

STUDENT b/n/f PARENT	§	BEFORE A SPECIAL EDUCATION
	§	
v.	§	HEARING OFFICER FOR THE
	§	
PLANO INDEPENDENT SCHOOL	§	STATE OF TEXAS
DISTRICT	§	

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioner *** by next friend *** (“Petitioner” is sometimes referred to within this Decision as “Student,” “Parent,” or “Petitioner”) brings this appeal, pursuant to the Individuals with Disabilities Education Improvement Act 20 U.S.C. § 1400 et seq., (hereinafter referred to as “IDEA”), against Respondent Plano Independent School District (hereinafter referred to as “Respondent,” “School District,” or “District”). Petitioner filed a written Request for a Due Process Hearing and Required Notice (“Complaint”), received by the Texas Education Agency (“TEA”) on July 10, 2013, and was styled and docketed as shown above. Petitioner appeared through student’s next friend, *** of Plano, Texas. Respondent was represented by Attorneys Mari McGowan and Brandy Davis of the law firm Abernathy, Roeder, Boyd & Joplin, P.C. in McKinney, Texas.

The Special Education Due Process Hearing in this matter was held from Tuesday, July 30, 2013 through Wednesday, July 31, 2013 in the Plano Independent School District Administrative Offices. Following the conclusion of the hearing, the parties agreed that written closing arguments would be filed by August 2, 2013, and that the Decision of the Hearing Officer would be issued on or before August 9, 2013. On August 1, 2013, the Hearing Officer granted a party request that closing arguments could be filed on Monday, August 5, 2013, and that the Decision of the Hearing Officer would be issued on or before Friday, August 9, 2013.

Petitioner raised the following issues regarding the special education identification, evaluation, placement, programs and services of Petitioner, and Respondent’s alleged denials of a free appropriate public education (“FAPE”):

1. Respondent has not provided home-bound services after a treating physician provided support for homebound services for the 2011-2012 and 2012-2013 school years, therefore, Petitioner alleges that Student’s placement is inappropriate;

2. In November, 2012, Respondent suspended Petitioner for three (3) days and placed Petitioner in the *** room for a period of approximately four (4) days after a Manifestation Determination Review (“MDR”)

Committee found that Petitioner's *** was not related to Petitioner's disabilities. Petitioner contends that the MDR Committee's determination was inappropriate and Student's actions were the result of a disability;

3. In March, 2013, Respondent suspended Petitioner for three (3) days and placed Petitioner in the *** room for more than 45 days in an Alternative Education Program ("AEP") after the MDR Committee erroneously found that Petitioner's physical assault on another student was not related to Petitioner's disabilities;

4. Petitioner alleges that Respondent failed to have sufficiently trained personnel in the AEP to provide Student appropriate instruction in student's multi-sensory program ***;

5. Respondent failed to provide a safe learning environment away from Petitioner's allergies to ***; and

6. Respondent failed to place Petitioner in a building free of allergens, and therefore, Petitioner's allergies have caused physical sickness and Petitioner has been sent home for a period no less than 24-hours on multiple occasions.

As relief in this Special Education Due Process Hearing, Petitioner requests that Respondent be ordered to do the following:

1. Provide Petitioner with a limited school day in a safe learning environment;
2. Provide Petitioner with homebound services;
3. Include Petitioner's allergies as a classification under Other Health Impairment ("OHI") disability; and
4. Cease all truancy complaints related to Petitioner's allergies and disabilities.

After considering the evidence of record and the arguments of the parties, the Special Education Hearing Officer makes the following Findings of Fact and Conclusions of Law:

II. Findings of Fact

1. Petitioner is a ***-year old in the *** grade. Petitioner is eligible for special education services as a student with a Specific Learning Disability ("LD"), Speech Impairment ("SI") and the Other Health Impairment ("OHI") classification related to Attention Deficit Hyperactivity Disorder ("ADHD"). (R6 p. 26; R6 p. 70)

2. Respondent is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing Petitioner a free appropriate public education in accordance with the

Individuals with Disabilities Education Improvement Act, 20 U.S.C.A. § 1400, *et seq.*, and the Federal and Texas rules and regulations promulgated pursuant to IDEA.

3. A Full Individual Evaluation (“FIE”) was conducted on Student on **November 10, 2010**. The purpose of the evaluation was to formally evaluate Student’s present levels of performance and educational needs and to determine if Student meets the criteria for Dyslexia. The evaluators also considered information from Parent to determine if family and environmental situations might be influencing Student’s educational performance. (R2 pp. 88-99)

4. The November 10, 2010 FIE included a physical examination that was performed on Student. The evaluators reviewed Student’s medical history and considered information from Parent. The FIE concluded that Student was generally healthy, and there were no physical factors that might affect Student’s ability to benefit from the educational process. (R2 pp. 89)

5. The November 10, 2010 FIE confirmed Student’s eligibility based on Specific Learning Disability and Speech Impairment. The FIE did not confirm that Student has Dyslexia. (R2 p. 96-97)

6. A Neuropsychological Evaluation was conducted on Student by the District’s Licensed Specialist in School Psychology (“LSSP”). The date of the report is **March 24, 2011**. Student was referred for an additional evaluation so that Student’s Admission, Review, and Dismissal Committee (“ARDC”) could obtain additional information regarding areas of growth based on Student’s current difficulties responding to programming. Also, it was suspected that Student may be eligible under the categories of OHI and/or Traumatic Brain Injury. Student’s Parent suspected that Student’s family and environmental situations might be influencing Student’s educational performance. (R2 pp. 32-56)

7. The LSSP gathered information from the following sources to complete her March 24, 2011 evaluation:

- a) Review of records
 - b) Review of previous evaluations
 - c) Review of current performance in the classroom
 - d) Observations in the classroom
 - e) Questionnaires from Parents and teachers
 - Behavior Rating Inventory of Executive Functioning (“BRIEF”)
 - Conner’s Rating Scale
 - Attention Deficit Disorder Evaluation Scale (“ADDES”)
 - Behavior Assessment System for Children-2 (“BASC-2”)
 - f) Evaluation of Cognitive Skills
 - g) Neuropsychological Instruments
 - NEPSY-II
 - Wide Range Assessment of Memory and Learning (“WRAML2”)
- (R2 p. 34)

8. During the LSSP’s classroom observations of Student, the LSSP noted that Student was distractible and fidgety. However, Student was able to remain on task 80% of the time. (R2 pp. 35-36)

9. The LSSP noted in her March 24, 2011 evaluation that Student exhibited the characteristics of ADHD. The LSSP also noted significantly elevated difficulties for Student in executive functioning. Executive functioning is a collection of processes that are responsible for guiding, directing and managing cognitive, emotional and behavioral functions, particularly during active, novel problem-solving. (R2 pp. 39-40)

10. The LSSP noted that Student exhibited a significantly elevated range of responses in the:

Behavior Regulation Index:

This captures the rated child's ability to shift cognitive set and modulate emotions and behavior via appropriate inhibitory control.

Metacognition Index:

This is intended to reflect the child's ability to initiate, plan, organize, self monitor, and sustain working memory.

Global Executive Composite:

This is a summary score that incorporates all of the BRIEF clinical scales.

Student's difficulties in executive functioning are a hallmark feature for ADHD. (R2 p. 40)

11. The March 24, 2011 Neuropsychological Evaluation noted that Student's teacher reported clinically significant Externalizing Composite behaviors. These behaviors measure disruptive behaviors. The reporting teacher indicated that Student often or almost always:

- Argues when denied own way;
- Loses temper too easily;
- Defies teachers;
- Teases others;
- Has trouble staying seated;
- Bothers other children when they are working;
- Is overly active;
- Acts without thinking;
- Has poor self-control;
- Cannot wait to take a turn; and
- Seeks attention while doing schoolwork. (R2 p. 41)

12. The March 24, 2011 Neuropsychological Evaluation confirmed that Student has ADHD. The LSSP did not confirm an environmental relationship with Student's ADHD, but acknowledged that Student's Parent had suggested a connection with chemical exposure to Student, based on a family experience at a previous residence. The LSSP recommended that Student receive a medical examination so that Student's Parent's concerns could be investigated, further. (R2 pp. 34-35, 54)

13. The LSSP concluded, in her March 24, 2011 Evaluation that Student's behaviors were adversely affected by frustration and feelings of being overwhelmed by an inability to perform certain assigned academic tasks because of Student's learning disability and Dyslexia. The LSSP attributes Student's emotional outbursts to Student's great frustration with not being able to ***; which leads to avoidance behaviors in order to compensate for feelings of inadequacy. The LSSP further concluded that Student's ADHD/Combined Type characteristics further complicate Student's behavioral responses to frustration with the other observed educational disabilities. (R2 p. 54)

14. Student currently takes no prescription medication for any physical disability, or for allergies or ADHD. (Tr. pp. 185-187)

15. Student is a social, apparently healthy student who has friends at school with whom Student associates freely. Until Student's adverse behavior caused Student to be *** in December 2012, Student ***, outdoors. Outside of school Student is not restricted to home. Student goes to the local shopping mall with friends, McDonalds™, and other social gatherings. Student enjoys swimming and playing soccer. (Tr. pp. 64-67)

16. ***, D.O. is a physician who has actively practiced in the United States and Canada for the past 25 years. Dr. *** primary specialty is in the area of Internal Medicine, and his secondary specialty is in the area of Allergy and Immunology. Dr. *** currently maintains a private practice in ***, Texas. (R12)

17. Dr. *** has treated Student and Student's family for a number of years and has known Student since Student was a small child. Dr. *** has concluded that Parent's allergies have been passed on, genetically, to Student ***. Dr. *** bases his opinions regarding the extent of Student's allergies to environmental conditions at Student's school. His opinion is based, in part, on what Student's Parent has reported to him about *her* reactions to Student's school environment during her visits at the school. Dr. *** has examined Student once in 2006; once in 2011; and once in 2013. Dr. *** has never actually tested Student for multi-chemical sensitivity. Dr. *** has performed one (1) skin test on Student and determined that Student is allergic to formaldehyde. Dr. *** has prescribed no medications, of any kind, for Student. Dr. *** would develop extracts or "antigens" for Student, but has not done so, thus far, because of the expense. (Tr. pp. 173-195)

18. On *** Dr. *** entered into a mediated Agreed Order with the Texas Medical Board which required Dr. *** to use a revised informed consent form and special medical chart tracking system with patients undergoing a non-commercial, non-FDA approved ***. Dr. *** was required to complete ten (10) hours of Continuing Medical Education ("CME") in allergy/immunology and eight (8) hours of CME in medical record-keeping within one (1) year of the order; to complete a 14 hour certification board review course in allergy/immunology within two (2) years of the order; and to submit a list of therapies and extracts used in his practice within 60 days of the order and pay an administrative penalty of \$4,500. The mediated Order resolved an administrative complaint that included the Board's finding that Dr. *** failed to obtain informed consent regarding intradermal injection of extract from diesel exhaust or maintain adequate medical records. (R12)

19. Dr. *** is unfamiliar with the criteria for educational placements; educational programs, including special education; or state or federal criteria for determining the need for homebound placement. Dr. *** is unfamiliar with the term "IEP" and does not know the difference between homeschooling and homebound

placement. Dr. *** has never visited Student's home or school, or talked to anyone from Student's school. Dr. *** was unaware that Student's Parent had refused to provide Student's school with her consent for the school to speak with Dr. *** about his treatment of Student. Dr. *** has provided no information to Student's school that could be confused as a medical and/or professional opinion in support of an eligibility determination of OHI, based on allergies or multi-chemical sensitivity. (Tr. pp. 174-177)

20. On **September 14, 2011** Dr. *** wrote a one (1) page, two (2) paragraph letter "To whom it may concern," recommending that Student *** be allowed to transfer from one (1) *** school within District to another *** school. The letter contends that the transfer is "medically necessary" because of "recent allergic reactions, symptoms and ongoing medical problems." Further, according to Dr. *** letter, *** students had previously attended the *** school to which the transfer was sought and "had limited problems and tolerated the environment well." (P1)

21. On **October 21, 2011** Dr. *** signed a Plano ISD Homebound Needs Evaluation-Referral that stated that based on his examination of Student, Student has a serious, acute illness/injury or a long term medical condition requiring homebound services. Dr. *** checked a box on the form stating that Student is unable to function in the school day, even for a shortened day or with other accommodations. Dr. *** further checked boxes that he recognized that homebound is very restrictive placement and that his recommendation concerning Student's educational placement is based on his professional assessment of Student's condition. (P4)

22. On **March 7, 2012** an Admission, Review, and Dismissal ("ARD") meeting was convened on behalf of Student. The purpose of the meeting was to perform an annual review of Student's special education program. Student's Parent attended the meeting. (R6 pp. 105-139)

23. The March 7, 2012 ARDC reviewed Student's FIE dated November 10, 2010 and Student's State/District Required Assessment Consideration results, that showed that Student passed the TAKS-Mod exams in Math and Reading for the 2010-2011 Spring semester. The ARDC also considered Parent's concerns for Student, including a request for Music Therapy assessment. (R6 pp. 105-106)

24. Student's March 7, 2012 ARDC determined that Student meets eligibility criteria for special education based on OHI (ADHD); Specific Learning Disability; and Speech Impairment. The ARDC further determined that Student was not multiply disabled nor medically fragile. (R6 p. 106)

25. Student's March 7, 2012 ARDC determined that Student's behavior does impede Student's own learning or that of others. The ARDC developed measurable Adaptive Behavior goals for Student and a Behavior Intervention Plan ("BIP"). Student's ARDC agreed that Student would be subject to the Student Code of Conduct. (R6 p. 109)

26. Student's March 7, 2012 ARD meeting ended in agreement. (R6 p. 136)

27. On **May 31, 2012** an ARD meeting was convened on Student's behalf. The purpose of the meeting was to discuss a music therapy assessment for Student and to consider some concerns with Student's behavior,

particularly at after school activities. The diagnostician for the music therapy assessment requested additional time to complete the music therapy assessment. (R6 pp. 95-99)

28. On ***, 2012 Student confronted another student at the school's ***. Previous to the confrontation, the two (2) students may have been exchanging angry words with one another. However, at the ***, Student walked up to another student ***. The other student walked away from Student, without further action. The parents of *** student filed a report against Student and Student was ***. Student was returned to Student's general education placement while a Manifestation Determination Review was scheduled to determine if Student should be removed to a Disciplinary Alternative Educational Placement ("DAEP"). (R7 pp. 1-7)

29. On **November 26, 2012** an MDR was convened to determine if Student's ***, 2012 attack on another student was caused by a manifestation of Student's eligible special education disabilities of LD, SI, and OHI (ADHD). The Principal stated that Student had been successful on campus and had already served three (3) days suspension outside of school. The MDR committee decided that Student would serve three (3) days of In School Suspension ("ISS") on campus and receive all services under the existing Individual Educational Program ("IEP") in pull-out classes. This form of placement is termed *** by the school. Therefore, Student was never removed from placement for ten (10) days or more because of the ***, 2012 incident. (R6 pp. 76-82)

30. On **February 20, 2013** an ARD meeting was convened on Student's behalf. The purpose of the ARD meeting was to perform an annual review of Student's special education program and services. Student's Parent and Student attended the ARD meeting. (R6 pp. 26-67)

31. On February 20, 2013 the ARDC noted that Student passed the 2011-2012 Math and Reading STAAR-M test. The ARDC acknowledged that Student was currently receiving Music Therapy and Speech Therapy. The ARDC determined that Student continued to be eligible for special education based on a Specific Learning Disability, SI and OHI (ADHD). The ARDC determined that Student exhibits no physical limitations. (R6 pp. 26-30, 35)

32. The February 20, 2013 ARDC determined that Student is capable of following the District's Student Code of Conduct. Student's ARDC developed a BIP to address Student's non-compliant behavior. The ARDC accepted two (2) measurable adaptive behavior goals for Student:

“(2) By the end of 36 instructional weeks, when frustrated/upset [Student] will use coping strategies such as asking to go cool down in another room, taking a break, using a stress ball, to calm down instead of lashing out or shutting down three (3) out of five (5) times.

...

(8) By the end of 36 instructional weeks, while interacting with adults and students at school, [Student] will meet expectations set forth in [Student's] BIP for beginning work, following directions, and following rules four (4) out of five (5) days per week, across curriculum every six (6) week period.”

(R6 pp. 34-40)

33. At the February 20, 2013 ARD meeting, Student's Parent did not have any concerns "at this time." Student's Parent stated that Student was enjoying making progress with music therapy. Both Student and Parent signed in agreement with the remainder of the ARDC. (R6 p. 50)

34. On ***, 2013 Student was involved in a physical altercation with another student in the school's *** room. Student had been removed from a class and was waiting in the front office to speak to an administrator. Student's teacher had complained about Student's repeated classroom disruptions and disrespectful non-compliance with teacher directives. The school counselor escorted Student to ***. On the way back to the front office, Student ran ahead and entered the *** room. The teacher who was escorting Student instructed Student to leave the *** room. Student had taken a seat next to another student with whom Student's sibling had a verbal altercation the week before. When the teacher instructed Student to leave the room Student said: "That aint happening." While student was talking to the teacher, ***. (R7 pp. 1-12; R6 pp. 4-21)

35. Based on the ***, 2013 incident, the school held an MDR on **March 18, 2013** to determine whether Student would be removed to DAEP, as would be required by ***. The MDR committee determined that Student had a current Functional Behavior Assessment ("FBA") and BIP in place that had been implemented appropriately. The MDR committee concluded that Student's actions on ***, 2013 in the *** room were not a manifestation of Student's Specific Learning Disability, SI, or OHI (ADHD). Student's Parent did not agree with the other members of the MDR Committee. (R6 pp. 4, 6-21)

36. Student was removed for 45 days to a DAEP campus located within the District. Student returned from the DAEP placement to the home campus on ***, 2013.

37. In Student's regular placement, Student uses a multi-sensory reading program called ***. *** is a Dyslexia intervention used by Student's school, but *** is not a specified multi-sensory program in Student's IEP. The IEP only requires that a multi-sensory program be used. When Student was placed in the DAEP because of the ***, 2013 incident in the *** room, Student was provided a multi-sensory program to implement Student's existing IEP. However, the DAEP campus does not use *** and Student was not provided *** during the disciplinary placement in the DAEP. (Tr. pp. 223-225)

38. Student's Parent has mentioned that Student has severe and debilitating allergies to molds, pollens and chemicals at multiple ARD meetings. However, Student's Parent never provided independent medical confirmation of these claimed debilitating allergies to Student's ARDC. At one of the ARD meetings where Student's allergies were discussed, Student's Parent was provided with a District OHI form. Parent was told that the form was to be completed by Student's treating physician to support eligibility based on allergies or multi-chemical sensitivity. Student's Parent has never returned the completed OHI form to the Student's ARDC. (Tr. pp. 251-255)

39. Student's ARDC has never determined that Student was eligible for special education under OHI, based on allergies or a multi-chemical sensitivity.

40. The teachers and the administrators at Student's school who have worked with and observed Student for over a school year have not reported or noticed that Student struggles with debilitating allergies during the school day.

41. Student's Parent never specifically requested services from Student's ARDC for Student's allergies.

42. Homebound placement is not the best educational placement for Student. Student does not perform well in academic settings where Student is asked to work independently. Moreover, Student is social, and removal from the campus setting would not benefit Student's social development. Student's adaptive behavioral goals in the existing IEP cannot be implemented in a homebound setting. (Tr. pp. 256-258, 298-302, 319-322)

43. Student passed all classes for the 2012-2013 school year. Student achieved mastery of the *** grade TEKS and obtained meaningful academic benefit. Student did not have an attendance problem that required review by the ARDC. (R6 pp. 71-75; R8 pp. 1-5; R9 pp. 1) (Tr. pp. 235-238, 259-260)

III. Discussion

Petitioner filed a Due Process Hearing request to challenge the findings of an MDR Committee regarding Student's actions on ***, 2012 and ***, 2013; and to seek placement for Student in a restrictive, homebound setting. Petitioner asserts that Student's *** was a manifestation of and was caused by Student's disability. Petitioner not only claims that Student has severe allergies to mold, pollen and a variety of chemicals, but that these allergies are the "true" reason for Student's OHI eligibility classification. Moreover, Petitioner claims that these same allergies actually *cause* Student's misbehavior, generally and in the two (2) instances where an MDR was convened. Further, Petitioner asserts that these allergies cause the school setting to be toxic and inappropriate for Student. This last assertion is the basis for a request for homebound placement.

Appeals of determinations by MDR Committees are governed by Federal law. Therefore a summary of that Federal law is appropriate.

School Disciplinary Actions Involving Disabled Students

IDEA and its implementing regulations direct the Local Educational Agency ("LEA") in the appropriate handling of a disciplinary infraction committed by a student who has an educational disability. The overall guiding principle is that a student should not be *punished* for exhibiting a disability. If the disability itself *caused* the disciplinary infraction, then the student is not at fault and punishment is unwarranted. Likewise, if the disciplinary infraction happened because the LEA failed to implement established and agreed upon elements of the student's IEP (usually found in a BIP that has been included in the IEP), then the student is not

considered at fault for the infraction. In either case, the assumption is that a violation of a school's Student Code of Conduct caused by a manifestation of a disability should not result in the punishment of a disabled student. Since a change of placement to a disciplinary alternative educational setting is usually a key element of a disciplinary punishment, a student should not be removed from the general setting *as punishment* because of a manifestation of a disability.

The sections of IDEA that encompass the aforementioned "guiding principle" are found at 20 U.S.C. §1415, and are further implemented in the implementing regulations at 34 CFR §§300.530 and 300.532. The statute provides in pertinent part:

"School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension for not more than 10 school days... [20 U.S.C. §1415(k)(B)]

If school personnel seek to order a *change in placement that would exceed 10 school days* and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability... the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedure would be applied to children without disabilities... [20 U.S.C. §1415(k)(C)] (emphasis added)

...the local education agency, the Parent, and relevant members of the [ARD Committee]... shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the Parents to determine –

- (I) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- (II) If the conduct in question was the direct result of the local education agency's failure to implement the IEP.
- (II) Manifestation. If the local educational agency, the Parent, and relevant members of the [ARD Committee] determine that either subclause (I) or (II) of clause (i) is

applicable for the child, the conduct shall be determined to be a manifestation of the child's disability. [20 U.S.C. §1415 (k)(E)]”

The implementing regulations at 34 CFR §300.532 mirror what is set out in the statute, including the requirement that *an appeal* of a decision of the MDR Committee must be handled as an expedited hearing. [34 CFR §300.532(c)]

In the foregoing summary, what is implied in part and stated outright is that the MDR Committee is to look to Student's existing ARD Committee determinations of eligibility and services. Student has been *determined* to be eligible for special education based on SI, a Specific Learning Disability and OHI based on ADHD. There have been no ARD determinations of eligibility based on allergies or chemical sensitivity. There has been no competent medical support ever provided to the ARDC that allergies can *cause* misbehavior or ADHD, as Petitioner has argued, during the hearing. In other words, an MDR Committee is obligated to apply to a disciplinary infraction by this student as it would with *any other special education student*, the information on hand regarding *disabilities confirmed by Student's ARDC*.

IDEA sets out a process by which a student is found to have an educational disability, whether that be for the first time or for determining additional disabilities. The first step is to evaluate the child. The Federal regulations at 34 CFR §§300.300-300.305 set out the rules for evaluating and re-evaluating a child for an educational disability. With parent's consent (34 CFR §300.300), a child may receive an initial evaluation if a disability is suspected by teachers or parents or requested by teachers or parents. Even if a parent believes there is a disability that the school does not suspect, the student first has to be evaluated by a *qualified* diagnostician or medical professional, if the suspected disability is medically based.

The determination of an eligible educational disability is not simply a matter for either a diagnostician or a physician to determine. The regulation requires that the determination be made by all of the child's key stakeholders who can provide information about whether or not a physical, cognitive or emotional disability would interfere with the child's ability to receive an education. The regulation at 34 CFR §300.306(c)(1) provides:

- (c) Procedures for determining eligibility and educational need.
 - (1) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under §300.8, and the educational needs of the child, each public agency must-

- (i) Draw upon information of a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and
- (ii) Ensure that information obtained from all these sources is documented and carefully considered.

Only an ARDC can determine whether a child has an educational disability.

In the case of this student, Petitioner never completed the first step. Student's Parent was given an OHI form to have completed by a physician. This was never completed and returned to the Student's ARDC. Student's teachers and school administrators did not observe Student exhibit a potentially eligible disability based on allergies during the school day. Therefore, they were not obligated to evaluate Student beyond the current November 10, 2010 FIE, that included a medical examination.

In short, Student's MDR did not and should not consider allergies or chemical sensitivity in examining Student's misbehavior until it is *determined* to be an educational disability *before* the misbehavior. The MDR Committee's determination on March 18, 2013 was appropriate. While Student's actions leading up to *** in the *** room seemed to be consistent with characteristics of ADHD discussed in the March 24, 2011 Neuropsychological Evaluation; it is also clear that Student's actions seemed to be pre-meditated and deliberate, rather than impulsive and thoughtless. The November 26, 2012 determination is not eligible for an appeal because Student's placement was changed for less than ten (10) school days.

Homebound Placement

All of the foregoing discussion applies to Petitioner's assertions regarding the inappropriate placement of Student on campus and the request for homebound placement. There has been no competent evidence to support homebound placement presented to Student's ARDC or this Hearing Officer. The process for a change in placement based on a new disability has not been followed. Dr. *** testimony was wholly unpersuasive. Dr. *** does not appear to be qualified to render a relevant opinion regarding *any* educational placement or education program. However, the process required under IDEA, even using Dr. *** as the evaluator, has not been used.

The standards for homebound placement do not exist in a vacuum, nor is it left up to the generalized opinion of a physician who is unfamiliar with the written State standards. Commissioner Rule 19 T.A.C. §89.63, pertaining to Instructional Arrangements and Settings provides at subsection (c)(2):

- “(2) Homebound. This instructional arrangement/setting is for providing special education and related services to students who are served at home or hospital bedside.
- (A) Students served on a homebound or hospital bedside basis are expected to be confined for a minimum of four consecutive weeks as documented by a physician licensed to practice in the United States. Homebound or hospital bedside instruction may, as provided by local district policy, also be provided to chronically ill students who are expected to be confined for any period of time totaling at least four weeks throughout the school year as documented by a physician licensed to practice in the United States. The student’s ARD committee shall determine the amount of services to be provided to the student in this instructional arrangement/setting in accordance with federal and state laws, rules, and regulations, including the provisions specified in subsection (b) of this section.”

It appears to this Hearing Officer that based on the hearing testimony and foregoing standards that Student does not require homebound placement. Student appears robust and healthy and seems to engage in activities involving mold, pollen, and other people when the activity suits Student. Student is social and does not appear to need a restrictive placement that would interfere with social development. However, even *these* opinions are largely moot. Without sufficient, qualified professional support and fidelity to the process as prescribed in the rules, a change in this student’s placement is simply not allowed by the law.

Summary

The record shows that Student’s MDR committee appropriately applied Student’s confirmed list of disabilities to Student’s actions on ***, 2012 and ***, 2013. The MDR convened on November 26, 2012 is not subject to appeal because Student was not removed from regular placement ten (10) or more days. The March 18, 2013 MDR committee applied the review standards for Student’s March 1, 2013 infraction, appropriately.

The record also shows that Student received a free appropriate public education in the existing placement and made significant educational progress. Therein, Student passed all classes and all state required academic assessments. Student’s IEP was implemented appropriately. There is no evidence to support a change in placement to a restrictive homebound placement.

IV. Conclusions of Law

1. Petitioner is a student who resides within the School District who is eligible for special education as a child with a Specific Learning disability, Speech Impairment and OHI based on ADHD/Combined Type. [20 U.S.C.A. §1401(3); 34 C.F.R. §300.8(c)(4) and (9); 19 T.A.C §89.1040(c)(4) and (8)]

2. Petitioner failed to prove that Respondent has failed to offer an educational program that is capable of providing Student a free appropriate public education based on the unique needs of a child with a Specific Learning Disability, Speech Impairment and OHI based on ADHD/Combined Type. [20 U.S.C. §1414; 34 C.F.R. §300.1, et seq.; 19 T. A. C. §89.1001; *Bd. Of Education v. Rowley*, 458 U.S. 176, 73 Led 2d 690, 102 S. Ct. 3034(1982), *Cypress Fairbanks ISD v. Michael F.* 118 F.3d 245 (5th Cir. 1997)]

3. The decision of the MDR Committee convened on March 18, 2013 was appropriate and consistent with existing regulations, based on all the information that was available to the March 18, 2013 MDR Committee. The MDR Committee's decision of November 26, 2012 is not subject to appeal. [20 U.S.C. §1415 (K)(B),(C),(E); 34 C.F.R. §300.532]

4. The Hearing Officer lacks authority to issue an order with respect to the filing or litigation of truancy complaints.

V. Order

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer ORDERS that the relief sought by Petitioner is DENIED.

ISSUED in Austin, Texas this 9th day of August, 2013.

/s/
Stephen P. Webb
Special Education Hearing Officer

DOCKET NO. 268-SE-0713

STUDENT b/n/f PARENT	§	BEFORE A SPECIAL EDUCATION
	§	
v.	§	HEARING OFFICER FOR THE
	§	
PLANO INDEPENDENT SCHOOL	§	STATE OF TEXAS
DISTRICT	§	

SYNOPSIS

Issue: Did Respondent convene and perform an appropriate Manifestation Determination Review meeting to consider the actions of a *** year old *** school student with OHI (ADHD) who *** on ***, 2012 and ***, 2013?

Federal Citation: 20 U.S.C. §1415(k)(B); and 34 CFR §300.530; §300.532.

Held: *For Respondent:* Respondent held a duly constituted MDR that considered the Student’s IEP, teacher and parent input and established disability as required by IDEA. The MDR decision on March 18, 2013 appropriately applied the facts and the law. The November 26, 2012 MDR decision is not subject to appeal because Student was removed from usual placement less than 10 days.

Issue: Is Petitioner entitled to a change in placement to homebound placement based on Student’s alleged allergies and multi-chemical sensitivity?

Federal Citation: 20 U.S.C. §1414; 34 CFR §300.1 et seq.; *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Cypress Fairbanks ISD v. Michael F.* 118 F.d 245 (5th Cir. 1997)

State Citation: 19 T.A.C. §§89.63; 89.1001

Held: *For Respondent:* Student has received a FAPE in the existing campus placement that is far less restrictive than homebound placement. Petitioner has failed to follow process to allow Student’ ARD Committee to determine the eligibility of allergies or a multi-chemical sensitivity. Student does not apparently exhibit physical characteristics for homebound placement, based on state standards.