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**DOCKET NO. 253-SE-0405**

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<b>Student</b>	§	<b>BEFORE A SPECIAL EDUCATION</b>
<b>B/N/F Parent</b>	§	
	§	
<b>VS.</b>	§	<b>HEARING OFFICER</b>
	§	
<b>PLEASANTON INDEPENDENT</b>	§	
<b>SCHOOL DISTRICT</b>	§	<b>FOR THE STATE OF TEXAS</b>

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**DECISION OF THE HEARING OFFICER**

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**PROCEDURAL HISTORY**

The above-captioned request for due process hearing was filed with Texas Education Agency (“the Agency”) on or about April 7, 2005, the same day on which I dismissed without prejudice an earlier case between these parties docketed as No. 165-SE-0205. Case No. 165, which was received by the Agency on February 10, 2005, asserted Petitioner’s claim that the District failed to timely refer Student for a special education eligibility evaluation, and failed to conduct such evaluation. The Pre-hearing Orders following the March 14, 2005, pre-hearing conference in No. 165 identified the following claim of IDEA violation by the District, based on Petitioner’s allegations in the pre-hearing conference:

[Student] is a \*\*\* year old student attending \*\*\* grade in Pleasanton I.S.D. Petitioner alleges that [Student] has experienced academic failures and discipline problems in school, been taking anti-psychotic medications, and been visiting MHMR for counseling. Petitioner contends that the District was aware of [Student’s] problems but nevertheless failed to timely refer her for an evaluation for special education eligibility and services. As relief for the District’s failure to identify Petitioner requests two years of compensatory educational services.

Respondent agreed in the pre-hearing conference to conduct evaluation to determine whether Student was eligible for special education. Petitioner agreed to the evaluation. I granted a continuance in No. 165 for the District to complete its evaluation and consider the results relative to Student’s special education eligibility. On April 1, 2005, Petitioner requested a continuance or in the alternative a dismissal without prejudice, on the grounds that Respondent had not produced records to Petitioner. Hearing naught from Respondent, I dismissed No. 165 without prejudice on April 7, 2005, and Petitioner promptly submitted the instant hearing request. This case was set for evidentiary hearing on June 29, 2005.

On April 8, 2005, Respondent filed its request for dismissal with prejudice, alleging that Petitioner’s parent and Next Friend never consented for the District to conduct the eligibility evaluation agreed to on March 14, 2005. On April 11, 2005, I ordered Petitioner to show cause why the case should not be dismissed. Petitioner thereafter filed, through counsel, a consent form for

assessment executed by Student's parent and Next Friend on or about April 12, 2005. The consent form Petitioner filed did not specify any particular area of assessment for which consent was granted.

On June 15, 2005, Respondent filed a Motion to Dismiss, alleging that the District's evaluation did not establish any basis for Student's special education eligibility, and therefore Petitioner was not entitled to special education relief. Petitioner responded on or about June 20, 2005, claiming that Respondent's evaluation was inappropriate for failing to assess Student in all areas of suspected disability, and therefore Petitioner was entitled to an independent educational evaluation ("IEE"). Petitioner claimed specifically that Respondent's evaluation did not include a psychological assessment despite Respondent having been put on notice of a possible emotional disability. Petitioner also requested leave to amend the issues for hearing to include the claim that Respondent failed to assess Student in all areas of suspected disability.

Respondent initially objected to amendment of the issues because Petitioner's request was filed less than ten days before the evidentiary hearing. However, Respondent subsequently withdrew the objection. On June 25, 2005, I denied Respondent's Motion to Dismiss; limited the issues for hearing to whether PISD's evaluation was inappropriate for failing to address all areas of suspected disability and whether Student's parent had withheld consent to a psychological evaluation; and severed for want of ripeness Petitioner's claims for compensatory or other relief.

The matter proceeded to hearing on June 29, 2005. All evidence was received on that date and the record closed subject to submission of closing argument. The parties were granted leave to file their closing arguments in writing, requiring a five-day extension of the decision deadline for good cause shown. Closing arguments were timely filed and the record closed on July 8, 2005.

### **STATEMENT OF THE CASE**

The issue for hearing raised by Petitioner's amended claim for IEE concerns whether the District's assessment of Student was appropriate insofar as the assessment addressed all suspected areas of disability. Petitioner challenges the scope of the assessment, specifically the District's failure to conduct a psychological assessment. Respondent raises a defensive issue, asserting that the District was prevented from undertaking psychological assessment of suspected emotional or behavioral disability by the failure or refusal of Student's parent to grant consent for a psychological evaluation.

### **FINDINGS OF FACT**

1. Student is a \*\*\* year old female who, at all times pertinent to Petitioner's complaints, has resided within PISD. Student is not eligible for IDEA special education. Student passed her courses and was seen as having an average school career prior to her \*\*\* year in high school, which was the 2003-2004 school year. Hearing Transcript Page ("Tr.") 98-101, 117-118.
2. In the 2003-2004 school year Student was identified as having an emotional disability that substantially limited her major life activities of learning and social situations, and qualified her for services in the general education program under Section 504. Student's Section 504 Committee Evaluation completed on or about 9-25-03 stated that "depression is severe enough that it keeps her from being successful in the classroom." The Committee documented at that time that Student took medication for depression. Petitioner's Exhibit ("P")-9.

3. Student was admitted to \*\*\* Hospital in November 2003 because she was hearing voices and trying to hurt herself. Anticipating that Student might miss school, Student's parent informed Student's counselor at school that Student was being admitted to the hospital, and the reasons why. Tr. 120-121.
4. Student failed \*\*\* grade in the 2002-2003 school year. Subsequently, as of May 21, 2004, and at the time of her expulsion from PISD, Student was failing \*\*\*-grade Algebra \*\*\*, Art \*\*\*, and English \*\*\*. P-4, P-12; Tr. 93.
5. Student was expelled from PISD on or about May 20, 2004, in connection with conduct involving a controlled substance. Student thereafter attended school at the Atascosa County Juvenile Probation Department Alternative Education Program. P-5; Tr. 89-93.
6. Student took state-wide standardized testing in spring 2003 and spring 2004, and both times passed Reading but failed mathematics. Respondent's Exhibit ("R")-11, R-12.
7. Student experienced excessive absences in the 2003-2004 school year and the 2004-2005 school year. She missed 29 school attendance days in the 2003-2004 school year, and 27 days in the first half of the 2004-2005 school year. Student missed school mainly because of excessive sleeping. Tr. 85-86, 122; R-33.
8. Student experienced a traumatic event in May 2004. She receives psychiatric treatment and has been diagnosed with post-traumatic stress disorder, and continues to be diagnosed with major depression, recurrent, with psychotic features. P-22; Tr. 20-32,122.
9. The educational diagnostician who performs special education assessments for PISD is employed by a special services co-operative organization that serves several school districts. The diagnostician initiated Student's assessment in late March 2005. The diagnostician initially encountered difficulty locating the parent, but in time was able to schedule a meeting with the parent for 4-11-05 to discuss procedures and obtain informed consent. Student's parent cancelled that meeting, informing the diagnostician that she (the parent) would be obtaining consent forms and providing consent to the district through her counsel. Tr. 34-39.
10. PISD's diagnostician obtained an executed consent form from Student's parent, but the form did not identify the school district authorized to conduct assessment, nor did it authorize any type of assessment. The consent form contains a checklist specifying the type, or area, of assessment to which the parent is granting consent. None of the types or areas of assessment listed on the form were checked as authorized by the parent. Tr. 40-42; R-32.
11. PISD's diagnostician met with Student's parent on 5-23-05 to discuss procedures and IDEA safeguards, and to explain the type of assessment for which the parent was granting consent. At the 5-23-05 parent meeting, PISD's diagnostician did not discuss with the parent the possibility of PISD conducting a psychological assessment of Student. The parent did not raise any question about psychological assessment nor did the parent grant or refuse consent for PISD to conduct psychological assessment. Tr. 42, 122-123.
12. PISD's diagnostician conducted intellectual, adaptive behavior, and academic testing of Student on 5-23-05. Tr. 42.
13. As of 5-23-05 when Student's parent was informed concerning the type of assessment planned for Student, PISD's diagnostician had access to Student's educational records including the notice of evaluation, a parent interview checklist, and Student's grades and

standardized test scores. The diagnostician also had, and reviewed, the information from Student's Section 504 Committee including Student's evaluation and the modifications and other Section 504 interventions that had been scheduled by PISD for Student, but had not yet seen the checklist completed by Student's teacher. Tr. 43-53, 70.

14. PISD's diagnostician did not have information as of 5-23-05 concerning the underlying basis of Student's Section 504 Committee evaluation and findings. Specifically the diagnostician did not have among the referral data any medical, psychiatric, or psychological reports concerning Student, nor was the diagnostician aware of information concerning Student's hospitalization. Tr. 52-54; R-33.
15. The parent interview checklist provided to PISD's diagnostician reported that Student was under a doctor's care and was taking medication for depression, attention deficit disorder, and for sleep – the same information contained in Student's Section 504 Committee evaluation report. PISD's diagnostician had no information from the doctor to indicate whether the medication was effective. Tr. 67, 89-90; R-33.
16. PISD's diagnostician when conducting assessments ordinarily considers information from a variety of sources, including relevant information from doctors if the diagnostician knows about them. Student's parent was not asked for information concerning Student's doctors or psychiatrist prior to completion of Student's intellectual, adaptive behavior, and academic assessments. Tr. 70-72; R-33.
17. PISD's diagnostician assessed potential emotional and behavioral disabilities by reviewing information provided on parent and teacher checklists concerning emotional and behavioral issues. Data obtained from Student's parent reflects that Student is nervous, stubborn, has temper outbursts and has difficulty attending to instructions. Data from the classroom teacher reflects that Student is average in most respects except having an even disposition, and becoming discouraged by minor difficulties and setbacks. R-33; Tr. 56-57.
18. PISD's diagnostician used appropriate instruments and procedures in the conduct of Student's intellectual, adaptive behavior, and academic assessments. Tr. 54-62; R-33.
19. PISD's diagnostician, in writing up the results of Student's evaluation, did not recommend any further assessment of any kind to address emotional and behavioral factors. R-33.
20. PISD's diagnostician who assessed Student is not a psychologist or licensed specialist in school psychology and therefore is not qualified to conduct a psychological eligibility assessment of emotional and behavioral factors. PISD's diagnostician can initiate a referral for psychological evaluation without prior approval of an IEP Team ("ARD Committee"). Tr. 74, 93.
21. As of 6-29-05 PISD had not evaluated Student in all areas of suspected disability. Tr. 80.

## **DISCUSSION**

A school district must conduct pre-placement evaluation on every child suspected of having a qualifying disability and need for special education. 34 CFR §300.125; 19 TAC §89.1011. In determining the appropriate scope and extent of pre-placement evaluation, school districts must ensure that the persons identified in 34 CFR §300.344, and other qualified professionals as appropriate, plan and undertake procedures to assess all areas related to the suspected disability and

educational need. 34 CFR §§300.532(g), (h); 300.533. The multidisciplinary team responsible for planning assessment includes persons who serve as members of an IEP Team, but Texas law does not require that the IEP Team, or ARD Committee, constituted as such, plan and conduct pre-placement evaluations. 19 TAC §89.1040(b). Parent consent is not necessary for school officials to review existing school information in identifying areas of suspected disability, when considering the need for pre-placement evaluation. 34 CFR §300.505(a)(3).

Petitioner requested an IEE based on Petitioner's complaint that the District's evaluation failed to assess Student in all areas of suspected disability. Respondent elected to defend its evaluation rather than provide an IEE. Petitioner has the burden of proving that PISD failed to afford Student with a free appropriate public education. However, on the issue of appropriate assessment, Respondent's election puts the burden on Respondent to come forward with evidence that it conducted an appropriate evaluation. 34 CFR §300.502(b)(2)(i); Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984).

Petitioner's only issue is whether PISD failed to assess Student in all areas of suspected disability. I am persuaded by the greater weight of evidence that PISD's evaluation was inappropriate for omitting assessment - particularly, psychological assessment - to fully evaluate Student for possible emotional disturbance as required by 22 TAC §465.38(1)(C). I make no finding or decision that Student would or should so qualify. The finding is only that PISD had sufficient reason to suspect that Student might be a student with emotional disturbance, at the time the diagnostician who assessed Student met with Student's parent to plan the assessment, and decided to obtain parent consent for an evaluation that did not include a psychological evaluation.

As of May 23, 2005, PISD had enough information to raise concern about possible emotional disturbance and resulting educational need. Student was already identified by PISD as a student with a qualifying Section 504 eligibility because of depression that interfered significantly with her classroom performance and socialization. PISD had reason to believe that Student had been taking medication for depression, and should have concluded that it would be appropriate to seek out medical reports or information. PISD (though not necessarily its diagnostician) had reason to believe that Student was hospitalized around Thanksgiving 2003 for suicidal behavior and hallucinations. PISD knew that Student failed \*\*\* grade once and was on course to fail \*\*\* grade again. PISD knew that Student was in trouble academically from absences totaling almost sixty days during the 2002-2003 school year and the first half of 2003-2004. PISD had reason to believe that Student used a controlled substance on at least one occasion. PISD had information from the parent to indicate the parent's perception that Student had emotional problems. And PISD had reason to believe that Student's parent was not acting under any misconception concerning Student having emotional problems. Information then available to PISD, considered as a whole, adds up to create reason to suspect a possible emotional disturbance and thus a reason for further eligibility assessment.

The diagnostician who tested Student testified during the evidentiary hearing that Student does in fact require additional assessment to rule out a possible emotional disturbance, and that such additional assessment should be recommended to Student's ARD Committee. This was the diagnostician's statement after the case had advanced to trial. However when writing Student's eligibility report, the diagnostician made no mention of Student needing any further assessment. Indeed, PISD filed a Motion to Dismiss on June 15, 2005, in which PISD stated its belief that Student's assessment was then complete. Parties file pre-trial motions for many strategic reasons; they ordinarily do not do so for frivolous reasons. Thus, some additional evidence derives from PISD's decision to file its motion, based on the belief that Student's assessment was finished and

complete. The content of PISD's motion is consistent with the conclusion stated in Student's eligibility report. And of course PISD proceeded to trial to defend the eligibility report.

In terms of ordering relief, and despite the diagnostician's testimony concerning a possible recommendation for further assessment, the record discloses no agreement or determination that would bind PISD to conduct psychological evaluation of Student PISD's evaluation, as has been stated, facially rules out emotional disability, and precludes any need for further assessment, and PISD at all times argued that this assessment was complete and appropriate. So this hearing testimony of one professional evaluator does not moot the central issue for hearing.

I will grant, in part, Petitioner's request for an independent educational evaluation. Respondent came forward with evidence that PISD's assessment of intellectual, adaptive behavior, and academic factors was carried out in compliance with applicable regulations and was appropriate. I find that the evaluation of those factors was appropriate. The assessment of emotional and behavioral factors was inappropriate, for failing to include a psychological evaluation as necessary to consider the possibility of an emotional disturbance. There is no need for an independent evaluation in areas where the District's evaluation was appropriate. Therefore I will order only an independent evaluation of Student's emotional and behavioral factors, by a psychologist qualified to conduct such assessments who satisfies District criteria.

### CONCLUSIONS OF LAW

1. Pleasanton I.S.D., as a local education agency and political subdivision of the State of Texas, is subject to requirements of IDEA, 20 U.S.C. §1400 et seq., and its implementing regulations.
2. Student is a school-age student who resides within Pleasanton I.S.D.
3. IDEA requires Pleasanton I.S.D. to assess all students in the District who are suspected of having a disability and educational need that qualify them for special education. 34 CFR §300.125.
4. IDEA requires Pleasanton I.S.D. to evaluate students suspected of having an IDEA disability, in all areas of suspected disability and educational need. 34 CFR §§300.532, 300.533.
5. Pleasanton ISD failed to evaluate Student in all areas of educational need; specifically, the District failed to assess Student for suspected emotional disturbance. 34 CFR §300.532.

### ORDERS

In consideration of the foregoing, Petitioner's request for independent educational evaluation is hereby **GRANTED** in part. Accordingly,

**IT IS ORDERED** that Pleasanton I.S.D., within 45 calendar days following this Order (or before such other date as the parties may mutually agree in writing), provide Student with an independent evaluation of emotional and behavioral factors by a qualified evaluator who meets District criteria, for the purpose of determining whether Student is eligible for special education as a student with emotional disturbance.

**IT IS FURTHER ORDERED** that Pleasanton I.S.D. shall timely implement this decision within 10 school days (except as otherwise specifically provided herein) in accordance with 19 TAC §89.1185(q) and 34 CFR §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.

**IT IS FURTHER ORDERED** that any and all additional or different relief requested by Petitioner herein is **DENIED**.

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

Finding that the public welfare requires immediate effect of this Decision, this Hearing Officer makes it effective immediately, pursuant to 19 Tex. Admin. Code §157.5(n).



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JAMES N. HOLLIS  
SPECIAL EDUCATION HEARING OFFICER  
FOR THE STATE OF TEXAS

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**DOCKET NO. 253-SE-0405**

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<b>Student</b>	§	<b>BEFORE A SPECIAL EDUCATION</b>
<b>B/N/F Parent</b>	§	
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<b>VS.</b>	§	<b>HEARING OFFICER</b>
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<b>PLEASANTON INDEPENDENT</b>	§	
<b>SCHOOL DISTRICT</b>	§	<b>FOR THE STATE OF TEXAS</b>

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**SYNOPSIS OF DECISION**

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**ISSUE:** Whether Pleasanton I.S.D. provided Student with an appropriate full and individual evaluation that assessed all areas of Student’s suspected disabilities.

**CITATION:** 34 C.F.R. 300.532

**HELD:** For the Petitioner, in part. Respondent established that its intellectual, adaptive behavior, and academic assessments of Student were appropriate. However the preponderance of evidence showed that Respondent’s assessment of intellectual and behavioral factors was inappropriate for failing to include a psychological evaluation as was necessary to assess for the presence of suspected emotional disturbance. Therefore Petitioner prevailed in establishing the inappropriateness of Respondent’s emotional and behavioral assessment and therefore Petitioner’s entitlement to an independent emotional and behavioral assessment.