

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

**STUDENT,
bnf. PARENT
 Petitioner,**

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v.

DOCKET NO. 015-SE-0914

**GRAPEVINE-COLLEYVILLE
INDEPENDENT SCHOOL DISTRICT,
 Respondent.**

DECISION OF THE HEARING OFFICER

Introduction

Petitioner, Student bnf Parent (“Petitioner” or “the Student”) brings this action against the Respondent Grapevine-Colleyville Independent School District (“Respondent,” or “the school district”) under the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. § 1400 et. seq. (IDEA) and its implementing state and federal regulations.

Party Representatives

Petitioner was represented pro se throughout this litigation by Student’s parent, *** Respondent has been represented from the inception of this litigation by its legal counsel Nona Matthews with the law firm of Walsh, Anderson, Gallegos, Green & Trevino. Interpreter and translation services have been provided throughout this litigation to facilitate the parent’s understanding and communication between the parent, the school district’s counsel, and the hearing officer.

Resolution Session/Mediation

The parties met in a Resolution Session on September 25, 2014 but were not successful in resolving the issues in this case. The parties also convened a mediation session on November 18, 2014 but again were unable to resolve the issues in this case through that process.

Student’s Issues

Petitioner seeks resolution of the following issues under the Individuals with Disabilities Education Act (IDEA) in this case:

1. Whether the school district should have identified Student as eligible for special education services under the IDEA, including specifically, whether Student meets the criteria as a student with Other Health Impairment (OHI) based upon a diagnosis of Attention Deficit Disorder (ADD) and other medical issues, a student with a speech/language impairment, or as a student with a specific learning disability;
2. Whether the school district failed to consider all relevant information, including information from the ***, Student’s medical providers and evaluators, and Student’s academic performance at school, in making the determination that Student was not eligible for special education;

3. Whether Student is entitled to an Independent Educational Evaluation (IEE) at school district expense; and,
4. Whether the school district failed to provide Student with a free, appropriate public education under the IDEA.

Student's Requested Relief

Student requests the following items of relief:

1. The school district identify Student as a student with OHI and eligible for special education services under the IDEA;
2. Provide Student with a free, appropriate public education including: (i) occupational therapy; (ii) language therapy; (iii) accommodations in the classroom and assistance in the areas of reading, writing, and math as recommended by the *** evaluation;
3. The school district fund Student's IEE, including the full cost of the *** IEE;
4. Allow Student's parent to be present for all future evaluations conducted by the school district to ensure the school district's evaluations are accurate; and,
5. Address Student's health and medical needs as a component of Student's ability to learn.

School District's Legal Position and Counterclaim

The school district contends it evaluated Student appropriately in all areas of suspected disability and rightfully concluded Student was not eligible for special education services under IDEA criteria. The school district contends it did consider all available information including information provided by the parent and from outside evaluators. The school district confirmed it is tendering payment to the *** for the intelligence portion of the IEE at a rate that meets the school district's cost criteria.

However, the school district contends the scope of the *** IEE went beyond what the school district agreed to with the parent. The school district submitted a Counterclaim as to whether Petitioner is entitled to the full cost of the *** IEE because it did not meet school district criteria. The school district also contends the parent's failure to communicate with the school district in a timely manner or follow school district procedures in securing the IEE delayed payment of the IEE.

Due Process Hearing

The due process hearing in this case was conducted on December 3-4, 2014. At Petitioner's request the hearing was an open hearing and members of the public and local media attended the hearing. Petitioner continued to be represented by Student's parent, ***. Student's parent *** also attended the hearing. On the second day of the due process hearing Student attended a portion of the hearing as well. *** provided interpreter services to Student's parents and to facilitate communication throughout the two day hearing.

Respondent continued to be represented by its attorney Nona Matthews. Ms. Matthews was assisted by her co-counsel Michael Clark at the hearing -- both attorneys are with the law firm of Walsh, Anderson, Gallegos, Green & Trevino. ***, Director of Special Education for the school district, also attended the hearing as the Respondent's party representative.

The hearing was recorded and transcribed by a certified court reporter. The parties requested an opportunity to submit written closing arguments and they both did so in a timely manner by January 6, 2014 as agreed. The decision of the hearing officer is due January 19, 2015 by previous request of the parties.

Findings of Fact

1. Student first enrolled as a *** grader in the school district in August 2013. (Respondent's Exhibit 3, pp. 14-15)(referred to hereafter as "R. Ex. ____."). Before enrollment Student attended *** and *** in the *** (the prior school district). Student was evaluated by the prior school district with a Full and Individual Evaluation (FIE) in *** in October 2011. The 2011 FIE noted that *** Student's communication skills fell within the delayed range when compared with peers and that Student's intelligibility deteriorated in conversational speech; therefore Student received speech therapy from the prior school district during ***. (R. Ex. 1, pp. 1-2).
2. The 2011 FIE was conducted to determine Student's present levels of performance and to address parental concerns raised at an Admission, Review, & Dismissal Committee (ARD) meeting regarding Student's articulation skills and voice quality. In February 2011 Student ***. The *** recommended individual speech therapy *** to aide Student in adjusting and maximizing utilization of the ***. (Petitioner's Exhibit 12)(referred to hereafter as "P. Ex. ____.")(R. Ex. 1, pp. 4-5).
3. The prior school district administered a number of tests and evaluation instruments. Further testing was conducted to determine whether initial data indicating delayed language skills were a result of bilingualism or an underlying language impairment. Student's vocabulary skills fell within the average range for bilingual children living in the United States; Student's responses to expressive and receptive vocabulary tests were consistent with a student learning two languages. Student's overall intelligibility was not affected by *** and intelligibility was not an issue in the classroom. (R. Ex. 1, pp. 7-8) (Transcript Volume I, p. 123) (referred to hereafter as "Tr. Vol. ____.") Although Student's language skills in Spanish and English fell below average on one measure they were within normal limits on four other measures with strongest results in tests allowing bilingual responses. (R. Ex. 1, pp. 8-9) (Tr. Vol. I, pp. 123-126, 128-129) (Tr. Vol. II, p. 276).
4. Interpreting the results of testing for bilingual children can be difficult due to the challenges of learning two languages which often resemble the deficits exhibited by children with language difficulties. The 2011 FIE concluded the test results did not suggest an underlying language impairment but instead were consistent with Student as a dual language learner. The 2011 FIE noted Student demonstrated gains in Student's present language of instruction – English. (R. Ex. 1, pp. 7-9). Fluency was within normal limits. (R. Ex. 1, pp. 8-9).
5. The prior school district concluded Student did not meet eligibility requirements as a student with a speech impairment. In addition, the prior school district did not see a statistically significant deficit between student's intellectual ability and educational performance or a pattern of strengths or weaknesses therefore ruling out a specific learning disability. (R. Ex. 1, p. 21) (Tr. Vol. I, p. 132) (Tr. Vol. II, pp. 278-279).
6. The 2011 FIE recommended speech therapy be discontinued. (R. Ex. 1, p. 9). However, in response to parental demands the prior school district agreed to identify Student as a student with a speech impairment and provide some speech therapy services. An IEP was developed by the prior school district for that purpose. (R. Ex. 3, p. 2). Records from the prior school district showed Student completed the 2012-2013 school year on grade level making good grades in all academic subjects. (R. Ex. 20, pp. 1-4).
7. Following Student's enrollment in the school district an initial ARD meeting convened on August 29, 2013 to implement the set of services identified in Student's IEP from the prior school district until a 30 day transfer ARD could convene. (P. Ex. 24) (R. Ex. 3, pp. 14-15, 24) (Tr. Vol. I, pp. 85-86) (Tr. Vol. II, p. 279). Student's parent participated in the initial ARD in August 2013 and shared Parent's concerns that Student was significantly behind in reading and writing. (R. Ex. 3, p. 14).
8. The ARD accepted the prior school district's identification of Student as a student with a speech impairment - specifically in the area of receptive and expressive language. The ARD agreed upon three IEP goals to

address Student's receptive and expressive language skills and *** for intelligibility purposes based on the 2011 FIE. (R. Ex. 3) (Tr. Vol. I., p. 86) (Tr. Vol. II, pp. 279-280).

9. The ARD agreed to provide 30 minutes of speech/language therapy per week for the first 30 days of school. (R. Ex. 3, pp. 12, 15, 24) (Tr. Vol. II, p. 280). The ARD also agreed to conduct a Full Individual Evaluation (FIE) to determine Student's continued eligibility for speech/language services. The purpose of the FIE was to evaluate all areas of suspected disability including speech and language, cognitive functioning, and achievement. (R. Ex. 3, p. 14) (Tr. Vol. I, p. 88). The school district provided speech services to Student after the initial ARD in August 2013. (Tr. Vol. II, pp. 280-281)
10. In response to parental concerns the ARD also agreed Student would receive educational support through its Response to Intervention (RTI) services while the FIE was pending. (P. Ex. 16) (P. Ex. 17) (R. Ex. 3, p. 15) (Tr. Vol. I., p. 101). RTI services provide extra instructional help for students who need it. There are three tiers to RTI services: Tier I is regular classroom instruction; Tier II is additional instructional time such as 60 minutes for two days a week with small group intervention; Tier III is increased frequency of additional instructional time – often 4-5 times a week in small groups with more intensive intervention. RTI services are regular education services provided during the school day. (Tr. Vol. I., pp. 101-102).
11. The ARD agreed Student should be placed in a classroom with a certified English as a Second Language (ESL) teacher to support Student's language differences as a bilingual student. (R. Ex. 3, p. 15) (Tr. Vol. I., p. 99). ESL students typically lag somewhat behind their peers in language development but catch up as they age. (Tr. Vol. I., p. 105)
12. Student's parents also expressed concerns about Student's ability to eat due to a possible diagnosis of ***. (R. Ex. 3, p. 15) (Tr. Vol. I, pp. 204-205). The nurse conferred with Student's physician about dietary needs related to the ***. The doctor advised Student simply avoid foods high in sugar. (Tr. Vol. I, 193-194). The school district agreed teachers would monitor Student at lunch and prompt Student to eat when necessary. The ARD ended in consensus. (R. Ex.3, pp. 15-16) (Tr. Vol. I, pp. 87-88).
13. Subsequent to the initial ARD Student's parent informed school district staff that Student had ***. (R. Ex. 3, p. 25). The school district's nurse was able to contact Student's pediatrician, secure doctor's orders for the ***, and notified Student's teachers of Student's ***. The school district, through its regular education health services, has an emergency health plan in place for the ***. (R. Ex. 2, pp. 3, 5) (Tr. Vol. I., pp. 191-192, 203-204).
14. The FIE was completed on September 25, 2013. (P. Ex. 16) (R. Ex. 4) (Tr. Vol. II, p. 281). The FIE noted Student was a bilingual English-Spanish speaker and that while Student's native language was Spanish Student's academic language was English. English was identified as Student's dominant language. (P. Ex. 26, p. 2) (R. Ex. 4, p. 2). As with the prior school district's 2011 FIE the school district's 2013 FIE also showed Student's speech and language skills were in the average range and commensurate with Student's status as an ESL learner. (R. Ex. 4, pp. 1-4) (Tr. Vol. I., pp. 134-135, 136).
15. Student was able to speak in sentences adequate in length and complexity. Student used correct pronouns, verb tense, prepositions, and subject-verb agreement. Student was able to sequence events and used age appropriate vocabulary. Student could initiate and maintain conversations, make topic transitions and ask questions to continue a conversation. Student was able to communicate wants, needs and ideas appropriately. Student made no articulation errors and pronounced all phonemes correctly. (P. Ex. 26, p. 3) (R. Ex. 3, p. 3) (Tr. Vol. I., p. 135).
16. Articulation skills were within normal range and did not demonstrate consistent articulation errors during

conversation. Intelligibility of connected speech was excellent with or without contextual information. The Student's teacher reported no difficulty understanding Student's speech in the classroom. Speech was intelligible when asking or answering questions, when reading, and during casual conversation. Fluency skills were also assessed to fall within normal range. (P. Ex. 26, p. 3) (R. Ex. 3, p. 3) (Tr. Vol. I, p. 136).

17. Although Student's ***. Student's *** did not impact the intelligibility of Student's connected speech in conversation. An oral facial exam was completed on September 24, 2013 and included as a component of the FIE. Student's facial symmetry appeared normal; no abnormal movements were observed, Student was able to open and close the mouth normally, and able to pucker and "swing" the lips normally with adequate lip strength. The tongue was normal in color and size with a normal range and speed of motion and adequate strength. Student could move the tongue tip in all directions without difficulty. Student exhibited normal posterior and lateral movement. (P. Ex. 26, p. 4).
18. In the classroom Student interacted appropriately with peers, was cooperative, completed tasks, had good attendance, worked independently, completed assignments, had a positive work attitude, maintained personal space, was organized, exhibited positive peer-involvement, was verbally appropriate, respected the rights of others, used appropriate language, demonstrated self-confidence and accepted compliments appropriately. By parent report Student's behavior at home was good and Student was sweet and social. (P. Ex. 26, p. 6) (Tr. Vol. II, pp. 282-283). The evaluators concluded Student did not meet eligibility criteria for special education services as a student with a speech/language impairment. (R. Ex. 4, pp. 11-13) (Tr. Vol. I, p. 137).
19. The FIE also assessed Student's cognitive functioning using the Kaufman Assessment Battery for Children, Second Edition (the Kaufman). The Kaufman is a valid, reliable, and age appropriate standardized evaluation instrument. The Kaufman uses visual supports that are highly engaging and not as language loaded as other instruments such as the Wechsler Intelligence Scale for Children IV – a consideration for bilingual students in the process of learning two languages. (P. Ex. 26) (R. Ex. 4) (Tr. Vol. II, pp. 283-284, 323). Student's overall cognitive ability fell within the average range with a score of *** and no cognitive deficit was identified. (P. Ex. 26) (R. Ex. 4, p.7) (Tr. Vol. II, p. 284).
20. Student's profile fell within the average range of the different areas of intelligence. No statistical weaknesses in any intellectual area were identified. (Tr. Vol. II, pp. 284-285). The results were commensurate with the results of the 2011 FIE conducted by the prior school district. (R. Ex. 4, p. 8) (Tr. Vol. II, pp. 285-286). The impact of Student's bilingual background was becoming less and less on Student's educational progress. (Tr. Vol. II, p. 286).
21. The 2013 FIE also considered grade level assessments administered three times a year to monitor language, written language, and math. (Tr. Vol. II, p. 287). At the beginning of *** grade Student scored in the *** percentile in math – an average score is the 50th percentile – thus, Student's score was in the expected average range. In the area of language usage Student's score fell to the *** percentile but was still within the average range. (R. Ex. 4, p. 9) (Tr. Vol. II, p. 287).
22. A reading assessment identified both the expected text level for the student and the student's current level of difficulty. (Tr. Vol. II, p. 288). The expected test level for *** grader in reading at the beginning of the year is a ***. Student scored an ***. Fluent reading (measured in terms of words read per minute) becomes stronger as comprehension improves. Student was assessed at reading *** words per minute – the minimum expectation for the beginning of *** grade is ***. (R. Ex. 4, p. 9) (Tr. Vol. II, p. 288). The expected reading comprehension score for the beginning of *** grade is *** – Student scored a *** and thus was considered on grade level at the beginning of *** grade. (Tr. Vol. II, p. 289).
23. The school district uses a writing rubric to assess written expression i.e. a descriptor of what writers at a

particular stage are able to perform as opposed to identifying a specific grade level. At the beginning of *** grade a student is expected to be performing at a stage *** – Student’s writing at the beginning of *** grade was a stage ***. Student was able to write ***. (Tr. Vol. II, p. 289). This was somewhat below average for the beginning of *** grade but not statistically significant. (Tr. Vol. II, p. 292).

24. The FIE also included a highly reliable and valid standardized achievement test. (R. Ex. 4) (Tr. Vol. II, p. 290). Student demonstrated a very stable achievement profile with no significant or unexpected deficits, personal or statistically relevant. Student’s achievement profile was commensurate with Student’s cognitive ability. (Tr. Vol. II, p. 291). Classroom observation was also a component of the 2013 FIE. (Tr. Vol. II, p. 292).
25. The classroom observation confirmed Student’s performance was consistent in terms of what Student could do in the classroom. Student attended to task and no behavioral concerns were noted in the observation. (Tr. Vol. II, p. 294). Based on the results of the cognitive and achievement testing, classroom observation, and behavioral and emotional data Student did not meet eligibility criteria as a student with a specific learning disability. (R. Ex. 4, pp. 12, 18) (Tr. Vol. II, p. 292).
26. The multidisciplinary FIE team also considered health information provided by Student’s private providers, including the information about Student’s possible ***, the ***, an audiological report establishing Student’s hearing was within normal limits, and parent and medical information regarding Student’s ***. (R. Ex. 4, pp. 4-5).
27. Although the information established Student had several medical/health conditions the FIE also showed that Student did not require specially designed instruction as a result of those conditions. The multidisciplinary team concluded Student did not meet eligibility for special education as a student with Other Health Impairment (OHI). (P. Ex. 26, pp. 4-5) (R. Ex. 4, pp. 5-6).
28. There were no concerns about Student’s emotional or behavioral development expressed by Student’s parents or teachers. (R. Ex. 4, pp. 5-6) (Tr. Vol. II, pp. 282-283). Student demonstrated average intelligence with no normative weaknesses of a processing deficit. (R. Ex. 4, pp. 6-7). Student’s academic skills fell within the average range of functioning – Student was generally on grade level. (R. Ex. 4, pp. 6-9). In sum, the multidisciplinary team concluded Student did not meet eligibility criteria for special education services. (R. Ex. 4, pp. 11-12).
29. The 30 day transfer ARD convened on October 3, 2013 for the purpose of reviewing the 2013 FIE and determining permanent placement. (R. Ex. 5, p. 1) (Tr. Vol. I, p. 89) (Tr. Vol. II, pp. 281, 294). School staff agreed with the recommendations of the multidisciplinary team that Student did not meet eligibility criteria for special education as a student with a speech/language impairment or as a student with a specific learning disability. Student’s parents disagreed and maintained Student had a hearing impairment. (R. Ex. 5, p. 5) (Tr. Vol. I, p. 89) (Tr. Vol. II, p. 295). There was a lot of discussion at the October 3rd ARD about whether a diagnosis of *** had an effect on Student’s ability to communicate clearly. School staff concluded Student’s health needs could be adequately handled by the campus without the need for special services. (Tr. Vol. II, pp. 281-282).
30. The October 3, 2013 ARD also addressed parental concerns that Student was not eating enough at school and experienced pain while eating. School staff observed Student was eating at school and did not refuse or show an inability to eat. The Assistant Principal was keeping track of what Student selected to eat and what Student ate from the school menu. That information was routinely provided to Student’s parents. (Tr. Vol. II, pp. 299-300, 391).

31. Even though Student passed the school district's hearing screening the ARD agreed to further assess Student's hearing to address parental concerns. (R. Ex. 5, p. 5) (Tr. Vol. I, p. 90) (Tr. Vol. II, p. 295). The school district agreed to the parent request for the audiological to be conducted by Student's pediatrician at ***. (Tr. Vol. II, pp. 296-297). The ARD also agreed to continue to maintain Student's eligibility for special education and provide speech therapy services pending completion of the additional hearing evaluation. (R. Ex. 5, p. 5) (Tr. Vol. II, pp. 295-296). The IEPs were reviewed, the ARD meeting recorded by the parent, and an interpreter was provided to the parent to review the IEPs in Spanish. (Tr. Vol. II, p. 348). The ARD ended in consensus. (R. Ex. 5, p. 6).
32. However, the next day Student's parents notified the school district they now disagreed with the decisions of the October 3, 2013 ARD. Student's parents requested an IEE in the areas of intelligence, speech, and hearing. (R. Ex. 6, p. 1) (Tr. Vol. II, p. 298). The school district agreed to the request for IEEs in the areas of intelligence and speech because it previously assessed Student in those areas and provided the parents with IEE information. (R. Ex. 6) (Tr. Vol. II, pp. 299).
33. However, the school district refused the request for an IEE to assess Student's hearing because the school district had not yet had the opportunity to conduct its own hearing evaluation – the *** evaluation agreed to at the ARD the day before. (R. Ex. 6, p. 1) (Tr. Vol. II, pp. 298-299). The school district provided Student's parents with its IEE guidelines and a list of evaluators for parental consideration who met school district criteria. (R. Ex. 6, pp. 1-5) (Tr. Vol. II, p. 301). A school district representative met with Student's parent in October with the assistance of an interpreter and reviewed the steps for securing an IEE. All the steps and required documentation were explained to the parent and the parent was provided with an opportunity to ask questions about the IEE process. (R. Ex. 7) (Tr. Vol. II, pp. 304-305).
34. The parent obtained the hearing evaluation from *** and the school district paid for it. (Tr. Vol. I, pp. 138-139)(Tr. Vol. II, p. 297). An ARD reconvened on January 28, 2014 to consider the *** audiological evaluation and continue the discussion of Student's eligibility for special education. (R. Ex. 9) (R. Ex. 10) (Tr. Vol. II, p. 302). The *** audiological confirmed Student was able to hear all speech sounds of the English language. (R. Ex. 8, pp. 5-6) (Tr. Vol. I, pp. 137-138) (Tr. Vol. II, pp. 303-304). School staff concluded Student did not demonstrate a hearing impairment for purposes of special education services. By this time Student mastered all the speech/language IEP goals. (R. Ex. 9, p. 2) (Tr. Vol. II, pp. 305-306). The school district amended the FIE to include the results of the *** audiological assessment. (R. Ex. 8) (Tr. Vol. II, p. 302).
35. At the January 2014 ARD Student's parent also presented a report from *** in *** dated October 21, 2013. That report confirmed Student was making good progress but recommended further testing through *** to address parental concerns. School district procedures for securing the IEE's were again reviewed at the ARD. To address parental concerns the school district explained the levels of RTI services at the January ARD and agreed to provide Student with more intensive RTI services at the next level. (R. Ex. 9, p. 2) (Tr. Vol. II, pp. 306-308).
36. The January 28th ARD again concluded Student did not meet eligibility criteria for special education because Student did not demonstrate an educational need for special education services. The ARD again recommended dismissal from special education. Student's parent objected and requested the ARD reconvene to review additional information the parent planned to provide. The parties agreed to reconvene in ten school days. (R. Ex. 9, p. 2) (Tr. Vol. II, pp. 304, 306, 308). The school district provided the parent with prior written notice of its decisions regarding Student's eligibility and dismissal from special education. (R. Ex. 10, pp. 2-9).
37. The reconvened ARD met on February 11, 2014. Bad weather and scheduling issues for Student's parents

were factors in getting back to ARD. (R. Ex. 9, pp. 8-10)(R. Ex. 10) (Tr. Vol. II, pp. 309-310). The ARD discussed parental concerns over Student's hearing ability, the ***, and Student's speech/language skills – including parental concerns over Student's ability to speak Spanish correctly. Student's classroom teacher reported Student was able to communicate with peers and adults in the classroom. (P. Ex. 24)(R. Ex. 10, pp.2-3)

38. Student's parents finally identified their chosen IEE evaluators at the February 11th ARD. *** was selected to conduct the speech/language IEE and *** for IQ testing. The school district requested parental consent to make arrangements with *** for the IQ IEE. Instead, Student's parent reported private insurance would cover the cost of both evaluations even though the school district continued to offer to fund the IEEs. (R. Ex. 10, p. 3) (Tr. Vol. II, pp. 312, 314).
39. The school district later discovered that the *** would not conduct an IQ test alone and instead would only conduct a comprehensive evaluation. (Tr. Vol. I, p. 256). Because the school district only approved an IEE for IQ testing Student's parents were asked to select another evaluator – school district IEE criteria and a list of possible evaluators were again provided to Student's parents. (R. Ex. 11, pp. 1-2) (Tr. Vol. II, pp. 312-313). The school district continued to offer to pay for the IEEs. (R. Ex. 13) (Tr. Vol. II, p. 314).
40. At the end of the first term in *** grade (2013-2014 school year) Student made excellent grades in all academics: *** in language arts, *** in math, *** in reading, *** in science and *** in social studies. Student was identified as "Excellent" in art, music, and PE. At the end of the second term in *** grade Student's grades were *** in language arts, *** in math, *** in reading, *** in science, and *** in social studies. Student again attained "Excellent" ratings in music, PE and Spanish (replacing art in the second term). By the third term of *** grade Student's grades were *** in language arts, *** in math, *** in reading, *** in science and *** in social studies. Student was again rated "Excellent" in music, PE and Spanish. (P. Ex. 25).
41. By the end of *** grade Student's overall score on grade level assessments exceeded the goal for the end of *** grade. (R. Ex. 14, p. 4) (Tr. Vol. II, p. 315). The school district also administered a standardized cognitive abilities assessment to all *** graders using a nationally normed test that assesses three areas of intelligence: verbal, quantitative, and nonverbal. (R. Ex. 14, p. 5) (Vol. II., pp. 315-316). Student's profile was very stable with an overall score of *** – with 100 as average. Student's verbal intelligence scores were lower than other areas of intelligence but still fell within normal limits. (R. Ex. 14, p. 5) (Tr. Vol. II., p. 316). In *** grade Student was on grade level in reading, writing, and math earning A's and B's. (R. Ex. 22) (Tr. Vol. II, pp. 399-400).
42. Following the ARD meeting in February 2014 the school district convened an Academic Support Committee (ASC) meeting also known as the RTI Committee. Although Student was progressing at the *** grade level the Committee decided to continue to provide Student with Tier II reading services as a courtesy to address parental concerns. (Tr. Vol. I, pp. 91-94).
43. Following the dismissal from special education, Student's parents notified the school district that Student had dyslexia. (R. Ex. 14, p 1). In response, the school district conducted a dyslexia evaluation in April 2014. Student did not meet state criteria as a student with dyslexia. However, the dyslexia evaluation recommended continuing to receive Tier II RTI for reading with some direct instructional time devoted to blending word parts – a weakness identified by one of the dyslexia assessment subtests. (P. Ex. 13) (R. Ex. 14) (Tr. Vol. I., p. 93) (Tr. Vol. II, pp. 314-315).
44. A Section 504 meeting convened to determine if Student met eligibility requirements for 504 services. (R. Ex. 22). Student did not meet the criteria to be identified as a student with dyslexia under 504. By the end of

the 2013-2014 school year Student exceeded grade level reading expectations and was on grade level in all academic areas. (P. Ex. 14) (R. Ex. 14, p. 4) (R. Ex. 20, pp. 5-6) (Tr. Vol. I., p. 93).

45. An independent speech/language evaluation was conducted by *** in April 2014. (R. Ex. 16, pp. 2-4) (Tr. Vol. I., p. 142). The evaluation showed an improvement in Student's English language skills as measured from the 2011 FIE. English was Student's dominant language over Spanish. (Tr. Vol. I. pp. 143-144). Furthermore, Student's phonological awareness improved from the time the school district conducted the dyslexia assessment. (P. Ex. 14) (R. Ex. 16, p. 2) (Tr. Vol. I., p. 144).
46. The independent speech/language evaluation concluded Student has a mild receptive and expressive language disability. However, students with mild speech and language impairments can function well in the regular classroom. Although such students demonstrate some weaknesses the classroom teacher can work with the student and implement accommodations to support the student in the classroom. (R. Ex. 16, p. 4) (Tr. Vol. I., p. 146). The independent speech/language evaluation also recommended speech therapy but the recommendation was based on the previous medical history and not on the current evaluation. (Tr. Vol. I., p. 146).
47. The school district contacted Student's parent in mid-August 2014 to determine the status of the *** evaluation. (R. Ex. 15) (Tr. Vol. II, p. 317). The *** evaluation was conducted on July 29, 2014 and the IEE report was finally presented to the school district on August 22, 2014 – just prior to the beginning of the 2014-2015 school year. (P. Ex. 1) (R. Ex. 15, p. 6). The scope of that evaluation exceeded the scope of the IQ testing the school district agreed to. Furthermore, the *** evaluator was not a licensed specialist in school psychology (LSSP) and thus did not meet school district IEE criteria. (R. Ex. 16, pp. 16-17) (Tr. Vol. II, p. 334).
48. Parental concerns stated in *** IEE over Student's ability to sustain attention were very different from any concerns expressed by Student's parent to the school district or observed by school staff. (R. Ex. 15, p. 7) (Tr. Vol. II, pp. 318-319). Parental reports that Student was argumentative and lost Student's temper contradicted Student's behavior at school. Student was a compliant, happy child without any disciplinary issues, well liked and well behaved at school. (Tr. Vol. II, pp. 319, 329).
49. Behavioral data for the *** IEE came almost exclusively from the parent. (R. Ex. 15, pp. 16) (Tr. Vol. II, pp. 328-329, 332). The behavioral profile in the *** IEE did not reflect the Student's behavior at school or fit the social-emotional scores within the IEE. (Tr. Vol. II, p. 331). In the self report component of the IEE Student described ***self as very confident, average in behavior and thinking and feeling happy overall. (Tr. Vol. II, pp. 331-332).
50. In the first progress report in *** grade (2014-2015 school year) Student's grades were: *** in language arts, *** in math (absence from school affected Student's progress in math), *** in reading, *** in science with a rating of "Excellent" in Spanish. (P. Ex. 25). Student's ability to express ***self in writing is an area of academic weakness but Student does not require specially designed instruction to make progress in written expression. Student scored at the average *** grade level on a recent writing assessment. (Tr. Vol. II, pp. 392-393).
51. Student's *** grade teacher spoke of Student with affection. Student comes to school with a smile, is a positive member of the class, has friends, and enjoys being in school. Student ***. Student enjoys *** and ***. (Tr. Vol. II, pp. 384-385). Student works well with other children, is engaged in class and helpful. Student is not a discipline problem in *** grade. At times the teacher needs to repeat directions for Student but that is typical for a *** grader. (R. Ex. 22, p. 2) (Tr. Vol. II, pp. 400-401).

52. The parties met in a two day ARD meeting on September 10-11, 2014. (R. Ex. 18) (Tr. Vol. II, p. 337). The *** speech/language IEE was presented by Student’s parent for the first time at the September 10th ARD and reviewed. The *** speech/language IEE confirmed Student did not meet eligibility requirements for special education as a student with a speech impairment. (R. Ex. 18, pp. 10-11) (Tr. Vol. II, pp. 335-336).
53. An auditory processing disorder is a deficit of auditory input and how it is understood or managed by the central nervous system. (Tr. Vol. I, p. 147). The IEE included an auditory processing assessment. Although Student’s phonological awareness and word memory were lower Student’s memory scores were higher – these results are inconsistent with an auditory processing disorder. (R. Ex. 15, p. 12) (Tr. Vol. I, p. 148) (Tr. Vol. II, p. 327). Furthermore, Student’s working memory and processing speed fell within the average range. The audiologist could not conclusively identify an auditory processing deficit. (P. Ex 11, p. 6) (Tr. Vol. I, pp. 149-150) (Tr. Vol. II, pp. 324-325).
54. The experts agree Student’s hearing should be retested at least annually and a reassessment of Student’s auditory processing abilities in one year, if still a concern, is also recommended. (Tr. Vol. I, p. 150). Student does not need an FM amplification system. (Tr. Vol. I, pp. 150-151). The school district followed many of the other recommendations made in the *** speech/language IEE. The recommendation for development of self advocacy compensatory strategies can be easily implemented if Student shows an academic need for them. (Tr. Vol. I, pp. 151-154). Student does not exhibit the need for special education as a student with a speech impairment or a specific learning disability in the nature of an auditory processing deficit. (Tr. Vol. I, pp. 154-155).
55. The September 2014 ARD also considered *** evaluation. (R. Ex. 18) (Tr. Vol. II, p. 335). IQ and achievement scores from *** were generally consistent with the school district’s FIE. Slightly depressed math fluency scores were attributed to Student’s frequent erasures during the assessment. (P. Ex. 1) (R. Ex. 18, pp. 11-12) (Tr. Vol. II, pp. 324, 326, 406).
56. Student fell within the low average range of intellectual functioning and displayed adequate skills related to overall reading, math and writing with some increased difficulty on tasks with auditory directions. The *** IEE concluded Student was performing academically at the expected level given Student’s intellectual functioning and age. (P. Ex. 1)(R. Ex. 18). Student continues to receive RTI services in *** grade in reading, is working on grade level, continuing to progress and is “the star” of the small reading group. (Tr. Vol. II, p. 394). Student is in the low average *** grade reading group. (Tr. Vol. II, pp. 402-403).
57. Phonological processing may be a weakness for Student although it is also common for bilingual students to have the two phonological systems “seep into each other” – a bilingual student can become confused because vowel sounds in English and Spanish are different – or some sounds occur in English but not in Spanish. It is not uncommon for bilingual students to exhibit a lower phonological awareness at the beginning when learning to read because the student is required to mentally separate the two systems. (Tr. Vol. I, pp. 141-142).
58. The *** also included a behavioral component with information derived primarily from Student’s parent . The *** suggested the possibility of Attention Deficit/Hyperactivity Disorder (ADHD) based on parental reports and observations during testing that Student was impulsive and distracted throughout the six hour test session. However, *** noted the lack of sufficient information from a variety of sources prevented a conclusive diagnosis of ADHD. (P. Ex. 1) (R. Ex. 15, p. 16). The IEE evaluator did not follow up with the school district to secure additional behavioral information from the teachers. (Tr. Vol. II, pp. 322, 328).
59. Parental responses on a behavioral rating scale were very different from the way Student functioned in the classroom (Tr. Vol. II, p. 328). The symptoms of ADHD in the IEE setting were inconsistent with Student’s

behavior and classroom performance at school. (Tr. Vol. II, pp. 333-334, 395). The September 2014 ARD discussed the *** suggestion of ADHD but Student did not present any concerns at school with attention, behavior, or self-help skills. Student's teachers reported Student responded quickly to directions, stayed on task and Student's attention was good. (R. Ex. 18, pp. 12-13) (Tr. Vol. II, pp. 386-387). Student did not exhibit any of the mood issues reported by the parent or signs of hyperactivity, aggression, conduct problems or anxiety. (Tr. Vol. II, pp. 387-388, 404).

60. The total cost of the *** IEE was ***. A portion of that cost was paid by ***. The school district reimbursed Student's parents on October 3, 2014 in the amount of ***. As of the date of the due process hearing the school district has paid all bills submitted by ***. (Tr. Vol. I., pp. 256-257). There may be a balance due of ***. (P. Ex. 9).
61. In May 2014 Student was seen by a pediatric eye specialist who reported Student was doing well with 20/25 vision or better in each eye – although Student was found to be slightly farsighted with some astigmatism Student did not require spectacle correction. The pediatric eye specialist confirmed Student's ability to read and any letter reversals were not the result of a vision deficit. Instead, the doctor suggested a neurological processing issue might explain letter reversals. (P. Ex. 12) (Tr. Vol. II, pp. 339-340).
62. School staff followed up with the eye doctor. The doctor confirmed the intent of his note was merely to confirm Student did not have a vision issue to explain any letter reversals. (Tr. Vol. II, pp. 340, 367). Although Student does occasionally reverse letters it is not unusual for *** graders to do so (for example with "b" and "d"). Student shows some improvement in that regard this school year. (Tr. Vol. II, pp. 403-404). The September 2014 ARD considered the results of the eye examination. (R. Ex. 18, p. 12) (R. Ex. 25).
63. The September 2014 ARD also addressed parental concerns over Student's eating habits at school – Student appeared to be eating and getting sufficient nutrition at school. (R. Ex. 18, p. 11). In response to on-going parental concerns the school district agreed to continue to offer Student Tier II RTI services in reading. (R. Ex. 18, p. 14). The September 2014 ARD also discussed Student's ***, ***, and the need for ***. (Tr. Vol. I. pp. 192-193).
64. The ARD concluded Student still did not meet eligibility requirements for special education. (R. Ex. 18, pp. 10-11, 15). The ARD ended in disagreement and the parties agreed to another ten day recess. (R. Ex. 18, p. 14) (Tr. Vol. II, p. 337). During the recess period the school district conducted an occupational therapy (OT) assessment in response to parental concerns about Student's handwriting. (R. Ex. 17) (Tr. Vol. II, p. 336).
65. The parties met again on September 24, 2014 to consider additional information including the school district's OT evaluation. There was no additional information from ***. Student continued to meet grade level expectations as reported by the Student's *** grade teacher. (R. Ex. 20, p. 9)(Tr. Vol. II, pp. 409-410). The school district's OT evaluation concluded Student needs interventions in the area of handwriting but did not recommend OT services. (R. Ex. 20).
66. Instead, the OT report included a set of recommendations for the classroom to address handwriting issues. (R. Ex. 17, pp. 1, 4)(Tr. Vol. I., pp. 227-229, 241-242, 246-247, 251)(Tr. Vol. II, pp. 393-397). The handwriting strategies recommended by the OT are being implemented by the *** grade classroom teacher and have proven effective and successful. (Tr. Vol. II. pp. 397-398) Otherwise Student is able to function well in the school environment without the need for OT services. (Tr. Vol. I., pp. 237-239, 242-244, 246).
67. At the September 24th ARD Student's parent presented a letter from Student's physician regarding Student's need for a restricted diet. (R. Ex. 18, p. 15). The school district's Director of Health Services explained the school district's procedure for dietary restrictions at school in writing to the physician and via email to

Student's parent. A parent may restrict a student's dietary choices by completing and submitting a dietary restriction form. Student's parents were provided with the form but the form has never been submitted. (R. Ex. 26, pp. 14-21).

68. In addition, the school district's Child Nutrition Department has a registered dietician on staff who can work with the family to meet medically certified dietary needs. (R. Ex. 26, p. 18) (Tr. Vol. I., pp. 194-196). Student's health needs can be met through the school district's health services -- available to all students with medical needs whether they are special education students or not. (Tr. Vol. I., pp. 203-204, 206-207). The school district can only provide medical services ordered by a physician under state law. (Tr. Vol. I., pp. 207-208). Parents play a collaborative role with the health services department in meeting a student's health needs. (Tr. Vol. I., p. 209).
69. Student's parent also expressed concerns over Student's math skills even though school district assessment data showed Student was performing on grade level. (R. Ex. 18, p. 15). To address those concerns the school district agreed to provide Tier I RTI services in math. However, the ARD again determined Student did not meet eligibility criteria as a student with a disability in need of special education. (R. Ex. 18, p. 15) (Tr. Vol. II, pp. 337, 405, 407, 411-412). The school district again provided Student's parent with prior written notice of its decisions regarding Student's eligibility. (R. Ex. 18, pp. 17-20).
70. Student's parent communicated with school staff frequently and regularly on a wide variety of issues and concerns during the relevant time period. Staff attempted to answer parental questions and address concerns. Staff worked with Student's parent in securing information from outside providers, facilitating the IEEs, and in providing Student's parent with Notice of Procedural Rights under both the IDEA and 504. (P. Ex. (16) (P. Ex. 17) (P. Ex. 18) (P. Ex. 19) (P. Ex. 20). The school district provided Student's parent with an interpreter to facilitate understanding of Student's IEP, IEE procedures, and, ARD meeting discussions and decisions. (Tr. Vol. I., pp. 91, 257-258).
71. Student needs the support of Tier II reading services which Student continues to receive in the regular *** grade classroom. The services are provided during a 50 minute block of time during the school day -- children needing the service are pulled into small groups. Student is making progress in the small Tier II reading group. (Tr. Vol. I, pp. 95, 107). Student's behavior in *** grade is exemplary. Student has no office referrals. (Tr. Vol. I., p. 96). Student needs ESL services for reading and writing with the expectation Student will catch up with peers over time. (Tr. Vol. I., pp. 105-106).

Discussion

Introduction

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free, appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. *20 U.S.C. § 1400 (d)*. Under the IDEA the school district has a duty to provide a free appropriate public education to all children with disabilities who attend the school district. *34 C.F.R. § 300.101 (a)*.

Eligibility as a Student with a Disability

General Rule

A free, appropriate public education must be available to any individual child with a disability who needs special

education and related services. 34 C.F.R. § 300.101 (c) (1). The determination that a child is eligible for special education and related services must be made on an individual basis by the group responsible for making eligibility determinations. 34 C.F.R. § 300.101 (c) (2). In Texas that group is the Admission, Review & Dismissal Committee (ARD). 19 Tex. Admin. Code §§ 1040 (b); 89.1050 (a) (5). The student must be a “child with a disability” within the meaning of the IDEA to be eligible for special education services in Texas. 19 Tex. Admin. Code § 89.1040 (a).

Child With a Disability

A “child with a disability” is a defined term under the IDEA. 34 C.F.R. § 300.8 (a). A child with a disability may qualify for special education services under more than one of the IDEA enumerated disability categories. *E.M. v. Parajaro Valley Unified Sch. Dist.*, 63 IDELR 211 (9th Cir. 2014), cert. denied (1/12/15) (No. 14-604) (*auditory processing deficit of bilingual student did not result in eligibility under OHI or SLD – student no more distractible than classmates, student had no trouble following directions, and, teacher’s interventions resulted in significant improvement of student’s attention to tasks; scant evidence processing deficit adversely affected student’s educational performance*).

Evaluation

The ARD must make the eligibility determination on the basis of an evaluation that meets IDEA criteria. 34 C.F.R. §§ 300.8 (a) (2) (i); 300.304 – 300.311; 19 Tex. Admin. Code § 89.1040 (b). A multidisciplinary team must collect and/or review the evaluation data in connection with the determination of a student’s eligibility for special education in Texas. *Id.* The multidisciplinary team that collects and/or reviews evaluation data in determining eligibility based on OHI must include not only a licensed specialist in school psychology (LSSP) but also a licensed physician. 19 Tex. Admin. Code §§ 89.1040 (b) (1) (2) (c) (8).

Threshold Issue in this Case

The major issue in this case is the eligibility determination decisions made beginning with ARD meetings on October 3, 2013, January 28, 2014, February 11, 2014, and the series of ARD meetings in September 2014. Based on the results of its own evaluations and consideration of a number of outside, independent evaluations school district members of the ARD meetings concluded Student did not meet eligibility requirements for special education as a student with OHI, a speech/language impairment, or as a student with a learning disability.

Petitioner argues the school district ignored relevant information from Student’s physicians and disregarded Student’s academic struggles supporting Student’s identification as a student with a disability under the IDEA. Petitioner contends Student is eligible for special education as a student with Other Health Impairment (OHI), a speech/language impairment and/or a specific learning disability. *See*, 34 C.F.R. § 300.8 (c)(9) (10) (11).

Other Health Impairment

OHI is an eligibility classification recognized by the IDEA. 34 C.F.R. § 300.8 (c) (9). In order to qualify for services as a student with OHI the student must demonstrate limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment due to chronic or acute health problems such as attention deficit disorder or attention deficit hyperactivity disorder. In addition the health problem must adversely affect the child’s educational performance. 34 C.F.R. § 300.8 (c) (9) (i) (ii); 19 Tex. Admin. Code § 89.1040 (c) (8).

Medical Information

The evidence shows Student does indeed have some health and medical issues. The evidence established Student

has ***, a ***. The Student requires ***. The school district had access to the medical information as Student's parents shared it over time. Student proved the presence of chronic health problems in that regard with the exception of ADHD. The IEE evaluator and other medical records suggest the presence of ADHD.

However, the information supporting possible ADHD provided to the IEE evaluator and medical providers came almost solely from Student's parents. Even the IEE evaluator noted a diagnosis of ADHD could not be confirmed without data across environments, including most significantly, the educational environment. The evidence showed that Student did not exhibit symptoms or signs of ADHD at school and was no more distractible or inattentive than Student's classmates.

Although Student does have some chronic health issues Student did not meet the burden of proving those conditions adversely affected Student's educational performance. The school district was aware of Student's *** and took the appropriate steps to ensure *** when needed. Medical/health services such as these are a component of the school district's health services -- special education is not required to address Student's health needs.

Student's parent was concerned with Student's eating at school. There is some evidence that Student has some ***, ***, and ***. However the evidence also showed that Student's eating was adequately monitored by the school staff. Student's parent had the opportunity to limit Student's diet at school by providing the proper documentation but apparently chose not to do so. School staff observed Student eating properly at school. The speech/language evaluation included an assessment of Student's lips, tongue, and related anatomical components related to Student's ability to eat and speak. The evidence established that any issues in that regard were adequately addressed and did not adversely affect Student's educational performance.

Specific Learning Disability

A specific learning disability under the IDEA is a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. A specific learning disability does *not* include learning problems that are primarily the result of visual, hearing or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural or economic disadvantages. *34 C.F.R. § 300.8 (c) (10); 19 Tex. Admin. Code § 89.1040 (c) (9)*. A variety of assessment tools and strategies are required under the state rule to determine whether the student meets the federal regulatory criteria for a learning disability. *19 Tex. Admin. Code § 89.1040 (c) (9) (B) (i)*.

The state rule also requires a finding that the Student does not achieve adequately for the student's age or meet state-approved grade-level standards in oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, mathematics calculation or mathematical problem-solving when provided appropriate instruction and as indicated by performance on multiple measures such as in-class tests, grade averages over time, norm or criterion-referenced tests, statewide assessments or a process based on the child's response to scientific, research-based intervention. *19 Tex. Admin. Code § 89.1040 (c) (9) (B) (ii)*.

In this case the evidence showed Student is able to listen, think, speak, read, write, spell, and perform mathematical calculations commensurate with Student's intellectual ability. Furthermore, any delay in the acquisition or mastery of reading or language skills can be attributed to Student's status as a bilingual learner and not to any processing deficit. *19 Tex. Admin. Code § 89.1040 (c) (9)*.

The state rule further requires a finding that the student does not make sufficient progress when provided with RTI services when compared to the student's classmates OR when assessment identifies a pattern of strengths and weaknesses in performance, achievement or both relative to the student's age, grade-level standards, or intellectual ability with significant variance among specific areas of cognitive function. *19 Tex. Admin. Code § 89.1040 (c) (9)*

(B) (ii) (I) (II).

The evidence showed Student is making sufficient progress with the support of RTI services. The various assessments conducted by both the school district and outside providers did not establish a pattern of strengths or weaknesses in performance, achievement or both relative to age, grade level standards or Student's intellectual ability. Indeed, the outside IEE showed that Student was performing as expected given Student's intellectual ability. Therefore Student did not meet the burden of proving Student meets the federal and state definitions as a student with a specific learning disability.

Speech/Language Impairment

Under the IDEA a speech impairment is a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment that adversely affects a child's educational performance. *34 C.F.R. § 300.8 (c)(11)*. Although the evidence showed Student may *** the record does not support a finding that those issues adversely affected Student's educational performance. Student's *** and Student's speech is intelligible – especially to Student's classroom teacher -- critical for purposes of gauging educational performance. The evidence did not support a finding of a language impairment that adversely affects Student's performance either.

Instead, the evidence showed that Student mastered the speech/language goals of the IEP implemented during the 2013-2014 school year, made average or better than average grades in all core academics including reading and language arts and performed overall in the average range in *** grade and for the first reporting period of *** grade. The pace of the development of Student's language skills is affected by Student's status as a bilingual learner. However, the evidence showed that Student's acquisition of language skills is steadily improving when compared to Student's skill level as a ***. The school district adequately supports Student's continued acquisition of reading and language skills through the RTI process and services as an ESL student under its regular I education program.

Consideration of All Relevant Information

The evidence showed the school district collaborated with Student's parent over the course of multiple ARD meetings and considered all the information provided by the parent and outside evaluators as it became available. The evidence also showed that the school district conferred with Student's medical providers and considered their input in addressing Student's health needs. Student did not meet Student's burden of proving that the school district failed to consider all relevant information in making its determination about Student's eligibility for special education. *34 C.F.R. § 300.8 (a); 300.304-300.311*.

Independent Educational Evaluation (IEE)

The parents of a child with a disability have the right under the IDEA to an IEE at school district expense if the parent disagrees with the school district's evaluation. *34 C.F.R. § 300.502 (a)(1)(3)(ii)(b)(1)*. Upon parental request for an IEE the school district must provide parents information about where the IEE may be obtained and the school district's criteria for the IEE. *34 C.F.R. § 300.502 (a)(2)*.

The school district may not unreasonably delay providing the IEE or filing a request for a due process hearing to determine whether its own evaluation is appropriate. If the school district files for hearing and its evaluation is found to be appropriate the school district is relieved of funding the IEE. *34 C.F.R. § 300.502 (b) (2)(i)(ii)(3)(4)*.

The school district may establish the criteria for funding an IEE including the location of the evaluation. Furthermore, the qualifications of the IEE examiner must be the same criteria the school district uses to conduct its own evaluation to the extent the criteria is consistent with the parental right to an IEE. *34 C.F.R. § 300.502 (e)*

In this case there was some considerable delay in completing the agreed upon IEEs. However, the evidence showed

the school district provided Student's parents with the requisite IEE information and the delay was due in large part to the length of time it took the parent to identify the selection of the IEE examiners. Some delay was also a result of the school district's objections to the scope of the *** IEE that went beyond the agreed upon IQ testing. However, it was reasonable for the *** IEE to include achievement and behavioral assessments since the school district's IEE included at least some inquiry into those areas as well as measuring Student's intelligence.

Although the school district raised a legitimate question about the qualifications of the *** examiner (who was not a LSSP) there is insufficient evidence in the record to conclude the examiner was not otherwise qualified to conduct the IEE. Finally, the record is unclear as to whether there is a balance due on the *** IEE. There was some evidence that the school district paid at least one invoice but there is also some evidence there may be a balance due on the account. If so, the school district is responsible for the balance due. *34 C.F.R. § 300.502*

Free, Appropriate Public Education

A free, appropriate public education is special education, related services and specially designed personalized instruction with sufficient support services to meet the unique needs of the child in order to receive a meaningful educational benefit. The instruction and services must be provided at public expense and comport with the child's IEP. *20 U.S.C. § 1401(9); Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).*

While the IDEA guarantees only a "basic floor of opportunity" the IEP must nevertheless be specifically designed to meet Student's unique needs, supported by services that permit Student to benefit from the instruction. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. at 188-189.*

While the IEP need not be the best possible one nor must it be designed to maximize Student's potential the school district must nevertheless provide Student with a meaningful educational benefit – one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist. v. VP, 582 F. 3d 576, 583(5th Cir. 2009) cert. denied, 559 U.S. 1007(2010).* The basic inquiry in this case is whether the IEP implemented by the school district was reasonably calculated to provide the requisite meaningful educational benefit. *Rowley, 458 U.S. at 206-207.*

Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. ¹ *Schaffer v. Weast, 546 U.S. 49, 62 (2005); Teague Ind. Sch. Dist. v. Todd L., 999 F. 2d 127, 131 (5th Cir. 1993).* In this case the school district was obligated to provide Student with special education services during the period of time the school district conducted an updated evaluation following Student's transfer from the prior school district. *19 Tex. Admin. Code § 89.1050 f) (2).* Student was identified as a student with a speech impairment in need of special education by the prior school district. The prior school district developed and implemented a speech/language IEP.

The evidence showed the school district implemented a speech/language IEP while it conducted an updated evaluation. Student continued to be eligible for special education during the period of time the parties debated whether Student met eligibility criteria. The school district continued to implement the IEP up through the February 2014 ARD when Student was dismissed from special education. The school district also supported Student with RTI services for both reading and later on in math and continued to do so through the remainder of the relevant time period.

The Four Factors Analysis

¹ There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z., 580 F. 3d 286, 292 n. 4 (5th Cir. 2009).*

In this jurisdiction there are four factors to determine whether the IEP at issue and as implemented was reasonably calculated to provide Student with the requisite meaningful educational benefit under the IDEA. These factors are:

- The program is individualized on the basis of the student's assessment and performance;
- The program is administered in the least restrictive environment;
- The services are provided in a coordinated and collaborative manner by key stakeholders; and,
- There are positive academic and non-academic benefits demonstrated.

Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997). There is no requirement the four factors be considered or weighed in any particular way. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d, 286, 293 (5th Cir. 2009). The evidence in this case shows the IEP in effect for the relevant time period and as implemented was reasonably calculated to provide Student with the requisite meaningful educational benefit. *Rowley, supra*; *Michael F., supra*.

The IEP was individualized based on the prior school district's assessment and continued on the basis of on-going assessments by the school district and in response to parental concerns. Student needed to continue to develop language skills. The IEP was specifically directed towards meeting those needs. Medical assessments and prior medical history suggested *** issue and the IEP also included a specific goal to address Student's intelligible speech.

The IEP was delivered in the regular *** grade classroom with speech therapy as a related service. The IDEA's preference for mainstreaming students with special needs to the maximum extent appropriate was met by administering Student's program – along with the RTI support services – within the regular education classroom. 34 C.F.R. § 300.114(a) (2).

The evidence showed the services were provided in a coordinated and collaborative manner – Student's classroom teacher, the speech/language therapist, school district administrative staff, and Student's parent communicated frequently with one another over the relevant time period. Although school staff did not see the same level of need that Student's parent did school district staff nevertheless implemented RTI support services first in reading, and then later in math. Parental concerns and suggestions were considered and school staff attempted to address and respond to them. Interpreter services were provided to Student's parent to ensure the parent's understanding of the IEP, IEE procedures, and ARD discussions.

Finally, the evidence showed Student derived both academic and non-academic benefit from the program implemented by the school district during the relevant time period. Student made good grades, was sociable and engaged in the classroom and school environment, and exhibited no behavior issues at school. Petitioner did not meet the burden of proving the educational program implemented during the relevant time period failed to provide Student with a meaningful educational benefit in the least restrictive environment. *Schaffer v. Weast*, 546 U.S. at 62; *Rowley, supra*; *Michael F., supra*.

Conclusions of Law

1. Student does not demonstrate an educational need for special education services as a student with a speech/language impairment, a specific learning disability, or as a student with other health impairment within the meaning of the Individuals with Disabilities Education Act. 34 C.F.R. § 300.8(a) (c)(9)(10)(11).
2. The school district considered all relevant information, including all information from Independent Educational Evaluations, Student's medical providers, parents, and Student's academic performance in school, in making the determination that Student was not eligible for special education services under the IDEA. 34 C.F.R. § 300.304-200.311.

3. Student's parents are entitled to the Independent Educational Evaluations secured by Student's parents at school district expense. *34 C.F.R. § 300.502.*
4. The school district provided Student with a free, appropriate public education during the relevant time period and within the meaning of the Individuals with Disabilities Education Act. *20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Bd. of Educ. of Hendrick Hudson Int. Sch. Dist. v. Rowley, 458 U.S. 176 (1982); Cypress-Fairbanks Ind. Sch. Dist. v. Michael F. , 118 F. 3d 245 (5th Cir. 1997).*

ORDERS

Based upon the foregoing findings of fact and conclusions of law it is hereby **ORDERED** that Petitioner's claims and requests for relief under the Individuals with Disabilities Education Act are hereby **GRANTED IN PART AND DENIED IN PART AS FOLLOWS**: The school district shall contact *** within five (5) school days of the date of this Decision and determine whether there is a balance due for the cost of the *** evaluation and, if so, the amount of that balance.

It is further **ORDERED** that the school district shall pay the balance due, if any, for the cost of the *** evaluation within ten (10) school days of receipt of documentation from *** establishing the balance due. It is further **ORDERED** the school district shall provide Student's parents with written confirmation the balance due, if any, has been paid within five (5) school days of the date of such payment. All other relief not specifically stated herein is **DENIED**.

SIGNED the 19th day of January 2015

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,**

§
§
§
§
§
§
§

v.

DOCKET NO. 015-SE-0914

**GRAPEVINE-COLLEYVILLE
INDEPENDENT SCHOOL DISTRICT,
 Respondent.**

SYNOPSIS

ISSUE:

Whether *** bilingual student should have been identified by school district as a student with a speech/language impairment, a specific learning disability and/or as a student with other health impairment for purposes of eligibility for special education services under the IDEA.

HELD: FOR THE SCHOOL DISTRICT

School district conducted FIE that demonstrated Student was performing academically commensurate with Student's intellectual ability, acquiring and demonstrating expressive and receptive language skills given Student's status as bilingual learner, and performing well in the classroom, on grade level, and within average range on most measures. Although Student did prove presence of a number of medical conditions Student did not prove those conditions adversely affected Student's ability to learn or need for special education.

Outside IEEs also supported, for the most part, that Student was performing academically commensurate with Student's intellectual ability and given status as bilingual learner. Student did not prove existence of auditory processing deficit that adversely affected Student's learning or a hearing impairment.

Behavioral assessment as component of IEE suggested ADHD. IEE conceded there was insufficient information from a variety of sources (including specifically from the school environment) to confirm ADHD. IEE suggestion of ADHD based almost solely on parental reports that were inconsistent with Student's behavior at school.

Student's educational needs for additional support in reading, handwriting, and math were adequately addressed with RTI services within regular education program and classroom; Student's nutritional needs were monitored by school district staff, parent had opportunity to submit medically certified dietary restrictions under school district procedure but chose not to, and, student's other medical and dietary needs could be adequately addressed and met through the school district health services available to all children.

34 C.F.R. §§ 300.8 (a) (c) (9) (10) (11)

ISSUE:

Whether school district failed to consider all relevant information, including information from IEE, medical providers, and Student's academic performance at school, in making determination Student was not eligible for special education services.

HELD: FOR THE SCHOOL DISTRICT

Evidence showed school district collaborated with Student's parents over the course of multiple ARD meetings and considered all information provided by Student's parents and outside evaluators, including medical information, as it became available. School staff conferred with some medical providers to clarify reports and medical information. School district considered, reviewed and discussed outside evaluations in series of ARD meetings. School district considered results of comprehensive FIE, reviewed prior FIE, classroom observation, teacher input, OT evaluation, and, all outside data and evaluations in reaching determination Student did not demonstrate a need for special education services.

34 C.F.R. §§ 300.8 (a); 300.304-300.311

ISSUE:

Whether parents entitled to IEEs at school district expense.

HELD: FOR THE STUDENT IN PART AND THE SCHOOL DISTRICT IN PART

Parents were entitled to independent evaluations at school district expense and to full payment of a comprehensive IEE that went beyond the scope of IQ testing school district initially agreed to. School district's own FIE included more than simply IQ testing. School district fulfilled its obligation to pay a speech/language assessment and paid invoice submitted to date by comprehensive IEE evaluator but record unclear as to whether balance due for that evaluation. To the extent a balance remains on the comprehensive IEE school district responsible for paying it. Even though school district raised legitimate questions about qualification of IEE examiner (not a LSSP) school district did not prove examiner otherwise not qualified to conduct the assessments that comprised the IEE.

34 C.F.R. § 300.502

ISSUE:

Whether the school district provided Student previously identified as student with speech/language impairment by prior school district with a free, appropriate public education while school district evaluated Student for continued eligibility until date Student dismissed from special education. School district implemented IEP that addressed Student's need to develop language skills and ensure intelligibility of speech. Services provided met the four factors test of *Michael F.* and thus provided Student with FAPE.

20 U.S.C. § 1401 (9); 34 C.F.R. 300.17; *Bd. of Educ. of Hendrick Hudson Int. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997).