

STUDENT,	§	BEFORE A SPECIAL EDUCATION
b/n/f PARENT,	§	
Petitioner	§	
	§	HEARING OFFICER FOR
v.	§	
	§	
TEXAS SCHOOL FOR THE DEAF,	§	
Respondent	§	THE STATE OF TEXAS

DECISION OF HEARING OFFICER

*** (Student) through next friend Parent (collectively, Petitioner),¹ requested a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 United States Code § 1400 *et. seq.* Respondent is the Texas School for the Deaf (TSD). After considering the evidence and arguments presented, the Hearing Officer concludes that Petitioner has not established a basis for relief in this case. Therefore, the relief requested by Petitioner is **DENIED** in its entirety. In regard to the relief requested by TSD, the Hearing Officer finds that TSD’s evaluation of Student was proper and further finds it appropriate to require a full psychological evaluation of Student. Therefore, TSD’s request is **GRANTED**.

I. ISSUES ADDRESSED

A. Petitioner’s Issues

The issues raised by Petitioner were identified in paragraph 73, sub-issues A through R, of Petitioner’s *Special Education Due Process Hearing Request* received by the Texas Education Agency (TEA) on April 30, 2014. In addition, at the prehearing conference, Petitioner identified another issue that TSD agreed could be added to the proceeding. Accordingly, the comprehensive list of issues raised by Petitioner are set forth below, in that Petitioner alleges that TSD failed to provide a free appropriate public education (FAPE) by:

- A. Failing to assess Student in all areas of suspected disabilities;
- B. Failing to find Student eligible as a child with an Other Health Impairment, specifically Attention Deficit Hyperactivity Disorder (ADHD), in a timely manner;
- C. Proposing to place Student in an overly restrictive educational setting;
- D. Failing to provide Student an appropriate educational program individualized to meet Student’s unique needs;

¹ *** is also individually referred to as “Parent.”

- E. Failing to provide Student with appropriate Individualized Education Program (IEP) goals and objectives individualized to meet Student's unique needs;
- F. Failing to develop an appropriate Behavior Intervention Plan (BIP) uniquely tailored to meet Student's individualized needs;
- G. Failing to provide an appropriate Functional Behavior Assessment (FBA);
- H. Failing to allow Student's parents the ability to fully participate in Admission, Review and Dismissal (ARD) committee discussions to make educational decisions for Student by denying them prior access to information available to all other members;
- I. Failing to have all required members in attendance at ARD committee meetings;
- J. Requesting Student's parents seek evaluations at private expense;
- K. Requesting Student be medicated in violation of the Texas Education Code;
- L. Failing to provide occupational therapy (OT) services;
- M. Failing to properly consider Extended School Year (ESY) services;
- N. Failing to provide ESY services;
- O. Failing to provide Student's parents with prior written notice/notice of refusal regarding their request for 1:1 educational support in Student's classroom;
- P. Failing to seek Student's mother's agreement prior to amending Student's social studies and science IEP goals and objectives and again denying her participation in a ARD decision;
- Q. Failing to provide appropriate medication management procedures;
- R. Failing to allow Student's mother access to Student's psychiatrist at TSD; and
- S. Failing to provide Student an education from a qualified teacher.²

B. TSD's Issues

TSD has also raised an issue in its *Request for Special Education Due Process Hearing* received by TEA on May 11, 2014. Specifically, TSD requested a complete psychological evaluation of Student, but Parent refused to consent to such request. Therefore, TSD requested that Student be required to submit to a psychological evaluation. Also, TSD requests that a finding be made that Petitioner is not entitled to an Independent Educational Evaluation (IEE) at TSD's expense, because an appropriate evaluation was previously conducted by TSD within the prior year.

II. PROCEDURAL HISTORY

Petitioner filed its *Special Education Due Process Hearing Request* with TEA on April 30, 2014. TSD filed its own *Request for Special Education Due Process Hearing* with TEA on May 11, 2014. The case was

² This issue was added at the prehearing conference.

continued numerous times because of health issues of counsel and other concerns raised by the parties. The hearing was held on May 26-29, 2015. Attorneys Yvonnilda Muniz, Dorene Philpot, and Olivia Ruiz represented Petitioner. Attorneys Leonard Schwartz and Maia Levenson represented TSD. After the hearing was concluded, the decision due date was extended to August 31, 2015, by request of the parties, to allow both parties an opportunity to submit written arguments. This Decision is being timely issued.

III. SUMMARY OF DECISION

At the outset, the Hearing Officer finds it helpful to discuss this case in a general sense, with the specific issues reserved for more detailed discussion further below.

A. Summary of the Applicable Law

It is first appropriate to discuss the legal framework of this case. Under IDEA, a school district is required to provide FAPE to all children. To provide FAPE to a child with a disability, a school district must design and implement an individualized program reasonably calculated to enable the child to receive educational benefits.³ When evaluating whether an educational program is calculated to provide meaningful educational benefit consistent with IDEA, there are four factors to consider: (1) whether the program is individualized on the basis of the student's assessment(s) and performance; (2) whether the program is administered in the least restrictive environment; (3) whether the services are provided in a coordinated, collaborative manner by key stakeholders; and (4) whether positive academic and non-academic benefits are demonstrated.⁴ The educational program offered to a student under IDEA is presumed to be appropriate, and the burden of proof is on a challenging party to show that the school district did not provide the services required by law.⁵ Thus, Petitioner has the burden of proof on the issues raised in Petitioner's due process complaint.

However, the burden of proof is shifted in regard to issues related to a parental request for an IEE. In this case, Petitioner requested an IEE. Under 34 C.F.R. § 300.502(b)(2), TSD must either cover the cost of the IEE or file a due process complaint to show that its evaluation was appropriate. TSD denied the request for an IEE, and filed a due process complaint seeking a hearing on Petitioner's request, as well as its own request for a

³ *Bd. Of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982).

⁴ *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).

⁵ *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1010 (5th Cir. 2010).

psychological evaluation of Student, which was brought under 34 C.F.R. § 300.300(c)(1)(ii). Thus, on these two requests (whether Petitioner is entitled to an IEE of Student and whether TSD is entitled to a psychological evaluation of Student), TSD bears the burden of proof.

B. Summary of the Case

At its heart, this case is about TSD's alleged failure to specifically label Student as having ADHD or provide services tailored specifically to addressing a diagnosed and labeled condition of ADHD. This is not *per se* a child find issue, as Student was identified by TSD as having an eligible disability because of Student's Auditory Impairment (AI). In fact, as TSD notes, it serves *only* students with disabilities because it is a specialized school providing a unique on-campus educational experience for students with hearing impairments. As such, all of TSD's students have been identified as students with disabilities who are entitled to special education services under IDEA.

It is undisputed that Student was never formally labeled by TSD as having the other health impairment (OHI) of ADHD. It also appears generally undisputed that Student likely has ADHD. Thus, Petitioner contends that TSD failed to provide the educational services required by IDEA because it never formally identified Student as having ADHD and did not provide specific services tailored to addressing Student's special educational needs necessitated by Student's ADHD.

In contrast, TSD argues that because Student was already identified as having a disability and entitled to special educational services under IDEA, it was not necessary for TSD to assign the "label" of ADHD to Student. Rather, TSD was required to evaluate all of Student's educational needs and provide the required services to ensure that Student got FAPE. TSD argues that it did this by recognizing the symptoms of Student's ADHD and providing the necessary services to address those symptoms. Thus, even without assigning the ADHD label, TSD argues that it provided the services necessary to address Student's ADHD and, therefore, it has complied with IDEA.

Ultimately, the Hearing Officer agrees with TSD. The evidence demonstrates that TSD recognized the impacts of Student's ADHD and properly attempted to tailor its educational services to address Student's special needs associated with Student's ADHD. Because Student was identified as having a disability and entitled to special educational services under IDEA, TSD was not required to specifically classify *all* of Student's

disabilities, including Student's ADHD. It was merely required to ensure that Student received FAPE consistent with IDEA and that Student's educational needs were met. The evidence shows this was done. Each year, TSD's ARD committee recognized Student's needs related to Student's ADHD symptoms and attempted to match the educational services provided to those needs. Moreover, despite some lags in Student's educational performance, Student made progress in Student's education and was positively regarded by Student's teachers. Although at one point the suggestion was made to move Student to a special needs classroom, this was never done and Student was kept in the main classroom for Student's grade level.

Thus, the evidence shows that TSD complied with the applicable standards in providing FAPE to Student. Specifically, TSD developed a program appropriately individualized on the basis of Student's assessments and performance; the program was administered in the least restrictive environment; the services were provided in a coordinated, collaborative manner by key stakeholders; and positive academic and non-academic benefits for Student were demonstrated. This satisfies the applicable legal requirements for IDEA.

Petitioner contends that TSD's continued recognition of Student's subpar performance or the need for improvement in Student's education is evidence that Student did not receive FAPE. As Petitioner states in reply arguments, "If at all times [Student] received FAPE, as TSD staff claims, then there was no reason for emails that expressed concern about [Student's] progress or need to amend Student's Reading IEP at the beginning of the 2013-2014 school year."⁶ This statement is indicative of Petitioner's position in this case: namely, because Student continuously demonstrated learning difficulties or had room for improvement, then clearly TSD was not providing FAPE. But that is simply not a proper understanding of the law or the facts.

Almost all students have room for improvement, and a student with disabilities will nearly always have some difficulties beyond those experienced by a student without disabilities. IDEA does not guarantee that a child will not struggle or have room for improvement, nor could any law do so. Rather, IDEA requires school districts to provide appropriate educational services. Here, the evidence shows that TSD staff were undertaking reasonable efforts to ensure that Student was educated fully and appropriately, and evidence showing their ongoing concerns and statements to try to improve Student's education is not proof that Student's education was deficient. Simply put, having room for improvement is not the same as "inadequate." Undoubtedly, the evidence shows that TSD's staff was continuously recognizing Student's struggles and trying to improve Student's educational experience. This is not a sign of TSD's failing, but rather of its care for Student's education.

⁶ Petitioner's Reply Brief, p. 6.

IDEA is an admirable law that seeks to ensure that all children receive an appropriate education. It would be unfortunate and misguided to apply a hyper-technical standard to its application that looks at form over substance. In this case, the Hearing Officer is convinced that TSD took good faith efforts throughout Student's educational experience to ensure that Student received an appropriate education in light of Student's disabilities. TSD certainly fulfilled the goals and requirements of IDEA, despite the fact that it did not label Student with ADHD and despite the fact that, in a few instances, its actions may not have been in compliance with certain technical provisions of the law.⁷

In this case, when one steps back and looks at the educational services provided to Student by TSD, it is clear that Student's disabilities were properly accounted for and Student was provided a good educational experience by TSD—one that complied with IDEA and ensured FAPE. Accordingly, the Hearing Officer finds that Petitioner is not entitled to relief.

As to TSD's due process complaint, the Hearing Officer finds that (1) Petitioner is not entitled to an IEE because a proper evaluation was done by TSD; and (2) a full psychological evaluation of Student is necessary to ensure that Student does not have any additional disabilities that need to be addressed in Student's educational program. Therefore, TSD's request for relief is granted in that regard. The Hearing Officer now turns to the specific facts of this case and an analysis of the specific issues raised by the parties.

IV. FINDINGS OF FACT

Based upon the evidence and argument of the parties, the Hearing Officer issues the following findings of fact.⁸

1. TSD is a political subdivision of the State of Texas and is responsible for providing Student a FAPE in accordance with IDEA, 20 U.S.C. § 1400, *et seq.*, and the rules and regulations promulgated thereto.

⁷ Examples of technical violations include two ARD meetings where one of the required persons was not in attendance, minor amendments to some IEP goals without parental notice, and the failure by TSD to provide an additional 4.5 hours of OT services required by Student's IEP. However, as noted below, the Hearing Officer concludes that these minor technical violations do not give rise to any right to relief to Petitioner in this case.

⁸ The parties submitted voluminous proposed findings with their briefing. However, a large portion of the parties' proposed findings were simply recitations of evidence. Accordingly, the Hearing Officer has not adopted many of the parties' proposed findings, especially TSD's proposed findings, which were almost exclusively recitations of evidence.

2. Student is a ***-year-old student enrolled in TSD, who was recently promoted to the *** grade. At the time the due process complaint was filed, Student was ***-year-old student who was completing the *** grade at TSD. Pet. Ex. 18, p. 5.
3. The due process complaint was filed by Petitioner on April 30, 2014. Accordingly, the scope of this proceeding encompasses the 1-year period from April 30, 2013, through April 30, 2014.⁹
4. Student, Student's mother, *** reside *** Independent School District but Student's mother has parentally placed Student at TSD. Pet. Ex. 18, p. 5.
5. ***. Pet. Ex. 18, p. 5.
6. Student is currently eligible for special education and related services under IDEA as a child with AI, with severe to profound bilateral hearing loss. Pet. Ex. 2, p. 10; Pet. Ex. 20, p. 2. Student's dominant language is American Sign Language (ASL), ***. Pet. Ex. 2, p. 7.
7. Student has attended TSD since the *** school year, when an ARD meeting was held on ***, to plan for Student's ***. Pet. Ex. 1, pp. 4-24.
8. The initial Full and Individual Evaluation (FIE) is dated ***. Pet. Ex. 5, pp. 10-15. Findings indicated Student's cognitive functioning appeared to be average with some skills in the below average range. Pet. Ex. 5, p. 13. Student's academic skills ranged from ***. *Id.* Both these findings were based on the results of the Hawaii Early Learning Profile (HELP). *Id.*
9. A counseling evaluation was completed on ***. Pet. Ex. 5, pp. 7-9. The reason stated for the referral was that "[b]oth teacher and mom reported concerns about [Student's] behavior toward other children and adults, especially mom. They report that [Student] is easily angered and often can be impulsive." Pet. Ex. 5, p. 7.
10. On ***, an Amendment to Student's IEP was completed to add Health Services, a related service, so that medical monitoring by the TSD psychiatrist could occur. Pet. Ex. 4, p. 1. The nurse's rationale for the amendment was so that Student could take medications "administered by nurse that impacts [Student's] ability to access education." *Id.* Based on an Evaluation Report, dated the same day, the functional implications of dispensing medication in school was "to help student focus and stay on task." Pet. Ex. 5, p. 1. This demonstrates that TSD was aware of and working with Student's ADHD as early as ***.
11. At an ARD meeting on ***, the ARD committee considered the Initial Psychiatric Evaluation. Pet. Ex. 3, p. 27. At that ARD meeting, the counselor shared the TSD doctor's evaluation results but claimed that despite the recent change in classes (smaller groups) and home situation, some impulsiveness was still there. Pet. Ex. 3, p. 28. Although the TSD doctor recommended medication, Student's mother wanted to seek a second opinion. *Id.* The ARD committee agreed Student was eligible for counseling services 30 minutes per week. Pet. Ex. 3, p. 28; Pet. Ex. 3, p. 16. The committee recommended that Student's mother "meet with the teacher every nine weeks to review accommodations and other necessary arrangements to better support" Student. Pet. Ex. 3, p. 28.

⁹ The findings of fact detail a great deal of information prior to April 30, 2013. This information is provided for background and context, not as an actionable basis for relief.

12. To date, no ARD committee for TSD has specifically determined that Student is eligible for special education services under IDEA as a child with OHI for ADHD. However, TSD has been aware of Student's ADHD since at least *** and has adapted Student's educational program to ensure that Student receives appropriate education in light of Student's ADHD.
13. Student's *** report card for the *** indicates Student only reached the proficient level in ***. Pet. Ex. 21, p. 1. According to the report card, Student could ***. *Id.* During the *** grading period, Student's teacher wrote that Student needs 1:1 help to stay focused and not hurt Student's peers. Pet. Ex. 21, p. 2.
14. Student's eligibility for Speech Impairment (SI) was also discussed at the ARD meeting on ***, but, as the deliberations note, Student's mother felt "speech therapy should be put on hold considering [Student] is not interested at this time." Pet. Ex. 3, p. 28; Pet. Ex. 3, p. 16. Officially, the SI eligibility was removed as of ***. This determination was based on a rubric completed at the ARD meeting of ***.
15. An ARD committee meeting was held on ***, to plan for Student's *** school year. Pet. Ex. 6, pp. 5-24. It was at this ARD meeting that the first BIP was accepted. Pet. Ex. 6, pp. 11-16. Behaviors reported by school staff that "interfere with learning" were listed as "Short attention span, noncompliance, aggression towards peers and staff, struggling with transitions times, does not like to change activity if the next activity is more challenging[, and] ***. There has been an increase in aggression towards peers, not staying in assigned area." Pet. Ex. 6, p. 11.
16. The deliberations at the ARD meeting of ***, note that Student was assigned a primary teacher assistant to support Student in Student's classroom. Pet. Ex. 6, p. 23. Student's teacher reported Student's behavior had improved with the support in place but she remained concerned that Student had gaps in Student's academic progress, especially ***. Pet. Ex. 6, pp. 23-24.
17. An ARD meeting was held on ***, but because Student's mother was not present the committee members agreed not to discuss plans for the following school year. Pet. Ex. 7, p. 26. Student's teacher reported improvement in Student's behavior and participation in class. *Id.* The committee agreed to reschedule the ARD meeting for later when Student's mother was available to participate. *Id.*
18. On ***, another ARD meeting was held to discuss Student's school year, but Student's mother did not attend. Pet. Ex. 9, p. 38. Student's teacher recommended monitoring Student's progress *** to see if Student would benefit from extra support and/or further accommodations. *Id.* No changes were made to the supplementary aids and services as the members were satisfied with the current accommodations in place. *Id.* There was a discussion whether Student's vision should be checked. *Id.* Student's BIP was not discussed. *Id.* Student was promoted to ***. *Id.*
19. Student's annual ARD meeting was held on ***, to address Student's academic needs for *** grade. Pet. Ex. 10. It was also considered a withdrawal ARD ***. Pet. Ex. 10, p. 39. The ARD committee conducted a Review of Existing Educational Data (REED). *Id.* Student's teacher shared what Student had done academically, and stated she would like to see more vocabulary use and application of vocabulary when Student retells, discusses, and writes. *Id.* The counselor shared she had seen much growth in Student. *Id.* This was reflected in Student's *** Progress Report. Pet. Ex. 21, p. 8. Although Student mastered just a few skills, Student was making progress on the great many of them. *Id.* The report card shows Student had difficulty with ***. Pet. Ex. 21, pp. 8-9. Student mastered almost all of Student's IEP objectives. Pet. Ex. 21, pp. 10-16.

20. The REED was completed on ***. Pet. Ex. 12. The review of current data indicated that Student's intellectual functioning was in the average range and no additional evaluations were needed. Pet. Ex. 12, p. 4. Academically, no additional evaluations were needed but then-current levels of performance in reading indicated Student did not ***. *Id.* In Math, Student attempted to ***. *Id.* Student attempted to ***. *Id.* Assessment indicated Student was at ***. *Id.* Student was unable to ***. *Id.* In Science, Student had difficulty recalling the question of the experiment. *Id.* Student was also having difficulty in social studies. *Id.*
21. Student returned to TSD at the start of the *** school year. Because Student was ***, Student's IEP was amended to add Health Services to continue medical monitoring. Pet. Ex. 11, p. 3. The rationale for the amendment was "takes meds administered by nurse that impacts [Student's] ability to access education." *Id.* An Evaluation Report for School Health Services was completed by the school nurse. Pet. Ex. 11, p. 6. The diagnostic impression was ADHD and the reason to dispense the medication was "to help focus and stay on task." *Id.*
22. Student was re-admitted to TSD at ***. Pet. Ex. 13, p. 31. Prior to leaving TSD ***, Student received Student's report card. Pet. Ex. 22, pp. 1-2. Student's report card included comments such as: "[Student] is a great role model in our classroom and is an excellent, hard worker who is always motivated to learn. Student is a great participator and has a great background of knowledge." Pet. Ex. 22, p. 1. Concerns were noted in spelling, reading and, although Student was still working on Student's ***, Student had "a good understanding of concepts relating to ***." *Id.*
23. At an ARD meeting held on ***, the ARD committee adopted the previous IEP developed for Student on ***. The ARD committee also developed a BIP for Student based on previous experience. Behaviors reported by staff that interfered with Student's learning included short attention span, non-compliance, aggression towards peers and staff, struggling with transitions times, does not like change in activity if the next activity is more challenging, and ***. It was noted there was an increase in aggression toward peers and not staying in Student's assigned area. The BIP was to continue for 6 weeks at which time the BIP would be assessed and adjusted as appropriate. Staff would continue to collect baseline information.
24. Only Parent and two TSD staff attended the ARD meeting on ***. Pet. Ex. 13, p. 60. The same person signed as the administrator and the special education teacher, two of the required members of the ARD team. *Id.* The other person from TSD, the counselor, did not sign as a required member of the ARD team. *Id.*
25. On ***, an ARD meeting was held at Parent's request to discuss 1:1 support. Pet. Ex. 14. Student's mother was concerned that Student's reading was delayed, that Student struggled with homework when Student comes home from school and did not want to do Student's homework. Pet. Ex. 14, p. 12. Medication was discussed. *Id.* Options such as Student *** or having a specific intervention plan were discussed. The committee also discussed the need to focus on ADHD in Student's BIP. *Id.* The committee came up with a plan to address the issues – to have a team meeting to develop the BIP based on ADHD, review the current medication arrangement to see if there was any need for change, a specific intervention plan to benefit Student in response to Student's ADHD and reading struggles and ensure the instructional plans reflect this need, and determine future plans – ***, specific plans or intervention plans. *Id.* The listed recommendations were to be discussed at Student's annual ARD meeting, scheduled for ***. *Id.* A team meeting to focus on Student's BIP "where it is most responsive to [Student's] current needs and what intervention plans are beneficial for [Student]" was to be held prior to the annual ARD meeting. *Id.*

26. Student was absent from school *** days during *** grade, in addition to missing an additional *** days at the beginning of *** prior to being re-enrolled at TSD. Thus, Student had a total of *** days absent from school during *** grade. TSD Ex. 89, pp. 2695-2696; TSD Ex. 16.
27. Student's annual ARD meeting initially convened on ***, and re-convened on ***. Pet. Ex. 15. The following additional evaluations were requested: OT; FBA; observation by the licensed specialist in school psychology (LSSP); and the Behavior Assessment System for Children (BASC). Pet. Ex. 15, p. 1. The evaluations were to be completed by ***. *Id.* According to this ARD, Student continued to meet eligibility as a student with AI. Pet. Ex. 15, p. 2. It was determined Student's behavior impeded Student's learning or the learning of others and a BIP was attached. Pet. Ex. 15, pp. 29-33. Student's teacher shared concerns with Student's reading, retaining words, and writing. Pet. Ex. 15, p. 41. She believed there was "a need to look into this more" referring to Student's writing difficulties and the committee agreed to have a work bank available to Student. *Id.* Although Student was making consistent progress in counseling, Student's counselor recommended individual counseling for the next school year and more support to be given in the classroom setting during recess, the cafeteria and other classroom-based activities. *Id.* She believed that Student would benefit from the application of positive coping strategies during specific situations.
28. Student's IEP for *** grade was adopted in ***, after an ARD meeting on ***. Pet. Ex. 15.
29. Student's IEP was individualized, appropriate, and allowed Student to make progress. Tr. 807-808.
30. Student's IEP goals in all areas were reasonable, appropriate, understandable, and measurable. Pet. Ex. 15; Tr. 531.
31. In ***, an FBA was conducted by ***, the LSSP on staff with TSD. Pet. Ex. 18. In conducting the FBA, Ms. *** reviewed existing data, observed Student in class, spoke to Student's parent, teachers, and counselors, and administered two instruments: (1) the DAS:II and (2) the BASC-II. TSD Ex. 43, pp. 775-794; TSD Ex. 106, p. 44. The Evaluation Report included a detailed history, several observations, interviews with Student's former teacher, then-current teachers, and counselor, cognitive/intellectual functioning, behavior checklist or rating scales, psychological/psychiatric evaluations, and medical information. Pet. Ex. 18, pp. 1-6. It outlined Student's strengths and behaviors of concerns and offered hypothesized functions of Student's behavior and recommendations for both home and school. Student's *** grade teachers reported that Student had "on and off" days, did best working in small groups or when receiving individual instruction and support and got "lost" in large group instruction and activities. Pet. Ex. 18, p. 7.
32. Ms. *** conducted the various portions of the FBA properly, with the exception of a slight mistake in administering the DAS:II which did not significantly change or alter the scoring or the interpretation of the test results. The FBA was an appropriate, reliable assessment of Student.
33. Student's progress was properly evaluated and measured in regard to Student's IEP goals. TSD Ex. 50.
34. Student received 1:1 instruction and small group instruction when needed. Tr. 531.
35. Student received counseling to assist Student with the manifestations of Student's ADHD.

36. TSD adopted practices, including short instructions, frequent and immediate feedback, repeating and explaining instructions, opportunities for 1:1 instruction at times, opportunities for small group instruction, classroom structure and management adjustments, frequent breaks, and behavior improvement techniques reflected in the BIP, among other things, to assist Student in learning despite Student's ADHD. TSD Ex. 19; TSD Ex. 21; TSD Ex. 23; Tr. 258. These practices were appropriate, reasonable, and designed to ensure that Student received FAPE.
37. Student was absent from school *** days during *** grade, and *** of those absences were unexcused. TSD Ex. 89.
38. Student's absences adversely affected Student's academic and behavioral progress. Tr. 532. However, despite this, Student still made progress in *** grade. TSD Ex. 50.
39. There is no indication that Student's many absences were a manifestation or effect of any of Student's disabilities.
40. During an ARD meeting on ***, the committee discussed the possibility of placing Student in TSD's special needs program. However, when Petitioner objected to this, no further action was taken and Student was never placed in the special needs program.
41. Student's BIP was properly individualized and tailored to meet Student's needs, including Student's ADHD, and was designed to ensure that Student received an appropriate education. Tr. 446-450, 851. The BIP recognized Student's specific struggles associated with ADHD symptoms ("Short attention span, noncompliance, aggression towards peers and staff, struggling with transitions times, does not like to change activity if the next activity is more challenging[, and] ***. There has been an increase in aggression towards peers, not staying in assigned area.") and provided specific tools for dealing with them (frequent breaks and the ability to move around the back of the room, frequent prompts, immediate praise so Student can connect the praise with the positive conduct, and assigned seating away from high traffic areas to help Student not be distracted by other students). Pet. Ex. 15, pp. 31-32.
42. At ARD meetings on ***, and ***, a required teacher was not present. Thus, on at least two occasions, TSD did fail to have all necessary persons present at an ARD committee meeting. However, these failures are merely technical procedural violations that did not deprive Student of FAPE nor did they in any way deprive Parent of meaningful opportunity to participate in Student's educational process.
43. At an ARD meeting on ***, the ARD committee recommended Student's family pursue a neurological examination. Pet. Ex. 20, p. 38. At that ARD meeting, Ms. *** encouraged the parents to have a neurological evaluation done because it would give an extensive amount of information that would offer the committee answers. Ms. ***'s FBA report, however, merely indicates that a neurological evaluation be considered, whereas a psychological evaluation was definitively recommended. TSD Ex. 21, p. 432.
44. The evidence does not demonstrate that a neurological evaluation was a necessary, required evaluation for Student's educational services.
45. The evidence does not demonstrate that Parent ever formally requested a neurological evaluation at TSD's expense or that TSD formally refused to pay for a neurological evaluation deemed necessary for Student.

46. Student's IEP called for 270 minutes of OT services each 9-week grading period, beginning at the end of ***. TSD Ex. 21. Student received Student's first 35-minute session on ***, but had no more sessions during that 9-week grading period. During the next nine weeks, TSD provided Student with 160 minutes of OT services. During the final nine weeks, TSD provided Student with 105 minutes of OT services. In total, TSD failed to provide Student with approximately 4.5 hours of a prescribed 9 hours of OT services between *** and ***.
47. Student accomplished most of Student's IEP goals, including Student's OT goal, even with the missed OT services. The evidence does not demonstrate that Student's education suffered in any significant way due to the missed OT services. Thus, even with the missed OT services, Student received FAPE.
48. ESY for Student was considered by the ARD committee on *** (***). At that time, the committee determined that it was best to wait until the various evaluations were done on Student in the fall (including the FBA). Then, after those evaluations, TSD could attempt interventions during the school year and assess in the spring whether ESY might be appropriate for Student ***. TSD Ex. 19, p. 391.
49. There is no evidence that ESY was necessary for Student. In particular, there is no evidence that, in the absence of ESY, Student exhibited, or reasonably would have been expected to exhibit, severe or substantial regression in one or more critical areas addressed in Student's applicable IEP goals and objectives that could not have been recouped within a reasonable period of time.
50. At numerous ARD meetings between *** and ***, the issue of 1:1 support was brought up by Parent and discussed by the ARD committee. TSD Ex. 18, p. 343; TSD Ex. 19, p. 391; TSD Ex. 21, p. 432; TSD Ex. 23, p. 509. However, at none of these meetings was it made clear what type of 1:1 support was being requested by Parent and at no time did TSD actually refuse to provide any 1:1 support.
51. In response to a request for clarification of her 1:1 support request at an ARD meeting on ***, Parent indicated that "she would prefer a small group instead of all *** [students] within one classroom and two teachers are working with them all." TSD Ex. 23, p. 509. When questioned in her deposition about what she meant by 1:1 support, Parent testified "Well, I didn't mean one-on-one only. I meant one-on-one and small group, more of a focus concerning [Student's] ADHD, [Student's] attention deficit, and [Student's] delay." TSD Ex. 117, pp. 26-27. When asked further how much one-on-one she believed should have been provided, Parent testified "I always say that I wanted [Student] to be involved in smaller groups." TSD Ex. 117, p. 73.
52. During the *** school year, TSD amended Student's science and social studies IEP goals at a *** ARD meeting at which Parent was not in attendance. These changes in goals were made without formal written notice to Parent and without Parent's consent. The changes primarily modified the manner in which compliance was shown, removing a required written demonstration and emphasizing other verbal expression rather than written form. This was done because of Student's difficulty with writing. Other minor modifications were made as well.
53. When Parent found out about the changes, she objected and TSD reinstated the prior science and social studies goals. TSD staff then excluded the third nine weeks goals from the social studies and science evaluations so that the amendments did not directly impact evaluation of Student's ability to meet Student's IEP goals.

54. The amendments to Student's science and social studies IEP goals at a *** ARD meeting were procedural defects by TSD, but they did not meaningfully deprive Parent of her rights under IDEA nor impact Student's education in such a way as to deny FAPE.
55. In ***, TSD had medication administration errors with Student. Pet. Ex. 40, pp. 1, 10. These errors were minor, and there is no evidence they impacted Student's education. The medication given to Student on *** and the medical personnel involved noted no issues of concern. Parent was properly notified of the error and proper protocols were followed for handling the error, consistent with Texas Department of State Health Services guidelines. Two errors in a span of two school years do not represent a systemic problem with TSD's procedures, nor is there any evidence that the errors impacted Student's education.
56. The standard practice for TSD was to have a contract psychiatrist perform services for TSD in regard to students, and to communicate directly with TSD staff rather than parents. Then, TSD staff—especially the nurse liaison—would communicate with parents regarding the psychiatrist's opinions and observations. The consent form signed by Parent in *** (and again in ***) noted this procedure. There is no evidence this procedure deprived Parent of any meaningful right in regard to Student's education.
57. A number of Student's *** grade teachers were not "highly qualified" and/or had their certificates expired and were teaching under emergency certificates. Pet. Ex. 28. Despite their lack of the "highly qualified" designation, Student's teachers understood the unique nature of deafness and were proficient in appropriate language modes for deaf students.
58. Student may have additional educational needs that are not yet known and a complete psychological evaluation is necessary and appropriate to fully determine Student's educational needs at this time.
59. At all times relevant to this case, TSD provided FAPE to Student.
60. At all times relevant to this case TSD afforded Parent full rights of participation and input into Student's educational services.

V. DISCUSSION

As the Hearing Officer turns to a discussion of the issues raised in the due process complaint, he finds it appropriate to note some matters at the outset. First, except in regard to TSD's defense of its evaluation and request for a psychological evaluation of Student, the burden of proof is on Petitioner to establish a right to relief. Thus, it is not TSD's responsibility to defend all of its educational decisions related to Student and to establish that its actions were always the best option for Student. Rather, it is Petitioner's responsibility to show that Student was denied FAPE or some other substantive right provided by law. As noted above and set out in more detail below, Petitioner simply has not done this.

In coming to this conclusion, the Hearing Officer points to the extensive persuasive witness testimony offered by TSD in this case, contrasted with the limited amount of expertise offered by Petitioner's witnesses. A

case is never simply about the amount of testimony offered, or the qualifications of one side's witnesses over the other, but those are factors that play into the weight to be given to the evidence offered. In this case, the contrast in evidence is striking. The discussion below demonstrates the stark contrast in evidence offered by each side.

A. Summary of Witness Testimony

1. Petitioner's Witnesses

Petitioner offered the testimony of five witnesses: (1) ***, an advocate; (2) ***, Ph.D.; (3) ***, Ph.D.; (4) ***; and (5) Parent. Their testimony is very briefly discussed below.

Ms. *** was offered as a fact witness, because she was involved in assisting Petitioner through the ARD process. She testified as to ARD meetings and her review of Student's educational records and her observations of Student's experience at TSD. She also testified regarding TSD's facilities, including the special needs classroom.

Dr. *** was also offered as a fact witness, although some of his testimony was more akin to expert testimony. Petitioner asked Dr. *** to observe Student in the classroom setting and testify about his observations and opinions about Student's education and placement. Dr. *** testified to his observations and opinions regarding the quality of education that Student was receiving at TSD. This testimony is essentially an expert opinion. However, Dr. *** was not designated by Petitioner as an expert and, in fact, lacks the requisite qualifications to qualify as an expert in the area of Student's education. Without going into great detail on this point, Dr. *** himself testified that he does not "have that much training" in education of children ***,¹⁰ has not had any training on curriculum for children of those ages,¹¹ and admitted that he is "not exactly an expert" on *** education.¹² Dr. *** observed Student for only one hour on a single day.¹³ Given these factors, Dr. ***'s testimony may have weight in regard to his factual observations, but it lacks weight in regard to any opinions he offers about the sufficiency or appropriateness of Student's education.

¹⁰ TSD Ex. 122, pp. 15-16.

¹¹ TSD Ex. 122, pp. 15-16.

¹² TSD Ex. 122, p. 17.

¹³ Tr. 92-93.

Dr. *** was designated and offered as an expert witness by Petitioner. Dr. *** is a clinical neuropsychologist and a licensed specialist in school psychology. She also has taught a class at *** University related to psychological testing. Dr. *** testified to inadequacies she perceived in the testing and evaluation of Student by TSD staff, as well as problems she perceived in the delivery of educational services to Student, especially in light of Student's ADHD. However, Dr. *** has never been a professional educator and she admitted that she was not testifying as an expert in educational curriculum.¹⁴ Rather, she was testifying simply about Student's behavior and indicators of Student's cognitive function.¹⁵ Further, Dr. ***'s opinions were based solely on her review of records, as she has never communicated with Student, any of Student's teachers, or any of the Staff at TSD.¹⁶ Further, she has not communicated with Parent, except in a social context. Her testimony was based solely upon a review of records and, by her own admission, was limited to Student's behavior and cognitive function, including a review of the various assessment tools used with Student.

Further, Dr. *** does not know ASL and has, by her own admission, no training in educating deaf students.¹⁷ This is significant, as TSD's experts consistently testified that deaf student populations present unique educational requirements, and also demonstrate different behaviors than hearing student populations. Thus, according to those experts, a person with no expertise in deaf culture, deaf communications, deaf education, or deaf cognition is not qualified to offer an expert opinion on the education of a deaf student.¹⁸ For example, some traits that are often considered demonstrative of ADHD are also commonly found among deaf students who do not have ADHD, simply because they are reflective of deaf communication habits or cognitive functioning.¹⁹

Petitioner also called Ms. *** to testify. Ms. *** is a counselor at TSD who works with Student. Ms. *** testified to the facts surrounding Student's educational experience and her understanding of Student's progress. She also testified that Student has ADHD, and that Student's ADHD impacts Student's educational progress.

¹⁴ Tr. 377.

¹⁵ Tr. 377-78.

¹⁶ Tr. 372-73.

¹⁷ Tr. 374 and 393; TSD Ex. 105, p. 50.

¹⁸ Tr. 466 and 510.

¹⁹ Tr. 449.

Petitioner's last witness was Parent, who testified as to Student's disabilities, Student's education, and Parent's experience with TSD. Parent was not qualified to offer an opinion about the adequacy of Student's education or curriculum, however, because she lacks any expertise. So, the value of her testimony was limited to the facts surrounding Student's education.

To summarize, then, Petitioner offered four fact witnesses and only one expert witness, who was not an educator and was not qualified to testify about educational curriculum or deaf student populations.

2. TSD's Witnesses

TSD offered the following witnesses: (1) ***, Ph.D.; (2) ***; (3) ***; (4) ***; (5) Ms. ***; (6) ***; (7) ***; (8) ***; (9) ***; (10) ***; (11) ***; (12) ***; (13) ***; (14) ***; (15) ***; (16) ***; and (17) ***, Ph.D.

Dr. *** was offered as an expert witness on deaf education. He is an adjunct professor at *** and a full-time professor at ***. Dr. *** has expertise in the education of deaf children and their cognitive functioning. Dr. *** opined that it is generally preferable to avoid giving additional disability labels to students with AI, as it can have negative effects by making a child feel more disabled than they are.²⁰ Rather, the child's needs should simply be addressed in Student's educational program without attaching an additional label. Dr. *** reviewed the BIP and IEP for Student and opined that they were appropriate and individualized to Student's needs, and that adding the classification of ADHD would not have changed the services offered to Student.²¹

Dr. *** also reviewed the FBA conducted by Ms. *** and found it appropriate.²² Finally, in reviewing Student's education, he also spoke to each of Student's teachers. Based upon his review of Student's educational records, communications with Student's teachers, and analysis of Student's educational program, Dr. *** concluded that Student was receiving FAPE and that the additional classification of ADHD would not have changed the services Student received.²³

²⁰ Tr. 448-49.

²¹ Tr. 446-48.

²² Tr. 447.

²³ Tr. 447 and 450. However, it is also worth noting that Dr. *** later incorrectly identified FAPE as "free accessible public education." Whether this was simply an inadvertent misstatement or genuinely a misunderstanding of the law is not clear, as he was not further examined about his misstatement. However, Dr. ***'s knowledge was not actually impeached during cross-examination, although at times he was perhaps more colloquial than legally formal in his responses.

Dr. *** was offered as an expert witness on educational and psychological testing. Most recently, Dr. *** was a tenured professor at *** and has been significantly involved in authoring educational psychological tests and textbooks. Dr. ***' experience and expertise in the area of educational psychology and testing is significant and not subject to challenge.²⁴ Of particular note, Dr. *** is the senior author of ***.²⁵ He also has authored a textbook on ADHD.

Dr. *** reviewed the documents in this case, interviewed teachers and staff, observed the classroom settings, and also participated in depositions and hearings observations. After reviewing all of the materials and speaking with the appropriate TSD staff, Dr. *** concluded that Student's FBA was administered in an "exemplary" manner by Ms. *** and, in fact, her administration would likely be used by him as a positive model in future workshops.²⁶ Dr. *** also opined that the BIP used by TSD for Student was a very appropriate BIP for a student with ADHD, although he would not comment on its appropriateness specifically for Student because he lacked the necessary qualifications for understanding the deaf student population.²⁷

Mr. *** testified as an expert in school psychology, particularly in regard to deaf student populations. Mr. ***, a certified school psychologist with more than 25 years' experience, has served as a professor at multiple universities. He has specialized in educational psychology in deaf populations and has consulted with schools for the deaf and test publishers. He has been previously recognized as ***.²⁸

Mr. *** reviewed documents in this case, interviewed teachers and staff, observed the classroom settings, and also participated in hearings observations. Based upon his review of all of this evidence, he concluded that Student was provided with an appropriate individualized education program, but that further assessment would be helpful (as recommended by Ms. *** in the FBA report) to clarify Student's potential additional needs. Thus, he concurred with Ms. ***'s recommendation for psychological testing of Student (the testing which was refused

²⁴ Among other things, Dr. *** has served as *** of numerous prestigious professional journals and has received a litany of awards, including the *** as the outstanding school psychologist ***, and the *** for contributions to measurement science. The list of Dr. ***' awards and positions of leadership is extensive. *See* Tr. 824-32; TSD Ex. 97, pp. 3281-3352.

²⁵ Tr. 832.

²⁶ Tr. 837-38.

²⁷ Tr. 851.

²⁸ Tr. 643.

by Parent and which is now the subject of TSD's counterclaim).²⁹ He further opined that Student was provided an education in the least restrictive environment and was receiving positive academic and nonacademic benefits from Student's education.³⁰ Ultimately, Mr. *** concluded his direct testimony with the following comments:

So, [Ms. ***] selected a good instrument. She administered it well. She got our test results. The school is doing a really impressive job with what they had at the time. And I think, again, it's ongoing. So this is a shifting, moving target. But I've been very impressed with the school and the services they have here. If I had a deaf child, this would be one of the three or four places in the country that I would look at relocating to place my own child here, and I can think of no higher endorsement because I have pretty high standards for my kids.³¹

TSD also offered the testimony of numerous members of its staff. Because of the large number of witnesses presented, the Hearing Officer does not discuss each fact witness's testimony. Rather, it is only worth noting that these witnesses testified generally to TSD's facilities or services, Student's educational experience, the IEP, the BIP, Student's attendance, and TSD's attempts at providing services to Student. Many of these witnesses also offered their own opinion that Student was receiving FAPE.

B. Petitioner's Issues

In the request for due process hearing, Petitioner has identified numerous issues.³² Each of the issues is discussed below, with an analysis addressing whether the allegation is established by the evidence and, if so, whether the allegation shows a violation of the law that would allow for relief.

1. Did TSD fail to assess Student in all areas of suspected disabilities?

Petitioner alleges that TSD failed to properly assess Student in all areas of suspected disabilities, because TSD failed to properly identify and address Student's diagnosed ADHD. However, the Hearing Officer concludes that Petitioner's allegations lack merit. It is true that TSD did not specifically label Student as having an OHI, specifically ADHD; however, this is not required for purposes of IDEA.

²⁹ Tr. 677-78.

³⁰ Tr. 679-80.

³¹ Tr. 681-82.

³² However, in closing arguments Petitioner did not specifically address all of the issues raised in the due process hearing request. Despite this, the Hearing Officer still discusses all previously-identified issues in this Decision.

Because of Student's hearing impairment, Student had already been identified as being entitled to special education services under IDEA. The law does not require that all disabilities be labeled. Although there is a general requirement for students with disabilities to be identified, IDEA provides:

Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in Section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.³³

Although this provision focuses on state obligations under IDEA for federal funding, it also recognizes the principle that IDEA's focus is on ensuring that students with disabilities are classified as such and provided all necessary services. The labeling or classification is not critical, except to the extent that it reflects a failure by the educational institution to provide the necessary services for that particular student.

In this case, in providing the required educational services under IDEA, TSD did recognize and assess Student's ADHD symptoms and addressed those in the IEP and BIP, as well as in the actual provision of educational services to the Student.³⁴ TSD acknowledged Student's ADHD as early as ***, and adjusted Student's IEP to add Health Services as a related service to allow for medical monitoring by the TSD psychiatrist, with the rationale for the amendment being that Student could take medications "administered by [a] nurse that impacts [Student's] ability to access education." Based on an Evaluation Report, the functional implications of dispensing medication in school was "to help student focus and stay on task." This clearly reflected recognition by TSD, and an attempt to address, Student's ADHD symptoms.

Further, at an ARD meeting on ***, the ARD committee considered Student's Initial Psychiatric Evaluation and determined that Student was eligible for 30 minutes of counseling services per week.³⁵ The committee recommended that Student's mother "meet with the teacher every nine weeks to review accommodations and other necessary arrangements to better support" Student.³⁶ At the start of the *** school year, Student's IEP was again amended to add Health Services to continue Student's medical monitoring.³⁷ An

³³ 20 U.S.C. § 1412; *see also* 34 C.F.R. § 300.111(d).

³⁴ Even Petitioner's advocate acknowledged that everyone involved on Student's ARD committee accepted that Student had ADHD. Tr. 25.

³⁵ Pet. Ex. 3, p. 28; Pet. Ex. 3, p. 16.

³⁶ Pet. Ex. 3, p. 28.

³⁷ Pet. Ex. 11, p. 3.

Evaluation Report for School Health Services was completed by the school nurse, with the diagnostic impression being identified as ADHD and the reason to dispense the medication was to help Student focus and stay on task. Thus, at least as early as ***, TSD's own staff recognized Student's diagnosis of ADHD.

Further, TSD developed a BIP to improve Student's focus and performance in class. An ARD meeting was held on ***, to plan for Student's *** school year.³⁸ It was at this ARD meeting that the first BIP was accepted.³⁹ Behaviors reported by school staff that "interfere with learning" were listed as "Short attention span, noncompliance, aggression towards peers and staff, struggling with transitions times, does not like to change activity if the next activity is more challenging[,]***. There has been an increase in aggression towards peers, not staying in assigned area."⁴⁰ These behaviors were symptomatic of Student's ADHD. So, not only was TSD aware of Student's prior diagnosis of ADHD, but TSD also took steps to address the symptoms of Student's condition through the adoption of the BIP that targeted the behaviors associated with ADHD.

At an ARD meeting held on ***, the ARD committee adopted the previous IEPs developed for Student. The ARD committee also developed a BIP for Student based on Student's prior BIP. The BIP was to continue for 6 weeks at which time it would be assessed and adjusted as appropriate. Again, this reflected an ongoing effort by TSD to evaluate and address Student's ADHD.

At an ARD meeting in ***, the ARD committee discussed Student's ADHD and the need to address it more fully in the BIP. At the ARD meeting on ***, the committee again recognized Student's ADHD by specific reference, noting that "We agreed we would leave the current health service and psychiatric monitoring until we know more about what the family decides to do as they have some concerns there may be other issues than ADHD."⁴¹ In these instances, the TSD staff was always aware of Student's ADHD and the need to provide Student services to ensure that Student received FAPE despite the effects of Student's ADHD.⁴²

The facts discussed above reflect that TSD was actively addressing and evaluating Student's ADHD as part of its provision of educational services to Student throughout Student's time at TSD. Although a formal label

³⁸ Pet. Ex. 6, pp. 5-24.

³⁹ Pet. Ex. 6, pp. 11-16.

⁴⁰ Pet. Ex. 6, p. 11.

⁴¹ Pet. Ex. 15, p. 41.

⁴² Other documents, including a TSD ***, as well as a TSD psychiatric summary, reflect TSD's awareness that Student had ADHD. Pet. Ex. 40, p. 28; Pet. Ex. 42, p. 35.

was not given by TSD, the Hearing Officer concludes that TSD did, in fact, properly recognize and assess Student's ADHD and account for it in providing services to Student under IDEA. This conclusion is further supported by the expert testimony of Mr. ***, who testified TSD had properly evaluated Student in all areas of suspected disability,⁴³ and Dr. ***, who testified that the BIP and IEP for Student were appropriate and individualized to Student's needs, and that adding the classification of ADHD would not have changed the services offered to Student.⁴⁴

2. *Did TSD fail to find Student eligible as a child with an Other Health Impairment, specifically ADHD, in a timely manner?*

As noted above, the evidence conclusively establishes that TSD did not specifically identify and label Student as a child with an OHI, specifically ADHD. However, the Hearing Officer concludes that TSD was not required to do so. Student was already identified as a child entitled to special education services by virtue of Student's identified hearing impairment. Accordingly, under the law, Student was entitled to all required educational services necessary to ensure that Student received FAPE.

The Hearing Officer concludes that, once a child is deemed entitled to special education services under IDEA, TSD is not required to identify every other potential qualifying impairment that might entitle the child to special education services. Rather, TSD is simply required to provide all necessary services the child might need. Put simply, TSD did not have to identify and label Student as having ADHD, provided that TSD provided the services necessary to ensure that Student, with Student's ADHD, was receiving FAPE. As discussed above, and in more detail in regard to the additional due process issues identified further below, the Hearing Officer finds that TSD did provide Student with the services required by IDEA for Student's disabilities, including Student's ADHD.

3. *Did TSD propose to place Student in an overly-restrictive educational setting?*

This allegation arises from TSD staff's recommendation, during an ARD meeting, that Student be placed in TSD's special needs program. However, when Petitioner objected to this at the ARD meeting, no further action was taken and Student was never placed in the special needs program.⁴⁵

⁴³ Tr. 703.

⁴⁴ Tr. 446-48.

⁴⁵ In addition to TSD staff testifying to this effect, Petitioner's advocate also acknowledged that Student was never placed in the special needs classroom. Tr. 27.

Much time was spent at the hearing and in briefing addressing this issue. Ultimately, though, the Hearing Officer finds that the mere recommendation, without any further action by TSD, does not reflect actionable conduct by TSD to place Student in an overly-restrictive setting.⁴⁶ Accordingly, the Hearing Officer finds that TSD did not violate IDEA by merely discussing and recommending placement of Student in a special needs classroom in an ARD meeting, without any further action.⁴⁷

4. *Did TSD fail to provide Student an appropriate educational program individualized to meet Student's unique needs?*

The Hearing Officer concludes that TSD provided Student with an appropriate educational program individualized to meet Student's unique needs. The various ARD committee deliberations reflect that TSD was aware of Student's unique needs—resulting from both Student's AI and also Student's ADHD—and adjusted Student's educational program accordingly. The BIP was specifically adopted in recognition of the symptoms of Student's ADHD and was designed to help Student overcome the impairments from Student's ADHD so Student could continue to receive an appropriate education. Student's teachers testified that the IEP and BIP were individually tailored to meet Student's specific needs. There is no credible evidence in the record that Student's educational programs were not individualized, although there is some dispute as to whether they were “appropriate.” This is a matter for expert determination.

The experts who were adequately qualified to assess Student's education testified that the IEP was properly individualized to Student's needs, including Student's ADHD, and provided an appropriate education to Student.⁴⁸ Further, the expert testimony indicates that the BIP was properly tailored to Student's needs, including Student's ADHD, and was designed to provide Student with an appropriate education.⁴⁹ The BIP provided, among other things, that Student would need frequent breaks or the ***, frequent prompts, immediate praise so Student can connect the praise with the positive conduct, and assigned seating *** to help Student not be

⁴⁶ Again, even Petitioner's own advocate recognized that the mere discussion of placement in a different setting is permissible. Tr. 63-66.

⁴⁷ Because the discussion never led to specific action by TSD, the Hearing Officer finds it unnecessary to address whether the special needs classroom was a more restrictive setting. It is worth noting, however, that the special needs classroom provided some of the things Parent was seeking, such as a lower staff-to-student ratio. Thus, it was not unreasonable for TSD to have considered it in response to Parent's ongoing concerns and request for more focused attention on Student.

⁴⁸ Tr. 446-50, 677-80.

⁴⁹ Tr. 446-50, 851.

distracted by other students.⁵⁰ These active strategies were directly related to addressing Student's ADHD symptoms.

In contrast, Petitioner offered no competent evidence to demonstrate that TSD failed to provide Student an appropriate educational program individualized to meet Student's needs. The only expert designated by Petitioner was Dr. ***, and she lacked qualification in the education of deaf students. Perhaps even more troubling, Dr. *** had not even reviewed Student's BIP when she made her initial report and recommendations.⁵¹ The BIP was the primary tool used to address Student's ADHD symptoms. An expert opinion that was not based on a specific review of Student's BIP has very little value in answering the question of whether Student's educational programs were individualized and appropriate. Thus, Petitioner has no competent expert testimony that demonstrates inadequacy in the individualized educational programs offered to Student by TSD.

The weight of the evidence in the record establishes that TSD provided Student with an appropriate educational program individualized to meet Student's unique needs. However, even if TSD's evidence had not shown that, Petitioner's evidence still would not be sufficient to prove that TSD had failed to provide an appropriate individualized educational program to Student. To attempt to show the insufficiency of Student's IEP, Petitioner spends much time pointing out areas in Student's education where Student was not performing at the expected levels. Certainly, Student's performance lagged behind what was expected. While Student more often than not met Student's educational goals in Student's different classes, there were a number of grading periods when Student did not. Moreover, at the end of Student's *** grade year, TSD principal *** expressed concerns about Student's overall lack of progress. It was these concerns that led to the FBA and, ultimately, to TSD's request for a psychological evaluation to determine if Student suffered from other disabilities that might be impeding Student's education.

Although Student had difficulty with Student's educational coursework, there is no doubt that Student made progress, as Student frequently met Student's progress report goals and has consistently been passed to the subsequent grade. As of the time of the hearing, Student had just been promoted to *** grade. At the hearing, videos were offered of Student *** in ***, and then in ***. These videos showed great improvement in Student's communication, confidence, and grasp of material between the two time periods. While those videos represent

⁵⁰ Pet. Ex. 15, pp. 31-32.

⁵¹ Tr. 384-87.

only small snapshots in time, they demonstrated great progress by Student in *** grade. The testimony of Mr. *** discussing the difference between the first video and the second video summarizes this succinctly:

Four or five months later, I saw a very different child. . . . I saw somebody who's ***, who's telling a coherent story with a beginning, middle and end, who's smiling, who's supported by [Student's] teacher in the classroom, who's engaged, whose eyes are bright and enjoying telling a coherent story. And I'm thinking ***, five months, including all the absences, including all the normal Christmas breaks, that's a pretty impressive demonstration. For those of us who have access to sign language, I think we all saw the same thing.⁵²

Overall, although Student clearly struggled throughout *** grade, Student made substantive progress. Further, the adequacy of Student's educational programs is measured at the time they are developed, not in hindsight. The experts all testified the IEP and BIP were appropriate for Student. Thus, the evidence simply does not establish that TSD failed to provide Student an appropriate educational program individualized to meet Student's unique needs. Accordingly, on this issue, Petitioner has shown no ground for relief.

5. *Did TSD fail to provide Student with appropriate IEP goals and objectives individualized to meet Student's unique needs?*

The Hearing Officer concludes that TSD did provide Student with appropriate IEP goals and objectives individualized to meet Student's unique needs. This issue is essentially a subset of the prior issue and is subsumed within it. Therefore, no further discussion is offered.

6. *Did TSD fail to develop an appropriate BIP uniquely tailored to meet Student's individualized needs?*

The Hearing Officer concludes that TSD did provide Student with an appropriate BIP individualized to meet Student's unique needs. The various ARD committee deliberations reflect that TSD was aware of Student's unique needs—from Student's AI, as well as Student's ADHD—and adjusted Student's educational program accordingly. The BIP was specifically adopted in recognition of the symptoms of Student's ADHD and was designed to help Student overcome the impairments from Student's ADHD so Student could continue to receive an appropriate education.

As noted above, the BIP recognized Student's specific struggles associated with ADHD symptoms ("Short attention span, noncompliance, aggression towards peers and staff, struggling with transitions times, does not like

⁵² Tr. 676-77.

to change activity if the next activity is more challenging [, and] ***. There has been an increase in aggression towards peers, not staying in assigned area.”) and provided specific tools for dealing with them (frequent breaks and the ability to move around the back of the room, frequent prompts, immediate praise so Student could connect the praise with the positive conduct, and assigned seating away from high traffic areas to help Student not be distracted by other students).

The Hearing Officer finds that this demonstrates that TSD adopted an appropriate BIP individualized to meet Student’s unique needs. The qualified experts agree and testified as much.⁵³ Thus, Petitioner has failed to establish a right to relief on this issue.

7. *Did TSD fail to provide an appropriate FBA?*

The Hearing Officer finds that TSD provided an appropriate FBA to Student. The FBA was conducted in *** by Ms. ***, LSSP for TSD.⁵⁴ In conducting the FBA, Ms. *** reviewed existing data, observed the Student in class, spoke to Student’s parent, teachers and counselors, and administered two instruments: (1) the DAS:II and (2) the BASC-II. Although Ms. *** made a slight mistake in administering the DAS:II, this mistake was not likely to “significantly change or alter the scoring nor the interpretation of [the test] results,” according to expert Mr. ***.⁵⁵ Ms. ***’s administration of the BASC-II was “exemplary,” according to ***.⁵⁶ In addition, Mr. *** testified that the BASC-II was the best option for Ms. *** to use, and “she used it very well.”⁵⁷ There is no competent testimony to the contrary offered by Petitioner. Thus, the tests appear to have been properly administered by Ms. ***.

Ms. ***’s Evaluation Report for the FBA included a detailed history, several observations, interviews with Student’s former teacher, then-current teachers, and Student’s counselor, cognitive/intellectual functioning, behavior checklist or rating scales, psychological/psychiatric evaluations, and medical information.⁵⁸ It outlined Student’s strengths and behaviors of concerns and offered hypothesized functions of Student’s behavior and

⁵³ Tr. 448 (Dr. ***’s opinion that the BIP was appropriate for Student); Tr. 851 (Dr. ***’ opinion that the BIP was appropriate for a student with ADHD).

⁵⁴ Pet. Ex. 18.

⁵⁵ TSD Ex. 108, pp. 74-75.

⁵⁶ Tr. 837-38.

⁵⁷ Tr. 661.

⁵⁸ Pet. Ex. 18, pp. 1-6.

recommendations for both home and school. In sum, Ms. ***'s FBA administration and analysis was detailed and, by all qualified expert accounts, proper. Petitioner has failed to offer competent evidence to the contrary. Thus, Petitioner has failed to show any right to relief on this issue.

8. *Did TSD fail to allow Student's parents the ability to fully participate in ARD committee discussions to make educational decisions for Student by denying them prior access to information available to all other members?*

This allegation appears primarily based on evidence showing that prior to an ARD meeting in Student's *** grade year, TSD staff shared and discussed the FBA report and BIP for Student before they were provided to Parent. The Hearing Officer finds that this does not give rise to a right to relief in this case.

Teachers and administrators who are present in the school will almost always have easier access to information related to a student's education than those outside the school. Moreover, because teachers and other staff frequently communicate throughout the school day in their duties related to educating students, it is not surprising when they have access to information before a parent does. In this case, there is no evidence that TSD improperly withheld information from Student's parents or failed to provide access to any necessary information for Student's education. In fact, the evidence demonstrates that TSD staff worked diligently with Parent to try to address Student's educational needs.

The Hearing Officer finds that TSD at all times allowed Student's parents to participate fully in ARD committee discussions and other aspects of Student's education. Parent's input was accepted and recognized by TSD and TSD made all reasonable efforts to include Parent in Student's education. There is no evidence that TSD knowingly withheld any significant information from parents that deprived them of the opportunity to participate in the ARD committee discussions or make informed decisions regarding Student's education.

9. *Did TSD fail to have all required members in attendance at ARD committee meetings?*

At ARD meetings on ***, and ***, a required teacher was not present. Thus, on at least two occasions, TSD did fail to have all necessary persons present at an ARD meeting. However, these failures do not give rise to relief in this case. First, both of these instances are outside of the 1-year window that is available for relief in this proceeding and, thus, are not properly encompassed within Petitioner's due process complaint filed on April 30, 2014. Second, these two failings represent merely a technical procedural violation for which no relief should be afforded. They did not deprive Student of FAPE nor did they in any way deprive Parent of meaningful opportunity to participate in Student's educational process.

10. *Did TSD request Student's parents to seek evaluations at private expense?*

The evidence is undisputed that TSD personnel recommended that Parent get a neurological examination of Student at Parent's expense. Petitioner argues that this violates IDEA, which requires a school district to pay for any necessary medical assessments. TSD argues that it merely suggested the neurological examination to Parent as a way to address some of Parent's concerns, not because TSD believed the neurological examination was necessary for assessing Student's disabilities or providing educational services to Student.

The evidence is somewhat unclear as to the purpose of the recommended neurological examination. The ARD meeting notes from ***, reflect that the "Committee recommended the family to pursue a neurological examination."⁵⁹ The notes also indicate that Ms. *** "encouraged the parents to do a neurological evaluation because this is going to give us an extensive amount of information that will offer the committee answers."⁶⁰

However, at her deposition, Ms. *** indicated that she did not believe a neurological examination was necessary for TSD's purposes in educating Student, but she simply recommended it to Parent for Parent's benefit. Her report indicated it was "recommended that [Student's] parents *consider* pursuing a neurological evaluation outside the school to rule out any underlying problems that might be impacting [Student] and Student's performance."⁶¹ In contrast to her recommendation that a neurological evaluation be "considered," her report went on to definitively recommend that a psychological evaluation be done.⁶²

While some of the evidence certainly makes it appear that TSD staff thought a neurological evaluation might be beneficial, the reasons for such are not entirely clear. Thus, there is some dispute as to whether the neurological evaluation was recommended because it was necessary for Student's education, or whether it was simply to address concerns raised by Parent previously.

What is clear is that TSD never actually refused to pay for a neurological evaluation and Parent never actually requested a neurological evaluation. Because of this, the Hearing Officer concludes that Petitioner has

⁵⁹ Pet. Ex. 20, p. 38.

⁶⁰ Pet. Ex. 20, p. 38.

⁶¹ TSD Ex. 21, p. 430. (emphasis added)

⁶² TSD Ex. 21, p. 432.

not shown an IDEA violation for which relief should be granted. While TSD did recommend a neurological evaluation, Parent did not specifically agree that one be done and did not formally request that TSD pay for any such evaluation. The matter was simply the subject of discussion during ARD meetings and was merely a possibility, much like the discussion of placement of Student in the special needs classroom. In this circumstance, the Hearing Officer does not conclude that the mere discussion or recommendation of a neurological evaluation at Parent's expense was an actionable violation of the law.

Certainly, if the evidence established that a neurological evaluation was a necessary assessment for Student's education, then TSD's failure to provide it at its own expense would potentially be actionable. But, the evidence does not establish that. Rather, the testimony of TSD's expert and staff establishes that a psychological examination is what is needed and that is what TSD has sought by way of its own due process complaint.

11. Did TSD request Student be medicated in violation of the Texas Education Code?

Texas Education Code § 38.016(b) prohibits school employees from recommending that a student use a psychotropic drug. Petitioner notes that TSD staff recommended that Student be medicated in violation of this law. The record evidence does show that such a recommendation was made in *** by a psychiatrist working for TSD in evaluating Student, and such recommendation was discussed with Parent by TSD staff.⁶³ However, it is not clear it is a violation of Texas Education Code § 38.016(b) when the employee making the recommendation is, in fact, a licensed physician who is evaluating Student's needs. Moreover, it does not appear that a violation of this particular provision of state law actually gives rise to any private right to relief in a due process hearing.

It is not necessary to decide either of these two legal issues, though, because this incident occurred outside the one-year limitations period window allowed by Petitioner's complaint filed on April 30, 2014. Thus, even if the recommendation by a physician violated state law and gave rise to relief in a due process proceeding, it is beyond the scope of this particular proceeding because it occurred well prior to the 1-year limitation period allowed by the current due process complaint. Therefore, Petitioner has not shown a due process right to relief in regard to this issue.

⁶³ Pet. Ex. 35, p. 1.

12. Did TSD fail to provide OT services?

Petitioner alleges that TSD should have provided more OT services to Student. In particular, Student's IEP called for 270 minutes of OT services each 9-week grading period.⁶⁴ This requirement was put into place during an ARD meeting ***. Student received Student's first 35-minute session on ***, but had no more during that 9-week grading period.⁶⁵ During the next nine weeks, TSD provided Student with 160 minutes of OT services. During the final nine weeks, TSD provided Student with 105 minutes of OT. This was indisputably less than the amount of OT services Student was entitled to.

TSD offered evidence showing some of the reasons for the missed OT services. Some were due to Student absences, some due to school closings, and some due to school activities. Regardless of the reasons, TSD argues that the missed OT services did not deny Student FAPE. The Hearing Officer agrees.

A mere technical failure to comply with an IEP does not necessarily mean that FAPE has been denied to a student. Rather, "a party challenging the implementation of the IEP must show more than a *de minimis* failure to implement all elements of the IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant portions of the IEP."⁶⁶ In this case, Student received about half of the OT services Student was entitled to during the second semester of Student's *** grade year, meaning Student did not receive approximately 4.5 hours of OT services during the semester. The records demonstrate that Student accomplished most of Student's IEP goals, including Student's OT goal, even with the missed OT services, so it does not appear that Student's education suffered in any significant way due to the missed OT services.⁶⁷

As TSD cites, numerous courts have held that FAPE was still properly given even though OT services were not provided consistent with an IEP.⁶⁸ In the same way, the Hearing Officer here finds that the missing 4.5 hours of OT services does not constitute a denial of FAPE or otherwise give rise to relief in this case.

⁶⁴ TSD Ex. 21.

⁶⁵ There were only *** school days remaining in that grading period after the OT requirement was adopted by the ARD committee. Student was absent for *** of these days and many other days were busy with ***.

⁶⁶ *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000).

⁶⁷ TSD Ex. 50; Tr. 773-74.

⁶⁸ For a listing of such cases, see TSD's closing argument, p. 52.

13. Did TSD fail to properly consider ESY services?

Petitioner argues that TSD should have offered ESY services to Student. It is undisputed that an ESY program was not offered to Student during the time period in issue (*i.e.*, ***). The only question is whether ESY was necessary for Student and TSD should have been aware of such necessity, yet failed to provide it.

ESY was considered by the ARD committee on *** (***), at which time the committee determined it was best to wait until evaluations (including the FBA) were done on Student in the fall. After those evaluations, TSD could attempt interventions during the school year and assess in the spring whether ESY might be appropriate for Student after *** grade.⁶⁹ This shows that ESY was considered and determined to not be necessary for Student until additional evaluations were done in *** grade.

Petitioner has the burden to show this determination by the ARD committee was incorrect because Student needed ESY services sooner. Under 19 Texas Administrative Code § 89.1065(2), for ESY to be necessary, it must be shown that:

. . . in one or more critical areas addressed in the current [IEP] goals and objectives, the student has exhibited, or reasonably may be expected to exhibit, severe or substantial regression that cannot be recouped within a reasonable period of time. Severe or substantial regression means that the student has been, or will be, unable to maintain one or more acquired critical skills in the absence of ESY services.

A party seeking ESY must satisfy a very strict standard, “because ‘providing an ESY is the exception and not the rule under the regulatory scheme.’”⁷⁰ To show the need for ESY, Petitioner must demonstrate more than that Student might regress without it; rather, Petitioner must show a likelihood of severe or substantial regression that cannot be recouped in a reasonable amount of time.⁷¹ Slow progress or low achievement levels alone are generally not enough to demonstrate a need for ESY.⁷²

⁶⁹ TSD Ex. 19, p. 391.

⁷⁰ *N.B. v. Hellgate Elementary Sch. Dist., ex rel. Bd. of Directors, Missoula Cnty., Mont.*, 541 F.3d 1202, 1211 (9th Cir. 2008), quoting *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 315 (6th Cir. 2007).

⁷¹ 19 Tex. Admin. Code § 89.1065(2).

⁷² *Coleman v. Pottstown Sch. Dist.*, 983 F.Supp. 543, 574 (E.D.Pa. 2013).

In this case, Petitioner's evidence simply does not demonstrate a need for ESY for Student at any point during the time frames in issue. None of Petitioner's witnesses, including the sole expert offered, testified that ESY was necessary because Student was likely to suffer severe or substantial regression without it. Rather, Petitioner's witnesses complain that it was not considered or offered. Contrary to their concerns, the ARD meeting notes do reflect that it was discussed in *** and was going to be evaluated again at the end of Student's *** grade year. Petitioner filed a due process complaint in April 2014, thus precluding further determination of ESY for the summer after Student's *** grade year. Petitioner's complaint that more consideration of ESY should have been undertaken by TSD is not a ground for relief in this case. Rather, Petitioner must show that ESY was actually necessary for Student and was not provided. In this regard, Petitioner has failed to offer any evidence that would establish that ESY was actually necessary for Student during the time periods in issue.

14. *Did TSD fail to provide ESY services?*

It is undisputed that ESY services were not offered to Student during the time period covered by Petitioner's due process complaint. But, as noted above, there is no evidence that ESY was necessary for Student. Thus, the failure to provide ESY to Student does not give rise to relief in this case.

15. *Did TSD fail to provide Student's parents with prior written notice/notice of refusal regarding their request for 1:1 educational support in Student's classroom?*

At different points in Student's education, Parent made requests for 1:1 support. At numerous ARD meetings between *** and ***, the issue of 1:1 support was brought up by Parent and discussed by the ARD committee.⁷³ However, at none of these meetings was it made clear what type of 1:1 support was being requested by Parent and at no time did TSD actually refuse to provide a specific type of 1:1 support.

The matter of 1:1 support can refer to many different things—it can be a full-time instructional aide assigned to a student in a larger classroom, a single teacher assigned to a classroom with only one student, or a teacher spending part of classroom time teaching only one student, among other things. While Parent frequently brought up the issue of 1:1 support, Parent was never able to clarify exactly what was meant by this request. Even when prompted to explain, Parent often gave conflicting responses. For example, in response to a request for clarification of her 1:1 support request at an ARD meeting on ***, Parent indicated that “she would prefer a small

⁷³ TSD Ex. 18, p. 343; TSD Ex. 19, p. 391; TSD Ex. 21, p. 432; TSD Ex. 23, p. 509.

group instead of all *** [students] within one classroom and two teachers are working with them all.”⁷⁴ When questioned in her deposition about what she meant by 1:1, Parent testified “Well, I didn’t mean one-on-one only. I meant one-on-one and small group, more of a focus concerning Student’s ADHD, Student’s attention deficit, and Student’s delay.”⁷⁵ When asked further how much one-on-one she believed should have been provided, Parent testified “I always say that I wanted [Student] to be involved in smaller groups.”⁷⁶

So, a clear request for 1:1 support services was never made to TSD and, in fact, from the evidence it appears that Parent may have simply been using a term that she had heard before without really understanding what it meant, or even what she really wanted for her child. This is not to fault Parent, as she would not be expected to know and understand educational terminology. But, at the same time, TSD cannot be faulted for not understanding what exactly Parent was seeking, nor can TSD be deemed to have refused to provide a service that was never clearly requested. In fact, virtually all of Student’s teachers testified that Student was given some 1:1 instruction in Student’s classes on a regular basis. Moreover, Student’s classes were relatively small, with Student’s *** grade classroom consisting of *** students taught by two teachers and a teaching assistant, resulting in a student to instructor ratio of ***.⁷⁷ Thus, Student was often taught in the small-group setting that Parent indicates she wanted.

Given this evidence, the Hearing Officer concludes that TSD did not refuse a clear request for 1:1 support services and, as such, did not fail to give any required notice of refusal. Therefore, Petitioner’s request for relief in this regard is unfounded.

16. Did TSD fail to seek Student’s mother’s agreement prior to amending Student’s social studies and science IEP goals and objectives and again denying her participation in an ARD decision?

During the *** school year, TSD amended Student’s science and social studies IEP goals at a *** ARD meeting at which Parent was not in attendance. These changes in goals were made without formal written notice to Parent and without Parent’s consent. The changes primarily modified the manner in which compliance was shown, removing a required written demonstration and emphasizing other verbal expression rather than written form. This was done because of Student’s difficulty with writing. Other minor modifications were made as well.

⁷⁴ TSD Ex. 23, p. 509.

⁷⁵ TSD Ex. 117, pp. 26-27.

⁷⁶ TSD Ex. 117, p. 73.

⁷⁷ Tr. 630; TSD Ex. 120, pp. 14-15.

When Parent later found out about the changes, she objected and TSD reinstated the prior science and social studies goals. TSD staff then excluded the third nine weeks goals from the social studies and science evaluations so that the amendments did not directly impact evaluation of Student's ability to meet Student's IEP goals.⁷⁸

Petitioner contends that the initial amendments in *** without parental consent or participation deprived Parent of her right to meaningful participation as a member of the ARD committee. Petitioner notes that the failure to provide for meaningful participation by the parents in the ARD process can result in a denial of FAPE. In response, TSD argues that the amendments were merely procedural defects that did not meaningfully deprive Student of educational opportunities, nor substantively deprive Parent of her right to participate in the IEP process.

The Hearing Officer concludes that the amendments to Student's science and social studies IEP goals at a *** ARD meeting were procedural defects by TSD, but they do not rise to the level of meaningfully depriving Parent of her rights under IDEA nor impacting Student's education in such a way as to deny FAPE. As the Fifth Circuit Court of Appeals has noted, "Procedural deficiencies alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity or infringe parents' opportunity to participate in the IEP process."⁷⁹ In this case, while it was improper for TSD to modify the IEP goals without parental knowledge, the modifications were not significant and they were in place for just a couple of months. The modifications were designed to assist Student learn substantively, while at the same time accommodating Student's difficulty with written expression. The modified goals ultimately were not used in evaluating Student's performance, nor were they shown to have caused any substantive harm to Student's education. Thus, the Hearing Officer finds that these procedural defects do not give rise to any relief in this case.

17. Did TSD fail to provide appropriate medication management procedures?

While Student was at TSD, there were two instances when TSD had medication administration errors with Student. The first occurred *** and the second occurred ***.⁸⁰ However, these errors appeared to be relatively minor, and there is no evidence they impacted Student's education. By themselves, these two isolated medication

⁷⁸ TSD Ex. 50, pp. 1000-001.

⁷⁹ *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 398 (5th Cir. 2012) (cites omitted).

⁸⁰ Pet. Ex. 40, pp. 1, 10.

errors do not demonstrate a denial of FAPE or give rise to another ground for relief. In fact, in closing arguments, Petitioner has not elaborated in any way as to how these medication errors adversely impacted Student in such a way as to create a right to relief under IDEA. The medication given to Student *** and the medical personnel involved noted no issues of concern. Parent was properly notified of the error and proper protocols were followed for handling the error, consistent with Texas Department of State Health Services guidelines. Two errors over two school years do not represent a systemic problem with TSD's procedures, nor is there any evidence that the errors impacted Student's education in a way that might rise to the level of supporting a due process complaint. Accordingly, Petitioner's request for relief in this regard is unfounded.

18. *Did TSD fail to allow Student's mother access to Student's psychiatrist at TSD?*

Petitioner alleges that TSD failed to allow Parent access to the TSD psychiatrist, thus depriving her of a meaningful opportunity to participate in Student's educational decisions. The evidence does show that the standard practice was for a contract psychiatrist to perform services for TSD in regard to students, and to communicate directly with TSD staff rather than parents. Then, TSD staff—especially the nurse liaison—would communicate with parents regarding the psychiatrist's opinions and observations. The consent form signed by Parent *** (***) noted this procedure, stating:

I understand there is typically minimal contact between the TSD contract psychiatrist and the student's family. The psychiatrist may be called upon to give a brief explanation to a family member about a medication change or recommendation, but that is typically handled by the TSD nurse liaison working with the psychiatrist during the clinic and/or student's assigned counselor. I understand that I can always obtain private psychiatric care for my child in a setting where I can have more direct communication with the psychiatrist.⁸¹

Thus, Parent was aware as early as *** (***) of TSD's procedures regarding access to the TSD contract psychiatrist. The Hearing Officer does not find that this procedure deprived Parent of any meaningful right in regard to Student's education. The procedure was reasonable, given the number of TSD students who might be seen by the contract psychiatrist, and the information from the psychiatrist was made available to the Parent. Only direct communication access was limited. The Hearing Officer is not aware of any legal requirement for direct access and, in fact, Petitioner does not cite any authority in closing arguments as to why TSD's procedures might violate the law. Ultimately, the Hearing Officer finds that TSD's actions in this regard did not violate the law and do not give rise to any right to relief for Petitioner.

⁸¹ TSD Ex. 61, pp. 1795, 1797, and 1799. (representing the same form signed three separate times—in ***).

19. *Did TSD fail to provide Student an education from a qualified teacher?*

Petitioner notes that a number of Student's *** and *** grade teachers were not designated "highly qualified" and/or had expired certificates and were teaching under emergency certificates.⁸² The designation of "highly qualified" is required by the "No Child Left Behind Act." A separate law, specifically Texas Education Code § 29.304, also addresses the qualifications required of a teacher of deaf or hard-of-hearing students in Texas. That law requires that these teachers must "understand the unique nature of deafness" and must be "proficient in appropriate language modes."

In this case, there is little doubt that Student's teachers understood "the unique nature of deafness" and were "proficient in appropriate language modes" for deaf students. Thus, there does not appear to be any violation of state requirements. It is undisputed that some of Student's teachers in *** and *** grade were not designated "highly qualified." However, federal law does not permit a due process complaint solely on the basis of a student's teacher(s) not being "highly qualified." Specifically, 34 C.F.R. §§ 300.18(f) and 300.156(e) make it clear that the qualification requirements for special education teachers do not create a right of relief.⁸³

While a parent may challenge the qualifications of a teacher, the challenge cannot be based simply on the fact the teacher does not meet the qualification requirements of the law; rather the challenge must demonstrate that the lack of qualifications has prevented the child from receiving an appropriate education. In this case, Petitioner has made no such showing, instead simply relying on the fact that Student's teachers were not designated "highly qualified." This does not provide a basis for relief.

C. TSD's Counterclaims

1. *Was TSD's evaluation adequate such that it was not required to provide an IEE to Student at TSD's expense?*

⁸² Pet. Ex. 28.

⁸³ For example, 34 C.F.R. § 300.156(e) provides that "Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this part shall be construed to create a right of action on behalf of an individual student or a class of students for the failure of a particular SEA or LEA employee to be highly qualified" See also 71 Fed. Reg. 46562 (The rules of construction . . . do not allow a parent or student to file a due process complaint for failure . . . to provide a highly qualified teacher.).

Petitioner expressed concerns about the FBA conducted by Ms. *** in *** and, because of these concerns, requested an IEE. As noted previously in this Decision, the Hearing Officer finds the FBA was conducted properly and it rendered reliable results. Accordingly, Petitioner is not entitled to an IEE.

2. *Is TSD entitled to have Student submit to a psychological evaluation by TSD?*

Both TSD and Petitioner have expressed concerns that Student may have additional disabilities simply beyond AI and ADHD. In particular, the concern has been raised that Student may have a learning disability. In her FBA report, Ms. *** acknowledged this concern and recommended a psychological evaluation of Student. Because of this, TSD requested that Parent consent to a complete psychological evaluation of Student. Parent denied consent for this testing.

In his testimony, Mr. *** agreed with Ms. ***'s FBA report and her request for psychological testing of Student. He noted that it appeared that there are additional concerns with Student that need to be explored. Even Parent seems to agree that additional testing should be done, as she seeks an IEE. However, an IEE is not appropriate at this time when TSD has not been given the opportunity to conduct the full psychological evaluation it seeks. Thus, the Hearing Officer finds that TSD's request for a complete psychological evaluation of Student is appropriate to ensure that all of Student's suspected disabilities may be explored and Student's educational programs can be developed accordingly. Accordingly, TSD's request should be granted.

VI. CONCLUSION

In accordance with the evidence presented during this hearing and the above findings, the Hearing Officer finds against Petitioner on all issues raised in Petitioner's due process complaint. Thus, Petitioner is not entitled to any relief in this case and no remedies are awarded. Further, the Hearing Officer finds that TSD met its burden of proving that Petitioner was not entitled to an IEE at TSD's expense as an appropriate evaluation was conducted within the necessary time frame. Further, the Hearing Officer finds that TSD's request for a complete psychological evaluation of Student should be granted.

VII. CONCLUSIONS OF LAW

1. Student currently is entitled to special education services from TSD pursuant to IDEA, 20 U.S.C. §1400, *et seq.*, as amended.
2. TSD is required to provide Student with a FAPE, pursuant to 20 U.S.C. §1400, *et seq.*, as amended.
3. Student is eligible for IDEA services with the primary identified disability of AI.
4. As a child with a diagnosed disability, Student is entitled to all necessary IDEA services, including those related to Student's unlabeled condition of ADHD.
5. As the party challenging the educational program offered by TSD, Petitioner bears the burden of proof on issues it brought before the Hearing Officer. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984). TSD bears the burden of proof on the two issues raised in its due process complaint.
6. TSD properly assessed Student in all areas of suspected disabilities, and provided all necessary educational services required by Student's AI and ADHD.
7. TSD provided FAPE to Student, and any procedural violations did not constitute a violation of the right to FAPE; specifically, no procedural violations resulted in the loss of an educational opportunity or infringe parents' opportunity to participate in the IEP process. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 398 (5th Cir. 2012) (cites omitted).
8. TSD met its burden of proving that Petitioner is not entitled to an IEE at the District's expense, because an appropriate evaluation was conducted by TSD. 34 C.F.R. § 300.502(b).
9. TSD met its burden of proving that a complete psychological evaluation is needed to properly evaluate Student for additional suspected disabilities and to properly develop an educational program for Student going forward.

VIII. ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, the Hearing Officer hereby **ORDERS** that the relief sought by the Petitioner is **DENIED** in its entirety. Further, Petitioner is not entitled to an IEE at TSD's expense. It is further **ORDERED** that TSD's request for a complete psychological evaluation of Student is **GRANTED**.

IX. NOTICE TO THE PARTIES

This Decision is final and is appealable to state or federal district court. Any party aggrieved by the findings and decision made by the Hearing Officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 19 Texas Administrative Code § 89.1186(n).

X. SYNOPSIS

Issue No. 1: Did TSD fail to properly identify and assess Student in all areas of suspected disability?

Held: For TSD. TSD did properly identify and assess Student in all areas of suspected disability, until such time as Parent refused consent for a complete psychological evaluation, which is necessary to evaluate Student for additional impairments.

Citation: 34 C.F.R. § 300.304(c)(6).

Issue No. 2: Did TSD fail to find Student eligible as a child with the Other Health Impairment of ADHD in a timely manner?

Held: For TSD. TSD identified and provided services for Student's ADHD, despite the fact that it did not label Student with ADHD as an OHI. The law does not require that Student's additional impairment of ADHD be labeled, so long as Student has already been identified as a Student entitled to special education services under IDEA.

Citation: 20 U.S.C. § 1412; 34 C.F.R. § 300.111.

Issue No. 3: Did TSD fail to provide FAPE to Student?

Held: For TSD. TSD provided all necessary requirements of FAPE to Student, including properly individualized programs on the basis of Student's assessments and performance, administered in the least restrictive environment, provided in a coordinated, collaborative manner by key stakeholders, and resulting in positive academic and non-academic benefits for Student.

Citation: 34 C.F.R. § 300.101.

Issue No. 4: Was Petitioner entitled to an IEE at TSD's expense?

Held: For TSD. TSD conducted a proper comprehensive evaluation within the year prior to Petitioner's request for an IEE. Thus, Petitioner was not entitled to an IEE at TSD's expense.

Citation: 34 C.F.R. § 300.502(b)(2).

Issue No. 5: Should Student have a complete psychological evaluation done by TSD?

Held: For TSD. The evidence demonstrates that a complete psychological evaluation is necessary to determine whether Student has additional impairments, other than AI and ADHD, affecting Student's ability to receive an education.

Citation: 34 C.F.R. § 300.300(c)(1)(ii).

SIGNED this 28th day of August 2015.



Craig R. Bennett
Special Education Hearing Officer
For the State of Texas