DOCKET NO. 202-SE-0204

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

DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner Student, by her next friend, Parent, (hereinafter "Petitioner," "Student," or Parent), brought a complaint pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 *et seq*., as amended, complaining of Community Independent School District (hereinafter "District" or "Respondent"). On February 12, 2004, Petitioner filed her original complaint and a Request for a Due Process Hearing with the Texas Education Agency ("TEA"). The original decision due date was March 28, 2004. It was later extended by the agreement of the parties to August 26, 2004.

As reflected in Prehearing Conference Order No. 7, the issues set for hearing were as follows:

1. Should Petitioner remain eligible for special education and related services as a child with learning disabilities and/or OHI conditions?
2. Should the Respondent impose further disciplinary consequences on Petitioner as a result of a January 20, 2004 incident in which Petitioner was involved, and in connection therewith, whether Petitioner's behavior at that time was a manifestation of her disability?
3. Whether proper notice was given to the parents of Petitioner for a May 5, 2003, ARD meeting.
4. Whether the IEP that was in the place for the 2003-04 school year provided Petitioner with FAPE?

For relief, Petitioner sought the following:

1. Petitioner continue to be eligible for special education and related services.
2. There would be no further disciplinary actions to Petitioner as a result of the January 20, 2004, incident.
3. The Respondent develop an IEP that will be reasonably calculated to provide Petitioner with FAPE, considering all areas of disability.
4. As compensatory relief, Respondent provide tutoring services for Petitioner during the school day.

Procedural History

On February 13, 2004, the Hearing Officer was assigned this matter by TEA. The telephonic prehearing conference was held on February 23, 2004. Parent, her former husband, a representative of Students 1st, the special education director for the school in question, and an attorney for the District participated in the hearing. The parties agreed to a stay-put in Petitioner's placement pending the issuance of this Decision.

The hearing was initially set for April 7, 2004 (Prehearing Conference Order No. 1). The parties later requested a continuance because there was a delay in getting the IEP for Petitioner completed. It was ordered that the IEP be completed by April 22, 2004, and an ARD meeting be held no later than April 30, 2004. Accordingly, the hearing was continued to May 14, 2004. (Prehearing Conference Order No. 2).

On or about April 6, 2004, Ms. *** entered an appearance on behalf of Petitioner and requested a continuance. For good cause, another continuance of the hearing was granted to May 24, 2004. (Prehearing Conference Order No. 3).

The ARD meeting was held on April 26, 2004. A number of issues arose from it, including whether the Hearing Officer could order a Manifestation Determination prior to the due process hearing that was set for May 24, 2004. This arose because of the District's determination at the ARD meeting on April 26, 2004 that Petitioner was no longer eligible for special education services. The Hearing Officer determined that he was without authority to order a "hypothetical" MDR prior to the scheduled due process hearing, nor, under those circumstances, could he consider issues at the due process hearing pertaining to whether there could be any further disciplinary actions arising out of the January 20, 2004 incident, because those issues had neither been presented to nor considered by an ARD committee. (Prehearing Conference Order No. 4).

Thereafter, the parties, on their own volition, agreed to conduct a hypothetical MDR, so that if the Hearing Officer determined at the due process hearing that Petitioner was eligible for

special education, then to save time and resources, and to prevent further delay to the parties in a resolution of this matter, the Hearing Officer could evaluate whether or not Petitioner's behavior on January 20, 2004 was a manifestation of that disability.

The ARD meeting for this purpose was held on June 1, 2004. For purposes of this hypothetical MDR, the parties presumed that Petitioner's disabilities consisted of a learning disability and OHI [ADHD, inattentive type]. At the MDR, the District found that Petitioner's behavior on January 20, 2004 was not a manifestation of either of those disabilities.

In order that the MDR could be conducted on June 1, 2004, the parties jointly moved for another continuance. For good cause, the due process hearing was reset for June 11 and June 14, 2004. (Prehearing Conference Order No. 5).

On June 1, 2004, another prehearing conference was conducted to ascertain what issues were ultimately to be heard at the due process hearing as a result of additional testing done on the Petitioner and the ARD meeting. The issues and relief sought by Petitioner noted on pages 1 and 2 of this Decision were determined that day. (Prehearing Conference Order No. 7).

Initial testimony was taken on June 11 and June 14, 2004. Because of the unanticipated illness of one of Petitioner's expert witnesses, it became necessary to continue the due process hearing. On June 28, 2004, the parties conducted a prehearing conference and mutually agreed upon the date of July 23, 2004, to resume the hearing and to conclude taking testimony in the matter.

The hearing was resumed on July 23, 2004. At the close of evidence, the parties were given until August 2, 2004 to submit their closing arguments. A new decision due date was later extended to August 26, 2004. (Post Hearing Order No. 2).

The Petitioner was represented at the due process hearing by Myrna Silver. The Respondent was represented by Ms. Marianna N. McGowan and Mr. Tim Brightman. Ten witnesses were called on behalf of Petitioner, while the Respondent called seven witnesses. A record in excess of 850 pages and four large volumes of exhibits was created.

Based upon the evidence presented and admitted into the record in this proceeding, as well as the arguments of counsel, I make the Findings of Fact and Conclusions of Law as set forth below.[1]

Findings of Fact

[1] All references to the transcript will be designated as TR, followed by the volume number and page number. All references to Petitioner's and Respondent's exhibits will be designated as Pet. Ex., or Resp. Ex., followed by the exhibit number.

1. Student is ***-year-old student who resides with her parents within the jurisdictional boundaries of the Community Independent School District. During the 2003-04 school year, she attended the *** grade at *** School.
2. Community ISD is a political subdivision of the State of Texas and is a duly incorporated independent school district located in Collin County, Texas.
3. At the time of the January 20, 2004 incident in question, she was receiving special education services as a student with a learning disability. ***(Resp. Ex. 6.1)***.
4. Student has attended schools in the District since kindergarten. ***(Resp. Ex. 7.1)***. On the Comprehensive Individual Evaluation ("CIA") performed on her on October 31, ***, while she was in the *** grade, it was noted that she might meet the eligibility requirements for special education because she was considered to be speech impaired. ***(Pet. Ex. 1.4)***. She was not placed in special education, however, until two years later. Placement was not made until then because of her age and other extenuating circumstances. On the Stanford-Binet Intelligence Scale (4^{th} Ed.), it was noted that her test composite was ***, but with a notation that this high range intellectual functioning should be interpreted with caution because of her age. ***(Pet. Ex. 1.3)***.
5. On her "CIA" while in the *** grade, it was noted that she appeared to meet the eligibility criteria for a student with a learning disability, ***(Pet. Ex. 2.1)***, and Student was placed in special education at this time.
6. In ***, a triennial reevaluation was required. 34 CFR §300.536. On October 26, ***, that CIA was performed. The Wechsler Intelligence Scale for Children–III was administered and the resulting full scale I.Q. score was ***. While this was lower than her *** score in ***, it was noted that the difference was partly due to her age and the fact that small children are given fewer subtests. ***(Pet. Ex. 3.3)***. The verbal I.Q. score was a *** and the Performance I.Q. score was a ***. All of these indicators placed her in the average range.
7. On the Test of Nonverbal Intelligence-2 in ***, she obtained a standard score of ***. The Clinical Evaluation of Language Fundamentals- Third Edition indicated a receptive language score of ***, expressive language score of ***, and a total language score of ***. In the area of speech/language proficiency, a TONI-3 score was used as non-verbal measure of cognitive ability.
8. It was determined that Student required special education services because she had a severe enough of a discrepancy between her level of intellectual functioning and level of

educational performance in the areas of basic reading skills, math calculation, math reasoning, written expression, listening comprehension and oral expression. ***(Pet. Ex. 3.6)***. She was considered to meet the eligibility criteria for both a learning disabled and speech impaired student. ***(Pet. Ex. 3.8)***.

9. While an annual ARD had been convened for Student on September 24, 1998, another one was convened on October 27, 1998, after learning her CIA results. At that time, Student was taking science, social studies, math, reading and writing. As a result of the meeting, in the area of instructional modifications/supports, she was provided the following in all five of her subjects: (i) extra time to complete assignments; (ii) short instructions; (iii) opportunity to repeat and explain instructions; (iv) visual aids; (v) oral exams/open book exams; (vi) positive reinforcement. In science and social studies, she was provided auditory aids. She was provided access to Content Mastery ("CMC") a minimum of 15 minutes per week in several of the classes.

10. The next ARD took place early during her *** grade school year. On October 26, 1999, the committee met and determined that Student was still eligible, as she was a student with a learning disability and a speech impairment. ***(Pet. Ex. 16.1)***. Her Individualized Education Program ("IEP") provided CMC in all of the subjects that school year. ***(Pet. Ex. 16.4)***. The instructional modifications/supports also changed. Reduced assignments were provided for all the courses, as had been the case during the previous year. Extra time to complete assignments was given for math, science and social studies. An assignment notebook was added for all of the courses, while peer tutoring was added for math and science. ***(Pet. Ex. 16.5)***.

11. Approximately one month later, Student's parents had her evaluated at Texas Scottish Rite Children's Hospital. ***(Pet. Ex. 13)***. At the conclusion of the examination, Scottish Rite made certain recommendations and modifications that they thought might help Student in the areas of oral language, expressive writing, phonics and attention, areas where they determined that she was having some developmental problems. Although it was noted that Student had some mild weaknesses in phonological awareness and her ability to decode multiple-syllable words, Scottish Rite concluded that these results were not consistent with dyslexia. As to any attention problems, Scottish Rite told her parents that Student's difficulties in this area did not reach a level usually seen in children with attention-deficit/hyperactivity disorder ("ADHD"). ***(Pet. Ex. 13.5)***.

12. Two additional ARDs were held during Student's *** grade school year. The first was on February 17, 2000, where a speech/language assessment of Student was requested by the parents after she had just been released by the District from special education services for speech. ***(Pet. Ex. 16.13)***. Student's modifications and goals remained unchanged. Several months later, another meeting was held on April 19, 2000, where the parents were advised of the speech testing results, and the fact that the District believed that Student no longer qualified for speech impairment. ***(Pet. Ex. 16.17-18)***. No changes, however, were made in her modifications or placement.

13. At the end of her *** grade year, she had passed all of her courses and her end of the year average grades for all of her subjects, except science, clustered around ***; the science grade was several points higher. In her previous *** years in *** school, she had passed all of her courses, with the exception of history in the *** grade. The other grades for all of her courses in those *** years of *** school ranged from semester lows of *** to a high in a course of ***. For example, in the *** grade, her end-of-the-semester grades for reading were ***,***; her math grades were ***,***; and her science grades were ***,***. ***(Resp. Ex. 7.1)***. Thus, from her grades, it is fair to say that she was a very solid, average-performing student throughout her first ***years of school.

14. Her annual ARD for her *** grade year was held on November 12, 2000. ***(Pet. Ex. 17-1)***. Although no longer considered speech impaired, she remained in special education and was provided services based on a learning disability. At that point in time, she was making ***'s and ***'s in her courses, except for Spanish. At that point in time, her low Spanish grade was attributed to missing assignment papers. The goals set for Student at the meeting were for her to increase her reading comprehension skills and to improve her math computation and problem-solving skills. She was provided CMC in all of her courses. The accommodations provided in school year 2001-02 were (i) in all courses, a retake of tests when the grade was lower than a 70; (ii) be provided with an assignment notebook in all courses; (iii) short instructions in reading and math; (iv) repeat and explain instructions for comprehension in math; (v) and, for math only, she be given clearly defined limits, have frequent eye contact with the teacher and private discussion concerning behavior. ***(Pet. Ex. 17.5-6)***. A decided effort was being made for math assistance. At the end of the year, aside from her P.E. grade, her average grades for the year ranged from a low of *** in math to a high of *** in social studies. ***(Resp. Ex. 7.2)***. The level of her math grade was not disturbing.

15. Student's next two ARDs occurred in October 2001, while she was in the *** grade. She was again eligible for special education services because of her learning disability. The learning disability assessment for her originally came from the results of her CIA in ***. On October 2, ***, the ARD committee met, and the committee agreed that no new testing was needed to determine her continued eligibility in special education. Since Parent did not attend the ARD meeting, she was contacted by phone and concurred with that approach. ***(Pet. Ex. 18.1-3)***.

16. Later that month, on October 25, 2001, the ARD committee again convened. For purposes of the triennial evaluation, and after reviewing Student's prior assessments, current evaluation data and other information, the committee concluded that no additional data was needed to determine whether Student could continue in special education as a child with a learning disability. ***(Pet. Ex. 18.5-6, 17)***. Parent was unable to attend this ARD meeting as well, but she was contacted by phone and once again agreed with the District's recommendation that there was no further need for additional assessment of Student at that time. ***(Pet. Ex. 18.17-18; Tr. II. 33)***. This was a time of illness for Parent. ***(Tr. II. 32)***.

17. At the October 25, 2001 ARD, while the committee established a slightly different goal for Student in connection with her reading, it continued the same goal for math. Student was given access CMC for all of her courses. The accommodations were changed slightly from the previous year. For the upcoming 2001-02 school year, she was, again, to be able to retake tests in all of her courses (except the final exams) and to have an assignment notebook in each course. Frequent eye contact was expanded to all classes. The balance of the accommodations from the prior year was deleted. ***(Pet. Ex. 18.9-10)***.

18. Another ARD was convened in the spring of her *** grade year, as she was apparently struggling with math and reading. Parent attended this ARD meeting on March 4, 2002, and, again, concurred with the plan suggested by the committee. ***(Pet. Ex. 18.20-21,30-31)***. Student's final average grades for the *** grade, aside from P.E., ranged from a low of *** in English to a high of *** in TAAS/math. Again, she passed all of her courses and was performing adequately, even with reduced accommodations. ***(Resp. Ex. 7.2)***.

19. For the *** grade, Student's annual ARD was held on September 17, 2002. Being classified again as learning disabled, she was eligible for special education services. Adjustments were made in her IEP. It was determined that she have inclusion in her general education classes for English and math, and she would have CMC for science,

social studies and her electives. The CMC was to be a minimum of 15 minutes per week per class. The only accommodation specified for this school year was a retake on her tests if the grades were below ***. Parent attended the meeting and concurred with the proposals. ***(Pet. Ex. 19.1, 5-7, 11,14)***.

20. At the end of her *** grade year, she had again passed all of her courses. Her average grades, exclusive of P.E., ranged from a low of *** in math to a high of *** in health. ***(Resp. Ex. 7.3)***. She had inclusion for math.

21. The ARD meeting in the spring of that school year, however, is at the center of one of the several issues to be decided in this matter. On May 5, 2003, an ARD meeting was to be convened, the purpose of which was to discuss her upcoming *** program and to address a graduation plan. ***(Resp. Ex. 6.10)***. About 10 days before that meeting, the District gave Student a notice about the meeting that she was supposed to take home to her parents to sign and return to acknowledge their notice of the meeting. ***(Resp. Ex. 6.15-16; Tr. III. 195)***.

22. The District later followed this notice with a telephone call and left a message on Parent's voice mail. ***(Resp. Ex. 6.16; Tr. III. 196)***. While the note was not returned, Student told the District that her mother would be there. ***(Tr. III. 198)***.

23. The meeting was supposed to start at 11:00 a.m., but Parent failed to appear. At 11:45 a.m., Mr. ***, special education teacher for the *** grade, called Parent.

24. At this point, the parties' recollections differ as to what transpired. Parent contends that she was surprised by the call and had no idea that there was going to be ARD that day. She denies receiving a voice mail about the meeting. ***(Tr. III. 290)***. After the phone call with Mr. *** was over, she looked for and located the notice on Student's bureau; Student had simply not given it to her. ***(Tr. I. 208-209)***.

25. During the call that morning, she says she was adamant that she told Mr. *** that she did not want the meeting to go forward unless she could be in attendance. ***(Tr. I. 207; III. 291)***. She said that the conversation ended at that point and she claims her point was made. ***(Tr. II. 31)***.

26. Mr. ***'s account of the call is vastly different. When he learned about her inability to be there for the meeting, he tried to accomplish as much as he could with her over the telephone. He knew that Student was going to attend the meeting when it convened a little later. He outlined for Parent that (i) the District felt that there was not a need for another assessment for Student; (ii) that Student was passing all of her classes; and (iii)

there would be no major changes in her program, as she was about to go into the *** grade. ***(Tr. III. 198-201)***. Under those circumstances, he told Parent that it was not as important for her to attend. Student would be attending and he would later send the material home for Parent to review. Had Parent asked him that morning to reschedule it, he would have done so. He said Student was a good student and there would have been no reason not to have an ARD with the parent, if the parent desired to be there. ***(Tr. III. 208-09)***. Mr. *** then said Parent expressed her agreement to this approach, and he noted her agreement to proceed with the meeting without her in the place provided on the District's copy of the notice. ***(Resp. Ex. 6.16)***.

27. I find Mr. ***'s recollection of the May 5, 2003 conversation with Parent to be more plausible and credible. The District did not arbitrarily proceed over Parent's supposed objection; she consented to what was proposed. The District had always been willing in the past to respond to Parent's requests for ARDs, and there was no indication in this instance that it was not willing to do so. Her non-attendance was not unusual, as Parent had handled several of Student's ARD's in this same manner over the years in instances where she either could not attend or did not desire to attend the meeting. Also no major urgency existed as the completion of this ARD, in the sense that it could have apparently been done shortly thereafter, if necessary.

28. There were no major dramatic changes made in Student's program as a result of that meeting. ***(Resp. Ex. 6.1-21)***. At the time, Student was performing at the *** grade level in her courses. As she had during the 2002-03 school year, the only accommodation specified for her was the retaking of all tests. ***(Resp. Ex. 6.6,10)***. She was given CMC for all of her classes for a minimum of 15 minutes per week per class. The only difference was that she was not provided inclusion in English and math, as had been the case in the *** grade.

29. Parent claims that when she received the ARD papers about a week later and learned that the meeting had actually been held over her objections, she contacted the District and requested a meeting in July. She said that the date in July proposed by the District did not work for her because of a doctor's appointment. She then claims she asked the District for a date in August shortly before school started. She claims the District rejected that date because of staff vacations. She then said that she asked for an ARD hearing in October 2003, but never heard from the District. ***(Tr. I. 208-11)***. I find no

corroborating written or testimonial evidence in the record that reflects requests for these ARD hearings on those dates.

30. I do find, however, that the District did send Parent a notice about another ARD meeting for Student concerning school year 2003-04. The notice was dated July 23, 2003, and the meeting was scheduled for August 14, 2003, which was apparently just after the start of the school year. This ARD was scheduled by the District at the request of Parent. ***(Tr. II. 36-37; II. 315-16)***. Parent Acknowledged receiving the notice. ***(Tr. II. 37)***. On the day of the meeting, ***, the *** School special education teacher *** teacher, called Parent to remind her of the meeting. Just prior to Student's meeting, Mr. *** was going to have a §504 meeting that day concerning ***. From the more credible and plausible evidence, I find that Parent told Mr. *** in their conversation that day that she did not believe that it would be necessary to have an ARD meeting that day and that she would call him in the future if there were any problems or if she wanted an ARD meeting. I further find that Mr. ***, contemporaneous with the event, made a notation to this effect at the top of the District's copy of the notice, and the District did not fabricate such evidence to support its case.[2] I further find that Parent made no further requests for an ARD committee meeting about Student after that point in time. Thus, whether the purpose of the ARD meeting that was attempted on August 14, 2003, was to completely reconsider Student's situation in its entirety because the District proceeded over her objections and conducted it in her absence, as she contends, or whether, after receiving and reviewing the ARD papers from the May 5, 2003 meeting, she had a change in mind about the accommodations or other aspects of the IEP, I find that Parent chose not to pursue any changes to the IEP that were established for Student's program in the May 5, 2003 meeting. Accordingly, she has waived the right to now claim such.

31. At the end of the first semester of her *** grade year, she had mixed results in her academic performance. She ended up with a *** average in ***. ***(Resp. Ex. 7.3)***. It was a course that was taught primarily by video, with a facilitator in the room. For the first cycle in the course, she made a ***, but her grades in the next cycles dropped rapidly. She recorded *** and ***, on her second and third cycles and a *** on her final exam.

[2]Parent this time contends that the conversation actually took place before August 14 and that she could not make the meeting that day because of the doctor's appointment and that she never received a copy of the notice with the above notation on it on any school records directly produced to her. ***(Tr. II. 37-38)***. (Compare this to ***Tr. I. 208-11***).

She had apparently never had this type of "meltdown" in any of her courses in *** or *** classes.

32. Her other grades for the first semester were an *** in economics, *** in English, *** in IPC, *** in algebra and *** in history. In the process, she just barely failed the final exams in IPC and history. She could not retake a final exam. Her grades in algebra and English were good for not having inclusion.

33. Her pattern of performance did not materially improve in the second semester. Yet, despite all that was occurring after the incident in question, by the end of the school year, she only failed one course – ***. A part of this was due to her failure to make up homework assignments and tests, despite offers and opportunities for her to do so. ***(Tr. III. 317)***. The principal opined that Student simply quit trying in ***. ***(Tr. II. 177)***.

34. Student was perceived as a leader among her peers by her teachers and was respected by her classmates. She was very active and planned on trying out for cheerleader in the spring. The teachers felt that Student generally did acceptable work in their classes and had a good mastery of the material. ***(Tr. I. 144; II. 22)***. Although offered many opportunities to go to Content Mastery for assistance in her courses, Student frequently refused to go. ***(Tr. II. 23-4, 51-3; III. 312)***. In fact, the records reflect that she only went to Content Mastery 10 times in the school year before the incident, despite constant encouragement to do so by her teachers. ***(Pet. Ex. 28)***. A student cannot be compelled to attend CMC.

35. Interestingly, the record in this matter does not reflect Parent calling for an ARD at any time after the one that was set, but not held, in August, to go over her daughter's above performance problems. This is curious because Parent had never been reluctant to call for an ARD in the past where less striking problems were present.

36. The re-take of tests, make-up of homework assignments, obtaining study guides, reduction of questions into smaller pieces, and extra time to do assignments, which had been or were currently accommodations for Student, were all opportunities that were typically available to the general student population as well. ***(Tr. I. 145, 166-68; II. 13, 20, 55)***.

37. On January 20, 2004, Student was in a science class that ***. The teacher ***. ***(Pet. Ex. 30.28)***. ***.

38. Shortly after the incident Parent called one of the other children who was in the classroom that day and asked that the student tell the school administrators that Student

was not involved incident. The student declined to do so, telling Parent that Student was, indeed, involved. ***(Respondent's Ex. 4.40; Tr. II. 256)***.

39. The principal of *** initiated an immediate investigation that included taking statements from students who were in the classroom. Not only did the investigation corroborate that Student was involved in *** and that the ***, it also showed that ***. ***(Resp. Ex. 4.36-41)***.

40. As a result of the investigation, the principal correctly concluded that the students had engaged in conduct that contained the elements of an assault within the meaning of §22.01(a)(1) of the Texas Penal Code, which included intentionally, knowingly or recklessly causing bodily injury to another. Under §37.006(a)(1) of the Texas Education Code, it is mandatory that students engaging in this type of conduct be removed to the Discipline Alternative Education Program ("DAEP"). ***(Tr. II 186, 228-29)***.

41. On January 27, 2004, the principal held a "Level I" disciplinary hearing to review the incident. The principal presented the evidence he had gathered and Parent responded. At the end of the hearing, he issued a letter that recommended that Student be placed in DAEP for 45 school days for her misconduct in this matter. ***(Resp. Ex. 4.18-29)***. He later reduced it to 19 days. Student was placed in in-school suspension ("ISS") on the day of the incident. During the time in ISS, due to multiple absences for illness and other educational and psychological testing, she was present in ISS for only nine days. While there, she received all of her assignments from her classes, was not assigned any "disciplinary assignments" and she did not appear to be emotionally distraught. ***(Tr. I. 132-33, 152-54)***.

42. The day before the Level I hearing, Parent initiated a series of steps to defend Student. Student was first sent to her mother's physician, Dr. ***. Dr. *** is board certified in internal medicine, and is neither a psychiatrist nor a psychologist by training. ***(Tr. III. 16, 47-48)***. However, she claims expertise in diagnosing ADHD.

43. Student's only office visit with Dr. *** occurred on January 26, 2004. Apparently no charge was made for her services. ***(Resp. Ex. 18.20; Tr. III. 55)***. Dr. *** did not take a detailed medical history of Student, although the visit was just less than two hours. Instead, she made only a few cursory notes, as well as creating a letter aimed at school officials. The medical notes and the letter are telling, both for what they say and what they do not say. ***(Resp. Ex. 18.21-22)***. Parent was apparently telling Dr. *** that Student was to have had her annual ARD meeting in October 2003 and that she may have called

the District to complain about such in December 2003 when Student was failing ***. Parent neither offered any specific testimony to this effect at the hearing nor is there any record of such from the District's records that Parent either requested or expected an ARD in either October or December.

44. Dr. *** claimed that she can reliably diagnose ADHD through personal observation and by listening to the patient's responses to her general questions; she does not believe it is necessary to run medically recognized diagnostic tests to reliably diagnose ADHD. At the hearing, Dr. *** said that she strongly suspected ADHD from their initial visit. ***(Tr. III. 18- 19)***. Yet, with ADHD now being a central issue in this matter, ADHD is neither mentioned in the notes of Student's only visit with Dr. *** that day nor is it mentioned in the "To Whom It May Concern" letter written that same day in which Dr. *** requested that Student be allowed to continue to participate in her normal curriculum at school.

45. Dr. *** confirmed that she never performed any diagnostic tests on Student for ADHD. Moreover, she recalled being told before her only visit with Student that she had ADHD. ***(Tr. III. 87)***. Yet, there is nothing in the record to confirm any ADHD diagnosis of Student prior to the January 26, 2004 visit with Dr. ***. She prescribed no medication for either the ADHD or for the menstrual problems that Student had just begun to experience nor did she ever suggest any form of treatment for Student. ***(Tr. III. 52, 55, 86)***. She also confirmed that: (i) she was not familiar with the legal requirements of what was required for a student to be eligible for special education services under IDEA; (ii) she did not know what the term "educational need" meant in the context of IDEA; (iii) she did not know what the District had provided to Student in the way of accommodations; and (iv) she had not talked to anyone at the District about Student. ***(Tr. III. 54, 82)***.

46. Immediately after the Level I. hearing on January 27, 2004, a Manifestation Determination Review ARD ("MDR/ARD") was convened to consider the disciplinary recommendation from that Level I. hearing. In addition to District representatives, present were Parent and ***, who was an advocate for Parent and Student. Mr. *** and Parent urged that Student's agreed triennial assessment from October *** was neither current nor effective, and they requested that the District conduct a Full Individual Evaluation ("FIE") of Student. The District agreed to do so and have it completed within 10 days. It also agreed to postpone the MDR and recess the ARD until February 10, 2004. ***(Resp. Ex. 5.1-3)***. The District did not waive the right to have the MDR.

47. While the District was also performing the FIE, Parent arranged for Student to see Dr. *** on January 30, 2004. ***(Resp. 18.14-15)***. He is a psychiatrist, and he diagnosed her with ADHD, predominantly inattentive type. ***(Resp. Ex. 18.15)***. Dr. *** did not offer testimony at the hearing.

48. On February 5, 2004, Parent arranged for Student to see Dr. ***, a psychologist. He ran various tests and concluded that she had ADHD, combined type, which includes a component of impulsiveness. ***(Resp. Ex. 18.17)***. Dr. *** also did not offer testimony at the hearing, but appeared at the February 10, 2004 ARD meeting.

49. In order to obtain an OHI classification for ADHD, a diagnosis of that condition must be made by a physician; a diagnosis by a psychologist is insufficient. ***(Tr. III. 133)***. On February 9, 2004, Dr. *** signed a disability report that reflected that Student had ADHD in order to obtain an OHI designation, but he did not mention that it was the combined type as Dr. *** had done. ***(Resp. Ex. 18.13)*** (generally known as an "OHI form"). Dr. *** thereafter declined to participate in any of the proceedings or meetings.

50. Based on what Parent learned from Dr. *** it was important that a physician sign off on the diagnosis of ADHD, combined type, with its requisite component of compulsivity, in order to improve Student's chances to demonstrate her behavior was a manifestation of her ADHD. This is because ADHD, inattentive type, does not include material components of compulsivity.

51. With this in mind, Parent, herself, filled out an OHI form to reflect a specific diagnosis of "ADHD, combined type," referring to DSM-IV criteria 314.01. She ultimately submitted it to Dr. *** to sign so that Student could obtain the OHI classification. On March 28, 2004, Dr. *** signed the OHI form, although (i) she ran no medically recognized tests to support the diagnosis; (ii) she did not recall the diagnostic criteria concerning that diagnosis; (iii) she could not recall the difference in the diagnostic criteria for the combined type versus the inattentive type of ADHD; and (iv) she never talked with Dr. *** about his testing. ***(Resp. Ex. 18.7; Tr. III. 80-81)***. The particulars as to completion of the OHI form and suggestions for Dr. *** to give to the District were largely precipitated by an email from Mr. ***, the advocate, to Parent. In it, Mr. *** told her about the importance of mentioning the 314.01 DSM-IV diagnostic designation. ***(Resp. Ex. 18.10)***.

52. Critical to the validity of the OHI form signed by Dr. *** on March 28, 2004, was the fact that Dr. ***'s OHI was attached to it, and she was relying upon it to support her

diagnosis, as he was far more qualified to opine on it than she. However, Dr. ***'s attached OHI form made no reference to ADHD, combined type (314.01). Parent acknowledged at the hearing that it was a mistake for her to complete the form signed by Dr. *** with a "combined type" designation on it, as this had the effect of overstating Dr. ***'s opinion. At most, it should have only been ADHD, inattentive type. ***(Tr. I. 157)***. Thus, as the record now stands, the only diagnosis that currently exists for Student from a physician is for ADHD, inattentive type.

53. On February 9, 2004, the FIE on Student was completed. ***(Resp. Ex. 1.1-17)***. After observation (Ms. ***, *** teacher) and testing thoroughly and competently done by Ms. *** (Collin County Special Education Co-op lead diagnostician); Dr. *** (LSSP for the Co-op); Ms. *** and Ms. *** (Co-op speech-language therapists) were considered, it was determined that student exhibited behaviors that were consistent with her diagnosis of ADHD, inattentive type. They did not say Student was eligible for special education services, only that the ARD committee needed to make that determination for her OHI. They also remarked that Student did not have the disability of an emotional disturbance. While acknowledging that she had some problem areas, they said she was within normal limits and had no language or communication disorders. In short, under either Method I or II, *** no longer met the criteria to be considered to be learning disabled, as she had been over the years since 1997. (***Resp. Ex. 1.4, 11, 13- 17; Tr. III. 91-95, 119, 132-33, 228. See also Resp. Ex. 2.1-195)***.

54. On February 10, 2004, an ARD was convened to go over Student's FIE and conduct the MDR that had been postponed from January 27, 2004 at the request of Parent. ***(Pet. Ex. 21.4-8)***. The ARD committee proposed that Student be dismissed from special education services based on the results of the FIE and their belief that, despite a possible ADHD, inattentive type condition, she did not need special education services. It was a recommendation to which Parent and the advocate strongly objected. The advocate then requested an Independent Educational Evaluation ("IEE") for Student. The ARD meeting was again recessed until the IEE was performed and the results were reviewed. The MDR was never reached, but it was not waived by the District because Student desired further assessment for Student.

55. Parent then immediately withdrew Student from school and then re-enrolled her on February 12, 2004. It was also on that day that Parent filed a request for a due process hearing with TEA. Although the placement for Student had not changed, and because of

a concern for Student's absences in ISS and her need for instruction prior to TAKS, the District agreed on February 19, 2004 to a "stay-put" from ISS back to her regular education classes.

56. Due to a number of delays, Student's IEE was not completed until March 25, 2004. It was done by ***, PhD., at the Children's Medical Center of Dallas. ***(Pet. Ex. 6.1-12)*** ("IEE" or "*** Report"). Like Dr. ***, Dr. *** was an LSSP. She spent about 6 hours with that day interviewing and testing her. ***(Tr. I. 228-29)***. Dr. *** agreed with Student's diagnosis of ADHD, inattentive type, and added that she had dyslexia. ***(Pet. Ex. 6.8; Tr. I. 234, 237, 240)***. She was very clear that Student did not have the ADHD, combined type. ***(Tr. I. 246)***. Moreover, she did not find Student to have any learning disability. Interestingly, she found that Student's math and reading scores were, more or less, in the average range ***(Tr. I. 249)***, although her reading comprehension and math were a grade level or so lower than her peer class. ***(Tr. I. 237- 39)***. The latter are less reliable indicators.

57. Dr. *** made some recommendations to minimize Student's difficulties. These seven recommendations were keyed to helping Student with her dyslexia. ***(Pet. Ex. 6.9-10)***. These included a recommendation to have a live teacher in foreign languages, shortening assignments, extending testing time, maintenance of good keyboarding skills, specialized reading instruction and accommodations for the written difficulties, taking the simplest of math courses, and, finally, bringing closure to the January 20, 2004 incident because of the stress on Student. All of these could be done in a general education setting. The *** Report was not inconsistent with the results of the District's FIE.

58. Dr. *** acknowledged that she was not familiar with the IDEA eligibility requirements for a person with dyslexia. In her report, she was referring to dyslexia as being a learning disability in a clinical context. ***(Tr. I. 253, 258)***. She felt that if the District could meet the recommendations she proposed outside of the special education program, she had no problem with that approach. ***(Tr. I. 260)***.

59. On March 26, 2004, Parent then had Student evaluated at the University of Texas at Dallas' Callier Center for Communication Disorders. ***(Pet. Ex. 7.1-5)*** ("Callier Report"). The testing and the report on any potential speech-language problems was done by Ms.***, a speech-language pathologist. The results of the Callier Report were consistent with the testing by the District in its FIE and did not contradict or undermine the District's FIE results in the areas of speech and language. ***(Tr. I. 76-77; III. 94-95)***. The

Callier Report reflected, among other things, that Student was able to manage with her speech/language skills, although she did have some deficiencies in grammar and vocabulary. Ms. *** did not believe Student had any type of speech/language disorder. In fact, in response to a question at the hearing by Student's own attorney, she candidly said that the recommendations that she made for Student could probably be accomplished in a general education setting. ***(Tr. I. 75-76, 82-84)***.

60. On March 28, 2004, Dr. *** signed the OHI form prepared by Parent.

61. On April 26, 2004, the ARD committee reconvened to consider the FIE, IEE, reports from teachers, academic performance information, and any input from Parent. ***(Resp. Ex. 5.10-49)***. Ms. Silver was now representing Student. After a thorough review of everything and an exchange of ideas and positions, the ARD committee (with the exception of Parent and her attorney) determined that Student was no longer eligible for special education services, as she no longer demonstrated an educational need for those services. It also concluded that she could receive a free appropriate public education ("FAPE") through regular education services, utilizing the Student Support Team ("SST") process of the District's dyslexia program. In this regard, it was felt that even the things being done for Student in CMC could be done by the general education teacher. ***(Resp. Ex. 5.10-49; Tr. I. 144-49 [***]; II. 2-26 [***]; 168, 171-76, 182, 184 [***]; III. 95-97 [***]; 135-37, 144-47 [***]; 217, 224-28 [***])***. No MDR was conducted in light of the District's decision that she was no longer eligible for or needed special education services.

62. Sometime later after this ARD, the parties agreed to consolidate possible issues presented at the hearing, and prior to the due process hearing, they could conduct an MDR/ARD to determine whether Student's behavior on January 24, 2004, was a manifestation of her ADHD, inattentive type or dyslexia. In agreeing to this procedure, the District did not waive its position that Student did not have a learning disability or that her OHI did not qualify her for special education services.

63. This hypothetical MDR was held on June 1, 2004. ***(Resp. Ex. 4.1-63)***. It was done so that if the Hearing Officer found that Student qualified for special education, the parties would then save the time and inconvenience of holding the MDR proceeding at a much later date in time in the 2004-05 school year.

64. At the MDR, the principal presented the disciplinary information, and thereafter received presentations by Dr. ***, Parent and Dr. ***. In opposition to the District's testimony

that Student's condition did not impair her ability to understand the impact and consequences of her behavior and the ability control it, Dr. *** said that she did not know if Student understood the impact and consequences of whether someone might *** if she ***. As an example, she said that Student considered *** a "safe" exercise because she did it *** at home to ***. She said that the family also played with *** as toys, so Student considered them to be "safe." ***(Tr. 34-35)***. The point that Dr. *** was trying to make, unusual as it might seem, is that Student may not be able to perceive the dangerousness of how the *** could be used because of her ADHD and the positive reinforcement she received at home about the ***. As to a learning disability, everyone agreed that that type of disability did not impair her ability to control her behavior. ***(Resp. Ex. 4.8- 9; Tr. III. 72)***.

65. After being presented with everything, and taking into account the factors for assessing such information, the MDR/ARD committee determined that Student's behavior on January 20, 2004, was not a manifestation of the disabilities asserted by Parent at the meeting. ***(Resp. Ex. 4.2)***. I find that the MDR/ARD committee properly conducted a manifestation determination review and used the appropriate standards required by 34 CFR §300.523 (c).

Discussion

A. General Authority

The issues raised by the Petitioner in this matter involve many important touchstones of the law concerning IDEA. Accordingly, a review of some of these guiding principles is appropriate before undertaking an analysis of the issues.

IDEA defines "special education" as specially designed instruction, at no cost to the parents, that meets the unique needs of a "child with a disability." 20 U.S.C. §1401(25). The term "free appropriate public education" ("FAPE") means special education and services that:

(a) have been provided at public expense, under public supervision and direction, and without charge;

(b) meet the standards of the State educational agency;

(c) include an appropriate preschool, elementary, or secondary school education in the State involved; and

(d) are provided in conformity with the individualized education program required under section 1414(d) of the Act.

20 U.S.C. §1401(8).

In *The Board of Education of the Hendrick Hudson Central School District Westchester County v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982), the Supreme Court interpreted for the first time the procedural and substantive requirements of IDEA. The Act was designed to allow a disabled child "to benefit" from instruction, namely, to have a "basic floor of opportunity." Thus, under FAPE, as tailored by an ARD committee and described in an IEP, the education is not the best possible education, nor one that will maximize the child's potential; rather, it need only be an education that is specifically designed to meet that child's unique needs, supported by services that will permit the child to benefit from the instruction. To this end, the IEP must be reasonably calculated to provide some benefit, which means that the benefit must be something more than a mere modicum or *de minimus*. *Board of Education v. Rowley*, 458 U.S. at 189, 192, 200-202, 207; *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 247-48 (5th Cir. 1997); *Teague Independent School District v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993); *El Paso Independent School District v. Robert W.*, 898 F.Supp. 442, 446-49 (W.D. Tex. 1995).

In *Michael F.*, the Fifth Circuit fashioned four factors to serve as indicators of whether an IEP is reasonably calculated to provide a meaningful education benefit under IDEA:

1. The program is individualized on the basis of the student's assessment and performance;
2. The program is administered in the least restrictive environment;
3. The services are provided in a coordinated and collaborative manner by key stakeholders; and
4. Positive academic and non-academic benefits are demonstrated.

Cypress-Fairbanks Independent School District v. Michael F., 118 F.3d at 253. However, in examining the appropriateness of the Community Independent School District's program in this instance, a presumption exists in favor of the District's plan for Student. As such, Petitioner bears the burden of proving that the IEP and program were not appropriate. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983).

In providing FAPE, it must be accomplished in the "least restrictive environment." This means that, to the fullest extent possible, disabled children be educated with non-disabled children in the least restrictive environment. This is frequently referred to an "mainstreaming" and is something under IDEA and the Texas law that is not unimportant or to be taken lightly.

Board of Education v. Rowley, 458 U.S. at 202; *Teague Independent School District v. Todd L.*, 999 F.2d at 128. *See also* 20 U.S.C. §1412(5)(B); 19 Tex. Admin. Code §89.1015(a)(6).

For a child to be entitled to special education services, a two-step process is involved, neither step of which is necessarily a simple exercise:

> The term "child with a disability" means a child:
>
> (i) with mental retardation, hearing impairments…, speech or language impairments…, serious emotional disturbance…, orthopedic impairments, autism, traumatic brain injury, *other health impairments*, or *specific learning disabilities*; and
>
> (ii) who, by reason thereof, *needs* special education and related services.

See 20 U.S.C. §1401(3)(A)(i)-(ii) (emphasis added); 34 C.F.R. §300.7(a).

As to the first step, ADHD, inattentive type, is categorized as an other health impairment ("OHI"). While dyslexia is identified as a "specific learning disability" under 34 C.F.R. §300.7(c)(10), eligibility for special education services for dyslexia is tempered by 34 C.F.R. §300.541(a)(1)-(2), where it states that the student must have a *severe* discrepancy between achievement and intellectual ability in seven defined areas *and* that discrepancy is not primarily the result of a visual, hearing or motor impairment, mental retardation, emotional disturbance or environmental, cultural or economic disadvantage. *See also* 19 Tex. Admin. Code §89.1040(c)(9)(A). As TEA has long noted, an identification of dyslexia alone does not automatically make a student eligible for special education services. *The Dyslexia Handbook*, Texas Education Agency, February 2001, pages 21 and 25.

The second step of the process is even more challenging and is at the very center of the issues in this matter. Texas law requires that the disability prevents "the student from being adequately or safely educated in public school without the provision of special services…." Tex. Educ. Code §29.003. Thus, in addition to having a disability, it must be shown by the child that he or she presently *needs* the special education services to progress and obtain an educational benefit. *Eric H. v. Judson Independent School District*, No. SA-01-CA-0804, 2002 WL31396140 at *22 (W.D. Tex., Sept. 30, 2002); *Venus Independent School District v. Daniel S.*, 2002 WL 550455 at *10-12 (N.D. Tex., April 11, 2002); *Student v. Clear Creek Independent School District*, Dkt. No. 242-SE-0403 (Tex. Hrng. Off. 2003); *Student v. Mineral Wells Independent School District*, Dkt. No. 193-SE-0303 (Tex. Hrng. Off. 2003). *See also J.D. v. Pawlet School District*, 224 F.3d 60, 65-66 (2d Cir. 2000).

When a manifestation determination review becomes necessary to determine whether a student's behavior was a manifestation of his or her disability, 34 C.F.R. §300.523(c) establishes the standards for the conduct of the review that the District must meet:

> *(c) In carrying out a review described in paragraph (a) of this section, the IEP team and other qualified personnel may determine that the behavior of the child was* ***not*** *a manifestation of the child's disability only if the IEP team and other qualified personnel –*
>
> *(1) First consider, in terms of the behavior subject to the disciplinary action, all relevant information, including –*
>
> *(i) Evaluation and diagnostic results, including the results or other relevant information supplied by the parents of the child;*
>
> *(ii) Observations of the child; and*
>
> *(iii) The child's IEP and placement; and*
>
> *(2) Then determine that –*
>
> *(i) In relationship to the behavior subject to the disciplinary action, the* ***child's IEP and placement were appropriate*** *and the special education services, supplementary aids and services, and behavior intervention strategies were provided* ***consistent with the child's IEP and placement****; and*
>
> *(ii) The child's disability did not* ***impair the ability*** *of the child to* ***understand the impact and consequences*** *of the behavior subject to disciplinary action: and*
>
> *(iii) The child's disability did not* ***impair the ability*** *of the child to* ***control*** *the behavior subject to disciplinary action.*

See Student v. Klein Independent School District, Dkt. No. 060-SE-1000 (Tex. Hrng. Off. 2000). When an MDR situation arises, it is the burden of the school district to demonstrate that the student's behavior in question was *not* a manifestation of that disability. 34 C.F.R. §300.525(b).

The first two issues are procedural in nature and are interrelated. The arguments advanced by Petitioner attack the appropriateness of the IEP in place on the day of the incident and challenge whether the triennial reevaluation done by the REED process on October 25, 2001, was sufficient to constitute a current assessment of Student, as of the day of the incident. On those two grounds, Petitioner argues that FAPE was not being provided Student at the time of the

incident and that the District was mandated to find that Student's behavior was a manifestation of her disability. I disagree.

B. May 5, 2003 ARD Meeting

The IEP that was in effect for Student on January 20, 2004 was developed on May 5, 2003. Parent contends that she was not given adequate notice and that the IEP was developed over her objection not to proceed with the meeting unless she was present. This event was thoroughly discussed in ¶s 21-30 of this Decision. In short, Student consented to that ARD meeting proceeding in her absence. Later, when she received a copy of the materials from that meeting, she asked for another meeting, which was then set for August 14, 2003. Parent then later said that there was no need to have the meeting, and she would contact the District in the future if a meeting was necessary. After that, she never called the District. Thus, the May 5th IEP remained unchanged. It was effectively developed under the circumstances in a collaborative manner by the key stakeholders. 34 C.F.R. §300.343-345. I find that she certainly had notice of the August 14th ARD and she consented to the IEP that was in place on the day of the incident from the May 5, 2003 ARD meeting. Accordingly, the May 5th IEP was neither inappropriate nor did it fail to provide FAPE for Student on those grounds. 34 C.F.R. §300.345(d)-(f).

C. The Triennial Reevaluation

Student had a three-year triennial reevaluation on October 26, ***. The testing that was done is reflected in ¶s 6-7 of this Decision. As a result of the testing, Student was placed in special education.

When it came time for another triennial evaluation in October ***, the Petitioner argues that the District was required to conduct a new assessment. 34 C.F.R. §300.536(b). In other words, unless an actual FIE is done every three years, you cannot have a "current" FIE. She contends that if you do not have a current FIE, then you cannot meet the first step from *Cypress-Fairbanks ISD v. Michael F.* of providing a program that is individualized on the grounds of the student's assessment. Moreover, for purposes of an MDR, you cannot get past the first step of considering all of the relevant information because the information is "stale." 34 C.F.R. §300.523(c)(1). Petitioner contends that last "real" assessment of Student was more than five years old at the time of the incident. I disagree that a complete assessment must always be done.

The ARD committee met, on October 25, 2001. After reviewing the existing evaluation data, they concluded that no new data or new assessment was necessary. ***(Pet. Ex. 18.5-18)***.

Most importantly, they concluded that Student would remain eligible for special education services.

Parent could not attend the meeting, but was advised of the outcome by telephone. After being advised of the particulars of the meeting, she agreed with the committee's assessment that no new assessment was necessary, just as she had earlier in the month. She was thereafter provided with the materials from the October 25, 2001 ARD meeting, yet never raised an objection to it or requested a reevaluation.

This manner of handling a reevaluation is known as "review of existing evaluation data" ("REED"). Under the correct circumstances, it is an acceptable way to handle the triennial reevaluation. *See generally Letter to Anonymous*, 35 IDELR 218 (OSEP 2001).

Two critical things occurred that make the REED evaluation a valid form of assessment for the triennial reevaluation. First, the committee determined that Student would continue to be considered a child with a disability and remain in special education. Secondly, despite having every right to do so for a triennial evaluation, Parent chose not to request a new assessment.
Section 300.536(b) relied upon by Petitioner must be read in proper context and in conjunction with §300.533(d). Section 300.536 provides:

> "Each public agency shall ensure —
>
> (a) …
>
> (b) That a reevaluation of each child, in accordance with §§300.532—300.535, is conducted <u>if</u> conditions warrant a reevaluation, or <u>if</u> the child's parent or teacher requests a reevaluation, <u>but</u> at least once every three years."

Section 300.533(d) provides:

> "(d) Requirements if additional data are not needed
>
> (1) If the determination under paragraph (a) of this section is that no additional data are needed to determine whether the child continues to be a child with a disability, the public agency shall notify the child's parents —
>
> (i) Of that determination and the reason for it; and
>
> (ii) Of the right of the parents to request an assessment to determine whether, for purposes of services under this part, the child continues to be a child with a disability."

Here, the District not only verbally told Parent of the determination, but Parent was also provided with the materials from the ARD meeting that subsequently notified her of the

determination and, from a review of those documents in whole, the reasons for such were made known. ***(Pet. Ex. 18.6, 16-17)***.

A REED is predicated on two things: disclosure and consent. On the disclosure side, if the school advises a parent that there is no further need for reevaluation data (particularly where the decision is to remove the child from special education), then the school must advise the parents that they have the right to request that a reevaluation actually be performed. On the consent side, that consent is effectively rejected if the parent requests the complete assessment be done. 34 C.F.R. §300.533(d)(2). If you have disclosure and consent, then you have REED.

The decision of *Student v. Houston Independent School District*, Dkt. No. 323-SE-0603 (Tex. Hrng. Off. 2003) cited by Petitioner is inapposite. In that matter, there was no REED involved. Moreover, it was undisputed that the reevaluation took place six months after the three-year deadline.

In summary, the REED was properly conducted in this matter for the triennial evaluation in October 2001. Accordingly, the reevaluation was timely and the assessment of Student was current at the time of the incident. Therefore, it does not provide grounds to invalidate an MDR nor cause the IEP to be inappropriate.

D. IEP Provided FAPE

The IEP that was in place at the time of the incident included accommodations that would permit Student access to CMC in all of her courses, except P.E., for a minimum of 15 minutes per week and to retake tests (but not finals). ***(Resp. Ex. 6)***. To determine whether FAPE is provided to a student, two factors are considered: (1) the district's compliance with the procedural requirements of IDEA; and (2) the extent to which the district designed and implemented a program that was "reasonably calculated" to enable a child to receive educational benefits. *Del Valle Independent School District v. Student*, Dkt. No. 213-SE-0301 (Tx. Hrng. Off. 2001).

The District complied with the first requirement. As to the second requirement, the four factors from *Michael F.* are the indications to use in determining whether an educational benefit provided is more than *de minimus.* Applying the *Michael F.* factors, I find that the Petitioner failed to meet her burden to establish why the IEP in this instance did not provide FAPE.

The thrust of Petitioner's evidence concerning a denial of FAPE for Student for the 2003-04 school year involves Student's failures this school year: the course in *** (only course she failed); failures on three of her six final exams her first semester and four of five her second semester after the incident occurred; and her failure of the math portion of her TAKS test.

(Resp. Ex. 7.3-4). These factors are also later used by her to establish why special educational services are needed by Student, in addition to her fear that Student might fail in the future unless special education services are continued. ***(Tr. II. 84)***.

A focus on one year's performance is too narrow and is not instructive. A look back over her educational history reveals that she had failed only one course in the previous *** grades. While an average student, she has shown educational progress that has been consistent and adequate, and I find that she has been provided a meaningful educational benefit. ***(Resp. Ex. 7.1-3)***.

The District felt Student was performing in an acceptable manner across the board except for her one "bump in the road" with ***. ***(Tr. III. 241)***. While it is acknowledged that the *** report said she would likely encounter problems in foreign languages, part of the problem in *** was she was not completing her assignments and possibly even ceasing to make a meaningful effort in the course the second semester. Finally, while she failed the math portion of the TAKS test ***(Resp. Ex. 7.4)***, it is undisputed that 41% of students across Texas did so as well. She had previously passed the math portion of the TAAS test, but the TAKS' math portion was admittedly harder and the most impacted group by it in the state were ***. In this regard, approximately 50% of *** failed the test. ***(Tr. II. 181)***. It is also interesting to note that her dyslexia did not seem to keep her from passing the reading portion of the TAKS test. ***(Tr. III. 224)***.

In the *Board of Education v. Rowley*, 458 U.S. at 200-02, the Supreme Court opined that passing marks and advancing from grade to grade is an important factor in determining the educational benefit, but does not say that just passing a test is the sole factor; other factors need to be considered on a case-by-case basis. By the same token, Petitioner cannot solely upon failures this year in *** and on some of the other final exams establish the lack of an educational benefit and why she has not received FAPE. A broader perspective of all factors over a longer period of time must be considered. *Austin Independent School District v. Robert M.*, 168 F. Supp.2d 635 (W.D. Tex. 2001). *See also Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000); *Student v. Houston Independent School District*, Dkt. No. 323-SE-0603 (Tex. Hrng. Off. 2003).

As far as the other *Michael F.* factors are concerned, it is undisputed that she was being educated in the least restrictive environment, as she was being mainstreamed in the *** grade and CMC opportunities offered to her.

Nor is there any serious question about the services being provided in a coordinated and collaborative manner by key stakeholders. Parent is a parent who has stayed actively engaged in the special education process with the District. She has consistently provided input and frequently made requests and/or suggestions about Student's programs. When Parent was not in attendance at ARD meetings, she was always included in the process by telephone and the materials were always made available to her for review. The fact that she might disagree with a decision by the ARD committee does not mean there was a lack of coordination and collaboration by the key stakeholders in the process. *See generally Eric H. v. Judson Independent School District*, at *12. From a review of all of the ARDs, I find that the District was diligent in insuring input from all school and parent sources for Student in determining what her IEP would be each year and then following through in implementing the IEPs.

I am also very persuaded by the compelling testimony of the District teachers and administrators about the positive academic and non-academic benefits Student has received. They are the ones who had the most immediate knowledge of Student's performance at school. While Student is by no means in the top tier of her class academically, she has been a consistent, performer in the average category over the years.

Ms. *** was Student's English teacher. Student performed quite well in her class (a *** average for the year) and Ms. *** considered her one of her very good students. ***(Tr. I. 136)***. As an aside, Ms. *** has a son who is dyslexic, and I feel she is in a particularly good position to evaluate Student. ***(Tr. I. 146)***.

The measure of the student's performance is not limited to just academics. *Venus Independent School District v. Daniel S.* at *11. Student was not a behavioral problem at school. Until the *** incident, she had not been the subject of anything other than typical in-classroom discipline. When told to stop talking in class or to repeating an instruction to her to do an assignment, Student promptly complied. In this and other matters, such as her attentiveness in class, Student was little different from the other teenage students. (***Tr. I. 123-27)***. Ms. *** never saw her lose control in the classroom. ***(Tr. I. 176)***. In fact, Ms. *** considered Student to be an organizer and a leader of her peers in classroom and academic activities. (***Tr. 125)***. She had a positive attitude and was intending to try out to be a cheerleader this past spring until these problems arose and she missed the tryouts.

One of the courses that Student was having some difficulty in was IPC that was taught by Ms. ***. Ms. *** was out on maternity leave part of the first semester. When she returned in the second semester, Student's cycle grades improved. Because of the poor grade on the final

exam, her final average for the year was a ***. However, Ms *** felt from observing her daily work and participation in class that she understood the material. ***(Tr. I. 22-23)***.

Mr. *** was her math teacher. ***, he felt from observation of Student's daily work and participation in class that she understood the material. Student received a final grade of *** in the course.

It could also be said that Student was underutilizing her placement in CMC and not doing all the retakes, yet she was still doing acceptable in everything except *** and that this is another indicator of FAPE, an education that could be even better if she used all the resources. ***(Tr. III. 241)***.

In summary, then, I find that Student received positive, demonstrable, and meaningful academic and non-academic benefits under her IEP.

E. Removal From Special Education

At the time of the incident, Student was classified as learning disabled and she was receiving special education services. No assessment for Student was indicated and the District had no plans to do so until her triennial evaluation in October 2004. ***(Tr. II. 202, 205)***. It was the request of Parent at the January 27, 2004 ARD meeting that caused the District to perform an FIE on Student that ultimately led the District to conclude that she should be removed from special education services. That FIE demonstrated that she no longer had the learning disability that was the reason for her receiving special education services in the first place. ***(Resp Ex. 1.1-17)***. While the FIE reflected that Student did exhibit behaviors compatible with ADHD, inattentive type, an ARD concluded she did not need special services for that condition.

The record demonstrates that the FIE was very thorough, covered all necessary and appropriate areas, and was conducted and interpreted by highly qualified personnel who had no pre-conceived idea to "test until they got the result they wanted," as was suggested by Parent The wide variety of assessment tools and strategies to gather relevant functional and developmental information included the following:

- Observation by a teacher, Ms. ***
- Observations by the test administrators as part of their testing
- Children's Depression Inventory
- Revised Children's Manifest Anxiety Test
- Wisconsin Card Sorting Test
- Behavior Assessment System for Children – Teacher, Parent & Self Reports
- Forer Structured Sentence Completion Test
- Wechsler Intelligence Scale for Children – IV.
- Wechsler Individual Achievement Test – II.

- Clinical Evaluation of Language Fundamentals – Fourth Edition
- Oral and Written Language Skills
- Informal review of grades and school records

The District's multidisciplinary team even considered whether Student could qualify for special education under Method II. It determined that she did not qualify under that method either. ***(Tr. III. 217)***. Interestingly enough, when going back and looking at Student's CIA from ***, the team detected an error in the testing done at that time. If the test had been done properly, then Student might never have been placed in special education in the first place. ***(Tr. III. 255)***.

The testing Parent had done on Student at the Children's Medical Center (*** Report) and at the University of Texas at Dallas (*** Report) pretty well confirmed the results found in the FIE. It should be noted that the team found an error in the *** Report that caused the degree of Student's dyslexia to be somewhat overstated. ***(Tr. III. 223)***.

The District's FIE testing was very thorough and extensive and provides an accurate picture of Student that is consistent with her grades and observations of her teachers. Moreover, the Petitioner failed to prove that Student had a severe discrepancy between achievement and ability that is not correctable without special education. 34 C.F.R. §300.543(a)(6).

Accordingly, I find that the District's FIE of Student was proper, thorough and complete, and the ARD committee was justified, based on that FIE, in removing Student's IDEA eligibility of learning disability.

F. Need for Special Services

ADHD, inattentive type, and dyslexia are disabilities. However, merely having either one of those conditions does not qualify a student for special education services. There must be a demonstrated need for those services. In fact, there must be shown to be a present need for those services, not that something might occur in the future, such as the fear by Parent that Student might fail a course in the future. ***(Tr. II. 84)***. *Eric H. v. Judson Independent School District*, 2002 WL 31396140 at *2; *Austin Independent School District v. Robert M.*, 168 F. Supp.2d at 639; *Student v. Pasadena Independent School District*, Dkt. No. 324-SE-699 (Tex. Hrng. Off. 1999).

After all is said and done, this is the central controversy in this matter. After evaluating Student's FIE, IEE and other materials, was the ARD committee on April 26, 2004 in error for concluding that she was not in need of special education services for her dyslexia and ADHD, inattentive type? Was the ARD committee in error for concluding that Student's needs could be met, and that she be provided FAPE, through help in a regular classroom setting outside of

special services? I do not believe so. Stated another way, I find that Petitioner failed to meet her burden of proof in this regard to show that the ARD committee's decision was inappropriate and that Student's needs can only be met with special education services.

Parent is without a doubt a devoted mother, always seeking to protect the best interests of her child, especially where it involves education matters. As previously noted, she is concerned about the possibility that Student might fail in the future without having access to special education services. Her underlying argument for this pertains to Student's failure in ***, the TAKS math test and troubles with Student taking final exams.

First of all, the focus must be on Student's present needs, not on something in the future. Secondly, these "failure" problems of a limited nature fail to support a "need" for special education services for the same reasons they failed to support her argument earlier in this Decision that the IEP in place was not providing her with FAPE.

The Texas Education Code requires that whatever disability a student has must prevent that student from being adequately or safely educated without the provision of special services. Tex. Educ. Code §29.003. Before referring a student for an evaluation for possible special education services, a district must first consider all other support services available to address the situation. 19 TAC §89.1011. The intent of these provisions is clear. Referral of a student to special education for problems that he or she may be having in the classroom is not to be done hastily; otherwise, the special education system's resources could be quickly overwhelmed. ***(Tr. II. 182-83)***. I find that the Petitioner has not demonstrated that Student's education performance has been adversely affected by either her ADHD or dyslexia, to the point where it is necessary that she must have special education services to be adequately educated in public school.

Student's teachers and principal who testified at the hearing were unanimous in their opinion that, despite Student's ADHD, inattentive type, and dyslexia (degree unknown), she could benefit from the education provided by the District without special education services. ***(Tr. I. 145-46; II. 25-26; II. 179-85)***. This is because the accommodations Student had been receiving as a result of her IEP, as well as the ones she had previously received, were generally being extended to most of the high school general student population as well (retaking of tests, breaking of questions into smaller pieces, extra time to do assignments, make-up of homework, obtaining study guides). ***(Tr. I. 145, 166-68; II. 13, 20, 25-26, 55)***.

The *** Report raised the issue of the dyslexia and Dr. *** made seven recommendations about Student. All of these recommendations mirror things that could be done

for Student outside of special education. In fact, Dr. *** said that if the school could meet her recommendations outside of special education, then it was acceptable to her. ***(Tr. I. 260)***.

Likewise, in the *** Report, Ms. ***, said her recommendations could probably be accomplished in a general education setting. ***(Tr. I. 75-76, 82-84)***.

Dr. **** the LSSP for the Co-op, was the most qualified, objective and persuasive witnesses in this matter. After her testing, she did not believe that Student's ADHD and dyslexia were severe enough to merit special education services and that Student's needs could be met through accommodations and services provided through the general education curriculum. ***(Tr. III. 136-38, 144-47)***.

Parent's biggest concern seems to be with Student's dyslexic condition. Ironically, the high school principal ***, Mr. ***, previously served as a teacher at the Shelton School in Dallas. It is a private school for dyslexic and ADHD students, so he had significant experience with the needs of these students. ***(Tr. II. 169)***. He agreed with Dr. *** that Texas schools have developed two separate programs for addressing these types of problems. ***(Tr. II. 171)***. Whether it be working with the *** SST (student support team) to implement study skills help or doing something more complex such as the Stephenson Reading Program, or using the resources of the District's dyslexia program, or even having a referral for a §504 accommodation, all of these options could be provided to *** outside of the special education program. ***(Resp. Ex. 24.1-7; Tr. II. 173-76, 184)***. *See generally Student v. Mineral Wells Independent School District*, Dkt. No. 193-SE-0303 (Tex. Hrng. Off. 2003).

Parent is concerned that this approach would be totally devoid of the accountability that would otherwise be there if Student were in a special education program and operating under an IEP. Parent is particularly troubled by any use of services under the guise of §504 of the Rehabilitation Act, 29 U.S.C. §794, because there is no IEP required under it.

In this regard, she cites the case of *Yankton School District v. Schramm*, 93 F.3d 1369 (8th Cir. 1996). The case is inapposite because the student in that case was eligible for both IDEA and §504 and needed the services for her orthopedic impairment. Thus, the school district had to comply with both provisions. It could not opt out for the less restrictive requirements of §504. But that is not the case here, as Student is not eligible for services under IDEA because she does not have a present need for the special education services.

In summary, I find that the accommodations in the general education context can provide Student with FAPE and special education services are not required.

G. MDR

The MDR/ARD held on June 1, 2004 was handled in a most unusual way by the parties to meet equally as unusual circumstances. The parties wanted to conduct a hypothetical ARD so that it would not have to be done after this Decision if the Hearing Officer decided that Student was eligible and needed special education services. In light of the above rulings, any issues as to the MDR may be moot. However, out of an abundance of caution, and to the extent it is necessary, I address the MDR issues raised.

I find that the District did not waive its right to ultimately conduct the MDR on June 1, 2004. Further, I find that the ARD committee at *** properly conducted a manifestation determination review on June 1, 2004 concerning Student relative to her behavior of *** that was the subject of the disciplinary action; that the committee used the appropriate criteria; and that the committee properly considered and determined in all respects that Student's disabilities did not impair her ability to either understand the impact and consequences of *** nor impair her ability to control that behavior.

As to the supposed waiver of the MDR matter, Superintendent *** made his decision on Student's appeal of the DAEP decision on February 16, 2004. The MDR obviously occurred more than 10 days thereafter. 34 C.F.R. §523(a)(2). However, the delays were the result of Parent's requests for additional assessments. An MDR cannot be conducted unless there are current and complete assessments. 34 C.F.R. §523(c)(1). A district should not be penalized for accommodating a parent's request of this nature. *Student v. Poteet Independent School District*, Dkt. No. 382-SE-898 (Tex. Hrng. Off. 1998). In any event, Parent now concedes that the District did not waive the right to conduct the MDR. ***(Tr. II. 104)***.

At the time of this incident, Student was under IDEA. It was not until the April 26, 2004 ARD meeting that her status changed. Until then, she was eligible for special education services as a result of being learning disabled. At the "hypothetical ARD" on June 1, 2004, she was to be evaluated on two disabilities: the learning disability and the ADHD, inattentive type, the latter of which became known after the incident. No opinion is expressed as to bringing the later discovered disability into consideration. It is a moot point, however, because the committee properly concluded that her behavior of *** was not a manifestation of either disability.

The MDR/ARD committee carefully followed the steps required of it by 34 C.F.R. §300.523(c)(1) and (2). Under subsection (1), it reviewed her evaluations and diagnostic results, regardless of whether they were originated before or after the incident, the observations of Student by the concerned persons and her IEP placement. ***(Resp. Ex. 4.1-63)***. For the reasons

stated earlier in this Decision, her October 25, *** triennial evaluation was current because of a REED.

Most of the testimony at the MDR, as well as this hearing, focused on subdivisions (ii) and (iii) of 34 C.F.R. §300.523(c)(2):[3]

A. Did Student's ADHD and/or learning disability impair her ability to understand the impact and consequences of ***?
and
B. Did these disabilities impair her ability to control that behavior?

As far as any learning disability, the parties ultimately agreed at the MDR that that learning disability did not impair Student's ability to understand the consequences of and control her behavior. ***(Resp. Ex. 4.7; Tr. III. 152)***. The primary witness for Student about how her ADHD, inattentive type, supposedly impaired her ability to understand the impact and consequences of her behavior and her ability to control her behavior was Dr. ***. As previously noted in the Decision, Dr. *** stated that she was not sure that Student could truly understand the consequences of *** because of her ADHD. Secondly, she also opined that the ADHD impaired Student's ability to understand the consequences of her behavior and to control it because of *** at home as toys and to ***. Dr. *** said she believed that Student probably assumed it was a "safe activity" to use *** at school as well and no one would be hurt in the process.

First, Dr. ***'s unusual examples to support her opinion are not anecdotal of anything in Student's educational environment. Second, the analysis of the mental state of Student relative to *** and how that translates to the current incident seems more suited for a psychiatrist than a physician who is board certified in internal medicine. Thus, Dr. ***'s opinion testimony on these issues to be of questionable foundation, marginal reliability and pressing the envelope of credibility.

If Student could ***, logic compels a decision that her ADHD did not impair her ability to understand the consequences of that behavior. It was a calculated, premeditated act by Student. ***(Tr. II. 198)***.

In contrast, the District's witnesses – Ms. ***, Mr. ***, Ms. *** and Dr. *** – provided more education-pertinent, credible, persuasive and reasoned opinions on the "understanding" and "control" issues. ***(Tr. I. 162-64, 176; II. 198, 258; III. 111, 152-56)***.

Ms. *** testified about student's ability to control her behavior in the classroom and how she could plan and strategize in the classroom. While she also acknowledged that Student would sometimes act without thinking or would occasionally be inattentive, she said it was no more so than any other teenager.

Ms. ***' testing revealed that Student did not have any problems with pragmatic judgment. Pragmatic judgment deals with a person's ability to interpret a social situation and to act within that situation. ***(Tr. III. 110-11)***. The ADHD did not impair Student's ability to assess and appreciate and react within that situation.

Dr. *** also gave very persuasive testimony on the understanding and control issues. She said Student could be adequately focused much of the time. Importantly, she pointed out that ADHD, inattentive type, lacks significant components of compulsivity. ***(Tr. III. 152-56)***.

Ms. *** discussed that Student was cognitively intact and could set goals and work toward them, which included trying out for cheerleader. She also gave another example of Student's forethought, intent and planning that involved a coupon-saving project that resulted in a higher grade. ***(Tr. III. 239-40)***.

These examples by District personnel considered, the Petitioner argues that the District used incorrect standards on the "consequences" and "control" issues, and thus, the determination by the ARD committee that her behavior was not a manifestation of her disability is necessarily void. By the way the witnesses phrased some of their answers, Petitioner assumes that the witnesses were answering in the context that Student's ADHD prevented her from being able to understand the impact and consequences of her behavior, as opposed to the "impairs one's ability to understand or control" standard currently required in 34 C.F.R. §300.523(c). Petitioner also cites the decision of *Student v. Klein Independent School District*, Dkt. No. 060-SE-1000 (Tex. Hrng. Off. 2000) as controlling on this issue.

I find that the District used the correct standard in this instance where the focus is on the ADHD impairing Student's "ability" to understand and control. The questions posed to the witnesses at the hearing by the attorney for the District used the correct standard. A fair reading of the responses by the witnesses reflects that they correctly understood that standard and attempted to provide anecdotal evidence and opinions in response to the questions as best as they could. Although perhaps not as pointedly and specific as would be desired in a perfect world, I

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[3] As far as subdivision (i) is concerned, I find that the IEP and placement on the date of the incident were appropriate and the special education services provided were consistent with Student's IEP and placement.

find they were responding to the "impaired" standard. The substance of their answers here prevails over the form of them.

In *Klein ISD*, the ARD committee used an MDR form that contained questions predicated on standards that were used before the instant standards enacted in 1997. Thus, in *Klein ISD*, they asked the wrong questions and got the wrong answers. That is not the case here.

The *Klein ISD* decision is also inapposite for another reason. In *Klein ISD*, the student had ADHD, combined type. He was involved in a spontaneous, impulsive biting incident, aggravated by the fact that he had not taken his medication for it that morning. Student's ADHD is the inattentive type, and it does not contain the marker of compulsivity as does the combined type, nor do the facts of the *** incident here lend themselves to a conclusion that her behavior was in any way compulsive.

H. Placement in DAEP

Referencing Texas Education Code §37.009(c) concerning instances of placing students in an alternative education program for a period that extends past the end of the school year (2003-04), the Petitioner contends that a special showing must be made to justify the placement and that no usual purpose can now be served by the placement, since the school year in which it happened has now passed. I am not persuaded that I have jurisdiction under IDEA to rule on the issue, and, accordingly, I will refrain form doing so.

Conclusions of Law

1. At the time of the incident in question, Student was a student eligible for special education and related services under the provisions of IDEA, 20 U.S.C.§1400, *et. seq.*, and related statutes and regulations.
2. The Community Independent School District is the local education agency responsible for providing Student's free appropriate public education.
3. The District had the burden of demonstrating that Student's behavior *** was not a manifestation of her disability, which in this case was ADHD, inattentive type. In so doing, the District is required to use the proper standards of 20 U.S.C. §1415(k)(4) and 34 C.F.R.§300.523(c). Using the correct standards, the District established by a preponderance of the evidence that it properly determined that her ADHD did not impair her ability to understand the impact and consequences of her behavior nor did it impair her ability to control her behavior in question. Accordingly, the June 1, 2004, MDR/ARD for Student was appropriate.

4. Parent was given effective notice of the August 14, 2003 ARD meeting and she consented to the IEP that was developed at the May 5, 2003 ARD meeting. The Petitioner failed to show by a preponderance of the evidence that the IEP from the May 5, 2003 ARD meeting was inappropriate. 34 C.F.R. §300.345 (d)-(f).

5. The triennial reevaluation conducted on October 25, ***, was handled properly through a review of existing evaluation data and the reevaluation was thus timely and current as of the time of the incident in question. 34 C.F.R. §300.532-536.

6. The Petitioner failed to meet its burden of proof and did not establish that the IEP in place at the time of the incident failed to provide Student with FAPE. The proposed program and placement for the 2003-04 school year was appropriate and reasonably calculated to provide Student with the requisite educational benefits. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

7. The District's FIE of Student on February 9, 2004 was properly and thoroughly completed. The District did not err in removing Student from special education. She no longer demonstrated a learning disability, and the District complied with IDEA in the removal of that disability. 20 U.S.C. §1401(3)(A); 34 C.F.R. §300.7(a); 34 C.F.R. §300.541(a)-(b); 34 C.F.R. §300.543(a)(6).

8. The ADHD, inattentive type, and dyslexia of Student do not require special education services. Petitioner failed to establish by a preponderance of the evidence a present need for those special education services in order to progress and obtain an educational benefit. 20 U.S.C. §1401(3)(A).

9. The Hearing Officer is without jurisdiction in this instance to consider the issues arising in this matter under Texas Education Code §37.009(c) about whether the placement of Student in alternative placement can, or should be, extend past the 2003-04 school year.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** that Petitioner's requests for relief are **Denied**.

It is further **ORDERED** that all relief not specifically granted is **Denied**.

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

SIGNED AND ENTERED this 26th day of August, 2004.

Original signed by Mr. Rickman

Jess C. Rickman III

Special Education Hearing Officer

DOCKET NO. 202-SE-0204

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

SYNOPSIS

ISSUE: Whether parent was given notice of May 5, 2003 and August 14, 2003 ARD meetings?

Whether parent consented to the IEP that was developed at the May 5, 2003 ARD meeting:

Held: For school district. CISD gave proper notices on both occasions. The student did not deliver the first notice to the parent. The district made an interim call and also contacted parent on the day of the ARD. After the district explained what was to be covered, the parent consented to the meeting proceeding without her. After receiving all the materials from that meeting, she later requested another ARD meeting, which was set for August 14, 2003. She then chose to cancel it and did not seek to have the IEP developed on May 5, 2003 changed. Thus, proper notice was given, the parent consented to the meeting proceeding and consented to the IEP. The IEP was thus appropriate. The IEP was thus developed in a collaborative manner by the key stakeholders.

Cite: 34 C.F.R. §300.345(c)-(f)
19 T.A.C. §89.1045

ISSUE: Whether a student must have an FIE every three years?

Held: For the district. A triennial evaluation for student was scheduled for October ***. When the ARD committee met it was determined that no new data was necessary and the student would remain eligible for special education services. The parent consented to this REED, as she did not request a reevaluation after being advised of the ARD committee's determination. This REED constituted a timely reevaluation. The REED was properly conducted and the FIE in effect at the time of the incident was current.

Cite: 34 C.F.R. §300.533(d)
34 C.F.R. §300.536(b)

ISSUE: Whether the IEP for school year 2003-04 provided FAPE for the student?

Held: For the district. Applying the standards of *Cypress-Fairbanks Independent School District v. Michael F.*, the parent failed to meet her burden of proof, where she primarily relied on the student failing a foreign language course, having difficulty in passing final exams in one school year and her not passing a portion of the TAKS exam. The IEP was reasonably calculated to, and did, provide student with more than a mere modicum of educational benefit.

Cite: 20 U.S.C. §1401(25)
34 C.F.R. §300.346
Cypress-Fairbanks Independent School District v. Michael F., 118 F.3d 245 (5th Cir. 1997)

ISSUE: Whether the student's termination of eligibility for special education services was proper?

Held: For the district. At the time of the incident, the student was entitled to special education services as a result of her learning disability. In January 2004, the parent demanded an FIE, which the district completed within 10 days. The FIE was thorough and complete and demonstrated that she was no longer learning disabled. The district was proper in removing her disability.

Cite: 20 U.S.C. §1401(3)(A)
34 C.F.R. §300.7(a)
34 C.F.R. §300.541(a)-(b)
34 C.F.R. §300.543(a)(6)

ISSUE: Whether the student had a need for special services.

Held: For the district. The new FIE and IEE for the student revealed that she had ADHD, inattentive type, and dyslexia. Upon evaluation, the ARD committee determined that the student was not eligible for special education services and that her needs could be met by the district outside the area of special education. The parent failed to meet her burden of proof to show that the district was in error in its decision.

Cite: 20 U.S.C. §1401(3)(A)
Tex. Educ. Code §29.003

19 T.A.C. §99.011

ISSUE: Whether the student's conduct in *** was not a manifestation of her disability?

Held: For the district. The district met its burden of proof in demonstrating that the student's behavior was not a manifestation of her ADHD, inattentive type, or learning disability. In the process, the district used the correct standards pertaining to whether the disabilities impaired her ability to understand the impact and consequences of her behavior and impair her ability to control that behavior.

Cite: 20 U.S.C. §1415(k)(4)
34 C.F.R. §300.523(c)(2)

ISSUE: Whether the hearing officer had the authority to rule on the amount of time a student could spend in an alternative education program if the student's time there extended past the school year in which it occurred.

Held: For the district. The hearing officer did not believe he had authority under IDEA to modify the behavioral placement that was controlled by the Texas Education Code.

Cite: 20 U.S.C. §1415(b)(6)
20 U.S.C. §1415(f)
Tex. Educ. Code §37.009(c)