BEFORE A SPECIAL EDUCATION HEARING OFFICER FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

STUDENT, b/n/f/ PARENT,	**§**	
Petitioner	**§**	
	§	
v.	**§**	**DOCKET NO. 139-SE-0210**
	§	
AUSTIN INDEPENDENT	**§**	
SCHOOL DISTRICT,	**§**	
Respondent	**§**	

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Statement of the Case

Student and the student's grandparent/guardian, *** (collectively referred to as "the student" or "Petitioner"), bring this due process complaint pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §1400, *et seq.*, against Austin Independent School District ("the district" or "Respondent").

Petitioner was represented by Matthew L. Finch, an attorney in San Antonio, Texas. Respondent was represented by Cynthia S. Buechler, an attorney with the firm Buechler & Associates, P.C., in Austin, Texas.

Petitioner filed his due process request on February 14, 2009, and by agreement of the parties and order of the hearing officer, the two-day hearing occurred in the offices of the district on May 12-13, 2010. Counsel for the parties were granted their request to file written closing arguments and agreed that this decision would be timely issued on or before July 19, 2010, in accordance with the regulatory timeline. The issues for hearing were as follows:

1. Failure to timely evaluate and identify the student's need for special education services in all areas of disability, including assessment for a Learning Disability ("LD") in Reading and Written Expression, occupational therapy ("OT") services, and assistive technology ("AT");

2. Denial of a free appropriate public education ("FAPE") to the student by the inadequate development of an individualized education program ("IEP"), failure to conduct a functional behavioral assessment, and failure to develop a behavioral intervention plan for the student;

3. Failure to provide an appropriately restrictive placement for the student that satisfies least restrictive environment concerns and enables the student to make meaningful academic and emotional progress by means of individualized programming, accommodations, considerations, and IEP development specific to the student's unique needs; and,

4. Failure to provide appropriate related services for the student, including tutoring to address areas of deficit, counseling, a mentor, and other miscellaneous services.

As relief, Petitioner sought compensatory education and related services of tutoring, counseling, and/or private placement services, including private tutoring during the summer of 2010 in areas of identified deficits and private counseling for the student and family. Petitioner additionally sought: a) a full and individual educational evaluation ("FIE") at district expense; b) assessment of AT, OT, and physical therapy ("PT") needs; c) consideration of Petitioner's independent educational evaluation ("IEE") at a meeting of the Admission, Review, and Dismissal Committee ("ARDC") with the evaluator invited at district expense to give input to the ARDC; d) reimbursement of appropriate fees and costs, including out-of-pocket expenses for the IEE; e) a requirement for the district to hold an annual staff meeting to address the student's IEP and to address appropriate training for school staff working directly or indirectly with the student; and, f) any and all other remedies that Petitioner may be entitled to by law.

Based upon the evidence and argument admitted into the record of this proceeding, the Hearing Officer makes the following findings of fact and conclusions of law:

Findings of Fact

Background

1. Petitioner is a ***-year-old student in the *** grade who resides with his maternal grandmother within the jurisdictional boundaries of the district. [Petitioner's Exhibit ("P.Ex.") 1; Respondent's Exhibit ("R.Ex.") 1; Transcript ("Tr.") at 275 and 319].

2. Petitioner's grandmother obtained custody of Petitioner at age nine months. Petitioner had *** surgery at 15 months ***. ***. At age three years, Petitioner was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). Petitioner has a history of asthma. [R.Ex. 3; Tr. at 171, 286, and 306].

3. Petitioner has a *** as a result of his *** surgery. [P.Ex. 1 at 3; Tr. at 352].

4. Based on numerous interactions with and statements by Petitioner and his aunt to district staff, Petitioner received care from his great-aunt from October 2009 until the time of the due process hearing in May 2010. Although Petitioner's grandmother can take care of the student "most of the time," her chronic health issues prevent her from being able to transport the student to school, causing her to rely on the help of extended family to take care of the student. [Tr. at 279-280 and 502-503].

5. Petitioner's grandmother has concerns about Petitioner's feeding, toileting, and dressing issues. Petitioner, according to his grandmother, buttons his shirt incorrectly and puts pants with an elastic waistband on backwards. [Tr. at 174-175 and 287-288].

2008-2009 – * Grade School Year**

6. In 2008, Petitioner transferred into the district from Pflugerville Independent School District as a general education student for the *** grade. [R.Exs. 3 and 16].

7. During the *** grade, Petitioner made passing grades in all subjects, passed the Texas Assessment of Knowledge and Skills ("TAKS") Math on the first administration, and passed the TAKS Reading on the second administration without testing accommodations. [R.Exs. 16 and 17; Tr. at 206].

8. Petitioner's teacher and the reading specialist consulted regularly throughout Petitioner's *** grade year. Because both educators believed Petitioner could benefit from extra reading support, Petitioner began receiving small-group reading support in the reading lab every day for 30 minutes. [Tr. at 205 and 246-248].

9. The reading specialist and the *** grade teacher on occasion observed classic ADHD behaviors from Petitioner, such as fidgeting, difficulty staying focused for an extended period of time, and difficulty completing his work. These behaviors did not occur on a daily basis. [Tr. at 245-246].

2009-2010 – * Grade School Year**

10. Petitioner's neurosurgeon saw Petitioner on September 9, 2009. After hearing concerns from Petitioner's grandmother about Petitioner's school performance, the neurosurgeon attempted to contact the school directly to have Petitioner classified as Other Health Impaired ("OHI"). Unable to reach the school counselor, the neurosurgeon spoke with the school principal. The principal promised to investigate what needed to be done with the school counselor and then get back in touch with the grandmother. The neurosurgeon told the principal to call back if there was additional paperwork that needed to be filled out by the neurosurgeon. During the office visit, the neurosurgeon wrote a prescription for neuropsychological testing of Petitioner in order to qualify as a student with OHI, to be delivered to the school by Petitioner's grandmother. [P.Ex. 19; Tr. at 530-532].

11. Petitioner's grandmother delivered the prescription from the neurosurgeon to the campus office on September 10, 2009. The office secretary made a copy that became part of Respondent's cumulative file for the student. [P.Ex. 19; Tr. at 291-293].

12. No one from the district followed up with Petitioner's grandmother regarding the neurosurgeon's prescription for neuropsychological testing of Petitioner. [Tr. at 294].

13. Petitioner's grandmother approached Petitioner's *** grade teacher regarding testing of the student. Petitioner's teacher explained the district's response to intervention ("RTI") process, referred to by the district as the IMPACT process. Petitioner's teacher referred the student to the IMPACT team and the first meeting, according to written minutes, occurred on September 30, 2009. Petitioner's grandmother was not invited to this meeting. [R.Ex. 15 at 1-8; Tr. at 74, 302, and 376-377].

14. The educational diagnostician for Petitioner's campus discussed the grandmother's desire for testing with his teacher in September 2009. The teacher received the educational diagnostician's phone number and gave it to the grandmother, but the grandmother and educational diagnostician did not speak by telephone. [Tr. at 129 and 382].

15. Petitioner's *** grade teacher informed the IMPACT committee that Petitioner's grandmother sought testing of Petitioner. Petitioner's teacher interpreted this request to be for special education testing rather than the testing that every student received at the beginning of the year. [Tr. at 413 and 417].

16. Petitioner's *** grade teacher understood that the IMPACT process was an absolute requirement, according to the principal, before special education testing could begin. [Tr. at 417].

17. Petitioner's *** grade teacher reported no concern over Petitioner's self-help skills. Although Petitioner from time to time has dressing issues like all *** grade boys, such as forgetting to zip up a zipper, his self-help skills were comparable to other students in his class. He exhibited no problems dressing or with toileting issues. [Tr. at 390 and 409-410].

18. Petitioner continued to receive specialized instruction from the reading specialist throughout his *** grade year. [Tr. at 228-229].

19. Petitioner's *** grade classroom had access to four computers. [Tr. at 453].

School Nurse

20. Petitioner's school nurse had kept ADHD medication for Petitioner in the nurse's office since September or October 2009. [Tr. at 347].

21. Petitioner's grandmother expressed concern about Petitioner to the school nurse early in the Fall 2009 semester. On September 21, 2009, Petitioner's grandmother gave written consent to the school nurse for release of medical/health records from Petitioner's neurologist and neurosurgeon. The purpose as stated on the release was on-going "case management." When the school nurse sent out the requests on September 23, 2009, the neurologist and neurosurgeon forwarded the requested records by October 16, 2009. [P.Exs. 3 and 18; Tr. at 259-260 and 347-348].

22. No one from the district followed up with the grandmother about the medical/health records requested by the school nurse. [Tr. at 291].

23. At the request of the assistant principal, the school nurse made copies of Petitioner's medical/health records in October or November 2009 when all records had been received. [Tr. at 358-360].

Independent Testing

24. Petitioner's grandmother pursued independent testing of Petitioner by Austin Child Guidance Center in September 2009. Petitioner's grandmother had concerns about Petitioner's

inattention as well as his reading and writing skills. The testing took place on September 29, 2009, and the written report was issued on October 8, 2009. [P.Ex. 1; Tr. at 301].

25. The October 2009 independent testing report detailed cognitive, academic, and neuropsychological testing of Petitioner. On the Wechsler Intelligence Scale for Children, Fourth Edition ("WISC-IV"), Petitioner fell within the *** range of abilities. However, the General Ability Index ("GAI") showed significantly higher ability than the full-scale intelligence functioning, placing him in the *** range of abilities. The written report also noted Petitioner's relative weakness in processing speed. The evaluation assessed Petitioner's reading skills in the *** range on Broad Reading on the Woodcock Johnson Test of Achievement, Third Edition ("WJA-III"). On the Gray Oral Reading Test, a test of reading ability that requires oral reading and multiple choice completion, Petitioner fell in the *** overall range at the *** percentile with reading speed at the *** percentile or *** range. [P.Ex. 1].

26. Petitioner's independent testing assessed Petitioner's math skills using the WJA-III. In Broad Mathematics, Petitioner scored in the *** range, a score relatively weaker than expected given his overall cognitive functioning. Petitioner's Dysgraphia, low average processing speed, and low orthographic recall likely impacted Petitioner's score in the *** range on Math Fluency. Based on this information, the evaluating psychologist did not determine a Math Disorder, but instead suggested ongoing monitoring of Petitioner's math skills. [P.Ex. 1 at 8].

27. Petitioner exhibited difficulty with cognitive flexibility, self-monitoring, initiation, behavioral productivity, planning and organizing visual tasks, and idiosyncratic reasoning skills, as reported in the independent testing report. The evaluating psychologist gathered responses from Petitioner's great-aunt, teacher, and self-report on the Behavior Assessment for Children ("BASC-2"). On the BASC-2, his teacher's responses indicated a significant level of learning problems, with relatively more atypical or unusual behaviors for Petitioner than other students his age. [P.Ex. 1 at 12].

28. The evaluating psychologist concluded that Petitioner demonstrated ADHD, a primary reading disability of Dyslexia and a secondary LD of Basic Reading, as well as a primary developmental coordination disability of Dysgraphia. Secondary to Dysgraphia and Dyslexia, the psychologist determined Petitioner had an LD of Written Expression. [P.Ex. 1].

29. Petitioner's independent testing report recommended school Section 504 services for Dyslexia. The report included four pages of specific recommendations appropriate for the school setting, to address reading fluency and comprehension skills, Dyslexia, and ADHD. For subjects with a significant reading and writing component, the evaluating psychologist recommended tutoring and/or a "study buddy" peer tutoring as needed. [P.Ex. 1 at 15-18].

30. Petitioner's independent testing report recommended OT for Petitioner, suggesting an OT evaluation for examination of fine motor skills used in the writing process and for the remission of Dysgraphia. The report suggested two possible providers for sources for evaluation if an occupational evaluation was not available through the school system. [P.Ex. 1 at 17].

October 2009

31. Petitioner's grandmother did not share the September 2009 independent testing report with Respondent until January 19, 2010. [P.Exs. 10, 11- Tape 1; Tr. at 471].

32. Petitioner received failing grades in three subjects at the end of the first nine-week grading period of Fall 2009 in ***, ***, and ***. [R.Ex. 16].

33. On October 21, 2009, the school principal chaired a second IMPACT meeting as the campus IMPACT coordinator. The campus educational diagnostician attended, but Petitioner's grandmother was not able to attend. Petitioner's grandmother gave permission to go ahead with the meeting. Participants discussed the grandmother's desire for testing, reviewed recent assessment data, wrote goals and objectives for Petitioner, and discussed teacher accommodations for the student's organizational skills. The principal prepared the written documentation of this meeting, including a comment area showing that the information was conveyed to Petitioner's grandmother on or about October 23, 2009. The IMPACT committee planned to seek consent from the grandmother to implement Section 504 accommodations. [R.Exs. 9, 14, and 15 at 9; Tr. at 103-105, 233-234, 377-378, and 468].

34. The school nurse was not invited to the IMPACT meetings for Petitioner. The campus principal was in charge of inviting personnel to the IMPACT meetings. [Tr. at 486].

35. Following the second IMPACT meeting, the principal gave instructions to the assistant principal – the campus Section 504 coordinator – to schedule a Section 504 meeting for Petitioner. The Section 504 coordinator immediately began efforts to contact Petitioner's grandmother. When Petitioner's grandmother did not respond to several messages left by the Section 504 coordinator, Petitioner's teacher made two contacts through Petitioner's great-aunt. Ultimately, Petitioner's grandmother agreed to attend a Section 504 meeting set for January 2010. [R.Ex. 18; Tr. at 83, 114-116, 419, and 470-471].

36. Respondent did not give Petitioner's grandmother written notice of a refusal to test for special education after the IMPACT meetings of September and October 2009. [Tr. at 479].

37. Petitioner's grandmother never received any written documentation of the IMPACT committee meetings after September and October 2009 after the meetings. The assistant principal contacted her several times in November 2009 and left messages concerning scheduling the Section 504 meeting. [Tr. at 302 and 505].

Section 504 Meeting

38. On January 8, 2010, Petitioner's grandmother signed consent to begin evaluation for Section 504 and completed a Health, Social History, and Family Information form. Petitioner's grandmother reported the student's *** surgery, attention problems, writing difficulty, and lack of focus on this form. [P.Ex. 12].

39. On January 19, 2010, Respondent held a Section 504 meeting. Petitioner's grandmother participated and agreed to Petitioner's placement in Section 504 and to the accommodation plan discussed at this meeting. Participants from the student's campus included the

educational diagnostician, nurse, reading specialist, Petitioner's *** grade teacher, the assistant principal, and another administrator. [P.Exs. 10 and 11; R.Ex. 11; Tr. at 363].

40. As part of the January 2010 Section 504 meeting, the educational diagnostician discussed special education eligibility. Near the beginning of the meeting, Petitioner's grandmother indicated confusion over what she was signing. The meeting director clarified that they could go over parental rights at the end of the meeting. [P.Ex. 10].

41. During the January 2010 Section 504 meeting, participants discussed Petitioner's strengths and weaknesses, accommodations made by his *** grade teacher, and his progress. Benchmark testing assesses students on material that will be in the TAKS test for that school year. At the beginning of the year, students have not had exposure to the curriculum that will be tested by the TAKS. Petitioner's beginning of year scores, tested nine days into the semester, were compared with his middle of year scores as follows:

*** Grade Benchmark Percentage Mastery

Subject	Beginning of Year	Middle of Year
Reading	***%	***%
Math	***%	***%
Writing	***%	***%
Social Studies	(not tested)	***%
Science	(not tested)	***%

Petitioner's teacher noted that Petitioner showed an area of strength in math skills, even with the middle of year decrease in his benchmark mastery. Although Petitioner responded well to interventions put into place during the IMPACT process, Petitioner still functioned below grade level and was making slow progress in comparison to his peers. [P.Exs. 7, 10, and 11; R.Ex. 11; Tr. at 88-89].

42. Petitioner's reading specialist assessed Petitioner in late October 2009 with the Systematic Instruction for Phonemic Awareness, Phonics, and Sight Words ("SIPPS"), a program found effective with dyslexic students. Petitioner passed every portion of the SIPPS with no indication of Dyslexia. To assess reading, all district students in the *** through *** grades are assessed with the Flynt-Cooter Reading Inventory for the Classroom ("Flynt-Cooter"). In October 2009, Petitioner's Flynt-Cooter scores were good, but his fluency rate was low. After more intensive interventions by the reading specialist began as a result of the IMPACT process, Petitioner's fluency rate increased from *** words per minute to *** words per minute. [R.Ex. 12; Tr. at 231-232].

43. Petitioner's grandmother revealed the existence of Petitioner's independent evaluation during the January 2010 Section 504 meeting discussion. After listening to what school personnel knew about Petitioner, she told the participants about the independent testing report conclusions – that Petitioner had ADHD, with secondary diagnoses of Dysgraphia and Dyslexia. The committee members expressed immediate interest in reviewing the written report. Petitioner's

grandmother gave a copy of the written independent testing report to district personnel after the meeting. [P.Exs. 10 and 11- Tape 1; R.Ex. 11; Tr. at 301-302].

44. During the Section 504 meeting, the educational diagnostician discussed differences between special education and Section 504 for students who are OHI, then checked for understanding by Petitioner's grandmother who confirmed her understanding the difference due to previous experiences with Section 504 services and her daughter. Petitioner's grandmother stated she "by no means thought" the student "was special education." [P.Ex. 11- Tape 1].

45. The Section 504 committee did not discuss the grandmother's right to start special education testing of Petitioner by making a specific request. Instead, the educational diagnostician began, but did not finish a statement, "If you feel that pursuing a special education evaluation is appropriate . . . ." The grandmother interjected that she had recognized that there was a problem last year ". . . so I spoke about it since day one this year asking for testing . . . because I know he is not supposed to write like that, I know he is not supposed to read like that. He's struggling." In response, the educational diagnostician commented, "I have to be very strict by saying I can't. . . I can't look at your kiddo until we try some interventions . . . do a lot of interventions." [P.Ex. 11- Tape 1].

46. At the January 2010 Section 504 meeting, the district's educational diagnostician suggested that special education testing may be initiated. [Tr. at 55-56].

47. On January 19, 2010, Petitioner's grandmother signed in agreement with the proposed accommodations and gave consent for Section 504 services for Petitioner as a student with ADHD. Participants planned to reconvene on March 2, 2010. Before the meeting ended, the assistant principal addressed any remaining questions from Petitioner's grandmother regarding the Section 504 testing consent form, clarifying that the evaluation was "really an evaluation to review evaluations." Petitioner's grandmother did not have further questions about the Section 504 consent form at that time. [P.Exs.10 and 11; R.Ex. 11 – Tape 1; Tr. at 238-239 and 366].

48. Documentation of the Section 504 meeting of January 19, 2010, designated Petitioner to be a student with a mental impairment of Attention Deficit (Primary) and Dysgraphia and Dyslexia. The documentation specifies "Learning" and "Working" as major life activities substantially limited by this impairment. [P.Ex. 10 at 1-2; R.Ex. 11 at 1-2].

49. Petitioner's Section 504 accommodations included peer tutoring assistance in his core classes, making available a word processor without requiring Petitioner to use it, behavioral/organizational checklists, reduced or "chunked" work as appropriate, provision of class notes for him to copy, and private discussion regarding behavior and focus. [P.Ex. 10 at 3; R.Ex. 11 at 4].

50. Respondent did not offer a consent form for special education testing to Petitioner's grandmother at the January 2010 Section 504 meeting. At the close of the meeting, the educational diagnostician clarified that no one from special education would be involved in the process until the grandmother was "fully informed and signed consent." [P.Ex. 11 – Tape 1; Tr. at 480 and 504].

51. After the Section 504 meeting on January 19, 2010, the educational diagnostician reviewed Petitioner's independent testing report. On the same day, the educational diagnostician sent an electronic communication about the independent testing report addressed to Petitioner's grandmother and copied to Petitioner's teacher, reading specialist, assistant principal, and principal. The report supported the presence of ADHD and an LD in Writing, Reading, and Reading Fluency for Petitioner – disabilities that may be served in general education under Section 504, or, if severe enough, may be served in special education. Restating the conclusion of the Section 504 committee earlier that day, the educational diagnostician wrote, ". . . [W]e are not at a point of considering a special education evaluation for [the student] just yet, but I did want you to know that the data we have is a good indicator that [the student] would be eligible for special education if we decided to 'go there.'" [P.Ex. 9 at 2; Tr. at 58 and 121-122].

52. After the January 2010 Section 504 meeting, Respondent did not send written notice of district refusal to test Petitioner. Respondent's educational diagnostician explained at the due process hearing that the Section 504 committee did not refuse special education testing for Petitioner. By contrast, on occasions when special education testing is refused, the district sends out written notice of the refusal to test. [Tr. at 479].

53. At the due process hearing, Petitioner's grandmother confirmed that she did not want Petitioner in special education, but was confused about the difference between "special education" and "special education testing" at the January 2010 Section 504 meeting. She recalled district participants asking if she wanted Petitioner in "special education," but no participant ever combined the words "special education testing." Petitioner's grandmother wanted help at the Section 504 meeting for Petitioner, believing it was necessary to test Petitioner before placing him into special education. [Tr. at 300-303 and 503-504].

54. As a result of the IMPACT process and the Section 504 committee meeting, Respondent provided most of the recommendations made by Petitioner's September 2009 independent testing by the end of January 2010. Both the principal and assistant principal left the student's campus before the Section 504 meeting in January 2010. Neither of these individuals testified at the due process hearing. [P.Ex. 1 at 17; R.Exs. 11 and 19; Tr. at 365, 417, and 470].

55. After consultation with her advocate and her attorney, Petitioner's grandmother filed this proceeding approximately two weeks after Petitioner's January 2010 Section 504 meeting on February 12, 2010. [Pleading file].

56. Respondent did not offer a consent form for special education testing until after Petitioner filed for due process. [Tr. at 503].

57. On March 2, 2010, the date scheduled for a second Section 504 meeting, Petitioner's grandmother called the district, reporting that she was unable to attend due to illness. [Tr. at 87].

Resolution Meeting

58. On February 25, 2010, Petitioner's grandmother and her advocate participated in a resolution meeting with Respondent's Assistant Director, *** Special Education. No other school

participants attended this meeting. No attorney appeared on behalf of Respondent or Petitioner at the resolution meeting. During this meeting, the assistant director left the meeting frequently to gather data and to consult with legal counsel present in the administration building on issues regarding attorney's fees. [P.Ex. 15; R.Ex. 8; Tr. at 144-145].

59. The written agenda of the resolution meeting includes Petitioner's requested relief and the district response. Respondent's written offer stated the district "will continue to offer" an FIE with included testing for Petitioner's OT, PT, and AT needs. Upon completion of the FIE, the district offered a neuropsychological evaluation, should the completed FIE indicate an educational need for a neuropsychological evaluation. Respondent also offered to share completed FIE results prior to convening an ARDC meeting, to consider the FIE results at an ARDC meeting, and to ensure Petitioner's access to the school's Dyslexia program. For the remainder of the 2009-2010 school year and for the 2010-2011 school year, Respondent offered two 90-minute sessions per week to address Petitioner's reading and writing skills. In the event Petitioner did not pass the TAKS *** test for Math in March 2010, Respondent offered to include tutoring for math skills. [P.Ex. 15; R.Ex. 8].

60. Petitioner's grandmother and advocate signed the resolution meeting documents to indicate participation in the meeting, but did not sign agreement to the evaluation or agreement to Respondent's offers in the document. Instead, Petitioner wrote a statement of disagreement on the document alleging a failure to have appropriate ARDC persons present for the resolution meeting. Petitioner also disagreed that Petitioner's grandmother had ever declined testing, instead asserting her request for testing began in September 2009. [P.Exs. 15 and 19; R.Ex. 8].

61. On March 1, 2010, the campus reading specialist checked Petitioner's progress. Petitioner's fluency rate had increased from *** words per minute at the end of *** grade to *** words per minute. Also in March 2010, Petitioner passed a TAKS *** test with a *** percentile, a level considered commended performance by the State of Texas. [R.Ex. 15; Tr. at 228-229 and 392-393].

62. On March 4, 2010, Petitioner's grandmother signed consent for special education testing of Petitioner, at which point the educational diagnostician transmitted an OHI to Petitioner's neurologist. In turn, Petitioner's neurologist returned the completed OHI form to the district on March 12, 2010. [R.Ex. 7; Tr. at 122-123].

63. Respondent's evaluators completed the FIE testing by April 9, 2010, and the written report was issued on April 14, 2010. Respondent completed the combined PT and OT evaluation and written report by April 16, 2010. [P.Exs. 2 and 4; R.Exs. 2 and 3].

64. Respondent's FIE assessment reviewed existing data as well as gathered additional testing data and input from Petitioner's grandmother, teacher, and a classroom observation. Behavioral checklists completed by the teacher and grandparent on the BASC-2 indicated Petitioner consistently and significantly manifested problematic behaviors in home and school that appear to impact or interfere with learning. The behaviors appear to be manifestations of ADHD. Adaptive behavior is the degree to which a student is socially and personally independent. The FIE report

found Petitioner may demonstrate some adaptive behavior deficits at home or school likely due to his attention deficits, but recommended no further evaluation. [P.Ex. 2 at 9; R.Ex. 3 at 10].

65. The FIE tested Petitioner's cognitive ability on an extended battery administration of the Woodcock-Johnson Tests of Cognitive Ability – Third Edition ("WJ-III COG"). Petitioner's scores on the WJ-III COG ranged from the *** to *** range compared to other students his age. His GIA score of *** fell within the *** range, a score generally comparable with his GIA score in the September 2009 independent testing. Based on the previous and new testing data, Petitioner's cognitive abilities fell within the *** range compared to other students his age. [P.Ex. 2 at 8; R.Ex. 3 at 9].

66. The March 2010 FIE assessed Petitioner's academic achievement on the Kaufman Test of Educational Achievement, 2nd Edition ("KTEA-II"). Petitioner showed reading fluency weakness and difficulty comprehending longer passages, with strengths in word reading and decoding. The FIE report noted Petitioner passed the *** TAKS Reading test with a grade of *** percentile as well as his recent benchmark score increases in fluency rate. Petitioner scored in the *** range on the KTEA-II in math skills, exhibiting weaknesses in calculation errors, misreading signs, calculation of change, reading a standard clock to the half hour, and solving multi-step problems. [P.Ex. 2 at 11-12; R.Ex. 3 at 12-13].

67. The FIE report concluded Petitioner met the eligibility criteria for special education as a student with LD in Reading Comprehension, and OHI based on his physician-confirmed diagnosis of ADHD. Petitioner exhibited a significant discrepancy in Math Calculation. Because Petitioner's inattention impacted his math calculation skills, this was not a separate identified area of academic concern. Petitioner was not identified as having an LD in Math at this time. [P.Ex. 2 at 13; R.Ex. 3 at 14].

68. Respondent completed an OT and PT evaluation of Petitioner on April 19, 2010. Petitioner did not meet eligibility for PT services. The report included recommendations to address Petitioner's AT needs by providing trial usage of a portable keyboard. For the OT portion of the report, the occupational therapist reviewed Petitioner's independent testing results, administered additional assessment, and reviewed records, including Petitioner's medical records kept by the school nurse describing Petitioner's *** surgery, ADHD diagnosis, and asthma history. After completing this review, the occupational therapist recommended consultative OT services to address Petitioner's decreased motor control, decreased handwriting legibility and indicators of Dysgraphia, delayed drawing skills, and visual-spatial confusion. [P.Ex. 4 at 1; R.Ex. 2 at 1; Tr. at 170-171].

69. The occupational therapist did not address the feeding issues or self-help skills concerns expressed by Petitioner's grandmother, but included input from his teacher that Petitioner has independent self-help skills in the classroom. [P.Ex. 4 at 2; R.Ex. 2 at 2; Tr. at 174-177].

70. On April 19, 2010, Respondent convened an ARDC meeting to review the completed FIE. The ARDC found Petitioner eligible for special education as a student with OHI and LD. Petitioner's grandmother participated in the meeting with assistance from her advocate. Committee members reviewed the completed FIE and developed an IEP incorporating all

accommodations from Petitioner's IMPACT and Section 504 plans. The IEP added monitoring by an additional staff person in the classroom, the special education teacher. [P.Ex. 20; R.Ex. 1; Tr. at 94-96, 161, 277, and 394].

71. Petitioner would begin switching classrooms for the first time in the 2010-2011 school year. Although Petitioner's *** grade teacher did not think Petitioner needed special education in his current classroom of 18 students, the teacher agreed that Petitioner would benefit from added assistance in the *** grade as he transitioned into larger *** school classes of 35 students. [Tr. at 394].

72. Petitioner's IEP added goals and objectives for OT and AT, dyslexia-bundled accommodations for TAKS testing, and one 30-minute session per month of consultative OT services. As Petitioner's behavior did not impact his learning or that of others, the ARDC did not find a need for development of a specific behavioral intervention plan. Because his Section 504 behavioral accommodations had been effective, the ARDC continued the same accommodations for his behavior in his IEP. [P.Ex. 20; R.Ex. 1].

73. Dyslexia-bundled accommodations for TAKS testing are services available through Section 504 as well as through special education. [Tr. at 453].

74. Petitioner made passing grades in all his classes after the first nine-week grading period of the 2009-2010 school year. [R.Ex. 16].

75. Petitioner did not produce evidence to show a need for counseling, a recommendation included in his Fall 2009 independent testing report.

76. Petitioner's behavior did not show a need for development of a behavior intervention plan or specific interventions for his behavior during the 2008-2009 or 2009-2010 school years.

Discussion

The communication between the parties underlies this special education dispute. Petitioner's grandmother did not understand what options were available for testing the student, and the school district did not know of the grandparent's confusion until she consulted her advocate and her attorney. Yet, the school district responded to the student's changing needs by adding increased accommodations and interventions before the student began special education services.

It is undisputed that Petitioner received general educational services through the majority of his *** grade year in 2009-2010 until his placement into special education in April 2010 – more than two months after filing this due process proceeding. It is also undisputed that Respondent applied successive interventions to this program as part of the district's RTI process beginning in September 2009. The parties sharply disagree, however, on the *appropriateness* of Petitioner's program before placement into special education in April 2010. While Petitioner alleges the student's grandmother made repeated requests for special education testing beginning in

September 2009, Respondent defends the appropriateness of the intervention process to determine whether Petitioner demonstrated a need for special education services.

Petitioner bears the burden of proof to establish by a preponderance of the evidence that the school district violated the provisions of IDEA. *Shaeffer v. Weast,* 546 U.S. 49, 62 (2005).

Child Find

Under IDEA and its implementing regulations, school districts have an affirmative duty referred to as the "Child Find" obligation to identify, locate, and evaluate students whom they suspect may be disabled and provide them with special education services, including students who are advancing grade to grade. 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. §300.111(a), (c)(1). The Child Find duty is triggered when a school district has reason to suspect the student has a disability, coupled with reason to suspect that special education services may be needed to address the disability. *El Paso ISD v. R.R.,* 567 F.Supp. 2d 918 (W.D. Tex. 2008); *rev'd on other grounds,* 591 F.3d 417 (5th Cir. 2009); *citing Dep't of Educ., State of Hawaii v. Cari Rae S.*, 158 F.Supp. 2d 1190, 1194 (D. Haw. 2001).

In *El Paso,* the Western District of Texas applied a two-pronged inquiry to review whether the school district complied with its Child Find responsibilities. The first inquiry examines whether the school district had reason to suspect that the student had a disability, and whether the school district had reason to suspect that special education services might be needed to address that disability. The second inquiry considers whether the school district evaluated the student within a reasonable time after having notice of the behavior likely to indicate a disability. *El Paso, supra,* at 949-951.

Reason to Suspect a Disability and Reason to Suspect a Need for Special Education Services

In the current dispute, Respondent had reason to suspect OHI eligibility both because of his inattentive behaviors for which he took ADHD medication, and also because of *** from his early childhood *** surgery. The preponderance of the evidence showed, however, that Petitioner made good academic progress in *** grade, made passing grades, and did not fail any courses, passed his TAKS testing, and was generally successful within his general education classroom. His teachers noted no concerns signaling a need for intervention beyond routine classroom redirection and teacher supervision within the classroom.

As Petitioner began the *** grade on September 9, 2009, Petitioner's grandmother presented a request for neuropsychological testing from Petitioner's neurosurgeon to the school office. I found the hearing testimony of Petitioner's neurosurgeon credible and persuasive. The neurosurgeon spoke with the principal specifically about the grandmother's request on or about September 9, 2009, asked what needed to be done to get the student qualified as OHI, and received assurances that the principal would get back to the neurosurgeon if other documentation was needed. Around this same time, the grandmother gave consent to Respondent by means of the campus nurse to obtain medical documents from Petitioner's neurosurgeon and neurologist. The preponderance of the evidence established that Respondent did not follow up with Petitioner's grandmother regarding the testing request or the status of the request for medical records. No one provided special education testing consent forms to the grandmother, and no one sent an OHI form to the neurosurgeon.

By the first IMPACT meeting, (1) Petitioner's campus had a copy of the neurosurgeon's prescription requesting neuropsychological testing and qualification as OHI, (2) the principal had direct discussion with that neurosurgeon establishing the physician's willingness to complete any needed paperwork regarding Petitioner's OHI status, (3) Petitioner's grandmother executed releases for medical documents to the school nurse, and (4) campus personnel had knowledge of Petitioner's *** surgery. The preponderance of the evidence before me established that the student's teacher understood the testing request of Petitioner's grandmother to be for special education testing – testing beyond what was routinely done for most students. The teacher conveyed this information to the campus principal, at which time the campus principal called the IMPACT team together. I conclude that the school district had reason to know that Petitioner was likely a student with a disability with OHI, as reflected on the IMPACT documents on September 30, 2009, and that the grandmother was requesting evaluation of that disability to access proper services. At this point, the school district had knowledge of the parental request for special education testing.

Respondent argues, in essence, that Petitioner's grandmother made an ambiguous "testing" request which, when coupled with the neurosurgeon's request for testing, was for OHI qualification – a disability that may be served in *either* special education or general education. Respondent further argues that Petitioner's independent testing report recommended the Section 504 services ultimately recommended by the IMPACT process. I find these arguments do not overcome the fact that Petitioner's grandmother made a parental request for testing for the student and, as a result, the school district had a duty to evaluate the student that overrode the district's use of the local district RTI process – the IMPACT committee – before evaluating the student for special education. *Id*. at 496-498.

Evaluation of the Student within a Reasonable Time

The second Child Find inquiry requires a determination of whether the school district evaluated the student within a reasonable time after suspecting the student might have a disability. In *El Paso,* the Western District of Texas found a thirteen-month delay was not reasonable between the student's request for evaluation and the school district's offer of evaluation. *Id.* at 952. Different federal courts have applied varying standards for determining reasonableness. *Compare Cari Rae, supra,* at 1195-97 (six-month delay from point school had reason to suspect the student had a disability to scheduling the evaluation constituted a Child Find violation), with *New Paltz Cent. Sch. Dist. V. St. Pierre ex rel. M.S.,* 307 F.Supp. 2d 394, 401 (N.D.N.Y. 2004) (approximate ten-month delay from the time the parent informed the school of difficulties until evaluation performance constituted a Child Find violation).

The facts of this dispute show that the student's behaviors attributed to his disability, such as fidgeting and focus, required some teacher monitoring and redirection, and provided small group pull-out reading support. However, the student made progress with these general education supports, passing his TAKS Math on the first administration and his TAKS Reading on the second administration with passing grades and overall good progress. It was not until Fall 2009 that Petitioner made three failing grades, an event that occurred at approximately the same time as Petitioner's parental request for testing. At this time, the school district began applying interventions specifically focused on areas of concern in writing and reading skills, and the student began to demonstrate success with measurable increases in those skills.

Although the school district claimed making offers of special education testing refused by Petitioner's grandmother at the second IMPACT meeting on October 21, 2009, and also at the Section 504 meeting in January 2010, the district did not provide written refusal to the grandparent, effectively negating this claim. However, the evidence further established that the district discussed the verbal report of Petitioner's independent testing at the time of the January 2010 Section 504 meeting and made specific plans to reconvene in six weeks for a second meeting. During this period, the district attempted increasing interventions and, in fact, Petitioner showed increases in the targeted areas of fluency and writing skill, with a passing grade on the *** TAKS Reading test in the commended range at the *** percentile. I do not find the school district's delay to have been unreasonable under these facts where the student made progress in targeted areas during the period of increasing intervention.

As a result, I decline to find Respondent violated its Child Find obligation by the approximate five-month delay in testing from September 30, 2009, through the initiation of testing on March 4, 2010.

FAPE

The United States Supreme Court developed a two-part test for the determination of whether a school district delivered a FAPE. The first part reviews the school district's compliance with IDEA's procedural requirements. The second part reviews whether the student's IEP was reasonably calculated to confer an educational benefit. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Rowley, supra; Houston Ind. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 350 (5th Cir. 2000).

Procedural Sufficiency

The procedural requirements of IDEA apply to the formulation and implementation of a student's IEP. The mere presence of procedural flaws in an IEP does not mandate finding that the educational program denied a FAPE to the student. However, procedural flaws that result in the loss of educational opportunity, impede a student's right to FAPE, or seriously infringe upon the parents' opportunity to participate in the development of the IEP, result in a denial of FAPE. *Adam J. v. Keller ISD*, 328 F.3d 804 (5th Cir. 2003); 34 C.F.R. §300.513(a)(2).

IDEA and its implementing regulations require school districts to give "prior written notice" to the parents of a child when a school district proposes to initiate or change, or refuses to initiate or change, "the identification, evaluation, or educational placement of the child, or the provision of a FAPE to a child." 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503. As previously discussed, the record established that Respondent did not send notice of a refusal to evaluate Petitioner, arguing that it had not "refused" special education testing at either the IMPACT meetings or at the Section 504 meeting when Petitioner's grandmother signed in agreement. Petitioner's grandmother gave credible hearing testimony of her confusion at the Section 504 meeting – testimony fully corroborated by the audio recording of that meeting. Respondent should have sent the required notice to Petitioner's grandmother after both the second IMPACT meeting and after the Section 504 meeting. This is a procedural flaw.

Under Texas law, a school district must complete an FIE of a student within 60 calendar days from the date written consent is received by the school district. TEX. EDUC. CODE §29.004(a). The preponderance of the evidence established that Petitioner's grandmother was offered a consent form for special education evaluation at the time of the resolution session on February 14, 2010, but elected not to sign the form at that time. Ultimately, the grandmother signed the consent form on March 4, 2010, at which time the evaluation began and was completed well within 60 days. Respondent complied with this provision.

Petitioner's grandmother was invited, but did not attend, the second IMPACT team meeting of October 21, 2009. Petitioner's grandmother attended and fully participated at the Section 504 meeting in January 2010, at which time participants developed his Section 504 plan. I find no loss of educational opportunity for Petitioner occurred because of the failure to give written notice of refusal to evaluate Petitioner. Throughout this period, Petitioner had access to IMPACT accommodations and his Section 504 plan accommodations that ultimately formed the vast majority of Petitioner's IEP developed at the ARDC meeting on April 19, 2010. Petitioner's grandmother attended and fully participated in the ARDC meeting. The failure to give prior written notice to Petitioner's grandmother did not seriously infringe upon her opportunity to participate and develop Petitioner's educational program because of the procedural flaw. Based on the preponderance of this evidence, I conclude that the procedural flaw did not amount to a denial of FAPE.

Substantive Sufficiency

A hearing officer's determination of FAPE must be based on substantive grounds. 34 C.F.R. §500.513(a)(1). Petitioner's program was individualized to his needs and was based on his current assessments and performance throughout his 2008-2009 and 2009-2010 school years. Petitioner remained within the general education classroom setting with services and interventions added to that setting as his needs changed. Petitioner's teachers and grandmother helped develop his program, and teaching staff coordinated the delivery of the program. While Petitioner did not show mastery of his 2009-2010 benchmarks, he made increases in all subjects but Math, demonstrating marked increases in the targeted area of fluency skills, and passing his *** grade TAKS *** test at the *** level. I conclude that Petitioner made academic progress in his school program and functioned well with this teachers and peers.

Petitioner challenged the level of related services under Respondent's educational program and alleged a need for tutoring to address deficit areas, counseling, mentoring, and other services. Petitioner did not present evidence of a need for counseling in this dispute. Respondent's program addressed deficit areas *as they were brought to the district's attention*, adding the suggestions in Petitioner's independent testing report once the District received this input. I do not find that Petitioner met his burden to show he was denied appropriate related services during all times pertinent to this dispute.

Based on the preponderance of this evidence, I conclude that Respondent developed a responsive program for Petitioner as his needs changed that both provided a FAPE and conferred an educational benefit. Accordingly, I decline to award any relief to Petitioner.

Conclusions of Law

1. The student is eligible for special education and related services as a student with a disability under IDEA, 20 U.S.C.A. §1400, *et. seq.*, and its implementing regulations.

2. The educational program proposed by the school district is presumed to be appropriate. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro,* 468 U.S. 883 (1984). Petitioner bears the burden of proving that the educational program is not appropriate or that the school district has not complied with the procedural requirements under IDEA. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Petitioner has not met his burden to prove the inappropriateness of Respondent's 2008-2009 and 2009-2010 program.

3. Petitioner has not met his burden to prove that the district failed to meet its Child Find obligation to the student. 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. §300.111(a), (c)(1).

4. Respondent's educational program developed and implemented during the student's 2008-2009 school year was reasonably calculated to confer educational benefit and provided FAPE to the student with an individualized program of instructional services and appropriate related services and supports. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); 34 C.F.R. §§300.34(a)-(c), 300.101, and 300.300.

5. The procedural inadequacy of Respondent's failure to give prior written notice of a refusal to evaluate for special education on October 21, 2009, and on January 19, 2010, did not significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the student, and did not deprive the student of educational benefit. Respondent delivered all services specified by the student's educational program through the date of the due process request. *Adam J. v. Keller ISD*, 328 F.3d 804 (5th Cir. 2003); 34 C.F.R. §§300.34 and 300.513(a).

6. Because the student received a FAPE, Petitioner is not entitled to an award of compensatory services. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985); 34 C.F.R. 300.148(b).

7. Petitioner did not meet his burden to show a need for additional services, including related services of counseling. 34 C.F.R. §§300.34(c) and 300.324(a)(2)(v).

8. Respondent's placement of the student within the general education classroom is the least restrictive placement for the student's needs. Petitioner did not meet his burden to show the student was denied or required a more restrictive setting to meet his unique needs. 34 C.F.R. §300.116(b)-(e).

ORDERS

Based upon the record of this proceeding, the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that the relief requested by Petitioner is **DENIED**.

IT IS FURTHER ORDERED that any and all additional or different relief not specifically ordered herein is **DENIED.**

Signed this 19th day of July 2010.

/s/ Mary Carolyn Carmichael

Mary Carolyn Carmichael
Special Education Hearing Officer

NOTICE TO THE PARTIES

This decision is final and immediately enforceable, except that any party aggrieved by the findings and decision may bring a civil action in any state court of competent jurisdiction or in a district court of the United States as provided in 20 U.S.C. §1415(i)(2); 34 C.F.R. §300.516; and 19 Tex. Admin. Code §89.1185(o).

DOCKET NO. 139-SE-0210

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

SYNOPSIS OF DECISION

ISSUE A: ***Whether the school district timely identified a student in need of special education services in all areas of disability, including assessment for a Learning Disability in Reading and Written Expression, occupational therapy services, and assistive technology?***

FEDERAL CITATION: **34 C.F.R. §300.111(a), (c)(1)**

TEXAS CITATION: **19 TEX.ADMIN.CODE §§89.1001 and 89.1040**

HELD: **For the District.**

ISSUE B: ***Whether the student was denied a free appropriate public education by inadequate development of an individualized education program ("IEP"), failure to conduct a functional behavioral assessment, and failure to develop a behavioral intervention plan for the student?***

FEDERAL CITATION **34 C.F.R. §§300.17 300.101, 300.300, 300.323(c), 300.324(a), 300.503, and 300.513(a)**

TEXAS CITATION: **19 TEX.ADMIN.CODE §§89.1050 and 89.1075**
TEX. EDUC. CODE §29.004(a)

HELD: **For the District.**

ISSUE C: ***Whether the district provided an appropriately restrictive placement for the student that satisfied least restrictive environment concerns and enabled the student to make meaningful academic and emotional progress by means of individualized programming, accommodations, considerations, and IEP development specific to the student's unique needs?***

FEDERAL CITATION: **34 C.F.R. §§300.114(a), 300.115, and 116(b)-(e)**

TEXAS CITATION: **19 TEX.ADMIN.CODE §89.63(c)**

HELD: **For the District.**

ISSUE D: ***Whether the district provided appropriate related services for the student, including tutoring to address areas of deficit, counseling, a mentor, and other miscellaneous services?***

FEDERAL CITATION: **34 C.F.R. §§300.8(c)(9)-(10), 300.34(a), (c)(2)**

TEXAS CITATION: **19 TEX.ADMIN.CODE §89.1055(e)(9)**
TEX. EDUC. CODE §29.002

HELD: **For the District.**