

**DOCKET NO. 084-SE-1104**

<b>Student, b/n/f</b>	§	<b>BEFORE A SPECIAL EDUCATION</b>
<b>Parent, Petitioner</b>	§	
	§	
<b>v.</b>	§	<b>HEARING OFFICER</b>
	§	
<b>DALLAS INDEPENDENT</b>	§	
<b>SCHOOL DISTRICT,</b>	§	<b>FOR THE STATE OF TEXAS</b>
<b>Respondent</b>	§	

**DECISION OF THE HEARING OFFICER**

**STATEMENT OF THE CASE**

Student, (hereafter Student or Petitioner), through her next friend Parent, 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 the district timely evaluated Student for special education;
- 2) Whether the district timely identified Student as eligible for special education;
- 3) Whether the district timely provided Student with appropriate special education services;
- 3) Whether the alleged violations contributed to Student’s \*\*\* numerous classes and retention in \*\*\* grade and denied her a free appropriate public education (FAPE).

As relief, Petitioner requested completion of a pending independent educational evaluation (IEE), placement in special education, and placement in \*\*\* grade. At the time of the hearing the IEE had been completed and Student had been placed in special education. Petitioner raised numerous issues dating back many years that fell outside the statutory limitation period. Also, her discrimination claims, request for damages for mental anguish of the parent and student, and requests for amended records are outside the jurisdiction of an IDEA Hearing Officer.

Held, for Petitioner in part and Respondent in part.

**PROCEDURAL HISTORY**

Petitioner’s request for hearing was received by the Texas Commissioner of Education on November 12, 2004, and was received by the Hearing Officer on November 15, 2004. Petitioner appeared *pro se*, with her mother, Parent, as next friend. Respondent was represented by Joni Jalloh.

Telephone prehearing conferences were held on November 30, 2004, and February 23, 2005, and were transcribed by a court reporter. The hearing originally was set for December 10, 2004. The parties requested a continuance to allow time to complete an IEE and pursue mediation. The continuance was granted and the hearing was reset to January 20, 2005. The Decision due date was extended accordingly.

Subsequently, Respondent requested a continuance, unopposed, to allow time to complete the IEE and convene an ARDC meeting. The continuance was granted and the hearing was reset to January 27, 2005. The Decision due date was extended accordingly.

Subsequently, the parties again requested a continuance to allow time to complete the IEE and convene a meeting of the Admission, Dismissal, and Review Committee (ARDC). The continuance was granted and the hearing was reset to March 1, 2005. The Decision due date was extended accordingly.

The ARDC qualified Student as eligible for special education due to an emotional disturbance (ED) on February 14, 2005. The parties requested a continuance to allow time for Parent to obtain medical documentation to support possible eligibility under other health impairment (OHI) and for the ARDC to reconvene and develop an individualized education program (IEP). The continuance was granted and the hearing was reset to April 5, 2005. The Decision due date was extended accordingly.

Subsequently, Respondent requested a continuance, unopposed, to allow additional time for Parent to obtain medical documentation to support eligibility under OHI and to specify the issues remaining for hearing. The continuance was granted and the hearing was reset to May 6, 2005. The Decision due date was extended accordingly.

Subsequently, Respondent filed a Motion to Dismiss arguing that no justiciable issues remained for hearing. The Motion to Dismiss was denied. Petitioner requested a continuance to allow additional time to resolve the issues. The continuance was granted and the hearing was reset to June 14, 2005. The Decision due date was extended accordingly.

The hearing was held on June 14, 2005. The Decision due date was extended by agreement of the parties to July 19, 2005, and was issued on that date.

### **FINDINGS OF FACT**

1. Student is a \*\*\*-year-old girl who completed \*\*\* grade for the second time in May 2005. She has been diagnosed with depression, anxiety, and ADHD, and is eligible for special education services as a student with ED and OHI. She also has scoliosis and may warrant eligibility on the basis of orthopedic impairment. She attends the \*\*\* School campus in Dallas ISD.

2. Student attended \*\*\* grade for the first time in the 2003-2004 school year. In August 2003, Student's mother, Parent, contacted the \*\*\* school counselor and requested a special education evaluation. The counselor asked her to wait until students were settled into their classes and schedule changes had been made.

3. Student received several \*\*\* grades on her report card for the first six weeks of Fall 2003. Her mother requested a parent-teacher conference, which was held on or about November 6, 2003. Several teachers reported that Student needed to attend tutoring before or after school, and that she at times refused to speak, spoke inaudibly, sat in class and did nothing, had serious problems with completing assignments and turning in work, and had numerous zeros due to failure to turn in work. Parent again requested a special education evaluation in the November 6, 2003, meeting. The school counselor's meeting notes indicate that she asked Parent to return the following day to complete the special education referral and evaluation documents. Parent did not return to fill out the documents and denies that she was asked to do so.

4. In December 2003, Parent went to the counselor's office without an appointment, and the counselor was unable to find Student's special education referral packet. She asked Parent to return the next day but Parent

did not do so. In February or early March 2004, Parent spoke to the counselor in her office about Student's report card, but did not complete the referral forms. On May 26, 2004, the counselor overheard Parent inquiring from another employee about the procedure to file a grievance. She requested that Parent come to her office to fill out the referral information, but Parent did not do so.

5. In late May or early June 2004, Parent complained to DISD Area 5 that she had not been able to obtain a special education evaluation for her daughter. \*\*\*, special education director for DISD Area \*\*\*, was notified of the complaint on June 2, 2004. Parent met with \*\*\* on June 17, 2004, and filled out the referral information packet and consent for evaluation. Parent was first provided a copy of procedural safeguards at the meeting on June 17, 2004.

6. The district's full individual evaluation (FIE) was completed by a DISD diagnostician on July 26, 2004. The FIE tested Student's intelligence and academic achievement but did not evaluate her emotional state or adaptive behavior skills. The Wechsler Intelligence Scale for Children-III/IV scores indicated a full-scale IQ score of \*\*\*, which is rated as borderline. Student's verbal comprehension and perceptual reasoning were also rated as \*\*\*; her working memory was \*\*\*; and her processing speed was \*\*\*.

7. On the Wechsler Individual Achievement Test-II, Student's scores rendered the following grade equivalencies: Word Reading – grade equivalent \*\*\*; Reading Comprehension – grade equivalent \*\*\*; Numerical Operations – grade equivalent \*\*\*; Math Reasoning – grade equivalent \*\*\*; Written Expression – grade equivalent \*\*\*.

8. The FIE did not recommend placement in special education because the testing did not demonstrate a significant discrepancy between IQ scores and academic achievement. The FIE found that Student had deficits in reading comprehension and numerical operations, and its recommendations included “remedial instruction on addition, subtraction, multiplication and division of fractions. Teach basic rules such as inverting the divisor when dividing fractions. Teach rules and place value of decimals.” Joint Exhibit 15.

9. The 2004-2005 school year began on August 16, 2004. ARDC meetings were scheduled for August 25 and September 9, 2004, but Parent did not respond to the ARDC notices because she never received them. DISD was using an incorrect address for the family during those months. The \*\*\* campus special education liaison contacted Parent by phone on September 9, 2004, and discovered the incorrect address problem. The ARDC meeting was rescheduled to September 21, 2004, and Parent attended. The committee determined that Student did not qualify for special education and Parent disagreed. She requested an IEE and signed her consent for evaluation in the meeting on September 21, 2004. The ARDC met again on October 5, 2004 and agreed to provide the IEE requested by the parent. Parent was provided a form in that meeting, the Parental Request for Independent Educational Evaluation form, which she signed on that date.

10. District staff mailed Parent a list of nine independent evaluators, which Parent received on or about October 13, 2005. The list provides a professional title for only one of the evaluators listed, and the other eight are mere names with no indication of professional qualifications. Consequently, the first evaluator chosen by Parent was later identified as being a speech pathologist and not qualified to perform a neuropsychological evaluation. A delay ensued while Parent was asked to choose another name. On November 9, 2004, Parent notified the district that she wanted the evaluation done by Dr. \*\*\*.

11. On November 12, 2004, the Texas Education Agency received Parent's request for this due process

hearing, alleging that Student had not been evaluated for special education.

12. Dr. \*\*\*, Licensed Specialist in School Psychology (L.S.S.P.), performed an independent neuropsychological evaluation of Student on January 4 and 6, 2005. Her findings on intellectual and academic functioning were consistent with the district's FIE. Student's scores were well \*\*\* in cognitive abilities, working memory, memory for simple auditory and simple visual information, processing speed, expressive abilities, and academic achievement. Her overall verbal, nonverbal, spatial, and quantitative reasoning abilities also were well \*\*\*.

13. Dr. \*\*\* noted that Student's test responses were very slow. Although Student was cooperative, she waited a lengthy period, sometimes several minutes, before responding to questions and gave very short answers, often a single word, in a soft voice. This is consistent with information provided by her mother and teachers.

14. On tests of emotional, behavioral, and adaptive functioning, Student appeared worried and anxious with physical symptoms that include not wanting to eat, trouble sleeping, stomach pains and sick stomach, and feeling tense, shaky, and dizzy. She wants to perform well academically but finds school highly stressful and feels inadequate.

15. On standardized checklists concerning emotional, behavioral and adaptive functioning, Student's mother and teachers indicated that she is sweet and compliant, but she avoids eye contact, is "too quiet," has trouble paying attention, and doesn't ask for help when needed. She has trouble understanding, organizing, and completing classwork and homework. She is shy with peers and adults, avoids group activities, and has trouble making friends. Both Parent and the teachers had "concerns with her attention, withdrawal, social skills, leadership, working memory, ability to initiate, planning/organization, and ability to self-monitor . . . ." Teacher responses indicated concerns with almost all the domains assessed, including concerns about Student's ability to shift from one task to the next in a timely manner. Student's emotional symptoms may indicate an adjustment disorder with mixed anxiety and depressed mood and/or social phobia. "In addition, her social reticence, sadness and worry, and difficulty developing relationships with others may be a direct reaction to her challenges in the academic setting; however at the present time they appear to meet . . . TEA criteria for an Emotional Disturbance." Joint Exhibit 35.

16. Dr. Nuche's testing also revealed symptoms of attention deficit hyperactivity disorder, inattentive type. She recommended that medical documentation of ADHD be sought to support OHI eligibility, and that Student be provided "a prescriptive individualized education plan (IEP)" to address her ADHD symptoms, which include problems with concentrating, organizing her work, and staying on task. Joint Exhibit 35.

17. Dr. Nuche's evaluation report contains numerous detailed recommendations, which include:

Accommodations to address attention problems: Breaking work into small units or shortening assignments and tests; preferential seating near the source of instruction; simple instructions repeated until she indicates understanding; encouragement to ask for clarification and/or repetition when needed; active tasks that allow her movement around the room; tests administered in a quiet place with few distractions.

Accommodations to address memory abilities: Provide reminders of any information she is expected to retain long-term; place visual cues and reminders in a folder or notebook and make it available for her review in each class; pre-teach information ahead of time when possible; teach basic components and break them down into the simplest components; allow a vocabulary list and other visual cues/reminders for assignments and tests.

Accommodations to address complex analysis skills: Go back to a level of reading based on her reading comprehension level and focus reading instruction on basic comprehension skills; use a basal text and supplemental material such as the Steck-Vaughn reading comprehension materials; provide “accommodations/modifications, and specific, sequential IEP goals, [so that] Student may be expected to continue to make academic progress and to reach a level of competence adequate for independent functioning and competitive employment. She will need much exposure to employment and social settings, clear-cut behavioral and cognitive expectations, and much repetition and practice, along with positive feedback regarding her performance. . . . Her reading, mathematics, and skills of written expression should include functional skills which she is assisted in applying within a real-life setting through vocational training.”

Accommodations to address organizational and study skills: Work on skills of independence and organization at home and at school; at school, make study and organizational skills a curriculum area for her; use study skills materials such as those published by Curriculum and Associates, present them at the second or third-grade level, and move through them slowly and sequentially; integrate the study skills she is working on into her daily routines for classwork and homework. “To integrate the skills with regard to her homework, it may be necessary for her to work with her individual teachers or attend tutorials which take into account her IEP goals.” At home, assist her in creating checklists of responsibilities which can be tied to privileges as rewards.

Accommodations to address adaptive and social skills: To help Student develop a self-confident attitude toward schoolwork, home responsibilities, and community activities, her family and school staff need to collaborate in developing clear-cut goals, and should “focus on developing a life plan with sequential expectations and goals to enhance her skills of independence through increasing responsibility. . . .” She should be provided a contact person at school, such as the school counselor, to work with her on learning to make and keep friends. “Her difficulties in socialization are significant . . . [and she needs] opportunities for practice and feedback. Participation in a small, structured group could be provided in speech/language therapy or by her school counselor in a social skills group. Whatever skills she practices in a therapeutic setting should be applied in daily life according to her IEP goals. She should receive frequent feedback and at least simple data [records] should be kept to provide information for goal-setting/revision . . . IEP goals [should] encourage her to greet others, to work in a group, to ask for help when she needs it, and to engage in other necessary skills of social interaction. These goals would need to be divided into small units and presented sequentially with strong incentives for her effort and a significant amount of encouragement.”

Accommodations to address self-evaluation, assertiveness, and interpersonal interaction/social skills: Avoid placing Student in embarrassing situations in light of her traits of being very quiet, socially cautious, and slow in processing information and giving oral responses. Pre-teach situations where she otherwise would be uncertain how to respond, and base performance expectations on her slow processing speed and responses and difficulty with spontaneous conversation. Provide opportunities to demonstrate competence, such as teaching a younger child a skill. Provide preparation and support for group activities where she is part of a team. To promote self-confidence, provide home and school responsibilities with clearcut expectations, strong incentives, and positive incentives to help her initiate and independently complete tasks. Encourage noncompetitive special-interest activities and praise effort rather than quality of performance. Joint Exhibit 35.

18. Dr. \*\*\* evaluation report was provided to the district in early February 2005, and the ARDC met on February 14, 2005, to review it. The committee determined that Student was eligible for special education as a student with an emotional disturbance. The committee determined that it would reconvene to develop IEPs after the special education teacher tested Student with the Brigance to determine her academic levels. The committee offered “compensatory” services for the previous school year in the form of tutoring before and

after school, as well as Saturday school and summer school. These services are available to all students who need them, and all are free of charge for special education students.

19. An ARDC meeting was held on March 10, 2005. At that time, Student had obtained only six \*\*\* school credits. The committee decided that her grades would be adjusted and her credits increased, but did not specify the basis or method for adjustment. The committee drafted IEPs for algebra, English \*\*\*, and content mastery. The IEPs were implemented in the resource room beginning the following school day.

20. The IEPs for algebra and English drafted in March 2005 were not based on Student's assessment or academic performance. The algebra IEP required the student to perform "quadratic and other nonlinear functions," which is beyond her academic abilities. The IEP for English I also was too advanced for Student's abilities, as demonstrated by the following short-term objective: "Draw inferences such as conclusions, generalizations, and predictions and support them from the text." Student continued to \*\*\* algebra and English for the remainder of the year. Joint Exhibit 35.

21. Dr. \*\*\*, M.D., examined Student on March 28, 2005, and found that she has "a very significant degree of inattentive attention deficit hyperactivity disorder." He also observed: "She is very quiet and her speech is poorly formed. It is somewhat difficult to make out her answers when we ask her questions. . . . Student clearly has learning problems including reading and language problems. Slow responses and attention problems are very definitely part of her deficits here." Dr. \*\*\* started Student on a small dose of Ritalin. He requested that a teacher checklist be completed to help him determine a proper Ritalin dosage, but the teacher input was not timely provided despite several requests by Parent, and was delayed beyond Student's March 28, 2005, appointment with Dr. Johnson. Joint Exhibit 38; Testimony of Parent and \*\*\*.

22. The ARDC met on March 29, 2005, to qualify Student as having other health impairment due to ADHD. The committee did not develop additional IEPs. The ARDC minutes note that Student's doctor requested that a teacher ADHD checklist be completed within ten days. The teacher checklist was not provided within the time requested by the doctor and Parent made numerous requests for it before obtaining it.

23. On March 30, 2005, Student's resource teacher for algebra told her mother that Student was in the wrong math class and should be in basic math instead. Student remained in the resource algebra class till the end of the school year and continued to fail the course.

24. The ARDC met on May 16, 2005, at the parent's request, to consider academic issues and scoliosis. Parent told the committee that Scottish Rite Hospital had sent the school a letter regarding scoliosis in February 2005, but school staff said they did not have such a letter. Parent signed consent for Scottish Rite to release medical information to the school. The committee agreed that Student would have a separate set of books to keep at home and a book in each classroom so she could avoid carrying large amounts of books. The committee agreed Student would receive a physical therapy evaluation from the school, and would be provided a locker. Parent later provided medical documentation of a spinal problem to the school nurse on May 26, 2005.

25. At the May 16, 2005, meeting, the ARDC noted that Student was having difficulty in several classes and recommended placement in basic science, basic math, basic social studies, and resource English/language arts for the 2005-2006 school year. Her assignments in elective classes are to be reduced by 25% and she is to receive extra time for assignments. IEPs were developed for English \*\*\* instruction in the resource classroom, and for math, science, and social studies instruction in a self-contained special education classroom.

26. Student has not been provided a study skills IEP or a social skills IEP. It appears she also was not provided an IEP for summer school 2005, because none was produced at hearing. As of the hearing on June 14, 2005, Student was taking a regular education algebra course in summer school, and she was not receiving special education modifications.

27. During Student's first year in \*\*\* grade, 2003-2004, she failed reading, English \*\*\*, algebra \*\*\*, integrated physics and chemistry (IPC), and an elective in manufacturing systems. She passed art, world geography, and P.E. When Student repeated \*\*\* grade in 2004-2005, she again failed English \*\*\* and algebra \*\*\*, and also failed biology and floral design. She passed art, world history, and family life and child development.

28. Student has never passed the math portion of the Texas Assessment of Academic Skills (TAAS) or Texas Assessment of Knowledge and Skills (TAKS) tests. She also \*\*\* the reading portion of the tests in \*\*\*, \*\*\*, and \*\*\* grades.

29. Student needs \*\*\* to graduate from \*\*\* school and \*\*\* to be considered a \*\*\*. She \*\*\* at the end of the 2004-2005 school year, after her grades were adjusted at the behest of the ARD committee. If she passes her two summer school classes during Summer 2005, she will earn \*\*\*. If she passes her Fall 2005 courses she will earn \*\*\*.

## DISCUSSION

### **Background**

Student is \*\*\* years old. She finished \*\*\* grade in May 2005 for the \*\*\* time, and is classified as a \*\*\*. She failed numerous academic classes and electives during both of her years in \*\*\* grade, though she did quite well in her art classes.

### **Failure to Timely Evaluate and Identify**

Student's mother, Parent, alleged that she first asked the counselor for special education testing in August 2003, and the counselor did not dispute this in her testimony. Delays occurred at almost every step of the process. Parent should have been provided procedural safeguards when she initially requested a special education evaluation, but did not receive a copy until June 17, 2004, approximately 10 months after she first requested the evaluation. This omission is a serious procedural error under 34 CFR Sec. 300.504, and is presumed to have contributed to the delay in obtaining signed consent for evaluation, since the parent did not have timely notice of evaluation procedures or special education procedures in general. The district is not excused from providing procedural safeguards by the fact that the parent had not yet signed the referral forms.

Parent signed consent for evaluation on June 17, 2004, and Student was finally evaluated by the district in July 2004. Approximately two months later, on September 21, 2004, the ARDC determined that she did not qualify for special education. In that ARDC meeting, Parent disagreed with the district's evaluation and the committee's refusal to provide special education services, requested an IEE, and signed her consent for evaluation.

The ARDC reconvened on October 5, 2004, and agreed to provide the IEE. Parent received a list of evaluators from the district on October 13, 2004, but did not make her final selection of independent evaluator until November 9, 2004, at least in part because the list provided by the district did not indicate the professional specialties of eight of the nine evaluators listed. Consequently, the first evaluator chosen by Parent was later identified as being a speech pathologist and not qualified to perform a neuropsychological

evaluation, and a delay ensued while she chose a second evaluator.

The evaluator Parent selected, Dr. \*\*\*, L.S.S.P., performed an intake interview in mid-December 2004, performed the evaluation the first week of January 2005, and provided a written report in February 2005. The ARDC reviewed the IEE on February 14, 2005, and qualified Student as a student with an emotional disturbance on that day.

IEPs were developed on March 10, 2005. At that point it had been approximately 19 months since Parent first requested a special education evaluation in August 2003, and in the meantime Student was left to \*\*\* in \*\*\* attempts at regular \*\*\* grade with no special education support. The record is devoid of any interim consideration of a referral to Section 504 or other formal consideration of instructional accommodations. It simply was not enough for district staff to tell this student to attend before- and after-school tutoring, especially given that the parent had requested special education services and the student was visibly shutting down and completely \*\*\* to participate or turn in work in several classes.

DISD has a child-find duty under 34 CFR Sec. 300.125, which places the responsibility squarely on school districts to find, identify, and serve students in need of special education in their jurisdiction. The district alleges that Parent did not always promptly return phone calls and did not come in and complete the referral documents when asked to do so, which Parent vehemently denies. On at least one occasion she did visit the counselor to complete the referral documents, and the counselor could not find the referral packet that day. It is certainly true that Parent has the responsibility to promptly complete all paperwork requested by the district and promptly return phone calls, but the district is ultimately responsible for providing a free appropriate public education. Even where a parent fails to timely complete referral documents, a delay of this magnitude is not reasonable. Under the circumstances of this case, where the district had ample reason to suspect the child needed special education, it could have requested a due process hearing if necessary to override lack of parental consent for evaluation and/or placement under 34 CFR 300.505(b). Based on the parent's repeated requests for evaluation, however, I believe the district could have obtained consent for evaluation from this parent without resorting to drastic action.

The district's FIE took place in July 2004, 11 months after it was requested by the parent, and the ARDC meeting to review the FIE did not take place until approximately two months later in September 2004. Adding to the delays, the district used an incorrect address for Parent in August and September 2004. This was a bureaucratic error rather than any fault of the parent. Almost five months elapsed between the time Parent requested the IEE in September 2004 and February 2005, when Student finally was qualified for special education. When IEPs were finally drafted, 24 days later on March 10, 2005, the math and English IEPs were inappropriate for reasons discussed below, and Student continued to make \*\*\* grades all the way through her \*\*\*-grade year.

A major cause of the delay in identifying and serving Student in special education is that the district's FIE tested only academic and intellectual functioning. The record shows the FIE compared Student's intellectual abilities with her low academic achievement scores, found no discrepancy, and looked no further. In contrast, the independent evaluator had Student's parent and teachers complete standardized checklists to assess emotional and adaptive behavior, which readily revealed sufficient evidence of a disability to qualify Student as having an emotional disturbance. Nothing in the record suggests that Student's emotional state or behavior had changed between the FIE and the IEE. On the contrary, in the November 2003 parent-teacher conference, when she was beginning \*\*\* grade for the first time, her teachers noted to the counselor her behaviors of repeatedly shutting down and declining to participate in class, sitting in class and doing nothing, speaking inaudibly and at times refusing to speak, and \*\*\* to turn in any work at all in some classes, resulting in numerous grades of zero. Dr. \*\*\* noted in her February 2005 report that these traits were "longstanding, existing before this school year," and included "extreme social discomfort and worry which undermine her ability to assert herself and obtain clarification, assistance, or support when she needs it." Joint Exhibit 35.

As recently as the hearing on June 14, 2005, Student apparently was still falling through the cracks in the system. No documentary evidence or testimony suggests that Student was provided IEPs for her summer classes, which were termed “compensatory” services by the ARDC. Her mother testified without contradiction that Student was taking regular education algebra and integrated physics and chemistry (IPC) classes in summer school, which started on June 6, 2005, and that these classes were not being modified. For Student to once again take an unmodified algebra course is a prescription for yet another failure, and a violation of the ARDC decision in May 2005 to remove her from regular algebra and place her in basic math. Respondent implied that Parent may not have filled out the correct summer enrollment form to alert staff that Student is a special education student. This typifies a long and deplorable pattern revealed by the record: Confusion abounds about paperwork, and meanwhile the child struggles on for more than two years, continuing to fail inappropriate, unmodified classes. Student’s continuing academic failures have contributed heavily to her problems with anxiety and depression, as Dr. \*\*\* pointed out. “[A]djustment to an ongoing and chronic stressor can bring about . . . a chronic and paralyzing social anxiety, which appears to be the case with Student” Dr. \*\*\* evaluation, Joint Exhibit 35.

### **IEPs**

Dr. \*\*\* recommended IEPs for social skills and study skills, but none were provided. The March 2005 ARDC placed Student in the resource room for math and English instruction. The math IEP drafted in that meeting and used for the remainder of the school year ignored both Student’s classroom performance and her assessment data from the FIE and the IEE, both of which noted a full-scale IQ of \*\*\* and \*\*\* delays in academic functioning for her age. This was a violation of 34 CFR Sec. 300.346. The FIE reported that Student was functioning at a \*\*\*-grade level in numerical operations and a \*\*\*-grade level in math reasoning, and recommended remedial instruction in basic math functions such as addition, subtraction, multiplication, and division of fractions. Dr. \*\*\* report also recommended teaching basic concepts and breaking them down into the simplest components, having her master each component before going on to the next one. The ARDC nevertheless drafted a math IEP with short-term objectives that required Student to continue her futile pursuit of advanced mathematical concepts, including analyzing graphs of quadratic functions in algebra. At that point she had been \*\*\* algebra for almost two years, and continued to fail it for the remainder of the school year. Her math teacher informed her mother on March 30, 2005, that Student was in the wrong math class, but this issue was not addressed by the ARDC until the end of the school year.

The IEP for English \*\*\* also was too advanced for Student’s abilities, as demonstrated by the following short-term objective: “Draw inferences such as conclusions, generalizations, and predictions and support them from the text.” Joint Exhibit 35. This is inappropriate in light of the district’s own assessment data showing that Student’s reading comprehension is at a \*\*\*-grade level. Student continued to \*\*\* English for the remainder of the year.

The ARDC met again on May 16, 2005, and changed Student’s placement to basic math, basic science, and basic social studies in a self-contained classroom, and also modified the English IEP to a more basic level, to be provided in the resource classroom.

### **Educational Benefit**

The district’s proposed educational program is entitled to a legal presumption of appropriateness. Petitioner bears the legal burden of proving that the program offered by the district is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983). Petitioner has met that burden in this case.

Schools must provide personalized instruction with sufficient support services to permit the student to receive an “educational benefit,” i.e., a program that is meaningful and is reasonably calculated to produce progress rather than regression or trivial educational advancement. See *Bd. of Educ. v. Rowley*, 458 U.S. 176

(1982); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997); *Polk v. Central Susquehanna Inter. Unit 16*, 853 F. 2d 171, 181 (3d Cir. 1988); *Hall v. Vance Cnty. Bd. of Educ.*, 774 F. 2d 629, 636 (4th Cir. 1985). The U.S. Supreme Court stated that achievement of passing marks and advancement from grade to grade is one important factor in determining educational benefit. *Rowley*. However, the Court explicitly stated that it did not mean to establish any one test for determining the adequacy of educational benefits. In the *Cypress-Fairbanks* case, the 5<sup>th</sup> Circuit approved other factors to consider, specifically, whether the program is 1) individualized and based on the student's assessment and performance; 2) administered in the least restrictive environment; 3) provides services in a coordinated and collaborative manner by the key stakeholders; and, 4) demonstrates positive benefits both academically and non-academically.

Student was denied a free appropriate public education. She was not timely evaluated and identified for special education, and at the time of the hearing had been denied instruction based on her assessment and performance and tailored to her unique needs for at least two years. Due to her \*\*\* grades, Student has attended summer school every summer since she completed sixth grade. In March 2005, the district offered "compensatory" summer school and tutoring before and after school. However, these services are available to all \*\*\* students who need them, and free for all special education students. The fact that these services were offered to Student at no cost does not transform them into adequate compensatory services.

## **Relief**

Student did the best she could do in regular classes that were lacking the special education instruction and modifications that she needed. As Dr. \*\*\* stated, Student "deserves commendation for attending school regularly, for remaining compliant, and for her lack of complaint in the face of academic material which she finds overly complex and challenging. She is currently overwhelmed . . ." Joint Exhibit 35. Student wants to do well in school, and is embarrassed and distressed to have been retained in \*\*\* grade. Therefore, she and her mother request that she be placed in \*\*\* grade, although she does not have sufficient credits to be classified as a \*\*\*. Student certainly deserves compensatory services, but I must deny her request to be moved to \*\*\* grade because the evidence indicates such a move would not serve her best interests or provide her a FAPE. She is severely behind her age peers academically and needs to make up lost ground. It appears that advancing her to a grade for which she is not prepared would only compound her academic problems.

Tutoring. Student needs several hours of one-on-one tutoring per week to help her catch up, especially in reading, language arts, and math. If at all possible the tutoring should commence prior to the Fall 2005 semester. The tutoring should continue at least through the 2005-2006 school year, and longer if it appears necessary at the end of the 2005-2006 school year. Such tutoring can be provided by a DISD teacher or by a private tutor contracted by the district. With the help of one-on-one tutoring, I am optimistic that Student will pass her classes and be classified as a \*\*\* by Spring 2006. The scheduling of the tutoring will require communication and cooperation between the parent and district staff, and I urge all parties to set aside their differences and concentrate on the best interests of Student henceforward.

IEPs. Dr. \*\*\* recommendations clearly contemplate both a social skills IEP and a study/organizational skills IEP with a specified curriculum. Note that my fact findings merely summarize Dr. \*\*\* recommendations and do not contain all the details she listed that need to be addressed in Student's program. Therefore, it is important that the ARDC carefully review the IEE report in developing IEPs. The ARDC must convene a meeting as soon as possible to develop specific, prescriptive IEPs for social skills and study/organizational skills, and comply with all IEP content requirements in 34 CFR Sec. 300.347. The IEPs must be ready prior to the first day of school, as required by 34 CFR Sec. 300.342. The IEPs must incorporate Dr. \*\*\* recommendations as detailed in her evaluation report. If it can be accomplished without delaying the provision of IEPs beyond the first day of school, the district should obtain Dr. \*\*\* presence at the meeting to aid in drafting IEPs.

Evaluations. The district has already committed to a physical therapy evaluation. In addition, Student's extremely slow processing speed, slow rate of response to questions, and extreme reluctance to speak to peers and adults warrant an evaluation to rule out a communication disorder and/or learning disability in expressive and/or receptive language, which may require some form of speech and language therapy or other therapy or accommodation. This evaluation should go beyond speech articulation and examine whether a disability other than anxiety and delayed social skills underlies Student's severe difficulties with speaking at school, which hinder her in seeking needed instructional clarification and help from teachers.

Counseling. Student's mother and Dr. \*\*\* both indicate that she has unresolved emotional issues stemming from an incident in elementary school that upset her. In addition, counseling could help with her anxiety, depression, extreme social discomfort, and problems with organization. District staff have offered the family services through DISD Youth and Family Services, but I saw no evidence that counseling was ever addressed by the ARDC. So far Parent has resisted the idea of using Youth and Family Services due to her conflicts with school staff. I understand that both parties are frustrated with each other, but for the sake of the child Parent should explore this option further. The ARDC needs to formally address the counseling issue in the next meeting.

Social Skills Contact. Pursuant to Dr. \*\*\* recommendations, the ARDC must designate a contact person at school, possibly the school counselor, to check in with Student regularly, help her with social skills, and act as a resource for her when she feels overwhelmed. Dr. \*\*\* recommended practice of social skills in a small, structured group such as a speech/language therapy group, if Student qualifies for such, or in a social skills group led by the school counselor. The ARDC should keep her need for social skills practice in mind when choosing her elective classes.

Parent Contact/Services Coordinator. The district must assign a specific contact person who is responsible for overseeing Student's special education services until she graduates from \*\*\* school. This could be \*\*\* or someone else with sufficient authority to act quickly and effectively on Student's behalf when needed. This person will regularly monitor whether Student is receiving the services and accommodations determined to be necessary by the ARDC and receiving them on a timely basis, and will regularly inform the ARDC and the parent of Student's progress and of any problems. If her academic performance and social skills do not improve significantly during the Fall 2005 semester, the ARDC must reconvene to adjust her program as necessary.

## **CONCLUSIONS OF LAW**

1. Student resides in Dallas ISD, a legally constituted independent school district within the State of Texas, and is entitled to special education services pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, et seq., as amended. Student is eligible for special education as a student with an emotional disturbance and other health impairment. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

2. The district failed to timely provide a special education evaluation, timely identify Student as eligible for special education, and timely provide appropriate special education services.

3. The district failed to timely provide notice of procedural safeguards pursuant to 34 CFR Sec. 300.504, and this failure is presumed to have contributed to the parent's delay in signing her consent for evaluation.

4. The ARDC failed to provide any IEPs or special education services for the 2003-2004 school year, and failed to provide such services during the 2004-2005 school year until March 2005. The math and English IEPs developed in March 2005 were inappropriate because they were inconsistent with Student's classroom performance and assessment, and were too advanced for her academic capabilities. The academic

IEPs drafted in May 2005 for the 2005-2006 school year are reasonably calculated to provide an educational benefit, but the district failed to develop needed IEPs for social skills and study/organizational skills.

5. The district failed to provide IEPs for summer school, and failed to ensure that Student received instructional modifications in her regular education summer classes for at least six school days during June 2005.

6. The educational program proposed by the school district is presumed to be appropriate. As the party challenging the educational program proposed by the district, Petitioner bears the burden of proof. Petitioner demonstrated that Dallas ISD denied Student a free, appropriate, public education. *Tatro v. State of Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983), aff'd 468 U.S. 883 (1984); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997).

7. Student displays symptoms warranting further evaluation to rule out a communication disorder. The ARDC also must consider whether she has an orthopedic impairment related to spinal problems, and whether she needs a counseling IEP.

8. Student is entitled to compensatory services, including a case coordinator to carefully monitor her program and serve as a liaison for her parents, a contact person at school to help Student with social skills, and compensatory one-on-one tutoring in academic subjects for at least the 2005-2006 school year.

### **ORDER**

Based upon a preponderance of the evidence and the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the relief requested by Petitioner is **GRANTED IN PART and DENIED IN PART**. Petitioner is entitled to compensatory relief; however, Petitioner's request to be reclassified as a \*\*\* is **DENIED**.

The district is hereby **ORDERED** to convene an ARDC meeting as soon as practicable, and in sufficient time to develop IEPs prior to the beginning of the Fall 2005 semester. The ARDC shall:

- 1) Designate a special education administrator who will: act as case coordinator and be responsible for overseeing Student's special education services until she graduates from \*\*\* school; act as a liaison for her parents, regularly monitor whether Student's IEPs are implemented and ensure that all services and accommodations determined necessary by the ARDC are delivered in a timely and efficient manner; and regularly inform the parent and other ARDC members of Student's progress and any problems. The coordinator must have authority to take effective action on Student's behalf, including recommending that ARDC meetings be convened. If Student's academic performance and social skills do not improve significantly by the end of the second six weeks of the Fall 2005 semester, the ARDC must reconvene to address the reasons, and should convene earlier if deemed necessary by the case coordinator or requested by the parent.
- 2) Designate a contact person for Student, possibly the school counselor, to check with Student regularly, help her with social skills, and act as a resource when she feels overwhelmed.
- 3) Develop IEPs for social skills and study/organizational skills, and ensure that all IEPs, including academic IEPs, are detailed, prescriptive, sequential, contain measurable goals and objectives, and are based on Student's classroom performance and assessment data. The IEPs must conform to the

recommendations in Dr. \*\*\* February 2005 independent evaluation report, unless Dr. \*\*\* makes different recommendations based on input from committee members. The committee must consider how to provide Student with opportunities to practice social skills in a small-group setting, as recommended by Dr. \*\*\*. The IEPs must be in place prior to the beginning of the Fall 2005 semester.

4) Arrange for one-on-one tutoring to begin as soon as possible and preferably prior to the start of the Fall 2005 semester, to be offered for a minimum of one hour three times per week unless Dr. \*\*\* recommends otherwise, to continue at least through the 2005-2006 school year and longer if deemed necessary after ARDC review in Spring 2006. Transportation is to be provided if necessary to ensure the student's attendance.

5) Provide a physical therapy assessment and review all information provided by the parent concerning Student's spinal problems.

6) Provide a thorough communication evaluation to rule out a communication disorder. This evaluation should go beyond issues of speech articulation and examine whether a disability other than anxiety and delayed social skills underlies Student's severe difficulties with speaking at school.

7) Address the issue of whether Student needs a counseling IEP, and provide counseling as a related service through DISD Youth and Family Services or other DISD provider. If necessary, the case coordinator will help Parent set up a counseling schedule at the DISD Youth and Family Services location of her choice.

### **NOTICE TO THE PARTIES**

This Decision is final and is appealable to state or federal district court.

The district shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of Complaints Management at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1. Documentation demonstrating that the Decision has been implemented; or 2. If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

**SIGNED** this 19<sup>th</sup> day of July, 2005.

*Janis Herd*

Janis Herd  
Special Education Hearing Officer

DOCKET NO. 084-SE-1104

Student, b/n/f  
Parent, Petitioner

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BEFORE A SPECIAL EDUCATION

v.

HEARING OFFICER

DALLAS INDEPENDENT  
SCHOOL DISTRICT,  
Respondent

FOR THE STATE OF TEXAS

SYNOPSIS

**Issue 1:** Did the district timely evaluate the student for special education?

**Held:** For Petitioner. The student was not evaluated until approximately 11 months after the parent first requested a special education evaluation. Shortly after the mother's first request for evaluation, the student's \*\*\* grades and classroom demeanor gave the district further reason to suspect a disability. The parent signed the referral and evaluation consent forms 10 months after she first requested the evaluation, on the same day she first received a copy of the procedural safeguards. The delay in obtaining signed consent does not excuse the district from its child-find duty. The district contributed significantly to delays in obtaining signed consent, including \*\*\* to provide procedural safeguards for 10 months and temporarily misplacing the referral documents so that they were not available when the mother came to the office to sign them.

**Citation:** 34 CFR §§300.504; 300.125; 300.505; 300.343.

**Issue 2:** Did the district timely identify the student as eligible and timely provide special education services?

**Held:** For Petitioner. When the student was finally evaluated in July 2004, the district's FIE failed to identify the emotional disturbance, and the independent evaluation which qualified her for special education was not completed until February 2005. The student's first IEPs were drafted in March 2005, approximately 19 months after the parent first requested an evaluation.

**Citation:** 34 CFR §§300.125; 300.505; 300.7; 300.343.

**Issue 3:** Did the district provide the student a FAPE?

**Held:** For Petitioner. The student was denied a FAPE. By the time she received her first IEPs in March 2005, she was \*\*\* regular \*\*\* grade for the \*\*\* time due to lack of appropriate special education services and placement. Further, the academic IEPs drafted in March 2005 were inappropriate. They were not based on assessment data or classroom performance, were too advanced for her academic abilities, and resulted in continued \*\*\* grades. In addition, she was not provided a study skills IEP to address her ADHD and organization problems, or a social skills IEP to address her severe difficulties with speaking to teachers and peers, as recommended by the independent evaluator. Further, she received no special education modifications for at least six school days in her 2005 summer school classes.

**Citation:** 34 CFR §§300.346; 300.347; 300.300.

**Issue 4:** Should the student be moved to \*\*\* grade as compensation for being retained in \*\*\* grade while being denied special education services?

**Held:** For Respondent. The evidence indicates that skipping tenth grade would not serve Student's best interests and provide her a FAPE. She needs time to work on her academic skills in an appropriate instructional setting, and to acquire communication and social skills to prepare her for future employment, as recommended by the independent evaluator. She is entitled to compensatory services, including a case coordinator to carefully monitor her program and serve as a liaison for her parents until she graduates from \*\*\* school; a contact person such as the school counselor to help her with social skills; and one-on-one tutoring in academic subjects for at least the 2005-2006 school year to help her regain lost ground. She also is entitled to IEPs for social skills and study skills; further evaluation of her communication difficulties; and ARDC consideration of her counseling needs, her spinal problems, and her need for elective courses that will help advance her social skills.

**Citation:** 34 CFR §§300.24; 300.343; 300.346.