

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

**STUDENT,  
bnf PARENT,  
Petitioner,**

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v.

**DOCKET NO. 066-SE-1013**

**FORNEY INDEPENDENT  
SCHOOL DISTRICT,  
Respondent.**

**DECISION OF THE HEARING OFFICER**

Introduction

Petitioner, \*\*\* bnf \*\*\* (“Petitioner” or “Student”) brings this action against the Respondent Forney Independent School District (“Respondent,” or “the school district”) under the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. § 1401 et. seq. (IDEA) and its implementing state and federal regulations.

Party Representatives

Petitioner was represented throughout this litigation by Student’s legal counsel Tomas Ramirez, Attorney at Law with the Law Office of Tomas Ramirez, III. Student’s mother \*\*\* and Melody Watson parent advocate also attended the due process hearing. Respondent was represented throughout this litigation by its legal counsel Jan Watson and assisted at the hearing by her co-counsel Nona Matthews both with the law firm of Walsh, Anderson, Gallegos, Green and Trevino. \*\*\*, Director of Special Education, also attended the due process hearing as the school district’s party representative.

Procedural History

The initial due process hearing request in this case was filed on October 28, 2013. This case was set for hearing on December 17-18, 2013 and the original decision due date was January 12, 2014.

Resolution Session and Good Cause to Grant  
Joint Request for Extension of 45 Day Deadline

On November 4, 2013, both parties confirmed in writing their waiver of the opportunity to convene a Resolution Session in this case. The school district declined the opportunity of attempting to resolve the issues in this case through mediation. Therefore, the 45 day decision due date was adjusted from the original due date of January 12, 2014 to December 19, 2013. During the prehearing telephone conference on November 12, 2013 both parties requested the due process hearing originally set for December 17-18, 2013 remain as scheduled; therefore in order to maintain those hearing dates the parties also requested an extension of the adjusted decision due date of December 19, 2013 to January 24, 2014.

The due process hearing was conducted on December 17-18, 2013 and recorded and transcribed by a certified court reporter. Petitioner made an oral closing argument at the conclusion of the hearing. Respondent requested an opportunity to submit a written closing argument. The hearing officer agreed written closing arguments would be helpful due to the complexity of the evidence with regard to the legal issues. Petitioner was provided with the opportunity to supplement the closing oral argument with a written brief. The parties selected January 13, 2014 as the date written closing arguments were due without further extension of the decision due date. Both parties timely filed their respective written closing arguments. The due date for the Decision of the Hearing Officer was January 24, 2014.

## Issues

Petitioner submitted the following issues for decision in this case:

1. Whether the school district failed to conduct timely evaluations in all areas of suspected disability within the meaning of the IDEA beginning in late January 2013/early February 2013 up through June 2013; and,
2. Whether the school district failed to provide Student with a free, appropriate public education within the one year statute of limitations rule as applied in Texas when it allegedly failed to adequately address Student's safety at school as a victim of bullying that interfered with access to student's educational program within the meaning of the IDEA.

Respondent submitted the following additional issues for decision in this case:

3. Whether Petitioner's claims that arise under any statute or law other than the IDEA should be dismissed as outside the hearing officer's jurisdiction;
4. Whether Petitioner's request for attorney's fees and litigation costs under IDEA are outside the authority of a special education hearing officer and should therefore be dismissed; and,
5. Whether the school district's Full Individual Evaluation (FIE) was appropriate within the meaning of the IDEA and therefore whether Petitioner is entitled to an Independent Educational Evaluation (IEE) at school district expense.

## Requests for Relief

Petitioner requested the following items of relief:

1. The school district provide Student with an IEE at school district expense;
2. The school district convene an Admission, Review & Dismissal Committee (ARD) to confirm Student's identification and eligibility for special education as a student with a disability under the IDEA and design an Individual Educational Plan (IEP) that includes measureable goals and objectives and that addresses all of Student's needs as identified by all current assessment data;
3. The ARD also design a "safety plan" as a component of the IEP;
4. The school district provide training to all school district staff in identifying bullying when it occurs and utilizing effective intervention strategies;
5. The school district provide Student with compensatory educational services as identified by the results and recommendations of all current assessment data; and,
6. Reasonable attorney's fees and litigation costs.

Respondent requests Student's claims arising outside the IDEA be dismissed, Student's claims for attorney's fees be dismissed, and Student's IDEA claims be denied.

## Dismissal of Claims Arising Under Laws Other than the IDEA

A parent may file a request for a due process hearing under the IDEA stating claims related to the identification, evaluation or educational placement of a child with a disability, or the provision of a FAPE to the child. *34 C.F.R. § 300.507 (a)*. In Texas due process hearings are implemented under a one-tier system and governed by the IDEA regulations and a set of state rules. *19 Tex. Admin. Code § 89.1151 (a) (b)*. The due process hearing is conducted by an impartial hearing officer selected by the Texas Education Agency. *19 Tex. Admin. Code § 89.1170*.

The hearing officer's authority and jurisdiction is therefore limited to claims arising solely under the IDEA and its implementing state and federal regulations. Therefore, to the extent that any of Petitioner's claims are submitted or arise under any laws other than the IDEA are therefore outside the hearing officer's jurisdiction and must be dismissed.

## Attorney's Fees and Litigation Costs under the IDEA

A court, in its discretion, may award reasonable attorney's fees as part of the costs to a prevailing party who is the parent of a child with a disability in an appeal of a hearing officer's Decision under the IDEA. *34 C.F.R. §§ 300.516; 300.517(a) (1) (i)*. However, this authority is limited to a court of competent jurisdiction and is therefore outside the authority of a special education hearing officer in Texas. To the extent Petitioner seeks an award of attorney's fees and/or other litigation costs those requests for relief are outside the hearing officer's jurisdiction and must also be dismissed.

## Findings of Fact

1. Student lives within the jurisdictional boundaries of the school district with both parents. Student \*\*. Student's mother characterized Student's \*\*\*. Student's mother reported she has \*\*\*. Student's mother observed Student fights constantly with \*\*\*. (Transcript Volume I, pages 67-68, 70, 72, 75)(referred to hereafter as "Tr. Vol. \_\_, p. \_\_").
2. Home life is difficult and stressful for Student's mother. She feels she must monitor everyone and is anxious about her children's futures and their ability to learn and at some point hold a job. Student's mother feels the need to be constantly on top of Student with frequent reminders. (Tr. Vol. I, pp.69-70, 73, 158). Change is stressful for Student at home and Student does not seem to cope with it well. Student is distressed by loud noises, fussy about clothes, is a picky eater, and seems sensitive to certain textures. (Tr. Vol. I, pp. 85, 88-89, 90-92).
3. Student was a difficult child, constantly in trouble and very rambunctious. Student's mother observed difficulty with communication and respecting boundaries. Student's father taught Student to make eye contact when talking to others. Student does not appear to initiate social interactions with peers appropriately. (Tr. Vol. I, pp. 70-71, 72, 74, 82-83). Student has \*\*\* cousins and the family often socializes with the extended family. Student is not successful in group play with Student's cousins or neighborhood children. (Tr. Vol. I, pp.71, 74, 77-78, 81, 84-85, 87).
4. Student was educated in the \*\*\* Independent School District through the first semester of \*\*\* grade. Student had difficulty in school, made poor grades, and was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). (Tr. Vol. I, pp. 90-100). The family moved to Forney because of its reputation as a good school district and \*\*\*. Student exhibited the same problems at Forney that were evident in \*\*\*. (Tr. Vol. I, pp.101).
5. A Student Support Team (SST) referred Student for a special education evaluation in \*\*\* grade. Student was identified and eligible for special education services as a student with a speech impairment (SI) with

noted deficits in expressive language – specifically syntax. Student received speech/language therapy and instructional accommodations. Student’s mother felt Student continued to exhibit social skill deficits. (Tr. Vol. I, p. 102) (Tr. Vol. II, pp. 349-350) (Respondent’s Exhibit 1) (referred to hereafter as “R. Ex. \_\_\_”) (R. Ex. 17:3). Student received special education services until Student was dismissed from special education in \*\*\* grade. (Tr. Vol. I, p.103)(Tr. Vol. II., 351-352)(R. Ex. 17:4).

6. Student was then eligible for instructional accommodations under 504<sup>1</sup> as a student with ADHD and asthma. The school district served Student under 504 for the remainder of \*\*\* grade and the entire \*\*\* grade year. (R. Ex. 17:4). In August 2009 Student’s mother requested the school district conduct an evaluation for autism and eligibility under OHI. (Tr. Vol. I, p. 105). The school district agreed to consider OHI eligibility. (Tr. Vol. I, p. 107)(Tr. Vol. II, p. 352)(Petitioner’s Exhibit 14, p. 1)(referred to hereafter as “P. Ex. \_\_\_”).
7. The school district completed a Full Individual Evaluation (FIE) on October 22, 2009 (R. Ex. 5). An Admission, Review & Dismissal Committee (ARD) was conducted in November 2009 to review the FIE and Student’s eligibility for special education as a student with Other Health Impairment (OHI) based on Student’s ADHD and asthma. The ARD concluded Student was not in need of special education and instead could be successfully supported under 504. (R. Ex. 6:7-9). It does not appear an autism screening was conducted or discussed at the ARD. (R. Ex. 5) (R. Ex. 6).
8. In \*\*\* school up through \*\*\* grade Student was the occasional victim of bullying by peers and cousins who called Student “weird.” (Tr. Vol. I, pp. 111-112). Student’s mother \*\*\* Student over fears for Student’s safety. (Tr. Vol. I, p. 112). Student was \*\*\* for the entire \*\*\* grade year and \*\*\* grade. (R. Ex. 17:5, 16).
9. In \*\*\* grade Student’s mother \*\*\*. (Tr. Vol. I, p. 113)(Tr. Vol. II, p. 352)(P. Ex. 5) (R. Ex. 17:5). Student’s mother \*\*\*. (Tr. Vol. I, pp. 116-117). In the fall of \*\*\* grade Student was enrolled in \*\*\* using the \*\*\*. (P. Ex. 5). By \*\*\* grade Student’s mother decided to re-enroll Student in the school district. (Tr. Vol. I, p. 120).
10. Student formally re-enrolled in \*\*\* 2013 a \*\*\*. (Tr. Vol. I, p. 120)(R. Ex. 17:4-5). Almost immediately Student’s mother began receiving emails from Student’s \*\*\* grade teachers reporting Student’s lack of class participation and failure to turn work in. At home Student’s mother observed that Student did not bring work home or seem to understand it when it did make it home. (Tr. Vol. I, p. 121).
11. At the end of the \*\*\* grade fourth six weeks Student failed \*\*\* with a 65, failed \*\*\* with a 60 and barely passed \*\*\* with a 70. By the end of the fifth six weeks Student failed \*\*\* with a 55, failed \*\*\* with a 65, and failed \*\*\* with a 61. By the end of the final six weeks Student failed \*\*\* with a 49, failed \*\*\* with a 36 finishing the semester with final grades of 58 in \*\*\*, 54 in \*\*, 70 in \*\*\* and 71 in \*\*\*. Student showed strength in \*\*\* and did well in \*\*\*. (R. Ex. 20:6).
12. On February 11, 2013 Student’s mother submitted a written request to the Special Education Director seeking an FIE to assess Student for speech, autism, and learning disabilities in math and writing. (P. Ex. 8:1). The request was to be forwarded to the campus to consider. A copy of Procedural Safeguards was provided to the parent the same day. (P. Ex. 8:1). Another SST met on February 27, 2013 to consider the parental request for an FIE. The parent participated by phone. The SST refused the request. School district personnel decided Student was behind academically because of \*\*\*. Instead, the SST proposed to continue to serve Student under 504 as it had before. (Tr. Vol. I, p. 123-125)(R. Ex.10:1-4) (R. Ex. 12). The school district provided the parent with the requisite prior written notice of the SST decision. (R. Ex. 11) Tr. Vol. I, pp. 123-125) (R. Ex. 11)

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<sup>1</sup> Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794

13. A 504 meeting was conducted on March 4, 2013. The parent did not participate. Teachers noted Student was failing classes due to incomplete or missing assignments. The teachers recommended preferential seating to address distractibility issues and that Student attend daily tutorials. (R. Ex. 12). The 504 service plan included four instructional accommodations, placement in a \*\*\* class aimed at the development of social skills, and participation in mandatory tutorials. The four instructional accommodations were: preferential seating \*\*\*, note exchange, clearly defined deadlines for lengthy assignments, and reminders to stay on task. The 504 plan was adopted on March 4, 2013. (R. Ex. 12). It was difficult for Student to attend tutorials every day in every class. (Tr. Vol. II, pp. 123-125).
14. Despite these interventions by the end of the \*\*\* grade spring semester Student failed \*\*\* and \*\*\* classes and the \*\*\* portions of the state mandated test known as “STAAR”. (Tr. Vol. I, p. 125)(Tr. Vol. II, pp. 386, 388, 426, 674)(P. Ex. 8:2) (R. Ex. 12) (R. Ex. 19:2-4) (R. Ex. 20:6). These results were in contrast to Student’s previous success in \*\*\* school passing previous versions of the state mandated test (known as the “TAKS”) in grades \*\*\*, including commended performance in \*\*\* grade in \*\*\* and \*\*\* and in \*\*\* grade in \*\*\*. (R. Ex. 19:2, 6-11). In response to Student’s failures the school district proposed Student should be retained in \*\*\* grade. However, Student was able to pass the second administration of the STARR test in the summer and therefore promoted to \*\*\* grade per school district policy. (Tr. Vol. II, p. 388).
15. On June 21, 2013 Student’s mother again submitted a request for an FIE to the school district’s Special Education Director. (R. Ex. 13). The Special Education Director and head educational diagnostician conducted a Review of Existing Evaluation Data (REED) on July 11, 2013 and agreed to the request. A Notice of FIE and consent forms were sent to the parent and signed the same day. (Tr. Vol. I, pp. 127-128) (R. Ex. 14:1-11, 15-18) (R. Ex. 14:12-13, 19-21). The plan was to complete the FIE when school staff returned in the fall. (Tr. Vol II., p. 337).
16. In August 2013 the principal and parent discussed via email Student’s schedule for the upcoming first semester of \*\*\* grade. The principal expressed his concern over the disparity between Student’s \*\*\* and \*\*\* school performance on the state mandated exams. He felt that either there was something interfering with Student’s ability to learn or Student missed a significant amount of instruction. The principal concluded that either way Student was in need of some significant help. (Tr. Vol. II., pp. 653-654)(P. Ex. 14:19-20).
17. The principal proposed placement in some remedial classes including \*\*\*, a \*\*\* class, and \*\*\* class (\*\*\*) to address Student’s educational needs identified through the \*\*\* grade STARR results. The principal felt implementation of 504 accommodations and placement in those proposed classes were appropriate interventions for Student in addressing Student’s educational needs. The parent initially disagreed with the proposal. (Tr. Vol. II, pp. 659-664, 672) (P. Ex. 14:19-20). It appears, however, that Student was ultimately placed in the \*\*\* and \*\*\* classes for the first semester of \*\*\* grade. (R. Ex. 20:7).
18. Student missed \*\*\* days of school at the beginning of \*\*\* grade fall 2013 semester due to illness. Student returned to school on September \*\*\*, 2013 with a doctor’s note. The doctor’s note included a statement that Student continued to need “special education consideration.” (Tr. Vol. I, p. 142)(P. Ex. 11:7-8) (R. Ex. 18:21). Student has \*\*\*. (Tr. Vol. I, pp. 143-144)(P. Ex. 11). At the end of the first six weeks in \*\*\* grade Student failed \*\*\* with a 65, failed \*\*\* with a 65, failed another class with a 65, and barely passed \*\*\* with a 71. Student fared somewhat better in \*\*\* with a 77, excelled in \*\*\* with a 91, and did well in \*\*\* with an 84. (R. Ex. 20:7).
19. The school district conducted the FIE between August – September 2013 by a multi-disciplinary team consisting of a Licensed Specialist in School Psychology (LSSP), an educational diagnostician, a speech/language pathologist, and an occupational therapist. (R. Ex. 17). The referral question for the FIE

was to determine whether Student met eligibility criteria for special education as a student with autism, Other Health Impairment, a specific learning disability (in math and/or writing), to address speech/language concerns, and whether student demonstrated a need for occupational therapy (OT) and/or assistive technology (AT). (R. Ex. 17:2) (Tr. Vol. II, pp. 357-358).

20. The FIE included a review of prior assessments including the 2009 FIE. The FIE acknowledged Student's educational history under 504 based on ADHD and asthma. The FIE referenced Student's previous 504 program. (R. Ex. 17:1-5). The testing instruments to be used, the testing schedule, and other aspects of the FIE were discussed in a collaborative manner by the multidisciplinary team. (Tr. Vol. II, p. 323).
21. The school district's educational diagnostician administered the academic and cognitive portions of the FIE. The school district's LSSP was in the same room and observed Student while the diagnostician conducted her assessment. (Tr. Vol. II, p. 313). This was not the ideal preference stated in the testing manual which advised limiting the testing situation to the examiner and the subject if possible. (Tr. Vol. I, p. 228)(P. Ex. 16). However, Student did not appear to be unduly distracted or otherwise affected by the presence of the LSSP. (Tr. Vol. II, pp.360-361).
22. The school district had concerns over the impact of sociological factors on Student's academic performance -- specifically differences between \*\*\* and public school curricula. (Tr. Vol. II, pp. 362-363). However, the diagnostician did not request a copy or access \*\*\* or discuss it with the parent except in rather brief terms. A phone message to the parent about the \*\*\* was not returned. (Tr. Vol. II, pp. 336, 338, 342, 344)(R. Ex. 17).
23. The diagnostician requested parental consent to update Student's OHI form from Student's physician. (Tr. Vol. II, p. 365). Although the 2009 OHI form was still available (characterizing Student's ADHD as "moderate") the diagnostician felt current information was required. (Tr. Vol II, pp. 366-367). However, Student's mother withheld her consent until the school district's FIE was completed. (Tr. Vol. II, p. 366).
24. The diagnostician used the Woodcock-Johnson to determine whether Student exhibited a learning disability. The test manual requires clinical expertise or consultation with someone who has clinical expertise in assessing students suspected of having attentional deficits. (Tr. Vol. II, p. 321)(P. Ex. 16). The diagnostician conferred with the LSSP who had the requisite clinical experience. The diagnostician was qualified to assess Student using the Woodcock-Johnson under her Texas certification. (Tr. Vol. II, p. 381)(R. Ex. 24:3).
25. The school district also assessed Student's adaptive behavior. Adaptive behavior is the ability to form socially appropriate daily living skills such as bathing, dressing, hygiene and other self-care skills. Student's adaptive behavior was assessed using informal measures, observation and a parent information form. Student exhibited age appropriate adaptive behavior based on these measures. (Tr. Vol. II, pp. 379-380, 436)(R. Ex. 17).
26. The FIE also included interviews with three \*\*\* grade \*\*\* school teachers: English, science and art. The English teacher reported a single incident of atypical behavior involving \*\*\*. The English teacher also reported Student came to her class tardy. The art and science teachers reported distractibility and a lack of focus and attention in class. All three \*\*\* grade teachers reported when Student first returned to public school Student was withdrawn and quiet but as the semester progressed Student was less withdrawn and began to communicate with others more often. (Tr. Vol. II, pp. 369-370)(P. Ex. 13:32-4) (R. Ex. 17:22).
27. The three \*\*\* grade teachers stated the following concerns: occasional need for instructions to be repeated; does not seem to retain information previously taught as do peers; takes longer to think things through; needs information broken down into smaller bits; lacks focus and attention and requires step-by-step

instructions. These concerns were supported by parental observations that Student has difficulty following directions the first time given; appears to have a selective memory but can tell every detail of something that is of interest; and, is unable to process information at the rate it is delivered. (P. Ex. 13:34-38) (R. Ex. 17:34).

28. The FIE also included feedback from three \*\*\* grade teachers: math, science and English. Behavioral concerns reported by the teachers included: poor attention and concentration, difficulty staying on task, and non-compliance with teacher directives. One teacher noted occasional “off topic” comments during class and another excessively high activity level. (R. Ex. 17:18).
29. The diagnostician administered the Test of Written Language (TOWL) to address parental concerns that Student might have a learning disability in writing. Student’s overall writing ability was well within the average range. Student’s use of punctuation and capitalization were somewhat inconsistent but Student was aware of the mistakes and corrected them on a test writing task. (Tr. Vol. II, p. 395). Student was also assessed for a learning disability in math (another parental concerns) using the Key Math. Student scored in the average range for math as well. (Tr. Vol. II, pp. 395-396)(R. Ex. 17).
30. The diagnostician found no pattern of strengths and weaknesses that would have supported a finding of a learning disability. Student fell within the average range on all academic achievement measures. (Tr. Vol. II, pp. 371-374, 389). Comparison between the 2009 FIE and the 2013 FIE confirmed Student exhibited no cognitive weaknesses and fell within the average range of cognitive function. (Tr. Vol. II., pp. 371, 379)(R. Ex. 17). However, the diagnostician also concluded Student needs structure and monitoring in the instructional setting. (Tr. Vol. II., pp. 363)(R. Ex.17).
31. The school district’s speech/language pathologist was also a member of the FIE multi-disciplinary assessment team. (Tr. Vol. II, pp. 444, 451). The speech/language pathologist was aware that a determination of autism was one of the evaluation issues. Pragmatic language is the way a person uses language socially. It can include visual and facial cues and body language. (Tr. Vol. I, pp. 180-181)(R. Ex. 17:9). Assessment of a student’s pragmatic language skills is crucial in identifying autism. Teacher input is especially useful in that regard. (Tr. Vol. I, pp. 172, 181)(Tr. Vol. II, p. 559). The speech/language pathologist reviewed the 2009 FIE, gathered parent and teacher information, and conducted her own formal assessments, including the Comprehensive Assessment of Spoken Language (“CASL”) to evaluate Student’s language skills including pragmatic language. (Tr. Vol. I, p. 185)(Tr. Vol. II., pp. 451-452)(R. Ex 17:8-10).
32. The speech/language pathologist distributed teacher input forms to seven of Student’s \*\*\* school teachers still employed by the school district as part of her evaluation. She received a small number back but the forms were not signed or dated. (Tr. Vol. II., pp. 444-445)(R. Ex. 17). The speech/language pathologist decided the unsigned, undated teacher forms were therefore not useful for her portion of the FIE. As a result, she shredded the unsigned, undated teacher input forms. (Tr. Vol. II., pp. 445-446)(P. Ex. 1:19).
33. The speech/language pathologist’s role was also to determine whether Student met criteria as a student with a Speech Impairment (SI). Under the CASL Student’s receptive and expressive language skills fell in the average to high-average range, with pragmatic language skills in the average range. (Tr. Vol. II, pp. 454-455, 467)(R. Ex. 17:13). The speech/language pathologist observed Student in student’s \*\*\* class because it was likely to include social interactions between Student and the instructor and with classmates. She also observed Student in the other FIE testing situations. (Tr. Vol. II., p. 456). Student communicated well with the \*\*\* instructor and conversed appropriately with the evaluators. (Tr. Vol. II, p. 457)(R. Ex. 17:13). Scores on the CASL in the 2009 FIE were consistent with those in the new FIE and fell within the average range. (Tr. Vol. II., p. 462)(R. Ex. 5:1-3).

34. The speech/language pathologist found Student demonstrated the ability to use and understand language; i.e., Student was able to understand the ideas that others had about a conversation – this ability is known as “theory of mind.” There was a disparity between the speech/language pathologist’s observations and parental reports of Student’s ability in this regard. The disparity can be explained by Student’s ability to control the use of language in different settings; choosing not to use language appropriately in one setting over another. This ability to choose and control the use of language is inconsistent with a student with autism who generally lacks this ability. (Tr. Vol. II., pp. 458-461, 489).
35. The school district’s LSSP conducted around 44 evaluations since her licensure in 2011. More than half of those were for autism. (Tr. Vol. II, pp. 519, 522-523). The LSSP’s role was to determine whether Student met criteria on the autism spectrum. (Tr. Vol. II, p. 527). The LSSP conducted four observations. These included the student interview portions of the assessments conducted by the other members of the team. She also observed Student in \*\*\* class, during lunch, and navigating the school hallways. (Tr. Vol. II., pp. 523-524, 585-586). \*\*\* class is not a typical \*\*\* classroom. None of the LSSP’s observations were conducted in an academic \*\*\* class. (Tr. Vol. II, pp. 557-558).
36. The school district’s LSSP also used the Monteiro Interview Guidelines for Diagnosing Asperger’s Syndrome (“MIGDAS”) – an interview protocol for diagnosing Asperger’s Syndrome (a mild form of autism) developed by Dr. Marilyn Monteiro, a nationally well-known expert. Many professionals rely on the MIGDAS for this purpose. The MIGDAS requires a team-based approach to evaluation and its focus is to generate qualitative, not quantitative, data. (Tr. Vol. I., pp.212-213, 215-216)(P. Ex. 16:1-4) (R. Ex. 17:32-33).
37. The LSSP utilized four rating scales and the MIGDAS as part of the autism evaluation. (Tr. Vol. II, pp. 528-529). The school district’s autism specialist assisted the LSSP in administering the MIGDAS. (Tr. Vol. II, p. 529)(P. Ex. 20: 15-18). Although the autism specialist was classified as a paraprofessional by the school district she had extensive experience and training in working with students with autism. The autism specialist is an independent contractor providing in-home and parent training services to the school district. (Tr. Vol. II, p. 530) (P. Ex. 20:2, Exhibit 1). The autism specialist was appropriately trained to assist the LSSP in administering the MIGDAS but it was the LSSP’s responsibility to reach a final conclusion, not the specialist. (Tr. Vol. II., p. 592)(P. Ex. 20). The MIGDAS does not require that all of the professionals listed in the manual be included as members of the team. A team can be as few as two people. (Tr. Vol. II., p. 532)(P. Ex. 16:1).
38. The LSSP obtained additional behavioral data from the parent and Student’s \*\*\* grade English teacher using the Behavior Assessment System for Children, 2d Edition (BASC-2). (R. Ex. 17:25). Parental BASC-2 ratings included significant areas of concern. (Tr. Vol. II, p. 575). Teacher ratings on the BASC-2 were elevated and the LSSP decided to interview the teacher to clarify the teacher’s responses. On follow up the teacher could only identify a single incident where Student exhibited atypical behaviors. Both the parent and the \*\*\* grade teacher composite scores for adaptive skills were clinically significant. Validity indices for the parent were within acceptable range but the teacher’s ratings were excessively negative and were therefore treated with caution by the LSSP. (Tr. Vol. II, p. 569)(P. Ex. 13:2) (R. Ex. 17:25-27).
39. Composite scores for disruptive behaviors, school problems, and, overall behavior problems were clinically significant for both the parent and the \*\*\* grade teacher. Although both teacher and parent stated concerns with Student’s distractibility the data also confirmed Student could be re-directed and able to interact with peers. (Tr. Vol. II, p. 576). The Student also completed a self-rating scale from the BASC-2. Student’s responses were reflective of a typical teenager and Student’s self-ratings matched the LSSP’s observations. (Tr. Vol. II, pp.574, 587-588).

40. The Diagnostic and Statistical Manual of the American Psychiatric Association (DSM) is the principal set of guidelines used by various professionals in applying clear criteria for diagnostic purposes. The DSM is revised from time to time. (Tr. Vol. I., pp. 243-244). The DSM V superseded the DSM IV this past spring although many professionals still use the DSM IV. (Tr. Vol. II, p. 244).
41. The LSSP used the DSM IV in formulating her conclusions as to whether Student was a student with autism. (Tr. Vol. II, pp. 560-561)(P. Ex. 17). Asperger's is a form of a high functioning person with autism. (Tr. Vol. II, pp. 563-564). The evaluator must look at multiple sources to determine whether the student exhibits characteristics of autism across all settings because of the pervasive nature of autism. (Tr. Vol. II, pp. 575, 584). Experience with students with autism is needed in order to make a proper diagnosis (Tr. Vol. I., p. 229) (P. Ex. 17). Some high functioning students with autism can be mis-diagnosed as students with ADHD. (Tr. Vol. II, p. 562)(P. Ex. 17:3). The LSSP was not aware that Student's \*\*\*. While that would have been relevant information it would not have changed her ultimate conclusion that Student did not meet criteria as a person with autism. (Tr. Vol. II, p. 564).
42. The LSSP also used the Gilliom Asperger's Disorder Scale (GADS) that included responses from the \*\*\* grade teacher and Student's mother. Student exhibits some behaviors consistent with Asperger's in one setting but not others – if Student had Asperger's the behaviors would be noted across all settings. (Tr. Vol. I, pp. 208-209) (Tr. Vol. II., pp. 590, 595-596).
43. The LSSP also used the Childhood Autism Rating Scale, 2<sup>nd</sup> Edition (CARS-2) another diagnostic instrument for autism. The CARS-2 requires ratings in 15 different categories, including behavior towards food. The parent questionnaire relied on by the LSSP did not include queries related to food or clothing textures – behaviors noted by Student's mother. The LSSP would have discovered that information if she used the CARS-2 parent questionnaire. (Tr. Vol. II., pp. 546, 548-549, 556)(P. Ex. 13:9, 13:107). Parent information from other evaluation sources may be integrated into the CARS-2. (Tr. Vol. II., p. 556).
44. Student's mother completed a parent questionnaire, a sensory profile and the two screening instruments for autism –the GADS and BASC II. (Tr. Vol. I, p.129)(Tr. Vol. II, p. 539)(R. Ex. 17:33). Although parent information was not listed as a component of the CARS-2 in the FIE parent information was considered by the LSSP in reaching her conclusions about Student's eligibility as a student with autism. (Tr. Vol. II, pp. 540-541,544).
45. The members of the school district's FIE team collaborated in making a decision as to Student's eligibility as a student with autism. The results of the speech/language pathologist's pragmatic language assessment were consistent with the LSSP's evaluation. Student exhibits a number of pragmatic language skills. Student was able to speak in complete sentences, Student's language was appropriate, Student understood social language, Student responded appropriately to humor, and Student picked up on non-verbal cues. (Tr. Vol. II, pp.599, 601, 603)(P. Ex. 15) (R. Ex. 17:8-14).
46. The multi-disciplinary team found no evidence of impairment or disruption in social interaction, in daily interactive language or conversational skills, or pragmatic skills that were the result of an autism spectrum disorder. Student does not exhibit the expected patterns in the development of sensory use, language/communication, and, social relationships of an adolescent with an autism spectrum disorder. Student is aware of Student's environment and others in it. Student is able to interact with others despite parent information to the contrary – especially with peers. Teachers observed Student interacted more when Student was comfortable with others. Adolescents, particularly those with ADHD, miss social cues at times and can be uncomfortable in social situations. (R. Ex. 17:38).
47. OT and AT evaluations were components of the FIE. Student's sensory issues were addressed in the OT evaluation and included the parent information about Student as a “picky eater” with resistance to certain food textures. (Tr. Vol. II., pp. 596-598)(R. Ex. 17:72-76).

48. The diagnostician sent the draft FIE report to the head diagnostician who made some edits and suggestions to the draft report. The team later met with the head diagnostician to discuss the revisions and ensure all issues were addressed in the school district's FIE. (Tr. Vol. II., pp.323-327). The FIE acknowledged Student's grades fell in \*\*\* and \*\*\* grade, Student required additional tutoring throughout student's schooling in the district, and Student takes longer to process information. (Tr. Vol. II., pp. 414-415, 429)(P. Ex. 14:19-20) (R. Ex. 17)(R. Ex. 20:1). The FIE report was completed on September 17, 2013. (R. Ex. 17). The FIE concluded Student did not meet eligibility criteria for special education as a student with autism, a learning disability, or that Student was in need of OT or AT. The FIE left the question of OHI eligibility open. (R. Ex. 17:78-79).
49. An ARD meeting was conducted on October 8, 2103 to review and discuss the results of the FIE. The school district provided Student's mother with a copy of the FIE report prior to ARD although she declined the diagnostician's invitation to review it with her beforehand. The parent received a copy of procedural safeguards at the meeting. (R. Ex. 18). Student's mother presented letters of apology from several classmates that established Student was bullied and mistreated by peers in \*\*\* school. (Tr. Vol. II, p. 401)(P. Ex. 10) (R. Ex. 18).
50. Students first six weeks of poor grades were available to the ARD. The school district members of the ARD concluded Student did not meet eligibility criteria for special education services under the IDEA. School district staff felt that Student's academic difficulties were a result of a mis-alignment between \*\*\* and public school curricula. The meeting ended in disagreement. The tenor of the ARD was difficult and school staff found the meeting to be very stressful. Questions and comments from the parent advocate came off as aggressive and accusatory. The ARD lasted 7-8 hours, an atypical amount of time for an ARD. (Tr. Vol. II., pp. 397-398, 399, 401, 468-470)(R. Ex. 18: 1-6).
51. Student withdrew from the school district on October \*\*\*. Student's mother was concerned that Student would get into trouble without the special education support she felt Student needed. (Tr. Vol. I., pp. 139-140). Student's mother placed Student in \*\*\* at a cost of \$4,350. (Tr. Vol. I., p. 140).
52. The parties reconvened the ARD on October 18, 2013. (Tr. Vol. I., p. 134)(R. Ex. 18:6-7, 28-34). The parent submitted letters from Student's aunt, grandmother, and a family friend involved with Student's \*\*\*. The letters all described Student's social deficits. (Tr. Vol. I., pp.135-136). Student's mother asked the school district to consider those reports in making its decisions. Student's mother also requested an Independent Educational Evaluation (IEE) which was taken under consideration. (Tr. Vol. I., pp. 134, 136).
53. The parent also presented a revised OHI form. There were problems with the revised form. It included hand written notations on the original 2009 OHI form signed by the physician. The diagnostician knew that statements on the 2009 form were no longer true; specifically, Student no longer took a medication noted on the 2009 form and no longer had difficulty getting on and off the school bus. Furthermore the revised OHI form was signed by a nurse-practitioner not the physician. The revised form included a statement that Student exhibited symptoms of ADHD, LD, and speech difficulties that had an impact on Student's classroom performance. No one from the physician's office contacted school personnel to discuss Student's classroom performance. (Tr. Vol. II, pp. 404, 406-407).
54. The school district requested consent from the parent to allow the school district to secure an updated OHI form directly from Student's physician per school district policy and practice. The parent declined to provide the requested consent at the October 18<sup>th</sup> ARD. (Tr. Vol. II., pp. 405-407)(R. Ex. 17:15-16). Because the parent denied consent for updated information from Student's physician the school district did not make a determination of eligibility under OHI. (R. Ex. 17:16) (R. Ex. 18).

55. On October 28, 2013 the school district refused the parental request for an IEE at school district expense. (Tr. Vol. I., p. 136). Student's mother then secured her own independent evaluations. (Tr. Vol. I., p. 137). The outside evaluation team included a psychologist, a speech/language pathologist, and an educational diagnostician. (Tr. Vol. I., pp. 137-138, 169-170)(P. Ex. 15:65). The total cost to Student's mother for the independent evaluations was \$5,375. (P. Ex. 15:66).
56. The IEE was conducted in November 2013. (Tr. Vol. I., p. 171). The outside speech/language pathologist evaluated Student's receptive and expressive language, pragmatic language skills, and auditory processing. (Tr. Vol. I., p. 171)(P. Ex. 15:36-40). In assessing Student's pragmatic language skills she used information from Student's mother, her own observations, and information from previous assessments. She did not contact school district personnel for their input regarding Student's pragmatic language skills because Student \*\*\*. (Tr. Vol. I., pp.176-177).
57. However, the outside speech/language pathologist reviewed teacher data from the school district's FIE noting teachers reported Student had poor attention and concentration and difficulty staying on task. Teacher reports placed Student below average in the following emotional/behavioral/social areas: taking responsibility for own actions; initiating activities independently; maintaining an organized desk, notebook or backpack; exhibiting organization in accomplishing tasks; completing tasks on time; retaining instruction from week to week; and listening to lessons and lectures. (P. Ex. 15:52).
58. The outside speech/language pathologist concluded Student exhibited pragmatic language deficits, a possible auditory processing deficit (that can only be diagnosed by an audiologist), and had difficulty following directions. Both the IEE and FIE showed Student had some difficulty understanding the viewpoint or feelings of others and instead focused on Student's own sense of self and how things related to Student. (Tr. Vol. I., pp. 173-174, 177)(P. Ex. 15:40). The outside speech/language pathologist recommended one hour of speech/language therapy a week to address auditory processing, listening, and pragmatic language skills through conversation and non-verbal communication. (Tr. Vol. I., pp. 175, 177).
59. A licensed psychologist with an LSSP credential conducted a psychological as a component of the IEE. (Tr. Vol. I., p. 192). The outside psychologist concluded Student exhibited a mild high functioning autism disorder that manifested itself primarily in Student's inability to relate socially. (Tr. Vol. I., p. 234)(P. Ex. 15:58, 60-61). The outside psychologist also advised that the "long-standing diagnosis of ADHD should continue to form a basis for understanding [Student's] disabilities." The outside psychologist also agreed with the finding that Student had "some difficulties with language processing and following directions." (P. Ex. 15:61). ADHD can be a co-morbid condition with Asperger's under both the DSM IV and V. (Tr. Vol. II, p. 613).
60. The outside psychologist reviewed the school district's FIE and the autism component specifically. He found the LSSP made good choices in the instruments she used in conducting the autism assessment but disagreed with the LSSP's reliance on a single teacher in completing autism screening instruments. Conversely, he did not obtain any data directly from teachers for his portion of the IEE. (Tr. Vol. I., pp. 236-237). It is important to collect as much data from as many people that know the student as possible in order to properly assess the student's behavior and social skills for purposes of an autism diagnosis. (Tr. Vol. I., pp. 200-201, 203).
61. The outside psychologist viewed the teacher's responses on the autism screening instruments as excessively negative and therefore the LSSP should have treated those with caution which she did. (Tr. Vol. I., pp. 211-212)(Tr. Vol. II, pp. 584-585). In his view, the LSSP should have secured more data from other teachers and other school district personnel. (Tr. Vol. I., pp. 203-205, 207-210). The outside psychologist did not see a completed CARS-2 form completed by the parent which in his view would have been appropriate. (Tr. Vol. I., p. 220).

62. The outside educational diagnostician conducted an educational, academic, and psycho-educational independent evaluation. She administered a standardized intelligence test and portions of a standardized academic achievement test. (Tr. Vol. I., p. 259)(P. Ex. 15:40-58). The outside diagnostician reviewed the school district's previous FIE's as part of her assessment. She selected testing instruments so as not to duplicate those used by the school district in order to ensure reliability and validity of her testing although she did not contact any school district staff for her evaluation. (Tr. Vol. I., pp. 281, 283). She easily established rapport and conversation with Student. Student displayed the same cooperative and diligent approach to the IEE testing as in the FIE. (P. Ex. 15:31, 38) (R. Ex. 17:5-6). The ability of the IEE evaluators to easily establish rapport and engage in conversation with Student is not typical of a student with autism. (Tr. Vol. II., p. 601).
63. Student fell within the average range on most measures; the IEE results supported the FIE conclusion that Student did not meet criteria as a student with a learning disability. (Tr. Vol. II, pp.372, 392)(P. Ex. 15). However the outside diagnostician also felt Student had little or no awareness of student's academic difficulties and saw \*\*\*self as a successful student. Student expressed a desire to \*\*\*. (Tr. Vol. I., pp. 261-262)(P. Ex. 15). The IEE included a set of recommendations for Student's learning environment, effective teaching strategies, acquisition of skills to support learning and development of speech and language, and, skills to address social weaknesses. (P. Ex. 15:62-63).
64. The outside diagnostician criticized the school district's interpretation of the Relative Proficiency Index ("RPI") in the draft report that changed in the final report. She also felt historical data regarding Student's academic difficulties noted in the draft should not have been omitted in the final report. In her view these aspects of the FIE minimized Student's academic difficulties. (Tr. Vol. I., pp. 270-272, 274, 276-278)(R. Ex. 17).
65. The RPI predicts a student's level of proficiency on tasks that typical age or grade level peers will perform with 90% accuracy. The RPI generates statements about a student's predicted quality of performance on academic tasks similar to the test items. However, the RPI did not change the average scores calculated under the testing instrument or change the determination of a learning disability. (Tr. Vol. II, p. 390). The RPI language was revised from the draft FIE report to the final report to avoid confusion for the reader. (Tr. Vol. II, pp. 390-391). It was appropriate to describe Student's functionality as "manageable" because Student's standard scores fell within normal limits and other assessment data corroborated that finding. (Tr. Vol. II, pp. 328, 333-334, 391). The use of RPI descriptors is not required or referenced in the test instrument manual. The RPI statements provide some extra information but do not add to the overall test results. (Tr. Vol. II, pp. 391-392).
66. The school district uses a software package to generate a draft FIE report. The sociological impact paragraph in the draft FIE report was the default template generated by the software. The final FIE report included a significant edit of the default "boiler plate" language to address the sociological factors the team felt were significant in explaining Student's academic performance. (Tr. Vol. II, p. 339-341)(R. Ex. 17).
67. Student was \*\*\* in \*\*\* grade. \*\*\*. The \*\*\* classes are very structured and organized and follow a predictable routine. The \*\*\* instructor observed that Student was very disciplined, made good eye contact, appeared to integrate well with \*\*\*, and was a "very capable young \*\*\*." (Tr. Vol. II., pp. 497, 500, 509).
68. Communicating with an audience is a skill addressed in \*\*\* class. Student gave three successful speaking assignments. (Tr. Vol. II, p. 501). The instructor was considering a leadership position for Student. Student appeared to like the \*\*\* program. The \*\*\* instructor did not observe any behaviors that would have been consistent with a student with either autism or an attention deficit. (Tr. Vol. II, pp. 498, 502-503).

69. Student missed about \*\*\* weeks of instruction in \*\*\* grade math class. Student was slightly below average in math which the math teacher attributed to absences. Student was in the position of learning new content at the same time Student was catching up. Student made an effort to pay attention in math class but appeared a bit lost at times. (Tr. Vol. II, pp. 620, 623-624)(P. Ex. 13:39). Student's \*\*\* grade English teacher noted Student was able to make up missing work following Student's absences in the first six weeks. (Tr. Vol. II, pp. 635-636).
70. The \*\*\* school principal attempted to address parental concerns that Student was a victim of bullying at the October ARD. (Tr. Vol. II, pp. 408-409). The principal undertook his own informal investigation and then directed the assistant principal to conduct a more formal investigation to determine whether bullying was an issue for Student. School staff receive annual training on identifying and responding appropriately to bullying. Neither investigation could confirm any evidence of Student as a victim of bullying. (Tr. Vol. II., pp. 648-649, 651)(P. Ex. 10:12-13) (R. Ex. 22) (R. Ex. 23).
71. There is some history of Student as a victim of bullying. Student was injured as a result of several incidents of bullying by peers in \*\*\* school – particularly in \*\*\*. (P. Ex. 10:1-7, 14-16, 19). There was a documented bullying incident in \*\*\* grade in \*\*\* by several peers that led to disciplinary action. (P. Ex. 10:8). The \*\*\* school principal was unaware of that incident when he conducted his investigation. (Tr. Vol. II., pp. 658-659).

### Discussion

#### Did the School District Conduct Evaluations in all Areas of Suspected Disability in a Timely Manner

Either a parent of a child or a school district may initiate a request for an evaluation to determine if the child is a child with a disability. *34 C.F.R. § 300.301 (b)*. The parent must provide consent for the evaluation. *34 C.F.R. § 300.300*. The initial evaluation must be conducted within 60 days of receiving the parental consent or within the State's timeframe if established otherwise under state law. *34 C.F.R. § 300.301 (c) (1)*. This rule applies to Student because student was previously dismissed from special education and was no longer receiving special education services.

The parent provided written consent for a Full Individual Evaluation on July \*\*\*, 2013. The FIE report was completed on September \*\*\*, 2013 – 64 calendar days following receipt of the parental consent. The FIE was untimely by four days under this rule although I do not find this short delay to be so egregious that it resulted in a substantive harm.

Under state law an Admission, Review & Dismissal Committee must convene to determine the student's eligibility for special education within 30 calendar days from the date the FIE report is completed. *19 Tex. Admin. Code § 89.1050 (d)*. In this case an ARD convened on October 8, 2013 – 21 days from the date the FIE report was complete and was therefore timely under this rule. *Id.*

Petitioner contends the school district should have completed the FIE sooner than September 2013. The question of whether the FIE was timely in that regard requires an examination of the totality of the circumstances beginning with Student's re-enrollment back into the public school in \*\*\* 2013. Within the first 20 days of attendance teachers reported that Student was not completing work or turning it in, that Student was distracted in class and didn't stay on task, and in math refused to show work as directed.

The evidence showed that Student's parent submitted a request for an FIE on February 11, 2013. A SST met on February 27, 2013 refused the request, provided the requisite prior written notice of its refusal, and instead

recommended serving Student under 504. A 504 meeting convened on March 4, 2013 and the school district designed a 504 service plan that was implemented for the remainder of the 2013 spring semester.

Under state law a referral for students for an FIE must be part of the school district's overall general education referral or screening system. Prior to referral students experiencing difficulty in the general classroom should be considered for support services available to all students, including tutorial, remedial, and other academic and behavioral services. The student must be referred for a special education evaluation if the student continues to experience difficulty in the general classroom after the interventions have been provided. *19 Tex. Admin. Code § 89.1011.*

By the end of the fourth six weeks of \*\*\* grade Student was in public school for only a short period of time failing \*\*\* and \*\*\* and barely passing \*\*\*. However, by the end of the next six weeks, Student failed \*\*\*, \*\*\* and \*\*\*. The evidence showed problems with turning work in, missing assignments, and a lack of motivation continued to plague Student and the teachers. The school district complied with state law by providing support services available to all students. The evidence shows that the school district should have initiated a special education referral by the end of the fifth six weeks. By then it was clear that despite the interventions Student was not learning in most of the core academic classes.

By the end of the \*\*\* grade semester Student's semester grades were so poor, failing \*\*\* and \*\*\* miserably and barely passing \*\*\* and \*\*\*, that the school district again had an opportunity to initiate the special education referral but again did not do so. The STAAR test was administered in late April 2013. At some point thereafter (the record is unclear on this point) the school district knew Student failed the \*\*\* portions of the STAAR.

These factors taken together lead me to conclude that by the end of the fifth six weeks and certainly by the end of the semester the school district should have initiated a referral for special education under both state and federal law. Instead, it was not until the parent submitted a written request for an FIE in mid June 2013 that the school district set in motion the referral process. I therefore conclude that the school district did not meet its responsibilities under the IDEA to conduct the FIE in a timely manner. *34 C.F.R. § 300.301 (b).*

The evidence shows the FIE assessed Student in all areas of suspected disability: autism, learning disabilities (math and writing), speech/language, and occupational therapy and assistive technology and was therefore appropriate in that regard. *34 C.F.R. § 300.304 (c)(4).*

Was the School District's Evaluation Appropriate or  
Is Petitioner Entitled to an IEE at School District Expense?

The evidence showed that overall the school district's FIE met the requirements of the IDEA. *34 C.F.R. § 300.304.* The FIE also included a review of existing evaluation data as required. *34 C.F.R. § 300.305.* The FIE met the specific additional regulatory requirements for determining whether Student met eligibility criteria as a student with a learning disability. *34 C.F.R. §§ 300.307, 300.309, 300.310.*

RPI Predictions

Petitioner's expert criticized the revisions to the final FIE report as minimizing Student's academic difficulties. I do not find the difference in the RPI predictions between "somewhat difficult" and "manageable" to be particularly significant in describing Student's functional abilities in the classroom or that the term "manageable" in the final FIE report misled the members of the ARD to reach an erroneous conclusion. An academic task that may be "somewhat difficult" may nevertheless be "manageable" in the classroom for Student who functions within the average range on almost all measures as confirmed both in the FIE and IEE.

### Sociological Factors

The revised paragraph regarding sociological factors was also appropriate in order to include specific information related to Student beyond the “boilerplate” language generated by the FIE software. The omission of historical academic history was understandable given that the FIE report included that information elsewhere albeit in somewhat different form.

### \*\*\* Grade Teacher Data

The failure of the speech/language pathologist to adequately follow up with Student’s \*\*\* grade teachers as a component of her assessment was a weakness in the FIE. Doing so would have provided both the multidisciplinary assessment team and the ARD members, additional information about Student’s behavior and performance in the classes where student would spent the most time.

It is a reasonable inference from the credible evidence that the speech/language pathologist simply chose not to follow up with the \*\*\* grade teachers. I also conclude, however, that having decided not to use the unsigned, undated teacher forms the speech/language pathologist was justified in shredding the forms because she did not rely on them in reaching her conclusions. While those responses would have been helpful I do not conclude their omission meant the entire speech/language evaluation was not appropriate.

The educational diagnostician collected some behavioral data from three of Student’s \*\*\* grade teachers that the multidisciplinary team used in the FIE. The information from both \*\*\* and \*\*\* grade teachers confirmed Student exhibited distractibility and attention issues, problems with organization -- in particular failing to complete assigned work or missing work -- and difficulties participating in some group activities, in part due to lack of understanding.

### Behavioral Observations

The evidence also showed there were no behavioral observations in any of Student’s core academic classes where student had the most difficulty. A good part of the observation data for the FIE took place in the context of the testing situations of the other evaluators. While those observation settings were not in and of themselves inappropriate they did not reflect the realities of a regular classroom.

The classroom observation in the \*\*\* class while appropriate was a very different environment from an academic, general education class with its structure, emphasis on following rules, and its predictability. Student was performing well in the \*\*\* class and student’s behavior, therefore, was likely to be appropriate and it was. It would have been preferable for the school district to include behavioral observations in at least one of Student’s academic core classes. This too was a weakness in the FIE.

### Overall Conclusion re FIE

There were some weaknesses in the FIE. While these weaknesses do not rise to the level of an IDEA violation they did contribute to conclusions the ARD made about Student’s educational need for special education. However there was enough valid information in the FIE to allow the multidisciplinary team to make an informed decision about whether Student met criteria as a student with autism or as student with a student with a speech/language impairment or a learning disability.

The evidence showed that the IEE supported many of the FIE’s conclusions. The differences in the way some of the data was collected and interpreted between the IEE evaluators and the FIE team simply demonstrated that reasonable minds may differ. In that regard those differences were not determinative to the issue of whether the school district’s FIE was appropriate within the meaning of the IDEA.

## OHI Eligibility

The ARD Committees on October 8 and 18, 2013 concluded that a determination as to whether Student met criteria as a Student with a disability under OHI was not possible without an updated OHI form from Student's physician. It was not unreasonable for the school district to request that information and it is unclear from the record why the parent refused to provide the requisite consent to do so. The FIE considered Student's eligibility under OHI and collected appropriate data but declined to reach a determination of OHI eligibility without an updated OHI form from a physician.

The FIE concluded that Student demonstrated difficulty maintaining attention and focus in both home and classroom settings. Parental refusal to provide the requisite consent was an obstacle to both the FIE team and the ARD. The school district was justified in seeking the information and the parent's lack of cooperation was an impediment to the determination of Student's eligibility for special education.

However, there is no real dispute between the parties that Student does have ADHD and asthma. The evidence showed that Student's long-standing diagnosis of ADHD should continue to form the basis for understanding Student's educational performance, both academic and behavioral. It is not surprising that Student performed well in the class with the highest degree of structure and predictability. Both the FIE and the ARD Committees could have relied on the 2009 OHI form and all the other available information to determine Student's eligibility as a student with OHI based on both student's ADHD and asthma.

The 2009 diagnoses of ADHD and asthma were unlikely to change. Indeed, the evidence showed that Student missed a significant amount of instruction at the beginning of \*\*\* grade due to illness. Student's history of attendance issues related to student's asthma was available to both the FIE evaluators and to the ARD. Furthermore, the FIE itself included data from teachers and the parent that supported Student's educational need for special education services as a Student with OHI based on student's ADHD and asthma. *34 C.F.R. § 300.8(a)(c)(9)*.

The evidence showed the 504 interventions were not sufficient in adequately addressing Student's needs that arose from those medical conditions. Under the federal regulations the FIE evaluators and the ARD members could have identified Student as eligible for special education as a student with OHI. Both asthma and ADHD are specifically noted in the federal regulation eligibility criteria. *34 C.F.R. § 300.8(c)(9)*. It is only the state rule that requires the multidisciplinary assessment team include a physician. *19 Tex. Admin. Code § 89.1040(c)(8)*.

The question here is whether the 2009 OHI form was sufficient for purposes of determining Student's eligibility as a student with OHI under the state rule. I conclude that under the unique circumstances of this case it was. Because there is no real dispute that Student does have ADHD and asthma the acquisition of an updated OHI form from Student's physician was somewhat of a formality.

The outcome in this case would be different if there was no previous OHI form completed by a physician – the state rule certainly requires a physician must make the diagnosis of these medical conditions. However, once that diagnosis was on file and no longer a matter of dispute both the FIE and the ARD committees could have made the OHI determination. In this regard the FIE was not appropriate. I also conclude that the parental refusal in providing consent for updated OHI information from the physician was unreasonable and a relevant factor in awarding any relief.

### Did the School District Fail to Provide Student with FAPE By Failing to Address Student's Safety at School that Interfered With Student's Access to the Educational Program?

The evidence showed that Student was the victim of mistreatment and some bullying by peers in \*\*\* school and

\*\*\* grade. There was insufficient evidence to suggest that this continues to be a problem now that Student is in \*\*\* school. The credible evidence supports the inference that Student does have some social skill deficits that need to be addressed in student's educational program. However, Petitioner did not meet the burden of proving that Student was denied access to the educational program as the result of safety issues when student returned to the public school in \*\*\* or in \*\*\* grade.

The parent was certainly free to \*\*\*. While Student may have been the target of mistreatment or bullying, there was insufficient, credible evidence Student was denied access to the educational program within the applicable statute of limitations period. Petitioner did not meet the burden of proof on this issue. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

### Conclusions of Law

1. The school district failed to conduct timely evaluations of Student within the meaning of the IDEA beginning in April 2013. *34 C.F.R. § 300.301; 19 Tex. Admin. Code § 89.1011.*
2. The school district conducted appropriate evaluations in all areas of suspected disability. *34 C.F.R. §§ 300.304, 300.305, 300.309, 300.310.*
3. Petitioner did not meet the burden of proving the school district failed to provide Student with a free, appropriate public education by failing to adequately address Student's safety as a victim of bullying and therefore Student's access to the educational program within the meaning of the Individuals with Disabilities Education Act (IDEA). *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *34 C.F.R. § 300.17.*
4. Student meets the criteria for special education services as a student with Other Health Impairment. *34 C.F.R. § 300.8(a)(c)(9); 19 Tex. Admin. Code § 89.1040 (c)(8).*
5. To the extent any of Petitioner's claims arise under any law other than the IDEA those claims are dismissed as outside the hearing officer's jurisdiction. *34 C.F.R. § 300.507; 19 Tex. Admin. Code §§89.1151 (a)(b); 89.1170.*
6. Petitioner's request for attorney's fees are outside the hearing officer's authority under the IDEA and limited to an award by a court of competent jurisdiction in its discretion. *34 C.F.R. § 300.516.*

### ORDERS

Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief are **GRANTED IN PART AND DENIED IN PART** as follows:

1. Petitioner's request for an IEE at school district expense is **DENIED**;
2. Petitioner's request that an ARD Committee be convened to confirm Petitioner's eligibility as a student with Other Health Impairment for purposes of special education is hereby **GRANTED** and the school district shall convene an ARD Committee meeting within ten (10) school days from the date of this Decision for the purpose of identifying Petitioner as a student with OHI eligible for special education;
3. It is further **ORDERED** the ARD Committee shall design an Individual Educational Plan that includes measureable goals and objectives that address Petitioner's needs as identified by the Full Individual Evaluation including all areas of academic weakness and social/behavioral needs and include the recommendations stated in the FIE;

4. It is further **ORDERED** that the ARD Committee shall also consider, but is not bound by, the recommendations stated in Petitioner's IEE for purposes of designing the IEP; The ARD Committee shall also include a plan to provide educational services when Student is absent from school for more than three (3) consecutive school days due to student's asthma as supported by a doctor's note;
5. It is further **ORDERED** the school district shall provide the parent with the consent form for an updated OHI report from the physician at the ARD meeting;
6. It is further **ORDERED** that the parent shall execute the requisite consent at the ARD meeting to allow the school district to secure updated medical information from Petitioner's physician so updated medical information can be made available to both parties and added to Petitioner's educational file as maintained by the school district;
7. It is further **ORDERED** that the ARD Committee shall include a plan to transition Petitioner back into the public school including individual tutoring, remedial instruction, and any adjustments to Petitioner's class schedule that the school district recommends;
8. It is further **ORDERED** that parent shall cooperate with the school district in designing both the IEP and the transition plan back into the public school by providing the school district within five (5) school days prior to the date of the ARD meeting a copy of the curriculum and all records related to Petitioner's work and educational progress in the home school program provided to Petitioner since Petitioner's withdrawal from the school district on October \*\*\*, 2013 up through the date of this Decision;
9. It is further **ORDERED** as compensatory relief that the school district shall provide Petitioner with individual tutoring and remedial instruction, the schedule to be worked out in a collaborative manner at the ARD meeting, to support Petitioner as Petitioner returns to the public school in order to close gaps in instruction and any differences between the \*\*\* and to assist Petitioner in keeping up with classroom assignments, preparing for tests, and/or completing assigned projects for the remainder of the current school year.

All other relief not specifically stated herein is **DENIED**.

**SIGNED the 24th day of January 2014**

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Ann Vevier Lockwood  
Special Education Hearing Officer

### **NOTICE TO THE PARTIES**

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. *34 C.F.R. § 300.516; 19 Tex. Admin. Code Sec. 89.1185 (n); Tex. Gov't Code, Sec. 2001.144(a) (b).*

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

**STUDENT,  
bnf PARENT,  
    Petitioner,**

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v.

**DOCKET NO. 066-SE-1013**

**FORNEY INDEPENDENT  
SCHOOL DISTRICT,  
    Respondent.**

**SYNOPSIS**

**Issue:**

Whether the school district failed to conduct timely evaluations of student with history of ADHD, asthma and 504 accommodations when student returned to public school after \*\*\* and student struggled with academics upon student's return.

**Held: FOR THE STUDENT**

By end of second six weeks grading period of semester student returned to public school student failed three core academic classes and teachers noted student had problems turning work in, missed assignments, and exhibited lack of motivation. By end of the semester student's semester grades were poor in two core academic classes and student barely passed two other core academic classes. Student also failed \*\*\* portions of the STAAR test administered in late spring of the same semester. School district should have initiated referral for special education at least by end of semester if not before. Instead, parent's request for an FIE in mid June was finally considered and agreed to in July and FIE was not completed until mid September. **34 C.F.R. § 300.301; 19 Tex. Admin. Code § 89.1011.**

**Issue:**

Whether the school district conducted appropriate evaluations in all areas of suspected disability.

**Held: FOR THE SCHOOL DISTRICT**

All areas of suspected disability were evaluated. While there were some weaknesses in some components of the way information was collected in the FIE the credible evidence supported the school district met all regulatory requirements in conducting an appropriate FIE. **34 C.F.R. §§ 300.304, 300.305, 300.309, 300.310.**

**Issue:**

Whether the school district failed to provide student with a FAPE by failing to adequately address student's safety as a victim of bullying at school and therefore student's access to the educational program.

**Held: FOR THE SCHOOL DISTRICT**

While there was some evidence student was a victim of bullying and mistreatment on occasion by peers in \*\*\* school and during semester student returned to school student failed to meet burden of proof that student was denied access to educational program and failed to show bullying or mistreatment by peers continued the next semester. **Schaffer v. Weast, 546 U.S. 49, 62 (2005); 34 C.F.R. § 300.17.**

**Issue:**

Whether student met criteria for special education services as a student with OHI.

**Held: FOR THE STUDENT**

Student's long standing diagnosis of ADHD and asthma that were not in dispute and student's educational need for special education services where 504 interventions were not successful along with previous OHI form signed by physician established student met criteria under IDEA as a student with OHI eligibility for special education services.

Parent's refusal to sign consent for updated OHI form from physician a factor in awarding appropriate relief but under unique circumstances of the case school district could have relied on the previous OHI form and all other available information, including results of FIE, to reach determination of OHI eligibility. **34 C.F.R. § 300.8 (a) (c) (9); 19 Tex. Admin. Code § 89.1040 (c) (8).**

**Issue:**

Whether student's claims arising under laws other than the IDEA should be dismissed as outside the hearing officer's jurisdiction under the IDEA.

**Held: FOR THE SCHOOL DISTRICT**

Hearing officer's jurisdiction strictly limited to claims related to the identification, evaluation, educational placement, or provision of FAPE. **34 C.F.R. § 300.507 (a).**

**Issue:**

Whether student's request for attorney's fees should be dismissed as outside the hearing officer's jurisdiction under the IDEA.

**Held: FOR THE SCHOOL DISTRICT**

Only a court of competent jurisdiction may award attorney's fees in its discretion to a parent who is a prevailing party in an appeal of a hearing officer's decision. **34 C.F.R. §§ 300.516; 300.517.**