CONFIDENTIAL

SOAH DOCKET NO. 701-21-2320.IDEA
TEA DOCKET NO. 181-SE-0521

[redacted] **B/N/F** [redacted] **Petitioner**	§	**BEFORE A SPECIAL EDUCATION**
v.	§	**HEARING OFFICER FOR**
COPPELL INDEPENDENT SCHOOL DISTRICT, **Respondent**	§	**THE STATE OF TEXAS**

ORDER NO. 8
GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

[redacted], by next friend [redacted] (collectively, Petitioner or Student), filed a request for a due process hearing under the Individuals with Disabilities Education Act (IDEA) against the Coppell Independent School District (Respondent or the District) on May 12, 2021. The due process hearing in this case is set for October 27-28, 2021, with the decision of the hearing officer due on December 9, 2021.

On September 16, 2021, Respondent filed a Motion for Summary Judgment (Motion).[1] Petitioner, a self-represented litigant, did not file a response. For the reasons set out below, the hearing officer finds the Motion should be granted.

I. MOTION AND RESPONSE

Respondent's Motion is a no-evidence motion for summary judgment. Respondent argues that summary judgment is warranted on all claims because Petitioner has presented no evidence through discovery or otherwise to support the allegations. The allegations Respondent asserts are appropriate for summary judgment are those identified in Order No. 6, which include claims alleging a denial of Student's right to a free, appropriate public education (FAPE), failure to implement Student's Individualized Education Program (IEP), failure to timely identify Student

[1] Order No. 4 established September 15, 2021 at 5 p.m. as the deadline to file dispositive motions. The hearing officer granted an extension of this deadline to September 20, 2021 at 5 p.m. Respondent's Motion was thus timely.

as a student with a Specific Learning Disability, inappropriate denial of Petitioner's request for an Independent Educational Evaluation (IEE), and various procedural violations. As relief, Respondent seeks an order granting its Motion and dismissing Petitioner's claims with prejudice.

Responses to motions must be submitted no later than 5 p.m. on the third business day following a party's receipt of the motion, unless another deadline is set by order, or agreed to in writing by the parties and filed with the hearing officer. *See* Order No. 1. This expectation is also set out in the Guidelines for Special Education Due Process Hearings issued with Order No. 1. On September 17, 2021, the hearing officer confirmed receipt of Respondent's Motion for Summary Judgment via email and gave Petitioner until September 21, 2021 at 5 p.m. to file a response. On September 21, 2021, the hearing officer again confirmed the deadline to respond in an email to the parties. Petitioner did not file a response or request an extension of the deadline to respond.

II. LEGAL STANDARD

Except as modified or limited by certain federal regulations, the Texas Rules of Civil Procedure apply in a due process hearing under the IDEA. 19 Tex. Admin. Code § 89.1185(d). Under the Texas Rules of Civil Procedure, a party against whom a claim is asserted may move for summary judgment. Tex. R. Civ. P. 166a(b). The applicable rules specifically authorize a party to file a no-evidence motion seeking summary judgment. Tex. R. Civ. P. 166a(i). Specifically,

> "After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact." *Id.*

A no-evidence motion should be specific as to the challenged elements to give fair notice to the non-movant of the matters on which it must produce some evidence. *See Cmty. Initiatives, Inc. v. Chase Bank of Texas,* 153 S.W.3d 270, 279 (Tex.App.—El Paso 2004, no pet.). A party can

contest every element of its opponent's case so long as each element is distinctly and explicitly challenged. *See Martin v. McDonald*, 247 S.W.3d 224, 233 (Tex. App.—El Paso 2006, no pet.).

When a movant files a proper no-evidence motion for summary judgment, the burden shifts to the non-moving party, and unless the non-moving party produces summary judgment evidence raising a genuine issue of material fact, the trial court must grant the motion for summary judgment. Tex. R. Civ. P. 166a(i). To defeat a no-evidence motion for summary judgment, the non-movant need not marshal [redacted] evidence, but must point out in [redacted] response evidence raising a fact issue as to the challenged elements. *See* Comment to Tex. R. Civ. P. 166a(i). Responding to a no-evidence summary judgment is virtually mandatory. *Lee v. Palacios*, No. 14-06-00428-CV, 2007 WL 2990277, at *1 (Tex. App.—Houston [14th Dist.] Oct. 11, 2007, pet. denied) (citing Judge David Hittner & Lynne Liberato, Summary Judgments in Texas, 47 S. Tex. L. Rev. 409, 488 (2006)). If the non-moving party fails to file a response and produce evidence, the party "is restricted to arguing on appeal that the no-evidence summary judgment is insufficient as a matter of law." *Viasana v. Ward County*, 296 S.W.3d 652, 654 (Tex. App.—El Paso 2009, no pet.). The trial court is required to grant a no-evidence summary judgment if the nonmovant produces no summary judgment evidence in response to the summary judgment motion. *Watson v. Frost Nat. Bank*, 139 S.W.3d 118, 119 (Tex. App.—Texarkana 2004, no pet.); *see also Michael v. Dyke,* 41 S.W.3d 746, 751 (Tex.App.—Corpus Christi 2001, no pet.) (recognizing that "[f]ailure to respond to a no-evidence motion is fatal").

III. ANALYSIS

A no-evidence motion for summary judgment is proper after adequate time for discovery. Here, Petitioner filed the due process hearing request in May 2021 and responses to the District's Requests for Production were due on August 6, 2021. The District granted Petitioner two extensions and Petitioner had not produced any documentation to support [redacted] claims apart from "one email" at the time the instant motion was filed. The hearing officer concludes there has been adequate time for discovery.

Respondent moves for summary judgment on the ground that there is no evidence of one or more essential elements of Petitioner's claims on which [redacted] would have the burden of proof at trial. The burden of proof in an IDEA due process hearing is on the party challenging the IEP and placement. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The burden of proof is thus on Petitioner to show the District did not provide Student a FAPE. In addition, the District satisfied its obligation under Texas Rule of Civil Procedure 166a(i) as the moving party to state the elements as to which there is no evidence by laying out the applicable elements for each of Petitioner's claims, including the four-factor test used to resolve FAPE claims;[2] the standard for analyzing failure to implement claims;[3] the two-part test used to resolve a Child Find allegation;[4] the standard for granting an Independent Educational Evaluation;[5] and the standard for resolving procedural violations under the IDEA.[6]

Because Respondent's Motion was proper in that it explicitly challenged each element and specifically stated the elements of each claim as to which there is no evidence, Petitioner was given fair notice of the evidence [redacted] must present in response. The burden to produce summary judgment evidence raising a genuine issue of material fact then shifted to Petitioner. Here, Petitioner did not respond to the Motion and thus produced no summary judgment evidence raising a genuine issue of material fact. Notably, Petitioner's lengthy petition is not sufficient. Even sworn and verified pleadings are generally not competent summary judgment evidence. *See Laidlaw Waste Sys. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex.1995). Here, Petitioner's failure to respond to the Motion means that [redacted] cannot meet [redacted] burden. As such, Respondent's Motion must be granted in accordance with Texas Rule of Civil Procedure 166a(i).

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

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

[4] *Dallas Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 320 (5th Cir. 2017); *A.L. v. Alamo Heights Ind. Sch. Dist.*, 2018 WL 4955220, *6 (W.D. Tex. 2018).

[5] 34 C.F.R. § 300.502(b)(1).

[6] 34 C.F.R. § 300.513(a)(2)(i-iii).

While Respondent seeks an order dismissing the claims with prejudice, the hearing officer finds that such a disposition is not appropriate because the success of the District's motion hinges not upon a substantive conclusion that Petitioner has no evidence or there is no genuine issue of material fact, but instead that Petitioner cannot overcome [redacted] failure to respond to the Motion.

ORDERS

Based upon the foregoing, the record on file, in accordance with the IDEA and its implementing state and federal regulations, and because Petitioner did not produce any summary judgment evidence raising a genuine issue of material fact under Texas Rule of Civil Procedure 166a(i), it is therefore **ORDERED** that Respondent's Motion for Summary Judgment is hereby **GRANTED** and this case is **DISMISSED WITHOUT PREJUDICE**.

SIGNED September 30, 2021.

Kathryn Lewis
Special Education Hearing Officer
For the State of Texas