SOAH DOCKET NO. 701-21-2245.IDEA
TEA DOCKET NO. 175-SE-0521

STUDENT, B/N/F PARENT and PARENT, Petitioner	§	**BEFORE A SPECIAL EDUCATION**
v.	§	**HEARING OFFICER FOR**
SHARYLAND INDEPENDENT SCHOOL DISTRICT, Respondent	§	**THE STATE OF TEXAS**

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

Student, by next friends Parent and Parent (Student, Parents, or collectively, Petitioner), brings this action against the Sharyland Independent School District (Respondent or the District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400-1482, and its implementing state and federal regulations.

The main issue in this case is whether the District violated its Child Find obligation by failing to evaluate and identify Student for special education and related services, and therefore denied Student a free, appropriate public education (FAPE). The Hearing Officer concludes the District violated its Child Find duty to Student and therefore denied Student a FAPE. The Hearing Officer orders compensatory services.

II. DUE PROCESS HEARING

The due process hearing convened on September 28-30, 2021, via the Zoom videoconference platform. The hearing was recorded and transcribed by a certified court reporter. Petitioner was represented by Petitioner's attorney, Jordan McKnight, who was assisted by non-attorney, Debra Liva. Petitioner was also represented throughout this litigation by attorney Todd Dudley, however Mr. Dudley did not participate in the due process hearing. In addition, *** and ***, Student's parents, attended the hearing. Respondent was represented by its attorney, Greg Kerr. In addition, Dr. ***, the Executive Director of Special Education for the District, attended

the hearing as the party representative. Both parties timely filed written closing briefs. The decision in this case is due on November 18, 2021.

III. ISSUES

A. Petitioner's Issues

Petitioner raised the following issues arising under the IDEA for the 2019-2020 and 2020-2021 school years for decision in this case:

1. Whether the District failed to locate and timely evaluate Student in all areas of suspected disability.
2. Whether the District failed to identify Student as eligible for special education.
3. Whether the District provided Student a Free Appropriate Public Education (FAPE).
4. Whether the District provided Student an appropriate Individualized Education Plan (IEP), including appropriate related services.

Claims arising under laws other than the IDEA were dismissed for want of jurisdiction in Order No. 2.

B. Petitioner's Requested Relief

Petitioner seeks the following items of requested relief:

1. Order the District to provide compensatory services, including private tutoring, speech, social skills, counseling, and *** therapy services.
2. Order the District to provide Independent Education Evaluations (IEEs) in all areas of suspected disability.
3. Order the District to place Student in a non-public placement.
4. Order the District to develop an appropriate program for Student.
5. Order the District to provide private *** services.
6. Order the District to reimburse Student's parents for out-of-pocket expenses for privately-obtained evaluations and services.
7. Order the District to provide any other relief the Hearing Officer deems appropriate.

Petitioner's request for representation fees was dismissed for want of jurisdiction in Order No. 2.

C. Respondent's Legal Position and Additional Issues

Respondent generally and specifically denied the allegations stated in the Complaint. Respondent filed an amended response to the Complaint on September 2, 2021 asserting the statute of limitations as a defense.

IV. FINDINGS OF FACT

Educational Background

1. Student is *** years old and ***. Student lives with Student's parents ***. Student has been enrolled in the District since the 2012-2013 school year, Student's *** grade year.[1]

2. Student was in *** grade when Student's parents obtained a private psychological evaluation from ***, report dated November ***, 2012, due to concerns with inattentive and hyperactive behavior. Student was diagnosed with attention deficit hyperactive disorder (ADHD).[2]

3. Student began receiving support through a Section 504 Plan in *** grade based on ADHD. At Student's initial Section 504 eligibility meeting on September ***, 2013, Student's mother provided the District with the *** psychological evaluation. She also provided input related to Student ***.[3]

4. Not all students who *** demonstrate a need for special education services. *** disorders, including ***, also fluctuate over time.[4]

5. Student's parents enrolled student in private speech therapy in *** school, which Student has attended off and on over the years. Student has not attended private speech therapy since March 2020.[5]

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[1] Petitioner's Exhibit (PE) 1 at 1, 17; Transcript (Tr.) 62.

[2] PE 5 at 1, 16; Tr. 66.

[3] PE 1 at 48; PE 42; PE 43; Tr. 66-67, 326-27.

[4] Tr. 442, 444.

[5] PE 1 at 14; PE 36; Tr. 69-70.

6. In April 2016, Student's mother obtained a private psychological evaluation to investigate the possibility of a learning disorder. Dr. *** diagnosed Student with ADHD and a specific learning disorder in written expression. This evaluation was provided to Student's Section 504 Committee.[6]

7. Student passed all STAAR tests in grades *** with the exception of the *** grade *** assessment. Student passed the end of course exams in *** in *** grade, during the Spring of 2019. The *** state assessment was waived by the state in the Spring of 2020 due to the COVID-19 pandemic, during Student's *** grade year.[7]

8. Student attended private tutoring at *** in *** grade and the fall semester of *** grade.[8]

9. Student has received all passing grades in ***.[9]

2020-2021 School Year

10. Student was in *** grade during the 2020-2021 school year. Student participated in the District's remote learning program in the Fall 2020 semester.[10]

11. Student's Section 504 Plan was reviewed in September 2020 and distributed to Student's teachers. Student's Plan provided classroom accommodations of note-taking assistance, small group administration, extra time, reminders to stay on task, and visual aids. The 504 Plan noted that Student *** and Student should be permitted to pass on *** in class. At that time, Student was not demonstrating an academic need related to speech or Student's ***.[11]

12. Student's parent obtained a private psychological evaluation from ***, report dated October ***, 2020, to assess for executive functioning and ADHD. The evaluation diagnosed Student with ADHD and "***." Student's Section 504 coordinator was unaware of this evaluation and it was never reviewed by Student's 504 Committee during the 2020-2021 school year. Student's mother did not provide this evaluation to anyone at the District at the time it was completed.[12]

13. Student's mental health declined rapidly following Thanksgiving 2020. Student was ***.[13]

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[6] PE 4 at 2, 4; Tr. 71-72, 324.

[7] PE 1 at 49-50; PE 11 at 2; PE 34 at 6.

[8] PE 37.

[9] Respondent's Exhibit (RE) 7.

[10] PE 1 at 1; Tr. 76.

[11] PE 14; Tr. 337-38.

[12] PE 3 at 8; Tr. 75-76, 78, 308, 335.

[13] Tr. 78.

14. On December ***, 2020, Student was ***.[14]

15. On December ***, 2020, Student's mother emailed the *** academic counselor, informing him that Student had been *** and "there is a lot more going on with Student's mental state than just ***." Student's mother emailed the counselor again on December ***, 2020, informing him that Student had *** and inquiring about catching up on missed schoolwork. Student's mother also provided the *** report to an unidentified District employee at some point in December 2020. [15]

16. At that time, the counselor was unaware that he, as a District employee, could refer students for a special education evaluation. If he had known that at the time, he would have referred Student for a special education evaluation.[16]

17. The *** assistant principal submitted a credit appeal letter, dated December ***, 2020, stating "[Student] ***. Asking for committee to waive all denied credits due to ***."[17]

18. On February ***, 2021, Student was ***. Student's mother emailed the counselor, informing him that Student had *** again and inquiring about options for switching to in-person learning. On February ***, 2021, Student's mother and the counselor exchanged emails about the process for returning to in-person learning when Student was ***.[18]

19. Student began attending school in-person on March ***, 2021.[19]

20. On April ***, 2021, another student contacted a *** administrator to report that Student told *** that Student ***. The next day, Student admitted to administrators that Student had made these statements to the other student and to Student's mom.[20]

21. Student was subsequently ***.[21]

22. The District determined that Student *** in violation of the District's student handbook and was assigned a 60-day removal to the District's disciplinary alternative education program (DAEP).[22]

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[14] PE 8 at 1; Tr. 80.

[15] PE 21 at 1, 3; Tr. 78, 83, 278.

[16] Tr. 286-88.

[17] PE 7.

[18] PE 6; PE 21 at 5, 7-8; Tr. 86-87.

[19] PE 1 at 1.

[20] PE 18; PE 19.

[21] PE 18; Tr. 91.

[22] PE 13.

23. Student transitioned back to remote learning on April ***, 2021.[23]

24. On April ***, 2021, a Section 504 manifestation determination review (MDR) meeting was held to determine whether Student's conduct of *** was a manifestation of Student's ADHD. The Section 504 Committee determined that Student's conduct was not a manifestation of Student's disability, nor the result of the District failing to implement Student's Section 504 Plan. Student's parents did not offer any input or information during this meeting. The family's advocate disagreed on behalf of the family.[24]

25. Student's Section 504 Coordinator was not made aware of Student's *** until the committee was preparing for the MDR. The District did not ever hold a Section 504 Committee meeting to discuss Student's ***.[25]

26. During the MDR, the Section 504 Coordinator asked Student's parents if they would like to request a special education evaluation. The family's advocate responded that they were not answering any questions.[26]

27. On April ***, 2021, the *** principal emailed Student's mother offering that Student could receive services from a counselor and a school psychologist during the DAEP removal.[27]

28. Student was withdrawn from the District on May ***, 2021. The District's Special Education Director emailed Student's mother: "It is my understanding that you have decided to withdraw your ***. If you decide to re-enroll [Student] at [District] or any other District, I encourage you to make a Child Find referral to determine if [Student] is eligible to receive specially designed instruction and supports through special education. Our team of Educational Diagnosticians and Licensed Specialists in School Psychology (LSSPs) will be glad to conduct a Full and Individual Evaluation (FIE)."[28]

Pendency of This Proceeding

29. Student's parents filed this request for a due process hearing on May 4, 2021.[29]

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[23] PE 1 at 1.

[24] PE 11; Tr. 342.

[25] Tr. 310, 315.

[26] PE 27 at 36:04; Tr. 343.

[27] PE 32 at 13-14.

[28] PE 1 at 1; PE 21 at 15; RE 12.

[29] Petitioner's Notice of Filing (May 4, 2021).

30. On June ***, 2021, counsel for the District emailed counsel for Petitioner that the District was proposing conducting a special education evaluation of Student. Counsel for Petitioner declined the evaluation.[30]

31. On June ***, 2021, the District again requested consent to evaluate. On June ***, 2021, Student's father signed the consent for the District to complete an evaluation of Student. Procedural safeguards were provided to the parent.[31]

32. On June ***, 2021, the District's Special Education Director corresponded with Student's mother regarding the schedule for conducting the evaluation. The Director offered a meeting to review the evaluation with the parent on June ***, 2021 and a potential initial Admission, Review, and Dismissal (ARD) Committee meeting during the week of July ***, 2021.[32]

33. The District completed a Full Individual and Initial Evaluation (FIIE) in approximately one week, and produced a draft report dated June ***, 2021.[33]

34. In the area of speech and language, Student's receptive, expressive, and pragmatic language, and articulation were comparable to peers and Student did not meet eligibility criteria for special education in these areas of speech. Student met eligibility criteria for special education in the area of speech *** based on a moderate to severe *** disorder. Student's eligibility under speech impairment was based on the adverse effects Student was experiencing ***.[34]

35. Student was not found to exhibit characteristics of an autism spectrum disorder and did not meet eligibility criteria based on autism.[35]

36. Student met eligibility criteria for emotional disturbance based on characteristics of ***.[36]

37. Student's general intellectual ability was a ***, in the average range. Short-term working memory was a relative weakness. When testing short-term working memory, the diagnostician gave an additional subtest after the first two subtests resulted in divergent scores, with one score lower than the rest of Student's subtest scores. The diagnostician used the average of the three subtests to produce the score for short-term working memory. Standard practice would have been to omit the aberrantly low score as an outlier, but the

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[30] RE 30; Tr. 244-245.

[31] PE 10 at 6; RE 16; Tr. 103, 238-239.

[32] RE 18.

[33] PE 1 at 1.

[34] PE 1 at 8-11, 15; Tr. 440.

[35] PE 1 at 40.

[36] PE 1 at 40-41.

diagnostician chose to include it to provide more information on Student's area of weakness.[37]

38. On academic achievement testing, Student's reading scores were average, high average, or above average. Student's math scores were low or low average.[38]

39. The District used a cross-battery method to examine cognitive abilities and determine specific learning disabilities. Although Student demonstrated a significant normative academic deficit in *** skills, Student had no significant cognitive deficits. Therefore, Student did not qualify for special education based on any learning disability.[39]

40. A preliminary report was reviewed with the Student's parent on June ***, 2021. District staff also discussed with Student's mother trying to schedule an ARD Committee meeting to review the report during the week of July ***, 2021. The Special Education director deferred further communication about scheduling the ARD Committee meeting to counsel for the parties at the request of the family's advocate.[40]

41. On July ***, 2021, a physician completed the other health impairment (OHI) form indicating that Student should meet criteria for OHI based on ADHD, ***.[41]

42. The final FIIE is dated July ***, 2021. The final report added information from the OHI form completed by Student's pediatrician. The final report recommended eligibility based on emotional disturbance, other health impairment, and speech impairment. The only difference between the June *** draft and the July *** report was the addition of the OHI information from the pediatrician.[42]

43. A copy of the report was provided by counsel for the District to counsel for Petitioner on July ***, 2021.[43]

44. An ARD Committee meeting was scheduled for August ***, 2021 but did not proceed when the parents did not attend. The ARD Committee meeting notice was sent to counsel for Petitioner. Student's parents were not informed by their advocate or attorneys about the scheduling of this ARD Committee meeting.[44]

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[37] PE 1 at 43-44; Tr.511-12; 532-33- 545.

[38] PE 1 at 50; Tr. 515.

[39] PE 1 at 42, 54-55, 82; Tr. 511-12, 517.

[40] PE 22 at 2; RE 29; Tr. 140, 383, 384-86.

[41] PE 29.

[42] PE 31 at 17, 59; Tr. 381.

[43] PE 22 at 4; Tr. 259.

[44] PE 24; RE 34; RE 35; Tr. 170.

45. On August ***, 2021, the District informed the parents that the DAEP removal was extinguished and that Student would not be subject to any days of the DAEP removal upon re-enrollment in the District.[45]

46. An ARD Committee meeting was scheduled for September ***, 2021, but was not held. The parties ultimately agreed to hold an ARD Committee meeting on September ***, 2021. Student's parents were unaware of the District's multiple attempts to schedule an ARD Committee meeting through their counsel prior to the scheduling of the September ***, 2021 meeting.[46]

47. At the September ***, 2021 initial ARD Committee meeting, the FIIE was reviewed. The District proposed that Student be served in the general education setting with in-class support in math for 30 minutes two times per week. The District proposed speech therapy once per week in the fall semester and six times per *** weeks in the spring semester. The District recommended psychological services by an LSSP for 30 minutes every other week.[47]

48. Student's parents and advocate attended the meeting. Agreement was not reached. Student's parents sent correspondence dated September ***, 2021 indicating disagreement. Parents signed "agree" on the signature page but included written descriptions of their areas of disagreement. Parents disagree with an eligibility for emotional disturbance. Parents did not sign consent to initiate special education services.[48]

49. Student is now re-enrolled in the District and attending school. Student currently attends private counseling outside of school once every other week.[49]

V. STATUTE OF LIMITATIONS

Under the IDEA, a parent may file a due process complaint on any matter relating to the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE to the child within two years from the date the parent knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.507(a)(1)-(2).

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[45] PE 24.

[46] PE 39; RE 41; RE 42; Tr. 253-254.

[47] PE 31; PE 32 at 5.

[48] PE 34 at 1, 10, 56; Tr.187, 248-49.

[49] Tr. 219-21, 256, 411-12.

The two-year limitations period may be more or less if the state has an explicit time limitation for requesting a due process hearing under the IDEA. 20 U.S.C. §1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2). Texas has adopted an alternative time limitation, and state regulations require a parent to request a hearing within one year of the date he or she knew or should have known of the alleged action(s) forming the basis of the petition. 19 Tex. Admin. Code § 89.1151(c). The limitations period begins to run when a party knows, or has reason to know, of an injury. *Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995).

There are two exceptions to this rule. The timeline does not apply if the parent was prevented from filing a due process complaint due to:

(1) specific misrepresentations by the public education agency that it had resolved the problem forming the basis of the due process complaint; or

(2) the public education agency's withholding of information from the parent that was required by 34 C.F.R. § 300.1, *et seq*. to be provided to the parent.

19 Tex. Admin. Code § 89.1151(d).

Petitioner filed the Complaint in this case on May 4, 2021, which recited the legal standard for exceptions to the statute of limitations in Texas, but did not plead facts supporting either exception. Petitioner clarified in the prehearing telephone conference in this matter that Petitioner's claims pertain to the 2019-2020 and 2020-2021 school years. The District contends that the one-year statute of limitations applies. Petitioner has the burden of proving that one of the exceptions tolled the statute of limitations. *G.I. v. Lewisville Indep. Sch. Dist*., 2013 WL 4523581, at *8 (E.D. Tex. Aug. 23, 2013).

Petitioner's Closing Brief argues that the withholding exception was met when the District did not provide the parents with prior written notice or copies of procedural safeguards at various points between 2012 and 2021 when Student's parent provided District staff with copies of private evaluations. Petitioner also references Student's mother's testimony that she requested speech therapy to an unidentified staff member at an unidentified date, and that prior written notice should have been given at that time. A copy of the procedural safeguards "must be given to the parents

[of a child with a disability] only one time a school year." 34 C.F.R. § 300.504(a). A copy also shall be given to the parent: (i) upon initial referral or parental request for an evaluation; (ii) upon the first occurrence of the filing of a due process complaint; and (iii) upon request of the parent. 20 U.S.C. §1415(d)(1)(A). Under the IDEA, local education agencies are required to provide prior written notice to the parents of a child, whenever that agency proposes to initiate or change, or refuses to initiate or change "the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child." 20 U.S.C. § 1415(b)(3).

There is no dispute that Petitioner was not identified as a "child with a disability" under the IDEA during the 2012-2013 through 2020-2021 school years. There were no initial referrals, no parental requests for evaluation, and no due process hearings. Petitioner has not met Petitioner's burden to show that the District had an obligation to provide Petitioner with information such as procedural safeguards or prior written notice until the present dispute. Because the law did not require the District to provide procedural safeguards or prior written notice, this exception to the statute of limitations does not apply. Therefore, the one year statute of limitations bars any claims for relief by Petitioner accruing prior to May 4, 2020.

VI. DISCUSSION

Petitioner alleges the District denied Student a FAPE by violating its Child Find obligation, failing to timely evaluate and find Student eligible for special education, and failing to provide an appropriate program.

A. Burden of Proof in an IDEA Case

There is no distinction between the burden of proof in an administrative hearing and a judicial proceeding. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 292 n.4 (5th Cir. 2009). The burden of proof in a due process hearing is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1291 (5th Cir. 1991). Accordingly, Petitioner bears the burden of showing that the District violated its Child Find obligation and failed to provide Student a FAPE.

B. Child Find Under the IDEA

The IDEA's Child Find provisions guarantee access to special education for students with disabilities. 20 U.S.C. § 1400(d)(1)(A). A school district, like Respondent, has an affirmative duty to have policies and procedures in place to locate, and timely evaluate, children with suspected disabilities in its jurisdiction, including "[c]hildren who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade." 20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.111(a), (c)(1); *El Paso Indep. Sch. Dist. v. Richard R.R.*, 567 F.Supp.2d 918, 949 (W.D. Tex. 2008).

The Child Find duty is triggered when a school district has reason to suspect a student has a disability and reason to suspect that special education services may be needed to address the disability. When these suspicions arise, the school district must evaluate the student within a "reasonable" time after school officials have notice of reasons to suspect a disability. *Richard R.R.*, 567 F.Supp.2d at 950.

The analysis for resolving a Child Find issue is two-fold:

1. Whether the school district had reason to suspect the student has a disability *and* had reason to suspect the student may need special education and related services as a result of the disability; and

2. Whether the school district acted in a "reasonable" amount of time after having reason to suspect the student may need special education and related services. *Id.*; *Dallas Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 320 (5th Cir. 2017); *A.L. v. Alamo Heights Ind. Sch. Dist.*, 2018 W.L. 4955220, *6 (W.D. Tex. 2018).

The District completed an FIIE during the pendency of this proceeding and determined that Student has disabilities and is in need of special education as a student with emotional disturbance, speech impairment, and other health impairments. Thus, there is no real dispute that Student is a student with a disability in need of special education services under IDEA. However, the parties disagree as to whether the School District should have conducted the FIIE earlier.

1. Reason to Suspect Disability and Need for Special Education

Student has been supported by a Section 504 Plan for ADHD since Student was in *** grade. Therefore, the District had long been aware of this disability. Petitioner contends that Student's *** and relative weakness in math should have triggered the District's Child Find obligation. However, Petitioner did not present sufficient evidence that Student's ADHD, ***, or weakness in math were significant or preventing Student from being successful in the general education curriculum and setting with the support of Student's Section 504 Plan. Student's mother testified that Student struggled, but this was not corroborated by any evidence that the District was aware of Student struggling and should have identified a possible need for special education. In particular, there was no evidence presented that the District was aware of Student struggling in school between May 2020 and December 2020, within the statute of limitations for this case. Student was receiving passing grades and had passed all *** end of course exams. Thus, the evidence does not support a conclusion that the District had reason to suspect Student had a disability or disabilities and was in need of special education services prior to Student's *** decline in the Fall 2020 semester.

On December ***, 2020, Student's mother informed a *** counselor that Student was ***. The counselor was made aware that Student was ***. The counselor testified that, in retrospect, he believed that he should have referred Student for a special education evaluation at that time. The District was aware that Student had ***. Based on these facts, by December ***, 2020, the District had reason to suspect that Student had a disability related to emotional/behavioral health and may need special education.

2. Reasonable Time Period for an Evaluation

The next inquiry in a Child Find case is whether the school district evaluated the student within a reasonable time after having notice of the behavior likely to indicate a disability. *Woody*, 178 F.Supp.3d at 468. The IDEA's implementing regulations address how quickly a school district must act after parental consent to evaluate is obtained, but neither the statute nor its implementing regulations establish a specific number of days in which a school district must evaluate a student

between notice of a qualifying disability and referring the student for an evaluation. *Woody*, 865 F.3d at 319. In *Woody*, the court inferred a "reasonable time standard" into the provision. *Id*. at 320. A school district must also "identify, locate, and evaluate students with suspected disabilities within a reasonable time after the school district is on notice of facts or behavior likely to indicate a disability." *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 676 (5th Cir. 2018); *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W*., 961 F.3d 781, 790-91 (5th Cir. 2020).

Read together, *Krawietz* and *Woody* indicate the reasonableness of a delay is not defined by its length in weeks or months, but by the steps taken by a school district during the relevant period. A delay is reasonable when, throughout the period between notice and referral, a school district takes proactive steps to comply with its Child Find duty to identify, locate, and evaluate students with disabilities. Conversely, a time period is unreasonable when the school district fails to take proactive steps throughout the period, or ceases to take such steps. *O.W. by Hannah W*. 961 F.3d at 793. Under the test set out in this jurisdiction, a finding of a Child Find violation turns on three inquiries: (1) the date the Child Find requirement was triggered due to notice of a likely disability; (2) the date the child find duty was ultimately satisfied; and (3) the reasonableness of the delay between these two dates. *See*, *Krawietz,* 900 F.3d at 676.

The hearing officer concludes the District's Child Find obligation to Student was triggered due to notice of a likely disability and reason to suspect Student may need special education and related services on December ***, 2020 when the District was aware that Student had *** and the counselor testified that he should have referred Student for an evaluation. There was essentially one semester of delay before Student was evaluated in June 2021.

A special education evaluation of Student was first discussed during the April ***, 2021 MDR meeting, when the District asked the parent if they would like to request an evaluation. Petitioner has argued that the precise wording of asking the parent if *they* would like to request an evaluation, in contrast to a direct request *from the District* for consent to evaluate, means that the District continued to violate its Child Find obligation. Student's mother testified that she would have wanted an evaluation at many different points throughout Student's educational career. However, the family's advocate stated a refusal to answer this question about whether the family

would like an evaluation in the April ***, 2021 MDR meeting. Likewise, there was no response to the Special Education Director's May ***, 2021 email offering an evaluation. Further, on June ***, 2021, counsel for Petitioner declined an offer to evaluate Student. In all of these instances, the District initiated a conversation about an evaluation and Petitioner declined or was non-responsive. These efforts satisfied the District's Child Find obligations and the delay beyond this point in completing an evaluation is attributable to Petitioner.

The District ultimately obtained consent to complete an evaluation on June ***, 2021. The evaluation was preliminarily completed, pending information from the Student's pediatrician, by June ***, 2021, and findings were shared with Student's parent on June ***, 2021. The FIE was finalized when information was obtained from the pediatrician on July ***, 2021 and a copy was provided to counsel for Petitioner on July ***, 2021.

In order to evaluate the reasonableness of the delay between when the District's Child Find obligation was triggered and when it was satisfied, it is helpful to compare the timeline that would have unfolded absent a violation. School districts must respond to a parent request for an evaluation within 15 school days. 19 Tex. Admin. Code § 89.1011(b). An evaluation must be completed within 45 school days of receiving written consent to evaluate. *Id*. at 89.1011(c). An ARD Committee meeting must meet to review the evaluation and determine eligibility within 30 calendar days from the completion of the evaluation. *Id*. at 89.1011(d). In this case, if the District had received consent to evaluate Student on December ***, 2020, when it's Child Find obligation was triggered, the ensuing evaluation would have been due by roughly March ***, 2021, taking into consideration school breaks. The District, therefore, would have been required to hold an ARD Committee meeting to establish eligibility by roughly April ***, 2021.[50]

The District should have taken proactive steps to evaluate Student between December ***, 2020 and April ***, 2021, but took no steps. The District did not comply with its Child Find duty within a reasonable amount of time from the time when the District had reason to suspect Student

[50] The hearing officer takes judicial notice of Respondent's academic calendar, publicly available on the District website.

was a child with a disability in need of special education and related services. *See Woody*, 865 F.3d at 320. However, beginning with the April ***, 2021 MDR meeting, the District was making proactive efforts that were rebuffed by Petitioner and had satisfied the District's Child Find obligation. Thus, further delay past that point is reasonable.

The parties argue about who is at fault for the delay between the completion of the evaluation and establishing Student's eligibility for special education, which had still not occurred at the time of the due process hearing. The parties have both acted at their own peril by communicating exclusively through counsel about routine school business like scheduling an ARD Committee meeting. Petitioner has suffered by not being informed by Petitioner's counsel of the District's multiple attempts to schedule an ARD Committee meeting. The District has suffered by not attempting to communicate directly with the parents about scheduling when communicating only through counsel was not legally required and clearly delayed the process. The parties did not ultimately hold an ARD Committee meeting until less than two weeks before the due process hearing. That meeting did not conclude in agreement and the parents had yet to signed consent to initiate special education services at the time of the due process hearing.

The District took proactive steps to schedule an ARD Committee meeting and consider Student's eligibility in the time between the completion of the evaluation and the dates of the due process hearing. Thus, the delay in establishing eligibility in this time period is reasonable. In sum, the District is liable for the unreasonable delay during the Spring 2021 semester. If a timely referral had been made, Student could have been eligible and received services for roughly the last two months of the 2020-2021 school year.

C. Eligibility Determinations under the IDEA

Petitioner alleges that the District failed to identify Student as eligible for special education under the IDEA. A critical distinction exists between the Child Find obligation and whether a school district should have identified a student as eligible for special education under one of the enumerated disability classifications under the IDEA. Questions of eligibility and identification as a student with a disability are resolved on the basis of whether an evaluation shows the student

meets the criteria of one or more of the enumerated disability classifications and demonstrates a need for special education. *See* 34 C.F.R. § 300.8(a), (c)(1-13). At the time of the due process hearing, the District had completed an evaluation recommending IDEA eligibility based on ED, speech impairment, and OHI. Petitioner disagreed with the eligibility determination of ED and had not consented to the initiation of special education services. Petitioner did not offer any expert testimony or reports identifying other areas of eligibility.[51] Petitioner did not meet Petitioner's burden to show that the District is responsible for an ongoing failure to identify, beyond the Child Find violation the hearing officer finds herein.

D. FAPE

Petitioner alleges that the District denied Student a FAPE and failed to offer an appropriate IEP. The purpose of the IDEA is to ensure that all children with disabilities have available to them a free, appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. 20 U.S.C. § 1400(d). The District has a duty to provide FAPE to all children with disabilities ages 3-21 in its jurisdiction. 34 C.F.R. §§ 300.101(a), 300.201; Tex. Educ. Code § 29.001.

The Hearing Officer has already concluded that the District violated its Child Find obligation in failing to seek consent for an evaluation of Student when its duty was triggered in December 2020, and that the District's failure led to two months where Student could have been eligible and receiving services at the end of the 2020-2021 school year. Petitioner was offered psychological services by the *** principal on April ***, 2021, however the evidence did not establish a duration or frequency of services being offered. Therefore, the District denied Student a FAPE during this time period and failed to offer an appropriate program by offering no program at all during the Spring 2021 semester.

[51] The 2016 *** report made a clinical diagnosis of a learning disability, however it does not opine on eligibility for special education under the IDEA, instead recommending that the client discuss this further with the school.

Respondent's Closing Brief argues the appropriateness of the IEP offered at the September ***, 2021 ARD Committee meeting and requests a ruling from the hearing officer that the proposed IEP offers Student a FAPE. Petitioner does not seek a ruling on the proposed IEP and disclaimed in Petitioner's Closing Brief that the Complaint concerns any FAPE allegations regarding the 2021-2022 school year. The proposed IEP has not been fully considered by the ARD Committee as the parties were still in disagreement at the time of the due process hearing and the District had not issued prior written notice of its offered IEP. The appropriateness of the September ***, 2021 proposed IEP is not properly before the hearing officer and is not included among the issues identified for this due process hearing. Therefore, the hearing officer will not opine upon its appropriateness.

E. Evaluation

Both parties' Closing Briefs make arguments about the appropriateness of the District's FIIE, completed while this case was pending. Petitioner argues that the evaluation was inappropriate and requests relief of an IEE. Respondent argues that the FIIE was appropriate. This issue is not properly before the hearing officer in this case. Petitioner's Complaint did not state any issues regarding the appropriateness of a District evaluation (none had been completed at the time of filing), and Petitioner never amended Petitioner's complaint to add an issue related to the appropriateness of the FIIE after it was completed. Likewise, Respondent has not filed a counterclaim in this matter seeking to defend the appropriateness of its FIIE. Therefore, the appropriateness of the District's FIIE was not identified as an issue for the due process hearing and the hearing officer will not opine upon it.

F. MDR

Petitioner's Closing Brief makes arguments about the outcome of the Section 504 MDR meeting that was held on April ***, 2021 and whether proper procedures were followed regarding the discipline determination. These issues are not before the hearing officer in this case. While Petitioner's Complaint made factual allegations about the DAEP removal and discipline process, counsel for Petitioner confirmed during the initial prehearing telephone conference in this matter

that Petitioner was not seeking an expedited hearing required for a DAEP appeal. An appeal of the MDR outcome was therefore not included in the issues for hearing outlined in Order No. 2. Petitioner later filed a separate, expedited due process hearing request to appeal the DAEP removal. That case, TEA Docket No. 236-SE-0821, was subsequently dismissed. Therefore, the appropriateness of the now-extinguished DAEP removal, and the procedures followed therein, are not issues for this case and the hearing officer will not opine upon them.

G. Remedy

The District violated its Child Find duties in this case. The District impermissibly delayed evaluating Student during the Spring 2021 semester, resulting in approximately two months when Student could have been receiving services but was not. As such, the District must compensate Student for this failure.

An impartial hearing officer has the authority to grant all relief deemed necessary, including compensatory education, to ensure the student receives the requisite educational benefit denied by the school district's failure to comply with the IDEA. *Letter to Kohn*, 17 IDELR 522 (OSERS 1991). Compensatory education imposes liability on the school district to pay for services it was required to pay all along and failed to do so. *See Meiner v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986); *D.A. v. Houston Indep. Sch. Dist*., 716 F.Supp.2d 603, 612 (S.D. Tex. 2009), *aff'd* 629 F. 3d 450 (5th Cir. 2010) (upholding decision that student failed to prove amount of compensatory reimbursement student entitled for school district's failure to timely evaluate).

Compensatory education may be awarded by a hearing officer after finding a violation of the IDEA. It constitutes an award of services to be provided prospectively in order to compensate the student for a deficient educational program provided in the past. *G. ex. Rel RG v. Fort Bragg Dependent Schs.*, 343 F. 3d 295 (4th Cir. 2003). Hearing officers have broad equitable powers, as courts do, to fashion appropriate relief where there has been a violation of the IDEA. *Burlington Sch. Comm. v. Dept. of Educ*., 471 U.S. 35, 374 (1996); *Harris v. Dist. of Columbia*, 19 IDELR 105 (D.D.C. 1992). A qualitative, rather than quantitative, standard is appropriate in fashioning compensatory and equitable relief. *Reid ex rel Reid v. District of Columbia*, 401 F. 3d 516, 523-24

(D.C. Cir. 2005).

Petitioner requests reimbursement for past expenses for speech therapy, private counseling, psychological evaluations, and private tutoring. Petitioner requests prospective compensatory services in the areas of speech therapy, psychological services, and math instruction. Petitioner has also requested that the hearing officer order the District to provide an IEE. In Petitioner's Complaint, Petitioner requested private placement and private *** services, however Petitioner made no arguments and presented no evidence on these items at the due process hearing or in Petitioner's Closing Brief.

Petitioner has not offered competent evidence on any of Petitioner's requests for reimbursement. Petitioner's speech therapy and private tutoring reimbursement requests occurred outside the period of violation, as well as outside the statute of limitations in this matter, and therefore do not constitute appropriate relief. Verbal testimony from a parent regarding expenses, absent invoices or other competent documentary evidence, does not establish a sufficient basis to award reimbursement. Petitioner's health insurance claim history information[52] also does not provide competent evidence on which to establish an order of reimbursement, absent corroborating evidence on expenses paid.

Petitioner brought forward no expert testimony or evidence explaining the nature and scope of the compensatory services Student requires to remedy the delay in identifying Student as eligible for special education services. The Hearing Officer is mindful of the expert testimony from District staff that more services are not always better, especially when providing more services requires removing Student from Student's least restrictive environment in Student's regular classes.[53] The Hearing Officer is also mindful that Student's parents had not consented to the initiation of special education services at the time of the due process hearing. Therefore, the compensatory award ordered here is contingent upon Student's parents, or the *** Student, consenting to the initial provision of special education services from the District. The Hearing Officer does not order the District to provide

[52] PE 41.

[53] Tr. 441.

compensatory services if Petitioner does not consent to special education eligibility.

In light of the approximately two months of services that Student could have received during the 2020-2021 school year if the District had made a timely Child Find referral, and the hearing officer's broad discretion to fashion appropriate relief, the Hearing Officer grants compensatory psychological services in the amount of four 30-minute sessions. These services may be provided by a District LSSP, or by a qualified private provider, at the discretion of the District. The Hearing Officer declines to award compensatory services in the area of speech or academics in the absence of any expert testimony or recommendations establishing the need or an appropriate amount. *See D.A*., 716 F.Supp.2d at 617.

VII. CONCLUSIONS OF LAW

1. Petitioner's claims arising before May 4, 2020 are barred by the one-year statute of limitations rule as applied in Texas. 34 C.F.R. § 300.507(a)(2); 19 Tex. Admin. Code §89.1151(c); Petitioner did not meet Petitioner's burden of proving any exceptions to the rule should apply. 34 C.F.R. §300.511(f).

2. As the challenging party, Petitioner met the burden of proving the District abridged its Child Find duty to Student. *Schaffer v. Weast*, 546 U.S. 49 (2005); 20 U.S.C. § 1400(d)(1)(A).

3. Petitioner did not meet the burden of proving that the District has failed to find Student eligible for special education and related services under the IDEA. 34 C.F.R. §§ 300.8(a)(2)(i), 300.304-306.

4. The District denied Student a FAPE by failing to timely identify Student as a student with a disability and in need of special education, and failing to offer an appropriate program during the Spring 2021 semester. *Schaffer v. Weast*, 546 U.S. 49 (2005); 34 C.F.R. § 300.101.

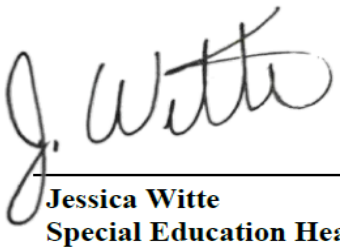
VIII. ORDERS

Given the broad discretion of the hearing officer in fashioning relief, the hearing officer makes the following orders:

1. Subject to Student's parents, or *** Student, consenting to the initial provision of special education services, the District shall offer Student four additional 30-minute sessions of psychological services during the 2021-2022 school year or summer 2022, above and beyond any that may be provided through any IEP adopted by Student's ARD Committee. The four additional 30-minute sessions may be provided by a District LSSP or a qualified private provider, at the discretion of the District.

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

SIGNED November 17, 2021.



Jessica Witte
Special Education Hearing Officer
For the State of Texas

IX. NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 20. U.S.C. § 1415(i)(2); 19 Tex. Admin. Code § 89.1185(n).