute seizure disorder, for which the Student was taking medication.

51. The October 25, 2006 504 Committee adopted the following modifications: providing the Student with outlines and study guides; providing copies of class notes; providing the Student with written instructions; reducing the length of the Student's assignments, as needed; offering alternative assignments; extending time for the Student when testing; allowing the Student to preview test questions; placing the Student in small groups; allowing the Student a cooling off period; allowing the Student frequent water breaks; encouraging the Student's participation; giving the Student access to Content Mastery; giving the Student access to the school counselor; and giving the Student access to the school nurse.

52. On October 25, 2006, the 504 Committee reviewed the Student's Accommodation Plan for the Fall. Parent and teacher information, attendance records, medical reports (not specified) and current grades were all reviewed. The Student was deemed eligible for 504 accommodations by having ADD/ADHD, Asthma, Asperger's Syndrome, Minute Seizure Disorder, Encephalopathy and Tourette's Syndrome. The Student was said to be taking medication for some of these health issues, but the review did not specify which disorders were being medicated.

53. The October 25, 2006 504 Committee adopted the following modifications: providing the Student with outlines and study guides; providing copies of class notes; providing the Student with written instructions; reducing the length of the Student's assignments, as needed; offering alternative assignments; extending time for the Student when testing; placing the Student in small groups; allowing the Student a cooling off period; allowing the Student frequent water and bathroom breaks; giving the Student access to Content Mastery; giving the Student access to the school counselor; and giving the Student access to the school nurse.

54. On November 30, 2006, one of the Student's treating physicians diagnosed the Student with mild Asperger's Syndrome.

55. On November 30, 2006, the Student's mother spoke, via telephone, to one of the school's administrators. During the conversation, the Student's mother expressed dissatisfaction with the level of the Student's assessments and requested an additional assessment, particularly one designed to detect an autism spectrum disorder.

56. An ARDC meeting was held on January 9, 2007 to review the Student's progress. Assessment Reports, an FIE dated May 5, 2006, a CIA dated April 16, 1996, information from the Student and the Student's parents, as well as information from School District personnel were all

reviewed. During the ARD, the Student's mother stated that the Student was no longer bi-polar. She went on to state that while there were signs of depression, the Student no longer needed to be medicated for depression. The ARD agreed to call for further assessments on parental concerns. The Student's mother requested accommodated P.E., and was referred to speak with school administrators and 504 services. The Student's mother disagreed with the rest of the ARDC's decision regarding the Student's placement.

57. The January 9, 2007 ARDC noted that the Student would be visited by the School District's LSSP for some consultation on personal issues.

58. On January 9, 2007, the Student's Pediatric Neurologist presented an Eligibility Report on the Student. It stated that the Student had "limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness in the educational environment, due to chronic or acute health problems, which adversely affect educational performance."

59. The January 9, 2007 Report stated that the Student had mild to moderate ADD and encephalopathy.

60. On January 9, 2007, the Student's mother provided Respondent with a Consent for Evaluation for Special Education Services.

61. The School District's LSSP with the District who did not have direct contact with the Student, but did observe the Student. The LSSP stated that, during the observation, the Student appeared introverted, but apparently normal. He also noted that while the Student did display some autistic characteristics, these characteristics were common in other students, and not indicative of having the disorder. The LSSP did not conclude that the Student was autistic, nor did the Student have any educational need for special education services to address an autism spectrum disorder.

62. On January 24, 2007, a Gilliam Autism Rating Scale - Second Edition evaluation was performed on the Student, who was \*\* old at the time. The evaluation was done by an LSSP.

63. On January 24, 2007, an Asperger Syndrome Diagnostic Scale evaluation was performed on the Student, who was \*\* old at the time. The evaluation was done by an LSSP.

64. On February 14, 2007, the 504 Committee met for the Student's Spring review. Parent and teacher information, as well as health records, were reviewed. The Student was deemed eligible for 504 accommodations by having ADD/ADHD, Asthma, Asperger's Syndrome, Minute Seizure Disorder, Encephalopathy, and Tourette's Syndrome. It was noted that Student was taking unspecified medications for some of the health concerns.

65. The February 14, 2007 504 Committee adopted the following modifications: providing the Student with outlines and study guides; providing copies of class notes; offering the Student peer assistance; providing the Student with written instructions; reducing the length of the Student's assignments, as needed; offering alternative assignments; using an alternative form of assessment which focused on the Student's strengths; allowing the Student to preview test questions; allowing standardized test accommodations; placing the Student in small groups; using positive verbal and written feedback for the Student; allowing the Student a cooling off period; allowing the Student frequent water breaks; giving the Student access to Content Mastery; giving the Student access to the school counselor; and giving the Student access to the school nurse.

66. The February 14, 2007 504 meeting was signed off on by the parent, pending an ARD meeting for the Student.

67. The February 14, 2007 504 Committee noted that P.E. credits would be earned outside of the school setting with a waiver from TEA. Golf would be allowed for credit.

68. On March 2, 2007, an Adapted Physical Education FIE Report was compiled on the Student, who was \*\* old at the time. A CTAPE was reviewed for this evaluation. It was determined that the Student did not demonstrate a need for adapted physical education in order to make appropriate education progress.

69. On March 7, 2007 an OT evaluation was performed on the Student by an OTR. The assessment was that the Student should not be considered as a candidate for OT under the State Board of Education rules for handicapped students.

70. On March 9, 2007, an Addendum to the May 5, 2006 FIE was added, entitled Autism Evaluation. The Student was \*\* old at the time. The evaluation was performed by an LSSP, MA, Diagnostician, Regular Education Teachers and a school nurse. The following sources of information were reviewed:

- Review of Records from March 9, 2007 by LSSP;
- The Student's teacher information;
- The Student's parent interview from January 24, 2007;
- The Student's health information obtained from a Licensed Vocational Nurse on January 22, 2007.
- Informal observations gathered by an LSSP;
- Autism Behavior Checklists from the Student's mother, and teacher, dated January 24, 2007;
- Asperger Syndrome Diagnostic Scale; and

- Gilliam Autism Rating Scale - Second Edition from January 24, 2007, by both the Student's mother and Autism Assessment Team.

71. The 504 Committee requested the March 9, 2007 evaluation because the Student's mother had concerns about the Student's apparent lack of socialization, limited coping skills, and inability to participate in P.E. without accommodations. Additionally, the Student has a diagnosis of mild Asperger's Syndrome from his Pediatric Neurologist, dated June 28, 2006.

72. At the time of the March 9, 2007 evaluation, the Student was receiving services from the 504 Committee, under the classification of emotionally disturbed in the areas of inappropriate types of behavior or feelings under normal circumstances.

73. The evaluation team used the information completed by the Student's mother and the Student's teachers with the BASC-II assessments. The results are shown below. Scores in the significant range are indicated with (\*\*) and in the at-risk range with (\*). Scores in the average range are unmarked. Scores in the at-risk range identify either a significant problem that may not be severe enough to require formal treatment, or a potential for developing a problem that needs careful monitoring. T-scores have a mean of 50 and a standard deviation of 10.

| Clinical Scales        | [the Student's Mother] | Teacher M | Teacher C | Teacher R |
|------------------------|------------------------|-----------|-----------|-----------|
| Hyperactivity          | **                     | **        | **        | **        |
| Aggression             | **                     | **        | **        | **        |
| Anxiety                | **                     | **        | **        | **        |
| Depression             | **                     | **        | **        | **        |
| Somatization           | **                     | **        | **        | **        |
| Attention Problems     | **                     | **        | **        | **        |
| Atypicality            | **                     | **        | **        | **        |
| Withdrawal             | **                     | **        | **        | **        |
| Internalizing Problems | **                     | **        | **        | **        |

|   |    |    |    |    |
|---|----|----|----|----|
| Externalizing Problems                      | ** | ** | ** | ** |
| Behavior Symptoms Index                     | ** | ** | ** | ** |
| Adaptive Scales (Higher numbers are better) |    |    |    |    |
| Adaptability                                | ** | ** | ** | ** |
| Social Skills                               | ** | ** | ** | ** |
| Activities of Daily Living                  | ** | -  | -  | -  |
| Adaptive Skills                             | ** | ** | ** | ** |
| Functional Communication                    | ** | ** | ** | ** |

It was stated that the Student's mother rated the Student more negatively than the Student's teachers, with the exception of one of the Student's teachers. It also stated that this teacher's classroom appeared to be a very unstructured learning environment, which might have explained the discrepancy between her ratings of the Student and the Student's other teachers' ratings.

74. The following information was noted in the evaluation:

“Health Concerns: According to information provided by the parent and review of school records, [the Student] has a previous diagnosis of: immune suppression disorder, asthma, gastrointestinal reflux, depression which has since been changed to bipolar disorder (early onset), anxiety disorder (NOS), complex motor tics, and possible minute seizure disorder.”

75. The March 9, 2007 evaluation team concluded that the Student:

“...meets the following criteria and demonstrates some characteristics of **Asperger's Disorder**. However, the team concluded that this is not a problem at school. In fact, [the Student] has had to be moved closer to the teacher due to excessive socialization and the Student has been showing an interest in the opposite sex and has been reprimanded by some of his teachers for socializing during the class period. The team observed that criteria were not met for any other specific Pervasive Developmental Disorder or Schizophrenia, and that the Student *does not* meet the criteria

as a Student with an Autism Spectrum disorder under the Individuals with Disabilities Education Act and the Texas State Board of Educational Rules.”

76. The March 9, 2007 evaluation team also recommended that the Student stay in general education classes with accommodations and access to Content Mastery assistance as needed. The Student should continue to take the regular state assessment measure on grade level, but may need to take it in a small group setting (reduce distracting stimuli). It did not appear that counseling was needed, but all involved were reminded that the Student could participate in counseling on an as needed basis.

77. On April 3, 2007, a CIA was made on the Student, who was \*\* at the time. The evaluation was requested by the Student’s parents over some concerns at school and home. It was determined that there was no educational need for the Student to receive OT.

78. On April 3, 2007, an ARD meeting was convened to review the Student’s placement amid concerns from the Student’s mother that counseling issues and transition issues were not being taken into consideration for the Student. The Student’s mother also felt that the Student displayed some behavioral issues. An FIE dated May 5, 2006, two CIAs, dated April 16, 1996 and April 3, 2007, information from the Student and the Student’s parents, as well as information from School District personnel were all reviewed. The Student’s previously developed IEP was not reviewed.

79. It was determined by the April 3, 2007 ARDC that the Student did not meet specific TEA and federal eligibility criteria to receive special education services. The Student displayed normal vision, normal hearing, good general health, as well as interacting appropriately with adults, interacting appropriately with peers, adjusting easily to new situations, respecting authority, being cooperative and completing tasks. The Student was also determined to be able to participate in P.E. classes with no modifications.

80. The Student’s parent did not agree with the conclusions made by the April 3, 2007 ARDC. The Student’s mother requested an IEE in the following areas: speech, achievement, emotional/ behavioral, and intellectual.

81. In an Addendum to the Minutes of the April 3, 2007 ARD meeting, the Student’s mother stated that she did not give up any of her or the Student’s rights, nor had she been given a Notice of Refusal from the District.

82. On or about April 23, 2007, the Student went to the emergency room because of an incident in his P.E. class where he became uncomfortable and experienced chest pains.

83. On April 26, 2007, the Student's mother sent an email to a teacher and the Principal at the Student's school, stating that the Student's parents would be sending the Student back to school on that date. In the note, the Student's mother asked that the Student be given extra minutes to get to/ from class until further notice and that the Student be encouraged to lighten his backpack. It also noted that the Student had a note from the Student's doctor which excused the Student from PE for one (1) week.

84. On May 11, 2007, one of Student's doctors prepared a letter that indicated that the Student would be unable to attend school for medical reasons for at least six weeks and that homebound services would be needed.

85. On May 29, 2007 an Eligibility Report for Orthopedically Impaired, Other Health Impaired on May 29, 2007, stating that the Student had "limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness in the educational environment, due to chronic or acute health problems, which adversely affect educational performances." The Student's M.D. specifically stated that the Student had severe Asperger's Syndrome, Immune Deficiency and Chronic Gastrointestinal Issues. The report also went on to say that the Student had difficulty performing activities found in a regular classroom, and may require special adaptations to the regular program, including homebound care and difficulty maintaining alertness in the regular classroom.

86. The Student's M.D. stated that the Student's issues kept the Student from attending classes regularly, and attributed the Student's long absences from school to the Student's health concerns, the cause of which were not specifically diagnosed. Functional implications included difficulty performing activities found in a regular classroom that may require special adaptations to the regular program, including homebound care, and difficulty maintaining alertness in the regular classroom.

87. The Student's first semester grades for the 2006-2007 school year were as follows: Ag Science,; Algebra I, \*\*; English I, \*\*; Biology I, \*\*; Health, \*\*; Pre-AP World Geography, \*\*; and Spanish I, \*\*.

88. The Student's fifth six-weeks grades for the 2006-2007 school year are as follows: Applied Ag Science Tech, \*\*; Algebra I, \*\*; English I, \*\*; Biology I, \*\*, Foundations of Fitness, \*\*; Pre-AP World Geography, \*\*; and Spanish I, \*\*.

### III. Discussion

#### **General Impressions**

For most of his life, the Student has had physical and emotional issues that have impacted his interpersonal relationships. The early evaluations and pre-school intervention reflected some of the Student's difficulties in relating to his social environment, and performing academic tasks required of him. However, like many school children whose disabilities can be manifested in more variable or subtle ways, characterizing the Student's disabilities in the context of the specific requirements of IDEIA has been very difficult. Diagnosing or otherwise defining the Student's difficulties in the school setting is a "moving target" that requires the evaluators to re-think the nature of his problems and what, if any, initiatives are required to address them. Even the Student's parents have been on both sides of the question of whether the Student requires special education services, more than once.

In this background, Petitioner has filed a due process hearing complaining about the District's failures to timely address certain educational disabilities that are specifically asserted. The requirements of a due process hearing focuses the inquiry through discreet parameters of a broader and confounding educational history. While it is appropriate to consider the Student's medical history and previous educational programs as *background*, the time period I am to review is limited to events occurring from April 23, 2006 to April 23, 2007 [§ 89.1151(c)]. Moreover, I am restricted to rule on the issues presented to me and the District, in a Resolution meeting, that are found in the due process hearing request. The relief requested by the Petitioner is similarly restricted to what was requested in the due process hearing request. In short, while the Student's issue may be evolving with a complex history, my determination must be based on what was proven, by a preponderance of the evidence, regarding a relatively limited period and issues defined by the parties. The issues identified in my Prehearing Order issued June 6, 2007, provides the framework for the rest of my discussion of my decision in this case.

### **Allegation No. 1**

*The Student is eligible to receive special education services as a student who is emotionally disturbed and who is other health impaired because of Asperger's Syndrome.*

This is one of the ultimate issues in this case and an issue that is hotly contested. There is little argument between the parties that the Student has suffered from an emotional disturbance that is, sometimes, manifested by anxiety and withdrawal. However, the May 23, 2006 ARD ended with the unanimous conclusion that the Student *did not* require special education services and that the negative effects of his ED could be successfully managed through 504 services. In fact, as best as can be determined, Petitioner is not now arguing that the Student should be re-admitted to special education because of the same *ED* classification, but rather, because of Asperger's Syndrome, which was diagnosed for the first time, mere months before the May 23, 2006 ARD.

The Asperger's diagnosis is clearly contested as a basis for an OHI eligibility classification. Petitioner sponsored medical testimony that was based on less than a full educational evaluation that the Student has Asperger's Syndrome. Even that evidence is unclear as to whether the asserted disability is mild or severe. On the other hand, the District's position is that the Student does not have Asperger's at all, and its opinion is supported by two FIE's completed during the relevant time period and information provided by almost all of the Student's teachers. Aside from the apparent disparity in the amount of evidence presented by the parties, the Petitioner's case does not explain how the Student is to have suddenly developed Asperger's, when it was not discussed throughout his educational history, or how he exhibits traits that are not usually found in students with Asperger's.

It would be a mistake to assume that this case is a referendum on whether the Student has Asperger's and that I am the arbitrator of that decision. Even if the Student has Asperger's, the disability would have to have a recognizable adverse impact on his education to satisfy the requirement of IDEIA. Ultimately, IDEIA requires that such a determination be made by a multidisciplinary team of evaluators and the Student's ARD Committee. Leaving aside, for the moment, that two ARD Committee meetings did not identify Asperger's as an educational disability with which the Student suffers, the record does not support Asperger's as an educational disability. Whatever intermittent emotional difficulties the Student faced the first semester of the 2006-2007 school year his academic performance seemed more than satisfactory. The same can be said for the first portion of the second semester, as well. In fact, the supposed negative educational impact of Asperger's was non-existent throughout the run up to his May 23, 2006 *dismissal* from special education. There is no expert testimony that Asperger's is ever an intermittent disorder. The record does not suggest that the Student is eligible for special education services by virtue of Asperger's Syndrome.

### **Allegation No. 2**

*Respondent has had information and documentation of the Student's eligibility and has blatantly denied the Student services under IDEA to ensure meaningful benefit that would prepare him for transition into post-secondary education and independent living.*

This allegation is dependent upon agreement with the Petitioner's position in Allegation 1. Only special education students are entitled to services under IDEIA. The May 23, 2006 ARD Committee dismissed the Student from special education. The issue of re-admission did not resurface until January 7, 2007, and then because of the Student's parents' original assertion of Asperger's at the end of November, 2006. As discussed herein, the Student's eligibility based on Asperger's was, and is, contested. It is hardly appropriate to find that the District failed to provide services that the evidence does not show were needed.

### **Allegation No. 3**

*Respondent has failed to timely assess and/ or seek consent to test the Student, nor has it provided the Student's parents with a "Notice of Refusal" of services.*

The record does not support this allegation. Petitioner's allegation of delay includes the Student's mother expressing dissatisfaction on October 25, 2006, to the 504 Committee with the provision of counseling to the Student. Also, the Petitioner references a telephone conversation between the Student's mother and a school official in late November, 2006, wherein the Student's mother requested further assessment. Given the limited, available time at the end of a Fall Semester, and the fact that written consent was secured on January 7, 2007, it does not appear that there was unusual or relevant delay in the District's efforts to obtain consent. The record shows that the actual FIE was conducted within state time guide lines as was an ARD meeting [Tex. Ed. Code §29.004; TEC §89.1050]. Any procedural delays or deficiencies were harmless error.

#### **Allegation No. 4**

*The Respondent has deliberately denied the Student's parents an opportunity to be equal partners in the ARD process, which is tailored to meet the Student's unique needs.*

The record contradicts this allegation. Petitioner's parents, particularly his mother, were frequent and active participants in the Student's education, and the ARD process. The Student's mother regularly called and emailed members of the Student's ARD Committee, the 504 Committee, and various teachers and school administrators. It appears that the January 7, 2007 ARD meeting *was* recessed inappropriately. It was recessed without a date certain and so that a District member could "speak to" a non-member about ARD issues. However, this dubious procedure was not shown to be harmful to the Student's education or the process.

In the main, Petitioner appears to base this allegation on the fact that the Student's parents and the rest of the ARD Committee disagreed on the issue of the Student's OHI eligibility, discussed herein. Also, Petitioner tries to support this allegation by referring to events that occurred after this due process request was filed. The issue of the last five or six weeks of the 2006-2007 school year and the Student illness is not, in fact, an issue at all. The apparent District problems in providing the Student homebound services when it was finally clear that he would not return to school (May 11, 2007) and the curious award of final grades that were not actually earned, was never pled in this case.

#### **Allegation No. 5**

*Respondent has ignored the Student's parents' notifications of the Student's physical limitations, which resulted in physical harm to the Student and continuing medical problems.*

This allegation is wholly unsupported by the record. Petitioner refers to the single incident involving the Student's physical distress during a P.E. class that resulted in him being treated in an emergency room. The Petitioner's assertion that the Student's participation in the P.E. class was against doctor's orders is completely inconsistent with the four week restriction placed on the Student's P.E. participation, over a year *prior* to the incident. Moreover, since the hearing, Petitioner has argued that the single incident was responsible for the Student's gastrointestinal issues, his immune deficiency problems, and most amazingly, his Asperger's Syndrome. Petitioner's advocacy, in this record, is more than excessive. Petitioner's claims exceed the testimony of his own expert witness who could not, as of the hearing, identify the nature or the cause of the Student's current physical problems. It is not even clear, on this record, if the Student's physical problems that kept him out of school at the end of last year will continue and become a disability that could qualify him for special education under OHI classification.

### **Allegation No. 6**

*Respondent has ignored the Student's parents' requests for services and have denied the Student a free appropriate public education.*

If by "services" Petitioner refers to *special education* services, this allegation is substantially similar to Allegation No. 2, discussed herein. Other "services" are outside of my limited jurisdiction. Since the hearing, Petitioner has sought to connect the denial of FAPE to the end of school absences and the lack of homebound services. However, these events, even if they are appropriately considered as a denial of school services, would only be a denial of FAPE if the Student is a special education student that has an educational disability, such as OHI, that requires frequent homebound services. The Student's own doctor could not identify such a disability as of his testimony, during the hearing.

### **Allegation No. 7**

*Respondent has been unwilling to address the Student's parents' concerns about the Student's educational setting and that the Student's current setting will remain ineffective and provide the Student with no educational benefit.*

This broadly phrased allegation is no more than a combination of other allegations, discussed herein. However, the core premise of the allegation - that the Student received no educational benefit from his regular educational placement - is inconsistent with the record. Except for the first semester absences that were not addressed, or the end of year physical breakdown, that was not explained, the Student received more than basic educational benefit from his regular education placement.

### **Allegation No. 8**

*The Student would benefit from counseling, social skills training, transition planning, tutoring and other available interventions and services.*

This allegation is such a broadly phrased truism that is applicable to *any* student, that it fails to support any grant of relief.

### **Conclusion**

The petitioner failed to satisfy his burden of proof regarding any of the alleged failures by the District. Accordingly, the relief requested should be denied.

#### IV. Conclusions of Law

1. Respondent has a responsibility to provide the Student with a free appropriate public education. 20 U.S.C.A. § 1412; 34 C.F.R. §300.300; 19 T.A.C. § 89.1001.
2. Petitioner failed to demonstrate, through a preponderance of the evidence that the Respondent failed to provide Petitioner with a free appropriate public education.
3. Respondent demonstrated that it had provided Petitioner with the placement, program and support services necessary for the Student to receive educational benefit therefrom.

#### V. Order

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer ORDERS that the relief sought by Petitioner is DENIED.

SIGNED this 4<sup>th</sup> day of September, 2007.

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Stephen P. Webb  
Special Education Hearing Officer

#### **NOTICE TO THE PARTIES**

Under State Board of Education rules, it is not necessary for a party to perfect an appeal to state district court by filing a Motion for Rehearing. However, either party may request, within ten (10) days after the date of this decision, specified additional or amended findings of fact or conclusions of law. 19 T.A.C. § 89.1185(n) (o).

STUDENT § BEFORE A SPECIAL EDUCATION  
§  
V. § HEARING OFFICER FOR THE  
§  
HUTTO ISD § STATE OF TEXAS

**SYNOPSIS**

**Issue:** Whether the School District failed to timely assess and identify a fifteen year old student who has previously been served through §504 for eligibility for special education services.

**Federal Citation:** 34 CFR §§300.125, 300.300(a)(2)

**Texas Citation:** 19 T.A.C. §89.1101

**Held:** For the Respondent. Petitioner’s claim that the Student had developed Asperger’s Syndrome and was not being served by §504 service is not supported by the record. Two recent Full and Individual Evaluations that were completed timely do not support Asperger’s Syndrome as a disability for this student. Moreover, the Student has been doing well in school except for periodic academic problems with sardine classes and absences, due to undiagnosed physical ailments.

**Issue:** Whether the School District failed to provide special education services to the Student.

**Federal Citation:** 20 U.S.C.A. § 1400 *et seq.*

**Held:** For the Respondent. Because the Student was not shown to be eligible for special education, the lack of special education services was appropriate.