

DOCKET NO. 098-SE-0117

**STUDENT, B/N/F PARENT,
Petitioner**

v.

**NORTH EAST INDEPENDENT
SCHOOL DISTRICT,
Respondent**

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BEFORE A SPECIAL EDUCATION

HEARING OFFICER FOR

THE STATE OF TEXAS

DECISION AND ORDER

*** (Student), b/n/f ***

were unable to reach an agreement. Consequently, the legal issues set out in Order No. 3 remained in dispute.

The hearing convened on April 17-18, 2017, before Catherine Egan, hearing officer, at the District's Administration Building, 8961 Tesoro Drive, San Antonio, Texas. Attorneys Karen Seal

The parties agreed the one-year statute of limitation applies to this case.⁵ The accrual date for this proceeding is January 13, 2016.

II. ISSUES, REQUESTED RELIEF, AND BURDEN OF PROOF

The disputed issues and relief requested set out in Order No. 3, and confirmed at the beginning of the due process hearing, are listed below.

A. Issues⁶

The disputed issues are:

1. Whether the District failed to identify Student as a student with disa

1. That the District be required to reimburse Petitioner for the assessments Petitioner paid for to identify Student as being entitled to special education services;
2. That the District pay for the services at *** for the 2016-2017 school year to address the District's failure to identify and evaluate Student as a student entitled to special education services and to implement an appropriate IEP; and
- 3.

1. The District is a political subdivision of the State of Texas and a duly incorporated

2015-2016 School Year

8. In *** grade, Student was taught all core subjects in Student's *** class by Student's *** teacher, except for *** of ***. The District began preparing *** grade students for ***.

9. The District school was aware Student was diagnosed for ADHD and that Student ***, but never received an ADHD assessment from Student's Psychologist.²⁰

10. At the beginning of the 2015-2016 school year, the District asked Petitioner to participate in a Section 504 meeting to determine Student's needs as a student witsude0 >e nen -year, the D t,olotwas 504 5(05 1 Tiff 1()Tji)-10(t)-206as81.wi D Td ()t)-2(u du n 504 is-4(tw4(a)6)JTJ-

DOCKET NO. 098-SE

22. On April ***, 2016, Student had a rough day in *** class because Student ***. Student also took the *** STAAR test that day ***.³⁷
23. Student's mother never asked the *** teacher to have Student evaluated for special education. Student did not exhibit any indicators²². r steach b6cause d i d

student in *** grade.⁴⁵ Student was within the normal spectrum of *** graders seen by the *** teacher each year as she ***, despite Student's "unsatisfactory" *** grade all year.⁴⁶

29. *** is a program offered to *** grade students who are on *** grade level, but need a little push so they are ready for *** grade and can pass the *** STAAR. This program is not designed for students with learning disabilities or problems.⁴⁷ It is designed to help those *** students in the *** grade class identified by the teacher as needing additional help with the grade level *** curriculum.⁴⁸

30. The *** teacher referred Student to the *** program because Student had not *** before the April ***, 2016 STAAR *** test and she was worried Student had not been able to concentrate fully.⁴⁹ Despite not ***, Student passed the first administration of the *** STAAR test so Student ief0 Td [(t)-6(h)-4(e)]TJ 0 T[c 004 39 ****(-)-10(pr)3(ogr)3(a)6(y)16(.)]TJ E

to provide Student with a Section 504 evaluation.⁵⁶ Student's mother requested a Section 504 meeting on March ***, 2016, and the District arranged for the 504 meeting to take place on April ***, 2016.⁵⁷

35. On March ***, 2016, Student's Psychiatrist wrote a letter stating that Student had been under his psychiatric care since ***,

DOCKET NO. 098-SE-0117

51. Although Student received an unsatisfactory grade in *** throughout *** grade, Student had no bigger discipline problem than ***.⁸⁰ None of Student's teachers ever discussed with the 504 Coordinator any concerns about Student's academic performance.⁸¹
52. Student's performance during *** grade reflects that Student made behavioral and academic progress. Student had passing grades in all subjects from *** grade through *** grade, except for the unsatisfactory grade Student received in ***, and passed all the *** grade STAAR tests. Student was a polite student, who behaved just as other *** *** at school, and was not a discipline problem.⁸²

August 2016 Private Evaluation

53. When a student is admitted into ***, the new student is required to undergo a comprehensive evaluation by an evaluator on ***'s approved list of evaluators.⁸³ Student's mother requested that a clinical psychologist/neuropsychologist on ***'s list of evaluators perform Student's evaluation (the ***-Approved Psychologist).
54. At Student's mother's request, the ***-Approved Psychologist performed Student's psychoeducational testing on August *** and ***, 2016, and met with Petitioner on August ***, 2016, to review her findings and to discuss her letter to Student with him.⁸⁴ The evaluation was done for ***.⁸⁵
55. On August *** and ***, 2016, the ***-Approved Psychologist gave Student the following battery of tests: (1) the Wechsler Intelligence Scale for Children, 5th edition; (2) the Woodcock Johnson achievement battery of tests, 4th edition; (3) the Woodcock Johnson Texas of Cognitive Abilities, 4th edition, (4) the Conner's Continuous Performance Test, 3rd edition, and (5) the Conner's Continuous Auditory Test of Attention (CATA), a new test for listening.⁸⁶
56. The ***-Approved Psychologist evaluated Student while Student was *** because she prefers to see how a child performs ***.⁸⁷ During Student's evaluation, Student talked almost non-stop, had difficulty listening, and took an unusual number of restroom breaks.

⁸⁰ Tr. at 366.

⁸¹ Tr. at 367.

⁸² Res. Ex. 3 at 41-42.

⁸³ Tr. at 509-510.

⁸⁴ Tr. at 510-511.

⁸⁵ Tr. at 492, 506; Pet. Ex. G at 224-231.

⁸⁶ Pet. Ex. G at 225.

⁸⁷ Tr. at 503; Pet. Ex. G at 226.

Had Student ***, Student would not have been as silly and would not have talked so much.⁸⁸

57. The ***-Approved Psychologist did not request any documentation or information from Student's *** grade teachers or from

63. The ***-Approved Psychologist made several recommendations specific for ***. These included (1) breaking down information into short chunks instead of paragraphs, (2) repeating lessons more than once, (3) learning to keyboard to avoid getting bogged down with writing, (4) practicing remedial reading, (5) providing immediate positive or negative responses to Student's behavior, (6) providing short exercise breaks before Student starts lessons, and using perhaps a standing desk, and (7) engaging in physical activities.¹⁰¹
64. After August ***, 2016, the ***-Approved Psychologist had no further interaction with Student. She has never observed Student in class.¹⁰²

65. *** was established to meet the needs of students who have learning disabilities, ADHD, and dyslexia. Every three years, students receive a battery of cognitive tests that is discussed with the parents and from which the school's psychologist creates a set of accommodations for the student that the teachers are to follow, monitor, and keep data on.¹⁰³
66. Although Student began attending *** at the beginning of the 2016-2017 school year, it had not yet done its own evaluation of Student.¹⁰⁴ According to Student's *** and *** teacher (the *** teacher), she has not seen the August 2016 evaluation of Student done by the ***-Approved Psychologist, was unaware that the District had identified Student as a student with ADHD, or that the District had offered and implemented a Section 504 plan.¹⁰⁵
67. The *** teacher agreed that ***, and re-teaching difficult concepts are accommodations beneficial for Student as is giving Student extended time on assignments and deadlines, checking for understanding by ***, and redirecting Student from time to time. But she does not keep behavioral data on Student because Student does not require it.¹⁰⁶ *** students are not required to take state assessment tests.¹⁰⁷
68. Student is currently doing *** grade ***. In ***, Student is making a "C" or "C+". In ***, Student has *** other students in Student's class of various grade levels. *** at *** includes ***. Student is at a *** grade level in ***, but is making an "A" in the class.

¹⁰¹ Tr. at 496-498.

¹⁰² Tr. at 511.

¹⁰³ Tr. at 200.

¹⁰⁴ Tr. at 203.

¹⁰⁵ Tr. at 203-204, 207; Pet. Ex. G at 224, 227-229.

¹⁰⁶ Tr. at 211-212.

¹⁰⁷ Tr. at 215.

IV. ANALYSIS

A. The IDEA and Its Implementing Regulations

Under the IDEA, and its implementing regulations, school districts in Texas must identify and afford children with disabilities, who by reason thereof, need special education and related services, to provide the student with a FAPE. The IDEA defines a FAPE as special education and related services that (a) are provided at public expense, under public supervision and direction, and without charge; (b) meet State standards (including IDEA requirements); (c) include an appropriate preschool, elementary school, or secondary school education; and (d) are provided in accordance with a properly developed IEP.¹⁰⁸ It is essential to establish that the child has a disability under IDEA, and by reason of this disability, the child needs special education and related services, such as a child with OHI or a SLD.

B. Whether District Failed to Identify Student as a Student with a Disability in Need of Special Education Services

The first issue to address is whether the District met its Child Find obligation towards Student. The District does not dispute that Student had a diagnosis for ADHD. What is disputed is whether the District had reason to suspect that Student was in need of special education and related service.

Congress enacted the IDEA provisions to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs.¹⁰⁹ To that end, each school district has an affirmative duty to have policies and procedures in place to identify, locate, and evaluate children with suspected disabilities in its

¹⁰⁸ 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

¹⁰⁹ 20 U.S.C. § 1400(d)(1)(A).

jurisdiction, including “[c]hildren who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade.”¹¹⁰ This is commonly referred to as Child Find.¹¹¹ A student with an impairment is not

2. Reason to Suspect a Need for Special Education

Student presented at school as a typical *** grade *** student. Student had very few behavior issues and on the few occasions that Student did misbehave at school, the District's interventions, used for all general education students, were appropriate and effective. Student passed all Student's courses, passed the state assessment tests, and exhibited no unusual behavioral issues for *** grader. Student even passed Student's *** grade *** state assessment test ***.

Both Student's core curriculum teachers in *** grade, Student's *** teacher and Student's *** teacher, testified that Student had good days and bad days, just as any other *** grade student. Neither observed any behavior at school that caused them to suspect that Student was in need of special education and related services. While Student sometimes performed poorly on quizzes and tests, this was not a consistent pattern. When the District considered Student might benefit from accommodations under Section 504, Student's mother declined a Section 504 evaluation until the spring of 2016, after *** counseled her to do so.

Petitioner emphasized that Student received an "unsatisfactory" grade in *** throughout the year indicating Student had behavioral issues. However, Student's teachers explained that Student did not receive this grade because Student was acting up in class, but because Student

the STAAR tests, and did not test Student while Student was ***. Although the evaluation may have met the criteria for ***, it was not intended to be a retrospective evaluation of Student's performance in *** grade. Consequently, Petitioner did not meet the burden of proof to show Student had a SLD or that Student needed special education and/or related services while Student was in *** grade.

The ***-Approved Psychologist admitted she did not review Student's educational records

DOCKET NO. 098-SE-0117

DECISION OF HEARING OFFICER

NOTICE TO THE PARTIES