

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

**Student, bnf**

**Parent,**

**Petitioner,**

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**v.**

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**DOCKET NO. 094-SE-1103**

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**KELLER INDEPENDENT**

§

**SCHOOL DISTRICT,**

§

**Respondent.**

§

**DECISION OF THE HEARING OFFICER**

**Procedural History**

Petitioner Student, bnf Parent (“Student” or “Petitioner”) brings this action against the Respondent Keller Independent School District (“the school district”, “KISD”, or “Respondent”) under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. Sec. 1400 et. seq as amended, and its implementing state and federal regulations. Petitioner filed her initial request for hearing on November 17, 2003.

**First Prehearing Conference**

Petitioner was initially represented pro se in this case by her mother, Parent Respondent has been represented by its legal counsel Susan Graham of Walsh, Anderson, Brown, Underwood & Schulze, P.C. from the inception of this litigation. A prehearing telephone conference was conducted on December 5, 2003. The issues and relief requested were identified. However, the parties agreed on the need for a continuance in order to allow the school district to complete an agreed upon evaluation and convene an Admission, Review & Dismissal Committee (“ARD”) meeting to review and discuss the results of that assessment. Petitioner agreed to the continuance and the parties selected new dates for the hearing.

**Second Prehearing Conference**

A second prehearing conference was conducted on January 16, 2004. Petitioner continued to be represented pro se by her mother and the school district by its legal counsel. The parties were not able to resolve their differences at the ARD meeting. The parties requested a second continuance in order to attempt mediation to resolve the issues. Petitioner also requested the continuance in order to allow her the opportunity to secure legal counsel.

**Third Prehearing Conference**

A third prehearing conference was conducted on February 11, 2004. Petitioner was now represented by her legal counsel, Myrna Silver, Attorney at Law. Respondent continued to be represented by its legal counsel. The issues and items of requested relief were clarified, confirmed

and refined. The parties selected new dates in April 2004 for the hearing because mediation had not yet been attempted.

### **Additional Delays**

Mediation was attempted but unfortunately failed. Petitioner submitted a Motion for Continuance of the April hearing to allow her independent expert to conduct and complete an evaluation. Petitioner also requested the expert be allowed to observe Student in the school setting. The Motion for Continuance was denied but the request for a school observation was granted.

A dispute subsequently arose between the parties over the testimony of Petitioner's expert. Phone conferences were conducted with counsel on April 19-20, 2004. The parties ultimately agreed to another continuance in order to allow Petitioner's expert to prepare a report of her evaluation and to provide Respondent with an adequate opportunity to review that report and prepare a defense. The hearing was reset for late May. Student's Individual Educational Plan ("IEP") continued to be implemented during the entire course of this litigation under the "stay put" rule. *See, 34 C.F.R. Sec. 300.514.*

### **The Due Process Hearing**

The special education due process hearing was finally conducted on May 27-28, 2004. Both parties were represented by counsel. The parties agreed to submit written closing arguments and subsequently agreed to extend the deadline for submission of those arguments to June 11, 2004. Both parties submitted written closing arguments in a timely manner. The deadline for the Decision of the Hearing Officer was June 15, 2004. However, the parties agreed to extend the deadline until June 23, 2004 in order to resolve scheduling conflicts for the hearing officer that delayed review of the record and preparation of the written Decision.

### **Issues**

The issues in this case are:

1. Whether Student should continue to be identified by the school district as a student with a disability for purposes of special education services within the meaning of the Individuals with Disabilities Education Act ("IDEA");
2. Whether the school district should fund Petitioner's request for an Individual Educational Evaluation ("IEE") under the provisions of IDEA; or,
3. Whether the school district's most recent evaluation of Student dated September 4, 2003 is appropriate and meets the requirements of IDEA;
4. Whether Student needs to receive English and Latin instruction through the Texas Tech University correspondence program in a one-to-one tutoring arrangement for the remainder of her \*\*\* school tenure in order to receive a free, appropriate public education ("FAPE") within the meaning of IDEA; and,

5. Whether Student needs a study period built into her daily school schedule for the remainder of her \*\*\* school tenure in order to work on assignments and access Content Mastery (when needed) in order to receive FAPE within the meaning of IDEA.

### **Relief Requested**

As relief, Petitioner requests the following:

1. An Admission, Review & Dismissal Committee (“ARD”) meet for the purpose of identifying Student as a student with a disability in need of special education services within the meaning of IDEA;
2. The school district fund an IEE to evaluate Student’s need for special education services in the following areas of suspected disability: Asperger’s syndrome, Attention Deficit Disorder – Inattentive Type; Mixed Receptive-Expressive Language Disorder, Written Expression Disorder, Dyslexia and Developmental Coordination Disorder; and,
3. The ARD Committee convene to revise Student’s Individual Educational Plan (“IEP”) for the additional purposes of building a study period into Student’s daily school schedule (with access to Content Mastery as needed) and to document and confirm that Student will receive her English and Latin instruction through the Texas Tech University correspondence program in a one-to-one tutoring arrangement for the remainder of her \*\*\* school tenure.

### **Findings of Fact**

1. At the time of the due process hearing, Student had just completed \*\*\* grade at \*\*\* School. She was fully mainstreamed for all academic classes and electives but received modifications and accommodations as well as Content Mastery support. Student was a member of the school’s varsity bowling team and regularly participated in bowling tournaments and practices throughout the year. She received a PE waiver for this activity.
2. Student first came to KISD at the beginning of \*\*\* grade from the Birdville ISD, a neighboring school district. In Birdville, Student was identified as a student with a speech/language impairment eligible for special education services. KISD accepted the speech/language eligibility classification from Birdville and provided Student with speech therapy services. However, KISD subsequently dismissed Student from speech after a three year re-evaluation found only a “mild” language disorder that was not severe enough to establish an educational need for continued services.
3. Student has a long and well documented history of language processing deficits, organizational issues, and difficulties with reading and especially writing. Even after her dismissal from speech services KISD responded to parental concerns providing Student with a two year dyslexia reading program. Student was re-evaluated for special education in \*\*\* grade in response to continued parental concerns over her school performance.

4. KISD found that Student qualified for special education as a student with a learning disability in written expression. The ARD Committee also decided that although formal test measures did not establish a speech/language disability, her somewhat shaky school performance at the time along with teacher and parent concerns supported the need for speech/language consultation services.
5. Disagreements arose between the parties on the content and focus of Student's Individual Educational Plan ("IEP") following the KISD assessments. Student's mother, Parent, was very concerned about Student's academic struggles and advocated a more aggressive approach to meeting Student's needs than the school district proposed. The school district did not share the sense of urgency Student's parents felt but ultimately agreed to fund an Individual Educational Evaluation ("IEE") to respond to parental concerns that Student was not performing up to her potential at school.
6. The Child Study Center (CSC) conducted an IEE paid for by KISD. The CSC report was issued in late May - early June 2001 after Student completed \*\*\* grade. The CSC evaluation reviewed school records, parental input and administered an IQ test, an achievement test, and, a variety of social and behavioral measures. The CSC did not conduct an observation of Student in the school environment nor interview or conference with any KISD personnel directly.
7. The CSC evaluation concluded that Student met DSM-IV criteria for the following: Asperger's Syndrome, Attention-Deficit Disorder – Inattentive Type, Mixed Receptive-Expressive Language Disorder, Dyslexia, and, Developmental Coordination Disorder. The CSC evaluation recommended Student receive special education services to address her needs given these diagnoses.
8. The parties convened an ARD meeting to review and discuss the results of the CSC evaluation. Student's parents were reassured by the CSC findings of Asperger's because the diagnosis explained a number of distressing behaviors they observed at home. Student's parents have long been concerned about her social skills in addition to her reading, writing and organizational difficulties. At home, Student does not socialize with age appropriate peers except in the context of organized, structured sports teams such as bowling or soccer. Instead, she prefers to be alone and "do her own thing." When she does socialize she is more comfortable playing with younger children, including her younger brother's friends or younger neighbors. She avoids conflict and does not generally initiate social interactions. She has no real circle of friends.
9. Asperger's is within the spectrum of autism disorders, falling on the "higher functioning" end of the autism continuum. However, KISD was reluctant to accept the diagnosis of Asperger's or to re-classify Student as a student with autism for purposes of special education. Although some of Student's \*\*\* and \*\*\* grade teachers reported some concerns with her social, organizational and/or language skills they did not match the degree of concern or severity stated by Student's parents and noted in the CSC report.

10. KISD requested parental consent to conduct its own evaluation for autism but Student's parents refused. They were stung by the school district's reluctance to simply accept the CSC results. They did not understand the school district's position. Confused and disappointed, they withdrew Student from KISD and unilaterally placed her at The Key School.
11. The Key School is a small, private school that serves children with learning disabilities and other language-based problems. Student received 1:1 instruction in reading and writing at the Key School as well as in other academics. She attended The Key School for \*\*\* and \*\*\* grades. Student returned to KISD and enrolled at \*\*\* School for the 2003-2004 school year. An ARD met and initially placed Student into special education as a student with a learning disability based upon data from The Key School and her prior history with the school district. An IEP was designed that included instructional modifications and Content Mastery support as needed. Morning and after school tutorials were also available to Student throughout the year.
12. In September 2003 KISD conducted a Full, Individual Educational Evaluation ("FIE") that used a wide variety of well recognized testing instruments. A multidisciplinary team of a \*\*\* teacher, an \*\*\*, and \*\*\* conducted the FIE. Family and sociological history from January 2001 was reviewed. The \*\*\* assessed Student's physical condition. The \*\*\* teacher provided information about Student's fine, gross motor, and language abilities and her behavioral and emotional adjustment.
13. The \*\*\* administered a widely recognized IQ screening test and the full battery of another widely used and respected IQ test. Achievement testing completed the previous spring by The Key School was also a component of the FIE. The achievement tests used are well regarded, widely accepted instruments. The FIE concluded that Student did not meet the severe discrepancy criteria needed to establish an educational need for special education as a student with a learning disability. Student's parents disagreed with these conclusions.
14. Following the FIE, Student's parents consented to a KISD autism evaluation and it was completed by October 2003. The school district's autism expert reviewed Student's educational records, including information from The Key School. Those records did not establish teacher concerns that Student exhibited emotional, behavioral, or social difficulties to a degree that would suggest autism. Student's current teachers completed a behavior rating checklist. A few teachers indicated "mild" concern over some social, communication, and, organizational skills, and an even smaller number of "moderate" concerns – no teachers indicated a "great" or "serious" concern over Student's social or behavioral abilities.
15. The autism evaluation also included the use of two standardized tests specifically designed to aid in the identification of Asperger's (the type of autism identified by the CSC evaluation). The probability of Asperger's on one measure was "very unlikely." The

probability of Asperger's on the other (derived solely from parent feedback) was "likely." However, the behaviors noted by Student's parents were not reported by school staff or observed by the autism assessment team.

16. Student was also observed throughout the school environment. She interacted and behaved appropriately and normally. She did not display any observable signs of anxiety, frustration or difficulty sustaining attention. She navigated the school environment and functioned well. According to DSM IV criteria the essential features of Asperger's are severe and sustained impairment in social interaction and the development of restricted, repetitive patterns of behavior, interests and activities. The clusters of behaviors consistent with Asperger's must be displayed with frequency, intensity and duration across all environments. Student did not exhibit those behavioral indicators to the degree required by the DSM IV criteria. Student's parents disagreed with the findings of the KISD autism team and filed the request for hearing soon after.
17. \*\*\* School operates on an "accelerated block schedule." Students enroll in only four classes for a semester with the exception of Algebra which is a year long course. Each class period is 90 minutes long rather than the traditional 50-60 minutes. The rationale for the accelerated block schedule is that with a longer class period teachers have time to vary their methods, lessons, and activities and students bring greater focus and concentration to their studies since they only have four classes to cope with rather than the traditional six or seven.
18. Student's parents were concerned about Student's ability to perform in English or foreign language classes under the accelerated block schedule. They didn't think Student would be able to keep up with the pace of the classes or the volume of class work. Prior to the beginning of the\*\*\* grade, Student's mother made arrangements for Student to take both \*\*\* English and Latin I through a Texas Tech University correspondence course program. Student worked at her own pace on her English and Latin correspondence classes outside of regular school 1:1 with a private tutor. She used the entire \*\*\* grade year to complete the first semester of each of the correspondence classes and plans to complete the second semester over the summer before the beginning of \*\*\* grade.
19. KISD has a school policy that requires a student to submit a written request to the administration and secure permission to take a correspondence course for graduation. The policy also limits students to two correspondence courses for credit. The rationale for this policy is to ensure that students take courses they really need to graduate and that their instructional needs are adequately met. \*\*\* School prefers that Student receive instruction directly from its own teaching staff. In Student's case, the ARD that transitioned her from The Key School back to \*\*\* School either did not consider the policy or was unaware of the policy.
20. After some confusing communications back and forth between home and school and while this litigation was pending, the \*\*\* finally granted permission for the two correspondence courses. Student will receive the requisite academic credit for the coursework she completes. KISD will not give Student academic credit for any future correspondence

courses unless and until she requests and secures administrative permission to do so. Under the policy Student will not be able to earn any more academic credit by correspondence since she has already taken the maximum number of classes allowed under the policy.

21. In \*\*\* grade Student took Algebra I, Biology, World Geography, Health, Art, Basic Communication Systems (“BCIS”), Computer Multi-Media Animation Technologies (“CMA”) and Photojournalism. The record shows that by March 2004 Student made mostly \*\*\*’s in her classes except for \*\*\*’s in Health and a final Biology grade of \*\*\*. She struggled in Biology the entire semester. Student performed particularly well in BCIS making grades in the low \*\*\*’s. She also participated in a Photojournalism class but the record is not clear as to her performance and she did not receive academic credit for that class.
22. Student can communicate with her teachers and classmates in a coherent manner. She is compliant and polite. Student was initially very shy and somewhat withdrawn in her classes. However, as the \*\*\* grade year progressed, Student began to exhibit greater social interaction with peers and teachers and began to seek teacher assistance and ask questions when it was appropriate to do so. She behaves appropriately in class. She can carry on a conversation with a teacher or classmate that makes sense and is appropriate. She maneuvers herself around the high school environment appropriately although she tends to shy away from physical contact.
23. While this litigation was pending, Student’s parents retained an independent evaluation by a licensed psychologist and speech/language pathologist in private practice to assess Student for autism. Those experts utilized a variety of sources of information, administered well recognized and valid instruments, and observed Student during the extensive assessment process and in the school environment. The psychologist interviewed Student as well as her parents. Petitioner’s experts concluded that Student meets criteria for a child with an autistic disorder; specifically, Pervasive Developmental Disorder Not Otherwise Specified. (“PDD-NOS”).

## Discussion

### Two Part Test for Eligibility

Eligibility for special education services under IDEA is determined under a two part test. First, does the student meet the stated criteria for one or more of the classifications explicitly recognized by the statute based upon evaluation and assessment data? *20 U.S.C. Secs. 1401 (3) (A) (B) and 1401 (26); 34 C.F. R. Sec. 300.7 (a) (1); Tex. Educ. Code Sec. 29.003 (a) (b); 19 Tex. Admin. Code Sec. 89.1040 (a)*. Second, does the student demonstrate an “educational need” for special education services? *20 U.S.C. Sec. 1412 (a) (3) (A) (B); 34 C.F.R. Sec. 300.125 (a) (1) (i)*.

Both strands of the eligibility test are in dispute in this case. Student’s parents argue that she meets the criteria for a child with autism, specific learning disability and/or speech/language impairment. *34 C.F. R. Sec. 330.7 (a)(1)(c)(1)(i)(ii)(10)(11)*. They argue that Student needs a lot of parental

assistance and intervention in order to keep up with her schoolwork. They claim that instructional modifications are critical to Student's ability to pass her classes and receive an "educational benefit" within the meaning of IDEA.

The school district acknowledges that at one time Student demonstrated some speech/language and writing deficits and a need for special education and related services to meet those needs. However, the school district argues that Student no longer meets any of the eligibility criteria stated in IDEA; the school district especially disputes Petitioner's claim that she qualifies for special education as a student with autism.

### **Burden of Proof**

In the Fifth Circuit, the burden of proof is on the Petitioner to establish that the school district's program and/or placement are not appropriate under IDEA. This burden extends to issues of eligibility. *See, Tatro v. Texas, 703 F. 2d 823 (5<sup>th</sup> Cir. 1983) (Tatro II), aff'd on other grounds sub nom Irving Ind. Sch. Dist. v. Tatro, 468 U.S. 883 (1984); Alamo Heights Ind. Sch. Dist. v. State Bd. of Educ., 790 F. 2d 1153 (5<sup>th</sup> Cir. 1986); Christopher M. v. Corpus Christi Ind. Sch. Dist., 933 F. 2d 1285 (5<sup>th</sup> Cir. 1991).* Therefore, in order to prevail on the key issues in this case, Student had the burden of proving that she met one or more of the classification criteria in IDEA and that she demonstrated an educational need for special education and related services.

Petitioner failed to meet this burden in establishing that she is a child with autism, a specific learning disability and/or a speech/language impairment. *Id.*; **34 C.F.R. Sec. 300.7 (c) (1) (10(11)).**

### **Autism and Battle of the Experts**

The issue of whether Student is a student with autism became a "battle of the experts" pitting the school district's autism expert and language therapists against the psychologist and language therapist retained by Student's parents. All of the experts had impeccable credentials and were genuine and sincere in their opinions and conclusions. Resolution of the autism issue boils down to the probative weight I should give to the competing and contradictory expert testimony.

### **Assessing the Value of Expert Testimony**

The United States Supreme Court has articulated a method by which the reliability of expert testimony can be evaluated. *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).* A number of factors in evaluating expert testimony were developed by the *Daubert* court. *Daubert, supra.* None of these factors are exclusive or dispositive however. Instead, the Court's rule in *Daubert* is meant to be a flexible one. *Id.*; *Kumho, supra.* In addition, the evidentiary rules of hearsay and unfair prejudice must also be considered when evaluating the admissibility or value of expert testimony. *Id.*

None of the factors specifically set out in *Daubert* are applicable in this case since *Daubert* involved the reliability of purely scientific evidence. In this case, there was no real dispute about the admissibility of expert testimony or about the scientific reliability or validity of the psychological, academic and intellectual measures used by the experts. Instead, there were

disagreements between the experts on interpretations of the data or in the use of some tests or subtests over others. This “cherry picking” by the experts is simply the kind of disagreement that reasonable experts in any field may have with one another.

### **Relevant Factors to Assess Expert Testimony in this Case**

Courts following the *Daubert* approach have articulated a number of other factors useful in evaluating expert testimony including:

Whether the expert’s testimony naturally comes out of their work or whether the expert’s opinion was developed expressly for purposes of testifying; *Daubert, supra*

Whether the expert unjustifiably “extrapolated” to an unfounded conclusion; *General Electric v. Joiner, 522 U.S. 136 (1997)*; and,

Whether the expert adequately accounted for obvious alternative explanations; *Claar v. Burlington Northern R.R., 29 F. 3d 499, 502 (9<sup>th</sup> Cir 1994)*.

### **Application of the Factors to Petitioner’s Experts**

I conclude that the probative value of Petitioner’s expert opinions was diminished since the opinions were developed expressly for the purpose of testifying in this case, the experts did not adequately account for other obvious alternative explanations, and the opinions were the result of unjustifiable extrapolation.

Petitioner’s experts did not conduct their evaluations or prepare their reports until this litigation was well underway. Indeed the hearing itself was delayed in order to give the experts an opportunity to complete their reports for purposes of the hearing. In addition, Student’s shyness, difficulties with expressing her thoughts and feelings, and other “odd” behaviors noted by the experts could have been explained by other obvious alternatives such as a language or cognitive deficit, a psychological rather than neurobiological reason, or, simply due to her discomfort with the evaluation/observation process. Finally, the diagnosis of autism was an unjustifiable extrapolation given the failure to establish that the behaviors at issue reached the level of severity, intensity, and frequency across all environments required by the DSM-IV.

In this case, the credible evidence showed that while Student may exhibit some characteristics or behaviors that fall within the clusters of behaviors that describe either Asperger’s Syndrome or PDD-NOS, she did not display the frequency, intensity, or severity of those behaviors across all environments as required by the DSM-IV. Both sets of experts cited the DSM-IV with approval and relied on its criteria.

## **Learning Disabilities and/or Speech/Language Impairment**

The credible evidence showed that although written and expressive language are certainly areas of weakness for Student she does not exhibit a severe enough discrepancy between achievement and intellectual ability in order to qualify as a student with a learning disability under IDEA. **34 C.F.R. Sec. 300.7 (c) (10); 19 Tex. Admin. Code Sec. 89.1040 (9)**. Student passed all her classes except one. None of the well recognized and widely accepted standardized instruments showed an overall severe discrepancy between her achievement and intellectual ability. While there were areas of weakness identified in the testing, that data alone is insufficient for purposes of IDEA eligibility. **Id.**

Similarly, the speech/language assessments do not demonstrate a severe speech/language deficit. Again, while Student does have a mild impairment and some specific areas of weakness, Petitioner did not meet her burden of proving she meets IDEA criteria as a student with a speech/language impairment. The credible evidence showed that her functional language is sufficient in the school environment and thus she does not demonstrate an educational need for speech/language services under IDEA. **20 U.S.C. Sec. 1412 (a); 34 C.F.R. Sec. 300.125**.

### **Correspondence Courses and Study Period as components of FAPE**

I need not reach the issue of whether Student needed correspondence courses or a study period built into her school day in order to receive a free, appropriate public education (“FAPE”) having concluded that Student does not meet eligibility criteria for special education under IDEA. The legal right to receive FAPE arises only when a student has met eligibility criteria for special education services under IDEA. **See, 34 C.F.R. Sec. 300.7. and 300.300**. Even if my conclusions about Student’s eligibility are incorrect, it would not necessarily follow that Student needed the correspondence courses or the study period in order to receive FAPE.

It may well be that 1:1 private tutoring instruction following a correspondence course curriculum at her own pace and/or the addition of a study period would be best for Student. IDEA however does not require a school district to “maximize” a student’s educational benefit but instead is merely charged with providing the student with a “basic floor of opportunity.” **Bd. of Educ. v. Rowley, 458 U.S. 176, 192, 199-201 (1982)**.

In this case the credible evidence showed that Student was able to pass all but one of her classes and earn academic credit to move along in \*\*\* school. Even if Student is eligible as a student with a disability under IDEA, the school district was not required to fund the two correspondence courses or provide her with a study period as part of the school day. She received instructional modifications, Content Mastery support, and the opportunity to seek extra help from tutorials. Providing more would not have been required under the rule in Rowley. **Id.**

## **School District's Evaluation and Petitioner's Request for an IEE**

IDEA provides parents with the right to an independent educational evaluation at public expense if a parent disagrees with the school district's evaluation. *34 C.F.R. Sec. 300.502 (a) (b)*. However, a school may challenge a parent's right to an IEE at public expense in a due process hearing by showing that its own evaluation was appropriate and meets IDEA criteria. *34 C.F.R. Sec. 502 (b) (2)*.

In this case, Student's parents objected to the school district's conclusions in the Full Individual Evaluation ("FIE") completed and reported on September 4, 2003. The FIE found Student did not qualify for special education under IDEA. A number of the testing instruments used by the school district were used by both The Key School and Petitioner's own experts. Although the experts disagreed on the use of some tests or subtests over others and over the interpretation of data it is not uncommon for reasonable experts to differ in that regard. Such differences do not establish that the school district's FIE was otherwise flawed under IDEA. The instruments used and the other informal sources of information and measures met IDEA criteria. *34 C.F.R. Sec. 300.532 (a) - (j)*. For example, using data previously collected by The Key School was appropriate under IDEA. *34 C.F.R. Sec. 300.533*. KISD drew from a variety of sources in making its eligibility determination. *34 C.F.R. Sec. 300.535 (a)*. There was insufficient evidence that the examiners were not otherwise qualified to administer the tests or that they were not used for their proper purposes. Therefore, Student's parents are not entitled to reimbursement for the IEE completed in preparation for this litigation.

### **Conclusions of Law**

1. Petitioner failed to meet her burden of proving that she was eligible as a student with autism, a specific learning disability or a speech/language impairment within the meaning of IDEA. *Tatro v. State of Texas, 703 F. 2d 823 (5<sup>th</sup> Cir. 1983) aff'd on other grounds sub nom Irving Ind. Sch. Dist. v. Tatro, 468 U.S. 883 (1984); 34 C.F.R. Secs. 300.7 (c) (1) (10) (11)*.
2. Respondent met its burden of proving that its evaluation of September 2003 was appropriate and met IDEA criteria. *34 C.F.R. Secs. 300.532; 300.533, 300.534 and 300.535*.
3. Therefore, Petitioner is not entitled to an independent educational evaluation at public expense. *34 C.F.R. Sec. 300.502*.
4. Since Petitioner was not a student with a disability she was not entitled to a free, appropriate public education within the meaning of IDEA. Therefore, Respondent was not obligated to provide Petitioner with correspondence courses or a study period as part of her school day in order to receive a free, appropriate public education. *34 C.F.R. Sec. 300.7; 34 C.F.R. Sec. 300.300; Bd. of Educ. v. Rowley, 458 U.S. 176, 199-201 (1982)*.

5. Even if Petitioner was a student with a disability within the meaning of IDEA, Respondent was not obligated to provide her with correspondence courses or a study period as part of her school day. School districts are merely obligated to provide students with disabilities a “basic floor of opportunity” and not to “maximize” a student’s educational benefit under the statute. *Rowley, supra.*

### **ORDERS**

Based upon the foregoing findings of fact and conclusions of law I therefore **ORDER** that Petitioner’s claims and requests for relief in this cause are hereby **DENIED**. All other relief not specified herein is **DENIED**.

**SIGNED the 23rd day of June, 2004.**

/s/Ann V. Lockwood  
Ann Vevier Lockwood  
Special Education Hearing Officer

### **Notice to the Parties**

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

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

**Student bnf**

**Parent,  
Petitioner,**

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**v.**

**DOCKET NO. 094-SE-1103**

**KELLER INDEPENDENT  
SCHOOL DISTRICT,  
Respondent.**

**SYNOPSIS**

**Issue:** Whether shy, generally withdrawn \*\*\* grader with history of mild expressive language, writing, and, organizational deficits should have been identified as a student with autism for purposes of special education under IDEA.

**Held:** **For the school district.** Contradictory expert testimony resolved in school district’s favor where probative value of Petitioner’s experts was diminished with the application of court approved factors to evaluate expert testimony.

Petitioner’s expert opinions developed expressly for purposes of testifying; experts unjustifiably “extrapolated” to an unfounded conclusion; and experts did not adequately account for obvious alternative explanations. *Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 526 U.S.137 (1999); General Electric v. Joiner, 522 U.S. 136 (1997); Claar v. Burlington Northern R.R., 29 F. 3d 499 (9<sup>th</sup> Cir. 1994).*

Furthermore, behavioral clusters characteristic of autism spectrum disorders at issue did not occur at the level of intensity, frequency, duration or across environments required by DSM IV criteria. *34 C.F.R. Sec. 300.7 (c) (1) (i).*

**Issue:** Whether \*\*\* grader with history of mild expressive language, writing, and, organizational deficits should have been identified as a student with a specific learning disability and/or speech/language impairment for purposes of special education under IDEA.

**Held:** **For the school district.** Petitioner did not meet her burden of proof on this issue. Assessment data from all sources showed areas of weakness in expressive language, written expression and organizational skills but not to a degree that those deficits created a severe discrepancy between Petitioner’s achievement and intellectual ability. Petitioner’s overall communication skills and ability to use functional language were within average ranges. While assessment data showed some weaknesses those deficits did not adversely impair student’s performance to such a degree that she demonstrated an educational need. *34 C.F.R. Secs. 300.7 (10) (11).*

**Issue:** Whether \*\*\* grader required public school to fund two correspondence courses and/or provide her with a study period as part of the school day in order to receive FAPE.

**Held:** **For the school district.** Because \*\*\* grader was not eligible under IDEA for special education she was not entitled to FAPE. Even if \*\*\* grader was eligible under IDEA, school district merely required to provide student with “basic floor of opportunity” and not required to “maximize” student’s educational benefit. *34 C.F.R. Sec. 300.300.*

**Issue:** Whether school district’s FIE appropriate and met IDEA criteria or whether student entitled to IEE.

**Held:** **For the school district.** District’s assessment met IDEA criteria. Valid, well recognized instruments were utilized as well as a variety of sources of information. Review of previous testing as component of evaluation appropriate under IDEA. Student not entitled to reimbursement for IEE prepared for purposes of litigation. *34 C.F.R. Secs. 300.532, 300.533, 300.534.*