

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

**STUDENT, bnf  
PARENT,  
Petitioner,**

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v.

**DOCKET NO. 047-SE-1014**

**SAN ANTONIO INDEPENDENT  
SCHOOL DISTRICT,  
Respondent.**

**DECISION OF THE HEARING OFFICER**

Introduction

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

Party Representatives

Petitioner was represented by Petitioner’s legal counsel Karen Dalglish Seal, Attorney at Law with the Law Office of Karen Dalglish Seal. Respondent was represented by its legal counsel Stacy Ferguson with the law firm of Escamilla & Poneck.

Resolution Session

Both parties waived the Resolution Session but wished to pursue informal settlement negotiations during the 30 day resolution period. Those efforts were not successful. The parties declined the use of mediation in this case.

Due Process Hearing

The hearing was conducted on February 12-13, 2015. Petitioner continued to be represented by Petitioner’s attorney Karen Dalglish Seal assisted by her co-counsel Courtenay Euton, Attorney at Law, and Ms. Seal’s Legal Assistant, Mike Kasischke. Student’s \*\*\*, \*\*\* did not attend the hearing. Respondent continued to be represented by its attorney Stacy Ferguson. In addition Dr. \*\*\*, Special Education Director for the school district, attended the hearing as the school district’s party representative. The hearing was recorded and transcribed by a certified court reporter. The parties requested an opportunity to submit written closing arguments. Petitioner filed Petitioner’s Post Hearing on April 24, 2015. Respondent chose not to file a written closing argument. The decision of the hearing officer is due May 15, 2015 at the request of the parties.

Legal Issues

The legal issues submitted by Petitioner in this case are as follows:

1. Whether the school district should have identified Student as a student with a disability in need of special education services within the meaning of the Individuals with Disabilities Education Act (IDEA) beginning with the 2013-2014 school year up through the present;
2. Whether the school district failed to provide Student with an appropriate educational placement beginning with the 2013-2014 school year up through the present; and,
3. Whether the school district should have provided Student with a free, appropriate public education (FAPE), including appropriate services, beginning with the 2013-2014 school year up through the present.

#### Petitioner's Requested Relief

Petitioner's items of requested relief are as follows:

1. The school district implement a behavior and education plan for Student immediately for the remainder of the current 2014-2015 school year and into the following school year;
2. The school district devise an Individual Education Plan (IEP) for Student with measureable goals and objectives based on a recent assessment conducted by the \*\*\* (the \*\*\*);
3. The school district conduct a counseling evaluation and provide any recommended counseling services to Student for the remainder of the current 2014-2015 school year and into the following school year;
4. The school district conduct a psychological and any other updated assessments following review of the \*\*\* assessment and to do so in an expeditious manner;
5. Provide Student with an Independent Educational Evaluation (IEE) if eligibility remains in dispute following completion of the school district's review of the \*\*\*'s assessment and/or completion of the psychological and any other updated assessments conducted by the school district;
6. The school district provide Student with compensatory special education and/or related services;
7. The school district provide Student with a summer school program during the 2015 summer as compensatory relief;
8. The school district provide Student with a highly qualified certified special education teacher and direct instruction in basic reading, writing and math skills;
9. The school district conduct screenings for Occupational therapy (OT), Physical therapy (PT) and Speech and then more in-depth assessments if recommended by the screenings;
10. The school district return Student to \*\*\* upon completion of Student's current \*\*\* placement unless Student's \*\*\* (as Student's guardian) agrees to another educational placement within the school district's jurisdictional boundaries;
11. The school district reimburse Student's \*\*\* for expenses incurred for Student's care and benefit; and,
12. Attorney's fees and legal costs.

## Respondent's Legal Position

Respondent's legal position is as follows:

1. The school district conducted an appropriate evaluation in a timely manner for special education eligibility with its Full Individual Evaluation (FIE) completed on April 8, 2014;
2. The school district reached the appropriate determination that Student did not qualify for special education under the IDEA;
3. Student did not present any other outside evaluations or assessments to the school district or to an Admission, Review & Dismissal Committee (ARD) for consideration and review of the eligibility decision; and,
4. The school district is under no obligation to provide Student with a special education placement, special education services, or counseling because Student did not qualify for special education under the IDEA.

The school district also contends it did not expel Student from \*\*\* despite Petitioner's assertion to the contrary in Petitioner's initial request for hearing.

## Findings of Fact

1. Student has attended \*\*\* (\*\*\*) since the \*\*\* grade. (Transcript Volume II, page 357)(referred to hereafter as "Tr. Vol. \_\_\_\_, p. \_\_\_\_"). \*\*\*. \*\*\*. (Tr. Vol. I., pp. 43-44). \*\*\* serves students from \*\*\* to \*\*\* grade. Current enrollment is about \*\*\* students. (Tr. Vol. II., p. 355). \*\*\*. (Tr. Vol. II., pp. 355-356).
2. \*\*\* two other \*\*\* schools. Once a student reaches \*\*\* grade the student may \*\*\* schools depending on where the student lives. (Tr. Vol. II., p. 356). Student resides within the geographical boundaries of \*\*\* and was therefore an automatic admission. (Tr. Vol. I., p. 49).
3. Student lives with Student's \*\*\* and \*\*\*. (Joint Exhibit 1, page 5)(referred to hereafter as "J. Ex. \_\_-\_\_"). The \*\*\* principal knows the \*\*\* well and has a good rapport with her. Student's \*\*\* chose for Student to remain at \*\*\* for \*\*\* school \*\*\*. The family \*\*\*'s employment. (Tr. Vol. II, pp. 357, 367).
4. \*\*\*. \*\*\*. \*\*\*. \*\*\*. (J. Ex. 1-5).
5. \*\*\*. \*\*\*. (J. Ex. 2)(Tr. Vol. I., p. 191).
6. \*\*\*. \*\*\*. \*\*\*. \*\*\*. (Petitioner's Exhibit 1, page 2)(referred to hereafter as "P. Ex. \_\_-\_\_")(Respondent's Exhibits 2, page 5)(referred to hereafter as "R. Ex. \_\_-\_\_").
7. \*\*\*. \*\*\*. \*\*\*. (J. Ex. 2-3, 2-4)(Tr. Vol. I., p. 191). \*\*\*. \*\*\*. \*\*\*. (J. Ex. 2-4, 2-5).
8. Student was in the \*\*\* grade during the 2013-2014 school year. Student had the same teacher for both science and social studies (SS) that year. (Tr. Vol. I., p. 26). The science/SS teacher had a good relationship with Student – they shared a common background. The science/SS teacher did not have many problems with Student in her classroom. (Tr. Vol. I., p. 30). Student did well with individual projects, was on grade level and generally an average or "B" student. However, Student struggled in cooperative learning in a group – it was challenging to find a group willing to work with Student. (Tr. Vol. I., pp. 38, 48).

9. The science/SS teacher was aware Student had some behavioral difficulties in the hallways and gave the math teacher, \*\*\*, a difficult time during lessons. (Tr. Vol. I, p. 28). The science/SS teacher observed Student engaged in verbal confrontations, fighting, and leaving class without permission. (Tr. Vol. I, pp. 30, 32). The science/SS teacher was aware of “\*\*\* ...” and was concerned about Student \*\*\*. (Tr. Vol. I, p. 37).
10. There are two types of disciplinary referrals at \*\*\*. One is called a “PBIS” referral – for lesser offenses such as being disruptive in class, chewing gum, and being out of uniform. (Tr. Vol. I, p. 32). A district discipline referral is for more serious misconduct such as fighting, being verbally disrespectful to a teacher, and cussing. A student can only be suspended for a district referral. (Tr. Vol. I, p. 33).
11. Over a four year period, from October 2010 through May 31, 2014, Student was suspended \*\*\* times and received multiple behavioral referrals for: verbal abuse/confrontation \*\*\*, verbal, physical, \*\*\* misconduct \*\*\*, fighting/threatening \*\*\*, insubordination \*\*\*, \*\*\*, leaving class without permission \*\*\*, \*\*\*, and rules violations \*\*\*. (J. Ex. 2-5)(R. Ex. 9)(R. Ex. 10)(Tr. Vol. I, pp. 29-30). Student was also \*\*\* in the \*\*\* grade. (J. Ex. 1-1).
12. The \*\*\* \*\*\* grade teaching team met a few times each week to discuss classroom strategies. The team discussed Student frequently. (Tr. Vol. I, p. 45). The math teacher offers after school tutoring 2-3 times a week but Student did not take advantage of this service. (Tr. Vol. I, pp. 45, 47).
13. Student made good grades in \*\*\* grade during the previous 2012-2013 school year. (R. Ex. 12-1). However, Student did not pass the state reading assessment in any of the \*\*\* years Student took the exam. (R. Ex. 13). Although Student passed the state writing assessment in \*\*\* Student was unable to pass the state math assessments in \*\*\*. In \*\*\* Student did not pass the state reading simulation. Student was considered “at risk” for Student’s score on the state math simulation. (J. Ex. 1-1)(R. Ex. 13-1). The standards for the state assessments increase each year and Student was close to passing. Although Student continued to be under the passing mark Student actually made progress or was stable in Student’s terms of Student’s raw scores. (Tr. Vol. II, pp. 391-392, 398).
14. Student’s scores on the statewide assessment were not unusual for the \*\*\* graders at \*\*\* that year. Over half of Student’s \*\*\* grade classmates also did not meet state standards. (Tr. Vol. II, pp. 390-392). As required by the state assessment Student was placed in both reading and math intervention classes as a result of those failures. (Tr. Vol. I, pp. 39-40)(Tr. Vol. II, pp. 362-363, 364). Notice of the interventions and a planning guide were sent to Student’s \*\*\* each year. (R. Ex. 14). A failure on a statewide assessment alone is not typically viewed as a red flag for purposes of a special education referral due to labeling concerns. (Tr. Vol. II, p. 392).
15. Student was first referred to the \*\*\* (the \*\*\*) \*\*\* at school. The police were contacted by the \*\*\* Assistant Principal who received an anonymous tip that Student \*\*\*. (R. Ex. 8-1). Student admitted Student had \*\*\*. Student also admitted \*\*\*. Student \*\*\* Assistant Principal. (P. Ex. 2-1, 2-2)(Tr. Vol. I, p. 186).
16. Student claimed \*\*\* which Student \*\*\*. (P. Ex. 2-6)(Tr. Vol. I, pp. 184-185). When the police arrived they confirmed \*\*\*. Student was suspended from school \*\*\* (\*\*\*)\*\*\*. (R. Ex. 8-1)(R. 9-1). Student was placed on \*\*\*. (P. Ex. 2-9). As a result of the \*\*\* incident Student was placed at \*\*\*, an alternative disciplinary placement (DAEP). Student served Student’s time at the DAEP and returned to \*\*\* for the remainder of \*\*\* grade. (Tr. Vol. II, p. 358).
17. Student was initially referred for a special education by Student’s \*\*\* in the spring of 2014 after the \*\*\* incident at school. (J. Ex. 3-5)(R. Ex. 7-2)(Tr. Vol. I, p. 59). There were some delays in securing the requisite

consent from Student's \*\*\* because Student failed to give Student's \*\*\* the consent forms. Signed consent was finally provided on February 7, 2014. The school district conducted a Full and Individual Evaluation (the initial FIE) and issued its report on April 8, 2014. (J. Ex. 3-1).

18. At the time of the school district's initial FIE in April 2014 Student was still living with Student's \*\*\*. (J. Ex. 3-5)(Tr. Vol. I, pp. 60-61). Sources of information for the initial FIE included three of Student's \*\*\* grade teachers, Student's \*\*\*, and the school nurse. (Tr. Vol. I, p. 68).
19. The purpose of the initial FIE was to determine whether Student was eligible for special education services as a student with a specific learning disability (SLD) or an emotional disturbance (ED). (J. Ex. 3-1). Although Student passed Student's math intervention class in the fall semester Student was failing at the time of the initial FIE. (J. Ex. 3-1). During \*\*\* grade Student had a number of office referrals. These included: disruptive behavior, insubordination, walking out of class, throwing things in class, using vulgar language, and, physical aggression towards peers. (J. Ex. 1-1)(R. Ex. 9-3, 9-4, 9-5)(R. Ex. 10). Some of the behaviors are within the norm for a \*\*\* student such as insubordination and leaving class without permission. (Tr. Vol. II, p. 289).
20. Student was rated by Student's \*\*\* grade teachers in expressive and receptive language. Student scored in the below average range for listening comprehension and oral expression. Student was able to comprehend word meaning, follow oral instructions, remember information just heard, and, comprehend classroom discussions. Student exhibited an adequate vocabulary, displayed adequate grammar for general understanding, expressed \*\*\*self fluently when called on to speak, could relate a sequence of events in order, and organize and relate ideas and facts. Student's expressive and receptive language skills were within normal limits and therefore Student did not demonstrate a need for further speech/language evaluation. (J. Ex. 3-3).
21. The school nurse provided physical and health information for the initial FIE. (J. Ex. 3-4)(Tr. Vol. I, p. 68). Student had normal vision and visual acuity. Student's hearing was within normal limits. Student was born full term and met normal developmental milestones. There is no family history of learning disorders or intellectual disability. (J. Ex. 3-4).
22. Student's eye-hand coordination fell within the "poor" range when compared to other children Student's age. The initial FIE noted Student may have difficulty integrating or coordinating Student's visual-perceptual and motor abilities. However, Student's handwriting was assessed as "adequate" and Student demonstrated appropriate fine motor skills in other areas. Therefore Student's overall fine motor skills were within normal limits. (J. Ex. 3-4).
23. The initial FIE also found Student could walk, run, and climb stairs without difficulty and perform other physical activities as Student's same age peers. Student's gross motor skills were within normal limits. Although the FIE noted Student was under a physician's care for constipation Student had not been diagnosed with a physical condition that affected Student's ability to benefit from the educational process. (J. Ex. 3-4).
24. Sociological information for the initial FIE was provided by Student's \*\*\* who believed Student was \*\*\*. At the time of the initial FIE Student \*\*\*. The initial FIE also noted \*\*\*. (J. Ex. 3-5)(Tr. Vol. I, p. 67). Student's attendance in \*\*\* grade was excellent with only one absence at the time of the initial FIE. (J. Ex. 3-5).
25. The initial FIE noted that Student has experienced "several life events that may impact Student's behavior and learning" although the FIE also concluded it was "typical for children to experience worry or stress" when faced with the kind of circumstances Student was experiencing in Student's home life. (J. Ex. 3-5)(Tr. Vol. I, p. 68). The licensed specialist in school psychology (LSSP) who conducted this portion of the FIE was not aware that Student had \*\*\* or that Student was \*\*\*. (J. Ex. 2-5, 2-8)(Tr. Vol. I, pp. 72-73, 95).

26. In a clinical interview Student reported feeling uncomfortable being around Student's mother, that Student'd been \*\*\*. There were also "\*\*\*\*" around. (Tr. Vol. I., p. 95). Student denied \*\*\* when questioned directly. (Tr. Vol. I., p. 95). The LSSP reported the information about Student's \*\*\*. (Tr. Vol. I., p. 100).
27. The initial FIE assessed Student's behavior on three different days – two out of the three behavioral observations were conducted during testing sessions. Student was appropriate during the testing sessions. Student seemed sad when Student spoke of Student's parents. Although Student seemed worried at times Student also did not demonstrate any severe signs of distress. During testing Student appeared flustered with higher level items but made good attempts at answering. Student seemed to have a "competitive edge" and to enjoy racing against the clock during the testing. Student reported problems with Student's relationship with Student's mother, \*\*\*, and trouble with peer relations. (J. Ex. 3-6).
28. Student's \*\*\* and \*\*\* grade teachers also reported on Student's emotional, behavioral, and social skills. Student had trouble being generally cooperative and compliant with teacher requests. Although Student could typically initiate activities independently Student also demonstrated a tendency to become discouraged by setbacks or difficulties. Student did not always adapt well to new situations without getting upset but usually responded appropriately to praise and correction. The \*\*\* grade teachers rated Student below average in accepting responsibility for Student's actions and Student had difficulty working cooperatively with others at times. Student was rated below average to average by the teachers in having a happy disposition. (J. Ex. 3-6).
29. One of Student's teachers felt Student had the potential to be a leader in the classroom but that Student's attitude and choices hindered Student's potential. The teacher observed Student was very loyal to those Student considered Student's friends. Student was able to focus on assignments and tasks. The teacher also observed Student had difficulty controlling Student's aggression towards other students and managing responses to redirection from adults. Another teacher reported Student was a good student who simply needed understanding from Student's teachers. The teacher observed Student had the ability to use good social skills but did not show respectful behavior towards peers. Student worked well independently but had trouble working in small groups. Student could work hard and get Student's assignments turned in on time but could also create conflict with peers and had trouble controlling Student's temper. (J. Ex. 3-6).
30. In the initial FIE Student's \*\*\* reported a change in Student's behavior and attitude as Student became more rebellious and \*\*\* grade. Student was becoming aggressive towards Student's \*\*\*. Student's \*\*\* reported Student \*\*\* and was disciplined for fighting with Student's \*\*\*, \*\*\*, and being disrespectful. Student was disciplined for severe behavior by having privileges taken away or getting a spanking. Student was able to calm down with a spanking but other consequences didn't seem to be effective in changing Student's behavior at home. (J. Ex. 3-6).
31. The initial FIE included use of the Behavior Assessment System for Children, Second Edition (BASC-II) – a behavior rating scale designed to facilitate the differential diagnoses for a variety of emotional and behavioral disorders. The BASC-II includes a set of scales that identifies whether a student falls within certain clinically significant ranges. (J. Ex. 3-6). Student's \*\*\* and two of Student's teachers rated Student in several areas using the BASC-II. (J. Ex. 3-7)(Tr. Vol. II., p. 277).
32. In the school setting Student exhibited a higher level of aggressive and hyperactive behavior than what is typical of others Student's age. Student also exhibited aggressive behavior in the home. One teacher rated Student as demonstrating depressive, withdrawn or unusual behaviors. Another rated Student as inattentive. The teachers rated Student with social skill deficits although other measures on the BASC-II were within the average range. (J. Ex. 3-7). While there were some areas rated "at risk" the number of "clinically significant" areas did not meet severity criteria. (Tr. Vol. I., p. 278).

33. Student also completed a self rating using the BASC-II. Although Student's overall ratings were within average range Student endorsed many items that revealed anxiety, worrying often, and getting nervous. Student stated Student often felt depressed and expressed negative attitudes about teachers and towards school. Student also reported high levels of sensation seeking behaviors as well as hyperactivity. Student perceived \*\*\*self as being academically successful and able to achieve Student's goals. Student's ratings demonstrated adequate self-esteem and feelings of self-reliance. Student reported stresses and tension in Student's personal/social relationships except with Student's \*\*\*. (J. Ex. 3-8).
34. The initial FIE also utilized the Behavior Disorder Identification Scale – Second Edition (BDIS-2), the Children's Depression Inventory 2 (depression inventory), and, the Revised Children's Manifest Anxiety Scale 2 (the Anxiety Scale). Student's \*\*\* and two of the \*\*\* grade teachers completed the BDIS-2, Student and Student's \*\*\* completed the depression inventory, and, Student completed the Anxiety Scale. The raters were not consistent in how they observed Student's behavior under the BDIS-2 in the five criteria areas for meeting ED eligibility. (J. Ex. 3-8).
35. One of the teachers and Student's \*\*\* rated Student's overall behavior as within normal limits in all areas. The other teacher observed Student with signs of unhappiness or depression, difficulty with peer relationships, and inappropriate behaviors consistent with an ED. Student had difficulty at times following school rules, participating in class, and ignored the consequences of Student's actions. The \*\*\* noted Student had problems getting along with Student's \*\*\* and had temper tantrums and mood changes at home. (J. Ex. 3-8)(Tr. Vol. I, p. 70).
36. The depression inventory measures the extent to which a child is exhibiting symptoms of depression. Student's self report and the \*\*\*'s rating placed Student in the average range -- Student was not exhibiting any symptoms of depression at the time. Student did not report self-dislike, feelings of being unloved, or a tendency for suicidal thoughts. Student did not appear to have feelings of sadness, worry, or experience any symptoms related to anxiety or depression. Student did not have a negative perception of \*\*\*self or Student's ability and school performance. Student did not report any problems with Student's interactions or relations with others under the depression inventory. (J. Ex. 3-8).
37. Under the Anxiety Scale Student demonstrated a level of anxiety that was more problematic than for most students. Student's responses to the Anxiety Scale were valid. Student's scores in certain areas on the Anxiety Scale showed Student was experiencing high levels of obsessive concerns, somatic complaints, or anxiety in social or performance situations. Projective measures were also used in the initial FIE. Student's responses indicated anxiety about both parental and peer relations. Student demonstrated negative coping strategies and feelings of low self-esteem. Student expressed negative attitudes about school and teachers. Student's projective responses were indicative of an anxious personality with acting out tendencies. (J. Ex. 3-9).
38. A student exhibits an emotional disturbance in the educational setting when the student has a disproportionate lack of control of their emotional responses, low frustration tolerance for the stresses of every day and/or school, intermittent or sustained internal distress regarding their problems, or have become a danger to themselves or other manifested by the student's behavior, thoughts, and feelings across different settings to a severe degree. A student meets the criteria for special education as a student with a emotional disturbance when a student exhibits one or more of five specifically enumerated characteristics over a long period of time and to a marked degree that adversely affects the student's educational performance. (J. Ex. 3-9).
39. The initial FIE considered the five criteria and determined that Student is able to learn and was making academic progress despite some academic deficits. The initial FIE also found Student developed a good

relationship with at least one of Student's teachers, had some friends Student was loyal to, and that Student sought socialization with these friends outside of school. The initial FIE noted Student had difficulty handling peer conflict in an appropriate manner and controlling Student's anger. (J. Ex. 3-9)(Tr. Vol. I., pp. 59-60).

40. The initial FIE acknowledged that Student can engage in inappropriate behavior at school but not so frequently that it impacted Student's ability to learn. Rating forms from the \*\*\* did not indicate inappropriate types of behaviors or feelings exhibited "to a high degree." Student did not appear to be pervasively unhappy or depressed "to a marked degree" although Student did exhibit some tendencies towards depressive behaviors when stress with life circumstances or school became too overwhelming. (J. Ex. 3-9).
41. Somatic complaints were not significant. Student experienced anxiety but "not to a severe degree" such that it impacted Student's learning. The initial FIE concluded that although Student's behaviors were "problematic" and "disruptive in the classroom" the difficulties had not occurred across settings or to such a marked degree. There were not enough clinically significant factors across settings to meet the ED criteria. (J. Ex. 3-9)(Tr. Vol. I., p. 77)(Tr. Vol. II, pp. 338-339, 344).
42. Student was also assessed for learning disabilities. A cross-battery was used to determine Student's broad cognitive abilities – an approach supported by research based data. The cross-battery approach provides an analysis of cognitive strengths and deficits and therefore is helpful in formulating instructional interventions and accommodations. (J. Ex. 3-10). Seven broad cognitive abilities were assessed: fluid reasoning, comprehension-knowledge, visual spatial thinking/visual processing, auditory processing, short-term memory, long-term retrieval, and processing speed. (J. Ex. 3-14).
43. Student's adaptive behavior was assessed using informal measures and was within normal limits in most areas. Student had difficulty with coping skills and demonstrated some maladaptive behaviors when experiencing negative emotions. Student's \*\*\* grade teachers rated Student's academic achievement as average to above average in reading materials aloud, performing math computations, writing legibly, retaining instruction from week to week, completing tasks on time, and exhibiting organization in accomplishing tasks. Student was rated average in spelling and below average to average in comprehending reading materials. (J. Ex. 3-14).
44. The initial FIE used the Woodcock-Johnson III Tests of Achievement to assess Student's academic skills. Student scored in the below average range for math reasoning and average range for math calculation skills. Student could count with one-to-one correspondence and could use the sum to compare quantities. Student could order numbers and was able to recall and apply basic math facts and procedures for addition and subtraction. Although Student could also solve simply multiplication and division problems Student could not perform long division accurately. Student was able to add and subtract fractions with the same denominator and demonstrated average proficiency in Student's ability to add, subtract, and multiply rapidly. Student exhibited "very limited proficiency" in identifying number patterns, math concepts, and math formulae. Student used Student's fingers to count and some mistakes were careless errors. (J. Ex. 3-15).
45. Student scored in the below average range for basic reading skills and well below average for reading comprehension. Student's ability to comprehend reading passages based on context clues was weaker than Student's ability to recognize individual words. Student's ability to recognize and read individual words at grade level suggested Student would have an extremely difficult time trying to read on grade level. Student also had a very difficult time using context clues to provide a key word to complete a sentence. Student's ability to read printed statements rapidly and respond yes or no was within normal limits but Student's ability to read words and then provide synonyms, antonyms, and complete analogies was very limited. Student demonstrated limited proficiency in decoding skills. Student performed in the average range for reading fluency. (J. Ex. 3-15).



46. Student scored in the below average range for written expression. Student's writing ability was limited. Although spelling was within normal limits Student demonstrated difficulty with appropriate grammar and writing complete sentences when given a prompt. Student could write simple sentences when given three words, a picture and a time limit. Student showed no significant difficulty applying appropriate capitalization and punctuation consistently and Student's handwriting was legible. At the time of the initial FIE Student was receiving reading intervention to address reading deficits. (J. Ex. 3-16).
47. The initial FIE considered whether Student exhibited a pattern of strengths and weaknesses in performance, achievement, or both relative to Student's age, grade-level standards, or intellectual ability to determine whether Student met criteria as a student with a learning disability. Student was passing all Student's classes except math intervention the last nine weeks. Based on teacher reports Student was performing within the range of expectancy but also struggled meeting the standards of district and state assessments. Student was functioning below grade level in reading comprehension but exhibited strength in math calculation skills. (J. Ex. 3-17).
48. The initial FIE found Student demonstrated significant cognitive deficits with fluid reasoning and long term retrieval. Student's short term memory fell in the extremely below average range. Student performed in the below average range for comprehension-knowledge and well below average in visual spatial thinking and auditory processing. Student's processing speed was within the average range. No extraneous factors were found to be the primary cause of any academic or cognitive deficits (such as lack of a consistent educational opportunity or attendance). Student's sociological status could impact Student's learning and behavior and Student demonstrated some difficulties in the classroom and at home that create difficulties for Student in the learning process. (J. Ex. 3-17).
49. Although Student was not considered to be a child with an intellectual disability Student's overall IQ fell within the range of borderline intellectual functioning. (Tr. Vol. I, p. 94). Student's cognitive deficits were linked to reading, writing, and math achievement. Student's cognitive deficits were found to impede Student's ability to learn as Student fell in the "well below" or "extremely below" average range. (J. Ex. 3-17). However, Student's adaptive skills and functional academics were higher than Student's cognitive performance and consistent with age and grade level expectations. (Tr. Vol. I, pp. 107-109).
50. As a result, the initial FIE concluded Student did not meet the criteria for a specific learning disability. (J. Ex. 3-17)(Tr. Vol. I, p. 162). Student benefitted from the interventions and instruction being provided in the general education setting and was making progress. (J. Ex. 3-17). Student's grades indicated Student functioned within the expected range of performance – Student was able to learn and perform based on the instruction received in the classroom. (Tr. Vol. I. pp. 74-75).
51. A set of functional implications was included in the initial FIE report based on Student's intellectual and academic skills as evaluated. Although Student did not meet criteria as a student with a learning disability Student demonstrated several cognitive weaknesses. The initial FIE also noted behavioral concerns including aggressiveness, \*\*\*, \*\*\*, and non-compliance. However the initial FIE concluded those were related to a social maladjustment and conduct disorder rather than an emotional disturbance. A conduct disorder does not satisfy ED eligibility criteria. (J. Ex. 3-18)(Tr. Vol. II, pp. 318, 341-342, 345). Several sociological factors were found to impact Student's behavior and learning. The initial FIE acknowledged Student would "continue to need support in Student's emotional functioning, as well as academic achievement so that Student will make adequate progress and feel successful." (J. Ex. 3-18).
52. Student's failures in state and district assessments were not used as a factor in making a determination about whether Student met criteria for a disability. Many \*\*\* students have either been retained or there are other factors that affect a student's ability to meet assessment standards. (Tr. Vol. I, p. 63).

53. A set of recommendations to address Student's educational and behavioral needs was included in the April 2014 FIE report. (J. Ex. 3-18, 3-21)(P. Ex. 5-91, 5-92)(R. Ex. 1-21, 1-22)(Tr. Vol. I. pp. 77, 78, 80-81, 90-91)(Tr. Vol. II., pp. 393-394).
54. An Admission, Review & Dismissal Committee (ARD) met on April 14, 2014 to discuss the results of the initial FIE. (J. Ex. 4). Student's \*\*\*, the LSSP, an assistant principal, a special education teacher, a general education teacher, and Student all attended the meeting. The LSSP reviewed and explained the results of the initial FIE and the set of instructional recommendations. The ARD concluded Student did not meet eligibility for special education as a student with an emotional disturbance or as a student with a learning disability. (J. Ex. 3-17, 3-18, 3-20)(J. Ex. 4-3, 4-4).(Tr. Vol. I., pp. 90-91, 97).
55. However, the April 2014 ARD also agreed Student exhibited some academic deficits that needed to be monitored and supported through Response to Intervention (RTI). The April 2014 ARD acknowledged Student exhibited some anxiety and depressive tendencies. The school district provided Student's \*\*\* Notice of Refusal to Provide Services during the April 2014 ARD. (J. Ex. 4-7).
56. Student experienced a difficult summer between \*\*\* and \*\*\* grades in 2014. \*\*\*. (J. Ex. 2-1)(P. Ex. 2-9). \*\*\*. (J. Ex. 1-2)(P. Ex. 2-9).
57. Student was \*\*\*. Student was staying with \*\*\* at the time and experiencing sadness about \*\*\*. \*\*\* Student received anger management counseling. (R. Ex. 2-6). Student was \*\*\* to address mood issues. (P. Ex. 3-1). A Safety Crisis Plan was prepared as part of Student's treatment to address Student's \*\*\*. (P. Ex. 3-2, 3-3).
58. On \*\*\*, 2014 Student was \*\*\*. Student \*\*\*. (J. Ex. 2-1). (P. Ex. 2-9). Student has \*\*\*. (P. Ex. 1-2)(R. Ex. 2-5).
59. Student was in the \*\*\* grade for the 2014-2015 school year. By this time Student had \*\*\*. (J. Ex. 1-1, 1-10)(P. Ex. 2-9, 2-10). The \*\*\* conducted an assessment of Student under its \*\*\* (\*\*\*) program beginning in August 2014 and issued a report on October 8, 2014. (J. Ex. 2). Student was quite candid and forthcoming reporting Student's history of \*\*\*. (P. Ex. 2)(Tr. Vol. I., pp. 181-182, 184-186).
60. As a result of the \*\*\* assessment Student was diagnosed \*\*\* with posttraumatic stress disorder, (PTSD), major depressive disorder with psychotic features (by history), \*\*\*, parent-child relational problems (\*\*\*), and psychosocial stressors including past family struggles, current familial strain, \*\*\*, academic strain, poor peer relationships, \*\*\*, and lack of supervision. (J. Ex. 1-10)(J. Ex. 2).
61. The \*\*\* assessment revealed Student experienced \*\*\*. Student reported Student witnesses Student's \*\*\*. Student reported \*\*\*. Student admitted having a lot of distressing dreams and recurrent and intrusive thoughts \*\*\*. Student also had difficulty falling asleep, felt irritable and angry, hyper-vigilant, inattentive, and easily startled. (R. Ex. 2-6).
62. The \*\*\* assessment described Student as a cooperative, yet self-protective \*\*\* year old with a chaotic and neglectful upbringing. Student experienced \*\*\*. Student experiences significant perceived loss from \*\*\*. Student has difficulty following rules, engages in verbally and physical acts of aggression as well as \*\*\* acting out behavior. (R. Ex. 2-11).
63. The \*\*\* assessment described Student internalizes Student's trauma through mood symptoms of depression and anxiety because Student lacks coping mechanisms. Student seeks relationships and desires

- interpersonal connectedness but engages in socially inappropriate behavior as a means of achieving these goals. (R. Ex. 2-11). Student views adults who are nice to Student as Student's friends but who then take advantage of Student. Student is extremely naïve and vulnerable in that regard. (Tr. Vol. I, p. 197). Student has difficulty seeing \*\*\*self positively and describes \*\*\*self most often in terms of physical attributes. Student's self esteem is very low. Student sees \*\*\*. (Tr. Vol. I, p. 200). Student's relationships are likely maladaptive or harmful. (R. Ex. 2-12).
64. Student's \*\*\* cares about Student and has complied with everything the \*\*\* and \*\*\* have asked Student to do. However, Student's \*\*\* has trouble figuring out how to respond to Student so often chooses to do nothing. (J. Ex. 2-12)(Tr. Vol. I, p. 205). At times Student's \*\*\* has disciplined Student with physical punishment. (Tr. Vol. I, p. 207). Student's \*\*\* has difficulty accepting that mental health and trauma issues affect Student and Student's behavior. (Tr. Vol. I, p. 125).
65. Student's \*\*\* does not believe in the use of medication or in counseling and believes Student is simply making poor choices. The \*\*\* continues to work with Student's \*\*\* to acknowledge Student's mental health issues and ensure Student takes Student's medication regularly. (T. Vol. I, pp. 125, 191-192). Student's \*\*\* works long hours and keeps Student safe by locking Student in the house instead of engaging in outside community activities or family counseling. (Tr. Vol. I, p. 198).
66. \*\*\*. At the time of the due process hearing Student's \*\*\*. \*\*\*. (Tr. Vol. I, pp. 195, 209). \*\*\*. (Tr. Vol. I, p. 210).
67. In \*\*\* 2014 the \*\*\* principal contacted Student's \*\*\* to inquire as to whether Student would enroll for the 2014-2015 school year. \*\*\*. (Tr. Vol. II, p. 359).
68. After this litigation was filed the school district conducted a psychological reevaluation in January 2015 (the reevaluation) at the request of Student's \*\*\* to assess Student's current emotional/behavioral state. At the time of the reevaluation Student continued placement in \*\*\*. (J. Ex. 1-10)(Tr. Vol. I, pp. 192, 197). \*\*\* provides Student with continual individual counseling, family counseling, small group social skills development, medication management, and other supports Student's family is not providing. (Tr. Vol. I, p. 192)(Tr. Vol. II, pp. 281-282).
69. Student remained at \*\*\* at the time of the due process hearing. (Tr. Vol. I, p. 227). There is a relationship between the \*\*\*, the \*\*\*, and the school district. (Tr. Vol. I, pp. 227-228). The school district provides educational services to students \*\*\*. (Tr. Vol. II, pp. 383-384). The school district \*\*\* providing both special education and general education services. (Tr. Vol. II, p. 384). \*\*\* Student has the opportunity to participate with Student's educational peers in all services and extra-curricular activities through the \*\*\*. (J. Ex. 5-23).
70. Related services are also provided to eligible students \*\*\* by the school district. \*\*\* is a located \*\*\*. \*\*\*. \*\*\*. (Tr. Vol. II, p. 386). \*\*\*.
71. Student's \*\*\* teacher estimates Student is working at a \*\*\* or \*\*\* grade reading level and at a \*\*\*-\*\*\* grade level in math. (Tr. Vol. I, pp. 218-219, 220). The school at the \*\*\* is a very structured, small group setting – students receive a lot of individualized instruction. Student tends to do well with one-on-one attention and when larger tasks are broken into smaller chunks. (Tr. Vol. I, pp. 221, 223). Student is doing well academically at the \*\*\* school. (Tr. Vol. I, p. 225)(Tr. Vol. II, p. 387).
72. An Addendum was prepared to the initial FIE conducted in April 2014. (J. Ex. 1)(Tr. Vol. I, pp. 236, 238).

The \*\*\* Assessment was a new source of information used in the reevaluation. Updated clinical interviews with Student and Student's \*\*\* from the \*\*\* Assessment were new sources of information for the reevaluation. (J. Ex. 1-10)(Tr. Vol. I., pp. 238, 249).

73. By this time Student was experiencing high levels of anxiety, somatization, conduct problems, and aggression. Student's high anxiety levels were viewed as interacting with sociological factors such as \*\*\*, parent relational problems, and low abilities to cope with dysfunction in Student's environments. (J. Ex. 1-12)(P. Ex 5-91). The reevaluation also found Student's anxiety could be a significant factor in school related to underachievement, school refusal, and social isolation and/or trauma. Characteristics of Student's behavior manifested in and out of school needed to be considered in choosing Student's educational placement and programming. (J. Ex. 1-12).
74. The reevaluation identified the following problem behaviors that interfered with Student's learning: high need for desirability/acceptance; feelings of inadequacy; academic underachievement; and leaving the classroom or campus when overwhelmed or anxious. (J. Ex. 1-12). Student has difficulty building and maintaining relationships and engages in some maladaptive behaviors when experiencing negative emotions. (J. Ex. 1-17). The school district's reevaluation concluded that updated assessment data now supported the presence of an emotional disturbance. (J. Ex. 1-12)(P. Ex 5-91). A set of behavioral recommendations were included in the Addendum. (J. Ex. 1-21)(Tr. Vol. I., pp. 244-245).
75. An ARD meeting was held on January 28, 2015 (the January 2015 ARD) to review the results and recommendations of the reevaluation and as an initial placement ARD for special education. (J. Ex. 5-1, 5-22). Student's \*\*\* and attorney attended the ARD meeting. (J. Ex. 5-22). The school district's attorney also attended the ARD meeting along with several administrators, a special education teacher, a general education teacher, a LSSP, a LSSP intern, the school district's Consulting Psychologist, a clinical services coordinator, and a special education facilitator. (J. Ex. 5-22, 5-23). The January 2015 ARD reviewed the initial FIE as well as the \*\*\* assessment. (J. Ex. 5-23).
76. The January 2015 ARD concluded that Student now met eligibility criteria for special education as a student with an emotional disturbance. (J. Ex. 5-1, 5-6, 5-23, 5-33). By the time of the reevaluation Student had experienced the traumatic events \*\*\*. The ARD now had more clinically significant information available than it had in April 2014 ARD. (Tr. Vol. I., p. 329).
77. At the time of the January 2015 ARD Student continued to receive educational services at the \*\*\*. (J. Ex. 5-4, 5-23). The January 2015 ARD agreed that Student does well in a controlled, structured environment. Although more restrictive than other placements the advantages of the \*\*\* placement outweighed any potential harmful effects. The small classroom \*\*\* environment provide the kind of structure and individualized instruction Student needs. (J. Ex. 5-23, 5-24). Outside counseling was contemplated to address social skills. (J. Ex. 5-23).
78. The January 2015 ARD agreed Student needs a highly structured environment in order to make academic progress as well as in Student's personal life. There is a \*\*\*. (J. Ex. 5-23).
79. IEP's for English Language Arts and Reading, Math, Adaptive Behavior, Counseling, and \*\*\* were approved by the January 2015 ARD. (J. Ex. 5-7, 5-8, 5-9, 5-10, 5-11). The English Language Arts and Reading and Math IEPs were directed at mastery of the \*\*\* grade curriculum. (J. Ex. 5-7, 5-8).
80. The January 2015 ARD agreed Student's behavior now clearly impeded Student's own learning and the

learning of others and Student needed a Behavior Intervention Plan (BIP). (J. Ex. 5-5, 5-12). The Adaptive Behavior IEP and the BIP addressed Student's need to eliminate verbal or physical aggression towards peers or adults, task completion/refusal issues, and, noncompliance. (J. Ex. 5-9, 5-28, 5-29). The BIP identified the set of problem behaviors, antecedents, consequences, a set of reinforcers, and the function of Student's maladaptive behaviors. (J. Ex. 5-30 to 5-33).

81. The IEP included counseling as a related service and provided for one 45 minute counseling session every two weeks for a total of 10 sessions. (J. Ex. 5-20). The Counseling IEP addressed Student's need to develop and use appropriate coping skills to carry out school responsibilities and participate in healthy social relationships and activities. The Counseling IEP addressed Student's stress, anger, and anxiety, self-esteem issues, and developing socially acceptable reactions to conflict situations. (J. Ex. 5-10).
82. A set of accommodations to be utilized in the core academic classes were also approved by the January 2015 ARD. (J. Ex. 5-12, 5-13). A set of behavioral accommodations for all Student's classes were also approved including setting clearly defined limits, frequent reminders of the rules, positive reinforcement, frequent eye contact/proximity control, private discussions about behavior, in-class timeout, following the BIP, and, following the \*\*\*. (J. Ex. 5-13). \*\*\* IEP was also approved by the ARD to address Student's needs for \*\*\*. (J. Ex. 5-11).
83. The instructional arrangement for Student's placement was a "\*\*\*\*" at the \*\*\*. (J. Ex. 2-1)(J. Ex. 5-23). The IEP included Tier I, II, and III instructional interventions, Title I programs, supplementary aids and services, and the set of accommodations, in a general education setting. (J. Ex. 5-16, 5-17). Student's services and IEP could not be provided \*\*\* because of Student's \*\*\*. The ARD documents also noted Student's \*\*\* for purposes of educational placement. (J. Ex. 5-18).
84. The IEP contemplated seven periods of instruction each day with 50-60 minutes per period. The ARD discussed Student's needs for Extended School Year services but those were not recommended. Student was scheduled for all \*\*\* grade level core academics, PE/Health, and an extra period for writing or math. (J. Ex. 5-19). Special education services began on January 2, 2015 and continued through January 27, 2016. A schedule of services for the following 2015-2016 school year was also included in the IEP. Student was placed into \*\*\* grade core academics, an elective to work on writing and math, and, PE/Health. (J. Ex. 5-19, 5-20).

#### Discussion

#### 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. The student must meet the criteria under one or

more of the enumerated disability classifications. *34 C.F.R. § 300.8 (a)*. A child with a disability may qualify for special education services under more than one classification. *E.M. v. Pajaro Valley Unified Sch. Dist.*, 758 F. 3d 1162(9<sup>th</sup> Cir. 2014), cert. denied, 2015 U.S. Lexis 204 (2015). However, not every student who struggles in school requires an evaluation for special education. *Alvin Ind. Sch. Dist. v. A.D.*, 503 F. 3d 378, 384 (5<sup>th</sup> Cir. 2007).

### Educational Need

Even if a student can meet the criteria of one or more of the disability classifications a student must also demonstrate a need for special education and related services for eligibility purposes. *34 C.F.R. § 300.8 (a)(1)*. The determination of whether a student who is advancing from grade is “in need of special education” must be determined on an individual basis. *Bd. of Hendrick Hudson Int. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982).

### Should the School District Have Identified Student as Eligible for Special Education?

The major issue in this case is whether the school district should have identified student as eligible for special education services during the 2013-2014 school year. As a threshold matter the record shows that it was not until after Student became involved \*\*\* in January 2014 that there was any reason to suspect Student might be a student with a disability in need of special education.

As a \*\*\* grader Student passed all Student’s classes and made good grades. Although there were a few behavioral issues in \*\*\* grade there was insufficient evidence to show that Student entered \*\*\* grade with either academic or behavioral issues that were sufficiently egregious to put the school district on notice Student might be a child with a disability. Failing to meet state assessment standards is only one factor in determining whether a student might be a child with a disability.

The evidence shows Student continued to make good grades and could function reasonably well in the school environment the fall semester of the 2013-2014 \*\*\* grade school year. Although there were some behavioral issues and Student had some academic struggles there was insufficient evidence to show that the school district should have suspected Student might be a child with a disability during the fall semester. Student was not \*\*\* grade until Student was \*\*\* at school and \*\*\*.

Before a student is referred for a special education evaluation the student experiencing difficulty in the general classroom should be considered for support services available to all students including tutorials, response to research-based intervention, remedial services and other academic or behavioral supports. *19 Tex. Admin. Code § 89.1011*, eff. November 1, 2007, amended eff. January, 1, 2015. The evidence showed that Student received those supports through the math and reading intervention classes. In addition, after school math tutoring was available although Student apparently did not choose to take advantage of it.

At least one teacher and the school principal were aware of Student’s difficult family history and had concerns about Student. The record is unclear as the extent of their knowledge and when they became aware of the family history. However, the evidence showed that Student’s attendance was excellent, Student’s \*\*\* provided Student with a stable home life, and Student was making academic progress in \*\*\* grade. Student’s \*\*\* had a good relationship with the principal and did not express any concerns over Student’s education until Student \*\*\*.

Furthermore, there was insufficient evidence to show the school district was aware of Student’s \*\*\* until Student \*\*\*. Even if school staff were aware Student \*\*\* -- and there was no evidence Student \*\*\* -- \*\*\* alone does not meet eligibility criteria under the IDEA. \*\*\*.

The evidence showed the school district responded to the \*\*\*’s request for a special education evaluation in a timely manner despite the delay in securing the requisite written consent. Once the consent was received – in this case on February 7, 2014 – the school district completed the evaluation on April 8, 2014 within the sixty day federal timeline. 34 C.F.R. § 300.301 (c)(1)(i). An Admission, Review & Dismissal Committee (ARD) meeting was duly and timely convened on April 28, 2014 to review and discuss the results of the FIE. 34 C.F.R. § 300.323 (c)(1).

I conclude the school district was not under an obligation to conduct an initial evaluation for special education until Student’s \*\*\* requested it in January 2014. 34 C.F.R. § 300.301 (a)(b). The next issue is whether Student should have been identified as a student with either an emotional disturbance or specific learning disability at the April 2014 ARD.

### Emotional Disturbance

Under the IDEA an emotional disturbance is a condition exhibiting one or more of a set of specific characteristics over a long period of time and to a marked degree that adversely affects the child’s educational performance. 34 C.F.R. § 300.8 (c)(4)(i). Those characteristics include:

1. An inability to learn that cannot be explained by intellectual, sensory, or health factors;
2. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
3. Inappropriate types of behavior or feelings under normal circumstances;
4. A general pervasive mood of unhappiness or depression; and/or
5. A tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R. § 300.8 (c)(4)(i)(A)-(E).

A student who is socially maladjusted is not a student with an emotional disturbance under the IDEA unless the student otherwise meets one or more of the five enumerated characteristics. 34 C.F.R. § 300.8 (c)(4)(ii).

The evidence showed that although the April 2014 FIE found Student exhibited some social deficits and some feelings of sadness those indicators were not present “over a long period of time” or “to a marked degree.” At the time of the April 2014 the school district did not know that Student had \*\*\* – that information only came to light much later when Student was assessed by the \*\*\*. Student had not yet \*\*\* – that did not occur until June 2014.

Student earned good grades, received math and reading interventions, had a positive relationship with at least one teacher, and appeared to have some friendships. It was reasonable for the school district to conclude in April 2014 that sociological factors affected Student’s behavior and academic performance rather than a specific emotional disability. It was not until January 2015 that the school district had access to the \*\*\* assessment, in-depth information about Student’s history of abuse, and the \*\*\*. Student now demonstrated a sufficient set of characteristics to meet the severity criteria for an emotional disturbance under the IDEA. The January 2015 ARD made the appropriate decision in concluding Student was a student with an emotional disturbance for purposes of special education services. Student’s emotional disability now clearly had an adverse effect on Student’s learning.

### Specific Learning Disability

The evidence also showed that Student did not meet the eligibility criteria as a student with a specific learning disability. The intellectual, cognitive, and achievement assessments were thorough, valid, and reliable. The

assessment showed that student's academic achievement was commensurate with Student's intellectual and cognitive abilities – the evidence supports the conclusion Student was performing academically the best that Student could.

There is no question that Student has specifically identified academic skill deficits. Now that Student is eligible for special education as a student with an emotional disturbance Student's academic deficits must be addressed in any educational program going forward. However, the school district made an appropriate decision at the April 2014 ARD when it concluded Student did not meet IDEA criteria as a student with a specific learning disability. *34 C.F.R. § 300.8 (c)(10)*.

### Educational Placement

Petitioner contends the school district failed to provide Student with an appropriate educational placement during the 2013-2014 school year. The evidence shows that up until Student \*\*\* Student was making academic progress at \*\*\*. Student was supported in two remedial academic intervention classes and class sizes were smaller than those in a typical \*\*\*. The school district was not under a duty to provide Student with an appropriate educational placement within the meaning of the IDEA until Student became eligible for special education services in January 2015. By then Student was \*\*\*. \*\*\*.

The IEP developed for Student at the January 2015 ARD addressed Student's current placement at \*\*\* and noted that Student's \*\*\* for the \*\*\* outweighed any benefit Student might receive in a less restrictive setting. *See, 34 C.F.R. § 300.114*. \*\*\* staff to meet Student's \*\*\*. The school district \*\*\*.

\*\*\*. Certainly the evidence in this case supports Student's need for a highly structured educational setting with a low student to teacher ratio that facilitates one-to-one individualized instruction. \*\*\*.

### FAPE

The school district was not under an obligation to provide Student with a free, appropriate public education within the meaning of the IDEA until Student was eligible for special education services. As discussed *infra* the school district came to the appropriate conclusions about Student's eligibility at the April 2014 ARD and again at the January 2015 ARD when updated and new information supported the conclusion that Student now met the severity criteria for eligibility as a student with an emotional disturbance.

The evidence showed the IEP approved at the January 2015 ARD met Student's academic and behavioral needs. A Behavior Intervention Plan and counseling services were components of the IEP. Goals and objectives addressing Student's need to continue to progress and access the regular curriculum were developed. A set of accommodations to meet Student's needs was also included as a component of the January 2015 IEP.

The evidence shows the January 2015 IEP:

- Is individualized on the basis of Student's assessment and performance;
- Is being administered in the least restrictive environment [\*\*\*];
- The services are being provided in a coordinated, collaborative manner by key stakeholders; [\*\*\*] and,
- Student is demonstrating academic and non-academic benefits. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5<sup>th</sup> Cir. 1997)*.

Student currently receives appropriate educational services \*\*\*. \*\*\*.



The evidence shows the school district was not under an obligation to provide a free, appropriate public education until January 2015 when Student was determined to be eligible under the IDEA for special education. The evidence shows the IEP designed in January 2015 is reasonably calculated to provide Student with a meaningful educational benefit. *Bd. of Educ. of Hendrick Hudson Int. Sch. Dist. v. Rowley*, 458 U.S. at 205 (1982). Student did not meet Student's burden of proof on this issue. *See, Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

### Conclusions of Law

1. Respondent was not under an obligation to identify Student as a student with a disability within the meaning of the Individuals with Disabilities Education Act until January 2015. *34 C.F.R. §§ 300.8 (c)(4)(10); 19 Tex. Admin. Code § 89.1011.*
2. Petitioner did not meet Petitioner's burden of proving the school district failed to provide Petitioner with an appropriate educational placement during the 2013-2014 school year up through the present. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *34 C.F.R. § 300.114.*
3. Respondent was not under an obligation to provide Petitioner with a free, appropriate public education until Petitioner was identified as a student eligible for special education under the Individuals with Disabilities Education Act in January 2015; Petitioner did not meet Petitioner's burden of proving the Individualized Education Program designed in January 2015 failed to provide Petitioner with the requisite educational benefit. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5<sup>th</sup> Cir. 1997).
4. Petitioner's requests for relief Nos. 1, 2, 3, 4, and 8, as stated *infra*, are moot given that the school district has or is currently providing the educational services contained in those requests. *See, El Paso Ind. Sch. Dist. v. Richard R.*, 567 F. Supp 32 918 (W.D. Tex. 2008), *rev'd on o.g.*, 591 F. 3d 417 (5<sup>th</sup> Cir. 2009)(*a controversy is moot where as a result of intervening circumstances there are no longer adverse parties with sufficient legal interests to maintain the litigation*); *Crown Point Cent. Sch. Dist.*, 46 IDELR 269 (SEA N.Y. 2009)(*math evaluation completed prior to due process hearing*).

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

**SIGNED the 15th day of May 2015**

/s/ Ann Vevier Lockwood  
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).*

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

**STUDENT, bnf  
PARENT,  
    Petitioner,**

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**v.**

**DOCKET NO. 047-SE-1014**

**SAN ANTONIO INDEPENDENT  
SCHOOL DISTRICT,  
    Respondent.**

**SYNOPSIS**

**Issue:**

Whether \*\*\* grade student should have been evaluated and identified by school district as student with an emotional disturbance and/or learning disability.

**Held:**

**FOR THE SCHOOL DISTRICT**

School district had no reason to suspect a disability during student's fall semester of \*\*\* grade. School district appropriately evaluated student following parental request for special education evaluation as a result of \*\*\*.

School district's FIE was appropriate. ARD made the correct decision that student did not meet eligibility criteria for ED or LD; student's depressive characteristics and anxiety were related to a conduct disorder and social maladjustment in response to family issues (\*\*\*) and did not rise to sufficient levels of clinical significance. Student exhibited some academic deficits but student's academic performance was commensurate with cognitive and intellectual abilities; student made academic progress in \*\*\* grade.

\*\*\* Student experienced a series of additional traumatic events, \*\*\*. School district appropriately reevaluated Student in January following request by parent for psychological. In \*\*\* conducted its own evaluation now available to school district with updated information about student's \*\*\* intensified levels of anxiety and depression. Student now met the severity criteria for an ED.

**34 C.F.R. §§ 300.8 (a)(1)**

**Issue:**

Whether school district failed to provide student with an appropriate educational placement as a \*\*\* grader.

**Held:**

**FOR THE SCHOOL DISTRICT**

School district was under no obligation to provide student with an appropriate educational placement unless and until student was identified as eligible for special education services; student was \*\*\* at the time school district identified student as eligible for special education; \*\*\*.

**34 C.F.R. § 300.114**

**Issue:**

Whether school district should have provided \*\*\* grade student with a FAPE.

**Held:****FOR THE SCHOOL DISTRICT**

School district had no duty to provide FAPE until student was identified as eligible and in need of special education services. That duty did not arise until \*\*\*. Once school district completed reevaluation with updated and new sources of information school district convened ARD and developed appropriate IEP that was reasonably calculated to provide student with requisite educational benefit. School district \*\*\* and provided educational services – student began receiving those services in January and IEP developed for one year that addressed student's academic and behavioral needs.

**34 C.F.R. § 300.101**