

DOCKET NO. 289-SE-0519

DALLAS INDEPENDENT SCHOOL DISTRICT,	§	BEFORE A SPECIAL EDUCATION
Petitioner	§	
	§	
v.	§	HEARING OFFICER FOR
	§	
STUDENT, B/N/F PARENT AND PARENT,	§	
Respondent	§	THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

The Dallas Independent School District (Petitioner or District) brought this action against Student by next friends Parent and Parent (collectively, Respondent or Student) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and its implementing state and federal regulations. The District requested a due process hearing on May 13, 2019, with notice issued by the Texas Education Agency the next day.

The issue in this case is whether the District may proceed with its proposed full and individual evaluation (FIE) of Student in all areas of suspected disability, to include autism, without parental consent.

The hearing officer concludes the District did not meet its burden and is therefore not entitled to an order overriding parental consent.

A. Continuances

The due process hearing was continued to July 31, 2019 and the decision due date was extended to September 6, 2019 (Order No. 2). The decision due date was then extended to October 8, 2019 (Order No. 7). A third extension of the decision due date was granted to give the

parties an opportunity to submit written closing arguments (Order No. 8). The hearing officer's decision is due on November 1, 2019.

B. Legal Representatives

The District was represented by Dianna Bowen of Thompson and Horton, LLP throughout the litigation. Student was initially represented by David Bunger of the Bunger Law Firm, who later withdrew. Sonja Kerr, of Connell, Michael, Kerr, LLP, made an appearance on behalf of Student in July 2019 and represented Student thereafter. *** made an appearance on behalf of Student on September 16, 2019.

C. Preliminary Motions

The hearing officer resolved several preliminary motions, including Petitioner's Motion to Require Resolution Process and Allow Discovery for Respondent's Counterclaim (Order No. 5) and Respondent's Motion Concerning Lack of Jurisdiction and to Dismiss (Order No. 7).

II. DUE PROCESS HEARING

The due process hearing was conducted in person on July 31 and August 12, 2019 and reconvened by phone on September 12, 2019. The hearing was recorded and transcribed by a certified court reporter.

Petitioner was represented by Student's legal counsel, Sonja Kerr. Student's parents, *** and ***, and *** attended. Respondent was represented by its legal counsel, Dianna Bowen of Thompson and Horton, LLP. The following individuals attended as party representatives: ***, Critical Case Coordinator; ***, Principal at ***; ***, Licensed Specialist in School Psychology Supervisor; ***, Licensed Specialist in School Psychology; and ***, Speech Language Pathologist.

III. ISSUES

A. Petitioner's Issue and Requested Relief

EVALUATION: Whether the District may proceed with its proposed full and individual evaluation (FIE) of Student in all areas of suspected disability, to include autism, without parental consent.

The District seeks an order overriding lack of parental consent for a complete FIE.

B. Respondent's Legal Position

Student's parents object to testing in the area of autism, and seeks an order directing the District to finalize testing in areas where the parents have already consented so the information can be considered by the Admission, Review, and Dismissal (ARD) Committee.

IV. FINDINGS OF FACT

1. Student is *** years old and in *** grade. Student went to *** in *** Independent School District. Student then attended *** grade at *** (****) in the District during the 2018-2019 school year.¹ *** is a magnet school and parents seek admission. Student's parents chose *** program because the curriculum can be adjusted to meet a student's needs, and because Student is a hands-on learner whom they thought may benefit from *** classroom composition and instructional methods.²
2. *** instruction uses guided instruction and stresses independence, requiring students to work independently.³ ***.⁴ The curriculum in a *** setting may be advanced as compared to public school curriculum.⁵
3. Student is creative and has a good sense of humor and good peer relationships.⁶ Student

¹ J. Ex. 6 at 2 (hereinafter J. Ex. at ____).

² Tr. at 822-823.

³ Tr. at 373, 470.

⁴ Tr. at 372-373.

⁵ Tr. at 395.

⁶ P. Ex. 9 at 5; J. Ex. 6 at 2.

- lives with Student's parents, ***. Student enjoys playing with *** other children and likes ***.⁷ Student may be shy depending on the situation, and may be reserved if Student does not know someone.⁸
4. ***. ***.⁹ Student's mother has a history of dyslexia.¹⁰
 5. Student's *** teacher has worked in the District for twenty-nine years and has been a *** instructor for nineteen years.¹¹ In a September ***, 2018 communication with Student's mother, she told her Student could not keep up with the other students in spelling.¹² Student's teacher reported concerns with Student's reading, math, and handwriting skills. She had also observed certain behaviors, including putting Student's head down, not doing work, making noises, and falling out of Student's chair.¹³ Student also had good days behaviorally.¹⁴ ***.¹⁵
 6. Student's mother requested a meeting with Student's teacher in early October 2018 and expressed concern with Student's sadness Student could not keep up with peers.¹⁶ She also had concerns with Student's handwriting, processing speed, short-term working memory, and long-term retrieval abilities, and reported Student was unmotivated and sad about school because Student perceived ***self as less smart than the other students. Student's mother requested an FIE, to include an Occupational Therapy (OT) evaluation, Speech Impairment evaluation, and Dyslexia evaluation on October ***, 2018.¹⁷
 7. Since becoming aware of Student's academic struggles, Student's parents got Student eyeglasses, began a home tutoring program, and provided private tutoring at parental expense ***.¹⁸
 8. Student's special education referral packet shows Student had difficulty with reading and handwriting, ***, routinely forming letters, and hearing letter sounds in words. Student also had short-term memory deficits, slow processing speed, and difficulty in math when

⁷ J. Ex. 1 at 1; P. Ex. 9 at 4.

⁸ Tr. at 445, 815.

⁹ Tr. at 441-442, 772-773.

¹⁰ P. Ex. 9 at 1.

¹¹ Tr. at 356, 359-361.

¹² P. Ex. 33.

¹³ Tr. at 156.

¹⁴ Tr. at 371.

¹⁵ Tr. at 361.

¹⁶ P. Ex. 34 at 2.

¹⁷ P. Ex. 3 at 2.

¹⁸ P. Ex. 3 at 2; Tr. at 407-408, 778.

reading was involved. A parent rating scale reported mild concerns in social skills and behavior and significant concerns in the areas of emotional and self-esteem. Student had not shown an interest in learning to read.¹⁹

9. A rating scale completed by Student's teacher in late October indicates below average or poor skills in all academic areas, organization, interactions with classmates and Student's teacher, following directions, and receptive and expressive language skills. In the areas of Emotional/Behavioral/Social Characteristics, she rated Student as having poor or no strengths in most areas, with the exception of adapting to new situations and having an even, usually happy disposition. She reported difficulty with attention and concentration, completing tasks, and following directions/instructions. She noted Student had difficulty working independently, ***, did not follow classroom rules and procedures, ***, and ***.²⁰
10. The District provided Student's parents Notice of Full and Individual Evaluation on November ***, 2018.²¹ The proposed evaluation would include a speech and OT evaluation due to Student's short-term processing and fine motor skill deficits and family history of dyslexia. Student's mother consented an FIE on November ***, 2018.²²
11. Student was evaluated *** in January 2019 at parental expense due to concerns with sight word recognition, decoding, oral reading fluency, handwriting, and spelling skills. Testing showed Student is of high average intelligence.²³ Student was also diagnosed with Dyslexia, Handwriting Problem, and Attention Deficit/Hyperactivity Disorder (ADHD), Combined Presentation.²⁴ Individuals with this type of ADHD display both inattentive and hyperactive/impulsive behaviors.²⁵ Recommendations included a structured multisensory phonics approach to reading instruction and accommodations under Section 504 of the Rehabilitation Act (Section 504) at school for attention deficits.²⁶
12. The District convened a Section 504 Committee meeting on January ***, 2019. The Committee considered parental input, academic progress, health information, early intervention and behavior/discipline data, and the *** evaluation before finding Student eligible for Section 504 services. Student's disabilities were identified as ADHD, Dyslexia, and a Handwriting Problem. Student's Section 504 Plan called for *** minutes of a dyslexia *** until the end of the 2018-2019 school year and then for Student to begin

¹⁹ P. Ex. 9 at 5, 6.

²⁰ P. Ex. 10 at 3, 5, 7.

²¹ J. Ex. 4.

²² J. Ex. 4 at 3, Tr. at 783.

²³ J. Ex. 6 at 2, 8; Tr. at 456-457.

²⁴ J. Ex. 5 at 8, 14.

²⁵ Tr. at 473.

²⁶ J. Ex. 5 at 8-10.

the Dyslexia program in the fall of 2019.²⁷ Student's mother consented to the Section 504 plan offered by the District.²⁸

13. A school district may not know the full scope of an evaluation a student requires until after parental consent is obtained and an evaluation is underway because additional needs may arise during testing. The District does not seek further parental consent for additional testing after it begins an FIE because the parent has already consented to a full evaluation.²⁹ The District uses a team approach to evaluate students who may have a disability and a variety of disciplines may evaluate a student to develop a full picture of his or her needs.³⁰
14. An OT evaluation looks at a student's functional ability to participate in instruction. An experienced occupational therapist evaluated Student, conducting classroom observations and teacher interview, reviewing records, and briefly consulting with Student's other evaluators. The OT evaluation is incomplete because the evaluator has not conferred with the other evaluators and has not observed Student in other settings.³¹ However, based on the information gathered, Student would benefit from OT.³² The draft OT report recommended *** minutes of direct instruction every *** weeks.³³
15. Student was evaluated by an experienced Speech Language Pathologist (SLP) for the FIE. She conducted an oral-motor examination, articulation assessment, and administered the Oral and Written Language Scale, which looks at receptive and expressive language. The SLP conducted observations and observed language samples, noting Student answered the questions appropriately, tended to engage in appropriate conversation, and had trouble sitting still and focusing.³⁴ Though pragmatics testing is incomplete, the evaluation identified an articulation impairment.³⁵ The SLP, however, wants to conduct additional pragmatics testing of Student.³⁶
16. Student was evaluated by an experienced Licensed Specialist in School Psychology (LSSP) for the FIE.³⁷ The LSSP observed Student in different settings, reviewed Student's referral

²⁷ J. Ex. 9 at 10, 13.

²⁸ J. Ex. 10.

²⁹ Tr. at 279.

³⁰ Tr. at 32.

³¹ Tr. at 38-40, 85, 114, 141, 144.

³² Tr. at 86.

³³ J. Ex. 11 at 13; Tr. at 115.

³⁴ Tr. at 236-237, 238-240.

³⁵ J. Ex. 11 at 6.

³⁶ P. Ex. 49; Tr. at 245.

³⁷ Tr. at 256.

file, and consulted with the other evaluators.³⁸ An LSSP may determine through an evaluation whether a student has Autism.³⁹

17. Given Student's above average intelligence, Student's academic struggles are not explained by lack of capacity to understand the work.⁴⁰ District evaluators and Student's *** teacher suspected certain behaviors Student exhibited may be indicators of a disability other than a learning disability.⁴¹ Due to sensory seeking behaviors observed during observations of Student for the FIE, the District proposed Student be evaluated in the area of Autism.⁴² Autism is a neurodevelopmental disorder that typically emerges in childhood characterized by deficits in communication and language, sensory processing, and social development.⁴³
18. Autism and ADHD are both neurological conditions and may result in similar behaviors. The two diagnoses may be present in the same student, including inattentiveness, high levels of movement, and impulsivity.⁴⁴ A student may have an Autism diagnosis may also have a Specific Learning Disability, such as Dyslexia.⁴⁵
19. Certain behaviors reported by Student's *** teacher and observed by District evaluators could be associated with Autism.⁴⁶ A significant percentage of students with Autism have sensory issues, but some sensory problems can exist on their own without other diagnoses. There is also overlap in the behaviors seen in Autism Spectrum Disorders and ADHD. The behaviors observed could be signs of Autism or ADHD, and certain behaviors Student exhibited may also be risk factors for Autism.⁴⁷ Student's behaviors could also be attributed to unmanaged ADHD symptoms in a student with a learning disability who is not receiving appropriate classroom support and is being taught in a new educational structure.⁴⁸
20. Student's parents were unaware District evaluators suspected Autism until February 2019.⁴⁹ They believe the behaviors observed by District evaluators are closely associated

³⁸ Tr. at 304.

³⁹ Tr. at 260.

⁴⁰ Tr. at 312.

⁴¹ Tr. at 306, 321.

⁴² Tr. at 91, 94-95, 174.

⁴³ Tr. at 98, 471-472.

⁴⁴ Tr. at 271-272.

⁴⁵ Tr. at 272.

⁴⁶ Tr. at 67-68, 85.

⁴⁷ Tr. at 79, 84, 85, 127-128, 484, 485.

⁴⁸ Tr. at 477.

⁴⁹ Tr. at 776.

with Student's identified disability of ADHD, rather than Autism.⁵⁰ Student's parents are also concerned District evaluators did not take into account Student's *** culture and lifestyle, ***, into account during testing.⁵¹

21. Because of Student's ADHD diagnosis, Student may be eligible as a student with an Other Health Impairment. The District asked Student's parent to have a physician complete an Other Health Impairment form on February ***, 2019.⁵²
22. Because certain portions of Student's FIE could not be completed because Student did not have glasses for a period of time, Student's mother signed an Agreement to Extend Timelines to Complete an Initial Evaluation form on February ***, 2019. The form does not indicate when the FIE will be complete.⁵³
23. Student's mother initially asked the District to hold off on the proposed evaluation until she spoke with Student's father. In a February ***, 2019 communication, she advised the District they did not want additional testing in Autism. She reiterated this position in a February ***, 2019 communication and requested completion of the cognitive and achievement portions of the FIE.⁵⁴
24. The District responded that, without the opportunity to evaluate in all suspected areas of disability, including Autism, the FIE could not be completed. The District provided Student's mother a revocation of consent form on February ***, 2019.⁵⁵ Student's mother did not return the form and has not revoked consent to evaluate Student in the agreed upon areas.⁵⁶
25. The District views Student's parents' refusal to consent to an Autism evaluation as revocation of consent for the FIE altogether. The District also views the parents' failure to consent to the full scope of the proposed FIE as an obstacle to getting a complete picture of Student's educational needs.⁵⁷
26. A student's Admission, Review, and Dismissal (ARD) Committee can develop a program for whatever that child needs regardless of classification category.⁵⁸ The District has sufficient information available to it to serve Student as a student with OHI based on

⁵⁰ P. Ex 28 at 1-2; Tr. at 447, 813-814.

⁵¹ Tr. at 817.

⁵² P. Ex. 15; Tr. at 128-129, 197.

⁵³ P. Ex. 18, 19; Tr. at 302-303.

⁵⁴ P. Ex. 26; P. Ex. 28 at 1-2.

⁵⁵ P. Ex. 29.

⁵⁶ Tr. at 461, 462, 792-793, 794-795.

⁵⁷ Tr. at 74-75, 81, 95-96, 127, 179-180, 243, 245, 321-322, 325-326.

⁵⁸ Tr. at 129.

ADHD and as a student with a Specific Learning Disability based on Dyslexia.⁵⁹

27. Student's mother filed a complaint with the Texas Education Agency on February 11, 2019 over its failure to complete Student's FIE.⁶⁰ TEA initially closed the complaint, advising her it was not yet ripe because it was filed before the FIE due date.⁶¹ She refiled the complaint on February 22, 2019.⁶²
28. In a report dated April 17, 2019 TEA found the District violated Student's rights by failing to complete an FIE within the regulatory timelines.⁶³ TEA directed the District to convene an ARD meeting to determine whether Student is eligible for special education and related services and determine the appropriate level of compensatory services Student will receive to remedy the violation. TEA directed the District to submit a proposed timeline for completing the corrective actions identified by May 17, 2019.⁶⁴
29. The District did not convene an ARD meeting as directed by TEA.⁶⁵ The District did not appeal TEA's findings and filed the instant litigation on May 14, 2019.⁶⁶
30. The District has not completed Student's FIE.⁶⁷ Whether Student has Autism has not been determined by the District, and no qualified medical provider has diagnosed student with Autism.⁶⁸ Student was evaluated by a pediatrician in May 2019, who noted no signs of neurobiological condition.⁶⁹
31. Student did not re-enroll in the District for the 2019-2020 school year and now attends a private school at parental expense.⁷⁰

⁵⁹ Tr. at 132-133.

⁶⁰ R. Ex. 49 at 1-5.

⁶¹ Tr. at 796-797.

⁶² R. Ex. 51; Tr. at 799.

⁶³ R. Ex. 77A at 1.

⁶⁴ R. Ex. 77A at 6-7.

⁶⁵ Tr. at 117.

⁶⁶ R. Ex. 82.

⁶⁷ Tr. at 136, 286, 304.

⁶⁸ Tr. at 458-459.

⁶⁹ R. Ex. 82A; Tr. at 803-804.

⁷⁰ Tr. at 818-819.

V. DISCUSSION

A. Burden of Proof

There is no distinction between the burden of proof in an administrative hearing and judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n. 4 (5th Cir. 2009). The burden of proof in a due process hearing is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The burden of proof is on the District.

B. A School District's Child Find Duty

The IDEA's Child Find provisions guarantee access to special education and imposes on each local educational agency an affirmative duty to have policies and procedures in place to locate and timely evaluate children with suspected disabilities in its jurisdiction, including “[c]hildren suspected of being a child with a disability ... and in need of special education, even though they are advancing from grade to grade[.]” 34 C.F.R. §§ 300.111(a), (c)(1); *see* 20 U.S.C. § 1412(a)(3) (imposing on each state and local educational agency the affirmative duty to identify, locate, and evaluate all children with disabilities within its jurisdiction).

A school district's Child Find duty is triggered when there is reason to suspect a disability and reason to suspect special education services may be needed to address it. When these suspicions arise, the school district “must evaluate the student within a reasonable time after school officials have notice of behavior likely to indicate a disability.” *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 949-950 (W.D. Tex. 2008). A school district's Child Find duty begins when it receives notice a student likely has a disability and it cannot unreasonably delay between this event and identifying him or her as eligible under the IDEA. *Spring Branch Indep. Sch. Dist. v. O.W.*, 938 F.3d 695 (5th Cir. 2019).

C. Initial Evaluations

A school district must conduct an FIE that meets certain regulatory requirements before the initial provision of special education and related services to a student with a disability. 20 U.S.C. § 1414(a)(1)(A). The evaluation must determine whether a student has a disability and his or her educational needs. 20 U.S.C. § 1414(a)(1)(C). Assessments and other evaluation materials used to assess the student must be selected and administered so as not to be discriminatory on the bases of race or culture and assess the student in all areas of suspected disability. 20 U.S.C. § 1414(b)(3)(A)(1); 20 U.S.C. § 1414(b)(3)(B).

If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation, or the parent fails to respond to a request to provide consent, the school district may pursue an initial evaluation of the student by filing a due process hearing. 34 C.F.R. § 300.300(a)(3)(i).

D. Timeline to Complete an Initial Evaluation

The IDEA provides an FIE must be completed within 60 day of receipt of parental consent or, if the State has its own timeframe, within the State's timeframe. 20 U.S.C. § 1414 (a)(1)(C)(D); 34 C.F.R. § 300.301(c)(1)(i). In Texas, an FIE must be completed not later than the 45th school day after consent is received. 19 Tex. Admin. Code § 89.1011(b). A school district may seek permission from the parent to extend the FIE due date if a student is not made available for testing. 34 C.F.R. § 300.301(d).

Here, Student's mother consented to an FIE on November ***, 2018. The FIE should have been completed in February 2019. While the District sought, and Student's mother agreed to, an extension so further testing could take place when Student had Student's glasses, the extension was not to a date certain. Student's FIE remains incomplete. The District did not complete the FIE in the timeline prescribed by the IDEA and its implementing regulations. 19 Tex. Admin. Code § 89.1011(b).

E. Informed Parental Consent to Evaluate

Informed parental consent is required before a school district may conduct an initial evaluation of a student suspected of having a disability and need for special education. 20 U.S.C. § 1414(a)(1)(C)(i)(I); 34 C.F.R. § 300.300(a). If a parent refuses to consent or revokes consent for an FIE, a school district may seek an order overriding lack of consent. 20 U.S.C. § 1414(a)(1)(D)(ii)(I). To obtain such relief, a school district must show it is essential to override lack of parental consent and demonstrate reasonable grounds exist to do so. *Shelby v. Conrad*, 454 F. 3d 450 (5th Cir. 2006).

Student's parent provided consent for an FIE on November ***, 2018. Student's educator parents do not believe Student has Autism and attribute the behaviors observed by District personnel as symptoms of ADHD. Though substantial portions of the FIE were already near complete, Student's parents were unaware of the evaluators' suspicions Student may have Autism until February 2019, at which point the FIE had been underway for almost three months and should have been near completion. While the District may view the parents' curtailing of the scope of the evaluation as preventing it from completing the FIE, the credible evidence shows Student's mother asked the District to continue with the agreed to portions of the evaluation. The District failed to do so.

Given the substantial amount of information it had concerning Student's disabilities, including the *** evaluation that diagnosed Student with ADHD and Dyslexia, identified OT needs, and an identified articulation impairment, the District did not develop a program to meet Student's known needs. While behaviors noted by District personnel may suggest Student has Autism, they could also be related to Student's already identified disability of ADHD, which was already known to impact Student's success at school and required interventions. The District did not show it is essential to override lack of parental consent. *Shelby v. Conrad*, 454 F. 3d 450, *supra*.

The District's reliance on a suspicion Student has Autism as a basis to abandon the evaluation process altogether, even in areas where consent was given, left it in a no better position as before it began the FIE. The information the District had gathered as of February 2019 was sufficient to convene an ARD to develop a program to address Student's already identified educational needs. On

these facts, reasonable grounds do not exist to override parental consent for only one component of the FIE.

The District argues Student's parents revoked parental consent to *any* evaluation of Student by refusing to consent to the Autism evaluation as an aspect of the proposed FIE. However, this argument is untenable in that Student's mother requested the District continue cognitive and achievement testing even after declining Autism testing and significant portions of the evaluation, including OT and speech evaluations, were all but complete.

A parent may not assert the student is entitled to special education services while simultaneously refusing to allow the school district to evaluate the student to determine what those services may be. *Andress S. v. Cleveland Indep. Sch. Dist.*, 64 F. 3d 176, 178-70 (5th Cir. 1995), cert. denied, 519 U.S. 812 (1996). In this case, Student's parents did not deny the District an opportunity to evaluate Student and readily consented to an FIE. Indeed, three experienced evaluators completed significant work on the FIE between November 2018 and February 2019 when, nearing the end of the regulatory timeframe to complete it, the District wanted to expand its terms and further delay its completion. The District should have completed the FIE in the areas where consent had been obtained and work with the parents to develop a program to address Student's already identified disabilities and educational needs.

VI. CONCLUSIONS OF LAW


1. Petitioner did not meet its burden of proof and is not entitled to an order overriding lack of parental consent. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).
2. The District failed to evaluate Student within a reasonable time after school officials had notice of behavior likely to indicate a disability. *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d. 918, 949-950 (W.D. Tex. 2008); *Spring Branch Indep. Sch. Dist. v. O.W.*, 938 F.3d 695 (5th Cir. 2019).
3. The District failed to complete Student's FIE within the timelines established by the IDEA and its implementing state and federal regulations. 20 U.S.C. § 1414(a)(1)(C)(I); 34 C.F.R. § 300.301(c)(1)(i); 19 Tex. Admin. Code § 89.1011(b).

VII. ORDERS

Based upon the foregoing findings of fact and conclusions of law, Petitioner's request for relief is **DENIED**.

The District is **ORDERED** to complete Student's FIE and convene an Admission, Review, and Dismissal Committee meeting to consider it.

SIGNED November 1, 2019.



Kathryn Lewis
Special Education Hearing Officer
For the State of Texas

VIII. NOTICE TO PARTIES

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